

# ENVIRONMENTAL GOVERNANCE UNDER THE NEW NAFTA

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## I. INTRODUCTION

“The world is a place that is so interconnected that what happens in another part of the world will impact us.”<sup>1</sup> Those are the words of Dr. Anthony S. Fauci, the Director of the National Institute of Allergy and Infectious Diseases and a leader of the U.S. response to the COVID-19 pandemic.<sup>2</sup> Environmental issues are also interconnected.<sup>3</sup> Air and water pollution spread across borders.<sup>4</sup> Fisheries deplete from overuse by individual countries.<sup>5</sup> Climate change and ozone depletion cause global impacts.<sup>6</sup> The world needs effective environmental governance.<sup>7</sup>

This article addresses three questions. First, what are the values of modern environmental governance? This article considers four values present in environmental law: international cooperation, public participation, transparency, and effective enforcement.<sup>8</sup>

1. Interview with Dr. Anthony Fauci, Dir., Nat'l Inst. of Allergy and Infectious Diseases (Nov. 30, 2007), <http://edition.cnn.com/2007/HEALTH/conditions/11/30/aids.day.fauci/index.html>; Dr. Anthony S. Fauci, USASEF, <https://usasciencefestival.org/people/dr-anthony-s-fauci/> (last visited May 4, 2020).

2. See Dr. Anthony S. Fauci, USA SCI. & ENG'G FESTIVAL, <https://usasciencefestival.org/people/dr-anthony-s-fauci/> (last visited May 4, 2020); see also Anthony S. Fauci, M.D., NIAID, Director, NAT'L INST. OF ALLERGY & INFECTIOUS DISEASES, <https://www.niaid.nih.gov/about/director> (last visited May 4, 2020).

3. See Tseming Yang & Robert V. Percival, *The Emergence of Global Environmental Law*, 36 *ECOLOGICAL L.Q.* 615, 616 (2009) (“[E]nvironmental problems increasingly transcend national borders and pose serious challenges to the health of the planet.”).

4. See Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 *DUKE L.J.* 931, 932 (1997) (“[P]ollution is a transboundary phenomenon. Air and water pollution, and to a lesser extent groundwater contamination, can cross political boundaries.”).

5. See Alison Rieser, *Prescriptions for the Commons: Environmental Scholarship and the Fishing Quotas Debate*, 23 *HARV. ENVTL. L. REV.* 393, 398 (1999) (“[O]pen access fishery classically illustrates . . . the ‘tragedy of the commons.’”). The “tragedy of the commons” describes the “overuse and degradation” of common resources as each individual actor seeks to “maximize his gain.” CHRISTINE A. KLEIN ET AL., *NATURAL RESOURCES LAW* 364 (4th ed. 2018).

6. See Cass R. Sunstein, *Of Montreal and Kyoto: A Tale of Two Protocols*, 31 *HARV. ENVTL. L. REV.* 1, 2 (2007) (“No nation is able to eliminate [ozone depletion or climate change] on its own. Indeed, no nation is even able to make significant progress on either problem on its own, especially not in the long run. Because of the diversity of contributors, both problems seem to be best handled through international agreements.”).

7. See Nicholas A. Robinson, *Transnational Perspectives on the Paris Climate Agreement Beyond Paris: Redressing American Defaults in Caring for Earth's Biosphere*, 34 *MD. J. INT'L L.* 301, 301 (2019) (“Without enhancing International Environmental Law, the biosphere that sustains all nations is imperiled.”); see also Christopher Vajda & Michael Rhimes, *Greening the Law: The Reception of Environmental Law and its Enforcement in International Law and European Union Law*, 24 *COLUM. J. EUR. L.* 455, 456 (2018) (noting that the “root causes of the threats to the environment are international”).

8. Other important values influence environmental governance. See, e.g., Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 *LOY. L.A. INT'L & COMP. L. REV.* 389, 408 (2004) (identifying accountability as an important value in environmental governance); see also Jeff Todd, *Trade Treaties, Citizen Submissions, and Environmental*

Second, what does modern environmental governance look like in practice? This article uses the North American Agreement on Environmental Cooperation (NAAEC) as a case study.<sup>9</sup> Negotiated as a side agreement to the North American Free Trade Agreement (NAFTA) between the United States, Canada, and Mexico,<sup>10</sup> the NAAEC represents an “experiment” in environmental governance.<sup>11</sup> It empowers individuals and non-governmental organizations in the United States, Canada, and Mexico to challenge whether the three countries effectively enforce their domestic environmental laws.<sup>12</sup> “Unique”<sup>13</sup> and “innovative”<sup>14</sup> at its creation, the NAAEC provides fertile ground for analysis after two-and-a-half decades of existence.<sup>15</sup> As an agreement governing three countries<sup>16</sup> and nearly a half-billion citizens,<sup>17</sup> and which embodies the values of international cooperation, public participation, transparency, and effective enforcement, the NAAEC provides a helpful case study of modern environmental governance.<sup>18</sup>

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*Justice*, 44 *ECOLOGY L.Q.* 89, 91 (2017) (noting environmental justice as an important value, especially “for considering trade”). Other values of environmental governance also relate to the values discussed in this article. See, e.g., Mark R. Goldschmidt, *The Role of Transparency and Public Participation in International Environmental Agreements: The North American Agreement on Environmental Cooperation*, 29 *B.C. ENVTL. AFF. L. REV.* 343, 346–48 (2002) (discussing how transparency and public participation promote compliance, another important value in environmental governance). The four values chosen in this article, international cooperation, public participation, transparency, and effective enforcement, serve as objectives of the NAAEC. To view the NAAEC, see North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 *I.L.M.*, 1480 (1993) [hereinafter NAAEC].

9. NAAEC, *supra* note 8.

10. See 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, 506 (2012) (describing the NAAEC as “the side agreement to the North American Free Trade Agreement”).

11. *Id.* at 505.

12. See NAAEC, *supra* note 8, at art. 14(1) (“[A]ny non-governmental organization or persons [may] assert[] that a Party [to the agreement] is failing to effectively enforce its environmental law.”).

13. John H. Knox, *Fixing the CEC Submissions Procedure: Are the 2012 Revisions Up To The Task?*, 7 *GOLDEN GATE U. ENVTL. L.J.* 81, 106 (2013).

14. David L. Markell, *The North American Commission for Environmental Cooperation After Ten Years: Lessons About Institutional Structure and Public Participation in Governance*, 26 *LOY. L.A. INT'L & COMP. L. REV.* 341, 346 (2004).

15. The NAAEC took effect in 1993. See NAAEC, *supra* note 8.

16. See *id.*

17. The United States has more than 329 million citizens. See *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> (last visited May 11, 2020). Mexico has more than 128 million citizens. See *Mexico Population*, *WORLDMETER*, <https://www.worldometers.info/world-population/mexico-population/> (last visited May 11, 2020). Canada has over 37 million citizens. See *Canada Population*, *WORLDMETER*, <https://www.worldometers.info/world-population/canada-population/> (last visited May 11, 2020).

18. See NAAEC, *supra* note 8, at art. 1 (setting international cooperation, public participation, transparency, and effective enforcement as objectives of the agreement).

Third, what will environmental governance look like going forward? In 2018, the United States, Canada, and Mexico replaced the NAFTA, and its NAAEC, with a new agreement, the United-States-Mexico-Canada Agreement (USMCA, or “New NAFTA”).<sup>19</sup> By 2020, the three countries have now ratified the agreement.<sup>20</sup> This article compares the NAAEC to its successor in light of the values of international cooperation, public participation, transparency, and effective enforcement. It considers what environmental governance may look like under the “New NAFTA.”

## II. WHAT ARE THE VALUES OF MODERN ENVIRONMENTAL GOVERNANCE? FOUR VALUES: INTERNATIONAL COOPERATION, PUBLIC PARTICIPATION, TRANSPARENCY, AND EFFECTIVE ENFORCEMENT

### *A. International Cooperation*

International cooperation is “the effort of States to accomplish an objective by joint action, where the actions of a single State cannot achieve the same result.”<sup>21</sup> There are several explanations for cooperation on environmental issues.<sup>22</sup> Modern communication and information sharing technology facilitates cooperation<sup>23</sup> and increases public awareness about environmental issues.<sup>24</sup> Environmental quality also comes with cost, competing

19. See Jacob M. Schlesinger & Bob Davis, *U.S., Mexico and Canada Sign Pact to Replace Nafta*, WALL ST. J. (Nov. 30, 2018), <https://www.wsj.com/articles/u-s-mexico-and-canada-sign-pact-to-replace-nafta-1543581929>. To view the USMCA, see Agreement between the United States of America, the United Mexican States, and Canada (hereinafter USMCA), available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

20. See Jeff Stein, *Trump signs USMCA, revamping North American trade rules*, WASH. POST (Jan. 29, 2020), <https://www.washingtonpost.com/business/2020/01/29/trump-usmca/>; David Ljunggren, *Canadian Parliament rushes through ratification of USMCA trade pact*, REUTERS (Mar. 13, 2020), <https://www.reuters.com/article/us-usa-trade-usmca-canada/canadian-parliament-rushes-through-ratification-of-usmca-trade-pactidUSKBN2102I5>; Danielle Haynes, *Mexico first to ratify new North American trade agreement*, UNITED PRESS INT'L (June 20, 2019), [https://www.upi.com/Top\\_News/World-News/2019/06/20/Mexico-first-to-ratify-new-North-American-trade-agreement/1221561050162/](https://www.upi.com/Top_News/World-News/2019/06/20/Mexico-first-to-ratify-new-North-American-trade-agreement/1221561050162/).

21. LAVANYA RAJAMANI ET AL., LEGAL PRINCIPLES RELATING TO CLIMATE CHANGE, INTERNATIONAL LAW ASSOCIATION 40 (2014).

22. See Yang & Percival, *supra* note 3, at 641–53 (discussing the trends promoting global environmental law).

23. *Id.* at 623 (“Advancements in global information flows have not only made it easier for countries to borrow legal and regulatory policy innovations from each other, they have also created closer linkages between international and national legal systems.”).

24. *Id.* at 643 (“[R]apid growth of the Internet across the world has increased public access to a wealth of information and made communities better informed.”).

with other public needs.<sup>25</sup> As countries grow in affluence, public demand for improved environmental quality may increase.<sup>26</sup> In fact, the environment now receives global concern.<sup>27</sup>

International environmental cooperation also arises out of necessity.<sup>28</sup> Air and water pollution spread across borders.<sup>29</sup> Shared resources, such as fisheries, require cooperation to prevent overconsumption.<sup>30</sup> Climate change causes global impacts and requires global solutions.<sup>31</sup> Governments recognize “that degradation of the environment is a worldwide problem, and that international cooperation is necessary.”<sup>32</sup>

The 1972 Stockholm Conference provided the “first global environmental summit.”<sup>33</sup> It “encouraged governments to negotiate and conclude treaties in the environmental field.”<sup>34</sup> Before the Stockholm Conference, “only a few dozen multilateral treaties” addressed the environment.<sup>35</sup> By the 1992 Rio Conference, that number increased to “more than 900 international legal

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25. See Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039, 2052–53 (1993) (“Experience shows that societies treat environmental quality as a ‘luxury’; they demand relatively more of it as income rises and needs for housing, food, and other ‘basics’ are satisfied.”); see also James L. Huffman, *An Exploratory Essay on Native Americans and Environmentalism*, 63 U. COLO. L. REV. 901, 916 (1992) (arguing that “environmental protection has been a luxury good”); *Id.* at n. 62 (“[E]nvironmental protection has been almost the exclusive province of the developed countries of the world. Environmental protection involves significant, often enormous, costs.”)

26. See Yang & Percival, *supra* note 3, at 650 (“Rising levels of affluence and consumption have also increased the demand for environmental quality and protection.”).

27. See Yang & Percival, *supra* note 3, at 616 (“Worldwide growth of public concern for the natural environment has been one of the most important developments in recent decades.”); see also Taylor Kilduff, *The Difficulties of Enforcing Global Environmental Law*, 2019 GEO. ENVTL. L. REV. 1, 1 (2019) (“There has been a marked rise in cooperative international efforts to protect and preserve the global environment in the last few decades.”).

28. See Robinson, *supra* note 7, at 301 (“Without enhancing International Environmental Law, the biosphere that sustains all nations is imperiled”); see also Vajda & Rhimes, *supra* note 7, at 456 (noting that the “root causes of the threats to the environment are international”).

29. See Merrill, *supra* note 4; see also Yang & Percival, *supra* note 3, at 616 (“[E]nvironmental problems increasingly transcend national borders and pose serious challenges to the health of the planet.”).

30. See Rieser, *supra* note 5; see also KLEIN ET AL., *supra* note 5.

31. See Sunstein, *supra* note 6.

32. 61B AM. JUR. 2D *Pollution Control* § 1 (2020); see also Greg Block, *The CEC Cooperative Program of Work*, in GREENING NAFTA 25, 35 (David L. Markell & John H. Knox eds., 2003) (“[T]here is a “growing need to apply a regional lens to improve environmental policies and practices.”); Robinson, *supra* note 7, at 327 (“[T]he need for a coherent regime to guide international cooperation toward sustainable development is widely acknowledged.”).

33. Robert V. Percival, *Liability for Environmental Harm and Emerging Global Environmental Law*, 25 MD. J. INT’L L. 37, 40 (2010).

34. Andronico O. Adede, *The Treaty System from Stockholm (1972) to Rio de Janeiro (1992)*, 13 PACE ENVTL. L. REV. 33, 34 (1995).

35. David L. Markell, *The Commission for Environmental Cooperation’s Citizen Submission Process*, 12 GEO. INT’L ENVTL. L. REV. 545, 547 (2000). Before the Stockholm Conference, “international governance was largely silent on the environment.” Teresa Parejo Navajas & Nathan Lobel, *Framing the Global Pact for the Environment: Why It’s Needed, What it Does, and How it Does it*, 30 FORDHAM ENVTL. L. REV. 32, 33 (2018).

instruments.”<sup>36</sup> International environmental cooperation has also spurred success.<sup>37</sup> For example, the 1987 Montreal Protocol, ratified by “almost all nations,”<sup>38</sup> will restore the ozone layer by 2050.<sup>39</sup> The environmental agreement serving as a case study in this article, the NAAEC, makes international cooperation a main objective.<sup>40</sup>

### B. Public Participation

Public participation promotes civil society.<sup>41</sup> Civil society involves non-governmental actors in public discourse<sup>42</sup> and incorporates diverse perspectives.<sup>43</sup> Public participation also influences environmental regulation.<sup>44</sup> Non-governmental actors can act as “quasi-regulators.”<sup>45</sup> Public participation varies from contributing “information to an environmental decision-making process” to “participating in the making of the actual decision.”<sup>46</sup> Non-governmental actors may serve as “watchdog[s]” or “private enforcers” of environmental law.<sup>47</sup>

36. Markell, *supra* note 35.

37. See Sunstein, *supra* note 6, at 4 (“The Montreal Protocol . . . stands as “an extraordinary and even spectacular success story.”); see also *International Actions - The Montreal Protocol on Substances that Deplete the Ozone Layer*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/ozone-layer-protection/international-actions-montreal-protocol-substances-deplete-ozone-layer> (last updated Feb. 13, 2020) (“The Montreal Protocol . . . is considered by many the most successful environmental global action.”).

38. Sunstein, *supra* note 6, at 3.

39. See Sunstein, *supra* note 6, at 4 (“By 2050, the ozone layer is expected to return to its natural level.”).

40. See NAAEC, *supra* note 8, at art. 1(b) (seeking to “promote sustainable development based on cooperation”), art. 1(c) (seeking to “increase cooperation between the Parties to better conserve, protect, and enhance the environment”), art. 1(f) (seeking to “strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices”).

41. See *Civil Society*, UNITED NATIONS, <https://www.un.org/en/sections/resources-different-audiences/civil-society/index.html> (last visited May 1, 2020) (“Civil society is the ‘third sector’ of society, along with government and business.”).

42. See *Civil Society*, WORLD BANK, <https://www.worldbank.org/en/about/partners/civil-society/overview> (last visited May 1, 2020) (stating that civil society includes a “wide array of non-governmental and not for profit organizations that have a presence in public life”).

43. See *id.* (noting that civil society advances “ethical, cultural, political, scientific, religious or philanthropic considerations”).

44. See Yang & Percival, *supra* note 3, at 631 (“An engaged civil society and affected communities can provide important voices in regulatory decision making.”).

45. See NEIL GUNNINGHAM ET AL., SMART REGULATION 93 (Keith Hawkins ed., 1998) (“[T]he “traditional view of regulation as exclusively a government function has become outmoded.”); *Id.* (“[G]overnment can influence public interest groups, commercial third parties and industry itself to act as quasi-regulators, thereby facilitating innovative and pluralistic regulatory activity.”).

46. Donald McRae, *Trade and the Environment*, in GREENING NAFTA 237, 239 (David L. Markell & John H. Knox eds., 2003).

47. GUNNINGHAM ET AL., *supra* note 45, at 95.

Public participation is a value reflected in American domestic laws, such as the Administrative Procedure Act (APA) and National Environmental Policy Act (NEPA).<sup>48</sup> Citizen suit provisions of environmental statutes, including the Clean Water Act,<sup>49</sup> Clean Air Act,<sup>50</sup> and Endangered Species Act, also encourage public participation.<sup>51</sup> At the international level, the 1992 Rio Declaration states that “[e]nvironmental issues are best handled with the participation of all concerned citizens.”<sup>52</sup> Six years later, the United Nations adopted the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.<sup>53</sup> The Aarhus Convention seeks to “empower the role of citizens . . . in environmental matters.”<sup>54</sup>

The NAAEC also strives for public participation.<sup>55</sup> Concern for public participation<sup>56</sup> led to the creation of the NAAEC’s Joint Public Advisory Committee (JPAC),<sup>57</sup> which provides “an internal voice for the North American public.”<sup>58</sup> The NAAEC also

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48. See 5 U.S.C. § 553(c) (stating that under the APA, federal agencies “shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments”). NEPA requires for “proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official” on environmental impacts and alternatives, as well as resource commitments. 42 U.S.C. § 4332(c). The responsible officials identified under NEPA “must use appropriate communication procedures to ensure meaningful public participation throughout the NEPA process.” 40 C.F.R. § 6.203(a)(5).

49. See 33 U.S.C. § 1365(a) (allowing citizens to file civil lawsuits against any person violating the Clean Water Act’s effluent standards as well as against the EPA Administrator for failure to perform legal duties).

50. See 42 U.S.C. § 7604(a) (providing any person the power to seek civil legal action against any persons or government entities violating the Clean Air Act’s emission standards, persons constructing “major emitting facilit[ies] without a permit,” and the EPA Administrator for failure to perform legal duties).

51. See 16 U.S.C. § 1540(g) (allowing citizen civil lawsuits against persons, including the EPA Administrator, for failing to comply with Endangered Species Act requirements).

52. *Rio Declaration on Environment and Development*, CONVENTION ON BIOLOGICAL DIVERSITY, <https://www.cbd.int/doc/ref/rio-declaration.shtml> (last visited May 1, 2020).

53. *About the Aarhus Convention*, UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, <https://www.unece.org/env/pp/introduction.html> (last visited May 1, 2020).

54. *The Aarhus Convention*, AARHUS CENTRES, <https://aarhus.osce.org/about/aarhus-convention> (last visited May 1, 2020).

55. See NAAEC, *supra* note 8, at art. 1 (seeking to “promote . . . public participation in the development of environmental laws, regulations, . . . [and] policies”).

56. See John D. Wirth, *Perspectives on the Joint Public Advisory Committee*, in GREENING NAFTA 199, 200 (David L. Markell & John H. Knox eds., 2003) (stating that the environmental non-governmental organizations supporting NAFTA and the NAAEC “were concerned about enforcement and public participation”).

57. *Id.* (“[Environmental advocates] also wanted citizen participation to be a constituent part of the Commission. In this way JPAC became part of the basic architecture of the Agreement.”); see also NAAEC, *supra* note 8, at art. 16 (creating the Joint Public Advisory Committee).

58. Markell, *supra* note 14, at 348.

establishes National Advisory Committees made up of “members of [the] public, including representatives of non-governmental organizations.”<sup>59</sup>

### C. Transparency

Transparency deals with “access to information.”<sup>60</sup> By making environmental information available, governments increase public trust and strengthen their legitimacy.<sup>61</sup> Transparency may encourage governments to better enforce environmental laws, or else face negative publicity.<sup>62</sup> Armed with new information, the public can also advocate for better environmental regulation.<sup>63</sup>

American environmental laws, such as the 1986 Emergency Planning and Community Right-to-Know Act<sup>64</sup> and the 1990 Pollution Prevention Act, promote transparency.<sup>65</sup> These laws, which establish a Toxic Release Inventory,<sup>66</sup> require industry to report toxic chemical releases.<sup>67</sup> Federal efforts led to state and local

59. NAAEC, *supra* note 8, at art. 17.

60. McRae, *supra* note 46, at 238.

61. *Id.* (“In respect of environmental institutions, one aspect of effectiveness involves the extent to which the institutions are perceived as having legitimacy, particularly in relation to whether the actions of the institutions are public, known, and open to external input.”).

62. See Raustiala, *supra* note 8, at 408 (noting that the “threat” of non-governmental actors learning about government failures “has deterrent value”).

63. See A. Dan Tarlock & John E. Thorson, *Coordinating Land and Water Use in the San Pedro River Basin*, in GREENING NAFTA 217, 219 (David L. Markell & John H. Knox, eds., 2003) (“[T]he assembly and dissemination of environmental impact information can be an important regulatory policy instrument.”).

64. See 42 U.S.C. § 11023(a) (requiring owners and operators of industry facilities to complete toxic chemical release forms). The Emergency Planning and Community Right-to-Know Act establishes this requirement “to provide information to the Federal, State, and local governments and the public, including citizens of communities surrounding covered facilities.” 42 U.S.C. § 11023(h).

65. See 42 U.S.C. § 13103(b)(4) (requiring the EPA Administrator to “develop improved methods of coordinating, streamlining and assuring public access to data collected under Federal environmental statutes”); see also 42 U.S.C. §§ 13105(a)-(b) (requiring the EPA Administrator to “establish a Source Reduction Clearinghouse to compile information [on] . . . approaches to [pollution] source reduction” and to “make available to the public such information on source reduction as is gathered”).

66. See Mark S. Winfield, *North American Pollutant Release and Transfer Registries*, in GREENING NAFTA 38, 40 (David L. Markell & John H. Knox eds., 2003) (“The TRI was created through Title III of the 1986 Superfund Amendment and Reauthorization Act, known as the Emergency Planning and Community Right to Know Act (EPCRA).”); *Id.* at 41 (“The 1990 Pollution Prevention Act significantly expanded reporting requirements under the TRI.”).

67. See *Toxic Release Inventory (TRI) Program*, ENVTL. PROTECTION AGENCY (Mar. 24, 2020), <https://www.epa.gov/toxics-release-inventory-tri-program/what-toxics-release-inventory> (“TRI tracks the management of certain toxic chemicals that may pose a threat to human health and the environment. U.S. facilities in different industry sectors must report annually how much of each chemical is released to the environment . . .”).



“community right-to-know measures.”<sup>68</sup> Other countries, such as Canada and Australia, have similar transparency requirements for toxic releases.<sup>69</sup>

Furthermore, transparency “increasingly find[s] its way into international environmental conventions.”<sup>70</sup> Agenda 21 of the 1992 Rio Conference “encourage[s] governments to establish emission inventories of toxic chemicals. . . .”<sup>71</sup> The 1998 Aarhus Convention “imposes on Parties and public authorities obligations regarding access to information.”<sup>72</sup> The NAAEC requires public availability of all environmental laws, regulations, and rulings of the United States, Canada, and Mexico.<sup>73</sup> It also requires annual reporting on the countries’ compliance with the agreement.<sup>74</sup>

#### D. Effective Enforcement

“There is little point in enacting environmental law if it cannot be enforced.”<sup>75</sup> Enforcement varies by the strategies chosen.<sup>76</sup> Deterrence sanctions violators.<sup>77</sup> Advice and persuasion emphasizes “bargaining and negotiation” with regulated

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68. Winfield, *supra* note 66.

69. Canada’s National Pollutant Release Inventory “tracks over 320 pollutants from over 7,000 facilities across Canada.” *About the National Pollutant Release Inventory*, GOV’T OF CANADA (Nov. 28, 2019), <https://www.canada.ca/en/environment-climate-change/services/national-pollutant-release-inventory/about-national-pollutant-release-inventory.html>. It provides publicly available reports. *Id.* Australia’s National Pollutant Inventory provides the public with “emission estimates for 93 toxic substances and the source and location of these emissions.” *National Pollutant Inventory*, AUSTRALIAN GOV’T DEPT OF AGRICULTURE, WATER AND THE ENVIRONMENT (last visited May 1, 2020), <http://www.npi.gov.au>.

70. McRae, *supra* note 46, at 239.

71. Winfield, *supra* note 66, at 39.

72. *About the Aarhus Convention*, UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE (May 1, 2020), <https://www.unece.org/env/pp/introduction.html>.

73. See NAAEC, *supra* note 8, at art. 4(1) (“Each Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.”).

74. See NAAEC, *supra* note 8, at art. 12 (authorizing the Secretariat to create “an annual report of the Commission” to analyze “the actions taken by each Party in connection with its obligations under this Agreement, including data on the Party’s environmental enforcement activities”).

75. Vajda & Rhimes, *supra* note 7, at 467.

76. See GUNNINGHAM ET AL., *supra* note 45, at 3–4 (“For policymakers, a variety of strategies are available that might, subject to political and economic constraints, enable serious environmental damage to be slowed down, halted, or, ideally, reversed.”).

77. See Neil Gunningham, Compliance, Deterrence and Beyond, in COMPLIANCE & ENFORCEMENT OF ENVIRONMENTAL LAW 63, 64 (LeRoy C. Paddock et al. eds., 2017) (“The deterrence strategy emphasizes a confrontational style of enforcement and the sanctioning of rule-breaking behavior.”).

parties.<sup>78</sup> Traditionally, enforcement is a government function.<sup>79</sup> Nevertheless, environmental law continues to evolve “from a centralized command-and-control and planning model to a more decentralized, inclusive system. . . .”<sup>80</sup>

Even a well-functioning government cannot enforce all laws on the books to an equal degree.<sup>81</sup> Non-governmental actors may fill in the gaps to effective enforcement.<sup>82</sup> Recent approaches to environmental enforcement, such as “Smart Regulation,” incorporate non-governmental actors as “surrogates for direct government regulation.”<sup>83</sup> The prominent role of non-governmental actors has even created a regime of private environmental governance.<sup>84</sup> The NAAEC, the case study in this article, seeks to “enhance compliance with, and enforcement of, environmental laws and regulations.”<sup>85</sup> It does so, in part, through non-governmental actors.<sup>86</sup>

### III. WHAT DOES MODERN ENVIRONMENTAL GOVERNANCE LOOK LIKE IN PRACTICE? USING THE NAFTA’S NAAEC AS A CASE STUDY

#### *A. North American Agreement on Environmental Cooperation (NAAEC)*

In 1993, the United States, Canada, and Mexico established the NAAEC as an environmental side agreement<sup>87</sup> to

78. *Id.*

79. See GUNNINGHAM ET AL., *supra* note 45, at 93 (noting the “traditional view of regulation as exclusively a governmental function”).

80. Tarlock & Thorson, *supra* note 63, at 231; see also ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION 1, 975 (7th ed., 2015) (noting an “emergence of a fairly broad-based desire to expand the toolbox for promoting compliance”).

81. See Yang & Percival, *supra* note 3, at 631 (Stating that “[l]aws and regulations cannot be enforced by government officials all of the time”); see also Cameron Holley & Darren Sinclair, Enforcement Strategies: Inspection, Targeting and Escalation, in COMPLIANCE AND ENFORCEMENT OF ENVIRONMENTAL LAW 101, 101 (LeRoy C. Paddock et al., eds., 2017) (“In most circumstances, agencies will not be able to inspect and target all regulated firms or sites due to limited resources.”).

82. See Yang & Percival, *supra* note 3, at 631 (noting that “voluntary compliance and social pressures must fill in [gaps in enforcement] more often than not”).

83. See Gunningham, *supra* note 77, at 68.

84. See generally Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129 (2013).

85. NAAEC, *supra* note 8, at art. 1(g).

86. See *id.* at art. 14 (authorizing “non-governmental organization[s] or person[s] [to] assert[] that a Party is failing to effectively enforce its environmental law”).

87. Markell, *supra* note 14, at 341–42. The three nations established the companion agreement “[i]n an effort to assuage environmental organizations that feared NAFTA’s impact on the North American environment.” Raustiala, *supra* note 8, at 389.

NAFTA.<sup>88</sup> The NAAEC creates a Commission for Environmental Cooperation (CEC)<sup>89</sup> comprised of a Council, Secretariat, and JPAC.<sup>90</sup> The Council is the “governing body” of the CEC.<sup>91</sup> The EPA Administrator and respective cabinet-level environmental ministers of Canada and Mexico form the Council.<sup>92</sup> The Secretariat implements and administers the CEC’s programs,<sup>93</sup> investigates and reports on environmental issues,<sup>94</sup> and facilitates public participation.<sup>95</sup> The JPAC serves as a public advisory body.<sup>96</sup>

### *B. Submissions on Enforcement Matters (SEM)*

The NAAEC’s Articles 14 and 15 govern the SEM process.<sup>97</sup> The SEM process empowers individuals and organizations in the United States, Canada, and Mexico to challenge whether the three countries effectively enforce domestic environmental laws.<sup>98</sup> Individuals and organizations cannot challenge the substance or merit of domestic environmental laws.<sup>99</sup> Rather, the process focuses on *enforcement*.<sup>100</sup>

Furthermore, the SEM process only considers enforcement of *environmental law*.<sup>101</sup> The NAAEC defines environmental law as

88. The NAFTA took effect on Jan. 1, 1994. North American Free Trade Agreement (NAFTA), OFFICE OF THE U.S. TRADE REP., <https://ustr.gov/about-us/policy-offices/press-office/ustr-archives/north-american-free-trade-agreement-nafta> (last visited Nov. 1, 2020). It sought to eliminate tariffs, duties, and other trade restrictions between the United States, Canada, and Mexico. *Id.* In addition to reducing barriers to trade, the agreement provided standards governing customs, agriculture, and intellectual property. *Id.*

89. NAAEC, *supra* note 8, at art. 8(1).

90. *Id.* at art. 8(2).

91. *Id.* at art. 10(1).

92. *EPA’s Role in the North American Commission for Environmental Cooperation (CEC)*, EPA, <https://www.epa.gov/international-cooperation/epas-role-north-american-commission-environmental-cooperation-cec> (last visited Aug. 26, 2020) [hereinafter EPA]. Canada’s Council member is the head of Environment and Climate Change Canada. *Id.* Mexico’s Council member is the head of Mexico’s Ministry of Environment and Natural Resources. *Id.*

93. NAAEC, *supra* note 8, at art. 10(1).

94. *Id.* at arts. 12–13.

95. *Id.* at arts. 14–15.

96. The JPAC provides an even balance of representation from the three nations. *Id.* at art. 16(1). For a list of current JPAC members, see *Members*, COMM’N FOR ENVTL. COOPERATION, <http://www.cec.org/about/joint-public-advisory-committee/> (last visited Mar. 14, 2021); see also NAAEC, *supra* note 8, at art. 16(4) (“The [JPAC] may provide advice to the Council on any matter within the scope of the Agreement . . . and on the implementation and further elaboration of this Agreement . . .”). *Id.* at art. 16(5) (stating that the JPAC “may provide relevant technical, scientific or other information to the Secretariat”).

97. NAAEC, *supra* note 8, at arts. 14–15.

98. *Id.* at art. 14(1).

99. See *id.*

100. *Id.*

101. The NAAEC’s definition of environmental law is also found in Article 45. See *id.* at art. 45(2).

“any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health.”<sup>102</sup> It does not include laws “directly related to worker safety or health”<sup>103</sup> or the “commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.”<sup>104</sup>

For clarity, this article divides the NAAEC’s SEM process into five Parts, each with a description followed by a summary table. For Part 1, the Secretariat examines the submission based on five initial criteria: (1) the submission must be written in the language of the Party at issue; (2) it must clearly identify the submitters; (3) it must include “sufficient information” and available “documentary evidence”; (4) it must promote enforcement as opposed to industry harassment; and (5) the submitter must have written to the countries at issue and include any response the countries have provided.<sup>105</sup>

<b>Part 1</b>
<p>Article 14(1) 5 initial criteria</p> <p>The Secretariat reviews the submission. The submission must:</p> <ul style="list-style-type: none"> <li>• Be written in language of Party at issue</li> <li>• Clearly identify submitters</li> <li>• Include sufficient information &amp; evidence</li> <li>• Promote enforcement, not industry harassment</li> <li>• Describe prior notice given to Party at issue</li> </ul>

If the submission satisfies the above criteria, the process moves to Part 2, where the Secretariat decides whether the submission “merits requesting a response from the Party.”<sup>106</sup> The Secretariat considers four factors: (1) whether the submission alleges harm specific to the submitter; (2) whether the Secretariat’s investigation would promote the goals of the NAAEC; (3) whether the submitter has sought relief under the Party’s domestic legal system; and (4) whether the allegations come “exclusively” from mass media reports.<sup>107</sup>

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102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at art. 14(1).

106. *Id.* at art. 14(2).

107. *Id.*

**Part 2**

Article 14(2) 4 criteria to determine if submission merits response from Party:

The Secretariat considers whether the submission “merits requesting a response from the Party” based on four factors:

- If the submission alleges specific harm to submitters
- If investigation would promote NAAEC goals
- If domestic remedies already pursued
- If allegations come exclusively from mass media

For Part 3, the Parties verify whether they have addressed the submission’s subject matter through domestic proceedings.<sup>108</sup> The Parties may also provide the Secretariat any additional information.<sup>109</sup>

**Part 3**

Article 14(3) Party advises Secretariat:

The Parties advise the Secretariat regarding:

- Pending domestic proceedings
- Additional information Parties want to submit

For Part 4, the Secretariat determines if the submission “warrants developing a factual record.”<sup>110</sup> If the Secretariat decides that the submission warrants a factual record, it must provide the Council with its reasoning.<sup>111</sup> Next, the Council authorizes the preparation of a factual record by at least a two-thirds vote.<sup>112</sup> If the Council authorizes, the Secretariat drafts a factual record addressing the submitters’ allegations,<sup>113</sup> to which the Parties may provide comments.<sup>114</sup>

108. *Id.* at art. 14(3).

109. *Id.* at art. 14(3)(b).

110. *Id.* at art. 15(1).

111. *Id.*

112. *Id.* at art. 15(2).

113. *Id.*

114. *Id.* at arts. 15(5)–(6).

**Part 4**

Article 15(1)&(2)&(5) draft factual record:

If the Secretariat determines a factual record is warranted:

- It must explain to Council why record warranted
- Council may authorize draft record by 2/3 vote
- If authorized, Secretariat submits draft to Council
- Parties may provide comments to draft record

For Part 5, the Council may make a factual record public by a two-thirds vote.<sup>115</sup>

**Part 5**

Article 15(7) making factual record public:

The Council may authorize the public release of a final factual record by a 2/3 vote

### *C. Sem Process Results*

The CEC has received ninety-eight submissions.<sup>116</sup> Submissions increased from the late 1990s to early 2000s.<sup>117</sup> Submissions then declined going into the second decade of the 2000s.<sup>118</sup> The trend, however, has increased in recent years.<sup>119</sup> In 2019, two submissions addressed the United States, one addressed Canada, and two addressed Mexico.<sup>120</sup>

115. *Id.* at art. 15(7).

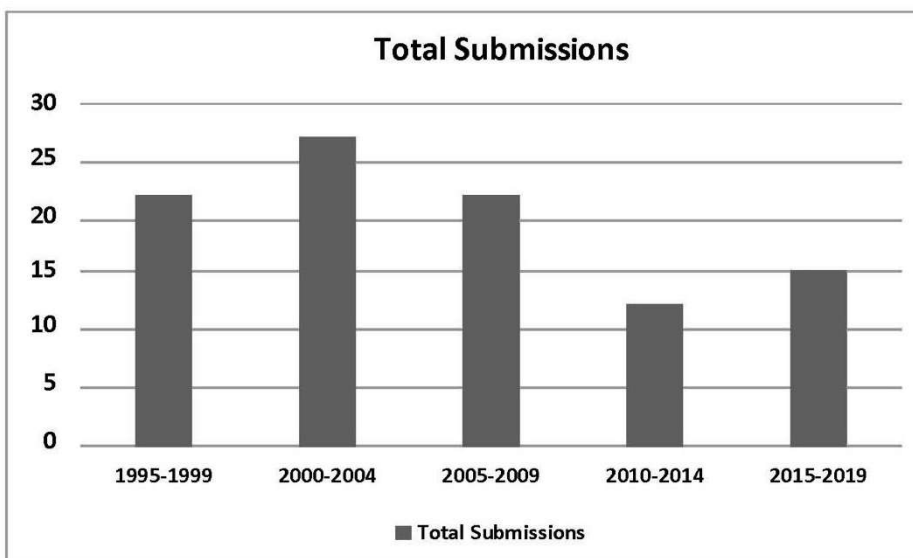
116. *See All Submissions*, COMM'N FOR ENVTL. COOPERATION, <http://www.cec.org/submissions-on-enforcement/registry-of-submissions/> (last visited Oct. 14, 2020).

117. *See id.*

118. *See id.*

119. *See id.*

120. *See All Submissions: 2019*, COMM'N FOR ENVTL. COOPERATION, [http://www.cec.org/sem-submissions/all-submissions?title=&field\\_submission\\_date\\_value%5Bvalue%5D%5Byear%5D=2019&field\\_submission\\_country\\_tid=All&field\\_submission\\_status\\_tid=All](http://www.cec.org/sem-submissions/all-submissions?title=&field_submission_date_value%5Bvalue%5D%5Byear%5D=2019&field_submission_country_tid=All&field_submission_status_tid=All) (last visited May 2, 2020).



The ninety-eight submissions reflect the work of over 300 submitters.<sup>121</sup> Many non-governmental organizations have used this process, including the National Resource Defense Council,<sup>122</sup> Sierra Club,<sup>123</sup> Humane Society,<sup>124</sup> and Audubon Society.<sup>125</sup> These organizations often collaborate on submissions.<sup>126</sup> One submission, alone, involved forty-nine U.S. and Canadian non-governmental organizations.<sup>127</sup> Individuals have also used the SEM process, either on their own<sup>128</sup> or by collaborating with non-governmental organizations.<sup>129</sup>

121. See 25 YEARS OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION, COMMISSION FOR ENVIRONMENTAL COOPERATION (June 24, 2019), available at <http://www.cec.org/files/documents/25years/25th-poster-booklet-en.pdf> (noting that “[m]ore than 300 stakeholders and community groups have raised their voices” through the SEM process).

122. See, e.g., *Alberta Tailings Ponds II*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/alberta-tailings-ponds-ii> (last visited May 2, 2020).

123. See, e.g., *Coal-fired Power Plants*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/coal-fired-power-plants> (last visited May 2, 2020).

124. See *Seal Hunting*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/seal-hunting> (last visited May 2, 2020).

125. See, e.g., *Logging Rider*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/logging-rider> (last visited May 2, 2020).

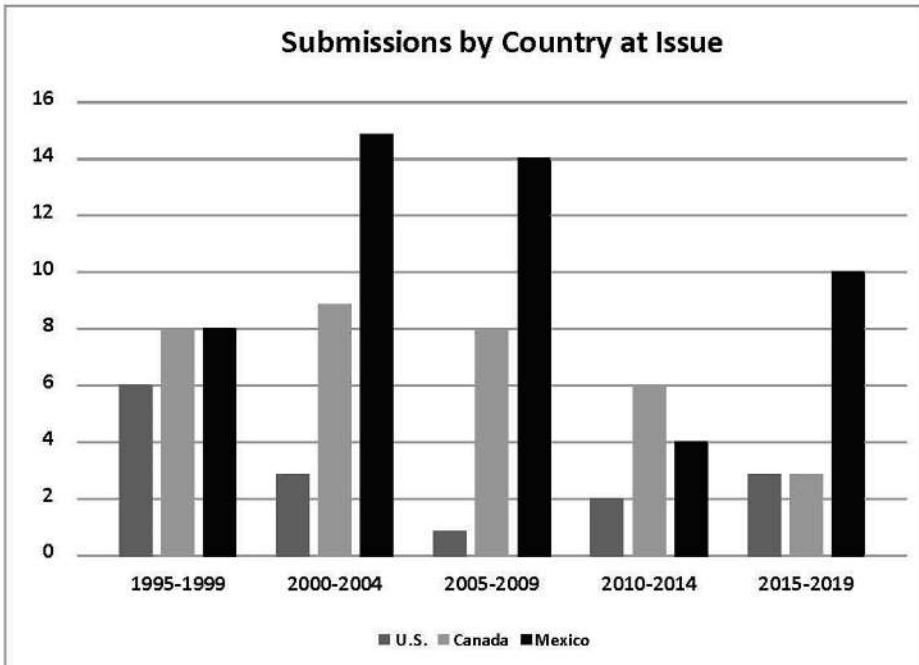
126. For example, the National Audubon Society and Sierra Club worked together on the 1995 “Logging Rider” submission. See *id.* The 2004 “BC Logging” submission reflected the collaborative efforts of the Sierra Club, Natural Resources Defense Council, Greenpeace, and Earthjustice. See *BC Logging*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/bc-logging> (last visited May 2, 2020).

127. See *Ontario Power Generation*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/ontario-power-generation> (last visited May 2, 2020).

128. See, e.g., *Municipal Wastewater Drop Shafts*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/municipal-wastewater-drop-shafts> (last visited May 2, 2020).

129. See, e.g., *Drilling Waste in Cunduacán*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/drilling-waste-cunduacan> (last visited May 2, 2020).

To date, fifteen submissions address the United States,<sup>130</sup> thirty-four address Canada,<sup>131</sup> and fifty-one address Mexico.<sup>132</sup> The comparatively few submissions addressing the United States has prompted concern.<sup>133</sup> Between 2001 and 2013, only two submissions addressed U.S. enforcement of environmental laws.<sup>134</sup> The trend may be changing, however, as five submissions since 2013 pertain to the United States.<sup>135</sup>



130. See *All Submissions: United States*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/submissions-on-enforcement/registry-of-submissions/?q=&country=united-states> (last visited Oct. 14, 2020).

131. See *All Submissions: Canada*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/submissions-on-enforcement/registry-of-submissions/?q=&country=canada> (last visited Oct. 14, 2020).

132. See *All Submissions: Mexico*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/submissions-on-enforcement/registry-of-submissions/?q=&country=mexico> (last visited Oct. 14, 2020).

133. See Knox, *supra* note 13, at 87 (noting that the “distribution of factual records is . . . lopsided”); see also 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 & COMP. L. REV. 415, 434 (2004) (arguing that the lack of U.S. submissions reflects “a loss of credibility in the Citizen Submission Process among U.S. environmental organizations”).

134. See *All Submissions: United States*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/submissions-on-enforcement/registry-of-submissions/?q=&country=united-states> (last visited Oct. 14, 2020).

135. See *id.*



Of the ninety-eight submissions, twenty-five resulted in public factual records.<sup>136</sup> For many submissions, the Secretariat dismissed due to failure to comply with Article 14<sup>137</sup> or determining that a factual record was not warranted.<sup>138</sup> For seven submissions, the Council voted against the creation of a factual record.<sup>139</sup> Two public records address the United States,<sup>140</sup> nine address Canada,<sup>141</sup> and fourteen address Mexico.<sup>142</sup> Five submissions remain open, leaving the possibility of further public production.<sup>143</sup>

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136. *See All Submissions*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/all-submissions> (last visited May 2, 2020).

137. *See, e.g., Lake Memphremagog*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/lake-memphremagog> (last visited May 2, 2020).

138. *See, e.g., Great Lakes*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/all-submissions> (last visited May 2, 2020).

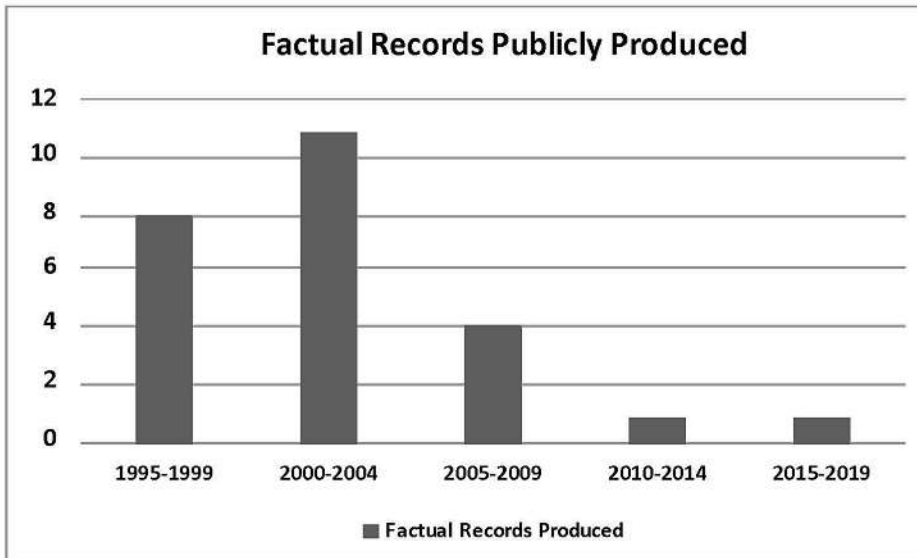
139. *See, e.g., La Primavera Forest*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/la-primavera-forest> (last visited May 2, 2020).

140. *See Coal-fired Power Plants*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/coal-fired-power-plants> (last visited May 2, 2020); *see also Migratory Birds*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/migratory-birds> (last visited May 2, 2020).

141. *See All Submissions: Canada*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/submissions-on-enforcement/registry-of-submissions/?q=&country=canada&factual=factual> (last visited Oct. 14, 2020) (listing “Quebec Automobiles,” “Montreal Technoparc,” “Pulp and Paper,” “Ontario Logging,” “BC Logging,” “Alberta Tailing Ponds II,” “Oldman River II,” and “BC Hydro” as the submissions addressing Canada which resulted in public factual records).

142. *See All Submissions: Mexico*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/submissions-on-enforcement/registry-of-submissions/?q=&country=mexico&factual=factual> (last visited May 2, 2020) (listing “Agricultural Waste Burning in Sonora,” “Sumidero Canyon II,” “Wetlands in Manzanillo,” “Ex Hacienda El Hospital III,” “Ex Hacienda El Hospital II,” “Environmental Pollution in Hermosillo II,” “ALCA-Iztapalapa II,” “Lake Chapala II,” “Tarahumara,” “Molymex II,” “Metales y Derivados,” “Aquanova,” “Río Magdalena,” and “Cozumel” as the submissions addressing Mexico which resulted in public factual records).

143. *See All Submissions: Open*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/submissions-on-enforcement/registry-of-submissions/?q=&status=open> (last visited May 2, 2020).



#### *D. Praise for SEM Process*

The SEM process is “innovative,”<sup>144</sup> “ground-breaking,”<sup>145</sup> and “unique.”<sup>146</sup> It creates an additional avenue to consider domestic environmental enforcement.<sup>147</sup> Submitters may challenge the enforcement efforts by any of the three countries, even of the two countries in which they do not reside.<sup>148</sup> Submitters in all three nations may also collaborate, strengthening transnational environmental coalitions.<sup>149</sup>

The SEM process promotes information sharing and spotlighting of environmental problems.<sup>150</sup> By threatening to

144. Markell, *supra* note 14, at 345.

145. Raustiala, *supra* note 8, at 392; *see also id.* at 403 (“By providing private actors with a formalized role in the international regulation of domestic enforcement, the NAAEC breaks new ground in international environmental law.”).

146. Knox, *supra* note 13, at 106.

147. Karrigan S. Börk & Rachael E. Salcido, *Through the Looking Glass: Using Trade Agreements to Enforce Environmental Law*, 32 NAT. RESOURCES & ENV’T 36, 40 (2017) (“When approaching environmental protection through the domestic court system fails to solve environmental problems, the citizen submission processes of NAAEC . . . provide[s] an alternative route.”).

148. *See* NAAEC, *supra* note 8, at art. 14(1); *see also* Raustiala, *supra* note 8, at 396 (“[S]ubmitters need not reside in or be a citizen of the party whose enforcement practices they challenge. Thus the process is truly transnational: Mexican NGOs can complain about enforcement failures in Nova Scotia, and . . . U.S. NGOs can complain about enforcement failures in Tijuana.”).

149. *See* Knox & Markell, *supra* note 10, at 528 (stating that the SEM process “provides opportunities for environmental activists from different countries to work together”).

150. *See id.* at 510 (“[T]he drafters hoped that shining a spotlight on a failure to effectively enforce domestic law would encourage better enforcement.”); *see also* Todd, *supra*

reveal enforcement failures, it may encourage the Parties to act proactively.<sup>151</sup> SEM reports also provide in-depth information from a credible source,<sup>152</sup> which individuals and advocacy groups may use to develop political movements.<sup>153</sup> Individuals and organizations can provide an “extension of the government’s regulatory efforts.”<sup>154</sup>

### *E. Criticism of SEM Process*

On the other hand, the SEM process has been characterized as being “inherently biased,”<sup>155</sup> with “fundamental problem[s]”<sup>156</sup> and “minimal to no effect on enhancing environmental protection.”<sup>157</sup> The CEC’s most powerful group is the Council,<sup>158</sup> represented by the Parties’ environmental ministers.<sup>159</sup> The Parties, through the Council, influence many aspects of the SEM process.<sup>160</sup> For instance, the Council can prohibit the Secretariat from developing a factual

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note 8, at 92 (“The hope is that SEMs spotlight the nation’s lack of enforcement and thus spur it toward action.”).

151. See Knox & Markell, *supra* note 10, at 510–11 (“The procedure could have a specific deterrent effect—to avoid negative publicity, a government might respond to a submission by increasing its enforcement efforts in the area identified—and a more general effect, in that governments might try to reduce the number of submissions by raising their overall level of enforcement.”).

152. See Jonathan Graubart, *Giving Meaning to New Trade-Linked ‘Soft Law’ Agreements on Social Values: A Law-in-Action Analysis of NAFTA’s Environmental Side Agreement*, 6 UCLA J. INT’L L. & FOREIGN AFF. 425, 456 (2001) (“[S]everal submitters have observed that this information-gathering from a perceived neutral and credible source is the most valuable aspect of the process.”).

153. See *id.* at 430 (“[M]any of the complaints have provided additional momentum to specific environmental drives, helped sustain activists’ resolve, and pressured governmental authorities to justify their actions publicly.”); see also Todd, *supra* note 8, at 144 (noting that “SEMs can help communities achieve positive results . . . when employed strategically in conjunction with political action”).

154. Goldschmidt, *supra* note 8, at 351.

155. Knox, *supra* note 13, at 90.

156. *Id.* at 82.

157. Linda J. Allen, *The Environment and NAFTA Policy Debate Redux: Separating Rhetoric from Reality*, 42 WM. & MARY ENVTL. L. & POL’Y REV. 965, 984 (2018).

158. See NAAEC, *supra* note 8, at art. 10(1) (establishing the Council as “the governing body of the Commission”).

159. EPA *supra* note 92.

160. The Secretariat must receive two-thirds approval of the Council in order to begin an SEM investigation. NAAEC, *supra* note 8, at art. 15(2). The Council also controls, by a two-thirds vote, whether a factual record will be publicly produced. *Id.* at art. 15(7).

record against the Secretariat's judgment.<sup>161</sup> The dual role of the Parties as targets and overseers of the SEM process creates a conflict of interest.<sup>162</sup>

Criticism also focuses on the Secretariat's limitations in the SEM process.<sup>163</sup> The Secretariat may not conclude in a factual record whether a Party has ineffectively enforced domestic environmental law.<sup>164</sup> The Secretariat also has no power to follow-up on whether a Party has addressed the issues raised.<sup>165</sup> Submitters must lobby for change domestically.<sup>166</sup>

IV. WHAT WILL ENVIRONMENTAL GOVERNANCE  
LOOK LIKE GOING FORWARD?  
FOUR CONSIDERATIONS OF THE NEW NAFTA  
IN LIGHT OF THE FOUR VALUES OF  
INTERNATIONAL COOPERATION,  
PUBLIC PARTICIPATION, TRANSPARENCY,  
AND EFFECTIVE ENFORCEMENT

A. SEM Process

The new agreement could have removed the SEM process.<sup>167</sup> However, the USMCA keeps the SEM process.<sup>168</sup> The following table

161. Tracy D. Hester, *Designed for Distrust: Revitalizing NAFTA's Environmental Submissions Process*, 28 GEO. ENVTL. L. REV. 29, 57 (2015) ("Even when the Secretariat concludes that a submission warrants development of a factual record, the Parties sometimes simply refuse to accept the Secretariat's recommendation.").

162. See Knox, *supra* note 13, at 82 ("The fundamental problem underlying all of these criticisms is that the procedure is overseen by the same Parties against which the submissions are directed."); see also Knox & Markell, *supra* note 10, at 539 ("[V]arious commentators have expressed concerns about the countries' performing dual roles (as the 'target' of submissions and also as key players during the decision-making process about how a petition should be handled).").

163. See Raustiala, *supra* note 8, at 397 ("[A] recurring critique of the current procedure is that the Secretariat may not make any explicit recommendations, nor does it have the power to reach affirmative conclusions as to whether the party in question is in fact 'failing to effectively enforce' its law.").

164. See Hester, *supra* note 161, at 65 ("Because the Parties oversee investigations of their own conduct, the process bars the Secretariat from offering any legal conclusions or opinions on whether a Party has actually failed to effectively enforce its own laws.").

165. See *id.* ("Another flaw in NAAEC's structure lies in its lack of any power to follow up on findings from the SEM process."); see also Knox, *supra* note 13, at 91 (similarly recognizing "the lack of follow-up of factual records" as a "problem").

166. See Graubart, *supra* note 152, at 457 ("Although Secretariat validation has proven critical, it is still up to the submitters and allies to mobilize that validation into support for the underlying cause.").

167. See Allen, *supra* note 157, at 1016 (arguing (before the USMCA's finalization) that "the renegotiation of NAFTA environmental policies may result in the complete elimination of NAAEC, or at a minimum, a significant reduction in its remit.").

168. See USMCA, *supra* note 19, at arts. 24.27–24.28.

compares the SEM processes of the NAAEC and USMCA using the five Part description of this article's previous section. The SEM process essentially remains the same.<sup>169</sup>

NAAEC SEM 5-Part Process	USMCA SEM 5-Part Process
<p>Article 14(1) 5 initial criteria:</p> <ul style="list-style-type: none"> <li>• Written in language of Party at issue</li> <li>• Clearly identify submitters</li> <li>• Sufficient information &amp; evidence</li> <li>• Not to harass industry</li> <li>• Prior notice to Party at issue</li> </ul>	<p>Article 24.27(2) 5 initial criteria:</p> <ul style="list-style-type: none"> <li>• Written in language of Party at issue</li> <li>• Clearly identifies submitters</li> <li>• Sufficient information &amp; evidence</li> <li>• Not to harass industry</li> <li>• Prior notice to Party at issue</li> </ul>
<p>Article 14(2) 4 criteria to determine if submission merits response from Party:</p> <ul style="list-style-type: none"> <li>• Alleges specific harm to submitters</li> <li>• Investigation promotes NAAEC goals</li> <li>• Domestic remedies already pursued</li> <li>• Allegations from mass media reports</li> </ul>	<p>Article 24.27(3) 4 criteria to determine if submission merits response from Party:</p> <ul style="list-style-type: none"> <li>• Alleges specific harm to submitters</li> <li>• Investigation promotes NAAEC goals</li> <li>• Domestic remedies already pursued</li> <li>• Allegations from mass media reports</li> </ul>
<p>Article 14(3) Party advises Secretariat:</p> <ul style="list-style-type: none"> <li>• Pending domestic proceedings</li> <li>• Information Party wants to submit</li> </ul>	<p>Article 24.27(4) Party advises Secretariat:</p> <ul style="list-style-type: none"> <li>• Pending domestic proceedings</li> <li>• Information Party wants to submit</li> </ul>

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169. However, the USMCA's SEM process also incorporates an Environment Committee, which will be discussed later on. *See id.* at art. 24.26 (establishing an "Environment Committee composed of senior government representatives").

NAAEC SEM 5-Part Process	•USMCA SEM 5-Part Process
<p>Article 15(1)&amp;(2)&amp;(5) draft factual record:</p> <ul style="list-style-type: none"> <li>• Secretariat explains to Council why factual record warranted</li> <li>• Council authorizes draft by 2/3 vote</li> <li>• Secretariat submits draft to Council</li> <li>• Parties may provide comments</li> </ul>	<p>Article 24.28(1)&amp;(2)&amp;(5) draft factual record:</p> <ul style="list-style-type: none"> <li>• Secretariat explains to Council why factual record warranted</li> <li>• Council authorizes draft by 2/3 vote</li> <li>• Secretariat submits draft to Council</li> <li>Parties may provide comments</li> </ul>
<p>Article 15(7) making factual record public:</p> <ul style="list-style-type: none"> <li>• Council authorizes by 2/3 vote</li> </ul>	<p>Article 24.28(6) making factual record public:</p> <ul style="list-style-type: none"> <li>• Council authorizes unless 2/3 oppose</li> </ul>

The SEM process provides a mechanism for international cooperation.<sup>170</sup> It requires the Council, comprised of a representative of each country, the Secretariat, a quasi-independent<sup>171</sup> body, and the JPAC, members of the public in each country, to collaborate.<sup>172</sup> Additionally, citizens of one country may file a submission addressed at a different country.<sup>173</sup> Citizens of multiple countries may also collaborate on a submission.<sup>174</sup> In these ways, the USMCA's SEM process may continue to advance international cooperation.<sup>175</sup>

170. See Block, *supra* note 32, at 35–36 (“The CEC is one of the few international institutions with the authority to call for environmental improvements in North America and the only one whose jurisdiction extends throughout the continent.”).

171. See Markell, *supra* note 14, at 356 (describing the Secretariat as “quasi-independent”).

172. As under the NAAEC, the Secretariat is the section of the CEC responsible for reviewing submissions and determining whether the submission warrants a factual record. See USMCA, *supra* note 19, at art. 24.27. The Council, again, authorizes the creation of draft factual records and public release of final factual records. See *id.* at art. 24.28. The JPAC may provide advice to the Secretariat during the factual record creation. *Id.*

173. See *id.* at art. 24.27(1) (“Any person of a Party may file a submission asserting that a Party is failing to effectively enforce its environmental laws.”); see also Raustiala, *supra* note 8, at 396 (“[S]ubmitters need not reside in or be a citizen of the party whose enforcement practices they challenge.”).

174. See Knox & Markell, *supra* note 10, at 528 (“[T]he procedure provides opportunities for environmental activists from different countries to work together.”).

175. In fact, other multilateral treaties have adopted a SEM process. See Hester, *supra* note 161, at 64 (noting that “other free trade agreements have already incorporated similar approaches that bring public attention and scrutiny to a member State’s failure to enforce its own environmental laws”); see also Todd, *supra* note 8, at 130. Trade agreements between the United States, Dominican Republic, Columbia, Panama, and Peru all have citizen submission procedures. See *id.* at 135. To view these agreements, see *Free Trade Agreements*, OFFICE OF U.S. TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements> (last visited May 3, 2020).

The success of the SEM process, however, requires continued public participation.<sup>176</sup> Concern exists that individuals and non-governmental organizations “have stopped making submissions because of doubts about the independence and integrity of the process,” especially the disproportionate influence of the Council.<sup>177</sup> It remains to be seen whether the SEM process under the USMCA will continue these concerns.<sup>178</sup>

Nevertheless, by keeping the SEM process, the USMCA preserves a mechanism for public participation.<sup>179</sup> With Council approval, the process results in a public factual record.<sup>180</sup> In doing so, the SEM process also promotes transparency while also encouraging public participation through domestic advocacy.<sup>181</sup> Furthermore, the process provides a mechanism to improve effective enforcement.<sup>182</sup> In fact, the number of submissions addressing enforcement issues has risen in recent years,<sup>183</sup> especially those regarding the United States.<sup>184</sup> Ultimately, only time will tell whether continued use of the SEM process will improve environmental law enforcement.<sup>185</sup> For now, keeping the SEM process should be seen as a positive result for environmental protection in North America.<sup>186</sup>

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176. See Wold, *supra* note 133, at 426 (emphasizing the need for “public confidence” to “allow the process to operate as designed”); see also Knox, *supra* note 13, at 92 (noting that if “the procedure increasingly comes to be seen as unfair, untimely, and ineffective, it will become less attractive to submitters”).

177. See Hester, *supra* note 161, at 63; see also Knox, *supra* note 13, at 90 (“The submissions procedure is inherently biased toward governments because the NAAEC gives them the right to decide whether to authorize factual records and whether to publish those records.”). The USMCA provides the same power to the Council. See USMCA, *supra* note 19, at art. 24.28.

178. See Hester, *supra* note 161, at 47 (arguing that Council influence “risks undermining the overall credibility and effectiveness of the SEM process in addition to the specific factual record in question”).

179. See Markell, *supra* note 14, at 348 (stating that the SEM process provides “a significant role for the public by allowing the public to trigger the process and to contribute information to it”).

180. See USMCA, *supra* note 19, at art. 24.28(6) (“The CEC Secretariat shall make the final factual record publicly available, normally within 30 days following its submission, unless at least two members of the Council instruct it not to do so.”).

181. See McRae, *supra* note 46, at 249 (noting that “the citizen submission process is one where there is substantial transparency”); see also Todd, *supra* note 8, at 144 (noting that “SEMs can help communities achieve positive results . . . when employed strategically in conjunction with political action”).

182. See USMCA, *supra* note 19, at art. 24.27(1).

183. *All Submissions supra* note 119.

184. *All Submissions: United States, supra* note 134.

185. See Knox, *supra* note 13, at 88 (noting that so far “many of the factual records have resulted in policy changes designed to improve environmental protection”); see also Allen, *supra* note 157, at 1012 (“CEC has been and will remain predominantly a forum for addressing hemispheric environmental issues, but only if it is the most convenient and effective means of doing so.”).

186. The USMCA and the SEM process received significant bipartisan support in

*B. Environment Committee*

The USMCA also creates a new committee called the Environment Committee.<sup>187</sup> The committee is made up of “trade and environment central level of government authorities.”<sup>188</sup> It provides an additional forum to review the agreement’s implementation of the agreement.<sup>189</sup> The Environment Committee must meet every two years.<sup>190</sup> Its chair rotates between the three countries.<sup>191</sup> Meetings must include a “public session” and allow for “public input on matters relevant to the Committee’s work.”<sup>192</sup> Decisions at Environment Committee meetings must be made by consensus<sup>193</sup> and made available to the public.<sup>194</sup>

The Environment Committee also influences the SEM process.<sup>195</sup> Under the NAAEC and USMCA, the Secretariat must provide its reasoning to the Council when it believes a submission warrants a factual record.<sup>196</sup> The USMCA adds the Environment Committee as a second group which the Secretariat must consult.<sup>197</sup> The Environment Committee also reviews final factual records and “provide[s] recommendations to the Council on whether the matter raised in the factual record could benefit from cooperative activities.”<sup>198</sup> Furthermore, the USMCA requires the Parties to “provide updates to the Council and the Environment Committee on final factual records.”<sup>199</sup>

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the U.S. House of Representatives. See William Mauldin & Natalie Andrews, *House Passes North American Trade Pact With Bipartisan Support*, WALL ST. J. (Dec. 19, 2019), <https://www.wsj.com/articles/usmca-clears-threshold-to-pass-in-the-house-with-bipartisan-support-11576790200>. USMCA legislation passed the House by a vote of 385 to 41, with 193 Democrats and 192 Republicans voting in favor. *Id.* The U.S. Senate passed the USMCA legislation by a bipartisan vote of 89 to 10, with 51 Republicans and 37 Democrats voting in favor. See Emily Cochrane, *Senate Passes Revised NAFTA, Sending Pact to Trump’s Desk*, N.Y. TIMES (Jan. 29, 2020), <https://www.nytimes.com/2020/01/16/us/politics/usmca-vote.html>.

187. See USMCA, *supra* note 19, at art. 24.26(2).

188. *Id.*

189. See *id.* at art. 24.26(3) (stating that Environment Committee shall “provide a forum to discuss and review the implementation” of the agreement’s environmental provisions).

190. *Id.* at art. 24.26(4).

191. *Id.*

192. *Id.* at art. 24.26(8).

193. *Id.* at art. 24.26(5).

194. *Id.* at art. 24.26(6).

195. See *id.* at arts. 24.27–24.28.

196. See USMCA, *supra* note 19, at art. 24.28(1) (“If the Secretariat considers that the submission, in the light of any response provided by the Party, warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons.”); see also USMCA, *supra* note 19, at art. 24.28(1) (establishing the same Council consultation requirement as the NAAEC).

197. See USMCA, *supra* note 19, at art. 24.28(1) (requiring the Secretariat to also inform the Environment Committee when the Secretariat determines that a submission warrants a factual record).

198. *Id.* at art. 24.28(7).

199. *Id.* at art. 24.28(8).



The Environment Committee may further international cooperation between the United States, Canada, and Mexico.<sup>200</sup> First, it provides a new forum for government officials of each country to discuss environmental issues.<sup>201</sup> Second, by rotating chair leadership between the countries and requiring decisions by consensus, the USMCA may incentivize cooperation as opposed to dominance by any single Party.<sup>202</sup> Third, the committee must provide advice to the Parties, specifically on ways to collaborate on issues raised in the SEM process.<sup>203</sup>

The Committee's procedural requirements promote public participation and transparency and reaffirm them as values of environmental governance.<sup>204</sup> Incorporating a public session at each Environment Committee meeting creates another mechanism for public participation.<sup>205</sup> Requiring "[a]ll decisions and reports" to be made public creates transparency.<sup>206</sup>

On the other hand, the Parties already wield significant influence through the Council.<sup>207</sup> As a committee of government officials, the Environment Committee may increase the influence of the Parties compared to the public.<sup>208</sup> Furthermore, the committee

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200. See David A. Gantz, *Labor Rights and Environmental Protection Under NAFTA And Other U.S. Free Trade Agreements*, 42 U. MIAMI INTER-AM. L. REV. 297, 315 (noting that "the governments have used the CEC, albeit cautiously, to collaborate on various environmental issues").

201. See USMCA, *supra* note 19, at art. 24.26(3) (establishing the Environment Committee to "provide a forum to discuss and review" the USMCA's environmental provisions).

202. The Council has a similar requirement to make decisions by consensus, which can be found in the Environmental Cooperation Agreement, the side agreement to the USMCA. See Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada [hereinafter ECA], at art. 3(7), available at <https://www.epa.gov/international-cooperation/2018-agreement-environmental-cooperation-among-governments-united-states> (stating that the "Council shall take all decisions and recommendations by consensus").

203. See USMCA, *supra* note 19, at art. 24.28(7) ("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.").

204. The USMCA's Environment Committee provisions require transparency and the opportunity for public participation. See *id.* at art. 24.26(6), (8).

205. Before its replacement by the USMCA and ECA, the NAAEC had two main mechanisms for public participation: the JPAC and the SEM process. See Markell, *supra* note 14, at 348 ("[I]n addition to establishing JPAC as an internal voice for the North American public, the Agreement, through its creation of the citizen submissions process, also creates a significant role for the public by allowing the public to trigger the process and to contribute information to it.").

206. See USMCA, *supra* note 19, at art. 24.26(5); see also McRae, *supra* note 46, at 238 (stating that "the concept of transparency is related to access to information").

207. See Knox & Markell, *supra* note 10, at 524 ("The criticisms of the procedure as unfair have been directed at the governments, both in their individual capacities and acting collectively through the Council."); see also *id.* ("The procedure is structurally biased in favor of the governments. It provides them rights that the submitters do not have . . .").

208. USMCA, *supra* note 19, at 24.26 (requiring the committee to be composed of "senior government representatives").

incorporates government officials from trade positions into the SEM process.<sup>209</sup> Whether a stronger trade-centric perspective develops, and any resulting effect on enforcement of environmental laws, remains to be seen.<sup>210</sup>

Nevertheless, the Environment Committee may help address a criticism of the SEM process: the inability to follow-up on issues raised in the SEM process.<sup>211</sup> The USMCA empowers the Environment Committee to “provide recommendations to the Council on whether the matter raised in the factual record could benefit from cooperative activities.”<sup>212</sup> The USMCA does not require the Council to follow the recommendations,<sup>213</sup> but this new provision may provide a needed outlet to follow-up on SEM matters and encourage the Parties to improve enforcement of domestic environmental laws.<sup>214</sup>

### C. Party Influence of Secretariat

The comparative power of the Council and Parties to the Secretariat provided a consistent concern of the NAAEC.<sup>215</sup> NAAEC Article 11 provided a check on Party influence of the Secretariat.<sup>216</sup> It prohibited the Secretariat from “seek[ing] or receiv[ing] instructions from any government or any other authority external to the Council.”<sup>217</sup> It also required the Parties to “respect the international character” of the Secretariat and prohibited Parties from “seek[ing] to influence [the Secretariat] in the discharge of their responsibilities.”<sup>218</sup>

209. See USMCA art. 24.26(2) (requiring members from “relevant trade and environment central level of government authorities”).

210. See Hester, *supra* note 161, at 74 (noting the “political turmoil and bitter public disputes over the current balance struck between commerce and the environment in current free trade agreements”).

211. See *id.* at 65 (“Another flaw in the NAAEC’s structure lies in its lack of any power to follow up on findings from the SEM process.”); see also Knox, *supra* note 13, at 91 (identifying “the lack of follow-up of factual records” as a “problem”).

212. USMCA, *supra* note 19, at art. 24.28(7).

213. See ECA, *supra* note 202, at art. 4(4) (stating that the Council “may consider” recommendations from the Environment Committee).

214. See Markell, *supra* note 14, at 354 (noting that “follow-up to the issuance of factual records . . . is likely to prove beneficial in . . . improving enforcement policies and practices.”).

215. See Graubart, *supra* note 152, at 429 (“Both the full investigation and the public dissemination of the resulting factual records require prior approval of the Council. Such limitations have, not surprisingly, provoked great frustrations among environmental activists concerning the value of the NAAEC’s citizens complaint mechanism.”); Hester, *supra* note 161, at 57 (“Even when the Secretariat concludes that a submission warrants development of a factual record, the Parties sometimes simply refuse to accept the Secretariat’s recommendation. NAAEC grants them that power by authorizing the Council to accept or reject the Secretariat’s proposal by majority vote.”).

216. See NAAEC, *supra* note 8, at art. 11(4).

217. *Id.*

218. *Id.*

The USMCA's side agreement, the Environmental Cooperation Agreement (ECA), governs the CEC's structure and functions.<sup>219</sup> The ECA, however, fails to include language equivalent to the NAAEC Article 11 prohibition of Party influence on the Secretariat.<sup>220</sup> Without this provision, the Parties could individually seek to pressure the Secretariat to reduce SEM enforcement investigations, creating distrust in the process and lessening public participation in enforcement investigations.<sup>221</sup> On the other hand, Parties may avoid direct influence of the Secretariat for fear of public backlash.<sup>222</sup> Furthermore, it is unclear if Party pressure would have any effect as the Secretariat has received consistent praise for its independence and quality of work despite Council influence.<sup>223</sup>

#### *D. Definition of Environmental Law*

Under the NAAEC and USMCA, the SEM process focuses on enforcement of "environmental law."<sup>224</sup> Both agreements define environmental law as any statute or regulation "the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health."<sup>225</sup> Both agreements exclude laws "directly related to worker safety or health" from the definition of environmental law.<sup>226</sup> Both also exclude laws addressing subsistence and aboriginal harvesting of natural resources.<sup>227</sup>

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219. See ECA, *supra* note 202, at art. 2(1) ("the Parties shall continue to participate in the Commission [for Environmental Cooperation], originally established under the NAAEC."); see *id.* at art. 2(3) (stating that the CEC "will continue to operate under the modalities in place as of entry into force" of the USMCA).

220. The ECA's corresponding section to NAAEC article 11 can be found in ECA Article 5. See *id.* at art. 5. The new section does not include the NAAEC's provisions preventing Party influence of the Secretariat. See *id.*

221. See Hester, *supra* note 161, at 47 (describing how the Parties, through the Council, have "risk[ed] undermining the overall credibility and effectiveness of the SEM process" through actions such as "alter[ing] the scope of a factual record to exclude damaging or embarrassing issues"); see also *id.* at 63 (stating that some individuals and organizations may "have stopped making submissions because of doubts about the independence and integrity of the process").

222. See Yang & Percival, *supra* note 3, at 631 (noting that "civil society involvement in environmental governance can serve as an important check on . . . political influence").

223. See Knox & Markell, *supra* note 10, at 524 ("Studies of the submission procedure have consistently concluded that the Secretariat makes objective decisions based on a careful review of the submissions and the relevant factors set out in the NAAEC."); see also Knox, *supra* note 13, at 88 ("Outside observers have consistently found the Secretariat's decisions on the admissibility of submissions, as well as the factual records, to be objective and reasonable . . .").

224. NAAEC, *supra* note 8, at art. 14(1); USMCA, *supra* note 19, at art. 24.27(1).

225. NAAEC, *supra* note 8, at art. 45(2); USMCA, *supra* note 19, at art. 24.1.

226. NAAEC, *supra* note 8, at art. 45(2); USMCA, *supra* note 19, at art. 24.1.

227. NAAEC, *supra* note 8, at art. 45(2); USMCA, *supra* note 19, at art. 24.1.

The USMCA, unlike the NAAEC, does not exclude laws related to commercial harvesting of natural resources from the definition of environmental law.<sup>228</sup> Consequently, the SEM process may now address laws directly addressing commercial harvesting of natural resources.<sup>229</sup> By increasing the scope of laws covered under the SEM process, the USMCA, in this context, may increase opportunities for public participation and investigations of enforcement.<sup>230</sup>

The USMCA also differs from the NAAEC by defining the terms “statute” and “regulation” for purposes of the definition of environmental law.<sup>231</sup> The USMCA defines statutes as acts of the federal legislative branch of each Party.<sup>232</sup> It defines regulations as those enforceable by the “central” or “federal” level of government.<sup>233</sup> Under the NAAEC, SEM process jurisdiction has encompassed not only federal laws of the Parties, but also laws of their states.<sup>234</sup> For example, in one submission under the NAAEC,<sup>235</sup> the Secretariat noted that California’s Water Code and Code of Regulations “qualify as ‘environmental law’ for purposes of the NAAEC.”<sup>236</sup>

Will the USMCA’s SEM process, limited to laws from the “federal legislative branch” and regulations enforceable by the “central level of government,” permit submissions addressing state environmental laws?<sup>237</sup> Under the USMCA, must the Secretariat reject a submission addressing California’s Water Code and Code of Regulations?<sup>238</sup> Removing state laws from the SEM process could significantly narrow its scope and reduce opportunities for public participation in enforcement issues.<sup>239</sup> To the extent the SEM process promotes transparency, it may also reduce information

228. The NAAEC exempts laws with “the primary purpose of . . . managing the commercial harvest or exploitation . . . of natural resources.” NAAEC, *supra* note 8, at art. 45(2). The USMCA does not include this exemption. See USMCA, *supra* note 19, at art. 24.1.

229. See USMCA, *supra* note 19, at art. 24.1.

230. See Börk & Salcido, *supra* note 147, at 40 (noting that the SEM process provides the public with another “route” to address environmental protection).

231. USMCA, *supra* note 19, at art. 24.1.

232. See *id.* at art. 24.1 (defining “statute” as “an Act of the Parliament of Canada” or “an Act of Congress” of the United States and Mexico).

233. *Id.*

234. See, e.g., *Lake Memphremagog*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/lake-memphremagog> (last visited May 4, 2020) (addressing, in part, Vermont’s Land Use and Development Act).

235. See *Neste Canada*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/neste-canada> (last visited May 4, 2020) (addressing, in part, the California Water Code and California’s underground storage tank regulations).

236. Secretariat of the Commission for Environmental Cooperation (Apr. 17, 2000), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/00-2-det-e.pdf>.

237. USMCA, *supra* note 19, at art. 24.1.

238. Secretariat of the Commission for Environmental Cooperation, *supra* note 236.

239. Due, in part, to federal gridlock, many states have increased and expanded environmental laws governing issues such as brownfields policy and climate change. See GLICKSMAN ET AL., *supra* note 80, at 77.

regarding state environmental laws.<sup>240</sup> However, only the results of future submissions addressing state laws will determine the effect, if any, of this change.

## V. CONCLUSION

Effective governance is critical to addressing environmental problems.<sup>241</sup> This article attempts to describe four important values in modern environmental governance: international cooperation, public participation, transparency, and enforcement.<sup>242</sup> By promoting these four values, the NAAEC and its SEM process provide a helpful case study of environmental governance.<sup>243</sup> Furthermore, as an agreement empowering nearly one-half billion citizens to challenge the enforcement activities of three countries, the NAAEC represents an important mechanism to advance environmental protection.<sup>244</sup>

Upon renegotiation of the NAFTA and NAAEC, concern arose over whether these environmental provisions would continue.<sup>245</sup> The principles of the NAAEC and the procedures of the SEM process have survived under the new tri-national agreement, the USMCA.<sup>246</sup> The USMCA brings new changes as well.<sup>247</sup> The creation of an Environment Committee may increase international cooperation, public participation, transparency, and effective enforcement.<sup>248</sup> Conversely, the removal of provisions preventing Party influence of the Secretariat could increase distrust in the SEM process, thereby reducing public participation in the enforcement process.<sup>249</sup> Moreover, changes to the definition of

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240. The SEM process aims to provide a spotlighting role regarding the laws covered under the process. See Knox & Markell, *supra* note 10, at 510 (stating that the SEM process seeks to “shin[e] a spotlight on . . . failure[s] to effectively enforce domestic law”); see also Todd, *supra* note 8, at 92 (noting the hope that “SEMs spotlight the nation’s lack of enforcement”).

241. See Robinson, *supra* note 7; see also Vajda & Rhimes, *supra* note 7.

242. For a discussion of the importance of these values, see *supra* Part II of this article.

243. International cooperation, public participation, transparency, and effective enforcement serve as objectives of the NAAEC. See NAAEC, *supra* note 8, at art. 1.

244. See U.S. and World Population Clock, *supra* note 17; see Mexico Population, *supra* note 17; see Canada Population, *supra* note 17.

245. See Allen, *supra* note 157, at 1016 (noting at the time of NAFTA renegotiation that a replacement agreement could “result in the complete elimination of the NAAEC”).

246. See USMCA, *supra* note 19, at art. 1 (retaining the values of international cooperation, public participation, transparency, and effective enforcement); see also *id.* at art. 24.27 (retaining the SEM process).

247. See, e.g., *id.* at 24.26 (“[E]stablish an Environment Committee composed of senior government representatives . . .”).

248. For a discussion of the possible impacts of the USMCA’s Environment Committee, see *supra* Part IV.B of this article.

249. For a discussion of the possible impacts of the removal of provisions preventing Party influence of the Secretariat, see *supra* Part IV.C of this article.

environmental law may, on the one hand, allow for non-governmental actors to challenge laws pertaining to commercial harvesting while, on the other hand, prevent them from addressing state environmental laws.<sup>250</sup>

Only time will reveal the effects of these changes. At a minimum, the USMCA, or “New NAFTA,” continues a regime which seeks to promote international cooperation, public participation, transparency, and effective enforcement in environmental governance.<sup>251</sup> Through its history, the SEM process under the NAAEC has involved hundreds of stakeholders<sup>252</sup> and resulted in nearly one-hundred investigations of environmental law enforcement.<sup>253</sup> Hopefully, the New NAFTA will continue these achievements and advance environmental protection in the United States, Canada, and Mexico.

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250. For a discussion of the possible impacts of changes to the definition of environmental law under the SEM process, see *supra* Part IV.D of this article.

251. See USMCA, *supra* note 19, at art. 1.

252. 25 YEARS OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION, COMMISSION FOR ENVTL. COOPERATION, *supra* note 121.

253. See *All Submissions*, COMMISSION FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/all-submissions> (last visited May 2, 2020).