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Environmental Cooperation in the (Partially) Disaggregated State: Lessons from the Security and Prosperity Partnership of North America

Neil Craik* and Joseph DiMento**

I. INTRODUCTION

On August 20 and 21, 2007, Canadian Prime Minister Stephen Harper, US President George W. Bush, and Mexican President Felipe Calderón met in Montebello, Quebec to discuss the Security and Prosperity Partnership of North America (“SPP”), a trilateral initiative that has as its objective enhanced regulatory cooperation between the three North American states in order to improve continental security and regional competitiveness. Despite being described in prosaic terms by government officials and industry supporters as a primarily technical exercise, the SPP has attracted trenchant criticism across the political spectrum. The SPP has been described variously as “integration by stealth,”¹ the creation of a North American “European Union with none of the safeguards on the environment and social rights,”² and (most floridly) as a “[u]nion that will bury America under more than 100 million, mostly poor Mexicans, and tens of millions of Canadians, used to their lavish social welfare benefits and socialized medicine.”³ Still others have dismissed the SPP altogether

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¹ Maude Barlow, *Where's the Transparency in the 'Security' and 'Prosperity' Partnership?*, Globe and Mail (Aug 16, 2007).

² Chris Cobb, *End 'Under the Table' Deal, Critic Says*, Ottawa Citizen A4 (Apr 2, 2007) (quoting Council of Canadians national chairman, Maude Barlow).

³ John Ibbitson, *Little Chance Partnership Proposal Will Lead to North American Union*, Globe and Mail A9 (July 9, 2007) (quoting the News Journal of Mansfield, Ohio).

as a disappointing “much ado about nothing,” noting that it is little more than a grocery list of bureaucratic minutiae that ignores the pressing trade and social imperatives affecting the region.⁴ And so opens another front in the fight over globalization.

From a governance perspective, the SPP appears to adopt on a grand scale what international legal and international relations scholars have identified as a trend towards international regulation through informal arrangements negotiated directly by domestic agencies with their foreign counterparts.⁵ In this regard, Anne-Marie Slaughter has written extensively about a “new world order” based on overlapping networks of regulators who seek to coordinate transnational activity and achieve common goals through direct agency-to-agency interactions.⁶ In some cases, the form of cooperation is quite minimal, such as sharing information on best regulatory practices or extending notice of regulatory activities to regulators in potentially impacted jurisdictions. However, informal cooperation efforts may evolve into more substantively prescriptive arrangements, such as regulatory harmonization, mutual recognition arrangements, and cooperative enforcement mechanisms. What distinguishes these governance structures from traditional forms of international cooperation is that network arrangements are not negotiated through central agencies such as foreign affairs departments, nor do they revolve around a formally binding treaty. Instead, cooperating regulators directly interact with one another with a view to developing shared guidelines or “frameworks for cooperation” to institutionalize their cooperative efforts.⁷ To use Professor Slaughter’s phrase, the state as a relevant international actor is increasingly “disaggregating into its separate, functionally distinct parts,” as opposed to operating as a single, indivisible unit.⁸

Cooperation among financial regulators has been the most active area for transgovernmental networks, with quite evolved regulatory networks in areas

⁴ See Roland Paris, *A Trilateral Mishmash*, *Globe and Mail* A17 (Feb 26, 2007).

⁵ Anne-Marie Slaughter, *A New World Order* (Princeton 2004). See also Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 *Va J Intl L* 1 (2002); Anne-Marie Slaughter and David Zaring, *Networking Goes International: An Update*, 2 *Ann Rev of L & Soc Sci* 211 (2006); Christopher A. Whytock, *A Rational Design Theory of Transgovernmentalism: The Case of E.U.–U.S. Merger Review Cooperation*, 23 *BU Intl L J* 1 (2005); Mark A. Pollack and Gregory C. Shaffer, eds, *Transatlantic Governance in the Global Economy* ch 5–7 (Rowman & Littlefield 2001) (providing case studies on US and European transgovernmental arrangements).

⁶ See Slaughter, *A New World Order* (cited in note 5).

⁷ *Id.* at 172. See also Raustiala, 43 *Va J Intl L* at 26–50 (cited in note 5) (providing examples of regulatory cooperation in securities, competition and, environmental regulation).

⁸ Anne-Marie Slaughter, *The Real New World Order*, 76 *Foreign Aff* 183, 184 (1997).

such as banking, competition law, insurance, and securities regulation.⁹ Environmental regulation is also emerging as an issue area where networks are being utilized to address transboundary and global environmental issues, as well as addressing environmental nontariff barriers to trade, although to date the regulatory achievements of environmental networks are less developed than those found in the financial area.¹⁰ The SPP marks a further, and in our view, important, development in the use of transgovernmental networks because under the SPP, the executive branches of Canada, the United States, and Mexico deliberately turn to transgovernmental networks as a governance strategy across multiple issue areas. The SPP, which proposes an ambitious agenda of security, economic, energy, and environmental initiatives, identifies areas for increased cooperation and charges a series of working groups that are principally made up of federal government officials from the three partner countries to negotiate and to implement cooperative solutions. The self-conscious use of networks as an alternative to traditional international institutions on a broad scale was contemplated by Slaughter,¹¹ but the SPP marks the first practical attempt by governments to create a cross-cutting transnational governance structure that relies principally on transgovernmental networks. Consequently, the SPP provides an important opportunity to consider the prospects and limitations of transgovernmentalism at large.

The SPP process in both its substance and form has attracted significant opposition by domestic groups in all three countries. It is viewed by its critics as proposing a more highly integrated governance structure that erodes national sovereignty through a process that has privileged corporate interests and lacks democratic accountability.¹² While it may be tempting to dismiss this criticism as coming from the margins of the political spectrum,¹³ the concerns over accountability have found much purchase within the legislative branches of the three North American governments, which have been excluded from the SPP

⁹ Anne-Marie Slaughter, *Governing the Global Economy through Government Networks*, in Michael Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* 177, 179 (Oxford 2000). See also Kalypso Nicolaidis and Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government*, 68 *L & Contemp Probs* 263 (2005).

¹⁰ Raustiala, 43 *Va J Intl L* at 49 (cited in note 5).

¹¹ Slaughter, *New World Order* at 244 (cited in note 5) ("Here . . . we turn to what could be if government networks were, alongside traditional international organizations, widely recognized and self-consciously constituted mechanism of global governance.").

¹² Barlow, *Where's the Transparency*, *Globe and Mail* (cited in note 1).

¹³ For example, much of the criticism in the United States arises from commentators on the far right of the political spectrum, while in Canada the criticism tends to come from the left.

process.¹⁴ The response to this criticism by government officials and the SPP supporters is to deny the SPP's governmental ambitions. Instead, government officials maintain that networks are mostly about exchanging ideas and information, and where rules do emerge they are largely technical and subject to domestic accountability measures.¹⁵ The picture that is emerging from the debate over the SPP is one of profound incommensurability, with respective understandings of the role and functions of the SPP being so divergent as to render any debate practically meaningless.¹⁶

In relation to environmental and resource issues, the SPP has raised concerns about the potential for the adoption of less preventive standards and the loss of control over national resource policy. These concerns have been exacerbated by the absence of any fixed avenues for input and consultation by nongovernmental groups and the absence of any substantive commitment to environmental values within the SPP structure. The result has been a lack of understanding and growing mistrust of the SPP's government and private sector supporters in relation to the SPP's impact on the environment.¹⁷

The purpose of this Article is to evaluate the SPP process critically and the opposition to it in light of the existing literature on transgovernmental networks.

¹⁴ The SPP has been raised as a campaign issue in both the Republican and Democratic presidential races in the United States. It has been the subject of an amendment to a transportation bill in the US Congress, "prohibiting the use of funds to participate in a working group pursuant to the Security and Prosperity Partnership." See CBC News, *SPP FAQ's*, (Aug 20, 2007), available online at <<http://www.cbc.ca/news/background/spp/>> (visited Nov 17, 2007). See also H Con Res 40, 110th Cong, 1st Sess (Jan 22, 2007), available online at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:hc40ih.txt.pdf> (visited Nov 17, 2007) (noting the SPP acts to "circumvent United States trade, transportation, homeland security, and border security . . . makes the United States-Mexico border less secure because Mexico is the primary source country of illegal immigrants into the United States," and can "violate and threaten United States sovereignty").

¹⁵ See Security and Prosperity Partnership of North America, *SPP Myths vs Facts*, available online at <http://www.spp.gov/myths_vs_facts.asp> (visited Nov 17, 2007) (describing SPP as a "dialogue" and noting requirements to conform with domestic administrative requirements) ("*SPP Myths vs Facts?*").

¹⁶ This divergence was exemplified in an exchange between Gordon Laxer, a political economist and resource expert, and Leon Benoit, the Conservative Chair of the Canadian House of Commons International Trade Committee. Laxer sought to raise concerns regarding the SPP discussions on energy security in the absence of any clear Canadian national energy policy, but was prevented from doing so on the basis that his comments were not relevant. In essence, while Laxer felt that energy policy was central to his concerns over the SPP, the Chair was not prepared to consider the link as directly bearing on the matter before the Committee. *Evidence of Gordon Laxer*, Standing Committee on International Trade, 39th Can Parl, 1st Sess 1210, 1210-1215 (May 10, 2007), available online at <<http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=208182&Lang=1&PARLSES=391&JNT=0&COM=0>> (visited Nov 17, 2007).

¹⁷ See, for example, Linda McQuaig, *Is Water on the Table at Montebello*, Toronto Star AA08 (Aug 21, 2007) (describing undisclosed plan to divert Canadian water to the United States).

This is accomplished with specific reference to those aspects of the SPP that address environmental and resource issues. More particularly, Section II of the Article contends that characterizing the SPP as a form of transgovernmentalism adds considerable analytic clarity to the debate over the SPP. Our basic argument is that the paucity of the debate results from the failure of the architects of the SPP and their critics to appreciate the nature of transgovernmental networks as a governance structure. To this end we identify certain structural features shared by transgovernmental networks and examine the competing claims concerning the SPP in light of these characteristics.

Section III of the Article provides additional support for the descriptive claims of transgovernmentalists that states are turning to networks. The development and structure of the SPP, however, qualifies the central transgovernmentalist claim that the state is disaggregating. Instead, the picture that emerges is one of partial disaggregation where central governments retain the power to create networks, to enable them, and to define their agendas. This Article argues that this is a state of affairs with mixed normative implications. The situation also puts the debate on the SPP, described in Section IV, in greater focus by allowing for exploration into whose characterization of the SPP more closely resembles its actual governance features. The result, we suggest, is that the debate is in its essence one between networks as they are and networks as they could be.

Finally, Section V argues that the nature of transnational networks requires a distinct form of legitimacy. In the SPP process, the framers rely exclusively on two forms of legitimacy: expert legitimacy, whereby the authority exercised by networks is justified on the basis of the qualifications of its members to solve technical problems, and a highly formalized version of process legitimacy, which tends to equate legitimacy with legality. In light of the discussion in the Section II of the Article, we argue that these forms of legitimacy are insufficient on their own. Here we compare the underlying normative structure of the SPP's environmental and resource network initiatives with the structure of other international environmental and resource institutions that express a shared normative commitment to substantive environmental ends. Our conclusion, like that of Professor Slaughter, is that the turn to networks as a governance strategy requires a shared normative foundation. But whereas Slaughter appears content to rely on principles of procedural legitimacy, such as inclusivity, discursiveness, and subsidiarity,¹⁸ this Article maintains that a shared commitment to substantive environmental principles is also required. This conclusion does not necessarily negate the possibility of an effective transgovernmental world order, but it suggests that we should approach such claims with caution.

¹⁸ Slaughter, *A New World Order* at 244–57 (cited in note 5).

II. THE NATURE OF NETWORKS

The emergence of the disaggregated state is primarily understood as a reaction to systemic conditions in world politics, such as vastly increased interdependence, technological innovation, and increased regulatory density.¹⁹ As the capacity of the nation-state to solve politically salient issues weakens due to a growing incongruence between global, economic, and national political arenas and the accelerated need for responsive regulatory action,²⁰ increased opportunities for the shifting of authority both vertically and horizontally have emerged. But despite the predictions of the waning influence of the state in world politics, the state has retained its prominence—although not its monopoly (such as it was)—on the exercise of authority beyond the state.²¹ The result is a “more decentralized, multi-centric system” that coexists alongside the traditional state-centered system.²²

Viewed in this context, the disaggregation of the state is presented as being demand driven. As regulated entities expand their activities and impacts beyond national borders, regulators seek to follow. While one possibility is for regulators to extend their regulatory powers beyond the state unilaterally, legal constraints and political resistance to extraterritoriality by other states make cooperative forms of regulation an attractive option.²³ Cooperation at the state-to-state level is another alternative, but requires take up by central governments, whose foreign affairs agendas are already crowded.²⁴ As an alternative means by which to pursue their regulatory goals, regulators have turned to their foreign counterparts to share information and to develop common and compatible regulatory approaches. Networks of administrative officials facilitate

¹⁹ See generally Robert Keohane and Joseph Nye, *Power and Interdependence: Politics in a World in Transition* (Little, Brown 1977). See also Robert Keohane and Joseph Nye, *Power and Interdependence Revisited*, 41 *Intl Org* 725 (1987).

²⁰ Consider Thomas Risse, *Transnational Governance and Legitimacy*, paper presented to the Fifth Pan-European International Relations Conference (Sept 9–12, 2004), in *Standing Group on International Relations* 3–4, available online at <<http://www.sgir.org/conference2004/papers/Risse%20-%20Transnational%20Governance%20and%20Legitimacy.pdf>> (visited Nov 17, 2007).

²¹ See Slaughter, 76 *Foreign Aff* (cited in note 8) (responding, in part, to Jessica Mathews, *Power Shift*, 76 *Foreign Aff* 50 (1997)).

²² James Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* 11 (Princeton 1990).

²³ In the environmental context, see Neil Craik, *Transboundary Pollution, Unilateralism, and the Limits of Extraterritorial Jurisdiction: The Second Trail Smelter Dispute*, in Rebecca Bratspies and Russell Miller, eds, *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* 109 (Cambridge 2006) (discussing difficulties of extraterritorial application of environmental legislation); Shi-Ling Hsu and Austen Parrish, *Litigating Canada—U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity*, 48 *Va J Intl L* 1 (2007).

²⁴ See Slaughter, *Governing through Government Networks* at 189–91 (cited in note 9).

communication, allowing officials to better understand their shared problems and how they might benefit from cooperation and to provide forums for the development of cooperative solutions.²⁵

Transgovernmental networks have not been defined and delineated in any precise way, and the definitions that do exist tend to be catholic in their approach, allowing for a large variation of arrangements to fall into the category.²⁶ What draws transgovernmental networks together as a distinct governance approach is the absence or minimization of the defining features of formal international organizations, namely: (1) membership composed of states or other international organizations; (2) establishment by treaty; (3) autonomy stemming from its membership and a distinct legal personality; and (4) the ability to adopt norms addressed to its membership.²⁷

Transgovernmental networks are not networks of states, but rather networks of governmental officials. The range of government actors involved in networks varies considerably, with some networks being constituted of highly visible government officials with strong democratic credentials, such as ministers,²⁸ although most networks are constituted of bureaucratic actors. These latter network participants may be directly part of the civil service or may be affiliated with agencies that have a measure of autonomy from the government, such as central banks or independent administrative agencies.²⁹ In the case of federal states, network participants may also include substate regulators. For example, the Canada–US Air Quality Committee is a body made up of agency officials from both the federal regulators and from state and provincial environmental agencies that share responsibility for regulating air

²⁵ For example, the North American Commission for Environmental Cooperation (“NACEC”) plays this role in relation to environmental issues. NACEC has identified issue areas where the members would benefit from cooperation; it undertakes studies and provides a forum for both government and citizen input into its initiatives. See note 36.

²⁶ For example, Slaughter provides the following definition: “[A] network is a pattern of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the ‘domestic’ from the ‘international’ sphere.” Slaughter, *A New World Order* at 14 (cited in note 5).

²⁷ Philippe Sands and Pierre Klein, *Bowett’s Law of International Institutions* 16 (Sweet & Maxwell 2001). See also Jose Alvarez, *International Organizations as Law-Makers* 4 (Oxford 2005).

²⁸ Prominent examples of high-level networks are meetings of the Finance Ministers of the G8 Group of Nations or the G20 Group of Nations. See Slaughter, *A New World Order* at 37 (cited in note 5).

²⁹ Examples of networks of independent administrative agencies include the International Organization of Securities Commissioners and the Basle Committee on Banking Supervision, while the International Network for Environmental Compliance and Enforcement is principally made up of environmental officials who are employed directly within the government. See generally Raustiala, 43 Va J Intl L (cited in note 5).

pollution.³⁰ Here, the flexibility of transgovernmentalism accounts for multilevel governance by providing an opportunity for transgovernmental cooperation between levels of government that have no formal recognition in international law. A key defining feature of transgovernmental networks is that network participants must be able to exercise authority within their own jurisdiction.³¹ Consequently, network members are able to implement network decisions in domestic legal orders with relative ease. Networks, unlike many international organizations, can control entry into the network. This form of exclusivity has led to some networks being described as “club-like,” in that membership may exclude not only representatives from other states, but may also exclude government officials from other ministries and agencies within the network member’s state that might have conflicting objectives.³² Networks can thus optimize the prospects of cooperation by excluding dissenting voices within and outside domestic polities.

Networks tend not to be constituted formally around a binding treaty, but rather are established by informal arrangements.³³ Consequently, transgovernmental networks are less likely to have permanent institutional structures, such as a secretariat or permanent headquarters.³⁴ Unlike the majority of financial networks, some environmental networks may be established by treaty, as in the case of the Canada–US Air Quality Committee.³⁵ Here the treaty provision defines the Air Quality Committee’s mandate, which is to assist in the implementation of the treaty in the broadest terms, but confers no formal regulatory authority on it and leaves membership in the committee up to the

³⁰ The Committee was created under the Agreement between the United States and Canada on Air Quality (1991), art VIII, 30 ILM 676, 682 (1991) (“Canada–US Air Quality Agreement”).

³¹ However, some networks include private entities, such as private stock exchanges in the International Organization of Securities Commissioners and environmental NGOs in the International Network for Environmental Compliance and Enforcement. See Slaughter, *Governing through Government Networks* at 184–185 (cited in note 9).

³² Slaughter, *The New World Order* at 200–03 (cited in note 5). See also Robert Keohane and Joseph Nye, *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in Roger Porter, et al, eds, *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* 264, 266–67 (Brookings Institution, 2001).

³³ See David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 *Texas Intl L J* 281, 301–02 (1998).

³⁴ There are some exceptions to this; for example, the Basle Committee on Banking Supervision uses the Bank for International Settlement to perform secretariat functions. See Slaughter, *Governing through Government Networks* at 182 (cited in note 9).

³⁵ Created under the Canada–US Air Quality Agreement, art VIII (cited in note 30). Slaughter refers to networks that exist within the framework of a treaty as “nested networks.” See Slaughter, *Governing through Government Networks* at 200 (cited in note 9) (citing the *North American Working Group on Enforcement and Compliance Cooperation* created under the *North American Agreement on Environmental Cooperation* (1993), 32 ILM 1480, 1485 (1993) as a further example).

parties. Functionally, the result is similar, leaving the network participants with discretion to define the scope of their cooperative efforts. The difference with networks created within a treaty framework is that the treaty structure more clearly defines the regulatory goals to which the committee is oriented. Similarly, the North American Commission for Environmental Cooperation (“NACEC”), a transgovernmental institution made up of the environmental ministers from each NAFTA country, was created under the North American Agreement on Environmental Cooperation and was given a broad implementation mandate.³⁶ The structure of that agreement also imbues the NACEC with a clear mandate to improve environmental quality.³⁷

The creation of a network does not involve the delegation of authority to the network. Unlike international organizations or their subsidiary bodies, which may be granted authority to make future decisions binding on the membership,³⁸ networks affect member behavior through voluntary means, such as the adoption of guidelines or recommendations.³⁹ In many cases, the network may simply function as a forum for information sharing. This is often the case with environmental networks. For example, the Strategic Implementation Plan of the International Network for Environmental Compliance and Enforcement (“INECE”) outlines goals relating to capacity building, raising awareness, and the development of evaluative tools, but does not seek to develop and to promote the adoption of specific environmental standards.⁴⁰

It would be a mistake, however, to dismiss networks as simply being talk shops.⁴¹ In a number of cases, networks have produced substantial sets of rules

³⁶ *North American Agreement on Environmental Cooperation*, art 9 (cited in note 35). For an in-depth review of the role of the NACEC in North American environmental governance, see generally David Markell and John Knox, eds, *Greening NAFTA: The North American Commission for Environmental Cooperation* (Stanford 2003).

³⁷ *North American Agreement on Environmental Cooperation*, art 1 (cited in note 35).

³⁸ See Robin R. Churchill and Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 *Am J Intl L* 623, 626 (2000).

³⁹ See *id.* at 655–56. See also Jutta Brunnée, *COPing with Consent: Law-Making under Multilateral Environmental Agreements*, 15 *Leiden J Intl L* 1 (2002).

⁴⁰ International Network for Environmental Compliance and Enforcement, *Strategic Implementation Plan*, (Nov 2006), available online at <http://www.inece.org/INECE_SIP_2006.pdf> (visited Nov 17, 2007).

⁴¹ But see Kenneth Anderson’s comment:

Far more common throughout the book than accounts of the successes of horizontal coordinating networks in the real world are descriptions of bureaucratic outputs. Networks held meetings, wrote papers, made recommendations, and drafted statements. To be sure, this is what networks must do in order to create successful outcomes in which network members go back to their own operations and implement now-coordinated policies. Yet

that have been adopted by network members. Prominent among these are the capital adequacy requirements developed by the Basle Committee and a large number of Memoranda of Understanding (“MOUs”) regarding securities regulation enforcement negotiated between participants in the International Organization of Securities Commissioners.⁴² While these documents are formally nonbinding, they are written in reasonably precise language and carry with them expectations of compliance.⁴³ Another common form of network cooperation is the use of mutual recognition agreements, which are often administered by networks but created by central governments. These arrangements provide for the acceptance and substitutability of another jurisdiction’s regulatory processes and standards in relation to imported products and services, again providing a hard edge to the work of transgovernmental networks.⁴⁴ The progress reports of the Canada–US Air Quality Committee also reveal a multifaceted work agenda, which includes coordination of consultation and notification requirements for projects with transboundary air pollution implications, the coordination of significant bilateral research and technical programs, as well as comprehensive assessments of the Air Quality Agreement itself.⁴⁵

From this brief description of networks, we can distill a number of important structural features that transgovernmental networks share. Firstly, they are *governmental*, not only because they are made up of government actors, but because they have as their purpose the creation of prescriptive norms to

unfortunately this is also precisely the procedure followed when networks create *unsuccessful* outcomes.

Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks: Book Review of Anne-Marie Slaughter, A New World Order*, 118 Harv L Rev 1255, 1277–78 (2005) (emphasis added).

- ⁴² See Slaughter, *Governing through Government Networks* at 183–85 (cited in note 9). See also Raustiala, 43 Va J Intl L at 22–23 (cited in note 5); International Organization of Securities Commissions, *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information*, (May 2002), available online at <<http://www.iosco.org/library/index.cfm?section=pubdocs&year=2002&publicDocID=126>> (visited Nov 17, 2007).
- ⁴³ For discussion of characteristics of legalized international arrangements, see Kenneth Abbott, et al, *The Concept of Legalization*, in Goldstein, et al, eds, *Legalization and World Politics* 17 (MIT 2001).
- ⁴⁴ Discussed comprehensively in Nicolaidis and Shaffer, 68 L & Contemp Probs at 272 (cited in note 9).
- ⁴⁵ For progress reports, see *Canada–US Air Quality Agreement Progress Reports*, available online at <http://www.ec.gc.ca/cleanair-airpur/Pollution_Issues/Transboundary_Air/Canada_-_United_States_Air_Quality_Agreement-WS83930AC3-0_En.htm> (visited Nov 17, 2007). Notification of regulated activities is also a feature of antitrust networks, as discussed in Whytock, 23 BU Intl LJ at 39 (cited in note 5).

govern social activities.⁴⁶ The governmental nature of networks may be overlooked because of their informal nature. Because networks are rarely the recipients of delegated authority, the commitments they generate tend to be reflexive and self-regulatory. Even where networks appear to be acting simply as clearinghouses for best practices and technical information, they are able to influence policy choices made by regulators.

As Slaughter points out, one of the most important roles that networks will play is sifting through large volumes of information, determining which information is most salient and most credible for network members, and disseminating that information among members.⁴⁷ It follows from this that access to networks will be a determinant of whether a group can successfully wield influence. Slaughter points out that in a highly complex world, where various interest groups are competing for influence with policymakers, the ability to privilege certain forms or sources of information is an important source of power. She continues:

Regulation of information is government by soft power. By changing the information available to others, you convince them that they want what you want—the very definition of soft power . . . The core role of the state thus shifts from enforcer to provider and guarantor of the quality of the available information.⁴⁸

The exercise of authority through soft power is no less governmental. Indeed, at the international level, states themselves often view softer forms of regulation as preferable over hard commitments.⁴⁹

This points to a further characteristic of transgovernmental networks. Transgovernmental networks are *international* in that they seek to govern activities and relationships beyond the state. As an international form of governance, the power of networks resides outside the state and, as such, networks cannot simply rely on the domestic delegation of authority to network members as a justification of network authority as a whole. This is so because as participants in an international institution, network members owe their allegiance

⁴⁶ Consider Commission on Global Governance, *Our Global Neighbourhood: The Report of the Commission on Global Governance* 5 (Oxford 1995) (defining “governance” as “the sum of the many ways individuals and institutions, public and private, manage their common affairs.”).

⁴⁷ Slaughter, *A New World Order* at 177–78 (cited in note 5). For an important analysis of the relationship between information that is salient and credible and the ability of that information to influence outcomes in international environmental policy processes, see Ronald Mitchell, William Clark, and David Cash, *Information and Influence*, in Ronald Mitchell, et al, eds, *Global Environmental Assessments: Information and Influence* 307 (MIT 2006).

⁴⁸ Slaughter, *A New World Order* at 187 (cited in note 5).

⁴⁹ For discussion of basis of why states may prefer “soft” legalization, see Kenneth Abbott and Duncan Snidal, *Hard and Soft Law in International Governance*, in Goldstein, et al, eds, *Legalization* 37 (cited in note 43).

to, or are accountable to, those individuals and groups that are affected by their activities, which will include their domestic constituents, but also includes constituents outside of their own polity.⁵⁰ For example, in international organizations such as the World Bank, member representatives are directly accountable to the government that appoints them, but the institution as a whole must be accountable to those persons affected by Bank policies. Consequently, the Bank provides outlets for participation and review of Bank decisions, such as the Inspection Panel process, whereby groups or individuals who are aggrieved by a failure of the Bank to follow its procedures may seek an independent review of the decision taken.⁵¹ Transgovernmental networks, which are understood as an alternative to international organizations, similarly recognize the same accountability commitments. Thus, we are beginning to see the development of forms of network accountability that provide opportunities for affected or merely interested persons to participate in, or comment on, network activities, in addition to direct principal-agent forms of accountability flowing from network members to their domestic political masters.⁵²

Transgovernmental networks are also *evolutionary* and directive in the sense that they are oriented towards convergence.⁵³ In many cases, convergence is the express policy objective of the network. For example, most of the major international economic networks seek to develop common sets of rules or approaches on matters such as bank capitalization requirements, antitrust policy, and securities regulation.⁵⁴ Here the purpose of networks is to provide an alternative to destructive regulatory competition arising from trade pressures through the creation of common standards and compatible regulatory approaches.⁵⁵ Kal Raustiala points out that in many instances convergence is the

⁵⁰ Slaughter, *A New World Order* at 233 (cited in note 5) (noting “In a pure disaggregated view, one set of government officials operates at both the national and the global-regional levels, performing a set of interrelated functions, but these officials would have to represent both national and global interests . . .”). See also Ruth W. Grant and Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 *Am Pol Sci Rev* 29, 29–30 (2005) (drawing a distinction between “participation” and “delegation” models of accountability).

⁵¹ See International Bank for Reconstruction and Development—International Development Panel, *The World Bank Inspection Panel* (Sept 22, 1993), Res No IBRD 93-10 and Res No IDA 93-6 (1999), available online at <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ResolutionMarch2005.pdf>> (visited Nov 17, 2007).

⁵² See, for example, David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 *Chi J Intl L* 547 (2005). But see Anderson, 118 *Harv L Rev* at 1285 (cited in note 41) (questioning as a normative matter whether this independence is desirable).

⁵³ This argument is most forcefully made by Raustiala, 43 *Va J Intl L* at 51–70 (cited in note 5).

⁵⁴ See, for example, Zaring, 5 *Chi J Intl L* at 572 (cited in note 52) (referring to financial regulatory networks as “proselytizers,” seeking to “spread [the] best practices to fellow regulators”).

⁵⁵ Slaughter and Zaring, *Networking Goes International* at 217 (cited in note 5).

result of a very deliberate policy of regulatory exportation by powerful countries.⁵⁶ For example, the United States Environmental Protection Agency and the Danish Environmental Protection Agency have adopted strategies that promote the adoption of their own regulatory solutions as a way to enhance and to improve the efficacy of other regulators, but also to create a demand for domestically created environmental technologies.⁵⁷ Regulatory convergence is not restricted to harmonization of substantive standards, but also includes the development of common monitoring and testing methodologies. Much of the NACEC's work regarding pollutant release and transfer registries has been directed at the creation of a compatible system of pollutant release tracking throughout North America.⁵⁸ Here, procedural policy convergence that resulted in accurate comparative assessments of environmental performance led to substantive policy convergence as jurisdictions identified as laggards faced public pressure to meet higher environmental standards.⁵⁹

Regulatory convergence through networks also arises through less direct means. For example, capacity building may push new regulators to adopt an existing regulatory approach since exporting regulators will be most likely to put forward their own regulatory solutions. From a cost standpoint, adoption of an existing framework may be preferable to creating one anew. Additionally, because network members often share common professional training and seek solutions to common problems, socialization of network members around a commonly held framework of norms is a principal source of network efficacy.⁶⁰ Socialization does not mean that network members will abandon self-interest, but insofar as it facilitates reasoned and deliberative interactions between members, cooperative solutions are more likely to emerge, and dominant network norms are more likely to be accepted.⁶¹ Moreover, because networks institutionalize repeated interactions among the same group, reputations become increasingly important, making recalcitrance a less desirable long-term strategy.⁶²

⁵⁶ See Raustiala, 43 Va J Intl L at 46 (cited in note 5).

⁵⁷ Id at 44–48 (citing EPA Strategy for Export Promotion, EPA /300 F-93-001).

⁵⁸ See generally Mark Winfield, *North American Pollutant Release and Transfer Registries: A Case Study In Environmental Policy Convergence*, in Markell and Knox, eds, *Greening NAFTA* 38 (cited in note 36).

⁵⁹ Id at 51.

⁶⁰ See Slaughter, *A New World Order* at 198–200 (cited in note 5). Socialization is also cited as a source of regulatory convergence in Raustiala, 43 Va J Intl L at 52 (cited in note 5).

⁶¹ In this regard, there is an acknowledged connection between transgovernmentalism and the nature of epistemic communities, as described in Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 Intl Org 1 (1992), discussed in Slaughter, *A New World Order* at 42 (cited in note 5).

⁶² Slaughter, *A New World Order* at 199 (cited in note 5).

There is nothing inevitable about regulatory convergence; as both Slaughter and Raustiala point out, networks are not a sufficient condition to produce convergence.⁶³ Slaughter, for example, argues that in some instances “informed divergence” may be a preferred outcome:

It is equally possible to imagine legislators or regulators being made aware of the divergence between their laws or rules and those of a substantial number of other countries and nevertheless concluding to prize and preserve their differences on historical, cultural, political, economic, social, religious, or any other distinctive national grounds. What is critical is that the same forces pushing *toward* convergence—the forces of regulatory export, technical assistance, distilled information and soft law—can also result in informed divergence.⁶⁴

While convergence may not always occur, there appear to be few examples of networks that do not seek at least to explore the benefits of greater integration. As the above quotation suggests, the value of convergence may depend on whose views are accounted for in the process. Where networks are narrowly drawn, the social and historical reasons for divergence are less likely to be aired. Thus, while most of the reasons that would propel states to favor convergence, such as reducing nontariff trade barriers and facilitating more efficient transnational regulation, exist independently of networks, the structure of networks is intended to facilitate and to deepen cooperation between agencies.

As a consequence, networks are *non-neutral* on debates regarding the value of integration—they favor it. The effect of adopting a transgovernmental approach to cooperation is to shift the goal posts by making the starting point of network discussions the extent of integration, not whether integration is desirable. To be clear, we do not oppose this shift as a normative matter, but, as elaborated below, we are of the view that the predisposition of networks towards integration is likely to affect the legitimacy of transgovernmental approaches to governance.

III. THE SPP AND PARTIAL DISAGGREGATION

The SPP process fits squarely within the transgovernmental framework, although the SPP is not a network itself, at least not as traditionally conceived. Initiated at a meeting of the three North American heads of state held in Waco,

⁶³ Raustiala, 43 Va J Int'l L at 52 and 56–7 (cited in note 5); Slaughter, *A New World Order* at 181–3 (cited in note 5).

⁶⁴ Slaughter, *A New World Order* at 182–183 (cited in note 5) (emphasis in original).

Texas in March 2005,⁶⁵ the SPP is an agenda of bilateral and trilateral regulatory cooperation initiatives that are centered on the twin themes of regional security and regional prosperity, referred to as the Security Agenda and Prosperity Agenda, respectively.⁶⁶ What unites these various initiatives, which are wide-ranging in their subject matter and in the form of cooperation that they contemplate, is their use of transgovernmental networks as the vehicle for cooperation.

The SPP initiatives are grouped along sectoral lines with corresponding working groups being created under the SPP process.⁶⁷ The working groups are made up of governmental officials from the three North American countries. The working groups themselves may divide their initiatives among smaller expert groups, which may include participation from nongovernmental groups, such as industry groups.⁶⁸ The SPP also created the North American Competitiveness Council (“NACC”), a group of thirty private-sector executives, whose mandate is to advise the leaders and ministers on priorities and on strategic approaches to increase regional competitiveness.⁶⁹ The momentum of the SPP initiatives is maintained by the identification of deadlines for outcomes and periodic reports to the leaders on SPP accomplishments. There has been an annual leaders’ conference in each of the three years the SPP has been in existence, which has been used to announce initiatives and to refine the priorities of the SPP further.

The impetus for the SPP can be attributed to several overlapping sources. Historically, the SPP, or at least the Prosperity Agenda, can be understood as a continuation of the economic integration process initiated under the Canada–United States Free Trade Agreement and NAFTA. While these agreements have

⁶⁵ Joint Statement of President Bush, President Calderón, and Prime Minister Martin (Mar 23, 2005), available online at <<http://www.whitehouse.gov/news/releases/2005/03/20050323-2.html>> (visited Nov 17, 2007) (“Joint Statement (Mar 23, 2005)”).

⁶⁶ The SPP initiatives are contained in two documents. See White House Office of the Press Secretary, *Prosperity Agenda*, (Mar 23, 2005), available online at <http://www.spp.gov/prosperity_agenda/> (visited Nov 17, 2007); White House Office of Press Secretary, *Security Agenda*, (Mar 23, 2005), available online <http://www.spp.gov/security_agenda/> (visited Nov 17, 2007).

⁶⁷ The working groups were established by the leaders following the 2005 launch of the SPP. See Joint Statement (Mar 23, 2005) (cited in note 65). A list of the SPP Prosperity Working Groups is available online at <http://www.spp.gov/prosperity_working/index.asp?dName=prosperity_working> (visited Nov 17, 2007).

⁶⁸ For example, this appears to be prevalent in the Energy Working Group.

⁶⁹ The North American Competitiveness Council was established in the White House Office of the Press Secretary, *The Security and Prosperity Partnership of North America: Progress*, (Mar 31, 2006), available online at <http://www.spp.gov/pdf/security_and_prosperity_partnership_of_north_america_statement.pdf> (visited Nov 17, 2007).

largely eliminated tariff barriers to North American trade, there remain a number of trade-related issues, such as complicated rules of origin requirements, regulatory divergence, and ineffective trade dispute settlement mechanisms that reduce trade efficiencies within North America.⁷⁰ The current situation was described by the Canadian International Trade Minister as “the tyranny of small differences.”⁷¹ The related concern driving the Prosperity Agenda is the widely felt recognition that North America was losing competitive ground to major emerging markets, such as China and India, necessitating a renewed focus on global competitiveness.⁷² Consequently, much of the SPP’s Prosperity Agenda is concerned with improved “regulatory cooperation,” which includes the harmonization of standards, mutual recognition, and equivalency measures. Within the Prosperity Agenda specific attention is given to a number of key sectors including steel, automotive, food and agriculture, and energy, as well as to cross-sectoral regulatory areas such as health and the environment.⁷³

The more seismic event that shaped the SPP was the increased emphasis on domestic security in the United States that followed the 2001 terrorist attacks in that country. This event underscored the need for enhanced border security in North America and highlighted the dramatic impact that tighter United States security measures would have on the movement of people and goods across North American borders, with consequential impacts on the economies of all three North American states.⁷⁴ The immediate response was the negotiation of bilateral border security arrangements, which themselves adopted a transgovernmental governance approach.⁷⁵ The security cooperation measures, which include border document requirements, immigration security measures,

⁷⁰ Council on Foreign Relations, *Building a North American Community* 158 (Council on Foreign Relations 2005).

⁷¹ Carl Ek, et al, *Canada–U.S. Relations*, Congressional Research Service Rept No 96-397 at 32 (May 15, 2007), available online at <<http://www.fas.org/sgp/crs/row/96-397.pdf> > (visited Nov 17, 2007).

⁷² Canadian Council of Chief Executives, *New Frontiers: Building a 21st Century Canada-United States Partnership in North America*, (Apr 2004), available online at <http://www.ceocouncil.ca/publications/pdf/8502a13cf417d09eab13468e2a7c9f65/New_Frontiers_NASPI_Discussion_Paper_April_2004.pdf> (visited Nov 17, 2007). See also *Evidence of Anthony Burger (Chief Economist, Department of Foreign Affairs and Trade)*, Standing Committee on International Trade, 39th Can Parl, 1st Sess 1110 (Apr 24, 2007), available online at <<http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=202771>> (visited Nov 17, 2007).

⁷³ *Prosperity Agenda* (cited in note 66).

⁷⁴ For a general discussion, see *Survey: Living with Number One*, Economist 10 (Dec 3, 2005).

⁷⁵ The Canada–United States Smart Border Declaration, (Dec 2001), available online at <<http://www.dfait-maeci.gc.ca/anti-terrorism/actionplan-en.asp>> (visited Nov 17, 2007); United States–Mexico Border Partnership Agreement, (Mar 21, 2002), available online at <<http://www.state.gov/p/wha/rls/fs/8909.htm>> (visited Nov 17, 2007).

bio-protection, aviation and maritime security, and intelligence cooperation, as well as measures to facilitate the efficient movement of goods and people across North American borders, make up the “Security Agenda.”⁷⁶

The SPP process also coincided with the development of two private-sector-initiated reports that outlined ambitious regional integration recommendations. The first initiative was launched by the Canadian Council of Chief Executives (“CCCE”), a business-oriented public policy and advocacy organization. In 2004, the CCCE issued a report under the “North American Security and Prosperity Initiative” calling for a reinvigorated regional integration strategy between Canada and the United States.⁷⁷ The second report was cosponsored by the Council on Foreign Relations, the CCCE, and the Consejo Mexicano de Asuntos Internacionales, and also proposed far-reaching integration measures in a report prepared by an independent task force in 2005.⁷⁸ In both cases, the areas of concern identified in their respective recommendations found expression within the SPP process, including the name “Security and Prosperity” itself (derived from the CCCE Initiative) and the suggestion for a North American Advisory Council (of private sector leaders), which became the NACC. The NACC consists of many of the same persons involved in the drafting of these two reports.⁷⁹ It provides advice and recommendations directly to the ministers responsible for the SPP. This was done for the first time in a February 2007 report outlining both short-term and medium-term goals for the SPP process.⁸⁰ There is no comparable avenue for the direct voicing of comments by other civil society groups, which again suggests that the SPP is understood to be a narrow exercise without broad policy ramifications for the public at large.

Integral to the SPP as a whole is the conscious linking of security with prosperity,⁸¹ but beyond this overarching goal the SPP does not articulate any coherent vision of a future North America, nor does the SPP seek to root its

⁷⁶ See *Security Agenda* (cited in note 66).

⁷⁷ Canadian Council of Chief Executives, *New Frontiers* at 4–5 (cited in note 72).

⁷⁸ Council on Foreign Relations, *Building a North American Community* (cited in note 70).

⁷⁹ For a list of members of the NACC, see North American Competitiveness Council, *Enhancing Competitiveness in Canada, Mexico and the United States: Private Sector Priorities for the Security and Prosperity Partnership of North America (SPP)*, 58 (Feb 2007), available online at <http://www.ceocouncil.ca/publications/pdf/test_4d5f2a8ae89332894118d2f53176d82b/NACC_Report_to_Ministers_February_23_2007.pdf> (visited Nov 17, 2007).

⁸⁰ See *id.*

⁸¹ See Joint Statement (Mar 23, 2005) (cited in note 65) (indicating “[t]his work will be based on the principle that our security and prosperity are mutually dependent and complementary, and will reflect our shared belief in freedom, economic opportunity, and strong democratic values and institutions”).

work program in a normative framework. Rather the approach is technocratic and problem oriented. The SPP agendas identify a large number of small problems and indicate types of cooperative outcomes that would solve the problem.⁸² Given this approach, the agendas themselves are a disparate collection of policy initiatives. Perhaps given this lack of focus, at the 2006 Summit, the leaders identified five priority areas for special attention: (1) the creation of the NACC; (2) cooperation on avian and pandemic influenza; (3) North American energy security; (4) North American emergency management; and (5) smart and secure borders.⁸³

In keeping with other forms of transgovernmental networks, the SPP has no formal institutional structure, nor has the SPP resulted in the creation of any institutions beyond the NACC. The structure at present is that each of the various working groups, which correspond to the classification of initiatives in the SPP agendas, report back to lead ministers, who in turn report to the leaders. There is no formal or informal role for the legislative branches. Indeed, in a well-publicized statement, one member of the NACC noted, “[w]e’ve decided not to recommend any things that would require legislative changes . . . [b]ecause we won’t get anywhere.”⁸⁴ Each state is responsible for appointing persons to the working groups, although in a number of cases it appears that pre-existing networks were brought into the SPP process. For example, the North American Energy Working Group, which was established in 2001, became the network for the energy initiatives under the SPP.⁸⁵ Similarly, the North American Steel Trade Committee, established in 2002 to pursue a North

⁸² The *June 2005 Report to Leaders* contains a Security Annex and Prosperity Annex, which set out in greater detail the proposed action to be taken and timeframe for completion for each initiative identified in the *Security Agenda* and *Prosperity Agenda*. See Security and Prosperity Partnership of North America, *June 2005 Report to Leaders*, (June 2005), available online at <http://www.spp.gov/report_to_leaders/index.asp?dName=report_to_leaders> (visited Nov 17, 2007).

⁸³ See Joint Statement (Mar 23, 2005) (cited in note 65).

⁸⁴ Luiza Savage, *Meet NAFTA 2.0*, *Maclean's* 28, 28 (Sept 11, 2006) (quoting Ron Corvais). This statement appears to be confirmed by Michael Hart (a former Canadian trade negotiator and a member of the Independent Task Force on the Future of North America) who notes:

The biggest problem that I see with [the SPP] is that it is an initiative that is limited to what can be done by the three governments within their existing legislative mandates. There's a commitment that they will not do things that will require them to go to Parliament or to Congress in order to make changes.

Evidence of Michael Hart, Standing Committee on International Trade, 39th Can Parl, 1st Sess 1140 (May 3, 2007), available online at <<http://cmte.parl.gc.ca/cmte/Committee/Publication.aspx?SourceId=206477>> (visited Nov 17, 2007) (“*Evidence of Michael Hart*”).

⁸⁵ North American Energy Working Group, *Overview*, available online at <<http://www.pi.energy.gov/documents/NAEWGBkg020306.pdf>> (visited Nov 17, 2007).

American Steel Strategy, began to report through the Manufactured Goods and Sectoral and Regional Competiveness Working Group.⁸⁶

Given the wide-ranging nature of the agenda items within the working groups, there appears to be a further division of labor within working groups resulting in the creation of more focused subgroups. There are no formal requirements for working groups to consult with stakeholders, although they are clearly free to do so.⁸⁷ The difficulty is that beyond the base documents, there has been little attempt made at general dissemination of information regarding working group activities. There are, for example, no readily available lists of which officials are part of which working groups, when meetings are held, what matters are discussed, and who is consulted.

Unlike most transgovernmental networks where the network itself is responsible for setting its own agenda, the SPP process is highly centralized. The executive branches of each government were jointly responsible for creating the Prosperity and Security Agendas, which not only identified the network's outcomes, but also identified timeframes.⁸⁸ The criteria by which agenda items were determined for inclusion is not disclosed, although by taking advantage of the work of existing networks, it is evident that the framers of the SPP sought to bring into that process a number of ongoing initiatives.⁸⁹ In addition, many of the initiatives appear to be derived from the issues identified by the private sector.⁹⁰ The result is an eclectic mixture of initiatives that lacks any real coherence.⁹¹

Consider, for example, the initiatives included in the environment and energy portions of the Prosperity Agenda.⁹² The environmental agenda is at once both far-reaching and narrow. The matters addressed include clean air and

⁸⁶ Discussed in Security and Prosperity Partnership of North America, *June 2005 Report to Leaders* (cited in note 82).

⁸⁷ There is a general SPP Comment Form by which members of the public can forward comments to particular working groups. See Security and Prosperity Partnership of North America, *SPP Comment Form*, available online at <<http://hq-intranet04.usfcs.doc.gov/bid/spp/comment.asp>> (visited Nov 17, 2007).

⁸⁸ The timeframes are identified in the Security and Prosperity Annexes to the *June 2005 Report to Leaders*. See Security and Prosperity Partnership of North America, *June 2005 Report to Leaders* (cited in note 82).

⁸⁹ See *Evidence of Michael Hart* at 1140 (cited in note 84).

⁹⁰ For example, many of the issues identified by the CCCE and subsequently by the Independent Task Force on the Future of North America have been incorporated into the SPP.

⁹¹ See Roland Paris, *A Trilateral Mishmash*, *Globe and Mail* at A17 (cited in note 4).

⁹² The specific deliverables are set out in Security and Prosperity Partnership of North America, *2006 Report to Leaders*, Prosperity Annex 25–30 (Aug 2006), available online at <http://www.spp.gov/2006_report_to_leaders/prosperity_annex.pdf?dName=2006_report_to_leaders> (visited Nov 17, 2007) (“2006 Report to Leaders”).

water, biological diversity, marine resources, and transboundary environmental impacts. However, none of these issue areas is tackled in a manner that approaches comprehensiveness. Instead, the Agenda tends to identify quite specific deliverables, such as increasing supply of low sulfur fuel to Mexico, addressing ship-source air pollution, developing options to advance ocean observation in the Arctic as input to International Polar Year, or concluding a transboundary environmental impact assessment agreement.⁹³ In most of these cases, the specific initiative identified preceded its identification in the SPP. For example, the conclusion of a transboundary environmental impact assessment agreement has been part of the NACEC's work plan for over ten years, being identified in the North American Agreement on Environmental Cooperation itself.⁹⁴ Another deliverable, signing the Declaration of Intent for the Conservation of North American Birds and their Habitat, was the work of an existing Tri-National Committee of the North American Bird Conservation Initiative created under the auspices of the NACEC.⁹⁵ The energy agenda similarly relies on the presence of pre-existing network structures and their work programs, such as the North American Energy Working Group, and the established experts groups within it, as well as the North American Electric Reliability Council.⁹⁶ The Environment and Energy Working Groups appear to operate largely as conduits, directing specific initiatives to smaller working groups and existing networks, and then reporting back on progress and outcomes to the lead ministers and leaders.

The transfer of existing networks and their work programs raises the question of why these existing networks needed to be brought into the SPP process at all. What the SPP offers that the existing frameworks do not is the ability of the central governments to exert greater control over the priorities and work plans of the networks. To the extent that the SPP process is permeable to democratic influences, the greater control exercised by visible politicians should be seen as improving the democratic responsiveness and efficacy of the

⁹³ Id at 29–30.

⁹⁴ *North American Agreement on Environmental Cooperation*, art X(7) (cited in note 35). For a discussion of this process, see Neil Craik, *Transboundary Environmental Impact Assessment in North America: Obstacles and Opportunities*, in Kees Bastmeijer and Timo Koivurova, eds, *The Theory and Practice of Transboundary Environmental Impact Assessment* ch 5 (Hotei 2007).

⁹⁵ See North American Bird Conservation Initiative, *Declaration of Intent for the Conservation of North American Birds and their Habitat: Questions and Answers*, (May 25, 2005), available online at <<http://www.nabci-us.org/aboutnabci/Q&A-NABCI-DOI.pdf>> (visited Nov 17, 2007).

⁹⁶ To be clear, not all of the agenda items were derived from existing initiatives. One of the energy initiatives was to increase oil sands production to increase continental energy supplies, which resulted in the creation of an ad hoc oil sands expert group. See *2006 Report to Leaders, Prosperity Annex* at 26 (cited in note 92).

networks. By identifying agenda items and timeframes for their completion, the central governments enable networks by directing departmental resources to given issues and signaling the political importance of the initiative to bureaucrats as a means to surmount bureaucratic inertia. The corollary is that those issues not identified may suffer from neglect. In this regard, it is noteworthy that many of the most pressing environmental issues, such as climate change, are not addressed in the SPP.⁹⁷ A further implication of the central governments' agenda-setting power is that outcomes are likely to be affected by the working group to which an issue is assigned. For example, the pesticide, new chemical, and biotechnology initiatives are all under working groups other than the Environmental Working Group.⁹⁸ The point is not that there is a correct network for addressing these issues, but rather that because of the cross-cutting nature of these issues, care needs to be taken to ensure that the network members have sufficient access to relevant government expertise and policy input. Given that the selective membership of networks may impact the information made available (or deemed relevant) to network members, there is a concern that governments can affect outcomes by excluding certain viewpoints, within and outside the government, from the deliberation process. While this might be done consciously, it is, in our view, more likely to be an unintended consequence of the centralized determination of network agendas.

Central governments have sought to distance the SPP process from the idea that the SPP is directed towards the creation of a supranational government.⁹⁹ Despite this disavowal, the SPP is clearly oriented towards integration. In this regard, the SPP is best seen as a compromise between two alternative approaches to continental governance in North America: the "big idea" and incrementalism.¹⁰⁰ Incrementalism seeks to address issues requiring cooperation on a case-by-case basis, while the "big idea" seeks to address integration on a comprehensive level, akin to the European Union, through the creation of common institutions and a broad, unifying vision of a North

⁹⁷ Outside the environmental area, critical trade issues such as softwood lumber and trade dispute resolution have also been left out of the SPP. See Paris, *A Trilateral Mishmash*, *Globe and Mail* at A17 (cited in note 4).

⁹⁸ New chemicals fall under the Manufactured Goods Working Group, while pesticides and biotechnology come under the Food and Agriculture Working Group. See *2006 Report to Leaders*, Prosperity Annex at 9 (chemicals), 35 (pesticides) (cited in note 92).

⁹⁹ See *SPP Myths vs Facts* (cited in note 15).

¹⁰⁰ Canadian Council of Chief Executives, *New Frontiers* at 4 (cited in note 72). For background on this debate, see Peter Hakim and Robert Litan, eds, *The Future of North American Integration: Beyond NAFTA* (Brookings Institution 2002); Robert Pastor, *Toward a North American Community: Lessons from the Old World for the New* (Inst Intl Econ 2001).

American community.¹⁰¹ The SPP seeks to capture some of the advantages of comprehensive integration without getting mired down in a more abstract debate about sovereignty and attracting the political frictions that would accompany a more formal approach. In the words of the *Economist*: “From the integrators’ perspective, one advantage of the SPP is the absence of any ‘big bang’: the officials can operate below the political radar, without involving the American or Mexican Congress or Canada’s Parliament.”¹⁰² In particular, what the SPP offers that pure incrementalism does not is an opportunity to link issues, to allow for trade-offs across issues, and to provide for a more comprehensive approach to regional integration.¹⁰³ In addition, packaging the initiatives together provides greater political momentum to move forward on issues.¹⁰⁴ Seen in this light, the SPP marries the US desire for enhanced North American security, including energy supply security, with the Canadian and Mexican desire for uninterrupted access to the US marketplace. The SPP’s centralized form of transgovernmentalism facilitates this middle ground by allowing government officials to work toward greater integration on identified issues within their area of expertise, while the central governments can oversee the agenda and ensure that any trade-offs are acceptable.

IV. SUPERHIGHWAYS AND HIDDEN AGENDAS: THE SPP’S CRITICS

One might expect the presence of greater central government control to mitigate concerns over the accountability of transgovernmental networks. This concern arises because of the perception that individual agencies are engaging in decisionmaking processes outside the usual domestic legal framework. The SPP appears to address this concern by having the agenda more closely controlled by the political executives of each of the partner countries. However, as noted in the Introduction, the SPP has been subject to a barrage of criticism from both sides of the political spectrum. In essence, the debate over the SPP is centered on whether it is, as its proponents maintain, an incremental and technical

¹⁰¹ Perhaps the most prominent advocate of the “big idea” is Robert Pastor. See Pastor, *Toward a North American Community* (cited in note 100).

¹⁰² *Living with Number One*, *Economist* at 10 (cited in note 74).

¹⁰³ Canadian Council of Chief Executives, *New Frontiers* at 4 (cited in note 72).

¹⁰⁴ *Evidence of Michael Hart* at 1140 (cited in note 84):

What the SPP did...is take many of these ongoing initiatives and package them together to provide a little bit more political jazz to them, and what’s useful to officials, in order to provide them with some political leadership. To an official working on a problem, the kind of speed and intensity with which you address those issues is dependent on the amount of political leadership you see, the amount of political commitment you see to a problem.

exercise,¹⁰⁵ or whether it has grander ambitions to implement “deep integration” and eventually establish North American supranational institutions.¹⁰⁶ The result is a sort of nondebate, with opponents pointing to hidden agendas and grand schemes and the governments maintaining that the SPP simply provides a forum for bureaucrats to resolve technical issues. So, for example, in Canada, the debate on the environmental and resource aspects of the SPP has been dominated by claims that the SPP will lead to a loss of control over natural resources, bulk water exports from Canada to the United States, and the adoption of lower environmental standards.¹⁰⁷ In the United States, the debate has focused on immigration and, puzzlingly, on the potential for the building of a “NAFTA superhighway.”¹⁰⁸

There is nothing within the SPP process that lends credence to these criticisms. Indeed, the governments have explicitly denied that bulk water

¹⁰⁵ See *Evidence of Alain Beaudoin (Executive Director, Innovation Partnership Branch, Department of Industry, Canada)*, Standing Committee on International Trade, 39th Can Parl, 1st Sess 1105 (May 10, 2007), available online at <<http://cmte.parl.gc.ca/Content/HOC/committee/391/ciit/evidence/ev2934562/ciitev62-e.htm#Int-2072697>> (visited Nov 17, 2007) (describing the SPP “as a step-by-step, practical approach to improve the way governments work together to enhance competitiveness”).

¹⁰⁶ “Deep integration” is described by one critic in the following terms: “the idea is that the more governments harmonize regulations across borders, the ‘deeper’ economic integration has been achieved. It is not just about policy harmonization in North America. It is policy harmonization that increasingly opens social life across the continent to the discipline of the market.” Teresa Healey, *Deep Integration in North America: Security and Prosperity for Whom?*, Canadian Labour Congress Research Paper 42 (Feb 2007), available online at <http://canadianlabour.ca/index.php/Deep_Integration/1134> (visited Nov 17, 2007). See also Andro Linklater, *The Center Shouldn’t Hold*, NY Times A17 (July 4, 2007) (noting “[a]nti-immigration drum-beaters like CNN’s Lou Dobbs and Representative Virgil Goode, a Virginia Republican, routinely portray the [SPP] as a threat to United States sovereignty”). Conservative activist Jerome Corsi has written a book condemning the SPP as part of an elaborate long-term strategy by multinational corporations to create a single continental market. See Luiza Savage, *Even the Best Neighbours Can Get Suspicious*, Maclean’s 44 (Aug 13, 2007).

¹⁰⁷ Andrew Nikiforuk, Adele Hurley, and Ralph Pentland, *Sold Down the River; Despite Claims to the Contrary, Water is on the Table in Trade Negotiations – We Need to be Clear With Our Neighbours That We Intend to Keep This Precious Resource*, Ottawa Citizen A11 (Sept 10, 2007) (“The fate of our water resources is now dependent on shadowy discussions taking place under the aegis of the Security and Prosperity Partnership (SPP), the all-purpose negotiating forum set up by the three NAFTA leaders in 2005.”). On control over energy resources, see Gordon Laxer, *Easterners Could Freeze in the Dark*, Globe and Mail A15 (May 28, 2007).

¹⁰⁸ For a representative rendition of this argument, see Ron Paul, *The NAFTA Superhighway*, available online at <<http://www.house.gov/paul/tst/tst2006/tst103006.htm>> (visited Nov 17, 2007).

This superhighway would connect Mexico, the United States, and Canada, cutting a wide swath through the middle of Texas and up through Kansas City. Offshoots would connect the main artery to the west coast, Florida, and northeast. Proponents envision a ten-lane colossus the width of several football fields, with freight and rail lines, fiber-optic cable lines, and oil and natural gas pipelines running alongside.

exports and the construction of a superhighway form any part of the SPP agenda. Nevertheless, these issues persist and have even been taken up by the legislative branches of the governments.¹⁰⁹ It is equally salient that very little of the criticism of the SPP's environmental agenda has focused on the actual initiatives undertaken within the SPP process, which appear constructive and oriented towards improved environmental performance.¹¹⁰ The focus is not on what the SPP actually is; rather, the criticism centers on the potential of the SPP to derogate from the authority of national governments to set domestic policy—be it on energy, the environment, or immigration—independently from the market, and from their trading partners.

The mistrust inherent in this form of critique is exacerbated by concerns regarding the democratic legitimacy of the SPP process.¹¹¹ These concerns relate to three aspects of the SPP process. Firstly, there is a sense that the central governments have quite deliberately turned away from the legislative process.¹¹² Secondly, the process has not offered meaningful opportunities for public consultation. Public consultation is the responsibility of individual working groups, but there is little evidence to date that working groups have opened up their processes to the broader public. And finally, while civil society has been shut out of the process, members of the business elite, as represented by the North American Competitiveness Council, have been granted direct access to the leaders and appear to have had many of their concerns taken up. The NACC has been a lightning rod for critics. At the Montebello Summit, civil society critics were quick to point out that while they were cordoned off, well away from the leaders' meeting, the members of the NACC met directly with the leaders.¹¹³

¹⁰⁹ The Canadian House of Commons has debated the bulk water export issue in relation to the SPP, 161 *House of Commons Debates (Hansard)* 9958 (May 31, 2007) (statement of Mr. Serge Cardin), available online at <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=1&DocId=2989762#Int-2114181>> (visited Nov 17, 2007). In the United States, a transportation bill was amended to include a provision blocking federal funding for a superhighway and for Department of Transportation participation in SPP working groups. See Savage, *Even the Best*, Maclean's at 45 (cited in note 106).

¹¹⁰ The concerns regarding the Security Agenda initiatives are more directed at the actual outcomes. See, for example, Emily Gilbert, *Leaky Border and Solid Citizens: Governing Security, Prosperity and Quality of Life in a North American Partnership*, 39 *Antipode* 77 (2007).

¹¹¹ In this regard the debate over the SPP tracks similar debates regarding the democratic legitimacy of transgovernmental networks generally. See Slaughter, *A New World Order* at 217–30 (cited in note 5).

¹¹² See *Evidence of Maude Barlow (National Chairperson, Council of Canadians)*, Standing Committee on International Trade, 39th Can Parl, 1st Sess 1125 (May 1, 2007), available online at <<http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=206020>> (visited Nov 17, 2007).

¹¹³ Norma Greenaway and Richard Foot, *Harper Broaches Arctic; PM Opens Summit with Bush, Calderon*, *National Post* A1 (August 21, 2007).

There is a clear link between the concerns over process legitimacy and the nature of substantive complaints raised by critics. The critics have seized on documents and statements made by integration proponents outside the government and have incorrectly attributed those views to the government. For example, the connection between bulk water export and the SPP has largely arisen because of the inclusion of a recommendation by the Independent Task Force on the Future of North America that those sectors excluded from NAFTA (such as bulk water export) be the subject of further review, and because the issue was raised at a meeting organized by a Washington, DC think tank on North American integration.¹¹⁴ In neither case did the suggestions regarding bulk water exports come from government officials. There has been no indication from governmental officials that bulk water exports are to become part of the SPP process.

Similarly, the superhighway issue has been given an air of reality because of the existence of a nongovernmental group (again unconnected to the SPP) promoting better North–South transportation corridors. The closed nature of the SPP process and its close affiliation with the private sector invites this kind of attribution because the line between the public process and private demands has been blurred.¹¹⁵ In some cases, placing an issue within the SPP process has reduced the avenues of public participation. When the negotiation of the transboundary environmental impact assessment agreement was the responsibility of the NACEC, that process provided for citizen oversight through the Joint Public Advisory Committee and the NACEC's own procedures for openness.¹¹⁶ Moving the issue into the SPP process has foreclosed this option, leaving the current status of negotiations and the process for public consultation uncertain.¹¹⁷

Not all of the concerns raised by the critics of the SPP fall outside the identified initiatives. The areas of pesticide and chemical regulation, both of

¹¹⁴ Maude Barlow, *Where's the Transparency*, *Globe and Mail* (cited in note 1).

¹¹⁵ See, for example, Paris, *A Trilateral Mishmash*, *Globe and Mail* at A17 (cited in note 4). Notwithstanding the government's view that these criticisms are coming from outside the mainstream, they have felt compelled to respond. The US government has set up a *SPP Myths vs Facts* webpage (cited in note 15).

¹¹⁶ The role of the Joint Public Advisory Committee within the CEC is described in John Wirth, *Perspectives on the Joint Public Advisory Committee*, in Markell and Knox, eds, *Greening NAFTA* 199 (cited in note 36).

¹¹⁷ These concerns are set out in *Petition Filed by Sierra Legal Defence Fund under Section 22 of the Auditor General's Act*, Petition No 166 (Apr 4, 2006), available online at <<http://www.oag-bvg.gc.ca/domino/petitions.nsf/viewe1.0/71CB737BBBD0AF5F852571B1007ADBF4>> (visited Nov 17, 2007).

which are addressed in the Prosperity Agenda,¹¹⁸ have attracted concerns regarding the potential for harmonization and shifts in regulatory approaches.¹¹⁹ Here as well, there appears to be little agreement on the basic orientation of the initiatives, with the critics characterizing the approach as leading inexorably to a harmonized regulatory regime¹²⁰ while government officials deny those objectives, preferring to differentiate between harmonization and regulatory cooperation.¹²¹ Instead of the debate addressing the extent and merits of regulatory cooperation, it focuses on the intent of the governments to achieve an end they specifically deny.

The government response to the criticism has been to emphasize the SPP's nonbinding and technical nature. A Canadian trade official described the SPP in these terms:

There is a misunderstanding among many that the governments have a legally binding agreement, or an agreement of any kind, that defines the partnership. In fact, it is a process by which governments seek to cooperate more fully on a range of issues.

With respect to each government, we have our own processes to engage the public and the stakeholders if we're talking about a change of policy, law, or regulation. Through the partnership, we are attempting to identify areas where individually we might choose to make changes that would work if they were done together. But they are subject to the usual oversight that all of our changes would have.¹²²

¹¹⁸ 2006 Report to Leaders, Prosperity Annex at 9 (chemicals), 35 (pesticides) (cited in note 92). Chemical regulation is also the subject of a separate agreement that arose out of the Montebello Summit. See Canada/United States/Mexico SPP Regulatory Cooperation Framework, *Regulatory Cooperation in the Area of Chemicals*, available online at <http://www.spp.gov/pdf/spp_reg_coop_chemicals.pdf> (visited Nov 17, 2007).

¹¹⁹ See *Evidence of Peter Julian*, Standing Committee on International Trade, 39th Can Parl, 1st Sess 1140 (May 10, 2007) (raising concerns with harmonization of pesticide standards), available online at <<http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=208182&Lang=1&PARLSES=391&JNT=0&COM=0>> (visited Nov 17, 2007) ("*Evidence of Peter Julian*"). See also Bruce Campbell, *More Than Jellybeans: The SPP Regulatory Framework Agreement and its Impact on Chemicals Regulation*, Canadian Centre for Policy Alternatives (Sept 2007), available online at <http://www.policyalternatives.ca/documents/National_Office_Pubs/2007/More_Than_Jellybeans.pdf> (visited Nov 17, 2007) (discussing concerns that regulatory cooperation could lead to increased deregulation).

¹²⁰ Campbell, *More Than Jellybeans* at 7 ("The cumulative effect, however, is hugely significant as we move closer to the endpoint: a single continental regulatory regime whose shape is determined informally by the large partner.") (cited in note 119).

¹²¹ CanWest News Service, *Ottawa Not Harmonizing Chemical Rules*, Financial Post FP6 (Sept 28, 2007) (quoting spokesperson for Canadian Health Minister, "We are not harmonizing. We are co-operating . . . Harmonizing is a completely different concept.").

¹²² *Evidence of William Crosbie (Director General, North America Bureau, Department of Foreign Affairs and International Trade)*, Standing Committee on International Trade, 39th Can Parl, 1st Sess 1105 (Apr

The supporters of the process tend to view it as 300 distinct technical initiatives, as opposed to a unified process of integration.¹²³ Seen this way, there is no hidden agenda; rather the SPP is what it appears to be. Moreover, the centralizing function of the government manifested in packaging these initiatives has the effect of shedding more, not less, light on the process. Given that much of the network activity was ongoing prior to the SPP, but with little attention given to it, it is evident that the SPP, and particularly the Leaders' Summits, have generated a greater awareness of the ongoing process of regional integration. However, it also remains true that the debate is largely dominated by "experts and enthusiasts," as opposed to the broader citizenry.¹²⁴

By characterizing the process as being largely technical, the central governments gloss over the essential governmental nature of the SPP. As discussed above, much of what the SPP contemplates undertaking goes beyond exchanging information. Many of the initiatives contemplate harmonization of standards, equivalency, and mutual recognition agreements. The response to concerns about possible lower standards resulting from harmonization has been to provide assurances that high standards will be maintained and that regulatory changes will be subject to the usual domestic processes.¹²⁵ The difficulty is that the SPP process provides no clear direction on the issue of standards in terms of both substance and procedure.¹²⁶ Concerns about the nature of convergence are not without foundation. Raustiala's study indicates that regulatory convergence will often result in the adoption of the standards of more powerful states,¹²⁷

24, 2007), available online at <<http://cmte.parl.gc.ca/Content/HOC/committee/391/ciit/evidence/ev2861332/ciitev57-e.htm#Int-2025319>> (visited Nov 17, 2007).

¹²³ *Evidence of David Stewart-Patterson (Executive Vice-President, CCCE)*, Standing Committee on International Trade, 39th Can Parl, 1st Sess 1120 (Apr 26, 2007), available online at <<http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=204967>> (visited Nov 17, 2007) ("[t]he initial SPP agenda included some 300 items. Many of these represent very small steps and individually won't make much of a difference. On the other hand, even 300 small steps, if we take them all, add up to a pretty giant leap for North America and without any need for a grand bargain.").

¹²⁴ Slaughter, *A New World Order* at 9–10 (cited in note 5) (quoting Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 *Ind J Global Legal Studies* 369, 376 (2001)).

¹²⁵ See, for example, the *SPP Myths vs Facts* webpage (cited in note 15), addressing this issue.

¹²⁶ For example, the SPP refers to "regulatory cooperation," which reveals little about the extent and nature of coordinated regulatory activity. See, for example, Security and Prosperity Partnership of North America, *Canada/US/Mexico SPP Regulatory Cooperation Framework*, available online at <http://www.spp.gov/pdf/spp_reg_coop_final.pdf> (visited Nov 17, 2007) ("Regulatory Cooperation Framework").

¹²⁷ Raustiala, 43 *Va J Intl L* at 58–61 (cited in note 5).

which in the context of North America would suggest that US standards are more likely to be adopted, even if they are lower.¹²⁸

Whether harmonization up or down makes sense will, of course, depend on a host of factors, many of which will be technical. But such a decision will also require consideration of the distributive consequences and value-based concerns that inhere in decisions regarding environmental standards, and as such needs to be subject to public deliberation. The direction of the SPP, and of the recently adopted SPP Regulatory Cooperation Framework,¹²⁹ is to favor international and “domestic voluntary consensus standards,” placing a further burden of justification on those who wish to deviate from those standards. This direction represents a form of indirect delegation to those standard creation bodies, with little direct input available to those affected by their decisions.

Providing that regulatory changes conform to domestic administrative requirements is a formal response to a process that is understood to operate more on the basis of soft power than binding obligations.¹³⁰ Here too the approach seems to ignore the informal and international nature of transgovernmentalism. The practical concern is that domestic administrative safeguards alone will not effectively provide for accountability when the decisionmaking process exists outside the domestic political system, even where the network members exercise their authority formally within the domestic system. If, however, one recognizes that the transgovernmental networks themselves are exercising authority, albeit soft power, then the locus of authority shifts from the purely domestic to the transnational.

One possible solution is to extend the procedural requirements to the network itself.¹³¹ Determining what those procedural safeguards might be is highly complicated in light of the informality of networks and the fact that network efficacy depends to a significant degree on the shared values of the network members, as opposed to the formal exercise of authority. In Slaughter’s words:

¹²⁸ Canadian critics have pointed to the adoption of lower US pesticide residue standards, as an example of this tendency. See *Evidence of Peter Julian* at 1140 (cited in note 119); Lori Wallach, *Accountable Governance in an Era of Globalization: The WTO, NAFTA and the International Harmonization of Standards*, 50 Kan L Rev 823, 831 (2001–02).

¹²⁹ *Regulatory Cooperation Framework* (cited in note 126).

¹³⁰ This approach is affirmed in the *SPP Myths vs Facts* website (cited in note 15): “If an agency were to decide a regulatory change is desirable through the cooperative efforts of SPP, that agency is required to conform to all existing U.S. laws and administrative procedures, including an opportunity to comment.”

¹³¹ For one proposal based on US administrative norms, see Richard Stewart, *U.S. Administrative Law: A Model for Global Administrative Law*, Institute for International Law and Justice Global Administrative Law Series—Working Paper No 2005/7 (May 2005), available online at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=723147> (visited Nov 17, 2007).

As any feminist who has battled 'the old boy network' will quickly recognize, the informality, flexibility, and decentralization of networks means that it is very difficult to establish precisely who is acting and when. Influence is subtle and hard to track; important decisions may be made in very informal settings. As Martti Koskenniemi argues . . . giving up form and validity is ceding fundamental constraints on power.¹³²

However, it is plain that providing privileged network access to regulated entities while at the same time excluding regulatory beneficiaries is not a sustainable position. In a governance structure where the ability to exercise influence is closely linked to the provision of information, being able to frame problems and to present preferred regulatory solutions is a significant advantage that should not be preferentially conferred.

The idea that the SPP is simply the sum total of its parts and nothing more also invites further scrutiny. At the heart of the critiques of the SPP is the opposing notion that the SPP is much more than what is presented. It is in this regard, we have suggested, that the critics of the SPP are less concerned with what the SPP is and more concerned with what it might be. If one considers the evolutionary nature of transgovernmental networks, then the structure of the SPP should be understood as dynamic and oriented towards convergence. This is quite different from a hidden agenda, which seems to imply a duplicity for which there is no evidence. Rather, the concern might be better phrased as relating to the lack of clear boundaries within the process.

The absence of boundaries is particularly acute with the SPP because of the breadth of the overall scheme. Network governance is more likely to be found acceptable where the agencies involved already enjoy considerable independence domestically. Thus, in the case of financial regulators such as central banks and securities regulators, insularity from political interference adds to their legitimacy. As a result, the exercise of that independence collectively in support of shared goals should be less controversial because their independence is broadly accepted and they are understood to exercise that independence only within the confines of their mandate. The SPP, by comparison, involves departments that operate under tighter political controls and provides no clear boundaries on what activities are subject to network decisionmaking. If the evolutionary nature of networks is to be taken seriously, then it follows that there needs to be clearly understood limits to the extent and scope of network activity.

¹³² Slaughter, *Governing through Government Networks* at 193–94 (cited in note 9).

V. NETWORK LEGITIMACY AND THE SPP

Ultimately, the stability of transgovernmentalism as an approach to governance depends on the legitimacy of the network. In this regard, the SPP's framers rely on a thin version of legitimacy based on the technical expertise of expert members and a highly formalistic version of procedural legitimacy. However, as the debate over the SPP suggests, this version of legitimacy is insufficient in light of the nature of transgovernmental networks. Expert legitimacy, which justifies authority based on the qualifications of the decisionmakers, assumes a rationalistic decisionmaking environment where right answers can be determined. This environment in turn assumes broad-based agreement on the regulatory ends sought.¹³³

If one accepts the SPP as simply an aggregation of technical problems, then the delegation of authority to networks is largely unproblematic. Indeed, the SPP succeeded in generating cooperative solutions to important issues such as emergency planning, adequate responses to pandemics, and energy performance standards.¹³⁴ These are not trifling accomplishments, and they certainly point to the value of networks in resolving technical issues. However, many of the issues, including those relating to access to energy supply and the nature and extent of environmental regulation, cannot be rooted solely in expert legitimacy since these issues require a careful balancing of competing values and objectives. Indeed, even the determination of whether an issue is technical is likely to be controversial and must itself be made with reference to substantive criteria.¹³⁵

In this regard, it is helpful to compare other approaches to transnational environmental governance with the SPP process. As noted, there are numerous existing transgovernmental networks in the environment field.¹³⁶ In addition, multilateral environmental agreements frequently resort to forms of delegated

¹³³ See Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law*, 93 Am J Int'l L 596, 619–23 (1999) (discussing the limitations of expertise and science as a basis for legitimacy in international environmental governance). See also Stephen Bernstein, *Legitimacy in Global Environmental Governance*, 1 J Int'l L & Int'l Rel 139 (2005); Neil Craik, *Deliberation and Legitimacy in Transnational Environmental Governance: The Case of Environmental Impact Assessment*, 38 Victoria U Wellington L Rev 381 (2007).

¹³⁴ *Joint Statement of Prime Minister Harper, President Bush and President Calderón*, North American Leaders' Summit (Aug 21, 2007), available online at <http://www.spp.gov/pdf/leaders_statement_2007_english.pdf> (visited Nov 17, 2007) (outlining the accomplishments of the SPP since the previous leaders summit).

¹³⁵ See, for example, Jacqueline Peel, *International Law and the Legitimate Determination of Risk: Is Democratising Expertise the Answer?*, 38 Victoria U Wellington L Rev 363, 365–66 (2007) (discussing fluid boundaries between science and politics in environmental decisionmaking).

¹³⁶ See discussion of NACEC, INECE, and Canada–US Air Quality Committee, in Section II above.

decisionmaking through the use of subsidiary decisionmaking bodies, such as Conferences of the Parties (“COP”) and Meetings of the Parties (“MOP”), which also provide a measure of autonomy to the participants.¹³⁷ However, unlike the SPP process, these institutions are bound by agreed-upon substantive principles. For example, the North American Agreement on Environmental Cooperation, which created the NACEC, contains an unequivocal commitment to maintain and to improve environmental quality.¹³⁸ Similarly, the Air Quality Agreement defines the role of the Air Quality Committee in light of an overarching environmental objective.¹³⁹ In relation to MOPs and COPs, these subsidiary bodies play a crucial role in implementing and deepening the commitments found in multilateral environmental agreements, but they do not have unfettered freedom to determine future normative arrangements. Rather, they must remain faithful to the underlying purposes of the regime. Thus, in the same manner that domestic administrative agencies are required to exercise their authority within the limits of the delegation granted to them, international instruments provide constraints on the exercise of discretion by transnational decisionmakers.

As with many domestic delegations of authority, these substantive constraints are limited because they are framed as principles in broad, open-ended prescriptions. Consequently, these exercises of authority must adhere to procedural norms, such as transparency, inclusivity, and a commitment to reasoned decisionmaking. The NACEC, for example, provides opportunities for citizen engagement through its citizen submissions process and Joint Public Advisory Committee.¹⁴⁰ Similarly, many subsidiary treaty bodies in multilateral environmental agreements provide extensive participatory rights to nongovernmental organizations.¹⁴¹ Adherence to procedural norms has both instrumental and noninstrumental ends. In relation to the former, inclusivity is intended to improve and to broaden the information that is brought to bear on decisions. For example, the decision to create the NACC has largely been

¹³⁷ See Churchill and Ulfstein, 94 *Am J Intl L* at 626–28 (cited in note 38) (discussing growing autonomy of subsidiary bodies in MEAs); Brunnée, 15 *Leiden J Intl L* 1 (cited in note 39) (providing a more specific discussion of the legitimacy concerns the autonomy of subsidiary bodies gives rise to and how these concerns may be mediated through process-oriented measures).

¹³⁸ *North American Agreement on Environmental Cooperation*, preamble, art I (cited in note 35).

¹³⁹ See Canada–US Air Quality Agreement, preamble (cited in note 30).

¹⁴⁰ See David Markell, *The CEC Citizen Submission Process: On or Off Course*, in Knox and Markell, eds, *Greening NAFTA* 274 (cited in note 36); John Wirth, *Perspectives on the Joint Public Advisory Committee* at 199 (cited in note 36).

¹⁴¹ See Jonas Ebbeson, *Public Participation*, in Daniel Bodansky, Jutta Brunnée, and Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* 681, 689–92 (Oxford 2007).

justified on the grounds that business leaders are in the best position to advise bureaucrats on matters relating to North America's competitive position.¹⁴² The noninstrumental benefits of process are that decisions that account for the views of those that are affected and which are justified in light of shared values are more likely to be accepted, even by those whose interests are prejudiced by the decision. Transparency can protect against rent-seeking minorities negatively influencing outcomes.¹⁴³ Generating acceptance through the provision of reasons is where procedural legitimacy interfaces with substantive legitimacy. In order for reasons to be acceptable they must appeal to shared substantive values.¹⁴⁴

In this vein, Slaughter argues that transgovernmentalism, if it is to become a stable form of transnational governance, must be situated within a shared normative framework:

What is still missing from this order, however, is norms. Power without norms is both dangerous and useless. It is dangerous because of the risk of abuse. It is useless because it lacks purpose. The answer in both cases is to harness power and to constrain it through norms.¹⁴⁵

Our analysis of the SPP indicates that, unlike other environmental networks, the process is not underlain by any expressed commitment to a shared set of values, procedural or substantive. The difficulty that the SPP faces, in light of its breadth, is finding a set of goals that are genuinely shared.

The approach in international environmental law has been to articulate a common commitment to resolve an environmental issue in advance of generating formally binding rules, usually in the form of a framework convention.¹⁴⁶ The purpose of the framework convention is to provide a context for the generation of more precise rules over time.¹⁴⁷ The efficacy of

¹⁴² See North American Competitiveness Council, *Enhancing Competitiveness in Canada, Mexico and the United States*, 10 (Feb 2007), available online at <http://www.ceocouncil.ca/publications/pdf/test_4d5f2a8ae89332894118d2f53176d82b/NACC_Report_to_Ministers_February_23_2007.pdf> (visited Nov 17, 2007).

¹⁴³ For a discussion of small group influence on a state's external agenda, see Eyal Benvenisti, *Sharing Transboundary Resources: International Law and Optimal Resource Use* 53–58 (Cambridge 2002).

¹⁴⁴ See Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* 25 (Princeton 2004) (discussing the inadequacy of procedural norms alone to act as a basis for reciprocal justification in deliberative processes).

¹⁴⁵ Slaughter, *A New World Order* at 215 (cited in note 5).

¹⁴⁶ See Günther Handl, *Environmental Security and Global Change: The Challenge to International Law*, 1 YB Int'l Envir L 3, 5–7 (1990) (discussing use of framework conventions and subsequent negotiation of more specific, rule-based protocols).

¹⁴⁷ See Jutta Brunnée and Stephen J. Toope, *Environmental Security and Freshwater Resources: Ecosystem Regime Building*, 91 Am J Int'l L 26, 30–31 (1997). But see George Downs, Kyle Danish, and Peter Barsoom, *The Transformational Model of International Regime Design: Triumph of Hope or Experience?*, 38

transgovernmental networks also relies on the identification of common problems and shared normative expectations by network participants. Where networks are demand driven, in the sense that the need for cooperation is identified and pursued by networks themselves, a shared substantive base is generated through self-selection but can deepen through socialization and an ongoing commitment to deliberation. It follows that Slaughter and other network scholars have not identified substantive criteria for networks, as these will depend on the networks themselves. In the case of nested environmental networks, these values are derived from the commitments that inhere within the regime itself.

The difficulties in a self-conscious attempt to use transgovernmental networks to effect cooperation across issue areas is that there remains a need for some clear basis upon which network outcomes can be assessed, but generating agreement even at a fairly abstracted level is a politically costly activity. The different forms of legitimacy that networks rely upon, namely expertise, process values, and substantive values, do not operate independently of one another. Instead, where there is an absence of one form of legitimacy, another form compensates for that absence. In light of the lack of a shared substantive commitment to integration and a common understanding of how the competing objectives of the SPP will be traded off against one another, there is an enhanced need for procedural norms to generate legitimacy. However, process is itself not without its costs, and where the costs of inclusivity and transparency outweigh the efficiency and flexibility benefits of networks, the stability of networks as a governance tool is likely to be eroded. Our analysis of the SPP provides support for the view put forward by Raustiala that transgovernmental networks will interact with traditional, treaty based forms of international law “synergistically and supportively.”¹⁴⁸ These positive interactions may result in functional benefits, but linkages between treaties and networks also provide opportunities for networks to draw on the substantive legitimacy of treaty commitments, facilitating deeper cooperation.

VI. CONCLUSION: THE LESSONS OF THE SPP

A study on the extent of transgovernmental networks between Canada and the United States identified at least 240 networks, showing that, even before the

Colum J Transnatl L 465, 470–73 (2000) (criticizing approaches to regime design that rely on cooperative evolution).

¹⁴⁸ Raustiala, 43 Va J Intl L at 91–92 (cited in note 5) (“Most notably, by promoting capacity building at the domestic level networks can enhance compliance with, and the effectiveness of, existing treaties.”). See also Slaughter and Zaring, 2 Ann Rev of L & Soc Sci at 225 (cited in note 5).

SPP, networked governance was pervasive in North America.¹⁴⁹ The SPP has sought to capitalize on the presence of networks and further institutionalize their use through the creation of more centrally controlled agenda-setting and reporting processes for networks. Our review of the environmental aspects of the SPP reveal an approach that is ad hoc in the sense that the network activities sought to be conducted appear to be mostly an amalgam of existing initiatives, lacking any overall coherence. The initiatives themselves have not attracted much concern, and indeed, they appear to be oriented towards achieving positive environmental change.

Despite the seemingly benign nature of the SPP's environmental agenda, critics have raised concerns regarding the potential of the SPP to erode environmental values and national sovereignty over resource and environmental policy. The result is an unproductive debate that focuses more on future intentions than present policy. While there is no apparent evidence of many of the specific concerns raised, the nature of the debate itself is in part a product of the structure of the SPP, which provides no underlying substantive vision and affords few procedural protections to citizens potentially affected by policy matters determined through the SPP process. Political oversight by the central executive branches of each of the SPP partners has not resulted in widespread acceptance of the SPP process.

The chief failing of the SPP is that its framers have not fully appreciated the nature of transgovernmentalism. Treating networks simply as meeting places for government officials, but not possessed of governmental characteristics, underestimates, in our view, the power of networks to generate formal and informal modes of governance. The result is to locate the locus of network authority incorrectly within the state and to anchor network authority solely in domestic legal authority. What is required in our view is a more robust understanding of network legitimacy that draws on a genuinely shared commitment to both procedural and substantive ends. At the center of the SPP debate are deep cleavages regarding the value of integration and the ends which cooperative behavior is meant to serve. The desire to avoid a politically costly debate on regional integration is understandable. However, given the evolutionary nature of networks and their inclination towards convergence, there is a clear need for the delineation of boundaries of network activity and, ultimately, linkage to the legislative branch of the government.

¹⁴⁹ *Evidence of Michael Hart* at 1140 (cited in note 84).