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TRANSPARENCY OF ENVIRONMENTAL REGULATION AND PUBLIC PARTICIPATION IN THE RESOLUTION OF INTERNATIONAL ENVIRONMENTAL DISPUTES*

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This paper will review the provisions for citizen input and citizen submissions to the Secretariat of the North American Commission for Environmental Cooperation [hereinafter "NACEC]; and the U.S., Mexican, and Canadian governments' guarantees of citizens' right-to-know, as well as citizen suits and remedies regarding environmental harm and requests for enforcement of environmental laws. It will begin with a brief overview of the North American Free Trade Agreement[1] and its environmental side agreement, and then undertake an analysis of the provisions for transparency of environmental regulation and citizen involvement. The conclusion is that the transparency and public participation provisions of the environmental side agreement are dramatic steps forward in the development of international environmental law.

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1. North American Free Trade Agreement (NAFTA), December 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 (1993).

I. INTRODUCTION

Generally, economic development and increased trade can result in environmental degradation. On the other hand, trade in environmental services and technologies can make environmental protection more efficient. While there is already a clear linkage between economic development and solving environmental problems, known as "sustainable development," there is also an increasing need for linkages between trade and the environment. There is a role for trade in achieving sustainable development, particularly in the prudent use and protection of natural resources, as well as the transfer of pollution prevention and clean-up technology.

Trade provisions have already been incorporated into the enforcement sections of international environmental agreements. Also, as a result of the NAFTA, environmental provisions are being incorporated into trade agreements. I like to call this "sustainable trade."

The transparency of environmental regulations and the availability of domestic and international public forums for the resolution of disputes based on environmental issues is a significant advancement brought about as the result of the NAFTA. And while it may be more common in the U.S., the guarantees in the agreement that each of the three parties made to their citizens to ensure that everyone was adequately informed about environmental issues and that all are guaranteed a domestic forum in which to raise environmental issues is a tremendous step forward.

Pollution does not respect national borders. Therefore, we see an increasingly international emphasis on global commons and cross-border pollution prevention and clean-up. Even without international impact, some governments may, because of international trade competition, be fearful of regulating environmental issues more heavily than their trading partners. In addition, as competition for dwindling resource stocks becomes more intense, we can expect the frequency and intensity of international resource trade disputes to increase. This type of dispute also includes conflicts between developing nations, who wish to use their natural resources to better the lot of their people, and developed nations who appear to the first group to be dictating resource use policy. In order to anticipate such challenges, we have begun to in-

clude environmental considerations in our trade policies, agreements, and dispute resolution procedures.

II. NAFTA

The North American Free Trade Agreement among the U.S., Mexico and Canada was approved by the United States Congress in October 1993, and became effective January 1, 1994.[2] It will be many years before we feel the full effect of the pact, due to the gradual nature of the removal of tariffs. Recent United States Department of Commerce trade figures, however, already show a substantial increase in trade during the first quarter of 1994.

A. *The Environment and the NAFTA*

The preamble of the NAFTA states that sustainable development is a commitment of the three countries, and that the parties will provide for environmental protection, planning, and enhancement of environmental laws.[3] The pact also has chapters specifically designed to preserve the integrity of environmental laws and regulations. However, the focus of the NAFTA is on free trade, not the environment. Technically, the environment only enters the picture in so far as environmental laws might be viewed as non-tariff barriers to trade. There is no direct public participation in the NAFTA trade disputes. Trade will continue to be the heady realm of the Washington, D.C. beltway trade lawyer who represents governments in trade disputes.

The NAFTA is the first trade pact in which some environmental good was accomplished, as evidenced by the following examples.

- The NAFTA maintains existing health, safety and environmental laws of the United States by allowing the U.S. to continue to prohibit the import of items that do not comply with laws of the United States.[4]

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2. *Id.*

3. "Contribute to the harmonious development and expansion of world trade . . . in a manner consistent with environmental protection and conservation; . . . promote sustainable development; . . . [and] strengthen the development and enforcement of environmental laws and regulations." NAFTA, *supra* note 1, at Preamble.

4. Chapter 7B of the NAFTA discusses Sanitary and Phytosanitary Measures and allows the maintenance or adoption of laws designed to protect human, animal and plant life from the threat of pests, disease, contaminants

- The NAFTA allows the parties, states and provinces to enact stronger environmental laws, as long as uniform national treatment is the rule, and prohibits the lowering of environmental standards.[5]
- The NAFTA encourages upward harmonization of environmental laws[6] and the adoption of international standards when such standards exist or are in the final processes of creation.[7]
- The NAFTA preserves the right to enforce international environmental treaty obligations, and lists certain treaties which will supersede the NAFTA in the event of an inconsistency.[8]
- The NAFTA shifts the burden of proving that an environmental law or regulation is a non-tariff barrier to the challenging party (opposite of the GATT).[9] Further, environmental experts can be used by a trade dispute panel,[10] and the NAFTA dispute procedures are favored over those of the GATT, which are historically anti-environment or at least indifferent to the environment.[11]

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and additives. NAFTA, *supra* note 1, at ch. 7B. Chapter 7B measures must have a scientific basis and a risk assessment. *Id.* Chapter 9 of the NAFTA discusses technical and Standards-Related Measures and allows regulation of process and production methods as long as they do not discriminate, do not create an unnecessary obstruction to trade, and have a legitimate objective. *Id.* at ch. 9. There is not a science test for Chapter 9 measures. *Id.*

5. NAFTA, *supra* note 1, at arts. 713, 905.

6. *Id.* at arts. 713, 714, 905, 906.

7. *Id.* at arts. 712(1), 905(1).

8. *Id.* at art. 104. The international treaties currently listed are the 1973 Convention on the International Trade in Endangered Species of Wild Fauna and Flora, the 1987 Montreal Protocol on Ozone Depleting Substances, the 1989 Basel Convention on the Control of Transborder Movements of Hazardous Wastes and Their Disposal, the U.S.-Canada Agreement Regarding Cross-border Movement of Hazardous Waste, the 1983 U.S.-Mexico La Paz Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area (including its annexes), the U.S.-Mexico Convention for the Protection of Migratory Birds and Game Mammals, and the U.S.-Canada Convention on the Protection of Migratory Birds. Other than these treaties, the NAFTA takes priority over all other international environmental treaties, and these seven treaties are only given priority if the parties act pursuant to them in a manner "least inconsistent" with the NAFTA. *Id.*

9. NAFTA, *supra* note 1, at art. 723(6).

10. *Id.* at arts. 2014-15.

11. The dispute resolution provisions allow the defending party to select a NAFTA trade dispute panel over a GATT panel when a dispute relates to an environmental law. See NAFTA, *supra* note 1, at arts. 2003-19. This has a further advantage in that the burden of proof is shifted to the challenger in the dispute.

- The NAFTA provides that no country may lower its environmental standards to attract investment.[12]
- The NAFTA would allow a country to prohibit the export of limited natural resources as long as it has equally limited the access/use by its own citizens and industry.

Thus, as long as an environmental law is reasonably scientifically legitimate and is equally imposed on foreign and domestic citizens and industry, it should be upheld by a NAFTA trade dispute panel.

The anti-NAFTA environmental groups which included Public Citizen, Greenpeace, Sierra Club, and the Friends of the Earth, were primarily either anti-trade or felt that the NAFTA did not go far enough, was too vague, or that stronger environmental laws of the United States could still be attacked as unfair non-tariff barriers to trade. These groups equate free trade with environmental deregulation.[13] To be fair to them, some serious process and production method (PPM) standards issues were not addressed in the NAFTA, and the tuna-dolphin case[14] circumstance was not resolved as some had wanted.

III. The Environmental Side Agreement

The stated goal of the Clinton Administration in calling for an environmental side agreement was to ensure that economic growth with Canada and Mexico, as a result of the NAFTA, does not come at the expense of the environment. The concept of the environmental side agreement is the harmonization of laws to avoid conflicts, conflict resolution, and cooperation in the enforcement of current laws, as well as the maintenance of a separate independent body to "watchdog" the environmental law enforcement of the parties. For these

12. NAFTA, *supra* note 1, at art. 1114(2).

13. The most radical of these groups predicted the NAFTA and the GATT trade dispute panels would overrule all of the hard won environmental laws of the United States. This fear is misplaced. Constitutional law of the United States would not automatically apply any dispute panel hearing results to the interpretation of U.S. domestic laws (dispute panel rulings are not self-executing treaties). An act of Congress would be required to change a law to conform with an international ruling.

14. GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, Aug. 16, 1991, 30 I.L.M. 1594. The U.S. has blocked the adoption of this report pending diplomatic resolution of the dispute with Mexico. The report has no legal effect until adopted by a GATT Council.

reasons, the side agreement shall have a significant effect on health and environment issues. This environmental pact should provide new opportunities for environmental policy lobbyists and environmental litigators of all types. Transactional and trade lawyers can also expect more stringent enforcement of domestic environmental laws with this independent, international watchdog in place.

The side agreement has four major purposes. These are all to be accomplished through the NACEC[15] created by the side agreement. This commission and its related bureaucracy is a new institution which will be used to examine current environmental concerns and those which arise in the future. First, the NACEC will work toward upward harmonization of environmental laws in the U.S., Mexico and Canada. The three parties agreed that no country could lower environmental standards.[16] Second, the NACEC will investigate and resolve complaints of non-enforcement of environmental laws, i.e. the governments will be held accountable for enforcement.[17] NACEC investigations can be prompted by citizens, non-governmental organizations (NGOs), businesses, and government entities.[18] Third, formal government-to-government disputes regarding lax enforcement of environmental laws and regulations will be resolved through the NACEC. The commission will impanel environmental experts to hear each party's arguments. These experts will conduct hearings similar to the trade dispute resolution procedures in the main trade agreement.[19] Fourth, the NACEC will have a study function which will include dissemination of information on environmental protection issues, trans-boundary environmental harm, and natural resources accounting methods.[20]

At the inaugural meeting of the three NACEC Commissioners[21] in March 1994, they decided that the focus of the

15. North American Agreement on Environmental Cooperation (NAAEC), Sept. 14, 1993, art. 3, 32 I.L.M. 1480.

16. *Id.*

17. NAAEC, *supra* note 15, at art. 5.

18. *Id.* at art. 14.

19. *Id.* at arts. 22-36.

20. *Id.* at arts. 10, 12-13.

21. The three NACEC commissioners are Carol Browner, Administrator of the EPA; Carlos Rojas Gutierrez, the Secretary of Mexico's National Institute of Ecology, Ministry of Urban Development and Ecology; and Sheila Copps, the Minister of Environment Canada.

NACEC will include pollution prevention, technology cooperation, and the compilation of a study on the environmental effects of the NAFTA. During the first year, the emphasis will be on environmental conservation and the enforcement of environmental regulations. The key goal, because the NACEC is part of a trade agreement, is to prevent unfair trade advantages for one country's industry as the result of lax enforcement of environmental laws. The official work program of the NACEC, adopted at the commissioners' first meeting will also include:

- conservation and ecosystem protection,
- enforcement of domestic environmental laws,
- pollution prevention,
- economic incentives such as user fees to reduce pollution,
- technology transfers to help Mexico improve its capacity to inspect and regulate polluters,
- trans-boundary pollution issues, and
- the NAFTA effects[22] and consultation.

The NACEC has been criticized for its lack of complete independence and authority, but this weakness is the unavoidable result of compromise and the fear of delegation of sovereignty. Some of these criticisms include:

- the Executive Director has not been given sufficient authority and independence;
- public access to reports or complaints can be blocked;
- a two-thirds vote of the Council is required to investigate a complaint from a non-government source;
- consultation requirements on environmental disputes will result in excessive delays;
- the NACEC agreement only seeks to promote, but does not make a commitment to guarantee the public's right-to-know; and
- there are strict limitations on citizen complaints.

All this said, environmental groups and others are reportedly prepared to submit complaints to the commission the moment its doors are opened. The NACEC Secretariat will be located in Montreal, Quebec, Canada.

22. It is anticipated that the increased trade resulting from the NAFTA pact will adversely affect the environment in two ways. First, there will probably be extra burdens placed on any environmental infrastructure in the border regions. Second, increased transport and traffic among the countries will increase the use of fossil fuels and reduce air quality.

One of the most important aspects of the side agreement involves its provision for public participation and for transparency in environmental issues. This part of the side agreement draws upon Principle 10 of the Rio Declaration on Environment and Development, which states that:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment, that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[23]

This concept was convincingly raised by environmental NGOs and members of Congress who wanted key environmental worries addressed before the approval of the NAFTA. In response, U.S. Trade Representative Mickey Kantor offered to match citizen rights related to the environment with those in the NAFTA regarding intellectual property protections.[24] The task to fulfill this promise fell to the United States Trade Representative staff and the Department of Justice lawyers assigned to the multi-agency NAFTA task force. The Department of Justice contacted the Natural Resources Defense Council (NRDC) for its input on drafting such language, and the NRDC provided proposed language.[25] The NRDC language was adopted by the U.S. government and was presented to Mexico and Canada in late May, 1994. Much of the NRDC's proposals survived and became part of the final text of the side agreement. The final language includes commitments made to assure public access to national courts for those seeking environmental enforcement or redress, for open administrative or judicial proceedings, and for

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23. U.N. Doc. A/CONF.151/PC/WG.III/L.33/Rev.1, Principle 10 (1992), commonly known as the Rio Declaration which was adopted at the U.N. Conference on Environment and Development, June 3-14, 1992. 31 I.L.M. 874, 878.

24. This is an excellent example of consultation and interaction which makes a pure up or down vote on fast-track legislation acceptable. The intellectual property provisions are found in the NAFTA, *supra* note 1, at ch. 17.

25. This task fell ultimately to the author.

transparency in the establishment of environmental laws and regulations.[26]

A. *Assurances of Public Access to National Courts and Meaningful Remedies for Those Seeking Environmental Enforcement or Redress*

In the side agreement, the U.S., Mexico, and Canada guaranteed their citizens the right of public access to courts, or the equivalent, for those seeking environmental enforcement or redress. This is a very important promise. In the U.S., we take for granted our broad access to the courts and our ability to use the courts in order to address environmental issues.[27] This access, however, is somewhat absent in Mexico and Canada, and is very much absent in the international arena. Suits seeking redress for environmental harm are analogous to citizen attorney general actions for the enforcement of laws. Suits against the government for non-enforcement or lax enforcement are a common occurrence in the U.S. and a favorite vehicle for environmental NGOs. In fact, it is very important to environmental NGOs to pursue the enforcement of environmental laws. Private rights of action are also useful in circumstances where government enforcement is limited by a lack of funds or other resources. Mexico, for example, has recently passed an excellent national environmental act that comprehensively covers environmental issues,[28] but as yet does not have a fully developed enforcement potential. Because of this suit guarantee, Mexico and its domestic industries will now know that environmental NGOs will be watching its enforcement efforts develop, and will selectively pursue priority environmental problems through litigation if necessary. Perhaps this will lessen the gap between the high quality of Mexican environmental laws on paper and their lax implementation in the field. The right to sue, however, must be cross-referenced with the right-to-know and

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26. NAAEC, *supra* note 15, at arts. 4, 6-7.

27. Most environmental citizen suit provisions in the U.S. are patterned after Section 304 of the Clean Air Act of 1970. 42 U.S.C.S. § 7604 (1988).

28. It should be noted that even before NAFTA was passed Mexico's 1988 General Law of Ecological Equilibrium, Chapter VII included "denunciation" procedures roughly comparable to administrative complaint procedures of the United States which could in certain circumstances be followed up by a civil suit. To date, Mexico has already investigated thousands of citizen environmental denunciations.

transparency provisions discussed below. The right to act is only useful if information is properly disseminated.

The side agreement has clear statements of private legal rights and remedies, including the following examples.

- Citizens are guaranteed the right to complain to authorities in their countries regarding violations of environmental laws, and the parties agreed that all reasonable complaints would be investigated.[29]
- Citizens are guaranteed "access to administrative, quasi-judicial or judicial proceedings for the enforcement of the [p]arty's environmental laws and regulations."[30]
- Citizens filing such suits are guaranteed both monetary and injunctive remedies to obtain redress for environmental harm and to prevent further harm to the environment.[31]
- Citizens filing such suits are guaranteed access at a reasonable cost and proceedings which are fair, open, and equitable.[32]
- Decisions from such proceedings must be made promptly, in writing, and be reasonably based on information presented during the proceedings.[33]
- Decisions from such proceedings should be subject to appeal and/or a petition of correction.[34]
- The only limitation on citizen suits is that no party may provide for a right of action against another party on the ground that the other party has acted in a manner inconsistent with the side agreement.[35]

B. Transparency and Citizen Rights-to-Know

Generally, in the U.S., we can watch how laws are made. To a lesser degree this is true in Canada, but it is a relatively new idea in Mexico. The most important aspect, however, is having the opportunity to comment prior to the adoption of the environmental law or regulation. In the U.S., this has been an invaluable means for individuals and NGOs to counter the input of industry, developers and agri-business

29. NAAEC, *supra* note 15, at art. 6(1).
30. *Id.* at art. 6(2).
31. *Id.* at art. 6(3).
32. *Id.* at art. 7(1).
33. *Id.* at art. 7(2).
34. *Id.* at art. 7(3).
35. *Id.* at art. 38.

(those whose input results from campaign contributions). Public debate and public hearings related to contemplated legislation provide balance for those most affected and provide an opportunity to include new ideas from those in the real world.

In addition to transparency in the creation of environmental law, the parties also committed themselves to ensure that their citizens are well informed about environmental laws, enforcement, and the status of the environment itself. Much of this citizen right-to-know obligation is a prerequisite for the other citizen rights created by the treaty. Without knowledge and access to information, no suits can be brought, no laws can be affected during creation, and no effective submissions to the NACEC Secretariat can be made.[36] In addition, publication of information regarding environmental harm or toxic chemical use provides industry with an incentive to reduce environmental risks or find non-toxic substitutes.

Two successful examples of citizen right-to-know laws are SEDESOL's[37] reporting on the daily air pollution levels in Mexico City and the EPA's publication of its Toxic Release Inventory.[38]

The side agreement contains a number of articles related to transparency and citizen rights-to-know:

- environmental laws, regulations, procedures, and administrative rulings must be promptly published once adopted;[39]
- environmental laws, regulations, procedures, and administrative rulings should be published in advance and be subject to public comment;[40]
- information regarding non-compliance with environmental laws must be published;[41]

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36. Better information results in higher quality public participation.

37. SEDESOL is the Spanish acronym for the Secretariat of Mexico's National Institute of Ecology, Ministry of Urban Development and Ecology.

38. *See also* National Environmental Protection Act on Environmental Impact Statements, 42 U.S.C. § 4332(2)(C) (1988); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001-11050 (1988); the United States Freedom of Information Act, 5 U.S.C. § 552 (1988); General Law of Ecological Equilibrium, art. 29 and tit. 5 (Mexico 1988). The Mexican Constitution also contains some basic public disclosure principles.

39. NAAEC, *supra* note 15, at art. 4(1).

40. *Id.* at art. 4(2).

41. *Id.* at art. 5(1)(d).

- information on each parties' environmental enforcement procedures must be published;[42]
- the Council will promote public access to information concerning the environment held by the authorities of each party;[43] and
- the only limitations on citizens obtaining information relate to disclosures which would impede environmental law enforcement, or those which laws governing business or proprietary information, personal privacy, confidentiality of government decision making, or national security protect from disclosure.[44]

C. Citizen Input and Submission to the NACEC Secretariat

Individual citizens are given an unprecedented role in the international arena. They can make submissions to the Secretariat created by the side agreement which will review each parties' enforcement of environmental law within its borders. Direct citizen access was proposed by the United States negotiating team, but was absent from the first proposed drafts of Mexico and Canada. However, direct access was strongly supported by environmental NGOs in Mexico, Canada and the U.S. The citizen input granted by the parties is a broad right to voice the public's concerns with reasonable limits on submissions. The open design of the NACEC will make it a more credible institution than one which uses closed proceedings and is thus suspect in its decision-making. Further, such credibility will lead to greater public support and party compliance with NACEC decisions.

Public participation in the NACEC Council includes:

- the Council must hold public meetings;[45]
- the Council may seek advice from NGOs, the general public and independent experts;[46]
- all decisions and recommendations of the Council shall be made public upon a consensus vote;[47] and

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42. *Id.* at art. 5(1)(e).

43. *Id.* at art. 10(5)(a). This is to ensure the parties comply with NAAEC articles 4(1), 4(2) and 5(1).

44. NAAEC, *supra* note 15, at arts. 39, 42.

45. *Id.* at art. 9(4).

46. *Id.* at art. 9(5)(b).

47. *Id.* at art. 9(7).

- the Council shall act as a point of inquiry and receipt for comments from NGOs and persons concerning environmental goals and objectives.[48]

The public will also have input in the key activities of the NACEC Secretariat:

- the Secretariat's annual report will be made public;[49]
- the Secretariat's annual report can draw upon relevant information submitted by NGOs and individuals;[50] and
- the public can make submissions to the Secretariat on the enforcement of environmental laws and regulations.[51]

A submission to the Secretariat must meet six threshold acceptance criteria. A submission must be in writing in a language specified by the party complained against, clearly identify who is making the submission, provide sufficient information to allow the Secretariat to review the submission, appear to promote enforcement rather than harassment, indicate that the issue has been communicated in writing to the party complained against, and be filed by a person or organization residing or established in Mexico, Canada or the U.S.[52] After a submission meets these tests, the Secretariat determines if it warrants a response. The criteria for a response are that the submission alleges harm to the person or organization making the submission, raises issues whose further study would advance the purposes of the NAAEC, that private remedies under the party's law have been pursued, and whether the submission is drawn exclusively from mass media reports.[53] If the submission meets this criteria it will then be up to the Secretariat to ask the offending party for an explanation. The party then has 30 to 60 days to explain itself or describe other remedies available to the person harmed.[54]

After receiving the response, the Secretariat may request permission of the Commissioners to create a factual record (study) of the issues raised. In preparing such a factual record, the Secretariat can consult any publicly available infor-

48. *Id.* at art. 10(6)(a).
49. *Id.* at art. 12.
50. *Id.* at art. 13(2)(b).
51. *Id.* at art. 14.
52. *Id.* at art. 14(1).
53. *Id.* at art. 14(2).
54. *Id.* at art. 14(3).

mation, information submitted by NGOs and persons, information from its Joint Public Advisory Committee, and information developed by the Secretariat or independent experts. The Commission then has the option to make a completed factual record public.[55] It is hoped that such a factual record will inspire corrective action by a party whose environmental enforcement may be lax in some manner. The submission criteria will require some definition by the Commissioners or the Secretariat. For example, can a submission relate to regional or global environmental effects, or only to environmental effects within the three parties' territories? What type of harm must the person or organization allege? Is prospective injury to human health, natural resources or environmental quality a valid form of harm? Must the person or organization offering the submission exhaust all domestic remedies, regardless of time and the imminence of harm?

D. Suggestions for the Further Development of Transparency and Public Participation

Many transparency and public participation procedures have yet to be decided upon. The many committees and working groups created by the NAFTA and its side agreements have been given discretion to set their own procedures for access to information and participation by members of the public. The following are six suggestions for these committees and working groups to incorporate in their creation of procedures:

- reasonable advance notice of committee and working group meetings,
- public meetings whenever possible,
- invitation of key stakeholders to meetings when full public participation is not practical,
- verbatim transcription of meetings should be made available to the public at a reasonable cost whenever appropriate,
- reports, back-up data and other relevant documents created by or submitted to the committees and working groups should be open and available to the public, and

55. *Id.* at art. 15. The Joint Public Advisory Committee has 15 members, 5 from each country. *Id.* at art. 16(1). It advises the Commissioners on the annual work program, budget and reports. *Id.* at art. 16(6).

- ideally, clear uniform rules for public participation should be established.

Dispute panels are also delegated authority to set procedures for their hearings and consultations. Suggestions regarding access to dispute panels would be for open hearings, automatic publication of final decisions of the dispute panels, written decisions which set forth the reasons for the decision reached, and perhaps most importantly, an opportunity for interested parties to present relevant information. Formal resolution of environmental disputes can only be initiated by a party, but the public may be consulted by an arbitral panel.[56] It is, as yet, unknown whether amicus briefs will be accepted by the arbitral panels from industry, NGOs or concerned citizens. The Commissioners must establish "Model Rules of Procedure" for dispute resolutions before we will know the answer to this question.[57] It seems clear that if a dispute panel is deciding whether a law or regulation challenged as an unfair barrier to trade was motivated by environmental protection concerns, an NGO which advocated for that law should be allowed to present its point of view by way of an amicus brief or other form of intervention.

IV. CONCLUSION

Overall, according to critics, trade is bad for the environment. However, because there has been and always will be trade, it should be regulated to minimize environmental harm. Or better yet, trade should maximize the efficient use of natural resources in order to achieve sustainable development (i.e. sustainable trade). As we enter a new era of sustainable trade, we can expect to see more transparency, public access and comment on the way that trade agreements are negotiated and enforced. We shall also see increased citizen input and citizen right-to-know demands placed on trade dispute panels. Because of their nature, environmental concerns must be global or futile, therefore they will eventually become integrated into decision-making related to trade which is also a global concern. Ultimately, the NAFTA, together with its environmental side agreements, contain innovative environmental provisions which will serve as a model,

56. *Id.* at arts. 22-24
57. *Id.* at art. 28.

and a possible starting point for future trade agreements, including the next GATT/World Trade Organization round, or other free trade agreements to be negotiated between the NAFTA countries and other Latin American nations. In other words, trade liberalization and international environmental protection can, and in some cases should, proceed on parallel tracks. Likewise, international environmental standards related to trade will be helpful in avoiding protectionism and discrimination in trade under the guise of unilateral environmental measures. Once this integration is accomplished, perhaps we will have *sustainable trade*. The key will be cooperation to achieve mutual benefits for developed nations and for developing nations. Classic economic theory says trade is based on the certain comparative advantages each country possesses. In the past, this has meant natural resources, infrastructure, labor, capital or other advantages. The change we now see is that richness in natural resources was not a true cost advantage. The exhaustion of natural resources has very high costs indeed and many natural resources were disposed of for too little and without sufficient thought of the future. The goal of sustainable development requires citizen involvement in decision-making and law creation, the consultation by government of all stakeholders, so that all interests are respected and balanced with the need to use natural resources in a way that assures they will be available for future generations. The NAFTA environmental side agreement is an excellent first step in the development of such public involvement in regulation and dispute resolution of international environmental issues.