

THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION: A JACOB'S LADDER OUT OF *FORTRESS NORTH AMERICAN* INTO A *NORTH AMERICAN COMMUNITY*

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Abstract

1. Introduction

These are dark days for the North American Community Agenda. A prevailing angst has descended upon the concept of a diverse and cooperative North American Community, a reaction largely attributable to the tragic events of September 11th. As with many dialogues since that fateful day, the optimistic and somewhat utopian notions that led the last decade of North American community-building have given way to a dominant security and economic agenda: of a “Fortress North America” outlook defined in terms of common security arrangements (e.g., defence, customs and immigration); integrated economies (e.g., free trade, harmonisation, a common currency); expanded access to resources (e.g., continental energy policy, inter-basin and trans-border water transfers); and a decreasing tolerance of social (e.g., health care principles) and cultural (e.g., popular media) distinctions. In the climate incited by a declared war on terrorism, concerns over the expanding NAFTA-rights of corporations, the declining sovereignty of governments, local communities and individuals, and the subordination of concerns for natural and social capital to the interests of owners of financial capital have been displaced and erased from the agenda.

This paper seeks to introduce an antidote of vision and illumination into this myopia and darkness, and attempts to re-energise the discourse of the North American Community Agenda by advocating a concept of a Sustainable North American Community – a position admittedly less practical and immediate than the currently prevailing view, but which builds on the comprehensive vision that began to coalesce over a decade ago – and in particular has yielded occasional brilliance through the work of the North American Commission for Environmental Cooperation (CEC) – and that might now serve to counteract the heightened profile granted to short term security and commercial interests. The nascence of this antidote rests on an unremarkable and pragmatic two-part strategy, aimed at the development of an informal North American Sustainability Charter, focussed on:

- the adoption of certain amendments and adaptations to the North American Documents (identified here as the North American Free Trade Agreement [NAFTA], the North American Agreement on Environmental Cooperation [NAAEC], and the North American Agreement on Labour Cooperation [NAALC]); and

- the continued building of a cooperative network of North American Civil Society Organisations (CSOs).

In this paper we attempt to sketch, based on a very brief review of the performance of the institutions created under the North American Documents, how such a strategy might contribute to a reappraisal of the concept of the North American Community and represent the origins of a *de facto* North American Sustainability Charter, a conceptualisation based less on a culturally homogenous and economically harmonised superstate (“Fortress North America”) than on a “community of communities” based on cooperative action resting on a shared consensus as to fundamental values.

We begin with a review of the recent history of the North American Community Agenda, with a focus on the past eight years under the North American Documents ending with an appraisal of the problems that exist as a result of that performance. If that appraisal can be characterised as “what’s wrong” with the current state of the North American Community Agenda, the following section sketches a framework for the concept of a Sustainable North American Community. We then describe a recommended process for getting from here to there, based on the two-part strategy alluded to above that is designed to lay out the initial steps for creating a *de facto* North American Sustainability Charter. We conclude with an attempt to remain optimistic about the prospects for a Sustainable North American Community over the longer term despite the current climate and the likelihood that the dominant view will reign for some time to come.

2. History and Evolution

The agenda for North American community-building changed dramatically after September 11th. A selective sampling of writings and actions contemporary with the writing of this paper includes the following:

- In April 2002 the C.D. Howe Institute – a Canadian public policy think tank – issued the first study in its new “Border Papers” series focussed on North American integration. In “Shaping the Future of North American Economic Space”, the Institute argued “that Canada should initiate a joint strategy for achieving a common goal of North American physical and economic security”².
- That same month, a speech by the President of the Institute for Research on Public Policy (another Canadian think tank) advanced the concept of a North American Community “that enshrines democratic principles, enhances economic growth and opportunity, deepens trade and regulatory co-operation, increases social justice and economic development and forms a basis for a Hemispheric Community of the Americas”³; this speech coincided with the release of a major IRPP study that advocated increased U.S. / Canada naval “interoperability” in the aftermath of September 11th.⁴
- At the time of writing, the Government of Canada’s website for “Canada – U.S. Relations” listed the following as its “hot topics”: energy, the Canada – U.S. softwood lumber dispute, the 2002 G8 Summit, Canadian military participation in the campaign against terrorism, and the Canada-U.S. Smart Border Declaration.⁵

These views represent what we call here the dominant security and economic agenda currently driving the concept of a “Fortress North America” approach to continental in-

tegration. However, one does not need to travel far back in time to reveal a much more sanguine agenda for the North American Community.

In March 1996 the North American Institute – a tri-national organisation established in 1988⁶ – convened a three-day meeting at Stanford University under the heading “Renewing Federalism in North America: Diversity of Peoples, Community of Purpose”.⁷ The discussion centred on topics such as Canada’s threatened sense of nationhood; the disparity between America’s market-oriented federalism and its deepening societal divisions; and the prospects for Mexico’s democratic institutions in the context of its economic uncertainties. That meeting ended optimistically by noting the appropriateness of the aphorism “good fences make good neighbours” in defining a workable federalism, while also being aware of the meaninglessness of fences when dealing with the challenges of common problems – characterising the balancing act as “biosphere-enhancing federalism”.⁸

The North American Partnership, formed in 1999 by the foreign ministers of the three North American countries, aimed at supporting and promoting “new and existing cooperative efforts, building on the solid foundation of our sovereignty and of our current partnership, while preserving that which makes our nations unique, to make of our diversity a shared source of strength.”⁹ Lloyd Axworthy, the former Canadian Foreign Affairs Minister who was instrumental in the North American Partnership initiative, has expressed in other writings the desire to pursue a North American relationship that goes beyond narrowly defined economic continentalism. This expanded relationship entails fostering a sense of the North American Community based on the common experiences and underlying values shared amongst the three countries. The route to a North American identity is to be through development of broadly based principles outlining a general framework for economic interaction without undermining the characteristics that make the various cultures unique. The development of such a common identity is not premised upon the many communities within each nation being subsumed within a homogeneous society.

While the dominant North American security and economic agenda is largely a post-September 11th reaction, the late 1990’s North American Community agenda can be read as a reaction to the adoption and implementation of the NAFTA and the market and legal ramifications that became apparent early in its life.

Although multilateral trade regimes have traditionally focused on alleviating tariff barriers to trade, NAFTA’s goal was to reduce both tariff and non-tariff barriers. Unfortunately, provisions such as procurement policies and preferential treatment which are at the heart of domestic policy instruments used to encourage domestic economic development and promote cultural survival can be viewed as trade-distorting non-tariff barriers, and NAFTA takes aim directly against them. For this reason, a system of reservations and exceptions was developed.

Canadian negotiators were successful in establishing a series of reservations to reduce the scope of the agreement’s applicability in areas identified as important to Canada. For example, policies related to aboriginal affairs are the subject of an unbound reservation to the disciplines of the treaty as are policies related to minority affairs. Protection

of environmental measures that "... ensure that investment activity ... is undertaken in a manner sensitive to environmental concerns" is secured. A further provision of the agreement allows Canada to require a foreign investor to carry out research and development, employ or train workers and to construct or expand facilities in Canada. And so on.

Other overriding clauses within the NAFTA accord exacerbate the deficiencies of the reservation system. Chapter 11 on investment entitles investors to challenge government measures directly through an investor-state dispute mechanism. NAFTA is the first multilateral agreement to contain this process allowing foreign enterprises themselves, rather than governments, to bring up disputes pursuant to the provisions contained within the agreement.

If a government action appears to violate an obligation in NAFTA's investment chapter, foreign investors from another NAFTA party can directly challenge that measure before a fast track international tribunal without the complaint being screened by their national government or domestic court system. The arbitration panel, made up of trade specialists, will make a decision on the claim based on interpretation of the trade provisions outlined within the agreement.

The investment chapter of NAFTA has been used more often than any other section of the document to constrain government action in various areas of public policy making. The protection against policy measures deemed equivalent to expropriation that the investment chapter confers on the foreign investor has been the basis of a number of recent cases brought against governments. The scope of policy issues interpreted as subject to the disciplines of the investment chapter has widened as a number of diverse cases have been interpreted and settled in favour of the private investor.

The implications for public policy in Canada are obviously serious. The investment clause has the potential to restrict substantially the range of policy instruments that parties to the agreement can use for social purposes such as human resource development within their borders. At all levels of governance, there is a risk that policies and programs directed toward aboriginal peoples will be subject to the disciplines and the remedies at the disposal of foreign trade partners. The requirement to pay compensation to any private investor adversely affected by a public initiative is a significant deterrent to the development of any public policy measure that might be viewed as violating the provisions of the investment clause. There is notable lack of international consensus on what constitutes a legitimate measure to protect the environment, for example, and there is a similar lack of consensus on what constitutes a legitimate measure to protect aboriginal cultures (not to mention other features of Canadian communities, or "Canadian culture" itself).

To address these concerns, the mechanisms created by the NAFTA process itself should be used to erect a broader framework of social norms to govern interpretation of the agreement. Principles might be developed to safeguard environmental or social measures such as the preferential policies that may be essential to assure indigenous communities the opportunity to participate effectively in the mainstream economy without jeopardizing core cultural values.

As NAFTA negotiations themselves stalled in the tri-national setting (actually in the US Congress in a Presidential election year), two parallel accords were negotiated as the condition for passage of NAFTA itself, and came into force at the same time (January 1, 1994). The North American Agreement on Environmental Cooperation (NAAEC) and the North American Agreement on Labour Cooperation (NAALC) create an institutional framework to facilitate a coordinated North American response to environmental and social problems respectively that cannot be managed through market mechanisms within one nation state.

Both agreements contained provision for review after four years, and reports by independent review committees were completed last year. Interestingly, they reflect strikingly different visions of the scope and purpose of the agreements and of the reviews themselves.

The principles enshrined in the NAALC reflect a common concern with the overall quality of working and social life in North America. These principles, however, relate only to domestic enforcement of legislation to govern labour relations in each nation. Although it was envisioned that the NAALC would evolve so that the general objectives of the agreement would be increasingly realized through tri-national cooperative activities undertaken within the institutions and mechanisms created by the NAALC, the review panel insisted in its report that the Agreement should be viewed as a “social clause” of a trade agreement rather than as independently concerned with labour or social matters. The Mexican panel member and Mexican National Advisory Committee insisted also that the purpose of the review was to be interpreted narrowly against the provisions of the Agreement as negotiated, not as an invitation for proposals to broaden or reform the mandate in light of changing conditions or understandings in the continental community.

Nevertheless the review committee did suggest that the institutions established by the NAALC should be better utilized to enhance trilateral cooperation in responding to “the emerging challenges presented by the changing nature of the workplace.”¹⁰ In its report, the Independent Review Committee (IRC) established to carry out the four-year review of the Commission for Environmental Cooperation (CEC) also addressed this issue of extended tri-national cooperation.¹¹ But the emphasis is very different.

Recommendation number 1 of the report advocates that the NAAEC be viewed as an essential parallel process to NAFTA, not as a “side deal” subsidiary to it. The IRC suggests indeed (p. 15) that the CEC should be seen as having the mandate to pursue the goal of sustainable development in North America.

This present paper urges that this observation should be taken further, to view the NAAEC and its companion, the NAALC, not simply as parallel accords, but as “seriously negotiated international instruments,”¹² creating an overarching frame, within which NAFTA is to be managed in the interests of the overall community.

3. *Sketching a Future*

If the building of a North American Community is to proceed in a sustainable fashion, it cannot do so with a single-minded focus on economic imperatives at the expense of social and ecological imperatives. Even a simplified conceptualisation of sustainability (e.g., a system in which economic, social and environmental imperatives are continu-

ously reconciled and kept in balance) requires that the expansion of rights conferred to corporate entities (e.g., under NAFTA's Chapter 11) and the increased priority afforded to the value of expanding produced physical capital (as a *raison d'être* of the NAFTA) be seen in the context of their simultaneous effect on social structures and ecological systems throughout the North American Community. Two models can be used to illustrate the concept of sustainability in the North American context: the "three-legged stool" metaphor and the more detailed "multi-dimensional" capitals approach.

Developed from early work in the sustainable development field, the three legged stool model employed by environmentalists was derived from Firey's broad groupings of knowledge related to natural resource use, those being: ecological (the physical habitat); ethnological (the human culture); and economic (the market); that work concluded that resource use planning and policy must seek to balance the criteria used to optimise each of these elements.¹³ Following the popularisation of the term "sustainable development" in 1987 by the United Nation's World Commission on Environment and Development in its report *Our Common Future*, defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs", the metaphor of the "three-legged stool" emerged as a way of illustrating the interdependence of environmental, economic, and social equity concerns. If we were to apply this image of sustainability to the North American Community and specifically to the North American Documents, each of the documents can be thought of as one of the legs of this precariously balanced seat: by increasing the scope and effectiveness of the NAFTA (economic) component, at the expense of or without simultaneous regard for the social (NAALC) and environmental (NAAEC) components, the stool tips toward instability. Rebalancing the stool does not require diminishing the importance of the economic leg, but rather increasing the scope and effectiveness of the social and environmental legs.

The "three-legged stool" metaphor has generally been abandoned in the sustainability literature as overly simplistic and analytically suspect.¹⁴ Of the more useful sustainability models that have emerged over the past decade, the one that has resonance with this current paper is the "multi-dimensional capital" concept of sustainable development used by the World Bank.¹⁵ Applying this model to the effects of increasing North American economic integration (measured either in a specific locale or continent-wide), those developments can be considered (and in most cases empirically or at least conceptually measured) in terms of their effect on:

- *Financial capital*: wealth accumulation and the addition of productive capital by individuals and firms through the recognition of tradable paper claims and titles.
- *Physical capital*: produced public goods and infrastructure assets such as buildings, machines, roads, power plants, and ports.
- *Human capital*: investments in health and education, resulting in enhanced skills (embodied in persons, and not tradable) measured as a privately held asset but contributing to social outcomes.
- *Knowledge and Intellectual Capital*: resulting from research and development and the activity of organisations and individuals (disembodied and tradable).

- *Social capital*: institutions, relationships, and norms that shape the quality and quantity of a society's social interactions and contribute to a more resilient community through more effective collective action with lower transaction costs.
- *Natural capital*: natural resources, both commercial and non-commercial, and ecological services that provide the requirements for life, including food, water, energy, fibres, waste assimilation, climate stabilization, and other life-support services.

Does increasing economic integration, expanding rights of corporations and continental defence and security approaches contribute to a sustainable North American? Such moves may likely contribute to expanded financial and physical capital; indeed, they may contribute to increased human and intellectual capital. What seems missing from the current economic and security agenda, however, is an appreciation of how this might affect social capital – from the local community level to the national and continental – and the natural capital that defines the North American ecosystem.

At one level, the key challenge in operationalising the multi-dimensional capitals approach is converting all values to comparable monetary terms. Obviously, financial and physical capital can be expressed monetarily; intellectual capital can be valued as the stream of future revenues it can produce; human capital can be expressed in terms of its expected impact on future wealth; and a number of techniques exist for valuing natural resources – though these techniques are not so good at valuing ecosystem services.

At another level, however, pricing these non-market capital items is not necessary for a multi-dimensional capitals approach. What has occupied and eluded researchers for several years now are techniques and methods for measuring and valuing social and ecological capital. While there is widespread agreement that these non-market assets are key elements of a sustainable human system, the absence of a monetary metric should not be seen as a fatal flaw. Rather than attempting to monetise these values, an appropriate overarching framework – what we call here a North American Sustainability Charter – can be created around the trade and commercial relationships championed in the NAFTA by valuing these non-market capitals in non-monetised ways. Achieving this valuation is made more plausible through the existence of the NAFTA's parallel accords – the NAAEC and the NAALC.

- Process judgement not valuation
- Possible remaining questions: does a Sustainable North American Community mean the same thing as a “Community of Sustainable North American Countries”? Can North American be sustainable if any part of it isn't? How to avoid the imposition of one worldview for another? What is a “community”? (Dare I ask, “What is sustainability”?)

4. *From Here to There*

Even if a sustainability charter could help to protect the non-monetary and non-commercial aspect of a Sustainable North American Community, the adoption of such a charter by the North American governments would likely remain an unattainable fantasy for the foreseeable future. In the short term, the preoccupation with continental se-

curity appears to trump all other concerns. In the longer term, the primacy of economic and commercial interests tends to crowd out less tangible concepts of wellbeing.

It is for these reasons that we describe an unremarkable and pragmatic approach to the development of a North American Sustainability Charter. While a frontal assault on the hegemonic principles of security and economic growth would likely be met with derision by the North American governments and commercial interests and easily deflected, creating a *de facto* sustainability charter by stealth might seem simultaneously improbable yet plausible. The approach we describe centres on: (A) institutional and legal adaptations to the North American Documents (NAFTA, NAAEC and NAALC) and on (B) networks and cooperation among North American Civil Society Organisations (CSOs).

A. *Institutional and Legal Adaptations to the North American Documents*

This first approach rests solely with the right of North American governments to initiate institutional adaptations and amendments to the procedures under the North American documents in order to elevate the status and effectiveness of the NAAEC and NAALC in relation to the NAFTA and thus provide a voice for interests not otherwise present in trade and commercial deliberations. (While the currently dominant view of the North American community might leave one pessimistic about the three governments agreeing to such changes, there is recent precedent for the NAFTA signatories making minor changes to the operational principals of the agreements.¹⁶) Our proposed changes, described below, include amending the provisions for empanelling a panel under NAFTA's arbitration procedure to include judges appointed under the auspices of the CEC and CLC; and requiring, as a matter of course, that the parallel secretariats provide *amicus briefs* to the NAFTA panels in every arbitration process and defend the rights and responsibilities related to their respective agreements.

(i) Broadening the Perspectives: A Proposal for Expanding the Use of Environmental and Social Reasoning in NAFTA Tribunal Rulings¹⁷

For the NAFTA arbitration tribunal panellist looking to the letter of the Agreement for direction on determining whether an environmental, social or sustainability related measure unfairly restricts the rights of an investor or exporter, there are several references in the text that can be used to evaluate whether the measure should be allowed. The preamble to the NAFTA describes several overarching principles related to environmental protection, social welfare and sustainability,¹⁸ though the authority of any treaty's preamble remains suspect.¹⁹ But beyond the possible ambiguity of the preamble, explicit reference to environmental issues is made in five chapters of the NAFTA: Objectives (chapter 1),²⁰ Sanitary and Phytosanitary Measures (chapter 7 b),²¹ Standards-Related Measures (chapter 9),²² Investment (chapter 11), and Exceptions (chapter 21).²³

Our focus here, however, is on the NAFTA's chapter 11 on Investment, which offers a dichotomous view of the Agreement's impact on environmental policies. On its face and in its apparent intention, the innovative protections and allowances contained in the chapter do appear to support the contention that NAFTA was designed as a "green" trade treaty. In its interpretation and effect, however, chapter 11's provisions for investor-state dispute resolution have revealed significant environmental and social implications for the Parties – indeed it appears that the purported intentions of the negotiators have turned Chapter 11 on its head. These implications are dealt with in the discussion below

on some arbitration panel rulings to date.

Chapter 11's Article 1114 has two provisions,²⁴ the most important of which requires an unprecedented commitment to avoid using lax environmental laws to attract foreign investment – explicitly allowing a Party to design environmental policies “to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns” and holding that the Parties “recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures” – to guard against a race to the bottom.²⁵ Chapter 11 also provides for certain exceptions to the general prohibition on performance requirements.²⁶ Article 1101(4) requires that chapter 11 be construed so as to not “prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter.”

When assessing whether the NAFTA rights of an investor have been infringed by a Party's policy or measure, the arbitration panel must weigh those elements of the Agreement that promote trade and investor rights with the exceptions and allowances described above. To what extent have NAFTA tribunal decisions surveyed here taken into account the agreement's environmental and social objectives? Beyond the text of the NAFTA, have the panels referred to the parallel agreements on environmental and labour cooperation, or other international environmental or social commitments? We attempt to address these questions here by reviewing two arbitration cases that explicitly addressed environmental policies of a Party: *Metalclad v. Mexico*, and *S.D. Myers v. Canada*.²⁷

Metalclad v. Mexico

The Facts: In 1993, Metalclad, a U.S. waste management company, purchased a Mexican competitor that operated a waste transfer station in the municipality of Guadalupe intending to build and operate a hazardous waste landfill facility there. Municipal permit applications by the original company to construct a hazardous waste landfill had previously been denied. Metalclad was granted a state-level (San Luis Potosi) permit for the construction of the landfill (subject to certain technical requirements being met, but without prejudice to any permits from other authorities that would be required). The Mexican federal government issued their permits, and based on those permits – and on the assurances (as asserted by Metalclad and accepted by the Tribunal) by the Mexican government that Metalclad could then proceed – construction was started.

A municipal permit to construct the hazardous waste facility was never received by Metalclad. Despite a submission from the Mexican government that Metalclad was never told that municipal permits were not necessary (nor would then automatically be issued), the Tribunal accepted that Mexican federal officials had indeed assured Metalclad of this, and that Metalclad had acted upon those assurances.

Construction was started in the absence of a municipal construction permit and continued until Guadalupe authorities ordered that it stop. Construction resumed when a municipal permit was applied for in, additional federal permits were granted and an environmental assessment found the site to be suitable for landfilling hazardous waste.

However, the municipal permit application was finally denied over a year later, and construction was finally halted. The state government subsequently protected the site as a “Natural Area” ecological preserve, ruling out its future use as a landfill.

Metalclad claimed that two main provisions of chapter 11 (Article 1105 on minimum international standards, and Article 1110 on expropriation) were breached. The Tribunal agreed and ruled against Mexico, awarding over \$16.5 M USD to Metalclad.

The Reasons: The Tribunal noted its responsibility to decide the issue at hand in accordance with the specific terms and overall objective of the NAFTA and any applicable rules of international law. In referring to the stated objectives of the NAFTA, the Tribunal cited paragraph 6 of the Preamble (where the Parties agreed to “ensure a predictable commercial framework for business planning and investment”) and Article 102 (1)(c) (noting the importance of transparency and increased investment opportunities), but did not refer to the preambular language relating to environmental protection and sustainable development nor any other environment-related language in the agreement. Indeed, the entire ruling is predicated on a reference to the underlying principle of promoting investment and assisting investors, ignoring the apparently “green” aspects of the Agreement. It is clear that the Tribunal saw this case as hinging on the perceived unpredictability and opaqueness of the Mexican regulatory environment²⁸ – in a context that coincidentally had some secondary environmental aspects. In the lone reference to the Agreement’s environmental exceptions, the Tribunal rejected the applicability of Article 1114 by citing the federal government’s approval of the project – equating this higher-level approval with universal Mexican satisfaction that all environmental concerns were met.

While the Tribunal accepted that the municipal permit may have been denied because of

the opposition of the local population, the fact that construction had already begun when the application was submitted, the denial of (previous permit applications) in December 1991 and January 1992, and the ecological concerns regarding the environmental effect and impact on the site and surrounding communities

these reasons were deemed not sufficient for the rejection of the application and were therefore deemed to be not covered by any reservations or exceptions in the Agreement.

S.D.Myers v. Canada

The Facts: The public policy action at issue here involves attempts by the Government of Canada to react to a changing regulatory environment in the United States with respect to the importation of PCB wastes into the United States between November 1995 and July 1997. Before this period, the U.S. border was closed to imports; a court decision led to a U.S. Environmental Protection Agency (EPA) administrative action opening the border to imports, which in turn precipitated the 1995 decision by the Canadian federal government to impose a temporary but comprehensive ban on the export of PCB wastes to the United States (this 1995 decision was the focus of S.D.Myers’ claim). In February 1997 a permanent though less comprehensive Canadian regulation was established, allowing the export of PCB waste to certain types of disposal facilities, though not to landfill sites. The following July, the EPA administrative action was overturned in a court decision and the border was closed once again, thus negating the Canadian export

regulations.²⁹

The investor, U.S. hazardous waste disposal company S.D.Myers, had long sought to export PCB wastes from Canada to its U.S. disposal facilities. S.D.Myers claimed that the Canada regulatory action during the period of U.S. legal uncertainty represented a breach of Canada's chapter 11 obligations related to:

- *National Treatment* (Article 1102): alleging that the government of Canada shut the border to favour Canadian PCB waste disposal facilities.
- *Minimum International Standards of Treatment* (Article 1105): alleging that the treatment was neither fair nor equitable, constituted a denial of justice, and denied the company due process and an opportunity to consult on the regulation.
- *Performance Requirements* (Article 1106): alleging that a trade ban or prohibition represents a breach of the performance requirements obligation.
- *Expropriation* (Article 1110): alleging that the regulation deprived the company of a business opportunity thus constituting a measure tantamount to expropriation – requiring full compensation.

The government of Canada's defence as it relates to the environmental context of this case focussed on the compliance by NAFTA Parties with two international agreements on the transboundary movement of hazardous wastes, which is mandatory under the MEI terms and is also a recognized requirement in Article 104 of NAFTA.³⁰ (Canada also argued that simply opening an office in Canada does not establish S.D.Myers as an investor. In its ruling, the Tribunal made it clear that it considered investment to be a broad concept that included: acting in a joint venture, being a branch of the investor, making a loan to a related company, and the firm's market share in Canada.)

The Tribunal issued a Partial Award on the merits of the claim in November 2000 (leaving the damage award for a second phase), ruling in favour of S.D.Myers on the national treatment and minimum international standards claims, but not on performance requirement and expropriation grounds.³¹ On February 8, 2001, Canada filed a Notice of Application for judicial review in the Federal Court of Canada seeking the setting aside of the award in whole or in part. This case is still pending.

The Reasons: The Tribunal's ruling focussed on two facts in particular: the statement by the then-Environment Minister (Hon. Sheila Copps), during a parliamentary question period and repeated in a later public speech, that it was the position of the government "that the handling of PCBs should be done in Canada by Canadians" – a statement which the Tribunal read as clearly showing that the measure was protectionist in intent;³² and that briefing material from federal civil servants to the Minister indicated that the export of PCB wastes to the U.S. was not inherently environmentally unsound – rather that such a policy could have environmental benefits.³³

The observations made here on the Tribunal's ruling centre on two issues: whether the Tribunal's inference of the government's policy intent was appropriate, and whether the Tribunal's understanding of Canada's NAFTA obligations vis-à-vis its other international commitments (particularly under the *Basel Convention on the Control of Trans-*

boundary Movements of Hazardous Wastes and their Disposal and the Canada-U.S. Agreement on the Transboundary Movement of Hazardous Wastes) was correct.

The Tribunal's dogged focus on the Minister's "in Canada by Canadians" reference to the treatment of PCBs reveals a particularly egregious approach to determining legislative intent that would be remarkably inappropriate in a Canadian court (see endnote 32, above). Yet whether appropriate or not, for the Tribunal to cite a policy that supports the domestic treatment of toxic wastes as being *de facto* trade distorting implies that pollution remediation is not an ethical responsibility but rather a legal responsibility. As the minority opinion from Tribunal member Bryan Schwartz points out in detail, the government of Canada's environmental objective (i.e., the safe disposal of the PCB inventory) could have been efficiently met in large part through the services of S.D. Myers (see endnote 31, above). However, as the Minister's more detailed speech of November 1995 states, the policy could be interpreted as originating from an ethical position: "The handling of PCBs should be done in Canada by Canadians. We have to take care of our own problems."³⁴

On the question of whether the comparison of NAFTA and the relevant MEAs (multilateral environmental agreements) was correct, the Tribunal ruled that the MEAs listed in Article 104 could only take precedence over NAFTA's trade rules where the terms of the MEA were appreciative of certain trade law principles; in this particular case, if a country had a number of alternatives for meeting its *Basel Convention* obligations, this ruling holds that the country should choose the alternative least incompatible with the objectives of the NAFTA. Instead of interpreting the NAFTA in light of the previously negotiated MEAs, the Tribunal read the NAFTA principles back into the earlier agreements. Harold Mann considers the Tribunal's comparison of the NAFTA with the relevant multilateral environment agreements to be "one of the more disturbing parts of the judgment from an environmental perspective... it is legally unfounded to interpret two prior agreements, both negotiated in very different contexts and one at a very different level, by infusing them with trade law principles agreed to later in time."³⁵

Metalclad and *S.D. Myers* represent particularly unbalanced rulings. Yet we accept that the panellists in these particular cases, and the individuals listed on the respective national rosters with the Trade Secretariat, were drawn from the ranks of the best international trade dispute arbiters in the world who clearly demonstrate a thorough mastery of the principles of international trade law, dispute settlement rules and the terms of the NAFTA itself. To rationalise the rulings with the rulers, one must appreciate that the rulings represent particular perspectives in international trade law that have been properly informed by a trade-law perspective. Following Abraham Maslow's observation that "When the only tool you own is a hammer, every problem begins to resemble a nail," it is not surprising that the respective tribunals ruled as they did. Holding the hammer of international trade law, Mexican and Canadian policies were seen as trade-distorting nails having unjustifiable impacts on the trade principles underlying the NAFTA. But what if the panellists had a wider variety of tools at its disposal?

Our proposal stemming from this very brief survey is that if the provisions for empaneling a panel under NAFTA's arbitration procedure were amended to include the appointment of judges having expertise or experience in the principles underlying the

NAAEC and NAALC, the perspective of the panel would likely be broadened such that the narrow decisions revealed above might be avoided. For example, current rules require the appointment of three judges³⁶ from the respective national rosters listed with the Free Trade Secretariat;³⁷ this proposed amendment could require that the rosters that exist at the labour and environment secretariats³⁸ serve as the basis for selecting judges additional to those appointed from the NAFTA rosters. Thus the tribunals would become arbitration panels of, say, five members (three from the trade secretariat roster, and one each from the respective Commissions).

Would the *Metalclad* and *S.D. Myers* cases been settled differently if the respective arbitration panels included members appointed for their knowledge of environmental and labour law and their appreciation of the principles of sustainable development? It is pure speculation to replay the two cases inserting a sustainability perspective – indeed, both tribunal rulings made limited reference to the environmental aspects of the respective cases – but the commentary from the respective panels reveals how their particular trade-oriented perspective would have shielded them from a more holistic approach.

In *Metalclad*, the Tribunal determined that municipal concerns over the potential ecological impacts were not important in light of the federal and state-level approval of the project. For the Tribunal, if the federal or state level approves a project (or, at least, does not raise any ecological concerns), then any such concerns raised by a municipality would be unfounded. Contrast this with the finding of the Supreme Court of Canada in *Spraytech v. Hudson*:³⁹ while municipalities (as statutory bodies) may exercise only those powers delegated by the province, the by-law in question – which restricted the use of federally-approved pesticides by a provincially-permitted firm – had the purpose of promoting the health of its inhabitants *as perceived by that municipality*. The existence of federal or provincial approval for the application of pesticides does not trump the ability of the municipality to restrict the use of those same pesticides within its jurisdiction. From such a perspective, the concerns of the municipality of Guadalcalzar over the safety and appropriateness of the waste treatment facility might appear more legitimate.

In *S.D. Myers*, one could argue that the interpretation of the relationship between the NAFTA and the Article 104 MEAs was erroneous (Mann, 2001). Nonetheless, it was the inference drawn from the Minister of Environment's "in Canada by Canadians" statement that was the basis of the Tribunal's conclusion that the intent of the regulation was to protect and foster a domestic waste treatment industry. Given the Tribunal's perspective, it is not surprising that the panellists read the Minister's "in Canada by Canadians" statement as being protectionist in intent; the point of this paper's proposal – that NAFTA's dispute resolution procedures should be expanded to include arbitrators from NACEC and NACLIC rosters – however, is that a Tribunal equipped with a wider range of viewpoints might be better placed to adjudicate disputes from a broader perspective with a longer-term outlook.

(ii) *Deepening the Discourse: A Proposal for Increasing the Stature of Amicus Curiae in NAFTA Arbitration Panels*

One potential means by which the NAFTA governments might initiate institutional adaptations and amendments to the procedures under the North American Documents, in order to elevate the status and effectiveness of the NAAEC and NAALC in relation to the

NAFTA, would be to require, as a matter of course, that Chapter 11 arbitration procedures are open to submissions from key stakeholders to the outcomes of the dispute. Operationally, this could mean that the parallel secretariats would routinely act as *amicus curiae* (“friends of the court”) to the NAFTA arbitration panels in every arbitration process. Under such an arrangement, the CEC and CLC would speak to the rights and responsibilities related to their respective agreements and represent the concerns and perspectives of the ecological and labour environments, respectively, in the trade matter at hand. This section briefly surveys some recent NAFTA tribunal rulings with respect to the involvement of *amicus curiae* in arbitration tribunals, reveals how governments have approached the issue in the World Trade Organization setting, and finally speculates on what impact such a change might have on NAFTA arbitration panel deliberations.

The NAFTA Record on Amicus Curiae

The controversies surrounding NAFTA’s Chapter 11 and the perceived disenfranchisement of North American governments and civil society, diminished at the expense of the expanding rights of corporations, have been most starkly highlighted in several of the rulings of the international arbitration panels. During the eight years that NAFTA has been in force, transnational corporations have sought to defend their Chapter 11 rights that, in their effect, have challenged public policies in the three NAFTA countries.

The predominant Chapter 11 dispute settlement process – governing investor-state disputes – is binding on both participants, and there are very limited opportunities to appeal or review a decision. Currently there have been seventeen such cases initiated. Generally, in Chapter 11 disputes, each Party appoints one arbitrator and the third (and presiding) member is jointly agreed upon. The arbitration takes place with limited public access to the written documents produced for the case, and no public access to the actual proceedings unless all participants agree to open them up (something that has not happened to date). The secrecy surrounding the investor-state process has been a major source of civil society criticism.

The most important NAFTA arbitration case that dealt with the issue of *amicus curiae* is *Methanex Corp. v. United States of America*.⁴⁰ Methanex Corporation, a Canadian marketer and distributor of methanol, submitted a claim to arbitration for alleged injuries resulting from a California ban on the use or sale in California of the gasoline additive MTBE (methyl tertiary butyl ether), which is used to increase oxygen content and act as an octane enhancer in unleaded gasoline. Methanol is a key ingredient used in the manufacture of MTBE.

Methanex contends that a March 1999 order by the State of California to ban the use of MTBE by the end of 2002 (in order to protect groundwater supplies and, by extension, protect human health and safety and the environment) expropriated parts of its investments in the United States in violation of Article 1110, denied it fair and equitable treatment in accordance with international law in violation of Article 1105, and denied it national treatment in violation of Article 1102. Methanex claims damages of over \$900 million U.S.⁴¹

The International Institute for Sustainable Development (IISD) sought leave to intervene in this case, requesting that it be permitted to submit an *amicus* brief (and make an oral presentation) to the Tribunal following an opportunity to examine the submission of the Parties. IISD also re-

quested that it be granted “observer status” at the proceedings. This request was based on the Institute’s contention that, *inter alia*, IISD’s expertise in the legal principles of sustainable development could assist the Tribunal in incorporating these principles into its deliberations. Methanex and Mexico opposed the IISD petition, while the United States and Canada formally supported the petition and the jurisdiction of the Tribunal to accept at least written *amicus* briefs.

In January 2001, the Tribunal ruled that it does have the authority to accept written *amicus* briefs, and that it is willing to accept IISD’s petition in the Methanex case.⁴² However, the Tribunal rejected the request to allow oral arguments by *amici* in the absence of the agreement of the litigating Parties, or to grant intervenor status to IISD.⁴³

Lessons from the World Trade Organization

While not setting a legally binding precedent, the ruling on *amicus curiae* in the *Methanex* case opens the door to the involvement of a wider array of “stakeholders” in Chapter 11 arbitration processes. The practical question remains, however: would the NAFTA parties agree to the inclusion of a requirement that the Labour and Environment Secretariats act as *amicus curiae* in every case before a NAFTA arbitration panel? (Alternatively, this might be achieved through a two part process: the Free Trade Commission could agree that stakeholders have a general right to file *amicus* briefs, and the respective Commissions have special rights in this regard; and the Labour and Environment Councils could agree that the respective Secretariats will, as part of their mandate, act as *amicus curiae* in every arbitration process).

The issue of *amicus curiae* has been more extensively debated within the World Trade Organization. In his opening address celebrating the 50th anniversary of the GATT, President Bill Clinton proposed “that the WTO provide the opportunity for stakeholders to convey their views, such as the ability to file *amicus* briefs to help inform the panels in their deliberations.”⁴⁴ While the Dispute Settlement Understanding (DSU) is silent with respect to whether a WTO Panel or the Appellate Body may accept an *amicus curiae* brief, Article 13(1) of the DSU provides that “each Panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate.” Further, according to Article 13(2) “Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter.” The WTO Appellate Body has interpreted these provisions as consistent with advocacy by *amici* stating that a Panel “has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not.” Mavroidis⁴⁵ argues that – while the DSU does not require Panels to receive *amicus* briefs (nor are they under any legal duty to either respond to the sender or to reflect the content of the briefs received in their findings) but Panels do have the right to invite, receive and consider them in their judgments – the whole issue led to such strenuous opposition from WTO members that the Appellate Body has effectively closed the door to *amicus curiae* in dispute processes.

Would Amicus Curiae Be a Friend Indeed?

Thus it is by no means certain that either the NAFTA Parties or the corporations that currently enjoy exclusive rights under Chapter 11 rules would wish to share those rights with a wide range of “stakeholders”. Canada did suggest in its submission to the

Methanex Tribunal that the NAFTA Parties should develop an agreement on the involvement of stakeholders; however, Mexico opposed the IISD petition. The ruling of the WTO Appellate Body was harshly criticised by several WTO member states, which “felt that non institutional players, like NGOs, could end up having more rights than WTO Members”.⁴⁶ Most of the opposition in the WTO setting has come from developing countries, which might foreshadow the opposition of Mexico to the inclusion of such an amendment in the NAFTA context.

As noted above, there is precedent for amending the rules for arbitrating NAFTA disputes.⁴⁷ However, the NAFTA ministers and the trade secretariat have not made explicit reference to the issue of rules for allowing *amicus curiae* to participate in hearings.

Mavroidis argues that NGOs might be motivated to develop and submit an *amicus curiae* brief for two reasons: to either provide an opinion as to how the facts of the case might be interpreted, or to impress upon the panel the wider public interest issues at play, and to demonstrate to the panel its role in the society in which it operates in a way that might not be obvious to the panel – thus acting as a bridge between the court and society, which – given the closed nature of trade panel proceedings – should not be underestimated in its importance.⁴⁸

B. Building and Strengthening North American Civil Society

The second element of the approach we propose for building a Sustainable North American Community centres on those organisations that occupy the space between markets and states – the set of institutions, associations and relationships that make up North American civil society. Based on voluntary interactions, civil society does not rely on the coercive power of legal structures to regulate behaviour, nor does it require profit and financial gain as an incentive to engagement and interaction. It operates independently of these motivations, relying on ideas such as caring, public service, common concerns and civic virtue to achieve what the state will not and what the market cannot.

Despite filling those gaps, however, civil society cannot on its own replace the market or the state. Markets are the efficient allocator of resources, guided by the “invisible hand” of financial incentives. The state is the creation of its citizenry, established as a response to market failures – externalities, public goods and inequities – and granted governing authority in exchange for our compliance with its laws and obligations. Voluntary activity is generally not able to achieve the level of activity that the market does, nor can civil society coerce and constrain behaviour as the state does. Civil society can, however, contribute to the effectiveness of governance and the market and through the influence of social capital. In communities with a healthy civil society based on trust, norms and networks, market transactions are facilitated with reduced transactions costs and compliance with laws is more likely.

(i) Pre-Millennial Enthusiasm for Civil Society Prospects

As North America entered the last decade of the 20th century – in an environment witness to the collapse of communism, the widespread perceived failure of the welfare state, growing disenchantment with western democratic systems, mistrust of neo-conservative economics as the means for meeting basic needs and values and perceived threats from expanding global economic forces – the time appeared ripe for the re-emergence of the concept of civil society. The optimistic perspective, that this environ-

ment could lead to an energised North American civil society, found its origins in two elements of the modern global economy itself: the potential network enhancing effect of information and communication technologies (ICTs), and the potential economic power residing in the purchasing and investment decisions of global citizens.⁴⁹

Around the time that Al Gore was inventing the Internet,⁵⁰ long before the dot-com boom and bust of the later 1990s, the information revolution was often heralded as a means by which the disenfranchised and powerless could level the playing field through forming networks with similarly dispossessed actors and gain virtual access to centres of decision-making. New ICT-based network-organisations – comprised of small, previously isolated groups using ICTs to communicate and coordinate their efforts to influence political decision-making and affect social change – were seen as the start of a trend.⁵¹

The effectiveness of the tactics of the new ICT-based network-organisations was well illustrated in the Mexican state of Chiapas in January 1994; it was there that the actions of the Zapatista National Liberation Army (EZLN), and the government's response, coalesced civil-society NGOs from throughout North America to support the EZLN's objectives.⁵² Another example of the potential for ICTs to mobilise civil society efforts was the opposition mounted to the proposed Multilateral Agreement on Investment (MAI).⁵³ MAI negotiations ran from late 1995 through early 1997 with little public attention until a leaked draft of the February 1997 negotiating text appeared on the web sites of public advocacy groups. From there, opposition to the MAI spread rapidly facilitated, in part, by the Internet.⁵⁴ In December 1998 the OECD announced that it had ceased negotiations on the MAI, largely because of a lack of support from OECD members – a result, perhaps of the public opposition mounted by the Internet-based campaign.

The ability of global consumers to influence governmental and corporate decision-making half a world away led British Columbia's Chief Forester to observe in 1994: "forest practices are no longer a provincial issue. They are an international issue."⁵⁵ The central arena for the internationalisation of British Columbia forests in the early 1990s was Clayoquot Sound, on the west coast of Vancouver Island and now a UNESCO Biosphere Reserve, with the protection of old growth forests being the focus.⁵⁶ The search for sustainability in Clayoquot Sound is an ongoing story, one that has occupied that region for at least the last fifteen years and continues to reveal challenges, dismay and inspiration.⁵⁷

During the early 1990s, local environmental groups in the region – such as the Friends of Clayoquot Sound, the Western Canada Wilderness Committee, Greenpeace and the Sierra Club of B.C. – were able to use concern over the sustainability of Clayoquot Sound as a springboard into a greater scale of operations with international exposure, cultivating links with foreign media, environmental groups and prominent U.S. politicians. And acting in concert with consumer groups, global environmental NGOs applied pressure and led boycotts designed to influence the purchasing practices of some of the province's biggest forest products customers – primarily newsprint buyers and lumber retailers. This international attention had clearly become a key influence in domestic decision-making in the early 1990s.⁵⁸

Cohen calls this internationalisation a central feature of the sustainable development paradigm that ultimately views the globe as a single ecosystem: "there is a growing reali-

zation that, while political boundaries will continue to exist, we are connected to human beings and to the natural environment in other parts of the world; humanity has no boundaries, and the environment has no boundaries.”⁵⁹ International environmental treaty making, which attempts to address actual deleterious impacts of transborder pollution, is the most obvious manifestation of this realisation. But the engagement of private consumer choices as a mechanism for affecting policy change was seen during the period as a powerful potential force.

(ii) Post-Millennial Reality Check

While we still remain hopeful that ICTs and reflexive-consumerism can be harnessed for positive social purposes, many challenges remain and the enthusiasm of a decade ago is less prevalent today. In the ICT realm, the optimistic perspective changed rapidly during the 1990s from the hopeful prospects for a “cyberocracy”⁶⁰ – where existing democratic institutions would open up to a wider array of “netizens”, and informed deliberation would emerge from the enhanced communication medium – to pessimism over the “digital divide”⁶¹ and “netwars”.⁶² Over the past few years, a distinction has emerged between those ICT-based/NGO-supported causes such as the 1994 Zapatista movement in Mexico (a “social netwar”) and the current image of ICT-using terrorist networks (a “violence-prone netwar”).⁶³ But while the Zapatista movement can be seen as “a violent insurgency in an isolated region [that] mutated into a non-violent though no less disruptive ‘social netwar’”,⁶⁴ in the post-September 11th “war on terrorism” environment it seems unlikely that such a mutation will occur in instances where disruptive efforts to force social change are labelled “terrorist activities”; thus the line between “social netwars” and “violent netwars” may have disappeared for the time-being, raising further challenges for ICT-based civil society activism.⁶⁵ In 2002, ICTs are bound up in globalisation, both as a facilitator of economic convergence and the means for contesting the neo-liberal global economic agenda. Despite the presence of many persuasive NGO websites and the use of ICT-networks to mobilise social activism,⁶⁶ the optimistic view of the Internet must reconcile itself to the current record showing the Internet as a medium principally oriented towards facilitating commerce⁶⁷ and satisfying individual pursuits.⁶⁸

Do consumers at the start of the new millennium represent a force that corporations and governments must acknowledge and respond to? There are still many advocates for the power of “ethical consumption” and the ability of consumer boycotts to influence targeted policies, and it is possible to point toward many campaigns in which the policy was reversed.⁶⁹ Whether the policy was changed because of the market impact, some wider public image impact of the campaign, or for other reasons, can be difficult to demonstrate conclusively. But it seems clear that no corporation or government would welcome a consumer boycott or consumer-targeted NGO campaign. What remains even more elusive are measures of the wide-scale effectiveness of NGO exhortations for consumers to choose products based on their production impacts; obviously, some consumers do regularly make purchasing decisions based on an assessment of the relative merits of competing products. For many consumers, however, lower prices, brand loyalty, perceptions that alternatives are of inferior quality, a failure to differentiate between point-of-use impacts and life-cycle impacts, and a failure to connect private consumption with the wider impacts remain key factors militating against a wide-scale adaptation of purchasing decisions in favour of lower-impact products.

Even for the reflexive consumer, making a difference can prove difficult. With limited knowledge of the inputs, processes and impact of a product, and an inability to verify any marketing claims, consumers must sometimes settle for *feeling* that their purchasing decisions make a difference. “Eco-certification” has emerged as one way of helping consumers make informed decisions and rewarding firms for adopting best practices. Highly developed in the labelling of forest products, certification involves the setting of ecologically- and socially-responsible production practices that are confirmed by the certification agency and communicated at the retail level.

*** how much more to get into certification? ***

(iii) North American ENGOS and the NAFTA Challenge

Reflexive consumerism is an important element in the building and strengthening of civil society, through the autonomous actions of individuals that might, through exhortation and information, minimise the impact from consumption and provide incentives for firms to adopt best practices. And we do not underestimate the necessity for sustainability to be grounded in behavioural changes at the individual level.⁷⁰ But when dealing with governments and large institutions, it is formal non-governmental organisations that provide the institutional capacity in civil society necessary for creating a coordinated structure in counter-balance to the power of the market and the authority of the state.

The role of ENGOS in policymaking has evolved in recent years; traditionally focussed on providing general environmental advocacy and acting as part of a policy network, many ENGOS now increasingly acting as auditors, monitors and facilitators of environmental policy implementation.⁷¹ In addition to becoming involved at early stages in the advocacy and policy development process, ENGOS are also increasingly involved throughout the policy-making process – through regulatory codification, monitoring and compliance. Other possible roles for ENGOS include: advocating effective legislative frameworks to address environmental concerns within broader economic initiatives (e.g., the parallel environmental accord to the NAFTA); playing key audit roles in both the rule-making and compliance stages of policy; pushing for international “soft law” approaches (e.g., framework conventions) to environmental protection; and pressing for the inclusion of a wider range of beliefs and values that can augment the market system.⁷²

In the specific context of the North American environment, civil society organisations can work to help develop a *de facto* North American Sustainability Charter through increasingly taking advantage of the provisions within the North American Documents to strengthen and enhance the representation of social and environmental issues vis-à-vis the economic imperatives of NAFTA. Primarily, this would mean filing “citizen submissions” under the NAAEC, through work on social issues could also be advanced through the NAALC.⁷³

The NAFTA parallel agreements (NAAEC and NAALC) were negotiated in order to assuage labour and environmental group concerns in the United States after the NAFTA was negotiated. These concerns were primarily driven by the belief that Mexico might purposefully and selectively choose to not enforce existing laws in order to attract or retain investment in their territories.⁷⁴ What seems remarkable, in light of this motive, is

that most NAAEC Article 14 submissions have been filed by ENGOs against their home governments – even in the United States whose citizens enjoy a range of domestic mechanisms for monitoring the enforce efforts of their governments.⁷⁵ Where certain non-enforcement allegations involved cases having transboundary implications, three bilateral cross-border collaborative filings have been made.⁷⁶ And in only two cases have ENGOs from all three countries jointly filed a submission.⁷⁷

Means by which this can occur include:

Increasingly challenge North American governments that purposefully and selectively choose to not enforce existing laws, using recourse to overarching legislation and principles to force the application of specific remedies;

Work to enhance the public input process of the parallel agreements to further enhance continental cooperation;

Argue for processes to be included in the parallel agreements allowing citizens to claim that a policy represents a “social-distorting” or “ecosystem-distorting” effect, thus elevating the rights of citizens to a par with those now enjoyed by corporations.

These two cases were filed against the United States Government and led by U.S.-based ENGOs. In the *Migratory Birds* submission,⁷⁸ nine ENGOs⁷⁹ led by the Washington-based Center for International Environmental Law alleged that the U.S. Government has failed to effectively enforce the Migratory Bird Treaty Act (MBTA) that prohibits the killing of migratory birds without a permit. The reasons for enlisting this range of North American ENGOs include the fact that the MBTA implements international treaties with Canada and Mexico,⁸⁰ submitters’ “common interest in protecting migratory bird populations shared by Canada, Mexico and the United States.”⁸¹ The submission also asserts that the “enforcement failure undermines the cooperative efforts of Canada, Mexico and the United States to maintain biodiversity, a goal which the CEC has explicitly recognized and recently adopted through its North American Biodiversity Conservation Project.”⁸²

The 1995 *Logging Rider* submission⁸³ was led by the U.S.-based Sierra Club and Sierra Club Legal Defense Fund and listed a total of 28 NGOs.⁸⁴ In it, the submitters alleged that certain provisions of the U.S. federal “Fiscal Year 1995 Supplemental Appropriations, Disaster Assistance and Rescissions Act” led to a failure to enforce effectively all applicable Federal environmental laws by eliminating private remedies for salvage timber sales. Specifically, the submission alleged that a rider in the Rescissions Act (the “logging rider”) provided that salvage timber sales shall not be subject to administrative review and that the sales shall be deemed to satisfy all federal environmental and natural resource laws. The reasons given for enlisting the Mexican and Canadian ENGOs was

because of their “interest in ensuring that the U.S. does not suspend enforcement of its environmental laws and thereby initiate a race to the bottom”.⁸⁵

5. *Concluding Thoughts*

- the realistic prospects for a Sustainable North American Community or North American Sustainability Charter – not great at present
- prevailing view will reign for some time to come.
- But we can only hope and work to build the boundary – bridging, culture – crossing understandings that will sustain a North American Community.

Endnotes

¹ Ref.

² Dobson, 2002 p. 1

³ Segal, 2002, p.2

⁴ Sokolsky, 2002

⁵ Canada-United States Relations Web Site of the Department of Foreign Affairs and International Trade at <http://www.can-am.gc.ca/menu-e.asp>, accessed June 5 2002.

⁶ The North American Institute (NAMI) is a public policy think tank with offices and members in Canada, the U.S.A. and Mexico, and a tri-national secretariat in Santa Fe, New Mexico. Established in 1988, NAMI works to promote new approaches to North American issues, deepen tri-national understanding, examine all aspects of the North American regional relationship and recognize the challenges facing the governments, peoples and cultures of North America. The lead author of this paper (Dobell) served as the President of NAMI-Canada from 1988 to 1998.

⁷ Ref NAMI website

⁸ Dobell, "Rapporteur's Summary"

⁹ Statement Agreed by U.S. Secretary of State Madeleine K. Albright, Mexican Foreign Secretary Rosario Green, and Canadian Foreign Minister Lloyd Axworthy, September 1999, New York, NY (archived information on the *North American Partnership* is available at http://www.state.gov/www/regions/wha/uscanmex_trilat). Background notes prepared by the lead author of this paper go a little further, suggesting ***

¹⁰ Council of Ministers for the North American Agreement on Labor Cooperation. *Four-Year Review of the North American Agreement on Labor Cooperation*, 1998. Available on the Commission's website, www.naalc.org

¹¹ Independent Review Committee. *Four-Year Review of the North American Agreement on Environmental Cooperation*, 1998. Available on the Commission's website, www.cec.org

¹² Douglas M. Johnston, *Consent and Commitment in the World Community* (Irvington-on-Hudson, NY: Transnational Publishers, 1997).

¹³ Firey, Walter. 1960. *Man, Mind and Land – A Theory of Resource Use*. Glencoe, Illinois: The Free Press.

¹⁴ While still useful as a broad metaphor, the three legged stool approach to sustainability has been superseded in large measure by other conceptualisations, e.g., Hodge, R. A. 1995. *Assessing Progress Toward Sustainability: Development of a Systemic Framework and Reporting Structure*. School of Urban Planning, Faculty of Engineering. Montreal: McGill University.

¹⁵ Ref.

¹⁶ See, e.g., the July 31, 2001 clarification to the dispute resolution provisions in the NAFTA. (Available at <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp>)

¹⁷ **Questions: To what extent have NAFTA tribunal decisions taken into account the agreement's environmental and social objectives? Do they rely solely or principally on the NAFTA text or do they also refer to the parallel agreements? What of other international environmental or social commitments?**

When the NAFTA was negotiated (around 1992 and UNCED), pressure from various quarters led to the negotiation of what was then considered by some to be "the 'greenest' trade agreement ever" (even in the absence of the parallel agreements). Have the interpretations of the arbitration panels lived up to this billing? If not, is this due to a misinterpretation of the text, the particular worldview of the panellists – or was the initial characterisation inaccurate? If the problem lies in the interpretation of the agreement, could an amended arbitration panel process work to better align the interpretation with the intention? Would the

inclusion of arbitrators selected from NACEC and NACLC lists (a large step beyond the previous *amicus curiae* proposal) arguably change the decisions of arbitration panels?

¹⁸ The NAFTA recognizes a state's sovereign right to protect public health and the environment. NAFTA's environmental and sustainability-related objectives found in the preamble include goals of:

- creating new employment opportunities and improving working conditions and living standards;
- undertaking each of the agreement's economic objectives in a manner consistent with environmental protection and conservation;
- preserving governments' flexibility to safeguard the public welfare;
- promoting sustainable development;
- strengthening the development and enforcement of environmental laws and regulations; and
- protecting, enhancing and enforcing basic workers' rights.

¹⁹ While Article 31(2) of the *Vienna Convention on the Law of Treaties* states that the preamble to a treaty is relevant to its interpretation, legal opinions and jurisdictional practices differ as to the importance of a treaty's preamble. These differences of opinion and practice appear to cleave along a common law / civil law divide. (N.B.: Throughout North America, there is a mix of common law and civil law traditions: Canada – mixed common law / civil law; Mexico – mixture of US constitutional theory and civil law; U.S. – common law). It is generally accepted that in civil law jurisdictions, interpreting an ambiguous statute requires the exploration of the intention of the legislature by examining the legislation as a whole. In common law jurisdictions, statutes are objectively constructed according to certain rules standing by themselves; in the Canadian context, the fundamental rule when interpreting statutes is to ascertain the intent of the legislature using one of three canons of construction: the "literal" or "plain meaning" rule, which relies on the precise words of the statute and does not infer any errors or omissions; the "golden" rule, where the ordinary sense of the words should be followed except where that leads to an absurdity or inconsistency; and the "mischief" rule, where a "mischief" or "defect" in the common law being addressed by a statute should be suppressed by the interpretation and the remedy advanced (Gall, Gerald L. 1983. *The Canadian Legal System*. 2nd Edition. Toronto: Carswell). There are also various "aids to statutory interpretation" for determining legislative intent, including: interpretation statutes (such as the *Vienna Convention*); definition sections within statutes; legislative context (e.g., other sections of the statute); other statutes of similar intent enacted by the same legislature; treatises and dictionaries; the same text in an official translation of the statute; and the statute's legislative history (see note 32, below) (Gall, 1983). Precedent is also important: common law statutes are read against a case law background, while civil law codes and statutes are the primary source of the law. And legal philosophy and tradition also play a role: "civil law judges are influenced by Rousseau's theory that the State is the source of all rights under the social contract, while English judges favour Hobbes' theory that the individual agreed to forfeit to the State only certain rights." (Tetley, William. 1999. "Mixed jurisdictions: common law vs. civil law [codified and uncoded]. [Part I]." *Uniform Law Review*, 1999-3, pp. 591-619).

Consider also two examples of respective Supreme Court interpretations of the respective preambles of the Canadian and U.S. constitutions: In the United States context, Chief Justice Marshall wrote (*Sturges v. Crownshield*, 17 US 122 at 202): "the spirit of an instrument, especially of a Constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words." The "spirit" residing within those "words" would seem likely to start with the preamble. In the Canadian context, Chief Justice Lamer wrote (*Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R.): "The preamble identifies the organizing principles of the Constitution Act, 1867 and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text... Although the preamble has been cited by this Court on many occasions, its legal effect has never been fully explained. On the one hand, although the preamble is clearly part of the Constitution, it is equally clear that it 'has no enacting force' ... But the preamble does have important legal effects. Under normal circumstances, preambles can be used to identify the purpose of a statute, and also as an aid to construing ambiguous statutory language."

²⁰ In chapter 1, language is included that gives deference to Multilateral Environmental Agreements (MEAs) in situations where the trade provisions of certain MEAs conflict with NAFTA rules (Article 104).

Article 104: Relation to Environmental and Conservation Agreements

1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:

- a) the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, done at Washington, March 3, 1973, as amended June 22, 1979,
- b) the *Montreal Protocol on Substances that Deplete the Ozone Layer*, done at Montreal, September 16, 1987, as amended June 29, 1990,
- c) the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, or
- d) the agreements set out in Annex 104.1,

Annex 104.1 – Bilateral and Other Environmental and Conservation Agreements

1. *The Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste*, signed at Ottawa, October 28, 1986.

2. *The Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area*, signed at La Paz, Baja California Sur, August 14, 1983.

²¹ Under chapter 7b's Sanitary and Phytosanitary Measures, NAFTA rules appear to permit Parties to adopt certain measures, which protect human, animal or plant life or health from the introduction or spread of a pest or disease or the presence of a contaminant or toxin in food or feed, without contravening trade rules. Such measures must, however, be based on "scientific principles" and "a risk assessment, as appropriate to the circumstances." The reliance on a science-based risk-assessment approach represents in itself a highly problematic requirement raising several tensions identified below.

²² Standards-Related Measures, covered in chapter 9, allow a Party to prohibit exports from another Party that do not comply with the importing Party's environmental standards (Article 904). Furthermore, Article 905 allows all levels of government to set their own environmental norms, even if they are stronger than international standards.

²³ Chapter 21, specifically Article 2101, covers general exceptions to NAFTA obligations, including exceptions for environmental measures to protect human, plant and animal life and health, and to conserve natural resources. However, while these exceptions are applicable to trade in goods, they are not applicable to the chapter 11 investment obligations.

²⁴ The first axiomatic provision holds that nothing in chapter 11 prevents a country from adopting, maintaining or enforcing an environmental measure that is otherwise consistent with the chapter.

²⁵ However, while this appears to place a stringent burden on the NAFTA Parties, the paragraph exhorts Parties to comply rather than require them to, and there is no mechanism for private parties to claim that a Party is in non-compliance with the Article. While the public submission process under the NAECC allows a citizen to claim that a Party is not enforcing its existing laws, if Article 1114 were made subject to a private party claim, Chapter 11 might begin to provide a check on public policy making – seen as detrimental to the North American environment – on a par with the investor rights provided for in Chapter 11.

²⁶ Environmental exceptions to the general prohibitions against performance requirements are contained in 1106 (2) and 1106 (6).

²⁷ Other environment-related cases include: *Ethyl Corp. v. Canada*, *Robert Azinian et al. (Desona de. C.V.) v. Mexico*, *Waste Management (Acaverde) v. Mexico*, (Nos. 1 and 2), *Sun Belt Water v. Canada*, *Pope & Talbot v. Canada*, *Methanex v. United States*, *Ketchum Investments Inc. and Tysa Investments Inc. v.*

Canada. These cases were not surveyed here as none have resulted in the release of a final ruling on the case's merits.

²⁸ The Tribunal also questioned the authority of the municipality of Guadalupe to reject the construction of a hazardous waste facility – supporting Metalclad's position that the federal and state governments were the only relevant authorities. This position runs contrary to some perspectives in sustainable development case law (e.g., *Spraytech v. Hudson*. 2001. Supreme Court of Canada. 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town). 2001 SCC 40. File No.: 26937; 2001: June 28. Available at http://www.lexum.umontreal.ca/csc-scc/en/pub/2001/vol2/html/2001scr2_0241.html), which argue that a crucial element of sustainability (one of the preambular principles underlying the NAFTA) lies in the ability of local governments to exercise decision-making authority over developments within their jurisdiction.

²⁹ **Interesting question arises: if the Tribunal found that the Canadian export ban was unjustifiable for environment protection reasons, would the American import ban be similarly unjustifiable?**

³⁰ See fn. 20, above.

³¹ An extensive additional opinion by Prof. Brian Swartz (Asper Professor of International Trade and Business Law at the University of Manitoba, and one of the Tribunal members) issued along with the ruling concurs with the conclusions of the Tribunal except to contend that the Canadian measures *did* amount to performance requirements. Prof. Swartz' additional opinion, while having no force or effect in the arbitration, includes *inter alia* a detailed lesson on the environmental benefits of NAFTA. Quoting from Prof. Schwartz' opinion: "A close examination of NAFTA and its surrounding agreements shows that NAFTA is actually environmentally friendly. It does not place trade above environmental standards. It generally permits public authorities to pursue whatever environmental objectives they desire, no matter how ambitious. Governments are basically only required by NAFTA to pursue those objectives in ways that do not *unnecessarily* interfere with NAFTA's provisions on free trade." (paragraph 25). Schwartz then defined the term *unnecessarily*: while a government is free to determine whatever environmental objective it deems appropriate, if a government could have accomplished the same environmental objective by an alternative measure that was reasonably available and that would have infringed less on free trade norms, the measure in question can be said to constitute *unnecessary interference* (paragraphs 26-27). This definition represents a particular approach to risk assessment: if the Canadian government position was that it was the ethical responsibility of Canada to treat its PCB waste disposal problem domestically, the "environmental objective" could only be met through an export ban; if one saw it as a global trade issue (and disregarded the Basel Convention in doing so), the export ban interfered with both the environmental objective *and* the free trade objective. Prof. Schwartz, one of Canada's leading legal scholars, reveals in his opinion how a compelling and learned interpretation of a legal text, uninformed by an environmental ethic, can lead to a position that is either unassailable or indefensible – depending on one's perspective. The particular perspective of this present paper is that Prof. Schwartz's additional opinion reveals a flawed approach to determining whether the government's objective represented a necessary response to NAFTA trade principles.

³² Paragraph 116, Partial Award. The Minister's answer to Parliament, recorded in Hansard (June 9, 1995), might have been interpreted differently. It was the Minister's questioner who drew the inference that requiring the domestic treatment of PCBs would assist in the development of the nascent domestic PCB disposal industry; yet the Minister's answer does not clearly identify the objective of the policy as the development of a domestic waste disposal industry. Further, the more contextualised and prepared statement by the Minister to the Canadian Bar Association Environmental Section on November 16, 1995 read: "We are meeting our obligations under the Basel Convention to dispose of our own PCBs. And this kind of action was supported by provincial and territorial environment ministers when they met in Charlottetown in 1989. The handling of PCBs should be done in Canada by Canadians. We have to take care of our own problems." (Paragraph 185, Partial Award).

In any event, by reverting to responses during oral question period, public speeches by the Minister, and second-hand accounts of what the Minister may have said (e.g., Paragraph 169, Partial Award), the Tribunal has taken a particularly American approach (indeed, appearing to revel in having unearthed a "smoking gun") to the interpretation of what the intention of Parliament was in this case (e.g., Paragraph 161,

Partial Award: “The intent of government is a complex and multifaceted matter. Government decisions are shaped by different politicians and officials with differing philosophies and perspectives. Each of the many persons involved in framing government policy may approach a problem from a variety of different policy objectives and may sometimes take into account partisan political factors or career concerns. The Tribunal can only characterize Canada’s motivation or intent fairly by examining the record of the evidence as a whole.”)

As noted above (see footnote 19), judges can apply a number of rules and aids in determining the intention of legislation; when it comes to the use of the statute’s “legislative history” and other surrounding records, however, Canadian judicial custom and convention (though undergoing some rapid evolution in recent years – REF**) appears quite clear: “A judge may not examine any of the legislative debates contained in Hansard nor any speeches given by, for example, the minister responsible for the bill, nor any proceedings or reports of a parliamentary committee, nor any other extrinsic aid of that nature.” (Gall, 1983, p. 257). Such an approach is based on the premise that a statute, in its final enactment, represents the embodiment of all of its legislative history – the sum total of all parliamentary debates, committee reports and other elements. Contrast this with the U.S. context, where “all elements of legislative history, including debates in Congress and other legislative bodies, reports of congressional committees, etc., are admitted in determining legislative intent.” (Gall, 1983, p. 257). If the tribunal had taken the Canadian approach to determining the intention of the Minister, they could have read the explanatory note to the November 1995 interim order: “The purpose of the Interim Order is to ensure that Canadian PCB Wastes are managed in an environmentally sound manner in Canada and to prevent any possible significant danger to the environment or to human life or health.” (*PCB Waste Export Interim Order, Amendment to Section 4 of the PCB Waste Export Regulations*. November 20, 1995).

33 Note the possible parallel to the congressional investigation of Cheney’s energy report. If the advice that political executives receive from the civil service can be used as evidence when determining legislative intent, does that provide a disincentive against offering frank and varied opinions?

³⁴ Paragraph 185, Partial Award.

³⁵ Howard Mann, 2001. p. 90.

³⁶ NAFTA, Article 1123: Number of Arbitrators and Method of Appointment

³⁷ NAFTA Article 2009 (Roster) reads:

1. The Parties shall establish by January 1, 1994 and maintain a roster of up to 30 individuals who are willing and able to serve as panelists. The roster members shall be appointed by consensus for terms of three years, and may be reappointed.

2. Roster members shall:

(a) have expertise or experience in law, international trade, other matters covered by this Agreement or the resolution of disputes arising under international trade agreements, and shall be chosen strictly on the basis of objectivity, reliability and sound judgment;

(b) be independent of, and not be affiliated with or take instructions from, any Party; and

(c) comply with a code of conduct to be established by the Commission.

³⁸ NAAEC Article 25 (Roster) reads:

1. The Council shall establish and maintain a roster of up to 45 individuals who are willing and able to serve as panelists. The roster members shall be appointed by consensus for terms of three years, and may be reappointed.

2. Roster members shall:

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- (a) *have expertise or experience in environmental law or its enforcement, or in the resolution of disputes arising under international agreements, or other relevant scientific, technical or professional expertise or experience;*
 - (b) *be chosen strictly on the basis of objectivity, reliability and sound judgment;*
 - (c) *be independent of, and not be affiliated with or take instructions from, any Party, the Secretariat or the Joint Public Advisory Committee; and*
 - (d) *comply with a code of conduct to be established by the Council.*

The relevant section in the NAALC (Article 30) is identical, *mutatis mutandi*.

³⁹ 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town). 2001 SCC 40. File No.: 26937; 2001: June 28. Available at http://www.lexum.umontreal.ca/csc-scc/en/pub/2001/vol2/html/2001scr2_0241.html

⁴⁰ The issue was also raised in *United Parcel Service of America v. Government of Canada*. United Parcel Service of America, Inc., a U.S.-based courier, has submitted claims against Canada under the UNCITRAL rules, claiming that Canada Post, as a letter mail monopoly, engages in anti-competitive practices: in providing its non-monopoly courier and parcel services (Xpresspost and Priority Courier), it, allegedly, unfairly uses its postal monopoly infrastructure to reduce the costs of delivering its non-monopoly services. Both the Canadian Union of Postal Workers (CUPW) and the Council of Canadians sought leave to intervene and participate as *amicus curiae* in this case, and to be made a party to the proceedings. In October 2001, the Tribunal hearing this case ruled that it was within its power to accept written *amicus* briefs from the Petitioners, but in all other respects the Petitions were rejected.

⁴¹ As part of its strategy, Methanex filed a submission under Article 14 of the *North American Agreement on Environmental Cooperation*, asking the CEC Secretariat to develop a factual record on California's enforcement of its environmental regulations on underground gasoline tanks and the performance of small two-stroke motors. Methanex claimed if these laws were properly enforced, there would be no need to ban MTBE. In January, a second Canadian manufacturer of MTBE initiated a second submission on this same issue. However, under Articles 14(3) and 45(3) of the NAAEC, no factual records can proceed because the subject matter is being considered in an international law proceeding, and such duplication is not permitted in the submission process. Both have therefore been terminated.

⁴² *Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions From Third Persons to Intervene as "Amici Curiae,"* 15 January, 2001. Note that arbitration panels have the ability to hear from environmental experts (cf. Article 1133: ... a Tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.)

⁴³ In determining whether several Canadian ENGOs would be granted intervenor status in the appeal of the S.D. Meyers v. Canada tribunal ruling, the Federal Court of Canada noted that:

A party seeking intervenor status must establish three things: it has an interest, that is a direct legal interest, in the outcome of the litigation; its rights will be seriously affected by the litigation; and, it will bring to the Court a point of view different from those of the parties. Its intervention must constitute an enhancement to the proceedings, not a distraction, and it is not permitted to redefine or expand upon the issues which have been legitimately brought before the Court by the parties to the action. In *Canadian Council of Professional Engineers v. Memorial University of Newfoundland* (1997), 75 C.P.R. (3d) 291 at 294, Rothstein, J. considered these criteria and concluded as follows:

The Court must be concerned with the expeditious and efficient progress of litigation, always having regard to fairness to the parties and indeed to the proposed intervenors. Expeditiousness and fairness considerations, I think, are at the root of the conditions that must be met by proposed intervenors. Where the rights of intervenors are not affected by the litigation and the intervenors are not shown to add anything new to the issues, the Court cannot allow itself to become bogged down with an expansion of participants in the litigation. While some authorities

suggest that the rules of court may be used to avoid or reduce delay or expense, from a practical perspective, the addition of participants will almost inevitably complicate the proceedings and result in some additional time and expense.

⁴⁴ President William J. Clinton. 1998. "Remarks by the President at the Commemoration of the 50th Anniversary of the World Trade Organization." May 18, 1998. This view was reiterated in the "Preliminary View of the United States Regarding Review of the [WTO] Dispute Settlement Understanding," October 29, 1998 and in the "Prepared Statement of Ambassador Susan Esserman, Deputy U.S. Trade Representative," WTO General Council Session, Geneva, Switzerland. July 29, 1999. The authors have written to the Office of the United States Trade Representative inquiring as to whether this policy has changed under the current administration, but a response was not forthcoming prior to publication.

⁴⁵ 2001

⁴⁶ (Mavroidis, 2001)

⁴⁷ On July 31 2001, the Trade Ministers of Canada, the United States and Mexico (the North American Free Trade Commission) announced that they had agreed to the interpretation of certain provisions of NAFTA's Chapter 11. See "Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, July 31, 2001)" at <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp> The announcement states that there is nothing in the NAFTA rules (with limited exceptions) that restricts Parties from releasing, or that compels them to keep confidential, any documents submitted to or issued by a Chapter 11 arbitration panel. It further says that there is nothing in the rules of arbitration (ICSID or UNCITRAL) that imposes such restrictions either, other than certain, very limited specific exceptions. Finally, it pledges that the Parties to a Chapter 11 dispute will "make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal", subject to possible exceptions. See also IISD. 2001. "Note on NAFTA Commission's July 31, 2001, Initiative to Clarify Chapter 11 Investment Provisions". Winnipeg: International Institute for Sustainable Development. Available at http://www.iisd.org/pdf/2001/trade_nafta_aug2001.pdf

⁴⁸ Mavroidis, 2001

⁴⁹ Robert Putnam has also noted that the last great surge in civil society building in North America occurred in response to a parallel set of challenges approximately 100 years ago. By the late 19th century, a half-century of dramatic technological and social change had fundamentally changed American society, which "displayed classic symptoms of social capital deficiency: huge problems in the cities, concerns about political corruption, and growing class antagonism. Then, within the next two decades, American civil society righted itself in one of the nation's greatest bursts of social innovation. Virtually all of the major civic institutions that endure to this day were created during these 20 years: the YWCA, the Boy Scouts, the American Red Cross, the League of Women Voters, the NAACP, the Urban League, trade unions, fraternal organisations, and many others. Almost all of these institutions were created in response to the decay and irrelevance of earlier forms of social connectedness." Saguro Seminar. 1999. *The Saguro Seminar: Civic Engagement in America. An initiative launched by Professor Robert D. Putnam at the John F. Kennedy School of Government at Harvard University.* <http://www.ksg.harvard.edu/~saguro>

⁵⁰ An explanation of how a vague comment by former U.S. Vice President Al Gore was transformed from not-wholly-inaccurate claim to the butt of many jokes can be found at Declan McCullagh (2000) "The Mother of Gore's Invention." *Wired News*. Oct. 17, 2000. <http://www.wired.com/news/print/0,1294,39301,00.html>

⁵¹ David Ronfeldt of the RAND Organization was a leading scholar in this arena during the 1990s, and there was persuasive empirical evidence to support the optimism of the theory. See, e.g., David F. Ronfeldt (1991) *Cyberocracy, Cyberspace, and Cyberology: Political Effects of the Information Revolution*. RAND Document #P-7745; David F. Ronfeldt (1993) *Institutions, Markets, and Networks--a Framework About the Evolution of Societies*. RAND Document #DRU-590; David F. Ronfeldt, Cathryn Thorup, Sergio Aguayo, and Howard H. Frederick (1993) *Restructuring Civil Society Across North America in the Information Age: New Networks for Immigration Advocacy Organizations*. RAND Document #DRU-599; David F. Ronfeldt and Cathryn Thorup (1994) "NGOs, Civil Society Networks, and the Future of North America." In *Trans-Border Citizens: Networks and New Institutions in North American*. Rod Do-

bell and Michael Neufeld (eds.). Lantzville, B.C.: Oolichan. David F. Ronfeldt and Cathryn Thorup (1995) *North America in the Era of Citizen Networks: State, Society, and Security*. RAND Document #P-7945.

⁵² See David F. Ronfeldt, John Arquilla, Graham E. Fuller, Melissa Fuller (1998) *The Zapatista Social Netwar in Mexico*. RAND Document #MR-994-A.

⁵³ The MAI was initiated at the Organisation for Economic Co-operation and Development (OECD) in order to provide a comprehensive framework of rules for the liberalisation and protection of foreign investment, together with effective dispute settlement procedures. In addition to the 29 OECD member countries and the European Union, eight non-member countries participated in the negotiations as observers. The agreement was also designed to be open to accession by any non-OECD country.

⁵⁴ Peter J. Smith and Elizabeth Smythe (1999) "Globalization, Citizenship and Technology: The MAI Meets the Internet." *Canadian Foreign Policy*, Vol. 7, no. 2, pp. 83-107.

⁵⁵ Quoted in Cohen, David. 1994. "Domestic Land-Use Decisions Under International Scrutiny." Paper presented at the North American Institute Forum *North American Environmental Co-operation: Transition to Sustainable Development?* March 1994. Vancouver, B.C.: North American Institute. Copy on file with authors.

⁵⁶ Other B.C. areas and issues of particular international concern throughout the 1990s have been the Tatshenshini-Alsek area in northwest B.C., the Carmanah and Walbran Valleys south of Clayoquot Sound, the Khutzeymateen and Kitlope areas on the province's central coast, and native land claims and forest practices generally.

⁵⁷ The authors of this present paper are, respectively, the Principal Investigator and Project Coordinator of the *Clayoquot Alliance for Research, Education and Training* at the University of Victoria. This project, funded under the "Community-University Research Alliance" (CURA) envelope of the Social Sciences and Humanities Research Council of Canada (SSHRC), is a partnership of the University of Victoria and the Clayoquot Biosphere Trust founded with the goals of: forging creative links between the university community and the local community in Clayoquot Sound; providing a forum in which community interests and needs become research concerns; and making the education and training resources of the University more accessible to members of the Clayoquot Sound community. More information on the project is available at <http://web.uvic.ca/padm/crt>

⁵⁸ Jeremy Wilson (1998) *Talk and Log: Wilderness Politics in British Columbia*. Vancouver: UBC Press.

⁵⁹ Cohen, op. cit., p.2. This realisation is not limited to environmental issues. The recent unprecedented action by NATO to intervene in the Kosovo conflict represents a significant shift on the part of the international community, in what would have hitherto been considered an "internal dispute." Having recently witnessed the horrors of the Bosnian civil war, the world community found itself unwilling to stand by and watch Kosovo unfold similarly under the rhetoric of national sovereignty.

⁶⁰ David F. Ronfeldt (1996) *Cyberocracy Is Coming*. RAND Document #RP-222

⁶¹ The "digital divide" concept primarily centres on the income and demographic characteristics that affect an individual's access to ICTs; this traditional model has recently been characterised as an "analogue divide" centring more on questions of basic literacy, one's capacity for citizen engagement and the willingness to assert one's agency as a citizen (see Justin Longo and Chris Corbett. 2002. "reconsidering e-governance in the context of the analogue divide: socio-demographic and literacy barriers to internet use and their implications for the future of electronically mediated citizen involvement, citizen engagement and citizen agency." Centre for Public Sector Studies – E-Government Forum Working Paper. Available at <http://web.uvic.ca/~jlongo/analoguedivide.pdf>).

⁶² John Arquilla and David F. Ronfeldt (2001) *Networks and Netwars: The Future of Terror, Crime, and Militancy*. RAND Document #MR-1382-OSD.

⁶³ *Op. cit.*, Arquilla and Ronfeldt.

⁶⁴ Ronfeldt *et al.* (1998) *op. cit.*

⁶⁵ At a conference on “e-terrorism” and protection of computer-record privacy, the Canadian federal government’s Office of Critical Infrastructure Protection and Emergency Preparedness (<http://www.ociepc-bpiepc.gc.ca/>) identified “hactivists” as “protesters in cyberspace with a deviating ideology of social and political issues” and described other threatening cyberspace groups as “e-terrorists” (those who “want to instil fear by making a statement that is seen, felt and remembered”) and “ordinary hackers” (“punks who do it for glory, power or money”). Despite the “e-terrorism” hook employed by the conference organisers, “speakers were low-key about terrorists, and steered clear of the kind of rhetoric U.S. security experts are using in the wake of the Sept. 11 attacks on the World Trade Center and the Pentagon.” Jack Kapica (2002) “Thwart cybercrime with education, experts say.” *The Globe and Mail*, Friday, June 14, 2002.

⁶⁶ The Ruckus Society, an Oakland-based NGO that “provides training in the skills of non-violent civil disobedience to help environmental and human rights organizations achieve their goals” convened its first annual *Tech Toolbox Action Camp* in June 2002, designed to “bring together activists to talk about how they’re using the Internet and other technologies in working for change – and to show others how to do the same.” (<http://ruckus.org>) Topics included electronic organizing (effective use of email, internet broadcast, web sites, online fundraising, interactive tools); independent media; secure collaboration (encryption, viruses, firewalls, privacy); tactical communications / electronic intelligence (communications, surveillance and counter-surveillance); and related policy issues (e.g., bridging the digital divide, open source software, privacy and intellectual property rights, culture jamming, “cyber civil disobedience”).

The *Action Camp* (and the Ruckus Society) was characterised differently by the Office of Critical Infrastructure Protection and Emergency Preparedness (OCIEPEP). In noting that “the bad guys out there are educating themselves,” OCIEPEP cited the action camp as a training session in “on-line activism, such as which kinds of computer attacks work and which don’t, how to ‘beat the heat’ (the police) when arrested, and what to do when police burst through the door and shout ‘don’t touch that keyboard!’” *Ibid*.

⁶⁷ Despite some limitations (n.b.: the data in this table presents some analytical challenges that are not resolved here, e.g., these types apply to U.S.-registered sites but do not include country-specific sites (e.g., .ca, .us and .mx sites); there is no prohibition against a non-U.S. entity registering a site under one of these types, nor is there a requirement that an entity register its site under its country code; it is not clear whether .net sites are primarily commercial; civil society organisations could conceivably have a .com or .net registration.), the following table shows that the number of commercial sites is over three orders of magnitude greater than sites register as .org

Distribution of Selected Top-Level Domain Names by Host Count, January 2002

| Type | | # of Hosts |
|------|---------------|------------|
| net | Networks | 47,761,383 |
| com | Commercial | 44,520,209 |
| edu | Educational | 7,754,038 |
| mil | US Military | 1,906,902 |
| org | Organizations | 1,321,104 |
| gov | Government | 793,031 |

Source: Internet Software Consortium (<http://www.isc.org/>)

⁶⁸ Ref: StatsCan studies on “what people are doing on-line”.

⁶⁹ E.g., see “Ethical Consumerism – Some Successes.” <http://www.ethicalconsumer.org/aboutec/successes.htm>

⁷⁰ Ref: Longo presentation at SSHRC MCRI Salon de Recherche; Dobell papers.

⁷¹ Rod Dobell (1998) “Evolution and the Role of ENGOs in North America.” *The Role of Environmental Non-Governmental Organizations (ENGOs) in North America – Report from a Workshop*. February 1995. Santa Fe: North American Institute.

⁷² Alternatively, grass-roots environmental organisations often play a less political, more operational role in civil society. Such groups are often formed to meet specific objectives in clearly defined geographic areas (e.g., habitat restoration of a particular creek), and members often volunteer their efforts to help meet those objectives – as opposed to larger ENGOs which typically rely on financial contributions from members to reach their goals. The distinction between grass-roots ENGOs and their larger cousins was brought into stark contrast in the United States following the apparent “capture” of the mainstream ENGOs by the new Clinton Presidency in the early 1990s: “The big environmental groups ... are too timid or too indented to speak of the nation’s real problems... The movement now finds itself in near-total disarray; viewed as sell-outs and detested by grass-roots activists... Lacking in political vision; fragmented; marginalized; dispirited; co-opted; stumbling in directions that can only reinforce the status quo.” (Rachel’s Environment and Health Weekly #425 – January 19, 1995. “Big-Picture Organizing, Part 5: A ‘Movement’ in Disarray”, quoted in Dobell, *op. cit.*) The advancement of environmental and sustainability issues through civil society clearly requires efforts on both of these fronts – political and operational – although the impact of grass-roots organisations on system conditions is easier to attribute than are the broader social-political effects of monitoring and advocacy carried out by larger ENGOs.

⁷³ NAAEC Article 14 (Submissions on Enforcement Matters) provides an avenue for NGOs or individuals “residing or established in the territory of a Party” to argue “that a Party is failing to effectively enforce its environmental law.” The NAALC requirement is less stringent: Article 16(3) of the Labour Agreement creates a channel for public participation, instructing each National Administrative Office “to provide for the submission and receipt of public communications on labour law matters arising in the territory of another Party.” Each NAO has defined and published guidelines for the submission and receipt of public communications, differing in important aspects in accordance with the respective national institutional traditions. All of the public communications submitted to date have raised concerns regarding a lack of enforcement of existing labour laws. The NAALC also contains formal processes for independent analysis of the enforcement of labour laws using Evaluation Committees of Experts and for the resolution of disputes; however, neither these processes nor bodies have yet been established.

⁷⁴ John J. Audley (1997) *Green Politics and Global Trade: NAFTA and the Future of Environmental Politics*. Washington, D.C.: Georgetown University Press.

⁷⁵ David L. Markell (2001) “The Citizen Spotlight Process.” *The Environmental Forum*. March / April, 2001, p. 32.

⁷⁶ Between 1995 and 2002, a total of 34 submissions were filed with the CEC Secretariat. Source: CEC Secretariat, “Citizen Submissions on Enforcement Matter,” available at <http://www.cec.org/citizen>

⁷⁷ Chris Tollefson (2002) “Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime.” *Yale Journal of International Law*. Winter 2002. Vol. 27, no. 1, p. 169.

⁷⁸ Center for International Environmental Law (1999) “Submission to the Commission on Environmental Cooperation Pursuant to Article 14 of the North American Agreement on Environmental Cooperation.” A14/SEM-99-002/01/SUB (Re United States); date filed: 19 November 1999 (re: failure of the U.S. Government to effectively enforce Section 703 of the Migratory Bird Treaty Act). Available at <http://www.cec.org/citizen>

⁷⁹ The ENGOs listed on the submission are: Alliance for the Wild Rockies (Boise, Idaho); Center for International Environmental Law (Washington, D.C.); Centro de Derecho Ambiental del Noreste de Mexico (Chihuahua); Centro Mexicano de Derecho Ambiental (Mexico City); Friends of the Earth (Washington, D.C.); Instituto de Derecho Ambiental (Zapopan, Jalisco); Pacific Environment and Resources Center (Washington, D.C.); Sierra Club of Canada (Toronto); and West Coast Environmental Law Association (Vancouver).

⁸⁰ The Migratory Bird Treaty Act (MBTA) implements the Convention between the United States (US) and Great Britain (on behalf of Canada) for the Protection of Migratory Birds in the US and Canada; and the Convention between the US and Mexico for the Protection of Migratory Birds and Game Mammals. Also listed as requirements under the MBTA are the Convention between the US and Japan for the Protection of Migratory Birds in Danger of Extinction, and their Environment; and the Convention between the US

and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment.

⁸¹ CIEL, *op cit.*, p. 19.

⁸² *Ibid.*, p. 20.

⁸³ Sierra Club Legal Defense Fund (1995) "Submission Pursuant to Article 14 of the North American Agreement on Environmental Cooperation on the U.S. Logging Rider." A14/SEM/95-002/01/SUB (Re United States); date filed: 30 August 1995 (re: failure to enforce effectively all applicable Federal environmental laws by eliminating private remedies for salvage timber sales). Available at <http://www.cec.org/citizen>

⁸⁴ The listed ENGOs were: Sierra Club (San Francisco); Alaska Center for the Environment (Anchorage); Ancient Forest Rescue (Boulder); Friends of the Earth (Washington, D.C.); Headwaters (Ashland, Oregon); Hells Canyon Preservation Council (Joseph, Oregon); Idaho Conservation League (Boise, Idaho); Inland Empire Public Lands Council (Spokane); Institute for Fisheries Resources (Eugene, Oregon); Klamath Forest Alliance (Etna, California); National Audubon Society (Washington, D.C.); Natural Resources Defense Council (San Francisco, California); Northcoast Environmental Center (Arcata, California); Northwest Ecosystem Alliance (Bellingham); Oregon Natural Resources Council (Portland, Oregon); Pacific Coast Federation of Fishermen's Associations (Eugene, Oregon); Pacific Rivers Council (Portland, Oregon); Pilchuck Audubon Society (Stanwood, Washington); Portland Audubon Society (Portland, Oregon); Seattle Audubon Society (Seattle); Southern Rockies Ecosystem Project (Nederland, Colorado); Western Ancient Forest Campaign (Washington, D.C.); The Wilderness Society (Washington, D.C.); Earthlife Canada Foundation (*operating as* BC Wild - Vancouver); Environmental Resource Centre of Alberta (Edmonton); Centro Mexicano de Derecho Ambiental (Mexico City); Grupo de Los Cien (Mexico City); Red Mexicana de Accion Frente al Libre Comercio (Mexico City).

⁸⁵ Sierra Club, *op cit.*, p. 16.