IMPROVING THE PROCESS: DISPUTE RESOLUTION MECHANISMS FOR THE PROPOSED FREE TRADE AREA OF THE AMERICAS (FTAA)

CLIENT:

Quebec Environmental Law Centre (QELC)

RESEARCHERS:

Rachel Anderson; Aurore d'Anselme;
Anne-Laure Bouvier; Jason Found;
Christine Grossutti; Kurt Houghton;
Heidi Lajoie; Becky Lipton; Jay Ploss;
Meredith Wain

FACULTY SUPERVISOR:

Professor Jaye Ellis, Faculty of Law

SCHOOL OF ENVIRONMENT
MCGILL UNIVERSITY, DECEMBER 6TH, 2001

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The Issue: The Free Trade Area of the Americas (FTAA) is in the process of being created. Using existing free trade regimes and their dispute resolution mechanisms (DRMs) as examples, it is clear that such regimes often overlook non-trade related considerations, such as the environment. This trend will likely continue under the FTAA unless its DRM differs significantly from those of existing trade regimes.

Research questions:

1. How do the current trade DRMs of the General Agreement on Tariffs and Trade and the World Trade Organization (GATT/WTO) and the North American Free Trade Agreement (NAFTA) function?
2. What weaknesses in the processes of these existing DRMs prevent "good" decisions from being reached?
3. How can these processes be improved upon to provide DRMs for the FTAA that will result in "good" decisions?

Methodology: A literature review was conducted to broaden our understanding of how the DRMs of WTO/GATT, NAFTA, and the future FTAA function, and to reveal weaknesses in these mechanisms. A list of potential recommendations for the DRM of the FTAA was drafted and brought before individuals from diverse areas of interest and expertise in interviews to gauge their responses and include additional recommendations. The pros and cons of each recommendation, as revealed through the literature and interviews, were considered in determining their desirability.

Recommendations: We advise the following be applied to the DRM of the future FTAA:

1.1 Publication of all dispute settlement proceedings at all stages of the process.
1.2 Publication of documents through major mass media.
2.1 Publication of panelists' names and backgrounds.
2.2 More stringent regulations preventing conflicts of interest of panelists.
3.1 Require consideration of submissions from third parties (i.e. amicus briefs).
3.2 Institutionalize consultation of neutral advisory bodies.
3.3 Diversify panelist roster to include expertise beyond trade.
5.1 Provide funds and technical assistance for nations and small organizations to access the process.

We feel that these recommendations will help the FTAA move toward a dispute settlement process in which decisions reflect the concerns of those effected by an issue, take into account all expertise pertaining to the issue, and are fully transparent to all stakeholders.

PREFACE

This report represents the work of ten researchers directed by the Quebec Environmental Law Center (QELC) to investigate the ways in which the Dispute Resolution Mechanisms (DRMs) of the proposed Free Trade Area of the Americas (FTAA) might be made more sensitive to non-trade issues, and the environment in particular. This field of investigation is extremely complex and nuanced – as would be expected of a field that lies at the intersection of international relations, macroeconomics, sustainable development, political science, and environment. In discussing the issues within, we have sought to highlight our assumptions, declare our biases, and balance our opinions with those of other scholars. We are confident that this report will be of use in the creative institution building that the rapidly changing economies and ecologies of our planet demand.

INTRODUCTION

Free trade regimes have the goal of improving the welfare of the peoples of their member countries through the promotion of predictable and secure international commerce (WTO, 2001). This is done through providing: (1) a forum for member countries to negotiate trade liberalization[1], and (2) dispute resolution mechanisms (DRMs) which serve to enforce the rules which are established through these negotiations (WTO, 2001). However, it is not clear that trade liberalization is always an appropriate means for improving welfare – in particular where the environment is concerned.

Perhaps the most direct way of framing the conflict that exists between the agenda of free trade regimes and that of environmentalists is as follows: while free trade regimes seek to constrain government policy in favour of free markets, environmentalists seek to constrain free markets in order to correct their historic and ongoing failure to meet environmental goals (Shrybman, 2000). Although free trade regimes have recently begun to address these concerns by including language which provides for exceptions to trade liberalization on the grounds of environmental protection (Housman 1994), there remains a great deal of criticism from the environmental community both towards the extent and nature of this language, and the ability of free trade regimes to properly interpret it in the course of resolving disputes. (Housman, 1994; IISDa)

As part of a larger project initiated by the Quebec Environmental Law Center (QELC) in order to study the trade and environment conflict, this research group opted to focus on **how the *process* of resolving disputes through DRMs might**

[1] Trade liberalization generally involves reducing or eliminating national policies which act as barriers to trade, creating regulations to counter overly aggressive trade practices (such as 'dumping'), and providing foreign investments protection from appropriation (NAFTA, 1992).

be improved for the proposed Free Trade Area of the Americas (FTAA). This decision was motivated chiefly by the critical role DRMs play in the actual execution of free trade policy (WTO, 2001) and consequently how it effects the environment.

In order to study and produce recommendations for the DRMs of the FTAA, we used as case studies the DRMs of the two principal North American free trade agreements: the General Agreement on Tariffs and Trade/World Trade Organization (GATT/WTO), and the North American Free Trade Agreement (NAFTA)). Additionally, the non-trade DRM of the North American Agreement on Environmental Cooperation (NAAEC) was used as a source of options. Criticism related to these agreements was gathered from academic literature, regime texts, non-governmental organizations (NGOs), and a series of interviews conducted with experts in trade, law, environment, and political science. In an investigation of this sort, it is very difficult to judge how much information is "enough," and consequently the breadth of our research reflected an attempt to adequately treat the scope of our project within time (three months) allotted to us.

The options which were considered for recommendation included:

1. The mandatory publication of all dispute settlement proceedings at the appropriate time.

2. Publication of proceedings via mass media

3. The mandatory publication of panelists' names and backgrounds.

4. More stringent regulations to prevent conflicts of interest.

5. Requiring panels to consider submissions from third-parties with a demonstrated interest

6. Requiring the consultation of advisory bodies.

7. Requiring specialists on panels for disputes which encompass issues beyond trade
8. The provision of access to domestic governmental mechanisms to raise concerns about DRMs.

9. Holding public hearings

10. Providing funds and technical Assistance to developing nations and small non-governmental organizations.

A CASE-STUDY

In March 1999, the state of California passed a ruling which ordered the complete phase out of methyl tertiary butyl ether (MTBE), a gasoline additive, by the year 2002. Their reason for doing so was that the additive contaminates drinking water supplies; therefore, putting both human and environmental health at risk. In response, the Canadian company Methanex, a major producer of methanol, which is a key component of MTBE, put forth a claim under the investor dispute settlement process in Chapter 11 of NAFTA. Methanex claimed that the ban was essentially an expropriation of the company's investment, and that it violated several of NAFTA's Articles, including national treatment[2] and minimum international standards of treatment provisions. Methanex was seeking financial compensation of $900 million U.S. (IISDb)

The International Institute for Sustainable Development (IISD), a non-governmental organization (NGO) who pays significant attention to both trade and public interest issues, identified that it had relevant expertise and knowledge to add to the ruling of the case. The IISD's argument for acceptance of their amicus brief[3] was based on the fact, according to the IISD, that the Methanex case included public interests, differentiating it from most private or commercial arbitration, and that the IISD would help to represent those interests; increased public participation would increase public confidence in the system; and submissions such as these should be accepted as they fall under the United Nations Centre for International Trade Law's guidelines for arbitration.

[2] The principle of national treatment states that foreign products "shall be accorded treatment no less favourable" than local or domestic products.

[3] An amicus brief is an informative report given to a tribunal by an individual or organization who is not party to the dispute, but who believes that the tribunal's decision may affect its interest.

Methanex immediately opposed the tribunal's acceptance of the IISD's amicus brief arguing that the tribunal did not have the authority to accept the petition, and if it did, future arbitration would be flooded with others. In January 2001, the tribunal ruled that it did have the authority to accept amicus briefs, although they did not actually order on its allowance in this specific situation. The Methanex case is still in the initial stages and the tribunal has not yet begun to arbitrate the actual case. However, if the tribunal does decide to accept the IISD's submission, it would be a significant move forward for public participation in the dispute settlement procedure, as well as for a more balanced and legitimate process itself.

HISTORICAL CONTEXT

The first attempt to create a broad, global FTA was the International Trade Organization (ITO), which was drafted after World War II to encourage trade liberalization; however, it was never ratified due to the mistrust which consumed international legal institutions during the Cold War era (Hudec, 1998). The General Agreement on Tariffs and Trade (GATT) was one of several subdivisions of the proposed ITO, and entered into force in 1948 signed by twenty-three nations (Dunkley, 1997).

The GATT was ultimately a "Power-based" regime, where the relative power of nations determined their leverage in negotiations and influence when interacting with other nations (Byrne, 2000). "The result will not always be that which is equitable but, rather, what the parties will accept given disparate bargaining positions" (Byrne, 2000, p. 417).

The DRM of the newly formed GATT was the first attempt at third party adjudication in the history of trade agreements (Hudec, 1998). The GATT was, however, an agreement and not an organization; therefore, its DRMs were not overly ambitious in scope or power. Furthermore, it had weak legal foundations. It was perhaps this weakness and ambiguity which allowed the GATT to be passed when the ITO was struck down, since it wasn't viewed with as much suspicion by signatory states (Hudec, 1998).

Rulings in the GATT's early DRMs were made by diplomats of the signatory governments themselves (Hudec, 1998). Evolution of the DRM moved it towards negotiations carried out by a working party, that would reach an agreement deemed acceptable by the disputing parties. These early decisions were purposely vague in order to gain support for this new method of dispute resolution, and to leave room for future changes (Hudec, 1998).

In 1952, the Panel on Complaints was created to hear disputes, thus increasing the neutrality and objectivity of the process. The panel differed from the working party in that disputing countries did not have members on the panel, rather the panel met privately to decide the case. Furthermore, the decision made did not necessitate the approval of the disputing parties (Hudec, 1998). As respect for the panel and its decisions grew, it became more transparent by publishing the names of panel members, instead of only their country of origin, and explaining the panel's working procedures in published GATT reports (Hudec, 1998).

Notable concerns with respect to trade and environmental issues emerged in the 1970s. Trade officials were concerned that environmental policies could act as a form of protectionism and impede trade (WTO, 2001), whereas environmentalists worried that free trade policy could reduce a government's ability to ban environmentally unsafe products. Likewise, the idea that free trade would lead

to the creation of pollution havens in nations with lower environmental standards was of concern.

The 1980s and 1990s saw an increase of the number of cases tried by the GATT Panel on Complaints, with many of the decisions being criticized for lack of legal expertise, as well as for their non-legally binding nature (Winham, 1993). On 1 January 1995, following the Uruguay Round of GATT, which lasted from 1986 to 1994, the World Trade Organization (WTO) was established and replaced the GATT. The WTO was to provide states with a set of consistent international legal rules for negotiation. Now states would negotiate under the law, rather than based on power relationships (Schell, 1996, p. 366). This type of "Rule-based" diplomacy improved the abilities of weak nations to compel more powerful ones to comply with decisions through their adherence to previously agreed upon rules (Byrne, 2000, p. 417).

Today, the Dispute Settlement Body (DSB) heads the WTO's DRMs. If initial consultations between disputing nations fail, the DSB nominates a three-member dispute panel from a roster of trade officials and commercial trade lawyers (Hossein-Zadeh, 1997). Any member nation with substantial interest in a case has the opportunity to make written submissions to the panel as a third party. However, such amicus briefs can only be presented by representatives of trade offices of national governments (Barker & Mander, 1999). Additionally, the panel can choose to consult experts if a scientific or technical issue is raised. The panel then drafts a confidential final report outlining its ruling, which is distributed to the DSB and the disputing member nations. Either nation may appeal the panel's ruling to the Appellate Body, but only on points of law such as legal interpretation. The standing Appellate Body is composed of seven permanent members, with similar backgrounds to the dispute panel, of which three at a time will review appealed cases (WTO, 2001). Nations which do not alter their

inconsistent trade laws after a ruling can face compensation payments and even permanent trade sanctions as penalties.

During the 1980s, Canada and the United States (US) began to negotiate their own FTA, which was implemented in 1989. Mexico was brought into negotiations soon after, and by 1992 the North American Free Trade Agreement (NAFTA) was signed by Canada, the US, and Mexico, and entered into force on January 1, 1994. The DRM of the Canada-US FTA was modelled after the panel procedure of the GATT, and was subsequently closely mirrored by NAFTA (Winham, 1993).

By November 1993, the North American Agreement on Environmental Cooperation (NAAEC) was signed as a parallel agreement to NAFTA. The creation of a separate parallel track side-agreement demonstrated concern for environmental issues; however, environmental organizations worried that the separation of environment from trade would limit the ability of parties to "green" the NAFTA (Housman, 1994) or have any real impact on changing trade policy for the good of the environment. The NAAEC requires that countries publish public reports on the state of the environment, promote environmental education, and ensure interested persons access to compensation for violations of environmental laws (Blum, 2000).

The Commission for Environmental Cooperation (CEC) was formed under the NAAEC to promote environmental issues through cooperation of the American, Canadian and Mexican governments, and through public participation. The latter is achieved through the Joint Public Advisory Committee (JPAC), a fifteen-member body with relevant technical and scientific knowledge, which serves as a liaison between the general public and the CEC council. Under Article 14 of the NAAEC, any member of the general public may submit a written statement to JPAC concerning a perceived failure of a government to effectively enforce its

domestic environmental statutes. If this submission meets certain criteria, JPAC gathers information and creates a factual record on the matter, which is made public only by consensus of two of the three CEC council members. This process does not deal with trade issues, nor are any findings considered legally binding. Rather, factual records act by drawing international attention to a government's non-enforcement of its environmental laws, resulting in public pressure on the offending government.

NAFTA's dispute settlement mechanism is divided into different dispute types. The two main DRMs are found in Chapters 11 and 20. Chapter 11 establishes a mechanism for the settlement of investment disputes. This dispute tribunal is made up of three members, one selected by each disputing party, and the third chosen by consensus of both parties. The panel may choose to consult outside experts if one of the parties requests this and neither party objects. The final report of the tribunal may award the winner monetary damages or restitution of property. If the loser of the dispute refuses to abide by the tribunal's final penalty, the party of the investor may request an arbitral panel under Chapter 20, which includes provisions relating to the avoidance of or settlement of all disputes regarding the interpretation or application of the Agreement (NAFTA, 1992). Chapter 20 panels are made up of five members. Both parties agree on the Chair and each party selects two panellists, which are citizens of the other disputing country. Beyond these small technicalities, the DRM under Chapter 20 mirrors that of the WTO.

In December 1994, the 34 states of the Western Hemisphere (all nations except for Cuba) attended the First Summit of the Americas and agreed to create the Free Trade Area of the Americas (FTAA). The first draft of the FTAA was completed early in 2001, and some parts of the agreement have begun to be implemented. The final negotiations should be completed by 2005. Despite inclusion of language such as "sustainable development" and "environmental conservation"

in the Declaration of Principles of the Summit (FTAA, 1994), so far Brazil and MERCOSUR (South America's largest trading block) have been successful in keeping the environment out of FTAA discussions (Blum, 2000).

While meeting in May of 1997, party ministers created a working group on dispute settlement, to begin negotiating the FTAA's DRMs. In 1988, we saw the creation of the Committee of Government Representatives on the Participation of Civil Society, which will receive and analyze input from civil society, and present these views to ministers (Salazar-Xirinachs, 2001; DFAIT, 2001). It has been suggested that the creation of the committee shows recognition of the importance of including different sectors of society in the FTAA; however, the committee still has a long way to go in truly increasing transparency and involving the public (DFAIT, 2001). Concurrently, the US requested that the environment be represented by its own working group, nevertheless the issue was shuffled under the committee, clearly away from the forefront of the agenda (Blum, 2000).

The DRM of MERCOSUR has rarely been used, as the Latin American political and economic climate seems to prefer less formal methods of settling disputes. MERCOSUR members, in fact, find NAFTA's DRM to be too structured for their tastes (Blum, 2000). The first DRM of the FTAA will likely utilize flexible, informal DRMs modelled after the WTO, which will, in turn, probably move towards more formal, rule-driven mechanisms (Lopez, 1997).

THE SITUATION TODAY: FRAMING THE ISSUE

Recently, there has been a growing world-wide dissent with respect to free trade regimes[4]. Trade regimes deal with, and make decisions on through the DRMs, issues which extend beyond trade. The regimes flow into substantive public interest issues such as health and the environment (Enders, 2001). As these issues are decided upon by regimes constructed to deal mainly with trade policy, many people have become concerned about the legitimacy of their dispute settlement processes and its ability to suitably address such concerns.

As previously stated, trade regimes frequently overlap with the sphere of the environment. For example, if the production of a specific good has deleterious environmental effects, increased production as a result of increased trade will magnify these effects. The conflict between trade and the environment also comes about through measures put in place by governments to protect the environment. These regulations can be interpreted as non-tariff trade barriers that can be challenged under the trade regimes. The case of Methanex versus the U.S. is a prime example (IISDb). The Californian government wanted to protect its citizens from what it identified as a threat from environmental pollution. However, the ability for the government to regulate on the issue was challenged under NAFTA.

Trade regimes are primarily concerned with economics despite their effect on other issues. This 'business first' perspective has resulted in much of the public's hostility towards free trade regimes. One particular trade mechanism, which can improve the lack of consideration of non-trade issues is the dispute resolution mechanism. DRMs interpret, apply, and enforce the rules of trade regimes. Within the dispute resolution mechanisms, we have identified areas in which

free trade regimes might implement changes to address public issues more effectively.

Subsequently, one of the areas in which trade regimes need to incorporate significant change is transparency. Both scholars and NGOs maintain that dispute settlement proceedings should be made more open to the public, which would allow for greater input, as well as make the process itself more legitimate (IISDa; Wallach, 2000; Olson, 1998; Barker & Mander 1999; Cordonier *et al.*, 2001). Furthermore, the transparency of the dispute resolution procedure can have a positive impact as it will, in turn, increase the public's confidence in the mechanisms as well as in the regime itself (Schneider, 1999). A lack of transparency excludes civil society from having any significant degree of participation in issues that affect them. The "closed nature of the dispute process prevents domestic proponents of health, environmental or other policies that are being challenged from obtaining sufficient information about the proceedings to provide input" (Wallach, 2000).

Another area of criticism has been towards the expertise and interests of the decision makers. Here people have focused on the limited backgrounds of the eligible panelists, as they are mostly chosen from a group of trade officials and corporate lawyers, whom may have a strong bias based on their backgrounds (Barker & Mander, 1999). Choosing people from these areas, "promote[s] the selection of panelists with a stake in the existing trade system and rules" (Wallach, 2000). Under the WTO and NAFTA, when the issue being addressed falls outside the scope of the panelists' expertise, they are under no obligation to consult outside experts (Wallach, 2000; Johnson & Beaulieu, 1996). Under these circumstances, people have argued that public interest issues, such as the environment, are not properly addressed (Wallach, 2000; Johnson & Beaulieu,

[4] High-profile protests such as those against the WTO in Seattle, and against the FTAA during the Summit of the Americas attest to this trend, as does the increasing body of literature on the topic.

1996). It can be therefore argued that decisions being made through current DRMs do not reflect well-balanced decision-making due to the limited array of expertise which sit on the panels.

The degree to which the public should be involved in DRMs raises another issue. On one hand, the feeling of being excluded from a decision-making process results in a sentiment of non-confidence in the final decisions. On the other hand, it is argued that although public participation would be desirable, it is simply not possible because of the extensive time factor involved in such a process (Mitchell, 1997). An examination of the theory and evidence of public participation in decision-making processes shows that although the initial stages of the dispute process may take longer, this approach increases confidence in the process and will lessen the amount of conflict, dispute, and dissent created over the final decision, irrespective of the decision itself (Schneider, 1999; Mitchell, 1997). Given the above context, the closed process and adamant refusal of DRMs to allow more public involvement into the process seems ill founded.

There are many issues surrounding the dispute settlement process. The areas introduced above serve to orient a discussion aimed at exploring and recommending alternatives to render dispute mechanism resolutions more effective. This is useful since we may learn from our past experiences in order to make positive changes to the DRM since it can be assumed that further free trade regimes will emerge in the future.

RESEARCH QUESTIONS AND HYPOTHESIS

In order to define the scope of this project and frame our research, the following research questions were drafted:

1. How do the current trade DRMs of the General Agreement on Tariffs and Trade and the World Trade Organization (GATT/WTO) and the North American Free Trade Agreement (NAFTA) function?

2. What weaknesses in the processes of these existing DRMs prevent "good" decisions from being reached?

3. How can these processes be improved upon to provide DRMs for the FTAA, which will result in "good" decisions?

Our hypothesis was that a good decision requires a good process, and further that a good process is transparent, incorporates appropriate and balanced expertise in the course of making decisions, and allows stakeholders to formally voice their concerns.

METHODOLOGY

In order to understand the possible problems which may arise in the dispute resolution process of the future FTAA, our group consciously chose to study two well-established FTAs, focusing on their DRMs. We researched the WTO/GATT and NAFTA by looking at primary information sources such as the texts of the agreements themselves, conventions, and dispute panel reports, as well as secondary information sources such as academic literature, government, NGO, and other media publications. Furthermore, our researchers were in attendance at the Joint Public Advisory Committee (JPAC) to the Commission on Environmental Cooperation (CEC) sessions in Montreal through October 22-23, 2001, where interviews were conducted with key persons with respect to issues relevant to this project.

The focus of our research was to broaden our understanding of the functioning of the DRMs within the WTO/GATT and NAFTA, and to uncover the strengths and weaknesses of these mechanisms partly based on past case studies. The WTO/GATT and NAFTA are appropriate case studies since the FTAA is being modelled on these current FTAs; therefore, any problems within the DRMs of the WTO/GATT or NAFTA are likely to manifest themselves within the FTAA as well.

As our research moved forward, a range of options to be considered for recommendations to the FTAA was conceptualized. Subsequently, we conducted fifteen interviews with scholars, NGO representatives, past members of dispute resolution panels, and members of JPAC [see Appendix A] in order to amass expert opinion both on our various options, as well as to add to our option list. Appendix B contains the material received by the interviewee from our research team, as well as an outline of the questions asked. All interviewees

were given the explicit option to remain anonymous. Furthermore, we re-evaluated the literature and re-assessed our previous research to help finalize our list of options.

Our final step was to critically evaluate our list of options. To do this, we considered the pros and cons of each option based on their assessments given within the literature as well as within the interviews. We were then able to finalize our recommendations along with the necessary provisions that would ensure the optimal effectiveness of the recommendation.

ANALYSIS

Three key areas of concern regarding the effectiveness of DRMs have emerged: transparency, balance of expertise, and the public ability to voice concerns.

TRANSPARENCY

Transparency is a key component in ensuring the public's ability to understand the basic functioning of a regime as well as the DRM, to be able to hold the regime accountable, and to ensure that the dispute settlement process is balanced and fair (Wallach, 2000; Cordonier *et. al* 2001; Schneider, 1999; Anonymous 8, 2001). In addition, an increase in transparency has the potential to increase the legitimacy of the regime. Furthermore, the increased awareness of the proceedings will promote public confidence in the process of DRMs and the regime (Schneider, 1999).

ISSUE 1: **Opaque dispute mechanisms prevent domestic proponents of health, environment, and other sectors from obtaining sufficient information about the proceedings to provide input** (Wallach, 2000).

Since the scope of trade regimes has been shown to have significant impacts on areas other than trade, public access to documents is crucial to ensure that non-economic elements are protected. To remedy this situation some feel that all documents of dispute settlements should be released. Moreover, closed sessions should be made open to observers (Olson, 1998). There are several ways in which the process might be made more transparent, all of which could be adapted to respect confidential trade details and intellectual property rights (Anonymous 10, 2001; Anonymous 7, 2001; Anonymous 8, 2001). Unfortunately, current confidentiality clauses are abused by keeping certain documents private without just reason.

The CEC was created to increase the transparency of NAFTA, the citizen submission process itself is not sufficiently transparent, yet the confidentiality rules established in Articles 14 and 15 of the NAAEC act, in part, as a deterrent for public participation in the process since the submitter is allowed neither to review the filed submission nor the response from the offending party. Increased transparency would give the public the ability to accurately judge the legitimacy of decisions based on the facts of the case, which they would also have access to.

OPTION 1.1: **THE MANDATORY PUBLICATION OF ALL DISPUTE SETTLEMENT PROCEEDINGS AT THE APPROPRIATE TIME.**

If incorporated in the FTAA, this option would ensure that all segments of the public would be made aware of disputes that may affect them by creating a public record. "If documents and decisions are not made publicly available then the public may lose the knowledge necessary to oversee and support the procedure" (JPAC, 2001). In addition, increased public access to dispute settlement proceedings can calm the public suspicion that surrounds trade regimes (Anonymous 1, 2001; Schneider, 1999), by allowing the public to be more involved in the process whose outcome may directly impact their lives. Accountability can also help resolve issues of inconsistent use of precedence in cases (Shrybman, 2000), which may make any dispute settlement process dubious for parties.

Our research team has found that, under the NAAEC, groups or individuals that have submitted claims do not receive all relevant information at the appropriate time. JPAC suggests that if the offending party's response includes information that was not referred to in the original submission, the submitter should be notified and allowed to respond. This process should also be repeated when the recommendation is made for a factual record by the Secretariat. In the NAAEC,

it appeared that claimants have not been kept up-to-date with the information given to the panel, especially concerning responses from the defendants. In order that the council can make a fully informed decision, submitters should be informed of any new information as soon as possible in order to provide a proper reply (JPAC, 2001, p. 9). JPAC's comments identifies weaknesses that the FTAA should try to avoid in its procedures.

Within this issue, the ensuing matter of timeliness must be addressed; a time frame in which disputes are dealt with is of concern within the NAFTA regime. Some citizen submissions, brought under the NAAEC, such as one brought by the BC Inter-Tribal Fisheries, have taken up to three years to be brought to the stage at which a factual record is prepared (CEC, 2001, p. 1). The process must be expedited under clearly established time limits to be credible with the public. If the public receives documents without sufficient time to mount a response, the value of the publicized documents is diminished. Furthermore, strict deadlines for the defending government to respond must be set so that a decision on the claim in question does not lose its relevance. The key for the FTAA is to ensure that documents are made available at each stage of the process, within a time-frame that allows for response.

There are other considerations to be made concerning the accessibility of publications. The language used by trade panelists is often cryptic and elitist, which prevents the broader range of the public from understanding documents (Anonymous 2, 2001; Anonymous 4, 2001; Anonymous 5, 2001). It has been suggested that NGOs could provide interpretations of overly technical language (Anonymous 5, 2001). Additionally, concern over the objectivity of the interpreters and whether or not they are a reliable source due to fluctuations in funding. It has been suggested that if proceedings are published, panelists may make decisions based on political motives (conflicts of interests may arise) rather

than justice (Anonymous 4, 2001). This is a possibility which could be addressed by choosing impartial panelists.

The difficulty in publishing a numerous cases, in a timely manner, in several languages, within budgetary constraints is a challenge; however, the benefits accrued as a result of such policies, such as increased confidence in the regime and the DRMs, as well as the decrease in public suspicion and opposition, greatly outweighs the investment.

OPTION 1.2: **MASS MEDIA.**

This option includes the publication of trade information through live televised proceedings, the Internet, and by widely accessible sources such as radio, newspapers, and pamphlets. This option will help solve problems of timeliness; however problems of elitist language may remain. It will help ensure a transparent process, which includes a larger section of society since diversifying the media by which trade information is conveyed serves to inform a broader range of the public (Anonymous 11, 2001). Typically, trade regimes release documents to the public by making them available on the Internet even though only a minority of citizens to be included in the FTAA have access to the Internet (Anonymous 15, 2001). Concerning live televised proceedings, the potential costs must be considered, as well as the risk of turning proceedings into a political spectacle for grandstanding. Televised proceedings would be costly, and it is unlikely that many individuals could or want to devote the time required to watch them in their totality. Although the cost of more traditional options may be greater than simply relying on the Internet, they clearly reach the largest portion of society. Also, publishing reams of information regarding claims and regulations on the internet is of no use to people who do not understand, and are not aware of, the organizations that are being used.

The most effective transmission of information may be to provide the public with basic knowledge of the regimes in the most accessible manner while simultaneously providing formal documents for interested professionals. Basic information should be distributed through mass media sources, such as information pamphlets, newspapers, and broadcasting over the radio.

ISSUE 2: **Present dispute resolution mechanisms do not insure that conflicts of interest of panelists are avoided.**

A panelist could have a vested economic, political or personal interest in a particular issue being raised through the issue itself or the disputing members. Such conflicts of interest may result in non-impartiality of a panellist; therefore infringing on objectivity of the decision.

OPTION 2.1: **THE MANDATORY PUBLICATION OF PANELISTS' NAMES AND BACKGROUNDS.**

This option addresses the issue of providing the public with the backgrounds of those who serve as panelists in order to allow the public to expose conflicts of interest, and to assess the expertise of panel members. While this publication might expose panelists to pressure from interest groups and thereby hinder ability to make an objective decision, this exposure to influence is no different from the everyday experience of judges, for example, and panelists should be able to cope with the situation (Anonymous 15, 2001). Publishing the names of panelists would also subject them to public scrutiny, which itself may act as a watchdog for evidence of undue influence and conflicts of interest.

OPTION 2.2: **PREVENTION OF CONFLICT OF INTEREST.**

In the past, conflicts of interest have not always been addressed properly in terms of panelists and the cases they are ruling on. An example of this is the European Union's challenge of the U.S. Helms Burton Law, which included the Cuban Liberty and Democratic Solidarity Act. Arthur Dunkel served as the chair of the International Chamber of Commerce's Commission on International Trade and Investment Policy, which has expressed a strong position in opposition to the U.S. law (Public Citizen, 1998), yet he was chosen to rule upon this case even though there was an obvious conflict of interest. Furthermore, he also served on Nestle's board, which has a plant in Cuba. This is relevant since the U.S. law invoked sanctions against certain foreign investors in Cuba (Wallach, 2000). Dunkel's potential economic stake in the ruling may have infringed on an objective decision. Thus, it is argued that such associations must be identified and then used to rule out certain panelists.

The WTO framework includes safeguards to prevent these types of conflicts of interest. However, the language limits the disclosure of information when "the respect of personal privacy" of the panelists is jeopardized, or when the bureaucracy becomes so burdensome that it "makes it impracticable for otherwise qualified persons to serve on the panels" (Wallach, 2000). Consequently, an easier procedure is to leave it to the panellist's discretion to identify a conflict of interest; however, a panelist may avoid this step by claiming that it infringes on privacy or is too burdensome.

BALANCE OF EXPERTISE

Often the most current scientific information pertaining to a dispute is known only by specific sectors of society that are not involved in trade panels. Ensuring that their expertise is involved in dispute deliberations is necessary to obtain balanced decisions.

ISSUE 3: **Dispute resolution panelists lack expertise to deal with disputes that involve areas such as environmental concerns, leading to decisions that lack legitimacy and weight** (CEC, 1996, p. 27).

Within NAFTA, there have been several cases in which expert advice may have changed the decisions of the panel. In the case of "Canada's landing Requirement for Pacific Coast Salmon and Herring" none of the panelists had any background in conservation or sustainable development issues, which were crucial in weighting the merits of the disputing parties' arguments. In the case of "UHT milk from Quebec" the issue brought to the panel was not a legal one, but whether the equivalence between American and Canadian Standards had been shown. In the case, milk from Quebec was withdrawn from the Puerto Rico market because it did not comply with new standards aligned with those of the US. Quebec farmers were not given the opportunity to show their milk was produced with equivalent standards. All the panelists were from trade or legal backgrounds, even though the panel was not ruling on a case of trade procedures. In either of these cases, expert advice would have been extremely useful and relevant. When issues such as public or ecosystem health are at risk, it is imperative that the opinions of independent, neutral experts be consulted or included as members of the deliberation. As one trade lawyer pointed out (Anonymous 7, 1995) this must be done on a case-by-case basis.

NGOs and professionals from fields other than that of trade have expertise that trade representatives may lack. For example, the IISD comments, "Arbitrations ought to recognize legal principles of sustainable development. IISD, for example, could use its expertise to assist the [Methanex case] tribunal in incorporating these principles into its work;" (IISDb). It may also prove crucial where ambiguous terms of agreements must be interpreted to render judgement.

Trade representatives will argue that outside expertise is not always appropriate. We must be careful not to rule out trade procedure when environmental questions are brought to a panel (Anonymous 7, 1995). For example, it is argued that the substantive environmental question may not be the legal issue before a panel, and that it would be a mistake to divert the panel's attention away from the essential procedural questions before it (CEC, 1996, p. 28). However, such an argument fails to acknowledge the levels of influence that dispute panels have on a broader range of issues. For example, if a panel were dealing with health system issues, it would probably be more appropriate to have the "World Health Organization through a public process, [as opposed to] three trade lawyers meeting in secret, determining whether a country's pharmaceutical compulsory-licensing system or parallel-importing system actually serves a public health goal" (Wallach, 2000). Some suggest that this would require the creation of a World Environment Organization, which would "set rules, incorporate existing international environmental law agreements and negotiate new ones, monitor compliance, and settle disputes over environmental policies" (Anderson, 1998). While this would eliminate the difficult task of employing trade measures to achieve environmental objectives, it is not clear how discrepancies between the rulings of the WTO and the proposed WEO would be resolved (Anderson, 1998). There are numerous ways in which proper expertise can be integrated into dispute mechanisms without resorting to the creation of another world organization.

OPTION 3.1 **REQUIRE PANELS TO CONSISTENTLY CONSIDER SUBMISSIONS FROM THIRD PARTIES WITH A DEMONSTRATED INTEREST (IE. AMICUS BRIEFS)** (Wallach, 2000).

Under the CEC, dispute settlement panels are not required to consider third party submissions. The panel can choose to adopt submissions, but there is no clear, consistent use of mechanisms such as amicus briefs to ensure all relevant

information reaches panels. For amicus briefs to be effective, they would have to be accepted based on established criteria. One key is that when rejected, a letter explaining why the brief was rejected should accompany them. There are concerns that forcing panels to consider too many submissions would delay the already lengthy process of dispute resolution. Within the FTAA this problem could be resolved through the establishment of appropriate criteria that would ensure the relevance of the submission to a panel.

OPTION 3.2 **REQUIRE THE CONSULTATION OF ADVISORY BODIES.**

The consultation of advisory bodies is already an option available to NAFTA and WTO panelists (Johnson & Beaulieu, 1996). However, panels are not required to consult such bodies, even if they do not possess the relevant expertise to assess a claim, and unfortunately they rarely do so (de Mestral, 1995). Advisory bodies could be composed of scientists or other objective experts, on an ad hoc basis from the fields that are involved in a dispute, with a mandate to educate the trade representatives in the potential ramifications of their decisions. It could be stipulated that the consultation with advisory bodies by a panel is mandatory, if the panel does not represent the particular area of expertise in question, much like the way that environmental assessments must be conducted before construction can begin in an area of concern. This option, if used, could help alleviate the problem of panelists being 'over-loaded' by amicus briefs and would provide better use of expertise to dispute panels.

Another option for the composition of advisory bodies would be to allow NGOs to represent the public interest to the panel advisors (IISDb). Regardless of the tribunal's final decision, public confidence in the system would be strengthened if they see their concerns being voiced and seriously considered (IISDb). One of the major contributions of NGOs is communicating information to governments, individuals, intergovernmental organizations (IGOs) and other NGOs (Gamble &

Ku, 2000, p. 230). Widely read NGO publications reveal failures in negotiations and vague language that would otherwise shield governments from accountability for their actions (French, 1996, p. 255). Those groups with information to distribute influence political and legal processes as governments try to remain credible to a better-informed public (Gamble & Ku, 2000, p. 233).

For the FTAA, this option would ensure that expert information is given to the panelists, but the problem remains whether information outside the panelists' areas of expertise would be taken into account in the decision. The following option attempts to address this.

OPTION 3.3 **REQUIRE SPECIALISTS ON PANELS FOR DISPUTES WHICH ENCOMPASS ISSUES BEYOND TRADE** (de Mestral, 1995).

There is a wide arena of ambiguous language in texts that must be interpreted. Often, panelists that are limited to trade experience employ narrow interpretation of these texts. The problem lies in a discrepancy between the interpretation by the panelists versus the one of the claimants and defendants. The interpretations of the agreements were crucial in many cases. In the famous "Tuna-Dolphin" case the country submitting the claim, Mexico, clearly had a very different interpretation of the agreement from the offender, the US. The panel put in place did not have to deal only with trade procedures, but it had to rule over environmental measures. In order to protect non-trade interests, Nichols recommends the selection of potential panel members to include experts from fields other than trade (Nichols, 1996). This would promote more balanced decisions by actually including a wider range of expertise at the decision making level.

There are arguments against, and qualifications for, this proposal. Schell (1996) supports this proposal but fears that its effects will be superficial; therefore, not

leading to any significant change in decision-making (Schell, 1996). Some interview subjects felt that the panels are suitably trade experts because they are operating within the framework of a trade regime (including experts such as climatologists) (de Mestral, 1995; Anonymous 10, 2001). Many academics have suggested that to be effective all panelists should have a legal and/or trade background in addition to their area of specialization. (Anonymous 9, 2001; Anonymous 10, 2001).

PUBLIC ABILITY TO VOICE CONCERNS

As dispute panels are mainly composed of trade experts, we see not only an imbalance of expertise (as addressed in the previous section), but also an imbalance of concerns and interests. This imbalance becomes particularly visible in the WTO, where "[w]hat is needed, the WTO critics say, is a focus not on free trade but on fair trade--a concept that, they say, takes into account the best interests of all players, from corporations to workers to citizens of all concerned countries" (Tebo, 2000). In addition to specific scientific knowledge about an issue, the concerns of the public must also be recognized by the process in which they are stakeholders. Presently, WTO rules promote the selection of panelists who have a predetermined trade bias, with their own stake in the existing trade regime. "It is therefore not surprising that the WTO panelists consistently have issued interpretations that lean toward furthering trade liberalization whenever that goal conflicts with other policy goals" (Wallach, 2000).

ISSUE 4: **The interests of people and organizations affected by disputes are not consistently represented on panels.**

Trade agreements have effects on the general public, the environment, and the economy, making it necessary to involve competent public organizations and peoples in the system to defend and combine the interests from all of these

sectors. On the other hand, "if environment groups are authorized to intervene, businesses, unions, consumer groups and even private law firms would demand the same access and the existing system would be transformed into a system based on confrontation and contradiction" (Graham, 1999, pp. 3-18). While the risk of confrontation and contradiction exists, it does not necessarily have to be the case if steps are taken to facilitate an open and dialectic process (Mitchell, 1997).

OPTION 4.1 **CITIZENS BE PROVIDED ACCESS TO A DOMESTIC GOVERNMENTAL MECHANISM TO RAISE CONCERNS ABOUT THE DRM.**

This solution avoids the problem of confrontation, and maintains free trade regimes as government-only bodies. Yet, there is the pervasive concern that governments do not always represent their citizens adequately. Currently, under the WTO, governments are allowed to include the contents of outside briefs or other materials in official submissions. However, if a public interest or advocacy organization disagrees with the position of its government in a case dealt with under the WTO, it is unlikely that the information will reach panelists, because the government would not submit it (Wallach, 2000). This option would only be affective in cases where governments act as vehicles for the interest of all of their citizens. Within a trade regime it is unlikely that a government would be able, or willing, to voice a multitude of varying interests. If is more likely that the interest of those that are the loudest, or the most consistent with government policy would be recommended for FTAA process changes.

OPTION 4.2 **HOLD PUBLIC HEARINGS**

It has been suggested that public hearings ought to be held where the general public is able to take part and the relevant ministers are forced to attend (Anonymous 13, 2001; Anonymous 12, 2001). The implementation of this option

involves logistical difficulties, because of the large number of people and countries involved in the FTAA. It would also prove to be expensive. Neither of these negates the value of public hearings, but reveal impracticality. There is also the danger that participation of the public could be reduced to tokenism if the public advisory body does not have any power over the process itself. For example, since the JPAC does not have any executive power, public concerns brought before it may be effectively mute; the specific concerns might not be carried beyond the public hearing to a decision making level. Even if information gathered from widely held and attended hearings did make it to this level, there is also the danger that the minority's voice might not be heard out of the masses. Still, some argue that the mere fact that organizations such as the JPAC are institutionalized suggests that they do have an impact, that is, that the concerns of the public are documented (Anonymous 12, 2001).

ISSUE 5: **Governments from developing countries and smaller organizations rarely have resources or staff to mount equal challenges against wealthy nations in trade dispute settlement systems** (Barker & Mander, 1999).

The governments and NGOs involved in the future FTAA parties have considerably different access to resources and experience with DRMs. This imbalance could manifest a disadvantage for poorer, or less experienced, countries and organizations.

OPTION 5.1 **PROVISION OF FUNDS AND TECHNICAL ASSISTANCE.**

The secretariat of the WTO suggests that one way to improve the flow of information to less wealthy members would be to establish WTO reference centres in these countries. (WTO, 2001, p. 3) Ann Weston of the North-South Institute notes that "… most countries lack legal expertise and, as the WTO's capacity to provide legal assistance is severely limited, in most cases [developing

countries] have had to use international law firms. The high costs limit their right to know let alone defend their rights. Thus, a number of countries have proposed the creation of an Advisory Centre on WTO law…" (Graham, 1999, pp. 3-1). Funds could be provided to hire trade lawyers in order to file claims that comply with trade regulations. Some argue that this could lead to the problem of being overwhelmed by frivolous claims (Anonymous 9, 2001). While more potential claims will likely be raised, time may be saved by ensuring that claims are submitted with a thorough understanding of the relevant regulations (Anonymous 2, 2001). Frivolous claims often arise when groups are not aware of the circumstances, and manner in which, disputes can legitimately be filed.

These funds could also serve to help smaller organizations translate their expertise into the language of amicus briefs. The same concern regarding increasing numbers of submissions sent to the panel would also apply to the amicus briefs. However, the benefits of receiving the expertise of the public for the decision making process has already been made clear. In addition, as above, access to funds would probably ensure that amicus briefs are filed in the proper manner, which would limit frivolous submissions.

In addition to providing funds, the process should be kept free of ``power-struggles``, which make submitting a claim overly troublesome. This type of problem can be seen in situations such as the case of the migratory birds. In this case, the Governmental Advisory Committee to the U.S. Representative to the CEC spoke out against an attempt by the US government to limit the independence of the Secretariat. The U.S. expressed its intention to vote in favour of an investigation into the Migratory Bird Submission, but only if the investigation was limited to the two anecdotal violations identified in the submission, in effect undermining the Secretariat's ability to conduct an independent and complete inquiry.

CONCLUSION

In summary, we are making the following recommendations to the FTAA dispute settlement process:

To ensure the transparency of the process, **all dispute settlement proceedings and related documents must be published, as they become available**, before the process proceeds to the next step.[5] However, confidentiality must be respected. **This information must be published in various mass media and not just on the Internet**[6]. We feel the most accessible and far-reaching media are the traditional sources of newsprint and radio broadcasts. First and foremost, it is crucial that a general understanding of the basic operations and importance of the regime and its bodies be explained to the general public. This information must be adapted so that the language and terms do not exclude any certain group of society from understanding it.

To prevent conflicts of interest from occurring on FTAA dispute panels, we make two interdependent recommendations. The first is to **make the names and relevant background of panelists available to the public**.[7] The second is to **include strong regulations in the agreement that prevent anyone with a potential conflict of interest from serving as a panelist**.[8] Many of the following recommendations are contingent upon the above measures, for it is impossible to make carefully aimed arguments in defence of the public interest to trade panels if their activities are secret or otherwise obscured.

As has been argued above, to make the best decisions, FTAA dispute settlement panelists may need specialised information from outside their traditional

[5] Option 1.1
[6] Option 1.2
[7] Option 2.1

economic expertise. We recommend three ways to ensure that relevant expertise is included. First, **the panel should consider third party submissions, such as amicus briefs.**[9] Whether or not such submissions are accepted must be decided on a case-by-case basis; however, there must be a mechanism in place to ensure that amicus briefs are used consistently. This mechanism should include a filter, which allows only the most relevant briefs to reach the panel when information is lacking. However, this filter must be implemented in such a way that it cannot be abused. That is, panelists should not be able to disregard submitted information arbitrarily. A requirement to publish the reasoning behind why a brief was or was not considered would prevent this ignorance.

A second recommendation that would provide FTAA panels with expert advice is to **institutionalize the consultation of neutral advisory bodies**.[10] This measure serves the same end as the previous one, so again, it must be decided on a case-by-case basis if one or the other or both will be employed in the resolution of any dispute. Where in the previous recommendation the responsibility to gather and provide expert information pertinent to a dispute is placed on individuals and organisations of society at large, the advisory body option internalises this responsibility, as well as its cost. The latter may be preferable, if the FTAA is to be self-sufficient and gain the respect and trust of citizens under the agreement. However, it is important that both avenues exist for expertise to enter the process, as one or the other may be better suited to certain situations. The advisory body itself must be formed on an ad hoc basis; experts on the issue should be called on to provide the necessary information to complement the expertise of the panelists. A third, more general, recommendation is to **diversify the roster of panelists so that a wide range of knowledge and perspectives is represented**.[11] Ideally, only panelists with trade expertise in addition to another

[8] Option 2.2
[9] Option 3.1
[10] Option 3.2
[11] Option 3.3

area of specialisation would be added to the roster. Of course, for this provision to function properly there should be regulations or a mechanism in place to achieve the employment of specific panelist expertise in the appropriate cases.

Not only will the FTAA panels need to hear from experts, we have argued, but they will also need to be informed of the interests and concerns of citizens who will be affected by their pending decisions. Certain sources have suggested that the FTAA agreement should not include any provision for civil society to access the panels directly and that private concerns be brought to domestic governments, who will then represent these concerns before the panel.[12] However, due to the political nature of governments, we feel this method will not consistently or effectively represent public interest to panels. Another way to bring public concerns to panels is through public hearings.[13] However, due to problems we addressed under this option in the analysis, namely expense, logistical difficulties and the threat of tokenism, it is not clear that these hearings would have any real impact on the decisions of dispute resolution panels.

Although we have not recommended either option that directly addresses the lack of representation of the public interest to the panels, we feel that our earlier recommendations to institutionalise the influx of expert information[14] will also provide a passage for the entrance of a broader range of interests. FTAA decision-makers should always be well aware of the human and environmental consequences of their actions and behave in an ethical and cautious manner. If the process is transparent enough, that is if our recommendations[15] to increase transparency are accepted, this behaviour can be demanded and scrutinized by the citizens of FTAA's jurisdiction. The panelists should adopt a general attitude of partnership with stakeholders who voice their concerns and work diligently to

[12] Option 4.1, not recommended
[13] Option 4.2, not recommended
[14] Options 3.1, 3.2, 3.3
[15] Options 1.1, 1.2

make decisions that serve both trade and alternative goals. For example, when environmental protection laws are deemed to violate trade rules, panelists could suggest ways that the environmental standard could be changed so that it can remain in place and not violate FTAA rules.

Our recommendations will secure the quality of decisions made by FTAA dispute settlement panels, but only if all interested parties have equitable access to the proposed mechanisms. We have demonstrated that a disparity exists between wealthy and poor nations' functional and financial ability to take full advantage of the dispute settlement process. A similar disparity exists amongst NGO's as well as among individuals. It is for this reason we recommend that **funds and technical assistance should be provided to disadvantaged parties wanting to access the system**.[16] Several measures fall under this recommendation. Information centres can be established in developing nations, where legal assistance will be provided and financial backing can be requested. Similarly, legal and financial assistance should be provided for organisations or individuals wishing to submit an amicus brief to a panel. Of course, mechanisms will need to be in place to guarantee some degree of fairness and impartiality in the distribution of funds.

These recommendations have been developed in response to a concern that the decisions made by free trade regimes have had deleterious effects for the environment, as well as other spheres, and that this trend will only be perpetuated and intensified by the upcoming FTAA agreement. Our recommendations address this concern by suggesting ways the dispute settlement process could be made more open and flexible and therefore responsive to environmental issues. However, the dispute settlement process is only part of the problem. Our research has made us aware of issues that warrant

[16] Option 5.1

further, in-depth study, if the FTAA is to be made as 'environmentally friendly' as it can be.

First of all, strong environmental language needs to be included in the agreement itself. References to key international environmental conventions and basic principles of *sustainable development* are important to prevent interpretations which overwhelmingly give preference to economic goals, when and if these goals conflict with the public interest. For example, reference could be made to the *precautionary principle,* which emphasises safe action in the face of uncertainty. Traditional environmental standards must be scientifically justified to be respected by trade law. "From the moment there is any doubt as to the scientific justification of a measure, the panels and Appellate Body reject it if it cannot be justified by another provision of the agreements" (Graham, 1999, pp. 3-15). Any reference to environmental agreements or principles should be expressed in strong clear language, so that they cannot be ignored, manipulated, or otherwise loosely interpreted.

More study is also warranted on how North-South power dynamics undermine a rule based trading system. This is a major issue which encompasses questions of equity and cannot be given the treatment it deserves in this context. Of the many implications of an international imbalance of power, one is the reluctance of southern nations to sign onto the agreement if it contains environmental measures in its text. Such measures are often perceived as just one more way rich countries act to secure their own power by inhibiting the economic growth of developing countries (Anonymous 13, 2001). Study into the ways in which environmental standards can be made acceptable to southern members, or ways in which these members might be convinced of their merit, would be invaluable.

We do not intend to perpetuate the perceived conflict between trade and the environment. Because trade relies on a healthy, 'productive' environment, and

the economic activity of humans is the major vehicle through which we change the environment, it is imperative to establish a discourse between the spheres of environment and trade (Anonymous 10, 2001; Anonymous 14, 2001). What is needed is a new single concept to encompass both ideals. This is what the term *sustainable developme*nt conceptually provides, but it is not accepted or understood on a wide enough scale to be meaningful. Very specific descriptions of how sustainable development can be applied to existing and emerging institutions must be devised. Our recommendations for the dispute settlement process of the FTAA could be considered part of this description, however small in proportion, which nurtures the partnership of trade and environment.

Although we have focused on institutional public participation in our study, we recognize the critical role of informal public action. Whether the FTAA will embrace unconventional mechanisms that restrain it from inflicting damage on the environment, and thus society, will depend on the response of the public. Information must reach the public before the FTAA is finalized so that we may have say in the form it takes. It is important to remember that the posited purpose of free trade regimes is to raise standards of living in member countries. If the public can argue convincingly in solidarity that unleashed free trade may not be achieving this goal, and possibly even be moving away from it, the FTAA will be forced to rearrange itself in response to citizens.

REFERENCES CITED:

Anderson, K. 1998. Environmental and Labour Standards: What role for the WTO?, pp. 231-255. In *The WTO as an International Organization*, edited by A. Krueger. Chicago, Il: University of Chicago Press.

Anonymous 1. 2001. Personal communication on October 23, 2001 (Centro Mexicano de Derecho Ambiental).

Anonymous 2. 2001. Personal communication on October 22, 2001 (North American Fund for Environmental Cooperation).

Anonymous 4. 2001. Personal communication on November 2, 2001 (McGill University Political Science Professor).

Anonymous 5. 2001. Personal communication on October 22, 2001 (US Governmental Advisory Committee (GAC)).

Anonymous 7. 2001. Personal communication on October 30, 2001 (McGill University Law Professor).

Anonymous 8. 2001. Personal communication on October 23, 2001 (Pennsylvania State University Professor).

Anonymous 9. 2001. Personal communication on October 25, 2001 (McGill University Economics Professor).

Anonymous 10. 2001. Personal communication on October 22, 2001 (Dante B. Fascell North-South Center).

Anonymous 11. 2001. Personal communication on October 23, 2001 (University of Moncton Professor).

Anonymous 12. 2001. Personal communication on November 9, 2001 (STOP Environment Group).

Anonymous 13. 2001. Personal communication on October 22, 2001. (North American Institute)

Anonymous 14. 2001. Personal communication on October 30, 2001 (Clean Air Strategic Alliance).

Anonymous 15. 2001. Personal communication on October 22, 2001 (CEC Legal Officer).

Barker, D. & J. Mander. 1999. Invisible Government For the New Millennium? A Primer. The International Forum on Globalization (IFG).

Blum, J.S. 2000. The FTAA and the Fast Track to Forgetting the Environment: A Comparison of the NAFTA and the MERCOSUR Environmental Models as Examples for the Hemisphere. *Texas International Law Journal* **35**: 435-457.

Byrne, J. 2000. NAFTA Dispute Resolution: Implementing True Rule-Based Diplomacy Through Direct Access. *Texas International Law Journal* **35**(3): 415-434.
CEC. 1996. Dispute Avoidance: Weighing the Values of Trade and the Environment Under NAFTA and the NAAEC *Environment and Trade Series* (1). Prospectus Inc.

CEC. 2001. Citizen submission process proves valuable in BC Hydro Case. *Trio* (1).

Cordonier-Segger, M-C., M. Bastida Muños, Virgina Paul (St. Lucia), P.R. Meireles, J.Z. Taurel. 1999. Trade rules and sustainability in the Americas. *IISD*. Cited on November 7, 2001. Available from the World Wide Web: http://www.iisd.org/pdf/trsa_book.pdf.

DFAIT. 2001. Trade Negotiations and Agreements. Government of Canada: Department of Foreign Affairs and International Trade (online). Cited on October 29, 2001. Available from the World Wide Web: http://www.dfait-maeci.gc.ca/tna-nac/menu-e.asp.

Dunkley, G. 1997. The Free Trade Adventure: The Uruguay Round and Globalism – A Critique. Melbourne: Melbourne University Press.

Enders, A. "Openness and the WTO". *International Institute for Sustainable Development.* Cited on November 7, 2001. Available from the World Wide Web: http://iisd1.iisd.ca/trade/knopen.htm#_Toc419576030.

French, H. 1996. The Role of Non-State Actors, pp.251-258. In: J. Werksman (ed.) *Greening International Institutions*. London, UK: Earthscan Publications.

FTAA. 1994. Summit of the Americas: Declaration of Principles. *Free Trade Area of the Americas*. Cited on November 1, 2001. Available from the World Wide Web: http://www.ftaaalca.org/ministerials/miami_e.asp

Gamble, J.K. & C. Ku. 2000. International Law – New Actors and New Technologies, *Law and Policy in International Business* **31**: 221-262.

Graham, B. (M.P. Chair) 1999. Canada & the Future of the World Trade Organization: Advancing a Millennium Agenda in the Public Interest. *House of Commons: Report Standing Committee on Foreign Affairs and Trade.*

Hossein-Zadeh, E. 1997. NAFTA and Sovereignty. *Science and Society* **61**: 243-254.

Housman, R. 1994. The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment. *Stanford Journal of International Law* 30: 379-422.

Hudec, R. E. 1998. The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure. pp101-120. In *The Uruguay Round and Beyond*, edited by J. Bhagwati & M. Hirsch. Michigan: University of Michigan Press.

IISDa. Six Easy Pieces: "Five Things the WTO Should Do—and One it Should Not". In Trade and Investment: The WTO. Cited on November 7, 2001. Available from the World Wide Web: http://iisd1.iisd.ca/trade/wto/sepmain.htm.

IISDb. "Methanex Corporation vs. The United States of America". In Trade and Investment: Investment. Cited on November 7, 2001. Available from the World Wide Web: http://www.iisd.org/pdf/trade_methanex_background.pdf.

Johnson, P-M. & A. Beaulieu. 1996. The Environment and NAFTA: Understanding and implementing the New Continental Law. Washington D.C., USA: Island Press.

JPAC. 2001. Lessons Learned: Citizen Submissions under Articles 14 and 15 of the NAAEC, Final Report to the Council of the Commission for Environmental Cooperation. *JPAC*.

Lopez, D. 1997. Dispute Resolution Under a Free Trade Area of the Americas: The Shape of Things to Come. [FREE TRADE IN THE WESTERN HEMISPHERE SYMPOSIUM]. *University of Miami Inter-American Law Review* **28**: 597.

de Mestral, A. 1995. Expert Advice to NAFTA and NAAEC Bodies, Project 95 (11).

Mitchell, B. 1997. *Resource and Environmental Management*. London, UK: Addison Wesley Longman.

NAFTA. 1992. Agreement text. In: *The North American Free Trade Agreement* (online). Cited on October 14, 2001. Available from the World Wide Web: http://www.nafta-sec-alena.org/english/index.htm?nafta/nafta.htm

Nichols, P.M. 1996. Participation of Nongovernmental Parties in the World Trade Organisation. *University of Pennsylvania Journal of International Economic Law* **17**: 295-329.

Olson, E. 1998. "Critics Say World Trade Group Disregards Environment *The New York Times*. Cited November 7, 2001. Available from the World Wide Web: http://www.citizen.org/trade/wto/gats/documents/articles.cfm?ID=1620.

Public Citizen. 1998. "Conflict of Interest Raises Questions About WTO Panelists: Arthur Dunkel Serves As Chairman of Body Critical of the Law He Was to Consider As WTO Panelist". Cited on November 7, 2001. Available from the World Wide Web: http://www.citizen.org/trade/wto/Dispute/articles.cfm?ID=5570.

Salazar-Xirinachs, J.M. & R. Maryse (eds.) 2001. Toward Free Trade in the Americas. Washington, D.C., USA: Brookings Institution Press.

Schell, G. R. 1996. Participation of Nongovernmental Parties in the World Trade Organisation. *University of Pennsylvania Journal of International Economic Law* **17**: 359-381.

Schneider, A.K. 1999. Getting Along: The evolution of Dispute Resolution Regimes in International Trade Organizations. *Michigan Journal of International Law* 20: 697-773.

Tebo, M. G. 2000. POWER BACK to the People: It was shocking enough to see demonstrators taking to the streets and tangling with police recently in D.C. and Seattle—but over world trade issues? 86 A.B.A.J. 52

Wallach, L. (Director, Public Citizen's Global Trade Watch) 2000. "The WTO Dispute Settlement System: Powerful Enforcement of Unbalanced, Extensive Regulations Without Basic Due Process Protections" Presented to Senate Finance Committee, Subcommittee on International Trade.

Winham, G. R. 1993. Dispute Settlement in NAFTA and the FTA, pp251-270. In *Assessing NAFTA: A Trinational Analysis*, edited by S. Globerman, & M. Walker. Vancouver, BC: The Fraser Institute.

WTO. 2001. WTO documents (online). Cited on November 15, 2001. Available from the World Wide Web: http://www.wto.org/english/tratop_e/envir_e/envir_e.htm.

APPENDIX A: Interview Methodology and Record

Part A: Interviewee Backgrounds

Anonymous 1 (Oct 23, 2001)

Centro Mexicano de Derecho Ambiental

Anonymous 2 (Oct 22, 2001)

North American Fund for Environmental Cooperation

Anonymous 3 (Oct 23, 2001)

Environmental lawyer

Anonymous 4 (Nov 2, 2001)

McGill University Political science professor

Anonymous 5 (Oct 22, 2001)

US Governmental Advisory Committee (GAC)

Anonymous 6 (Oct 26, 2001)

McGill University Management professor

Anonymous 7 (Oct 30, 2001)

McGill University Law professor

Anonymous 8 (Oct 23, 2001)

Pennsylvania State University professor

Anonymous 9 (Oct 25, 2001)

McGill University Economics professor

Anonymous 10 (Oct 22, 2001)

Dante B. Fascell North-South Center

Anonymous 11 (Oct 23, 2001)

University of Moncton professor

Anonymous 12 (Nov 9, 2001)

STOP Environment Group

Anonymous 13 (Oct 22, 2001)

North American Institute

Anonymous 14 (Oct 30, 2001)

Clean Air Strategic Alliance

Anonymous 15 (Oct 22, 2001)

CEC Legal Officer

Part B: Project Summary

Environmental Protection in Free Trade Regimes:
A Study of Recommendations for the Free Trade Area of the Americas (FTAA)

Contact: Jay Ploss
Tel: (514) 277-3521 Fax: (514) 398-1643
5420 St. Urbain, Montreal, QC, H2T 2X1
Email: jay@mse.mcgill.ca

The Issue: The Free Trade Area of the Americas (FTAA) is in the process of being created. Using various existing free-trade regimes as examples, it is clear that the objectives of such regimes often dictate that environmental considerations be overlooked. Historically, disputes based on concerns that certain trade practices have negative effects on the environment have been settled in favour of continuing the trade practice in question, and thus allowing the associated environmental degradation to continue. This trend will likely continue under the FTAA unless the dispute resolution mechanism can be reworked. Allowing greater public participation in the dispute settlement process can increase the degree to which environmental concerns are taken into consideration by opening the process to groups and individuals with environmental interests and expertise.

Objectives: To identify a spectrum of recommendations for improved public participation that could be added to the proposed FTAA dispute resolution mechanism. These recommendations will be selected based on their projected effectiveness and likelihood of adoption.

Method: A rigorous literature review will be conducted, revealing a variety of potential recommendations. Once they have been identified, the recommendations will be brought before individuals from diverse areas of interest and expertise in interviews to gauge their reactions and responses, and any alternative recommendations.

Deliverables: The principle outcome will be a spectrum of recommendations for the FTAA dispute resolution mechanism that would make it more environmentally responsive. These results will be communicated through a written report, a presentation, and a web site.

Research Team: We are a group of students at the McGill School of Environment performing this research for the Quebec Environmental Law Centre, under the supervision of Professor Jaye Ellis.

Part C: Interview cover letter and questions

FTAA Research Group Interview Questions

Preamble

- You are under no obligation to conduct this interview and may cease at any time.
- You will remain anonymous unless you would prefer to be identified.
- The content of this interview will form a component of our policy analysis.
- The product will be submitted to our client, the QELC, and if satisfactory would then be disseminated to NGOs studying the FTAA.

Background

a) What is your job title?
b) How long have you held this post?
c) What experience do you have with Dispute Resolution Mechanisms?
d) What other relevant expertise do you posses? (e.g. a Master's Degree)
e) What is your complete contact information?

Questions

Q1: Given that all policy changes are not equally useful, which options under each of the following broad themes would you consider to be desirable and effective? What obstacles might you anticipate to the successful implementation of these options?

Increased transparency

- Publication of all proceedings
- Publication of the list of eligible panelists
- Other options…

Ensuring appropriate expertise available to decision makers

- Expansion of the roster of panelists to include non-trade specialists.
- Require consultation of advisory bodies
- Other options…

Increased opportunity for public input in process

- Expand importance of mechanisms such as Amicus briefs.
- Public hearings (JPAC as a model)
- Other options…

Extending right to initiate trade dispute resolution to private actors

- Provide formal assistance to claimants with limited resources / experience (CEC as a model)
- Grant member citizens, not just member states, the right to claim that a member country is acting contrary to its obligations under trade law.
- Other options…

Q2: Where do changes to Dispute Resolution Mechanisms "fit in" to the larger context of reconciling environmental and free trade issues?