PUBLIC PARTICIPATION IN TRANSNATIONAL LAW: ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS IN NORTH AMERICAN TREATIES

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When created, the North American Free Trade Agreement (NAFTA) was considered historic since it was the first multilateral trading regime to incorporate environmental considerations. It contributed to raising NGOs' expectations that NAFTA and its side agreement, the North American Agreement on Environmental Cooperation (NAAEC) would enhance government accountability and transparency in the dual context of trade and the environment. Thus, NAFTA and the NAAEC represented at that time, a laboratory for public participation on environmental justice at the international level. This article examines the transformation that has occurred in the fields of public participation and access to justice in environmental matters in North America since NAFTA and NAAEC's inception. The first part focuses on the NAAEC's citizen submission process and the extent to which it has promoted transparency and public participation in an international environmental regime. The second part provides an overview of NAFTA's controversial investor-state arbitration process and describes how its hermetic procedures left no room for citizen participation and access to justice in environmental matters. It further illustrates how environmental groups have fought for access to justice and how arbitral tribunals have recently recognized the need for greater openness.

I INTRODUCTION

Nearly twenty years ago, the United States, Canada and Mexico signed the North American Free Trade Agreement (NAFTA),[1] thus creating what was then the largest

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free trade area in the world.[2] During the negotiations, the tensions between the trade community objective to eliminate trade barriers and the environment community to preserve the right of each nation to enact and implement environmental protection seemed nearly impossible to reconcile, up to the point of threatening the signature of the treaty. Fearing particularly the effects of the trade liberalisation in the Mexican border regions, environmental non-governmental organisations (NGOs) were exercising public pressures on the governments.[3] In response to these concerns, the three governments negotiated an environmental side agreement, with the participation of NGOs in its conception and design. The North American Agreement on Environmental Cooperation (NAAEC)[4] was adopted together with NAFTA.

Acknowledging that trade policy cannot be aimed at environmental protection, NAFTA and NAAEC suggest the value of paralleling the trade and environment debate into issues or groups of issues to be handled separately. Nevertheless, environmental issues are dealt with to some degree in the trade agreement itself. For instance, NAFTA underlines the importance and the prevalence of four international environmental treaties and the necessity of reaching compatibility between trade and environmental measures.[5] In enacting these provisions, three nations within the world trade system do affirm that there are instances where trade restrictions are both necessary and appropriate in order to advance environmental goals.

Not surprisingly, when they entered into force in January 1994, NAFTA and NAAEC were saluted as the first free trade agreements to address both environmental protection and international trade.[6] They were considered a testing ground for addressing environmental concerns and for elaborating new solutions of conciliation, including limited citizen participation.[7] Indeed, over the first few years, they have notably influenced the insertion of similar arrangements in other multilateral agreements.[8]

[1] *North American Free Trade Agreement*, Canada-USA-Mexico, signed 17 December 1992, 32 ILM 289 (entered into force 1 January 1994) ('*NAFTA*').
[2] The combined economies of the three nations measured US$6 trillion and directly affected more than 365 million people.
[3] John H Knox and David L Markell, 'The Innovative North American Commission for Environmental Cooperation', in David L Markell and John H Knox (eds), *Greening NAFTA: The North American Commission for Environmental Cooperation* (2003) 256.
[4] *North American Agreement on Environmental Cooperation*, Canada-USA-Mexico, signed 14 September 1993, 32 ILM 1480 (entered into force 1 January 1994) ('*NEEAC*').
[5] When obligations are in conflict, states are required to use the least incompatible measure with the environment protection (s 104). *NAFTA* also entails that it is inappropriate to encourage investments by relaxing domestic health and environment standards (s 1114.2).
[6] Terence J Schoenbaum, 'International Trade and Protection of the Environment: The Continuing Search for Reconciliation' (1997) 91 *American Journal of International Law* 282.
[7] According to the UNEP, they were to serve 'as an important laboratory for cultivating solutions to many issues in the trade and environment field': Robert Housman, 'Reconciling Trade and the Environment: Lessons From the *NAFTA*' (PNUE, 1996) 20.
[8] For instance, the *Energy Charter Treaty*, opened for signature 17 December 1994, 2080 UNTS 95, (entered into force 16 April 1998) and the *Colonia Protocol for the Promotion and Reciprocal Protection of Investments in the MERCOSUR*, signed 1 January 1994, MERCOSUR/CMC/DEC No 11/93. See Noemi Gal-Or, 'Private Party Direct Access: A Comparison of the *NAFTA* and the EU Disciplines' (1998) 11 *Boston College of International and Comparative Law Review* 42.

On the one hand, NAAEC elevates the promotion of transparency and public participation in the development of environmental laws as one of its main objectives.[9] On the other hand, it is particularly devoted to developing both the coordination of environmental programs in North America and the participation of the civil society by putting in place an innovative institution, the *Commission for Environmental Cooperation* (CEC), and an innovative tool, the citizen *Submission in Enforcement Matters* (SEM).

The CEC plays a central role in stimulating and framing public participation, up to the point of representing a new model of access to justice at the international level. Composed of a Council, a Secretariat located in Montreal, and a Joint Public Advisory Committee, the CEC is intended to be 'an environmental watchdog' mandated to oversee, under the Council direction, the enforcement of environmental laws by the parties.[10]

The main feature of the NAAEC, the citizen SEM is meant to formalise this mandate. NAAEC arts 14 and 15 provide citizens and NGOs with a procedure allowing them to submit allegations to the Secretariat of the CEC of a country's failure to effectively enforce its environmental laws. Monitored and guided by the CEC, the SEM creates a direct role for private actors, allowing citizens and NGOs to participate in the operation of an international treaty for the first time. The objective of these articles is not to evaluate the adequacy of domestic environmental laws and regulations but to focus only on the effectiveness of their enforcement. At all stages of the process, the relative transparency of this pioneer procedure underlines the failure of a state to comply with its international commitments. In this way, NAAEC challenges the state-oriented exclusive traditional approach to international law.

However, the NAAEC Citizen Submission Process also appears as a counterpart to the procedural rights that NAFTA gives to foreign investors. NAFTA is the first multilateral treaty providing private corporations, who believe their investor rights have been infringed, with the right to file a claim against a member state for having enacted non-discriminatory public health and environmental regulations.[11] Since its implementation, the North American treaty has been highly criticised for this unique settlement mechanism, portrayed as a bill of rights for transnational corporations.[12] Despite the fact that most of the decisions held enormous public interest, as half of the claims concerned the implementation and making of environmental laws and policies, critics underlined the lack of access to information and citizen participation.[13]

Nevertheless, it is within this forum that environmental groups have fought for access to justice and were admitted for the first time to intervene as third parties. While this

[9] *NAAEC* preamble.
[10] Ibid arts 8, 9–15.
[11] Before *NAFTA*, the right for private investors to file a claim with an international arbitral tribunal only existed in the context of bilateral investment treaties. See Patrick Dumberry, 'The *NAFTA* Investment Dispute Settlement Mechanism: A Review of the Latest Case-Law' (2001) 1 *Journal of World Investment* 151.
[12] See, eg, Chris Tollefson, 'Games without Frontiers: Investor Claims and Citizens Submission under the *NAFTA* Regime' (2002) 27 *Yale Journal of International Law* 148.
[13] Since 1994, ch 11 has engendered a total of 59 investor claims (as of 1 August 2011).

form of participation may seem very narrow, it still represents a procedural breach in international investor-state dispute. Even if NAFTA and NAAEC combined limited participation by civil society, they nonetheless put in place new participation mechanisms, both witnesses and direct contributors to the transformation of the relations between the states and the citizens. They aim at increasing public participation in environmental matters, which are still frequently arbitrated between the individual states and private sector. In this transnational context, even if public participation tends to be confined to narrow channels, it contributes to breaking the tradition of political and trade secrecy, while creating a role played by civil society in an international regime.

This article aims to explore the transformation in the spheres of public participation and access to justice in environmental matters in North America. The first part is focused on the issue of citizen participation in NAAEC and the significance of its innovative process in terms of new actors and new mechanisms entering the field of the enforcement of environmental laws. The second part of this article provides an overview of NAFTA's controversial investor-state arbitration process and describes how tribunals have recently acknowledged the need for greater openness and public participation in promoting the legitimacy of the process.

II Citizen Participation in *NAAEC*

As a pioneer procedure, the NAAEC SEM marks real progress in the democratisation of international environmental law.[14] Paradoxically, it achieves this advancement by addressing the sphere of enforcement of domestic environmental law. In the course of its process, the SEM triggers a 'fire alarm' at a continental scale.[15] Over the years, it has generated positive and normative benefits in terms of effectiveness and efficiency, contributing towards more participative governance in environmental matters (outlined further in Section A).

Despite their shortcomings, both the SEM process and its administrative institution, the CEC, proved to be innovative. Since their initiation, they have set the path towards public participation within the operation of an international treaty (outlined further in Section B).

A *Access to Justice in Environmental Matters*

The NAAEC allows citizens and NGOs to file a SEM 'alleging that their government is failing to effectively enforce its environmental law.' NAAEC defines 'environmental law' by explicitly excluding the worker, health and safety laws,[16] but it does not define what would constitute *a failure to effectively enforce* it. Rather, NAAEC explicitly excludes two situations as failures to enforce environmental law: a) where the action or inaction in question reflects a reasonable exercise of discretion;

[14] Jonathan G Dorn, '*NAAEC* Citizen Submissions Against Mexico: An Analysis of the Effectiveness of a Participatory Approach to Environmental Law Enforcement' (2007) 3 *Georgetown International Environmental Law Review* 90.
[15] Kal Raustiala, 'Police Patrols & Fire Alarms in the *NAAEC*' (2005) 26 *Loyola Los Angeles International and Comparative Law Review* 389, 391, 404.
[16] *NAAEC* art 45(2).

or b) results from bona fide decisions to allocate resources to enforcement of other environmental matters determined to have higher priorities.[17] Over the years, the Secretariat of the CEC has established that the 'alleged failure' must be connected to an explicit government obligation.

The procedure is stringent but, as it is innovative in multiple ways, it is useful to comment on all its different steps. First of all, in order to be admissible, a submission must meet six material criteria: 1) it must be in writing; 2) it must be filed by a clearly identified non-governmental organisation or person residing in Canada, Mexico or the United States; 3) it must assert that a party is failing to effectively enforce its environmental law; 4) it must provide sufficient information for the Secretariat to review this assertion; 5) it must not be aimed at harassing industry but rather at promoting enforcement of environmental laws; and 6) it must indicate that the matter has been communicated to the government concerned and refer to any response received. The Secretariat of the CEC generally interprets the meaning of art 14 'liberally and consistently', and has indicated that these material criteria are not intended as 'insurmountable procedural screening devices',[18] which sets a relatively low admissibility barrier.[19]

When material criteria are met, the Secretariat must decide whether to ask the government in question to respond to the submission. To guide its decision, the Secretariat ponders four elements: 1) whether the submission alleges harm to the person or organisation making the submission;[20] 2) whether the submission raises matters whose further study would advance the goals of NAAEC;[21] 3) whether all private remedies available under the party's law have been pursued; and 4) whether the submission is drawn exclusively from mass media reports, exposing no confidential data.[22] The Secretariat dismisses the request if a submission fails to meet one of these criteria.

Despite its interest, the citizen submission process does not provide a mechanism through which a citizen can obtain relief directly from the polluter. In drafting NAFTA and NAAEC, the states intentionally avoided expanding the liability of free-traders to environmental litigation.[23] Therefore, when a citizen or a NGO submits a claim under the Citizen Submission Process, the subject of the complaint shifts from

[17] Ibid art 45(1).
[18] 'Determination Pursuant to Article 14(1) & (2) of the *NAFTA*' (Submission ID SEM/98-003, CEC, 1999) 2.
[19] Marirose J Pratt, 'The Citizen Submission Process of the *NAAEC*: Filling the Gap in Judicial Review of Federal Agency Failures to Enforce Environmental Laws' (2009) 20(1) *Emory International Law Review* 741, 753.
[20] This alleged harm should be due to the asserted failure of enforcement, and related to protection of the environment or prevention of danger to human life or health. 'Determination Pursuant to Article 14(1) & (2) of the *NAFTA*', above n 18, 1.
[21] The Secretariat must take into account the statute of the CEC as a transnational institution with a continental realm. See Knox and Markell, above n 3, 560.
[22] *NAAEC* art 14(1)–(2).
[23] *NAAEC* avoids as well the vocabulary of litigation, using words such as submission, request, inquiry, and factual record.

the polluter's illegal activity to the country's failure to enforce its legislation.[24] It becomes a responsibility of the concerned state.

After having weighed positively the four factors that determine whether to request a response from the concerned party, the Secretariat of the CEC asks for a response. This procedure requires the country to advise the Secretariat within 30 days: 1) if the issue is the subject of a pending legal or administrative proceeding; and 2) of any other information that the party wishes to submit.[25] The Secretariat may end the process if it considers that a pending proceeding may duplicate or interfere with it.

This analysis, called the 'determination process', has to be published in the CEC registry of citizen submissions, which provides information on all the submissions filed and treated.[26] This information highlights the enforcement of some problematic environmental laws from a public standpoint. As it mirrors citizens' expectations, it could serve as source of soft enforcement indicators.[27] Unfortunately, there is no existing compilation of the information available and the website presentation is not particularly helpful. Nevertheless, any interested organisation or person may consult the electronic file and follow the status of any given submission.

After the Secretariat has received the response of the concerned government, it must then decide if the submission, in the light of the response provided by the party, warrants developing a factual record. In doing so it looks at the same four factors as in the previous step: 1) the extent of the alleged harm; 2) the potential advancement of the goals of NAAEC with this submission; 3) the previous pursuit of private remedies available under the law of the state concerned; and 4) the verification that the documents submitted involve no confidential data.[28] When the Secretariat concludes that the submission warrants the preparation of a factual record, it must first seek Council agreement, which requires a two-thirds majority vote, indicating that the representatives of two countries agree with the proposal.[29]

The last phase of the process occurs when the Council authorises the Secretariat to prepare a factual record. In realising this inquiry, the Secretariat must consider any information: 1) publicly available; 2) submitted by interested non-governmental organisations or persons; 3) submitted by the Joint Public Advisory Committee; or 4) developed by the Secretariat or by independent experts. When the factual record is ready, the Secretariat submits a draft to the Council, and receives any party comments on the accuracy of the record, for a period of up to 45 days. At the expiration of this time limit, NAAEC requires the Secretariat to incorporate the comments in the factual record and submit it again to the Council. Over the years, these reports have

[24] Laura Bickel, 'Baby Teeth: An Argument in Defence of the Commission for Environmental Cooperation' [2002–03] 37 *New England Law Review* 815, 840.

[25] This delay can be extended to 60 days in exceptional circumstances on notification to the Secretariat. *NAAEC* art 14(3).

[26] The registry is available on the CEC website: <http://www.cec.org/Page.asp?PageID=924&SiteNodeID=21>.

[27] Katia Opalka, 'Enforcement indicators and citizen submission on enforcement matters under the North American Agreement on Environmental Cooperation' (Paper presented at the 7th international conference on environmental compliance and enforcement, Marrakech, 9-15 April 2005) 4.

[28] *NAAEC* art 15(1).

[29] Ibid art 15(2).

contributed considerably to research developments regarding industrial pollution and biodiversity conservation in the three countries.

Finally, there is a last hurdle that the submission must overcome before the publication of the factual record, which marks the most successful end for the submitter. The CEC must seek Council approval for public release of the factual record. At the end of this lengthy process the Council may, by a two-thirds vote, make the final factual record publicly available.

The time required for the process became an issue at the beginning of the year 2000, when the average period for the publication of the factual records generated for submissions against Mexico reached 53 months.[30] The NAAEC imposes no time limits on reviewing the submission during the determination process. Since 1995, the average length of the determination process in the 16 factual records realised and published from the initial citizen submission to the publication of the factual record itself has been almost five years.[31]

Since 1995, 77 submissions have been received by the Secretariat of the CEC: 10 of them concerned the United States, 28 were about Canadian environmental law and 39 originated from Mexico.[32] The majority of submissions have been filed by environmental NGOs against their home government. The difference in submission numbers between the three states is mainly due to the Council's actions. It effectively narrowed the factual records, restraining them to individualised instances, thus refusing most of the claims for general non-compliance brought against the United States.[33] As a result, up to 1 August 2011, only 16 citizen submissions have been completed by a factual record.

Currently, 11 active submissions have been filed: five of them involve Mexico, five concern Canada and one is directed against the United States. Half of them relate to pollution control and half to biodiversity conservation. Two SEM, submitted in 2004, are at the final step of the factual records: the *Quebec Automobiles Case* and the USA *Coal-fired Power Plants* case. The delays in dealing with the active files are among the longest in SEM history.

Despite their shortcomings, factual records have been described as 'repositories of information on the expectations of different actors around environmental law enforcement'.[34] Their publication highlights a non-compliant party by creating public awareness that the party does not respect its environmental commitments. The CEC discloses complete information on a failure to enforce a specific environmental law through the Registry of Citizen Submissions. In that perspective, the SEM appears as a potential model of accountability for a new breed of international institutions,

[30] Dorn, above n 14, 60.
[31] See <www.cec.org>.
[32] Ibid. As of 1 August 2011.
[33] Chris Wold, 'The inadequacy of the citizen submission process of articles 14 and 15 of the North American Agreement on Environmental Cooperation' (2005) 26 *Loyola Los Angeles International and Comparative Law Review* 415, 435-6.
[34] Opalka, above n 27, 5.

giving citizens and NGOs the opportunity to disclose information on matters that normally remain hidden from the public's awareness.[35]

Does the citizen submission process provide an effective response to citizen claims of government inaction and a real forum for participating in an international institution? Does this mechanism really contribute to persuading the country to enforce its domestic environmental laws? We will now turn to the realm of the CEC as an institution of renewed environmental governance and to the SEM as a tool for increased participation in international environmental matters.

B. *Does Public Participation Make a Difference?*

The initial expectations of the citizen submission process were that it would contribute to improving compliance with environmental laws by stimulating enforcement and thereby engender better environmental protection.[36] As expected, the citizen submission process has generated hopes for citizens and NGOs and created apprehension on the part of the states, who viewed themselves as potentially challenged. Although it did not evolve as a threatening process for the states, the SEM did not completely thwart the expectations of citizens and NGOs, offering them additional access to justice and a glimpse into intergovernmental affairs.

The main critics remain preoccupied with the fact that the NAAEC does not give the CEC the authority to force countries to meet the terms of the treaty. After the publication of the factual record, the country concerned is not required to take corrective measures and later notify the CEC. Moreover, the factual records contain no conclusions and no recommendations, and there is a complete lack of follow-up after their publication. In the cases of 'persistent pattern of failure of enforcement', the countries have not even used the mechanisms at their disposal to convene an arbitration panel according to art 24.[37] Since the beginning, governments have been reluctant 'to give breathing room to a mechanism that scrutinises their own conduct'[38] and the countries never participated actively in the SEM, treating the process as antagonistic rather than cooperative, up to the point of being obstructive.[39]

As a result, since its creation, the institution has been gradually limited to gathering and disseminating information, rather than to promoting public participation. Indeed this has occurred despite the adoption of its *Framework for Public Participation in Commission for Environmental Cooperation Activities* in 1999, which set a policy inviting all the stakeholders to participate in the CEC mission.[40] A North American Fund for Environmental Cooperation was in operation between 1995 and 2003 but

[35] Raustiala, above n 15, 397.
[36] David L Markell, 'Governance of International Institutions: A Review of the North American Commission for Environmental Cooperation's Citizen Submission Process' (2005) 30 *North Carolina Journal of International Law and Commercial Regulation* 759, 762.
[37] Enabling a Party to request that the Council institute an arbitration panel.
[38] Marc Paquin, Karel Mayrand and Carla Sbert, 'The Evolution of the Program and Budget of the Commission for Environmental Cooperation of North America' (CEC, 2003) 6.
[39] Wold, above n 33, 435-6.
[40] Adopted on 22 October 1999.

there have been no financial means to sustain stakeholders' participation since the cessation of this fund eight years ago.[41]

The NAAEC's initial allocation of authority, as it pertains to the SEM process, was more generous towards citizens, NGOs and the Secretariat than the current pattern. It intended to limit the power of the Council to some extent by creating an independent role for the Secretariat and an important role for the citizen. However, since the adoption of a restrictive policy in 2000, the Council has showed little flexibility, and it has infringed on the previous limits of its authority.[42] The turning point dates back to 2001, when the Council issued four resolutions in which it directed the Secretariat to prepare factual records in connection with four citizen submissions by substantially limiting or redefining the scope of the factual records to be developed.[43] There has been considerable criticism of the Council, implying that it has overplayed its role by limiting the independence and authority of the Secretariat, thereby weakening the process.[44]

Composed of the highest level environmental representatives of the governments in the three countries, the Council is the governing body of the CEC.[45] In the SEM process, it voices the intergovernmental advice regarding the matters raised in the submissions and makes all decisions. A new era started in the year 2000, dominated by the decision of the Council to disallow factual records concerning patterns of ineffective enforcement, thus affecting the SEM's ability to attain its environmental objectives[46]. More recently, the Council adopted resolutions in the still active files, directing the Secretariat in the *Coal-fired Power Plants* submission[47] and in the factual record against Canada in the *Quebec Automobiles* case.[48]

The Council's decisions have unfortunately undermined public reliance on the process, discouraging the larger NGOs from filing submissions.[49] The Council did not only limit the extent of the SEM and the powers of the Secretariat, it also restrained the scope of influence of the Joint Public Advisory Committee (JPAC),[50] paying little attention to most of its recommendations regarding a necessary follow-up of factual

[41] Between 1995 and 2003, the North American Fund for Environmental Cooperation awarded 196 grants for a total of US$9.36 million.
[42] CEC, *Council Resolution 00-09: Matters related to Articles 14 and 15 of the Agreement* (13 June 2000)
<http://www.cec.org/Page.asp?PageID=122&ContentID=1143&SideNodeID275&BL_ExpandID>.
[43] CEC, *Council Resolutions no. 01–08, 01–10, 01–11, 01–12 Regarding BC Mining, BC Logging, Migratory Birds, and Oldman River II submissions* (16 November 2001)
<http://www.cec.org/Page.asp?PageID=1224&ContentID&SideNodeID272&BL_ExpandID>.
[44] Markell, above n 36, 780.
[45] *NAAEC* art 8(3).
[46] Wold, above n 33, 423.
[47] [47] CEC, *Council Resolutions no. 08-03* (23 June 2008)
<http://www.cec.org/Page.asp?PageID=122&ContentID=941&SideNodeID265&BL_ExpandID>.
[48] CEC, *Council resolution no .06-07* (14 June 2006)
<http://www.cec.org/Page.asp?PageID=122&ContentID=1069&SiteNodeID=267&BL_ExpandID=>.
[49] Paquin et al, above n 38, 9.
[50] Composed of 15 citizens (five from each country) the Joint Public Advisory Committee advises the Council on any matter within the scope of the *NAAEC* (arts 8(2), 16(4), 16(5)). JPAC reports and advice to Council are available on the CEC website at:
<http://www.cec.org/Page.asp?PageID=1226&ContentID=&SiteNodeID=258&BL_ExpandID=91&BL_ExpandID=91>.

records and the transparency of the whole process. As the third component of the CEC, JPAC describes itself as a 'microcosm of the public', setting a high standard for public involvement[51], which underlines the very unique character of the CEC; a transnational organisation that structurally implements different forms of public participation in multiple ways. Over the years, JPAC has notably contributed to raising awareness of the enforcement of environmental laws in the three countries, but it has progressively been limited to a role of providing mere consultation due to the cumulative effect of the Council's resolutions.

The statute of the CEC as an institution confers another element to the ambiguity of the SEM process and threatens the participation model, which affects both its credibility and its legitimacy. There is an inherent tension between evaluating allegations against a party in the CEC's 'watchdog capacity' and at the same time implementing consensus-based programs in the general cooperation process.[52] Despite this ambiguity, the SEM, in ensuring dynamism, innovation and broader access to information, has oriented the informational mandate of the Secretariat.[53] In the course of this mandate, the publication of the factual records signalled the largest disclosure of information relevant to the enforcement of environmental laws in the three countries.

The 16 factual records published in the 17 years since the entry into force of the NAAEC cover a variety of pollution and biodiversity issues, which differ from country to country. The number of submissions filed each year has been stable since the creation of the process and, as expected, involve a very large variety of statutes, industries and natural areas. In 2004, some observers noted that the SEM had helped strengthen compliance monitoring in some natural areas and contributed to improving the Canadian law on environmental impact assessment.[54] However, it is now generally admitted that enforcement has not improved significantly with regard to the specific issues raised in the process.

Unfortunately, submissions and factual records remain neglected by the governments as a source of information about the shortcomings in environmental enforcement matters, let alone improvement in environmental laws and policies.[55] Nevertheless, the SEM offers an additional, innovative approach which can fill some gaps in government enforcement by simply giving access to a form of review where no other mechanisms are available.[56] The SEM also invites NGOs to participate in the enforcement process and thus to play a role at the international level.[57] As traditional ways of stimulating enforcement of international environmental agreements have

[51] JPAC, *Vision Statement* (26 July 1994) CEC <http://www.cec.org/Page.asp?PageID=122&ContentID=1375&SideNodeID208&BL_ExpandID>.

[52] Greg M Block, 'The North American Commission for Environmental Cooperation and the Environmental Effects of *NAFTA*: A Decade of Lessons Learned and Where They Leave Us' (2005) 26 *Loyola Los Angeles International and Comparative Law Review* 445.

[53] Mark R Goldshmidt, 'The Role of Transparency and Public Participation in International Environmental Agreements: The *NAAEC*' (2002) 29 *Boston College Environmental Affairs Law Review* 359.

[54] Paquin et al., above n 38, 16; Dorn, above n 14, 74.

[55] Opalka, above n 27, 4; Paquin et al, above n 38, 7.

[56] Pratt, above n 19, 742, 744, 788.

[57] John H Knox, 'Separated at Birth: The North American Agreements on Labor and the Environment' (2004) 26 *Loyola Los Angeles International and Comparative Law Review* 359-62.

frequently proven to be insufficient, public participation can make a difference.[58] Previous assessments of the CEC activities, in 2001 and 2003, concluded that the intergovernmental institution has advanced toward transparent and participatory environmental governance in North America,[59] and that it possesses the potential to develop into a quasi-supranational tribunal and an element of a managerial regime by its revitalisation of the international arbitration of environmental arguments.[60] From this standpoint, it could have evolved to offer a role for individuals to protest the negative consequences of globalisation, therefore granting environmental interests a legitimate position in influencing policy decisions.[61] In that sense, it could represent a positive response to globalisation by providing citizens with a voice in the affairs of an international organisation,[62] partially compensating for the reduction in the importance of the national level in the globalisation process.[63] However, it did not develop in this way.

The budget of the CEC, US$9 million per year, has never been increased since its creation in 1994. The fact of the budget freeze, despite CEC's increased responsibilities over the years, tends to illustrate the reluctance of the three governments to sustain public participation, up to the point of compromising environmental benefits. This is the basic ambivalence of the process: the SEM expresses the states' commitment to enforcement and transparency, but in a very narrow and ambiguous way, being ‘inconclusive, unbinding, relatively unused and essentially under their control’.[64]

Criticisms intensify and become harsher when NAAEC-SEM is compared to NAFTA ch 11, the investor-state dispute resolution mechanism, which gives private corporations a right to file a claim against a member state for having enacted non-discriminatory environmental regulations. The disjoint between the publication of a factual record as the only remedy under NAAEC and the enormous indemnities awarded to private investors through NAFTA ch 11 is a real shock to citizens and NGOs. The Mexican submission *Metales y Derivados* provides a good example of this disjoint: the Mexican NGO obtained the publication of the factual record,[65] while the investor Metalclad Corporation received US$15.6 million as a monetary indemnification under NAFTA ch 11 for the loss of its hazardous wastes landfill.[66]

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[58] Goldshmidt, above n 53, 343.
[59] Paquin et al, above n 38.
[60] John H Knox, ‘A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the *NAFTA* Environmental Commission’ (2001) 28 *Ecology Law Quarterly* 10.
[61] Chris Dove, ‘Can Voluntary Compliance Protect the Environment?: The North American Agreement on Environmental Cooperation’ (2002) 50 *University of Kansas City Law Review* 878–9.
[62] Wold, above n 33, 416.
[63] Jacques Donzelot et R Epstein, ‘Démocratie et participation: l’exemple de la rénovation urbaine’ (2006) 326 *Esprit* 5.
[64] Paquin et al, above n 38, 10.
[65] CEC, *Metales y Derivados Submission ID SEM-98-007* (23 October 1998) <http://www.cec.org/Page.asp?PageID=2001&ContentID=2372&SideNodeID543&BL_ExpandID=&BL_ExpandID>.
[66] *Metalclad Corporation v United Mexican States* (*Award*) (ICSID Arbitral Tribunal, Case No ARB(AF)/97/1, 30 August 2000).

Another case was also submitted both as a SEM and as an arbitration during the same period. Methanex Corporation, a Canadian-based company, launched arbitration procedures and filed a SEM against the United States in response to the decision of a Californian Governor to prohibit *Methyl tert-butyl ether* (MTBE), an octane enhancer in unleaded gasoline.[67] As explained in the following section, as a NAFTA claim, Methanex Corporation was the first to address a petition for public participation. The Methanex Corporation SEM however reached the final step of the process, where the Secretariat of the CEC had to consider whether to require a factual record. Subsequently, according to the NAAEC criteria, the Secretariat had no choice but to rule against proceeding further, because the matter was subject of a pending judicial proceeding, the company having opted for the NAFTA arbitration process.

III North American Free Trade Agreement: Gaining Room for Public Participation?

Since its implementation, the NAFTA ch 11 investor-state dispute resolution mechanism has been highly controversial, and surprisingly contrasts with the procedures put forward by the NAAEC. The main concern is that it allows private investors to challenge laws aimed at protecting the environment, human health, and other public-policy objectives through a process that lacks transparency and gives no substantial right for potentially interested third parties to participate in the proceedings.[68]

Since the turn of the millennium, however, NAFTA has been a real testing ground for NGOs and citizens with respect to expanding the limits of transparency in the context of international investment disputes. NGOs have fought for greater access to information and participation (outlined further in Section A) and NAFTA's member states have endorsed some practices intended to achieve that goal. Nevertheless, the public still has no guarantee of procedural or formal rights to access to information and public participation (outlined further in Section B).

A. *The Struggle for Access to Information and Public Participation*

Over the years, NAFTA arbitration tribunals have operated in secret. NAFTA's proceedings do not provide the basic guarantee of due procedures or openness given to domestic courts. The three sets of arbitral rules that can be used under NAFTA do not provide for public hearings or for the disclosure of arbitral awards without the consent of both parties.[69] Except for the obligation to maintain a public register of arbitration claims, there is no other provision in NAFTA ch 11 concerning access to information, participation or transparency.[70]

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[67] CEC, *Methanex ID SEM-99-001* (18 October 1999) < http://www.cec.org/Page.asp?PageID=2001&ContentID=2371&SiteNodeID=250>.

[68] Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, (Working paper, Harvard European Law Association, 2010) <http://www.law.harvard.edu/students/orgs/hela/workingpaper2010.html>.

[69] (1) The International Centre for Settlement of Investment Dispute (ICSID) Rules; (2) The ICSID Additional Facility Rules; and (3) United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.

[70] Article 1126(13).

Moreover, there is no consensus whether the general principle of confidentiality that traditionally pertains to private international commercial arbitrations should apply in investor-state disputes. Secretive proceedings of commercial arbitration between two private disputing parties have always been advocated by the need to protect technical difficulties, financial problems, or other commercial secrets from becoming public knowledge.[71] In fact, confidentiality is often presumed to be the principal advantage of international commercial arbitration when compared with a formal trial. However, no law or regulation explicitly confirms the existence of any confidentiality requirement for arbitration proceedings,[72] and the belief that a duty of confidentiality exists is more a truism than a fact and is highly contentious.[73] It is somewhat paradoxical that what is seen as an advantage of private arbitration is now perceived as a major liability in the context of NAFTA. Moving away from the secretive procedures of investor-state arbitration to allow greater transparency and participation has become vital to assuring the treaty's credibility and viability.

The initial progresses towards increased participation were in access to information and were achieved on an ad hoc basis. The first advancement was due to the Metalclad Corporation claim against Mexico in 1997, arising from the construction of a controversial hazardous waste facility. Early in the arbitration proceedings, the Mexican government filed the tribunal with a claim against Metalclad Corporation for breach of confidentiality. Mexico pretended that some confidential information relating to the arbitration had been divulgated to shareholders and the public. The Mexican government argued that confidentiality was an implicit requirement of commercial arbitration. The tribunal concluded that no general principle of confidentiality existed and that each party was free to speak publicly of the arbitration.[74] However, the recommendation of the tribunal was to limit public discussion of the case to a minimum, subject only to any externally imposed legal obligation of disclosure, in order to maintain good working relations between the parties.

The next development in relation to access to information took place during the *Loewen Group Inc.* case, submitted against the United States in 1998, for alleged injuries arising out of litigation before the Mississippi State Courts in the previous years. In May 1999, the government of the United States asked the arbitration tribunal for permission to open the proceedings to the public. The Loewen Group Inc. agreed to publish all documents related to the arbitration, but only once a final decision was rendered on the arbitration at stake. The tribunal determined that in the absence of express provision preventing disclosure to the public by a party, no general duty of

[71] Philip Rothman, 'Psst, Please Keep it Confidential: Arbitration Makes it Possible' (1994) 49(3) *Dispute Resolution Journal* 70.

[72] Confidentiality and privacy of arbitration have been challenged by recent tribunal decisions, arbitrators, and even the parties of the arbitration themselves, in England, Australia and USA. See Tatsuya Nakamura, 'Confidentiality in Arbitration SVEA Court of Appeal Decision: Is it Good News for Stockholm?' (1999) 12 *Mealey's International Arbitration Report* 24; Philip Rothman, above n 71, 70 Hans Bagner, 'Confidentiality — A Fundamental Principle in International Commercial Arbitration' (2001) 2 *Journal of International Arbitration* 243–9.

[73] Yves Fortier, 'The Occasionally Unwarranted Assumption of Confidentiality' (1999) 131 *Arbitration International* 193.

[74] *Metalclad Corporation v United States of Mexico* (*Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information Regarding ICSID Case*) (ICSID Arbitral Tribunal, Case No ARB/(AF)/97/1, 27 October 1997) [43].

confidentiality should be implied. According to the tribunal, such secrecy would deprive 'the public of knowledge and information concerning government and public affairs'.[75] However, as for the *Metalclad Corporation* decision, the tribunal recommended to limit public discussion on the arbitration to what was considered necessary.[76]

With respect to participation, *Methanex Corporation* is the first NAFTA case to mark a difference. As we have seen, in 1999, the Canadian-based company Methanex Corporation launched arbitration procedures against the United States in response to the decision of a Californian Governor to prohibit *Methyl tert-butyl ether* (MTBE). The California ban argued that MTBE, used to increase oxygen content in unleaded gasoline, was a potentially dangerous substance for human health and the environment. According to Methanex Corporation, this prohibition was arbitrary and unjustified, and thus represented a violation of NAFTA provisions.[77] As noted earlier, Methanex Corporation simultaneously submitted a SEM, arguing that the MTBE ban was a trade barrier created to address an environmental issue caused by the failure of the United States to effectively enforce California's water laws.

The *Methanex Corporation* claim before the NAFTA arbitration tribunal rapidly became the most comprehensive and famous case relative to public participation in mixed international arbitration, as it was the first time NGOs were allowed to participate as amicus curiae. Also known as 'third party intervention', amicus curiae can be described as a person or an entity that has no direct legal interest in the conflict at hand and that submits 'an unsolicited report to the court about factual circumstances in order to facilitate the court's ability to decide the case'.[78] Amicus curiae participation is usually granted on the basis that the third-party in question is in a position to offer to the tribunal a unique perspective or knowledge on the dispute. It often takes the form of a written submission presented to the tribunal, even though it could take other forms of participation, such as attending the hearings, or having access to disputing parties' documents.[79]

In 2000, the International Institute for Sustainable Development (IISD), a Canadian NGO, petitioned the *Methanex Corporation* tribunal to be given the authorisation to submit an amicus curiae brief on significant legal matters of public concern occurring in the case.[80] An identical joint petition presented by a coalition of American environmental NGOs was submitted to the tribunal a few months later.[81] The two

[75] *The Loewen Group Inc. and Raymond L. Loewen v United States of America* (*Decision on Hearing of Respondent's Objection to Competence and Jurisdiction*) (ICSID Arbitral Tribunal, Case No ARB(AF)/98/3, 5 January 2001) [49].
[76] Ibid [59].
[77] In violation of *NAFTA* art 1105 'Minimum Standard of Treatment' and art 1110 'Expropriation and Compensation'.
[78] George Umbricht, 'An Amicus Curiae Brief at the WTO' (2001) 4 *Journal of International Economic Law* 778.
[79] Levine, above n 68, 9.
[80] *Methanex Corporation v USA* (*Application for Amicus Standing IISD*) (In the Matter of an Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, 25 August 2000) 2. This tribunal will hereafter be referred to as the '*NAFTA* Arbitral Tribunal'.
[81] The petition was signed by: Communities for a Better Environment; the Bluewater Network of Earth Island Institute; and the Center for International Environmental Law.

petitions claimed authorisation to be granted observer status at the oral hearings and the right to make oral submissions, and asked to obtain copies of all documents related to the arbitration. The two NGOs justified their requests by the significant public interest raised by the arbitration. Indeed, the claim of Methanex Corporation raised both procedural and substantive issues concerning how a government can make environmental laws and the scope of those laws.[82]

The tribunal concluded that there was nothing in the arbitration rules or in ch 11 that either conferred upon the tribunal the explicit power to accept amicus curiae submission or expressly provided for the opposite. It further declared that it had the power to accept written submissions from the petitioners,[83] pursuant to the arbitration rules which allow for a tribunal to conduct the arbitration in the manner it considers appropriate.[84] The tribunal concluded, however, that without the agreement of all parties, the submitters could not attend the hearing or gain access to documents generated by the arbitration. The confidentiality of the arbitration was thus regarded as a question of procedures having to be regulated between the parties.

Nevertheless, the tribunal encouraged access to information and transparency, considering that the arbitration had an undeniable public interest and that the issues raised extended far beyond those usually raised in a dispute between two private parties: 'the ch 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive'.[85]

With respect to participation and amicus curiae issues under NAFTA, a second step occurred in 2001 with the *United Parcel Services of America Inc.* ('UPS') case, based on Canada Post Corporation's alleged inappropriate use of its monopoly. UPS asserted that Canada Post Corporation was in breach of several NAFTA provisions, as it was employing non-competitive practices and inappropriately using its monopoly to compete unjustly against private-sector parcel services. Following UPS's claim, the Canadian Union of Postal Workers and the Council of Canadians submitted a request to represent Canadian postal workers as amicus curiae, asserting that they were directly affected by the object of the claim and, more broadly, by the consequences it could have on government policy. Notably, the tribunal mainly followed the *Methanex Corporation* approach by allowing amicus curiae participation, but limited it to written briefs and submissions.[86] In its decision, the tribunal highlighted the importance of according greater room for transparency for proceedings such as these.[87] In addition, UPS and the government of Canada both agreed to make the hearings open to the public, subject to the non-disclosure of confidential information.

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[82] *Methanex Corporation v United States of America* (*Application for Amicus Standing, IISD*) (*NAFTA* Arbitral Tribunal, 25 August 2000) [3].
[83] *Methanex Corporation v United States of America* (*Decision of the Tribunal on Petitions from Third Persons to Intervene as « Amici Curiae »*) (*NAFTA* Arbitral Tribunal, 15 January 2001) [23].
[84] Article 15(1) of the *UNCITRAL Arbitration Rules*.
[85] *Methanex Corporation v United States of America* (*Decision of the Tribunal on Petitions from Third Persons to Intervene as « Amici Curiae »*) (*NAFTA* Arbitral Tribunal, 15 January 2001) [22].
[86] *United Parcel Services of America Inc. v Government of Canada* (*Decision of the Tribunal on petitions for intervention and participation as amici curiae*) (*NAFTA* Arbitral Tribunal, 17 October 2001) [70].
[87] Ibid.

The public hearings took place in Washington, at the World Bank Headquarters in July 2002, and were broadcast live on television.

Notably, both *Methanex Corporation* and *UPS* tribunals acknowledged the importance of the public interest in relation to the cases that were brought before them and the potential contribution that third-party participation would make to the legitimisation of the tribunals' final decision along with the entire proceedings, and to some extent, the treaty itself. In response to these increasing pressures from civil society for more open proceedings, the NAFTA Free Trade Commission (FTC)[88] published three Notes of Interpretation on access to information and public participation, in 2001, 2003 and 2004, clarifying the member states' position.

B. *Going Forward on Open Process*

The NAFTA FTC issued the first Note of Interpretation in 2001. Entitled 'Notes of Interpretation of Certain Chapter 11 Provisions',[89] it stated that nothing in the chapter imposes a general duty of confidentiality or precludes the parties from providing public access to documents, with the exception of confidential business information or privileged information protected under a specific law. It further suggested making available to the public all documents submitted to, or issued by, a ch 11 tribunal.

The second Note of Interpretation, 'Statement of the FTC on non-disputing party participation',[90] confirmed that no provision in NAFTA limits a tribunal's discretion to accept written submissions from a third-party. The FTC further elaborated four criteria for tribunals to grant the participation as amicus curiae: 1) the submission must assist the tribunal by bringing in particular knowledge on the issue; 2) it must address matters within the scope of the arbitration; 3) the submitter must have a significant interest in the arbitration; and 4) the subject matter of the arbitration must hold a public interest. Based on this Note and these criteria, the *Methanex Corporation* tribunal (January 2004) accepted amicus curiae, and outlined the steps and modalities for interested third-parties to apply for amicus curiae status. Open hearings also took place in the World Bank Headquarters.

The NAFTA FTC then issued a third Note of Interpretation[91] to highlight these recent improvements, underlying that: 'for the first time a tribunal accepted written submissions from a non-disputing party and adopted the procedures that we recommended ... for the handling of such submissions.'[92] The provision in ch 11 provide that such Notes may be binding provided some conditions must are met.[93] Where the Notes are not an interpretation of NAFTA per se, or the commitments are

[88] The Free Trade Commission ('FTC'), which consists of cabinet-level representatives from the three member countries, is the central institution of *NAFTA*. It supervises the implementation of the agreement, resolves disputes that may arise regarding its interpretation or application, and supervises the committees and working groups. See *NAFTA*.
[89] 'Notes of Interpretation of Certain Chapter 11 Provisions' (*NAFTA* FTC, 31 July 2001).
[90] 'Statement of the FTC on non-disputing party participation' (*NAFTA* FTC, 7 October 2003).
[91] '2004 *NAFTA* Commission Meeting: Joint Statement' (*NAFTA* FTC, 16 July 2004).
[92] Ibid.
[93] Article 1131(2).

limited in their scope they will not be binding. Therefore, it appears that the three Notes of Interpretation do not necessarily bind future tribunals.[94]

NAFTA has been the first investment regime to codify the requirements for amicus curiae participation in an official interpretive statement. The three Notes of Interpretation acknowledged that information on investor-state arbitration holds an instrumental value as it allows citizens to participate in the decision process in a significant manner. However, they did little to ensure access to information, and North American citizens still have no standing and no substantive rights to attend the procedures.

In 2005, the *Glamis Gold* case expanded the concept of third-party participation to not only include public interest advocacy groups, but a broader range of actors.[95] Glamis Gold Ltd., a Canadian corporation engaged in the mining of precious metals, submitted a claim to arbitration alleging that certain federal government actions and California measures, with respect to open-pit mining operations, were in violation of the United States' obligations under NAFTA.[96] The California measures included regulations requiring backfilling and grading for mining operations in the area of sacred native American sites. Glamis Gold claimed damages of US$50 million.

The tribunal accepted a submission from the Quechan Indian Nation[97] regarding the government's duty under international law to protect sacred land on which the mines were situated. The Quechan Nation stated that their interests were to ensure their ancestral land would be protected to the maximum extent possible and treated with appropriate dignity.[98] The tribunal also agreed to receive a submission from the National Mining Association stressing the necessity of ensuring that California's regulations are not contrary to the interests of miners.[99] Based on the FTC's statement on non-disputing party participation, the tribunal decided to accept the amicus curiae written submissions.[100]

It is important to note that the *Glamis Gold* decision does not differ from other ch 11 decisions since the tribunal approached the issues of participation as a matter of strict procedure. In the UPS case for instance, the tribunal, inspired by the *Methanex Corporation* decision, affirmed that its ability to receive amicus curiae submissions was a matter of its discretionary powers rather than third-party right.[101] Transparency and third-party participation are, therefore, still limited to a purely procedural

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[94] Ibid. See also Anthony VanDuzer, 'Enhancing the Procedural Legitimacy on Investor-State Arbitration Though Transparency and Amicus Participation' (2007) 52 *McGill Law Journal* 681.
[95] Levine, above n 68, 15.
[96] Article 1110 ('Expropriation') and art 1105 ('Minimum standard of treatment').
[97] The Quechan, a federally recognized Indian Nation, occupy a reservation in the south-east of California and of Arizona.
[98] *Glamis Gold Ltd. v the United States of America* (*Non-Party Supplemental Submission, Quechan Indian Nation*) (*NAFTA* Arbitral Tribunal, 16 October 2006) 8–9.
[99] *Glamis Gold Ltd. v the United States of America* (*Non-Disputing Party Submission of the National Mining Association*) (*NAFTA* Arbitral Tribunal, 13 October 2006) 5–6.
[100] *Glamis Gold Ltd. v The United States of America* (*Decision on Application and Submission by Quechan Indian Nation*) (*NAFTA* Arbitral Tribunal, 16 September 2005) 2.
[101] *United Parcel Service v Canada* (*Decision on Petitions for Intervention and Participation as Amici Curiae*) (*NAFTA* Arbitral Tribunal, 17 October 2001) [61].

approach which does not do justice to the substantive reasoning for the tribunal's decision.[102]

Furthermore, ch 11 decisions on transparency and third-party participation failed to adopt a cohesive and homogeneous line of reasoning. This appears, however, to be frequently observed in ad hoc tribunals, where the arbiters tend to concentrate on the conflict at stake, rather than on achieving procedural uniformity with other decisions in other tribunals.[103] This case-specific approach meets the expectations of business people in international commercial arbitration, who do not expect that the procedure before the tribunal be similar to what they would have received in their respective national courts. They expect, rather, that the general process be fair, the end result being typically more important to them than the reasoning that leads to it.[104] On the other hand, governments and the public in general usually confer more importance to the strict and rigorous enforcement of formally constituted procedural rules.

These tensions between the interests of private parties and the expectations of civil society are particularly palpable in the context of NAFTA. Since it has been largely recognised that cases like *Methanex* and *Glamis Gold* are of interest to the public, the question that remains to be solved is how the public interest should influence the rules that regulate the availability of information. A more explicit and institutionalised approach to transparency and third-party participation in NAFTA could set up a formal framework that would allow rational decision-making based on fair and impartial rules.

The necessity for explicit rules for investor-state arbitration and the need for more transparency and public participation has been widely acknowledged by the international community. The International Centre for Settlement of Investment Disputes (ICSID) reformed its arbitration rules in 2006 to give tribunals the authority to accept and consider third-party submissions.[105] It now allows a tribunal to accept a third-party written submission on the basis that it would bring a perspective or particular knowledge that is different from that of the disputing parties.

Non-disputing parties who wish to present a submission must also have a significant interest in the dispute at stake. Interestingly, there is no requirement for a general public interest in the dispute to allow third-party participation in ICSID arbitration. Further, the United Nations Commission on International Trade Law (UNCITRAL) Working Group on Arbitration and Conciliation is presently assessing a proposal to formally adopt procedural rules that would permit amicus curiae submission in investor-state disputes.[106]

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[102] Monique Pongracic-Speier, *Confidentiality and the Public Interest exceptions: Considerations for Mixes International Arbitration* (2001) <http://cfcj-fcjc.org/full-text/2001_dra/monique_pongra.html>

[103] Barton Legum, 'Confidentiality: Is International Arbitration Losing One of its Major Benefits?' (2003) 2 *Arbitration International* 146.

[104] Ibid 147.

[105] The amendments concern ICSID Arbitration Rules art 37 and ICSID Arbitration (Additional Facility) Rules art 41.

[106] A recent report by the UNCITRAL Secretariat proposed procedural rules allowing amicus submissions, transparency and public participation (arts 25(4), 32(5), 3, 15). Jan Paulsson and Georgios Petrochilos, *Revising the UNCITRAL Arbitration Rules to Address State Arbitration* (February 2007) International Institute for Sustainable Development <http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration.pdf>.

These developments outside of NAFTA indicate that the move toward transparency is part of a greater tendency which may signify that the recent changes in practice could be lasting.[107] In addition, provisions like those implemented on an ad hoc basis by NAFTA tribunals have been incorporated as obligatory provisions on transparency in the new model for bilateral investment treaties used by Canada and the United States.[108] Treaties following these models now include new standards for investor-state dispute resolution mechanism: all hearings must be open to the public and documents must be made available in a timely fashion. Indeed, by positioning transparency at a mandatory level, these new treaty models demonstrate that the major deficiency with ch 11 practices and with the FTC interpretative statements can be overcome.[109]

Allowing amicus curiae participation in investor-state disputes also raises preoccupations regarding the potential negative consequences it could have on disputing parties or even on the tribunal itself. Even though experience with amicus curiae has been relatively limited to this day, it has been said that third-party participation in investment arbitrations, at least by adding additional pleadings, puts extra burden on the parties.[110] Nevertheless, this burden appears to be reasonably manageable for tribunals.

The extent to which third-parties' submissions in ch 11 arbitrations have been determinative of the final awards remains difficult to assess, but in general, amicus curiae did not influence the decisions to date in any investor-state case.[111] This being said, the quality of amicus curiae submissions obviously depends on the level of access to documents permitted during the arbitration. Greater access to information for third-parties would also mean better prepared and targeted submissions.

In the last decade, NAFTA has shown some improvements with respect to access to information and participation. As seen with the UPS and *Methanex* claims, tribunal hearings can now be open to the public — with the agreement of the investor — and documents in the dispute must now be made available in a timely fashion.[112] In addition, the 2003 FTC note on non-disputing party participation has given to tribunals the implicit authority to consider whether or not to accept amicus curiae briefs. Yet, the rights being given to third parties in NAFTA's arbitrations are limited and the possibility for citizens to attend the hearings still depends on the veto power of the investors.

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[107] VanDuzer, above n 94, 681.

[108] *Agreement Between Canada and __________ for the Promotion and Protection of Investments,* Canada, Model BIT (2004) art 19; *Treaty Between the Government of the United States of America and the Government of [Country]Concerning the Encouragement and Reciprocal Protection of Investment,* United States of America, Model BIT (2004) art 11.

[109] VanDuzer, above n 94, 707.

[110] Meg Kinnear, 'Transparency and Third Party Participation in Investor-State Dispute Settlement' (Paper presented at Making the Most of International Investment Agreements: A Common Agenda, Symposium Co-Organized by ICSID, OECD and UNCTAD, Paris, 12 December 2005) 7.

[111] Ibid 7; *Metalclad Corporation v United Mexican States* (*Award*) (ICSID Arbitral Tribunal, Case No ARB(AF)/97/1, 30 August 2000).

[112] For instance public hearings were held in *Canfor Corporation v United States of America* (*UNCITRAL* Arbitral Tribunal, Hearing Transcript, 7, 8, and 9 December 2004). The public hearings, broadcasted live, were held on 7-9 December 2004 in the World Bank Headquarters.

Nevertheless, NAFTA tribunals have recognised that the overall fairness of judgments in investor-state arbitration could potentially be improved by the contribution of a variety of interveners, offering to the tribunal a unique perspective or knowledge on the dispute at stake. The progress made by NGOs and the recognition given to them by NAFTA tribunals have already had repercussions on other international treaties and will most likely influence the geneses of the next generation of trade agreements.

IV CONCLUSION

The innovative mechanisms of NAFTA and NAAEC reflect the rising interest in greater public participation in international forums while creating new roles for non-state actors, thus contributing to increased public participation in environmental matters at a supranational level. However, the progress made by NGOs is not a complete victory, and both NGOs and citizens must remain vigilant to exercise their NAAEC and NAFTA rights of access to information and public participation. In this regard, the Canadian government approach to several NAFTA claims, choosing to conclude out-of-courts settlements, is particularly threatening.

Last year, in 2010, the Canadian government signed a $130 million out-of-court settlement with Abitibi Bowater Inc. which did nothing to win back the public's trust or show leadership in matters of public participation.[113] Out-of-court settlements, made *in camera* between the sole parties, completely forbid access to information. Up until August 2011, the Canadian government has negotiated three out-of-court settlements in ch 11 disputes: in Ethyl Corporation in 1998, with Trammel Crow Company in 2002, and in Abitibi Bowater in 2010,. The governments of the United States and Mexico have not concluded out-of-court settlements in any of NAFTA ch 11 claims.

Until recently, there were two NAFTA ch 11 claims pending against the government of Canada based on environmental grounds, and raised by American companies: Chemtura's[114] and Dow Agroscience's.[115] In the latter, a coalition of environmental NGOs petitioned the Canadian government to advocate Quebec's ban on the pesticide as a reasonable measure to protect human health and the environment.[116] Unfortunately, these cases were closed without any debate on public participation and there are currently no other claims based solely on recent environmental legislation.[117]

As regards the SEM process and the CEC, NAAEC mechanisms seem to be at a turning point in terms of public confidence and participation. Eleven files are still active, but the delays are the worst recorded to date. New submissions had been filed more or less at the same pace every year, except in 2011 where it has come to a standstill, with only one SEM submitted in seven months. Moreover, the 2011 SEM

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[113] *AbitibiBowater Inc. v Government of Canada* (*Consent Award*) (*NAFTA* Arbitral Tribunal, 24 August 2010).

[114] A C$100 million claim for lost income, arising from Canada's restriction on the use of a pesticide seed treatment.

[115] A multimillion dollar claim for lost income due to Quebec's ban of lawn-care pesticides for health and environmental concerns.

[116] The NGOs are Ecojustice, The David Suzuki Foundation, and Equiterre.

[117] Up to 1 August 2011.

could do little to better public trust in the process. Bennett Environmental Inc., a submitter on the PCB Treatment in Grandes-Piles, asserts that 'Canada, and more specifically the province of Québec, is failing to effectively enforce Québec's *Environment Quality Act ('Act')* and the *Regulations Respecting the Burial of Contaminated Soils ('Regulations')* by issuing a permit for the use of chemical oxidation to treat PCB-contaminated soils without evidence that the process works.'[118] This is an ambiguous submission, in the sense that it comes from a company which states that the targets set in the act are impossible to meet. Bennent Environmental Inc. argues that outside a laboratory context, at a commercial scale, chemical oxidation cannot reduce PCB concentrations in contaminated soils to meet maximum levels for landfilling set by the *Act* and *Regulations*. It is the second time, after Methanex Corporation in 1999, that a company has filed a SEM with rather thwarted motivations.[119] PCB Treatment in Grandes-Piles is at the first step of the determination process and its treatment by the CEC is critical. Will it affect the credibility of the process? Will it contribute to discourage citizens and NGOs to file a SEM? Or will it mark a new incentive for NGOs and the press to call for public participation in enforcing environmental laws? It is hoped that the delays will be shortened and the discussion enlarged.

[118] CEC, *PCB Treatment in Grandes-Piles ID SEM-11-001* (11 January 2011) <http://www.cec.org/Page.asp?PageID=924&ContentID=5608>.
[119] All the other 75 SEM were filed by NGOs or individuals citizens and directed at improving the enforcement of domestic environmental law.