WRITING COMPETITION ENTRY

#10

Regional Priorities:
A Comparison of Dispute Resolution Procedures
Under NAFTA Chapter 11 and the
North American Agreement on Labor Cooperation
Regional Priorities:
A Comparison of Dispute Resolution Procedures Under NAFTA Chapter 11 and the North American Agreement on Labor Cooperation

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## NAALC Submissions and Final Outcomes Concerning the Maquiladora Zone

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<th>NAALC Principle Allegedly Violated</th>
<th>Level of Review and Outcome</th>
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<tr>
<td><strong>US NAO No. 940001 &amp; No. 94002, February 14, 1994</strong></td>
<td>Freedom of Expression and Right to Organize Independent Unions</td>
<td>Informal Meetings among the US, Mexico and Canada</td>
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<tr>
<td><strong>US NAO No. 940003, August 16, 1994</strong></td>
<td>Freedom of Expression and Right to Organize Independent Unions</td>
<td>Ministerial Consultations and Follow-up Report</td>
</tr>
<tr>
<td><strong>Mexican NAO 9501</strong></td>
<td>Freedom of Association and Right to Organize</td>
<td>Ministerial Consultations, public meeting in San Francisco, and publication by the Secretariat entitled, “Plant Closings and Labor Rights.”</td>
</tr>
<tr>
<td><strong>US NAO No. 9701, May 16, 1997</strong></td>
<td>Gender Discrimination</td>
<td>Ministerial Consultations, conferences and public forms in three cities along the US-Mexico border</td>
</tr>
<tr>
<td><strong>US NAO No. 9702, Oct. 30, 1997</strong></td>
<td>Freedom of Association and Health and Safety</td>
<td>Ministerial Consultations; Tri-national public seminars on both freedom of association and health and safety concerns</td>
</tr>
<tr>
<td><strong>US NAO No. 9703, Dec. 15, 1997</strong></td>
<td>Freedom of Association and Health and Safety</td>
<td>Ministerial Consultations</td>
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<tr>
<td><strong>Mexican NAO 9801, April 13, 1998</strong></td>
<td>Right to Organize Collectively; Occupational Health and Safety; Overtime Pay</td>
<td>Ministerial Consultations</td>
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<tr>
<td><strong>Mexican NAO 9802, May 27, 1998</strong></td>
<td>Freedom of Association and Right to Organize; Right to Bargain Collectively; Minimum Employment Standards; Occupational Health and Safety; Protection of Migrant Workers</td>
<td>Ministerial Consultations</td>
</tr>
<tr>
<td><strong>Mexican NAO 9803, August 10, 1998</strong></td>
<td>Occupational Health and Safety; Minimum Employment Standards; Protection of Migrant Workers</td>
<td>Ministerial Consultations</td>
</tr>
<tr>
<td><strong>Canada NAO 98-2</strong></td>
<td>Health and Safety: INS and DOL had Memorandum of Understanding (MOU) that required DOL investigators to inquire into the legal residency of workers who reported health and safety violations and to report their suspicions to the INS.</td>
<td>INS and DOL created new MOU that superceded the other that canceled the former policy</td>
</tr>
<tr>
<td><strong>Mexican NAO 9804</strong></td>
<td>Freedom of Association, Minimum Employment Standards, and Occupational Safety and Health Regulations</td>
<td>Ministerial Consultations</td>
</tr>
<tr>
<td><strong>US NAO No. 9901, November 10, 1999</strong></td>
<td>Occupational Health and Safety; and unjust administrative proceedings</td>
<td>No action at time of writing</td>
</tr>
<tr>
<td><strong>Mexican NAO 2001-1</strong></td>
<td>Occupational Health and Safety and Compensation in Cases of Occupational Injuries and Illnesses</td>
<td>Ministerial Consultation</td>
</tr>
<tr>
<td><strong>US NAO No. 2001-01, June 29, 2001</strong></td>
<td>Freedom of Association</td>
<td>Submission rejected for review February 22, 2002</td>
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</table>
### Chronological List of all filings at the US NAO NAALC
Concerning the Maquiladora Zone and Action Taken

<table>
<thead>
<tr>
<th>Number and Date of Filing</th>
<th>Complaining Party</th>
<th>Company and Country Alleged in Violation</th>
<th>Claim</th>
<th>Level of Review and Final Outcome</th>
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</thead>
<tbody>
<tr>
<td>US NAO No. 940001 &amp; No. 94002, February 14, 1994</td>
<td>IBT &amp; UE</td>
<td>Honeywell and General Electric Plants - Mexico</td>
<td>Freedom of Expression and Right to Organize Independent Unions</td>
<td>Informal Meetings among the US, Mexico and Canada</td>
</tr>
<tr>
<td>US NAO No. 940003, August 16, 1994</td>
<td>ILRF</td>
<td>Sony - Mexico</td>
<td>Freedom of Expression and Right to Organize Independent Unions</td>
<td>Ministerial Consultations and Follow-up Report</td>
</tr>
<tr>
<td>Mexican NAO 9501</td>
<td>Sindicato de Telefonistas de la Republica Mexicana (Telephone Workers of the Republic of Mexico)</td>
<td>Sprint - United States</td>
<td>Freedom of Association and Right to Organize</td>
<td>Ministerial Consultations between the Mexican Secretary of Labor and the United States Secretary of Labor. Public forum in San Francisco, CA, USA. Publication by the Secretariat entitled, &quot;Plant Closings and Labor Rights.&quot;</td>
</tr>
<tr>
<td>US NSO No. 9601, June 13, 1996</td>
<td>ILRF, HRW, and ANAD</td>
<td>Sindicato Unico de Trabajadores de la Secretaria de Pesca (SUTSP, or the Mexican Fisheries Union)</td>
<td>Freedom of Association</td>
<td>Hearing in Washington, DC on January 27, 1996 and Ministerial Consultations</td>
</tr>
<tr>
<td>US NAO No. 9701, May 16, 1997</td>
<td>ILRF, HRW, and ANAD</td>
<td>Entire Mexican Maquiladora Industry</td>
<td>Gender Discrimination</td>
<td>Public Hearing in Brownsville, Texas, United States on November 1997; Conference on &quot;Protecting the Labor Rights of Working Women&quot; in Merida, Yucatan, Mexico; outreach sessions to teach female workers their rights under Mexican Federal Law in McAllen, Texas, United States and Reynosa, Tamaulipas, Mexico</td>
</tr>
<tr>
<td>US NAO No. 9702, October 30, 1997</td>
<td>Freedom of association: SCMW, ILRF, ANAD and Sindicato de Trabajadores de la Industria Metalica, Han Young maquiladora in Tijuana, Baja California, Mexico</td>
<td>Freedom of Association and Health and Safety</td>
<td>Ministerial Consultations; Tri-national public seminars on both freedom of association and health and safety concerns</td>
<td></td>
</tr>
<tr>
<td>NAO No.</td>
<td>Date</td>
<td>Participants</td>
<td>Issues</td>
<td>Notes</td>
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<tr>
<td>US NAO</td>
<td>December 15, 1997</td>
<td>Echlin Workers Alliance</td>
<td>Freedom of Association and Health and Safety</td>
<td>Mexico agreed to ensure Mexican workers are provided with information regarding their right to bargain collectively and to promote the use of voter lists and secret ballots for union elections. No time frame or methods for administering these objectives were included.</td>
</tr>
<tr>
<td>Mexican NAO 9801</td>
<td>April 13, 1998</td>
<td>Oil, Chemical and Atomic Workers International Union, Local 1-675; Sindicato de Trabajadores de Industria y Comercio “6 de octubre”; the Union de Defensa Laboral Comunitaria; and the Comité de Apoyo para los trabajadores de las Maquiladoras</td>
<td>Right to Organize Collectively; Occupational Health and Safety; Overtime Pay</td>
<td>Ministerial Consultations, Sept., 1999. As part of the plan of action contained in the agreement, the U.S. NAO hosted the Mexican NAO in a government-to-government meeting held in Washington, D.C. on May 23 and 24, 2001, with a follow-up session in Mexico City the week after. The U.S. NAO organized public forums in Yakima, Washington, on August 8, 2001, and in Augusta, Maine on June 5, 2002. The plan of action also called for a triennial guide on migrant workers, which the Secretariat has submitted to the Council of Ministers.</td>
</tr>
<tr>
<td>Mexican NAO 9802</td>
<td>May 27, 1998</td>
<td>Unión Nacional de Trabajadores (UNT), Frente Auténtico del Trabajo (FAT), Frente Democrático Campesino (FDC), and the Sindicato de Trabajadores de la Industria Metálica</td>
<td>Migrant workers in the apple industry in Washington state, and NLRB generally – US.</td>
<td>Ministerial Consultations, Sept., 1999. As part of the plan of action contained in the agreement, the U.S. NAO hosted the Mexican NAO in a government-to-government meeting held in Washington, D.C. on May 23 and 24, 2001, with a follow-up session in Mexico City the week after. The U.S. NAO organized public forums in Yakima, Washington, on August 8, 2001, and in Augusta, Maine on June 5, 2002. The plan of action also called for a triennial guide on migrant workers, which the Secretariat has submitted to the Council of Ministers.</td>
</tr>
<tr>
<td>Date and Nationality</td>
<td>Organization(s)</td>
<td>Action(s)</td>
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<tr>
<td>Mexican NAO 9803, August 10, 1998</td>
<td>Acero, Hierro, Conexos y Similares (STIMACHS), assisted by the International Labor Rights Fund</td>
<td>Mexican NAO 9804 Confederación de Trabajadores de México (CTM)</td>
<td>DeCoster Egg Farm Maine, USA</td>
<td>Occupational Health and Safety; Minimum Employment Standards; Protection of Migrant Workers</td>
</tr>
<tr>
<td>Canada NAO 98-2, Mexican NAO 9804</td>
<td>Yale Law School Workers' Rights Project and the ACLU Foundation Immigrants' Rights Project</td>
<td>United States INS and DOL.</td>
<td>Health and Safety: INS and DOL had Memorandum of Understanding (MOU) that required DOL investigators to inquire into the legal residency of workers who reported health and safety violations and to report their suspicions to the INS.</td>
<td>INS and DOL created new MOU that superceded the other that canceled the former policy.</td>
</tr>
<tr>
<td>Mexican NAO 2001-1</td>
<td>Individual Workers and several immigrant worker rights organizations, including Chinese Staff</td>
<td>New York state Workers' Compensation System</td>
<td>Occupational Health and Safety, and NAALC Article 5(1)(d) obligation to ensure that administrative</td>
<td>No action as of this writing.</td>
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<tr>
<td><strong>US NAO No. 2001-01, June 29, 2001</strong></td>
<td><strong>AFL-CIO and PACE</strong></td>
<td><strong>Duro Bag maquiladora, Rio Bravo, Tamaulipas, Mexico</strong></td>
<td><strong>Freedom of Association</strong></td>
<td><strong>US NAO declined to accept the submission for review on February 22, 2002.</strong></td>
</tr>
</tbody>
</table>
# Chronological List of Chapter 11 Filings and Action Taken

<table>
<thead>
<tr>
<th>Filing Date</th>
<th>Complaining Party</th>
<th>Country Denounced</th>
<th>Arbitration Rules</th>
<th>Alleged Illegal Action Taken</th>
<th>Chapter 11 Article(s) Filed Under and Final Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>April 1997</td>
<td>Ethyl Corporation</td>
<td>Canada</td>
<td>UNCITRAL</td>
<td>The Canadian parliament banned the importation of the chemical MMT, which Ethyl Corporation produced in the United States. However, the parliament did not ban the chemical in Canada.</td>
<td>Article 1110: Expropriation. Article 1102: National Treatment. Article 1106: Local performance requirement. The arbitration panel rejected the Canadian arguments that the parliament's action was not a &quot;measure&quot; under NAFTA on June 24, 1998. On July 20, 1998, the Canadian Parliament reversed its ban on the importation of MMT and paid Ethyl Corporation $13 million in legal fees and damages. The Canadian parliament also issued a public statement stating, &quot;&quot;current scientific information&quot; did not demonstrate MMT's toxicity or that MMT impairs functioning of automotive diagnostic systems.&quot; Payment and statement were issued within a year and three months.</td>
</tr>
<tr>
<td>January 2, 1997</td>
<td>Metalclad</td>
<td>Mexico</td>
<td>ICSID</td>
<td>Metalclad received permission to construct a hazardous waste materials facility in outside the community of Guadalcazar, San Luis Potosi, Mexico from the Federal Government of Mexico. The governor of San Luis Potosi state and the local leaders of the town of Guadalcazar repeatedly prohibited the company from constructing its facility by blocking the entrance to the site with protests and eventually state troopers. The governor subsequently declared the area to be a protected ecological zone.</td>
<td>Article 1110: Expropriation. Article 1105: Failure to Provide Fair and Equitable Treatment. The arbitration panel awarded Metalclad $16.7 million in damages on August 30, 2000. Mexico appealed the decision to the British Columbia state courts under ICSID rules. The British Columbia court held, in a split decision, that the ruling was correct, except the date of the expropriation. It therefore lowered the award to $15.6 million. On June 13, 2001, Metalclad announced Mexico decided to pay the full amount.</td>
</tr>
<tr>
<td>October 30, 1998</td>
<td>S.D. Myers</td>
<td>Canada</td>
<td>UNCITRAL</td>
<td>S.D. Myers sought to export PCBs to the United States from Canada. Canadian law only allowed the exportation of PCBs if the United States agreed. S.D. Myers obtained a importation permit from the US in 1995. It then exported</td>
<td>Article 1102: National Treatment. Article 1105: Minimum Standards of Treatment. Article 1106: Performance Requirements. Article 1110: Expropriation. On November 13, 2000, the arbitration panel</td>
</tr>
<tr>
<td>Date</td>
<td>Entity 1</td>
<td>Entity 2</td>
<td>Arbi. Panel</td>
<td>Overview</td>
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<tr>
<td>October 30, 1998</td>
<td>Loewen Group</td>
<td>United States</td>
<td>ICSID</td>
<td>A jury in Mississippi found the Canadian-based Loewen Group guilty of unlawful and anti-competitive acts in trying to purchase funeral homes. The jury eventually awarded the plaintiffs $500 million in damages. The Mississippi Supreme Court refused to waive the normal requirement of posting a bond prior to appealing a decision. The corporation settled with the plaintiffs for $150 million.</td>
<td></td>
</tr>
<tr>
<td>March 25, 1999</td>
<td>Pope &amp; Talbot</td>
<td>Canada</td>
<td>UNCITRAL</td>
<td>Pope &amp; Talbot is based in Oregon, US, and operates several sawmills in British Columbia, Canada. The lumber exported from British Columbia by Pope &amp; Talbot was subject to the Softwood Lumber Agreement between the US and Canada. Pope &amp; Talbot filed the Chapter 11 claim because the timber it wanted to export was subject to the Agreement, while timber exported from other parts of Canada was not.</td>
<td></td>
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</tbody>
</table>
INTRODUCTION:

"Where I work there is only one fan for the entire department of sixty workers. The environment is oppressive from bad ventilation; the air is full of gas from arsenic and other chemicals whose names I don't know... The plants don't have any windows. It's just walls on all sides so the lights and ventilation is artificial. In the winter it gets dark very early so we enter and leave work in darkness; we go for days without seeing the sun... One time they had to put me on worker's compensation for four months because my body was completely saturated with the chemicals [trichloroethylene, acetone, nickel, freon, and others]. I breathed those acid vapors for many hours on end, often ventilation was poor and I would get sick to my stomach. I received various detoxification treatments at the Social Security Clinic (IMSS) and they told me I could no longer work with chemicals. My stomach burned a great deal and I had constant headaches. When I returned to the job, I was assigned to work in the chemical room..."

"International Competition has forced many U.S. companies to develop the concept of production sharing to remain competitive with European and Far-East companies. When Mexico established the maquiladora program in 1965, U.S. corporations began to realize the advantages of establishing operations in Mexico, a country which offered lower production costs (including lower labor and transportation costs), closer proximity to the United States, and the availability of immediate technical assistance from parent companies, thereby producing higher product quality."

These contrasting narratives about the maquiladoras depict the two extreme worlds created by the North American Free Trade Agreement, or NAFTA. The first describes the marginalized world of the people who work in the maquiladoras; the second

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3 Maquiladoras are manufacturing plants on the Mexican side of the US-Mexico border. The name comes from the payment that millers received from farmers for grinding their corn into meal, and thereby adding value. Maquiladoras operate in cities all along the US-Mexico border, and increasingly they are being set up in Central Mexico. See, Devon G. Pena. *The Terror of the Machine: Technology, Work, Gender and Ecology on the U.S.-Mexico Border*. 46-51 (1997). The laws that they operate under will be described later in this paper.
describes the economic motivation, created by NAFTA, for US companies to finance maquiladoras. Many factors have worked to produce this manufacturing industry or zone. One factor is geographical: the US - Mexico border separates one of the most dramatic disparities in wealth between two nations, and especially their citizens, in the entire world. Another factor is historical: Mexican migrants have crossed the border to find better paying jobs in the US for decades; now they are being forcefully kept on the Mexican side of the border to work in US owned factories. However, the focus of this paper will be the agreements made between the three countries governing investment in one state by another, Chapter 11 of NAFTA, and labor relations and rights, the North American Agreement on Labor Cooperation, or NAALC. Comparing the way these two parts of NAFTA were drafted and have been used shows that the drafters of NAFTA listened to the investor’s story more than the worker’s story.

Through an examination these two components of NAFTA, and the claims filed under both of them, this paper will argue that NAFTA was written with a bias in favor of protecting the rights of investors and over protecting the rights of the workers of Mexico, the US and Canada. Specifically, this paper focuses on the submissions or reports of violations of Mexican federal labor law in the maquiladora zone submitted to the United States National Administrative Offices (NAO) and the claims filed under Chapter 11 of

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5 While the Germany/Poland border has a more dramatic GDP differential (11:1) compared to the US/Mexico border (6:1), the length of the border and the wage differential for a potential worker between the US and Mexico makes the differences all the more glaring. Stalker, Peter. Workers without Frontiers. Lynne Rienner Publishers (Boulder 2000)
7 NAFTA, Chapter 11, supra note 4
NAFTA. Chapter 11 of NAFTA governs investment in another State party to NAFTA, and is a procedurally simple, binding and readily enforceable way for corporations to protect their investments, even future investments. Conversely, lengthy deliberations, subtle procedural handicaps, and the lack of efficient enforcement procedures characterize the NAALC. Additionally, Chapter 11 has been used by investors obtain money judgments in the millions of dollars from the governments of the US, Canada and Mexico for enacting laws that lessen the profits of businesses investments, and thereby effectively operating above the law of the country. The NAALC, however, only has the power to require that a country enforce its current laws. Despite its structural weaknesses, discussed in detail below, NAALC is a very important mechanism because it was the first time that a trade agreement like NAFTA linked issues of trade to labor rights. It has also been successfully used to help foster international labor solidarity by creating a common forum for labor rights groups in one country to file a claim in support of labor groups in other countries.

The paper will begin with background on prior US – Mexico investment programs, leading up to the passage of NAFTA. This will include a discussion of Fast Track legislation and the political pressures that lead to the inclusion of the “side agreements,” NAALC and the North American Agreement on Environmental

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11 NAALC, Article 1, supra note 8.
Cooperation. The next paper will examine the most recent cases submitted under NAALC regarding the maquiladora zone, and all Chapter 11 filings. Then, both dispute resolution mechanisms will be evaluated and compared by asking two questions of each dispute resolution process: who decides the dispute? And, what can an aggrieved person expect to recover from filing a claim? These two questions highlight the benefits and structural weaknesses of both dispute resolution mechanisms.

US – MEXICO BORDER PROGRAMS: 1965 TO THE PRESENT

The Border Industrialization Program and Limitations on Investors

The US – Mexico Border Industrialization Program (BIP) began in 1965, just as the Bracero Program was ending. The BIP lowered import and export taxes along the border, thus offering an economic incentive for US corporations to establish maquiladoras. Mexico hoped that the maquiladoras would provide employment for the guest workers returning to Mexico after filling the labor shortages in the US during the Second World War. The maquiladoras were advertised as economically advantageous for both the US and Mexico. The US corporations would benefit from the cheap labor in Mexico, closer transportation costs and proximity to the US for oversight. Mexico would get jobs and a jump-start in industrial manufacturing by the transfer of technology.

The maquiladora zone was also created to make Mexico more competitive with the cheap production facilities in the Caribbean and the Far East.¹⁸

Over the years, Mexico has slowly relaxed different investment laws to accommodate US corporations. Just as Mexican President Porfirio Diaz did before the turn of the 19th century, Mexico's political leaders have again began enticing foreign investors with laws more favorable to investment. Generally, there are three kinds of laws that govern foreign investment: governance by the home state (where the corporation comes from), by the host state (where the investment is taking place) and by multi-nation organizations.¹⁹ Home nations have traditionally been reluctant to set any limits on corporate behavior that occurs outside of its jurisdiction. Similarly, multi-nationl organizations like the United Nations (UN) or the Organization for Economic Cooperation and Development (OECD) have largely failed to generate any international or national laws that govern corporate behavior. They focus their efforts on the "creation of guidelines for the conduct of multinational enterprises,"²⁰ and not on the promulgation of international law.

That leaves the laws of the host country, Mexico in the case of the maquiladoras, to control or govern the activities of multinational corporations in their territories. During the BIP phase of Mexico's foreign investment period, Mexican law reflected a bias in favor of local control. While the BIP lowered import and export tariffs on goods brought in for assembly and exported back exclusively to the US, the actual control and

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¹⁸ Id.
²⁰ Id. at 897, such as the UN's Code for Transnational Corporations
ownership of the maquiladoras were subject to joint venture requirements. A joint venture requirement usually meant that at least 51% of the company had to be owned and controlled by Mexicans. Mexico's 1973 Investment Law "both codified existing laws and decrees and extended the scope of the joint venture." However, NAFTA changed all that.

**Negotiating NAFTA and NAALC**

NAFTA was more of an investment agreement than a complete trade agreement. NAFTA is an example of a fourth type of governance, or a middle ground that countries have created. It is not a multination organization like the UN or the OECD, but an agreement by each member country to submit itself to NAFTA's jurisdiction and laws. For the US, this was done quite unconventionally. Normally, an international agreement of this type would be a Treaty, and subject to the Treaty provisions of the US Constitution. However, two things were done to remove NAFTA from the Constitution's Treaty requirements.

First, then President George Bush received Fast Track Negotiation Authority from Congress. This enabled him, and the United States Trade Representative (USTR), to negotiate the agreement in its entirety, with the House and Senate only voting for or against the agreement. Normally, an agreement of this kind would be subject to the "advice and consent" of the Senate, thereby enabling the Senate to change portions that it

22 Id. at 967
23 MacArthur, supra note 16 and Public Citizen, supra note 10
24 Id.
25 This section is taken from both Frederick W. Mayer. Interpreting NAFTA. Columbia University Press (New York 1998) [hereinafter "Mayer"] and MacArthur, supra note 5.
did not like. Second, it was voted on as an executive agreement, or similarly to legislation proposed by the Executive as implementing legislation. This required a simple majority to pass, whereas a treaty needs a 2/3 majority.

Then candidate Clinton was pressured into taking a firm stance on whether or not he would sign NAFTA. After heavy lobbying by pro-labor groups, environmentalists and corporations, he said he was in favor of signing NAFTA, but only if it included side agreements on labor and environmental protection. When Clinton was elected, he directed his own team in the USTR to draft and negotiate these side agreements. Mexico and Canada reluctantly agreed to the addition of NAALC. They agreed to its addition to preserve NAFTA, and only when it was negotiated to not infringe on their national sovereignty. It was assumed among the trade negotiators that the countries' labor laws generally complied with international standards, and that monitoring by the other countries party to NAFTA would suffice to ensure adequate compliance. Once the NAALC was negotiated and included in NAFTA, Clinton signed NAFTA and Congress voted it in by a narrow margin.

NAALC: FOSTERING INTERNATIONAL LABOR SOLIDARITY AND SMALL VICTORIES

Principles and Structure

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26 Id.
28 Mayer, supra note 25
29 Dombois, 6, supra note 12
30 Id.
31 Id.
32 Mayer, supra note 25
The main body of NAFTA deals exclusively with trade and investment issues.33

The North American Agreement on Labor Cooperation (NAALC)34 was negotiated to be a forum to resolve allegations of violations of a country’s own labor laws. First, it is important to note that NAALC does not create any supranational labor standards or a body to enforce such standards. Each country is required to enforce its own labor laws, and to “promote, to the maximum extent possible” eleven principles35:

1. Freedom of association and protection of the right to organize
2. The right to bargain collectively
3. The right to strike
4. Prohibition of forced labor
5. Labor protections for children and young persons
6. Minimum employment standards
7. Elimination of employment discrimination
8. Equal pay for women and men
9. Prevention of occupational injuries and illnesses
10. Compensation in cases of occupational injuries and illnesses
11. Protection of migrant workers

These guiding principles mirror those set out in the UN International Convention on Economic, Social and Cultural Rights,36 and are embodied in some form in laws of the US, Mexico and Canada. Again, the idea was not to create new laws, but to increase the enforcement of existing laws in each member country.

Each country is required to operate a National Administrative Office (NAO) to receive complaints about a country not fulfilling its duties under NAALC.37 A private right of action is provided for, meaning that any interested party can bring a claim before

33 Folsom II, supra note 21
34 NAALC, supra note 8
35 id. Art. 49
the NAO. This could be the aggrieved worker, a Union in another member country, or a Non-Governmental Organization (NGO). Additionally, each NAO is directed to hear claims arising out of another member country.

The scope of issues that the NAALC allows to be brought is wide; however, several of the eleven principles can advance beyond the first level of review. NAALC provides for a three-tier review process, with the scope of issues heard narrowed at each progressive tier. Once a claim is brought before a NAO, the office may refer the matter to ministerial consultations if it determines the complaint raises meritorious issues. However, NAALC does not give any guidelines on how the ministerial consultations should proceed. The parties are only directed to "agree on the interpretation and application of the Agreement, and shall make every attempt through cooperation and consultations to resolve any matter that might affect its operation" and to provide the other parties with any requested information.

The next tier, an Evaluation Committee of Experts (ECE), narrows the applicable issues to those relating to "patterns of practice by each Party in the enforcement of its occupational safety and health or other technical labor standards" and must be trade-related and "covered by mutually recognized labor laws." Any party may request the formation of an ECE, but it is subject not only to the above requirements, but also to

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39 NAALC, Article 16, supra note 12
40 See Keresztesi, 417, supra note 37
41 NAALC, Part Five, supra note 8
42 NAALC, Art. 20, supra note 8
43 NAALC, Art. 22, supra note 8
44 NAALC, Art. 23, supra note 8
approval by the Council. The members of the ECE are chosen by the Council, which also establishes the rules of procedure. There are three members and they are chosen for their “expertise or experience in labor matters or other appropriate disciplines,” and must be independent of the NAALC and comply with “a code of conduct established by the Council.”

These committees can investigate the complaint by holding hearings, visiting the location of the complaint, consider any information it deems relevant and publish their findings. They cannot, however, require action to be taken on the part of one of the Parties. The ECE’s only enforcement power is to issue reports that condemn the situation in the country where the violations occurred. Its report is sent to the Council for evaluation and consideration. The Council is then directed to work cooperatively to resolve the issue.

Only an arbitration panel can force a member country to either enforce its own labor laws by levying fines or removing trade benefits. However, the requirements for forming an arbitration panel have not been met as of this writing. The issue must not have been resolved 60 days after the Council convened, there must be a written request from a consulting Party, and the Council must pass a two-thirds vote to form an arbitral panel. Then, for the arbitral panel to hear the issue it must be a “persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards” and be trade-related and

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45 NAALC, Art. 23 (1) and Art. 9: The Council is comprised of labor ministers from each of the Parties. It establishes its own rules and procedures, but must convene once a year for regular session and for a “special session at the request of a Party,” supra note 8
46 NAALC, Art. 24, supra note 8
47 NAALC, Art. 24 & 26, supra note 8
48 NAALC, Art. 27 & 28, supra note 8
49 NAALC, Art. 29, supra note 8: see <www.naalc.org> for the status of submissions to the three NAOs.
“covered by mutually recognized labor laws.”51 If the Arbitral Panel finds that an abuse is ongoing, and the member nation refuses to take any action to remedy the situation, the panel may fine52 the country, or if it does not pay the fine, a suspension of NAFTA benefits may be levied.53 This final enforcement provision, the only one with what could be called “teeth,” comes after long delays caused by NAALC’s preference for consultations and reports. Each stage has many days (60 to 120) between them that add up, meaning that the complaining party could not see any enforcement for a terrible abuse until three or more years after the initiation of the complaint.54

Additionally, the arbitration proceedings themselves are undemocratic and biased in favor of business and trade interests.55 The panelists who sit on the arbitration panels are drawn from a list of potential arbiters. These arbiters are usually trade and investment lawyers.56 Since no NAALC claim has proceeded to arbitration,57 this discussion will be picked up in the analysis of Chapter 11, where arbitration panels have been used frequently.

**Cases**

This section analyzes all of the cases submitted under NAALC for labor rights abuses along the US-Mexico border thus far. They demonstrate the positive and the

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50 NAALC, Art. 29 (1), supra note 8
51 NAALC, Art. 29 (1) (a) & (b), supra note 8
52 NAALC, Art. 39, supra note 8
53 NAALC, Art. 41, supra note 8. It should be noted that under Article 4, the offending party is always one of the member nations. The nation will be solely responsible for the violation. The corporation that benefited from the lax enforcement of laws will never be held responsible.
54 Keresztesy, note 37
55 Public Citizen, supra note 10
56 Id.
57 For a summary of the submissions to all NAOs, see: <http://www.naalc.org/english/publications/summmain.htm>, last visited, April 3, 2003
negative aspects of the NAALC structure. Cases have been filed at every NAO, and for a wide range of labor abuses. 58 Most cases that the NAO decides are worthy of investigation are referred to “ministerial consultations.” 59 This process has helped foster international labor solidarity by providing a common forum in the NAALC for labor activists to air their grievances and communicate and work together. However, it has not resulted in substantive relief for many of the abused workers. Institutionalized labor abuses continue to happen on the border. Many times the abuses have been complained of in a NAO submission. Without a strong enforcement mechanism to ensure that reported and verified abuses stop, the NAALC will never completely realize its stated goals.

The vast majority of the cases submitted for the maquiladora zone at the time of writing concern freedom of association. 60 One submission concerns gender based discrimination, and many later submissions contain violations of occupational health and safety. 61 The majority (16) were filed with the US NAO, five with the Mexican NAO and three with the Canadian NAO. 62 One of the Canadian and all five Mexican submissions dealt with labor abuses in the United States. Only the first submission went farther than ministerial consultations. 63

58 Id.
59 Id.
60 Dombois, supra note 12
62 Id.
63 The first submission concerned the sudden closing of a subsidiary of the Sprint Corp. in San Francisco, California. An United States union filed a claim with the National Labor Relations Board (NLRB), and a Mexican union filed a submission with the Mexican NAO. The Mexican NAO requested ministerial consultations and the NLRB ruled that the workers should be rehired and paid back pay. However, the US Court of Appeals reversed, stating that the plant was closed for legitimate financial reasons, LCR, Inc. v. National Labor Relations Board, 129 F.3d 1276, 327 U.S.App.D.C. 164 (1997). The ministerial consultations went ahead as scheduled and produced a report on sudden plant closings in each country, Plant Closings and Labor Rights, available at: <http://www.naalc.org/english/publications/nalmcp.htm>,

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Submissions Regarding the Maquiladora Zone

1. Honeywell & General Electric

   The first US submissions accepted for review were submitted on February 14, 1994 by various labor unions to the US NAO. The International Brotherhood of Teamsters (IBT) submitted No. 940001 and the United Electrical, Radio and Machine Workers of America (UE) submitted No. 940002. The complaints were merged because they alleged the same violation. The submissions alleged that the right to freedom of association in Mexico was being violated because they were not allowed to freely form an independent union of their choice. The NAO accepted the cases for review on April 15, 1994.

   The NAO held an information gathering hearing on September 12, 1994. On October 12, 1994, it determined that there was sufficient evidence that Mexico failed to enforce its labor laws concerning freedom of association. Remarkably, in this first case submitted to a NAO, where evidence was collected that Mexico was in violation of the NAALC, the US NAO chose not to recommend ministerial consultations. It merely recommended that the US, Canada and Mexico work together to develop a program to address these issues.

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65 Id.
66 Id.
67 Id.
The unions were outraged while the companies commended the NAO. This first case brought before the NAO highlights some of the uncertainties and structural weaknesses of the NAO. First, it does not have subpoena power to compel witnesses to testify. Therefore, both Honeywell and General Electric sent written statements concerning their position that no Mexican laws were violated. This did not allow the union lawyers or the NAO hearing officer to question the representatives of the corporations about how much they knew about Mexican law or how much control the US executives might have had over the maquiladora’s day-to-day operation. Second, the NAO does not provide an adversarial trial that arrives at any binding conclusions. It is merely a fact-finding or exploratory hearing that can make recommendations. Then, it is up to the governments to follow those recommendations or not.

However, the NAO proceedings do provide a public forum for labor advocates and aggrieved employees to make their case when no other forum is available. Therefore, labor rights advocates should not be discouraged when the NAO does not take any direct action, because it simply cannot.

2. **SONY**

That same summer, on August 16, 1994 a group of labor rights organizations filed Submission No. 940003 with the US NAO. The International Labor Rights Fund (ILRF) headed the group. Again, this complaint alleged the inability of workers in a maquiladora in Nuevo Laredo, Tamaulipas, this time owned by Sony Corp., to exercise their right to

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69 Id.

70 Id.
freedom of association and the right to organize. After another information gathering session in February of 1995, the NAO issued a report in April recommending ministerial consultations concerning union registration in Mexico. The labor ministers of each country met and held a series of programs designed to address these problems in each country. They were concluded in 1996.

The US NAO issued a follow-up report in December 1996 on the status of the Sony workers. It noted that the situation on the ground had not changed, but there were "potentially significant developments" taking place in Mexico with a decision of the Mexican Supreme Court and other initiatives to change labor law that might provide greater rights for independent unions.

3. SUTSP

The ministerial consultations resulting from the Sony submission did not change the situation in Mexico and another submission was filed. The International Labor Rights Fund (ILRF), Human Rights Watch/Americas (HRW), and the Mexican Association of Democratic Lawyers (Asociacion de Nacional de Abogados Democraticos, or ANAD) filed Submission No. 9601 on June 13, 1996. It alleged the continued lack of freedom of association for federal workers, and went on to question the impartiality of the labor tribunals to effectively review the cases and these issues.

The Sindicato Unico de Trabajadores de la Secretaria de Pesca (SUTSP, or the Mexican Fisheries Union) lost its representation rights when the Mexican Fisheries

Ministry merged with a larger ministry of environment and natural resources. The submission alleged SUTSP lost its registration improperly at the merge because the other ministry's union was more pro-government. The Mexican federal labor law that prohibits more than one union per governmental entity was challenged as a violation of the International Labor Organization (ILO) Convention 87, which is part of the Federal Law of Mexico. It also alleged that the participation of other union in the hearing by the Mexican Federal Labor Board, the Junta de Conciliacion y Arbitraje (JCA, or the Conciliation and Arbitration Board), was a conflict of interest and a violation of principle of an impartial tribunal under the NAALC.

The Submission was accepted for review on July 29, 1996. A hearing was held in Washington, DC in December 1996. On January 27, 1997, a report was issued calling for ministerial consultations. It recommended the ministers address issues of the status of international treaties and constitutional provisions for the protection of freedom of association. During the consultations the governments of Canada, the US, and Mexico agreed to information publicly to facilitate a full examination of the issues.

4. Gender

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73 Id.
74 Id.
75 Id.
77 Id.
79 Id.
80 Id.
Human Rights Watch, the ILRF, and the ANAD filed Submission No. 9701 at the US NAO on May 16, 1997. For the first time, a submission alleged widespread gender-based discrimination in the entire Mexican maquiladora industry. The submission was centered on allegations of pregnancy testing as a requirement for employment, and as a requirement for continued employment. If a woman could not produce evidence that she was menstruating, she would either not be hired in the first place, or would be fired from her job, if she was already employed. The express purpose of this practice is to avoid paying the maternity leave required under Mexican law. Most of the Mexican maquiladora companies mentioned in the submission are subsidiaries of US corporations. Additionally, the submission alleged a violation of the NAALC Article 4 requirement that victims of labor abuse have access to remedy in a competent tribunal. Mexican law only reviewed cases where employees were discriminated against, and since women not hired because of pregnancy testing were never hired, they could not seek redress under Mexican law.

On July 14, 1997, the US NAO accepted the submission for review, and the following November a public hearing was held in Brownsville, Texas. The three Parties agreed to a Ministerial Consultations Implementation Agreement by which the Parties agreed to coordinate a conference that was later entitled “Protecting the Labor

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82 Grimm, supra note 17
83 Id.
84 Id.
85 Human Rights Watch, supra note 9
87 Id.
Rights of Working Women", and was held in Merida, Yucatan, Mexico.\textsuperscript{88} At first, the Mexican Government insisted that while post-hire employment termination for reasons of pregnancy was illegal, pre-hiring pregnancy testing and refusal to hire a pregnant woman was perfectly legal.\textsuperscript{89} During the course of the conference, the Mexican Government reversed its position and stated that employment discrimination based on the pregnant status of a woman was illegal, for either pre- or post-hiring situations.\textsuperscript{90} Pursuant to the Agreement, the US and Canada have hosted two outreach sessions to teach female workers their rights under the law: one in McAllen, Texas, and the other in Reynosa, Tamaulipas, Mexico.\textsuperscript{91}

However, pregnancy testing is still allegedly practiced in the maquiladoras, and is evidence of the Mexican Government's inability to effectively enforce its labor laws in the maquiladora zone.\textsuperscript{92}

5. \textbf{Han Young}

On October 30, 1997 the Support Committee for Maquiladora Workers (SCMW), the ILRF, the ANAD and the Union of Metal, Steel, Iron, and Allied Workers (\textit{Sindicato de Trabajadores de la Industria Metalica, Acero, Hierro, Conexos y Similares} – STIHMACS) of Mexico filed Submission No. 9702 with the US NAO.\textsuperscript{93} It concerned freedom of association rights of workers at the Han Young maquiladora in Tijuana, Baja

\textsuperscript{88} Id.
\textsuperscript{89} Human Rights Watch, supra note 9
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Ableman, Aimee M. The Success of Labour Side Agreements in Preventing Sex Discrimination in Mexico and Latin America. Unpublished Thesis, Queen's University, Kingston, Ontario, Canada (August 2001).
California, Mexico. Workers were intimidated and threatened by the company and some were fired. The NAO recommended ministerial consultations to once again ensure that worker's freedom of association rights were not being violated under Mexican law.94

An amendment alleging occupational safety and health violations was submitted on February 9, 1998 by the Maquiladora Health and Safety Support Network, Worksafe! Southern California, the United Steelworkers of America (USWA), the United Auto Workers (UAW) and the Canadian Auto Workers (CAW).95 The NAO also recommended ministerial consultations on issues of worker health and safety.96

Both ministerial consultations yielded more trinational public seminars on both freedom of association and occupational safety and health concerns.97 Mexico has promised to conduct seminars expressly dealing with the law and practice of its labor boards, the JCA, to ensure their impartiality.98

6. Echlin/ITAPSA

In one of the longest list of concerned organizations yet, the Echlin Workers Alliance, an association of unions in the United States and Canada, filed US NAO Submission No. 9703 on December 15, 1997.99 It is comprised of the Teamsters, the UAW, the CAW, UNITE, the UE, the Paperworkers, and the Steelworkers. Twenty-four additional organizations from all three NAFTA countries were listed as concerned

94 Id.
95 Id.
96 Id.
97 Compa, supra note 68
98 Id.
organizations. Later, the AFL-CIO, the CLC (of Canada) and the UNT (of Mexico) joined the submission.\textsuperscript{100}

Again, the submission alleged freedom of association violations in a maquiladora, this time in Central Mexico.\textsuperscript{101} The Itapsa processing plant in Ciudad de los Reyes, in the State of Mexico, was the site of reported harassment and intimidation. The abuses were not only committed by the company and the existing union, the CTM, but also with the knowledge and complicity of the Mexican Government.\textsuperscript{102} The NAO confirmed that workers were threatened, both physically and mentally, and faced dismissal if they joined the new union.\textsuperscript{103} One the day of the vote to elect the new union, management brought in hired thugs to intimidate the workers as they voted publicly.\textsuperscript{104} As to the health and safety violations, the submission alleged that the workers were exposed to asbestos and other toxic chemicals.\textsuperscript{105} This exposure was compounded because the company did not provide the workers with personal protective equipment.\textsuperscript{106}

The US NAO accepted the submission for review on January 30, 1998, and held a public hearing in Washington, DC in March 1998.\textsuperscript{107} In July, the NAO issued its report recommending ministerial consultations on freedom of association and health and safety laws.\textsuperscript{108} Almost a year later, on May 18, 2000, Mexican Secretary of Labor and Social Welfare Mariano Palacios and US Labor Secretary Alexis M. Herman signed a
ministerial agreement. Mexico will endeavor to make sure Mexican workers are provided with information concerning their right to collective bargaining agreements and to promote the use of voter lists and secret ballots to determine disputes over the election of new unions. However, there is no time frame or a detailed discussion of how Mexico will achieve these goals.

Mexico has held seminars in Tijuana, Baja California, Mexico about the right to freedom of association. Also, Mexico has once again agreed to hold seminars regarding its labor review boards, JCAs, to ensure their impartiality.

7. TAESA

This Submission involved allegations that a private Mexican airline company, Executive Air Transport, Inc. (TAESA), violated the rights to freedom of association, minimum employment standards, and occupational safety and health regulations. The Association of Flight Attendants (AFA) and the Association of Flight Attendants of Mexico (ASSA) filed Submission No. 9901 on November 10, 1999.

The submission alleges that the flight attendants union election system violated the freedom of association laws because workers who supported organizing a new union were terminated. Furthermore, the Mexican government did not enforce compliance with minimum labor standards, specifically the payment of overtime and mandatory

109 Id.
110 Id.
111 Human Rights Watch, supra note 9
112 Id.
114 Id.
contributions to social security, pensions and housing. Occupational safety standards were alleged violated because of inadequate safety training, unsafe flight conditions, and flight attendants were forced to work over the maximum number of hours in flight.

The US NAO accepted the submission for review on January 7, 2000, and a hearing was held in March of 2000 in Washington, DC. The NAO issued its public report on July 7, 2000, recommending ministerial consultations. The US Secretary of Labor requested ministerial consultations with his Mexican counterpart, who accepted on July 24, 2001.

8. **Auto Trim/Custom Trim**

The Coalition for Justice in the Maquiladoras filed Submission No. 2000-01 on July 3, 2000. The allegations include occupational safety and health and compensation in two maquiladoras. The first is the Auto Trim of Mexico in Matamoros, Tamaulipas, Mexico, and the second is the Custom Trim/Breed Mexicana at Valle Hermoso, Tamaulipas, Mexico. Both plants sew leather covers on steering wheels and gearshifts. The US NAO accepted the submission for review on September 12, 2000, and a public hearing was held in San Antonio, Texas, on December 12, 2000. The NAO report

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115 Id.
116 Id.
117 Id.
118 Id.
119 Id.
121 Id.
122 Id.
123 Id.
recommended ministerial consultations. On July 24, 2001 the Mexican Secretary of Labor formally agreed to the consultations offered by the US Secretary of Labor.  

9. **Duro Bag**

The AFL-CIO and PACE filed Submission No. 2001-01 to complain about a union representation election at a Duro Bag maquiladora in Rio Bravo, Tamaulipas, Mexico. The complaint alleged that the company violated the freedom of association laws by not permitting a secret ballot in a location the workers felt was free from managerial influence. The US NAO stated that consideration of this complaint would not further the objectives of the NAALC and declined to accept the submission for review on February 22, 2002.

**Conclusion**

The cases submitted under NAALC concerning labor rights abuses in the maquiladora zone highlight its strengths and weaknesses. It is important to remember that NAALC was the first time that labor rights were incorporated into a trade agreement. The cases have accomplished fostering international labor solidarity by providing a common forum to funnel their complaints, but they have not resulted in a change in the underlying causes of the disputes, namely the non-enforcement of the

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124 Id.
126 Id.
128 Dombois, supra note 12
129 Compa, supra note 68
Mexican labor laws. If the situation does not change, there will be an ever increasing list of “ministerial consultations” recommended by the NAOs. Additionally, a fatigue over filing submissions generated by the relative ineffectiveness of NAALC could lead to a drop-off of submissions.

In order to achieve the goals stated in the Preamble and Objectives of NAALC, it must have a stronger mandate and enforcement capability. The cases filed thus far show that freedom of association is violated throughout the maquiladora zone. The nine submissions to the US NAO concerning the maquiladora zone have all listed freedom of association violations. However, since the NAALC does not have the power to issue and does not allow for the cross-examination of witnesses, there is no way for the complaining party to fully investigate the alleged violations. The NAOs have defined their role in the proceedings as limited to information gathering and providing forums for cooperation among the member states. While this function is an important step in transnational labor protection, it does not go far enough to protect the labor rights of the working people in the maquiladora zone because the abuses continue.

Another structural criticism of the NAALC system is that it lacks an independent oversight body. There is no independent body that can call for further investigations or pursue sanctions against a Party. The NAOs are not separate from the political structure of each country. The Parties ensured that a political solution would always be available to labor abuse problems. Once a claim moves to ministerial consultations, it is removed.

130 Human Rights Watch, supra note 9
131 Dombois, supra note 12
132 NAALC, Preamble, Art. 1, supra note 8
133 Compa, supra note 68
134 Id.; Keresztesi, supra note 37
135 Human Rights Watch, supra note 9
136 Id.
to the political arena. It then takes political will on the part of the government to pursue
the claim. At the present moment, there are many other pressing political issues that the
governments deal with, including, but not limited to: immigration, drug trafficking,
promotion of trade, combating white-collar crime and combating terrorism.137

Secondly, the undefined manner in which the “ministerial consultations” proceed
allows the Parties to avoid effectively dealing with a complaint by having a ministerial
consultation.138 By not defining what should come out of a ministerial consultation, the
parties are free to declare that they complied with procedure and due process when they
have not done anything to remedy the problem. If the governments themselves have a
vested interest in allowing the abuse to continue, like keeping labor costs down, they can
avoid taking substantive action to prevent the abuse from happening again.139

Additionally, the inability to bring certain claims to the ECE and the arbitral
panels handicaps the process.140 Rights such as the promotion of high labor standards,
providing access to fair labor tribunals and the rights associated with freely forming
unions are essential and basic rights to ensure advocacy of labor rights, yet these cannot
be brought to ECEs or arbitral panels.141 The abuse of freedom of association rights has
been cited in all of the submission thus far, however, this abuse can only be dealt with
through ministerial consultations.142 Even in the face of nine submissions repeatedly
accusing the Mexican government of failing to observe its own laws allowing for
freedom of association, the NAALC can do nothing more than recommend ministerial
consultations. The rights of freedom of association and to freely choose an independent

137 Id., 2
138 Id., 21
139 Id., 21, see also, Grimm, supra note 17
140 Keresztesi, 430, supra note 37

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union are important because independent unions work to protect other rights, such as minimum wage pay, occupational health and safety, and child labor protections.\textsuperscript{143} However, only these more individualized rights concerning child labor, minimum employment standards, occupational injuries and illnesses can advance to the level where a group outside the government's control would review the case.\textsuperscript{144} Several authors have noted that associational rights were granted the weakest protection under NAALC.\textsuperscript{145}

The ITAPSA case demonstrates this problem.\textsuperscript{146} Although the submission alleged health and safety violations, along with freedom of association claims, it did not move past ministerial consultations.\textsuperscript{147} The health and safety violations were no doubt severe, but the more striking violation was the freedom of association and freedom to choose an independent union. Not only were the workers physically harassed by the state run union when they attempted to organize an independent union, but the Mexican Junta de Conciliacion y Arbitraje's neutrality was questioned because its panel was made up of representatives from the state union, the state itself and the business owner.\textsuperscript{148} In effect, the workers were faced with appealing their grievance under Mexican law to a panel stacked against them.\textsuperscript{149} However, the NAOs can only hold ministerial consultations on the freedom of association claims. Moreover, the claims of occupational safety and health were not advanced beyond ministerial consultations even though there have been

\textsuperscript{141} NAALC, Art. 29, Art. 38, supra note 8
\textsuperscript{142} Keresztesi, 430, supra note 37
\textsuperscript{143} Id., 430
\textsuperscript{144} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Keresztesi, 427, supra note 37
nine submissions alleging occupational safety and health violations in the maquiladora zone.¹⁵⁰

Time delays are also a concern with the current structure of the NAALC.¹⁵¹ There is no time specified for ministerial consultations to reach an outcome.¹⁵² Instead, it is left up to the countries to decide how long they will pursue ministerial consultations. Additionally, when the submission is finally accepted by the NAO, ministerial consultations can only gather information through public forums and hold informational seminars. Ministerial consultations cannot compel a Party to change or enforce its labor laws. Tri-national seminars on the continued abuse of freedom of association rights in Mexico are obviously not preventing recurring violations.¹⁵³

Finally, although there is a private right of action to submit a claim to an NAO,¹⁵⁴ there is no private right of appeal. If an NAO decides not to consider some of the facts alleged in a submission, or decides to only take a case to ministerial consultations, there is no procedure for a party to appeal the NAO’s decision.¹⁵⁵ There have been five submissions alleging a failure of Mexico to enforce its occupational safety and health laws.¹⁵⁶ Yet, there has been no action towards forming an ECE by the U.S. NAO.¹⁵⁷

¹⁵¹ Keresztesi, 430, supra note 37
¹⁵² NAALC, Art. 22, supra note 8
¹⁵³ Human Rights Watch, supra note 9
¹⁵⁴ NAALC, Art. 4, supra note 8
¹⁵⁵ Human Rights Watch, supra note 9
The sad reality is that Mexico is not enforcing its laws in the maquiladora zone.\textsuperscript{158} There are possibly two reasons why, among many. One is the cultural and governmental acceptance of these norms. The other is the fact that if Mexico enforces its laws and drives up the price of producing goods in Mexico, then the Multi-National Corporations (MNCs) might locate their business elsewhere.\textsuperscript{159} By raising the cost of doing business in Mexico, it might destroy its comparative advantage of cheap labor.

Perhaps even more insidious is the fact that Mexico and the US corporations can hide behind the façade of the NAALC procedures. If this is the only official means to police labor violations along the US-Mexico border, and if the NAALC does what it is required to do, then Mexico and the corporations can say they are complying with the law. Since there are no references to increased inspections or compliance procedures initiated by the Mexican government, the NAALC is not fulfilling a role as the solution to labor abuses in the maquiladora zone.

However, sanctions might not be the only answer. The effective enforcement of laws requires funds sufficient to do so. Ideally, a development fund under NAFTA would be created to help Mexico improve its administration of labor law.

\textsuperscript{158} Human Rights Watch, supra note 9

CHAPTER 11: PUBLIC HEALTH AND SAFETY REGULATIONS BECOME ILLEGAL

Principles and Structure

NAFTA Chapter 11 goes to the heart of NAFTA. Investment is the crux of the agreement: Mexico needed foreign investment, and US investors wanted more assurances of stability in Mexico. Chapter 11 is divided into two parts. The first part, Section A, deals with what treatment a country should give investors from another Party. The second part, Section B, is concerned with appropriate remedies if an investment is not treated as it should be under the first part. In this sense Chapter 11 is an attempt to address the deficiencies of international law in dealing with foreign direct investment.

Chapter 11's Dispute Resolution section is unique because the investors, or private parties, can sue the government directly if they feel their investment has been expropriated or infringed upon by a governmental "measure." This means that the federal governments of Canada, Mexico and the US are the entities that the corporations will sue. Even when the allegedly investment infringing law is promulgated by a local or state entity the federal government is still responsible. The federal governments will have to defend laws promulgated by local governments because Chapter 11 defines a government "measure" as something that could possibly infringe on an investor's rights, such as "any law, regulation, procedure, requirement or practice." What constitutes an

160 Mayer, supra note 25
161 NAFTA, Chapter 11, Section A, supra note 4
162 NAFTA, Chapter 11, Section B, supra note 4
163 Folsom II, supra note 21
164 NAFTA, Art. 1116 & 1117, supra note 4
165 NAFTA, Art. 201, supra note 4
"investor" is defined in NAFTA Article 1139: an enterprise, an equity security of an enterprise, a debt security of an enterprise, a loan to an enterprise, an interest in an enterprise that entitles the owner to income or profits, real estate or other property used for business purposes, and certain interest arising from the commitment of capital.

Of the many new rights given to investors under NAFTA Chapter 11, the five primary rights or privileges investors have invoked most often in Chapter 11 Arbitration are:

1. **Article 1110**: Direct Government Expropriation, which includes a government act that is tantamount to nationalization, or expropriation. The exception is if the expropriation is “(a) public purposes; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105 (1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.”

2. **Article 1102**: National Treatment. All States Parties to NAFTA must treat foreign investors the same as they do national investors.

3. **Article 1103**: Most Favored Nation Treatment. Each State Party to NAFTA must give an investor from another signatory Party the same treatment as it gives to any other investor from another nation, this may be better treatment than the Party gives to its own investors.

4. **Article 1105**: Minimum Standard of Treatment. This provision incorporates international law, “including fair and equitable treatment and full protection...”

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166 defined as a private or publicly held legal entity, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association, NAFTA, Article 201, supra note 4.
167 Public Citizen, supra note 10
168 NAFTA Art. 1110, supra note 4
and security." Investors have used this vague provision to expand the NAFTA's investment protections.

5. Article 1106: No Performance Requirements. This article explicitly prohibits rules that seek to protect local markets. These measures include domestic content and environmental conduct.

When a corporation believes that a member country has violated one of the above rights, it can file a claim with an international arbitration panel for binding arbitration and money damages. It authorizes the World Bank's International Center for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL). Both were created to hear private international commercial disputes. Once a request for a hearing has been filed, the parties appoint the members of the tribunal. Under both systems, the hearings are not open to the public, although the documents and memoranda filed in each dispute are generally made available to the public.

The most important laws governing foreign investment are those of the host country, and now of NAFTA. NAFTA establishes "common laws in some areas, and seeks to extend that harmonization to nearly all foreign investment, with minimum

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169 NAFTA, Art. 1105, supra note 4
170 Public Citizen, supra note 10
171 NAFTA, Art. 1120, supra note 4
173 Public Citizen, 7, supra note 10
174 Id., 7
175 Id., 7
176 ICSID cases are available at: <http://www.worldbank.org/icsid/cases/cases.htm>, last visited April 3, 2003; UNCITRAL cases are currently not available from the UNCITRAL web-page, <www.uncitral.org>, but most documents relating to NAFTA Chapter 11 claims are available at: <www.naftaclaims.com>, last visited April 3, 2003
177 Folsom, supra note 19

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exceptions." While each of the Parties’ laws are different, there is a common thrust to the laws of Canada and Mexico: they are both concerned with the dominance of US investment in their countries. The US is seen as the major exporter of foreign investment, and Canada and Mexico are concerned about the negative effects of unchecked foreign investment.

Canada has a history of restricting investment in particular areas like financial institutions, natural resources, transportation, and publishing. Canada was open to foreign investment until the 1960s, when nationalistic fervor prompted restrictions. Recently, however, the Investment Canada Act (ICA) was modified first by the Canada-US Free Trade Agreement, and then by NAFTA. Canada did, however, negotiate an exemption for its “cultural” industries.

Mexico has a long and turbulent history with foreign investment. When political power was consolidated in Mexico for the first time since independence, the politicos looked to the United States for investment. Porfirio Diaz ruled Mexico with a complex mix of political payoffs, military control of civilian life, and liberalism before it was “neo.” The Porfiriato, so called because Diaz ruled the country for more than forty years with the same economic advisors called científicos, opened the country up to foreign investment in railroads, banking, oil exploration, mining, and large-scale agriculture. By

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178 Id.
179 Negative aspects of foreign investment are: repatriation of profits, lack of local control over company direction, extraction of natural resources without sufficient compensation, adverse effects on the nation’s balance of payments, few managerial jobs for locals and/or the best jobs to foreigners, and for Canada especially, the loss of control over “cultural” industries like television, radio and publishing. Folsom II, supra note 21
180 Folsom II, supra note 21
181 R.S. 1985, ch. 28 (1st Suppl.), as amended by 1988 ch. 65 and Investment Canada Regulations SOR/85-611, as amended by SOR/89-69
182 Folsom II, 289, supra note 21
the time of the Mexican Revolution of 1910, a small group of Mexican elite and foreigners controlled the vast majority of the country's wealth. It is debatable if the Revolution was truly intended to reverse the situation, or to simply spread the wealth around to a few more Mexicans, and a few less foreigners. Regardless, it was not until President Cardenas used Article 27 of the Mexican Constitution to nationalized Mexican oil and later telecommunications industry that the stated goals of the Mexican Revolution began to be felt by the populace.

This history is important because it informs the discussion of modern Mexican politics surrounding foreign investment. The day that President Cardenas nationalized oil, and created PEMEX as the Mexican oil company, is now a national holiday, "el día de la nacionalización de petróleo," on March 18th. PEMEX is considered a national treasure and patrimony. The negotiations that led up to NAFTA were politically very difficult because the prospect of opening up PEMEX to foreign investment is tantamount to China buying the Statue of Liberty. Mexico has been on a slow road back to encouraging foreign investment since the 1940s. The Law to Promote Mexican Investment and Regulate Foreign Investment of 1973 attempted to create a more organized system for foreign investment, but retained a joint-venture requirement of 51% minimum Mexican ownership. After back and forth relaxation and tightening of the law over the next twenty years, the 1993 Investment Act was a major change and a necessary step in Mexico's attempt to join NAFTA. While the act was decidedly pro-investment, it did retain restrictions over natural resources, a reservation of some

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184 Mayer, supra note 25
185 Diario Oficial, March 9, 1973
186 Folsom, supra note 19
187 Diario Oficial, December 27, 1993
investment areas to Mexican nationals, and it did not abolish the Calvo Clause. This was a monumental achievement for the Mexican political leaders, one that turned the clock back almost 110 years to when Porfirio Diaz’s regime started opening Mexico up to foreign investors.

The United States does not have any regulations on foreign investment, per se, but has several restrictions with rationales based on other concerns. The most widely known and most complained about is the Exon-Florio amendment provisions. It enables the president to halt or reverse investment if it raising concerns of “national security.” Investors complain that national security is not defined anywhere in the act, and that it has been used as a cover to restrict investment for political reasons. However, it is not used very often, and does not serve as a block to everyday investment. Additionally, the US requires a maximum 25% foreign investment equity in airlines, and has many restrictions on the ownership of facilities that deal with or produce nuclear materials.

Cases

The cases filed and decided under Chapter 11 stand in marked contrast to those discussed under the NAALC. The cases move swiftly to arbitration, decisions were issued rapidly and the corporations were compensated for the harm to their investment in

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185 Folsom, supra note 19
189 Id. The Calvo Clause is an attempt to ensure that all litigation arising from an investment conflict with Mexico is settled under the laws of Mexico, and that any attempt to use the courts of another nation or encourage diplomatic pressure on Mexico is considered a waiver of any right to remedy. Taken from Weintraub, Russell J. International Litigation and Arbitration, Carolina Academic Press (Durham 2001)
190 It was passed through the Omnibus Trade and Competitiveness Act of 1988 as the Exon-Florio amendment to the Defense Production Act of 1950, 50 U.S.C.A.App. § 2170, and 31 C.F.R § 800.101
191 Folsom, supra note 19
192 Folsom II, 291, supra note 21
full. Moreover, the companies were compensated for losses that they could not have recovered under the national laws of each party to NAFTA.

1. Ethel v. Canada

In April of 1997 Ethyl Corporation filed a NAFTA Chapter 11 claim against the Canadian government for $251 million in damages with UNCITRAL rules of arbitration. Ethyl manufactured methylcyclopentadienyl manganese tricarbonyl (MMT) in the US and imported it to Canada to be refined. The adverse health effects of inhaling or ingesting manganese have been known since the 1800s, however, the full effects of putting these chemicals in gasoline were not know at the time. Canada took a precautionary measure by banning the importation and inter-provincial transport of MMT. This effectively banned MMT because it was not produced in Canada.

Ethyl had threatened the Canadian parliament with the Chapter 11 suit when it debated the proposed ban. Ethyl made good on its threats by suing under NAFTA Article 1100, claiming that the ban on MMT was an “expropriation” of its assets. It also sued under Article 1102 rules for national treatment because the ban was on imports, not domestic production, thus favoring any local producers of MMT and hurting importers. Finally, Ethyl sued under Article 1106, stating that the ban was a local

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194 Public Citizen, 8, supra note 10
195 Id.
196 Id.
197 Id., at 9
performance requirement because it forced Ethyl to establish a plant in every Canadian province.

Canada made initial arguments to the UNCITRAL panel claiming the ban on MMT was not a "measure" under NAFTA and that Ethyl failed to wait the requisite six months after the ban was passed to make a claim.¹⁹⁹ The Arbitral panel rejected Canada's arguments that the law was not a "measure" under Chapter 11 on June 24, 1998.²⁰⁰ On July 20, 1998, the Canadian government reversed the law banning MMT and paid Ethyl Corporation $13 million in legal fees and damages.²⁰¹ It issued a statement that "'current scientific information' did not demonstrate MMT's toxicity or that MMT impairs functioning of automotive diagnostic systems."²⁰² This was prepared for Ethyl to use in advertising. A year and three months after Ethyl filed its suit against Canada, it received compensation and a statement that its product was safe.

While the complete decision behind the settlement will not be known, it is obvious that the Canadian government felt that the arbitral panel would rule against them, and if they wanted to keep the law they would have to pay Ethyl damages. In this first case challenging a governmental public health and safety regulation with the Chapter 11 investor-to-state provision, it is striking that Canada would have had to pay Ethyl compensation under Chapter 11 even if the law was for a public purpose. Article 1110 states that even if a measure is for a public purpose, like stopping its citizens from inhaling a known disabling neurological agent that causes symptoms similar to

¹⁹⁹ NAFTA Article 1120: "Submission of a Claim to Arbitration" states that "provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration."
²⁰¹ Public Citizen, 9, supra note 10
²⁰² Id., 9
Parkinson’s disease,\textsuperscript{203} compensation must be paid in accordance with Article 1110 (2) through (6). Therefore, this first case showed that a corporation’s right to profits were greater than the public’s right to a clean environment. If the public wants a clean environment, then they must pay the corporation for lost future profits. This is entirely undemocratic, allowing corporations to be above the law. Chapter 11 is adding a spending clause to every environmental health bill that is passed by the governments of the NAFTA signatory countries: that they must pay for any lost profits.

2. \textit{Metalclad v. the Municipality of Guadalcazar, Mexico}

On January 2, 1997, Metalclad sued the government of Mexico for $90 million with the ICSID. It claimed that actions by the municipality of Guadalcazar were tantamount to an expropriation without compensation under Article 1110 and that Mexico had failed to provide fair and equitable treatment under Article 1105. Metalclad had a long and turbulent history with the municipality of Guadalcazar, and the toxic waste facility it bought and operated.\textsuperscript{204}

The facility is located on soils that are very unstable, with a complex hydrology that includes active sinkholes and subterranean streams. The community of about 800 people that live within 10 kilometers of the site,\textsuperscript{205} and had long resisted its expansion. At first, a Mexican company, Coterin, wanted to expand the facility. It was denied. Then, in 1993, Metalclad purchased the site, applied for an expansion permit, and was

\textsuperscript{203}Id.
\textsuperscript{204}Id.
\textsuperscript{205}Metalclad Corp. vs. the United Mexican States, ICSID Case No. ARB(AF)/97/1, available at <www.worldbank.org/icsid/cases/awards.htm>, last checked March 30, 2002
denied, as well. Metalclad then went to the Federal government and the state government and reportedly received a permit to construct the additional facilities. The local government, however, continued to protest the expansion of the facility. This included demonstrations and the active involvement of international environmental organizations. The corporation alleged that it was prevented from operating the site because of bureaucratic confusion on the part of the Mexican government, and that the Mexican government assisted the demonstrators in blocking entrance to the site.

Metalclad claims that they received permission from the Governor of San Luis Potosi to go ahead with the construction. However, the Governor ordered state troopers to block the entrance to the facility because he said it would contaminate the groundwater. He based this assertion on an ecological study done by the University of San Luis Potosi that conflicted with the one done by the federal government and Metalclad. The governor subsequently declared the area a protected ecological zone.

The arbitration panel reached its decision to award Metalclad $16.7 million on August 30, 2000. It held that 1) the municipality was wrong to require a local permit (it interpreted Mexican law when the Mexican authorities said it was otherwise); 2) a violation of Article 1105 took place; and 3) an expropriation under Article 1110 took place. Mexico challenged the panel’s ruling. This was the first time of an appeal from

\[206\] Metalclad installed insulation and disposed of asbestos products along the West Coast of the US, \textit{Id.}

\[207\] Metalclad Corp. vs. the United Mexican States, ICSID Case No. ARB(AF)/97/1, available at \textless www.worldbank.org/icsid/cases/awards.htm\textgreater , last checked March 30, 2002

\[208\] \textit{Id.}

\[209\] Public Citizen, supra note 10


\[211\] Metalclad Corp. vs. the United Mexican States, ICSID Case No. ARB(AF)/97/1, available at \textless www.worldbank.org/icsid/cases/awards.htm\textgreater , last checked March 30, 2002
a NAFTA governed decision.\textsuperscript{212} It filed in a British Columbia court because under ICSID rules the local rules of the place of arbitration govern.\textsuperscript{213} The British Columbia court held, in a split decision, that the date of the violations was wrong because the arbitration panel confused dates as the time of expropriation. This lowered the total to $15.6 million because of a reduction in interest.\textsuperscript{214} On June 13, 2001, Metalclad announced that Mexico decided to pay the full amount.\textsuperscript{215}

There were many disheartening aspects of the panel's decision for publicly minded government actors. The panel interpreted the meaning and applied its own interpretation of local environmental laws. This should have been decided in domestic courts. It also claimed that it "need not consider the motivation or intent for the adoption of the Ecological Decree", thereby totally ignoring the public policy behind the law and any consideration under Article 1114: "Environmental Concerns".\textsuperscript{216} This article allows for a party to have discretion when making environmental laws and that it is inappropriate to lower environmental laws to encourage investment. Authors have noted that by interpreting Chapter 11 under the Vienna Convention on the Law of Treaties, the panel should have looked to the intent of the drafters.\textsuperscript{217} Here, the intent of the NAFTA drafters was most likely to prevent an expropriation without immediate and full compensation, like Mexican oil in the 1930s and other events in the developing world. It was not to pay for creeping expropriation by governmental regulation of public health.

\textsuperscript{212} Portion of $16.7 Million Metalclad Award Set Aside. 16 No. 5 Mealey's Int'l Arb. Rep. 7 (May 2001)
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{215} Public Citizen, supra note 10
\textsuperscript{216} NAFTA, Article 1114, supra note 4
matters. The arbitral panel’s decision compensated a corporation’s business mistakes from only listening to one governmental entity when another is telling it the opposite.

3. S.D. Myers v. Mexico

S.D. Myers sought to import polychlorinated biphenyls (PCBs) from Canada into the US for treatment and disposal. PCBs were widely used as coolants and for lubrication in electrical equipment for many years. However, the US EPA determined that PCBs were toxic to humans and the environment. In 1977, the EPA banned their production. Because PCBs are so dangerous, the international community acted, as well. The Basel Convention strongly encourages countries not to export hazardous or toxic materials, and instead to develop ways to dispose of the material domestically. Canada stated it needed to review its policy regarding exports of PCBs to make sure it complied with these guidelines.

S.D. Myers sought an export permit from Canada during the 1990s. Canada’s 1990 PCB Waste Export regulations allowed export of PCBs to the US if the US EPA agreed. In 1995 the EPA granted S.D. Myers an import permit. One month after the US opened up the border to imports of PCBs, Canada issued an Interim Order banning exports of PCBs. During that one month period, S.D. Myers imported seven shipments of Canadian PCBs. Sixteen months later a US Federal judge issued a ruling stopping all

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218 Id.
219 Id.
220 Id.
221 Id.
222 Id.
223 Id.
importation of PCBs into the US because it was a violation of the Toxic Substance Control Act.\textsuperscript{224}

S.D. Myers then sued Canada for $20 million as compensation for lost profits during the sixteen-month period when the US still allowed the importation of PCBs and Canada did not allow their export.\textsuperscript{225} The corporation argued that the Interim Order violated 1) Article 1102: "National Treatment" because it was disguised discrimination aimed at S.D. Myers; 2) Article 1105: "Minimum Standards of Treatment" because Canada banned PCBs in a discriminatory and unfair manner; 3) Article 1106: "Performance Requirements" because the ban required the corporation to dispose of the PCBs in Canada; and, 4) the company argued that the ban was an expropriation of the profits it could have earned during the sixteen months.\textsuperscript{226}

On November 13, 2000, the UNCITRAL tribunal dismissed S.D. Myers' arguments regarding expropriation and performance, but upheld the other claims.\textsuperscript{227} The panel ruled that S.D. Myers' share of the Canadian PCB market was an "investment" under NAFTA, and Canada's ban was in violation of the national treatment provision and the minimum standards provision. Therefore, Canada should compensate S.D. Myers for its lost potential profits. However, at the time of this writing, the panel has not come up with a compensation award.\textsuperscript{228}

\textsuperscript{224} \textit{Sierra Club v. U.S. Environmental Protection Agency, S.D. Myers, et. al.,} No. 96-70224 United States Court of Appeals for Ninth Circuit, Nov. 7, 1996
\textsuperscript{225} \textit{Public Citizen, supra note 10}
\textsuperscript{226} \textit{Id.}
\textsuperscript{228} \textit{Public Citizen, supra note 10}
This case widens the definition of "investment" and "investor" to a new girth. S.D. Myers did not own any property affected in Canada. It did not employ any permanent employees in Canada. It is not clear what S.D. Myers' investment in Canada was. It was in the business of importing PCBs into the US. It knew it had problems doing so in the past, and had no standing contract that was breached because of the regulations. All it could show was that it might have imported more PCBs into the US and then it might have made a profit.

This decision was rendered because Canada made sure it was not in violation of other international treaty obligations. This case illustrates that no other facts or obligations will control in a Chapter 11 constituted arbitration panel other than the rights of "investors" to their potential profits. It opens the floodgates for investors to claim a loss of potential profits even when the regulations or measures do not have a direct effect on property or presently engaged contracts.

Additionally, this tribunal engaged in deciding the best way for Canada to implement its policy objectives. It suggested that Canada should have offered incentives to dispose of the PCBs in Canada. The language used was similar to the World Trade Organization's "least trade restrictive" means possible. This was a panel made up of trade lawyers and trade economists. They are not trained in environmental matters and are not accountable to the people of Canada. Yet, they decided how Canada should protect the health and well being of its citizens.

\[^{229} Id.\]
\[^{230} Id.\]
\[^{231} Id.\]
\[^{232} Id.\]
\[^{233} Folsom, supra note 19\]
4. **Loewen v. Mississippi Jury**

In this case a Canadian-based corporation sued under Chapter 11 to recoup the costs it lost in a jury trial in Mississippi. The Loewen Group had aggressively taken over more than 1,100 funeral homes in different areas of both the US and Canada. When it expanded into Southern Mississippi, a private funeral home owner, Jeremiah O'Keefe of Biloxi sued Loewen in state court alleging "various, unlawful, anti-competitive and predatory acts designed to drive O'Keefe's local funeral home and insurance companies out of business in violation of state law." The jury sided with O'Keefe, and came back with a verdict of $260 million. The Loewen Group could accept this judgment, or ask the jury to reconsider its award in a separate penalty phase according to Mississippi law. The Loewen Group sent the jury back, and they returned with a judgment of $500 million for Mr. O'Keefe. Loewen decided to appeal the decision, and asked to be exempt from a rule of state civil procedure. In order to appeal a verdict without first paying the plaintiff, the losing party must buy a bond. The bond is usually worth 125% of the judgment. Typically, the party purchases 10% of the bond and pledges the rest in property as collateral. The Mississippi Supreme Court denied Loewen's request to be exempt from the bond. At this point, Loewen settled with O'Keefe for $150 million.

However, the litigation did not stop there. Loewen filed a claim against the US under the ICSID in accordance with Chapter 11 on October 30, 1998. Although Loewen settled in Mississippi state court for $150 million, it demanded $725 million in damages.

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233 *Public Citizen*, supra note 10
234 *Id.*
235 *Id.*
236 *Id.*
237 *Id.*
238 *Id.*
from the US in its Chapter 11 claim. Loewen claimed the Mississippi judge allowed the plaintiffs to appeal to “anti-Canadian, racial and class biases,” of the jury during the trial. resulting in the jury’s large verdict for the plaintiff, and that this violated the national treatment provisions of Article 1102. Article 1105: “fair and equitable treatment” provision was violated because the bond requirement effectively forced Loewen to settle the case. Finally, Loewen argued that “the excessive verdict, denial of appeal, and coerced settlement were tantamount to an uncompensated expropriation in violation of Article 1110 of NAFTA.”

This marks the first time that a jury verdict was challenged under Chapter 11. The US argued that a jury verdict, especially a private contractual dispute, cannot be recognized as governmental measure, and NAFTA jurisdiction should be denied. The arbitral panel formed to hear this case, however, found jurisdiction and did not place any restrictions on the types of court actions it can review for NAFTA violations.

The case is still pending, and its ruling will be one of the most important yet. In the ever increasing scope of “investment”, “investor” and “expropriation” under Chapter 11, this arbitration panel could find that a legally constituted jury’s decision was “NAFTA-illegal.” A verdict in favor of Loewen will go much farther than the principles of “Most Favored Nation” or “National Treatment” because a US citizen could not appeal a jury decision in this manner. Here, the corporation is truly receiving extra

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240 Id., at 4
241 Id., at 162
242 Public Citizen, supra note 10
243 Id.
244 Id.
rights greater than those afforded to the citizen of that nation, or the citizens of any nation.

There is a prior case decided under NAFTA with similar facts, but a different outcome. *Azinian v. Mexico* was decided by an ICSID panel in 1999, and held that NAFTA should not be used as a court of appeals for unsatisfied investors. There, a group of US investors misrepresented themselves in a contract to provide waste removal services for the Mexican city of Naucalpan, which the city repudiated when it discovered the misrepresentation. A Mexican court held that the city of Naucalpan was justified in not performing the contract. When Azianian sued under Chapter 11, the arbitration panel dismissed the suit because it held that breach of contract was not sufficient to establish a NAFTA claim. Furthermore, it stated that NAFTA should not be a court of appeals for disappointed investors, and that Article 1105 must be accompanied by a clear violation of international law, independent of NAFTA.

5. **Pope and Talbot v. Canada**

Pope and Talbot operated three sawmills in British Columbia, and is based in Oregon. The company exports softwood timber from Canada to the US, and thus its exports are governed by the Canadian government under the U.S.-Canada Agreement on Trade in Softwood Lumber and enter duty-free up to a quota (“Agreement”). The Agreement was created to avoid a trade war on lumber between the US and Canada. The government owns the majority of Canada’s forests, and Canada has been accused of

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245 Id.
246 Award, International Center for the Settlement of Investment Disputes (Additional Facility), Between Robert Azinian, et. al., and the United Mexican States, Nov. 1, 1999
setting artificially low prices for timber extraction, thus driving down the price of lumber coming from Canada.\footnote{Public Citizen, supra note 10}

On March 25, 1999, Pope and Talbot filed a Chapter 11 claim against the Canadian government.\footnote{Id.} The complaint alleged that Canada violated the company’s rights because of the manner in which it implemented the Agreement.\footnote{Statement of Claim Under Chapter 11 of the North American Free Trade Agreement, Pope & Talbot Inc. v. Government of Canada, United Nations Commission on International Trade Law, Mar. 25, 1999, available at <www.naftaclaims.com>, last checked on April 1, 2002} The specific violations were 1) that the quota system in Canada violated the national treatment under Article 1102 and 2) that the minimum standard of treatment under Article 1105 was violated, too.\footnote{Id.} Additionally, the system imposed performance requirements on the company under Article 1106. Finally, the company argued that its investment was expropriated under Article 1110. In an amended submission to the UNCITRAL panel, it claimed $381 million in damages.\footnote{Id., Award on the Merits, In the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement, Between Pope and Talbot Inc. and the Government of Canada, Apr. 10, 2001, available at <www.naftaclaims.com>, last checked on April 1, 2002} The argument has been characterized as boiling down to “while Pope & Talbot obtained treatment similar to other companies in British Columbia, it was treated less favorably than logging companies that operate in other parts of Canada that are not subject to the quotas of the Softwood Lumber Agreement.”\footnote{Id.}

The arbitral panel issued a final ruling on April 10, 2001, granting relief to Pope & Talbot under the national treatment and minimum standards of treatment, but denying the other claims.\footnote{Id.} The panel ruled that Canada acted unreasonably in asking the company to procurement certain documents in Canada, rather than in the US. The panel
went on characterize the relationship between the company and Canada as hostile and combative, rather than cooperative.

This ruling again departs from the intent of the drafters of NAFTA. Canada presented evidence that the standard for government conduct to violate Article 1105 must be "egregious and amount to a willful neglect of duty or an insufficiency of governmental action that every reasonable and impartial person would recognize as insufficient." This arbitral ruling made a perception of rudeness by a government against a corporation possible NAFTA violation.

In March 2001, the governments did not renew the Agreement, although the US tried. At the time of writing, the dispute over timber is threatening to reach the point of a trade war between the US and Canada.

6. Other Cases Filed, Final Decisions Pending

There are at least nine other cases filed and now before an ICSID or UNCITRAL panel. Investors have filed claims against all three signatory countries. Their claims include expropriation based on ground water regulations in Canada (Sun Belt v. British Columbia); expropriation of market share of MTBE (even though the company does not produce Methanex, but a chemical needed for its production) in gasoline from a

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255 Public Citizen, supra note 10
256 Id.
257 Id.
258 Id.
California phase-out (Methanex v. California),\textsuperscript{260} use of NAFTA to appeal a sovereign immunity defense of Massachusetts for lost potential profits (Mondev v. City of Boston),\textsuperscript{261} expropriation based on Canada Post's alleged violations of competition policy, monopolies and state run enterprises in Chapter 15 of NAFTA (UPS v. Canadian Postal Service);\textsuperscript{262} violations of national treatment and performance requirements because of requirement to use US steel to receive federal highway funds (ADF Group v. Buy America);\textsuperscript{263} expropriation based on the revocation of waste disposal contract (Waste Management v. Mexico);\textsuperscript{264} failure to pay tax rebates from sale of cigarettes (Karpa v. Mexico);\textsuperscript{265} expropriations based on quotas in the Softwood Agreement (Ketcham Investments, Inc. et. al. v. Canada),\textsuperscript{266} and, expropriation of land after a Mexican court determined reported owners did not have good title to land (Adams, et. al. v. Mexico).\textsuperscript{267}

Conclusion

These cases stand in marked contrast to those brought before the NAALC.

Fifteen cases have been brought so far. The corporate win column stands at four, while

\textsuperscript{261} Notice of Arbitration under Chapter 11 of the North American Free Trade Agreement, Mondev International Ltd., v. the United States of America, International Center for Settlement of Investment Disputes, Sept. 1, 1999
\textsuperscript{263} Notice of Arbitration under Chapter 11 of the North American Free Trade Agreement, ADF Group, Inc. v. the Government of the United States of America, International Center for the Settlement of Investment Disputes, Jul. 19, 2000
\textsuperscript{264} Public Citizen, supra note 10
\textsuperscript{265} Notice of Arbitration under Chapter 11 of the North American Free Trade Agreement in the matter of Karpa (a.k.a. Feldman) v. United Mexican States, International Center for the Settlement of Investment Disputes, Apr. 1999
\textsuperscript{266} Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the North American Free Trade Agreement, Ketcham Investments, Inc. and Tysa Investments, Inc. v. the Government of Canada, Dec. 22, 2000
its loss column is at only one. And many commentators suggest that that case, Azinain, should have been dismissed. Ten are still undecided, but the odds are in favor of the corporations winning. The NAALC cases do not have a win or loss column because the abuses continue to happen while substantive relief is in the no-man’s-land of “ministerial consultations.”

Chapter 11 offers investors redress for loss profits through a procedure that can give them direct results against the offending country. Because the arbitration panels are interpreting the wording of NAFTA to embody a wider definition of “expropriation” than the drafters of NAFTA possibly intended, investors can be sure to collect monetary damages if their investment is infringed upon. In Pope & Talbot, the company was able to collect because the government of Canada was rude to them. S.D. Myers owned no property in Canada, yet the arbitration panel determined that its “investment,” importing chemicals made in Canada to the US, was infringed upon enough to collect monetary damages when Canada passed laws protecting its citizens from environmental contaminants. Finally, a jury award that caused a company to settle out of court might soon be considered a governmental “measure” under Chapter 11 in the Loewen case.

264 Public Citizen, supra note 10
265 Id.
266 Id., 37
272 Public Citizen, supra note 10
This definition “measure” is more expansive than the meaning in Chapter 11 itself. Therefore, the Arbitrators are in effect violating the Vienna Convention on the Interpretation of Treaties. The interesting point is that what they are doing, however, is completely legal and the established international norm. Commercial arbitration, including when a company sues a foreign nation, is the preferred way to settle disputes internationally. However, in the commercial setting the arbitration panels apply a certain body of law, usually a specific nation’s law. Under Chapter 11, the arbitral panels are applying NAFTA law without reference to what the drafters of NAFTA intended.

This amounts to an erosion of democracy. Chapter 11 of NAFTA should be revised to clarify what the drafters meant by “tantamount to” expropriation. If the governments of Canada, Mexico and the US really meant for a company’s potential profits, even when it has not signed a contract to sell or produce goods or services, to be the basis for expropriation relief, then the citizens of the different countries should know about it.

**General Conclusion**

Comparing Chapter 11 and NAALC provides a useful way to explore the priorities of the drafters of NAFTA. Chapter 11 was created to protect the interests of investors or multinational corporations. NAALC was created to protect the interests of

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274 Id.
277 Public Citizen, 39, supra note 10
278 Id.
279 NAFTA, Chapter 11, Art. 1, Art. 1115 supra note 4
the men and women who might work for those multinational corporations. The answers to two questions suggest that the drafters of NAFTA wanted to protect the interests of investors more than the working men and women of Canada, Mexico and the United States.

Who Decides?

Under Chapter 11, an arbitration panel composed of international commercial law experts hears the complaint by the investor. The panels usually follow a procedure like that of other arbitration panels, however, it is up to the panel to decide exactly what is allowed or not. Both the investor and the government are usually allowed to file briefs and give testimony to prove their case. Additionally, both sides are usually afforded limited discovery to investigate the claims of the other side.

Under NAALC, the complaining party submits its complaint to a governmental agency, an NAO. The NAOs have defined their role as primarily fact gatherers and providers of a forum to discuss the dispute. The NAOs do not have subpoena power, nor is there a formal discovery process whereby one side can obtain information about the other side. Additionally, the governments themselves have political concerns that the arbitration panels do not. The decision whether to pursue action against another country for alleged violations of that country’s own labor laws is a delicate decision that

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280 NAALC, Preamble, Art. 1, supra note 8
282 NAALC, Art. 16(3)
283 Compa, surpa note 68; Keresztesi, supra note 37
284 Id.
includes many different factors. The arbitration panel is generally free of political concerns about its decision to punish one side or the other.

Therefore, the Chapter 11 investors have a much more efficient and guaranteed mechanism to recover their lost investments than workers have to complain about violations of their rights. What investors and workers have recovered also demonstrates that NAFTA favors investors over workers.

What Can an Aggrieved Person Expect to Recover?

An aggrieved investor can expect swift recovery under Chapter 11. The cases decided thus far demonstrate that multinational corporations have successfully described their enterprises as “investments” and the cause of their loss as governmental “measures” as defined by Chapter 11. An UNCIRAL panel in the Ethyl case and an ICSID panel in the Metalclad case held that environmental regulation was a governmental “measure” “tantamount to expropriation.” S.D. Myers was able to convince an UNCITRAL panel that, although it did not have a contract signed to do so, its past practice of importing a chemical from Canada to the US was an “investment” under Chapter 11. Therefore, Canada’s decision to ban the import or export of the chemical was a governmental “measure” and S.D. Myers was entitled to money damages. Pope & Talbot recovered millions of dollars from Canada after an arbitration panel held that Canada was

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285 Human Rights Watch, supra note 9
286 Public Citizen, supra note 10; Portion of $16.7 Million Metalclad Award Set Aside. 16 No. 5 Mealey’s Int’l Arb. Rep. 7 (May 2001)
uncooperative with the company. All these cases show that governmental regulations that infringe upon, investors may be violations of Chapter 11, and an aggrieved investor can recover money damages from that government.

However, aggrieved workers have not been compensated in the same manner under NAALC. The violations of Mexican labor law in the Maquiladora zone submitted to the US NAO have resulted in public hearings, tri-national seminars on labor law and ministerial consultations. In a few cases, the individual workers have benefited by having their union recognized. However, these cases are overshadowed by the majority of cases where either action on the part of the US NAO is too late to help the workers because they were fired too long ago, they are already injured or the action taken simply did not affect the injured workers. What workers, and especially labor rights groups, can expect to gain through a NAALC submission is increased awareness of the labor abuses that occur in the Maquiladora zone. This may not be the millions of dollars that investors recover through Chapter 11 filings, but it is nonetheless important. NAALC is still unique in that it allows interest groups to use a trade agreement to promote international labor standards. However, it shows the bias towards protecting investors under NAFTA.

290 Compa, supra note 68