

GAO

Report to the Chairman, Subcommittee  
on Trade, Committee on Ways and  
Means, House of Representatives

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July 2001

# NORTH AMERICAN FREE TRADE AGREEMENT

## U.S. Experience With Environment, Labor, and Investment Dispute Settlement Cases



G A O

Accountability \* Integrity \* Reliability

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**Abbreviations**

BITS	bilateral investment treaties
ICSID	International Centre for Settlement of Investment Disputes
NAFTA	North American Free Trade Agreement
UNCITRAL	United Nations Commission on International Trade Law



United States General Accounting Office  
Washington, D.C. 20548

July 20, 2001

The Honorable Philip M. Crane  
Chairman, Subcommittee on Trade  
Committee on Ways and Means  
House of Representatives

Dear Mr. Chairman:

The North American Free Trade Agreement (NAFTA) went into effect on January 1, 1994, and was intended to facilitate trade and investment throughout North America. Separately, the three NAFTA countries—the United States, Canada, and Mexico—negotiated and entered into two side agreements, the North American Agreement on Environmental Cooperation and the North American Agreement on Labor Cooperation. The side agreements provide mechanisms that allow citizens and governments an opportunity to raise questions regarding failure to effectively enforce environmental or labor laws of any of the three countries. These mechanisms include both a submission process and a government-to-government dispute settlement process. NAFTA also provides protections for investors, such as nondiscriminatory treatment and the right to freely transfer funds related to an investment, as well as a mechanism to settle investor-state disputes through the agreement's chapter 11.

In preparation for considering future free trade agreements, we recently briefed your staff on the U.S. experience to date with cases brought under the environmental and labor side agreements and with chapter 11 investor-state dispute settlement. In this report, we provide information on the institutional structure, principles, process, cases, and outcomes associated with (1) the environmental side agreement's submission process, (2) the labor side agreement's submission process, and (3) NAFTA's investor-state dispute settlement mechanism. In addition, this report includes information on fines and trade sanctions under the side agreements, as well as summary data on cases filed under both the side agreements and chapter 11 (see app. I to IV).

To address these objectives, we interviewed officials from eight U.S. agencies with program responsibility for environmental, labor, or trade issues. In conducting the work, we examined the institutional structure and principles of the side agreements and chapter 11 on investment, the processes that are used to investigate and settle disputes, the cases that

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have been initiated under the side agreements and investment provisions, and the outcomes and disposition of these cases. We also talked to representatives from nongovernmental entities with knowledge of the environment and labor submission processes, as well as those familiar with NAFTA's investor-state dispute settlement mechanism. A more detailed description of our scope and methodology is contained in appendix V.

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## Results in Brief

The environmental side agreement created the Commission for Environmental Cooperation to implement that accord's principles and includes a process whereby citizens or nongovernmental groups can raise questions regarding the failure to effectively enforce environmental laws in all three member countries. This process is coordinated at the Commission by the Secretariat, which receives submissions from individuals or groups raising such questions. To date, 31 submissions have been filed with the Secretariat. Of these submissions, 8 were against the United States, 13 were against Mexico, and 10 were against Canada. These submissions have raised a wide range of concerns, from narrow questions of a government's failure to effectively enforce environmental laws in a particular instance, to broader concerns about enforcement in general. The submission process can lead to the publication of a "factual record," a report that outlines the history of the issue, a Party's obligations under the law in question, and the facts relevant to assertions made in the submission. Of the submissions made to date, only two have resulted in completed factual records, and neither of those completed factual records has involved the United States. The Commission recently finalized a review of the submission process. More detailed information on the submissions and process can be found in briefing section I and appendix II.

The labor side agreement established the North American Commission for Labor Cooperation to implement that accord's principles and includes a process whereby citizens, groups, or governments can raise questions of labor law enforcement in all three member countries. The Commission, through a network of National Administrative Offices in each country, coordinates the submission process, which can, in some cases, directly result in initiation of the government-to-government dispute settlement mechanism. To date, 23 submissions have been filed, with 7 against the United States, 14 against Mexico, and 2 against Canada. Although these submissions have covered a broad range of issues, a majority of them have raised concerns about freedom of association. Thus far, no submission has reached the dispute settlement phase. A review of the entire labor side agreement is scheduled for 2002. Additional information on the labor

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submissions and process can be found in briefing section II and appendix III.

NAFTA's chapter 11 is based in large part on previous international agreements, such as U.S. bilateral investment treaties and U.S. domestic legal principles applicable to investment (foreign and domestic). Chapter 11 includes specific protections of investor rights in the three NAFTA countries, as well as a mechanism for settling investor-state disputes. This dispute settlement process makes use of the international arbitration rules of the International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility, and the United Nations Commission on International Trade Law. The parties to the dispute are allowed to choose the arbitral tribunal. The process allows disputing parties to seek to revise, set aside, or annul an award on limited grounds. To date, 13 claims have been filed under this dispute settlement mechanism. Of those claims, four were against the United States, five were against Mexico, and four were against Canada. Only five cases have resulted in a final outcome—either settlement or award. Of these cases, two decisions were brought before Canadian courts for review of the arbitral panels' decisions; one is still pending and the other was partially upheld. Further details on the cases and process are described in briefing section III and appendix IV.

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## Agency Comments and Our Response

We obtained comments on a draft of this report from the Department of Commerce, the Environmental Protection Agency, the Department of the Interior, the Department of Labor, the Department of State, the Department of Justice, the Department of the Treasury, and the United States Trade Representative. Their comments were predominately technical in nature, and we generally incorporated them as appropriate throughout this report.

As arranged with your office, unless you publicly announce the contents earlier, we plan no further distribution of this report until 30 days after its issue date. At that time, we will send copies to interested congressional committees and the Secretary of Commerce; the Administrator, Environmental Protection Agency; the Secretary of the Interior; the Attorney General; the Secretary of Labor; the Secretary of State; the Secretary of Treasury; and the U.S. Trade Representative. Copies will also be made available to other interested parties upon request.

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If you or your staff have any questions about this report, please call me at (202) 512-4347. Additional contact and staff acknowledgments are listed in appendix VI.

Sincerely yours,

A handwritten signature in black ink that reads "Loren Yager". The signature is written in a cursive style with a large initial "L" and "Y".

Loren Yager, Director  
International Affairs and Trade

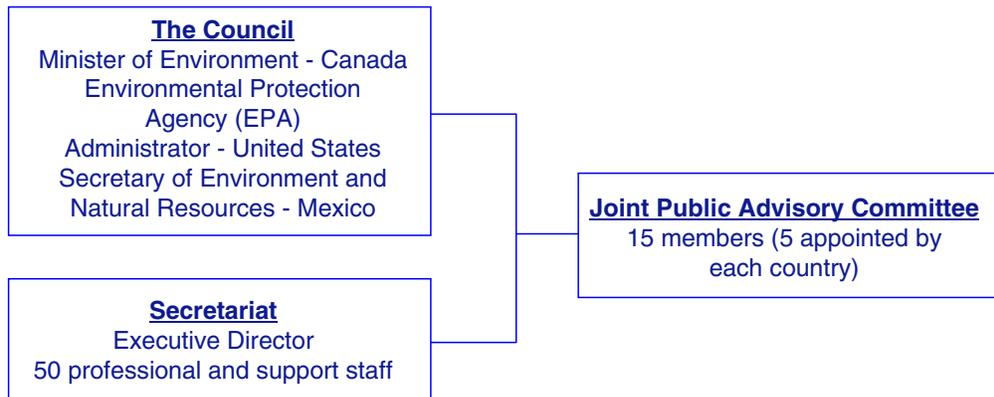
# Briefing Section I: Environmental Side Agreement

Briefing Section I



## Environmental Side Agreement: Institutional Structure

### Commission for Environmental Cooperation





Briefing Section I

# Environmental Side Agreement: Key Principles

## •Key principles

- Protect, conserve, and improve the environment
- Provide **citizens** and nongovernmental organizations an opportunity to raise questions regarding a Party's enforcement of environmental laws
- Provide **governments** an opportunity to raise questions regarding a Party's enforcement of environmental laws
  - Government-to-government process includes provisions for fines and trade sanctions

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## Slide 2: Key Principles

The environmental side agreement aims to protect, conserve, and improve the environment through increased cooperation and transparency among the three governments and greater public participation. Since the agreement's first full year of operation in 1995, member governments have worked cooperatively on a number of projects—producing reports on environmental topics of common concern such as conservation of biodiversity, holding symposia on topics such as understanding the linkages between trade and the environment, and implementing the Sound Management of Chemicals Program.

In addition, the agreement provides citizens and nongovernmental organizations an opportunity to raise questions about and shed light on a Party government's effective enforcement of its environmental laws through the submission process.<sup>1</sup> Party governments may also raise questions regarding another Party's enforcement of its environmental laws through the government-to-government dispute settlement mechanism; however, no government-to-government disputes have been initiated to date. The latter process includes a provision for the assessment of fines and trade sanctions.<sup>2</sup>

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<sup>1</sup>For more information on the cooperative work programs of the Commission for Environmental Cooperation, as well as the citizen submission process, visit the Commission's Web site at <http://www.cec.org>.

<sup>2</sup>While we do not provide specific information on the government-to-government dispute settlement mechanism in this report, appendix I provides a description of the monetary enforcement assessments and trade sanctions available under the North American Agreement on Environmental Cooperation.

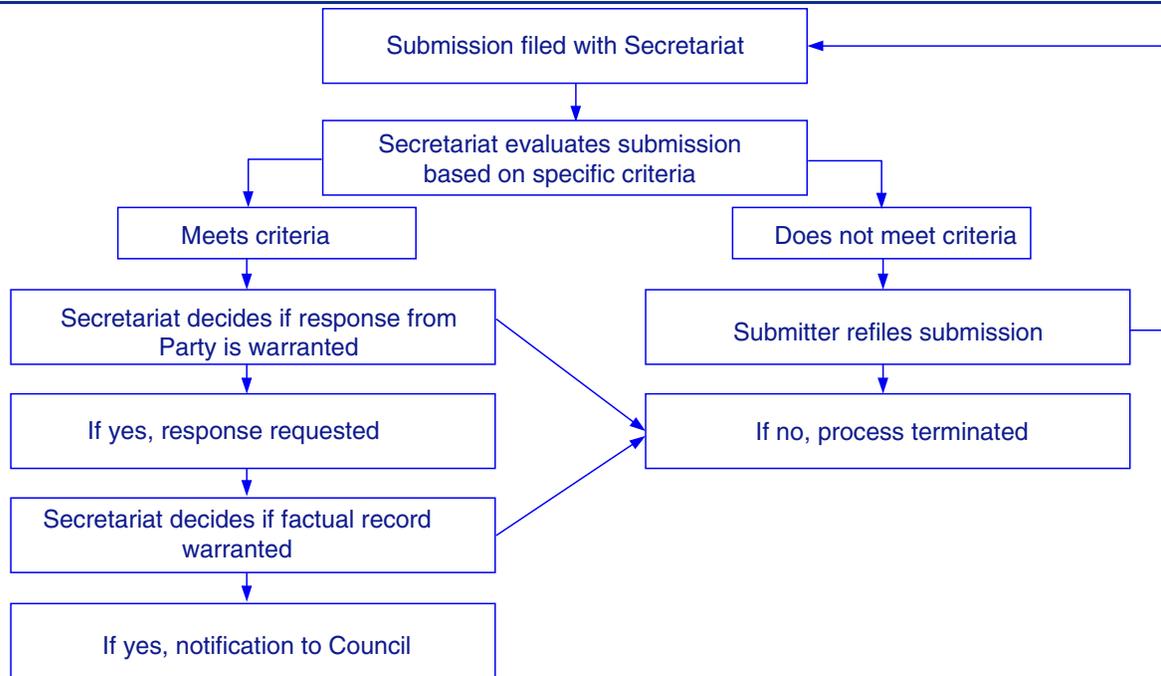
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Briefing Section I

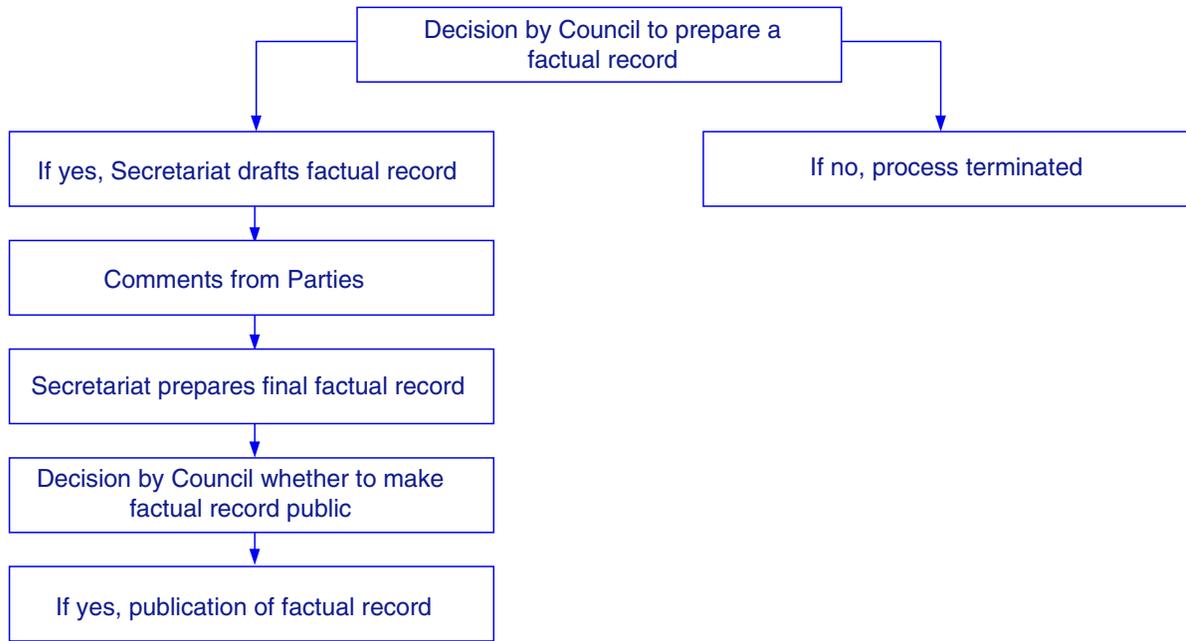
# Environment: Citizen Submission and Review Process





Briefing Section I

# Environment: Citizen Submission and Review Process



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## Slides 3 and 4: Citizen Submission and Review Process

The process for making a submission to the Commission for Environmental Cooperation begins when a citizen or nongovernmental group files a submission with the Secretariat. The process can then move through various decision points, which can culminate in the public release of a factual record on the issues raised in the initial submission. According to the Commission's guidelines, a factual record outlines the history of an issue and the facts relevant to the assertions made in the submission. In the two factual records prepared to date, the Secretariat has also included information on the obligations of the Party under the law in question and the actions of the Party in fulfilling these obligations.

Depending on the point of the process, the decision to proceed rests with either the Secretariat or the Council. The Secretariat is guided by criteria laid out in formal guidelines for implementing the submission process. Documentation of some of the Secretariat's determinations, as well as a Party's response to a submission, is generally available to the public.<sup>3</sup> For example, the Council recently resolved to amend the guidelines to reflect a requirement that the Secretariat make public its reason for recommending a factual record 5 working days after the Secretariat has notified the Council of such a recommendation. A vote of at least two-thirds of the Council is required to proceed at two key points of the process—whether to instruct the Secretariat to prepare a factual record and whether to publicly release the factual record.

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<sup>3</sup>Making files on the citizen submissions and related documents public is subject to the confidentiality provisions of the environmental side agreement and of the guidelines.



**Briefing Section I**

# **Environment: Citizen Submissions Filed and Status of Cases Against the United States**

**•31 Total submissions**

- 8 against the United States
- 13 against Mexico
- 10 against Canada

**•19 Submissions closed and 12 under review**

**•8 Submissions against the United States**

- 5 have been terminated or the process halted
- 1 was withdrawn
- 1 has been recommended for a factual record
- 1 is under review

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## Slide 5: Citizen Submissions Filed and Status of Cases Against the United States

There have been a total of 31 citizen submissions filed with the Commission for Environmental Cooperation alleging violations of environmental laws against all 3 member governments. Of these 31 submissions, 8 were against the United States, 13 were against Mexico, and 10 were against Canada. Nineteen submissions have been closed. Of these closed submissions, 17 were closed for several reasons, including that the submission did not meet specific requirements; and two are considered closed because a factual record was prepared. Twelve are currently under review and in various stages of the process.

Submissions have covered a broad range of concerns, from specific questions of a government's failure to effectively enforce a particular law in a particular situation, to others alleging a more general failure to effectively enforce environmental laws. For example, an early submission, known as the Cozumel Pier case, alleged that in one instance, the Mexican government had failed, among other things, to effectively enforce its requirements for conducting an environmental impact assessment of the Cozumel pier project. A more recent submission, known as the Migratory Bird case, involves a complaint alleging that the U.S. government fails to effectively enforce a law that prohibits the taking of migratory birds without a permit with respect to loggers and the logging industry.

Eight submissions were filed with the Commission alleging that the United States failed to effectively enforce its environmental laws. Of these eight submissions, one is currently being considered by the Council for preparation of a factual record, one is being reviewed in light of the U.S. government's response and additional information provided by the United States at the request of the Secretariat, and six are no longer being considered. A summary of all citizen submissions made under the environmental side agreement can be found in appendix II.



Briefing Section I

# Environment: Key Citizen Submissions Filed Against the United States

## MIGRATORY BIRDS

Submitters:

Center for International Environmental Law, et al.

Claim:

Migratory Bird Treaty Act (MBTA) not effectively enforced as it relates to loggers, logging companies, and logging contractors; logging operations exempted from the MBTA as a matter of U.S. internal policy

U.S. Response:

- No policy to exempt logging
- Agency discretion allows for current enforcement policy
- Resource allocation decision

Status:

- Preparation of a factual record recommended by the Secretariat
- Council will consider whether to approve preparation of a factual record

## GREAT LAKES

Submitters:

Department of the Planet Earth Inc., et al.

Claim:

Regulations and programs adopted to control airborne emissions of toxic substances from solid and medical waste incinerators violate and fail to effectively enforce U.S. domestic laws and U.S.-Canada Treaties

U.S. Response:

- Submission does not meet applicable requirements
- Allegations inaccurate
- Section of Clean Air Act misunderstood

Status:

- Additional information requested and received from United States
- Secretariat reviewing submission in light of response and additional information

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**Slide 6: Key Citizen  
Submissions Filed  
Against the United  
States**

The United States was named in eight submissions. However, two stand out as significant—the Migratory Birds and the Great Lakes submissions—because they have gone the furthest in the submission process, resulting in a U.S. response, and, in the Migratory Birds case, a recommendation from the Secretariat to the Council to prepare a factual record.<sup>4</sup> Currently, both submissions are pending, and it is not known in either case whether a factual record will be prepared and made public.

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<sup>4</sup>A third submission, the Fort Huachuca submission, also reached the point in the process where a response was prepared by the U.S. government and was submitted. However, the submitters withdrew their filing, and the process was terminated before the Secretariat made a decision about whether to recommend the preparation of a factual record.

## Environment: Outcomes

- **Two factual records have been prepared and made public**
  - Submission against Mexico in Cozumel case
  - Submission against Canada in BC Hydro case
  
- **Another factual record is being prepared**
  - Secretariat recommended and is preparing a factual record in a submission against Mexico (Metales y Derivados case)
  
- **History of submissions and submission process reviewed by the Joint Public Advisory Committee**

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## Slide 7: Outcomes

Of the 31 submissions made, only 2 have resulted in the preparation of a factual record and its public release. One factual record involved Mexico, and the other involved Canada. The Secretariat is currently preparing another factual record that involves Mexico.

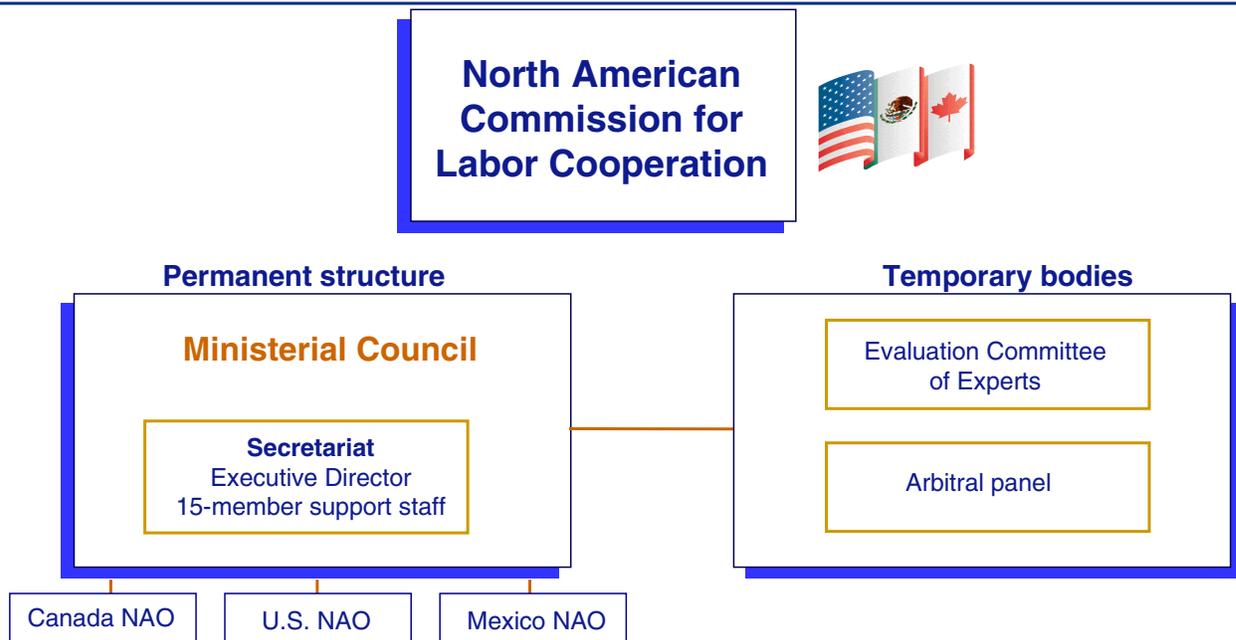
In June 2000, the Council passed a resolution to have the Joint Public Advisory Committee conduct a review of the history of submissions and the submission process. A final report covering the issues raised during this review was recently released by the Joint Public Advisory Committee.

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# Briefing Section II: Labor Side Agreement

## Labor Side Agreement: Institutional Structure



## Labor Side Agreement: Key Principles

### •Key principles

- Improve working and living standards through compliance with, and effective enforcement of, 11 labor principles
- Eleven labor principles fall into three categories:
  - Group I--union-related activities
  - Group II--workers' rights
  - Group III--child labor and workplace safety
- Provide citizens and governments an opportunity to address questions regarding enforcement of labor laws
  - Includes provisions for fines and trade sanctions that only apply to violations of Group III labor principles

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## Slide 9: Key Principles

The goals of the labor side agreement are to improve working conditions and living standards in each country, encourage the exchange of information regarding pertinent legal issues, foster transparency in administration of labor laws, and pursue cooperative labor-related activities among the three countries.<sup>1</sup>

In addition, under the labor side agreement, the three governments committed themselves to promote compliance with and effectively enforce (subject to domestic laws) 11 labor principles. These labor principles are generally grouped into three categories.

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Group I	<ul style="list-style-type: none"><li>•Freedom of association and right to organize,</li><li>•Right to bargain collectively, and</li><li>•Right to strike</li></ul>
Group II	<ul style="list-style-type: none"><li>•Prohibition of forced labor,</li><li>•Elimination of employment discrimination,</li><li>•Equal pay,</li><li>•Compensation for occupational injuries and illnesses, and</li><li>•Protection of migrant workers</li></ul>
Group III	<ul style="list-style-type: none"><li>•Child labor protections,</li><li>•Minimum wage technical standards, and</li><li>•Prevention of occupational injuries</li></ul>

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The agreement also allows citizens and groups to file submissions questioning implementation of labor laws. In addition, fines or trade sanctions may be imposed when a government is found to have failed to effectively enforce its labor laws related to group III principles.

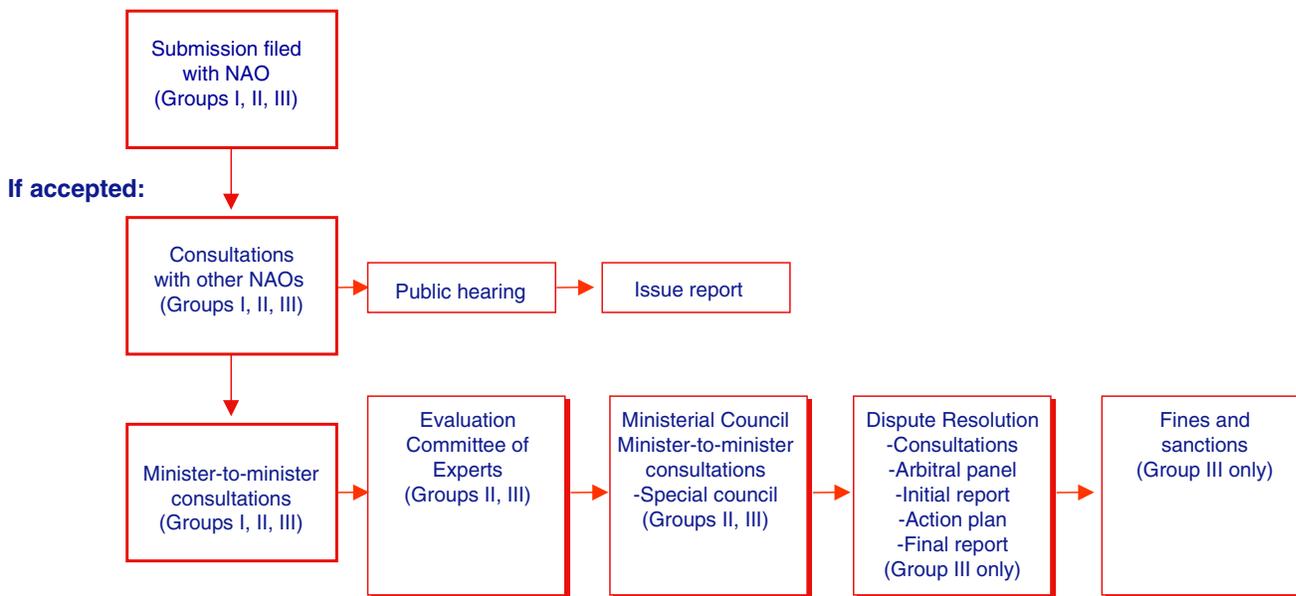
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<sup>1</sup>For additional information see the U.S. Department of Labor's National Administrative Office Web site: <http://www.dol.gov/dol/ilab/public/programs/nao/main.htm>.



Briefing Section II

# Labor: Submission and Review Process



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## Slide 10: Submission and Review Process

Any person or group in a NAFTA country may file a submission with a National Administrative Office alleging that one of the other governments has failed to effectively enforce its labor laws. If the National Administrative Office decides to accept the submission, it may hold public hearings to gather information; and it may consult with the other National Administrative Offices. The Secretary of the National Administrative Office receiving the submission may then recommend that the Ministers consult on the submission. Depending on the nature of the allegation, ministerial consultations may be followed by formation of an evaluation committee of experts to further consider the submission.

The labor agreement also provides a government-to-government dispute settlement mechanism to be used where cooperative efforts to resolve the problems fail and where the submission alleges a persistent pattern of failure to effectively enforce prevention of occupational safety and health hazards, child labor protections, or minimum wage technical labor standards. While some submissions have been eligible to proceed to the government-to-government dispute settlement level, none has advanced this far. If a submission were to reach this stage, an arbitral panel would be formed to review the allegations and make recommendations for corrective action. Failure to fully implement the panel's recommendations could lead to monetary sanctions. Collected fines would be placed in a fund used to improve enforcement of labor law in the country found in violation. Failure to pay the fines could result in suspension of NAFTA benefits. See appendix I for more information regarding how fines and trade sanctions would be applied.



Briefing Section II

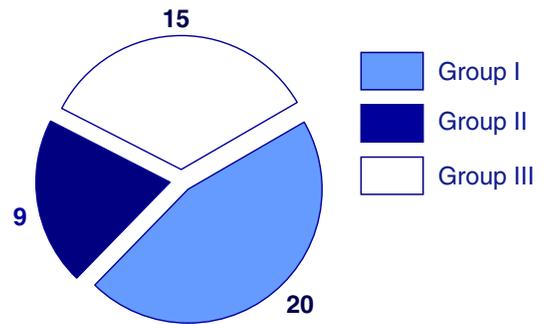
# Labor: Citizen Submissions Filed and Status of Cases Against the United States

- 23 Total submissions
  - 7 against the United States
  - 14 against Mexico
  - 2 against Canada

•15 Submissions closed and 8 under review

- 7 Submissions against the United States
  - 2 declined
  - 5 ministerial consultations

Labor principles addressed in all submissions<sup>a</sup>



<sup>a</sup>Numbers exceed 23 because a submission can address multiple labor principles

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**Slide 11: Citizen  
Submissions Filed and  
Status of Cases Against  
the United States**

The three National Administrative Offices have received a total of 23 submissions since 1994, with 7 submissions being filed between 1994 and 1996; 13 between 1997 and 1998; 2 in 1999; and 1 in 2000. At the time of this report, no submissions had been filed in 2001. Of the 23 total submissions filed, 7 were against the United States, 14 were against Mexico, and 2 were against Canada. Of these submissions, 15 have been closed and 8 are still under review. Of the seven submissions filed against the United States, three were the subject of ministerial consultations, two were declined, and two are pending ministerial consultations. A more detailed description of the 23 submissions can be found in appendix III.

The graph depicts the labor principles, by group, cited collectively in all 23 submissions. The number of labor principles cited exceeds 23 because more than 1 labor violation can be included in a submission. The majority of submissions have alleged group I violations, commonly citing freedom of association concerns.



**Briefing Section II**

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# **Labor: Submissions Filed Against the United States and Labor Principles Involved**

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**Group I cases**

- 4 cases cited freedom of association

**Group II cases**

- 3 cases cited employment discrimination
- 3 cases cited compensation for occupational injuries and illnesses
- 3 cases cited protection of migrant workers

**Group III cases**

- 5 cases cited minimum employment standards, such as minimum wages
  - 3 cases cited prevention of occupational injuries
-

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**Slide 12: Submissions  
Filed Against the  
United States and  
Labor Principles  
Involved**

Of the seven submissions filed against the United States, five were accepted for review. These submissions together claimed violations of 6 of the 11 labor principles, encompassing group I, II, and III labor principles. One of the five submissions alleged that the United States violated six labor principles.



## Labor: Outcomes

- No submission has progressed past the minister-to-minister consultation stage of the process
  - Submissions that have reached this phase have taken at least 2 years to do so
- Labor commission held jointly sponsored public seminars and forums and issued public reports
- Review of labor side agreement, including the submission process, scheduled for 2002

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## Slide 13: Outcomes

To date no submission has advanced past the ministerial consultation phase, and those that have reached this stage have taken at least 2 years to do so.

The labor submission process has resulted in conferences, seminars, and public reports. For example, in an effort to address concerns about gender-based discrimination that were raised in a submission to the U.S. National Administrative Office, the three NAFTA governments held a conference to discuss the laws and programs that protect employment rights of women in all three NAFTA countries. In another instance, a submission raising issues regarding the status of international treaties and constitutional provisions protecting freedom of association led the three Parties to hold a seminar on international treaties and constitutional provisions in each Party's labor laws. Furthermore, the Labor Commission initiated a variety of public outreach forums and conferences regarding workers' rights, as a result of issues raised in several submissions and published reports on the topics covered.

A review of all the components of the labor side agreement is scheduled to be completed in 2002, but may not be finalized as scheduled, according to U.S. officials. The reason for the delay is primarily because of the recent change in the U.S. administration and as-yet unfilled staff positions.

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# Briefing Section III: Investor-State Dispute Settlement

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Briefing Section III



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## NAFTA Investor-State: Background

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### •Previous international agreements on investment

- Friendship Commerce and Navigation Treaties (post-WWII)
  - Bilateral Investment Treaties (since the early 1980s)
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**Slide 14: Background**

The provisions on investor rights and the dispute settlement mechanism found in NAFTA's chapter 11 are modeled on other U.S. international treaties, with the underlying investment policy based largely on U.S. domestic practice. For example, during the post-World War II era, the United States negotiated treaties of friendship, commerce, and navigation to protect U.S. investors abroad. These treaties included a state-to-state dispute settlement mechanism designed to resolve investment disputes through diplomatic channels or arbitration. By the early 1980s, the effort to protect investors overseas shifted to the negotiation of bilateral investment treaties (BITS). These BITS provided investors more specific investment protections (similar to those found in U.S. domestic practice) and also introduced investor-state arbitration rules—rules similar to those found in NAFTA's chapter 11.

## **NAFTA Investor-State: Key Principles and Structure**

### **•Key principles**

- Provides investor protections that cover a broad range of issues, including national treatment (art.1102), minimum standard of treatment (art. 1105), performance requirements (art. 1106), and expropriation (art. 1110)
- Provides an investor-state dispute settlement mechanism, which includes authority to award monetary damages

### **•Uses existing international arbitration rules and structure**

### **•Cases against the United States generally overseen by the Department of State**

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**Slide 15: Key  
Principles and  
Structure**

NAFTA's chapter 11 on investment provides several basic protections for NAFTA investors and their investments including nondiscriminatory treatment,<sup>1</sup> minimum standard of treatment,<sup>2</sup> freedom from performance requirements,<sup>3</sup> free transfer of funds related to an investment, and expropriation only in conformity with international law. In addition, NAFTA's investment chapter allows investors and governments to use an investor-state dispute settlement mechanism when investors claim violations of the agreement's protections.

This mechanism relies on the use of three existing international commercial arbitration rules: the United Nations Commission on International Trade Law (UNCITRAL), the International Centre for Settlement of Investment Disputes (ICSID), and the ICSID Additional Facility. The Department of State is generally responsible for overseeing cases brought against the United States, but other agencies, such as the Department of Justice and the U.S. Trade Representative, as part of an interagency process, also play a significant role in supporting the U.S. position in chapter 11 cases.

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<sup>1</sup>Nondiscriminatory treatment requires each government to treat investors from another NAFTA country and their investments no less favorably than its own investors and their investments (national treatment), and no less favorably than investors of other countries and their investments (most-favored-nation (MFN) treatment). In addition, investors and their investments must be accorded the better of national treatment or MFN treatment (standard of treatment).

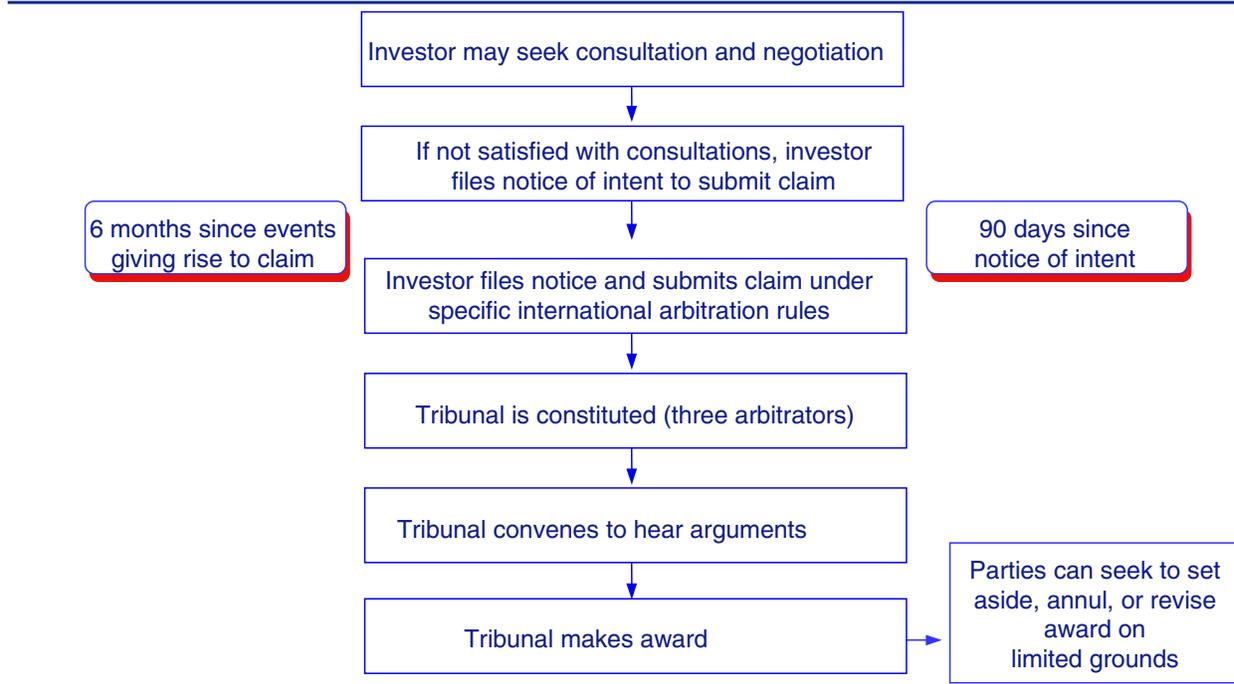
<sup>2</sup>Minimum standard of treatment requires each government to accord investors from another NAFTA country treatment in accordance with international law, including fair and equitable treatment and full protection and security.

<sup>3</sup>"Performance requirements" refers to a set of requirements that governments impose or enforce on investors or their investment either as a condition of establishment or operation, or as a condition for receipt of an advantage. Examples include requiring an investor to buy or use components from a local supplier or to export a specified level of goods or services.



Briefing Section III

# Investor-State: Dispute Settlement Process



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## Slide 16: Investor-State Dispute Settlement Process

Chapter 11 encourages consultations and negotiations as the first steps in the dispute settlement process under the investor-state dispute settlement mechanism. Failing successful consultations, an investor may proceed to the formal steps under the dispute settlement process and seek monetary damages against the host government, including interest and costs, for actions taken by that government at all levels, e.g., local, state, and federal. Article 1123 of NAFTA provides for the establishment of an arbitral tribunal consisting of three arbitrators, one appointed by each of the disputing parties, and the third, to be the presiding arbitrator, appointed by agreement of those parties.<sup>4</sup>

The investor selects the international arbitration rules that will govern the arbitration from the available alternatives provided under the NAFTA.<sup>5</sup> Generally, the tribunal receives formal written submissions from the disputing parties on the issues raised by the case and convenes to hear the parties' arguments. The extent of public access to proceedings, documents, or decisions is guided by the text of the NAFTA, the selected arbitration rules, and by the parties to the dispute. In addition, a panel can unilaterally issue a confidentiality order. These practices have limited the accessibility of information about investor-state cases.

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<sup>4</sup> NAFTA chapter 11 also includes specific provisions regarding the parties' failure to appoint arbitrators or agree on a presiding arbitrator.

<sup>5</sup> Currently, only the ICSID Additional Facility and the UNCITRAL Arbitration Rules are available.

The tribunal may make interim orders and final awards, which are binding on the parties. Under article 1136, which sets out rules governing enforcement of final awards, each NAFTA Party is obligated to abide by and comply with a final award and provide for enforcement of that award in its own country. In addition, this article allows a disputing party to seek enforcement of an award only where certain time requirements related to the applicable arbitration rules have elapsed and neither party has requested revision, set-aside, or annulment of the award; or where a revision, annulment, or set-aside application proceeding has been dismissed or completed by a court and there is no further appeal.<sup>6</sup> A government's failure to pay the award could result in the imposition of trade sanctions if the government of the investor seeks further resolution of the matter under NAFTA chapter 20's dispute settlement procedures.

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<sup>6</sup>Article 1136 allows a disputing party, under the law governing the arbitration, to commence proceedings to revise, set aside, or annul an award of the arbitral tribunal. Mexico and Canada have both initiated such proceedings in Canadian courts. Both countries sought to have awards in favor of the investor set aside under Canadian enactments of the UNCITRAL Model Law on International Commercial Arbitration, which allow decisions of arbitral tribunals, such as NAFTA chapter 11 tribunals, to be subject to action to set aside the award on limited grounds, including a tribunal exceeding its jurisdiction. Such a proceeding is not a judicial review of the merits of an underlying arbitration.

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## Investor-State: Claims Filed and Status of Claims Against the United States

- **13 Total claims filed**
  - 4 by U.S. investors against Canada
  - 5 by U.S. investors against Mexico
  - 4 by Canadian investors against the United States
  
- **4 Claims against the United States**
  - All pending and in various stages of the dispute settlement process

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**Slide 17: Claims Filed  
and Status of Claims  
Against the United  
States**

To date, 13 investor-state claims have been made under NAFTA's chapter 11.<sup>7</sup> Of these claims, nine have been filed by U.S. investors against Canada or Mexico. Canadian investors have filed four claims against the United States. All four cases filed against the United States are pending and in various stages of the dispute settlement process. For example, in one case, Loewen, a hearing was held in 2000 on jurisdictional issues. The next hearing, which involves the Methanex case, is scheduled for mid-summer 2001.

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<sup>7</sup>Thirteen refers to the number of formal claims submitted to arbitration. In some cases, a notice of intent to claim may have been submitted by an investor but was never followed up with a formal notice of claim or notice of arbitration. A case only becomes an official claim when it is submitted to arbitration under the applicable rules.

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Briefing Section III

# Investor-State: Cases Filed Against the United States

**Loewen: \$725 million**

**Claim:**

Mississippi jury awarded \$500 million in compensatory and punitive damages against Canadian-owned funeral home chain in civil proceeding for fraudulent and malicious business practices. To stay execution of the judgment pending appeal, company was required to post \$625 million appeal bond, a state statutory requirement upheld by the Mississippi Supreme Court. Company claims jury award and court action, among other things, amount to a denial of justice.

**NAFTA provisions:** Arts. 1102, 1105, and 1110

**Methanex: \$1 billion**

**Claim:**

California regulations ban use of MTBE, a gasoline additive that can contaminate drinking water, by end of 2002. Canadian firm Methanex, which produces methanol, a feedstock for MTBE, claims regulations illegally expropriate firm's U.S. investment and discriminate against it in favor of the U.S. ethanol industry.

**NAFTA provisions:** Arts. 1102, 1105, and 1110



Briefing Section III

# Investor-State: Cases Filed Against the United States

**Mondev: \$50 million**

**Claim:**

Canadian-owned real estate company that contracted with city of Boston and local agency to construct buildings won \$16 million award (reduced to \$9.6 million) for breach of contract and tort. Award was reversed by Supreme Judicial Court of Massachusetts, which ruled that Boston did not breach contract and agency was immune from suit under state law from tort liability. Firm claims that the city of Boston's alleged breach of contract and the court's ruling involve expropriation of Mondev's interest and a denial of justice.

**NAFTA provisions:** Arts. 1102, 1103, 1105, and 1110

**ADF: \$90 million**

**Claim:**

Canadian company's U.S. subsidiary subcontracted with U.S. firm to supply steel for a federally-aided highway construction project in Virginia. Canadian company's U.S. subsidiary wanted to fabricate U.S.-manufactured steel in Canada for use in the project. Buy America requirements prohibit use of Canadian-fabricated steel in the construction project. ADF claims Buy America requirements discriminate against and prohibited performance requirements on ADF.

**NAFTA provisions:** Arts. 1102, 1105, and 1106

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## Slides 18 and 19: Claims Filed Against the United States

Two claims, one filed by the Loewen Group and one by Methanex, together seek total monetary damages against the United States of approximately \$1.7 billion. While each case presents arguments unique on the facts, they both essentially assert that actions taken in the United States violated the national treatment and minimum standard of treatment provisions of chapter 11. In addition, they both claim that the U.S. actions (through Mississippi's justice system and California's regulations, respectively) amounted to an expropriation of their property, in violation of another key provision of NAFTA's investment chapter. The Department of Justice is the lead agency in the Loewen case, while the Department of State is leading the defense in the Methanex case.

The Mondev and ADF claims together call for \$140 million in monetary damages against the U.S. government. Both claims cite violations of NAFTA's national treatment and minimum standard of treatment provisions. The Mondev claim also cites violations of NAFTA's most-favored-nation provision, and further alleges that U.S. actions amount to an expropriation of its investment in Massachusetts. The ADF claim asserts that U.S. Buy America requirements impose performance requirements on ADF in violation of NAFTA's chapter 11. The Department of State is the lead agency defending the U.S. government position in both of these cases.

There have been interagency discussions among the U.S. Trade Representative, the Department of State, the Department of Justice, the Department of Commerce, and the Department of the Treasury on how the damages would be paid if awarded. However, no agreement has been reached, and no awards have had to be paid. One possible source for payment considered in interagency discussions is the permanent, indefinite appropriation in 31 U.S.C. 1304, known as the Judgment Fund, which is legally available to pay final judgments and comprise settlements against the United States. The Fund is administered by the Department of the Treasury, which certifies and disburses actual payments from the Fund. Before payments can be made, however, the Department of Justice must first certify that a judgment is final and payment is in the interest of the United States. In addition, the judgment must be for an actual sum of money, and there must be no other source of funds legally available to pay the judgment.

## Investor-State: Outcomes

### •5 Cases brought by U.S. investors have resulted in settlement or award

- Ethyl Corporation vs. Canada--settled for \$13 million
- S.D. Myers vs. Canada--partial award for investor; case under review in Canadian courts
- Pope & Talbot vs. Canada--partial award in favor of investor on one aspect of case
- Azinian, et al. (DESONA) vs. Mexico--award in Mexico's favor
- Metalclad Corporation vs. Mexico--\$16.7 million award for investor; Canadian courts upheld award in part

### •Experience with investor-state disputes is limited and few cases finalized

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**Slide 20: Outcomes**

To date, U.S. investors have made nine claims under NAFTA's investor-state dispute settlement mechanism, with results, so far, of settlement or award in five of those cases. Canada settled with a U.S. investor in one case in which a Canadian court, in an unrelated case, called for the federal government of Canada to reverse the actions that gave rise to the claim.<sup>8</sup> In two other cases involving Canada, arbitral tribunals found in favor of U.S. investors. In the S.D. Myers case, Canada is seeking to have the partial award against it set aside in its domestic courts.

Outcomes for U.S. investors in two cases involving Mexico have been split—with one arbitral tribunal's decision in favor of Mexico and another in favor of the U.S. investor. In the Metalclad case, Mexico sought to have the award against it set aside in Canadian courts. A Canadian court ruling denied Mexico's application to set aside the award in its entirety, but did set aside part of the award.

More investor-state dispute settlement cases are currently progressing through chapter 11's arbitral system. According to a schedule of deadlines for investor-state arbitration, a hearing will be held in four cases involving the United States or a U.S. investor before the end of 2001.

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<sup>8</sup> The provincial government of Alberta sued the Canadian federal government on the same measure raised in the Ethyl case and won.

# Monetary Enforcement Assessments and Trade Sanctions in the North American Free Trade Agreement's Labor and Environment

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The structure for monetary enforcement assessments (fines) and trade sanctions in the North American Free Trade Agreement's (NAFTA) labor and environmental side accords follows distinct processes. For labor, there is a single, continuous process that begins with a citizen submission on a labor law enforcement matter and could lead, in some cases, to fines or suspension of NAFTA tariff benefits. For environment, there are two processes. One specifically addresses citizen submissions on environmental law enforcement matters and can, at most, result in the publication of a "factual record" by the Secretariat of the Commission for Environmental Cooperation. The other, a Party-to-Party dispute settlement process, could lead to fines or suspension of NAFTA tariff benefits.

Aside from these distinct processes, the way monetary fines are assessed and what happens if a Party fails to pay a fine are handled the same under both side accords. How the United States pays fines assessed against it, while not addressed in either side accord, has been the subject of interagency discussion.

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## Environmental Process

Fines are called for in the Party-to-Party Consultation and Resolution of Disputes Section (part V) of the North American Agreement on Environmental Cooperation. Fines may be assessed if an arbitral panel determines that one Party has exhibited a persistent pattern of failure to effectively enforce its environmental law, Parties have not been able to agree on an action plan, or an action plan designed to correct a failure to effectively enforce a Party's environmental law has not been fully implemented. Even if a fine is assessed, the original plan for corrective action required by the arbitrage panel must still be fully implemented.

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## Labor Process

A citizen submission can evolve into a Party-to-Party Ministerial Consultation, which in turn can lead to the utilization of the dispute resolution mechanism for 3 of the 11 labor principles listed in the North American Agreement on Labor Cooperation: child labor, minimum wage technical labor standards, and occupational safety and health. An arbitral panel determines whether the Party complained against showed a persistent pattern of nonenforcement of one of the three labor principles and prepares a final report on the complaint. If the disputing parties have not agreed on a final report or cannot agree on full implementation of an action plan, then the panel can impose a monetary enforcement

assessment. Even if a fine is assessed, the original plan for corrective action required by the arbitral panel must still be fully implemented

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## Amount of Monetary Fines Under the Side Accords

A fine cannot exceed \$20 million or its equivalent in the currency of the Party paying the fine in the first year of NAFTA implementation or be no more than .007 percent of total trade in goods between the parties during the most recent year for which data are available. The fine must be paid into a fund directed by the Council of the Commission established under each side accord. The monies must be used as the Council directs to either improve the environment or labor conditions or the enforcement of environmental or labor laws in the territory of the Party complained against, consistent with the law of that Party.

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## How the United States Would Pay

There have been interagency discussions among the Department of Labor, the U.S. Trade Representative, the Department of State, the Department of Justice, and the Environmental Protection Agency on exactly how the fines would be paid. However, no agreement has been reached, and no fines have been assessed.

One possible source for payments considered in interagency discussions is the permanent, indefinite appropriation in 31 U.S.C. 1304, known as the Judgment Fund, which is legally available to pay final judgments and comprise settlements against the United States. The Fund is administered by the Treasury Department, which certifies and disburses actual payments from the Fund. Before payments can be made, however, the Department of Justice must first certify that a judgment is final and payment is in the interest of the United States. In addition, the judgment must be for an actual sum of money, and there must be no other source of funds legally available to pay the judgment.

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## If Fines Fail

If Mexico or the United States fails to pay a fine within 180 days, the complaining Party (or Parties) may suspend NAFTA tariff benefits, in an amount no greater than that sufficient to collect the fine. The rates of duty on goods originating in the Party complained against shall not exceed the lesser of (a) the rate that was applicable to those goods just prior to NAFTA's entry into force, or (b) the most-favored nation rate applicable to those goods on the date the Party suspends tariff benefits. To the extent practicable or effective, the sector that is impacted (i.e., that sector against

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**Appendix I**  
**Monetary Enforcement Assessments and**  
**Trade Sanctions in the North American Free**  
**Trade Agreement's Labor and Environment**

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which NAFTA benefits are suspended) shall be the same sector or sectors as those involved in a complaint.

In the case of Canada, <sup>1</sup> the respective Commissions may file the arbitral panel's determination (that a fine be paid or that an action plan be fully implemented) in a court of competent jurisdiction in Canada and may take legal measures for enforcement of the panel's determination. Neither the panel's determination nor a court order to enforce a panel determination is subject to review or appeal.

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<sup>1</sup>Both the environment and labor side agreements contain special rules that apply to Canada, which establish that trade sanctions are not applicable to Canada where Canada fails to pay an assessed fine or fully comply with an action plan.

# Citizen Submissions Under the North American Agreement on Environmental Cooperation

Case no. and name	Submitted by	Issue	Status	Against country
95-001 Spotted Owl	Biodiversity Legal Foundation, et al.	Alleged failure to effectively enforce selected provisions of the Endangered Species Act	Process terminated – Secretariat determined government response not merited	United States
95-002 Logging Rider	Sierra Club, et al. (1995)	Alleged failure to effectively enforce all applicable federal environmental laws by eliminating private remedies for salvage timber sales	Process terminated – Secretariat determined submission criteria not met	United States
96-01 Cozumel	Comité para la Protección de los Recursos Naturales, A.C., et al. (1996)	Alleged failure to conduct an environmental impact assessment before building a public harbor terminal for tourist cruises on the island of Cozumel	Factual record prepared and made public	Mexico
96-002 Aage Tottrup	Mr. Aage Tottrup, P. Eng (1996)	Alleged failure to effectively enforce Canadian and Alberta environmental laws resulting in the pollution of wetlands impacting fish and migratory bird habitats	Process terminated – Secretariat determined government response not merited	Canada
96-003 Old Man River I	Friends of the Old Man River (1996)	Alleged failure to effectively enforce habitat protection sections of Canada's Fisheries Act and the Canadian Environmental Assessment Act; charge of a de facto abdication of legal responsibility by the Canadian and provincial governments	Process terminated – Secretariat determined factual record not warranted	Canada
96-004 Fort Huachuca	The Southwest Center for Biological Diversity, et al. (1996)	Alleged failure of the U.S. Army to uphold the National Environmental Policy Act and produce an environmental impact assessment of Fort Huachuca base expansion	Process terminated – Submitter withdrew after U.S. government response	United States
97-001 BC Hydro	British Columbia Aboriginal Fisheries Commission, et al. (1997)	Alleged failure to effectively enforce the Canadian Fisheries Act and failure to protect fish and fish habitat in British Columbia from hydroelectric dam	Factual record prepared and made public	Canada
97-002 Rio Magdalena	Comite Pro Limpieza del Rio Magdalena (1997)	Alleged failure to effectively enforce environmental legislation governing the disposal of wastewater into the Magdalena River in the state of Sonora	Secretariat reviewing in light of Mexican response to determine if factual record warranted; Mexico has not responded to the Secretariat's September 1999 request for additional information	Mexico

**Appendix II  
Citizen Submissions Under the North  
American Agreement on Environmental  
Cooperation**

<b>Case no. and name</b>	<b>Submitted by</b>	<b>Issue</b>	<b>Status</b>	<b>Against country</b>
97-003 Quebec Hog Farms	Centre Quebecois du Droit de L'environnement, et al. (1997)	Alleged failure to effectively enforce environmental standards related to agricultural pollution originating from animal production facilities, mainly from hog farms	Council, by two-thirds majority, decided not to direct the Secretariat to prepare a factual record; process was terminated	Canada
97-004 Canadian Environmental Defense Fund	Canadian Environmental Defense Fund (1997)	Alleged failure to conduct an environmental assessment of "The Atlantic Groundfish Strategy" that could jeopardize the future of Canada's East Coast fisheries	Process terminated— Secretariat determined submission criteria not met	Canada
97-005 Biodiversity	Animal Alliance of Canada, Council of Canadians, Greenpeace Canada (1997)	Alleged failure to effectively enforce regulations ratifying the Convention on Biological Diversity signed at the Rio Earth Summit; claim that such ratification, under Canadian Law, is a legally binding "regulation"	Process terminated – Secretariat determined submission criteria not met	Canada
97-006 Old Man River II	The Friends of the Oldman River (1997)	Alleged failure to effectively enforce habitat protection sections of the Fisheries Act and the Canadian Environmental Assessment Act; charge of a de facto abdication of legal responsibility by the Canadian and provincial governments	Council decided to defer consideration of the Secretariat's notification recommending preparation of a factual record	Canada
97-007 Lake Chapala	Instituto de Derecho Ambiental (1997)	Alleged failure to effectively enforce environmental legislation regarding the hydrological basin of Lake Chapala	Process terminated – Secretariat is prevented, for procedural reasons, from considering the submission	Mexico
98-001 Guadalajara	Instituto de Derecho Ambiental, A.C., et al. (1998)	Alleged failure to effectively enforce the General Law on Ecological Balance and Environmental Protection in relation to explosions occurring in the Reforma area of the city of Guadalajara	Process terminated – Secretariat determined submission criteria not met	Mexico
98-002 Ortiz Martinez	Hector Gregorio Ortiz Martínez (1997)	Alleged failure to effectively enforce environmental legislation in relation to lumbering operations at the "El Taray" site in the state of Jalisco	Process terminated – Secretariat determined submission criteria not met	Mexico
98-003 Great Lakes	Department of the Planet Earth, et al. (1998)	Alleged violation of and failure to effectively enforce both U.S. domestic laws and ratified U.S.-Canada treaties designed to protect the Great Lakes	Secretariat reviewing submission in light of U.S. response and additional information to determine if factual record warranted	United States
98-004 BC Mining	Sierra Club of British Columbia, et al. (1998)	Alleged failure to enforce section 36(3) of the Fisheries Act to protect fish and fish habitat from the environmental impacts of the mining industry in British Columbia	Secretariat reviewing submission in light of Canadian response to determine if factual record warranted	Canada

**Appendix II  
Citizen Submissions Under the North  
American Agreement on Environmental  
Cooperation**

<b>Case no. and name</b>	<b>Submitted by</b>	<b>Issue</b>	<b>Status</b>	<b>Against country</b>
98-005 Cytrar	Academia Sonorense de Derechos Humanos, A.C., Lic. Domingo Gutiérrez Mendivil (1998)	Alleged failure to effectively enforce environmental legislation by having authorized the operation of a hazardous waste landfill (Cytrar) less than 6 kilometers away from Hermosillo, Sonora, in violation of official standards	Process terminated – Secretariat determined factual record not warranted	Mexico
98-006 Aquanova	Grupo Ecológico Manglar, A.C. (1998)	Alleged failure to effectively enforce environmental laws with respect to the establishment and operation of a shrimp farm located in Isla del Conde, Nayarit	Secretariat recommended preparation of a factual record; Council considering whether to approve preparation of factual record	Mexico
98-007 Metales y Derivados	Environmental Health Coalition, Comité Ciudadano Pro Restauración del Cañón del Padre y Servicios Comunitarios, A.C. (1998)	Alleged failure to effectively enforce environmental law in connection with an abandoned lead smelter in Tijuana, Baja California, that poses serious threats to the health of the neighboring community and to the environment	Council unanimously decided to instruct the Secretariat to prepare a factual record	Mexico
99-001 Methanex	Methanex Corporation (1999)	Alleged failure to effectively enforce California's environmental laws and regulations related to water resource protection and to the regulation of underground storage tanks	Secretariat determined not to proceed further because the matter raised by the submission is the subject of a pending arbitration proceeding initiated by Methanex under chapter 11 of NAFTA	United States
99-002 Migratory Birds	Center for International Environmental Law, et al. (1999)	Alleged failure to effectively enforce Section 703 of the Migratory Bird Treaty Act, which prohibits the killing of migratory birds without a permit	Secretariat recommended preparation of a factual record; Council considering whether to approve preparation of factual record	United States
00-001 Molymex I	Rosa María Escalante de Fernández (2000)	Alleged failure to effectively enforce environmental law regarding air quality and to limit pollution from the Molymex plant	Process terminated – Secretariat determined submission criteria not met	Mexico
00-002 Neste Canada	Neste Canada Inc. (2000)	Alleged failure to effectively enforce environmental laws, as defined in the environmental side agreement, relating to underground storage tanks	Secretariat determined not to proceed further because the matter raised by the submission is the subject of pending arbitration proceeding initiated by Methanex under chapter 11 of NAFTA	United States

**Appendix II  
Citizen Submissions Under the North  
American Agreement on Environmental  
Cooperation**

<b>Case no. and name</b>	<b>Submitted by</b>	<b>Issue</b>	<b>Status</b>	<b>Against country</b>
00-003 Jamaica Bay	Hudson River Audubon Society of Westchester, Inc., Save Our Sanctuary Committee (2000)	Alleged failure to effectively enforce Section 703 of the Migratory Bird Treaty Act and sections of the Endangered Species Act with the proposal of a bicycle path through the Jamaica Bay Wildlife Refuge, in Queens, New York	Process terminated – Secretariat determined submission criteria not met	United States
00-004 BC Logging	David Suzuki Foundation, et al. (2000)	Alleged failure to effectively enforce sections of Canada's Fisheries Act against logging on private land in British Columbia	Secretariat reviewing submission in light of Canadian response to determine if factual record warranted	Canada
00-005 Molymex II	Academia Sonorense de Derechos Humanos, Domingo Gutiérrez Mendivil (2000)	Alleged failure to effectively enforce environmental law in relation to the operation of the Company Molymex, including operation without environmental impact authorization	Secretariat reviewing submission in light of Mexican response to determine if factual record warranted	Mexico
00-006 Tarahumara	Comisión de Solidaridad y Defensa de los Derechos Humanos, AC (COSYDDAC) (2000)	Alleged failure to effectively enforce environmental laws by denying environmental justice to indigenous communities in the Sierra Tarahumara in the state of Chihuahua	Secretariat reviewing submission	Mexico
01-001 Cytrar II	Academia Sonorense de Derechos Humanos, A.C., Lic. Domingo Gutiérrez Mendivil (2001)	Alleged failure to effectively enforce environmental laws in relation to the establishment and operation of the Cytrar hazardous waste landfill	Secretariat requested and is awaiting Mexican response	Mexico
01-002 AAA Packaging	Names withheld pursuant to Article 11(8)(a) (2001)	Alleged failure to effectively enforce obligations in the environmental side agreement to prohibit export to the territories of the other Parties of a pesticide or toxic substance	Process terminated – Secretariat determined criteria not met	Canada
01-003 Dermet	Mercerizados y Tenidos de Guadalajara (2001)	Alleged failure to effectively enforce part of Mexico's environmental laws and failure to effectively enforce obligations in the environmental side agreement to provide procedural guarantees and private access to remedies	Secretariat reviewing submission	Mexico

# Submissions Under the North American Agreement on Labor Cooperation

Case no. and NAO identifier	Submitted by	Against country	Issue	Status	Time frame
U.S. NAO 940001 and 940002 Honeywell and General Electric	International Brotherhood of Teamsters, United Electrical, Radio and Machine Workers of America	Mexico	Alleged violations of workers' rights to freely organize into the unions of their choice	Submission accepted -- U.S. National Administrative Office concluded that the information was insufficient to establish that Mexico failed to enforce its labor laws. However, acknowledging the strong concerns raised by the submission, the United States proposed that all three NAFTA parties develop a comprehensive cooperative program to address these issues	2/14/1994-10/12/1994
U.S. NAO 940003 Sony	International Labor Rights Education and Research Fund, National Association of Democratic Lawyers of Mexico, Coalition for Justice in the Maquiladoras, et al.	Mexico	Alleged intimidation and pressure then dismissal by the company when workers attempted to organize a union	Ministerial consultations recommended -- a series of seminars and other activities addressed issues of union registration. Follow-up review included issues stemming from a related Mexican Supreme Court decision	8/16/1994-12/4/1996
U.S. NAO 940004 General Electric	United Electrical, Radio, and Machine Workers of America	Mexico	Alleged violations of freedom of association and the right to organize at a subsidiary in Mexico	Process terminated --the union withdrew the submission prior to completion of the review process	1/25/1995
U.S. NAO 9601 SUTSP	Human Rights Watch/Americas, International Labor Rights Fund, and the National Association of Democratic Lawyers of Mexico	Mexico	Alleged violations of freedom of association and the right to organize when employees of the Mexican government's Single Trade Union Workers of the Fishing Ministry attempted to receive recognition for their union	Ministerial consultations recommended -- on relations among international treaties, constitutional provisions, and domestic law protecting freedom of association. A related seminar was held in Baltimore, MD	6/13/1996-12/4/1997
U.S. NAO 9602 Maxi - Switch	Communications Workers of America, Union of Telephone Workers of Mexico, and the Federation of Unions of Goods and Services Companies of Mexico	Mexico	Alleged threats and intimidation by company management against workers trying to organize a union	Process terminated --submitters withdrew submission after resolving the dispute to their satisfaction	10/11/1996-4/16/1997
U.S. NAO 9701 Gender Discrimination	Human Rights Watch/ American, International Labor Rights Fund and the National Association of Democratic Lawyers of Mexico	Mexico	Alleged mistreatment or discharging of pregnant employees at a maquiladora plant to avoid paying maternity benefits	Ministerial agreement reached -- one conference and two outreach sessions held to discuss and educate workers on their rights	5/16/1997-5/30/2000

**Appendix III**  
**Submissions Under the North American**  
**Agreement on Labor Cooperation**

<b>Case no. and NAO identifier</b>	<b>Submitted by</b>	<b>Against country</b>	<b>Issue</b>	<b>Status</b>	<b>Time frame</b>
U.S. NAO 9702 Han Young	Support Committee for Maquiladora Workers, the International Labor Rights Fund, and the National Association of Democratic Lawyers of Mexico, et al.	Mexico	Alleged violations of health and safety, freedom of association, and the right to bargain collectively	Ministerial agreement reached, which resulted in: Mexico's agreement to promote the use of secret ballots in union representation elections and that workers be provided information pertaining to collective bargaining agreements; seminars on freedom of association issues and the structure and role of labor boards; and governmental exchange of information on techniques and policies to promote compliance with safety and health laws.  (The ministerial consultations with submissions 9702 and 9703 regarding freedom of association and safety and health issues were held congruent to one another)	10/30/1997- pending
U.S. NAO 9703 ITAPSA	Echlin Workers Alliance, the Teamsters, and 26 additional organizations including nongovernmental organizations, human rights groups and unions	Mexico	Alleged violations of freedom of association and occupational health and safety. Alleged worker exposure to asbestos and other toxic substances.	Ministerial agreement reached which resulted in: Mexico's agreement to promote the use of secret ballots in union representation elections and that workers be provided information pertaining to collective bargaining agreements; seminars on freedom of association issues and the structure and role of labor boards; and governmental exchange of information on techniques and policies to promote compliance with safety and health laws.  The ministerial consultations with submissions 9702 and 9703 regarding freedom of association and safety and health issues were held congruent to one another)	12/15/1997- pending
U.S. NAO 9801 Flight Attendants	Association of Flight Attendants, and the AFL-CIO	Mexico	Alleged violation of freedom of association for flight attendants employed by Aerovias de Mexico, S.A. de C.V. (Aeromexico). When workers tried to strike, the government of Mexico took over the company's operations.	Submission declined -- the U.S. National Administrative Office agreed to undertake a research project with the three Parties on freedom of association	8/17/1998- 10/19/1998

**Appendix III  
Submissions Under the North American  
Agreement on Labor Cooperation**

<b>Case no. and NAO identifier</b>	<b>Submitted by</b>	<b>Against country</b>	<b>Issue</b>	<b>Status</b>	<b>Time frame</b>
U.S. NAO 9802 Tomato/ Child Labor	Florida Tomato Exchange	Mexico	Alleged child labor violations in the production of fruit and vegetables in Mexico	Submission closed -- U.S. National Administrative Office requested additional information --but received nothing in a year	9/28/1998- 10/4/1999
U.S. NAO 9803 McDonald's	International Brotherhood of Teamsters, Teamsters of Canada, the International Labor Rights Fund, et al.	Canada	Alleged violations relating to freedom of association, and delays in union certification	Submission accepted and later withdrawn --Canadian government and corporation held consultations, and the two sides reached an agreement	10/19/1998- 4/21/1999
U.S. NAO 9804 Rural Mail Couriers	Organization of Rural Mail Couriers, Canadian Union of Postal Workers, National Association of Letter Carriers, et al.	Canada	Alleged denial of workers' right to bargain collectively. Alleged violation of occupational health and safety issues, and protection against discrimination	Submission declined	12/2/1998- 2/1/1999
U.S. NAO 9901 TAESA	Association of Flight Attendants, and the Association of Flight Attendants of Mexico	Mexico	Alleged violations of freedom of association, minimum employment standards, and occupational health standards	Submission accepted -- public report issued recommending ministerial-level consultations	11/10/1999- pending
U.S. NAO 2000-01 Auto-Trim/ Custom Trim	Coalition for Justice in the Maquiladoras, current and former workers, and 22 other unions and nongovernmental organizations	Mexico	Alleged violations concerning occupational health and safety and compensation in cases of occupational injuries	Submission accepted -- site visit conducted, and ministerial-level consultation recommended	7/3/2000- pending

**Appendix III  
Submissions Under the North American  
Agreement on Labor Cooperation**

<b>Case no. and NAO identifier</b>	<b>Submitted by</b>	<b>Against country</b>	<b>Issue</b>	<b>Status</b>	<b>Time frame</b>
Mexico NAO 9501 Sprint	Telephone Workers Union of the Republic of Mexico	United States	Alleged violation of freedom of association when a corporation subsidiary closed prior to a scheduled election on union representation	Ministerial consultations requested – Commission for Labor Cooperation issued report on the effects of sudden plant closings on freedom of association in each NAFTA country	2/9/1995-11/25/1997
Mexico NAO 9801 SOLEC	Local 1-675 of the Oil, Chemical and Atomic Workers International Union (“October 6”), et al.	United States	Alleged violations of freedom of association and minimum employment standards. Also, allegations of employment discrimination and health and safety violations	Submission accepted -- public report issued and ministerial agreement signed in May 2000 on freedom of association and health and safety issues  (The ministerial agreement signed in May 2000 covered issues raised in NAO 9801, 9802 and 9803.)	4/13/1998-pending per implementation of the agreement
Mexico NAO 9802 Apple Growers	National Union of Workers, the Authentic Workers' Front, the Metal, Steel, Iron and Allied Industrial Worker's Union, and the Democratic Farm Workers Front	United States	Alleged violations of freedom of association, right to organize, and minimum conditions of work. Also, allegations of employment discrimination, failure to prevent occupational injuries and illnesses, and protection of migrant workers	Submission accepted -- a ministerial agreement was signed on May 2000, which included plans for public outreach seminars for migrant workers, and government-to-government meetings to discuss migrant workers' rights  (The ministerial agreement signed in May 2000 covered issues raised in NAO 9801, 9802 and 9803.)	5/27/1998-pending per implementation of the agreement
Mexico NAO 9803 Decoster Egg	Mexican Confederation of Labor	United States	Alleged violations of freedom of association, protection for migrant workers, safety and health, and workers' compensation. Also, allegations of employment discrimination	Submission accepted --a ministerial agreement was signed on May 2000, which included plans for public outreach seminars for migrant workers, and government-to-government meetings to discuss migrant workers' rights (The ministerial agreement signed in May 2000 covered issues raised in NAO 9801, 9802 and 9803.)	8/4/1998-Pending per implementation of the agreement
Mexico NAO 9804 Yale/INS	Yale Law School Worker's Rights Project	United States	Alleged failure to effectively enforce the U.S. existing minimum wage and overtime protections	Submission accepted -- U.S. Department of Labor issued a new Memorandum of Understanding and Mexico issued report on U.S. labor violations. Ministerial consultation was recommended	9/22/1998-pending

**Appendix III  
Submissions Under the North American  
Agreement on Labor Cooperation**

<b>Case no. and NAO identifier</b>	<b>Submitted by</b>	<b>Against country</b>	<b>Issue</b>	<b>Status</b>	<b>Time frame</b>
Canada NAO 98-1 ITAPSA	Canadian Office of the United Steelworkers of America, in concert with 31 concerned organizations from the three NAFTA countries	Mexico	Alleged failure to effectively enforce labor legislation covering occupational health and safety and freedom of association of workers at a processing plant	Submission accepted -two reports issued –the first addressed freedom of association; the second covered occupation health and safety issues. Ministerial consultations pending	4/6/1998- pending
Canada NAO 98-2 Yale/INS	Yale Law School Worker's Rights Project	United States	Alleged failure to effectively enforce the U.S. existing minimum wage and overtime protections	Submission closed -- Canadian National Administrative Office considered the review inappropriate and closed the file in light of new Memorandum of Understanding	9/28/1998- 4/27/1999
U.S. NAO 9804 Rural Mail Couriers	Organization of Rural Mail Couriers, Canadian Union of Postal Workers, National Association of Letter Carriers, et al.	Canada	Alleged denial of workers' right to bargain collectively. Alleged violation of occupational health and safety issues, and protection against discrimination	Submission declined	12/2/1998- 2/1/1999
Canada 99-1 LPA	Labor Policy Association and EFCO Corporation	United States	Alleged failure to effectively enforce section 8(a)(2) of the U.S. National Labor Relations Act	Submission declined -- submitters filed an appeal on June 15, 1999	4/14/1999- 6/15/1999 appeal pending

# Cases Filed Under NAFTA's Chapter 11 Investor-State Dispute Settlement Mechanisms Through May 2001

Petitioner	Arbitration rules	Respondent	Action and Claim	Status
Ethyl Corp. (U.S. company)	UNCITRAL	Canada	<p><b>Action:</b> Canadian passage of MMT Act in April 1997 prohibits the importation or interprovincial trade of MMT without ministerial authorization.</p> <p><b>Claim:</b> Claim filed by Ethyl in April, 1997 states that Canadian actions through implementation of the MMT Act discriminated against it in violation of national treatment, imposed prohibited performance requirements, and unfairly expropriated its property. Ethyl sought \$250 million in damages.</p>	Canadian court decision called for Canada to reverse its actions giving rise to the claim. Canada settled with Ethyl for \$13 million in August 1998.
S.D. Myers (U.S. company)	UNCITRAL	Canada	<p><b>Action:</b> A ban on the export of polychlorinated biphenyl (PCB) waste from Canada to the United States was passed in late 1995.</p> <p><b>Claim:</b> S.D. Myers' October 1998 claim states that Canadian actions through PCB export ban discriminated against it in violation of national treatment and did not afford it a minimum standard of treatment. Furthermore, the ban imposed prohibited performance requirements and had the effect of expropriating S.D. Myers property. S.D. Myers sought \$20 million in damages.</p>	A partial award was issued in November 2000 in favor of S.D. Myers with respect to claims involving national treatment and minimum standard of treatment violations. However, the arbitral panel found in Canada's favor in all other respects. Canada has applied to a Canadian federal court to have the partial award against it set aside; that proceeding is ongoing.
Pope and Talbot (U.S. company)	UNCITRAL	Canada	<p><b>Action:</b> The Softwood Lumber Agreement between the United States and Canada allows a portion of Canadian timber sales to enter duty free into the United States.</p> <p><b>Claim:</b> Pope and Talbot filed a notice of arbitration on March 25, 1999, claiming that Canada's implementation of the U.S.-Canada Softwood Lumber Agreement breached Canada's obligations under chapter 11, including national treatment, minimum standard of treatment, performance requirements, and expropriation. Pope and Talbot sought damages of \$507 million.</p>	The tribunal rejected jurisdictional challenges by Canada on January 26, 2000. The tribunal issued a partial award on June 26, 2000, dismissing the investor's claims regarding performance requirements and expropriation. On April 10, 2001, the tribunal found that Canada did not violate the national treatment requirements. However, it found that Canada partially violated the minimum standard of treatment provision in connection with the verification review process it imposed on the investor.

**Appendix IV**  
**Cases Filed Under NAFTA's Chapter 11**  
**Investor-State Dispute Settlement**  
**Mechanisms Through May 2001**

<b>Petitioner</b>	<b>Arbitration rules</b>	<b>Respondent</b>	<b>Action and Claim</b>	<b>Status</b>
United Parcel Service (UPS) (U.S. company)	UNCITRAL	Canada	<p><b>Action:</b> Canada Post, a state enterprise and government monopoly, operates Canada's postal system.</p> <p><b>Claim:</b> In April 1999, UPS claimed that Canada Post abused its authority to run a postal monopoly by engaging in anticompetitive practices involving its nonmonopoly courier and parcel services in violation of Canada's national treatment and minimum standard of treatment obligations and the requirement that it supervise a 'government monopoly' and 'state entity.' UPS seeks \$160 million in damages.</p>	The tribunal has been formed and some procedural decisions have been made.
Azinian, et al. (U.S. company)	ICSID Additional Facility	Mexico	<p><b>Action:</b> A Mexican municipality dissolved its contract with Azinian after a Mexican federal court found that the waste disposal company was not complying with the terms of the contract.</p> <p><b>Claim:</b> Azinian (a.k.a. DESONA) claimed that Mexico's cancellation of the contract violated the minimum standard of treatment and expropriation provisions of chapter 11. Azinian sought damages of \$14 million in connection with this claim.</p>	The tribunal issued an award on November 1, 1999, in favor of Mexico on all counts, finding that the U.S. company misrepresented its qualifications.
Marvin Roy Feldman (U.S. investor)	ICSID Additional Facility	Mexico	<p><b>Action:</b> The Mexican government reversed its policy of allowing Feldman (a.k.a. CEMSA) tax rebates on cigarette exports as contemplated by Mexican legislation and confirmed by Mexico's Supreme Court</p> <p><b>Claim:</b> Feldman filed a formal notice of arbitration in April 1999 claiming that Mexico took actions, including refusing to allow CEMSA to export cigarettes with rebates of excise taxes as provided by law, which resulted in expropriation of his investment. Later, he also cited violation of chapter 11's national treatment provisions. He seeks \$40 million in damages.</p>	The finance ministers from Mexico and the United States rejected one of the proposed expropriation claims and allowed the others to proceed under chapter 11. The tribunal issued an interim decision on preliminary jurisdictional issues on December 6, 2000, and will hold a hearing on liability and damages in July 2001.

**Appendix IV**  
**Cases Filed Under NAFTA's Chapter 11**  
**Investor-State Dispute Settlement**  
**Mechanisms Through May 2001**

Petitioner	Arbitration rules	Respondent	Action and Claim	Status
Metalclad Corporation (U.S. company)	ICSID Additional Facility	Mexico	<p><b>Action:</b> Mexican municipality of Guadalcazar in the state of San Luis Potosi refused to grant Metalclad a municipal license to operate a hazardous waste treatment facility and landfill site and designated the Metalclad site as part of an ecological preserve.</p> <p><b>Claims:</b> Metalclad claimed in January 1997 that Mexico's refusal to grant a municipal license and the creation of an ecological preserve that included its facilities violated several provisions of NAFTA chapter 11: national treatment, most-favored-nation treatment, minimum standard of treatment, performance requirements, and expropriation. Metalclad sought \$90 million in damages.</p>	<p>On August 30, 2000, the tribunal upheld claims by Metalclad that Mexico breached its obligations under two sections of NAFTA chapter 11—expropriation and minimum standard of treatment—and ordered Mexico to pay the investor \$16.7 million. Mexico petitioned Canada's Supreme Court of British Columbia to set aside the award. On May 2, 2001, the court partially upheld the award but also set aside the ruling that the transparency provisions in the NAFTA preamble could be read into the obligation to provide fair and equitable treatment under chapter 11's minimum standard of treatment provision.</p>
Waste Management (U.S. company)	ICSID Additional Facility	Mexico	<p><b>Action:</b> State of Guerrero and city of Acapulco granted a 15-year concession to Waste Management (through Acaverde) in early 1995. Acapulco agreed to pay Waste Management for waste collection and disposal services and guaranteed that payment through Banobras, a Mexican state-owned bank and Guerrero.</p> <p><b>Claim:</b> Waste Management filed a notice of arbitration on September 29, 1998, asserting Acapulco, Banobras, and Guerrero failed to meet their contract obligations, including payment for services rendered. The claim states that these actions violated the minimum standard of treatment and expropriation obligations of NAFTA chapter 11. The U.S. investor is seeking \$60 million in damages.</p>	<p>The tribunal dismissed the case against Mexico on jurisdictional grounds, stating in its award that the U.S. investor had not met the waiver requirements of chapter 11. The U.S. investor resubmitted the claim on September 27, 2000. The new tribunal is not yet constituted.</p>

**Appendix IV**  
**Cases Filed Under NAFTA's Chapter 11**  
**Investor-State Dispute Settlement**  
**Mechanisms Through May 2001**

Petitioner	Arbitration rules	Respondent	Action and Claim	Status
Adams, et al. (U.S. investors)	UNCITRAL	Mexico	<p><b>Action:</b> Mexican federal district court decision in 1995 and its enforcement beginning in 1998 delivered possession of disputed property to individuals claiming to be the original Mexican landowners and evicted the U.S. investors by October 2000.</p> <p><b>Claim:</b> Adams, et al., filed a notice of arbitration on February 16, 2001, claiming that Mexican government actions to exclude them from participating in legal proceedings to determine ownership and possession of the disputed land violated the national treatment and minimum standard of treatment provisions of chapter 11. Furthermore, they claimed the Mexican federal court decision caused actions that resulted in the expropriation of the investors' possessions. Adams, et al., is seeking \$75 million in damages.</p>	No arbitral panel has been constituted.
ADF Group Inc. (Canadian company)	ICSID Additional Facility	United States	<p><b>Action:</b> The Virginia Department of Transportation determined that ADF's proposal to fabricate U.S. manufactured steel in Canada would not meet the Buy America requirements of its contract with the Virginia Department of Transportation.</p> <p><b>Claim:</b> ADF filed a notice of arbitration in July 2000 claiming that the U.S. requirements that federally funded state highway projects use only domestically produced steel violate NAFTA chapter 11's prohibition against performance requirements. In addition, ADF claims that Buy America requirements violate both the national treatment and minimum standard of treatment provisions of chapter 11. ADF is seeking damages of \$90 million.</p>	The parties agreed to join, or combine, the jurisdictional and merits claims. The hearing will likely be scheduled for spring 2002.
The Loewen Group (Canadian Company)	ICSID Additional Facility	United States	<p><b>Action:</b> A jury awarded \$500 million in compensatory and punitive damages in a civil suit against Loewen. Mississippi law requires, and the Mississippi Supreme Court ruled, that an appeals bond equaling 125 percent of the award must be posted. Loewen settled the case for \$175 million.</p> <p><b>Claim:</b> Loewen filed a claim in October 1998 alleging that the jury award and the Mississippi Supreme Court action amounted to a denial of justice and violated the national treatment, minimum standard of treatment, and expropriation provisions of NAFTA chapter 11. Loewen is seeking more than \$600 million in damages.</p>	A hearing on jurisdiction was held in 2000 and the tribunal issued a decision in favor of the claimants, holding that the United States can be held liable under NAFTA chapter 11 for decisions of state courts, even in litigation between purely private parties. Another hearing on competence and merits is scheduled for October 2001.

**Appendix IV  
Cases Filed Under NAFTA's Chapter 11  
Investor-State Dispute Settlement  
Mechanisms Through May 2001**

Petitioner	Arbitration rules	Respondent	Action and Claim	Status
Methanex Corp. (Canadian company)	UNCITRAL	United States	<p><b>Action:</b> California banned the use of MTBE, a gasoline additive, by the end of 2002.</p> <p><b>Claim:</b> Methanex submitted a claim in July 1999 alleging that the ban illegally expropriates the firm's U.S. investment, discriminates against it in favor of the U.S. ethanol industry, and denies it fair and equitable treatment. Methanex is seeking nearly \$1 billion in damages.</p>	A jurisdictional hearing is scheduled for July 2001.
Mondev International, Ltd. (Canadian company)	ICSID Additional Facility	United States	<p><b>Action:</b> Mondev sued the city of Boston and the Boston Redevelopment Authority for breach of and interference with a real estate contract. The jury found for Mondev and the court entered a \$9.6 million judgment. The Massachusetts Supreme Judicial Court overturned the ruling.</p> <p><b>Claims:</b> Mondev filed a notice of arbitration in September 1999 claiming that municipal authorities' actions and the court ruling amounted to an expropriation of Mondev's interest and a denial of justice, thus violating NAFTA obligations to provide a minimum standard of treatment to foreign investors. Mondev is seeking no less than \$50 million.</p>	The jurisdictional and merits phases were joined. A tribunal order regarding confidentiality was filed on February 27, 2001. A hearing will likely take place in late 2001 or early 2002.

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# Objectives, Scope, and Methodology

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In preparation for considering future free trade agreements, the Chairman of the Subcommittee on Trade, House Committee on Ways and Means requested that we review the U.S. experience to date with cases brought under NAFTA's environment and labor side agreements and the treaty's chapter 11 investor-state dispute settlement provisions. In performing this work, we studied the institutional structure and principles of the side agreements and chapter 11 on investment. We also examined the processes that are used to investigate and settle disputes. Finally, we reviewed the cases that have been initiated under the side agreements and investment provisions, as well as the outcomes and disposition of these cases.

To obtain information on the institutional structures and principles, we relied on our previous work in this area, and interviewed officials from the U.S. Trade Representative, the Environmental Protection Agency, and the Departments of Commerce, Justice, Labor, State, and Treasury. In addition, we reviewed the NAFTA agreement and the labor and environment side agreements.

To obtain information on the submission process of the side agreements and chapter 11's investor-state dispute settlement process, we interviewed agency officials at EPA, the Departments of Interior, Labor, State, Justice, Commerce, Treasury, and the USTR. To further understand the environmental and labor submission processes, we reviewed procedural guidelines issued by the Commission for Environmental Cooperation and the Department of Labor's National Administrative Office. To gain greater insight into the investor-state dispute settlement process, we also interviewed representatives from nongovernmental entities and reviewed the United Nation's and World Bank's commercial arbitration rules referenced in the NAFTA.

To obtain information on the cases initiated and their outcomes, we interviewed agency officials from the EPA, the Departments of Interior, Labor, State, Justice, Commerce, Treasury, the USTR, and the Commission for Environmental Cooperation. We also reviewed case information provided by the Department of Labor's National Administrative Office, the State Department, and the Web sites of the Commission for Environmental Cooperation, the World Bank, and Canada's Department of Foreign Affairs and International Trade. Finally, we interviewed representatives of nongovernmental entities with knowledge of the environment and labor submissions, as well as those familiar with cases brought under NAFTA's investor-state dispute settlement mechanism.

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**Appendix V**  
**Objectives, Scope, and Methodology**

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We conducted our work from February to June 2001 in accordance with generally accepted government auditing standards.

# GAO Contacts and Staff Acknowledgments

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## GAO Contacts

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In addition to those listed above, Janey Cohen, Kim Frankena, Ernie Jackson, and Julia Souder made key contributions to this report.

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