

NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy

Lessons for Fast Track and
the Free Trade Area of the Americas



Friends of the Earth
Fighting Environmental Destruction Where it Begins

September 2001

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ISBN 1-58231-027-0

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Acknowledgments: Research and writing of this report have been provided by Mary Bottari and Lori Wallach of Public Citizen, as well as David Waskow of Friends of the Earth. Additional invaluable assistance was provided by Angela Bailey, Amanda Ballantyne, Angela Bradbery, David Desrosiers, Darshana Patel, Paul Levy, Michael Stein and Patrick Woodall. In addition, Public Citizen would like to extend its thanks to Nathalie Bernasconi, Aaron Cosbey, Jim Grieshaber-Otto, John Nichols, Steve Schrybman, and Martin Wagner for their contributions to this report.

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EXECUTIVE SUMMARY

In the spring of 2001, President George W. Bush asked the U.S. Congress to delegate to him a 6-year chunk of Congress' constitutional authority over international trade through a process called Fast Track. Bush seeks Fast Track trade authority (which his Administration is attempting to rename "Trade Promotion Authority") to expand the 1994 North American Free Trade Agreement (NAFTA.) The proposed NAFTA expansion, formally called the Free Trade Area of the Americas (FTAA), would spread NAFTA's rules to an additional 31 Latin American and Caribbean nations by 2005.

The publicized goal of the FTAA proposal is to facilitate trade and deepen economic integration by expanding the NAFTA provisions that eliminate tariff and nontariff barriers to trade and investment throughout the hemisphere.¹ Careful consideration of NAFTA's record therefore becomes central to discussions of Fast Track and the FTAA.

Thus, this year, Public Citizen is releasing a series of reports on NAFTA's actual performance over its seven years in existence. This report, **NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy**, analyzes NAFTA's groundbreaking investment chapter, which granted expansive new rights and privileges for foreign investors operating in the three NAFTA signatory nations: U.S., Canada, and Mexico. It is often said that NAFTA was more of an investment agreement than a trade agreement. Now NAFTA's investor privileges and protections are at the core of the proposed FTAA.

NAFTA's investor protections are unprecedented in a multilateral trading agreement. Since the agreement's enactment, corporate investors in all three NAFTA countries have used these new rights to challenge a variety of national, state and local environmental and public health policies, domestic judicial decisions, a federal procurement law and even a government's provision of parcel delivery services as NAFTA violations. While most cases are still pending, some corporations have already succeeded with these challenges. (Please see the chart listing these cases and their status at the end of the Executive Summary.)

Remarkably, NAFTA also provides foreign investors the ability to privately enforce their new investor rights. Called "investor-to-state" dispute resolution, this extraordinary mechanism empowers private investors and corporations to sue NAFTA-signatory governments in special tribunals to obtain cash compensation for government policies or actions that investors believe violate their new rights under NAFTA. If a corporation wins its case, it can be awarded unlimited amounts of taxpayer dollars from the treasury of the offending nation even though it has gone around the country's domestic court system and domestic laws to obtain such an award.

Supporters of NAFTA claimed that these extensive investors protections and their private enforcement mechanism were necessary to protect investors from the state seizure of private property (i.e., nationalization). Mexico, which nationalized its foreign oil refineries in 1938, was the prime target of these concerns.²

However, the majority of the investor-to-state cases filed to date have had little to do with the seizure of property NAFTA supporters feared.³ Instead, the cases challenge environmental laws, regulations and government decisions at the national, state and local level:

- C The California-based Metalclad company successfully challenged the denial of a construction permit by a Mexican municipality for the building of a toxic waste facility;
- C Environmental and health bans of suspected toxins have been challenged, with one case already resulting in reversal of a Canadian government ban on the gasoline additive MMT;
- C Canada's implementation of two international environmental agreements has been successfully challenged, and Canada will soon be ordered to pay damages to U.S. investors in both cases;
- C Foreign corporations have taken two lawsuits they lost in U.S. domestic courts to be "reheard" in the NAFTA investor-to-state system, one challenging the concept of sovereign immunity regarding a contract dispute with the City of Boston and the other challenging the rules of civil procedure, the jury system and a damage award in a Mississippi state court contract case;
- C The American company, United Parcel Service (UPS), has filed a suit challenging the governmental provision of parcel and courier services by the Canadian postal service; and
- C A Canadian steel fabrication company challenged a federal "Buy America" law for highway construction projects in the U.S.

This extraordinary attack on normal government activity – such as operating a civil justice system through courts, denying a construction permit or establishing health and other public interest regulations – has drawn growing criticism to NAFTA's Chapter 11 investment rules. For some Republican and Democratic members of Congress who voted for NAFTA, these cases have been an unexpected and unwelcome result of the agreement. The Republicans were promised NAFTA would not undermine U.S. local and state sovereignty and control. The Democrats were promised NAFTA would not undermine domestic environmental and health laws. Both were promised NAFTA would not give foreign investors better treatment than local businesses or open the U.S. Treasury to new demands from foreign investors. But the NAFTA Chapter 11 cases have made a mockery of these promises.

Of the 15 cases reviewed in this report, the damages claimed by the companies add up to more than U.S.\$13 billion. Initially, not many cases were filed under these provisions. However, once the first investors obtained damages and/or reversal of the government policy they attacked, a flurry of additional cases were filed.

The expansion of NAFTA's new investor rights to 31 more countries of the Western Hemisphere via the FTAA has the potential to generate an explosive number of new cases. While these cases could drain the treasuries of the hemisphere's richest nations, the potential impact these cases would have on the hemisphere's poorest and weakest nations is even more alarming.

Given President Bush's Fast Track request is based on his desire to expand NAFTA's investment rules to the entire hemisphere through the FTAA, the NAFTA Chapter 11 issues have become central to the Fast Track debate.

The expansive rights granted to corporations under NAFTA were just one of the factors that went largely unnoticed by Congress and the media due to the fact that in the United States NAFTA was approved under an unusual "Fast Track" procedure, which expired in 1994 and was used only five times since its development in 1974 by President Nixon. Under Fast Track, Congress' role in developing the contents of international commercial agreements is severely limited. Once Congress grants a President Fast Track, the Executive Branch is allowed to negotiate the agreement and sign it, locking in the contents, before Congress has a vote on the deal. Because Congress' role was limited to a *post hoc* yes or no vote with no amendments allowed, many members of Congress who voted in favor of NAFTA had no idea that these investor provisions were a central element of its contents.

The use of Fast Track for NAFTA demonstrates how the process can obscure meaningful analysis of a proposed agreement's actual binding terms. Potential legal, public health and environmental implications can be overlooked. Given the broad set of domestic law issues now implicated in today's international commercial negotiations, many consider Fast Track to be an outdated trade policy tool. As a new Fast Track fight looms in Congress in the fall of 2001, the sovereignty and public policy implications of the NAFTA cases reviewed in this report argue against the use of Fast Track for development of the proposed FTAA and more generally as a tool of democratic decision-making and public policy.

This report reviews the major NAFTA investment cases of public interest and the potential for a massive acceleration of cases if similar investor rights are incorporated into the FTAA. As these cases are decided behind closed doors in NAFTA tribunals, information about the cases is difficult to obtain. Indeed, there is no requirement that the public or Congress be given notice that a NAFTA Chapter 11 case has been filed against the United States, raising the specter that in addition to the cases we have been able to unearth, perhaps more cases have been filed and either have been quietly settled through

negotiated payments or are still pending. Researchers must rely upon the final panel reports that are sometimes released by the tribunal at the end of the process and on the few other documents that have made it into the light of day, the majority of which have been written by the plaintiff corporations themselves.

Analysis of the NAFTA cases as a whole compels certain conclusions:

Foreign Investors Granted Greater Rights than U.S. Corporations or U.S. Citizens:

NAFTA's investment rules provide new rights and privileges for foreign investors that go significantly beyond the rights available to U.S. citizens or businesses in U.S. domestic law and provide a venue exclusively available to foreign investors to seek payment of U.S. taxpayer funds for alleged business losses. Previous trade or investment agreements typically focused on ensuring "national treatment" – that foreign investors or goods obtained the *same* treatment as domestic businesses and products. But NAFTA establishes new rights applicable only to foreign investors claiming compensation from taxpayers for the costs of complying with the same domestic policies that all domestic companies must follow. The string of cases analyzed in this report show how these NAFTA rules are being used by foreign investors to demand payment for any government action that impacts the value of an investor's property. Yet such a notion of "regulatory takings" does not exist for U.S. citizens or companies because it has been rejected by Congress and the courts. Attempts to legislate a broader definition of property rights through regulatory takings legislation has been repeatedly rejected by Congress. In addition, the U.S. Supreme Court held in the 1993 *Concrete Pipe* case that "mere diminution" of the value of an investment is not sufficient to establish a taking.⁴ Yet it is precisely a diminution of value resulting from compliance with government regulations that is at issue in most of these NAFTA cases. In short, these NAFTA cases are giving foreign investors greater rights and remedies on U.S. soil than are available to U.S. companies here at home.

"Our cases have long established that the mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."

– Justice David Souter, *Concrete Pipe and Products vs. Construction Laborers Pension Trust* 508 U.S. 602.

Foreign Investors Allowed to Evade Legal Liability? NAFTA's investor-to-state tribunals provide a way for foreign litigants to seek government compensation for damages ordered by U.S. courts. In one NAFTA case, a huge Canadian funeral conglomerate called the Loewen Group is using NAFTA's investor protections to, in effect, "reverse" a Mississippi jury's ruling in favor of a small funeral home operator who sued the conglomerate for breach of contract. After the conglomerate refused to engage in pre-trial settlement discussions, the jury found that Loewen had engaged in a variety of fraudulent actions and applied \$500 million in punitive and compensatory damages. Loewen claims that it was then "forced" to settle the case for \$150 million, because the Mississippi Supreme Court would not waive the normal rules of civil procedure for the company. These rules require that a

defendant post a bond when filing an appeal so that it cannot liquidate its assets in case the appeal is unsuccessful and the underlying damages must still be paid. Loewen is suing the U.S. taxpayers for \$725 million under NAFTA to compensate the company for this “expropriation,” almost five times the amount of the settlement. The U.S. defense in this case was that a jury ruling in a civil contract case was not a “government action” against which foreign investors were granted special NAFTA protections. Remarkably, the NAFTA tribunal in the Loewen case has ruled that not only is a Mississippi jury award in a contract case a legitimate target of a corporate suit under NAFTA, but to date the panel has placed no limits on what types of court decisions could be open to challenge. If Loewen prevails in its NAFTA case, the corporation will be able to push the “bill” for its illegal behavior onto the U.S. taxpayers, another “privilege” not allowed U.S. corporations. Moreover, this case shows how NAFTA provides an incentive for foreign investors to resist reasonable settlement discussions with the prospect that any final unfavorable court orders or damages could be evaded using NAFTA.

Public Disputes, Private Tribunals: Rather than setting up a new dispute settlement mechanism to handle these investor-to-state disputes, NAFTA instead relies upon two already existing dispute resolution systems – one operating under the auspices of the World Bank, the other operating under the auspices of the United Nations. Originally, these two arbitration bodies were set up to arbitrate private cases between contractual parties in narrow commercial disputes. These commercial disputes dealt primarily with private law issues, affecting only the parties to the dispute. Thus, in the past, the fact that these proceedings were strictly confidential with no access by the press or public and no process for amicus briefs was of less concern to the public at large. Now, however, these closed-door arbitral bodies are dealing with significant issues of public policy. Under NAFTA an array of public interest regulations, such as a California law phasing out a gasoline additive found to be contaminating water wells around the state, and other normal government functions have been challenged as violating NAFTA. The citizens of the state must rely on federal government agencies such as the Department of Justice, Department of State and the Office of the United States Trade Representative to defend their new law, which was created over several years using an open process. Even the Attorney General of California has no formal role. The residents of California cannot be party to the case, are not entitled to documents and cannot observe the operations of the NAFTA tribunal. Yet it is their tax dollars that may one day be awarded to the corporation that is demanding \$1 billion in compensation. Questions regarding the appropriateness of these private arbitration bodies for these public-interest disputes are made more urgent by the fact that cases in these bodies seem to be accelerating under NAFTA and under various bilateral investment treaties. In its 35-year history, the World Bank’s arbitral body has handled approximately 79 cases. However, half of those cases have been instigated in the past five years alone.⁵ The accelerating pace of complaints, coupled with the secretive, undemocratic nature of the arbitral bodies and the vast powers of the tribunal to award an unlimited amount of taxpayer dollars to compensate a successful corporation are proving to be a significant threat to the public interest.

Potential Cost to the Taxpayers in the Billions: In the end, it is the taxpayers of the challenged country who must pay the compensation to a corporation if it succeeds in its NAFTA suit. In the first seven years of NAFTA, with only a small number of cases filed, an astonishing \$13 billion has been claimed by corporations in their initial filings: \$1.8 billion from U.S. taxpayers, \$294 million from Mexican taxpayers and a whopping \$11 billion from Canadian taxpayers. In the California case, the corporation is seeking nearly \$1 billion or 1.2% of the state budget in compensation for the environmental measure phasing out the gasoline additive.⁶ A number of awards of that size could significantly impact the treasuries of national governments, and put pressure upon governments to squeeze states and localities for funds.

State and Local Governments are Not Safe from NAFTA Tribunals' Reach: Not only have federal laws, such as a U.S. "Buy America" procurement law, been challenged under NAFTA's Chapter 11, but a variety of measures taken by state, provincial and municipal governments have been challenged as well. In the toxic waste case, involving the U.S. Metalclad corporation, the decision of a Mexican municipality to demand a construction permit before a U.S. company could begin building a toxic waste facility was successfully challenged as NAFTA-illegal. In the same case, a later decision by the Governor of the state to create an ecological reserve was deemed a NAFTA violation challenged and the Mexican government has been ordered to pay \$15.6 million in damages. In another NAFTA case, British Columbia's decision to ban the bulk export of lake and river water to prevent it from being sucked up and shipped to California in supertankers was challenged by a California corporation called Sun Belt. The Mondev corporation of Canada has attacked the actions of the Boston Redevelopment Authority, the City of Boston and the Massachusetts Supreme Court in a NAFTA tribunal over a real estate deal arguing that NAFTA overcomes the U.S. common law right of sovereign immunity. While it is true that under NAFTA, a panel cannot directly rescind a law, and it is the federal government that is technically liable for any damages, federal governments currently have a variety of avenues under domestic law to bend state and local governments to their will. For example, federal governments can hold funds for state and local projects 'hostage' until the offending measure is rescinded or until the locality agrees to contribute to the damage award. State and local governments must begin to take a hard look at these NAFTA cases to understand the implications for state sovereignty and governance under NAFTA as well as the FTAA.

Governments Subject to Endless Second-Guessing by NAFTA Tribunals: A tribunal in another NAFTA case found that Canada's temporary ban of PCB exports because of environmental concerns (during a brief period when the U.S. lifted its PCB import ban) were reasonable. However the tribunal also ruled that Canada's actions were NAFTA-illegal because the tribunal decided that the manner in which Canada sought to implement its environmental goal was not the least trade restrictive manner possible. The panel, with no apparent expertise in environmental policy, put forward a variety of suggestions on other alternatives Canada might have pursued to achieve similar ends. In the California case, the Canadian corporation Methanex is arguing that the state of California

should not phase out the gasoline additive called MTBE (a suspected carcinogen, which is highly soluble in water posing a greater risk to drinking wells than similar additives), but rather should deal with the problem of MTBE-contamination of drinking water by cleaning up all potentially leaky fuel tanks – an extraordinarily costly endeavor that still would not remove all causes of MTBE water contamination. In a number of cases, corporations argue that the very process by which a law was achieved constitutes a violation of their new NAFTA investor rights. In the California case, the MTBE phase-out was achieved after a multi-year public process during which the state took deliberative actions, first commissioning numerous studies, followed by public hearing and debate. In the coming months, a NAFTA panel will be empowered to inform us if these common practices of democratic governance will soon be considered violations of NAFTA’s new investor rights.

NAFTA Challenges Chill Public Interest Policies: In another environmental case, the U.S. Ethyl corporation filed a suit against a Canadian environmental and public health measure restricting a gasoline additive it developed *as the ban was being debated in parliament*. NAFTA rules require corporations to wait six months after the events which give rise to the claim and then require an attempt to resolve the situation through negotiations before pursuing a NAFTA case. That a NAFTA tribunal accepted this case, which was a blatant attempt to intimidate a legislative body from taking action, sends an alarming signal. In the end, the government of Canada settled the case by revoking the ban on the gasoline additive MMT and paid the company \$13 million before the NAFTA tribunal had issued final ruling. If similar investor rights are incorporated as planned into the FTAA, the potential for large multinational corporations to bully the governments of the weakest and poorest countries of the hemisphere would be extraordinary. The mere threat of a vast damage award and the high costs of defending a suit could make poorer nations concede before the fight had been joined, which is the trend that has occurred in poor nations threatened with World Trade Organization (WTO) challenges filed on a state-to-state basis.

Principle of Sovereign Immunity Attacked: In addition to the implications of having governmental decisions second-guessed and undermined by NAFTA panels, the legal principle of sovereign immunity itself has been attacked in a NAFTA case. The doctrine of “sovereign immunity” is a centuries-old legal concept that holds that governments cannot be sued unless the lawsuit is expressly allowed by law. Many states and the U.S. federal government waive sovereign immunity by statute or on a case-by-case basis. One NAFTA case involves a Canadian corporation, Mondev, which has been involved in a lengthy contract dispute with the City of Boston over an option to buy a parcel of land. Mondev’s arguments were rejected by the Massachusetts Supreme Court on the grounds of sovereign immunity. Mondev has in effect “appealed” this U.S. domestic court decision to a NAFTA tribunal. The crux of Mondev’s argument is the notion that new rights for foreign investors granted in NAFTA trump a state’s sovereign immunity protections. If a NAFTA panel rules in Mondev’s favor, not only will it effectively “reverse” a state supreme court decision, but again foreign corporations will be granted rights and privileges not allowed U.S. corporations operating on U.S. soil. Moreover, a bedrock principle of

Common Law jurisprudence will have been trampled by a three-person NAFTA tribunal with broad ramifications for U.S. governance at all levels.

NAFTA Fishing Expedition for Government Compensation by Foreign Corporations: Another troubling trend in the NAFTA Chapter 11 cases is the tendency of corporations to seek government compensation in instances when its actual investment in the country being sued is not readily apparent. Only two of the 15 NAFTA cases deal with circumstances that could be vaguely characterized as a seizure of property. Indeed, in many of these NAFTA cases it is unclear what “property” the investor held in the country being challenged. In the PCB case, it is not at all clear what investment the U.S. company had in Canada; it simply sought to import PCB waste from Canada for treatment and disposal in its Ohio plant. In finding for the company, the NAFTA tribunal decided, among other things, that “market share” was a legitimate investment under NAFTA – meaning that the fact that the company ever had been able to import PCB waste treatment in Canada established a right to do so protected by NAFTA. This is an alarming ruling that could spark an array of new suits geared toward garnering a larger share of the market. In the Sun Belt bulk water case, the U.S. company had visions of a joint venture with a Canadian company that would allow it to export Canadian water in tanker ships to California, but Sun Belt never claimed to have any property in Canada whatsoever. It would require a stretch of the imagination to liken these cases to seizure of property. Instead, the majority of cases being brought under NAFTA most closely resemble claims for “regulatory takings” not permitted under U.S. law.

NAFTA Environmental Protections Meaningless: The Preamble of NAFTA states that countries will undertake their obligations in a manner “consistent with environmental protection and conservation.” Further language in Article 1114 of the investment chapter purports to protect the environment, and prevent a race to the bottom in environmental standards. These provisions of NAFTA have been given such short shrift by NAFTA tribunals as to render them meaningless. In the toxic waste case, there was no evidence that the tribunal weighed NAFTA’s environmental provisions at all before reaching their final decision. The ruling does make clear that no weight was given to the environmental concerns of the community which was the reason that local officials tried to block the dump. Further, the panel set a number of disturbing precedents. It not only equated the denial of a municipal construction permit and the creation of an ecological reserve with an “expropriation” under NAFTA, but it broadened the definition of expropriations to include “incidental” interference with the value of a property thus opening the door for all sorts of legitimate zoning by a sub-national government to be challenged under NAFTA. In the PCB case, an environmental treaty that regulates trade in hazardous waste called the Basel Convention, was considered by the NAFTA tribunal, but in the end was completely discounted.

Importing Obligations of all of NAFTA and WTO Into Chapter 11: Utilizing the Article 1105 requirement that investors must be treated “in accordance with international law,” corporations have sought to import the obligations of NAFTA as a whole, as well as international trading obligations

of the General Agreement on Tariffs and Trade and the WTO, into Chapter 11 litigation. In the toxic waste case, the panel improperly imported the transparency obligations of NAFTA Chapter 18 regarding publication and administration of domestic law into Chapter 11. In the PCB case, the NAFTA tribunal decided that NAFTA's Chapter 11 protections applied even though the company did not have a concrete investment in Canada but rather sought to import PCBs into the U.S. for disposal. This ruling opens up the possibility that the NAFTA chapter governing services (Chapter 12) now could be dragged into investor-to-state enforcement in its entirety. Indeed, in a new case involving a service provider, United Parcel Service (UPS) is challenging the manner in which Canada provides postal services alleging discriminatory treatment under NAFTA's Chapter 12 as well as Chapter 11. In addition, the heart of UPS case rests on provisions in NAFTA Chapter 15 regarding state-run enterprises. Finally, in the California MTBE case, the corporation has attempted to import key elements of WTO law and jurisprudence into its argument. If this trend continues, the grounds for complaint under NAFTA's Chapter 11 will grow immeasurably, subjecting NAFTA parties and taxpayers to endless litigation and costly compensation.

Arbitrary Rulings Mean Rudeness by Government Officials Can Be NAFTA Violations: One ground for bringing an investor-to-state suit is NAFTA Article 1105 which guarantees a minimum standard of treatment for foreign investors. The article states that "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."⁷ Previously in bilateral investment disputes, similar language has been interpreted narrowly to apply to clear violations of international law, for example, detention without trial. NAFTA panels, however, have interpreted this language to create an enormous catch-all remedy for corporations that believe they have been treated unfairly. In the one case, the panel ruled against the corporation on claims that the Canadian government had violated an array of NAFTA terms. However, the panel found a violation of the minimum standard of treatment guarantee anyway. The panel did not find a violation of domestic or international law, rather it found that the overzealous and rude behavior of government representatives checking the company's paperwork was itself a violation. The ruling in this case broadens the Article 1105 catch-all to any instance when a corporation feels it has been treated unfairly. A recent July 31, 2001 clarification by the NAFTA governments has attempted to deal with this issue by seeking to narrow the application of Article 1105 to treatment that is required by "customary" international law. Yet the new interpretation does not define what is meant by "customary," providing enormous opportunity for a continuation of the expansive interpretation by the tribunals.

From Defense to Offense: A number of corporations are not even attempting to claim expropriation when initiating NAFTA Chapter 11 cases. Rather they appear to be using other provisions of NAFTA's investment chapter to improve their strategic position in the marketplace. A glaring example of this strategic maneuvering is the UPS case against the Canadian postal service. UPS is arguing that because Canada Post provides public mail services, it should not also be providing

integrated parcel and courier services. UPS claims that Canada Post's vast infrastructure is a NAFTA-illegal subsidization of its parcel and courier service, giving Canada Post an unfair advantage in the marketplace. In an era when public and commercial service delivery are often commingled, few public services including health care and education would be immune from similar corporate challenges. The UPS case encapsulates one of the most disturbing trends in the NAFTA cases taken as a whole, which is that many corporations seem to be moving from the defensive (protecting themselves against seizure of property) to the offensive in an attempt to carve out more favorable market conditions or market share.

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On July 31, 2001, the Free Trade Commission, comprised of three NAFTA country trade ministers, issued a "clarification" related to NAFTA Chapter 11. NAFTA provides for the Free Trade Commission to issue interpretations of NAFTA rules if agreed to by consensus.

The Chapter 11 clarification dealt with two issues. First, in response to building criticism of the closed-door process, the trade ministers attempted to address the issue of timely disclosure of NAFTA tribunal documents. The language the trade ministers agreed to in their clarification, however, still allows tribunals to set the guidelines regarding the release of documents other than the final award and tribunals could bar the release of any document until the case is completed. In addition, corporations have requested and have been granted confidentiality orders by tribunals. This practice was not prohibited by the clarification. In the end, the trade ministers' clarification may have limited effect.

Second, the clarification attempted to clear up the confusion surrounding the "minimum standard" of treatment provisions of Article 1105 by limiting NAFTA rights and protections to those afforded by "customary" international law. Unfortunately, the language the trade ministers agreed to conflicts with the plain language of NAFTA and does not define what is encompassed in the rubric of "customary" international law. As a result, although we are instructed that a traditional interpretation is intended, we do not know what body of law is included, leaving in place what amounts to an extremely vague and open-ended standard that can be used to challenge efforts to protect the environment and the public interest.

Meanwhile, in issuing this limited clarification, the trade ministers from the three NAFTA nations refused to deal with the core problems of Chapter 11 that have been raised by legislators and policy analysts in all three nations. The regulatory takings provisions of Article 1110 has drawn the most fire, but the trade ministers refused to provide an interpretation of the provision or in any way limit its use, despite increasingly expansive interpretations of the article by NAFTA Chapter 11 panels which continue to treat non-discriminatory domestic environmental and health policies as regulatory takings.

These radical regulatory takings provisions should be excised from NAFTA and kept out of the FTAA. Unfortunately, the Bush Administration has rejected just such demands from Congress. Congress must ensure that any Fast Track delegation of its constitutional trade authority to the Executive Branch guarantees that the Chapter 11 problems are remedied and certainly not expanded.

TABLE OF NAFTA CHAPTER 11 CASES

Corporation or Investor	Venue	Damages Sought (U.S. \$)	Status of Case	Issue
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Cases Against the United States

Loewen Oct. 30, 1998*	ICSID	\$725 million	Pending	Canadian funeral conglomerate challenges Mississippi jury damage award
Mondev Sept. 1, 1999	ICSID	\$50 million	Pending	Canadian real estate developer challenges Massachusetts Supreme Court ruling on local government sovereign immunity
Methanex Dec. 3, 1999	UNCITRAL	\$970 million	Pending	Canadian corporation challenges California phase-out of gasoline additive MTBE, which is contaminating drinking water around the state.
ADF Group Jul. 19, 2000	ICSID	\$90 million	Pending	Canadian steel contractor challenges U.S. "Buy America" law

Cases Against Canada

Ethyl Apr. 14, 1997	UNCITRAL	\$201 million	Settled; Ethyl Win, \$13 million	U.S. chemical company challenges Canadian environmental regulation of gasoline additive MMT
S.D. Myers Oct. 30, 1998	UNCITRAL	\$20 million	S.D. Myers Win**	U.S. waste treatment company challenges Canadian ban of PCB exports compliant with multilateral environmental agreement
Pope & Talbot Mar. 25, 1999	UNCITRAL	\$381 million	Pope & Talbot Win**	U.S. timber company challenges Canada's implementation of 1996 U.S.-Canada Softwood Lumber Agreement
UPS Apr. 19, 1999	UNCITRAL	\$160 million	Pending	UPS claims Canadian post office parcel delivery service enjoys unfair subsidy because it is a public service
Sun Belt Oct. 12, 1999	UNCITRAL	\$10.5 billion	Pending	U.S. water company challenges British Columbia's bulk water export moratorium
Ketcham Dec. 22, 2000		\$19.5 million	notified Canada of intent to sue	U.S. timber company challenges Canada's implementation of 1996 U.S.-Canada Softwood Lumber Agreement

Cases Against Mexico

Metalclad Jan. 13, 1997	ICSID	\$90 million	Metalclad Win, \$15.6 million	U.S. firm challenges Mexican municipality's refusal to grant construction permit for toxic waste dump and State declaration of ecological zone
Azinian, et al Mar. 17, 1997	ICSID	\$19 million	Dismissed	U.S. investors challenge Mexican federal court decision revoking waste management contract for suburb of Mexico City
Waste Management Sept. 29, 1998	ICSID	\$60 million	Pending	U.S. waste disposal giant challenges City of Acapulco revocation of waste disposal concession
Karpa Apr. 7, 1999	ICSID	\$50 million	Pending	U.S. cigarette exporter challenges denial of export tax rebate by Mexican government
Adams, et al Feb. 16, 2001	UNCITRAL	\$75 million	Pending	U.S. landowners challenge Mexican court ruling that developer who sold them property did not own land

* All dates correspond with filing of Notice of Arbitration.

** Award pending as of August 2001.

BACKGROUND

The North American Free Trade Agreement (NAFTA) includes expansive rules on investment designed to grant special legal protections and new rights to corporations from one NAFTA country that invest in another NAFTA country. NAFTA is an international commercial agreement between U.S., Mexico, and Canada that came into force in 1994. NAFTA's investment chapter, Chapter 11, is unique because it provides for the *private* enforcement of these new investor rights and privileges outside of a nation's domestic court system.

NAFTA was negotiated by President George Bush and signed in 1992. The Clinton administration conducted a major campaign to obtain congressional approval of NAFTA in 1993. Because NAFTA was negotiated under the Fast Track process, the congressional role was limited to an up or down vote a year after the agreement was finished and signed. Fast Track ensured that most members of Congress were excluded from any information about the negotiations much less a formal role in the negotiation. Given that Fast Track also limits congressional debate, for many members of Congress it was only after the Chapter 11 challenges began to occur that they realized NAFTA was more of an investment agreement than a trade agreement. Indeed previous multilateral trade agreements had never included any investment provisions. NAFTA's Chapter 11 investment rules not only provide new security and ease for companies to relocate production to another NAFTA country, but also empower corporations to challenge basic government policies as violating NAFTA's new investor rights.

When a corporation believes its investor rights under NAFTA's Chapter 11 have been violated, the corporation can challenge the policy or law of the government "hosting" its investment using NAFTA's special "investor-to-state" dispute resolution system. Investor-to-state dispute resolution allows a private investor to prosecute a case against a NAFTA government for failure to provide a NAFTA-granted investor privilege.

Such NAFTA investor claims can be brought to a special NAFTA tribunal rather than pursued in a country's domestic court system. Neither sovereign immunity shields nor basic due process guarantees exist in this NAFTA enforcement system. This private enforcement system operates parallel to the state-to-state dispute resolution system that was also established in NAFTA. State-to-state enforcement actions are how trade disputes are traditionally resolved. The global trade agreements of the WTO, for example, are enforceable only through a dispute resolution system which allows only governments to bring cases, not private businesses.

As more of these NAFTA cases are filed and decided, NAFTA's Chapter 11 investor protections and its private enforcement mechanism are drawing growing scrutiny to the NAFTA model of international commercial agreements and the procedures, such as Fast Track, that have led to the

development of such agreements. These cases are teaching a stark lesson: Under NAFTA rules, governments must be willing and able to compensate all foreign investors even marginally affected by governments' most fundamental regulatory functions.

Investors And Their New NAFTA Rights and Privileges

Under NAFTA rules, an “investor,” who is empowered to use the NAFTA Chapter 11 enforcement system, is one who makes an investment under NAFTA. A long list of business activities constitute an “investment” under NAFTA’s definition, including:

- C an enterprise (defined as a private or publicly held legal entity, including any corporation, trust, partnership, sole proprietorship, joint venture or other association),
- C equity security of an enterprise,
- C debt security of an enterprise,
- C a loan to an enterprise,
- C interest in an enterprise that entitles the owner to income or profits,
- C real estate or other property used for business purposes, and
- C certain interest arising from the commitment of capital.⁸

Under NAFTA’s investor-to-state dispute resolution system, only the “parties” to NAFTA can be sued. This means the federal governments of Mexico, Canada and the United States must defend these cases brought by private investors. However, an array of state and local laws and policies are exposed to challenge by investors under NAFTA Chapter 11's new investor guarantees. A government “measure” that can be challenged under NAFTA as infringing on investor rights includes “any law, regulation, procedure, requirement or practice.”⁹ State and local governments whose policies are challenged as violating NAFTA must rely on federal governments to defend their interests.

NAFTA’s Chapter 11 contains a number of new rights and protections for investors. There are five primary rights or privileges that investors have claimed have been violated in the 15 investor-to-state cases reviewed in this report:

- C NAFTA Article 1110 guarantees foreign investors compensation from the treasuries (i.e., from the taxpayers) of NAFTA governments for any direct government expropriation (i.e., nationalization) or any other action that is “tantamount to” an expropriation or an “indirect” expropriation.¹⁰ This “tantamount to” clause has been used to file cases claiming that government regulatory policies, including those that treat domestic and foreign investors the same, are equivalent to takings because they restrict investors’ actions. This clause is the basis of “regulatory takings” claims that have occurred under Chapter 11.

- C NAFTA Article 1102 includes a “national treatment” provision which requires governments to treat foreign investors from a NAFTA signatory country no less favorably than domestic investors with respect to all phases and aspects of investment, from the initial establishment of an investment to the sale of the investment.¹¹
- C NAFTA Article 1103 provides for “most favored nation treatment,” a provision which requires governments to give foreign investors from signatory nations no less favorable treatment than the best treatment given to investors of another signatory nation or even nonsignatory nations, even if that treatment is *better* than that given to domestic investors.¹²
- C NAFTA Article 1105 contains a “minimum standard of treatment” provision, which says that investors must be given treatment “in accordance with international law” including “fair and equitable treatment and full protection and security.”¹³ This vague catch-all has been used in several investor-to-state cases to dramatically expand NAFTA's corporate investor protections.
- C NAFTA Article 1106 forbids the use of “performance requirements” such as domestic content rules and other measures geared toward regulating investors by requiring certain environmental conduct or shaping the terms of foreign investment to ensure local economies also benefit.¹⁴

If a company believes that a government has violated these NAFTA rights and protections, the corporation can initiate a binding dispute resolution process and seek monetary damages outside the country's court system. Such NAFTA investor-to-state cases are litigated in special international commercial arbitration bodies which are closed to public participation, observation and input. The decisions made in these bodies, which have no appeals process, are binding. Two arbitral bodies, which are described in the next section, are listed in NAFTA's Chapter 11 as venues for private enforcement of NAFTA's terms: the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank's International Center for Settlement of Investment Disputes (ICSID). These two venues do not provide the basic due process or openness guarantees afforded in national courts. Rather, three-person panels composed of professional arbitrators meet behind closed doors to hear arguments in cases. Instead of acting as conciliators, the tribunal members become judge and jury and can rule that a NAFTA member nation must pay an unlimited amount of taxpayer dollars in compensation to the corporation whose NAFTA rights the three arbitrators concluded have been impaired.

Although a NAFTA panel in an investor-to-state dispute cannot directly order a NAFTA country to rescind the law or policy in question, nations are under tremendous pressure to do just that in order to shield themselves from being ordered pay further awards of cash damages to investors because of the policy. Indeed, in the very first NAFTA investor-to-state case ever litigated, which involved the U.S. Ethyl Corporation, Canada moved to rescind its environmental and public health measure

Investor Rights v. Environmental Protection:

While NAFTA provides an array of legally binding constraints on government regulatory action, new rights and privileges for foreign investors and strong private enforcement of these rules, NAFTA's meager terms concerning the environment or other public interest concerns are merely hortatory. Notably, the non-binding preamble of NAFTA states that the parties resolve to strengthen the development and enforcement of environmental laws and regulations as well as promote sustainable development. In addition, Article 1114 of NAFTA's investment chapter contains language purporting to protect the environment. Article 1114.1 states that nothing in Chapter 11 shall prevent a Party from maintaining measures to ensure that investment is undertaken in an environmentally sensitive manner. Article 1114.2 states that parties "should" not encourage investment by relaxing or waiving or derogating their domestic health, safety or environmental measures in order to encourage investment. Of course, unlike NAFTA's investor rights rules, this clause is permissive, not mandatory. The term "shall" is used to establish investor rights, while environment terms "should" be met. This environmental language is also worth noting because it has been almost entirely disregarded by the investor-to-state NAFTA tribunals primarily when weighing environmental protection against investor rights under NAFTA.

regulating a gasoline additive developed by Ethyl even before the final NAFTA tribunal ruling in an effort to avoid a large damage reward. In addition, when a state or local measure is challenged successfully under NAFTA, the federal government bears the liability — creating enormous incentive to pressure local governments into rescinding such policies or to paying the damage award.

The "expropriations" that have been claimed using NAFTA's investment chapter are nothing like the government seizure of property that is generally conveyed by the term. U.S. courts have supported a narrow definition of expropriation, also called "takings," based on the constitutional requirement that property owners be compensated when their property is put to a public use (*i.e.*, for the construction of a road). Corporations and conservative anti-environment groups, such as the so-called "wise-use" property rights movement, have worked for two decades to broaden the notion of takings to encompass what they call "regulatory takings." Their goal is to have a variety of reasonable regulations that tangentially impact property value labeled as "regulatory takings," to create pressure to reverse governmental zoning, environmental and other policies. For example, property rights groups have launched legal attacks against the Endangered Species Act using "regulatory takings" theories. However, the majority of these cases have made little headway in the U.S. courts.¹⁵ Moreover, attempts to legislate a legal right based on "regulatory takings" have repeatedly failed in the U.S. Congress. In 1993, the U.S. Supreme Court ruled that "our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."¹⁶

Now corporations are using the NAFTA investment agreement to seek compensation for the very sort of public interest policies that the Congress and U.S. courts have determined *not* to be “regulatory takings.” Most of the NAFTA investor-to-state cases do not involve nationalization or seizure of property. Rather, environmental, public health zoning and other regular governmental actions that only marginally impact the value of an investment are the targets of foreign investors’ attacks. The broad language in NAFTA’s investment chapter providing for compensation for government actions “tantamount” to expropriation creates unprecedented rights for foreign investors to attack everyday local and state government powers in a manner that goes far beyond what is permitted under existing domestic law in any of the three NAFTA countries.

These expansive investor rights and constraints on normal government functions currently do not exist in WTO agreements or other major multilateral agreements. They are included only in NAFTA and also appear in an increasing number of bilateral investment treaties. However, plans are underway to incorporate these extreme provisions into a proposed 31-nation NAFTA expansion called the Free Trade Area of the Americas (FTAA).

NAFTA’s Chapter 11 investment text clearly was the starting point for FTAA’s negotiations. Broad corporate investor rights and privileges are one of the chief goals of the multinational corporations that are the primary backers of FTAA. These interests failed to pass “regulatory takings” legislation in the U.S. Congress. They failed to extend the NAFTA model of investor privileges in a proposed global Multilateral Agreement on Investment.¹⁷ The latest strategy is to preserve and extend the NAFTA model of these extreme new investor protections and privileges through an FTAA.

“[T]he potential for lawsuits under this process is far-reaching since it could be used by more than 350 million individuals and corporations throughout the NAFTA countries.”

— Appleton & Associates (Attorneys for Ethyl), “First-ever lawsuit against Canadian government using NAFTA investor-state process brought,” Press Release, Oct. 1996.

A leaked version of the FTAA investment text reveals the potential for even more expansive investor rights in the FTAA than in NAFTA. While FTAA has been portrayed as a new negotiation with other countries in the Western Hemisphere, there is no question that the radical NAFTA investment chapter is at its core. Indeed, an initial draft FTAA text includes an investment chapter that includes the exact language in question from NAFTA.

Information about NAFTA investor-to-state cases is often difficult to find. Because there is no requirement for notice about the cases, neither the public nor Congress can be certain of the total number of cases. This report reviews the cases known to have been decided by NAFTA tribunals, or settled, and the cases that are known to still be pending.

NAFTA Corporate Dispute Resolution: Private Enforcement of a Public Treaty

NAFTA's Chapter 11 lists two international arbitration bodies in which NAFTA investor-to-state disputes can be heard. These two bodies operate with similar rules and procedures which exclude the public while providing investors with a sympathetic ear. The International Center for the Settlement of Investment Disputes (ICSID), operates under the auspices of the World Bank. It first began operation in 1966 as the implementation arm for an international treaty called the Convention on the Settlement of Investment Disputes. The Convention assigned ICSID the role of administering the completely new arbitration system established in the convention for handling disputes between countries and private foreign investors. For the most part, the new system was intended to handle cases involving specific contractual disputes between governments and corporate contractors, not serious questions of public policy.¹⁸

The institutional scope of ICSID increased with the adoption of the ICSID "Additional Facility Rules" in 1978. These rules allowed proceedings when either the investor's home country or the country against which a case was brought did not belong to the ICSID Convention. In 1994, ICSID took on a new role when it was chosen by NAFTA negotiators as one of two arbitral bodies that could hear investor disputes under NAFTA's Chapter 11. Since neither Mexico nor Canada is an ICSID member country, any NAFTA cases involving parties from the United States and one of those two countries would have to be brought to ICSID under the Additional Facility Rules. Meanwhile, any NAFTA investor-to-state cases involving both Canada and Mexico have to be brought under the UNCITRAL rules.

Despite the rapid growth in bilateral investment agreements in recent years, the number of cases brought to ICSID was limited until very recently. In the past five years, however, in the words of the ICSID Secretary-General, "the floodgates then seemed to open."¹⁹ More than half of ICSID's case-load has been instigated since the beginning of 1997; 49 cases have been registered since then – nine more than in ICSID's entire previous history.²⁰

Moreover, while many of the early ICSID cases involved private contractual disputes, there has been a recent explosion in cases brought under investment agreements. The first case under a Bilateral Investment Treaty was brought in 1987, and of the 36 total cases brought under investment treaties, 30 have been brought since the beginning of 1997.²¹

The arbitration process in ICSID cases is a closed and unaccountable one. Arbitral tribunals for ICSID cases are appointed on a case-by-case basis, and there is no requirement for the arbitrators to have served in any similar capacity before.

Most strikingly, the parties to the case generally appoint the members of the tribunal, a system that may be suited for private contractual disputes, but not for public policy issues. Most often, including under NAFTA, the investor and the country involved each appoint one arbitrator, and the two initial arbitrators then choose a third who serves as the presiding arbitrator. If the parties can't agree on a third arbitrator, the ICSID Secretary-General can choose the third from an ICSID "panel" of arbitrators appointed by member countries.

ICSID provides only minimal information to the public about cases.²² ICSID only posts on its website basic information such as parties, date of complaint and arbitrators and does not post documents in the course of the proceeding. In addition, there is no provision for amicus participation by outside interested parties, and there is no standard appeals process such as that found in domestic courts.²³ The almost complete lack of transparency and public participation in ICSID, combined with the vast powers of tribunals to grant an infinite amount of taxpayer dollars to corporations that successfully bring NAFTA suits, raise questions as to whether it is an appropriate venue for the arbitration of such significant issues of public concern.

The UNCITRAL process is even more closed and unaccountable than that of ICSID. UNCITRAL is the United Nations Commission on International Trade Law. It adopted a set of Arbitration Rules in 1976 that parties from any country can use.²⁴ Since neither Mexico nor Canada are members of the ICSID Convention, any NAFTA investor rights cases in which both parties are from these two countries must be brought under the UNCITRAL rules. Any other Chapter 11 dispute can also be brought under UNCITRAL.

The UNCITRAL rules for the arbitration proceedings themselves are very much like those of ICSID, including the rules for the selection of arbitrators. However, unlike ICSID, UNCITRAL only provides a set of rules and does not have a webpage for NAFTA cases; it does not even have a professional staff to provide any administrative oversight for arbitration proceedings. It does not collect or compile final decisions and therefore cannot make them available to the public. In fact, UNCITRAL does not collect and therefore does not make public even basic information about pending and concluded cases. The history of cases brought under its rules is not known.²⁵ Furthermore, since UNCITRAL has no staff to oversee cases, there is no provision for the review of tribunal decisions. The UNCITRAL rules do not even provide for revision of a decision when significant new facts emerge.

Thus, the process under UNCITRAL provides even less transparency and public participation than under the ICSID rules. A case can proceed under UNCITRAL rules for years without the public being aware that it exists.

As the cases described in detail in this report demonstrate, this closed-door process has benefitted foreign investors to the detriment of the public interest.

MAJOR NAFTA CHAPTER 11 CASES

ETHYL V. CANADA

Ethyl Corporation is a Virginia-based chemical company with a long and controversial history. In 1922, Ethyl started to produce tetraethyl lead, the additive used to make leaded gasoline, to enhance auto engine performance.²⁶ Shortly after production started, many of the workers at its New Jersey plant began hallucinating and experiencing acute convulsions.²⁷ Eventually, five of the workers died.²⁸ It wasn't until 50 years later that the U.S. federal government took action to eliminate lead from gasoline. By then, numerous studies had demonstrated that lead from gasoline exhaust and spills was contaminating soils and surface water and creeping into the food chain.²⁹ Lead from automobile exhaust was even getting into the brains of American children, causing neurodevelopmental impairment.³⁰

In the 1950s, Ethyl Corporation developed a new gasoline additive called methylcyclopentadienyl manganese tricarbonyl (MMT).³¹ MMT, an anti-knocking agent used to improve engine performance, contains manganese – a known human neurotoxin.³² A concentrated form of MMT is produced in U.S., then imported into Canada by the Ethyl subsidiary there, Ethyl Canada, where it is diluted at a plant in Ontario and sold to Canadian gasoline refiners.³³

PUBLIC INTEREST

In 1977, MMT was banned from use in unleaded gasoline by California, which has its own clean air law, and by the U.S. Environmental Protection Agency (EPA) due to environmental and public health concerns.³⁴ Although little was known about the specific dangers posed to the public from manganese particles coming out of the tail pipes of cars burning fuel containing MMT, the dangers of inhaling manganese have been known since the 1800s.³⁵ Airborne manganese has been found to cause disabling neurological impairments and symptoms similar to Parkinson's disease in manganese miners.³⁶ A series of occupational studies of battery plant workers, steelworkers and other workers conducted in the 1990s was characterized in a public health journal as “compelling evidence of neurotoxicity associated with low-level occupational exposure” to manganese in the air.³⁷

Against this background, the Canadian Parliament imposed a ban on the import and inter-provincial transport of MMT in April 1997.³⁸ As MMT was produced only in the U.S., the transport ban effectively removed MMT from Canadian gasoline. Canada took this action for a number of reasons. First, while Canada was working to tighten vehicle emissions standards, auto manufacturers were recommending against the use of MMT because of concerns that the product damaged the proper functioning of catalytic converters and other devices in automobiles that help control auto emissions.³⁹ Canadian officials were concerned that MMT could undermine Canada's efforts to control air pollution, and could contribute to the build-up of greenhouse gases which contribute to global warming.⁴⁰ Second,

Canada was concerned about the potential health effects of exposing workers and drivers to airborne manganese particles via MMT.⁴¹ Although the potential hazards to human health were not fully-known, Canada acted in a precautionary manner until more information was available as had the state of California and the U.S. EPA.

NAFTA ATTACK

On September 10, 1996, while the prospective ban was being debated in the Canadian Parliament, Ethyl Corporation notified the government of Canada that it would sue for compensation under NAFTA's investment chapter if restrictions were placed on MMT. The Parliament withstood these threats and passed the ban a year later in April 1997.⁴² That same month, Ethyl filed a NAFTA Chapter 11 investor-to-state claim against the Canadian government for \$251 million in damages at the United Nations Commission for International Trade and Law (UNCITRAL).⁴³ Ethyl argued that NAFTA granted it new rights and privileges *vis-a-vis* the Canadian government and that the Canadian MMT ban amounted to a NAFTA-forbidden expropriation of its assets as defined in NAFTA Article 1110. Further, Ethyl argued that the ban was a violation of NAFTA's Article 1102 rules requiring national treatment for foreign investors, because it banned imports, but not local production of MMT.⁴⁴ Finally, the corporation argued that the ban was a "performance requirement" forbidden under NAFTA Article 1106, because it would effectively require Ethyl to build a factory in every Canadian province to comply with the transport ban and make an MMT investment in Canada.⁴⁵

OUTCOME

A NAFTA panel was constituted at UNCITRAL to hear the Ethyl case. Initially, Canada objected to the NAFTA suit, claiming that the MMT ban was not a "measure" covered by NAFTA Chapter 11, and that Ethyl had failed to wait the requisite six months after the ban was passed and implemented before filing a claim.⁴⁶ On June 24, 1998, however, the NAFTA panel rejected Canada's claims, clearing the way for the case to move forward.⁴⁷ Shortly after this initial ruling, the government of Canada decided to settle with Ethyl. On July 20, 1998, Canada reversed its ban on MMT, paid \$13 million in legal fees and damages to the Ethyl Corporation, and issued a statement for Ethyl's use in advertising declaring that "current scientific information" did not demonstrate MMT's toxicity or that MMT impairs functioning of automotive diagnostic systems.⁴⁸

IMPLICATIONS

Pay the Polluter: Ethyl Corporation's claim that restrictions on MMT "expropriated" the company's investment and the NAFTA tribunal's decision to accept the claim and allow it to proceed on the merits constitutes a significant and potentially dangerous new limit on the exercise of basic government functions. Governments must be able to regulate a product because of environmental or

public health concerns without having to pay a corporation that imports the substance. Effectively this case establishes a new protection for foreign investors under NAFTA that goes beyond what is recognized in U.S. law.

Intimidation: By threatening to initiate a NAFTA suit before the law was even passed and by circumventing domestic avenues for challenging a law or regulation, Ethyl hung the threat of future monetary damages over the heads of lawmakers. While the Canadian Parliament did not give in to the pressure, the number of threats of corporate “trade challenges” is increasing. The record of similar threats at the WTO shows that they can have a chilling effect on future public interest policies being considered by governments and often result in governments preemptively conceding and changing a policy to avoid a trade challenge – as Canada did in this instance.⁴⁹

Undermining the Government's Ability to Exercise Precaution: In this case, NAFTA was used to undercut a strong, domestic public interest protection. Cognizant of the parallels between the two organometallic compounds – tetraethyl lead and MMT – and not wanting to repeat the devastating history of leaded gasoline, the Canadian Parliament acted in accordance with the Precautionary Principle. The Precautionary Principle is generally understood to mean that in cases where there is a risk to public health or the environment, but the current data is insufficient to fully quantify or assess that risk, government has a right and a responsibility to err on the side of safety. The principle is based on the fact that science does not always provide the information necessary for authorities to avert public health or environmental threats in a timely manner. As the leaded gas example illustrates, sometimes it takes years and numerous long-term studies to fully understand the dangers of a new product. NAFTA and WTO rules turn the Precautionary Principle on its head and in effect require proof of harm before regulatory action can be taken. Both Canada and the U.S. are now undertaking the long-term studies needed to better understand the dangers posed by MMT. In the meantime, consumers in both nations are being exposed to the potentially dangerous compound.

Successful Suit: Ethyl's NAFTA lawsuit succeeded in reversing Canada's ban on MMT. This success has encouraged other corporations to use NAFTA's investment rules to challenge government policies. To date, more cases have been lodged against Canada (7 of 15) than any other NAFTA country.

METALCLAD V. MUNICIPALITY OF GUADALCAZAR, MEXICO

In 1990, the Mexican federal government authorized a Mexican company called Coterin to operate a hazardous waste transfer station in the State of San Luis Potosi.⁵⁰ Coterin wanted to expand

the site to be a hazardous waste landfill but was denied a municipal construction permit in 1991 and 1992 by the local municipality of Guadalupe. ⁵¹ In 1993, Metalclad, a California-based corporation, bought Coterin and the transfer station. For 30 years, Metalclad's primary work involved installing insulation and removing asbestos for industrial, commercial and public agency clients on the West Coast of the United States. ⁵² In Mexico, Metalclad soon took up Coterin's efforts to expand the transfer station into a toxic waste processing plant and landfill. Metalclad secured the requisite Mexican state and federal permits but failed to secure a local municipal construction permit, as had Coterin. ⁵³

PUBLIC INTEREST

Under Coterin management, the site was contaminated with 55,000 drums, or 20,000 tons of toxic and potentially explosive waste. ⁵⁴ The geology of the region involves a complex hydrology with active sinkholes and subterranean streams. ⁵⁵ Studies indicate that the site's soils are very unstable which could permit toxic waste to infiltrate the subsoil and carry contamination via deeper water sources as well as the intermittent surface streams that form only in the rainy season. ⁵⁶ In 1991, the local community mobilized to stop the dumping. ⁵⁷ They blocked trucks, called the federal authorities and succeeded in getting the facility shut down. ⁵⁸ Several years after this successful effort, the local community was still concerned about the environmental hazards posed by the site and strongly opposed reopening it. ⁵⁹

In 1994, the local municipality of Guadalupe ordered Metalclad to cease construction on the new toxic waste facility due to the absence of a municipal construction permit. ⁶⁰ Metalclad applied for the permit but continued construction while the permitting process was pending. ⁶¹ In 1995, the company paid for an environmental assessment supervised by federal environmental authorities. ⁶² The assessment found the site suitable for the project, but the report was quickly contested by Greenpeace Mexico and a local environmental group. ⁶³ The construction project was completed in March of 1995, still without the proper municipal permit, but the company was prevented from opening and operating the site due to continued local opposition and public demonstrations. ⁶⁴ In December of 1995, the municipal government denied Metalclad's request for a permit, reprimanding the company for moving forward without proper authorization. ⁶⁵ In October 1996, Metalclad notified Mexico that it intended to sue under NAFTA's Chapter 11. ⁶⁶ On September 23, 1997, the Governor of San Luis Potosi declared the site part of a special ecological zone for the preservation of the area's unique biological diversity and several species of rare cacti.

NAFTA ATTACK

On January 2, 1997, Metalclad sued the government of Mexico under NAFTA's investment provisions for \$90 million.⁶⁷ Metalclad claimed that the actions of the municipal government amounted to expropriation without compensation forbidden under NAFTA Article 1110.⁶⁸ In addition, the company claimed that the government of Mexico had failed to provide fair and equitable treatment in accordance with international law as required by NAFTA Article 1105.⁶⁹

OUTCOME

On August 30, 2000, a special NAFTA tribunal, operating under the rules of the World Bank's International Center for the Settlement of Investment Disputes (ICSID) Additional Facility Rules, awarded Metalclad \$16,685,000.⁷⁰ The tribunal held that the denial of the construction permit as well as the creation of an ecological reserve constituted "indirect" expropriations in violation of NAFTA Chapter 11.⁷¹ In addition, the tribunal held that Mexico violated the minimum standards provisions of NAFTA because the company was led to believe that the federal and state permits it secured allowed for the construction and operation of the landfill.⁷² The tribunal decided that by tolerating the actions of the municipality and by tolerating the actions of state and federal officials who failed to sufficiently clarify the situation for Metalclad, Mexico failed in its duty to provide "a transparent, clear and predictable framework for foreign investors."⁷³ (As one observer has noted, the NAFTA tribunal in effect created a duty for the federal government of Mexico to take the company by the hand and walk it through the complexities of Mexican municipal, state and federal law. Plus, the Mexican federal government was required to ensure that officials at the various levels of federal, state and local government, never gave contradictory advice—an extraordinary task for any government.)⁷⁴

In reaching its conclusions regarding transparency, the panel imported transparency obligations from NAFTA's preamble (Art. 102) and from NAFTA Chapter 18 into Chapter 11.⁷⁵ Remarkably, the panel also presumed an expansive competency and ruled that under Mexican domestic law, the municipality's insistence on and denial of a construction permit was improper.⁷⁶ Using circular reasoning, the panel not only argued that a domestic law violation had taken place, but they equated this perceived violation of domestic law with an international law violation under NAFTA Article 1105, significantly broadening the Article 1105 catch-all. The panel also ruled that the same facts that created a violation of Article 1105 also constituted an expropriation under Article 1110, thereby equating a process violation with an expropriation.

In an unprecedented move in October 2000, the government of Mexico challenged the NAFTA tribunal decision in a Canadian Court, alleging arbitral error.⁷⁷ This petition was initiated in British Columbia because under ICSID rules, a place of arbitration must be chosen by the panel, and in this instance Vancouver was chosen by the tribunal. Once a place of arbitration is chosen, the local laws governing arbitration in that region come into play.⁷⁸ In a narrow ruling that did not question the legitimacy of utilizing a commercial arbitration process for these expansive NAFTA claims, Justice David Tysoe of the Supreme Court of British Columbia issued a split decision. On May 2, 2001, Judge Tysoe held that the NAFTA panel erred when it imported the transparency provisions of NAFTA's Chapter 18 into Chapter 11.⁷⁹ As a consequence, Judge Tysoe struck down most of the panel's arguments with regard to Article 1105, relating to the actions of the municipality and Mexico's obligations to create a clear and predictable environment for investors. But the judge did so solely because the panel based these arguments on the wrong section of NAFTA. Consequently, he struck down the panel's finding that a violation of Article 1105 constituted a violation of Article 1110.⁸⁰ However, the judge agreed with the NAFTA panel on the merits that the actions of the Governor constituted expropriation. As a consequence, the Judge reduced the award due to Metalclad by post-dating the calculation of the award to the date the Governor issued the decree making the area an ecological zone.⁸¹ Mexico initially announced that it would appeal the decision to a higher Canadian court,⁸² but on June 13, 2001, Metalclad announced that Mexico agreed to pay the amount ordered by Judge Tysoe, \$15.6 million.⁸³

IMPLICATIONS

Undermining Local Control: In reviewing the NAFTA tribunal decision, Judge Tysoe noted that the tribunal's definition of expropriation was "sufficiently broad to include a legitimate re-zoning by a municipality or other zoning authority," but concluded that "the definition of expropriation is a question of law with which this court is not entitled to interfere."⁸⁴ Permit requirements and environmental land use controls at the local level are common in all three NAFTA countries. Local governments should not have their judgements second-guessed or undermined by NAFTA tribunals.

Deciding Issues of Domestic Law: The NAFTA panel felt competent to decide complicated issues of Mexican domestic law; *i.e.*, whether a municipal permit was required. Not only did the panel find that the municipal government's actions amounted to expropriation, but the panel went further to say the municipality "acted outside its authority" in denying the construction permit based on environmental concerns and made a ruling on the substance of Mexican domestic law declaring that the "exclusive authority for siting and permitting a hazardous waste landfill resides with the Mexican federal government."⁸⁵ Worse, when faced with the choice between Metalclad's interpretation of the Mexico's domestic law or the Mexican government's interpretation of its own law, the NAFTA panel chose the

corporation's interpretation. The proper place for such a substantive dispute over the meaning of a domestic law is a domestic court.⁸⁶

Disregard for Environmental Provisions of NAFTA: While the NAFTA tribunal imported language from NAFTA's preamble to support its convoluted reasoning in the case, it is striking that the tribunal completely ignored other language in the preamble supporting sustainable development and environmental protection. The panel also ignored Article 1114 of Chapter 11, which purports to protect NAFTA nations from a race-to-the-bottom in environmental standards. On the contrary, the Metalclad panel stated that even though it found that the Ecological Decree constituted further grounds for a finding of expropriation, the panel decided it "need not consider the motivation or intent for the adoption of the Ecological Decree."⁸⁷

Broadening the Definition of Takings: The NAFTA tribunal in the Metalclad case defined expropriation as not only "open, deliberate and acknowledged takings" of property such as outright seizure, but also "covert or incidental interference" with the use of property."⁸⁸ This definition of takings clearly is much broader than what is allowed by U.S. courts and could have a crippling effect on the ability of NAFTA nation's to carry out traditional governmental regulatory functions.

"Most of the Mexican environmental standards governing site selection for a toxic landfill have been violated by this project. Why would a North American company select a site that already has problems and select a partner that has demonstrated grave irresponsibility?"

— Fernando Bejarano, Mexico Network on Free Trade, (RMLAC) "Toxic Shock in a Mexican Village," *Multinational Monitor*, Oct. 1995.

Secrecy: Finally, it is striking that the NAFTA panel felt comfortable lecturing Mexico at length about its obligations to provide a transparent commercial environment for corporations while the tribunal itself operated behind closed doors. Under NAFTA, the citizens of San Luis Potosi could not be a party to the case. Even the state and municipal governments, whose actions were being challenged, had no standing in the case and had to rely on the Mexican federal government, who had been supportive of the Metalclad project, to defend their concerns. While federal governments are free to consult with state and local officials about the case, they are free to exclude them as well.

S.D. MYERS V. CANADA

S.D. Myers is an Ohio-based waste treatment company. S.D. Myers claimed to have an investment in Canada, variously referred to as S.D. Myers Canada and Myers Canada. In the early

1990s, the company sought to import polychlorinated biphenyls or PCBs from Canada to the U.S. for processing in its Ohio facility and pressed for permission to do so from U.S. and Canadian government officials. Canadian law at the time favored the domestic treatment and disposal of PCBs. However, Canada's 1990 PCB Waste Export regulations allowed for exports to the United States if the U.S. EPA gave prior approval.⁸⁹ In the U.S., the 1976 Toxic Substance Control Act prohibited imports of PCBs, with very narrow exceptions, such as imports from U.S. military bases overseas.⁹⁰ In October 1995, however, the EPA exercised its enforcement discretion to allow S.D. Myers and nine other companies to import PCBs into the U.S. for processing and disposal.⁹¹ In 1996, the EPA moved to make this informal policy a federal regulation and issued a final Import for Disposal Rule that opened the U.S. border to PCBs imports for processing and disposal.⁹² In November 1995, one month after the EPA opened the border, Canada issued an Interim Order banning exports of PCBs.⁹³ Canada declared that it sought time to study the contradictory legal situation in the United States (the law prohibiting imports and the regulation allowing them) and review its international obligations concerning PCB trade. Canada is a signatory to the Basel Convention, a multilateral environmental agreement governing trade in toxic waste.⁹⁴

PUBLIC INTEREST

PCBs were used as coolants and lubricants in transformers, capacitors and other electrical equipment because they are good insulators and weatherproofers.⁹⁵ PCBs were banned for production in the United States in 1977 because of evidence that they built up in the environment and caused health effects.⁹⁶ Over the years, the U.S. EPA has studied PCBs and determined them to be toxic to humans and hazardous to the environment. "PCBs enter the body through lungs, gastrointestinal tract, and skin and can circulate throughout the body and can be stored in fatty tissue. PCBs are absorbed and stored in the fatty tissue of higher organisms as they bioaccumulate up the food chain through invertebrates and mammals.... PCBs may cause developmental toxicity, reproductive effect and oncogenicity [cancer] in humans."⁹⁷

Because of the unique dangers posed by PCBs and other highly toxic substances, the Basel Convention sets rules regarding their disposal.⁹⁸ Canada and Mexico are parties to the 1989 convention, but the U.S. is not. The Basel Convention strongly encourages countries to limit exports of hazardous waste and to develop the capacity to treat hazardous waste domestically. When issuing its Interim Order which banned the export of PCBs, Canada announced that it needed to assess its obligations under the Basel Convention which encourages countries: 1) not to engage in trade in toxic waste with non-parties; 2) to ensure PCBs are disposed in an environmentally sound manner; and, 3) to develop a viable, long-term strategy to dispose of such waste at home.⁹⁹ In addition in deciding to issue the order, Canada was aware that U.S. law prohibited the importation of PCBs and correctly

questioned whether the EPA's "enforcement discretion" was in compliance with U.S. law.¹⁰⁰ Following the assessment, Canada moved to develop permanent regulations to allow the export of Canadian PCB waste to the U.S. under certain conditions.¹⁰¹ The new Canadian regulations took effect on Feb. 4, 1997, and S.D. Myers imported seven shipments of Canadian PCB waste into the United States.¹⁰² On July 20, 1997 however, the U.S. border was permanently shut for PCB trade by a U.S. judge after the Sierra Club successfully challenged the EPA's new Import Disposal Rule in a U.S. federal court as a violation of the Toxic Substance Control Act.¹⁰³

NAFTA ATTACK

On October 30, 1998, S.D. Myers sued Canada for \$20 million in compensation to cover its lost profits during the 16-month period that the EPA allowed for imports of PCBs while they were blocked by Canada.¹⁰⁴ The company argued that the Canadian Interim Order was a violation of NAFTA's investment chapter because it damaged its ability to recoup profits from its plan to import Canadian PCBs for disposal in the U.S. Specifically, the company claimed that its new NAFTA investor privileges were violated because the Canadian ban constituted "disguised discrimination" aimed specifically at S.D. Myers in violation of NAFTA's national treatment rules (Article 1102).¹⁰⁵ The company also claimed that the ban was done in a "discriminatory and unfair manner which constituted a denial of justice and violation of good faith" contrary to NAFTA rules guaranteeing foreign investors fair

and equitable treatment (Article 1105).¹⁰⁶ In addition, S.D. Myers argued that the export ban effectively required the company to dispose of PCBs in Canada, which constituted an illegal performance requirement on which its investment was being conditioned which is forbidden under NAFTA's Article 1106.¹⁰⁷ Finally, the company argued that the ban deprived the corporation of the benefits of its investment in Canada and constituted a measure "tantamount to an expropriation" as defined by NAFTA Article 1110.¹⁰⁸

"[H]azardous wastes and other wastes should, as far as is compatible with environmentally sound and efficient management, be disposed of in the State where they were generated."

— Preamble, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes, Mar. 22, 1989.

OUTCOME

On November 13, 2000, a NAFTA UNCITRAL tribunal ruled in favor of S.D. Myers. Although the tribunal dismissed S.D. Myers' claims regarding expropriation and performance requirements, the panel upheld the company's other claims. The tribunal found that Canada had violated the national treatment rules of NAFTA in a variety of ways.¹⁰⁹ Even though Canada had a "legitimate goal" in seeking to develop a domestic PCB treatment industry, the tribunal ruled that it was obliged to

do so in a manner “consistent with NAFTA investment rules.”¹¹⁰ The panel suggested that Canada should have used government contracts and subsidies to encourage a domestic PCB disposal system rather than issue an export ban.¹¹¹ In addition, the tribunal decided that S.D. Myers share of the Canadian PCB market constituted a legitimate investment under NAFTA, adding another form of investment to the long list already explicitly covered in the “definitions” section of NAFTA’s investment chapter.¹¹² In a fashion similar to the Metalclad panel, but reaching the opposite conclusion, the S.D. Myers panel also ruled that the national treatment violation in the case also constituted a minimum standards violation and thus no further injustice under international law need be established.¹¹³ Accordingly, Canada must compensate S.D. Myers for the profits it could have made had it been allowed to import PCBs during the 16 months in question. Although the tribunal has yet to determine the level of compensation, recent news reports indicate that the S.D. Myers claim has risen to \$50 million.¹¹⁴ Following the lead of Mexico in the Metalclad case, on February 8, 2001, Canada asked a British Columbia Federal Court to set aside the NAFTA tribunal’s decision.¹¹⁵ This case is still pending.

IMPLICATIONS

Broadening the Definition of Investor and Investment: The S.D. Myers case indelibly broadened the definition of “investor” and “investment.” S.D. Myers sought to be a cross-border service provider. The services would be provided at the company’s Ohio plant, not in Canada. As the government of Canada argued in its statement of defense, it is not clear what S.D. Myers’ “investment” was in Canada.¹¹⁶ The U.S. company claimed to have a joint venture with Myers Canada, which was owned by a Myers family member. However, it is not clear if this Canadian company had assets damaged by the closing of the border. Clearly S.D. Myers’ long-term efforts to obtain a share of the Canadian PCB market is not comparable to Metalclad’s investment via the construction of a multi-million dollar facility in Mexico. However, the NAFTA tribunal did just that, going so far as to suggest that S.D. Myers could be considered an investor merely because it sought a share of the PCB market in Canada.

Investor Rights Trump International Environmental Obligations: Canada raised its obligations under a multilateral environmental agreement (the Basel Convention) as a reason for its PCB export ban. Sierra Club trade specialist Christine Elwell called the decision “a devastating blow not only for a country’s domestic ability to set its own standards, but for the Basel Convention as well.”¹¹⁷ This case sends an alarming signal about what happens under NAFTA when investor rights come in conflict with other environmental obligations.

International Tribunals Second-Guess Governments: It is also striking that the tribunal in the S.D. Myers case felt competent to decide what policy the Canadian government could use to

carry out its environmental objectives. The tribunal, which had no expertise in environmental policy, designated Canada's goal of fostering a Canadian PCB industry as legitimate and did not find that the Canadian approach to meeting its goals was unreasonable. Rather, the panel decided that Canada was obliged to adopt a means of obtaining its goal that was most consistent with open trade, or "least trade restrictive" in WTO parlance. In other words, the corporate rights of foreign investors must be the chief policy concern of public policy officials crafting a domestic regulatory policy.

Don't Bother Me with the Law: Finally, while acknowledging the fact that at all times PCB imports were illegal under U.S. law, the NAFTA tribunal did not seem to find this fact at all relevant to the case.¹¹⁸ In other words, even if it was illegal to bring PCBs over the U.S. border, the fact that Canada halted such trade was ruled to be a Canadian NAFTA violation.

LOEWEN V. MISSISSIPPI JURY

The Loewen Group is a Canadian-based funeral conglomerate that has aggressively acquired more than 1,100 funeral homes across Canada and the U.S.¹¹⁹ The Loewen NAFTA case arose in the context of increasing consolidation in the U.S. funeral home market as a handful of conglomerates have acquired or pushed out of business small, independent firms. This phenomenon has drawn public attention because of subsequent consumer abuses and several high-profile investigations of anti-competitive business practices. A 1996 *Time Magazine* investigation into the funeral industry charged that "Loewen and a handful of other large death-care companies are racing to buy up as many independent funeral homes as possible – not out of any desire to share the resulting economies of scale and cut the cost of funerals – but rather to boost prices still higher."¹²⁰

PUBLIC INTEREST

In 1994, Loewen Group was sued in Mississippi state court by a Biloxi businessman named Jeremiah O'Keefe. O'Keefe alleged that Loewen, as part of a strategy to dominate the local funeral market, had committed various unlawful, anti-competitive and predatory acts designed to drive O'Keefe's local funeral and insurance companies out of business in violation of state law.¹²¹ This was neither the first nor the last time Loewen would land in U.S. court. In 1996, Loewen settled a similar breach of contract case for \$30 million.¹²² The Massachusetts Attorney General became so concerned about Loewen's near monopoly status in the Cape Cod area, that it ordered the company to divest itself of a number of funeral homes.¹²³

After a trial reviewing O’Keefe’s claims, a Mississippi jury agreed with O’Keefe. Angered by Loewen’s behavior, the jury came back with a verdict of \$260 million.¹²⁴ According to one juror, “The Loewen group...clearly violated every contract it ever had with O’Keefe... If there was ever an indefensible case, I believe this was it.”¹²⁵ Because the jury decided on an amount in the judgment phase of the trial and not the penalty phase, Loewen had the choice of accepting the jury’s verdict or going back to the same jury for the penalty phase of the trial. Loewen chose to go back to court, but this time the jury upped the damages to \$500 million.¹²⁶ Ironically, O’Keefe’s attorney’s had attempted to settle the case even before the trial began; \$5 million was the number they had in mind, but they were authorized to go even lower.¹²⁷

Loewen decided to appeal the jury verdict to a higher court. Before proceeding with the appeal, the company sought to be exempted from a long-standing rule of civil court procedure.¹²⁸ The state rule, which is identical to a national rule of civil procedure, requires that losing defendants who wish to pursue an appeal without beginning to pay damages to the plaintiff must buy a bond worth 125% of the damages owed. To buy a bond, a defendant will typically put forward 10% of the bond requirement in cash and pledge the rest in collateral. The purpose of the rule is to prevent defendants from using the lengthy appeals process to hide assets or otherwise evade liability. Loewen’s request to be exempt from the rule was rejected, and Loewen appealed the issue to the Mississippi Supreme Court. In 1996 the Mississippi Supreme Court rejected Loewen’s demand. Rather than post the large bond or pursue other legal avenues, Loewen decided to settle the case with O’Keefe, and on January 29, 1996, the company settled for approximately \$150 million, 30% of the jury verdict and more than 30 times what the company could have settled for when the case began.¹²⁹

NAFTA ATTACK

The settlement was not the end of the story, however. On October 30, 1998 Loewen filed suit against the United States in ICSID under NAFTA’s investment chapter.¹³⁰ Although Loewen only paid out a fraction of the original jury award, the company is demanding \$725 million in compensation from U.S. taxpayers, arguing that the jury verdict, the punitive damages and the Mississippi bond requirement (which is identical to the federal requirement) all violated its new investor rights guaranteed under NAFTA.¹³¹ Specifically, the company claimed that the judge allowed the plaintiff’s attorney to appeal to the “anti-Canadian, racial and class biases” of a Mississippi jury in violation of national treatment rules in NAFTA Article 1102.¹³² (In response to these allegations, the U.S. government has argued that comments by a private attorney in a private contract dispute did not constitute a government “measure” covered by NAFTA rules, noting that Loewen never objected to these comments at trial.¹³³) The company also claims that the bond requirement effectively forced Loewen to settle and thus denied Loewen its right to appeal in violation of Article 1105 requiring fair and equitable treatment.¹³⁴ Finally,

Loewen argued that “the excessive verdict, denial of appeal, and coerced settlement were tantamount to an uncompensated expropriation in violation of Article 1110 of NAFTA.”¹³⁵

OUTCOME

Loewen represents the first instance in which a jury ruling has been challenged under NAFTA. In March 1999, ICSID formed a NAFTA panel to hear the case consisting of Anthony Mason (Australia), L. Yves Fortier (Canada), and former Congressman and U.S. federal court judge Abner J. Mikva.¹³⁶ On January 9, 2001, the panel issued an interim decision rejecting a variety of U.S. arguments, including the argument that a jury decision in private contract litigation did not constitute a governmental measure under NAFTA.¹³⁷ Instead, the panel found NAFTA jurisdiction, surprising many observers. Further, the panel placed no limits on what types of court action or decision it considers covered by NAFTA rules. This ruling thereby opens up the possibility that all court decisions, even those of the U.S. Supreme Court, are now open to review by unaccountable NAFTA tribunals. A final decision on the merits of this case is still pending.

IMPLICATIONS

Using NAFTA to Evade Liability, A Special Right of Appeal: The Loewen case could send the powerful message to foreign businesses that they can evade justice by challenging the workings of state, local and federal courts in NAFTA tribunals. Foreign corporations that lose tort cases in the U.S. can use NAFTA to attempt to evade liability by shifting the cost of their court damages to U.S. taxpayers. In contrast, U.S. citizens and businesses must comply with the rulings of U.S. courts.

"The absolute frightening part of this thing is that in this particular instance, the United States government has surrendered its sovereignty over a matter of fraud and tort and predatory and illegal practices within its own boundaries."

— Michael S. Allred, Attorney for O’Keefe, “Trade Pacts Accused of Subverting U.S. Policies,” *Los Angeles Times*, Feb. 28, 1999.

Advancing a Rear-Guard Attack on the U.S. Legal System: The U.S. justice system guarantees a strong role for citizen juries. A jury trial is broadly viewed as an important safeguard for equalizing the imbalance between citizens and more powerful or wealthy interests. In addition to attacking the principle of a jury trial, the Loewen case attacks the U.S. civil justice system, which allows juries to send strong messages to defendants who abuse their power and resources to rip off consumers, pollute the environment or evade the law by assessing damages. In sum, Loewen Group is arguing that the U.S. civil justice system is NAFTA-illegal.

Forum Shopping: It is ironic that Loewen ended up paying \$150 million when it could have settled for less than \$5 million early in the civil suit and saved itself years of costly litigation. Loewen is seeking to use NAFTA to force U.S. taxpayers to pay for its legal missteps and failed courtroom strategy. The fact that Loewen had another avenue of appeal in the NAFTA dispute resolution system may have relieved the corporation of the pressure it might normally feel to settle the case quickly and easily in the U.S. court system. If Loewen succeeds in its NAFTA case, more foreign corporations may look to NAFTA for a “get out of jail free” card.

POPE & TALBOT V. CANADA

Pope & Talbot is an Oregon-based timber company that operates three sawmills in British Columbia, Canada. The company exports timber from British Columbia into the United States. A portion of these shipments enter duty-free up to a limit set by the government of Canada under an overall quota determined by a U.S.-Canada Agreement on Trade in Softwood Lumber.¹³⁸

PUBLIC INTEREST

The Softwood Lumber Agreement was a corporate-managed trade arrangement which ended in March of 2001 when it was not renewed by the parties, although the U.S. had sought renewal. The Agreement set a maximum quota of softwood lumber imports that could enter the U.S. duty-free from the four major timber-exporting Canadian provinces. The agreement was signed in 1996 to avert a trade war over U.S. industry complaints that Canada was unfairly subsidizing logging companies. The crux of the disputes has centered on the impacts that the different timber policies employed by Canada and the U.S. have on the lumber industries in the respective countries. The U.S. International Trade Commission has contended that the Canadian government subsidizes lumber production by setting the price lumber companies pay for harvesting rights (known as “stumpage fees”) from public land at artificially low levels.¹³⁹ Nearly all (93%) of Canadian forests are owned by the government.¹⁴⁰ In contrast, more than half (58%) of the timber land in the U.S. is privately owned.¹⁴¹ Environmentalists also have argued that Canada’s lumber policies promote intensive harvesting of Canada’s forests and sales of lumber at a fraction of its real value.¹⁴²

NAFTA ATTACK

On March 25, 1999, Pope & Talbot filed a NAFTA Chapter 11 suit at UNCITRAL alleging that the manner in which Canada implemented the lumber agreement violated the company's rights under

NAFTA. Specifically, the company claimed that the quota system established in the U.S. - Canada Softwood Lumber Agreement violated the national treatment and minimum standard of treatment guarantees provided for in NAFTA Articles 1102 and 1105 and imposed performance requirements on the company which are forbidden under NAFTA Article 1106.¹⁴³ The company argued that its investment has been “expropriated” in violation of NAFTA Article 1110 to the amount of \$507 million, an amount later reduced to \$381 million.¹⁴⁴ The complicated argument boils down to an allegation that, while Pope & Talbot obtained treatment similar to other companies in British Columbia, it was treated less favorably than logging companies that operate in other parts of Canada that are not subject to the quotas of the Softwood Lumber Agreement.

OUTCOME

On June 26, 2000, a special tribunal operating under UNCITRAL rules issued a partial ruling. The tribunal held that further hearings were necessary on Pope & Talbot’s claims regarding national treatment and minimum standards of treatment, but dismissed other claims including claims of expropriation.¹⁴⁵ On April 10, 2001 the panel issued its final ruling.¹⁴⁶ Although the panel held that Canada acted reasonably in response to most allegations raised by the corporation with regard to the country’s implementation of the Softwood Lumber Agreement, in the end the panel found against Canada. At issue was the behavior of Canadian government officials when the Canadian government was seeking to verify Pope & Talbot’s compliance with the requirements of the Agreement. During the period in question, Canada knew it was being sued by the company under NAFTA and the panel stated that relations between the company and the government “were more like combat than cooperative regulation.”¹⁴⁷ The tribunal found that Canada acted unreasonably when it asked the company to produce information verifying the company’s quota allocation in Canada versus providing the information at the corporate headquarters in Portland. The tribunal held that these and other actions were a violation of the fair and equitable treatment provisions of NAFTA.¹⁴⁸ Newspaper reports indicate that the company is now seeking \$80 million from the Canadian taxpayers.¹⁴⁹

IMPLICATIONS

“Fair and Equitable” Catch-All: At issue is what sort of government conduct rises to a level of violating investor guarantees. The ruling in this case suggests rudeness is a NAFTA violation. In a submission in the Canadian domestic court hearings on the Metalclad case, Canada made a strong argument that bilateral investment disputes have established the precedent that before any minimum standard violation can be found, the conduct must be egregious and amount to “a willful neglect of duty or an insufficiency of governmental action that every reasonable and impartial person would recognize as insufficient.”¹⁵⁰ To make its point, Canada cited numerous ICSID cases where American property was

looted or destroyed in other nations by government forces while battling guerrillas, arguing that it took such extreme circumstances for a government to be held liable.¹⁵¹ The Pope & Talbot panel rejected this formulation and focused on the allegations of rude and overly zealous behavior by Canadian officials attempting to verify Pope & Talbot quotas. The panel did not find a violation of international law or even domestic law in the government's conduct. Instead, by declaring that the actions of government officials in this case violate NAFTA's guaranteed "minimum standard of treatment" for foreign investors, the panel has expanded the concept of "fair and equitable treatment" to include almost any behavior a corporation might consider unfair, widening the Article 1105 catch-all even further than previous panels.

SUN BELT V. BRITISH COLUMBIA

Sun Belt Water, Inc. is a bulk water importer/exporter based in Santa Barbara, California. In the late 1980s, California was in the midst of a drought, and the City of Santa Barbara and neighboring towns expressed an interest in acquiring bulk water delivered by marine tanker.¹⁵² In 1990, Sun Belt claims that it embarked on a "joint venture" with the Canadian firm Snowcap Waters Limited, which possessed a limited license to export bulk water from Canada.¹⁵³ The companies planned to take the unprecedented step of exporting British Columbia river and lake water to California in oil tankers, and filed for an expanded water export license.¹⁵⁴

PUBLIC INTEREST

At a time when more of the world's people are living in areas where fresh water is a scarce resource, Canada holds 20% of the world's fresh water supply.¹⁵⁵ Over the years, a number of investors have looked longingly at Canada's vast fresh water resources as a potential profit-making enterprise. In the early 1990s, the British Columbia government issued six export licenses for sale of a limited amount of bulk water and Snowcap received one of them.¹⁵⁶ Dozens of applications for new and expanded licenses followed, and strong public opposition to bulk water exports quickly mounted.¹⁵⁷ Many Canadians feared that if any province in Canada started to sell bulk water, water would become treated as a "commodity" under NAFTA, and thus NAFTA's investor rights and service sector market access provisions would kick in. If Canada's domestic need expanded, the government would be unable to limit such water exports. In other words, under NAFTA rules, once the spigot is turned on for foreign investors or foreign service providers, it might be illegal under NAFTA to turn it off. In 1991, the British Columbia government was forced by public protest to impose a temporary moratorium on the granting of new or expanded licenses for the export of fresh water.¹⁵⁸ This temporary ban was extended and made permanent in 1995, when British Columbia imposed a moratorium on water exports.¹⁵⁹ In 1993, both Sun Belt and Snowcap sued the British Columbia government in domestic court.¹⁶⁰ In July 1996, a

settlement for \$245,000 was reached with Snowcap, which already held a water export license it could no longer use, but no settlement was reached with Sun Belt.¹⁶¹

NAFTA ATTACK

On October 12, 1999, Sun Belt filed a “notice of claim and demand for arbitration” in UNCITRAL for damages in excess of \$10.5 billion for the company's future expected losses given its permanent lost business opportunity due to the water moratorium.¹⁶² In its NAFTA submissions, Sun Belt argues that by reaching a legal settlement with Snowcap, which held the export license, and refusing to settle with Sun Belt, the Canadian government violated the NAFTA investor national treatment provisions requiring equal treatment for domestic and foreign investors under Article 1102.¹⁶³ In addition, the company claims that Canada violated NAFTA's minimum standard of treatment guarantee for foreign investors by infringing upon its due process rights (Article 1105).¹⁶⁴ The Sun Belt claim in its NAFTA petition regarding these issues are provocative: It alleges that the British Columbia government has delayed, obstructed and denied¹⁶⁵ the company's ability to take legal action in domestic courts and that “criminals remain entrenched in the bureaucracy at the Attorneys General's Office and elsewhere in Her Majesty's government of British Columbia.”¹⁶⁶ Sun Belt alleges these actions amount to an expropriation of its “investment” forbidden by NAFTA Article 1110.¹⁶⁷ Finally, since Sun Belt cannot argue that the 1991 water export moratorium violated NAFTA (which was signed in 1992 and adopted in 1994), it seems to be arguing that the moratorium violated the 1989 Canada-U.S. Free Trade Agreement (CUSTA), which was rolled into NAFTA. The firm also expanded its claim to incorporate the 1995 permanent regulation.¹⁶⁸

OUTCOME

No information is available from UNCITRAL about the status of this case.

IMPLICATIONS

Decreasing Control Over Natural Resources: The Sun Belt Case reinforces the concerns of many Canadians that NAFTA rules apply to fresh water – as a good, a service or an investment – a contention that would have far-reaching environmental consequences for governments at all levels in North America. If Sun Belt succeeds in its claim to have a right of access to Canada's water, Canada's capacity to regulate foreign investors who want to make a profit from the nation's glaciers, freshwater lakes and streams will be handicapped.

Does the Federal or State Government Pay?: As the first NAFTA investor-to-state challenge against a sub-national measure in Canada, the case will establish a precedent on how future cases are dealt with in Canada. Although only the federal government can be named in the NAFTA suit,

“Companies like Sun Belt see water as the oil of the next century.”

— Sarah Miller, Canadian Environmental Law Association, “National Organizations Urge Chretien to Ban Bulk Water Exports before It’s Too Late,” Council of Canadians, Press Release, Feb. 9, 1999.

critical questions remain unresolved about which level of government will be responsible for paying the costs of defending against these cases and for paying the compensation that may be ordered by a NAFTA panel. Federal governments have a number of ways in which they can hold provincial and local governments “hostage” for the funds needed in a NAFTA suit. In the end, however, Canadian taxpayers would foot the bill whether the money comes from the federal or a provincial treasury.

Using NAFTA to Enforce Other Agreements: The British Columbia water moratorium occurred in 1991, before NAFTA went into effect. Thus, Sun Belt seems to be arguing that the bulk water export moratorium violated some right it obtained under the terms of the earlier CUSTA, which had no investor-to-state provisions. Because CUSTA was subsumed into NAFTA, Sun Belt believes it can use NAFTA to enforce CUSTA, enhancing the possibility that NAFTA investor claims could proliferate by applying retroactively to 1989, when CUSTA was went into force.

METHANEX V. CALIFORNIA

Methanex, a Canadian-based corporation, is the world’s largest “producer and marketer” of Methanol.¹⁶⁹ Methanol is used to produce formaldehyde, acetic acid and other chemicals and is used in the manufacture of resins, adhesives, paints, inks, foams and plastic bottles.¹⁷⁰ Methanol is also the key ingredient in methyl tertiary-butyl ether (MTBE), a gasoline oxygenate designed to reduce harmful auto emissions. Notably, Methanex does not produce or manufacture MTBE which is the substance at issue in a California drinking water regulation that is the target of this NAFTA challenge. Methanex claims to own “indirectly” 100% of the shares of two U.S.-based companies, Methanex Methanol Company in Texas, which appears to be an marketing operation, and Methanex Fortier in Louisiana, which once produced Methanol.¹⁷¹

PUBLIC INTEREST

On March 25, 1999, the Governor of California ordered the phase-out by 2002 of MTBE from

gasoline sold in the state, after the gasoline additive had been found to have contaminated drinking water wells throughout the state.¹⁷² The California phase-out of MTBE is based on a 1998 University of California-Davis report that found “significant risks and costs associated with water contamination due to the use of MTBE.”¹⁷³ The report found that MTBE posed unique threats because it is highly soluble in water and will transfer readily to groundwater from gasoline leaking from underground storage tanks, pipelines and other components of the gasoline distribution system.¹⁷⁴ In addition to the significant environmental problems of water contamination, MTBE has been associated with human neurotoxicological effects, such as dizziness, nausea, and headaches.¹⁷⁵ It has been found to be an animal carcinogen with the potential to cause human cancer.¹⁷⁶ Because water contaminated with MTBE has a strong odor and taste, Santa Monica, California, had to shut down its municipal wells when MTBE leached into its drinking water. Dozens of other California municipal water supplies have been affected.¹⁷⁷ According to The New York Times, at least 11 other states are also in the process of restricting MTBE.¹⁷⁸

NAFTA ATTACK

On December 3, 1999, Methanex used Chapter 11 litigation to challenge the California executive order implementing the environmental policy.¹⁷⁹ In effect, Methanex demanded that MTBE be allowed in gasoline sold in California or that \$970 million be paid for keeping it out. In its NAFTA submissions, the corporation cited WTO principles to argue that the California phase-out was not the “least trade restrictive” method of solving the water contamination problem and therefore violated NAFTA's guarantee of fair treatment for foreign investors under international law (Article 1105).¹⁸⁰ Further, Methanex alleged that U.S. company Archer-Daniel-Midlands (ADM), a principal producer of another gasoline oxygenate called ethanol, influenced California Governor Davis' decision with \$200,000 in campaign contributions.¹⁸¹ Methanex does not say the campaign contributions were illegal *per se*, but that the process by which the decision to phase out MTBE was reached was a violation of NAFTA's “fair and equitable” treatment guarantees.¹⁸² Finally, Methanex claims that the ban improperly discriminates against MTBE in favor of a U.S.-produced gasoline additive ethanol and therefore gives preferential treatment to a domestic firm in violation of the national treatment provisions of NAFTA Article 1102.¹⁸³ Finally, the company claims that the California measure constituted an expropriation under Article 1110 because it prevented Methanex from maintaining its market share and, in effect, transferred that market share to U.S. ethanol producers.¹⁸⁴

OUTCOME

Methanex is pressing its lawsuit under UNCITRAL rules. The arbitration panel had its initial meeting in September of 2000 and the case is pending. Former U.S. Secretary of State Warren

Christopher has been appointed to the arbitration panel.¹⁸⁵ This case is one of the first to deal with the issue of whether NAFTA investor-to-state case tribunals will accept amicus briefs. In a preliminary decision, the panel ruled that it had the right to accept amicus briefs, but it was too early to decide in this instance whether it would do so.¹⁸⁶ Finally, it is notable that, as in the Loewen case, the U.S. government is arguing that Methanex's claims are not within the jurisdiction of a NAFTA tribunal. In its Statement of Defense filed August 20, 2000, the U.S. argues: 1) that no final regulation banning MTBE has yet taken effect so the California actions are not "measures" under NAFTA;¹⁸⁷ 2) that Methanex lacks standing to bring the case because the California actions are directed at MTBE and not methanol, the Methanex product;¹⁸⁸ 3) that Methanex hasn't demonstrated that it had an investment in the U.S. (versus seeks to import a product to the U.S.) because its plant in Louisiana had ceased production and its office in Dallas has no significant assets and earns no significant income;¹⁸⁹ and, 4) that the company's claims of violation of "fair and equitable treatment" are without merit because California's actions were taken in a democratic fashion after days of public comment and testimony and were based on ample scientific findings.¹⁹⁰ Methanex bases its damage claims on the decline in its market value.¹⁹¹ In response, the U.S. government argues that the decline in Methanex's share price began in 1995 and is due to market forces.¹⁹²

IMPLICATIONS

Local Control: The Methanex, Metalclad and S.D. Myers cases demonstrate that no state law, regulation, zoning ordinance or other decision is safe from attack by foreign investors using the expansive new rights and privileges NAFTA grants foreign investors. State governments in all three NAFTA countries need to be aware of these cases and decisions and the impact they might have on state sovereignty.

"This is a situation in which someone is causing a harm and then making the assertion that they will stop that harm only upon payment of a fee. It is tantamount to extortion. This is even more appalling when you consider that the victims of this extortion are the people of California, who don't want their drinking water contaminated by MTBE."

— Martin Wagner, Earthjustice Legal Defense Fund, Personal Communication with Author, Feb. 20, 2001.

The Chilling Effect: The U.S. EPA and many U.S. states are considering action to restrict the use of MTBE.¹⁹³ On March 24, 2000, EPA gave advance notice to the public that it was considering eliminating or limiting the use of MTBE and asked for public feedback on how best to do this.¹⁹⁴ However, to date, no formal federal regulation has been proposed. Some environmental and public health advocates worry that this is a sign that Methanex's NAFTA lawsuit is already having an effect on environmental and public health measures at the state and federal level.

Dragging the WTO into NAFTA: As if the corporate rights and protections established in NAFTA were not expansive enough, the Methanex corporation has attempted to import into NAFTA's Chapter 11, via the broad Article 1105 language, WTO rules and jurisprudence. Specifically, Methanex cites WTO rules which hold that governmental measures are only trade-legal if : 1) they are intended to achieve an objective that WTO considers to be legitimate; 2) they are the least trade restrictive alternative, and; 3) they do not constitute a disguised restriction on international trade.¹⁹⁵ These are key substantive rules from the WTO's Technical Barrier to Trade Agreement.

MONDEV V. CITY OF BOSTON

According to its NAFTA submission, Mondev International of Montreal Canada has been a major developer of commercial real estate both in Canada and the United States for 30 years.¹⁹⁶ In December 1978, Mondev entered into an agreement with the City of Boston to build several shopping complexes and a hotel in downtown Boston. The agreement – called the Tripartite Agreement – was signed by the City of Boston, the Boston Redevelopment Authority (BRA) and Lafayette Place Associates, a limited partnership owned and controlled by Mondev.¹⁹⁷ The agreement provided for a multi-phase, multi-million-dollar project to revitalize a dilapidated section of downtown Boston bordering on “the combat zone,” a crime-infested red light and pornography district. Phase I of the project consisted of a straightforward real estate development deal. Mondev built a mall, an underground garage and a hotel.¹⁹⁸ The first phase cost \$175 million.¹⁹⁹ Phase I was completed, named “Lafayette Place” and opened in 1986. Phase II, however, was never completed. The story of Phase II entails a 13-year saga including a seven-year legal battle that went all the way to the U.S. Supreme Court before ending up in a NAFTA tribunal.

PUBLIC INTEREST

Phase II of the Tripartite redevelopment plan was subject to Boston's implementing a plan to construct an underground parking facility under a parcel of land adjacent to Lafayette Place with the aboveground parcel offered for sale to Mondev for a formula price set out in the agreement.²⁰⁰ Mondev planned to construct an office tower, additional parking and another department store on the second parcel. In 1983, the city announced it would build the garage, and in 1986 Mondev announced that it would exercise its option to buy the second parcel.²⁰¹ However, by this time, almost 10 years after the original agreement was reached, the formula price set out in the agreement was much lower than the actual market value of the parcel, and the city and the BRA were reluctant to sell the land. Mondev alleges that the city pursued a variety of avenues to avoid selling the property at the price agreed upon in 1978.

In 1992, Mondev's Boston-based Lafayette Place Associates (LPA) sued the BRA and the City of Boston in the Massachusetts Superior Court for breach of the Tripartite Agreement.²⁰² In 1994, a jury found for LPA, awarding it and its Canadian partner Mondev \$16 million in damages. The jury found that the City had breached its contract and LPA was due \$9.6 million for this offense.²⁰³ The jury also found that the BRA had intentionally interfered with the contract and LPA was entitled to recover \$6.4 million for this second offense.²⁰⁴ The judge later held that the BRA was a public employer and therefore as a matter of law immune from suit for tort claims, and reduced the verdict to \$9.6 million.²⁰⁵ Both LPA and the City of Boston appealed the \$9.6 million verdict. In May 1998, the Massachusetts Supreme Judicial Court reversed and annulled the \$9.6 million breach of contract judgment, holding that LPA had failed to demonstrate that it was willing and able to perform its own contractual obligations.²⁰⁶ The Supreme Judicial Court also upheld the trial court's ruling that the BRA was statutorily immune from civil liability.²⁰⁷ In March 1999, the U.S. Supreme Court denied a re-hearing of the case, effectively reinforcing the Massachusetts Supreme Court's judgment on state sovereign immunity.²⁰⁸

NAFTA ATTACK

On September 1, 1999, Mondev filed suit under NAFTA Chapter 11 in ICSID. Mondev claims that its failure to obtain damages through the U.S. judicial system amounts to discriminatory expropriation without compensation, and that its loss was at least \$50 million in non-realized profits.²⁰⁹ Specifically, Mondev claimed that the Massachusetts Supreme Court's reversal of the jury award and application of the doctrine of sovereign immunity constitute a substantive and procedural denial of justice in violation of the minimum standards of treatment guaranteed foreign investors under NAFTA Article 1105.²¹⁰ Mondev argues that "under no conception of fairness and equity can the [Massachusetts Supreme Court's] arbitrary, unprecedented and unprincipled decision be allowed to strip Mondev of the \$16 million verdict..."²¹¹ Mondev's filing makes clear that it believes NAFTA provides compensation for lost revenues from a building project that was never begun. Further, Mondev argues that the actions of the Massachusetts Supreme Court constitute "expropriation without compensation" in violation of NAFTA Article 1110.²¹² Finally, Mondev alleges that comments by BRA staff and the Boston City Counsel demonstrate an anti-Canadian bias and discriminatory intent in violation of NAFTA Article 1102 national treatment guarantees.²¹³

IMPLICATIONS

NAFTA Review Higher Than Supreme Court? Like the Loewen funeral home litigation, the Mondev litigation and subsequent NAFTA case has little to do with international trade. Instead it is an attempt to circumvent the U.S. justice system. Unlike Loewen, however, Mondev aggressively appealed its case all the way through the domestic court system to the highest court in the land, and failed. Then

Mondev sought recourse unavailable to a U.S. business: it turned to NAFTA's regulatory takings provisions to make an end-run around an unfavorable judicial decision. If a NAFTA tribunal finds for Mondev, the U.S. government not only is liable for Mondev's claimed damages, but the case could open a flood-gate of similar claims as foreign corporations seek an avenue of appeal over and above the U.S. Supreme Court, an option not available to U.S. citizens or corporations in similar circumstances.

Sovereign Immunity: At the crux of Mondev's argument is the notion that new rights for foreign investors granted in NAFTA trump a U.S. state's sovereign immunity protections. The doctrine of "sovereign immunity" is a centuries-old legal concept that holds that governments cannot be sued unless such a lawsuit is expressly allowed. Sovereign immunity is intended to ensure that the federal government treats each state as a sovereign entity, and the doctrine provides taxpayers with a degree of protection from costly lawsuits that could drain the state treasury and lead to increased taxes. Many states and the U.S. federal government waive sovereign immunity by statute or on a case-by-case basis particularly to permit suits for malfeasant or criminal conduct. Clearly, a NAFTA dispute resolution panel is not the appropriate place to challenge this long-established principle of U.S. law. If a NAFTA panel rules in Mondev's favor, once again foreign corporations will be granted rights and privileges not allowed U.S. corporations under the same circumstances.

UPS V. CANADIAN POSTAL SERVICE

The United Parcel Service of America, Inc. (UPS) is based in Atlanta, Georgia and is the world's largest express carrier and package delivery company.²¹⁴ The company was founded in 1907, employs 330,000 people and delivers more than three billion packages and documents a year in the United States, Canada, Mexico and 200 other countries.²¹⁵ UPS Canada has been in operation since 1975.

PUBLIC INTEREST

In 1981, the Canadian postal system was transformed from a government department to a "Crown Corporation," which is a publicly owned corporation.²¹⁶ The organization, called Canada Post, often uses corporate terminology to describe its activities, but remains a public service that has been delegated by the Canadian government as the universal provider of postal services.²¹⁷ In 1993, Canada Post bought Purolator Courier, Canada's leading overnight courier company.²¹⁸ The joint entity employs approximately 64,000 workers, making the postal system the fifth largest employer in Canada.²¹⁹

NAFTA ATTACK

On April 19, 1999, UPS filed suit under NAFTA Chapter 11 for \$160 million dollars. UPS claims that Canada Post is in violation of NAFTA's Chapter 11 and provisions of NAFTA Chapter 15 on competition policy, monopolies and state run enterprises. NAFTA Articles 1502 (3) (a) and 1503 (2) require that government monopolies and state-run enterprises act in accordance with NAFTA Chapter 11 rules. These provisions are incorporated by reference in Chapter 11 in Article 1116.²²⁰ However the heart of the UPS allegations rests upon NAFTA Article 1502 (3) (d), which is *not* incorporated into Chapter 11. Citing this provision, UPS alleges that Canada Post abuses its special monopoly status by utilizing its infrastructure to "cross-subsidize" its parcel and courier services. According to UPS, this NAFTA-illegal cross-subsidization takes the form of postal boxes, retail postal outlets, ground and air transports, and even letter carrier and constitutes a violation of NAFTA's fair and equitable treatment rules (Article 1105) as well as NAFTA's requirements that domestic businesses not receive favorable treatment (Article 1102).²²¹ In addition, UPS claims that Canada Post gets preferential service for package importation, customs clearance and customs fees in violation of NAFTA's national treatment rules (Article 1102).²²² Finally, UPS says that NAFTA's Article 1105 "fairness" guarantees have been violated, because after a governmental review found that Canada Post was behaving in an anti-competitive way, the government failed to take action.²²³ In an unusual move, the company also alleges discriminatory treatment under Article 1202 of NAFTA, which is the national treatment provision of the Chapter dealing with cross-border service trade. The amount of damages claimed is calculated on revenue lost by UPS since NAFTA went into effect in 1994, plus the corporation adds on an estimated two years for the life of the NAFTA dispute.²²⁴ This is the first NAFTA investor-to-state case against a public service, and the case could have significant consequences for all public services in the three NAFTA nations.

OUTCOME

This case is proceeding under UNCITRAL rules. The Canadian Union of Postal Workers, whose lives and livelihoods would be most affected by an adverse NAFTA ruling, are attempting to legally intervene in the case as full parties with the same participatory rights granted to the corporation. Public Citizen filed a Freedom of Information Act (FOIA) request in this case and has been notified by the Department of State that the UPS Statement of Claim has been classified in the interest of "national security" and is therefore exempt from FOIA. It is very difficult to imagine what the national security issues are in this case. Currently, Public Citizen is proceeding with a lawsuit to challenge this decision.

IMPLICATIONS

From Defense to Offense: Rather than claiming an expropriation due to some specific act of the Canadian government, UPS appears to be using NAFTA Chapter 11 provisions in a strategic offensive to secure a greater share of the Canadian parcel and courier delivery market. UPS seems to be claiming that the very existence of Canada Post, a public sector competitor, violates its rights under NAFTA. In addition, the corporation backdates this claim to the day NAFTA went into force, January 1, 1994. If UPS's claim is successful, we can anticipate many more such claims against government services dating back to the moment corporations were granted these unprecedented new investment rights.

Threat to Public Services: UPS is arguing that because Canada Post provides public mail services on a monopoly basis, it should not also be permitted to offer integrated parcel and courier services on a competitive basis. In an era when public and commercial service delivery is commingled, few public services would be immune from similar corporate challenges. For instance health care and education are offered both as public and commercial services. If UPS is successful with this case, it may be just a matter of time before a Canadian or Mexican company launches a similar suit against the U.S. postal system.

Corporate Rights vs. Worker Rights: If UPS is successful in its claim, the government of Canada may be forced to restructure the manner in which it provides postal services to avoid future NAFTA suits. Yet the postal workers who would be most directly effected by an adverse decision have no voice in the NAFTA case. Even though corporations are not formal "parties" to NAFTA and have no obligations under the treaty as do governments, they are in effect elevated to the status of parties under Chapter 11's investor-to-state provisions which permit private enforcement of a public treaty. Citizens and workers affected by these decision have no such status, and must beg individual NAFTA tribunals for the opportunity to be heard under very limited and limiting circumstances and are subject to the tribunal's discretion.

ADF GROUP V. BUY AMERICA

ADF Group Inc. is a structural design and engineering firm based in Quebec, Canada. The company is a leader in the design and fabrication of bridges, airports, convention centers and other complex steel structures.²²⁵ The company owns ADF International, which is based in Florida and is a wholly-owned subsidiary.²²⁶ In March of 1999, ADF International signed a sub-contract with a U.S. firm called Shirley Contracting Corporation to work on the Springfield Interchange in Northern Virginia, a key section of highway where a number of important arteries meet. The Springfield Interchange, or

“Mixing Bowl” as it is referred to locally, is currently being revamped with a multi-year federally funded highway construction project designed to improve safety. ADF International was the subcontractor in charge of designing and fabricating the steel superstructure for nine highway interchanges at the Mixing Bowl.²²⁷

PUBLIC INTEREST

At issue is a “Buy America” provision in the main contract between the Virginia Department of Transport (V-DOT) and the primary contractor, Shirley Contracting. The provision is incorporated in the ADF International subcontract by reference and it states: “Except as otherwise specified all iron and steel products incorporated for use on this project shall be produced in the United States of America....Produced in the United States of America means all manufacturing processes whereby a raw material or reduced iron ore material is changed, altered or transformed into an item or product which, because of the process is different from the original material, must occur in one of the 50 states, the District of Columbia, Puerto Rico or international territories and possessions of the United States.”²²⁸ The V-DOT Buy America provision was required in the contract by the Federal Highway Administration (FHA) as a prerequisite to granting federal funds for the Mixing Bowl Project. The FHA administers the federal Buy America regulation.²²⁹ This law was developed in the 1980s to strengthen a troubled steel industry and contains a waiver which can be triggered in certain limited circumstances. ADF argued that it was willing to use 100% U.S. steel, but it needed to do certain fabrication work including cutting, welding, punching holes and milling at its plant in Canada, as its Florida plant did not have the capacity to deal with such a large project.²³⁰ ADF applied for a waiver from the FHA but was turned down.²³¹

NAFTA ATTACK

On July 19, 2000, ADF brought a NAFTA suit against the Buy America requirements of the federal law. Specifically, ADF claims that the law is designed to favor U.S. investments and investors and as such is discriminatory and in violation of NAFTA Article 1102.²³² In addition, ADF alleges that the Buy America regulation, and the decisions of U.S. officials implementing the regulation and denying the waiver, have violated the company’s right to fair and equitable treatment as guaranteed under NAFTA Article 1105.²³³ Further, ADF claims that the Buy America requirements constitute an illegal performance requirement under NAFTA Article 1106—meaning ADF’s investment was conditioned on terms, such as Buy America, forbidden under NAFTA.²³⁴ The corporation is claiming damages of \$90 million.²³⁵

OUTCOME

The case has been filed at ICSID and a tribunal has been formed. The parties have exchanged submissions arguing about the appropriate place of arbitration. ADF wants Montreal to be the place of arbitration and the United States wants the matter to be heard in Washington, D.C.²³⁶ The NAFTA tribunal will decide if an agreement cannot be reached between the parties. As the Metalclad case demonstrated, the place of arbitration could be significant if the case ends up in a domestic court system on allegations of arbitral error.

IMPLICATIONS

Local Economic Development Is Anti-NAFTA? Buy America provisions are part of a larger set of procurement laws that are designed to recycle taxpayers' money back into the local or national economy. Many countries use such procurement laws to develop, strengthen and maintain industries that have fallen on hard times, promote recycling, or give a boost to state and local economies. Many U.S. states and local governments have similar procurement provisions that encourage government agencies to buy from local goods or service providers and from small businesses, including women and minority-owned businesses. Although these measures are designed in a nondiscriminatory manner and apply to both foreign and domestic companies, they are by their very nature designed to assist local development. If ADF succeeds in its case against the Federal Highway Administration's Buy America provisions, other NAFTA suits against other state and federal procurement laws are likely to follow.

"Before long it could be bye-bye Buy American."

— Bruce Stokes, National Journal Inc.
"Talk About Unintended Consequences!"
National Journal, May 26, 2001.

Who Decides? Congress and state legislatures often target specific industries or regions for economic development measures such as Buy America provisions. If a NAFTA panel decides that these measures are NAFTA-illegal, it will strip elected representatives of the ability to take the steps they deem necessary to support and build local economies.

OTHER NAFTA CHAPTER 11 CASES

Azinian v. Mexico: The unusual Azinian case which was decided by an ICSID panel in 1999 is worth mentioning because language used by the panel has been cited by the United States government in

its statement of defense in the Methanex case. The investors in the case, including Robert Azinian, were U.S. citizens who were shareholders of a Mexican corporate entity named Desechos Solidos de Naucalpan S.A., or DESONA. In August 1993, DESONA won a multimillion-dollar contract with the Mexican City of Naucalpan to implement a solid waste collection, transportation and processing system.²³⁷ The investors claimed to represent a U.S. parent company called Global Waste Industries, Inc., which was alleged to have 40 years of experience and to have provided similar services to the residences, businesses and industries in the Los Angeles area.²³⁸ On March 21, 1994, the City of Naucalpan annulled the agreement after receiving independent legal advice that there were 27 irregularities with the contract. DESONA filed suit against the city for breach of contract and eventually lost in a Mexican federal court. On March 17, 1997, DESONA filed a NAFTA suit in ICSID, claiming that the cancellation of the contract was a violation of Articles 1105 and 1110 of NAFTA and asking for up to \$19 million in damages.²³⁹ On November 1, 1999, an ICSID panel dismissed the case.

Among other things, the panel found that Global Waste did not have 40 years of experience, but was founded in 1991 and went into bankruptcy 14 months later;²⁴⁰ that DESONA only provided two reconditioned vehicles and not the 70 state-of-the-art disposal trucks promised;²⁴¹ and that a variety of other representations which had been made by the investors, including promises to build a power plant, were “so unreasonably optimistic as to be fraudulent.”²⁴² The panel concluded that “the claimants entered into the Concession Contract on false pretenses, and lacked the capacity to perform it.”²⁴³

Even though the panel did not address the NAFTA claims at length, its reasoning in the case could be cited in future claims. The Azinian panel ruled that a breach of contract in and of itself was not sufficient to establish a NAFTA claim;²⁴⁴ that NAFTA the dispute settlement system should not be considered a court of appeal for every investor who is disappointed by an adverse ruling in domestic courts,²⁴⁵ and that any Article 1105 claim regarding failure to provide a minimum standard of treatment must include a clear violation of international law independent of other provisions of NAFTA.²⁴⁶ Finally, the panel held that:

[A] foreign investor entitled in principle to protection under NAFTA may enter into contractual obligations with a public authority and may suffer a breach by that authority, and still not be in a position to state a claim under NAFTA. It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities and disappointed again when national courts reject their complaints... NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.²⁴⁷

It can only be hoped that this reasoning is applied to other NAFTA contractual disputes, including the Mondev case.

Waste Management v. Mexico: Waste Management, the private waste disposal giant based in Houston, Texas, initially filed its NAFTA case on September 29, 1998.²⁴⁸ This case was dismissed by an ICSID panel on June 2, 2000, on the grounds that the company had not properly waived its right to pursue the case in the Mexican court system. Under the rules of NAFTA, a claimant cannot pursue the case in two venues at the same time, and ACAVERDE, S.A., Waste Management's subsidiary in Mexico, was concurrently pursuing the same issues in Mexican court. Waste Management re-filed its case on September 27, 2000. Although there are no documents available about the new case, the claims and the request for \$60 million in compensation are assumed to be the same as in their previous filing.²⁴⁹ Waste Management is alleging that Mexico expropriated its investment by revoking a waste disposal concession in Acapulco.²⁵⁰ In addition to the City of Acapulco, the state of Guerrero and a Mexican bank are named in the suit.²⁵¹ Waste Management alleges violations of Articles 1105 (minimum standard of treatment) and 1110 (expropriation) of NAFTA, and the case is pending at ICSID.

Karpa v. Mexico: A U.S. owner of the Mexican firm Corporacion de Exportaciones Mexicanas, S.A. (CEMSA) filed a NAFTA Chapter 11 suit against Mexico in April 7, 1999, alleging that Mexico failed to rebate cigarette excise taxes to the corporation between 1992 and 1997. Marvin Roy Feldman Karpa claims that Mexico's actions were "specifically targeted against CEMSA and intended to shut down its cigarette exporting business and to give [Mexican] producers a monopoly on exports."²⁵² Karpa claims that Mexican law entitled his corporation to these rebates, and that Mexico's refusal to pay the tax rebates was tantamount to expropriation in violation of Articles 1105 and 1101 of NAFTA.²⁵³ Karpa filed his NAFTA suit at ICSID and is claiming \$50 million in damages.²⁵⁴

Ketcham Investments, Inc. et. al. v. Canada: On December 22, 2000, the Seattle-based firm of Ketcham Inc. notified the Canadian government that it intended to pursue a NAFTA Chapter 11 lawsuit.²⁵⁵ Because of the secrecy of these proceedings, at the current time the only document that has been made public has been the notification of intent to file a claim. Ketcham alleges that Canada granted preferential treatment to domestic softwood lumber companies under the U.S. Canada Softwood Lumber Agreement and related regulations. Specifically, Ketcham claims that Canada gave higher quotas to domestic firms between the years 1996 and 2001 than it did to its Canadian investment, a firm called West Fraser Mills. The company argues that Canada's actions in this case violate Articles 1102, 1103, 1105, 1106 and 1110 of NAFTA and seeks damages in the amount of \$19.5 million.²⁵⁶ The Ketcham case is considered a copycat case to Pope and Talbot. It is currently unknown if Ketcham will proceed with its case given that a NAFTA panel ruled against similar arguments in the Pope and Talbot case.

Adams, et. al., v. Mexico: On February 16, 2001, a group of U.S. citizens sued Mexico under NAFTA's Chapter 11, alleging illegal expropriation of their vacation homes and rental properties in the

State of Baja California, Mexico.²⁵⁷ In 1995, a Mexican Federal District Court ruled that the developer who sold the properties to the U.S. investors did not own the land.²⁵⁸ After much legal wrangling and negotiation between the investors and the Mexican landowners, on October 30 and 31 of 2000, Mexican authorities physically removed the investors from the land without promise of compensation.²⁵⁹ The case was filed at UNCITRAL, and the Americans are claiming damages amounting to \$75 million.²⁶⁰

CONCLUSION AND RECOMMENDATIONS

Of the 15 cases reviewed, four have resulted in corporate wins and 10 are still pending. Only one, Azinian, resulted in a defeat for the corporation. Notably, this case was also accompanied by allegations of fraudulent behavior and most observers count this case as “dismissed” rather than a victory for the government. With the exception of the Metalclad and Adams cases, the cases reviewed above bear little to no resemblance to the seizure of public property that NAFTA supporters claimed they were protecting investors against when the trade agreement was signed in 1992. Rather, the majority of cases represent an array of “regulatory takings” attacks. These cases would face significant legal hurdles if pursued in U.S. domestic courts. In addition, a number of cases, such as the UPS case, seem geared toward strategically gaining an increased market share, a phenomenon Howard Mann of the International Institute for Sustainable Development has described as transforming Chapter 11 “from shield to sword.”

It is important to note that, since 1998, Canada has been pressing for a clarification or reform of NAFTA’s controversial investment chapter. In 1999, a confidential Canadian government memo proposed a variety of potential reform options including an “interpretive note” and/or an agreement among NAFTA partners to shift the burden of proof to the corporation to demonstrate that a measure was “truly expropriative.”²⁶¹

Alarmed by the growing list of NAFTA cases against Canada, Canadian Trade Minister Pierre Pettigrew announced on March 12, 2001, that he would not agree to FTAA language that does not address Canada’s concerns about investor-to-state issues.²⁶² However, a month later, Canadian Prime Minister Jean Chretien muddied the waters when he emerged from a meeting with U.S. President George W. Bush and Mexican President Vincente Fox at the Summit of the Americas and declared, “I think the clause has worked reasonably well in NAFTA, between Canada, Mexico and the United States.”²⁶³ In attempting to clarify the discrepancy, Pettigrew later told the Canadian House of Commons, “We believe it is absolutely imperative that investments be protected around trade agreements, we are not reopening the chapter. We are not renegotiating it. We want to clarify some

elements for the future.”²⁶⁴ The excessive waffling on this issue has led some NAFTA observers to the conclusion that Canada is backing off of its long effort to reform NAFTA Chapter 11. On June 11, 2001, the Canadian Center for Policy Alternatives released a report arguing that U.S. pressure prompted Chretien’s comments which constituted a reversal of Canada’s long held position and “a green light” to more investor-to-state lawsuits.²⁶⁵

Although some observers had hoped that Mexico might change its position on Chapter 11 after the \$16 million ruling in the Metalclad case, Mexican President Fox seemed to dash these hopes in April shortly before flying to Quebec City to attend the Summit of the Americas. Asked in an interview with *The Globe and Mail* newspaper if he supported Canada’s moves to reform Chapter 11, Fox stated, “At this moment we are not in favor of opening up clauses of the free trade treaty, because if we open one, then we would have to open many.”²⁶⁶

On the U.S. side, Ambassador Robert Zoellick, the U.S. Trade Representative, has indicated that he would not consider shrinking the regulatory rights given to corporations under NAFTA’s Chapter 11. At a meeting with environmentalists in April 2001, Zoellick said the recent arbitration decisions under NAFTA did not lead him to believe the investor-state provisions needed to be significantly altered, and that he would wait and see the results of future cases.²⁶⁷ In the meantime, industry groups in the U.S. have put pressure on the U.S. to continue to support broad new rights and protections for investors in the FTAA.²⁶⁸

On July 31, 2001, the Free Trade Commission, comprised of the three NAFTA country trade ministers, issued a “clarification” related to NAFTA Chapter 11. NAFTA provides for the Free Trade Commission to issue interpretations of NAFTA rules if agreed to by consensus.

The Chapter 11 clarification dealt with two issues. First, in response to building criticism of the closed-door process, the trade ministers attempted to address the issue of timely disclosure of NAFTA tribunal documents. The language the trade ministers agreed to in their clarification, however, still permits tribunals to decide what documents to release and when. In addition, even post-clarification, Public Citizen has been unable to obtain the UPS “statement of claim” from the U.S. government who has classified it in the interest of “national security.” Public Citizen has been forced to pursue Freedom of Information Act litigation to obtain this document of significant public interest. Second, the clarification attempted to interpret what is meant by the minimum standard of treatment in Article 1104 by limiting its terms to the rights and protections of “customary” international law. Unfortunately, the language the trade ministers agreed upon still does not define what is encompassed by the reference to customary international law. As a result, although we are instructed that a traditional interpretation is intended, we do not know what body of law is included, leaving in place what amounts to an extremely vague and

open-ended standard that can be used to challenge efforts to protect the environment and the public interest.

Meanwhile, in issuing this limited clarification, the trade ministers from the three NAFTA nations refused to deal with the core problems with Chapter 11 that have been raised by legislators and policy analysts in all three nations. The “tantamount to” expropriation language of NAFTA Article 1110 has drawn the most fire, but the trade ministers refused to provide an interpretation of the term or in any way limit use of the provision, despite increasingly expansive interpretations of the clause by NAFTA Chapter 11 panels to label non-discriminatory domestic environmental and health policies as regulatory takings. “I am concerned that an expansive regulatory taking theory is in essence being resurrected by Chapter 11 after the theory has already been rejected under Fifth Amendment jurisprudence,” wrote Rep. Eddie Bernice Johnson (D-TX) a pro-NAFTA Democrat to Pres. George W. Bush in a July 30, 2001 letter.²⁶⁹

Similarly, the trade ministers refused proposals by several members of the U.S. Congress to provide for a government review of Chapter 11 cases or rulings so as to add a public interest screen on otherwise private business sector decisions. The goal of this proposal is to require consideration of the implications of prospective cases for broader public interest goals rather than cases proceeding only after evaluation of specific narrow commercial interests that might be advanced. For instance, many analysts refer to the Metalclad toxic waste case as creating Chapter 11 jurisprudence that could boomerang back on U.S. local and state officials seeking to establish local rules regarding the construction and siting of toxic waste dumps.

Members of Congress have also demanded the addition of a general exception to Chapter 11 that would protect domestic health and environmental laws that treat domestic and foreign investors equally and have sought clarification that NAFTA does not provide foreign investors greater property rights than are afforded to ordinary American citizens. The trade ministers also did not deal with either of these issues which have been a target of considerable concern.

The FTAA and Fast Track

The FTAA negotiations have been underway behind closed doors since 1995. This door was breached shortly before the April 2001 Summit of the Americas in Quebec City when the investment chapter of the FTAA was leaked. Reflecting the continuing conflict between the national delegations to the FTAA negotiating groups, the draft text is heavily bracketed and includes multiple proposed versions of many of the provisions. Unfortunately, the available text is scrubbed, meaning that the annotations

that typically accompany working texts have been removed, making it unclear which of the often conflicting and very different alternate versions are likely to make it into a final document or which country supports that position.

Nevertheless, analysis of the draft FTAA investment chapter shows that it incorporates and expands upon many of the features of NAFTA and adds in elements of the infamous Multilateral Agreement on Investment (MAI). The MAI was secretly negotiated for several years at the Organization for Economic Cooperation and Development (OECD), whose thirty member countries include the U.S., Japan, Australia, and most of Western Europe. The OECD governments suspended negotiations on the MAI after a copy of the radical investment agreement was acquired by civil society groups and posted on the Internet in 1998. The condemnation that swiftly followed by concerned public officials and citizens around the world scuttled the proposed agreement.

Like NAFTA and the MAI, the FTAA investment chapter includes expansive definitions of the terms “investor” and “investment” and would establish an array of new investor rights and privileges including the right to compensation for losses, expropriations, and regulatory takings; restrictions on countries’ policies to counter currency speculation, such as regulation of financial transfers; and a ban on performance requirements.

As with NAFTA and MAI, these new treaty rights are privately enforceable using an investor-to-state mechanism similar to NAFTA’s. But in many areas, the draft FTAA text goes even further than NAFTA’s Chapter 11 and incorporates provisions from the failed MAI. For example, with regard to the definitions of “investor” and “investment,” the draft chapter includes multiple versions that range from exact duplicates of the NAFTA language, which lists eight specific types of assets that are covered, to expansions that go beyond even the much broader definition found in the MAI. Indeed, one proposed version defines investment as “every kind of asset and rights of any nature,” “owned or controlled, directly or indirectly, by an investor.”²⁷⁰ Investments fitting these definitions would gain the FTAA’s new protections and rights. Another proposal would require each government to “promote, within its territory, the investments of investors of other Contracting Parties,” which amounts to requiring governments to support foreign economic interests over domestic economic interests.²⁷¹

Eagerness to expand such corporate rights hemisphere-wide is what is fueling the current push for so-called Fast Track Authority. Supporters recognize that expansion of these radical provisions would come under intense criticism from Congress and concerned citizens. Thus, cutting Congress and the public out of the process via Fast Track (now called “Trade Promotion Authority” by its supporters) is seen as necessary to passing an FTAA with such provision.

Fast Track provides the Executive Branch a way around congressional checks and balances because it delegates away four separate congressional powers in one lump sum, limiting Congress' leverage during trade negotiations and reserving for Congress the narrow role of formally approving final agreements and their implementing legislation once both are completed.

Fast Track:

- C Delegates Congress' constitutional authority to decide terms for international commerce at negotiations. Congress includes a list of "negotiating objectives," but these are not enforceable. For instance, past Fast Track bills have included negotiating objectives requiring linkages between labor rights and trade, but no such provisions have ever been included in trade agreements.²⁷²

- C Permits the executive branch to lock down these trade terms and enter into pacts because under Fast Track, the administration signs trade deals before Congress ever votes on them.

- C Empowers the executive branch to write implementing legislation to change federal laws to conform them to an agreement's terms (usually Congress writes law, but Fast Track circumvents the congressional committee process of mark ups, etc.).

- C Pre-sets the floor procedures for final consideration of trade deals before negotiations start. Congress must vote on whatever the administration brings back (agreement and implementing legislation) within a set time with no amendments and only 20 hours of debate. This take-it-or-leave-it approach allows the Executive Branch to include objectionable provisions such as expansive new investor rights and private enforcement of them, daring Congress to bring down an entire agreement which may contain other positive provisions.

The Bush administration argues that Fast Track is necessary for the U.S. to successfully negotiate and approve trade agreements. Yet, since its inception under President Nixon in 1974, Fast Track has been used only five times.²⁷³ President Clinton used Fast Track to get NAFTA and the Uruguay Round agreements, which formed the WTO, through Congress. During the same period however, the Clinton administration negotiated over 300 separate trade agreements without Fast Track authority.

The only way to ensure that U.S. trade policy suits the broad needs of U.S. citizens and consumer is for Congress and the public to play a more prominent and continual role in the entire policy

process—from setting the U.S. agenda and selecting appropriate prospective trade partners with whom to negotiate to ensuring the negotiations are obtaining U.S. goals and then to guaranteeing that only agreements that meet U.S. goals are approved and implemented. This level of involvement and oversight is impossible under the Fast Track process.

Recommendations

If the NAFTA cases continue to be decided in favor of the corporations, the very harshest criticism of NAFTA increasingly will be made a high-profile reality. The governments of NAFTA countries will be unable to carry out the most fundamental regulatory functions without being ordered to compensate foreign corporations even marginally affected by the regulations with taxpayer funds. This indeed is a radical restructuring of the delicate balance struck between the sovereign rights of local and national government, property rights, and the diffuse public interest in health, safety, and order.

Both such expansive new investor rights and private enforcement of such rights established in a public treaty are bad policy. NAFTA's investment rules need a rewrite, and such provisions must not be included in future agreements. From a public interest perspective, an "interpretation" or "clarification" of the investment rules such as that recently issued by the three NAFTA trade ministers would not solve the concerns raised by the cases reviewed here. First, interpretations issued in July 2001 did not address many of the key points needing interpretive limitation. But more fundamentally, the implications of the existing known cases include much grander questions such as the wisdom of giving foreign corporations special preferential treatment relative to local investors and the wisdom of having a special avenue for foreign investors to challenge democratically implemented nondiscriminatory domestic laws. The golden rule on trade challenges should be simply: is the regulation in question discriminatory? Does it treat foreign and domestic investors alike? If these question are answered in the affirmative, no trade challenge should be brought. In addition, there is more at stake than the needed repairs to NAFTA, because the Bush administration has made it clear that it intends to expand these investor rights to the entire Western Hemisphere via the FTAA and is pushing now for Fast Track to do so.

To repair the balance between the public interest and corporate interests that has gone so badly askew under NAFTA and to avoid spreading this failed model further in FTAA, Public Citizen and Friends of the Earth recommend:

- C The radical regulatory takings provisions that are allowed under NAFTA, but not under U.S. domestic law, should be excised from NAFTA. No "interpretive note" will be sufficient to

protect the public and the treasuries of NAFTA countries from these expansive investor rights.

- C Similarly, the secretive investor-to-state dispute settlement procedure, which is premised on the notion that private commercial interests should have special rights to enforce treaties to which they are not parties, should be removed from NAFTA.

- C The potential for an explosion of new cases if these same investor rights are approved as part of the FTAA is extraordinary. These corporate cases pose a significant public policy and financial threat to developed countries and an even more significant threat to developing countries. Both the excessive new investor rights and their private enforcement must be kept out of the FTAA.

- C The expansive rights granted to corporations under NAFTA were just one of the factors that went largely unnoticed by Congress and the media due to the fact that the NAFTA agreement was approved under “Fast Track” procedures. The best way to ensure that these provisions are kept out of the FTAA is to defeat the pending Fast Track proposal in Congress.

FOR MORE INFORMATION, VISIT:

Public Citizen's Global Trade Watch: www.tradewatch.org

Friends of the Earth: www.foe.org

NAFTA Text: www.sice.oas.org/TRADEE.ASP#NAFTA

NAFTA Documents: www.naftaclaims.com

ICSID (provides list of pending cases): www.worldbank.org/icsid/

UNCITRAL (provides no information about pending cases): www.uncitral.org/

Endnotes

1. See Summit of the Americas Trade Ministerial, Joint Declaration, Denver, Colorado, Jun. 30, 1995.
2. "Obscure NAFTA Clause Empowers Private Parties," *The National Law Journal*, Apr. 6, 1998.
3. Two other cases one involving a Mexican pharmaceutical company (Signa, S.A.) and another involving an airport concession business in Mexico (Halchette) were apparently filed but never pursued. No documents are available about these cases, and there may be many more cases of which we are unaware due to the closed nature of the proceedings.
4. *Concrete Pipe and Products vs. Construction Laborers Pension Trust* 508 U.S. 602 at 615.
5. "Changing Investment Litigation, bit by BIT," *BRIDGES*, Vol. 5, No. 4, May 2001 at 12.
6. California Budget Project, "Budget Basics: Where Does the Money Come From? Where does it go?," 2000.
7. See North American Free Trade Agreement (NAFTA), 32 I.L.M 605, HR Doc. Noc. 103-159, 103 Cong. 1st Sess. (1993), (Hereafter, NAFTA), Art. 1105, available in <http://www.nafta-sec-alena.org/english/nafta/nafta.htm> cited Jul. 3, 2001.
8. NAFTA, Art. 1139.
9. NAFTA, Art. 201.
10. NAFTA, Art. 1110.
11. NAFTA, Art. 1102.
12. NAFTA, Art. 1103.
13. NAFTA, Art. 1105.
14. NAFTA, Art. 1106.
15. While some legal observers have seen the recent Supreme Court case *Palazzolo v. Rhode Island* as encouraging to proponents of regulatory takings, the opposite conclusion can also be drawn. *Palazzolo* clearly established that some state statutes can be considered by the courts as "background principles of state law" which means they can never be used as the basis for a regulatory takings case. NAFTA includes no such exemption. *Palazzolo v. Rhode Island* et. al. 121 S. Ct. 2448, Jun. 28, 2001.
16. *Concrete Pipe and Products vs. Construction Laborers Pension Trust* 508 U.S. 602 at 615.
17. The MAI (Multilateral Agreement on Investment) was a multilateral trade agreement that included expansive investor protections even broader than those in NAFTA. In 1998 a copy of the secret agreement was obtained and posted on the internet. The resultant outcry from civil society groups and others resulted in negotiators throwing in the towel in 1998.
18. This is clear from the fact that there were no cases brought under investment treaties until 1987. Antonio Parra, "Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties," in News from ICSID, Volume 17, No. 2, Fall 2000; personal communication between Parra and David Waskow, Friends of the Earth, Jul. 6, 2001.
19. Remarks by Antonio Parra, American Society of International Law proceeding, Apr. 6, 2000.
20. ICSID, *Concluded Cases and Pending Cases*, cited July 6, 2001, and www.worldbank.org/icsid/cases/conclude.htm.
21. Antonio Parra, "Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties," in News from ICSID, Volume 17, No. 2, Fall 2000; personal communication between Parra and David Waskow, Friends of the Earth, Jul. 6, 2001.

22. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Article 48; ICSID, *Concluded Cases and Pending Cases*, cited Jul. 6, 2001, available at <www.worldbank.org/icsid/cases/conclude.htm>.
23. Convention on the Settlement of Investment Disputes between States and Nationals of Other States; Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes [Additional Facility Rules].
24. UNCITRAL, *About UNCITRAL * An Introduction to the Work of UNCITRAL*, cited Jul. 6, 2001, available at <www.uncitral.org/en-index.htm>.
25. Personal communication between David Waskow, Friends of the Earth, and UNCITRAL staff Jul. 6, 2001.
26. "Toxins at the Pump," *New York Times*, Mar. 13, 1996.
27. "Toxins at the Pump," *New York Times*, Mar. 13, 1996.
28. "Toxins at the Pump," *New York Times*, Mar. 13, 1996.
29. "MMT Deja Vu and National Security," *American Journal of Industrial Medicine*, Apr. 2001, 39 (4): 434-5.
30. "MMT Deja Vu and National Security," *American Journal of Industrial Medicine*, Apr. 2001, 39 (4): 434-5.
31. "Methycyclopentadienyl Manganese Tricarbonyl: Health Risk Uncertainties and Research Directions," *Environmental Health Perspectives*, Vol. 106, Supplement 1, Feb. 1998, at 191.
32. "MMT Deja Vu and National Security," *American Journal of Industrial Medicine*, Apr. 2001, 39 (4): 434-5.
33. Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Ethyl Corporation v. Government of Canada*, United Nations Commission on International Trade Law, Sept. 10, 1999, at 4.
34. In 1995, Ethyl won a lawsuit against the U.S. EPA that forced the EPA to lift its restrictions on MMT and it became available for use in conventional unleaded gasoline. National Round Table on the Environment and the Economy, "Methcyclopentadienyl Manganese Tricarbonyl (MMT) Case Study," 1999, at 8, available at <http://www.nrtee-trnee.ca/eng/programs/Current_Programs/Health/MMT_e.htm> cited Apr. 24, 2001.
35. "Methcyclopentadienyl Manganese Tricarbonyl: Health Risk Uncertainties and Research Directions," *Environmental Health Perspectives*, Vol. 106, Supplement 1, Feb. 1998, at 192.
36. "Toxins at the Pump," *New York Times*, Mar. 13, 1996.
37. "Methcyclopentadienyl Manganese Tricarbonyl: Health Risk Uncertainties and Research Directions," *Environmental Health Perspectives*, Vol. 106, Supplement 1, Feb. 1998, at 193.
38. The transportation ban was necessary because the fuel standards established in the Canadian Environmental Protection Act are not sufficiently broad to cover a ban on substances that may damage pollution control systems in cars, even if such damage leads to increased emissions. Manganese-based Fuel Additives Act 1997, c. 11.
39. Statement of Defense in the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement between Ethyl Corporation v. Government of Canada, United Nations Commission on International Trade, Nov. 27, 1997, at 23-24.
40. Statement of Defense in the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement between Ethyl Corporation and the Government of Canada, United Nations Commission on International Trade, Nov. 27, 1997, at 24.
41. Statement of Defense in the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement between Ethyl Corporation and the Government of Canada, United Nations Commission on International Trade, Nov. 27, 1997, at 24.
42. Manganese-based Fuel Additives Act 1997, c.11.
43. Notice of Arbitration, *Ethyl v. Government of Canada*, United Nations Commission on International Trade Law, Apr. 14, 1997. Damages claimed known from Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Ethyl Corporation v. Government of Canada*, United Nations Commission on International Trade, Sept. 10, 1996.
44. Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Ethyl Corporation v. Government of Canada*, United Nations Commission on International Trade, Sept. 10, 1996, at 2,3.
45. Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Ethyl Corporation v. Government of Canada*, United Nations Commission on International Trade, Sept. 10, 1996, at 2.

46. Statement of Defense in the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement between Ethyl Corporation and the Government of Canada, United Nations Commission on International Trade, Nov. 27, 1997, at 9.
47. Award on Jurisdiction in the NAFTA/UNCITRAL Case between Ethyl Corporation and the Government of Canada, Jun. 24, 1998, at 36.
48. Government of Canada "Statement on MMT," Jul. 20, 1998.
49. See, Public Citizen Publication, *Whose Trade Organization? Corporate Globalization and the Erosion of Democracy*, Oct. 1999, for a discussion of trade threats that resulted in legislative changes.
50. Petitioner's Outline of Argument, In the Supreme Court of British Columbia, in the Matter of Arbitration Pursuant to Chapter 11 of NAFTA between Metalclad Corporation and the United Mexican States, ICSID Additional Facility, case number ARB(AF)/97/1, Jan. 22, 2001, at 2.
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54. "Toxic Shock in a Mexican Village," *Multinational Monitor*, vol.16 no.10, Oct. 1995.
55. "Toxic Shock in a Mexican Village," *Multinational Monitor*, vol.16 no.10, Oct. 1995.
56. "Toxic Shock in a Mexican Village," *Multinational Monitor*, vol.16 no.10, Oct. 1995.
57. Fernando Bejarano, Mexico Network on Free Trade (RMALC), communication, Apr. 6, 2001, on file with Public Citizen.
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61. Petitioner's Outline of Argument, In the Supreme Court of British Columbia, in the Matter of Arbitration Pursuant to Chapter 11 of NAFTA between Metalclad Corporation and the United Mexican States, ICSID Additional Facility, case number ARB(AF)/97/1, Jan. 22, 2001, at 4.
62. Fernando Bejarano, Mexico Network on Free Trade (RMALC), communication Apr. 6, 2001, on file with Public Citizen.
63. Fernando Bejarano, Mexico Network on Free Trade (RMALC), communication Apr. 6, 2001, on file with Public Citizen.
64. Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Center for Settlement of Investment Disputes, Aug. 25, 2000, at 15.
65. Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Center for Settlement of Investment Disputes, Aug. 25, 2000, at 17.
66. Amended Petition to the Court, In the Supreme Court of British Columbia, Re: Sections 30,31,42 of the Commercial Arbitration Act, RSBC 1996, c. 55 and in the Matter of Arbitration Pursuant to Chapter 11 of NAFTA between Metalclad Corporation and the United Mexican States, ICSID Additional Facility, case number ARB(AF)/97/1, Oct. 27, 2000.
67. The notice of arbitration has not been made public. The date and amount claimed are know from the Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Center for Settlement of Investment Disputes, Aug. 25, 2000, at 4, 36.
68. Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Center for Settlement of Investment Disputes, Aug. 25, 2000, at 1.
69. Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Center for Settlement of Investment Disputes, Aug. 25, 2000, at 1.
70. Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Center for Settlement of Investment Disputes, Aug. 25, 2000, at 42.

71. Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Center for Settlement of Investment Disputes, Aug. 25, 2000, at 32-35.
72. Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Center for Settlement of Investment Disputes, Aug. 25, 2000, at 28.
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74. "The Metalclad Decision Under NAFTA Chapter 11," *New York Law Journal*, Oct. 27, 2000.
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76. Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Center for Settlement of Investment Disputes, Aug. 23-24, 2000, at 31.
77. Amended Petition to the Court, In the Supreme Court of British Columbia, Re: Sections 30,31,42 of the Commercial Arbitration Act, RSBC 1996, c. 55 and in the Matter of Arbitration Pursuant to Chapter 11 of NAFTA between Metalclad Corporation and the United Mexican States, ICSID Additional Facility, case number ARB(AF)/97/1, Oct. 27, 2000.
78. In this case the applicable statutes were the British Columbia Commercial Arbitration Act R.S.B.C. 1996 c. 55 and the British Columbia International Commercial Arbitration Act, R.S.B.C. 1996, c. 233. Judge Tysoe ruled that the extent to which he could interfere in the case was limited by the terms of the International Commercial Arbitration Act.
79. In the Supreme Court of British Columbia, Between the United Mexican States and Metalclad Corporation, Reasons for Judgement of the Honorable Mr. Justice Tysoe, May 2, 2001, at 26-27.
80. In the Supreme Court of British Columbia, Between the United Mexican States and Metalclad Corporation, Reasons for Judgement of the Honorable Mr. Justice Tysoe, May 2, 2001, at 29.
81. In the Supreme Court of British Columbia, Between the United Mexican States and Metalclad Corporation, Reasons for Judgement of the Honorable Mr. Justice Tysoe, May 2, 2001, at 47-48.
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83. "Metalclad NAFTA Dispute is Settled," *Los Angeles Times*, Jun. 14, 2001.
84. In the Supreme Court of British Columbia, Between the United Mexican States and Metalclad Corporation, Reasons for Judgement of the Honorable Mr. Justice Tysoe, May 2, 2001, at 35.
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86. "The Metalclad Decision Under NAFTA Chapter 11," *New York Law Journal*, Oct. 27, 2000.
87. Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Center for Settlement of Investment Disputes, Aug. 25, 2000, at 35-36.
88. Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Center for Settlement of Investment Disputes, Aug. 25, 2000, at 33.
89. Statement of Defense, In the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, Between S.D. Myers and the Government of Canada, Jun. 18, 1999 at 3.
90. 15 USC sec. 2601.
91. Statement of Defense, In the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, Between S.D. Myers and the Government of Canada, Jun. 18, 1999, at 4.
92. 61 FR 11096, Mar. 18, 1996.
93. *Interim Order to PCBWE, 1990, PCB Waste Export (PCBWE) Regulations, 1996 1 SOR/90-453* (Issued Nov. 20, 1995)
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96. Agency for Toxic Substances and Disease Registry, ToxFAQs for Polychlorinated Biphenyls, Feb. 20001.
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99. Statement of Defense, In the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, Between S.D. Myers and the Government of Canada, Jun. 18, 1999, at 5-7.
100. Statement of Defense, In the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, Between S.D. Myers and the Government of Canada, Jun. 18, 1999, at 5.
101. Statement of Defense, In the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, Between S.D. Myers and the Government of Canada, Jun. 18, 1999, at 9; PCB Waste Export Regulations of 1996 SOR/97-109.
102. Statement of Defense, In the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, Between S.D. Myers and the Government of Canada, Jun. 18, 1999, at 9-10.
103. *Sierra Club v. U.S. Environmental Protection Agency, S.D. Myers, et al.*, No. 96-70224 United States Court of Appeals for Ninth Circuit, Nov. 7, 1996.
104. Statement of Claim Under Chapter 11 of the North American Free Trade Agreement, *S.D. Myers Inc. v. Government of Canada*, United Nations Commission on International Trade Law, Oct. 30, 1998.
105. Statement of Claim Under Chapter 11 of the North American Free Trade Agreement, *S.D. Myers Inc. v. Government of Canada*, United Nations Commission on International Trade Law, Oct. 30, 1998, at 11
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115. Notice of Application, In the Matter of Section 5 and 6 of the Commercial Arbitration Act RSC 1985, c. 17 (2nd Supp); In the Matter of Articles 1, 6, and 24 of the Commercial Arbitration Codes set out in the Schedule to the Commercial Arbitration Act and in the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement, *S.D. Myers v. Government of Canada*, Court file number T-225-01, Feb. 8, 2001.
116. Statement of Defense, In the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, Between S.D. Myers and the Government of Canada, Jun. 18, 1999, at 10.
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122. *Provident American Corporation, et. al. v. The Loewen Group Inc* (U.S.D.C. Ed. Pa. CA. No 92-1964). Settlement amount known from personal communication between Mary Bottari, Public Citizen, and Provident attorney Bret Flaherty, Aug. 21, 2001.

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124. Personal communication between Mary Bottari, Public Citizen, and Michael S. Allred, attorney for O'Keefe Aug. 17, 2001.
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127. Personal communication between Mary Bottari, Public Citizen, and Michael S. Allred, attorney for O'Keefe Aug. 17, 2001.
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