

Date: March 25, 2003
To: Professor Arriola
From: Ed Campbell

Re: Maquiladora Workers Memorandum (Version # 8.3—Fully completed version)
(*Note:* This is merely the eighth draft of a forthcoming "white paper" that will later be published on the topic of effective advocacy on behalf of maquiladora workers. It is a work in progress and not a finished manuscript--as such, it also includes a few bracketed "notes to self" by the author indicating where follow-up is necessary. Also, given the scope of the issues raised by the subject matter, my first priority has been to outline as many of the relevant areas of inquiry as possible. Many difficult questions remain unanswered and a number of legal alternatives are left unexplored so far in this long-term project.)

MEMORANDUM

I. Introduction

This memorandum outlines some of the legal alternatives available to maquiladora workers seeking redress for personal injuries caused by an employer's labor law violations, more stringent enforcement of existing Mexican labor laws, or more widespread structural reforms in the areas of occupational health and safety and organized labor. Given the maquiladoras' poor record of compliance with Mexico's ample labor laws and the outright human rights violations encountered in many of these "sweatshops"¹, it is clear that advancement in these areas will require the proactive efforts of workers and labor advocates willing to utilize every available legal avenue. Potential alternatives to traditional civil litigation include private alternative dispute resolution (ADR) or administrative proceedings before a governmental agency. It is additionally clear that, in many instances, the parties ultimately responsible for the harms suffered by maquila workers are the large transnational corporations (TNC) with ownership interests in the maquiladoras--many of which are headquartered in the United States. This memo, therefore, will attempt to explain in general terms the legal means by which maquila workers can employ the legal forums² potentially available to hold these TNC accountable for the labor law and human rights violations of their Mexican subsidiaries.

This memorandum is divided into sections that correspond with the different legal forums and the various legal claims that may be brought in each. The first major section, Part I, will discuss the initiation of traditional civil litigation in either the United States or Mexico. Part II will address the labor law provisions and dispute resolution mechanisms available under the NAALC, the labor side accord to the North American Free Trade Agreement (NAFTA). Other sections will likely be added at a later date as progress is made on this ongoing project.

This writing is intended for a general audience, and I will attempt to explain any unavoidable legal terminology in plain English.³ Its purpose is to present an overview of the relevant laws and legal issues which non-lawyers or lawyers unfamiliar with these practice areas

¹ See, e.g., Elvia R. Arriola, *Women on the Border: Documenting the lives of Women Working in the Maquiladoras available at www.womenontheborder.org.*

² See Black's Law Dictionary 664 (7th ed. 1999) ("**Forum.** ... 2. A court or other judicial body; a place of jurisdiction."); The term "forum" is basically synonymous with "court", and the terms are sometimes used interchangeably. "Forum" has a broader connotation, however.

³ Proper legal citation form will be used, however, to provide thorough documentation.

will find helpful. The subject matter nevertheless involves certain legalities that the reader may find challenging. Some readers may also be discouraged by the apparent unlikelihood of success on the merits of potential claims that are discussed--or by the lack of a real remedy for injured parties, as is likely under the NAALC accord. But it is precisely because these legal issues present such challenges that it is important to identify and organize as much relevant information as possible in order to: a) isolate the areas requiring significant additional research and analysis, b) properly catalogue all potential claims, anticipated defenses and appropriate replies, procedural requirements, alternative forums, outside reference materials, etc., in an accessible, easy to follow format; c) correlate this material in a way that will allow both non-lawyers and novice lawyers to better understand all the potential legal avenues available to advance the rights of maquiladora workers; and d) ultimately generate enough new information to help fashion new approaches to advocacy in this area.

I. Primary legal issues surrounding the filing of a civil lawsuit against a United States based corporation to recover damages arising from the negligent conduct of the corporation's Mexican subsidiary

This section will discuss the general procedural and substantive legal issues that a potential plaintiff or group of plaintiffs must address when filing civil suit in either the United States or Mexico against a U.S. corporation to hold it accountable for the harms wrought by its Mexican subsidiary. It will attempt to answer the most basic questions concerning where and when a lawsuit may be brought, what types of legal claims may be appropriate, what evidentiary and procedural thresholds must be met to prevail on these claims, and what strategic issues must be taken into account beyond the threshold legal requirements. All of these issues must be thoroughly researched and dealt with before any legal action is taken, even though many will involve considerations unlikely to arise until after a lawsuit is filed.

Section A will address civil litigation brought within the courts of the United States, while Section B will address civil litigation filed in Mexico. Certain fundamental procedural matters, such as appropriate jurisdiction and venue, are addressed first since these matters will always arise regardless of the underlying substantive legal claims.

A. Civil Litigation Initiated Within the United States

1. Appropriate Jurisdiction and Venue: Which courts have the authority to try our case, and where is it appropriate to file suit?

The plaintiff must file suit in a court with the appropriate jurisdiction to hear the case. The term "jurisdiction" is derived from the Latin words for "law" and "to speak", and can have different meanings, depending on the context in which it is used.⁴ It essentially refers to the judicial power of a court or other administrative body, but may also refer to the physical area in which a court may exercise its authority.⁵ A court may not proceed with litigation prior to a determination that its jurisdiction has been established as a fundamental legal matter. There are three separate elements to a court's jurisdiction: "(1) jurisdiction over the person, (2) jurisdiction over the subject matter, and (3) jurisdiction to render the particular judgment sought, or, as is sometimes said, jurisdiction of the particular case."⁶ A lack of jurisdiction will exist should the

⁴ 20 Am. Jur. 2d Courts § 54 (2002).

⁵ Black's Law Dictionary 855 (7th ed. 1999); For instance, lawyers may refer to the laws or the courts in a particular "jurisdiction", i.e., a particular state, county, or other area such as an appellate district or circuit.

⁶ *Supra* note 4.

court determine it lacks the power to hear the case or lacks authority over the subject matter or the parties.⁷

A U.S. state court will likely have “general jurisdiction”⁸ over a case involving claims brought against the wholly owned Mexican subsidiary of a U.S. company operating within the state's borders. This would be the most simple, straightforward scenario to contemplate. In reality, a plaintiff would likely face tricky issues of agency, corporate law, and the maquiladora statutory framework that would make proving the court's jurisdiction a more difficult proposition. These issues also lie beyond the immediate scope of this project, but may be addressed at a later point.

Federal courts, on the other hand, possess only “limited jurisdiction.”⁹ The extent of their jurisdiction is limited under the U. S. Constitution.¹⁰ Certain claims, for instance those brought pursuant to the Alien Tort Claims Act (ACTA), discussed below, must be filed in federal district court. Under the Federal Rules of Civil Procedure (FRCP) any pleading¹¹ that states a claim for relief (such as damages, an injunction, etc.) must contain “a short and plain statement of the grounds upon which the court's jurisdiction depends.”¹²

Jurisdiction must be distinguished from considerations of venue, a term referring to the proper or possible place for a lawsuit because the particular forum is convenient for the litigants, the witnesses, and the court itself.¹³ The appropriate venue, in other words, must have a plausible connection with the events leading up to the lawsuit, and the location must not unduly burden those who are involved with the case.

Closely linked with questions of jurisdiction and venue is the doctrine of “forum non conveniens.”¹⁴ It is also a doctrine closely associated with lawsuits involving TNC, particularly if the relevant people or events have ties with a foreign jurisdiction such as Mexico. The doctrine of forum non conveniens basically provides that, so long as the plaintiff has an alternative choice of forum, a court may decline to exercise its jurisdiction over a case if, in its discretion, the case should proceed in another court that would better suit the interests of the parties and conserve scarce judicial resources.¹⁵ Many jurisdictions have recognized the doctrine

⁷ *Id.*

⁸ See Black's Law Dictionary 856 (7th ed. 1999) (“**General jurisdiction.** 1. A court's authority to hear a wide range of cases, civil or criminal, that arise within its geographic area. 2. A court's authority to hear all claims against a defendant, at the place of defendant's domicile or the place of service, without any showing that a connection exists between the claims and the forum state.”); State trial-level courts ordinarily possess general jurisdiction over all civil or criminal matters arising within the state's boundaries.

⁹ *Id.* (“**Limited jurisdiction.** Jurisdiction that is confined to particular type of case or that may be exercised only under statutory limits and prescriptions.”)

¹⁰ “The judicial Power shall extend to all Cases ... arising under this Constitution, the Laws of the United States, and Treaties made ... under their authority; to all cases affecting Ambassadors, other public Ministers and Consuls; to all cases of admiralty and maritime Jurisdiction; to controversies to which the United States shall be a Party; to controversies between two or more States; between a State and Citizens of another State; between citizens of different States; between Citizens claiming Lands under the Grants of different States; and between a State, or Citizens thereof, and foreign States, Citizens, or subjects. U.S. CONST. art. III, § 2.

¹¹ See Black's Law Dictionary 1173 (7th ed. 1999) (“**Pleading.** 1. a formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses. In federal civil proceedings, the main pleadings are the plaintiff's complaint and the defendant's answer.”).

¹² FED. R. CIV. P. 8.

¹³ Black's Law Dictionary 1553-54 (7th ed. 1999).

¹⁴ Latin for “an unsuitable court”. *Id.* at 685.

¹⁵ *Id.*; 20 Am. Jur. 2d Courts § 130; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

of forum non conveniens as within the power of their courts, although each state individually may decide whether, and to what extent, the doctrine of forum non conveniens will apply in its courts.¹⁶ A court may dismiss a case because of forum non conveniens, depending on the jurisdiction, either on its own initiative or in response to the defendant's timely motion to dismiss.¹⁷ The defendant carries the burden to prove both: 1) the existence of an adequate alternative forum, and 2) that the strong presumption favoring the plaintiff's choice of forum is outweighed by the public and private interest factors which favor dismissal.¹⁸

The forum non conveniens doctrine requires the existence of an adequate alternative forum because the plaintiff should not be foreclosed the opportunity to obtain relief elsewhere once their claim is dismissed.¹⁹ The doctrine therefore presumes at least two forums where the defendant is amenable to process, and, of course, the defendant must consent to proceeding in the alternative forum²⁰. A court is unlikely to find the alternative forum inadequate, however, so long as the plaintiff will not be denied a remedy or be treated unfairly.²¹

Once the alternate forum has been established, the court will engage in a balancing test to determine whether the presumption favoring the plaintiff's choice of forum is clearly outweighed by the factors affecting the convenience of the litigants and the convenience of the court itself.²² Factors affecting the private interests of the litigants include the relative availability of access to: sources of proof, witnesses, a view of relevant locations, if appropriate, and "all other practical problems that make trial of a case easy, expeditious, and inexpensive."²³ Basically, the plaintiff's chosen forum must not "establish oppressiveness and vexation to a defendant out of all proportion to the plaintiff's convenience."²⁴ Factors affecting the public's interest include anything that may cause the court additional administrative or legal problems, such as: court congestion; the need to "have localized controversies decided at home" (i.e., pressure to transfer the case somewhere else, such as Mexico), the court's unfamiliarity with the body of law governing the action, potential problems with conflicts of law or the application of foreign law, and the burden of jury duty to citizens in an unrelated forum.²⁵ Although the plaintiff's choice of forum is ordinarily entitled to great deference, this presumption is weakened where the plaintiff is not a United States citizen.²⁶

¹⁶ 20 Am. Jur. 2d Courts § 130; *Missouri ex rel. Southern R.Co. v. Mayfield*, 340 U.S. 1 at 95 (1950).

¹⁷ 20 Am. Jur. 2d Courts § 130 (Some authority states that a court does not possess the power to invoke the doctrine of forum non conveniens on its own motion, while other authority states that a court may apply the doctrine on its own motion at any time, so long as the court provides the parties the opportunity to submit evidence relevant to this determination.)

¹⁸ *Jota v. Texaco Inc.*, 157 F.3d 153 (2nd. Cir. 1998); *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220 at 1225 (3rd. Cir. 1995).

¹⁹ *Bhatnagar* at 1225.

²⁰ *Id.*; *Gilbert* at 506-7 (1947); See Black's Law Dictionary 1222 (7th ed. 1999) ("**Process.** ... 2. A summons or writ, especially to appear or respond in court.")

²¹ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 at 264-55.; See also *Aguinda v. Texaco*, 303 F.3d 470 at 476-77 (2nd Cir. 2002); But see *Bhatnagar* at 1227-28 (Excessive litigation delay can render an alternative forum inadequate as a matter of law); Cf., *Bridgeway Corp. v. Citibank*, 201 F.3d 134 (State Department Country Reports admissible to show the impartiality of the Liberian judicial system in judgment creditor action.)

²² E.g., *Piper Aircraft* at 241.

²³ *Id.*

²⁴ *Id.* (citing *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 at 524 (1947)).

²⁵ *Id.*

²⁶ *Bhatnagar* at 1226; *Piper Aircraft* at 255.

2. Choice of Laws: What laws govern the plaintiff's rights and what legal claims are available under those laws?

a. State Tort Law Violations

b. Alien Tort Claims Act

Enacted by Congress primarily to ensure that the federal government maintains control over foreign relations matters, the Alien Tort Claims Act²⁷ (or ATCA) was until relatively recently a largely forgotten provision of the Judiciary Act of 1789.²⁸ This situation quickly changed after the ground breaking case of *Filartiga v. Pena-Iral*, in which the U.S. Second Circuit construed this provision to allow federal jurisdiction where a foreign plaintiff alleged the violation of "universally accepted norms of the internationally accepted law of human rights" by the foreign defendant.²⁹ Since then the ATCA has emerged as a viable means by which private party foreign plaintiffs may bring suit in U.S. federal district court for torts committed in violation of international law.³⁰ The ATCA grants the U.S. federal district courts subject matter jurisdiction over lawsuits in which: "(1) the plaintiff is an alien; (2) the claim is for a tort; and 3) the tort is committed in violation of the law of nations or an international treaty."³¹ Requirements (1) and (2) are straightforward and are rarely at issue because their criteria may be easily met. Requirement (1) simply limits ATCA jurisdiction to plaintiffs who are neither citizens nor nationals of the United States.³² Requirement (2) limits the plaintiff to pleading a claim in "tort", meaning a civil claim in which damages are sought as a remedy for the harm allegedly caused by the defendant's breach of a legal duty.³³ Requirement (3) is the most stringent jurisdictional test, because the plaintiff must allege that the defendant clearly committed a violation of international law--often a hotly contested subject.³⁴

The federal courts have been reluctant to grant "international law" status to particular legal standards precisely because it is so difficult for the international community to reach a consensus on international legal standards.³⁵ As the court stated in a leading opinion, *Kadic v. Karadzic*, the appropriate inquiry must reveal that the defendant's alleged conduct violates "well-established, universally recognized norms of international law as opposed to idiosyncratic legal rules".³⁶ Recognized sources of international law include: the writings of distinguished judges or legal scholars, the general practice of nations, or the judicial precedent that interprets and applies

²⁷ 28 U.S.C. § 1350 (Its text reads simply: "The district courts shall have original jurisdiction of any civil action for a tort only, committed in violation of the law of nations or a treaty of the United States.")

²⁸ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980).

²⁹ *Id.*

³⁰ *Wiwa v. Royal Dutch Shell Petroleum Co.*, 226 F.3d 88 at 103-04 (2nd Cir. 2000); Cynthia A. Williams, *Corporate Responsibility in an Era of Economic Globalization*, 35 U.C. Davis L. Rev. 705 at 750 (2002).

³¹ *Filartiga* at 887; *Ge v. Li Peng*, 201 F.Supp.2d 14 at 19-20 (2000); *Kadic v. Karadzic*, 70 F.3d 232 at 238 (2nd Cir. 1995).

³² This self-evident requirement was formally recognized by Judge Edwards in his concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 233 U.S. App. D.C.384.

³³ Black's Law Dictionary 1496 (7th ed. 1999).

³⁴ [??? Moreover, unlike the pleading requirements that allow the plaintiff to amend his pleadings if he fails to make a legitimate claim, the ATCA claimant must sufficiently allege a violation of international law in the first instance to avoid dismissal for lack of ATCA subject matter jurisdiction. ??? -Put this info elsewhere?]

³⁵ E.g., *Beanal v. Freeport Morgan*, 197 F3d 161 at 165, 167 (5th Cir. 1999); *Carmichael v. United Technologies*, 835 F2d. 109 at 113 (5th. Cir. 1985).

³⁶ *Kadic v. Karadzic*, 70 F.3d 232 at 239 (quoting *Filartiga* at 881).

that law.³⁷ This body of law is continually evolving as the standards of international conduct evolve and change.³⁸ Consequently, the rule has emerged that the courts will interpret international law not as it existed in 1789, but as it exists today.³⁹ A recognized norm of international law is the product of "a general and consistent practice of states followed by them from a sense of legal obligation."⁴⁰ Other requirements have additionally emerged under the case law⁴¹ that interprets the ATCA.

With certain limited exceptions, a plaintiff must successfully meet a "state action requirement" to invoke ATCA subject matter jurisdiction in the federal courts. Essentially, a private party may not be sued under the ATCA absent allegations that the party was acting under the "color of law".⁴² The majority rule states that: "A private individual acts under color of law ... when he acts together with state officials or with significant state aid."⁴³ This has also been termed the "joint-action test", under which "private actors are considered state actors if they are willful participants in joint action with the state or its agents."⁴⁴ The narrow exceptions to the state action requirement have developed only recently.

Kadic v. Karadzic, decided in 1995 was the case that firmly established the rule allowing the federal courts subject matter jurisdiction over ATCA claims against private parties for their private conduct. Prior to this time the status of the law was unclear, and it was often presumed that international law only governed the actions of sovereign states or their individual representatives.⁴⁵ The *Kadic* court recognized, however, that there was a substantial body of scholarly and legal precedent for the proposition that international laws may also govern the conduct of private parties.⁴⁶ A prime example would be the international prohibitions against piracy that developed under Admiralty and Maritime law.⁴⁷ The crimes of slavery, genocide, and acts considered "War Crimes" are also recognized exceptions to the "state action" requirement under the ATCA.⁴⁸

The *Kadic* opinion also makes it clear that failure to meet the state action requirement raises the already significant threshold for pleading violations of international law under the ATCA. Three separate categories of international law violations were at issue in *Kadic*, and the court explained the relevant state action requirements for each one. Regarding the first two

³⁷ *Id.* (Quoting *United States v. Smith*, 18 U.S. 153 at 160-61 (1820)).

³⁸ *Id.*

³⁹ *Id.*; *Filartiga* at 881.

⁴⁰ *Bao Ge* at 20 (quoting Restatement (Third) of the Foreign Relations Law of the United States § 102).

⁴¹ See Black's Law Dictionary 207 (7th ed. 1999) (Caselaw is simply legal shorthand for "The collection of reported cases that form the body of law within a given jurisdiction.").

⁴² *Kadic* at 245 (The court looked to the "color of law" jurisprudence of 42 U.S.C. 1983 as guide to determine whether the appellant in this case had acted in concert with a foreign state. Subsequent courts have adopted this line of analysis.)

⁴³ *Id.*; 42 U.S.C. § 1983.

⁴⁴ *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 (S.D.N.Y.).

⁴⁵ Anita Bernstein, *Conjoining International Human Rights Law with Enterprise Liability for Accidents*, 40 Washburn L.J. 382 at 398 (2001).

⁴⁶ *Kadic* at 239-240; [??? The federal courts have also recognized the significance of subsequent U.S. laws, such as the Torture Victim Act, which Congress passed with the express intent to codify the *Filartiga* holding (authorizing federal jurisdiction, pursuant to the ATCA, over claims alleging state sanctioned violations of internationally recognized human rights.) The Congressional record clearly stated that: " Put this info elsewhere???"

⁴⁷ *Id.*; See also Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 *Va. J. Int'l L* 587 at (Discussing the early development of international law in Admiralty cases.).

⁴⁸ *Kadic* at 239-40.

categories, "genocide" and "war crimes", the court held that private individuals could be sued pursuant to the ATCA irrespective of whether they had acted under the color of state law.⁴⁹ With respect to the third category, "other instances of inflicting death, torture, and degrading conduct", the court held that even the heinous crimes of "torture" and "summary execution" violated international law "only when committed by state officials or under color of law".⁵⁰ In other words, the court held that private individuals could not be held accountable for their isolated acts of murder or torture so long as they did not fit into a larger pattern of wartime atrocities or the targeted extinction of a particular ethnic group.

The narrowness of these exceptions illustrates the futility in attempting to bypass the state action requirement in order to hold private corporations liable under the ATCA. Recent caselaw, however, suggests that the courts have begun to more liberally interpret the meaning of "acting under color of law". At a minimum, the door opened by the Second Circuit with the *Kadic* decision has led to an influx of ATCA claims that have forced the federal courts to better define the criteria by which foreign plaintiffs can meet the state action requirement when suing a private corporation.

The highly influential District of Columbia Circuit⁵¹ recently explained these criteria in a relevant labor related case. In *Bao Ge v. Li Peng*, the plaintiffs appealed the dismissal by the district court of their claims under the ATCA against the Adidas Corporation.⁵² The plaintiffs claimed that the Chinese Communist Party (CCP) had them thrown into prison for their activities in support of China's free labor movement.⁵³ During their incarceration in the Chinese prison, the plaintiffs were allegedly forced by their jailers to perform slave labor for the Adidas Company. According to the complaint, the plaintiffs "were coerced into waxing, stitching, sewing, and making Adidas' soccer balls 14-18 hours a day under inhumane conditions. [They] were subjected to [b]eatings with belts, tortures of various horrifying kinds ... and other inhumane treatments such as malnutrition, no medical attention, and lack of sleep."⁵⁴ The complaint further alleged that Adidas had acted in concert with the Chinese government in what was referred to as some sort of "joint venture", a "partnership", or a "licensing arrangement".⁵⁵ It was claimed that Adidas knew that its soccer balls were being stitched by prison inmates under inhumane conditions and that it knowingly contributed to "prolong[ing] the system of oppression and terror inflicted intentionally over Mainland China" by the CCP. The only factual allegation made to support this theory, however, was that some of the plaintiffs had stitched soccer balls bearing the Adidas logo.⁵⁶ The issues before the court were whether the complaint alleged facts sufficient to prove Adidas' liability under the ATCA as either: 1) a state actor, or 2) a private party.⁵⁷

⁴⁹ *Kadic* at 241-43.

⁵⁰ *Id.* at 243-44.

⁵¹ Considered by many to be only "one step below" the United States Supreme Court in terms of authority and influence. See [Cite article related to the current Congressional deadlock surrounding the nomination of Thomas Pena (?) to the DC Circuit.]

⁵² *Bao Ge v. Li Peng*, 201 F.Supp.2d 14 at 19 (Under the relevant standard of review, the appellate court will accept all factual allegations made as true in order to give the plaintiff every benefit of the doubt.)

⁵³ *Bao* at 18 (No specific reasons for given for the plaintiff's incarceration other than "displeasing and attracting the attention of CCP functionaries.").

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 20.

The *Bao* court explained the relevant standards for determining when a corporation like Adidas can be held liable under the ATCA as a *de facto* state actor. Its rationale was based on the holdings of two other recent cases. In *Doe v. Unocal*, 963 F.Supp. 880 (C.D.Cal. 1997)⁵⁸ it was claimed that large oil companies had made payments directly to the Burmese military government so it would conscript slave laborers from among the population in order to build a natural gas pipeline through the Burmese countryside. The *Doe* court had denied a motion to dismiss, "finding that the complaint alleged a violation of the 'law of nations' against Unocal, as Unocal's involvement in the joint venture constituted 'participation in slave trading.'"⁵⁹ In *Iwanowa v. Ford Motor Company*, 67 F.Supp.2d 424 (D.N.J.1999) the complaint stated that Ford had knowingly used slave labor in its German subsidiary during World War II in order cut its overhead and increase profits.⁶⁰ The *Iwanawa* court held that Ford was a *de facto* state actor and there was proper subject matter jurisdiction under the ATCA.⁶¹ The *Boa* court determined that the facts and circumstances surrounding the partnerships presented in these cases showed there were four specific factors (other than outright formal agreement) which tend to prove that a close connection exists between a private corporation and a state entity working on a state project: If a corporation has: "(1) provided funds and other resources to the project, (2) made decisions in respect to the assignment of personnel and technology to the project, (3) monitored, determined, and audited the activities of the project, or (4) made decision regarding labor relations on the project" than a close relationship may exist sufficient to meet the state action requirement under the ATCA.⁶²

The *Bao* court reasoned that since the only factual allegation linking Adidas with the prison labor camp was the existence of the Adidas logo on the soccer balls assembled by the prisoners, the facts plead were insufficient to state a claim under the ATCA on a state action theory.⁶³ There were no formal agreements to point to and no indications that Adidas had played any direct role in such a project. The court next considered whether Adidas ATCA jurisdiction would be appropriate under the "private action" theory.

The *Bao* court next determined whether the use of forced prison labor to make soccer balls rose to the level of egregious misconduct necessary under *Kadic* to sustain ATCA action against private individuals. As could be expected, the court failed to find the existence of such conduct in this instance. Although the court condemned the use of prison labor under the conditions described, it nevertheless found that this conduct was not comparable to the genocide at issue in *Kadic* or to the slave labor practices encountered in *Unocal* or *Iwonawa*.⁶⁴ It also explained that forced prison labor is simply not a state practice prohibited under international law.⁶⁵

The case of *Bigio v. Coca-Cola Company* arose out of the Egyptian government's confiscation and nationalization of the plaintiffs' property in the early 1960's, apparently done just on the pretext that the individual plaintiff's were Jewish.⁶⁶ This property consisted of land

⁵⁸ A later appeal of this case is still pending, however. See *Doe v. Unocal*, 2003 WL 359787 (9th. Circuit).

⁵⁹ *Doe* at 891-92.

⁶⁰ *Iwanawa* at 433.

⁶¹ *Id.* at 445-46 (Although the case was ultimately dismissed on other grounds.)

⁶² *Bao* at 21.

⁶³ *Id.*

⁶⁴ *Id.* at 22.

⁶⁵ *Id.*

⁶⁶ *Bigio v. Coca-Cola Co.*, 239 F3d. 440 at 444 (2nd.Cir.2000) (Coca-Cola did not dispute this issue on appeal.).

and facilities that had been under lease to the Coca-Cola Corporation since the 1940's. The plaintiffs alleged that in 1993 Coca-Cola either purchased or leased their former property, although it was fully aware of the unlawful manner in which the property had been seized from the plaintiffs.⁶⁷ The plaintiff's, now Canadian citizens, brought suit in federal district court under the ATCA to collect compensation and punitive damages.

The court quickly concluded that the plaintiffs failed to allege the facts necessary to claim an exception under *Kadic* to the state action requirement.⁶⁸ It explained that "however reprehensible, neither racial or religious discrimination in general nor the discriminatory expropriation of property in particular is listed as an act of 'universal concern' [under the Restatement (Third) of Foreign Relations⁶⁹]" and therefore it could not waive the state action requirement.⁷⁰ As this was also to be expected, the main issue was instead whether Coca-Cola was a state actor for the purposes of the ATCA.

The *Bigio* court, following its own precedent in *Kadic*, relied on the "color of law" analysis it had developed from the application of 42 U.S.C. § 1983.⁷¹ The court looked to see if Coca-Cola acted in conjunction with state officials or received significant state aid.⁷² It concluded that it had not. The court reasoned that no allegations were made that could establish a link between the government's actions and Coca-Cola.⁷³ The plaintiffs failed to claim that Coca-Cola worked in tandem with state officials, received significant state aid, or even benefited in any regard from the transfer of this property interest. As the court explained, "A private party does not 'act under color of law' simply by purchasing property from the government."⁷⁴ The court also disposed of new allegations that the plaintiffs brought on appeal.

The *Bigio* plaintiffs attempted to expand the scope of their original complaint by claiming that Coca-Cola was somehow secretly involved as a "participant" or a "co-conspirator" with the Egyptians in their actions during the 1960's.⁷⁵ They also claimed that Coca-Cola had benefited economically from the nationalization of their former property even prior to acquiring a direct interest in this property some thirty years later. The plaintiffs argued they could "prove up" these new allegations if only the court would only grant their discovery request. The court dismissed the former claim simply because it was not raised in the initial complaint and no supporting evidence was presented.⁷⁶ The court dismissed the latter claim, however, because it failed to even state a viable ATCA cause of action. Here the court articulates a new rule: "An indirect economic benefit from unlawful state action is not sufficient to support jurisdiction over a private

⁶⁷ *Bigio* at 444-45. (What occurred is that after the property was seized, ownership was transferred to an insurance company wholly owned by the Egyptian Government, which in turn leased the property to a bottling company also owned by the Egyptian government. Two subsidiaries of Coca-Cola later bought a number of shares in the bottling company.)

⁶⁸ *Kadic* at 447-48.

⁶⁹ Black's Law Dictionary 1341(7th ed. 1999) ("**Restatement.** One of several influential treatises, published by the American Law Institute, describing the law in a given area and guiding its development."); The courts quite often rely upon the Restatement (Third) of Foreign Relations to determine ATCA jurisdiction.

⁷⁰ *Kadic* at 447-48.

⁷¹ *Bigio* at 448; *See supra* notes 42, 43.

⁷² *Bigio* at 448-49.

⁷³ *Id.*

⁷⁴ *Id.* at 448.

⁷⁵ *Id.*

⁷⁶ *Id.* at 449 (An appellant may not ordinarily bring a new claim on appeal that was not in the initial complaint.).

party under the ATCA."⁷⁷ It was not enough for the plaintiffs to claim that Coca-Cola stood to gain from the state's illegal activity; it had to additionally allege that *Coca-Cola itself* acted under the "color of state law."

The cases referenced above show us that, under the appropriate circumstances, the ATCA can provide a foreign plaintiff who may not otherwise have access to U.S. courts with the means to file suit in the U.S. Although these cases involved the alleged acts of U.S. corporations, they would be less straightforward to prosecute were it not for the ATCA. This statute may even confer federal jurisdiction in cases where the plaintiff, defendant, and any conduct that occurred have nothing to do with the United States, provided the plaintiff can serve process while their alleged persecutor is physically within the country and can attach the defendant's U.S. assets or otherwise enforce a judgment.⁷⁸ There is also precedent for the rule that although defendants may inquire into a plaintiff's citizenship to determine ATCA jurisdiction, they may not inquire into the plaintiff's immigration status.⁷⁹ Given the serious limitations presented by the state action requirement and the narrow scope of accepted international legal standards⁸⁰, however, foreign plaintiffs such as the maquila workers will undoubtedly find it challenging to successfully utilize the ATCA.

3. Res Judicata and Issue Preclusion: What effect, for instance, will workers' compensation claims settled in Mexico have on potential claims brought in the United States? Assuming that the settlement of claims brought in Mexico would not bar suit in the U.S., what effect will an employer's admission of liability in this setting have on claims in the U.S.? Will the prior settlement of Mexican claims affect a Mexican court's enforcement of a favorable U.S. judgment?

4. Conflicts of Law and Comity: Will difficult to reconcile conflicts arise between the laws of different jurisdictions with a connection to the case? Are there potential conflicts between the outcome of a judicial decision and the executive or legislative policies of a foreign government or the United States?

The court does not want to find itself in direct contention with the Mexican government over law and policy matters nor does it want to conflict with and it does not. This concern is expressed by the doctrine of international comity, which is the recognition that one nation allows within its borders to the legislative, executive, or judicial acts of another nation.⁸¹ Courts of one nation generally accord deference to the official position of a foreign state. The analysis, for our purposes, is the same as regards forum non conveniens: The court normally considers whether

⁷⁷ *Id.*

⁷⁸ See Jaques DeLisle, *Human Rights, Civil Wrongs and Foreign Relations: A "Sinical Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DePaul L. Rev. 473 at 527 (2002); Edward A. Amley, Jr., Note, *Sue and be Recognized: Collecting § 1350 Judgments Abroad*, 107 Yale L.J. 2177 (1998).

⁷⁹ *Topo v. DHIR*, 210 F.R.D. 76 at 79 (S.D.N.Y. 2002) ("[P]laintiff's immigration status is not relevant to her ATCA claims.").

⁸⁰ See *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 at 166 (Court declines to recognize sources of international law that "merely refer to an abstract sense of responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts. "); Unfortunately, such criticism could be directed at much of the NAALC accord, discussed below. It may prove difficult to find recognized sources of international labor law applicable to the ATCA.

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there's an adequate forum in the objecting nation and whether the defendant sought to be sued in the US is subject to or consents to the assertion of foreign jurisdiction.⁸² Dismissal does not ordinarily occur unless defendant agrees to suit in an adequate foreign forum, absent extreme circumstances where a foreign sovereign's interests would be severely undermined by conducting litigation in the US forum.⁸³

II. What options are available for Mexican workers and interested third parties to change working conditions for the better and to seek monetary relief for injustices under the North American Free Trade Agreement (NAFTA)?

The US, Canada, and Mexico signed the NAFTA treaty on December 17, 1992⁸⁴. Although the treaty in its preamble promised to: "REDUCE distortions to trade...CREATE new employment oppor tunities and improve working conditions, ...[and] PROTECT, enhance, and enforce basic workers' rights"⁸⁵, the treaty failed to offer any specific provisions requiring the member nations to enforce these ideals.⁸⁶ Public interest and labor activists in both Mexico and the US rallied for the creation of enforcement mechanisms to address their concerns. Contentious negotiations between the member countries over these issues delayed implementation of the treaty for over two years, because no country wanted to integrate a labor agreement into a treaty primarily intended to promote free trade (i.e. big business).⁸⁷

After securing the Presidency in 1992, however, Bill Clinton eventually finalized all negotiations by obtaining passage in the NAFTA member countries of a labor side accord to NAFTA named the North American Agreement on Labor Cooperation (NAALC).⁸⁸ On January 1, 1994 both NAFTA and the side accords⁸⁹ were brought into effect.⁹⁰ Much like the NAFTA agreement itself, the NAALC (or "the Agreement") counts among its objectives the overall improvement of working conditions and living standards in member countries.⁹¹ It primarily encourages effective labor law enforcement by each member, and it additionally seeks to "foster transparency in the administration of labor law."⁹²

⁸² [Id. at ___]

⁸³ [Id. at ___]

⁸⁴ [Cite to the original text of the NAFTA treaty.]

⁸⁵ [Cite to treaty itself (emphasis in original)]

⁸⁶ LEGAL MECANISMS FOR ENFORCING LABOR RIGHTS UNDER NAFTA, 18 U. Haw. L. Rev. 293, 295 (Hereafter to be referred to as Legal Mechanisms).]

⁸⁷ MAQUILADORAS AND WOMEN WORKERS: THE MARGINALIZATION OF WOMEN IN MEXICO AS A MEANS OF ECONOMIC DEVELOPMENT, 6 Sw. J.L. & Trade Am. 177, 195 (Hereafter to be referred to as: Maquiladoras and Women Workers.)]

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⁸⁹ [(Another accord, the Side Agreement on Environmental Cooperation, was passed at the same time.)]

⁹⁰ [See LEGAL MECHANISMS, at 295]

⁹¹ [See NAALC, 32 I.L.M. 1499, 1503; (The seven objectives of the Agreement are to: a) improve working conditions and living standards in each Party's territory, b) promote, to the fullest extent possible, the Labor principles set out in Annex 1 (see FN 31?), c) encourage cooperation to promote innovation and rising levels of productivity and quality; d) encourage publication and exchange of information, data development and coordination, and joint studies to enhance mutually beneficial understanding of the laws and institutions governing labor in each party's territory; e) pursue cooperative labor-related activities on the basis of mutual benefit; f) promote compliance with and effective enforcement by each Party of its labor law; and g) foster transparency in the administration of labor law.]

⁹² [Id.]

Beyond the embracement of such ideals, the NAALC further sets out a series of labor related "obligations" to be met by the member countries.⁹³ But, rather than enunciating specific criteria by which to judge existing labor conditions or specific enforcement standards by which member countries must abide, the Agreement instead defers to each member nation's laws and regulations and imposes minimum obligations on members. The Agreement encourages members to effectively enforce their existing labor laws "through appropriate government action", and it mandates that persons with legally recognizable interests have recourse to their nation's "administrative, quasi-judicial, judicial or labor tribunals" for this purpose.⁹⁴ Finally, members are required to ensure some adequate measure of due process (this provision apparently to be understood within the context of local constitutional guarantees and not in accordance with any universal standards), including public hearings (except "where the administration of justice otherwise requires") and with final decisions put into writing, "preferably" stating the decision's rationale.⁹⁵ Notably, neither decisions made in accordance with local laws nor related proceedings may be revised or reopened under the Agreement.

The NAALC administrative apparatus is known as the Commission for Labor Cooperation ("the Commission"), which is comprised of the Ministerial Council and the Secretariat and which is assisted by a National Administrative Office (NAO) established within each country.⁹⁶ The Ministerial Council ("the Council") is staffed by cabinet level appointees from the US, Mexico, and Canada. As the governing body of the Commission, the Council establishes the priorities and sets the agenda for the Secretariat or any other groups convened by the Council. The Secretariat operates to support the Council, both by drafting the Commission's budget for the Council's approval and by preparing background reports and studies on labor issues in member countries.⁹⁷ The NAOs serve as the interface between member countries, between the government agencies within each country, and between each country and the Secretariat. Each NAO also solicits public commentary on the labor practices of other member countries, a listing of which is periodically published.

Public participation is further encouraged under the Agreement by allowing the creation of national committees in each country. Citizens of each nation, including labor and business organizations, may form a National Advisory Committee to advise their government on issues that arise under the agreement.⁹⁸ Representatives of federal, state or local governments may participate in Governmental Committees established for the same purpose.

While private parties are thus allowed the opportunity to publicly express their labor related concerns through the NAALC, the Agreement contains no provisions for private parties to take direct action against any party for compensation for their labor related injuries, or to mandate the enforcement of existing labor laws. The NAALC instead permits outside parties to submit their complaints to the Commission for dispute resolution. The Commission may eventually issue a Final Report on the matter containing a "mutually satisfactory action plan" by which the parties agree to resolve their dispute and carry out the recommendations of an arbitral panel established by the Council.⁹⁹ Only when the country complained against is found not to be

⁹³ [Id at 1503-04.]

⁹⁴ [Id.]

⁹⁵ [Id.]

⁹⁶ [Id.]

⁹⁷ [Id. at 1506]

⁹⁸ [Id.]

⁹⁹ [Id. at 1511]

fully implementing this action plan will monetary fines be assessed. These fines may not exceed .007 percent of the total trade in goods between the countries in the most recent year on which data is available, and the money is to be spent by the Council to enforce labor laws in the country complained against.¹⁰⁰ Even if this dispute system were operating efficiently, it would take well over two years for any final resolution to occur.¹⁰¹

A. What are the formal procedural steps under the NAALC labor side accord, whereby Mexican workers or their representatives can raise labor-related grievances?

The length and complexity of a succinct yet thorough outline of the numerous procedures involved in the NAALC dispute resolution process itself serves to illustrate why the process is choked with delays and likelier than not to become sidetracked into oblivion. In the nine years of the NAALC's existence, not one of the eleven submissions brought forward under its auspices has survived long enough to invoke the final arbitration process by which monetary fines or the suspension of trade benefits could be assessed, or indeed any concrete steps need be taken beyond the "consultations" stage. [*Double-check facts and at least mention the Commission Reports at this point.*] The outline below will convey some of the complexities involved so that the reader may better understand why this is so, and it will also provide background information helpful to understanding the status of recent submissions, a summation of which will follow. It may also prove useful to those groups who, despite the NAALC's limitations, may still find the NAALC forum worthwhile as a means to help raise public consciousness and stimulate public pressure on politicians to more seriously address labor issues South of the Border.

The NAO serves as the primary point of contact for outside persons or groups seeking to submit claims against member countries under the NAALC accord alleging governmental failure to address persistent labor-law violations occurring within their respective borders.¹⁰² Any interested person or group may submit a claim with the US NAO pertaining to labor law matters within another member country.¹⁰³ Once submitted, the US NAO Secretary must decide within 60 days whether the claim merits further review.¹⁰⁴

The general guideline is that the US NAO Secretary will review any submission raising labor law issues arising in the territory of another party to the Agreement¹⁰⁵, provided that certain prerequisites are met. The submission must be signed and dated, adequately specify the relief requested, and it must include any supporting documentation available to the submitter.¹⁰⁶ The submission, "to the fullest extent possible", must address and explain: a) whether the issues

¹⁰⁰ [Id. at 1516]

¹⁰¹ [NAFTA AND WORKER RIGHTS: AN ANALYSIS OF THE LABOR SIDE ACCORD AFTER FIVE YEARS OF OPERATION AND SUGGESTED IMPROVEMENTS, Barry LaSala, 16 Lab. Law. 319, 326.]

¹⁰² [NAALC at 1507 (Article 16(3)), "Each NAO shall provide for the submission and receipt...of public communications on labor law matters arising in the territory of another Party"; *See also*, The Agreement, Article 49 [*double-check whether this is actually how this section reads or whether Annex 1 is referenced here instead.*] ("labor law" means laws and regulations, or provisions thereof, that are directly related to: (a) freedom of association and protection of the right to organize; (b) the right to bargain collectively; (c) the right to strike; (d) prohibition of forced labor; (e) labor protections for children and young persons; (f) minimum employment standards, such as minimum wages and overtime pay...(g) elimination of employment discrimination on the basis of grounds such as race, religion, age, sex, or other grounds...(h) equal pay for men and women; (i) prevention of occupational injuries and illnesses; (j) compensation in cases of occupational injuries and illnesses; (k) protection of migrant workers.")]

¹⁰³ [59 FR 16660, 16661 (Section F(1)).]

¹⁰⁴ [Id at 16661 (Section G(1)).]

¹⁰⁵ [Id (Section F(1)).]

¹⁰⁶ [Id (Section F(2)).]

raised demonstrate actions in contravention of a Party's general obligations under Part Two of the Agreement¹⁰⁷, b) the extent of any resulting harm to the submitter or to others, c) if the matters alleged demonstrate another Party's consistent failure to enforce its own labor laws, and d) the existence and status of any relief sought under the domestic laws of another Party or through any international body.¹⁰⁸ The Secretary may reject the submission outright if it fails to express this information with sufficient clarity to allow an appropriate review, fails to allege non-compliance with a Party's obligations under the Agreement, or else fails to demonstrate either that relief was unsuccessfully sought domestically or that the matter is not pending before an international body.¹⁰⁹ Finally, if the submission concerns factual issues already raised by a previous submission, it will not be considered for review unless new and significant information has been made available.

Provided that the complaint has been accepted for review, the US NAO may conduct a further factual investigation of its own.¹¹⁰ The Secretary will, at minimum, conduct a public hearing on the matter unless this is deemed inappropriate.¹¹¹ Notice of the hearing will be published in the Federal Register¹¹² at least 30 days in advance, along with instructions for the submission of oral or written testimony. In furtherance of its investigation, the NAO may request consultations with another NAO to discuss, "its labor law, its administration, or labor market conditions in its territory."¹¹³ The requested NAO is then obligated to provide relevant public data, including all appropriate laws, regulations, policies, etc., any proposed changes therein, and any other clarifying information. The Secretary of the NAO of another Party or his or her representative may, in turn, participate in the hearing.¹¹⁴ The Secretary conducting the hearing is required to publish a public report that summarizes the proceedings along with any findings or recommendations within 120 days from the submission's acceptance for review, unless "circumstances require" a 60-day extension.¹¹⁵ *[Get another copy of the Agreement to make sure you differentiate properly between procedures applicable to all members and those rules applicable only to the US NAO in its Rules and Procedures.]*

If the US NAO Secretary finds that initial consultations with the NAO of a Party under investigation have not produced satisfactory results, he can recommend that the Secretary of Labor request ministerial consultations under Article 22 of the NAALC.¹¹⁶ Ministerial consultations occur between cabinet level labor officials in the respective governments, namely the US Secretary of Labor and the Labor Ministers of Canada and Mexico. No publicly available protocols exist concerning the consultation process.

If the NAO Secretary finds that ministerial consultations prove unsatisfactory, he may recommend that the Secretary of Labor convene an Evaluation Committee of Experts (or

¹⁰⁷ [32 I.L.M. at 1503 (See also discussion above at p. 9; Party obligations include government enforcement of labor laws, the right of private action in administrative or judicial tribunals for the enforcement of labor laws, adequate procedural guarantees, and the availability of public materials concerning relevant laws and adjudications.)

¹⁰⁸ [59 FR at 16661 (Section F(2)(a) to F(2)(e)).]

¹⁰⁹ [Id (Section G(3)).]

¹¹⁰ [Id at 16662 (Section H(1)).]

¹¹¹ [Id at 16662 (Section H(3),(4),(5)).]

¹¹² [Explain the Federal Register and how to find the notice in lay terms.]

¹¹³ [32 I.L.M. at 1507-08 (Article 21).]

¹¹⁴ [59 FR at 16662 (Section H(7)).]

¹¹⁵ [Id (Section H(8)).]

¹¹⁶ [Id (Section I(1)) (See also 32 I.L.M at 1508 (Article 22(2) (Interested Third Parties may participate in the ministerial consultations on notice to the other parties).)]

"ECE"), pursuant to Article 23 of the Agreement, provided that the matters under consideration do not fall within the scope of certain exceptions¹¹⁷. If this occurs, the Council will select two individuals to serve on the ECE from a roster of up to 45 experts in labor law or other relevant disciplines appointed and retained by the Council. The Council will then select an ECE chairperson from another roster of twelve experts established in consultation with the International Labor Organization (or "ILO").¹¹⁸ According to the official criteria, roster members are chosen based upon their, "objectivity, reliability, and sound judgment", and they must remain unaffiliated with any Party or with the Secretariat.¹¹⁹ The ECE's mandate, as defined under Article 23 of the NAALC, will be to "analyze, in the light of the objectives of the Agreement and in a non-adversarial manner, patterns of practice by each Party in the enforcement of its occupational safety and health or other 'technical labor standards'¹²⁰ defined in the Agreement"¹²¹.

Although only ECE members may take part in that body's deliberations, outside persons or organizations may make written submissions to the ECE or may participate in an open information forum.¹²² Members are free, in fact, to consider any information provided at all by outside experts, organizations or institutions, or the public.¹²³ Parties to the dispute and all others wishing to make written submissions to the ECE must do so by delivering an original and six copies to the Secretariat within 30 days following a request for submissions.¹²⁴ The ECE may also invite both entities and persons possessing relevant expertise and the general public to attend an open information forum to share their viewpoints or provide additional data to the ECE, allowing it to provide a fuller analysis in its final written evaluation.¹²⁵ The Secretariat must notify the parties at least fourteen days in advance of the date, time, and location of the forum and provide adequate public notice.¹²⁶

The ECE is allowed 120 days from its date of establishment to present a draft report for consideration by the Council, followed by a final report due 60 days thereafter.¹²⁷ The draft report contains the E.C.E.'s general assessment and conclusions concerning the dispute along with any practical suggestions it has to offer. The Parties are then allowed 14 days to submit

¹¹⁷ [US NAO Procedures (Section I(2)); The Agreement, Article 23 (1),(3),(4) (No non-trade related matters or matters not covered by mutually recognized labor laws; any matter previously the subject of an ECE report must concern sufficient new information to warrant another report).

¹¹⁸ [Rules of Procedure for Evaluation Committees of Experts of the North American Agreement on Labor Cooperation (hereafter referred to as the "ECE Rules of Procedure"), Rules 18, 19(a), 21, 22).]

¹¹⁹ [ECE Procedural Rules, Rule 19(b)(c)]

¹²⁰ [The Agreement, Article 49 ("technical labor standards' means laws and regulations...that are directly related to subparagraphs (d) through (k) of the definition of labor law" -supra FN 31).]

¹²¹ [The Agreement, Article 23(2); ECE Rules of Procedure, Rule 27.]

¹²² [Id, Rules 35, 43.]

¹²³ [Id, Rule 57.]

¹²⁴ [Id, Rule 35 (The Secretariat ensures that ECE requests for written submissions be given appropriate public notice.); *See also* Rule 36 (Written submissions must clearly indicate the persons and organizations making the submission, including the address, and all submissions exceeding 10 pages must include an executive summary.); *But see* Rules 39-41 (Any information or information source may be kept confidential upon the submitter's request or if deemed necessary by the Secretariat.)]

¹²⁵ [Id, Rule 44.]

¹²⁶ [Id, Rules 43, 44; *See also* Rule 50 (Outside parties wishing to participate in the forum must advise the Secretariat at least 10 days before the forum begins and must deliver a list of representatives wishing to address the ECE no later than 5 days beforehand.)]

¹²⁷ [Id, Rules 59, 62.]

their own views on the draft report, and they are given another fourteen days to comment on each other's views to the ECE, via the Secretariat.¹²⁸ The ECE is then obligated to give these comments and views due consideration in preparing its final report.

Upon presentation of an ECE final report to the Council, the NAO Secretary may advise the US Secretary of Labor concerning the pursuit of dispute resolution under Part Five of the Agreement, if the matter has not been resolved to the Secretary's satisfaction.¹²⁹ Also, following presentation of an ECE final report addressing "occupational safety and health, child labor, or minimum wage technical labor standards", any party to the Agreement may pursue consultations with the party under investigation concerning whether it has failed to adequately enforce the standards addressed in the report.¹³⁰ The Agreement further allows any third party believing that it has a "substantial interest" in the matter to participate in the consultations, provided they give written notice to the other parties and to the Secretariat.¹³¹

If the parties to the matter fail to resolve their differences within either sixty days of delivery of the request for consultations or another agreed upon period, any party can request a special session of the Council.¹³² The Council must then convene within 20 days to assist the parties by any means necessary to reach a "mutually satisfactory resolution", including the creation of technical advisory panels or through mediation and dispute resolution procedures.¹³³ The Council may alternately defer taking further action where it finds that some other treaty or arrangement between the parties controls the matter.¹³⁴

Finally, if nothing has been resolved within sixty days after the Council has been convened, it may assemble an arbitral panel to rule on the matter upon written request by any consulting party and subject to agreement by a two-thirds majority vote, provided further that the allegations are trade related and covered by mutually recognized labor laws.¹³⁵ The arbitral panel will contain five members chosen from a roster of persons meeting qualifications similar to those for the ECE roster, although panelists may not have previously served on an ECE or in any other technical advisory capacity pertaining to the same dispute, and they may not have a personal interest at stake.¹³⁶ The panel's mandate, unless agreed upon otherwise at least twenty days in advance by the disputing parties, is: "to examine, in light of...the agreement...whether there has been a consistent pattern of failure by the party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards, and to make findings, determinations and recommendations" accordingly.¹³⁷ Once again, third parties with a stake in the proceedings are invited to participate, provided they give notice to the parties and to the Secretariat within seven days of the Council's decision to convene the panel. This entitles third parties to attend all hearings, make written and oral submissions to

¹²⁸ [Id at 60.]

¹²⁹ [NAO Procedures, Section I(3).]

¹³⁰ [NAALC, Article 27(2).]

¹³¹ [Id, Article 27(3).]

¹³² [Id, Article 28(1).]

¹³³ [Id, Article 28(3),(4).]

¹³⁴ [Id, Article 28(5).]

¹³⁵ [Id, Article 29]

¹³⁶ [Id, Article 30, 31 (*See also* Article 32: The panelists are actually chosen by the disputing parties themselves, each selecting two panelists whom are citizens of the *other* Party; the chair of the panel is chosen either by mutual agreement, or failing agreement, by the disputing party chosen by lot, who must select a chair not a citizen of his or her own party.)]

¹³⁷ [Id, Article 33.]

the panel, and to receive the written submissions of others.¹³⁸ The disputing parties are themselves granted, at minimum, a right to at least one hearing before the panel and the opportunity to make initial and rebuttal written submissions.¹³⁹

The panel is allotted 180 days, unless the disputing parties agree otherwise, to draft an initial report outlining its factual findings, including most importantly whether the party complained against has persistently failed to enforce its labor standards in the areas specified under the Agreement, or such other determination as the Council may require.¹⁴⁰ If a persistent pattern of non-enforcement is actually found, the report will additionally include the panel's recommendations to rectify the situation, typically that the party under investigation implement an "action plan" to remedy its persistent non-enforcement.

The panel is allotted another sixty days to put together its final report, during which it may additionally take into consideration any written commentary submitted by the disputing parties concerning its initial report or the results of any other examinations that it finds appropriate.¹⁴¹ Panel members are also allowed the option to publish separate opinions when they cannot reach unanimous agreement on an issue. This final report is then transmitted directly to the disputing parties, who must forward the report themselves to the Council within fifteen days of receipt along with any of their own final written comments. If the panel definitively concludes in its final report that the party complained against has exhibited a persistent pattern of failure to enforce its occupational safety and health, child labor, or minimum wage technical labor standards, the parties to the dispute are given sixty days to reach agreement on an action plan in conformity with the panel's findings and recommendations.¹⁴²

If the parties cannot initially reach agreement, or if the party complained against fails to implement an agreed upon action plan to the complaining party's satisfaction, the panel may again reconvene at the complaining party's request to reassess the situation and take appropriate action.¹⁴³ It is this final stage in the dispute resolution process that can eventually lead, in theory at least, to the levy of monetary sanctions and/or trade restrictions under the NAALC. The language authorizing such penalties, however, is inordinately vague. For instance, should the parties fail to agree on a satisfactory action plan, the panel will first either create its own action plan, or it will approve any existing proposal put forward by the complaining party adequate to remedy the non-enforcement, consistent with the laws of the party complained against.¹⁴⁴ But any fines levied are at the panel's complete discretion. The guiding criteria are simply that the

¹³⁸ [Id, Article 29, 30.]

¹³⁹ [Id.]

¹⁴⁰ [Id, Article 36.]

¹⁴¹ [Id, Article 36, Section 4 (A disputing Party may submit its written comments on the initial report to the panel within 30 days of the report's publication.)]

¹⁴² [Article 38; Article 39(1)(a) (Note the burden is on the complaining party to seek panel intervention if no agreement is reached.)]

¹⁴³ [Article 39(2) (Where the parties cannot reach initial agreement on an action plan, a disputing party may request the panel reconvene no earlier than 60 days after the final report's publication and no later than 120 days thereafter. If the parties cannot reach agreement yet no timely request was made seeking panel intervention in the matter, the last action plan, if any, submitted by the party complained against to the complaining party within 60 days of the date of the final report (or other previously agreed upon period) is deemed to be established by the panel 120 days after the date of the final report.); Article 39(3) (A party may not contest an action plan's satisfactory implementation prior to 180 days from the date of the plan's establishment and may do so only during the term of the plan.)]

¹⁴⁴ [Id, Article 39(4)(a).]

panel only impose a monetary fine "where necessary", and only in accordance with Annex 39 to the Agreement, which restricts the amount of fines both directly and through various mitigating factors that panel members are directed to take into account.¹⁴⁵ Should the complaining party instead seek the implementation of a previously agreed upon plan through the panel's intervention, the panel will first independently judge for itself the necessity of its intervention prior to imposing any fine. The fine itself would again be assessed against the broadly mitigating criteria of Annex 39.¹⁴⁶

The suspension of NAFTA trade benefits could occur, theoretically, after the party complained against either failed to implement an action plan mandated previously, or else failed to pay a monetary assessment within 180 days of a panel determination.¹⁴⁷ If either alternative should occur, the complaining party could suspend its annual application of NAFTA benefits to the party complained against in an amount no greater than the last monetary assessment, and subject to the further criteria listed in Annex 41B to the Agreement.¹⁴⁸

B. Do the legal mechanisms in place under NAFTA realistically present legitimate opportunities for the redress of grievances of Mexican workers?

1. Overview of the NAALC submission process:

It must be remembered that the NAALC was intended by design to function only as a mechanism by which to encourage NAFTA member nations to enforce their own existing labor laws. This forum was not designed to adjudicate private disputes or remedy the grievances of individual parties against any government entity. The processes described above should additionally make it clear that the main emphasis within the Agreement framework is to encourage high-level diplomatic consultations and to forgo adversarial proceedings if at all possible. That is why, of the eleven general areas of labor law recognized as appropriate topics for ministerial consultations¹⁴⁹, only three areas: occupational safety and health, child labor, and minimum wage levels are subject to dispute resolution and the accompanying threat of sanctions

¹⁴⁵ [Id, Article 39(4)(b) (The panel has ninety days to make any assessment); (Annex 39 provides that no monetary assessment may be greater than .007 percent of the total trade between disputing parties as gauged according to the most recently available data. Additional criteria the panel must follow include: a) the pervasiveness and duration of a party's pattern of non-enforcement, b) the enforcement level reasonably to be expected for a party given its resource constraints, c) any rationale put forward by a party for its pattern of non-enforcement, d) a party's remedial efforts in light of a negative final report, or e) any other relevant factors).]

¹⁴⁶ [Id, Article 39(5) (The panel has sixty days in this instance to make any assessment).]

¹⁴⁷ [Id, Articles 40 (If the party complained against was previously assessed a fine for failure to implement an action plan, the complaining party may reconvene the panel 180 days after the prior determination to determine whether the party complained against once again failed to implement the plan.); Article 41(1) (Allows benefit suspension for failure to pay assessment; Article 41(2) (Allows benefit suspension prior to expiration of the 180-day period under Article 40 if it is determined that the party complained against has not implemented a mandated action plan yet fines had already been assessed in the earlier agreement stage of the process, or if the panel itself had initially drafted the action plan.)]

¹⁴⁸ [Id, Article 41(3); Annex 41B (The complaining party may only increase the rates of duty on originating goods of the party complained against to the lesser of either the applicable rates in existence immediately prior to the NAFTA date of entry into force or the Most-Favored-Nation rate currently applicable. The increase may only apply for the duration necessary to collect the monetary assessment. The complaining party must first seek to suspend benefits in the sector in which the persistent pattern of non-enforcement has occurred, prior to suspending benefits in other sectors.)]

¹⁴⁹ [Cite to appropriate section in the Agreement where consultations are discussed; cite to corresponding language defining 'labor' law/Annex 1.]

or trade restrictions. This is also why even the "non-adversarial" and ostensibly neutral ECE analytical process is limited in scope, with ECE's prohibited from reviewing disputes concerning what many consider to be the most fundamental of workers' rights--the rights to organize, to bargain collectively, and to strike.

Not unsurprisingly, the Agreement has failed to significantly advance progress towards the fulfillment of its stated objectives¹⁵⁰, given its restricted sphere of operation, various procedural limitations, and often pointedly ambiguous language that promotes political conciliation and inaction instead of results. Even within the context of its primary focus to ensure member compliance with existing domestic labor laws, little concrete action has been taken. No recommendation or consultation pursuant to the Agreement has ever required a Secretary or Minister to undertake any formal or informal action to remedy a legal violation, correct any actions by government agencies, alter any procedures, or attempt to modify any laws.¹⁵¹ As outlined further in the summations below, a submission under the Agreement will typically lead only to ministerial consultations, a mysterious process that takes place behind closed doors, and one which is likely to result in no more than a stilted declaration by labor officials proclaiming their best intentions to address the issues at hand.

A more detailed analysis of factors contributing to this breakdown between theory and practice under the Agreement, as well as recommendations for the Agreement's future revision, may interestingly be found at the Commission for Labor Cooperation's own website.¹⁵² The Commission, as the international and presumptively neutral NAALC administrative arm, has, through the Secretariat, compiled a remarkable survey of academic literature, public comments, and reports submitted by various advisory committees and a special Review Committee that, along with its own analysis, comprises its 1998 review of the NAALC as mandated under the '94 Agreement itself. An inquiry to the Commission revealed that another four-year review would be under way this fall, when many of the academics either active in advisory committees or working independently on this project become available to contribute to the primary underlying research.¹⁵³ Unfortunately, a well-placed anonymous source reports that much of this primary material, of which a significant portion pertaining to the '98 review is still available on-line at the Commission website, is instead likely to be kept confidential this time around.¹⁵⁴ It is also believed that no revisions to the Agreement will be forthcoming either.

The submissions process has produced one positive result, according to many of the experts previously surveyed, and that is the increased public attention directed towards lax Mexican labor law enforcement and accompanying substandard labor conditions for maquiladora workers.¹⁵⁵ The NAALC was itself a product of compromise enacted in large part to placate unions, labor activists, and others who initially voiced strong opposition to NAFTA,

¹⁵⁰ [See FN 20]

¹⁵¹ [See NAALC - Review of the North American Agreement on Labor Cooperation (hereafter, the "NAALC Review"), Section III(C)(5) (See http://www.naalc.org/English/publications/review_annex1_3.htm.)]

¹⁵² [See http://www.naalc.org/english/publications/review_part2.htm.]

¹⁵³ [I spoke with the Executive Director of the Secretariat on August 09, 2002 concerning this issue.]

¹⁵⁴ [Id, [Professor: This info was given to me "off the record", or, as the Director put it, "on a personal basis". I'll leave it up to you how we should cite this info.]

¹⁵⁵ [NAALC Review, Part II: Highlights of Consultation Process (B)(1) (Under "Recommendations" section: "Public communications have generated a great deal of public interest and considerable attention by the media."); See also, NAALC Review, Annex 1, Section III: Submission of Public Communications (C)(1).]

owing to its likely overall negative effect for the US labor market as companies circumvented US labor laws by relocating to Mexico. Those same voices arguably must use all legitimate means, including the NAALC, to continue to drive their agenda forward. For what primarily limits the NAALC's effectiveness -i.e., its lack of a specific remedy for injured parties and endless focus on information gathering- also makes this unique forum a good place to publicly promote our overall policy goals. Unlike litigation, with its own myriad technical barriers to even bringing suit, much less nailing down a judgment against a particular plaintiff on a discreet issue, the NAALC procedure allows labor advocates to paint a broader picture concerning the larger scale patterns of workplace injustices. If the political will is lacking to force needed changes to NAALC procedures or more effective labor law enforcement in the first instance, then it is incumbent upon advocates to direct the voting public's attention to these matters and to influence their opinions accordingly. Sufficient media attention must be obtained in conjunction with each submission, however, by building an effective case for the relevancy of Mexican workers' rights to viewers, voters, and workers everywhere.

2. Status of the NAALC submissions filed by the US NAO against the Mexican Government (beginning with the most recent): - (Note: The actual submissions along with their corresponding public hearing transcripts, commission findings and recommendations, and extensive secondary materials (outlining everything from the relevant Mexican labor laws to the review standards and informational sources utilized) is available on-line at the Department of Labor's website: www.dol.gov/ilab/programs/nao/status.htm).

a) U.S. NAO Public Submission 2001-01 (Duro Bag):

Duro Bag is a Kentucky based shopping bag manufacturer with manufacturing facilities in Rio Bravo, Taumalipas, Mexico. On June 29, 2001, the AFL-CIO and PACE International Union filed this submission in response to the Mexican Government's alleged refusal to honor Duro Bag workers' request for a secret ballot union representation election at a neutral location and under conditions free from coercion.

It was claimed that the Federal Conciliation and Arbitration Board (FCAB) overseeing the case required an oral voting procedure in which individuals had to openly declare their choice of representative in the presence of management and government officials. If this were shown to be true, the Mexican government would have violated its obligations under the NAALC's labor principles to: promote freedom of association, protect the right to organize and to bargain collectively, and develop laws, regulations, procedures and practices that protect the rights and interests of Mexican workers. Mexico would have additionally violated its obligations under NAALC Article 2.5 to: ensure that its labor laws and regulations provide for high labor standards, continue to strive to improve those standards, promote compliance with and effectively enforce its labor law through appropriate government action, ensure that its administrative, quasi-judicial, judicial, and labor tribunal proceedings are fair, equitable and transparent, and to ensure that parties to these proceedings can seek remedies to enforce their labor rights. Lastly, the Mexican government would have failed to enforce its own laws, including its own Constitution and federal laws, meant to protect workers' freedom of association and their right to organize and bargain collectively.

On February 22, 2002, the U.S. NAO declined to accept the submission for review, after concluding that this would not further the objectives of the NAALC. Presumably this occurred because the submission failed to allege Mexico's "consistent failure" to enforce its own labor laws. But this rationale would fail to fully take into account that Mexico had already committed itself to ensuring secret ballot union elections in neutral voting places, pursuant to an

earlier Ministerial Agreement stemming from previous NAALC submissions, thereby tacitly acknowledging a prior pattern of failure on its part to ensure fair elections.

b) Submission No. 2000-01 (Auto Trim and Custom Trim/ Breed Mexicana)

Auto Trim and Custom Trim/ Breed Mexicana, based in Matamoros, Mexico, manufacture auto parts, including leather steering wheel and gearshift covers, and are owned by auto parts supplier Breed Technologies, Inc., headquartered in Lakeland, Florida. On July 3, 2000, current and former workers at Auto Trim and Custom Trim/Breed Mexicana, along with the Coalition for Justice in the Maquiladoras and over 20 other unions and nongovernmental organizations in Canada, the U.S., and Mexico, filed this submission, claiming that the Mexican Government failed to investigate numerous petitions sent by workers to federal agencies, detailing hazardous workplace safety and health conditions and improper medical treatment and compensation.

On September 1, 2000, the U.S. NAO accepted the submission for review. It was found that the workers raised legitimate concerns regarding the transparency, independence, and fairness of federal inspection procedures for the monitoring and reporting of workplace accidents and illnesses. Federal workplace inspection reports indicated worker interviews were not confidential, which made it unlikely workers would provide information critical of their employer. Inspectors used a "checklist" approach to inspections; the existence of safety systems and documentation were noted, but the systems were not actually tested for functionality. Further, inspection reports did not evaluate ergonomic conditions that directly effected worker health and comfort in a work environment requiring strenuous, repetitive manual labor. Workers gave credible testimony regarding their employer's medical staff's unwillingness to send workers to the Mexican Social Security Institute (IMSS) for treatment or for IMSS doctors to diagnose injuries as work-related. A clear conflict of interest was shown because certain IMSS doctors work for both employers and the IMSS.

Although the U.S. NAO found evidence indicating that the Secretariat of Labor and Social Welfare (STPS) responded to the submitter's 1998 petition for inspection, there was no evidence officials ever communicated this fact to anyone despite numerous inquiries by workers and their representatives. There was also credible information that the Mexican government received similar petitions sent by the submitters in 1999, although the government denied their receipt.

In conclusion, the U.S. NAO recommended ministerial consultations pursuant to Article 22 of the NAALC on the occupational safety and health and worker compensation issues raised in the submission. These consultations eventually resulted in a "Ministerial Consultations Joint Declaration" signed by the U.S. Secretary of Labor and the Mexican Secretary of labor and Social Welfare. In addition to platitudes too numerous and inconsequential to repeat here, the parties agreed to undertake, in summary, the following relevant activities: 1) the exchange of information among labor officials of the United States and Mexico, and 2) the establishment of a "bilateral working group of experts on occupational safety and health issues" charged to discuss and review issues related in the submission, including the development of "technical recommendations", and identification of other occupational safety and health issues appropriate for bilateral cooperation.