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Trade Secrets: The Hidden Costs of the FTAA

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Publication Date

2002

The John F. Henning Center for International Labor Relations presents...

UNDERSTANDING THE FREE TRADE AREA OF THE AMERICAS

A workshop for trade unions and community groups to accompany
the short film **Trade Secrets: The Hidden Costs of the FTAA**

Included in this packet:

- A. Facilitator's Guide
- B. Talking Points
- C. Participant's Handout
- D. Education Role Play
- E. Health Care Role Play
- F. Background Articles



To receive an updated version of this workshop or schedule a training, call
us at (510) 642-0323 or visit our website: <http://henningcenter.berkeley.edu>.

A project of the Center for Labor Research and Education, UC Berkeley.

FTAA Workshop Facilitator's Guide

Objectives

- To develop an understanding of key issues in global trade debates.
- To explore how trade agreements, particularly NAFTA and FTAA, may directly impact the lives of participants.

Time: 1 hour and 10 minutes including optional sections

Materials

- Video - Trade Secrets: The Hidden Costs of the FTAA
- TV and VCR
- Photocopies of Handout and Role Play character cards (optional)
- Flip Chart and Markers

1. Introduction (5 minutes)

Begin by introducing yourself and giving an overview of today's workshop.

Point out that in the past few years, "globalization" and "free trade" have become buzzwords. Many of us know about or even participated in the protests that took place in Seattle and other cities in opposition to the World Trade Organization, and we all know about the debates surrounding NAFTA – the North American Free Trade Agreement. Today we want to take some time to look at what those debates are all about – and what they mean for each of us, in our workplaces, and in our communities. We will see that "trade" and "globalization" are not foreign issues, or issues that affect only certain industries. They affect all people in virtually all sectors of society, and in ways we might not expect.

We're going to focus our discussion today on the next big threat of corporate globalization and so-called "free trade" – the Free Trade Area of the Americas or FTAA. The FTAA is a plan to extend NAFTA to the rest of the hemisphere, except for Cuba. It would be the most far-reaching free trade agreement ever negotiated.

It is important that we talk about the FTAA now because representatives of our government and 33 other governments in the Western Hemisphere have already begun negotiating the agreement and want to finalize it by 2005. We have a limited window of opportunity to affect these negotiations, before they become permanent.

Video
Screening

2. **Video – Trade Secrets: The Hidden Costs of the FTAA** (15 minutes)

Introduce the video. We're going to watch a short film about the FTAA and NAFTA. While we're watching, think about how the themes in the movie affect you and your community or how they could affect you in the future. Play the video.

Discussion
Questions

3. **Video Debrief** (10 minutes)

Ask participants to reflect briefly on the film. The following questions may be useful to provoke discussion. You may wish to focus on issues most important to the unions or community groups in attendance. Record a list of "Impacts of NAFTA and FTAA" on the flip chart.

Refer to the attached "Talking Points on FTAA" to supplement discussion.

- What was most distressing in the video?
- What are some ways that you have seen NAFTA impact the industry where you work?
- Has there been job loss due to downsizing?
- Has your employer talked about moving production abroad?
- What do you know about your employer's practices overseas?
- Can you imagine what would happen if your children's school were privatized and began charging tuition?
- How would life be different if there were no publicly supported hospitals? No postal services? No child care?
- What public health or safety laws are important in the workplace where you work? What would happen if those laws were taken away?
- What kinds of training and licensing standards are important in your workplace? What would happen if those policies were made illegal?
- Can you imagine which laws the corporations in your industry would like to get rid of if they could?
- What principles do you think should govern the globalization of commerce?
- Are there issues you think the video missed?

Hand out:
Under-
standing
the FTAA

4. **Sum-up** (10 minutes)

Pass out the "Understanding the FTAA" handout. Review the major themes covered in the "FTAA Talking Points."

Conclude by pointing out that trade and the globalization of commerce are not bad in themselves. But the rules that govern how we trade and how our corporations behave should reflect the needs of ordinary people, not just the interests of corporations. Let them know that they can learn more about "fair

trade” alternatives to corporate-sponsored trade agreements in the Further Resources section of their handout.

Interactive
Role Play

5. **Role Play** (25 minutes - Optional)

Explain that the group is now going to play out a fun and interactive role play to explore how the FTAA could impact each of us directly. Have participants perform the Education or Health Care Role Plays included in this packet. Notice that the role plays require prior preparation by the facilitator.

Conclusion

6. **Taking Action** (5 minutes or longer)

Conclude by reminding participants that the FTAA is currently being negotiated. Fortunately, there is still time to defeat it.

We suffered a set back this summer when Congress granted President Bush Fast Track negotiating authority. Under Fast Track, the Congress must vote “yes” or “no” on any trade agreement the President negotiates, with no amendments, and only 20 hours of debate.

When President Bush brings FTAA to Congress, we need to make sure our representatives feel pressure to vote no. There is still time get out the word out about FTAA. And there are plenty of things to do.

Lead a short brainstorming session on what participants would like to do together to take action. Ask them what strategies they think would effective to educate our communities and elected officials about the dangers of FTAA. Write ideas down on the flip chart. If feasible, make concrete plans and delegate tasks.

Here are some ideas to supplement discussion:

- **Educate your co-workers and community.** Hold workshops, video screenings, and town hall meetings at your union, church, and other community settings. You may wish to use the attached resolution against the FTAA as a starting point. You can also distribute the attached survey on the local impacts of the FTAA as way to begin dialogue. Revised surveys, tallied results, and other useful tools are available at: www.peoplesconsultation.org.
- **Contact your elected officials.** Send a letter to your elected representative with your concerns – a sample letter is included in the handout packet. You can also ask your senator or congressperson to sign a pledge to vote no on any FTAA proposal modeled after NAFTA. You can see how your representative stands on these issues at www.tradewatch.org.

- **Participate in the movement to defeat corporate globalization.** Link up with the growing social movements aimed at transforming the World Trade Organization, the IMF & World Bank, and other global governance bodies that undermine our democracies. Mass protests are planned every year, focusing on both these international organizations as well as local targets. For details, visit www.globalexchange.org and www.aflcio.org/globaleconomy.

TALKING POINTS ON THE FTAA

- 1) **What is the Free Trade Area of the Americas (FTAA)?** The FTAA is a plan to extend NAFTA to rest of the Western Hemisphere – except for Cuba – encompassing a total of 34 countries and over 800 million people. Scheduled for completion in 2005, it would be the most far-reaching “free trade” agreement ever negotiated. By all accounts, the FTAA would look like a vastly expanded NAFTA. So to know what to expect from FTAA, we need to look at NAFTA’s record.

- 2) **The FTAA would pit workers against each other and drive down labor standards.** The FTAA, like NAFTA, would eliminate border taxes between member nations, making it easier for companies to relocate production abroad. Under NAFTA, many US based companies moved production to Mexico to take advantage of lower wages and weaker environmental regulations. As a result of job flight, and a growing trade deficit with Mexico, the U.S. lost more than 766,000 jobs due to NAFTA. Employers have also used just the threat of relocating their plants to bust union organizing drives. Meanwhile, in Mexico, workers have seen little benefit from the increased business - real wages have actually declined and poverty has increased. Under the FTAA, the race to move jobs to where labor is cheapest is likely to accelerate. Workers in North America will now be pitted against even more desperate workers in countries like Haiti, where the minimum daily wage is about \$1.35 and more than half of the work force is jobless or underemployed. And, like NAFTA, the proposed FTAA would include no enforceable worker rights protections to prevent the exploitation and abuse that is now rampant in many impoverished countries of the region.

- 3) **The FTAA would be disastrous for workers in Latin America.** Mexico’s workers have suffered greatly in the new economy that NAFTA created. Just as NAFTA encouraged investors to move capital into Mexico, it also made it easier to move money out. Beginning in 1994, nervous investors and currency speculators pulled billions of dollars out of the country, leading to a severe currency devaluation and economic crisis. Wages dived and more than 4 million Mexican people were plunged into “severe” poverty (surviving on less than \$2 a day). Meanwhile, the dumping of U.S. corn and other products into the Mexican market forced hundreds of thousands of rural families to move into the cities to find work – often in highly exploitative “maquila” factories with sweatshop conditions – and to migrate north to the U.S. The FTAA would push the NAFTA model onto 31 more countries in Latin America and the Caribbean with impoverished economies similar to Mexico. This is why ORIT, the trade union confederation that represents 45 million men and women workers throughout the Americas, has launched an urgent campaign to defeat the FTAA.

- 4) **The FTAA would let private companies challenge public interest laws in secret tribunals.** NAFTA was the first free trade agreement in history to allow individual corporations the right to sue governments in a legally binding, private tribunal if they feel that a government policy has hurt their profits, even if the policy was designed to protect public health, workers rights, or the environment. Corporations have already used NAFTA to successfully challenge and overturn democratically enacted laws in each NAFTA country, in some cases winning millions of dollars in damages. (In one case still pending, a Canadian firm, Methanex, is suing the U.S. for \$970 million because California banned Methanex’s product MTBE, a gasoline additive linked to cancer.) Under the FTAA, these unprecedented corporate rights would be expanded to many new sectors. Down the road, pro-labor policies, like living wage ordinances, prevailing wage laws,

project labor agreements, anti-sweatshop procurement policies, right to organize laws, and ergonomics standards could all be challenged and overturned.

- 5) **The FTAA would lead to the privatization of essential public services.** Under proposed FTAA rules, government-run service programs are subject to free trade rules just like private service providers. This means that companies could claim that taxpayer support for public programs, like education and health care, violate free trade principles by making it harder for foreign companies to compete. If the companies' cases were successful, governments would have to stop funding all sorts of public programs or offer the same funds to private companies – leaving fewer resources for already starved public services. While similar claims have already been brought under NAFTA, they are likely to multiply under FTAA as more services are covered by trade rules. Public programs that could be affected include: child care, elder care, museums, libraries, law, social assistance, architecture, energy, water services, environmental protection services, tourism, transportation, broadcasting and many others.
- 6) **The FTAA is being negotiated in secret.** Since plans for the FTAA were first announced in 1994, all negotiations between government representatives have taken place behind closed doors. While unions and citizen's groups have repeatedly been denied access to draft documents, more than 500 corporate leaders have been given privileged security clearance through the FTAA's Trade Advisory Committee.
- 7) **There are alternatives to corporate-sponsored "free trade."** During the past several years, unions and community organizations from across the hemisphere have been working together to develop alternative proposals for "fair trade," based on the needs and interests of working families. These proposals include: enforceable protections for worker rights and the environment; national sovereignty and the right to enact public interest laws without being challenged in secret tribunals; and the ability to control financial speculation and obtain much-needed debt relief.

Adapted from the AFL-CIO's "The Free Trade Area of the Americas - Expanding NAFTA to the rest of the Hemisphere" and Global Exchange's "Ten Reasons to Oppose the Free Trade Area of the Americas"

UNDERSTANDING THE FREE TRADE AREA OF THE AMERICAS

What is the Free Trade Area of the Americas (FTAA)?

The FTAA is a plan to extend NAFTA to rest of the Western Hemisphere – except for Cuba – encompassing a total of 34 countries and over 800 million people. Discussion about the agreement began in 1994 at a meeting of trade ministers and business leaders in Miami, but negotiations did not get off the ground until 1998 at a second Summit of the Americas in Santiago, Chile, where participants agreed on a set of objectives, principles, and structure. Since then, negotiating committees have been meeting in secret, with the goal of finalizing the accord by 2005. Throughout this process, labor and citizen's groups have not been allowed to participate in negotiations or even see a draft text, and have had to rely on leaked documents and limited briefings. But by all accounts, the FTAA will look like a vastly expanded and strengthened NAFTA. Thus, to understand FTAA, we need to examine NAFTA's record.

How will the FTAA impact labor standards?

The FTAA, like NAFTA, would reduce tariffs (border taxes) between countries, making it easier for companies to relocate production and invest abroad. Under NAFTA, this has meant:

- **Job Loss**

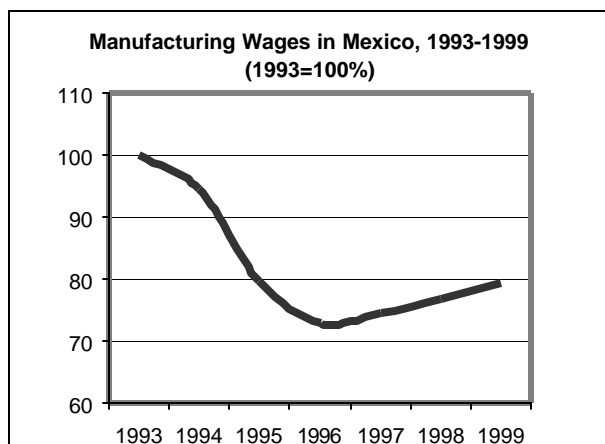
Many U.S. based companies have taken advantage of the lower wages and weaker environmental protections in Mexico and moved production there. As a result of job flight, and a growing trade deficit with Mexico, the US has lost more than 766,000 jobs due to NAFTA. ⁱ

- **Union Busting**

Companies have used the threat of moving overseas to bust unions. A study of a five-year period under NAFTA found that 90% of 400 plant closings or threatened plant closings in the US occurred illegally during union organizing drives. ⁱⁱ

- **Poverty**

Despite the influx of jobs, Mexican workers have seen little benefit from NAFTA. As a result of an economic crisis and currency devaluation triggered by the agreement, between 1993 and 1999, average manufacturing wages fell more than 20%, while the Mexican minimum wage fell nearly 18%. More than 4 million Mexican people have been pushed into severe poverty. ⁱⁱⁱ



THE FTAA AND PUBLIC INTEREST LAWS

Many people are aware that free trade has caused job loss for American workers. But most of us are not aware that free trade agreements like the NAFTA and FTAA have given corporations unprecedented new powers.

NAFTA's Investor Rights: NAFTA was the first trade agreement in history to allow individual corporations the right to sue governments in a special tribunal if they feel that a government policy has hurt their profits or anticipated profits, even if the policy was designed to protect public health, workers rights, or the environment. These rights are housed under NAFTA's Investment Rules in Chapter 11. The FTAA would extend Chapter 11 to 31 more countries and expand its scope to include new sectors.

What laws and policies could the FTAA endanger?

- **Public Health and Environmental Laws**

NAFTA's Investor Rights can mean citizens have to pay corporations not to pollute. For example, the American company Ethyl corporation used a NAFTA Chapter 11 law-suit to force Canada to pay \$16 million in damages for temporarily banning Ethyl's chemical MMT, a gasoline additive linked to nerve disease. Now, a Canadian firm, Methanex, is suing the U.S. for \$970 million because California banned Methanex's product MTBE, another gasoline additive linked to cancer. These are just two of more than a dozen cases brought by corporations under NAFTA. The FTAA would extend these powerful investor rights to new investors and new sectors.



- **Labor and Pro-worker Laws**

NAFTA's rules prevent member governments from considering social, environmental, or worker rights issues when making purchasing decisions. This meant, for example, that Mexico and Canada were exempted from a new Federal law that prohibits the Federal government from buying products made with child labor. If the FTAA rules cover state and local governments, pro-worker policies like living wage ordinances, prevailing wage laws, project labor agreements, anti-sweatshop purchasing policies, and right to organize laws could all be challenged and overturned. The FTAA may also require new domestic regulations to be the "least burdensome" policies available, a requirement that endangers statewide ergonomics standards, employee licensing requirements, and many other laws and policies that benefit workers.

**Pro-Worker Policies
in Jeopardy Under the FTAA**

| POLICY | EXAMPLES OF INDUSTRIES AFFECTED |
|---|--|
| Living Wage Ordinances | Hospitality, Janitorial, Home Care |
| Prevailing Wage Laws | Building and Construction Trades |
| Project Labor Agreements | Building and Construction Trades |
| Ergonomics Standards | All Public and Private Sectors, Clerical, Building and Construction Trades, Janitorial |
| Anti-sweatshop and Human Rights Purchasing Laws | Apparel, Other Manufacturing, Public Sector |
| Right to Organize Laws | All Public Sector |
| Employee Licensing & Employer Regulation Requirements | Building and Construction Trades, Health Care, Education |

THE FTAA AND PUBLIC SERVICES

From schools to hospitals to transportation, the privatization of public services has often led to diminished power for workers, more expensive and limited service, and a massive transferring of wealth from public into private hands. The FTAA would create a new, backdoor means for corporations to take over public services.

Which kinds of public services could the FTAA endanger?

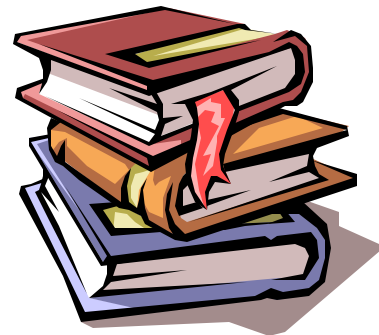
- **Postal Services**

Under NAFTA, the American company United Parcel Service is suing Canada for \$250 million, claiming that the Canadian government's support for its national postal and courier service is an unfair subsidy and puts UPS at an unfair competitive position. If UPS wins, Canada would have to compensate UPS for millions of dollars in lost profit or else overhaul and privatize part of its postal service, leaving many customers without service. Under the FTAA, lawsuits like this would become much more common, as more trade rules cover public services.



- **Education**

Worldwide, education amounts to a \$2 trillion a year industry. The financial firm Merrill Lynch predicts that that the coming decade will see dramatic increases in the privatization of K-12 education, while Leyman Brothers has pronounced the education industry "the final frontier for a number of sectors once dominated by public control."^{iv} By including public services under trade rules, the FTAA would help private education corporations, like Edison Inc, realize their dream of taking over public schools. Corporations could claim that taxpayer support for public schools violates free trade principles by making it harder for education corporations to compete. If they were successful, the resulting flow of public funds into private schools would resemble a private school vouchers system – on a massive scale.



- **Health Care**

The privatization of the American health care system over the past three decades has had a devastating impact on both the quality of care and quality of jobs in the health care industry. Since 1975, the US has lost one-third of its public hospitals. The FTAA could make a bad situation worse by enabling for-profit companies to privatize many services and insurance programs still under public control by granting them new rights to taxpayer funds. The FTAA's rules could also be used to challenge "overly burdensome" regulations designed to insure high quality care, such as professional licensing standards and nurse-to-patient ratios, and would enable corporations outsource work, such as X-ray analysis, abroad where wages are lower and oversight is more difficult.



TAKING ACTION

It is not too late to make your voice heard in the FTAA negotiations. Negotiators have set out to complete the agreement by 2005. But a major effort by unions and community groups could derail negotiations or defeat the FTAA in a vote in Congress.

How can you get involved?

- **Educate your co-workers and community.** Hold workshops, video screenings, and town hall meetings at your union, church, and other community settings. You may wish to use the attached resolution against the FTAA as a starting point. You can also distribute the attached survey on the local impacts of the FTAA as a way to begin dialogue. Revised surveys, tallied results, and other useful tools are available at: www.peoplesconsultation.org.
- **Contact your elected officials.** Send a letter to your elected representative to express your concerns – a sample letter is included in the handout packet. You can also ask your senator or congressperson to sign a pledge to vote no on any FTAA proposal modeled after NAFTA. You can see how your representative stands on these issues at: www.tradewatch.org.
- **Participate in the movement to defeat corporate globalization.** Link up with the growing social movements aimed at transforming the World Trade Organization, the IMF & World Bank, and other global governance bodies that undermine our democracies. Mass protests are planned every year, focusing on both these international organizations as well as local targets. For details, visit: www.globalexchange.org and www.aflcio.org/globaleconomy.

FURTHER RESOURCES

We suggest the following sampling of websites as places to begin further reading on NAFTA and FTAA. Each contains dozens of useful articles, reports, and fact sheets. You may wish to search for “FTAA,” “NAFTA,” “Globalization,” “Trade,” etc, as websites are constantly changing.

General Overviews and Background

Global Trade Watch: www.tradewatch.org
Global Exchange: www.globalexchange.org
Alliance for Responsible Trade: www.art-us.org
Peoples Consultation: www.peoplesconsultation.org

General Labor Resources

AFL-CIO: www.aflcio.org/globaleconomy
Jobs with Justice: www.jwj.org
Canadian Labor Congress: www.clc-ctc.ca

Economic Analysis and Education

United for a Fair Economy: www.faireconomy.org
Economic Policy Institute: www.epinet.org

Please also visit our website for more resources:
<http://henningcenter.berkeley.edu>

Information on the Public and Service Sector

Public Services International: www.world-psi.org
AFSCME: www.afscme.org
Canadian Union of Public Employees: www.cupe.ca
Communication Workers of America: www.cwa-union.org

Information on the Manufacturing Sector

Intl Brotherhood of Teamsters: www.teamster.org
United Steelworkers of America: www.uswa.org
Canadian Auto Workers: www.caw.ca

Official Agencies

Free Trade Area of the Americas: www.ftaa-alca.org
NAFTA Secretariat: www.nafta-sec-alena.org
US Trade Representative: www.ustr.gov

Sample Letter to Members of Congress

Dear Representative:

I hope that you will oppose FTAA, the trade agreement that, if approved, would expand NAFTA to include most of the Western Hemisphere

I feel strongly that it is important that strong labor and environmental standards be a part of any trade agreement entered into by the United States. As it stands now, the proposed FTAA agreement is virtually identical to NAFTA, except for the fact that it affects different nations. As such, it is designed to benefit multinational corporations at the expense of workers, consumers, and the environment just as NAFTA has. According to the Nation, the Mexican government estimates that Mexico's manufacture wages have dropped from \$2.20 per hour in 1994 to \$1.90 per hour in 1999, and this is only one small example.

Furthermore, I am disturbed by the determination of those involved in FTAA negotiations to keep the dealings secret. I have learned that requests for relevant documents, legal and legitimate requests under the Freedom of Information Act of 1974, have been ignored. Needless to say, this secrecy raises questions about the nature of the deal and the integrity of the corporate and government officials involved in formulating it. It also undermines the U.S. Congress's constitutional authority to oversee trade negotiation.

When President Bush brings the FTAA proposal to Congress, please vote against the agreement, unless it is revised to include strong and enforceable protection standards for workers, consumers, and the environment.

Yours truly,

(Adapted from letter by Public Citizen's Global Trade Watch)

Sample Resolution

Whereas, President George W. Bush has sought to extend NAFTA to all of Central and South America and the Caribbean – except Cuba – in a Free Trade Area of the Americas (FTAA).

Whereas, NAFTA's rules allow companies to pit worker against worker and drive down wages and working conditions. The U.S. lost hundreds of thousands of jobs due to NAFTA, as our companies relocated to Mexico to take advantage of lower wages and weaker worker and environmental protections. NAFTA includes no enforceable protections for workers or the environment.

Whereas, NAFTA gives corporations the right to challenge our laws in secret tribunals and demand compensation from governments. In one case, a Canadian company called Methanex is suing California for \$970 million dollars because the California legislature passed a law banning a toxic fuel additive that Methanex produces.

Whereas NAFTA restricts the ability of governments to regulate and provide essential public services. Pressure to deregulate and privatize services could raise the cost and reduce the quality of basic services like education and health care. Canada's right to support a government-run postal service has already been challenged under NAFTA.

Whereas, the FTAA would strengthen and extend NAFTA's rules to 31 more countries and another 400 million people. Negotiators hope to finalize the agreement by 2005.

Whereas, the FTAA is being negotiated in secret. While unions and citizens groups have not been allowed to participate in negotiations or access draft documents, more than 500 corporate representatives have been granted high-level security clearances to advise negotiators. Negotiators have refused to even form a study group on the inclusion of worker protections in the agreement.

Resolved, [Your Union or Organization] declares its opposition to a Free Trade Area of the Americas modeled after NAFTA.

Resolved, [Your Union or Organization] will support the national AFL-CIO and its affiliates in their efforts to educate union members and the general public about the dangers of NAFTA and the FTAA.

(Adapted from resolution adopted by the California Labor Federation, AFL-CIO, July 2002)

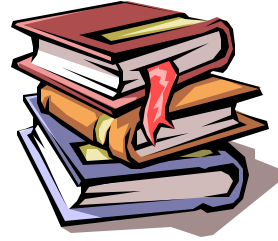
ⁱ Economic Policy Institute. 2001. "NAFTA at Seven: Its impact on workers in all three nations"

ⁱⁱ Commission for Labor Cooperation. 1997. "Plant Closings and Labor Rights: A report on the Effects of Sudden Plant Closings on Freedom of Association and the Right to Organize in Canada, Mexico, and the United States"

ⁱⁱⁱ Economic Policy Institute. 2001. "NAFTA at Seven: Its impact on workers in all three nations" & Institute for Policy Studies. 2001. "Seven Years Under NAFTA." A report by Sarah Anderson.

^{iv} International Forum on Globalization. 2001. "The Free Trade Area of the Americas: The Threat to Social Programs, Environmental Sustainability, and Social Justice." A report by Maude Barlow.

FTAA Education Role Play



Overview

Objectives:

1. To help participants gain a deeper understanding of what the FTAA could mean for ordinary people by playing out a hypothetical (but realistic) scenario about K-12 education.
2. To illustrate key international trade concepts, including Investor Rights and National Treatment.

Time Required: 25 minutes

Materials Needed:

- (10) Role Cards (cut-out before workshop)
- (5) Role Signs
- (1) Judge's Gavel (optional)

Background: The role play features a worst-case-scenario, in which a corporation uses the FTAA's rules to take control of a government-run public school. A for-profit company that manages prisons, called Last Frontiers Inc., sues a U.S state because the state subsidizes its public school system. Last Frontiers wants the same funding to run private schools. The role play is based on two key concepts about FTAA and trade generally.

- **Investor Rights:** Corporations can sue governments in a secret FTAA Tribunal if they feel that a policy has hurt their ability to make profits.
- **National Treatment:** Governments must treat foreign service providers the same as domestic providers – including even the government's own taxpayer supported services. This means private companies may have equal rights to funds for public service programs.

Preparations:

1. Make a photocopy of the character cards and signs. (You may wish make multiple copies if you have a large group).
2. Cut out all the character cards and signs from the copies.
3. Keep the original for your own reference.

Beginning

Introductions

1. **Set the stage.** The year is 2007. Two years ago the Free Trade Area of the Americas went into effect, because the labor movement and its allies could not stop the agreement from going forward. And we are now beginning to experience the first wave of assaults on public services based on the FTAA's rules.

Scene 1

2. **Pass out the cards from Card Set One.** If there are more participants than cards, make the additional participants Judges (as many as three) and make everyone else Students or Teachers.
3. **Have the participants introduce themselves in the following order.** Tell them they may ad lib if they wish. Read along on your copy of the cards and ask follow-up questions if they miss significant points.
 1. Teachers
 2. Students
 3. FTAA Judges
 4. United States Trade Representative
 5. CEO of Last Frontiers Inc.

I. The Trial

1. **Arrange the Room.** Rearrange seating to simulate a courtroom, with the judges at the front facing the plaintiffs and defendants, and everyone else behind them.
2. **Set the Scene:** Repeat that Last Frontiers has just filed a lawsuit against your state based the FTAA's rules.
 - The suit alleges that your state's taxpayer support for its public schools creates an unfair advantage for the public service system against competition from private, foreign companies like Last Frontiers.
 - These subsidies violate the FTAA's free trade principles and Last Frontiers deserves compensation for its lost profits.
3. **Set out the rules for the trial.** Read the rules aloud.
 1. The plaintiff, Last Frontiers Inc, will represent themselves.
 2. The defendant, your State, will be represented by the United States Trade Representative.
 3. The FTAA Panel has complete and final decision making authority in this case.
 4. Spectators, including teachers and students, may not participate in the court's proceedings. (In reality, they would not be allowed in the room or may not even know about the case.)
4. **Let participants make their case.** If they get stuck, try asking them follow-up questions.
 1. **Start with the plaintiff – Last Frontiers Inc.** (3 min.)
 - How is the state violating the FTAA?
 - How does state funding harm your ability to compete?
 - If you could compete freely, how would you do a better job at providing education than the current situation?

- Why should the judges rule in your favor?
- 2. **Then move to the defendant, represented by the United States Trade Representative. (3 min)**
 - How will this lawsuit affect the quality of education for our population?
 - How will it affect jobs?
 - What do taxpayers expect from the government?
- 3. **Ask the judges if they would like to ask the plaintiff or defendant any questions.**

Scene 2

II. Time-Out for Judge’s Deliberations

1. **Privately tell the Judges to rule in favor of Last Frontiers.** Ask them to caucus quietly.
2. **While the judges are deliberating, step out of the role play for a moment to discuss the case with the audience.**
 - As students, are you satisfied with the job that the USTR is doing to defend you?
 - As teachers, do you think that your interests are adequately represented in this process? What rights do you have in this situation?
3. **Instruct the Judges to announce their decision.**

Scene 3

III. One Year Later

1. **Set the Stage.** Explain that it is now one year after the trial. We’re going to see what has happened to each of us.
2. **Pass out Card Set Two to participants.**
3. **Have each participant report back to the group in the following order.** Tell participants that they are free to elaborate. Read along with your copy of Card Set Two and ask follow-up questions if necessary.
 1. Teachers
 2. Students
 3. FTAA Judges
 4. United States Trade Representative
 5. CEO of Last Frontiers Inc.

Debrief

IV. Conclusion

Have the players and the audience reflect on the play.

- What changes could FTAA make in our education system?
- How will FTAA change corporate power and government power?
- Who are the winners and who are the losers?
- What else did you learn from this role play?
- What do you think we should do about FTAA?

Conclude by pointing out that, while the scenario played out here may sound unbelievable, it is firmly rooted in the FTAA's proposed policies. The dangers of privatizing public education are real.

Worldwide, education amounts to a \$2 trillion a year industry. The influential financial firm Merrill Lynch predicts that that the coming decade will see dramatic increases in the privatization of K-12 education.

In the U.S, the Edison Corporation already runs 136 public schools, including over 75,000 students. Some of the problems described in the role play, though certainly not the most extreme ones, were inspired by a report by the San Francisco Unified School District on Edison's Charter Academy in San Francisco.

Education Role Play - Card Set One

Students

- You are students in an urban public high school.
- About 20% of you are immigrants for whom English is a second language. About 10% of you have learning disabilities. Almost all of you are from low-income families, without college-educated parents.
- Fortunately, the school has many special programs to help kids with special needs. And the school's art and music classes and sports programs make school life fun, or at least tolerable.
- But your school has recently been identified as "under-performing" because of low scores on standardized tests. There has been a lot of talk about ways to improve the scores.

Card One

School Teachers

- You are teachers in an urban public high school.
- Despite the large classes, you manage to help many students learn the skills necessary to move out of poverty, and to appreciate literature, history, and science – and have some fun doing it.
- Through your union, you have strived to make teachers' salaries high enough to attract long-term, experienced teaching staff and improve the learning environment.
- But because of low standardized test scores, your school has been labeled "under-performing." The governor has even used your school as an example of the need for more oversight over and control of teachers.

Card One

Panel of FTAA Judges

- You are a panel of appointed trade bureaucrats whose job it is to resolve disputes brought by corporations against governments under the FTAA. If you decide against a country, you can force the country to pay monetary compensation to the corporation or change its laws.
- You are never accountable to voters and can make your decisions in secret.
- Your background is in corporate trade law. You were schooled at Ivy League schools and have spent many years working at corporate law firms that help corporations avoid paying taxes.

Card One

United States Trade Representative

- When it comes to trade, you are the United States' head honcho. You serve as the President's principal advisor, negotiator, and spokesperson on trade agreements, including the FTAA.
- In the past, you've served on the board of many corporations, including Enron.
- If a corporation challenges a United States law under the FTAA, you will be in an awkward position – you will be asked to represent our country's policy against a trade agreement that you helped negotiate.
- Because of your background in Big Business, you are very attuned to the needs of companies. You won't be motivated to fight very hard to preserve the policy, but your job requires that you at least show up in court.

Card One

CEO of Last Frontiers Inc.

- You are the CEO of Last Frontiers Inc, a for-profit company, based in Brazil, that specializes in running prisons – for a profit – with taxpayer funding. You've already launched private prisons all over Latin America and even the U.S. – and made a ton of money.
- But you believe there is a real fortune to be made in contracts to run public schools. You believe your expertise in discipline and business know-how is perfect for improving test scores. And you are outraged that inefficient and poorly run public school districts have a monopoly on taxpayer funding.
- You think the FTAA may be your ticket into the education industry. So you've just launched a lawsuit against the U.S. government under the FTAA, demanding that the state provide you with the same funding it gives its public schools.
- You claim that the public school districts' monopoly over public funds discriminates against you as a foreign corporation.

Card One

Card Set Two – One Year Later

Students

- When Last Frontiers took over your school, the company announced a new “excellence through discipline” program.
- Now all students have to wear thick wool uniforms that get hot during the summer months. Between classes you have to walk single file down painted lines in the hallways.
- The school also started random urine-based drug testing and cavity searches. Getting caught results in immediate expulsion – unless you pass a difficult standardized exam.
- To cut costs and boost test scores, the school also eliminated its music, arts, and sports programs. You’re let out of class to walk around the track for half an hour each day.
- And you’ve noticed more advertisements on campus. There are Coca-cola ads on your desks and the bathrooms are sponsored by the Gap.
- You have become more and more fed up with these conditions and have started organizing walkouts and protests.

Card Two – One Year Later

School Teachers

- When Last Frontiers took over your school, the company announced a new “teaching efficiency” program.
- In one experiment, the students no longer have teachers, but instead watch lessons on mounted television sets. An armed guard stands at the back of each class.
- In the classes that you still teach, you have to read scripts written by the corporate management – all designed to raise the students’ test scores. There are surveillance cameras in each class to monitor your performance.
- You are now paid a base salary of \$18,000. The rest of your income is based on how well your students perform on the tests. Two full days each week are allotted to practice exams.
- Along with concerned parents, you’ve begun organizing protests to revoke Last Frontier’s contract for the school – but you wish you had done more to stop FTAA before it was finalized.

Card Two – One Year Later

Panel of FTAA Judges

- You have since moved on to rule in other cases that have led to the privatization of the healthcare (where it was once public), social services, water, and other industries.
- Your work has impacted millions of people throughout the US and the rest of the hemisphere.
- Yet you are still more or less anonymous. Few people will ever know your names.

Card Two – One Year Later

United States Trade Representative

- Of course, as a losing defendant in the lawsuit, you might be a little disappointed. But, in the end, what's fair is fair, and the Judge's decision was in line with the agreement you helped negotiate. So you can't get that upset.
- You look at the bright side. The new school, since it has been managed by a Brazilian company, has helped to strengthen economic ties between nations and foster international investment – at least on paper, and that's good enough for you.

Card Two – One Year Later

CEO of Last Frontiers, Inc

- Winning this case was a bonanza for you. By promising higher test scores, you've made billions of dollars on public contracts to run private schools.
- The school you took over was wasteful and unfocused. So you've streamlined by eliminating all ESL classes, programs for students with learning disabilities, and other unnecessary classes. Since many kids with lower standardized test scores dropped out, overall scores went up.
- The student body also needed more discipline. So you started random urine-based drug testing and cavity searches. Through this program you've been able to weed out many bad students, also raising scores.
- And you've got big plans in the works. To serve the community, you're planning a McDonalds Job Training Academy. Student will get school credit for "interning" at McDonalds during the school day.

Card Two – One Year Later

Teachers

Students

CEO of Last
Frontiers Inc.

FTAA

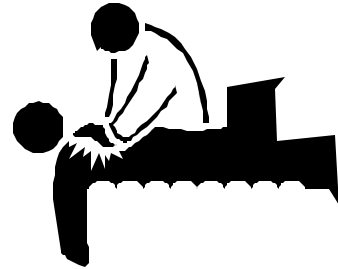
Judges

United States

Trade

Representative

FTAA Health Care Role Play



Overview

Objectives:

1. To help participants understand what the FTAA could mean for ordinary people by playing out a hypothetical (but realistic) scenario about public health care.
2. To illustrate key international trade concepts, including Investor Rights and National Treatment.

Time Required: 25 minutes

Materials Needed:

- (10) Role Cards (cut-out before workshop)
- (5) Role Signs
- (1) Judge's Gavel (optional)

Background: The role play features a worst-case-scenario, in which a corporation uses the FTAA's rules to take control of a government-run public hospital. A for-profit company called Health King sues a U.S. state because the state subsidizes its public hospital system. Health King wants the same funding to run private hospitals. The role play is based on two key concepts about FTAA and trade generally:

- **Investor Rights:** Corporations can sue governments in a secret FTAA Tribunal if they feel that a policy has hurt their ability to make profits.
- **National Treatment:** Governments must treat foreign service providers the same as domestic providers – including even the government's own taxpayer supported services. This means private companies may have equal rights to funds for public service programs.

Preparations :

1. Make a photocopy of the character cards and signs. (You may wish make multiple copies if you have a large group).
2. Cut out all the character cards and signs from the copies.
3. Keep the original for your own reference.

Beginning

Introductions

1. **Set the stage.** The year is 2007. Two years ago the Free Trade Area of the Americas went into effect, because the labor movement and its allies could not stop the agreement from going forward. We are now beginning to experience the first wave of assaults on public services

based on the FTAA's rules.

2. **Pass out the cards from Card Set One.** If there are more participants than cards, make the additional participants Judges (as many as three) and make everyone else Patients and Health Care Workers.
3. **Have the participants introduce themselves in the following order.** Tell them they may ad lib if they wish. Read along on your copy of the cards and ask follow-up questions if they miss significant points.
 1. Health Care Workers
 2. Hospital Patients
 3. FTAA Judges
 4. United States Trade Representative
 5. CEO of Health King, Inc.

Scene 1

I. The Trial

1. **Arrange the Room.** Rearrange seating to simulate a courtroom, with the judges at the front facing the plaintiffs and defendants, and everyone else behind them.
2. **Set the Scene:** Repeat that Health King has just filed a lawsuit against your state based the FTAA's rules.
 - The suit alleges that your state's taxpayer support for its public hospitals creates an unfair advantage for the public service system against competition from private, foreign companies like Health King.
 - These subsidies violate the FTAA's free trade principles and Health King deserves compensation for its lost profits.
3. **Set out the rules for the trial:** Read the following rules aloud.
 1. The plaintiff, Health King Inc., will represent itself.
 2. The defendant, your State, will be represented by the United States Trade Representative.
 3. The FTAA Panel has complete and final decision making authority in this case.
 4. Spectators, including patients and health care workers, may not participate in the court's official proceedings. (In reality, they would not be allowed in the room or may not even know about the case.)
4. **Let participants make their case.** If they get stuck, try asking them follow-up questions.
 1. **Start with the plaintiff – Health King Inc.** (3 min.)
 - How is the state violating the FTAA?
 - How does state funding harm your ability to compete?
 - If you could compete freely, how would you do a better job at providing health care than the current situation?

- Why should the judges rule in your favor?
2. **Then move to the defendant, represented by the United States Trade Representative.** (3 min)
 - How will this lawsuit affect the quality of healthcare for our population?
 - How will it affect jobs?
 - What do taxpayers expect from the government?
 3. **Ask the judges if they would like to ask the plaintiff or defendant any questions.**

Scene 2

II. Time-Out for Judge's Deliberations

1. **Privately tell the Judges to rule in favor of Health King.** Ask them to caucus quietly.
2. **While the judges are deliberating, step out of the role play for a moment to discuss the case with the audience.**
 - As patients, are you satisfied with the job that the USTR is doing to defend your families?
 - As health care workers, do you think that your interests are adequately represented in this process? What rights do you have in this situation?
3. **Instruct the Judges to announce their decision.**

Scene 3

III. One Year Later

1. **Set the Stage.** Explain that it is now one year after the trial. We're going to see what has happened to each of us.
2. **Pass out Card Set Two to participants.**
3. **Have each participant report back to the group in the following order.** Tell participants that they are free to elaborate. Read along with your copy of Card Set Two and ask follow-up questions if necessary.
 1. Health Care Workers
 2. Hospital Patients
 3. FTAA Judges
 4. United States Trade Representative
 5. CEO of Health King, Inc.

Debrief

IV. Conclusion

Have the players and the audience reflect on the play.

- What changes could FTAA make in our health care system?
- How will FTAA change corporate power and government power?
- Who are the winners and who are the losers?
- What else did you learn from this role play?
- What do you think we should do about FTAA?

Conclude by pointing out that, while the scenario played out here may sound unbelievable, it is firmly rooted in the FTAA's proposed policies. The dangers of privatizing health care are real.

The FTAA would give corporations the power to:ⁱ

- Further **privatize health care** by eliminating regulations on how public hospitals can be made private, and make it harder to create an efficient publicly coordinated health care system in the future.
- Weaken **professional licensing standards** that protect quality care.
- Challenge **staffing ratios** that limit the number of patients a nurse has to care for.
- Undercut **health and safety laws** in hospitals and health care facilities.
- **Export health care jobs** to regions where wages are weaker and oversight is more difficult.

ⁱ From United for a Fair Economy, 2002

Health Care Role Play - Card Set One

Hospital Patients

- You are patients of a large urban public hospital.
- About a third of you do not have any form of health care insurance – your jobs don't provide benefits, and your wages are not low enough to qualify for Medicaid.
- Fortunately, the local public hospital school has a policy of treating everyone, regardless of the their income or legal status. So when you get sick, you have a place to go.
- But, due to cost overruns and the state's budget deficit, there is talk of closing the hospital.

Card One

Health Care Workers

- You are health care workers in an urban public hospital.
- Despite budget constraints, you manage to serve the community's vital health care needs – and feel that you are making an important contribution to patients and society in general.
- The hospital has recently launched new programs, including health education and a social worker program that brings preventative care out into the community.
- And through your unions, you have strived to win decent salaries, and to get staffing levels up to a point that is workable, if not ideal.
- But because of the state's budget deficit and cost over-runs, the hospital has been threatened with being taken over by one of the big private health care corporations.

Card One

Panel of FTAA Judges

- You are a panel of appointed trade bureaucrats whose job it is to resolve disputes brought by corporations against governments under the FTAA. If you decide against a country, you can force the country to pay monetary compensation to the corporation or change its laws.
- You are never accountable to voters and can make your decisions in secret.
- Your background is in corporate trade law. You were schooled at Ivy League universities and have spent many years working at corporate law firms that help corporations avoid paying taxes.

Card One

United States Trade Representative

- When it comes to trade, you are the United States' head honcho. You serve as the President's principal advisor, negotiator, and spokesperson on trade agreements, including the FTAA.
- In the past, you've served on the board of many corporations, including Enron.
- If a corporation challenges a United States law under the FTAA, you will be in an awkward position – you will be asked to represent our country's policy against a trade agreement that you helped negotiate.
- Because of your background in Big Business, you are very attuned to the needs of companies. You won't be motivated to fight very hard to preserve the policy, but your job requires that you at least show up in court.

Card One

CEO of Health King Inc.

- You are the CEO of Health King, Inc. a Brazilian-based branch of the Burger King empire, that has recently entered the health care industry.
- While you've already launched several private hospitals, you believe there is a fortune to be made in contracts to run public hospitals. You believe your expertise in customer service is perfect for cutting spiraling health care costs. And you are outraged that inefficient and poorly run public hospitals have a monopoly on taxpayer funding.
- You think the FTAA may be your ticket into the health care market. So you've just launched a lawsuit against the U.S. government under the FTAA, demanding that the state provide you with the same funding it gives its public hospitals.
- You claim that the public hospitals' monopoly over public funds discriminates against you as a foreign corporation.

Card One

Card Set Two – One Year Later

Patients

- When Health King took over your school, the company announced a new “customer service” program.
- Upon entering the hospital driveway, patients state their symptoms through a drive-through intercom. There are now health care “menus” next to the beds in each exam room, with options for regular or “supersized” check-ups and tests. Children’s drugs come in a “fun drug bucket,” with toys related to Hollywood movies.
- Unfortunately, there have also been cuts in service. Patients without insurance and are no longer accepted at the hospital.
- The hospital has also tried to minimize costs by limiting expensive services to one franchise per county. Patients with chronic illness, such as kidney failure, often have to travel up to 50 miles to the nearest Health King that still has a dialysis machine. (Sometimes the machines are down, when parts are borrowed for the Burger King Deep Fryer.)
- Prescription drugs are now handled by the Health King’s sister company Drug King, whose selection unfortunately doesn’t include most new prescription drugs.

Card Two – One Year Later

Health Care Workers

- When Health King took over your hospital, the company announced a new “care efficiency” program.
- To make the hospital a more friendly destination, Health King has required all staff to replace their scrubs with colorful new uniforms and paper hats with the Health King logo. Nurses are required to ask each patient to buy additional tests and exams at least four times per visit.
- Doctors are now allowed to spend only one minute with each patient – down from eight minutes. There is a stopwatch on the wall of each exam room to let you know how long you have left. And salaries are now determined exclusively by how many patients you see per year. Doctors and nurses are also now required to refer any patient over 60 with a chronic disease to a local hospice.
- You’ve also launched an innovative “surgery efficiency” program, in which patients get discounts for voluntary amputation and donation of major organs (particularly kidneys and bone marrow.) Amputation is always recommended for operations costing more than \$10,000.
- Along with patients, you have become fed up with these conditions and have begun organizing to revoke Health King’s contract with the city – but you wish you had done more to stop the FTAA before it was finalized.

Card Two – One Year Later

Panel of FTAA Judges

- You have since moved on to rule in other cases that have led to the privatization of the education, social services, water, and other industries.
- Your work has impacted millions of people throughout the US and the rest of the hemisphere.
- Yet you are still more or less anonymous. Few people will ever know your names.

Card Two – One Year Later

United States Trade Representative

- Of course, as a losing defendant in the lawsuit, you might be a little disappointed. But, in the end, what's fair is fair, and the Judge's decision was in line with the agreement you helped negotiate. So you can't get that upset.
- You look at the bright side. The new hospital, since it is being managed by a Brazilian company, has helped to strengthen economic ties between nations and foster international investment – at least on paper, and that's good enough for you.

Card Two – One Year Later

CEO of Health King, Inc

- Winning this case was a bonanza for you. You believe that other hospitals simply haven't taken cost cutting and efficiency measures far enough. By promising cost reductions, you've made billions of dollars from public funds to run private hospitals.
- You believe liberal, activist groups like the American Medical Association get in the way of good business, so you've refused to recognize pesky standards like limits on working hours per week and health and safety rules.
- You've also exploited the FTAA's new "free trade" rules. X-ray analysis and other lab tests are now outsourced to a company in Haiti that uses sweatshop labor.
- Health King has also used your corporate connections to launch new services – including a Philip Morris Cancer Center, a Coca-Cola Diabetes Lab, and a Burger King Nutrition Program (patients get two-for-one coupons for BK coffee!).
- And you understand that Health King is more than a business – it's a brand. So you've launched an aggressive marketing campaign, with a catchy Health King jingle, and slogans like "We do Chemo right!" and "Health Care your way!"

Card Two – One Year Later

Patients

Staff

CEO of
Health King Inc.

FTAA

Judges

United States

Trade

Representative



April 2001 - VOLUME 22 - NUMBER 4

TRADE MADNESS!

NAFTA's Investor "Rights" *A Corporate Dream, A Citizen Nightmare*

[By Mary Bottari](#)

The North American Free Trade Agreement (NAFTA) includes an array of new corporate investment rights and protections that are unprecedented in scope and power. NAFTA allows corporations to sue the national government of a NAFTA country in secret arbitration tribunals if they feel that a regulation or government decision affects their investment in conflict with these new NAFTA rights. If a corporation wins, the taxpayers of the "losing" NAFTA nation must foot the bill. This extraordinary attack on governments' ability to regulate in the public interest is a key element of the proposed NAFTA expansion called the Free Trade Area of the Americas (FTAA).

NAFTA's investment chapter (Chapter 11) contains a variety of new rights and protections for investors and investments in NAFTA countries. Specifically, Article 1110 of NAFTA guarantees foreign investors compensation from the NAFTA governments for any direct government expropriation (i.e., nationalization) or any other action that is "tantamount to" an "indirect expropriation." In addition, Article 1102 provides for "national treatment," which means that governments must accord to companies of other NAFTA countries no less favorable treatment than they give to their own companies. Article 1105 contains a "minimum standard of treatment" provision, which includes vague prose about fair and equitable treatment in accordance with international law.

If a company believes that a NAFTA government has violated these new investor rights and protections, it can initiate a binding dispute resolution process for monetary damages before a trade tribunal offering none of the basic due process or openness guarantees afforded in national courts. These so-called "investor-to-state" cases are litigated in the special international arbitration bodies of the World Bank and the United Nations, which are closed to public participation, observation and input. A three-person panel composed of professional arbitrators listens to arguments in the case, with powers to award an unlimited amount of taxpayer dollars to corporations whose NAFTA investor privileges and rights they judge to have been impacted.

Corporate investors have used these unprecedented NAFTA investment protections to challenge national and local laws, governmental decisions and even governmental provision of services in all three NAFTA countries. To date, companies have filed more than a dozen cases, claiming damages of more than US\$13 billion [see "[The Chapter 11 Dossier](#)"].

"Tantamount to Extortion"

In the largest Chapter 11 suit yet brought against the United States, the Canadian corporation Methanex in 1999 sued the U.S. government for \$970 million because of a California executive order phasing out the sale of a Methanex product. Methanex claims that California's phase-out of methyl tertiary butyl ether

(MTBE), a gasoline additive, violates the company's special investor rights granted under NAFTA because the California environmental policy limits the corporation's ability to sell MTBE. If a NAFTA tribunal decides that California's environmental policy violates NAFTA's investor protections, the U.S. government can be held liable for the corporation's lost profits from not selling MTBE.

The case is "a clear threat to California state sovereignty and democratic governance," says Martin Wagner of the California-based Earthjustice Legal Defense Fund. If Methanex succeeds, California will be under pressure to rescind its executive order, to lessen the damage award.

Associated with human neurotoxicological effects, such as dizziness, nausea and headaches and found to be an animal carcinogen with the potential to cause human cancer, MTBE has been found in ground water and drinking wells around California. On March 25, 1999, California required the removal of MTBE from gasoline sold in the state by December 31, 2002. Governor Gray Davis declared that "on balance, there is significant risk to the environment from using MTBE in gasoline in California."

Methanex claims that adding MTBE to gasoline reduces air pollution. However, a 1998 University of California at Davis (UC-Davis) report, which informed the government action, found that "there is no significant additional air quality benefit to the use of oxygenates such as MTBE in reformulated gasoline." The report found "significant risks and costs associated with water contamination due to the use of MTBE." The report noted that "MTBE 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." It also noted that the use of MTBE in motor boat fuel results in contamination of surface water. The report concluded that "[w]e are placing our limited water resources at risk by using MTBE."

On the basis of the UC-Davis findings, California moved to ban MTBE. Methanex's response was to drag the California policy into NAFTA Chapter 11 litigation, demanding MTBE be allowed or \$970 million be paid.

In its amended claim, Methanex alleges that the California ban discriminates against MTBE in favor of ethanol, a similar U.S. product, and is therefore a violation of NAFTA's national treatment rules. As evidence, Methanex cites the executive order which requires the California Energy Commission to look into development of a California ethanol facility. Methanex alleges that Archer Daniels Midland (ADM), a principal producer of ethanol in the United States, influenced the governor's decision with \$210,000 in campaign contributions, arguing that the ban stands in violation of NAFTA's fair and equitable treatment rules. Finally, Methanex claims that the ban was not the "least trade restrictive" method to fix the water contamination problem, and thus violates NAFTA requirements that companies be treated fairly and "in accordance with international law." The relevant laws cited by Methanex are the rules of the World Trade Organization, which require countries to use the least trade restrictive means to achieve environmental and public health goals.

"These cases are tantamount to extortion," says Martin Wagner. "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. In the California case, Methanex is selling a chemical and saying to the U.S. government, 'If you want us to stop, you have to pay us.' 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."

The California case has drawn comparisons to the 1998 case brought against Canada by the U.S.-based Ethyl Corporation [see "Another NAFTA Nightmare," *Multinational Monitor*, October 1996]. In that case, Ethyl sued Canada for \$250 million after Canada banned the gasoline additive methylcyclopentadienyl manganese tricarbonyl (MMT) because of health risks. The state of California had banned MMT and the U.S. Environmental Protection Agency (EPA) was working on a similar regulation. Ethyl claimed the Canadian ban violated NAFTA because it "expropriated" future profits and damaged Ethyl's reputation. After learning that the NAFTA tribunal was likely to rule against its position, the Canadian government revoked the ban, paid Ethyl \$13 million for lost profits to date, and, as part of a settlement with Ethyl, agreed to issue a public statement declaring that there was no evidence that MMT posed health or

environmental risks.

Methanex brought its NAFTA case to the United Nations Commission for International Trade and Law (UNCITRAL), the arbitration regime of the United Nations. The case is now pending. Under UNCITRAL rules, not only are the citizens of California shut out of this proceeding, but so are the governor and the attorney general of California, the state whose policy is in question. California officials must rely on the Office of the U.S. Trade Representative (USTR) to defend the interests of California residents in this closed tribunal.

Deliver This

In a case that seeks to push the limits of Chapter 11, the U.S.-based United Parcel Service (UPS) is pursuing a NAFTA Chapter 11 case against Canada for \$100 million, arguing that the fact of the Canadian postal service's involvement in the courier business infringes upon the profitability of UPS operations in Canada.

In this case, the first NAFTA investor-to-state case against a public service, UPS is attempting to stretch the NAFTA Chapter 11 provisions in an entirely new direction. Canada Post is a "Crown corporation" owned by the people of Canada. Canada Post has not received direct taxpayer support for about a decade and has been paying income tax since 1994.

UPS claims that by integrating the delivery of letter, package and courier services, Canada Post has cross-subsidized its courier business in breach of NAFTA rules. For example, UPS argues that permitting consumers to drop off courier packages in Canada Post letter mail postal boxes unfairly advantages Canada Post as against other courier services. Other alleged forms of cross-subsidization include:

- Using letter carriers to pick up courier packages from the mail boxes and "transport them in vehicles that form part of the infrastructure of the Canada Post monopoly."
- Sorting courier packages at "Canada Post's letter mail monopoly sorting facilities across Canada."
- Transporting courier packages on airplanes and trucks chartered by the mail service.
- Selling courier services at post offices.
- "Precluding franchisees at Canada Post retail outlets from selling of any courier product other than Canada Post's."
- Permitting courier consumers to use postal stamp meters on courier packages.
- "Having the regulatory definition of 'letter' changed from 450 grams to 500 grams in order to expand its letter mail monopoly."

"UPS is entitled to receive the best treatment available in Canada with respect to the treatment of its investment," UPS argues in its claim. "This treatment would include having equal access to the postal distribution system provided" to the postal service's courier operations. Failure to provide such equal treatment, UPS alleges, violates the national treatment obligations of Chapter 11.

In a cable by the U.S. Embassy in Ottawa that Public Citizen obtained under a Freedom of Information Act request, UPS Canada Legal and Public Affairs Vice President Allan Kaufman was characterized as "very confident the Government of Canada stood to lose its fourth and largest Chapter 11 challenge with the UPS case," and Kaufman signaled that the corporation would be open to settlement.

Former Canadian Foreign Minister Don Mazankowski responded to these arguments in a February 2001 column in the *Globe & Mail*. He argued that Canada treated UPS with an even hand by allowing UPS access to the market on the same terms as any Canadian corporation, that UPS is not subject to any additional taxes or duties and that the company is governed by the same laws as any Canadian corporation.

"The UPS claim is unique. Unlike the other NAFTA-based foreign investor claims which have sought to recoup investments, UPS is using NAFTA Chapter 11 provisions in a strategic offensive to secure a greater share of the Canadian market," asserts Canadian trade attorney Steve Shrybman. "UPS is arguing that because Canada Post provides public mail services, it shouldn't also be providing integrated parcel and

courier services. In an era when monopoly and commercial service delivery is commingled, few public services including health care and education would be immune from similar corporate challenges."

This case is also proceeding under UNCITRAL rules and the Canadian Union of Postal Workers and other interested parties are attempting to intervene.

The Fast Track to Expanded Chapter 11

The "expropriations" that have been challenged under Chapter 11 are nothing like the government seizure of property that is generally conveyed by the term. Instead, corporations have used the provision to challenge or seek compensation for what are called "regulatory takings" in the United States - regulations which supposedly take away the entire value of a property. While a conservative legal movement has worked for two decades to espouse the theory of regulatory takings, with some success, regulatory takings suits continue to face significant judicial hurdles in U.S. courts. The Chapter 11 cases take this "regulatory takings" logic to a new extreme.

While these expansive investor rights currently are included only in NAFTA, plans are underway to incorporate similar provisions in the FTAA. FTAA is a proposed NAFTA expansion to all 34 countries of the Western Hemisphere (but for Cuba). The Bush administration has signaled that it wants the controversial fast-track trade negotiating authority in order to negotiate the FTAA. Once Congress delegates its trade negotiating authority to the president via fast track, it limits its own role to a single up-or-down vote on trade agreements' implementing legislation, which cannot be amended.

There is no guarantee the Bush administration will succeed in its effort to win fast track, or in its attempts to impose investment provisions in the FTAA.

Canada, which has been badly burned in a series of Chapter 11 cases, is no longer a believer. Canadian Trade Minister Pierre Pettigrew has declared that Canada will not sign FTAA if investor-to-state enforcement of broad regulatory takings rights are included, and Canada has called for a review of Chapter 11 within NAFTA.

Whether Canada will hold to these positions, and whether it can organize other countries to join it amidst the complex FTAA negotiations in which the United States is the dominant player, remains to be seen. In the meantime, environmentalists, public health groups, California residents and many others concerned about the broad regulatory takings provisions will continue to press for their removal from NAFTA and their exclusion from the FTAA.

Mary Bottari is director of Global Trade Watch's Harmonization Project.

The Chapter 11 Dossier: Corporations Exercise Their Investor "Rights"

Corporations have filed more than a dozen cases under NAFTA's Chapter 11 investment provisions, which enable corporations to sue governments for infringements of their "investor rights." Since they are conducted in confidential arbitral processes, inaccessible to public scrutiny and participation (in contrast to open proceedings in domestic courts), information on ongoing cases is sketchy. Available information on 15 of the cases is summarized below.

Suits against Canada

Ethyl Corporation

In this first investor-state case, Ethyl Corporation of the United States sued the Canadian government for \$250 million and obtained, in 1998, a settlement of \$13 million for the Canadian ban on the gasoline additive, MMT, a nerve toxin [see "Another NAFTA Nightmare," *Multinational Monitor*, October 1996]. The ban was reversed.

S.D. Myers

In October 1998, U.S.-based S.D. Myers Inc., which treats transformers containing toxic PCBs, filed a claim for \$30 million for losses it claims to have incurred during a one-and-one-half-year ban (1995 to 1997) on the export of PCB wastes from Canada. The Canadian federal government states that Canada is bound by international conventions that stipulate that PCBs must be destroyed in an environmentally sound manner, and that U.S. standards for PCB disposal are not as high as Canada's. The wastes were destroyed in a Canadian facility in Alberta, and the export ban was revoked in 1997. The U.S. government also controls cross-border movement of PCBs. In November 2000, the arbitral tribunal found that the ban did contravene the investment chapter regarding national treatment and minimum standards of treatment of foreign investors, and it is now determining whether S.D. Myers suffered damages. In the meantime, the Canadian government has applied to the (domestic) Federal Court to have the tribunal's partial award set aside, arguing that the case concerned cross-border trade, not a Canadian investment, and that the award conflicts with a well-established Canadian policy requiring disposal of PCBs and PCB wastes in Canada to comply with the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

Sun Belt Water Inc.

This California-based company is suing Canada for the decision of the provincial government of British Columbia to refuse consent for the company to export bulk water from BC. The government subsequently enacted the Water Protection Act, which bans bulk water exports and inter-basin diversions by domestic and foreign investors alike. In a colorful claim which alleges a decade of "smelly" actions by successive BC governments, Sun Belt Water expounds on the growing world-wide demand for water, assumes that water export must be a positive benefit (ignoring environmental and conservation requirements) and makes extreme claims of improprieties by the BC government and BC courts. In a BC court action, Sun Belt did not achieve its desired result. It is therefore using NAFTA Chapter 11 to seek damages of "between" \$1 billion and \$10.5 billion. Besides using the investment chapter for very dubious business practices, the case raises the fundamental issues of the uses of the investment chapter to evade the result of an action in a domestic court, and to challenge a non-discriminatory policy and legislation by a subnational (provincial) government.

Pope and Talbot

The US-based lumber company Pope and Talbot has sued Canada, claiming approximately \$510 million for alleged breaches of the NAFTA investment chapter related to changes in the profitability of its timber export business in Canada. Softwood lumber exports from Canada to the United States have been a source of contention and repeated trade disputes for decades. Forest products are among the most important exports from Canada, representing billions of dollars in export earnings, and over 90 percent of these products are exported to the United States. In 1996, in yet another attempt to resolve the ongoing timber wars, the Canadian and U.S. federal governments signed the Canada-US Softwood Lumber Agreement, governing exports of softwood lumber from four Canadian provinces, British Columbia, Alberta, Ontario and Quebec. The agreement, which will expire at the end of March 2001, establishes quotas for exports for each province, and requires producers to provide certain information regarding exports and pay an export levy if their exports exceed their particular quota. In arriving at such export agreements, the Canadian government consults extensively with industry. Pope and Talbot claimed that Canada has breached the NAFTA investment requirements regarding national treatment, most-favored nation treatment, minimum standard of treatment and performance requirements. The company's lawyers are critical of the Canadian government for its public release of the Notice of Intent to Submit a Claim, calling the release a "serious breach of international procedure." Pope and Talbot's operations are located in British Columbia. During the period of the softwood memorandum, BC's share of total softwood exports has declined relative to total Canadian softwood exports; Pope and Talbot argue that this decline is related to the agreement, and amounts to a breach of the NAFTA chapter. (Others point to the loss of BC's traditional markets in Asia, related to the Asian economic crisis.) In an interim award, the tribunal rejected the claim that expropriation had occurred, but decided to continue hearings on claims relating to national treatment and minimum standards of treatment. This case is an important indication of how far-reaching the impacts of the NAFTA investment chapter are and of how broadly multiple governmental powers and decisions may be challenged by an individual corporation for a huge compensatory claim.

United Parcel Service

UPS has filed a notice of intent to sue Canada for \$100 million, alleging that Canada favors the public postal service, Canada Post, regarding provision of courier services [see "NAFTA's Investor "Rights""].

Ketcham Investments and Tysam Investments

U.S.-based Ketcham Investments and Tysam Investments jointly own West Fraser Mills, a timber company. Ketcham and Tysam allege in a December 2000 notice of intent to file a claim that their timber quota under the U.S.-Canada Softwood Lumber Agreement was arbitrarily cut, denying them rights afforded Canadian companies. They are seeking C\$10 million in damages.

*Suits Against the United States***Loewen**

The B.C.-based Loewen Group is suing for compensation arising from alleged discrimination, denial of minimum standard of treatment and expropriation, claiming that a \$500 million Mississippi state court verdict against it amounts to a breach of NAFTA. The verdict came in a suit brought against Loewen by a Mississippi company, O'Keefe, alleging fraudulent practices and other anti-competitive practices. Loewen was denied an appeal of the court decision due to a state law which requires an appellant to post 125 percent of the damage award (\$625 million in this case) which Loewen could not post. (Loewen eventually settled the claim for \$175 million.) The company seeks to recover \$775 million in damages, interest and legal expenses through this investor-state claim and alleges that the Mississippi decision against it was based on anti-Canadian bias. A tribunal has agreed to hear the case. This case demonstrates, as does Sun Belt, the use by a corporation of the NAFTA Investment chapter to essentially reverse the results of domestic court proceedings, and to circumvent the course of normal commercial civil litigation. Having lost to a competitor in the courts, it claims compensation from the U.S. federal government.

Methanex Corp.

In June 1999, this Vancouver-based company announced that it will sue the U.S. government for \$970 million due to a California order to phase out use of the chemical MTBE (methyl tertiary butyl) a methanol-based gas additive, by late 2002 [see "NAFTA's Investor "Rights""].

Mondev

In September 1999, Mondev International Ltd., a Montreal-based real estate development firm, filed a claim against the U.S. government for \$16 million. The case arises from the refusal of the city of Boston to permit it to expand a mall into a vacant lot in the 1980s although Mondev had a contract with the city. Mondev successfully sued the city and its redevelopment authority for \$16 million, but the court decision was reversed on appeal due to state law protecting the redevelopment authority from liability. Mondev seeks to recover the damages through the NAFTA Chapter 11 investor-state route.

ADF Group

ADF, a Canadian fabricator of structural steel for complex structures, is suing the United States, seeking \$90 million in compensation. ADF entered into a contract with Shirley Contracting Corporation to provide materials for construction of a Virginia highway interchange. ADF sought to fabricate products in Canada, using U.S.-made steel. U.S. federal government authorities held that this arrangement ran afoul of a "Buy America" requirement. ADF proceeded to attempt to fulfill the contract using its U.S. facilities and subcontracting to other U.S. facilities. It alleges the Buy America rules violate Chapter 11 requirements for national treatment and for bans on performance requirements.

*Suits Against Mexico***Metalclad**

This case involves a claim by U.S.-based Metalclad, a waste-disposal company, that the Mexican state of San Luis Potosi breached Chapter 11 of NAFTA in refusing permission for a waste disposal facility.

The governor deemed the plant an environmental hazard to surrounding communities, and ordered it closed

down on the basis of a geological audit performed by environmental impact analysts at the University of San Luis Potosi. The study had found that the facility is located on an alluvial stream and therefore would contaminate the local water supply. Eventually, the governor declared the site part of a 600,000 acre ecological zone.

Metalclad sought compensation of some \$90 million for expropriation and for violations of national treatment, most favored nation treatment and prohibitions on performance requirements. This figure is larger than the combined annual income of every family in the county where Metalclad's facility is located.

In August 2000, a tribunal found that Mexico had breached the Investment chapter and awarded Metalclad \$16.7 million, the amount it had spent in the matter. In this case, Metalclad proceeded to begin construction of the facility without having local approvals, claiming that it had assurances from the Mexican federal government. The case raises important questions about whether governments retain the authority to enact environmental controls on foreign investors and about the powers of local governments.

The Mexican government has appealed the award to the Supreme Court of British Columbia, since hearings of the case were held in British Columbia, and the Canadian government and government of Quebec have intervened.

Waste Management Inc.

This case involves a claim filed in 1998 against the Mexican government for \$60 million by Waste Management, Inc. It concerns an exclusive 15-year concession to its subsidiary to provide solid waste management to Acapulco. The company claims that it was guaranteed payment by the state of Guerrero and the Mexican federal development bank, Banobras, and that the obligations have not been met, constituting actions tantamount to expropriation.

Desona/Azinian

U.S.-based DESONA and its individual investors, Robert Zinian et. al. filed this claim for over \$14 million and costs in 1997 against the Government of Mexico. The claim related to a waste management business in Mexico. Desona claimed that a long series of unfair and conflicting decisions and actions by local authorities contributed to its losses, and culminated in the forcible removal of its managers from its waste collection and landfill business in Naucalpan, a suburb of Mexico City on four days notice.

The case was dismissed by the arbitral panel in November 1999, in a scathing decision critical of the company's actions and record of dishonesty. However, since the case turned on the finding of invalidity of the contract on which the claim was based, it does not assist governments and citizens regarding the problem of the impact of Chapter 11 claims on legislative actions.

Cemsa/Feldman

This is the first NAFTA investor-state suit involving a tax issue. U.S. investor Feldman, sole owner of the corporation CEMSA, filed a claim against the Mexican government in May 1999 for \$50 million, alleging that his company was wrongly denied excise tax rebates and export rights for its cigarette exporting business. Again, allegations of numerous irregular actions by Mexican authorities are made, including that CEMSA was required to provide invoices from its vendors which stated the amount of tax included in the purchase price. However, CEMSA claims that the tax authorities did not require that manufacturers provide this information, so that CEMSA could not comply with the requirement.

Adams

This case involves a dispute over title to and use of land on which U.S. investors had built vacation homes. A group of Mexican landowners won a claim in Mexican courts that the disputed land had been illegitimately taken from them by the Mexican government, which later authorized its use by the U.S. investors. The Mexican Supreme Court ordered the land returned to the landowners, and Mexican authorities did subsequently return the land, including the vacation homes on it. The U.S. investors are seeking \$75 million in compensation under Chapter 11.

- Michelle Swenarchuk

March 11, 2001

Nafta's Powerful Little Secret

By ANTHONY DePALMA

Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged. And it is all in the name of protecting the rights of foreign investors under the North American Free Trade Agreement.

The corporations — American, Canadian and Mexican alike — that directly invest in neighboring countries are thrilled that Nafta provides some protection. But foes of the trade pact say some of their worst fears about anonymous government have become reality. And as Western economies move toward more free trade and globalization, environmentalists, consumer groups and anti-trade organizations are increasingly worried about how the tribunals influence the enforcement of laws. The groups are gearing up for a fight at the Summit of the Americas next month in Quebec, where President Bush will be pushing a vast new Free Trade Area of the Americas, which would provide for similar tribunals.

Protesters will attack the sweeping powers and broad impact of the tribunals, along with their very nature — ad hoc panels drawn from lists of academics and international lawyers almost unknown outside their highly specialized fields.

"What we're talking about here is secret government," said Joan Claybrook, president of Public Citizen, a consumer watchdog group in Washington that has been critical of Nafta and other trade agreements. Ms. Claybrook said the 16 Nafta cases that have been filed so far in the United States, Canada and Mexico showed how corporations were using Nafta not to defend trade but to challenge the functioning of government. "This is not the way to do the public's business," she said.

The tribunals have been used in Nafta disputes for only a few years, but the complaints they have handled have already had many repercussions, including these:

- The Canadian government lifted restrictions on manufacturing an ethanol-based gasoline additive that it considered hazardous after an American manufacturer said that the ban hurt its business.
- A tribunal ordered Mexico to pay an American company \$16.7 million after finding that local environmental laws prohibiting a toxic-waste-processing plant that the company was building were tantamount to expropriation.
- A Canadian-based funeral company is asking the United States government for \$725 million in compensation after a Mississippi jury found the company guilty in 1995 of trying to put a local funeral home out of business, and levied \$500 million in damages. The company contends that the jury sought to punish it because it is foreign. If the tribunal awards compensation, critics say, all jury awards involving foreign investors may be challenged.
- United Parcel Service, the package-delivery company, has filed a complaint contending that the very existence of the publicly financed Canadian postal system represents unfair competition that conflicts with

Canada's obligations under Nafta. Critics worry that if the tribunal upholds the U.P.S. claim, government participation in any service that competes with the private sector will be threatened.

It is clear that investors have gained a shield far more powerful than almost anyone had imagined when Nafta was written in the early 1990's. "There is no doubt that these measures represent an expansion of the rights of private enterprises vis - à-vis government," said Prof. Andreas F. Lowenfeld, an international trade expert at the New York University School of Law. "The question is: Is that a good thing?"

The international tribunals are authorized under a Nafta clause called Chapter 11, dealing with investments. Investors who believe they have suffered a loss because of a breach in Nafta rules can bring a claim against the government of the country where they made their investment. They can have the complaint heard under one of two existing sets of rules — one from the United Nations, the other from an independent office of the World Bank.

These off-the-shelf mechanisms adopted by Nafta have commonly been used to resolve private disputes between corporations, and are thus intended to provide a great degree of confidentiality. Both critics and proponents agree that the provisions run headlong into demands for openness and accountability when public issues are involved.

"The fact that the drafters of Nafta chose this secretive process to resolve these disputes is further evidence that they weren't foreseeing matters of broad social concern coming before these panels," said Martin Wagner, director of international programs for the Earthjustice Legal Defense Fund, an environmental group in San Francisco.

Critics say the corporate victories have spawned even bolder and broader challenges, each one further undermining public policy. In a recent case that critics consider one of the most worrisome, the Methanex Corporation of Vancouver, British Columbia, is challenging California's decision to phase out the use of a gasoline additive containing methanol, which Methanex makes. The state considers the additive, MTBE, which was originally intended to reduce air pollution from motor vehicle emissions, to be a health hazard when it enters the water supply. Santa Monica, Calif., with 93,000 residents, had to shut down most of its municipal wells when gasoline containing MTBE leached into the drinking water a few years ago.

METHANEX contends that MTBE poses absolutely no health hazard and that the state's action would effectively destroy its market. "The work that was done to make the decision to move forward with the ban wasn't extensive enough to draw the conclusion that MTBE is hazardous," said Bradley W. Boyd, director of investor relations at Methanex.

The company recently amended the claim to include accusations that a decision by Gov. Gray Davis of California to ban the additive might have been politically motivated and linked to more than \$200,000 in campaign contributions by the Archer Daniels Midland Company, which makes a competing product. A spokesman for the governor, Gabriel Sanchez, called the accusations "ludicrous."

Mr. Boyd said Methanex was not asking for the ban to be lifted, but rather for Methanex to be compensated if it was prevented from doing business in California because of the ban. The company wants \$970 million in compensation, which rankles many Californians.

"It's the height of corporate moxie," said Michael Feinstein, an environmental activist who is the mayor of Santa Monica. He said he was worried that a precedent would be set if the MTBE phase-out was undermined. Even if the tribunals have no power to overturn laws, he said, a decision in Methanex's favor "would have a devastatingly chilling effect on all such future laws and standards because of the belief that they would not stand up to challenge."

The United States government, named as a defendant in the Methanex complaint, is also concerned that the case stretches Nafta beyond recognition. In a statement to the tribunal, the government contends that

"Methanex's claim does not remotely resemble the type of grievance for which the states parties to the Nafta created the investor-state dispute mechanism."

Mr. Wagner has asked the tribunal to consider breaking with tradition and accepting written statements from third-party groups like the Bluewater Network, a citizens' environmental organization. The three-person tribunal hearing the complaint is unusual in that its members include former Secretary of State Warren Christopher. The tribunal determined in January that it had the right to accept written arguments, and said it would decide later whether to do so in this case.

Mr. Wagner said he was able to keep abreast of the proceedings by filing periodic Freedom of Information requests that force the United States government, when named as a defendant, to release the documents. Other advocates who obtain the filings this way post some on a Web site — www.naftaclaims.com. Canada also has a public access information law, but Mexico does not.

Officials who oversee the tribunals say that they understand concerns about the less-than-public aspects of the panels' work but that anything that opens the proceedings would undermine the promise of confidentiality that corporate investors consider essential. That, they say, would undermine the primary purpose of the arbitration mechanisms — to help foster commercial development.

"The whole thing here was to have a mechanism to give a base level of comfort to foreign investors," said Ko-Yung Tung, vice president and general consul of the World Bank and secretary general of its International Center for Settlement of Investment Disputes, which handles Nafta claims. He said that forcing more disclosure could drive corporations away from the established dispute-resolution process.

"If increased foreign investment is the prime goal in this, then making public these proceedings may be less important" than protecting investors, Mr. Tung said.

The center occupies a small suite of offices inside the World Bank's modern headquarters in Washington. With seven lawyers and four members of its support staff, it now oversees eight Nafta cases. There are also 29 other disputes on the center's docket that arise from some of the more than 1,400 bilateral treaties involving more than 130 nations that have signed an international convention to abide by the World Bank's investment rules.

For 20 years after the center was created in 1966, it established panels that heard on average no more than one case a year. Now, officials said, about one case is filed every month.

THE center's primary responsibility is to appoint the arbitrators to the panels, choosing from a list of internationally recognized experts who are paid \$1,500 a day for their work. The center is bound by strict confidentiality rules, and only investors can say whether documents should be made public.

"It's unfair to call this a closed or secret process," said Antonio R. Parra, deputy secretary general of the International Center. "While it's clearly not on all fours with a court proceeding, I don't think it is something that is shrouded in secrecy."

Under the center's rules, proceedings can be made public if both the investor and the involved government agree. But the Nafta proceedings are never opened to the public, nor have third parties until now been allowed to submit briefs. Corporations want the proceedings to remain closed.

"The majority of claimants in these cases are not large multinational corporations but small- to medium-sized companies," said Clyde C. Pearce, a California lawyer who represented one such company, the Metalclad Corporation, in a complaint against Mexico over the construction of a toxic-waste-processing site. Mr. Pearce said the obligation of responding to briefs submitted by third parties could overwhelm corporate lawyers, who are already outmatched by the governments they are bringing the claims against. "If others want to weigh in on these cases, they have access to their governments and should use that route to get their views across, not the tribunals," he said.

The other set of rules governing Nafta tribunals was devised by the United Nations Commission on International Trade Law, based in Vienna. "Arbitration is really private justice," said Jernej Sekolec, its secretary. Mr. Sekolec says the commission's rules for handling disputes are routinely written into commercial contracts between investors and, increasingly, agreements that let private investors bring complaints against a foreign government.

But he said the commission itself never became involved in a dispute in any way, not even to select the arbitrators. "Our overall mission is to streamline and facilitate negotiations and conclusions of contracts," he said.

Typically, the parties in a dispute each name one tribunal member and agree jointly to a third. Each panel is unique, and critics say this lack of continuity makes it hard to establish clear legal precedent.

That is especially important because a tribunal decision technically cannot be appealed. It can be submitted to a local court for review, to ensure that there was no corruption or gross misinterpretation of the rules. Mexico has recently filed such a review in the case won by Metalclad. Another appeal was filed recently by the Canadian government in a case won by S. D. Myers Inc., an Ohio waste-disposal company that said it was hurt by a Canadian law banning the export of PCB's.

Barry Appleton, a Canadian trade lawyer involved in several claims before Nafta tribunals, said critics were so driven by their opposition to globalization that they were overstating the power of the tribunals, which he contends are nothing more than dispute-resolution panels with no power to overturn any laws. "What they're doing," he said of the critics, "is scaremongering."

Mr. Appleton said the arbitration panels were meant to provide a nonpolitical alternative to resolving disputes in court. But he said controversy had arisen because the drafters of Nafta appeared to assume that the investor-protection provisions would be used by Canadian and American investors to protect their investments in Mexico from outright expropriation.

"The Canadian and American governments thought this was not going to apply to them," Mr. Appleton said, "and now they're disappointed."

THE lack of a traditional appeal process, transparency and legally binding precedent, along with the wide scope of what can be challenged under the free-trade investment rules, have made many people wary in all three nations, including government officials. Pierre Pettigrew, Canada's minister of international trade, has written to his counterparts in the United States and Mexico to begin a process of what he calls "clarifying" the limits of Nafta's investment protections and perhaps amending the agreement before negotiations begin in earnest on the Free Trade Area of the Americas.

Activists planning to go to the Summit of the Americas in Quebec said they would protest the idea of adopting similar tribunals in a hemispheric free-trade pact. "This is an example of the excessive powers enjoyed by corporations under Nafta that should not be expanded," said the Alliance for Responsible Trade, in a critique of the United States position on the proposed trade pact.

Critics also object to President Bush's campaign to gain approval of a so-called "fast-track authority," which expired after Nafta was passed in 1993. Mr. Bush has said he needs it to present the hemispheric trade pact to Congress for a vote without possibility of amendment. The critics contend that the scope of Nafta's investment-protection chapter was not well understood because the fast-track process denied Congress the chance to evaluate the agreement thoroughly.

The clash between investor rights and public policy is expected to grow more intense, even within the agencies entrusted with keeping aspects of the cases secret.

"The demand for a more transparent process will cause tension with the more traditional concept of confidentiality — it's inevitable," said Margrete L. Stevens, senior counsel of the International Center for Settlement of Investment Disputes. She said she believed that there was room to adjust, to open the process in keeping with such expectations throughout the world today — but only, she said, if "the parties have come under pressure in their own countries to do this."

In These Times

November 8, 2002

TRADING PLACES

Protesters rock FTAA meetings in Quito.

By Justin Ruben

Quito, Ecuador —It was a scene without precedent, even in the stormy recent history of trade negotiations. U.S. Trade Representative Robert Zoellick sat onstage with more than a dozen other economic ministers from across the hemisphere, flanked by activists holding signs that read, in Spanish, “Yes to life!” “No to the FTAA!” and “Another America is Possible!”

The audience—a raucous crowd of farmers, indigenous people and civil society leaders from across Latin America—chanted, “We don’t want to be a North American colony!” Zoellick, meanwhile, stared determinedly at his shoe.



North and South unite against the FTAA.

Zoellick and the protesters had come here for the 7th Ministerial Meeting of the Free Trade Area of the Americas (FTAA). If implemented, the FTAA would drop trade barriers between the 34 countries of North and South America (minus Cuba) and install a sweeping new set of rules boosting corporate control over everything from education to health care to biodiversity. The Bush administration hopes to conclude negotiations by the end of 2004, allowing the treaty to go into force the following year.

Ecuador’s powerful social movements, like their counterparts throughout Latin America, are alarmed at the prospect. “The FTAA would rob us of security in our work, would allow products to come in at prices that we can’t possibly compete with and would eliminate our culture,” says Juan Pablo Pacho Morocho, a farmer from southern Ecuador who led a group of protesting campesinos from his province. “The FTAA would privatize services like water, and it would threaten our ecology, eliminating plants that purify the air, and drying up the rain. Ecuadorian laws would be replaced by new laws interpreted in secret by faceless foreign judges.”

Morocho was among roughly 10,000 protesters who flooded the streets around the trade meeting on October 31. When protesters continued to press for entrance to the meeting, despite tear gas and a massive police presence, the Ecuadorian government eventually allowed a delegation of 50 social movement leaders in to address the ministers. It was in the ensuing chaos that Zoellick was forced to confront dozens of chanting campesinos and to listen to the recitation of a statement that had been hammered out in dozens of workshops and plenaries during the previous week.

Leonidas Iza, president of CONAIE, Ecuador's powerful indigenous federation, addressed the ministers on behalf of the group: "We are in desperate shape," he said. "You couldn't possibly understand, you who were born in golden cradles and have never suffered. But we don't have food to feed our children. Our markets are flooded with cheap imports. Imported milk is dumped in Ecuador for half of what it costs us to produce it, but transnationals sell it back to us at prices we can't afford. We have no way to live, and the FTAA will only make it worse. When we complain, the U.S. government calls us terrorists. We don't mean this as a threat, but we are hungry and tired, and things have to change."

Iza's message was not lost on anyone in the room. The protests in Quito were only the most recent expression of a rapidly intensifying wave of resistance across Latin America to free trade and neoliberalism, a prospect that has put the Bush administration and its allies in the region on the defensive. Organizers in Ecuador excitedly point to other facets of hemispheric upheaval: Hugo Chavez's popular regime in Venezuela; Evo Morales, the coca-growing campesino who nearly became president in Bolivia; the angry middle classes regularly taking to the streets in Argentina; the Zapatistas in Chiapas; and, closer to home, the victory of Lucio Gutierrez, the candidate supported by the Ecuadorian social movements, in the first round of presidential elections on October 18.

The Quito protest marked perhaps the first time that this movement came together to a significant degree with its Seattle-bred counterparts to the north. North-South collaboration was nearly everywhere you looked in Quito. Under the auspices of Indymedia Ecuador, a newly created node in the alternative media network born in Seattle, activists from Argentina, Peru, Bolivia, Mexico, Brazil, Ecuador, Canada, the United States and Europe collaborated seamlessly to spread the word about the mobilization. Many of the campesinos and indigenous people who came to the protests arrived on buses paid for by student organizations and direct action groups in North America, and the AFL-CIO helped foot the bill for Ecuadorian labor's mobilization. Meanwhile, dozens of solidarity actions were organized from Argentina to Montreal.

The results of Quito were striking. The protests lent weight and urgency to the complaints of poor-country representatives, who united behind the demand that the Bush administration agree to reduce agricultural subsidies. In the end, the ministerial declaration included language on agriculture that these countries viewed as a victory, and the United States felt obliged to present a plan to help poor countries fare better in trade negotiations. Perhaps more importantly, FTAA backers were forced to acknowledge the overwhelming opposition of the Latin American public.

But for at least some protest organizers, the real prize lay in the relationships built between social movements across the Americas. Says Jose Encalada, director of international relations for Ecuador's largest campesino federation: "The FTAA has given us the opportunity to get to know each other and to begin constructing a coordinated resistance across the Americas. This is essential, because the only possibility of stopping neoliberal globalization lies in building unity, regionally and hemispherically." ■