LOS "JONKEADOS"[1] AND THE NAALC:[2] THE AUTOTRIM/CUSTOMTRIM CASE AND ITS IMPLICATIONS FOR SUBMISSIONS[3] UNDER THE NAFTA LABOR SIDE AGREEMENT

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"I was in charge of handling the steering wheels and applying solvents and leather . . . . After a few years of working . . . I started to feel bleeding in my mouth. I had to keep a trash can nearby so I could use it as a spittoon . . . . And then, in '95, I was . . . [stretching] the leather over the steering wheel, and I heard my bone pop from my elbow . . . I only got a pill for my pain. And they sent me back to work. Well, my [arm] kept hurting . . . I was sent to the IMSS[4] [but] . . . they told me that I didn't have anything . . . I still kept on bleeding through my mouth, and I kept on bleeding more and more . . . [T]hey sent me to a psychologist . . . ." When I returned to [work] . . . they told me that I had already been discharged, that they did not need my services any more."

- Former worker, 1988-1998, Public Hearing on the Autotrim/Customtrim case[5]

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1. In Spanish, "los jonkeados" means "junk" or the "junked ones." It is a derogatory term used by some factory managers in Mexico to refer to ill or injured workers. *See* David Bacon, *Junked Workers Test NAFTA*, Z MAGAZINE, Feb., 2001, *available at* http://www.zmag.org/ZMag/articles/feb01bacon.htm.

2. The North American Accord on Labor Cooperation Between the Government of the United States, the Government of Canada, and the Government of the United Mexican States, Sept. 13, 1993, 32 I.L.M. 1499. [hereinafter NAALC or the NAFTA Labor Side Agreement]. The NAALC is often referred to as a "parallel" agreement to the North American Free Trade Agreement between the Government of the United States, the Government of Canada, and the Government of the United Mexican States, Dec. 17, 1992, 32 I.L.M. 296 [hereinafter NAFTA].

3. Autotrim/Customtrim, U.S. N.A.O. Public Submission 2000-01 (June 30, 2000). [hereinafter Autotrim/Customtrim Submission]. The Autotrim/Customtrim case was filed with the United States National Administrative Office [hereinafter U.S. NAO], established under the NAALC. *See infra* notes 39-41 and accompanying text for a summary of the NAO's responsibilities. NAALC submissions are also known as petitions or complaints. Those who file a NAALC submission are referred to as submitters, petitioners, or complainants. The Autotrim/Customtrim Submission is publicly available, with appendices, through the U.S. NAO Reading Room at the U.S. Department of Labor in Washington, D.C., and without appendices at http://www.dol.gov/ILAB/media/reports/nao/submissions/Sub2000-01pt1.htm (last visited Mar. 5, 2005).

4. IMSS is Mexico's Social Security Institute, the Instituto Mexicano del Seguro Social, which is responsible for providing medical care, disability pay, workers' compensation, and ongoing social security benefits to certain workers and former workers. *See* La Ley de Seguro Social ("LSS" or "Social Security Law") arts. 2, 24, 55-67, 84IIa; Ley Federal de Trabajo ("LFT" or "Federal Labor Law") arts. 480, 482, 492, 493, 514.

5. U.S. Dep't. of Labor, U.S. National Administrative Office, In the Matter of:

"After so much time and energy by the workers, after knocking on so many doors and not being heard, finally [government officials have] heard our testimony. This is good news and brings a ray of light to the maquiladora workers. Hopefully, when they hold their ministerial consultations, the ministers of our three countries–Mexico, the United States, and Canada–will make decisions that benefit the workers."
– Former worker, reacting to the NAO report on the Autotrim/Customtrim case[6]

"They meet, they tell you nice things, that the officials . . . respect the law . . ., but nothing happens."
– Former worker, describing the post-report NAALC submission process[7]

I. INTRODUCTION

The stated purpose of the North American Accord on Labor Cooperation ("NAALC" or "NAFTA Labor Side Agreement") is to improve working conditions and promote compliance with, and effective enforcement of, labor laws in the three NAFTA countries: Mexico, the United States, and Canada.[8] Filed on

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Public Hearing on Submission 2000-01, Dec. 12, 2000, Transcript of Public Hearing [hereinafter Hrg. Tr.] at 215-218 *available at* http://www.dol.gov/ilabmedia/reports/nao/submissions/autotrimhearing.htm. A hard copy of the printed transcript can be obtained through the U.S. NAO Dep't of Labor, Reading Room, *see supra* note 3. A printed copy is also on file with the author. In this article, page references to the transcript are to the printed version. Like many former Autotrim and Customtrim workers, this witness is unable to find regular work because of his health problems. Despite numerous efforts, he has been unable to persuade IMSS to pay him the benefits to which he is legally entitled or to provide him suitable medical treatment and rehabilitation. Affidavit Q in Appendix II, attached to the Autotrim/Customtrim Submission.

6. Translation of written communication to the Coalition for Justice in the Maquiladoras, June 8, 2001 (on file with author). A leader in the grassroots movement to improve conditions at Autotrim and Customtrim, this witness testified at the public hearing on the Autotrim/Customtrim Submission. *See* Hrg. Tr., *supra* note 5, at 47-54.

7. Linda Delp, Marisol Arriaga, Guadalupe Palma, Haydee Urita, & Abel Valenzuela*, NAFTA's Labor Side Agreement: Fading into Oblivion*? (2004), at 29-30 (unpublished manuscript, on file with the UCLA Center for Labor Research and Education) *available at* http://www.labor.ucla.edu/publications/nafta.pdf [hereinafter *Fading into Oblivion*] (last visited Mar 22, 2005).

8. NAALC, *supra* note 2, arts. 1(a), 1(f), 3. NAFTA's purpose is to facilitate greater trade among the three countries through measures such as: phasing out trade tariffs; eliminating restrictions on foreign investments and penalties for local companies that are owned by investors in other NAFTA countries; doing away with barriers that prevent

June 30, 2000, the Autotrim/Customtrim case was the first complaint submitted to the U.S. National Administrative Office ("U.S. NAO" or "NAO") under the NAALC to focus exclusively on the failure by a NAFTA country to enforce its own occupational health and safety laws. [9]

The NAALC's limited complaint mechanisms do not provide workers the right to file a case directly against an employer, or to seek monetary damages. Instead, the NAALC restricts workers to filing complaints alleging persistent non-enforcement of their government's existing labor laws.[10] The sole remedy the NAALC provides complainants is the possibility of improving enforcement of and compliance with those laws.[11]

The NAO's Public Report on the Autotrim/Customtrim submission, released on April 6, 2001,[12] concluded that the performance of the Mexican government was inconsistent with its obligations to enforce effectively Mexico's occupational health and safety laws, including laws related to social security compensation, diagnosis, and treatment, at Autotrim and Customtrim. The NAO recommended that the Autotrim/Customtrim case be referred for ministerial consultations, the next level of the NAALC process, where the labor ministers of the NAFTA countries could endeavor to resolve the occupational health and safety problems raised in the submission.[13] On June 11, 2002, more than a year after the NAO published the report, ministerial consultations purported to resolve the case through the U.S.-Mexico Ministerial Consultations Joint Declaration.[14] The Joint Declaration's self-styled resolution consisted of a pledge to create an intergovernmental Working Group which would further discuss deficiencies that

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service companies from operating across borders; restricting governments from using monopolies and state enterprises to restrict trade; and providing rigorous dispute resolution mechanisms. *See* NAFTA, *supra* note 2, arts. 1207, 1414, 1502, 1503, 1504.

9. Autotrim/Customtrim Submission*, supra* note 3, Section II(b).

10. NAALC, *supra* note 2, arts. 16(3), 20-43; Garrett D. Brown, *NAFTA's 10 Year Failure to Protect Mexican Workers' Heath and Safety, Maquiladora Health and Safety Support Network* (2004), at 6, *available at* http://mhssn.igc.org/NAFTA_2004.pdf.

11. NAALC, *supra* note 2, arts. 16(3), 22(3), 27(1) and (4), 28, 29, 38, 39, 40, 41, 43.

12. U.S. N.A.O., Bureau of Int'l Labor Affairs, U.S. Dep't of Labor, Public Report of Review of NAO Submission No. 2000-01 [hereinafter Public Report], *available at* http://www.dol.gov/ilab/media/reports/nao/pubrep2000-1.htm. A printed copy of the Autotrim/Customtrim Report is on file with the author, and available through the U.S. NAO Reading Room, *supra* note 3. The NAO Report's page numbers cited in this article are to the printed report.

13. *Id*. at 116.

14. Ministerial Consultations, Joint Declaration Between the Department of Labor of the United States of America and the Secretariat of Labor and Social Welfare of the United Mexican States Concerning U.S. NAO Public Communications 99-01 and 2000-01 and Mexican NAO Public Communication 98-04, June 11, 2002, *available at* http://www.dol.gov/ilab/nao/jointstate061102 [hereinafter Joint Declaration].

the petitioners and the NAO had already identified.[15]

During the four years since the submitters filed the Autotrim/Customtrim complaint, they have continued to press for a more concrete resolution of the case, and challenge the NAFTA governments to give the NAALC's promise of improved enforcement of labor laws real meaning.[16] Despite the petitioners' exhaustive approach, and the U.S. NAO's affirmation that their allegations were supported by credible evidence, the labor ministers of the NAFTA countries have failed to address workers' complaints directly, ignored worker recommendations to enhance enforcement of existing occupational health and safety laws, and neglected to take remedial measures. The labor ministers have also declined requests by workers and non-governmental organization ("NGO") petitioners to have a voice in the intergovernmental discussions prompted by the Autotrim/Customtrim submission.[17]

This outcome, along with similar unsatisfactory results in other NAALC cases, raises serious doubts that the NAALC complaint process can bring about real improvements for workers in the NAFTA countries, and that its potential benefits to workers outweigh its significant costs.[18] Participation in the Autotrim/Customtrim case leads the author to four conclusions, which are explored in this article. First, the NAALC's complaint procedures are deeply flawed and in need of substantial transformation, so that the purported beneficiaries of those procedures – aggrieved workers – can fully participate in developing appropriate resolutions to the problems they face in the workplace. Second, the submission process may eventually play a role in achieving better working conditions in the NAFTA countries, if used strategically by non-governmental organizations as one of a variety of advocacy approaches, and if the governmental entities established to implement the NAALC are willing to allow workers and other non-governmental stakeholders to participate in the process of resolving submissions. Third, continuing to file NAALC submissions can

15. *Id.*

16. *See infra* Parts III and IV.

17. *See infra* Part IV.

18. Critical assessments of the NAALC complaint procedure are especially timely given that January 1, 2004 marked the ten year anniversary of the implementation of the NAALC, and that the United States is in the process of negotiating broader hemispheric trade agreements. *See, e.g.*, Tim Weiner, *Free Trade Accord at Age 10:The Growing Pains are Clear,* N.Y. TIMES, Dec. 27, 2003, at A1; Press Release, Office of the United States Trade Representative, Executive Office of the President, Zoellick to Lead U.S. Effort to Advance the Free Trade Area of the Americas in Key Miami Meeting this Week, Nov. 14, 2003, *available at* http://www.ustr.gov; Marley S. Weiss, *Two Steps Forward, One Step Back–Or Vice-Versa: Labor Rights under Free Trade Agreements from NAFTA, Through Jordan, Via Chile, To Latin American and Beyond*, 37 U.S.F. L. REV. 689 (2003) [hereinafter *Two Steps Forward, One Step Back*]; Report of the Labor Advisory Comm. for Trade Negotiations and Trade Policy, The U.S.-Chile Free Trade Agreement, Feb. 28, 2003 (on file with author).

contribute to a growing body of public information about labor conditions in the NAFTA countries, and to the gradual shaping of legal norms which may propel the NAALC forward, and reinforce existing international labor standards. Fourth, such long-term and diffuse potential gains may not be worth the considerable cost and risk the NAALC process currently poses for workers.

Part II of the article provides an overview of the political and historical context in which the NAALC was negotiated, the NAALC's complaint procedure, and other provisions of the Accord related to the Autotrim/Customtrim case. Part III summarizes the workers' struggle at Autotrim and Customtrim to ameliorate working conditions prior to filing a NAALC submission, the development and substance of the Autotrim/Customtrim complaint and public hearing, post hearing issues, and the U.S. NAO's Public Report on the submission. Part IV reviews the submitters' futile efforts to participate in the NAALC complaint process, after the publication of the NAO Report, in order to advocate for concrete advances in occupational health and safety protections for Autotrim and Customtrim laborers and Mexican maquiladora workers generally.

Part V evaluates the efficacy of the NAALC process and offers suggestions for change. Drawing on the experience of the Autotrim/Customtrim case, Part V.A argues that despite the NAALC's emphasis on state sovereignty in labor affairs, workers and other stakeholders must be systematically included in post-hearing procedures if the submission process is to result in effective enforcement of labor laws, and makes several recommendations for achieving this goal. Part V.B discusses procedural changes that must be made to strengthen the submission process. Part V.C maintains that the NAALC submission process, even with its significant deficiencies, nonetheless may over time help advance workers' rights. Adopting a human rights perspective, this section examines the potential of the submission process to document and publicize particular problems; expand cross-border and multi-disciplinary advocacy strategies; and contribute to norm and institution building.

The article concludes that the NAALC complaint process as currently implemented and as illustrated by the Autotrim/Customtrim case is an ineffective response to documented practices of non-enforcement of labor laws in the NAFTA countries. Notwithstanding its possible long-range, indirect benefits, the continued failure of the NAALC's complaint process, more than ten years after its adoption, to improve compliance with existing labor laws in a significant, concrete, and transparent manner, is discouraging and should prompt serious reconsideration not only of the NAFTA and the NAALC, but also of other free trade agreements currently under negotiation.

II. OVERVIEW OF THE NAALC'S COMPLAINT PROCEDURES

A. Historical and Political Context

The United States government touted the NAFTA as a major step in trade liberalization in the western hemisphere, which would lead to unencumbered free trade and investment in a market of more than 370 million people, with a total production over $6.5 trillion.[19] Human rights, labor, and environmental advocates, however, expressed concern that workers, the poor, and the environment would pay a huge price for the "free" trade agreement. They pressured the NAFTA governments to incorporate enforceable provisions to protect human rights, labor, and the environment directly into the NAFTA text.[20] NAFTA's critics, and even some of its supporters, were particularly concerned that the failure to include meaningful provisions in these areas would result in "a race to the bottom" based on the belief that lowering standards would yield a

19. Message to the Congress of the United States, H. DOC. NO. 159, 103rd Cong., 1st Sess. 1 (1993). NAFTA "created the world's largest and first continent-wide free trade area." Betty S. Murphy, *NAFTA's North American Agreement on Labor Cooperation: The Present and the Future*, 10 CONN. J. INT'L L. 403, 404 (1995) [hereinafter *NAALC: The Present and the Future*]. Its major stated goals are to stimulate economic growth and jobs in Mexico, Canada, and the United States; eliminate tariffs and similar barriers; provide preferential treatment for one another's goods; and "increase their joint ability to compete against both a unified European community and an increasingly dynamic Asia." *Id*. at 403-04. *See also supra* note 8.

20. *See* MINNESOTA ADVOCATES FOR HUMAN RIGHTS, NO DOUBLE STANDARDS IN INTERNATIONAL LAW: LINKAGE OF NAFTA WITH HEMISPHERIC SYSTEM OF HUMAN RIGHTS (December 1992), *available at* http://www.mnadvocates.org/Publication_from_1987_-1995.html; DAN LA BOTZ, MASK OF DEMOCRACY: LABOR SUPPRESSION IN MEXICO TODAY (1992); James F. Smith, *NAFTA and Human Rights: A Necessary Linkage*, 27 U.C. DAVIS L. REV. 793 (1994); Eric Rosenthal, *Tie NAFTA to Human Rights*, MINNEAPOLIS STAR TRIBUNE, Mar. 31, 1993, at 19A; Leonard Bierman & Rafael Gely, *The North American Agreement on Labor Cooperation: A New Frontier in North American Labor Relations*, 10 CONN. J. INT'L L. 533-34 (1995); Robert F. Housman, *The Treatment of Labor and Environmental Issues in Future Western Hemisphere Trade Liberalization Efforts*, 10 CONN J. INT'L L. 301 (1995); Stanley M. Spracker & Gregory J. Mertz, *Labor Issues under the NAFTA: Options in the Wake of the Agreement*, 27 INT'L LAW 737 (1993); Jerome I. Levinson, *Unrequited Toil: Denial of Labor Rights Mexico and Implications for NAFTA*, WORLD POLICY INSTITUTE, THE NEW SCHOOL FOR SOCIAL RESEARCH (1993) [hereinafter *Unrequited Toil*]; Katherine A. Hagen, *Fundamentals of Labor Issues and NAFTA*, 27 U.C. DAVIS L. REV. 917, 918 (1994); John P. Isa, *Testing the NAALC's Dispute Resolution System: A Case Study*, 7 AM. U. J. GENDER SOC. POL'Y & L. 179, 184-185 (1999). MAXWELL A. CAMERON & BRIAN W. TOMLIN, THE MAKING OF NAFTA: HOW THE DEAL WAS DONE (2000) provides a detailed account of the negotiation of NAFTA and its side agreements.

competitive trade edge.[21]

Advocates for workers in the U.S., Canada, and Mexico proposed that NAFTA include language that would require upward harmonization of labor standards among the three countries, treat violations as actionable unfair trade practices, establish enforcement measures to protect labor rights, and create a private right of action or arbitration in labor-related disputes.[22] Some urged an agreement patterned on the European Community Charter of Fundamental Social Rights for Workers to help ensure that expanded free trade and investment did not undercut workers' rights.[23] The NAFTA governments, however, while willing to accept inroads into national sovereignty on trade issues,[24] opposed ceding control over labor issues to an international body,

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21. *See, e.g.*, Thomas R. Donahue, *The Case Against a North American Free Trade Agreement*, 26 COLUM. J. WORLD BUS. 94 (1991); Jerome I. Levinson, *NAFTA's Labor Side Agreement: Lessons From the First Three Years, Institute For Policy Studies and the International Labor Rights Fund* (1996), at 5-7 [hereinafter *The First Three Years*].

22. Mark J. Russo, *NAALC: A Tex-Mex Requiem for Labor Protection*, 34 U. MIAMI INTER-AM. L. REV. 51, 55-66 (2002); Jorge F. Perez-Lopez, *The Labor Side Agreement: The Promotion of International Labor Standards and Norms–Retrospect and Prospects*, 10 CONN. J. INT'L L. 427, 428 (1995) [hereinafter *The Promotion of International Labor Standards*]; *The First Three Years*, *supra* note 21. *See also* Symposium, *The Labor Cooperation Agreement Among Mexico, Canada, and the United States: Its Negotiation and Prospects*, 3 U.S.-MEX. L.J. 121 (1995); Luis Miguel Diaz, *Private Rights Under the Environment and Labor Agreements*, 2 U.S.-MEX L.J. 11 (1994).

23. *See, e.g.*, *Unrequited Toil, supra* note 20, at 24-28; Lance Compa, *The Multilateral Agreement on Investment and International Labor Rights: A Failed Connection*, 31 CORNELL INT'L L.J. 683 (1998); Edward Mazey, *Grieving Through the NAALC and the Social Charter: A Comparative Analysis of their Procedural Effectiveness*, 10 MSU-DCL J. INT'L L. 239 (2001); Craig Jackson, *Social Policy Harmonization and Worker Rights in the European Union: A Model for North America?*, 21 N.C. J. INT'L L. & COM. REG. (1995); Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L LAW 987 (1995). The European Community Charter of Fundamental Social Rights for Workers, adopted at Strasbourg by the European Council, Dec. 8, 1989 [hereinafter Social Charter]available at http://www.europarl.eu.int/charter. The Social Charter includes uniform standards concerning, for example, freedom of association and organiation, and the right to safe and health conditions of work. Individuals can file a complaint with the European Court of Justice if a member state fails to enact properly a labor protection directive issued through the Social Charter Process. In 1992, provisions based on the Social Charter were annexed to the European Economic Community Treaty. See 1992 O.J. (191)1, Protocol (No. 14) on Social Policy. *See, e.g.*, Stone, *supra* at 1002-03; Mazey, *supra*, at 264-266.

24. *See infra* Part IV.A.2.

especially one with enforcement power.[25] Some influential free trade proponents maintained that strict enforcement of labor laws would create trade barriers that would undermine NAFTA's objectives.[26] In the end, the NAFTA governments opted to negotiate the NAALC as a separate labor side agreement devoid of meaningful mechanisms to protect workers' rights.[27] Under the NAALC, the United States, Mexico, and Canada commit generally to enforce their own existing labor laws and "promote high labor standards.....in light of free trade, without transgressing their sovereignty."[28]

The NAALC marked the first time that the United States negotiated an agreement containing labor rights provisions in conjunction with a trade treaty.[29]

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25. *See, e.g.*, *Two Steps Forward, One Step Back*, *supra* note 18, at 703-706; Lance Compa, *Enforcing Worker Rights under the NAFTA Labor Side Accord*, 88 AM. SOC'Y INT'L PROC. 535, 536-37 (1994); Elizabeth C. Crandall, *Will NAFTA's North American Agreement on Labor Cooperation Improve Enforcement of Mexican Labor Laws?*, 7 TRANSNAT'L LAW. 165, 171 (1994); Laura Okin Pomeroy, *The Labor Side Agreement Under the NAFTA: Analysis of its Failure to Include Strong Enforcement Provisions and Recommendations for Future Labor Agreements Negotiated with Developing Countries*, 29 GEO. WASH. J. INT'L L. & ECON. 769, 793-796 (1996); Bierman & Gely, *supra* note 20, at 533-35; Isa, *supra* note 20, at 183-84.

26. *The First Three Years*, *supra* note 21, at 11-12.

27. *See id*. *See also* CAMERON & TOMLIN, *supra* note 20, at 179-207. The NAFTA governments also crafted a separate environmental side agreement, the North American Accord on Environmental Cooperation, Sept. 14, 1993 32 I.L.M. 1480 [hereinafter NAAEC]. For discussions of the NAAEC, *see*, *e.g.*, John H. Knox, *A New Approach to Compliance with the International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 ECOLOGY L.Q. 1 (2001); Jonathan Graubart, *Giving Meaning to New Trade-Linked "Soft Law" Agreements on Social Values: A Law-in-Action Analysis of NAFTA's Environmental Side Agreement*, 6 UCLA J. INT'L L. & FOREIGN AFF. 425 (2002).

28. Parbudyal Singh & Roy J. Adams, *Neither a Gem Nor a Scam: The Progress of the North American Agreement on Labor Cooperation*, 26 LAB. STUD. J. 1, 1-2 (2001). The preamble to the NAALC illustrates the parties' ambivalence toward the Accord. It begins by reiterating the resolve of the NAFTA countries to "create an expanded and secure market for goods and services produced in their territories" and "enhance the competitiveness of their firms in global markets." NAALC, *supra* note 2, Preamble, para. 1. Only after establishing that the underpinnings of the NAALC are expanded markets and competition, does the preamble begin to address the protection and promotion of labor rights, asserting that in adopting the NAALC, the NAFTA countries also resolve to "improve working conditions .... in their respective territories, and protect, enhance, and enforce basic workers' rights." *Id.* Later, the preamble states the NAFTA governments' commitment to promote 'high-skill high productivity economic development in North America" by *inter alia*, "encouraging employers and employees in each country to comply with labor laws and to work together in maintaining a progressive, safe, and healthy working environment." *Id.* para. 7. Yet the NAALC never articulates specific criteria for accomplishing these goals.

29. *See, e.g.*, Jack I. Garvey, *Current Development: Trade Law and Quality of Life –*

Many observers hailed it as an important step forward by the United States in recognizing international labor standards.[30] Advocates for stronger protection of worker rights, however, viewed the final version of the NAALC as weak, particularly since it contained no enforcement mechanism to remedy complaints of labor violations.[31]

B. The NAALC's stated objectives and substantive requirements[32]

Article 1 of the NAALC sets forth the Accord's objectives. Under Article 1(a), the parties must aim to "improve working conditions and living standards in each Party's territory." Article 1(b) mandates the NAFTA governments to undertake measures to "promote, to the maximum extent possible, the labor principles set out in Annex 1" to the NAALC. Annex 1 establishes guiding principles to which each Party commits, subject to its domestic laws, to protect the rights and interests of its workforce. Principles relevant to the Autotrim/Customtrim complaint include "prevention of occupational injuries and illnesses" and "compensation in cases of occupational injuries and illnesses."[33] In addition, the parties to the NAALC agree to "promote compliance with, and

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Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment, 89 AM. J. INT'L. L. 439, 440 (1995). Garvey noted that the "NAFTA is the first international trade agreement to specifically designate a methodology for engaging environmental, health and social values into the promotion of trade liberalization." *Id*.

30. *See The Promotion of International Labor Standards, supra* note 22, at 428-29; *NAALC: The Present and the Future*, *supra* note 19, at 406.

31. *See, e.g.*, Russo, *supra* note 22; *The First Three Years*, *supra* note 21.

32. This section addresses only those objectives and obligations that relate directly to the Autotrim/Customtrim case. For more general discussions of the NAALC's provisions, *see, e.g.*, Joaquin Otero, *The North American Agreement on Labor Cooperation: An Assessment of its First Year's Implementation*, 33 COLUM. J. TRANSNAT'L L. 639 (1995); Leonicio Lara, *The NAALC's Consultations and Evaluations: The First Labor Cases*, 4-SUM NAFTA: L. & BUS. REV. AM. 95 (1998); Barry LaSala, *NAFTA and Worker Rights: An Analysis of the Labor Side Accord After Five Years of Operation and Suggested Improvements*, 16 LAB. LAW. 319 (2001); Roy J. Adams & Parbudyal Singh, *Early Experience with NAFTA's Labour Side Accord*, 18 COMP. LAB. L.J. 161 (1997); Jorge F. Perez-Lopez, *The Institutional Framework of the North American Agreement on Labor Cooperation*, 3 U.S.-MEX. L.J. 133 (1995); Jorge F. Perez-Lopez, *Implementation of the North American Agreement on Labor Cooperation: A Perspective from the Signatory Countries*, 1-AUT NAFTA: L. & BUS. REV. AM. 3 (1995); Hagen, *supra* note 20; Human Rights Watch, *Trading Away Rights: The Unfulfilled Promise of NAFTA's Labor Side Agreement*, (April 2001) *available at* http://www.hrw.org/reports/2001/nafta/ (last visited Apr. 7, 2005).

33. NAALC, *supra* note 2, Annex I (9) and (10).

effective enforcement by each Party of its labor law,"[34] and "foster transparency in the administration of labor law."[35]

Article 2 of the NAALC affirms "full respect" for each Party's Constitution and labor laws, and the right of each of the NAFTA governments to adopt or modify its own laws and regulations. At the same time, Article 2 requires each Party to "ensure" that its labor laws "provide[] for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light." Article 3 obligates each party to promote compliance with and effectively enforce its labor law through appropriate government action, including: "monitoring compliance and investigating suspected violations including through on-site inspections;"[36] requiring record-keeping and reporting;[37] and "initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law."[38]

Article 4(1) prescribes that the domestic laws of each of the NAFTA governments guarantee an individual's access to relevant "administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the [its] labor laws." Article 5 directs that all proceedings for the enforcement of labor laws be fair, equitable, and transparent. It also requires that such proceedings comply with due process of law, are open to the public, are not unnecessarily complicated, and do not involve unwarranted delays. Article 7 requires each party to promote public information and awareness of its labor laws, including by: "(a) ensuring that public information is available related to its labor law and enforcement and compliance procedures; and (b) promoting public education regarding its labor law."

C. The NAALC's complaint procedures

Article 16(3) of the NAALC provides the jurisdictional basis for National Administrative Offices ("NAOs")[39] to receive, investigate and review

34. *Id*. art. 1(f).
35. *Id*. art. 1(g).
36. *Id.* art. 3(1)(b).
37. *Id*. art. 3(1)(d).
38. NAALC, *supra* note 2, art. 3(1)(g).
39. Each NAFTA country establishes a National Administrative Office (" NAO") at the federal level to assist the intergovernmental Commission for Labor Cooperation ("Commission") created by the NAALC, and handle basic government-to-government interactions on the NAALC. NAALC, *supra* note 2, arts. 8, 15-16. In practice, each NAO is staffed by officials of the particular country's labor department. The NAOs exchange information on labor law and practice, receive and review submissions from petitioners about alleged NAALC violations, conduct investigations, publish reports on their findings,

complaints (officially called "submissions" or "public communications")[40] from non-state actors alleging that a NAFTA country has failed to enforce or comply with its labor law.[41] The NAALC defines labor law as those "laws and regulations, or provisions thereof" that relate directly to: freedom of association and protection of the right to organize; the right bargain collectively; the right to strike; prohibition of forced labor; child worker rules; minimum employment standards, such as minimum wages and overtime pay; elimination of employment discrimination; gender pay equity; prevention of occupational injuries and illnesses; compensation in cases of occupational injuries and illnesses; and the protection of migrant workers.[42] Additionally, Article 16(3) complaints can raise questions of government compliance with the substantive mandates of the

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and carry out cooperative activities. *Id*. art. 16. They function "as hubs for the NAALC, serving as contact points for interested parties in each country." Singh & Adams, *supra* note 28, at 2. The Commission, which is assisted by each country's NAO, consists of a Ministerial Council and a Secretariat. NAALC, *supra* note 2, art. 8. The Council comprises labor ministers of each government or their designees, and serves as the governing body of the Commission. *Id*. arts. 9, 10. The Council's responsibilities include *inter alia:* further elaboration of the NAALC; overseeing committees or working groups the Council convenes; facilitating Party-to-Party consultations; interpreting the NAALC; and considering acting on other matters within the scope of the NAALC if all the parties agree. *Id*. art. 10. The Secretariat, also an intergovernmental body, is responsible for preparing and publishing reports and studies relevant to matters under the NAALC. *Id*. arts. 12-14.

40. *See, e.g., id.* art. 16(3); U.S. Department of Labor, Bureau of International Labor Affairs, *North American Agreement on Labor Cooperation: A Guide*, Apr. 1998, *available at* http://www.dol.gov/ilab [hereinafter *NAALC: A Guide*].

41. As the Accord is currently written, the entities the NAALC created to carry out most of the work–the Council, the Secretariat, and the NAOs–consist of representatives of the labor departments of Mexico, the United States, and Canada. Human Rights Watch correctly points out that this institutional structure ensures that governmental agencies accused of violating the NAALC–typically, the departments of labor of the three NAFTA countries–are those that sit in judgment of such allegations. Human Rights Watch, *supra* note 32, at 2. Under NAALC Article 16(3), cases filed by non-state actors against the government of one country are initially heard by the NAO of another NAFTA country. Ministerial consultations are handled by the labor ministers of the government that is the subject of the complaint, the government that initially considered the case, and sometimes, the third NAFTA government. NAALC, *supra* note 2, art. 22(1). Even in the initial steps of the NAALC process, where the NAO of one country issues a report regarding allegations against another country, a particularly harsh report has the potential to create political friction with the country complained against in the submission. Because of the rigid notion of sovereignty that underlies the NAALC, the Accord contains no guidelines mandating independence in decision-making by NAOs or the Council that might somewhat alleviate these problems. *See, e.g., infra* Parts V and V.A.

42. NAALC, *supra* note 2, art. 49.

NAALC itself, set forth in Articles 1-7.[43]

Under Article 16(3), submissions alleging NAALC violations by a NAFTA country are first filed with the NAO of another country. Each country may delineate its own procedures for addressing submissions filed with its NAO, as long as the procedures are not inconsistent with the NAALC itself.[44] The submission process established by the U.S. NAO, with whom the Autotrim/Customtrim complaint was filed, is governed by the NAALC, by guidelines promulgated by the U.S. NAO,[45] and by specific case-by-case instructions.[46]

The guidelines issued by the U.S. NAO mandate minimum standards for accepting a submission for review.[47] The submission must credibly allege: (1) that the government that is the subject of the complaint demonstrates a pattern of non-enforcement of its own labor laws; (2) conduct that has caused specific harm to the submitter or other persons; and (3) that relief has been sought under the domestic laws of the government in question. [48]

If the NAO accepts the submission for review, NAO personnel proceed to gather evidence to determine whether the party against which the complaint has been lodged has failed to enforce its labor laws. The NAO can conduct legal analysis, and evaluate evidence, including evidence presented at a public hearing on the submission.[49] The public hearing provides an opportunity for the submitters, the alleged offending government, and the company or companies at issue to put forward relevant information.[50] Additionally, the NAO may consult

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43. *See, e.g., supra* notes 32-39 and accompanying text.

44. *NAFTA Labor Cooperation Secretariat Maps Out Its Agenda, Responsibilities*, 12 INT'L TRADE REP. AM. 41 (1995).

45. Bureau of International Labor Affairs, North American Agreement on Labor Cooperation, Revised Notice of Establishment of U.S. National Administrative Office and Procedural Guidelines, 59 Fed. Reg. 16660-62 (1994) [hereinafter 1994 U.S. NAO Procedural Guidelines]; *NAALC, A Guide, supra* note 40.

46. *See, e.g.*, *infra* notes 120-24 and accompanying text.

47. *NAALC: A Guide*, *supra* note 40.

48. *Id.* The domestic exhaustion provision is not included in the NAALC itself. U.S. NAO guidelines further require: (1) the NAO Secretary to accept or decline review of a submission within 60 days of its receipt; (2) the publication of the decision to accept or deny review of a submission in the Federal Register; (3) if a submission is accepted for review, a public report must be issued within 120 days after acceptance, unless the Secretary deems it appropriate to extend the time period by 60 days; and (4) during the review process, a public hearing may be held, with notice of such hearing published in the Federal Register.

49. *NAALC: A Guide, supra* note 40, at 4-5.

50. The Guidelines clarify that a hearing is not a judicial proceeding; examination of the witnesses is only permitted by members of the U.S. NAO; the Federal Rules of Evidence are not in effect; and persons wishing to present testimony must give written notice to the NAO along with a statement of testimony to be presented. *See* 1994 U.S.

with the other NAOs, the submitters, the companies in question, and experts. At the end of this process, the NAO issues a public report. The purpose of the report is to determine the legitimacy of the submitters' allegations.[51] The NAO may recommend ministerial consultations if evidence supports the allegations.[52]

Articles 20-22 of the NAALC set forth procedures for consultations among the NAFTA governments regarding labor laws and conditions, including resolution of submissions. The NAALC emphasizes consensus and cooperation in such consultations.[53] Article 22 establishes procedures for ministerial consultations. Ministerial consultations, which are discussions between cabinet-level ministers or secretaries in each of the NAFTA countries, may be called to attempt to resolve certain labor law matters. If the NAFTA governments decide to engage in ministerial consultations about a particular submission, the NAALC neither imposes time limits for the consultations nor sets out procedures or guidelines for what the ministers must do during consultations. The NAALC neither requires nor forbids the participation of the case submitters or their representatives in the consultations.[54] Article 23 of the NAALC makes it clear that ministerial consultations should "resolve" the problems set forth in the NAO report. The NAALC does not define "resolve."

In cases involving violations of laws governing health and safety, child labor, minimum wage, forced labor, occupational disability compensation, protection of migrant labor, employment discrimination, and gender pay equity, if ministerial consultations fail to resolve the issues raised in the NAO report, and a demonstrated "pattern of practice" of failing to enforce the relevant laws exists, any of the NAFTA governments involved in the ministerial consultations may ask the Council of Ministers[55] to establish a quasi-independent Evaluation Committee of Experts ("ECE").[56] To date, the NAFTA governments have refused

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NAO Procedural Guidelines, *supra* note 45, and *NAALC: A Guide*, *supra* note 40.

51. *See* 1994 U.S. NAO Procedural Guidelines, *supra* note 45; *NAALC: A Guide*, *supra* note 40.

52. NAALC, *supra* note 2, art. 22.

53. Article 20, for example, provides that the NAFTA governments "shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to resolve any matter that might affect its operation." *Id*. art. 20.

54. *See infra* Parts IV and V for more detailed discussions of the general practice of the ministers to exclude workers, other submitters, and their legal representatives from the NAALC's post-hearing process.

55. The Council of Ministers comprises the labor secretaries of the United States and Mexico, and the Canadian labor minister. *See supra* note 39 and accompanying text.

56. NAALC, *supra* note 2, arts. 23, 49. The asserted purpose of the ECE is to analyze "in a non-adversarial manner, patterns of practice by each Party in the enforcement of its occupational safety and health or other technical labor standards" as they apply to the subjects considered by ministerial consultations. *Id*. art. 23 (2). The NAALC contemplates that an ECE comprise three independent experts selected by the NAFTA governments from

to establish an ECE.[57]

Only three kinds of complaints can progress beyond the ECE phase: those involving occupational health and safety, minimum employment standards, and child labor.[58] Since only the ECE can trigger the remainder of the NAALC's dispute resolution mechanisms,[59] such as convocation of an arbitral panel and assessment of monetary sanctions, those measures have never been implemented either.

The stated purpose of the arbitral panel,[60] is to consider ongoing allegations of a "persistent pattern of failure by the party complained against to effectively enforce its occupational safety and health, child labor or minimum wage" standards where the matter is trade-related and covered by mutually recognized labor laws.[61] If the panel determines that the government complained against continues its pattern of non-enforcement, the panel may award monetary sanctions.[62] During NAFTA's first year, monetary sanctions, had they been imposed, would have been capped at 20 million U.S. dollars or the equivalent in the currency of the government at fault.[63] Now, under Annex 39, an arbitral monetary assessment cannot exceed .007 percent of total trade in goods between the NAFTA governments during the most recent year for which information is available.[64] All monetary enforcement assessments must be paid in the currency of the offending government into a fund established under the NAALC, to be

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a roster developed in consultation with the International Labor Organization [hereinafter ILO]. *Id*. art. 24. The NAALC provides no timetable for establishing an ECE. If an ECE is established, it must present a draft report of its findings to the NAFTA governments. *Id*. art. 25. The report is to be issued within 120 days of the ECE's establishment, "or other such period" as the NAFTA governments may decide. The ECE must then submit a final report with recommendations to the NAFTA governments, a version of which must be published. *Id*. art. 26. The deadlines for these reports are also flexible. *Id*. The parties must file responses to the report with the Secretariat within ninety days of its publication. *Id*. art. 26(3).

57. *See, e.g.*, *Fading into Oblivion*, *supra* note 7, at 10.

58. NAALC, *supra* note 2, art. 27.

59. *Id*. at Part V.

60. The members of the arbitral panel are selected from "an established roster of independent experts." *Id*. arts. 30-32.

61. *Id*. art. 29.

62. *Id*. Annex 39.

63. *Id*.

64. *Id*. In determining the amount of the assessment, the arbitral panel must consider the pervasiveness and duration of the failure to enforce occupational safety and health, child labor or minimum wage standards; the level of enforcement reasonably possible given the offending country's resource constraints; the reasons provided by the government for not fully implementing a remedial action plan; efforts made by the party to begin remedying the pattern of non-enforcement; and any other relevant factors. *Id*. Annex 39(2).

used to improve labor law enforcement in that country.[65] Annex 41B allows a complaining government to suspend NAFTA tariff benefits for as long as is necessary to collect the monetary award assessment.

III. "LOS JONKEADOS" TRY TO CLAIM THEIR RIGHTS TO A SAFE AND HEALTHY WORKPLACE, 1994-2001

A. Working Conditions at Autotrim/Customtrim

Since 1994, the year the NAALC took effect, workers at Autotrim and Customtrim[66] – similar to other maquiladora[67] employees in northern Mexico –

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65. *Id.*, Annex 39(3).

66. Autotrim and Customtrim/Breed Mexicana, located respectively in Matamoros and Valle Hermoso in the state of Tamaulipas, are subsidiaries of Breed Technologies, one of the largest conglomerates of auto-part makers in the world. Autotrim/Customtrim Submission, *supra* note 3, at 20 (citing United States Securities and Exchange Commission, Annual Report Pursuant to the Securities Exchange Act of 1934 (June 30, 1997) at 14, *available at* http://www.sec/gov/Archives/edgar/data/891531/0000891554-97-00910.txt.) (last visited June 3, 1998). On September 20, 1999, Breed began Chapter 11 bankruptcy proceedings, from which the company successfully emerged on December 26, 2000. *See* Breed Technologies, 8-K, Current Report Pursuant to Section 13 or 15 (d) of the Securities and Exchange Act of 1934, December 26, 2000, *available at* http://www.sec.gov/Archives/edgar/data/8910000843-00-0.txt. (last visited Mar. 27, 2004). After the Autotrim/Customtrim case was filed with the NAO in June 2000, additional Breed subsidiaries began to operate in Tamaulipas: Customtrim de Mexico S.A. de C.V. in Ciudad Ramirez and Productos Electromecanicos BAC S.A. de C.V. in Matamoros. *See* http://www.breedtech.com. (last visited November 21, 2002).

Breed is a leading supplier of automotive occupant safety systems and steering wheels, with 57 facilities in 13 countries. *Id*. citing Securities and Exchange Commission Report, *supra*, at 1-2. Autotrim and Customtrim supply steering wheel, gear shift covers, and automobile and truck accessories to some of the largest car companies in the world, such as General Motors, Ford, and Daimler-Chrysler. *Id*. at 20-21. These manufacturers have recognized Autotrim and Customtrim for their high quality products by certifying that both maquiladoras comply with the quality control specifications under the car makers' QS-9000 guidelines. *Id*. at 21, n. 21. *See* http://www.breedtech.com, *supra*. On Sept. 29, 2003, Breed changed its name to Key Safety Systems, aligned with the Carlyle Management Group's Key Automotive Group, and relocated its headquarters to Detroit, Michigan. Press Release, Key Safety Systems, Inc., Breed Technologies, Inc. Changes Name to Key Safety Systems, Inc. and Relocates Headquarters to Metropolitan Detroit (Sept. 29, 2003), *available at* http://www.keysafetyinc.com/press_releases/9-29-2003.asp.

67. Mexican maquiladora operations involve the importation of production materials into Mexico, where they are assembled by Mexican labor into finished goods, and then exported, either to the country of origin or to a third country. Raw materials and finished products are moved back and forth across the border virtually tax and duty free. The

have earned the equivalent of between three and eight U.S. dollars per day.[68] Their employer does not provide health insurance. The IMSS, Mexico's social security system, is supposed to provide free medical care and legally mandated monetary compensation to workers who sustain employment-related injuries and illnesses.[69] Yet workers typically face significant obstacles in trying to obtain proper medical treatment and disability compensation from IMSS.[70]

Evidence shows that employees on both plant floors were exposed daily to toxic chemicals–mainly glues and solvents[71]–without adequate (and sometimes without any) personal protective equipment ("PPE") or functioning ventilation

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majority of Mexican maquiladoras are located along Mexico's border with the United States, and are operated by foreign or multinational companies, often U.S.-based firms. *See, e.g.*, Gerard Morales, Benjamin Aguilera, & David K. Armstrong, *An Overview of the Maquiladora Program*, 1994, *available at* http://www.dol.gov/ilab/public/media/reports/nao/maquilad.htm; Tom Morris & Cynthia M. Parett, *Management Style and Productivity in Two Cultures*, 23 J. INT'L BUS. STUD. 169 (1992); Kathleen Wiegner, *How to Mix Sake and Tequila*, FORBES, Mar. 23, 1987, at 48; Michael Joseph McGuinness, *The Politics of Labor Regulation in North America: A Reconsideration of Labor Law Enforcement*, 21 U. PA. J. INT'L. ECON. L. 1, 32 (2000). The term "maquiladora" comes from the Spanish word "maquila," the charge that millers collected from processing grain. Wiegner, *supra*, at 48. Although NAFTA accelerated the "maquiladorization" process, the maquiladora model of production and trade preceded the treaty. *See, e.g.*, Ginger Thompson, *Chasing Mexico's Dream into Squalor*, N.Y. TIMES, Feb. 11, 2001, at A1 ; Scott Schwartz, *The Border Industrialization Program of Mexico*, 4 SOUTHWEST J. BUS. & ECON. 1 (1987).

68. Autotrim/Customtrim Submission, *supra* note 3, at 21 (citing EMPRESA, No. 36, January 1999 at 49; Fabiola Martinez, *Wages in the Maquiladoras Have Not Increased*, LA JORNADA, May 27, 2000) (asserting that maquiladora workers earn up to the equivalent of eight dollars a day, approximately the same wage paid such workers in Mexico in the 1960s). Carlos Salas, *NAFTA at Seven: The Impact of NAFTA on Wages and Incomes in Mexico*, Economic Policy Institute, at 8 (2001) *at* http://www.epinet.org/content.cfm/briefingpapers_nafta01_mx (last visited June 19, 2001); Thompson, *supra* note 67; Salarios Minimos Generales, January 1, 2004, Comision Nacional (de Mexico) de los Salarios Minimos *at* http://www.conasami.gob.mx/estadisticas (last visited March 27, 2004) (minimum unskilled salary in Matamoros and Valle Hermoso is 45.24 pesos, the equivalent of U.S. $4.09). *See also* Autotrim/Customtrim Submission, *supra* note 3, Appendix II, Affidavits E, F, K; Hrg. Tr., *supra* note 5, at 83-92.

69. *See supra* note 4 and accompanying text.

70. *See,* Autotrim/Customtrim Submission, *supra* note 3, Appendix II, Interviews A-1, G, H, I, O, U, Affidavits B, C, J, K, L, M, P, Q, R, S, T, V, W, Y; Hrg. Tr., *supra* note 5, at 203-223, 235-237; Public Report, *supra* note 12, at iii, 106, 113.

71. Chemicals used at the Autotrim and Customtrim plants included 1.1.1 trichloroethane, toluene, acetone, hexane and its isomers, benzene, xylene. Hrg. Tr., *supra* note 5, at 118, 143. At the public hearing on the Autotrim/Customtrim case, Garrett Brown, certified by the American Board of Industrial Hygiene in comprehensive industrial hygiene, pointed out that Breed itself lists the first four as "forbidden or restricted chemicals" despite their use at both plants. *Id*. at 117-118, 125.

systems, causing workers to experience a range of negative health effects.[72] These included central nervous system disorders, skin and eye problems, respiratory illnesses, chronic headaches, sore throats, and coughs, stomachaches, dizziness, fainting, and addiction.[73] Long-term exposure to toxic chemicals may

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72. *See, e.g.*, Autotrim/Customtrim Submission, *supra* note 3, Appendix II, Interviews A-1, G, H, I, O, U, Affidavits B, C, J, K, L, M, P, Q, R, S, T, V, W, Y. *See also* i*d*., Appendix II, Interviews A, D, E, Affidavits F, N, X; Hrg. Tr., *supra* note 5, at 93-136; Public Report, *supra* note 12, at 64-65, 113; NIOSH Report at 1, 3-6. 11-12. Breed denied that working conditions at Autotrim and Customtrim were substandard. *See, e.g., infra* note 132.

The production processes and symptoms Autotrim and Customtrim workers described are consistent with those experienced by workers in other maquiladora plants, by workers in other places exposed to chemicals identical or similar to the chemicals used at the Autotrim and Customtrim plants, and by individuals whose work subjects them to similar types of ergonomic stresses as those present in Autotrim and Customtrim. *See, e.g.,* Rafael Moure-Eramo, et. al. *"Back to the Future: Sweatshop Conditions on the Mexico-U.S. Border,"* 25 AM. J. IND. MED. 311-324 (1994) (summarizing the results of a 1990-1991 survey conducted by Rafael Moure-Eramo and the Lowell Work Environment Program at the University of Massachusetts of 267 maquiladora workers in Matamoros and nearby Reynosa); Report by Leonor Cedillo, Spring 2001 (on file with author) [hereinafter Cedillo Report]. Cedillo, an industrial hygienist based in Hermosillo, Mexico, analyzed the testimony of Autotrim and Customtrim workers, including their descriptions of chemical exposures. Based on this review and her knowledge of health and safety problems typical of Northern Mexico's maquiladora industry, she observed that many of the symptoms that Autotrim and Customtrim workers and former workers reported were consistent with work-related contact with the chemicals used at Autotrim and Customtrim, and at other maquiladoras in the border region. *Id.*. *See also* Autotrim/Customtrim Submission, *supra* note 3, Appendix III: Pastoral Juvenil Obrera, Study of Health Problems in the Maquiladora Industry in Matamoros, 1998; CAFOR Survey of Maquiladora Workers on Occupational Health and Safety in Tijunana and Tecate, Mexico, June-July 1996.

73. The following descriptions illustrate some of the symptoms workers suffered that are indicative of unsafe chemical exposure. An Autotrim worker stated: "I have suffered from respiratory and throat problems, which I believe have been caused by working for years with toxic glues and solvents. I now suffer from a constant cough that never goes away. I frequently get throat infections and sometimes cough up blood. I sometimes feel as though I can't breathe properly–that I can't get enough air and that I'm gasping. My nose burns a lot...The skin on my hand is irritated and peels easily. Sometimes if I get a lot of glue or solvent on my hands, it causes skin burns … I get terrible headaches. I am now often dizzy and have almost constant nausea and stomach pain. I have trouble sleeping at night sometimes because of the pain." Autotrim/Customtrim Submission, *supra* note 3, Appendix II, Affidavit W. Another testified: "I was exposed to Varsol …, to the yellow glue and trichlorethane....It's difficult to accept, but I think I did suffer an addiction to the chemicals that I used during my work at Autotrim. When I was fired...I suffered withdrawal symptoms...I witnessed the problem in other co-workers...[I also suffered] damage to my forearm....I think [Autotrim] fired me because I had lost my ability to work. Hrg. Tr., *supra* note 5, at 95-98. *See also id*. at 117-129.

also have contributed to the elevated rates of miscarriages and birth defects in children born to plant workers.[74]

Workers at Autotrim and Customtrim also toiled under conditions that produced chronic musculo-skeletal injuries.[75] The intensely repetitive and forceful hand, arm, and back movements required to stretch, sew, glue and trim leather and vinyl covers to fit onto steering wheels and gear shift knobs caused chronic pain and disabling injuries in many Autotrim and Customtrim workers.[76] Employees assumed awkward body postures because plant managers failed to provide ergonomically sound production stations, further exacerbating musculo-skeletal problems.[77] Pressure from plant managers to increase output also contributed to such disabilities. Work team configurations maximized the possibility of workers stabbing themselves or one another with the long needles used to sew covers onto the steering wheel and gearshift bases.[78] Plant managers

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74. Experts discussed studies that indicated adverse reproductive effects for women and men from some of the chemicals the workers at Autotrim and Customtrim used, including toluene. *See, e.g*., Public Report *supra* note 12, at 58. Workers described the high rate of miscarriages among plant employees and neural tube and other defects among children born to employees. One worker, for example, testified: "After seven years of being exposed to these toxic substances ... my wife and I had a daughter who died two hours later; she had anencephaly. After this, we started asking about the cause of death of my daughter, and I started getting information from other workers who had children with physical defects. Eighteen days after my daughter died, another worker had a daughter that died due to hydrocephaly, and the wife of another co-worker had another daughter like my daughter. My friend...had a son with spina bifida." Public Report, *supra* note 12, at 107.

75. *See, e.g.,* Autotrim/Customtrim Submission, *supra* note 3, Appendix II, Interviews A, A-1, D, E, G, H, I, O, U, Affidavits B, C, F, J, K, L, M, N, P, Q, R, S, T, V, W, X,Y; NIOSH Report, supra note 72, at 2-3; Pastoral Juvenile Obrera Study, *supra* note 72; CAFOR Study, *supra* note 72. Leonor Cedillo likewise commented that the musculo-skeletal problems that Autotrim and Customtrim workers described are common at other maquiladoras. Cedillo Report, *supra* note 72.

76. *See, e.g., supra* note 72.

77. *See, e.g.,* Autotrim/Customtrim Submission, *supra* note 3, at 21-22, 24-25, 38-46; Hrg. Tr., *supra* note 5, at 54-58, 161-62, 167-69, 177.

78. A Customtrim worker explained "We would apply the leather to stick shifts ... using a brush to apply the glue, then sewing it on. Each person sewing had to meet a quota of 172 stick shifts a day. And for one [stick shift], you had to make forty-four repetitive movements. So, to meet the quota, that's 3,568 movements per shift." Hrg. Tr., *supra* note 5, at 58. An Autotrim employee explained: "I have to stretch the leather very tautly to get it to fit over the wheel. Doing this over and over again puts a lot of stress on my hands, wrists, shoulders, neck, and back ... [This] causes a lot of pain in my back, shoulders, neck, arms, wrists, and hands. I am losing my grip; it has become much weaker." *Id*. at 60. A former worker detailed the sewing process and cramped work configurations at Autotrim, which forced workers to assume particularly uncomfortable positions in order to avoid sticking one another with the needles they used to attach leather covers to steering wheels. She ended up sticking herself in the finger, causing an infection that spread up her arm,

referred to injured and ill employees as "junk," and eventually fired them.[79]

B. Pre-NAALC Submission Attempts to Remedy Conditions

Until the end of 1996, workers at Auto Trim and Custom Trim who were worried about the plants' health and safety conditions either kept their concerns to themselves or raised them in an ad hoc fashion with plant managers. Individual workers periodically asked managers for PPE, better ventilation, relief from repetitive tasks, which caused hand, arm, and back pain, and effective treatment and adequate compensation for illnesses and injuries related to their work.[80] Typically, workers were either unaware of existing occupational safety laws; that they could seek recourse from Mexican government agencies to remedy dangerous health and safety conditions; unsure of how to do so; or were convinced that such requests would be futile, and could lead to retaliation.[81]

Lacking confidence that they could obtain relief in Mexico, and hoping that international attention might spur improvements, in December 1996, workers at Autotrim drafted a document describing substandard health and safety conditions at the plant. They provided this document to representatives of the Canadian Steelworker's Union #1090, who were visiting the maquiladora workers to learn more about their work conditions, and explore avenues for cross-border organizing.[82]

In April 1997, Customtrim workers and plant management began to negotiate a new collective bargaining agreement. In theory, a local affiliate of the Confederación de Trabajadores Mexicanos (the Confederation of Mexican Workers or "CTM"), Mexico's "official" labor union, represented the workers.

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leaving her permanently disabled. A co-worker put his eye out with the needle. Hrg. Tr., *supra* note 5, at 161-164.

79. *See* Autotrim/Customtrim Submission, *supra* note 3, Appendix II, Interview A; Affidavit K.

80. *See id.* at 50, Appendix II, Affidavit V, Document 29.

81. For example, Isabel Morales, a nurse at Customtrim from 1995 until her termination in 1997, advocated for improved health and safety conditions at the plant. She made specific recommendations to plant management, sought to order medicine and materials to adequately stock the plant infirmary, and insisted on trying to refer injured or ill workers for medical treatment. Melissa S. Monroe, *Ex-Workers Testify about Maquiladoras*, SAN ANTONIO EXPRESS NEWS, Dec. 13, 2000, at 1E; Autotrim/Customtrim Submission, *supra* note 3, Appendix II, Affidavit L.

82. *See* Autotrim/Customtrim Submission, *supra* note 3, Appendix II, Affidavits K, O, V, and Document #29. Representatives of Canadian and U.S. unions were particularly interested in learning more about workers at the Mexican-based Autotrim and Customtrim plants because the jobs the Mexican employees performed there had previously been undertaken by unionized workers at Autotrim and Customtrim factories in Canada and the United States.

Observers have described the federal CTM and its local affiliates as a pro-government, pro-employer union that often ignores the needs of the workers the CTM purports to represent.[83] A number of Customtrim employees, lacking faith that the CTM would negotiate a contract that met their needs, also put forward an independent platform. In addition to asking for better wages, workers asked for improved health and safety conditions.[84]

On June 2, 1997, Customtrim fired 28 workers active in efforts to secure better working conditions.[85] In August 1997, at the invitation of the Canadian Steelworkers Union Local #1090, several of the fired workers traveled to Canada to speak about their situation, and seek support.[86] Upon their return, they were harassed by local government officials, and one of the recently-fired workers was subjected to death threats. He, his wife, and their young child went into hiding.[87]

By the late 1990s, a number of Autotrim and Customtrim workers, like many other Mexican maquiladora employees, realized that they could not rely on their employer, their government, or their "official" union, the CTM, to improve work-related health and safety conditions. They became determined to educate themselves about workplace chemical and ergonomic hazards, effective measures

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83. THE LAWYERS COMMITTEE FOR HUMAN RIGHTS, MEXICO CRITIQUE: REVIEW OF THE U.S. DEPARTMENT OF STATE'S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993, 244 (1994) (commenting that "Mexico suffers from a government-controlled system of officially sponsored and manipulated unions which often take steps antithetical to the best interests of the workers they claim to represent."); KEVIN MIDDLEBROOK, THE PARADOX OF REVOLUTION: LABOR, THE STATE, AND AUTHORITARIANISM IN MEXICO (1995); ANDREW A. REDING, DEMOCRACY AND HUMAN RIGHTS IN MEXICO, World Policy Papers, North America Project of the World Policy Institute at the New School for Social Research 19-22 (1995); Fredrick Englehart, *Withered Giants: Mexican and U.S. Organized Labor and the North American Agreement on Labor Cooperation*, 29 CASE W. RES. J. INT'L L. 321 (1997).

84. *See, e.g.*, Autotrim/Customtrim Submission, *supra* note 3, at 51-52.

85. *Id. See also* April Lindgren, *Mexican Workers Talk Shop*, OTTAWA CITIZEN, Aug. 21, 1997, at B7-8. Later that summer, workers fired by Customtrim filed a complaint with the Mexico's Federal Conciliation and Arbitration Board ("CAB"), which administratively adjudicates conflicts between labor and management. They challenged their terminations as unlawful, and asked for reinstatement and back pay. On December 16, 1998, the CAB issued a decision in favor of the Custom Trim/Breed Mexicana workers, and ordered that they be reinstated. See Expediente 178/8/97 Ante La Junta Especial # 8 de la Conciliacion y Arbitrage en el Estado de Tamaulipis. Custom Trim/Breed Mexicana appealed the decision. Workers have not been reinstated during the appellate process.

86. Lindgren, *supra* note 85.

87. Autotrim/Customtrim Submission, *supra* note 3, Appendix II, Interview O; Document 29. *See also* Memorandum to Monica Schurtman from Monica Cano Carroll, clinic student (Oct. 9, 1997) (memorializing an interview with the affected worker); 1997 Annual Report, Coalition for Justice: Maquiladoras (Spring 1998); Customtrim Alert, *Customtrim Worker's Family Receives Death Threat*, (Sept. 12, 1997) (all on file with author).

to prevent or diminish the occurrence of work-related injuries and illnesses, and Mexico's occupational health and safety laws.

Through their contacts with the tri-national Coalition for Justice in the Maquiladoras ("CJM") and the Maquiladora Health and Safety Support Network ("MHSSN"), Autotrim and Customtrim employees began to participate in workshops conducted by occupational health and safety experts. During these sessions, workers learned how to identify, document, and map occupational hazards; the legal requirements for companies to reduce such hazards; and steps they could take themselves to try to reduce harm caused by inadequate protections.[88]

In 1998 and 1999, Autotrim and Customtrim workers and former workers filed petitions asking for inspections and enforcement of occupational health and safety laws and workers' compensation statutes with Mexico's Departments of Labor, Social Security, and Health. They did not receive a response.[89]

C. Autotrim/Customtrim Meets the NAALC

As a result of increased cross-border education and organizing, Autotrim and Customtrim workers also learned about the NAALC. The knowledge and analytical skills they gained through the health and safety workshops facilitated the development of the Autotrim/Customtrim NAALC submission and presentation of the case at the Public Hearing that the U.S. NAO eventually convened.

In 1998, approximately twenty-five former and current employees of both plants, and the local, grassroots organizations they had formed,[90] decided to

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88. *Fading into Oblivion*, *supra* note 7, at 25; Autotrim/Customtrim Submission, *supra* note 3, Appendix II, Interview E; Hrg. Tr., *supra* note 5, at 78-85 107-08; Memorandum to Monica Schurtman from Kathleen Culhane, clinical student, (Mar. 16, 1997) (describing her observations of non-governmental health and safety workshop with maquiladora workers in Nuevo Laredo, Mexico); Coalition for Justice in the Maquiladoras Memorandum, Materials, and Health and Safety Workshop Outline (May 4, 1998) (on file with author); on-site observation by the author, Matamoros, Mexico, June, 1998; Mexico City Mexico, Jan. 1999, and Tijuana, Mexico, May 2000.

89. Autotrim/Customtrim Submission, *supra* note 3, at 52-54; Petitions attached to Autotrim/Customtrim Submission at Appendix I; Hrg. Tr., *supra* note 5, at 32-44. *See also* Brown, *supra* note 10, at 8 (observing that "workers did not file the NAALC complaints until they had exhausted every avenue within Mexico").

90. Workers organized these groups as an alternative to the local affiliate of the CTM. The groups included FUTURO, at Customtrim, Caminos, a network of grassroots workers' organizations on the Mexican border, and Pastoral Juvenil Obrera, a religious, social, and community organization that supports improved working conditions at Autotrim and other maquiladoras in Matamoros. Autotrim/Customtrim Submission, *supra* note 3, at

proceed with the preparation of the documents needed for a NAALC submission, notwithstanding the lack of concrete remedies available under the Accord. As with many human rights initiatives, it seemed that these individuals decided to participate because they felt they had nothing left to lose.[91] The Coalition for Justice in the Maquiladoras ("CJM" or "Coalition"), a network of Mexican, U.S., and Canadian religious, labor, health and safety, and human rights groups,[92] and law school clinic members[93] joined with the workers and former workers[94] to develop the case.

1. The Autotrim/Customtrim Submission

Although the Mexican government failed enforce the right of Autotrim and Customtrim workers to organize and vote freely,[95] the workers, CJM Executive Director Martha Ojeda, other CJM personnel, and clinic participants decided to focus the submission exclusively on health and safety issues. This decision was a strategic one which, in part, followed from the disappointments of earlier NAALC filings on organizing and union elections.

In developing the Autotrim/Customtrim complaint, the petitioners studied previous submissions to evaluate the kind of approach that might have the best chance to produce tangible improvements under the NAALC. After completing this assessment, the petitioners made a deliberate decision to concentrate on the failure of Mexico's federal Departments of Labor, Social Security, and Health to enforce work-related health, safety, and social security laws. No NAALC filing had yet addressed exclusively the failure to enforce

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91. *See Fading into Oblivion*, *supra* note 7, at 16.

92. *See, e.g.*, Autotrim/Customtrim Submission, *supra* note 3, at 13-14.

93. Students enrolled in the St. Mary's University School of Law Human Rights Clinic who worked on the Autotrim/Customtrim case under the author's supervision included Carlos Lopez, Marisol Perez, Alfonso Otero, Carolyn Perkins, Monica Cano Carroll, Sergio Aleman, Kathleen Culhane, Phillip Doyle, and Griselda Villareal. After the author left St. Mary's for the University of Idaho, College of Law, Mr. Lopez, Ms. Perez, Mr. Otero, and Ms. Carroll continued to devote significant time to the complaint under the auspices of the Committee of International Human Rights Clinic Graduates, which became a formal submitter in the case. Adolfo Banda and Mackay Hanks, students enrolled in the University of Idaho College of Law's Legal Aid Clinic, also worked on the case under the author's supervision. The author is currently finalizing an article that focuses on the implications of the Autotrim/Customtrim submission for cross-border clinical legal education.

94. For the sake of expediency, this article often refers to former and current workers alike as "workers."

95. *See, e.g.,* Autotrim/Customtrim Submission, *supra* note 3, at 51-52.

occupational health and safety laws.[96] The participants hoped that the decision to address only health and safety problems might generate greater attention by the NAFTA governments and the public to the plight of Mexican workers. While governments and the press might discount complaints related to repression of union organizing as power struggles among labor groups, the participants believed that focused documentation of the often incapacitating work-related injuries and illnesses suffered by workers employed at Autotrim and Customtrim would be more difficult to dismiss. Furthermore, under the NAALC, findings that a NAFTA government persistently failed to enforce occupational health and safety laws, could lead to remedies beyond non-binding ministerial agreements and ECE recommendations, and eventually to trade sanctions.[97]

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96. Prior to filing the Autotrim/Customtrim petition, a total of twenty-two submissions on a range of labor issues had been filed with NAOs in the United States, Mexico, and Canada. *See* U.S. DEP'T OF LABOR, BUREAU OF INTERNATIONAL LABOR AFFAIRS, NAO, STATUS OF SUBMISSIONS *at* www.dol.gov//ilab/programs/nao/status/htm (last visited April 22, 2005) (This website is the U.S. NAO homepage, which now has links to NAALC submissions, the Public Reports issued about the submissions, and other related materials).

The cases filed prior to the Autotrim/Customtrim case with the U.S. NAO against Mexico included U.S. NAO Submissions: 9401 and 9402 (Honeywell & General Electric), 9403 (SONY), 9404 (General Electric), 9601 (SUTSP–The Fishing Ministry Case), 9602 (Maxi-Switch), 9701 (Pregnancy Testing), 9702 (Han Young), 9703 (ITAPSA/Echlin), 9801 (AeroMexico/Flight Attendants), 9802 (Tomato Child Labor), and 9901 (TAESA). *Id*. Occupational health and safety issues were not raised at all in the first six submissions. The first five focused solely on the rights to organize and hold free and fair union elections, and the sixth, the Pregnancy Testing Case, addressed gender and pregnancy discrimination. Han Young, ITAPSA, and TAESA raised organizing, election, and occupational health and safety issues. For more detailed discussions of cases filed with the U.S. NAO, see Human Rights Watch*, supra* note 32, at 24-29, 37-55; *The First Three Years*, *supra* note 21; Lance Compa, *NAFTA's Labour Side Agreement and International Labour Solidarity*, ANTIPODE, 2000, at 4-5 [hereinafter *International Labour Solidarity*]; *Fading into Oblivion, supra* note 7.

97. One of the NAALC's significant flaws is the limits placed on certain types of complaints. Claims that do not involve occupational health and safety, child labor, or minimum wage violations cannot, even theoretically, move past the ECE stage. *See supra* note 56 and accompanying text. The NAALC thus gives short shrift to core principles of the ILO, which emphasize respect for freedom to organize, associate, and collectively bargain.

This limitation also appears inconsistent with the obligations of the NAFTA countries under Article 22(1) of the International Covenant on Civil and Political Rights ("ICCPR"), which states that "Everyone shall have the right to freedom of association with others, including the right to form and join in trade unions for the protection of his interests." All three NAFTA countries have ratified the ICCPR. *See infra* note 396. Effective organizing and collective bargaining can lead to improved workplace health and safety conditions. Therefore, the failure of the NAALC on its face to include provisions

The Autotrim/Customtrim submission alleged that although Mexican law contains comprehensive provisions to protect workers from chemical and ergonomic hazards, the Mexican government did not enforce those laws at Autotrim and Customtrim and other maquiladoras along the U.S./Mexico border.[98] The submitters (sometimes referred to as "petitioners" or "complainants") further contended that the failure of the Mexican government to enforce and comply with its own laws contributed to widespread work-related injuries and illnesses suffered by Autotrim and Customtrim employees.[99] Specifically, the complaint charged that the Mexican government persistently failed to enforce and comply with the occupational health and safety provisions of Mexico's Federal Labor Law ("Ley Federal de Trabajo" or "LFT"), the Social Security Law (Ley de Seguro Social or "LSS"), the Health Law ("Ley General de Salud" or "LGS"), and the legal regulations and norms issued pursuant to these laws.[100] According to the submission, the agencies at fault were those responsible for enforcement of these workplace health and safety laws: the Secretaria de Trabajo y Previsión Social (the "STPS" – Mexico's Labor Department), the Instituto Mexicano del Seguro Social ("IMSS" – Mexico's Department of Social Security), and the Secretaria de Salud ("SSA" – the Department of Health).[101]

The written submission totaled 108 pages.[102] It carefully documented

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that permit complaints regarding the ability to organize, associate, and collectively bargain to move past the Ministerial Consultations stage not only shortchanges these fundamental labor rights, it undercuts the ability of workers to challenge inadequate enforcement of occupational health and safety laws.

98. *See, e.g.*, Autotrim/Customtrim Submission, *supra* note 3, at 1-4.

99. *Id.*

100. *Id*. Mexico's occupational health and safety laws (and the regulations and norms promulgated pursuant to those laws) derive from Mexico's Constitution, and also reflect the government's obligations under numerous international treaties. Under this legal framework, the Mexican government must: conduct effective and transparent health and safety inspections of workplaces, including monitoring concentrations of toxic substances used in production; investigate reported violations; ascertain that employers inform and educate workers about occupational hazards; ensure that employers develop and implement training and hazard prevention programs; require reconfiguration of unsafe work practices; insist on functional exhaust and ventilation systems and personal protective gear; issue corrective orders and assess fines for violations; and ensure that employees who suffer occupational disabilities receive proper medical treatment and compensation. *Id. See also id*. at 54-105.

101. *Id*. at 1-4, 19-20, 54-105.

102. Four appendices comprised of more than several hundred additional pages were attached to the submission. The appendices consisted of the 1998 and 1999 petitions filed with STPS, IMSS, and the SSA; twenty-six worker affidavits detailing health and safety conditions at Autotrim and Customtrim, the illnesses and injuries workers had suffered, and attempts to seek improvements, treatment, and adequate workers' compensation; material safety data sheets on chemicals used at Autotrim and Customtrim; and reports of similar conditions at other maquiladoras along Mexico's border with the United States.

unlawful working conditions at Autotrim and Customtrim, particularly those related to employee exposure to toxic chemicals,[103] and production processes predicated on hazardous ergonomic practices.[104] Additionally, the submission explained how IMSS regularly failed to apply Mexican social security laws requiring companies to report work-related accidents and illnesses and refer workers promptly for treatment.[105] The submission showed as well that IMSS itself frequently violated Mexico's social security laws by refusing to properly classify injuries and illnesses as work-related, issue legally-mandated payments, and provide appropriate medical treatment.[106] Finally, the submission documented the illnesses and injuries that Autotrim and Customtrim workers suffered and evidence of the links between workplace conditions and the workers' symptoms, and showed how Mexico's failure to enforce occupational health and safety laws contributed to workers' disabilities.[107] Constrained by the NAALC's limited remedial possibilities, the relief submitters sought necessarily centered on

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103. Autotrim/Customtrim Submission, *supra* note 3, at 26-38, 66-75, 101-03, Appendix II.

104. *Id*. at 24-25, 38-44, 75-78, Appendix II.

105. *Id*. at 47-50, 80-83.

106. *Id*. at 83-92, Appendix II.

107. *Id*. at 21-47, Appendix II. Several of the submitters had urged filing a shorter and a less comprehensive petition. The workers, the Clinic, the CJM executive committee, and other submitters eventually prevailed in their belief that the submission's exhaustive approach would further several important purposes. First, they believed that even if the submission did not result in immediate change, it would at least serve as permanent documentation of the harms caused by Mexico's failure to enforce occupational health and safety laws. Second, they knew that the detailed and precise analysis under Mexican law and regulations was sufficiently solid that neither the Mexican nor U.S. government could legitimately claim that no legal violations existed. Third, the submitters were convinced that because the Autotrim/Customtrim submission was the first NAALC case to focus exclusively on occupational health and safety violations, and the first to raise claims not only against the STPS, but also against the IMSS and the Secretary of Health, it needed to be as comprehensive as possible. Fourth, the participants wanted to build on previous submissions that included health and safety issues in a way that might invigorate the NAALC process, and force it to do what its proponents had claimed it would accomplish: promote and protect the well-being of laborers in the NAFTA countries. Fifth, through a carefully articulated and argued legal analysis, the submitters sought to press the NAFTA governments to give substantive content to the NAALC's very general provisions. Finally, the submitters concluded that if the NAFTA governments failed to take corrective action in the face of yet another well-documented and analyzed submission--this one focused only on egregious health and safety violations - it would show what some labor advocates were already starting to suspect: that the NAALC submission process is incapable of protecting workers rights in tangible ways. As discussed *infra* Part V, however, given the dearth of concrete improvements in occupational health and safety enforcement at Autotrim, Customtrim and other maquiladoras, the petitioners would not urge such an exhaustive NAALC filing again.

securing effective enforcement of and compliance with Mexico's health and safety laws and work-related compensation and treatment statutes.[108]

Lance Compa, a long-time labor organizer, senior lecturer at Cornell University's School of Labor, consultant on several NAO submissions, and the author of several articles on the NAALC, characterized the Autotrim/Customtrim submission as:

> a major new complaint [filed with] the U.S. NAO...for workers suffering egregious health and safety violations at two Auto-Trim manufacturing plants in the maquiladora region.... [The] complaint reflects long and careful collaboration among the filing organizations, a high level of technical competency and legal argument, and a powerful indictment of the government's failure to enforce health and safety laws.[109]

Political science professor and lawyer Jonathan Graubert has noted that the most effective approach to the NAALC submission process "combines the dramatic framing of the complaints and the skillful integration of the legal argument" with the involvement of "multiple parties...connected to networks of activists."[110] He gave the Autotrim/Customtrim submission high marks on both counts.[111]

2. Post-filing Intimidation of Autotrim and Customtrim Workers and Organizers

The petitioners filed the Autotrim/Customtrim submission on June 30, 2000. Later that week, Mexican authorities, including local and municipal officials and representatives of the government-affiliated CTM, and members of maquiladora industry management, began a public campaign of intimidation against Mexican workers and organizers who supported the submission. The Toronto Globe and Mail reported that:

> Rather than supporting the workers, officials from the government-backed CTM union informed the eight who had spoken to the media that they would be fired. They publicly

108. Autotrim/Customtrim Submission, *supra* note 3, at 105-08.

109. *International Labour Solidarity*, *supra* note 96, at 6.

110. Graubart defines this kind of "dramatic framing" as "articulating the cause as a legal right while connecting it to stories of actual labour rights abuses." Jonathan Graubart, *Giving Teeth to NAFTA's Labour Side Agreement*, *in* LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION: NAFTA EXPERIENCES, GLOBAL CHALLENGES 203, 215 (John J. Kirton and Virginia W. Maclaren eds., 2000).

111. *Id*. at Table 13.5.

> accused U.S. and Canadian unions of carrying out a 'dirty war' against new investment in Mexico's maquila factories, and labeled Martha Ojeda, the executive director of [the Coalition for Justice in the Maquiladoras], a 'destabilizer' working with 'professional agitators.' A state government official threatened to have Ms. Ojeda arrested.[112]

In describing a labor rights forum held in Reynosa, Mexico later in the summer, journalist David Bacon noted:

> Also participating in the forum were workers from Custom Trim and Auto Trim maquila factories. They gave testimonies about the attacks they have suffered for making a complaint under the NAFTA labour side agreements, including employer and police harassment, threats by unidentified thugs and being publicly labeled as subversives in league with foreign agitators. Even lodging a complaint under the virtually unenforceable NAFTA labour side agreements is becoming a dangerous and 'subversive' act for Mexican workers.[113]

During that summer, workers, clinic students, and CJM responded to the threats and intimidation with legal, and diplomatic action and their own press initiative.[114] By the fall of 2000, harassment had abated. Anecdotal evidence exists, however, that since then, a number of Autotrim and Customtrim workers were fired because of the submission, and that some of the production processes were moved to other factories in more remote areas in order to diminish public scrutiny.[115]

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112. Lynda Yanz, *Mr. Fox, Does Mexican Democracy Include Workers?*, TORONTO GLOBE AND MAIL, Aug. 23, 2000. *See also* Angel Rene Arias, *Agitan extranjeros a obreros* ("Foreigners agitate workers"), EL BRAVO, Matamoros, July 28, 2000 (noting that according to local government authorities and "official" union leaders, Mexican workers involved in the Autotrim/Customtrim Submission were being manipulated by anti-business interests from the U.S., and insinuated that the submitters are bomb-planting terrorists); Hector Miguel Chavez, *Noticiero* ("Notice"), EL BRAVO, July 29, 2000 (accusing workers and foreigners of a campaign of aggression against the maquiladora industry and investors); e-mails to and from the author July-September, 2000 (on file with the author).

113. David Bacon, The Canadian Dimension, August, 2000 The Reynosa forum, held on August 14, 2000, drew more than 250 workers from different maquilas, democratic labor leaders and human rights advocates from Mexico and the U.S. A primary purpose of the forum was to denounce publicly the increasing repression against maquiladora workers who sought to improve their work conditions by forming unions independent of the government-directed, company-friendly CTM, and using the NAALC process. *Id*.

114. These actions are discussed more fully in another article the author is completing on the role of law school clinical students in the case. *See supra* note 93.

115. Confidential communications to the author (2000-02).

Additionally, other workers became too frightened to continue with or become involved in the NAALC process and other initiatives to secure improved working conditions.[116]

3. The Hearing and the NAO's Public Report

a. Pre-Hearing Issues

The U.S. NAO accepted the Autotrim/Customtrim case for review on September 3, 2000,[117] and scheduled a public hearing on the submission for December 12th in San Antonio, Texas.[118] As previously explained, the NAFTA governments have adopted few formal rules of procedure and no rules of evidence to guide NAALC hearings.[119] The NAO, therefore, controlled the hearing procedures and the taking of evidence, subject only to non-binding suggestions made by the submitters, the Mexican government, and the companies implicated in the submission.[120] Each witness had to testify without the structure direct examination can offer, and be ready to answer any question NAO personnel wanted to ask.

On November 9, 2000, the NAO published a notice in the Federal Register, which required each intending witness to file a written request to present oral testimony, along with a written statement or brief describing "the information to be presented or position taken."[121] The notice did not designate a deadline or format for such requests and statements.[122] The NAO, however, established additional ad-hoc oral and e-mailed instructions and deadlines, which caused the submitters confusion and unanticipated work.[123] For example, although neither

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116. Confidential communications to the author (2000-01).

117. Minimum Wages for Federal and Federally Assisted Construction, 65 Fed. Reg. 191 (Sept. 1, 2000).

118. Submission for O.M.B. Review, 65 Fed. Reg. 218 (Nov. 9, 2000).

119. *See supra* notes 41-47 and accompanying text.

120. *See id*. *See also* e-mails among the author, CJM, clinic students and NAO personnel, Oct. 23, 2000-Dec. 5, 2000 (on file with author).

121. Minimum Wages for Federal and Federally Assisted Construction, *supra* note 117.

122. *Id.*

123. These relatively last-minute directives were particularly challenging for the submitters, who had scant financial and staff resources. Additionally, neither the NAALC nor the U.S. NAO guidelines include provisions to defray expenses for complainants to participate in the process. Given that workers still employed by Autotrim and Customtrim, other maquiladoras, or in similar positions earned the equivalent of approximately $4.00 U.S. per day, *see supra* note 68, and that many of the witnesses were no longer employed at all because of work-related injuries and illnesses or termination because of their

the NAALC, the U.S. NAO Guidelines, nor Federal Register notices, contained deadline or language requirements, NAO personnel unexpectedly told the submitters that witnesses had to file their requests to testify, as well as summaries or outlines of their testimony, two weeks prior to the hearing; additionally, written translations had to accompany all such summaries and outlines.[124]

The ability to prepare systematically for the Autotrim/Customtrim hearing, already strained by an international border, considerable distance between the workers and their legal representatives, and inadequate funding, was further hampered by the lack of set procedures and rules. The workers and other submitters were resource-poor, and advocates and experts volunteered their time on the case. The absence of a fixed process and last-minute notices from the NAO about requirements for the hearing created unnecessary tension and forced the submitters to scramble to finalize hearing preparations.

b. The Hearing and Post Hearing Issues

On December 12, 2000, twelve employees and former employees of Autotrim and Customtrim testified at the NAO public hearing on the case in San Antonio, and presented physical exhibits and demonstrations of the dangerous work conditions at both plants.[125] Five expert witnesses attested to the effects of the toxic substances to which workers are exposed, as well as the ergonomic consequences of the excessively repetitive motions, awkward work postures, unsafe workstations, the hazards of work team configurations, and applicable Mexican laws. [126]

The immediate reaction to the hearing by the submitters was one of celebration and hope. Most importantly to the workers, they had fought for the opportunity to speak out about the abuses they suffered, and finally were permitted to do so in an official, public forum.[127] They were able to demonstrate, on their own terms, what it was like to work at the Autotrim and Customtrim plants; the serious impact that workplace illnesses and injuries had on themselves

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organizing activities, fact witnesses could neither cover the costs of obtaining travel documents nor the expense of travel and accommodations in San Antonio. Accordingly, while preparing for the hearing, CJM members, volunteers, and students also had to raise money to bring witnesses to San Antonio for the hearing, feed them, find them accommodations, and assist with visa arrangements. Scarce resources also meant that students and volunteers had to coordinate media work surrounding the hearing. New directives from the NAO during the weeks leading up to the hearing were thus particularly frustrating.

124. E-mail from author to other submitters, (Nov. 13, 2000) (on file with author).

125. *See* Hrg. Tr., *supra* note 5, Index.

126. *Id*.

127. Interviews with Autotrim/Customtrim workers (Dec. 12-13, 2000).

and their families; and how they struggled to make ends meet when they were too incapacitated to work and had been denied proper disability compensation.[128] It was the first time that any representative of any government had treated them with respect and their claims with concern.[129] Although the workers expected neither immediate change nor miracles, they were optimistic that positive action would finally be taken to alleviate the problems they described – for themselves and for other similarly-situated workers.[130]

The Mexican government declined to participate in the hearing. Since the NAALC only permits complaints against a NAFTA government for failing to enforce effectively its labor laws and not against an employer,[131] Autotrim and Customtrim and their parent company, Breed Technologies, were not direct subjects of the submission. Consistent with previous NAALC cases, however, the U.S. NAO invited company representatives to testify. Instead of testifying, two company attorneys were present to observe the proceedings.[132]

The night before the hearing, Breed delivered several hundred pages of documents to NAO personnel who had just arrived in San Antonio for the hearing.[133] Breed's attorneys asked that the documents be considered in the NAO's deliberations on the case.[134] Petitioners challenged the last minute filing, and the failure to disclose the documents to them. The NAO was non-committal about whether or not the documents would be considered in its deliberations, but promised that they would be provided to the submitters shortly.[135] In fact, the

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128. The workers conveyed that "they ... [were] for a free-trade agreement that respects their right to health and their right to life ... The submitters respect Mexico's sovereignty and ask only that the Mexican government enforce the laws it has enacted." Hrg. Tr. *supra* note 5, at 12. As a former worker put it: "I think we're dealing with a universal right, a global right for me, personally … I feel that regarding health, you cannot beg for that; you have to defend it." *Id.* at 98.

129. Interviews, *supra* note 127.

130. *Id*.

131. *See, e.g*., *supra* Parts II.B and C.

132. Breed's Vice-President for Legal Affairs characterized the workers' claims as "pure fantasy." Interview with Garrett Brown (Dec. 12, 2000). *See also* e-mail from Garrett Brown to the submitters (Dec. 21, 2000) (on file with the author). The Vice President additionally stated that worker testimony was "at variance with the facts," that the "only chemicals that are in use are green chemicals," and that "none of the chemicals being described [at the hearing] are in use at the plants." He maintained that Breed's health and safety department had inspected Autotrim and Customtrim and found them to be "in compliance with corporate and Mexican regulations ... "[Breed is] a big company with 16,000 employees in 50 facilities" and "if there is one thing that we do right, it is environmental protection inside and outside the plant ... [W]e know what we are doing and we certainly do not poison our employees." *Id*.

133. Interview with unnamed NAO personnel (Dec. 11, 2000).

134. *Id.*

135. *Id*.

NAO released the documents, totaling hundreds of pages, months later, and only after the petitioners filed a Freedom of Information Act ("FOIA") request.[136] The NAO also permitted Breed to file several hundred additional pages of documents two months after the public hearing. The document sets were largely technical and mainly in Spanish; the NAO imposed no translation requirement on Breed. The timing and nature of the document releases effectively deprived the submitters an opportunity to respond.[137]

Breed also invited the U.S. NAO to participate in a private, company-guided tour of the Autotrim and Customtrim plants from which the submitters were excluded.[138] On January 12, 2001, the submitters wrote to the U.S. NAO, expressing, among other concerns, that the NAO's decision to participate in the plant tours under such circumstances appeared inconsistent with the NAALC's goals of transparency, public scrutiny of labor issues, and fairness.[139] In the end, the NAO received permission from Breed only to bring along investigators and occupational hygiene experts from the National Institute for Occupational Safety and Health ("NIOSH") to visit the plants; NIOSH prepared an independent report based on these on-site observations and a review of the Autotrim/Customtrim submission.[140]

The NAO also permitted the Mexican government to file responses to written questions without imposing any deadlines.[141] Mexico did not respond to the questions posed by the NAO in October 2000, until February 27, 2001; the NAO forwarded the responses to the submitters two weeks later. The responses, in the form of a letter, consisted of bald assertions of occupational health and safety enforcement at Autotrim and Customtrim, and references to documents which the government implied would prove those assertions.[142] As far as the petitioners know, the government never furnished the underlying documents.[143]

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136. Letter and FOIA request filed by Monica Schurtman on behalf of the submitters, (Jan. 12, 2001) (on file with the author and available through the U.S. NAO Reading Room, *supra* note 3).

137. See *infra* Parts IV.C and V.B for further discussions of this issue.

138. Joe Belk, *Breed Gives NAO Tour of Two Border Plants: Work Conditions at Maquilas are Subject of International Labor Complaint*, SAN ANTONIO/MEXICO BUS. MONTHLY, Feb. 2, 2001, at 30. Plant workers claimed that the facilities closed for a week prior to the NAO visit to correct some of the health and safety violations, and that company managers dispensed protective equipment to some workers for the first time, and moved containers of glue and other chemicals. *Id.*

139. Letter from Monica Schurtman, on behalf of the submitters, to Lewis Karesh, Acting Secretary, U.S. NAO (Jan. 12, 2001) (Copy on file with the author).

140. NIOSH Report, *supra* note 72.

141. See *infra* Part V. B for further discussion of this issue.

142. Letter from the Mexican government to the U.S. NAO (Feb. 27, 2001) (on file with author).

143. Submitters' letter to the U.S. NAO (May 21, 2001) (on file with author).

c. Summary of the NAO's Public Report and NIOSH findings[144]

The NAO's Public Report on the Autotrim/Customtrim case, issued on April 6, 2001, affirmed the majority of the submitters' allegations that the Mexican government persistently failed to enforce its occupational health and safety laws at the two plants.[145] The Public Report also concluded that the Mexican government's conduct was often not consistent with NAALC Articles 3, 4, 5, 7 and Annex I.[146] Accordingly, the NAO "recommend[ed] ministerial consultations pursuant to Article 22 of the NAALC on the occupational safety and health and workers' compensation issues raised in [the] submission."[147] NIOSH concurred that the conditions its experts viewed at Autotrim and Customtrim were consistent with what workers described in the Autotrim/Customtrim submission, and that numerous health and safety violations persisted at the plants which continued to pose danger to workers.[148]

The NAO and NIOSH Reports differ in several ways, although both arrive at similar determinations regarding inadequate enforcement of health and safety laws at Autotrim and Customtrim. Perhaps the most striking difference is in the divergent tones of the Reports. The NAO uses a great deal of equivocal and deferential language in discussing the conduct of Mexican agencies, sometimes so much so that it is difficult to discern the Report's conclusions. The NIOSH Report is more straightforward in its assessment.[149]

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144. *See* Public Report, supra note 12; NIOSH Report, supra note 72. *See also infra* Part V.C.3 for a discussion of how the NAO's findings in the Autotrim/Customtrim case can be used as a basis for future norm-building under the NAALC.

145. *Id*. at iii-iv.

146. *Id*. at 115.

147. *Id*. at 116.

148. NIOSH Report, *supra* note 72.

149. For instance, the NAO Report notes that Mexican government inspectors apparently do not actually test and monitor systems ostensibly established to reduce chemical exposure, in order to assure compliance with the law. Yet, in the next paragraph, the Report states that the Mexican government "appear[s] to have generally enforced applicable laws and regulations with respect to monitoring," NIOSH Report, *supra* note 72.

NIOSH, in contrast, states plainly that: "It was apparent from reviewing STPS inspection reports that inspectors use a checklist approach, focusing primarily on reviewing documents provided by the employer to demonstrate the existence of certain components of a safety and health program. For example, the STPS inspector reviewed documents regarding maintenance of a ventilation system, but the reports provided no indication the

Workers who participated in the Autotrim/Customtrim case reacted optimistically to the NAO and NIOSH Reports.[150] As one worker put it:

> We are pleased that our testimonies have not remained sitting on a desk, and that they were heard by the NAO authorities. I, in particular, am very happy with the results of the reports that were issued. This means that our efforts have not been vain; there is hope for those who are still working at Autotrim and in other maquiladoras.[151]

i. Inspections

The Public Report determined that the STPS (although not the IMSS or SSA) had conducted inspections at the Autotrim and Customtrim plants, but strongly criticized the Mexican government for neither providing workers copies of inspection reports nor directly responding to workers' requests for inspection results and related information, as required by Mexican law.[152] The NAO found

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STPS inspector made a direct evaluation of the ventilation system in either plant. STPS inspectors did not conduct environmental monitoring for chemical exposures to verify results reported by the company." NIOSH Report, *supra* note 72. According to NIOSH, "[w]orkers have exposures to potentially hazardous solvents and glues by skin contact and inhalation. The LEV (local exhaust ventilation) system in both plants was not functioning effectively due to a combination of design and maintenance issues . . . Many of the worker health complaints mentioned in [the Autotrim/Customtrim] submission, such as respiratory and dermal irritation and central nervous system effects, are consistent with overexposure to these substances." *Id.* at 6.

The NAO's assessment of whether a governmental third-party monitoring system complies with Mexican law is opaque. The NAO asserts that: "[T]he procedures for certifying third party monitors, which are relied on by employers and the governmental authorities, are not clear." Public Report, *supra* note 12, at iii. NIOSH is more forthright in its evaluation of third-party monitoring at the plants, concluding that the monitors' reports "were significantly flawed in that they did not appear to be in compliance with Mexican standards on how chemical exposure evaluations are to be done." NIOSH Report at 9-10. NIOSH then explains how the three primary deficiencies in the procedures violate Mexican legal norm NOM-10-STPS-1999. *Id.* at 10-12. Finally, NIOSH determines that [t]he records provide evidence that over a period of several years the consultants' reports to STPS failed to meet the Mexican standards regarding methods of chemical exposure evaluations, and there were not STPS citations for these deficiencies." *Id.* at 12.

150. Press Release, CJM (Apr. 8, 2001) (on file with the author).

151. Translation of interview with Autotrim worker (Apr. 8, 2001) (on file with the author).

152. Public Report, *supra* note 12, at iii, 67-80, 114-15. The petitioners had alleged that virtually no inspections had been conducted at Autotrim or Customtrim, in part because they had never seen inspection reports, despite requests to the appropriate

that the government's failure to provide public information was inconsistent with NAALC arts. 3, 4, 5, and 7.[153] The NAO also noted that a number of the inspection reports had little to do with the occupational hazards that posed the greatest risks to workers; instead, reports often addressed issues such as whether light bulbs functioned and the walls had been painted.[154] Both the NAO and NIOSH faulted the methodology used by STPS inspectors, characterizing them as "checklist" and "paper" inspections, in which inspectors relied on documents provided by plant management, but did not actually test whether health and safety equipment actually functioned, or that ergonomic practices were sound.[155] The NAO and NIOSH reports additionally concluded that the government had failed to: certify the credentials of third party private inspectors; verify that third party testing was accurate; and correct private inspectors for not complying with monitoring standards required by Mexican law.[156]

ii. Use of Hazardous Materials

The NAO indicated that although some chemical hazards evidently had been reduced at the plants – through partial substitution of less toxic green glue – employees were still exposed to health risks from continued use of dangerous glues and solvents on a daily basis.[157] NIOSH concurred with this assessment, and added that: "Many of the workers' health complaints mentioned in [the Autotrim/Customtrim] Submission...., such as respiratory and dermal irritation and central nervous system effects, are consistent with overexposure to these substances."[158]

Based on their on-site visits in January 2001, the NAO and NIOSH determined that the ventilation and exhaust systems in both plants were largely ineffective against toxic fumes. The NAO stated, for example, that although local

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government agencies, and in part because it appeared that the plants had made no occupational health and safety improvements. *See, e.g.*, Autotrim/Customtrim Submission, *supra* note 3, at 52-54, 55-59, 78-80, 92-93. Mexican government inspection reports finally surfaced in the papers filed by Breed with the NAO. *See* Public Report, *supra* note 12, at 67-70; *supra* notes 133-127, and accompanying text.

153. Public Report, *supra* note 12, at iii-iv, 73-76, 115.

154. *Id*. at 72.

155. *Id*. at ii-iii, 84-85, 112-13; NIOSH Report, *supra* note 140, at 8. Both the NAO and NIOSH found that in instances where inspectors had spoken with workers about conditions, the interviews were not confidential and workers were thus unable to speak freely for fear of losing their jobs. Public Report, *supra* note 12, at iii, 112; NIOSH Report, *supra* note 27, at 8.

156. Public Report, *supra* note 12, at iii, 78-79; NIOSH Report, *supra* note 27, at 10-12.

157. Public Report, *supra* note 12, at 64-65; NIOSH Report, *supra* note 27, at 6.

158. NIOSH Report, *supra* note 27 at 6.

exhaust devices were present at most work stations in the leather wrapping areas, their effectiveness was limited, and that work stations in the finishing area, where glues containing ethyl-cyanoacrylate were used, had no local exhaustion.[159] NIOSH determined that the systems did not function properly due to a combination of design flaws and poor maintenance.[160] Both NAO and NIOSH observed that workers did not use air respirators.[161] NIOSH added that if Autotrim and Customtrim substituted less toxic substances for those still used, and that if the ventilation and exhaust machinery operated properly that respirators would not be necessary or desirable.[162] Furthermore, NIOSH noted that many workers were not using protective gloves, and of those who did, the gloves generally did not fit properly.[163] NIOSH pointed out that gloves should be "a control of last resort," but went on to say that if gloves are used, they should be available to workers in a variety of sizes.[164]

iii. Ergonomics

The NAO confirmed that under Mexican law, employers are required to take into account ergonomic conditions at the workplace.[165] The Report found that while some positive ergonomic changes had been made at both plants, serious problems remained.[166] NIOSH meanwhile concluded that:

> [based] on our experience involving repetitive and forceful upper extremity exposures in a variety of manufacturing facilities in the United States, the types of musculo-skeletal injuries recorded on company logs and those expressed by former workers at the public hearing are consistent with the bio-mechanical risk factors which exist in both plants.[167]

iv. Workers' Compensation and Medical Treatment

The NAO indicated that while reporting requirements for workplace accidents and illness were being met, significant problems persisted with the

159. Public Report, *supra* note 12, at 84-85.
160. *Id.* at 64-65; NIOSH Report, *supra* note 27, at 6.
161. Public Report, *supra* note 12, at 66; NIOSH Report, *supra* note 27, at 4.
162. NIOSH Report, *supra* note 27, at 4.
163. *Id*.
164. *Id*.
165. Public Report, *supra* note 12, at iii, 94.
166. *Id*. at 97.
167. NIOSH Report, *supra* note 27, at 3.

process.[168] In particular, the NAO noted the apparent lack of transparency in reporting, potential conflicts of interest because some of the doctors employed by Autotrim and Customtrim also work for IMSS, and that IMSS did not always communicate to workers their right to appeal valuation and diagnosis decisions.[169] The Report did not directly address whether the process of IMSS valuation or diagnosis of disease and injury as work-related or as "general illness" complied with Mexican law, notwithstanding the fact that these were issues about which workers expressed most concern.[170] Presumably because its mandate is to examine workplace conditions, the NIOSH Report did not cover workers' compensation.

IV. POST-REPORT DEVELOPMENTS

A. The NAO Asks the Submitters to File Recommendations

Several weeks after the U.S. NAO issued the Autotrim/Customtrim Report, acting director Lewis Karesh asked the submitters to prepare recommendations for ministerial consultations.[171] Current and former Autotrim and Customtrim workers, and other submitting organizations drafted an initial set of recommendations, which they submitted by letter to the NAO, dated May 21, 2001.[172]

The letter first noted the submitters' concern that neither the NAALC nor NAO procedures provides guidance about the process or content of ministerial consultations.[173] Next, the submitters asked that a number of actions be taken as soon as possible without waiting for formal consultations to be convened. Several of the requested actions were administrative in nature: set a schedule for consultations; keep the submitters informed about the schedule; facilitate participation by the submitters in the consultations; and obtain Mexican government documents cited in Mexico's February 27, 2001 letter to the U.S.

168. Public Report, *supra* note 12, at 105-106.

169. *Id*.

170. The Report, however, commented that dual employment of doctors by the plants and the IMSS, as well as the lack of transparency in the diagnosis and valuation process raised serious questions about its validity. *Id*., at 106-07, 110-11, 113.

171. Letter from the submitters to Lewis Karesh (May 21, 2001) (on file with the author).

172. *Id.*

173. *Id*. The submitters went on to state that: "Given the absence of such guidelines, we fear that consultations on Submission 2000-01 will fall victim to delay and political pressure aimed at diluting the potential for consultations to yield concrete occupational health and safety improvements for workers." *Id.*

NAO.[174] The submitters also pressed for immediate action in several areas. They recommended that IMSS perform independent re-evaluations of former Autotrim and Customtrim workers who were denied work-related compensation pay or alleged under-payments based on the nature of their injuries and illnesses.[175] They urged the STPS and SSA to conduct substantive inspections at both plants according to rules established by Mexican law and international agreements to which Mexico is a party; and impose appropriate sanctions for violations.[176] The letter closed with the request that the NAO forward a copy of the letter to the Mexican NAO .[177]

During a subsequent telephone conversation, Karesh told the author that the U.S. NAO believed the requests were reasonable, but asked for a complete set of prioritized recommendations.[178] In a letter dated July 6, 2001, the submitters filed a revised set of recommendations for actions to be raised during ministerial consultations on the Autotrim/Customtrim case, and identified priority actions.[179] The submitters divided the recommendations into those directed at the IMSS, the STPS, the SSA, and those which would best be addressed through inter-agency cooperation.[180]

Demands to IMSS for re-evaluation of workers denied employment-related compensation pay or who claimed under-payment were chief among the priority actions sought by former Autotrim and Customtrim workers.[181] An important corollary was the demand that IMSS: (1) order that re-evaluations be conducted by medical doctors unconnected to Autotrim and Customtim; (2) establish public, transparent criteria for these evaluations; (3) award compensation according to the framework laid out in Mexican law;[182] and (4) ensure that the persons evaluated be provided precise written reasons for decisions.[183]

The submitters wrote that STPS's priority actions must include: (1) re-

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174. *Id*.

175. *Id.*

176. Letter to Lewis Karesh, *supra* note 171.

177. *Id.*

178. Letter from Monica Schurtman to Lewis Karesh on Behalf of the Submitters: Submitters' Prioritized Recommendations, July 6, 2001 (Available at www.mhssn.ifc.org/nafta2.htm, and on file with the author and the U.S. NAO Reading Room.

179. *Id.*

180. *Id.*

181. *Id*.

182. As they had done in Autotrim/Customtrim Submission, *supra* note 3, at 86-89, the submitters cited LFT Article 492 which requires that IMSS consider the following factors in calculating benefits: the worker's age, the nature of the disability, the ability of the worker to perform remunerative activities similar to his or her profession or position, and whether the employer has made efforts for the worker to obtain professional re-education. *Id*.

183. *Id.*

inspection; (2) ongoing monitoring of the plants, (3) issuance of corrective measures; and (4) imposition of sanctions if the plants continued to violate Mexican law.[184] Recommended priorities for the Secretary of Health consisted of establishing "contact with the Texas Department of Health, NIOSH, and other relevant public and private organizations on both sides of the border to learn from past studies and collaborate on future studies of adverse reproductive outcomes among maquiladora workers, including current and former employees of Autotrim and Customtrim/Breed Mexicana;" and working with STPS to improve inspection, monitoring, training, and prevention.[185] The principal priority for coordinated interagency measures was the creation of an inter-agency mechanism to receive and respond immediately to information about babies born to maquiladora workers or their wives who have or die from birth defects.[186]

Longer-term and structural changes suggested by the submitters included requiring IMSS, STPS, and the Secretary of Health to establish and implement publicly-available protocols for carrying out their work, and create incentives for agency employees to do their jobs and meaningful sanctions for those who do not.[187] The letter closed by reiterating that the U.S. and Mexican governments

184. *Id.*

185. *Id*.

186. The submitters suggested that this mechanism might consist of a twenty-four hour hotline to receive such reports, and that "[i]mmediate responses from government health personnel should include direct medical interventions and physical examinations aimed at establishing the cause(s) of such conditions." *Id.*

187. Other recommendations to IMSS included adopting protocols for compensation and treatment that would include appropriate criteria for determining whether symptoms are work-related; methods for IMSS personnel to calculate proper workers' compensation based on LFT Article 492, *supra* note 182; notification in plain language of a worker's right to appeal IMSS determinations and a clear and complete explanation of the appeals process; intervention with an employer on a worker's behalf to facilitate medical appointments and health-related accommodations for the worker; referral for treatment and follow-up to ensure that treatment is effective; and reporting to STPS illnesses or injuries that may be work-related. The submitters also urged IMSS to assess whether current rates and categories of compensation should be changed. Additional structural changes recommended to STPS focused on re-orienting inspection practices from the "checklist" and "document review" approaches identified by the U.S. NAO and NIOSH, to more hands-on practices geared toward ensuring genuine employer compliance with health and safety laws. The submitters proposed specific practices to achieve such an end. Additional recommendations for inter-agency action emphasized developing more efficacious measures for preventing and treating workplace injuries and illnesses through ongoing consultations with a range of domestic, international, governmental and non-governmental experts. The submitters also encouraged inter-agency cooperation to evaluate the health effects on workers of exposures to mixtures of chemicals, and whether synergistic effects result from such exposure, as well as health impacts that water-based solvents may cause. Finally, the submitters proposed inter-agency coordination to draft and implement effective legislation forbidding retaliation against individuals who complain of improper conduct or

must establish a reasonable timetable for the conduct of ministerial consultations and implementation of the submitters' recommendations; the submitters asserted that if such actions were not undertaken in a timely fashion that an ECE should be convened under Article 23 of the NAALC.[188]

B. Submitters' Request for Information about Ministerial Consultations and for Convocation of an ECE.

Despite frequent frustrations with aspects of the NAALC process prior to filing the submitters' recommendations, workers involved in the Autotrim/Customtrim case still remained hopeful that their efforts to press for improved occupational health and safety enforcement would eventually bear fruit.[189] Workers and their legal representatives were sometimes excluded from the NAALC process,[190] and the Public Report's language was somewhat cautious;[191] still, the U.S. NAO and the submitters maintained regular communication, and the submitters were allowed to continue to participate in the process they had initiated. After filing recommendations, however, the submitters were completely excluded from the process. Simply trying to obtain information about the status of their case required persistence.[192]

By the first week of September, 2001, the only information that the U.S. NAO had communicated to the submitters about the status of ministerial consultations was that: (1) its personnel had forwarded the submitters' prioritized recommendations to the Mexican NAO; (2) the U.S. and Mexican NAOs had evidently engaged in preliminary discussions about ministerial consultations, and (3) no agreement about action or even a timetable for action existed.[193] During the fall of 2001, government business was necessarily disrupted by the September 11th attacks and their aftermath. As of mid-November, the submitters had still heard nothing further from the NAO about the Autotrim/Customtrim case. Reports from workers and former workers at the plants in Mexico made it clear that not a single request for action by the IMSS, STPS, or Secretary of Health had been undertaken.[194]

On November 20, 2001, the submitters wrote the U.S. NAO to inquire

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violations committed by employers, STPS, IMSS, or Secretary of Health personnel. *Id.*

188. *Id*. An ECE would allow for a more independent committee of experts to address issues unresolved by ministerial consultations. *See supra* Part II.C.

189. *See, e.g., supra* notes 150-51 and accompanying text.

190. *See, e.g., supra* notes 133-39 and accompanying text.

191. *See infra* Part III.C.3.c.

192. *See, e.g., infra* notes 193-95, 204-08, 221, 227 and accompanying text.

193. Letter from Monica Schurtman, on behalf of the submitters, to Lewis Karesh, (Nov. 20, 2001) (citing summer 2001 telephone conversation) (on file with author).

194. Telephone interviews with Linda Delp and Martha Ojeda (Oct. 2001).

about the status of ministerial consultations.[195] When the NAO failed to respond to their inquiry, the submitters wrote to U.S. Secretary of Labor, Elaine L. Chao, and asked that she call for establishment of an ECE to hear evidence of the Mexican government's persistent "pattern of practice" of failing to enforce health and safety laws in border area maquiladoras.[196] The submitters argued that this pattern of practice was demonstrated by the lack of ministerial action on the Autotrim/Customtrim case, and the failure to carry out even the general terms of ministerial agreements reached in the health and safety portions of the Han Young and Itapsa cases.[197] The request for an ECE – the first ever made – was filed with Chao's office on December 12, 2001, the one year anniversary of the NAO's public hearing on the Autotrim/Customtrim case.[198]

On February 4, 2002, the author received a reply from Thomas Moorhead, U.S. Labor Department Deputy Under Secretary for International Affairs.[199] Writing on behalf of Labor Secretary Chao, Moorhead explained that ministerial consultations on Autotrim/Customtrim were, in fact, underway, and that the U.S. and Mexican NAOs were also attempting "to resolve the matter."[200] He stated that: "We are hopeful that ministerial consultations [in Autotrim/Customtrim] will prove fruitful and lead to mutually beneficial results

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195. Letter to Lewis Karesh, *supra* note 193.

196. Letter from Monica Schurtman, on behalf of the submitters, to Elaine Chao, (Dec. 12, 2001) (on file with the author). "Pattern and practice" of failing to enforce labor laws is the standard the NAALC articulates for convocation of an ECE. The NAALC defines such "pattern and practice" as a "course of action or inaction beginning after the date entry into force of the [NAALC] and does not include a single instance or case." NAALC, *supra* note 2, arts. 23, 49.

197. For references to the Han Young and ITAPSA submissions, see Human Rights Watch, *supra* note 32, at 26-27, 40, 60-62. The submitters argued that the failure of the Mexican government over a period of years to enforce occupational health and safety laws at the Autotrim/Customtrim, Han Young, and Itapsa plants rose to the level required to establish a "pattern of practice" under the NAALC sufficient to seek establishment of an ECE. Letter to Elaine Chao, *supra* note 196, at 4. In addition, the submitters explained that the cases involved trade-related matters, covered by mutually recognized labor laws, as required by NAALC Article 23. *Id*. The strategy by which to press for an ECE was initially developed in communications between the author and Maquiladora Health and Safety Support Network Coordinator Garrett Brown, who had testified as an expert witness at the Autotrim/Customtrim hearing, and been involved in the health and safety portions of the Han Young and ITAPSA cases. E-mails between the Monica Schurtman and Garrett Brown (Summer 2001) (on file with author).

198. Catherine Hollingsworth, NAFTA Group Calls for Experts to Review Workers' Complaints at Mexico Plants, Daily Labor Report, BNA, January 4, 2002; Mexican Workers Call for Enforcement of Local Safety Standards, Inside OSHA, December 24, 2001.

199. Letter from Thomas Moorhead, Deputy Secretary of International Affairs, to Monica Schurtman (Feb. 4, 2002) (on file with author).

200. *Id*.

for all of those involved in the submission."[201] Accordingly, Moorhead and Chao believed that a "request for an ECE would not be appropriate at this time."[202] Moorhead made no mention of the failure to implement Ministerial Declarations in the Han Young and ITAPSA cases.[203]

On March 20, 2002, the submitters sent a follow-up letter to Chao and Moorhead, reiterating their position that convocation of an ECE was necessary and appropriate under the NAALC.[204] They also protested the secrecy in which the ministerial consultation process was shrouded.[205] The submitters sent copies of the letter to Edward Kennedy, chair of Senate Committee on Health, Education, Labor, and Pensions, and Ralph Regula, chair of the House of Representatives Subcommittee on Labor, Health, Human Services and Education.[206]

In the spring of 2002, members of submitter organizations and other NGOs met with U.S. Congressional representatives about the failures of the NAALC process, and ongoing problems at Autotrim and Customtrim. On May 7, 2002, Representative George Miller and thirty-four additional members of Congress sent a letter to Secretary Chao inquiring about the apparent lack of concrete progress in ministerial consultations in the Autotrim/Customtrim case. They noted that such a result "is unacceptable, particularly in light of the serious work-related injuries and illnesses suffered by workers at Autotrim and

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201. *Id*.

202. *Id*.

203. I*d*.

204. Letter from Monica Schurtman to Elaine Chao, U.S. Secretary of Labor, Thomas Moorhead, Deputy Undersecretary for International Affairs, (Mar. 20, 2002) (on file with the author). Petitioners maintained that consultative efforts do not preclude establishment of an ECE. *Id.* at 2. They argued that "[t]o give meaning to the NAALC, [ministerial] consultations must be effective." Petitioners contended that while "significant improvements in the enforcement of workplace health and safety laws may take time," they had already recommended at the Public Hearing and in their letters dated May 2 and July 6, 2001 a number of ameliorative measures that could and should be taken immediately, but that no evidence existed of any amelioration in conditions or enforcement. *Id*. Similarly, ministerial consultations had failed to resolve health and safety matters raised by the Han Young and ITAPSA submissions. *Id*. Therefore, the petitioners concluded that ministerial consultations notwithstanding an ECE should be convened to address the "pattern of practice" of the Mexican government's failure to enforce occupational health and safety laws within the maquiladora industry. *Id*. *See also* Kevin Maurer, Mexican Worker Advocates, Lawmaker Question DOL on NAFTA: Critics suggest U.S.-Mexican effort is not working, Inside OSHA, March 22, 2002 (discussing the submitters' letter and similar concerns about the Autotrim/Customtrim case expressed by Congressman George Miller, the ranking member of the House of Representatives Committee on Education and the Workforce).

205. Letter to Elaine Chao and Thomas Moorhead, *supra* note 204, at 1-2.

206. *Id*. at 3.

Customtrim, as documented in the NAO Report."[207] Further, they requested that they be kept apprised of progress on the case, and urged Chao to consider requesting an ECE if ministerial consultations did not produce adequate remedies.[208]

C. The Ministerial Declaration and Working Group Process

On June 11, 2002, Secretary Chao and Mexican Labor Minister Carlos Abascal issued a Joint Ministerial Declaration, which stated that the U.S. and Mexican governments had resolved the problems raised in the Autotrim/Customtrim case by establishing an intergovernmental Working Group to further study the issues.[209] According to the Joint Declaration, the Working Group "should contribute to a better understanding of labor laws and practices in both countries through information sharing, outreach, and exchange of best practices and technical expertise."[210] The stated aim was to undertake "[c]ooperative activities [which] may emphasize, among other things, best practices in the prevention of occupational injuries and illnesses specifically related to handling hazardous substances, labor-management cooperation mechanisms and ergonomics."[211]

The Joint Declaration neither adopted any of the submitters' proposals, nor referred to one of the workers' primary concerns: the failure of the IMSS to comply with its own laws, regulations, and norms regarding treatment and compensation for work-related injuries and illnesses. No commitment was made to undertake any specific ameliorative actions in any area. Instead, the Declaration promised more talk about occupational health and safety problems that had already been discussed as part of the cooperative activities conducted

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207. Letter from George Miller, Representative, and U.S. Congress, et. al, to Elaine Chao, U.S. Department of Labor Secretary (May 7, 2002) (on file with the author) *See also* Catherine Hollingsworth, *NAFTA Group Critical of DOL Efforts to Resolve Case Filed Years Ago Under NAFTA Labor Accord,*" BUREAU OF NAT'L AFF. DAILY LAB. REP., June 25, 2002, at A7.

208. Letter from George Miller, *supra* note 207.

209. Joint Declaration, *supra* note 14. The Declaration purportedly resolved U.S. NAO Public Communication 9901, the TAESA case, by holding a public seminar in Mexico where Mexican and U.S. labor officials would exchange information regarding the different types of unions in each country, and their rights to freedom of association and collective bargaining, and Mexican NAO Public Communication 9804, the Department of Labor/Immigration and Naturalization Service case, through the U.S. Department of Labor's development of informational materials in Spanish addressing workplace rights of migrant workers in the United States. *Id.*

210. *Id*.

211. *Id*. at 2.

under the auspices of the NAALC;[212] such activities notwithstanding, these problems had nonetheless still been identified by the Autotrim/Customtrim submitters, the U.S. NAO, and NIOSH, as ongoing deficiencies in the enforcement of occupational health and safety laws in Mexico. Despite the absence of a plan to improve enforcement of occupational health and safety laws, the Joint Declaration claimed to "resolve the matters raised in" the Autotrim/Customtrim case.[213]

CJM's Executive Director Martha Ojeda called the Declaration and establishment of a Working Group, a "charade" and a "disgrace." She asserted that the Declaration would result in "another round of in-house discussion between...government bureaucracies, which may go on for years and end without...any action[ ] whatsoever."[214]

On August 23, 2002, Senators Paul Wellstone[215] and Edward Kennedy[216] wrote to U.S. Labor Secretary Chao asking her to take more forceful action to protect the health and safety of Autotrim and Customtrim workers, noting that the workers "have been waiting patiently for five years for remedial action."[217] The Senators also underscored the importance of going beyond the Joint Declaration to "signal...our government's commitment to the effective enforcement of the labor rights provisions in the North American Free Trade Agreement as the United States moves forward with talks on a broader hemispheric trade agreement."[218] Finally, the Senators labeled the formation of the Working Group "an insufficient response to the issues raised by the Autotrim/Customtrim case."[219] They urged that the Working Group process "include some of the workers who submitted the NAO complaint and that the Working Group respond to the recommendations for protecting worker safety submitted by the petitioners in this

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212. Hollingsworth, *supra* note 207. "Cooperative activities" refers to intergovernmental educational fora and exchange of information undertaken pursuant to the NAALC, but not related to a particular NAALC filing. Human Rights Watch, *supra* note 32, at 32.

213. Joint Declaration, *supra* note 14, at 1. *See also* Inside OSHA, July 22, 2002 (where U.S. and Mexican labor officials again state that the creation of the Working Group "settles the occupational safety and health issues" raised by Autotrim/Customtrim and other NAALC submissions).

214. Hollingsworth, *supra* note 207.

215. Senator Wellstone was chair of the Senate Subcommittee on Employment Safety and Training.

216. Senator Kennedy was chair of the Senate Committee on Health, Education, Labor, and Pensions.

217. Letter from Paul Wellstone, Senator, U.S. Congress, and Edward Kennedy, Senator, U.S. Congress, to Elaine Chao, U.S. Labor Secretary (June 25, 2002) (on file with author).

218. *Id*.

219. *Id*.

case."[220]

On September 6, 2002, the submitters wrote to Secretaries Chao and Abascal protesting the characterization of the Joint Declaration as a resolution of the occupational health and safety problems that the Autotrim/Customtrim case raised and the lack of efficacy of the Working Group process.[221] They noted that:

> The Autotrim/Customtrim submission, the hearing, and reports on the case, and other analyses of unlawful working conditions and lax or non-existent enforcement of occupational health and safety laws in Mexico's maquiladoras have made clear, over and over again, what the problems are. Realistic recommendations that would create real improvements have also been proposed time and again. Another set of discussions, without a public commitment to action and the full participation of workers, cannot lead to real change. [O]nly governmental commitment to action and to participation by those most affected by the failure to enforce work-related health and safety laws, and actual implementation of plans that will directly improve the lives of workers will settle issues raised by the [NAALC] filings.[222]

The submitters formally asked for: (1) participation in the Working group by current and former maquiladora workers "who can speak from experience about what is needed to bring about real and lasting change in the enforcement of Mexican health and safety standards;" (2) integration of non-governmental occupational health and safety and legal experts into the Working Group process; (3) the creation of a timetable for implementing the submitters' July 6, 2001 recommendations; (4) an explanation for the rejection of any recommendation that the Working Group does not intend to carry out; and (5) the regular dissemination of information to the submitters of Working Group activities undertaken to address the problems raised in their submission.[223]

The Working Group held a closed meeting on October 7, 2002 in San Diego, California. Representatives of a number of the submitting organizations, along with the Environmental Health Coalition, assembled materials about the Autototrim/Customtrim case, the exclusion of workers, their representatives, and other non-governmental actors from the Working Group process, and held a press conference at the convention center where the Working Group was meeting.[224]

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220. *Id*.

221. Submitters' Letter to Labor Secretaries Chao and Abascal, September 6, 2002(on file with the author and available at http://mhssn.ifg.org/nafta13htm).

222. *Id*. at 2.

223. *Id*.

224. E-mail from Garrett Brown, Director, Maquiladora Health and Safety Support

Despite press coverage and public assurances by the Working Group chair, U.S. Assistant Secretary of Labor for Occupational Health and Safety, John Henshaw, that the process would produce "tangible results, ones that benefit us all by reducing injuries, illnesses and fatalities in all workplaces throughout North America," the Working Group continued its operations behind closed doors.[225] After numerous inquiries, the submitters learned only that the Working Group established four tri-national subgroups: (1) Occupational Safety and Health Management Systems and Voluntary Protection Programs; (2) Handling of Hazardous Substances; (3) Inspector and Technical Assistance Staff Training; and (4) Development of a Tri-national Webpage.[226]

On October 7, 2003, the submitters sent another letter to the three NAFTA government labor secretaries and Assistant U.S. Secretary Henshaw expressing their concerns about the ongoing inefficacy of Working Group process. The submitters again protested the secrecy of the process, its apparent lack of concrete results, and its failure to include workers and other private actors.[227] They renewed their request that workers and NGOs that had filed occupational health and safety complaints under the NAALC, be incorporated into the Working Group.[228] Additionally, they asked the NAFTA governments to create a Fifth Working Group subcommittee which, with the direct participation of workers and NGOs would "review the strengths and weaknesses of the NAALC submission process with respect to improving occupational health and safety conditions in the NAFTA countries, by examining the petitions that have been filed, how the petitions have been handled under the NAALC and their outcomes."[229]

Network, to Monica Schurtman (Oct. 13, 2002) (on file with author).

225. Press Release, Working Group (Oct. 7, 2002) (on file with author).

226. Sandy Smith, *Henshaw Meets with International Counterparts to Discuss Workplace Safety*, OCCUPATIONAL HAZARDS, (Sept. 8, 2003) *available at* www.occupationalhazards.com/articles/10515 (last visited Mar. 27, 2005).

227. Letter from Monica Schurtman and Garrett Brown, to Elaine Chao, U.S. Secretary of Labor, et.al. (Oct. 7, 2003) at 1, *available at* http://www.mhssn.igc/atct.htm.

228. *Id.*

229. *Id.* at 1. The letter also contended that:

> the failure of the Working Group to produce substantive improvements in the lives of real workers is unacceptable ... [T]he Working Group's quarterly discussions have taken place behind closed doors, and behind the backs of workers, NGOs, news media and the public ... [T]he Working Group's exclusion of workers–those with first-hand knowledge of the impact of inadequate enforcement of occupational health and safety laws–largely accounts for the dearth of tangible improvements in the health and safety conditions for maquiladora workers. [This] reduces the tri-national meetings to nothing more than 'talk shops' among government functionaries. Representatives of the NAFTA governments have had years to talk about how to improve enforcement of existing occupational health and safety laws. We are therefore skeptical about

The U.S. Department of Labor's Deputy Under Secretary for International Affairs and Canada's Minister of Labour responded in separate letters in December 2003.[230] Both characterized the Working Group as a valuable forum for in-depth intergovernmental cooperation on workplace health and safety concerns.[231] The U.S. called the Working Group itself a "tangible step" in "improv[ing] cooperation between our governments on [occupational health and safety] issues."[232] Canada referred to initiatives that the Working Group "has already undertaken...that should yield tangible results, including focused training sessions for health and safety inspectors and workshops, including business and labour representatives, to disseminate best practices."[233]

Neither letter explained how these initiatives would translate into concrete plans to improve workplace conditions, nor how they would help ensure accountability for ongoing health and safety violations. The training sessions they described were held in Mexico City, Ciudad Juarez, and El Paso, hundreds of miles away from the Autotrim and Customtrim plants.[234] Autotrim and Customtrim workers and other submitters were not invited. Notably absent from the letters was any mention of workshops to address the failure of the IMSS to enforce and itself comply with social security laws regarding treatment and compensation for work-related illnesses and injuries, an issue of enormous concern in the Autotrim/Customtrim case and to other maquiladora workers. Neither letter mentioned the concrete recommendations that the submitters prepared for the U.S. NAO and the labor ministers in July 2001. In response to

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the ability of Working Group meetings that comprise only government officials to produce tangible results. *Id*. at 2.

230. Letter from Arnold Levine, U.S. Department of Labor Deputy Under Secretary for International Affairs to Garrett Brown, Coordinator, Maquiladora Health and Safety Network (Dec. 15, 2003); Letter from Claudette Bradshaw, Canadian Minister of Labour, to Garrett Brown, Coordinator, Maquiladora Health and Safety Network (Dec. 18, 2003) (on file with author).

231. The emphasis in the U.S. and Canadian letters on tri-lateral cooperation under the NAALC seemed to indicate a continuing lack of political will to move beyond the Ministerial phase of the NAALC process. Neither letter mentioned convening a more independent ECE, and an arbitral panel that could impose sanctions if a "pattern of practice" of failure to enforce health and safety laws persists. Intergovernmental cooperation and consultation on occupational health and safety matters, while theoretically useful, does not ensure accountability.

232. Letter from Arthur Levine, *supra* note 230, at 1.

233. Letter from Claudette Bradshaw, *supra* note 230, at 1. The United States identified the subject matter of these trainings and workshops. Only two appeared even generally to address issues raised in the Autotrim/Customtrim case: (1) best practices in the automotive industry, and (2) classification and labeling of chemicals. Letter from Arthur Levine, *supra* note 230. The U.S. letter also noted the possibility of adding a workshop on ergonomic best practices in the automotive industry. *Id*.

234. *Id*.

the submitters' criticism that the Working Group process seemed to be designed to avoid public scrutiny and participation, the Levine and Bradshaw letters cited plans to launch a tri-national web site.[235]

Both letters acknowledged that the submitters' suggestion for incorporating workers and other stakeholders in the Working Group Process had merit.[236] On March 15, 2004, the submitters wrote to Bradshaw and Levine to inquire whether and when the NAFTA countries would open up the Working Group process to stakeholder participation, and reiterated their proposal for a fifth subgroup.[237] Levine replied on May 14, 2004 that in a meeting on April 26,th the Working Group chairs agreed that input from relevant non-governmental stakeholders would be valuable to the process, and established "a means for receiving input from and utilizing the expertise of relevant stakeholders."[238] Levine did not explain what those means were. The Working Group's Tri-national website, however, notes that "stakeholder participation was established in April 2004 for representatives of employers and workers."[239] As of September 2004, the Working Group had not asked Autotrim/Customtrim workers or their representatives to participate as stakeholders.

V. IMPLICATIONS OF THE AUTOTRIM/CUSTOMTRIM CASE FOR USING THE NAALC COMPLAINT PROCESS TO HELP ENFORCE WORKERS' RIGHTS

The Autotrim/Customtrim petitioners invested an enormous amount of time and energy, in some cases at considerable personal risk, in a process that failed to result in improvements in the health and safety conditions at their own

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235. The Tri-national Working Group did establish an occupational health and safety web page on April 4, 2004. *See* www.naalcosh.org/index_e.htm. (Last visited Aug. 1, 2004). The web page states that the Working Group was created pursuant to the June 11, 2002 Declaration. It also characterizes the Declaration as having "settled" various NAALC submissions–including the Autotrim/Customtrim case–and as reflecting the desire of the NAFTA governments "to strengthen labor relationships between the three nations and to confirm their commitment to work collaboratively toward improving working conditions and living standards for all workers ..." *Id.* The web page has links to sites that announce some of the Group's activities. *Id.*

236. Letter from Arthur Levine, *supra* note 230, at 2; Letter from Claudette Bradshaw, *supra* note 230.

237. Letter from Monica Schurtman to Claudette Bradshaw, Minister of Labour, and Arnold Levine, Deputy Under Secretary for International Affairs (Mar. 15, 2004) (on file with author).

238. Letter from Arnold Levine, Deputy Under Secretary for International Affairs, to Monica Schurtman (May 14, 2003) (on file with author).

239. *See* Tri-national Working Group webpage, *supra* note 235.

plants.[240] No evidence exists that their efforts achieved measurable gains in the enforcement of occupational health and safety laws at other maquiladoras.[241] In this regard, their experience is largely consistent with the experience of others who have tried to utilize the NAALC's submission procedures to help enforce labor laws in the NAFTA countries.[242] Some observers have noted a few concrete, but usually indirect and isolated gains from filing or threatening to file a NAALC complaint.[243] Still, although the NAALC complaint procedure may have yielded some minor positive results, given its lack of a direct remedy for violations, "[u]nions and allied groups have to weigh the value of using the Agreement in light of staff time, energy, and resources that might be allocated elsewhere."[244]

Garrett Brown, occupational health and safety expert and coordinator of the Maquiladora Health and Safety Support Network, poses the critical question raised by the exhaustive approach of the Autotrim/Customtrim submitters:

> If after dotting every 'i' and crossing every 't,' these Mexican workers, who have suffered serious health problems due to conditions at their plants, can't get the company or the Mexican and U.S. governments to correct the serious health and safety hazards documented by the U.S. Labor Department and U.S. NIOSH investigations, what does this mean for the enforcement of labor rights under NAFTA or the proposed Free Trade Agreement of the Americas (FTAA)?[245]

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240. Brown, *supra* note 10, at 8-9.

241. *See generally Fading into Oblivion*, *supra* note 7; Brown, *supra* note 10; Jonathan Graubart,"'Politicizing' a New Breed of 'Legalized' Transnational Political Structures: Labor Activists Uses of NAFTA's Citizen-Petition Mechanism" (forthcoming in Berkeley J. of Employment and Labor Law, spring 2005).

242. For example, in 2002, after five years of participating in the NAALC complaint process, John H. Hovis, Jr., President of the United Electrical, Radio and Machine Workers of America (UE), a key organization in the Han Young and ITAPSA submissions, concluded that discourse about the right to organize and secret balloting under the auspices of the NAALC "has deteriorated into a farce in which Ministerial Consultations result in empty declarations, submitters are kept in the dark about the status of their own cases, and worker and NGO recommendations are ignored." Consequently, Hovis explained, UE would withdraw from the process. Letter from John H. Hovis, Jr., President, United Electrical, to Elaine Chao, U.S. Secretary of Labor (July 24, 2004) *available at* http://mhssn.igc.org/nafta11.htm. *See also Fading into Oblivion*, *supra* note 7; *The First Three Years*, *supra* note 21; Human Rights Watch, *supra* note 32, at 24-56.

243. *International Labour Solidarity*, *supra* note 96, at 4-5; Graubart, *supra* note 110; Graubart, *supra* note 241; Human Rights Watch, *supra* note 32.

244. *International Labour Solidarity*, *supra* note 96, at 6.

245. House Lawmakers ask DOL for status of Mexican Workers' NAFTA Claim, Inside OSHA, May 13, 2002.

Close examination of the Autotrim/Customtrim endeavor and other NAALC cases demonstrates that the NAALC complaint process currently fails to function as a means of increasing enforcement of domestic labor laws, much less offers workers a system to resolve disputes, achieve concrete remedies, or improve health and safety conditions. Participation in the process and the current political climate make it clear, however, that radical changes are not likely to occur anytime soon. Accordingly, while the results of the Autotrim/Custom case persuades me more than ever that the NAFTA countries need an entirely different system to enforce and enhance worker rights effectively, the remainder of this article examines much smaller changes, which over time, might lead to a vastly better process.[246]

A. Submitters and Other Non-State Actors Must be Systematically Included in Post Hearing Procedures

One of the most significant flaws in the NAALC complaint process is the exclusion of submitters and other non-state actors from the case resolution process after the NAO hearing. Remedying this deficiency would not necessarily require amendments to the NAALC. Below, two basic frameworks are proposed for increasing inclusion of private stakeholders. The first approach would necessitate a shift in the text's interpretation, in political will, and in the strict notions of sovereignty that constrain the NAFTA governments' vision of labor issues, but no amendments to the existing text. The second approach would mandate significant textual changes and a more active re-conceptualization of sovereignty in matters of labor rights.

1. The No-Amendment Approach

The NAALC does not explicitly exclude private actors from participating in ministerial consultations or the post-consultation process.[247] Accordingly, the submitters in the Autotrim/Customtrim case pressed for inclusion at every juncture. They took seriously the U.S. NAO's invitation to prepare recommendations for ministerial consultations, and submitted a detailed, prioritized set of recommendations for consideration by the U.S. and Mexican

246. As Chayes and Chayes observed, "One useful approach for securing compliance in the international arena is to "start with a low obligational ante, and then to increase the level of regulation as experience with the regime grows." ABRAM CHAYES AND ANTONIA CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 16 (1995).

247. *See supra* Part II.C.

NAOs and labor secretaries.[248] By way of written correspondence, press coverage, and involvement of members of Congress, the petitioners continued to push for effective ministerial consultations and the convocation of a quasi-independent ECE for more than a year after publication of the U.S. NAO's Public Report on the case. After the disappointing Joint Ministerial Declaration, they still urged the Council of Ministers to make the Working Group process inclusive of all stakeholders, and remedy the occupational health and safety problems identified in the Autotrim/Customtrim case.[249] Despite petitioners' efforts, they remain excluded, and the ministers have failed to effectuate tangible improvements or a plan of action to implement remedies.

Routine inclusion of the workers who file cases under the NAALC in post-NAO activities and decision-making would lead to a more credible process.[250] Integration of workers and non-governmental experts into the process on a regular basis would also result in more effective problem solving.[251] Systematic incorporation of those most affected by the failure to enforce occupational health and safety laws, as well as specialists who focus on advocating for worker health and safety would not require any changes to the text of the NAALC.[252] Although the Accord's language emphasizes the participation

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248. *See supra* Part IV.A.

249. *See supra* Part IV.B.

250. As the submitters maintained in their October 7, 2003 letter to the three NAFTA governments: "[T]he exclusion of workers and their representatives inappropriately shields government officials responsible for implementing the NAALC from public scrutiny and accountability .... [F]undamental premises of the NAALC [are] transparency, openness, and public participation in the administration of labor laws and policy. NAALC, *supra* note 2, arts. 1(g), 5, and 7. The secret and exclusive nature of the discussions held by the Working Group thus flies in the face of the NAALC itself." *See* Letter to Elaine Chao, October 7, 2003, *supra* note 227.

251. After all, workers are the ones who suffer the consequences of health and safety violations, and can make suggestions for improvement based on direct experience. Non-governmental health and safety experts can offer recommendations unconstrained by government strictures. As the submitters stated in their October 7, 2003 letter to the three NAFTA governments, exclusive reliance on government representatives in the Working Group structure means a continuation of "a closed door process controlled by functionaries who have talked for years about occupational health and safety–with no discernable impact on worker protection. *Id.*

252. At least one NAALC complaint has resulted in some degree of constructive post-hearing stakeholder participation. The Washington Apple Case (Mx. 98-02) alleged a persistent pattern by U.S. and Washington state government agencies to fail to enforce a range of labor rights recognized under federal and state law, including the failure to enforce occupational health and safety laws (*available at* http://www.dol.gov/ilab/media/reports/nao/mxnao9802.htm). Filed with the Mexican NAO against the U.S. government, the case led to post-hearing discussions between Washington state labor officials, the submitters, and employers, which yielded somewhat improved conditions. *See, e.g.*, *Fading into Oblivion, supra* note 7, at 21-22, 30;

of government actors, in no way does it rule out including workers and other non-state actors in significant ways. Regular and meaningful involvement of relevant non-state actors requires persuading those who implement the NAALC that the case submission process will be enriched and improved by the participation of all stakeholders, including affected workers and other private individuals and organizations.[253] It also requires convincing the NAFTA governments that systematic incorporation of non-state actors into activities aimed at improving compliance with labor rights laws will not threaten their sovereignty.[254]

In short, a genuine commitment by the NAFTA countries to include workers and other private actors in the complaint resolution process in a

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Graubart, *supra* note 241, at 13.

253. Letter to Monica Schurtman from Arnold Levine, Undersecretary for International Labor Affairs, May, 15, 2004 (on file with author). Levine states that, "the NAALC does not envision and does not give the U.S. DOL ... the authority to adjudicate or remedy individual worker complaints." The Autotrim/Customtrim complainants, however, provided credible evidence of a persistent lack of enforcement by the Mexican government of its own occupational health and safety laws at the two maquiladoras, along with evidence that such a failure to enforce occurred with respect to other maquiladoras. Accordingly, Levine's characterization of the submitters' request to participate in the Working Group is inaccurate on at least three counts. First, the problems raised in the Autotrim/Customtrim submission are not "individual worker complaints;" they are complaints prevalent throughout Mexico's maquiladora industry, and they affect many maquiladora workers. Second, although the NAALC does not give the U.S. DOL direct authority to remedy individual complaints, neither does it preclude the DOL or the labor ministries of Mexico and Canada from involving workers and other non-state actors in procedures to resolve the failure to enforce work-related health and safety laws. Similarly, the NAALC does not prevent the NAFTA governments from remedying problems raised in a specific complaint. In fact, if enforcement problems are systemic, as they appear to be with regard to Mexican health and safety laws, remedying deficiencies identified in a specific complaint would serve as a model for remedying deficiencies on a larger scale. Third, the DOL has the authority to seek appointment of a more independent ECE, if labor complaints are not adequately resolved. NAALC, *supra* note 2, art. 23. It is the ECE which in turn can trigger the process that leads to establishment of an arbitral panel and imposition of financial sanctions against a recalcitrant government. If the NAFTA governments took more seriously the NAALC's provisions for a more independent ECE and arbitral panel, worker complaints might be addressed more effectively.

254. The submission process under the NAALC implicitly recognizes some concession to sovereignty. NAALC, *supra* note 2, art. 16(3). As Compa remarks, "empowering the authorities of a Party to *review* 'labor law matters arising in the territory of another Party' putatively breaches sovereignty in the strictest sense. It subjects domestic law and administration to judgments, including critical judgments, by a foreign entity." Lance Compa, *The First NAFTA Labor Cases: A New International Labor Rights Regime Takes Shape*, 3 U.S.-MEX. L.J. 159, 163 (1995). *See also* Compa, *supra* note 25. Precedent exists for the NAFTA countries to involve private actors in labor issues through the ILO.

constructive fashion would necessitate a major change in political will among the NAFTA governments; however, the regular inclusion of stakeholders would not necessarily require amendments to the NAALC itself. Maximizing private actor participation, consistent with the current text of the NAALC, could yield better labor law compliance, more effectively meet the goals of the NAALC, and begin to achieve real solutions in cases where governments fail to enforce workers' rights.

2. The Amendment Approach

Participation in the Autotrim/Customtrim case made clear that one way of understanding the NAALC's shortcomings is the extreme emphasis placed on outmoded notions of sovereignty,[255] at the cost of support for worker rights, including occupational health and safety rights. Consistent with this emphasis on sovereignty, the NAALC, as currently written, prohibits a direct private right of action challenging a government's breach of the Accord. This stands in stark contrast to the NAFTA itself, which provides generous private rights of action to

255. The NAALC is replete with language that reaffirms the sovereignty of each of the NAFTA countries, and underscores that labor standards are subject to each country's sovereign exercise of power. Yet, by submitting to an international agreement, especially one that focuses on rights of individuals living within its territory and control, a government cedes a degree of sovereignty. HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 2-4, 23 (Richard P. Claude & Burns H. Weston eds., 1992). Claude and Weston observe that "a dominant trend of the last half of the twentieth century ... is one that involves the sovereign state yielding to the "sovereignty of human kind." *Id*. at 4 (quoting HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 47 (1973)). *See also* Richard A. Bilder, *An Overview of International Human Rights Law*, *in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 4-5 (Hurst Hannum ed., 1984) (discussing evolving ideas of state sovereignty that have accompanied the adoption of international human rights treaties since 1945, and concomitantly, the growing importance of the rights of individuals and groups vis-a-vis governments). Bilder writes, for example, that "[t]he international human rights movement is based on the concept that every nation has an obligation to respect the human rights of its citizens, and that other nations in the international community have a right, and responsibility, to protest if this obligation is not lived up to . . . Concern for human rights rarely begins or ends at any single nation's boundaries, and effective action to protect and promote human rights, whether at home or abroad, can be furthered by the imaginative use of both national international techniques." *Id*. Labor rights, such as the rights to organize unions and freedom of association, have been included in numerous human rights treaties and declarations to which the NAFTA countries are party. *See, e.g.*, *infra* notes 369-72, 384-404 and accompanying text. Mexico has also ratified the International Covenant on Economic, Social, and Cultural Rights, which includes explicit rights to occupational health and safety. *See, e.g.*, *infra* notes 384-91 and accompanying text.

investors who assert harm from a government's alleged violation of the treaty.[256]

The NAALC's denial of recourse to private actors against offending governments also represents a departure from the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man, well-established regional agreements that allow individuals to file complaints against member governments who violate enumerated rights.[257] The European Union similarly permits private persons indirect access to the European Court of Justice on labor issues.[258]

The drafters of the NAALC ultimately insisted that the Accord not infringe in any way on the power exercised by each NAFTA government over its own labor affairs.[259] NAFTA itself, however, requires significant concessions to traditional concepts of sovereignty, particularly in such areas as intellectual property and investor rights. As one observer points out:

> . . . [an] interesting feature of NAFTA, especially in light of the modest labor side accord, is the hammer force of its clause on intellectual property rights (IPR). NAFTA's IPR chapter forces Mexico to revise its laws and its judicial structure in line with its U.S. counterparts to impose sharp, swift sanctions on violators. These include...mandatory injunctive relief, border seizures[260] and destruction of counterfeit goods. Traditional notions of sovereignty were overcome for intellectual property. When it came to labor rights, though, sovereignty yielded only grudgingly and weakly.[261]

NAFTA's Chapter 11 has made even greater inroads into national sovereignty. Chapter 11 allows corporate and individual investors in the NAFTA countries to bring private arbitral actions challenging national, state, and local environmental

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256. *See, e.g., infra* notes 262-64 and accompanying text.

257. *See infra* Part V.C.3.a. The entities that review and decide complaints filed under the American Convention and American Declaration are the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights. *See id*. The Commission and the Court function as more independent bodies, and have the authority to decide whether governments have complied with or violated their human rights obligations. *Id*. The framers of the NAALC, on the other hand, failed to create an independent oversight body, opting instead for weak bilateral and trilateral mechanisms as a basis for enforcement. *See, e.g*., Human Rights Watch, *supra* note 32, at 2.

258. *See* Compa, *supra* note 23.

259. *See supra* Part II.A.

260. *See* NAFTA, *supra* note 2, Chapter 17, Intellectual Property, arts. 1714 et. seq.; *Id*., Chapter 11, Investment, arts. 1101 et. seq.

261. Ruth Buchanan, *Access to Transnational Justice: Responding to NAFTA*, 88 AM. SOC'Y. INT'L. L. PROC. 531, 531-32 (1994).

and public health policies and regulations that investors claim infringe their rights under NAFTA, ostensibly by reducing investment profits in a manner tantamount to expropriation.[262] Under Chapter 11's "investor-to-state" dispute resolution system, investors can sue NAFTA governments in special tribunals to obtain monetary damages for alleged violations of NAFTA's investment provisions.[263] In other words, by circumventing domestic court systems and laws, and instead relying on a Chapter 11 tribunal, an individual or corporate investor can win unlimited awards from nations who are determined to have contravened Chapter 11.[264] Thus, in complete contrast to the NAALC, NAFTA itself allows for dispute resolution in the extreme; it permits non-state actors to sue NAFTA governments in certain instances, collect substantial monetary damages, and effectively override a nation's sovereign power to make, enforce, and adjudicate its own laws. If the concept of sovereignty is sufficiently elastic to permit private suits against governments for alleged violations of NAFTA's investment and intellectual property provisions, it can accommodate workers seeking remedies from governments that have failed to enforce domestic labor law.

In sum, NAFTA itself allows for direct private party challenges to a

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262. *See* Sanford E. Gains, *The Masked Ball of NAFTA Chapter 11: Foreign Investors, Local Environmentalists, Government Officials, and Disguised Motives*, *in* LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION: NAFTA EXPERIENCES, GLOBAL CHALLENGES (John J. Kirton & Virginia W. Maclaren eds., 2000); PUBLIC CITIZEN, NAFTA CHAPTER 11 INVESTOR-TO-STATE CASES: BANKRUPTING DEMOCRACY: LESSONS FOR FAST TRACK AND THE FREE TRADE AREA OF THE AMERICAS, (2001) at http://publiccitizen.org/documents/ACF186.pdf (last visited Apr 7 2005); Compa*, supra* note 25.

263. NAFTA, *supra* note 2, Chapter 11, arts. 1101 et. seq.; Robert F. Houseman, *Access to Transnational Justice Under the NAFTA: Different Interests, Different Access*, 88 AM. SOC'Y INT'L L. PROC. 531, 532 (1994); PUBLIC CITIZEN, *supra* note 262, at 1.

264. In the Metalclad case, for example, the International Center for the Settlement of Investment Disputes awarded Metalclad, a U.S. firm, $15.6 million in damages against Mexico because the state of San Luis Potosi refused to grant its Mexican subsidiary, Quimica Omega de Mexico, a permit to operate a waste management facility, after studies showed that the facility could contaminate the local water supply; San Luis Potosi also designated the area where the proposed facility had been planned a protected ecological zone. Metalclad successfully claimed that such regulation amounted to investor expropriation under Chapter 11. *See, e.g*, PUBLIC CITIZEN, *supra* note 262; Kevin Banks, *NAFTA's Article 1110 – Can Regulation be Expropriation*?, 5 NAFTA L. & BUS. REV.AM. 499, 500-01 (1999). In the Methanex case, Methanex, a Canadian company, filed an arbitration claim against the United States, because the state of California adopted a regulation to phase out the use of MTBE, a gasoline additive that contaminates drinking water. Methanex asserted that the regulation would constitute a taking of Methanex's U.S. business and investment in its U.S. subsidiary. *Id.* at 503. The claim resulted in California's decision to modify the regulation. *Id.* The Ethyl case, brought by a U.S. chemical company against Canada for Canada's regulation of the gasoline additive MMT, resulted in a $13 million settlement. *Id*.

government's alleged failure to enforce investor and intellectual property rules; if a challenge is successful, the offending government may be required to pay the petitioner multi-million dollar damage awards. The American Convention on Human Rights and European Union agreements permit non-state actors to lodge complaints against governments for allegedly violating multilateral treaties, to seek injunctive or declaratory relief, and in some cases to obtain damages.[265] These precedents suggest ways in which the NAALC could be amended.[266]

Of course, permitting non-state actors to file complaints directly or indirectly against NAFTA governments under the NAALC would require both a radical transformation in political will and in the text of the existing Accord. Given the intransigence of the NAFTA governments in regarding sovereignty as sacrosanct in labor matters, and in refusing to include non-state actors in the post-NAO process, it is unlikely that such changes will occur anytime soon. Still, less sweeping textual changes, such as creating provisions that would trigger mandatory establishment of an ECE and an arbitral panel in certain circumstances, could substantially improve the NAALC as a dispute resolution mechanism, and as a means to increase enforcement of domestic labor laws in the NAFTA

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265. American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673, (entered into force July 18, 1978) arts. 63, 69 [hereinafter American Convention]; European Convention on Human Rights, arts. 34, 41, 46.

266. In theory, one could also eventually envision a NAALC that would require companies to consent to a private right of action for claims of NAALC violations, or would create an arbitral panel with which non-state actors could file complaints against companies that allegedly contravene the NAALC. In recent years scholars and activists have begun to elaborate legal theories for holding companies liable for abuses under international human rights and humanitarian law treaties. *See* INTERNATIONAL COUNCIL ON HUMAN RIGHTS, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES (2002) [hereinafter, HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES]; at http://www.ichrp.org/ac/excerpts/41.pdf; Scott Pegg, *An Emerging Market for the New Millennium: Transnational Corporations and Human Rights*, *in* TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 1-32 (Jedrzej Frynas & Scott Pegg eds., 2003); William H. Meyer, *Activism and Research on TNCs and Human Rights: Building a New International Normative Regime*, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 33-52 (Jedrzej Frynas & Scott Pegg eds., 2003); Stephen R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001). The formulation of such theories is largely a response to concern about the growing political, economic, and social power of corporations. As the International Council on Human Rights Policy puts it: "The concept of the sovereignty of states, which has been eroded by the development of human rights, should not be replaced by a new corporate sovereignty, which is unrestricted or unaccountable." HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES, *supra*, at 10. As theories of internationally-based legal liability for corporations evolve, complainants such as the Autotrim and Customtrim workers may eventually have new, more direct remedies for workplace harms.

countries. Similarly, an amendment mandating participation of the submitters or their representatives in the post-hearing process would make for a more legitimate and effective system, even if the NAFTA governments continue to resist broader changes to the NAALC that would allow direct private party challenges to a state's failure to enforce labor law, and concrete remedies for such breaches.

B. Even if the substantive content of the NAALC's submission provisions remains unchanged, existing procedures must be clarified and strengthened

In 1994, the year the NAALC took effect, John French and Jefferson Cowie of Duke University called the Accord's complaint procedure "convoluted, drawn-out, and exception-ridden . . . designed to be used only rarely and certainly never pursued to [the NAALC's] much cited, but little understood final [sanctions] stages . . ."[267] Professor Katharine Van Wezel Stone, writing the following year agreed, describing the procedures as "clearly drawn-out and cumbersome," "vague," and "laced with qualifiers and exceptions."[268] In 1996, Stephen F. Diamond characterized the NAALC process as "severely weakened by...lengthy, complicated, and opaque steps."[269] A more recent report, based on the opinions of participants in a variety of submissions filed under the Accord, found extreme frustration with the procedural weaknesses in the NAALC process.[270]

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267. John French & Jefferson Cowie, *NAFTA's Labour Side Accord: A Textual Analysis*, *in* LABOUR AND NAFTA: A BRIEFING BOOK (1994) (prepared for a conference on Labor and Free Trade at Duke University, Durham, N.C., Aug. 25-27, 1994).

268. Stone, *supra* note 23, at 1009-11.

269. Stephen F. Diamond, *Labor Rights in the Global Economy: A Case Study of the North American Free Trade Agreement*, *in* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 199, 217 (Lance Compa & Stepen F. Diamond eds., 1996).

270. *Fading into Oblivion, supra* note 7, at 27-28. Adams and Singh, by contrast, claim that the processing of cases actually is not "long and drawn out." Adams & Singh, *supra* note 28, at 5-6. While it may be true that in most cases filed under the NAALC, the NAO process more or less adheres to the time limits set forth in the NAALC, this does not negate the reality that no time limits or guidelines exist at all for the ministerial consultations phase, or that the NAALC process is convoluted, riddled with exceptions, and designed and implemented so that the final stages of the NAALC,which could result in true enforcement, are never reached. Recent historical accounts of how the NAALC was negotiated suggest that this result may have been deliberate. Robert Reich, President Clinton's Secretary of Labor during the NAALC talks, has acknowledged that the primary purpose of the NAALC, and a similar environmental agreement, the NAAEC (see NAAEC, *supra* note 27), was to ensure passage of NAFTA. CAMERON and TOMLIN, *supra* note 20, at 201. A Mexican representative who participated in the NAALC and NAAEC negotiations has candidly observed that: "Mexican officials regarded the outcome of the side deal negotiations as a bit of a joke...The system is not worth a damn ... [A]t the end of

The Autotrim/Customtrim experience affirmed the validity of these characterizations. An important pre-requisite for improving the NAALC is to clarify and fortify its submission procedures. The NAALC's submission procedures are summarized in Part II.B of this article.

1. Overview of Procedural Deficiencies in the Autotrim/Customtrim Case

Parts III and IV of this article outline some of the most frustrating procedural deficiencies the submitters encountered during the Autotrim/Customtrim case. In short, these deficiencies may be classified as follows:

> (1) U.S. NAO pre-hearing procedures are not delineated in a sufficiently clear and timely matter, sometimes leading to unnecessary confusion, frustration, and last minute preparations for the petitioners–the most under-resourced actors in the submission process;[271]
>
> (2) U.S. NAO procedures and deadlines for accepting and relying on evidence from the corporation implicated in the submission and the Mexican government, and sharing it with the petitioners in a timely fashion are non-existent;[272]

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the day everyone says, 'Nice to talk with you, good luck'... Lots of public discourse, nothing more. This is the result we wanted." *Id*. at 200.

271. *See supra* Part III.C.3.a.

272. *See supra* Part III.C.3.b. Since July 2000, the Autotrim/Customtrim submitters had made publicly available, in the form of hundreds of pages of documentation and legal analysis, and close to ten hours of live testimony related to the allegations contained in the Autotrim/Customtrim submission. Letter from Monica Schurtman to Lewis Karesh, Acting Secretary, U.S. NAO (Jan. 12, 2001) (on file with author). The Mexican Government and Breed, on the other hand, chose not to participate in the public hearing. This choice, and the absence of post-hearing procedures, to a certain extent, worked to their benefit. The NAO went to considerable lengths to accommodate Breed's time frame. The NAO honored Breed's request to withhold public disclosure of the documents Breed itself filed, because the company's lawyers claimed they did not have time to review them prior to submission. Letter from Monica Schurtman to Lewis Karesh, Acting Secretary, U.S. NAO (Feb. 23, 2001) (on file with author). The NAO ignored the fact that Breed had plenty of time–more than five months–to review documents before filing, and the fact that the guidelines do not require making a FOIA request for the kinds of documents Breed provided. Similarly, the NAO accorded the Mexican government considerable deference by allowing the government to file a largely unsupported response after an unreasonably long delay. By contrast, the submitters were bound to submit, for example, written summaries of their anticipated hearing testimony and answers to written questions the U.S. NAO posed by particular deadlines, notwithstanding the fact that neither the NAALC nor

(3) Council of Ministers Post-Report procedural deficiencies.[273]

Weaknesses in the NAALC's procedures after the release of the Public Report on the Autotrim/Customtrim case are particularly troubling. It is only through the post-Report provisions that the failure of the Mexican government to enforce its health and safety laws can be remedied – through ministerial consultations, convocation of an ECE, or establishment of an arbitral panel capable of imposing monetary sanctions. The NAALC fails to specify even minimum procedural requirements for the content and progress of ministerial consultations. In the Autotrim/Customtrim case, as in other submissions filed under the NAALC, ministerial consultations were veiled in secrecy, ignored petitioners' concrete recommendations, and entirely excluded the submitters from effective participation in a process that they initiated.[274]

Additionally, the NAALC contains no deadlines for completing ministerial consultations.[275] As an exasperated worker in the Autotrim/Customtrim case put it: "So then they're going to meet whenever they damn well please?"[276] The worker also commented: "It's a very long process...3-4 years for the whole process; it's a lot of time and then people give up in despair."[277] A health professional involved in the Han Young submission expressed similar frustration in that case:

> The NAO report was pretty good and then they proposed ministerial consultations and that is the last I ever heard of

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the Federal Register guidelines referenced such time limits.

The absence of clear procedural provisions in the NAALC and its guidelines permitted inconsistent treatment of the players in the Autotrim/Customtrim case. Lack of well-defined procedures also began to undermine a key objective of the Accord: to foster public, transparent, and equitable labor proceedings. Although the Public Report on the Autotrim/Customtrim case largely confirmed the petitioners' allegations, in other instances, such an uneven procedural approach could prejudice the ability of submitters to present their evidence fully. The failure to allow petitioners time to review and respond to last-minute filings by governments and companies could also result in prejudice to the petitioners. As it was, the Public Report did rely to a certain extent on the Mexican government's response, not filed until well after the hearing. *See* Public Report, *supra* note 12, at 74, 75, 77, 116. That response, by way of a February 27, 2001 letter to the U.S. NAO, claimed that Mexican agencies had undertaken certain inspections and enforcement actions at Autotrim and Customtrim. Yet, as far as the submitters know, the Mexican government did not furnish the underlying documents to support those claims. *See supra* Part III.C.3.b.

273. *See supra* Part IV.

274. *See id*.

275. *See supra* Part II.C.

276. *Fading into Oblivion, supra* note 7, at 28.

277. *Id*. at 27.

> it...I've never been officially informed of anything that happened following the issuance of the report in August of '98...The whole set-up is so bizarre and Byzantine and drawn out and with so many drop dead spots in it that it will never result in any kind of improvements.[278]

The NAALC also mandates no standards for the content of ministerial consultations. Nor does it provide benchmarks for how to evaluate the success of a ministerial declaration, or when a case has been resolved.[279] Similarly, the NAALC provides no guidance about how to evaluate when an ECE should be convened, and, as illustrated in the Autotrim/Customtrim case, fails to offer recourse to petitioners in a specific submission in which a state party refuses to request establishment of an ECE.[280]

2. Suggestions for Procedural Changes

The Autotrim/Customtrim experience highlights several areas in which the NAALC's submission procedures must be fortified. Changes should be made that would require not just the submitters, but also companies and the government against whom a submission is filed, to provide information publicly and in a timely fashion in order for the NAO to rely on it.[281] Such procedural improvements could have helped avoid what many submitters perceived to be the U.S. NAO's undue deference to Breed and the Mexican government in the Autotrim/Customtrim case.

Uniformly applied procedures and deadlines for the submission of evidence could have forestalled last minute document releases by Breed only to the NAO, and prevented the NAO's delay – at Breed's request – in publicly releasing documents the company claimed exonerated its health and safety records until submitters filed a FOIA request. Rules regarding transparency in the handling of

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278. *Id.* at 28.

279. *See supra* Part II.C; Human Rights Watch, *supra* note 32, at 21-22. The failure to determine what "resolve" means in the context of a complaint filed under the NAALC is at least as much a substantive problem as a procedural one. One way to address the question of what constitutes a resolution of a NAFTA country's failure to enforce labor laws is to adapt frameworks from other areas of international law which define state responsibility for actions or omissions that result in ongoing violations. *See infra* Part V.C. 3.b.v.

280. Human Rights Watch, *supra* note 32, at 21-22. *See also supra* Part IV.B.

281. Exceptions to the presumption of public release of information could be made in limited circumstances. For example, to address the fears of some workers about personal safety or industry blacklisting, pseudonyms might be used and other identifying information kept private. Company information related to legitimate trade secrets could also be withheld from public disclosure.

submissions might have clarified whether or not the private tours of the Autotrim/Customtrim plants arranged by Breed for the U.S. NAO were proper. Written procedural rules might have also precluded reliance by the U.S. NAO on assertions by the Mexican government about compliance with enforcement of health and safety laws, given that Mexico failed to provide the underlying documents that purportedly supported its claims.

The Autotrim/Customtrim case also underscored that the NAALC and the 1994 and 1998 guidelines fail to provide adequate direction regarding appropriate follow up procedures on issues raised by submitters. Procedures governing recourse beyond the NAO hearing are especially ill-defined.

Some of the needed procedural changes could be accomplished through revisions to existing guidelines issued to implement the NAALC.[282] These include better defining NAALC procedures, deadlines, translation and other requirements, and ensuring that such procedures are applied evenly to the submitters, the company or companies alleged to have committed labor rights violations, and the government charged with failing to enforce its labor laws. The NAALC's emphasis on transparency in the administration of labor law would seem to encourage such clarifications.

Other reforms would likely require amendments to the NAALC itself, and necessitate sustained pressure by advocates to accomplish. These proposed changes tend to be both procedural and substantive in nature. They include establishing: (1) deadlines for initiating and completing ministerial consultations; (2) standards for the content of ministerial agreements and the process of implementing them; (3) at least a quasi-independent body to evaluation submissions and make recommendations;[283] and (4) factors that would trigger mandatory convocation of an ECE, an arbitral panel and sanctions.[284]

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282. *See* 1994 U.S. NAO Procedural Guidelines, *supra* note 45, and *NAALC: A Guide*, *supra* note 40.

283. For example, the NAAEC, *supra* note 27, created "an autonomous Secretariat" which "plays the principal role in the citizen review process" (a procedure roughly equivalent to the NAALC's submission process). *See, e.g.,* Graubart, *supra* note 27, at 431. The Secretariat comprises an executive director appointed by the NAFTA governments for a three-year term and professional staff from each of the NAFTA countries. "Neither the Secretariat nor the staff receives instructions or orders from their home countries." *Id.* at 432. Although the Secretariat ultimately has no enforcement power, and is often constrained by the political "sensitivities" of the NAFTA governments, its quasi-independent nature may sometimes produce concrete results, and perhaps renders the NAAEC a somewhat more effective advocacy vehicle than the NAALC. S*ee id.* at 436-39, 451-52, 462

284. A U.S. lawyer quoted in Delp's study aptly characterizes the lack of deadlines in the ministerial consultation and ECE phases of the NAALC process–and the need for changes – as follows: "There are no deadlines ... at the stage of ministerial consultations; one of the reasons they can sit there till Hell freezes over is that there is no deadline. If you had a deadline, several things would happen. One, you'd have a default; presumably

C. The Potential Value of Continuing to File Complaints under the NAALC: A Human Rights Perspective.[285]

Given the failure of the submission process to yield concrete improvements in occupational health and safety law enforcement at Autotrim and Customtrim and other Mexican maquiladoras, one should be wary to undertake or recommend the kind of intensive approach the petitioners adopted in the Autotrim/Customtrim case. Still, continuing to use the NAALC submission process may prove valuable, as long as it is strategically linked to a comprehensive initiative to secure better enforcement of workers' rights.[286] In

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the default would be that the case would automatically proceed to the next level in the cases where it could." *Fading into Oblivion, supra* note 7, at 27.

285. International human rights law addresses the protection of individuals and groups against violations of their internationally recognized rights and the promotion of those rights. *See* Bilder, *supra* note 255. It includes rules and principles contained in international agreements such as the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights, treaties of the International Labor Organization, and regional accords such as the American Declaration on the Rights and Duties of Man, and the American Convention on Human Rights; these agreements all include provisions for labor rights. *See, infra* Part V.C.3.b.iii. The International Covenant on Economic, Social, and Cultural Rights, the Universal and American Declarations on Human Rights, and an increasing number of international law experts recognize labor rights, the right to health, and the right to occupational health and safety as human rights. *Id*. The assessment of a country's compliance with international human rights standards typically involves an evaluation of whether national laws exist to give effect to those standards.

286. Diamond, *supra* note 269, at 201-23 (suggesting that trade-linked labor rights agreements such as the NAALC, no matter how weak, are vital to effective organization of a globalized economy, and that active participation of interested parties is key to realizing the potential in such agreements); *International Labour Solidarity, supra* note 96; Graubart, *supra* note 110; Memorandum from Garrett Brown, Coordinator, Maquiladora

this regard, human rights methodology and perspectives can be useful.[287] Promotion of labor rights, including occupational health and safety rights, is an increasingly important part of human rights advocacy.[288] Scholars and activists recognize that successful international human rights advocacy – the achievement of greater compliance with human rights norms and the strengthening of human rights systems – is a slow process. Such initiatives often fail to result in protection for the individuals who are the subjects of such endeavors, yet can still produce indirect gains for others. Professor Douglass Cassel articulates these realities as follows:

> . . . international human rights law must be understood and evaluated as part of a broader set of interrelated, rights-protecting processes. So understood, and taking into account its still early stage of historical development, international human rights law has shown itself to be a useful tool for rights protection. Most important are its indirect effects. International articulation of rights norms has re-shaped dialogues in law, politics, academia, public consciousness, civil society, and the press. International human rights law also facilitates international and transnational processes that reinforce,

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Health and Safety Network, to Monica Schurtman (Dec. 23, 1998) (on file with author).

287. *See generally* WILLIAM KOREY, NGOS AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A CURIOUS GRAPEVINE (1998); MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998); HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 269.

288. *See generally,* James A. Gross, *A Long Overdue Beginning: The Promotion and Protection of Workers' Rights as Human Rights*, *in* WORKER'S RIGHTS AS HUMAN RIGHTS, 1-22 (James A. Gross ed., 2003); ANTHONY WOODIWISS, MAKING HUMAN RIGHTS WORK GLOBALLY (2003); Sarah H. Cleveland, *Why International Labor Standards?*, *in* INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY 129, 137-38 (Robert J. Flanagan & William B. Gould eds., 2003); Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1 (2001); HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 269, at 1, 5; Virginia A Leary, *The Paradox of Workers' Rights as Human Rights*, *in* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 269, at 23-43 (observing that "[t]he status of workers' rights in a country is a bellwether for the status of human rights in general"); Daniel S. Ehrenberg, *From Intention to Action: An ILO-GATT/WTO Enforcement Regime for International Labor Rights*, *in* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 269, at 163 (noting that a number of human rights standards are also viewed as international labor rights standards); Emily A. Spieler, *Risks and Rights: The Case for Occupational Safety and Health as a Core Worker Right*, *in* WORKER'S RIGHTS AS HUMAN RIGHTS, *supra* note 288, at 78-117; David Montgomery, *Labor Rights and Human Rights: A Historical Perspective*, *in* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 269, at 14-21.

> stimulate, and monitor these domestic dialogues.[289]

Human rights advocates tend to agree that increased compliance with human rights norms stems from multi-faceted advocacy efforts. These approaches typically include: (1) documenting and publicizing violations; (2) conducting legal research and analysis to show why the law requires particular actions; contributing to norm-building and rights-protective interpretations of those norms; (3) suggesting changes in law, policies, and practices to bring governments into compliance with human rights standards; (4) creating, strengthening, and collaborating with coalitions of individuals and organizations with multiple areas of expertise to press for change; (5) community and public education; and (6) litigation, quasi-litigation, or other forms of presentation of alleged abuses in international and domestic fora.[290]

Lance Compa concurs that negotiating international accords to advance respect for basic rights is important in the labor arena, despite enforcement difficulties. He observes that with the NAALC process, as with other avenues for seeking improved labor conditions:

> [g]ains come obliquely, over time, by pressing companies and governments to change their behavior, by sensitizing public opinion, by building ties of solidarity, and taking other steps to change the climate for workers' rights advances...The challenge is to exploit what was written [in the NAALC], and to change it over time to strengthen workers' rights.[291]

The efficacy of the NAALC submission process thus can be evaluated in part by its ability to contribute to a broader, sustained set of processes aimed at increasing compliance with international norms intended to protect workers. Vigorous use of the NAALC by advocates and victims of labor abuses may slowly help transform the Accord into a more effective vehicle for protecting and promoting labor rights. Viewed from a long-term perspective and understanding the importance of strategic multi-faceted approaches in increasing protection of workers' rights, case advocacy under the NAALC can still play a useful role in the struggle to increase enforcement of occupational health and safety protections and other rights for workers in the NAFTA countries.

The discussion below looks at three ways the Autotrim/Customtrim

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289. Douglass Cassel*, Does International Human Rights Law Make a Difference?*, 2 CHICAGO J. INT'L L. 121, 121-22 (2001).

290. *See generally id*.; Bilder*, supra* note 255; Wiseberg, *supra* note 255.

291. *International Labour Solidarity*, *supra* note 96, at 6-7. *See also* Graubart, *supra* note 241. Human Rights Watch agrees that the NAALC complaint process can help generate long-term labor rights benefits, if the entities that are charged with implementing the NAALC make necessary changes. Human Rights Watch, *supra* note 32.

submission tried to promote increased long-term protections for workers: (1) documentation and public exposure of abuses; (2) enhanced opportunities for cross-border and multi-disciplinary advocacy; and (3) helping build norms under the NAALC and for broader labor rights initiatives. Continuing to file NAALC submissions may further these processes.

1. Documentation and Reporting

Careful documentation, analysis of the evidence within relevant legal frameworks, and public scrutiny of abuses are critical prerequisites for achieving increased compliance with international legal norms.[292] NAALC complaints can promote constructive discourse about the administration of labor law in the NAFTA countries.[293] Similarly, submissions can contribute to the so-called "sunshine effect," which, in the context of labor rights, refers to exposing work-related abuses and violations of domestic and international labor law publicly.[294] Viewed from the perspective of human rights methodology, documenting and publicizing abuse is the necessary foundation from which efforts to foster positive change flow.[295] The process of documenting and reporting can also play a crucial

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292. *See, e.g.*, Cassel, *supra* note 289. Wiseberg observes that: "one of the most important functions performed by [human rights] NGOs ... is that of monitoring the behavior of the state and of other power elites–of gathering, evaluating, and disseminating information and in the process, exposing human right violations. This is an important function because, unless their behavior is monitored, governments will not be held accountable .... While information is not, in and of itself, sufficient to halt human rights abuses, it is a precondition for stopping abuses and a prerequisite for effective action in the human rights field." Wiseberg, *supra* note 290, at 375.

293. Graubart, *supra* note 241; Graubart, *supra* note 110; *International Labour Solidarity*, *supra* note 96; Human Rights Watch, *supra* note 32.

294. *See, e.g.*, *Fading into Oblivion*, *supra* note 7, at 1, 26. Indeed, "[f]ormer Mexican government officials who made light of the Agreement when it was negotiated in 1993 later condemned it for the scrutiny and condemnation it brought to Mexican labour practices under the spotlight of complaints, public hearings, public reports, and government-to-government consultations." *International Labour Solidarity*, *supra* note 96, at 9 (citing Luis Medina, *Review of the North American Agreement on Labour Cooperation* (1999) *at* http://www.naalc.org (last visited Apr. 3, 2005)).

295. *See infra* Part V.C.3.a (observing that the first contentious case before the Inter-American Court of Human Rights, which resulted in a legal definition of forced disappearance, relied heavily on years of NGO documentation and reporting of disappearances); Diane F. Orentlichter, *Bearing Witness: The Art and Science of Human Rights Fact-Finding*, 3 HARV. HUM. RTS. J. 83 (1990). Professor Orentlichter notes that "while NGOs undertake a range of activities to promote their concerns, perhaps none has been more influential than their efforts to document and publicize human rights violations." *Id*. at 84.

role in shaping the normative content of particular rights and the scope of a government's obligation to respect, promote, and protect such rights.[296]

The Autotrim/Customtrim case, by virtue of its extensive public documentation of the Mexican government's failure to enforce occupational health and safety laws at the Autotrim/Customtrim plants and the resulting illnesses and injuries suffered by workers, can contribute to a growing movement to improve health and safety conditions in Mexico's maquiladora industry. Although the Working Group "resolution" of the Autotrim/Customtrim case is not at all a resolution of the grave workplace health and safety problems faced by Autotrim, Customtrim, and other maquiladora workers and former workers, it may contribute to critical discussions aimed toward law enforcement and improving health and safety conditions in the maquiladora industry.

The Autotrim/Customtrim submission's legal analysis examined the evidence in the context of Mexican constitutional requirements, laws, regulations, and operating instructions, provisions of NAALC, and international human rights and labor laws. This kind of analysis can aid in crystallizing occupational health and safety norms.[297]

Press reports on the Autotrim/Customtrim case in all three of the NAFTA countries, although not as wide-spread as the submitters had hoped, nonetheless played a public education function.[298] Drawing U.S. Congressional attention to the case and the failure of the NAALC to protect worker health and safety not only served to educate, it also led to active Congressional support for a better resolution for Autotrim/Customtrim workers, and a stronger NAALC process.[299]

The submission process may eventually produce improvements in worker protection, and labor law enforcement, because submissions concretely document and publicize real problems.[300] Well-researched complaints, sound

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296. *See infra* Part V.C.3.

297. *See infra* Part V.C.3.

298. Press coverage of the December 12, 2000 hearing was less than anticipated, because that was the day that the U.S. Supreme Court rendered its decision in *Bush v. Gore*, 531 U.S. 98 (2000). After the September 11 attacks, press attention to cross-border labor issues was minimal. Regular articles, however, continued to appear in government-oriented, smaller publications such as INSIDE OSHA and the BNA Labor Report. *See e.g.* Hollingsworth, *supra* note 198, Maurer, *supra* note 204, Hollingsworth, supra note 207. Those articles helped keep some pressure on the Department of Labor not to forget about the case entirely, and served to educate members of Congress. Interview with Garrett Brown (May 2002).

299. *See supra* Part IV.

300. Lewis Karesh, the U.S. NAO's Acting Director, noted for example, that the Mexican government promised two significant reforms in the Han Young and ITAPSA Ministerial Agreement. First, the Agreement asserted that workers would be allowed to elect union representatives by secret ballot in future elections. Second, the Mexican government would publish a list of all union contracts. This would make protection

legal analysis under domestic laws of the NAFTA countries, the NAALC itself, and international law, compelling testimony at NAO hearings, NAO reports affirming deficiencies in the enforcement of labor laws, and related press coverage undeniably expose serious gaps in respect for and protection of workers. Repeated public exposure of such problems is fundamental in efforts to correct government practices that allow occupational health and safety and other labor rights violations to persist.

2. Cross-border organizing

New treaties and agreements offer fresh opportunities through which non-governmental organizations and individuals can advocate for change, particularly across borders.[301] Compa asserts that the NAALC and its complaint mechanism have begun to "create new space for advocates to build coalitions and take concrete action to articulate challenges to the status quo and advance workers' interests."[302] He further maintains that: "[w]ithin its limits, [the NAALC] has shown itself to be a viable tool for cross-border solidarity among key actors in the trade union, human rights and allied movements."[303]

Delp's interviews with participants in NAALC submissions support this

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contracts (contracts negotiated for the benefit of leaders of government-affiliated unions rather than contracts negotiated as part of collective bargaining) public for the first time. When asked whether these commitments would be enforced, Karesh answered: "I believe we will begin to see an impact. But will there be immediate change? I don't think so." David Bacon, *Strikers Beaten at NAFTA-Sponsored Hearing*, LA PRENSA SAN DIEGO, June 30, 2000, *available at* http://www.laprensa-sandiego.org/archive/jun30/strike.htm. Echoing Karesh's view, Jonathan Graubart points out that the Han Young and ITAPSA cases prompted serious discussion in Mexico about secret balloting and public registration of union contracts, which may, over time, lead to enforcement of laws requiring such actions. Graubart, *supra* note 110.

On the other hand, the continued failure of the NAFTA governments to include the complainants and their representatives in such discussions, and the dearth of actual change led a major submitter in the ITAPSA case to withdraw from the NAALC process altogether, and to condemn it as a "farce." *See* Letter from John H. Hovis, *supra* note 242.

301. *See, e.g.*, Paul W. Kahn, *American Hegemony and International Law: Speaking Law to Power: Popular Sovereignty, Human Rights and the New International Order*, 1 CHI. J. INT'L. L. 1, 13-16 (2000) (emphasizing the role that NGOs play in creating and building compliance with international human rights law); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 670 (1998); KECK & SIKKINK, *supra* note 287; KOREY, *supra* note 287.

302. *International Labour Solidarity*, *supra* note 96.

303. *Id*. *See also Fading into Oblivion*, *supra* note 7, at 24-26; Brown, *supra* note 10, at 11. Graubart, *supra* note 241, at 9-10; Roy J. Adams & Parbudyal Singh, *Early Experience with NAFTA's Labour Side Accord*, 18 COMP. LAB. L.J. 161, 174-75 (1997).

view. An attorney quoted in Delp's study stated, for example: "I know that the combination of all the NAALC cases has created a network of activists and labor lawyers and scholars and trade unionists in all three countries that just didn't exist before...."[304] A Mexican worker involved in the Autotrim/Customtrim case explained: "[The Autotrim/Customtrim case resulted in] contact with people from other places...and with international organizations. The cooperation of everyone, the fact that we've worked a long time on this, was good for us."[305]

Up to a certain point, the Autotrim/Customtrim complaint, like other NAALC submissions, helped foster new approaches toward labor organizing, in particular, by serving as a catalyst for cross-border and multi-disciplinary initiatives. Initially, these new avenues of organizing included Autotrim and Customtrim workers and former workers collaborating with NGOs in Mexico, the United States, and Canada to: (1) document the facts that gave rise to the legal claims asserted in the Autotrim/Customtrim submission; (2) train other maquiladora workers how to file petitions with the STPS, IMSS, and SSA; (3) prepare for and participate in the hearing on the submission; (4) develop detailed recommendations pursuant to the U.S. NAO's request; (5) advocate for establishment of an ECE; (6) denounce the June 11, 2002 U.S.-Mexico Joint Ministerial Declaration purporting to resolve the Autotrim/Customtrim submission; and (7) press for inclusion in the Working Group process. The submission and advocacy around the submission brought together maquiladora workers in Mexico – individually and in local grassroots alternatives to the entrenched CTM union; religious groups in Mexico, the United States, and Canada; law clinic students in Texas and Idaho; lawyers and occupational health and safety experts from all three NAFTA countries; scientists; ergonomics specialists; and U.S. and Canadian union representatives.[306]

Now, many of those involved in the Autotrim/Customtrim case have lost faith that the NAALC process functions, even modestly, to help workers.[307] Consequently, some of them have turned their focus to publicizing the failure of the process. They are also publicly voicing their concerns – to members of the Mexican and U.S. Congresses and the Canadian Parliament, among other bodies – that new trade agreements must contain labor accords that are significantly

304. *Fading into Oblivion, supra* note 7, at 25.

305. *Id*. at 24.

306. *See supra* Parts III and IV; Autotrim/Customtrim Submission, *supra* note 3, at 12-19.

307. *See, e.g., Fading into Oblivion, supra* note 7; E-mails from Martha Ojeda, Director, Coalition for Justice in the Maquiladoras, to Monica Schurtman and others (summer 2004) (on file with author); E-mails from Garrett Brown, Coordinator, Coordinator, Maquiladora Health and Safety Support Network, to Monica Schurtman (summer 2004) (on file with author); Press Release, Coalition for Justice in the Maquiladoras (July 15, 2004) (on file with author).

stronger than the NAALC.[308]

3. Norm Building

In a rights context, norm-setting refers to establishing standards regarding the rights of individuals or communities which become either widely-accepted or widely-proscribed. Human rights scholars and advocates believe that one of the most important functions of an international agreement is its potential to help shape emerging international human rights norms and strengthen established standards.[309] This is because even human rights treaties such as the American Convention on Human Rights, which contain complaint provisions and mechanisms for achieving concrete remedies, ultimately cannot be enforced in the absence of the consensus of the states party to the treaty. State acceptance of human rights norms and the political will to enforce them depends on constant reinforcement and reiteration of their importance in different fora. Of course, norms cannot be reinforced and reiterated if their meaning is not fleshed out. Observers have pointed out that one reason the NAALC has failed to fulfill even its limited potential to promote labor rights is because the officials charged with implementing the Accord have been reluctant to define the reach and meaning of the NAALC's provisions.[310]

Craig Jackson notes that the absence of concrete legal standards in the NAALC by which "to adjudicate alleged violations draws into question the legitimacy of the [submission] process."[311] Human Rights Watch asserts that while the NAALC "has suffered from structural defects from the outset, it nevertheless holds far greater potential to promote workers' rights and high labor standards than its limited use by the signatory states would suggest."[312] With regard to the system's normative deficiencies, Human Rights Watch identifies two significant problems. First, the Accord itself does not set standards for interpreting the substance or the scope of its obligations.[313] Second, because the text of the NAALC fails to "define the reach of [its] obligations,"[314] the NAO, the

308. *See, e.g.,* E-mails from Martha Ojeda, Director, Coalition for Justice in the Maquiladoras, to Monica Schurtman (May 2004) (on file with author).

309. *See,* Koh, *supra* note 301; COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton, ed., 2000); Wiseberg, *supra* note 290, at 736.

310. *See* Human Rights Watch, *supra* note 32, at 1-5, 21; Jackson, *supra* note 23, at 45-83.

311. Craig Jackson, *Conflict Resolution-The Pre-Resolution Strategy of North-South Integration and South-South Integration*, 42 S. TEX. L. REV. 1227, 1238, n.52 (2001).

312. Human Rights Watch, *supra note* 32, at 1, 21-22.

313. *Id.* at 21.

314. *Id.*

Council of Ministers, and the Secretariat should–but do not–routinely use the case review process to help develop appropriate interpretations. Because the contours of the NAALC's requirements have not been defined in any significant way, the "NAALC's potential as a means to effect broad improvements in the labor rights situation in the signatory countries has remained severely under-utilized."[315]

Despite the system's significant flaws, aggrieved workers and advocates can use the NAALC as yet another forum in which to press for stronger workers' rights norms in the NAFTA countries; at the same time, filing NAALC submissions can exert pressure to make the complaint process more effective.[316] This approach, combined with solid documentation and public exposure of violations, and sustained cross-border advocacy in a variety of fora, may eventually lead to more effective enforcement of labor laws and meaningful remedies for violations.

a. The Example of the Inter-American Human Rights System

The growth of the Inter-American human rights system in recent years illustrates how, over time, intergovernmental institutions can become more effective; international norms can be created and defined; and the interaction between intergovernmental institutions and non-state actors can be increasingly productive in promoting and protecting rights.[317] A detailed discussion of the evolution of the Inter-American system is beyond the scope of this article.[318]

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315. *Id*. at 21-22.

316. For example, even the evanescent consideration by the Canadian and U.S. labor departments of the submitters' proposed addition of a fifth subcommittee to the Tri-national Working Group comprising Autotrim/Customtrim submitters and other non-state stakeholders (*see supra* Part IV.C) illustrates how pressure applied through the NAALC process can be potentially beneficial in building toward a norm - in this case, a norm recognizing the importance of public participation and critical evaluation of the NAALC complaint process. Although it now appears that the fifth subcommittee and inclusion of Autotrim/Customtrim submitters in the Working Group will not occur, the idea has been planted. In the future, perhaps with a change in the political climate, the submitters' proposal could become a reality.

317. The European Human Rights system is another example of a transnational human rights regime with modest beginnings, which eventually grew into a highly successful institution. The European Convention on Human Rights entered into force in 1950, yet did not begin to have much impact until the 1970s. By the 1990s, some considered the European Court of Human Rights to be as powerful in Europe as the Supreme Court is in the United States. *See, e.g*., Cassel, *supra* note 289, at 132.

318. See generally THOMAS BUERGENTHAL & DINAH SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS (4th rev. ed. 1995); DAVID HARRIS & STEPHEN LIVINGSTONE, THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS (1998) for more in-depth analyses of the evolution the Inter-American system. *See also* Christina M. Cerna, *The Inter-American*

However, examination of the system is valuable here because in its earlier days, the system was deemed unlikely to play an important role in strengthening international and regional human rights standards, yet is now recognized for its improved capacity to promote and protect human rights.[319]

In 1948, the Organization of American States ("OAS") adopted the Charter of the OAS[320] and the Declaration of the Rights and Duties of Man ("American Declaration").[321] These documents provided a foundation to promote human rights in the Americas, but no process for review of individual allegations of violations or enforcement of enumerated rights. A 1959 OAS Resolution created the Inter-American Commission on Human Rights with the goal of further advancing human rights in the Americas, but did not offer specific guidance about how the Commission should carry out this mandate.[322] The 1970 Protocol of Buenos Aires[323] amended the OAS Charter to strengthen the work of the Commission by allowing it to review complaints by private actors and states against all OAS member governments regarding violations of the American Declaration. The American Convention on Human Rights[324] ("American Convention"), which entered into force in 1978, further articulated certain rights

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System for the Protection of Human Rights, 16 FLA. J. INT'L L. 195 (2004).

319. *See* Cerna, *supra* note 318, at 203. Cerna states: "The most remarkable development in the evolution of the Inter-American human rights system ... is that it has become accepted. All of the Latin countries in the hemisphere have ratified the American Convention. The struggle for legitimacy of the Inter-American human rights system has been largely won in Latin America."; Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities During 1999 Through October 2000,* 16 AM. U. INT'L L. REV. 315 (2001) (observing that the "Inter-American human rights system continued to operate at vastly higher production levels during the past year, as it has in each of the preceding three years," and describing new cases handled by the system as well as innovations aimed at increasing knowledge of and encouraging wider public participation in the system); BUERGENTHAL & SHELTON, *supra* note 318, at 37-41; Victor Rodriguez Rescia & Marc David Seitles, *The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique*, 16 N.Y.L. SCH. J. HUMAN RTS. 593 (2000).

320. Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3 (entered into force Dec. 13, 1951).

321. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, Bogota, 1948, OEA/Ser.L/V/I.4 Rev.

322. Resolution VIII of the Fifth Meeting of Consultation of Ministers of Foreign Affairs, at Santiago, Chile, Aug. 12-18, 1959, OEA/Ser.C/ II.5, at 10 (1959).

323. Protocol of Buenos Aires, Feb. 27, 1967, 721 U.N.T.S. 324 (entered into force Feb. 27, 1970).

324. American Convention, *supra* note 265. Mexico and Canada are party to the American Convention. The United States is not. Under the 1970 Protocol of Buenos Aires, amending the OAS Charter, the United States, however, is subject to the jurisdiction of the Inter-American Commission for alleged violations of the American Declaration.

set forth in the American Declaration,[325] increased the responsibilities of the Inter-American Commission,[326] and created the Inter-American Court of Human Rights ("the Court").[327] The American Convention affirmed and strengthened the ability of the Inter-American Commission to investigate complaints of human rights violations from individuals and states, try to negotiate settlements between complainants and an offending state, and render judgments that states are supposed to follow.[328] In the event of an unsatisfactory resolution, the American Convention authorizes the Commission to refer cases to the Court for judgment and possible damages if the accused state has submitted to the Court's contentious jurisdiction.[329]

Ongoing pressure on the Inter-American system, especially by NGOs, to become more effective, sustained documentation of human rights abuses, legal analysis, and norm-shaping were essential for the system's growth and increasing viability as a means for protecting rights.[330] The relative success of *Velasquez-Rodriguez v. Honduras*,[331] the first contentious case brought before the Inter-American Court,[332] incorporated all these elements, and helped transform the system into an increasingly important institution for resolving allegations of human rights violations, and defining the scope and content of human rights provisions.

In *Velasquez-Rodriguez*, the Inter-American Court found the Honduran

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325. *Id.* arts. 1-25.

326. *Id*. arts. 44-51.

327. *Id*. arts. 52-73.

328. *See, e.g., supra* note 317; Protocol of Buenos Aires, *supra* note 323; American Convention, *supra* note 265.

329. American Convention, *supra* note 265, art. 62. The Commission then, in effect, serves as counsel for private party complainants before the Court. The Commission and the Court typically permit private attorneys and NGOs to assist the complainant before the Court as well, even though the American Convention does not explicitly provide for such assistance.

330. *See, e.g*., Dinah Shelton*, Improving Human Rights Protections: Recommendations for Enhancing the Effectiveness of the Inter-American Commission and Inter-American Court of Human Rights*, 3 AM. U. J. INT'L L. & POL'Y 323 (1988); Juan E. Mendez & Jose Miguel Vivanco, *Disappearances and the Inter-American Court Reflections on a Litigation Experience,* 13 HAMLINE L. REV. 508 (1993); BUERGENTHAL & SHELTON, *supra* note 318; ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON INTERNATIONAL HUMAN RIGHTS, A PROMISE UNFULFILLED 589 (1993).

331. Velasquez – Rodriguez case (Merits), Inter. Am Ct. H.R., Judgment of July 29, 1988, Ser. C No. 4.

332. Velasquez - Rodriguez was filed with the Court in 1987, eleven years after the American Convention entered into force. Contentious jurisdiction permits the Commission to bring an unresolved case to the Court if a state has accepted the Court's contentious jurisdiction. American Convention, *supra* note 265, art. 62. Under American Convention Article 64, the Court also has advisory jurisdiction, which allows a government to seek the Court's opinion about the compatibility of domestic law with the requirements of international human rights law.

government liable for the forced disappearance of Honduran citizen Angel Manfredo Velasquez Rodriguez.[333] State liability under the American Convention Articles 1, 4, 5, and 7[334] attached not only because evidence indicated Velasquez was disappeared by members of the Honduran security forces, but also because the government had failed to adopt measures to prevent the illegal action, or take appropriate remedial steps after it occurred.[335] The Court assessed monetary damages against the government payable to Velasquez's family.[336]

Velasquez-Rodriguez helped crystallize several enduring human rights norms regionally and internationally. These include: the scope of state responsibility for human rights violations; the definition of forced disappearance; and the establishment of disappearance as a violation of the American Convention on Human Rights, even though the Convention contained no express prohibition against disappearances.[337] Of particular relevance to the NAALC system, the Court's formulation of state liability for violations has been reiterated in subsequent Inter-American Commission and Court cases, and in other human rights contexts.[338] The case not only helped solidify key human rights norms, it also strengthened the viability of the Inter-American system.[339]

In sum, NGO advocacy, over the course of many years prior to the *Velasquez-Rodriguez* decision, played a critical role in the success of the case. Decades of exhausting and seemingly futile efforts by advocates and victims' families to document and report disappearances in Honduras and other countries, and years of NGO initiatives aimed at educating the public, governments, and intergovernmental bodies about disappearances finally bore fruit. In addition to

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333. Velasquez - Rodriguez Judgment, *supra* note 331.

334. Although disappearance itself is not explicitly prohibited by the plain language of the American Convention, the Court relied on Articles (1) (which establishes the duty of governments to respect and protect the rights enumerated in the Convention), 4 (right to life), 5 (right to humane treatment), and 6 (right to personal liberty) in finding that forced disappearance violates the Convention. American Convention, *supra* note 265, arts. 1,4,5,7.

335. *See*, Velasquez - Rodriguez Judgment, *supra* note 331, para. 147(b), (d)(i), (ii), (iii)(iv)(v), 84-87, 96, 118, 155-58, 166-67, 169-83, 186-88; Mendez & Vivanco, *supra* note 330, at 546-53.

336. Velasquez-Rodriguez Judgment, *supra* note 331, at para. 194.5; Velasquez-Rodriguez case (Compensatory Damages) (July 21, 1989).

337. *See generally* BUERGENTHAL & SHELTON, *supra* note 318; Mendez & Vivanco, *supra* note 330, Dinah Shelton, *Private Violence, Public Wrongs, and the Responsibility of States*, 13 FORDHAM INT'L L.J. 1 (1990); Linda Drucker, *Governmental Liability for 'Disappearances': A Landmark Ruling by the Inter-American Court of Human Rights*, 25 STAN. J. INT'L L. 289 (1989)

338. *See generally* BUERGENTHAL & SHELTON, *supra* note 318; Wilson & Perlin, *supra* note 319. *See also* Part V.C.3.b.iv.

339. *See, e.g.*, BUERGENTHAL & SHELTON, *supra* note 318; Shelton, *supra* note 337; Drucker, *supra* note 337.

documenting and publicizing disappearances, NGOs had worked to clarify international norms defining disappearance, specifically, and the parameters of state liability for human rights violations generally.[340]

The *Velasquez-Rodriguez* decision in turn spurred greater use of the Inter-American human rights system, and engendered increasingly sophisticated filings and jurisprudence.[341] The system's new potential for improving compliance with human rights norms in the Americas also helped prompt the creation of the Center for Education and International Justice ("CEJIL") which focuses on working with individuals and NGOs to file complaints with the Inter-American Commission, and assists in advocacy before the Inter-American Court.[342]

b. Applying Lessons from the Inter-American System and Other Human Rights Initiatives to the NAALC Process: Possibilities for Norm and Institution Building Under the NAALC

The development of the Inter-American human rights system demonstrates the possibilities for invigorating an inter-governmental human rights regime through bold interpretation of treaty law, norm definition, institution building, and the involvement of many players–non-governmental, intergovernmental and governmental–utilizing myriad approaches. Scholars and activists have described other successful international human rights undertakings that required many years, many players, and a variety of advocacy strategies.[343]

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340. *See* Vivanco and Mendez, *supra* note 330.

341. *See generally* BUERGENTHAL & SHELTON, *supra* note 318; Cerna, *supra* note 318; Wilson and Perlin, *supra* note 319; Antonio Augusto Cancado Trindade, *Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century*, 8 TUL. J. INT'L AND COMP. L. 5 (2000); Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INTER-AM. L. REV. 297 (1995); Ismene Zarifis, *News from the Inter-American System*, 9 NO.2 HUM. RTS. BRIEF 30 (2002); Patricia Staible, Kristin Edison, & Lilah Rosenblum*, Updates from the Regional Human Rights Systems*, 11 NO. 2 HUM. RTS. BRIEF 27 (2004); Dinah Shelton, *The Participation of Non-Governmental Organizations in International Judicial Proceedings*, 88 AM. J.INT'L L. 611 (1994).

342. *See, e.g.*, www.cejil.org/programas.cfm (last visited July 5, 2004). CEJIL incorporates three main approaches into its work to strengthen the Inter-American system: (1) training and information for local human rights defenders to make effective use of the system; (2) using CEJIL's own legal team to take strategic cases before the Inter-American Commission and assist at the Inter-American Court; and (3) collaborate with different sectors to promote growth and improvements in the Inter-American system. *Id*.

343. *See generally,* TO WALK WITHOUT FEAR: THE GLOBAL MOVEMENT TO BAN LANDMINES (Maxwell A. Cameron, Robert J. Lawson, & Brian W. Tomlin eds., 1998); KECK & SIKKINK, *supra* note 287; KOREY, *supra* note 287.

Key features of these movements have been the involvement of NGOs[344] and governmental agents interacting across borders and in law-interpreting or law-declaring fora, multi-disciplinary advocacy, vigorous interpretation of treaty language and customary law, forging alliances with like-minded governmental actors, and the eventual creation of viable legal norms that often build on existing or emerging human rights standards.[345]

Each transnational rights regime has particular characteristics that

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344. Successful transnational movements often involve NGOS that provide coordination and technical assistance. *See,* Koh, *supra* note 301, at 648. The creation of CEJIL to help support advocacy in the Inter-American system is one such example. See www.cejil.org/programas.cfm, *supra* note 342 and accompanying text. Early on, the International Campaign to Ban Landmines, formed a steering committee consisting of established NGOs (Human Rights Watch, Vietnam Veterans of America Foundation, Handicap International, the Mine Awareness Group and Physicians for Human Rights) to coordinate and support groups and individuals around the world who were working to eradicate anti-personnel landmines. *See, e.g.*, Monica Schurtman, The International Campaign to Ban Landmines and the Ottawa Landmines Treaty: Applications to the Movement to Restrict Small Arms and Light Weapons Transfers, Paper Presented at the Social Science Research Council Program of Global Security and Cooperation's Workshop on Law and International Relations, February 7, 2002 (on file with the author); Stephen Goose, The Campaign to Ban Anti-Personnel Landmines: Potential Lessons, Paper Presented at FORUM 2000, Montreal, Quebec, Canada (on file with the author) (explaining that NGOs involved in transnational advocacy must carefully assess the political context in which they operate; articulate goals and messages clearly and simply; focus on human costs; maintain flexibility; be inclusive and diverse yet speak publicly with one voice; value leadership and committed participants; create an action plan and deadlines; provide necessary follow-up; and utilize all available fora to promote their goals.) The formation of a new NGO or the designation of an existing NGO to coordinate and develop resources for groups and individuals who want to pursue cases under the NAALC could help strengthen the system.

345. *See* Koh, *supra* note 301, at 642-62, 676-78 (characterizing "successful transnational legal process" or "internationalization" of legal norms as dependent on 1. transnational norm entrepreneurs (frequently NGOs); 2. governmental norm sponsors (governments that have embraced a particular norm or set of norms and are willing to promote them); 3. transnational issue networks (often developed by transnational norm entrepreneurs and governmental norm sponsors working together); 4. interpretive communities and law-declaring fora (law-declaring fora include treaty regimes; executive entities; international, regional, and domestic courts; and other "governmental and non-governmental fora competent to declare both general norms of international law (e.g. treaties) and specific interpretation of norms in particular circumstances (e.g. particular interpretations of treaties and customary international law rules;") and, 5. social, political, and legal acceptance of the norm by various countries and resultant bureaucratic compliance procedures. *See also* Robert O. Muller, *New Partnerships for a New Order: NGOS, State Actors, and International Law in the Post-Cold War World*, 27 HOFSTRA L. REV. 21, 21-23 (1998); KECK & SIKKINK, *supra* note 287; KOREY, *supra* note 287; Schurtman, *supra* note 344, at 4-6, 11.

distinguish it from others. Still, each system has the potential to contribute to norm and institution-building endeavors. The NAALC has its own peculiar traits and is structurally weaker than the current Inter-American Human Rights system.[346] Nonetheless, the evolution from the modest beginnings of the Inter-American Human Rights system in 1948 to the important role it now plays in human rights norm-shaping and protection teaches that with sustained effort, real improvement in an initially weak institution is possible. One benefit of continuing to use the NAALC submission procedure, particularly in conjunction with other advocacy opportunities, is its potential to elaborate labor rights norms, including those related to occupational health and safety. At the same time, continued criticism of the NAALC's substantial deficiencies remains vital to creating a system in which normative improvements in protecting worker rights can become a reality.

i. Addressing the NAALC's general prescriptions

Mindful that the NAO and Council of Ministers give short shrift to formulating normative interpretations of the NAALC's broad provisions, the Autotrim/Customtrim submitters tried to tie the facts of the case to those general requirements in such a way as to promote the elaboration of specific norms under the Accord. The submitters alleged that the Mexican government's persistent pattern of failure to enforce its occupational health and safety laws in the cases of Autotrim and Customtrim violated Articles 1, 3, 4, 5, and 7 and Annex I of the NAALC.[347] In sum, as relevant to the Autotrim/Customtrim submission, these articles require the states party to the Accord to: improve working conditions and living standards; take measures to reduce occupational hazards; provide compensation if work-related injuries and illnesses occur; enforce and comply with their respective domestic labor and occupational health and safety laws through appropriate and effective government action; guarantee access to tribunals for enforcement of labor law; ensure that the administration of labor law is fair, equitable, transparent, open to the public, and not unduly complicated or lengthy; and promote public dissemination of information regarding labor laws and remedies for breaches.[348]

Petitioners also alleged that Mexico's pattern and practice of failing to

346. A key structural weakness in the NAALC, especially when compared with the Inter-American Human Rights System, is the failure of the NAALC, the NAOs, and the Labor Ministers to provide a well-defined procedure by which non-state actors can participate meaningfully in the complaint resolution process.

347. Autotrim/Customtrim Submission, *supra* note 3, at 5-8. *See also id*. at 54, 77, 93, 106-08.

348. *See id*. at 5-8, and *supra* Part II.B. for a more detailed rendering of these provisions.

enforce occupational health and safety laws showed disregard for the principles set out in the preamble to the NAALC. They argued, for example, that Mexico's persistent failure to enforce domestic health and safety laws at Autotrim, Customtrim, and other maquiladoras was inconsistent with paragraph 1 of the preamble, which articulates the parties' resolve "to protect, enhance, and enforce basic workers' rights."[349] The petitioners also contended that Mexico's failure to enforce was incompatible with paragraph 7 of the NAALC's preamble, which affirms the parties' resolve to promote "high-skill, high productivity economic development in North America" by *inter alia*, "encouraging employers and employees in each country to comply with labor laws and to work together in maintaining a progressive, safe, and healthy working environment."

Despite petitioners' efforts to help shape a normative framework under the NAALC, consistent with its Public Reports on other NAALC submissions, the U.S. NAO Report on the Autotrim/Customtrim case, did little to elaborate specific norms interpreting the NAALC's general requirements against which a NAFTA government's record of enforcement could be measured.[350] The Autotrim/Customtrim Report acknowledged the relevancy of Articles 1, 3, 4, 5, and 7 to the case,[351] but for the most part, neither analyzed how these provisions actually applied to the evidence presented, nor defined the scope of the provisions.

The Report directly tied its analysis of the Mexican government's failure to enforce occupational health and safety laws to particular provisions in the NAALC only with respect to Mexico's inaction on the petitions workers filed with the STPS, IMSS, and the SSA in 1998 and 1999. In this regard, the Report concluded that:

> The failure of the Government of Mexico to communicate to the workers about its efforts undertaken in response to the 1998 petition, the lack of records on the 1999 petitions, and the failure to respond to workers' inquiries about the petitions are inconsistent with the Government of Mexico's obligations under Articles 3, 4, 5, and 7 of the NAALC. Among other things, these articles obligate the government to require record keeping; to give due consideration to any request for an investigation of suspected violations of labor law; to ensure that persons have appropriate access to administrative proceedings for the enforcement of labor law; to ensure that proceedings are transparent; to provide for procedural guarantees in those

349. *Id*. at 7-8.
350. *See supra* Part III.C.3.c.
351. Public Report, *supra* note 12, at 17-19.

proceedings; and to promote public awareness of labor law.[352]

Government inaction on the petitions was the only subject where the Autotrim/Customtrim Report even began to analyze the evidence under specific provisions of the NAALC. A close reading of the Report nevertheless reveals that the NAO began to identify deficiencies in Mexico's enforcement of occupational health and safety laws in a way that could serve as a starting point for articulating normative standards under the NAALC.

The Report, for instance, raised questions about the efficacy of government inspections at Autotrim and Customtrim, given the "checklist" approach that inspectors used, and the inspectors' practice of noting the existence of health and safety devices, such as exhaust pipes, without actually conducting tests to determine whether the devices functioned properly.[353] Similarly, the Report remarked that the government did not seem to verify whether or not the company had adequately communicated to workers information about the chemicals they were using or their risks,[354] or conducted training as required by Mexican law.[355] The Report also criticized the lack of worker confidentiality during inspection interviews;[356] the failure of private third party consultants to comply with Mexican law regarding proper testing of chemical exposures;[357] and the government's evident failure to conduct chemical or environmental monitoring during inspections to validate the accuracy of monitoring provided by private consultants[358] or to require them to correct their methodology.[359] The Report, moreover, criticized deficient procedures for certifying private occupational health and safety monitors[360] on whose reports the government increasingly relies.[361] Additionally, the U.S. NAO determined that since Mexican law requires an ergonomically sound work environment, inspection reports must include adequate information about ergonomics.[362] The Report stated that the

352. *Id*. at 115. *See also id*. at iii-iv, 76. The Report also found that such inaction was incompatible with NAALC Article 1(g)'s objective of '[f]oster[ing] transparency in the administration of law." *Id.* at 73. As discussed previously, *supra* note 89 and accompanying text, several of the submitters had filed petitions with the STPS, IMSS, and SSA in 1998 and 1999. The Public Report affirmed the fact that the petitions had been filed and that the agencies had not responded. *See, e.g.*, Public Report, *supra* note 12, at 75-76.

353. *See, e.g.,* Public Report, *supra* note 12, at ii-iii, 84-85.

354. *Id.* at 86.

355. *Id*. at 87.

356. *Id*. at iii.

357. *Id.* at 78.

358. Public Report, *supra* note 12, at 79.

359. *Id*. at 78.

360. *Id*. at iii.

361. *Id.* at 79.

362. *Id*. at iii; 93-97.

evidence indicated that the Mexican government is capable of conducting proper inspections.[363] While the Public Report did not expressly tie flawed inspections and monitoring to breaches of the NAALC, its findings could nonetheless help lay the groundwork for an emerging norm under the Accord by which one could evaluate in the future whether the Mexican government is properly enforcing its workplace inspection laws. Such a standard might be articulated as follows: under the NAALC, effective inspections pursuant to Mexican law must, at a minimum, include actual testing and monitoring of protective equipment and levels of toxic substances on the plant floor; confidential worker interviews; ascertaining the existence of clear procedures for certifying third party monitors; and reviewing whether an employer utilizes ergonomically safe practices.

The Report also expressed doubt as to whether the process the STPS and IMSS used to monitor and report work place accidents and illnesses was transparent, independent, and fair.[364] This finding could be re-framed as the kernel of a norm that needs much more development: that the process of monitoring and reporting work-related disabilities must be transparent, independent, unbiased, and equitable.

The Autotrim/Customtrim Report additionally found credible worker allegations about the unwillingness of some medical staff at the plants to refer workers to IMSS, and of some IMSS doctors to diagnose illnesses and injuries as work-related.[365] The Report noted that certain physicians work for the private plants and for IMSS, thus creating real or apparent improprieties, conflicts of interest, and serious credibility problems for physicians in reporting, diagnosing, and valuating workplace illnesses and injuries.[366] These findings can be used to generate the core of a norm under the NAALC: that proper enforcement of and compliance with laws on reporting, diagnosing, and valuating work-related disabilities, at a minimum, requires neutral medical personnel and physicians who are not employed simultaneously by the plants and the government.

Future submitters addressing issues similar to those raised by the

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363. Public Report, *supra* note 12, at 73-74. The NAO based this characterization on evidence that the submitters did not see until shortly before the release of the Autotrim/Customtrim Report. Apparently, on September 22, 1995, based on an STPS inspection conducted a week earlier, Dr. Juan Antonio Legaspi, then Director of Inspections at STPS, wrote a letter to Breed management in which he recommended detailed changes the company needed to make to reduce ergonomic and chemical hazards at Autotrim. Dr. Legaspi's suggestions focused on ergonomics, but included "further air monitoring and biologic monitoring to assess workers' chemical exposures, and [that] local exhaust be installed at gluing work stations." *Id*. at 74. *See id*. at 68, 69, 97 regarding a disagreement between the Mexican government and Breed about whether the STPS had ever formally cited or sanctioned Autotrim for ergonomic violations.

364. *Id*. at iii.

365. *Id*. at iii.

366. *Id.* at iii; 106-107.

Autotrim/Customtrim complaint can build on the submission's efforts to connect the failure to enforce domestic law with violations of the NAALC, and the Report's rough normative formulations. Over time, with sustained advocacy, such rudimentary beginnings could evolve into meaningful norms. As the experience of the Inter-American system illustrates, one way to push a system forward is to insist on institutional growth in ways that give meaning to the rights a particular agreement claims to embody, and help flesh out the substantive requirements of general provisions.[367] Vigorous use of the NAALC's submission provisions and constant pressure on the NAFTA governments to interpret and define the NAALC's provisions in a way that promotes workers' rights may eventually breathe new life into the submission process.

ii. Using international law to help interpret the NAALC

International law can help elucidate the meaning of domestic law and multi-lateral agreements such as the NAALC, even with respect to countries that have not adopted particular treaties.[368] Where governments have ratified treaties relevant to the NAALC, invoking pertinent provisions can be even more powerful.

Under Article 33 of the Mexican Constitution, international treaties to which Mexico is a party constitute binding domestic law.[369] Mexico is a party to numerous international treaties and declarations covering matters related to occupational health and safety.[370] Following in the footsteps of the petitioners in the health and safety portions of the Han Young and ITAPSA cases,[371] the Autotrim/Customtrim submitters alleged that the Mexican government, by failing to adhere to work-related international human rights and labor treaties to which it is a party, also failed to enforce its domestic occupational health and safety laws

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367. *See infra* Part V.C.3.a.

368. In such instances, international law provisions can still serve as interpretive guides.

369. In fact, Article 6 of Mexico's federal labor law expressly incorporates international treaty provisions regarding labor issues. Article 6 states that "[t] he respective laws and treaties concluded and approved in the terms of Article 133 of the Constitution shall apply to labor relations insofar as they are to the worker's advantage, as from the date of commencement of their validity." *But see* Marley S. Weiss, *International Treaties and Constitutional Systems of the United States, Mexico, and Canada*, 22 MD. J. INT'L L. & TRADE 185, 204-05 (1998) for a more nuanced view of the relationship between international law and Mexican domestic law.

370. *See* Autotrim/Customtrim Submission, *supra* note 3, at 9.

371. *See* STATUS OF SUBMISSIONS, *supra* note 96.

and meet its obligations under the NAALC.[372] This approach allowed the petitioners to begin to press for the development of normative interpretations of the NAALC rooted in established international law.

The submitters first explained that ILO Convention 155, the "Convention Concerning Occupational Safety and Health and the Working Environment" to which Mexico is a party, requires implementation of measures to ensure that employers observe safe and healthy work practices, and provide adequate personal protective equipment and appropriate health and safety training.[373] The Convention also mandates that workers be informed about the hazards of tools and equipment, and dangerous properties of chemical substances used in the workplace.[374] The submitters claimed that the persistent failure by Mexican authorities to enforce these Convention 155 requirements at Autotrim, Customtrim, and other maquiladoras breached the government's treaty obligations as well as domestic law and the NAALC.[375]

Next, the petitioners maintained that Mexican authorities contravened ILO Convention 161, entitled "Occupational Health Services Convention."[376] Among other requirements, ILO Convention 161 specifies that employees must be informed of health hazards related to their work. Convention 161 additionally mandates that employers inform the governmental equivalent of Occupational Health Services (such as the IMSS and the STPS in Mexico) of any known or suspected factors in the work environment which might affect the workers' health, and of instances of poor health among workers and absence from work so that the agency can determine whether the reasons for ill health and absences are due to workplace hazards.[377] Mexican law also contains these requirements.[378] Since Mexican agencies did not enforce these rules, the government contravened ILO Treaty 161 as well as domestic law.

The submitters then invoked ILO Convention 170, the "Chemicals Convention," which establishes specific health and safety protocols that employers must follow in the production, handling, storage, transport, disposal, and treatment of chemicals.[379] It requires employers to disseminate information,

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372. *See*Autotrim/Customtrim Submission, *supra* note 3, Parts II (B) and II (D).

373. *Id*. at 9. ILO Convention No. 155, Occupational Safety and Health Convention, adopted on Jan. 22, 1981. ILO Convention No. 155 was ratified by Mexico on Jan. 2, 1984.

374. ILO Convention No. 155, *supra* note 373, arts. 9 and 12; Autotrim/Customtrim Submission, *supra* note 3, at 9.

375. *See* Autotrim/Customtrim Submission, *supra* note 3, at 9, 54; ILO Convention 155, *supra* note 373, arts. 9, 12.

376. *See* Autotrim/Customtrim Submission, *supra* note 3, at 9-10.

377. ILO Convention No. 161, Occupational Health Services Convention, adopted on June 25, 1985, arts. 13-15. Mexico ratified ILO Convention No. 161 on Feb. 17, 1987.

378. Autotrim/Customtrim Submission, *supra* note 3, at 47, 60, 68, 77, 80.

379. ILO Convention No. 170, Chemical Convention, adopted on June 25, 1990, art.

in a variety of formats, to employees about the identity and risks of chemicals they use.[380] Convention 170 additionally mandates that employers minimize the dangers chemicals pose through measures such as: substituting safer substances for toxic ones; adopting technology that eliminates or minimizes risk; employing adequate engineering control measures, and providing workers appropriate personal protective equipment.[381] Again, Mexican law incorporates provisions virtually identical to those in Convention 170.[382] Ample evidence existed of numerous violations of these requirements at Autotrim, Customtrim, and throughout Mexico's maquiladora industry.[383]

The submitters also relied on the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"),[384] to which two out of the three NAFTA governments (Mexico and Canada) are party.[385] Article 2 requires governments to take progressive measures to achieve the full realization of the rights set forth in the treaty. Article 7 recognizes the right to enjoy "just and favorable conditions of work" including "safe and healthy working conditions." Article 12 provides that governments undertake measures so that residents can enjoy the "highest attainable standard of physical and mental health." Of particular relevance to the Autotrim/Customtrim complaint, Article 12 requires states to take effective action "to achieve the full realization of this right includ[ing] those necessary" to:[386] reduce the stillbirth rate and infant morality;[387] allow the healthy development of the child;[388] improve "all aspects of environmental and industrial hygiene;"[389] prevent occupational diseases;[390] and create conditions to assure medical care in the event of sickness.[391] Mexico's persistent non-enforcement of occupational health and safety laws violates these provisions.

The petitioners cited the Universal Declaration of Human Rights ("UDHR")[392] and the American Declaration of the Rights and Duties of Man

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2(c)(i)-(vii). ILO Convention No. 170 was ratified by Mexico on Sept. 17, 1992.

380. *Id*. arts. 6,7,8, 11; Autotrim/Customtrim Submission, *supra* note 3, at 10.

381. *See, e.g.*, ILO Convention 170, *supra* note 379, arts. 12(a), 13.

382. Autotrim/Customtrim Submission *supra* note 3, at 10, 66-75.

383. *Id*. at 23-49, 54-104, and affidavits at Appendix II.

384. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 6 I.L.M. 360, (entered into force, Jan. 3, 1976) [hereinafter ICESCR].

385. Mexico ratified the ICESCR on Mar. 23, 1981. Canada ratified the ICESCR on May 19, 1976. The United States signed the ICESCR on Oct. 5, 1977, but never ratified it.

386. ICESCR, *supra* note 384, art. 12(2), 6 I.L.M. at 363.

387. *Id*. art. 12(2)(a), 6 I.L.M. at 363.

388. *Id*. art. 12(2)(a), 6 I.L.M. at 363.

389. *Id*. art. 12(2)(b), 6 I.L.M. at 363.

390. *Id*. art. 12(2)(c), 6 I.L.M. at 364.

391. ICESCR, *supra* note 384, art. 12(2)(d), 6 I.L.M. at 364.

392. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., 183d plen.mtg. (1948).

("American Declaration"),[393] to which Mexico, Canada, and the United States are signatories.[394] These declarations, which are foundational documents, respectively, for the United Nations and the Organization of American States, provide that signatory governments agree to promote and respect the right to just and favorable conditions of work.[395] Article 25 of the UDHR also mandates signatories to promote and respect a "standard of living adequate for . . . health and well-being." The submitters maintained that Mexico's failure to enforce work-related health and safety laws contravened these provisions as well.

The International Covenant on Civil and Political Rights ("ICCPR"), ratified by all three NAFTA countries,[396] was not named by the Autotrim/Customtrim submitters, but is also applicable to the case. Article 2 binds the parties to undertake "to respect and to ensure," through effective means, the rights enumerated in the treaty, including the right to "seek, receive, and impart information,"[397] and organize to seek protection of worker interests.[398] The refusal of the Mexican government to ensure that workers at Autotrim, Customtrim, and other maquiladoras were permitted to seek, receive, and impart information about workplace hazards and IMSS provisions, and to speak and organize to improve occupational health and safety conditions, without fear of retribution, breached the ICCPR.

Petitioners also noted that the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("San Salvador Protocol"),[399] to which Mexico is a party,[400] mandates that member States ensure that all persons have the right to work under satisfactory conditions particularly with respect to safety and hygiene.[401] Mexico is likewise a party to the American Convention on Human Rights.[402] Under Article 1,

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393. American Declaration of the Rights and Duties of Man, June 2, 1998, O.A.S. Res. XXX (adopted by the Ninth International Conference of American States, 1948).

394. The three countries signed the Universal Declaration of Human Rights on Dec. 10, 1948, and the American Declaration on May 2, 1948.

395. Universal Declaration of Human Rights, *supra* note 392, at 75; American Declaration of the Rights and Duties of Man, *supra* note 393, art. 14.

396. The International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368, (entered into force Mar. 23, 1976) [hereinafter ICCPR]. Mexico acceded to the ICCPR on June 23, 1981, and Canada on Aug. 19, 1976. The United States ratified the ICCPR on Sept. 8, 1992.

397. *Id*. art. 19(2).

398. *Id*. art. 22(1).

399. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, Nov. 17, 1998, 28 I.L.M. 161 (entered into force, Nov. 16, 1988) [hereinafter San Salvador Protocol].

400. Mexico acceded to the San Salvador Protocol on Mar. 8, 1996.

401. San Salvador Protocol, *supra* note 399, arts. 6, 7(e), 28 I.L.M. at 162,163.

402. American Convention, *supra* note 265. Mexico acceded to the American Convention on Mar. 24, 1981.

governments must take affirmative and concrete steps to prevent violations, investigate allegations of abuse, and, if appropriate, sanction wrongdoers and provide adequate remedies to victims.[403] Article 5(1) requires parties to promote and respect the right of all individuals to physical, mental, and moral integrity. Petitioners argued that this obligation includes the right to physical, mental, and moral integrity of workers in work-related matters, and that the Mexican government failed to promote, respect, and protect this right with regard to treatment of workers at the maquiladoras and by IMSS.[404]

Similarly, as a party to the Constitutions of the World Health Organization (WHO)[405] and the Pan American Health Organization (PAHO),[406] Mexico has agreed to promote the physical and mental well being of its residents. These documents establish measures that countries must take to combat disease, lengthen life, and promote physical and mental health.[407] Parties are also required to promote the improvement of working conditions and other aspects of environmental hygiene.[408] Petitioners in the Autotrim/Customtrim case maintained that Mexico's lack of enforcement of workplace laws in the maquiladoras also violated these provisions. [409]

The Public Report on the Autotrim/Customtrim submission affirmed the relevance of the ILO treaties petitioners cited,[410] and two that they did not: ILO Convention 17, the Workmen's Compensation (Accidents) Convention,[411] and the ILO Convention 42, the Workmen's Compensation (Occupational Diseases) Convention.[412] The Report also found pertinent the international human rights

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403. *See, e.g*, Velasquez - Rodriguez Judgment, *supra* note 331 and accompanying text.

404. Also, like ICCPR arts. 19, 22 (*see supra* note 396 and accompanying text), American Convention Articles 13 and 16, respectively, recognize the rights to information and to organize for labor purposes.

405. Constitution of the World Health Organization, opened for signature July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185 [hereinafter WHO Constitution]. Mexico accepted the WHO Constitution on Apr. 7, 1948.

406. Constitution of the Pan American Health Organization, opened for signature Oct. 2, 1947 [hereinafter PAHO Constitution].

407. *See id.* art. 1; WHO Constitution, *supra* note 405, art. 2.

408. *See* PAHO Constitution, *supra* note 406, art. 1; WHO Constitution, *supra* note 405, art. 2.

409. Autotrim/Customtrim Submission, *supra* note 3, at 12.

410. Public Report, *supra* note 12, at 51-53.

411. *Id.* at 53. Workmen's Compensation (Accidents) Convention C17, International Labour Organization (June 10, 1925) [hereinafter ILO Convention 17] requires parties to ensure that workers or their families are compensated for workplace accidents within five days of an incapacitating accident, and under certain circumstances, that workers are indemnified for medical expenses.

412. Public Report, *supra* note 12, at 53. ILO Convention 42, adopted in 1934, and ratified by Mexico on May 20, 1937, provides for compensation of workers or their

agreements to which the submitters referred – except for the American Convention, which the Report did not mention.[413] This broad recognition of the applicability of international standards notwithstanding, the U.S. NAO's Autotrim/Customtrim Report does not analyze the evidence in the case within interpretive frameworks provided by international law.[414]

iii. Future norm-building under the NAALC

The Autotrim/Customtrim Report – along with the observations of NIOSH – can provide a basis for beginning to articulate normative standards under the NAALC with respect to such issues as: (1) the components of meaningful plant inspections and monitoring; (2) the importance of unbiased IMSS medical personnel to evaluate and treat worker injuries and illnesses; (3) governmental responsibility for ensuring that employers use the safest production processes and protective equipment possible; (4) the meaning of transparency in and access to the administration of labor laws; (5) requirements for adequate government record-keeping and communication with workers; and (6) state responsibility to promote public awareness of work-related health and safety laws.

In addition, the NAO's recognition that international labor and human rights treaties and declarations are relevant to the Autotrim/Customtrim case can serve as a foundation on which future NAALC submissions and NAO reports can build. Where a NAFTA country is a party to a labor-related treaty and has incorporated it into its domestic law, failure to enforce its provisions may

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families in instances of incapacitating illness or death that result from occupational disease. Workmen's Compensation (Occupational Diseases) Convention (Revised) C42, International Labour Organization (June 21, 1934) [hereinafter ILO Convention 42]. The Convention also requires that indemnification rate for occupational illness must be at least equivalent to the rates paid for occupational injuries, as determined by the national legislature. *Id*. art. 1.

413. Public Report, *supra* note 12, at 54-55.

414. The Public Report begins to tie specific ILO treaty provisions to deficiencies in labor law enforcement and compliance in only two instances: (1) the Report notes that Article 5 of the ILO Convention 155 and Mexico's federal labor law and regulations require governments to adopt sound ergonomic policies (Public Report, *supra* note 12, at 94); and (2) the Report mentions that in 1996, in response to concerns raised about occupational health and safety inspections in the Matamoros area, the ILO Committee of Experts on the Application of Conventions and Recommendations ("CEACR") issued a statement expressing hope that Mexico's inspection practices would facilitate a reduction in accidents and workplace hazards in accordance with ILO Convention 155. With regard to this latter observation, the Autotrim/Customtrim Report remarked that Mexico responded that it was promulgating new regulations to formalize more clearly the country's occupational health and safety requirements. *Id*. at 71. The ILO in turn asked the Mexican government to continue efforts to reduce workplace risks and increase compliance with Convention 15. *Id*. The Report does not explain whether any further communication transpired between CEACR and the Mexican government. *Id*.

constitute a failure to enforce domestic labor laws. In the case of a country that has not ratified a particular treaty, labor-related provisions and interpretations of those provisions can still serve as normative guides for analyzing whether a government has complied with the NAALC.

These developments also offer a reason for continuing to insist that the three NAOs and the labor ministers provide more interpretive substance and normative content in their analyses and resolutions of Article 16(3) complaints.[415] In particular, norm building in the service of furthering worker protections in the NAALC must be incorporated at the ministerial level; this requires both fleshing out the NAALC's obligations, and undertaking concrete steps to effectuate those obligations. If the ministers are unwilling or unable to carry out these tasks, a more independent ECE must be established to do the job.

The section below outlines several existing normative frameworks, drawn from international human rights law, which future cases could apply in defining the parameters of government obligations under the NAALC.[416] This discussion is intended to illustrate some of the interpretive aids available to help make the NAALC a more effective instrument. Advocates, the NAOs, and the labor ministers themselves could draw from numerous other international sources to flesh out the substance of the NAALC's broad provisions. In addition to the human rights, ILO, and other international provisions raised in the Autotrim/Customtrim case and the frameworks enumerated below, these sources include among others, the constitutive documents of and relevant interpretations rendered by inter-governmental bodies such as the ILO,[417] WHO,[418] and PAHO.[419]

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415. The submitters' detailed recommendations about how to improve enforcement of health, safety, and social security laws in the maquiladoras, provided to the NAFTA governments, similarly can assist in an ongoing norm-building process, even though the governments have so far ignored them.

416. This discussion only touches on various normative and interpretive aids that might be used in future NAALC submissions, emphasizing U.N. and Inter-American Court treatment of relevant human rights treaties, and the MAASTRICHT GUIDELINES ON VIOLATIONS OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS (1997), *available at* http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html [hereinafter MAASTRICHT GUIDELINES].

417. The ILO, a specialized agency of the United Nations, helps establish, promote, and monitor compliance with international labor standards. *See generally*, HECTOR G BARTOLOMEI DE LA CRUZ, ET AL, THE INTERNATIONAL LABOUR ORGANIZATION: THE INTERNATIONAL SYSTEM AND BASIC HUMAN RIGHTS (1996); Virginia Leary, *Lessons from the Experience of the International Labour Organisation*, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 580-619 (Philip Alston ed., 1992). *See also* http://www.ilo.org/public.

418. The World Health Organization, established on April 7, 1948, is a specialized agency of the United of the United Nations. WHO's objective, set forth in its Constitution, is the attainment by all peoples of the highest possible level of health. *See* http://www.who.int/about.

Similarly, interpretations of pertinent human rights provisions issued by the U.N. bodies such as the Committee on Economic, Social, and Cultural Rights[420] and the Human Rights Committee,[421] and the Inter-American Commission and Court of Human Rights can be consulted for guidance. An increasing number of activists and scholars are examining ways in which to provide meaningful content to work and health-related treaty provisions.[422] They explore such topics as the necessary components of the right to organize for improved conditions of labor, the right to health, and occupational safety and health. Their analyses can also furnish interpretative and normative guidance for advocates and the tri-national entities charged with implementing the NAALC.

iv. Evaluating state responsibility under the NAALC

419. PAHO serves as the Inter-American System's specialized organization for health, and as the Regional Office for the Americas of the World Health Organization. It enjoys international recognition as part of the United Nations system. *See*, *e.g.,* http://www.paho.org. Its stated purpose is to promote and coordinate efforts of the countries of the Western Hemisphere to combat disease, lengthen life, and further physical and mental health of people living in countries within the Western Hemisphere. PAHO Constitution, *supra* note 406, art. 1.

420. E.S.C. Res. 1985/17, U.N. ESCOR, Xth Sess.

Through its adoption of General Comments and its analyses of required periodic reports by states party to the ICESCR on their compliance with the Covenant, the Committee clarifies, analyzes, and interprets the normative character of the provisions of the Covenant's provisions. *See generally* Philip Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights,* 9 HUM. RTS. Q. 332 (1987); Philip Alston, *The Committee on Economic, Social and Cultural Rights*, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 473-508 (Philip Alston ed., 1992); MATTHEW CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT (1995); Audrey R. Chapman, *A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 23 (1996).

421. The ICCPR established a Human Rights Committee, which reviews periodic required reports submitted by States regarding their compliance with the Covenant. The Human Rights Committee also issues General Comments interpreting the provisions of the ICCPR. Through these procedures, the Human Rights Committee clarifies, analyzes, and interprets the normative content of the ICCPR. *See generally* Sarah Joseph, *New Procedures Concerning the Human Rights Committee's Examination of State Reports*, 13 NETH. Q. HUM. RIGHTS 5 (1995); Dinah Shelton, *Compliance Mechanisms*, *in* UNITED STATES RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 149 (Hurst Hannum & Dana D. Fischer eds., 1993).

422. *See generally* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 269, at 1-9; Montgomery, *supra* note 288; Leary, *supra* note 262; WOODIWISS, *supra* note 288; Gross, *supra* note 288; Spieler *supra* note 288; Audrey R. Chapman, *Conceptualizing the Right Health: A Violations Approach*, 65 TENN. L. REV. 389 (1998).

Useful templates for assessing state responsibility already exist in international human rights law, which could assist in evaluating whether a NAFTA government has met it obligations under the NAALC. The three examples discussed below derive from interpretations of the American Convention and the ICESCR, and thus may apply more directly to Mexico and Canada, the two NAFTA countries that have ratified those treaties; they can, however, be used as interpretive aids in NAALC cases against the United States.

Each of these formulations emphasizes that both action and inaction can result in state responsibility for human rights violations. They are, therefore, particularly adaptable to evaluating complaints under the NAALC, which necessarily focus on a government's failure to enforce labor laws. The models can also prove helpful in determining when ministerial consultations or post-consultation stages of the NAALC process have resulted in genuine resolution of violations, because they clarify that resolution requires concrete action.[423]

a. The obligation of due diligence

Since the Inter-American Court's decision in *Velasquez-Rodriguez v. Honduras*,[424] the Court and Inter-American Commission, in assessing whether a state is responsible for human rights violations, examines whether the state has organized its governmental structures so as to: (1) prevent abuse; (2) investigate allegations of violations; (3) take appropriate legal action to stop violators; (4) attempt to remedy the rights violated; and (5) provide compensation for the injuries sustained due to such breaches.[425] This "due diligence" requirement obligates states to use all legal, political, and cultural means available to ensure that abuses do not occur within the territories over which they have control, and make clear that those responsible for abuses will be held accountable.[426] Such a formulation is important because it affirms that state responsibility attaches not only for direct complicity in the commission of an abuse, but also for failure to prevent it or take remedial action after its commission. State responsibility also adheres where a government has tacitly tolerated violations by private entities and individuals.[427] Thus, a state is required to take an active role in eradicating

423. I would argue that under existing frameworks for analyzing state responsibility for violations of the NAALC, a ministerial declaration such as the one adopted by the U.S. and Mexico in the Autotrim/Customtrim case, does not constitute a proper resolution, despite its label as such by the ministers, because the Declaration did not include a concrete plan to correct the existing violation and prevent future ones.

424. *See supra* notes 331-40 and accompanying text.

425. *See, e.g.,* Velasquez - Rodriguez Judgment, *supra* note 331, para.166.

426. *Id*. para.175.

427. *Id*. paras. 176, 182.

abuses, or itself risk liability. The concept of due diligence articulated in *Velasquez-Rodriguez* has been adopted by other international human rights legal regimes.[428]

b. ICESCR Article 2 and the Maastricht Guidelines

Article 2 of the ICESCR requires states to take progressive measures to achieve the full realization of the rights set forth in the treaty,[429] including Article 7(b), the right to just, favorable, safe and healthy working conditions, and Article 12, the right to health. According to the U.N. Committee on Economic, Social, and Cultural Rights, such measures should be "concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant" by "all appropriate means…."[430] International law experts tend to agree that Article 2 mandates nations to respect, protect, promote, and fulfill the rights recognized in the ICESCR, and assist their residents to realize them fully.[431]

The Maastricht Guidelines,[432] adopted in 1997, further explicate the nature and scope of state responsibility for violations of the ICESCR, and appropriate responses and remedies. Of particular importance both to NAFTA and the NAALC, Article 15 of the Guidelines provides that states party to the ICESCR violate the Covenant if they fail to: (1) enforce legislation that implements the Covenant's provisions;[433] (2) regulate activities of private individuals or groups to prevent them from violating economic and social rights;[434] (3) monitor the

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428. *See generally* United Nations International Law Commission, Report of the International Law Commission, U.N. General Assembly 56th Sess., Draft Articles on State Responsibility, U.N. Doc. A/56/10 (2001).

429. The scope of a government's obligations under Article 2 has been interpreted by numerous international law experts, including the United Nations Committee on Economic, Social and Cultural Rights. *See e.g.,* The Nature of States Parties Obligations, Office of the High Commissioner for Human Rights General Comments, U.N. Committee on Economic, Social, and Cultural Rights, 5th Sess., General Comments No. 3, U.N. Doc. E/1991/23 (1990) [hereinafter ESCR Comment No. 3).

430. *Id*. paras. 2, 3.

431. *Id*. paras. 2-14.

432. MAASTRICHT GUIDELINES, *supra* note 416. The Guidelines build on the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, June 2-6, 1986. Participants in the development of both documents included distinguished experts in international law from numerous countries invited by the International Commission of Jurists, the Urban Morgan Institute on Human Rights, and the Centre for Human Rights of the Faculty of Law of Maastricht University. *Id*.

433. *Id*. para. 15.

434. *Id*. *See also id*., para. 17 (governments must take effective measures to ensure "that private entities or individuals, including transnational corporations over which they

realization of economic and social rights, including the development and application of criteria and indicators for assessing compliance with those rights;[435] and (4) take into account their international legal obligations regarding economic and social rights when entering into bilateral or multilateral agreements with other states, international organizations or multinational corporations."[436]

The Maastricht Guidelines require states to create effective mechanisms to correct violations of the ICESCR. Corrective measures include effecting changes in abusive conduct, monitoring to ensure ongoing compliance, and providing remedies to victims. [437]

c. ICESCR Article 12 and U.N. General Comment 14

Article 12 of the ICESCR establishes the right to enjoy the "highest attainable standard of physical and mental health." Under Article 12, states must adopt effective measures to improve industrial hygiene; prevent occupational diseases; assure medical care in the event of sickness or injury; reduce the stillbirth rate and infant morality; and allow the healthy development of the child.[438]

In May 2000, the U.N. Committee on Economic, Social and Cultural Rights adopted General Comment 14 ("Comment 14"), a twenty-page interpretation of Article 12.[439] Comment 14 could be used in future health and safety cases filed under the NAALC as an interpretive guide for assessing whether NAFTA governments have complied with the Accord, and met their obligations to enforce domestic health and safety laws. Several of its provisions may also bear on the appropriateness of NAALC complaint resolutions.

Comment 14 confirms that the normative content of the right to health

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exercise jurisdiction do not deprive individuals" of their rights under the ICESCR).

435. *Id*. para. 15.

436. *Id*.

437. *Id*. para. 16. *See also id*. para. 17 (states are responsible for breaches of the ICESCR that result from failure to exercise due diligence over non-state actors); *id.* para. 23 (victims of such violations "are entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition.")

438. ICESCR, *supra* note 384, art 12.

439. *The Right to the Highest Attainable Standards of Health,* Committee on Economic, Social, and Cultural Rights, General Comment No. 14, U.N. ESCOR, 22nd Sess., U.N. Doc, E/C.12/2000/4, (2000) [hereinafter General Comment No. 14]. General Comment No. 14 recognizes that health itself cannot be guaranteed; instead, the Comment sets out norms and establishes indicators against which a government's obligation to undertake steps to achieve the highest possible standard of physical and mental health is evaluated. *Id.* para. 8.

encompasses the right to healthy occupational conditions.[440] To respect, protect, and fulfill this right, governments must implement measures to: (1) prevent workplace accidents and diseases; (2) reduce exposure to harmful chemicals; and (3)minimize the causes of work-related health hazards.[441] Under paragraphs 30 and 31 of Comment 14, governments must take "deliberate, concrete and targeted" actions designed to move toward the full realization of such rights, as "expeditiously and effectively as possible."[442]

In addition to offering an analytic framework for explaining why the Mexican government has failed to enforce its occupational health and safety laws, this formulation seems incompatible with the June 11, 2002 Joint Declaration on the Autotrim/Customtrim case. The Joint Declaration ignores the submitters' deliberate, concrete, and targeted recommendations for actions to improve enforcement of Mexico's work-related health and safety laws, in favor of a precatory "resolution" that involves a series of meetings and no commitment to tangible action.

Of central importance to the Autotrim/Customtrim case and others like it is the governmental obligation not only to develop a plan of action to maximize health based on epidemiological evidence, but also to ensure that the drafting and implementation of the plan rests on "a participatory and transparent process."[443] Equally important is the inclusion of "right-to- health indicators and benchmarks, by which progress can be closely monitored...."[444]

These requirements not only implicate the way in which governments develop, effectuate, and monitor occupational health and safety laws, they call into question the legitimacy of the Joint Declaration on the Autotrim/Customtrim submission, and the ensuing Working Group process. Despite the recent creation of a website with general information about the process, it remains essentially closed.[445] This makes it impossible to determine whether or not plans are being developed that include indicators and benchmarks to facilitate appropriate

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440. *Id*. paras. 11, 15.

441. *Id*.

442. *Id*. paras 30-31. *See also id*. para 36-37 (requiring states to formulate and implement "a coherent national policy to minimize the risk of occupational accidents and diseases"); *id.* paras. 14, 18, 21-22 (governments must develop plans with specific measures geared toward reducing the stillbirth rate and infant mortality, and increasing the healthy development of children).

443. General Comment No. 14, *supra* note 439, para. 43. Similarly, according to General Comment No. 14, countries must help ensure their residents access to rights related to occupational health and safety, such as the rights to seek, receive, and impart information and ideas concerning occupational health and safety issues. *See*, *id*. paras 12, 35, 37. Countries must also ensure residents the right to participate publicly in decision-making, goal-setting, and implementation of state plans for improving workplace health and safety. *See, id*. paras. 18, 35, 37.

444. *Id.* at para. 43.

445. *See supra* Part IV.C.

evaluation of the content and execution of Working Group occupational health and safety plans.

The focus of the Autotrim/Customtrim case was that the Mexican government persistently failed to enforce health and safety laws at the plants and at other maquiladoras. Paragraph 33 of Comment 14 emphasizes that states must adopt effective measures to "prevent third parties from interfering with [ICESCR] Article 12 guarantees." Paragraph 50 is similarly pertinent to the Autotrim/Customtrim submission. It requires states to:

> take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others; [and] the failure to protect...workers from practices detrimental to health, e.g. by employers....[446]

These provisions reinforce the principle that, through appropriate intervention and regulation, a state is bound to protect its residents from private actors, including corporations, whose conduct impedes the progressive realization of the right to health. The provisions offer another framework for evaluating whether a government has properly enforced its occupational health and safety laws.

Comment 14 also recognizes that the right to health encompasses the highest quality health services possible and ethically sound medical practices. It elaborates specific governmental duties for effectuating these obligations. These include: (1) not limiting access to medical practitioners and ensuring that third parties do not interfere with such access; (2) requiring health care personnel to adhere to ethical codes of conduct; and (3) ascertaining that third parties to do not limit people's access to health related information and services.[447] In addition, Comment 14 requires states to take concrete steps to help people restore their health.[448] These mandates could assist in interpreting whether a government has failed to enforce its laws related to medical treatment for work-related injuries and illnesses.

In the Autotrim/Customtrim case, for example, plant managers sometimes limited employee access to IMSS doctors, and several physicians

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446. General Comment No. 14, *supra* note 439, para. 51. *See also id*. para. 48 ("violations of the right to health can occur through the direct action of states or other entities insufficiently regulated by states"); *id*. para. 49 (violations can stem from "the omission or failure of states to take necessary measures arising from legal obligations").

447. *Id*. paras. 34-35. *See also id*. para. 12 (recognizing that the right to health requires states to take concrete steps toward ensuring good quality health services and ethically sound medical practices).

448. *See id*. paras. 36-37.

worked for the companies and IMSS at the same time, thereby creating a conflict of interest and raising ethical concerns.[449] Evidence also suggested that managers failed to provide health-related information concerning the ill effects of chemicals that workers used, and the musculo-skeletal risks caused by the ergonomic design of the production process.[450] Workers and former workers also credibly alleged that IMSS did not provide adequate treatment for workplace injuries and illnesses.[451] Comment 14's observations on a state's obligation to undertake effective steps toward achieving sound and ethical medical treatment provides a normative framework that could be used in NAALC cases to assess whether a state has enforced laws related to access to adequate and ethical medical services.

Finally, Comment 14 recognizes that any victim of a violation of the right to health should be able to access remedies at both national and international levels.[452] Victims "should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction, or guarantees of non-repetition."[453] This recognition raises critical questions about the efficacy of the Joint Declaration in the Autotrim/Customtrim case. Although the NAALC does not contemplate financial compensation for violations, its entities could certainly fulfill the concrete recommendations the Autotrim/Customtrim petitioners made with regard to correcting violations and adopting measures to help ensure their non-repetition.[454] Proper implementation of the recommendations would help provide some degree of reparation for Autotrim, Customtrim, and other maquiladora workers harmed by the government's failure to enforce occupational health and safety laws.

v. Using the NAALC in conjunction with other advocacy opportunities

Systematic linking by advocates of NAALC violations to existing international human rights and labor law norms could eventually advance more substantive and worker-friendly interpretations of the Accord, and make the complaint process a more effective means of advancing and protecting labor rights. Likewise, continuing to connect NAALC violations with provisions contained in international accords can serve to reinforce and give fuller definition

449. *See e.g.*, Public Report, *supra* note 12, at iii, 106-07, 113-14.

450. *See e.g.*, Autotrim/Customtrim Submission, *supra* note 3, at 23-24, 39, 68; *id*. Appendix. II, Affidavits B, K; Hrg. Tr., *supra* note 5, at 53-54, 67.

451. *See e.g.,* Autotrim Customtrim/Submission, *supra* note 3, at 84, *id*. at Appendix II, Affidavits B, L, R. Hrg. Tr., *supra* note 5, at 164; Public Report, *supra* note 12, at iii, 106.

452. General Comment No. 14, *supra* note 439, para. 59.

453. *Id*.

454. *See supra* Part IV.A.

to existing norms, thereby gradually building consensus among governments that such norms must be respected. One way to try to accomplish both goals would be to raise a particular issue or set of issues in a NAALC submission as well as raise them in other fora, as part of a well-coordinated advocacy strategy to reinforce norms protective of workers rights.

The occupational health and safety problems identified in the Autotrim/Customtrim case, for example, could be brought before the U.N. Committee on Economic, Social, and Cultural Rights, which monitors implementation of the ICESCR, and publishes periodic reports of each State party's compliance or non-compliance with the treaty's individual provisions.[455] In compiling these reports, the Committee takes into account NGO reports on particular countries and topics.[456]

Persistent labor problems, including the occupational health and safety conditions described in the Autotrim/Customtrim case, could also be presented to various monitoring bodies of the ILO.[457] Workers and advocates could also follow up with the ILO's CEACR[458] regarding its inquiry about health and safety inspections at maquiladoras in the Matamoros region.[459] Similarly, they could raise the kinds of health and safety problems reflected in the Autotrim/Customtrim submission with the WHO and PAHO.[460] The Inter-

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455. *See supra* note 420 and accompanying text.

456. *See e.g.*, E.S.C. Res. 1988/4, U.N. ESCOR, Supp. No. 1 at 8, U.N. Doc 6/1988/88 (1988), para. 116 (permitting NGOS to submit statements to the Committee that might contribute to recognition and realization of the rights set forth in the ICESCR). Additionally, ICESCR Article 18 authorizes specialized agencies of the United Nations, such as the ILO and WHO, to provide relevant information to the Committee. ICESCR, *supra* note 384, art. 18.

457. These include the ILO's Governing Body, Commission of Inquiry, and Committee of Experts on the Application of Conventions and Recommendations. *See, e.g.*, Constitution of the International Labour Organization (ILO), arts. 22-30, 49 Stat. 2712, *available at* http://www.ilo.org/public/english/about/iloconst.htm; International Labour Organization, *Use of ILO Complaints Procedure, In Practice*, *available at* http://www.ilo.org/public/english/standards/norm/enforced/complnt/a26_use.htm; International Labour Organization, Ad Hoc Supervisory Mechanisms, *available at* http://www.ilo.org/public/english/standards/norm/enforced/ad_hoc/index.htm. *See also* International Labour Organization, *Handbook of Procedures Relating to International Labour Conventions and Recommendations*, *available at* http://www.ilo.org/public/english/standards/norm/sources/handbook/.

458. *See supra* note 414 and accompanying text.

459. *Id.*

460. *See supra* notes 405-08 and accompanying text. The U.S.-Mexico Border Health Association (USMBHA), part of PAHO since June 16, 1943, and established to address the special health needs of the U.S.-Mexico border region, recently concluded an agreement granting USMBHA more autonomy, with PAHO still providing technical assistance. *See, e.g.,* PAHO Press Release, U.S.-Mexico Border: Historical Agreement for Health, (Aug. 31, 2004), *available at* http://www.paho.org/English/DD/PIN/pr040831.htm. The newly

American system of Human Rights could serve as a supplemental or alternative forum to the NAALC for labor-related complaints in the Americas,[461] including those raised in the Autotrim/Customtrim case.[462]

In the United States, advocates trying to improve labor conditions in other

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reconstituted USMBHA may be another office through which workers and advocates can press for improvements in maquiladora health and safety.

461. Depending on the country against which the complaint is filed and the subject matter, the case could be brought under the American Declaration, the American Convention, or both. Then, if the country at issue has accepted the contentious jurisdiction of the Inter-American Court, and the case is not satisfactorily resolved by the Commission, the Commission could choose to bring the case to the Court for adjudication. *See e.g.*, *supra* note 301 and accompanying text. Mexico has accepted the Court's jurisdiction. Additionally, the Court can issue advisory opinions on human rights questions, even with regard to disputes that arise in countries that have not accepted the Court's jurisdiction. *See* Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser.A) No. 18 (2003).

462. *See, e.g.,* Ileana M. Porras *Trading Places: Greening World Trade or Trading in the Environment?* 88 AM. SOC'Y INT'L PROC. 531, 549 (1994). Porras discusses the "obvious and critical relationship between the American Convention on Human Rights and [the NAALC]". She continues: "The American Convention has been stuck in the Senate since 1978 .... [I]f some of the energy that the anti-NAFTA forces have generated were to be channeled into pushing for ratification of the American Convention, and ceding jurisdiction to the Inter-American Court of Human Rights, we could begin to build institutions such as those we see in Europe." *Id. See also* Sonia Picado, *The Evolution of Democracy and Human Rights in Latin America: A Ten Year Perspective*, 11 NO. 3 HUM. RTS. BRIEF 28, 30 (2004) (discussing the work of the Inter-American Commission on state compliance with economic and social rights, and the Inter-American Court's recent opinions in the 2001 Baena Ricardo Case, which clarified the meaning and importance of American Convention Article 16 on freedom of association, and the 2003 Cinco Pensionistas (Five Pensioners) Case, which set a precedent by affirming that social service entitlements are ordinarily immune to limitation).

In 2002, the government of Mexico filed a request for an advisory opinion with the Inter-American Court of Human Rights as to whether international law is violated when a nation restricts labor law remedies available to workers because of their status as undocumented immigrants. The request, accompanied by detailed briefing and argument, effectively constituted Mexico's challenge to the U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) that undocumented workers could not recover back pay for serious violations of their right to organize. Sarah Cleveland, Beth Lyon, & Rebecca Smith, *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies are Restricted Based on Workers' Migrant Status*, 1 SEATTLE J. FOR SOC. JUST. 795, 796 (2003). In Advisory Opinion OC-18/03, *supra* note 461, the Inter-American Court of Human Rights determined that international law is breached when a country restricts labor law remedies based on immigration status, finding that a "state is bound by the corpus juris of the international protection of human rights, which protects every human person erga omnes, independently of its citizenship or migration status, or any other condition or circumstance." Picardo, *supra* note 462.

countries can work through several domestic channels. These include existing legislation which, in theory, bases a country's receipt of trade benefits on its compliance with basic worker rights.[463] The Alien Tort Claims Act ("ATCA")[464] offers another potential U.S.-based avenue to advance worker rights,[465] as does regular tort litigation.[466]

VI. CONCLUSION

The Autotrim/Customtrim case illustrates significant flaws in the NAALC submission process. Chief among these is the failure to permit meaningful worker and other non-governmental participation in resolving complaints after the NAO issues a Public Report. Particularly discouraging is the

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463. *See, e.g.*, Caribbean Basin Economic Recovery Act; 19 U.S.C.S. §§2701-2707 (2003); Interest and Dividend Tax Compliance Act of 1983, Pub. L. No. 98-67, 97 Stat. 369; Trade and Tariff Act of 1984, Pub. L. No. 98-573, sec. 503 et seq., 98 Stat. 2948; Overseas Private Investment Corporation Amendments Act of 1985, Pub. L. No. 99-204, sec. 5, 99 Stat. 1669; Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, sec. 1301, 102 Stat. 1107; Andean Trade Preference Act, Pub. L. No. 102-182, 105 Stat. 1233. For an excellent summary of this body of law, *see Promotion of International Labor Standards*, *supra* note 22, at 430-449. Additionally, the U.S. Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1993 permits Congress to bar aid to another country for any activity that contributes to a violation of international recognized worker rights. Pub. L. No. 102-391, 106 Stat. 1633.

464. The Alien Tort Claims Act, 28 U.S.C.A. §1350 (1993), was adopted as part of the Judiciary Act of 1789. It provides that U.S. federal "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the laws of nations or a treaty of the United States." The U.S. Supreme Court recently affirmed the ATCA's ongoing viability in *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004).

465. *See e.g.,* Sarah H. Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533, 1561-68, 1574-79 (1998); William S. Dodge, *Which Torts in Violation of the Law of Nations*? 24 HASTINGS INT'L & COMP. L. REV. 351 (1998); Saman Zia Zarifi, *Suing Multinational Corporations in the U.S. for Violations of International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81 (1999). Petitioners in the Autotrim/Customtrim case considered the possibility of ATCA and regular tort actions, and concluded that while legally colorable, petitioners lacked the resources to move forward with such litigation, given its expense and complexity. William Schurtman, Draft Memorandum to Monica Schurtman and Alfonso Otero, Mar. 5, 2002 (on file with author).

466. *See, e.g.,* William Schurtman, Draft Memorandum, *supra* note 465; Emily Yozell, *The Castro Alfaro Case: Convenience and Justice–Lessons for Lawyers in Transcultural Litigation*, *in* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 273, *supra* note 269; Anita Bernstein, *Conjoining International Human Rights Law with Enterprise Liability for Accidents*, 40 WASHBURN L.J. 382 (2001); Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J INT'L L. 41 (1998).

refusal to allow the involvement of the submitters themselves in crafting a genuine solution to the problems identified in the submission and the Report. This fundamental weakness could be corrected without amending the NAALC, if the NAFTA governments chose to do so.

Procedural gaps evident in the Autotrim/Customtrim case could be easily bridged through simple amendments to the NAALC and NAO guidelines. The absence of standards in the NAALC for mandating convocation of an independent ECE and arbitral panel willing and able to sanction offending governments needs to be remedied if the Accord is to provide timely redress to specific problems. Recently published accounts of the diplomatic history of the NAALC reveal, however, that the final Accord was drafted primarily to ensure NAFTA's passage;[467] this required combining lofty-sounding assurances that workers' rights would be protected and even enhanced, with ambiguous requirements, drawn-out, government-controlled procedures, and no enforcement mechanism or real possibility of sanctions.[468]

Given this historical backdrop, the results in the Autotrim/Customtrim case and other NAALC submissions are not surprising. Although the NAALC submission process may have long-range potential to enhance protection of worker rights, the costs to complainants in terms of time, energy, and resources– and for Mexican workers, the risk of threats, harassment, and black-listing– scarcely seem worth the intangible and diffuse possibilities the process currently offers workers. On the other hand, workers with nothing left to lose and labor rights advocates may choose to continue to use the system to try to strengthen it.

Lessons from successful human rights movements suggest that fortifying the NAALC complaint process stands a better chance if individuals and organizations use it strategically, as part of a larger advocacy campaign, to secure workers' rights.[469] Ideally, submissions would be filed to meet targeted

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467. *See e.g.*, CAMERON & TOMLIN, *supra* note 20, at 200-201.

468. *See id; The First Three Years*, *supra* note 21, at 11-13.

469. *See supra* Part V(C).

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objectives, including documentation and public exposure of particular patterns of non-enforcement, and norm-building in discrete areas, in conjunction with similar initiatives in other fora such as the IAHCR and the ILO, and would involve a multi-disciplinary, tri-national coalition of active participants. If activists choose to pursue complaints under the NAALC, one critical area in which they can work, even within the current constraints of the process, is in pressing for worker-friendly interpretations of the Accord. Existing and emerging interpretations of international human rights and labor law can provide an important source for such an effort.

At the same time, the negotiation of free trade agreements with strong protections for investors and entrepreneurs (often at considerable cost to state sovereignty) and no protection for workers (often justified by the need to protect state sovereignty) must be seriously questioned. Obtaining passage of free trade accords by increasing the vulnerability of low-paid workers already operating in unsafe and unhealthy workplaces itself violates established human rights norms, including the obligations of states to promote, respect, and protect the well-being of all its residents. As the workers who participated in the Autotrim/Customtrim case repeatedly explained, a "free" trade treaty that rides largely on the backs of workers is not truly free. Government and corporate accountability, and stronger mechanisms to ensure concrete protections for workers' rights, are necessary components of more equitable multilateral trade agreements.

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research librarians, Bob Pikowsky, Mike Greenlee, and Ruth Funabiki, Inter-Library Loan Coordinator Jane Lear and Carolyn Todd, Circulation Suprevisor for helping me locate materials for this article. I would also like to thank Dean Don Burnett of the University of Idaho, College of Law for supporting this research, former Dean Jack Miller for supporting work by University of Idaho clinic students Adolfo Banda and MacKay Hanks on the Autotrim/Customtrim case, and Barbara Aldave, Jon Dubin, and Kathleen Worthington, respectively, the former dean, the former director of Clinical Programs, and former clinic administrative staff of St. Mary's University School of Law, for their inspired assistance. Damian Mendez, Stacey Boyd, Gregory Ferbrache, James Smith, and Brenda Sandoval provided research assistance for this article. Colleagues, friends, and former students in San Antonio donated their time, resources, and ingenuity to help ensure that the Autotrim/Customtrim case was able to move forward. My deepest thanks goes to the Autotrim/Customtrim workers and former workers, who spent hundreds of hours on the case, to Martha Ojeda, Executive Director of the Coalition for Justice in the Maquiladoras, to the experts who volunteered their time: Garrett Brown, Linda Delp, Dr. Francisco Mercado, and Dr. Lida Orta, and to Nico and David Sánchez, who make me smile, and Raúl M. Sánchez who makes me dinner.