

# EVIDENTIARY ISSUES IN NAFTA CHAPTER 11 ARBITRATION: INQUIRING THE TRUTH BETWEEN STATES AND INVESTORS UNDER NAFTA CHAPTER 11

By Gustavo Carvajal Isunza\* & Fernando González Rojas\*\*

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*Now, of the four divisions which we have made of the essential idea of moral goodness, the first, consisting in the knowledge of truth, touches human nature most closely. For we are all attracted and drawn to a zeal for learning and knowing; and we think it glorious to excel therein, while we count it base and immoral to fall into error, to wander from the truth, to be ignorant, to be led astray. In this pursuit, which is both natural and morally right, two errors are to be avoided: first, we must not treat the unknown as known and too readily accept it; and he who wishes to avoid this error (as all should do) will devote both time and attention to the weighing of evidence. The other error is that some people devote too much industry and too deep study to matters that are obscure and difficult and useless as well.*

**Cicero.**

## I. INTRODUCTION

ONE OF THE NORTH AMERICA FREE TRADE AGREEMENT'S (NAFTA) objectives, as recognized in Article 102(c), is to increase substantially investment opportunities in the territories of the Parties. Conjointly, Article 102(e) establishes that the NAFTA Parties aim to create effective procedures for the implementation and application of

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\* Gustavo Carvajal Isunza is a partner in the Mexican law firm, Solorzano, Carvajal, Gonzalez & Perez-Correa, S.C., where he focuses on environmental law and arbitration. He served as Counsel for Metalclad Corporation and for Marvin R. Feldman in their successful NAFTA Chapter X1 cases against the Government of Mexico. He teaches environmental law and administrative law at the Instituto Tecnológico Autónomo de México. Mr. Isunza also serves as a Council Member of the National Council for Sustainable Development; as a Member of the Mexican Commission for Environmental Infrastructure; and as a Council Member of the Government Board of the Environmental General Attorney Office of Mexico City. He is President of the Board of "Justicia para Todos" which is a non-governmental organization that provides free legal services to people with scarce resources.

\*\* Fernando Gonzalez Rojas is an associate at the Mexican firm, Solorzano, Carvajal, Gonzalez & Perez-Correa, S.C. where he practices in the environmental law group. He holds a law degree from the National Autonomous University of Mexico and is a member of the Board of the Latin-American Council of International and Comparative Law,

NAFTA itself and for the resolution of disputes. To achieve the first objective, the Parties inserted into NAFTA Chapter 11 investors' substantial rights which can be enforced through an arbitration proceeding. To achieve the latter objective, Canada, Mexico and the United States chose three different sets of rules for conducting such arbitrations. However, in our opinion, the accomplishment of these two major NAFTA objectives ultimately relies on the ability of the NAFTA Parties to ensure an accurate assessment not only of the governing law but also of the factual allegations rendered in the disputes between them and the investors of another Party. This paper aims to address the rules which enable the disputing parties and the arbitrators to perform the second of these assessments: the inquiry for the truth.

## II. DISCOVERY IN CHAPTER 11 ARBITRATIONS: THE PROBLEM OF RECONCILING THE CULTURAL DIFFERENCES

'DISCOVERY' IS GENERALLY UNDERSTOOD as meaning "the disclosure by the defendant of facts, titles, documents, or other things which are in his exclusive knowledge or possession, and which are necessary to the party seeking the discovery or to be brought in another court, or as evidence of his rights or title in such proceeding."<sup>1</sup>

Although less extensive than in most common law countries, 'discovery' is generally available in most international arbitrations, either pursuant to voluntary agreement, by order of the tribunal, or by order of a national court.<sup>2</sup> There is almost a common understanding that complex cases such as those involved in Chapter 11 arbitrations, "require considerable issue definition, scheduling, and the like, and [therefore] is not uncommon in international arbitration to encounter [...] a measure of discovery."<sup>3</sup>

However, pre-trial discovery has traditionally been one of the features of common law proceedings that civil law lawyers find most difficult to accept.<sup>4</sup> Some have pointed out that "[a]rbitrators from civil law nations,

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with main offices in San Jose, Costa Rica. He also holds a Certificate on Environmental Law and Natural Resources from Instituto Tecnológico Autónomo de México, where he serves as an Adjunct Professor. He served as Counsel for Mr. Marvin R. Feldman in his NAFTA Chapter XI arbitration against the Government of Mexico. He has also acted as an advisor to the Mexican Senate in international investment matters.

<sup>1</sup> HENRY CAMPBELL BLACK, *BLACK'S LAW DICTIONARY* 4<sup>th</sup> ed (West Publishing Co., 1968), 552.

<sup>2</sup> GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES* (Kluwer Law and Taxation Publishers ed. 1994), 82.

<sup>3</sup> *Id.* 44.

<sup>4</sup> FOUCHARD ET AL. *INTERNATIONAL COMMERCIAL ARBITRATION* (Kluwer Law International ed. 1999), 689.

coming from inquisitorial traditions where party-initiated discovery is not common, are especially reluctant to order party-directed discovery” for example.<sup>5</sup> Some authors consider that general rejection of the “American discovery” from foreign procedural systems and international arbitrators alike is shown by the fact that, in order to gain acceptance by civil law countries, the *Hague Evidence Convention* includes a provision which enables a signatory party to refuse to execute Letters of Request issued for obtaining pre-trial discovery of documents as is customary in Common Law countries.<sup>6</sup>

These incompatibilities are present in Chapter 11 procedures due to the fact that Mexico has a civil law regime while Canada’s and the United States’ legal systems are mainly based in common law tradition. Some experts for instance, believe that “it is virtually impossible to merge the laws of [Mexico and the United States] simply because the Mexican legal system is a civil system while the United States’ legal system is based upon English common law.”<sup>7</sup>

However, many are convinced that arbitration is precisely a suitable mechanism to overcome cultural differences.<sup>8</sup> Moreover, some even believe that in arbitral procedures, such as that established by NAFTA Chapter 11 and the applicable arbitral procedural rules, “advantage can be taken of the differences between common law and civil law systems as to the conduct of the proceeding and the taking of evidence.”<sup>9</sup> As it has been expressed in colloquial terms, the characteristic of the procedural freedom of arbitration can produce a “happy marriage of civil law and common law procedures.”<sup>10</sup>

In practice, international commercial arbitrations now tend to incorporate influences from both legal traditions. It is generally accepted that the written stage in international arbitrations is essentially based on civil law tradition, whereas the oral stage has been influenced by “Anglo-American techniques.”<sup>11</sup>

As a matter of fact, in virtually every NAFTA Chapter 11 claim that has advanced into arbitration there has been a discovery stage. Additionally, as we will further explain in this paper, the common and civil law systems’

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<sup>5</sup> BORN, *supra* note 2, 83.

<sup>6</sup> Molly Warner Lien, “The cooperative and integrative models of international judicial comity: two illustrations using transnational discovery and breard scenarios” (2001) 50 *Cath. U. Rev.* 591, 590.

<sup>7</sup> Collin G. Warren, “A recent summary of international commercial arbitration: the United States versus Mexico and Canada?” 10 *Currents Int’l Trade L.J.* 75 (2001), 75.

<sup>8</sup> PIETER SANDERS, *QUO VADIS ARBITRATION?* (Kluwer Law International ed. 1999), 25.

<sup>9</sup> FOUCHARD, *supra* note 4, 689.

<sup>10</sup> BORN, *supra* note 2, 43.

<sup>11</sup> FOUCHARD, *supra* note 4, 690.

combination effect is also observable in NAFTA Chapter 11 arbitrations, where the written phase is primarily based on civil law principles while the hearings are guided by common law practices.<sup>12</sup>

Notwithstanding, we must anticipate that cultural differences will definitely have an impact on the conduction and resolution of Chapter 11 disputes. Arbitrators will tend to bring their legal backgrounds into the 'courtroom' and litigants will oppose practices that do not correspond to what, in their legal conception, is fair. For instance, in *Marvin R. Feldman v. United Mexican States* (Marvin Feldman case), the counselor for Mexico challenged the applicability of a previous decision on production of documents rendered by the tribunal in *Pope & Talbot, Inc. v. Canada* (Pope & Talbot case),<sup>13</sup> by noting that in the latter "both of the disputing parties and all of the arbitrators (two of whom are former common law judges) embrace[d] common law practices and traditions."

### III. APPLICABLE RULES AND PRINCIPLES: THE TASK OF FILLING THE GAPS AND OBSERVING THE DUE PROCESS PRINCIPLE

ARTICLE 1120 (SUBMISSION OF A CLAIM TO ARBITRATION) allows an investor to submit a claim to arbitration under: (i) the *Convention on the Settlement of Investment Disputes between States and Nationals of other States* (ICSID Convention), provided that both the disputing Party and the Party of the investor are parties to the Convention; (ii) the *International Centre for Settlement of Investment Disputes Additional Facility Rules* (Additional Facility Rules), provided that either the disputing Party or the Party of the investor is party of the ICSID Convention; or (iii) the *United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules* (UNCITRAL Rules).

The application of this international instrument remains merely hypothetical since, to date, only the United States is party to the ICSID Convention.

Except for the UNCITRAL Rules, these sets of norms do not by themselves establish the rules for the conduction of the arbitrations. Article 44 of the ICSID Convention establishes that any arbitration proceeding must be conducted in accordance with the provisions of ICSID Convention's

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<sup>12</sup> J.C. Thomas, Notes for an address to the IBA's conference on arbitration between states and investors: Evidentiary issues in investor-state arbitration under the NAFTA (9 March 2001) (*unprinted manuscript, on file at Thomas & Partners barristers & solicitors, available at <<http://www.thomasandpartners.com>>*), 2.

<sup>13</sup> *Feldman v. United Mexican States*, ICSID Case ARB (AF)/99/1, (Communication to the members of the arbitration tribunal) (January 11, 2001).

Section 3 of Chapter IV (Arbitration) and, except as the parties otherwise agree, in accordance with the *Rules of Procedure for Arbitration Proceedings* (Arbitration Rules). On the other hand, those arbitrations governed by the Additional Facility Rules must be conducted in accordance with the arbitration provisions embodied by Schedule C (Schedule C) of said rules (Article 6 of the Additional Facility Rules).

Additionally, Article 1120 of NAFTA states that Chapter 11 arbitrations must be conducted in accordance with these rules, except to the extent that NAFTA's Chapter 11 itself modifies them. As we will further highlight, the only relevant modification to such rules in relation to evidentiary matters are introduced by Article 1129 (Documents), Article 1133 (Expert Reports) and Article 1134 (Interim Measures of Protection).

All modern arbitration legislations endorse the Autonomy Principle which claims that the parties are free to choose the law or rules of law governing the arbitral procedure.<sup>14</sup> In the case of Chapter 11 arbitrations, this principle means that the disputing parties may adapt the rules identified by Article 1120.

For example, Article 44 of the ICSID Convention establishes that the Arbitration Rules are applicable "except as the parties otherwise agree". Therefore, notwithstanding the enunciation of the applicable rules made by NAFTA Article 1120, the expression "except as the parties otherwise agree" included in Article 44 of the ICSID Convention enables the disputing parties to choose a different set of rules or to modify, derogate or even create *ad hoc* rules to be applied in their proceedings.

In practice, it is very rare for the parties to agree in advance on detailed procedural rules.<sup>15</sup> These gaps are commonly addressed by way of subsequent agreement on a case by case basis.

These legislative powers are also conferred on arbitrators. Article 44 of the ICSID Convention for example, states that if any questions of procedure arise which are not covered by Section 3 of Chapter IV or the Arbitration Rules, or any rules agreed to by the parties, the arbitral tribunal must make a decision on the question. In practice, whenever the parties cannot agree, the decision is left to the arbitral tribunal.

However, the exercise of these legislative powers is limited by the rules concerning the awards' enforceability. The rules concerning enforcement are contained in relevant national laws of the state in which the arbitration is conducted and those of the state in which the award is sought to be enforced.<sup>16</sup> These mandatory requirements are mostly associated with

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<sup>14</sup> FOUCHARD, *supra* note 4, 648.

<sup>15</sup> BORN, *supra* note 2, 48.

<sup>16</sup> *Id.* 46.

the "principles essential to the proper administration of justice, including the principles of equal treatment of the parties, due process and, more generally, international procedural public policy."<sup>17</sup>

Experts agree that the concepts of international public policy and due process are closely related to the principle of equal treatment of the parties, which means that the parties<sup>18</sup> must be able "to present their arguments of fact and law under broadly similar conditions."<sup>19</sup>

The principle of equality is expressly recognized by Article 15(1) of the UNCITRAL Rules that mandates that an arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity to present its case.

The application of these principles in relation to evidentiary matters is reflected in several rules concerning the treatment of evidence. For example, evidence presented to a tribunal must also be communicated to the other party. Restricting certain evidence to the arbitrators' eyes may "be construed as a breach of due process and, thus, as a ground for setting aside the award,"<sup>20</sup> even if the parties consented to it. Chapter 11 tribunals do not have forum, *ergo* all laws should be considered as foreign law and their content should be established as a fact.<sup>21</sup> The opposite practice may also be deemed as a breach of the equality principle.<sup>22</sup>

Developing principles may also be found in: (i) the *UNCITRAL's Notes on Organizing Arbitral Proceedings* which contains guidelines as to the production of documentary evidence and the manner of taking oral evidence of witnesses; and in (ii) the *International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration* (IBA Evidence Rules) that "attempt to provide an efficient, but effective, basis for discovery that satisfies both common law and civil law traditions".<sup>23</sup>

For example, in *Methanex Corporation v. United States of America* (Methanex case)<sup>24</sup> the parties agreed on the application of the IBA Evidence Rules to govern the evidentiary issues of the proceeding.

Finally, complications arise concerning the extent to which the arbitrators, when deciding evidentiary questions, should take national laws

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<sup>17</sup> FOUCHARD, *supra* note 4, 650.

<sup>18</sup> BORN, *supra* note 2, 948.

<sup>19</sup> *Id.* 695.

<sup>20</sup> FOUCHARD, *supra* note 4, 693.

<sup>21</sup> *Id.* 692.

<sup>22</sup> *Id.* 692.

<sup>23</sup> BORN, *supra* note 2, 83.

<sup>24</sup> *Methanex Corp. v. United States of America* (Minutes of order of the second procedural meeting, 3) (September 7, 2000), 3.

into account. For instance, in *S.D. Myers, Inc. v. Canada* (S.D. Myers case), the tribunal concluded that when deciding matters of evidence the tribunal was allowed, under the UNCITRAL Rules, to embrace considerations of international and domestic law.<sup>25</sup>

#### **IV. TRIBUNALS' POWERS CONCERNING EVIDENCE: ORDERING THE PRODUCTION OF EVIDENCE AND ASSESSING ITS VALUE**

**A**RTICLE 43(A) OF THE ICSID CONVENTION allows a tribunal, if it deems it necessary and except as the parties otherwise agree, at any stage of the proceedings, to call upon the parties to produce documents or other evidence. Similarly, the Arbitration Rules establish that a tribunal may, if it deems it necessary at any stage of the proceeding, call upon the parties to produce documents, witnesses and experts as well as visit any place connected with the dispute or conduct inquiries there. Schedule C contains a similar provision except for the power to undertake *in situ* inspections that is not included. In the same manner, the UNCITRAL Rules state that at any time during the arbitral proceedings an arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal must determine (Article 24.3).

It must be noted though, that the parties may agree to limit these powers at the beginning of the proceeding in relation to a particular document, item, witness or expert testimony.

Additionally, the UNCITRAL Rules establish that the arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal must decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defense (Article 24.2).

The UNCITRAL Rules expressly recognize the tribunal's power to conduct the arbitration in a manner that it considers appropriate. However, as previously noted, attached to this provision, the UNCITRAL Rules make express reference to the principle governing arbitration which establishes that the parties must be treated with equality and that at any stage of the proceedings each party must be given a full opportunity to present its case (Article 15).

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<sup>25</sup> SD Myers Inc. v. Canada (Explanatory note to procedural order No. 10, § 10) (November 16, 1999), § 10.

In practice, most international arbitral tribunals are reluctant to issue discovery orders, "in part because they lack both the direct authority to sanction disobedience and the resources to supervise the process."<sup>26</sup>

Notwithstanding the evidentiary powers granted to Chapter 11 tribunals, in practice, arbitrators "have tended to take a 'hands off' approach, reminding each party that it bears the burden of proving the propositions that it advances."<sup>27</sup> While we may agree in general terms with this proposition, we also believe that there are remarkable examples where the arbitrators have adopted a more proactive approach and have ordered the production of substantial amounts of evidence.

In the *Pope & Talbot* case, the tribunal, after issuing its Interim Award on the merits, considered that in order to fully deal with the issues posed in relation to Articles 1102 and 1105, additional information was necessary and ordered the Respondent to produce a considerable amount of evidence.<sup>28</sup> Not only may tribunals order discovery but they may also impose conditions and modalities for it. For instance, the tribunal in the *Methanex* case declared that it had powers to impose conditions on the production of documents relating to confidentiality and the limited use of documents.<sup>29</sup> The expression "use of documents" imply that the tribunal may direct the parties to request the production of evidence related specifically to a certain part of the proceedings, as occurred for example in *Loewen Group, Inc. & Raymond L. Loewen v. United States of America* (Loewen case), where the tribunal accepted the Respondent's request for the production of documents but only for the purpose of the Respondent formulating its memorial on jurisdiction and competence and its counter-memorial.<sup>30</sup>

The Arbitration Rules and Schedule C set forth that a tribunal must be the judge of the admissibility of any evidence adduced and of its probative value (Rule 34.1 of the Arbitration Rules and Article 41.1 of Schedule C). In a similar provision, the UNCITRAL Rules empower an arbitral tribunal to determine not only the admissibility and weight of the evidence offered, but they can also comment on its relevance and materiality (Article 25).

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<sup>26</sup> BORN, *supra* note 2, 83.

<sup>27</sup> THOMAS, *supra* note 12, 3.

<sup>28</sup> *Pope & Talbot Inc. v. Canada* (Interim award on the merits, § 44) (June 26, 2000).

<sup>29</sup> *Methanex Corp. v. United States of America* (Preliminary award on jurisdiction and admissibility, § 81) (August 7, 2002).

<sup>30</sup> *Loewen Group Inc. et al v. United States of America*, ICSID Case ARB (AF)/98/3 (Decision of the arbitral tribunal on hearing of respondent's objection to competence and jurisdiction, § 21(5)) (January 5, 2001).



In Chapter 11 arbitration practice, “[e]vidence tends to be admitted freely with the real issue being the amount of weight that will be attached to it.”<sup>31</sup> Although this is consistent with general arbitration tendencies, some believe that “[t]he treatment of evidence in Chapter 11 cases is [even] more flexible than other forms of international dispute settlement.”<sup>32</sup>

In many cases, the admissibility of evidence depends on the tribunal’s ability to assess the relevancy of such evidence. For example, in *Metalclad Corporation v. United Mexican States* (Metalclad case),<sup>33</sup> the President of the tribunal indicated that “he could not at that stage of the proceedings, decide the extent to which the requested documents and materials might be relevant to the case”, but ordered the investor to produce the documents at issue and noted that the Claimant might seek an award on costs related to the production if the requests were adjudged unreasonable or improper. The tribunal in the *Marvin Feldman* case adopted the same position when concluding that it could not make a conclusive determination on the relevance of the evidence requested.<sup>34</sup>

A question arises on whether admissibility decisions may give grounds for the awards to be set aside. We believe that this question has to be decided on a case by case basis. However, as a matter of fact, the United States’ Courts for example, have consistently refused to overturn final arbitral awards because of evidentiary rulings. They have held that the property of evidence admission, even if contrary to judicial rules of evidence, is not for the courts to review.<sup>35</sup>

As to the issue of the tribunals’ powers over third parties, the decisions available to the public have repeatedly clarified that there are none. In the *Methanex* case for example, the tribunal observed that it had no power to order Canada and Mexico as NAFTA Parties to produce any documentation to Methanex during that arbitration.<sup>36</sup>

Finally, NAFTA Article 1134 empowers a tribunal to order an interim measure of protection to preserve the rights of a disputing party, or to ensure that a tribunal’s jurisdiction is made fully effective, including an order to preserve evidence in possession of a disputing party. This “order”

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<sup>31</sup> THOMAS, *supra* note 12, 6.

<sup>32</sup> *Id.*

<sup>33</sup> *Metalclad Corporation v. United Mexican States*, ICSID Case ARB (AF)/97/1 (Final award on the merits, § 12) (September 2, 2002).

<sup>34</sup> *Feldman v. United Mexican States*, ICSID Case ARB (AF)/99/1, (Procedural No. 5 concerning questions raised in connection with Procedural Order No. 4, § 8) (December 6, 2000).

<sup>35</sup> BORN, *supra* note 2, 92-93.

<sup>36</sup> *Methanex Corp. v. United States of America* (Preliminary award on jurisdiction and admissibility, § 81) (August 7, 2002).

may, according to Article 1134, itself take the form of a recommendation. This article seems to consider the preservation of evidence as being a right given to a disputing party. However, this power may not be extended to the *production* of evidence.

Similarly, Article 47 of the ICSID Convention establishes that a tribunal may, if it considers that the circumstances so require, recommend the application of provisional measures to preserve the respective rights of either party. The expression "respective rights of the parties" should be considered in order to determine whether or not the phrase is to be interpreted to have the same meaning as the text found in NAFTA Article 1134, particularly with respect to the right to require the preservation of evidence in possession of a disputing party.

The UNCITRAL Rules also refer to provisional measures. However, they do not relate the power to order such measures with the production or preservation of evidence. Nevertheless, this does not entail a limitation whatsoever to the tribunals' power to order provisional measures for such purposes as established by NAFTA Article 1134, since the latter provision must prevail over the applicable arbitration rules by virtue of Article 1120.

## V. DOCUMENTARY EVIDENCE

**T**HE ARBITRATION RULES, Schedule C and the UNCITRAL Rules indicate that a tribunal may, if it deems it necessary at any stage of the proceeding, call upon the parties to produce documents (Rule 34 of the Arbitration Rules, Article 41.2 of Schedule C and Article 24.3 of the UNCITRAL Rules).

The UNCITRAL Rules expressly indicate that the claimant and the respondent may annex to their statement of claim or defense all documents they deem as relevant or may add a reference to the documents or other evidence they submit (Articles 18 and 19).

Under the Arbitration Rules, except as otherwise provided by the tribunal after consultation with the parties and the ICSID Secretary-General, every supporting documentation or other instrument must be filed in the form of a signed original accompanied by the corresponding number of additional copies (Rule 23). Analogously, under Schedule C, the documentation filed in support of any pleading, written observation or other instrument introduced into a proceeding must consist of one original and of the respective number of additional copies. The original documentation must, unless otherwise agreed to by the parties or as ordered by the tribunal, consist of the complete document or of a copy or extract duly certified by a public official (Article 32).

In arbitrations conducted in accordance with the Arbitration Rules or

Schedule C, each party must, within the time limits fixed by the tribunal, communicate to the ICSID Secretary-General, for transmission to the tribunal and the other party, precise information regarding the evidence which it intends to produce and that which it intends to request the tribunal to call for, together with an indication of the points to which such evidence will be directed (Rule 33 of the Arbitration Rules and 40 of Schedule C). These rules make clear that this mechanism may be applied "without prejudice to the rules concerning the production of documents."

It is noteworthy that in the *Pope & Talbot* case, the tribunal interpreted the word "documents" used in its request of documents contained in the Interim Merits Award as meaning memos, notes, electronic documents and any other form of retaining records relating to the subjects addressed in the request.<sup>37</sup>

### **A. The Burden of Producing Documents: The Problem of Excessive Requests**

According to some experts, what is envisaged concerning documentary evidence in international arbitration is the well-known phenomenon that arbitrators may receive from both parties enormous amounts of documents.<sup>38</sup> As a practical matter, a tribunal "will typically encourage the parties to comply with some or all of the requests from the other party for the production of documents."<sup>39</sup> International tribunals however, tend to welcome complaints about burdensome requests and claims of privilege.<sup>40</sup>

In Chapter 11 arbitration practice, the tribunals have tended to reject demands for extensive discovery, usually coming, according to some experts, from American lawyers.<sup>41</sup> For example, in the *Methanex* case, the tribunal refused to accept a petition by the Claimant for documentary production under the argument that such documentation was not relevant to the decisions adopted in its preliminary award on jurisdiction.<sup>42</sup>

Litigants often oppose the production of documents under the excessive-request-argument. In *United Parcel Service of America v. Canada* (UPS case) for example, Canada argued that the Claimant's allegations exceeded the sphere of investor/state complaints under NAFTA. Therefore,

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<sup>37</sup> *Pope & Talbot Inc. v. Canada* (Appendix to interim award, § 44) (June 26, 2000).

<sup>38</sup> SANDERS, nota supra 8, 253.

<sup>39</sup> BORN, nota supra 2, 84.

<sup>40</sup> *Id.*

<sup>41</sup> THOMAS, nota supra 12, 3.

<sup>42</sup> *Methanex Corp. v. United States of America* (Preliminary award on jurisdiction and admissibility, § 81) (August 7, 2002).

Canada held that if those improper claims were not struck out by the tribunal the Claimant would have been allowed to exploit the Chapter 11 procedure to “access documents and elicit a response in areas of sophisticated fact and expert evidence that it [had] no right to explore.”<sup>43</sup> Canada finally claimed that the burden on it to respond to such expansive claims, particularly in terms of document collection, case development and expert advice, was enormous.<sup>44</sup>

But, what if the excessive request for documents comes precisely from the tribunal? In the *Methanex* case for example, the tribunal determined that in regards to the United States’ alleged liability, Methanex had a ninety day period to “file with that pleading copies of all evidential documents on which it relies [...], together with factual witness statements and expert witness reports of any person intended by Methanex to provide testimony at an oral hearing on the merits.”<sup>45</sup>

The Claimant asked the tribunal to confirm that it was not “being required to produce all evidence on which the presentation of its case on the merits will and may rely” since it would have implied “foreclosing the development and presentation of additional evidence at a later stage” and since “ninety days would be an extraordinarily short period in which to develop and present a case on the merits of a central issue [...]” Methanex Corporation went further and sustained that the enforcement of such limited period of time would prejudice Methanex Corporation’s opportunity of presenting its case.<sup>46</sup>

Concerning this request for interpretation, the tribunal decided that, notwithstanding that the ninety day period was reasonable, it could have accepted to extend it if a convincing application would have been submitted, instead of a request for interpretation of the Partial Award.<sup>47</sup>

This decision by the tribunal in the *Methanex* case may be contrasted with that in the *Loewen* case, where the tribunal granted twenty one days to the Claimants to produce the information related directly to the specific question of whether the Claimants had had other alternatives prior

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<sup>43</sup> *United Parcel Service of America v. Canada* (Memorial of the Government of Canada on preliminary jurisdictional objections, § 12) (February 14, 2002).

<sup>44</sup> *Id.*

<sup>45</sup> *Methanex Corp. v. United States of America* (Preliminary award on jurisdiction and admissibility, § 163) (August 7, 2002).

<sup>46</sup> *Methanex Corp. v. United States of America* (Claimant’s request for interpretation of the preliminary award on jurisdiction and admissibility, Point 3) (August 28, 2002).

<sup>47</sup> *Methanex Corp. v. United States of America* (Tribunal’s response to the Investor’s request for interpretation of the preliminary award on jurisdiction and admissibility, § 23) (September 25, 2002).

to entering into the "Mississippi settlement". It is worthy to mention that such information was in the possession of the Claimants themselves and their counselors. The question then arises on whether ninety days for the production of all the evidence in support of Methanex Corporation's amended statement of claim is reasonable in comparison to the twenty one day period granted to the Claimants in the *Loewen* case for the production of a specific item in their possession and under their control.

As to time limitations for the production of documentary evidence, in the vast majority of cases, the tribunals will accept extensions for the production of documents. Additionally, most commentators accept that "in absence of a specific agreement between the parties concerning compliance with deadlines, an award cannot generally be set aside or refused enforcement by the courts for having allowed the late submission of documents."<sup>48</sup>

In practice, not only have State parties been required to produce documents directly related to the case in question but have also been compelled to produce information related to other cases. This occurred in the *Mondev* case, where the Claimant requested and successfully obtained the production of documents generated under another NAFTA Chapter 11 tribunal.<sup>49</sup>

## **B. Producing Public Documents: The "I-Don't-Want-To-Stand-In-Line Claim"**

Whether or not disputing parties can be compelled to produce documents that are publicly available is a question that remains unresolved under Chapter 11 arbitrations. Arbitral tribunals have chosen different solutions when addressing this issue.

In the *Marvin Feldman* case for example, the tribunal limited its invitation to the parties to comply with the requests for documentary discovery to those documents that they regarded otherwise inaccessible to the party requesting them.<sup>50</sup>

In *ADF Group, Inc. v. United States of America* (ADF Group case) the same position was adopted. In that case, the Respondent refused to produce documentary evidence requested by the investor on the basis *inter alia*, that many of those documents were publicly available in the

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<sup>48</sup> BORN, *supra* note 2, 695.

<sup>49</sup> *Mondev International Ltd. v. United States of America* ICSID Case ARB (AF)/99/2 (Final award on the merits, §§ 23 and 24) (October 11, 2002). For example, one of the documents produced by the Respondent in the *Mondev* case was the tribunal's decisions in the *Loewen* case on disclosure of information.

<sup>50</sup> *Feldman v. United Mexican States*, ICSID Case ARB (AF)/99/1, (Interim Decision on Preliminary Jurisdictional Issues, § 16) (December 6, 2000).

National Archives and that "it would be unduly burdensome for the United States to produce these documents."<sup>51</sup> The Claimant replied to this objection by holding that the documents requested should be produced by the Respondent and that public availability of the documents was not an acceptable excuse since under the Freedom of Information Act of the United States virtually every governmental document is publicly available.<sup>52</sup> The Claimant additionally observed that it should not have to "stand in line at the door of *every* government agency to inquire about the existence and availability of relevant documents."<sup>53</sup> In the face of this statement, the Respondent argued that the Claimant was trying to unduly transfer to it the burden of collecting the documents in question. The United States also observed that, according to the Civil Reference Section Chief of the National Archives, there is no line at the National Archives.<sup>54</sup>

The tribunal decided that where the documents requested are in the public domain and equally and effectively available to both parties, there would be no necessity for requiring the other party to physically produce and deliver the documents except where the requesting party shows that it would sustain undue burden or expense in accessing the publicly available material.<sup>55</sup> Finally, the tribunal determined that it was sufficient for the Respondent to identify the particular government office at which the documents were in fact available to the Claimant, to having produced the documents within the meaning of Article 41(2) of the Schedule C.<sup>56</sup>

In contrast, the tribunal in the *Pope & Talbot* case considered that the public availability of documents was not an adequate basis for the

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<sup>51</sup> *ADF Group, Inc. v. United States of America*, ICSID Case ARB (AF)/00/1, (Objection to Claimant's request of documents of the Respondent the United States of America, 13) (August 17, 2001).

<sup>52</sup> *ADF Group, Inc. v. United States of America*, ICSID Case ARB (AF)/00/1, (Investor's response to objections raised by the Respondent the United States of America to production of documents, §§ 41 and 42) (August 24, 2001).

<sup>53</sup> *ADF Group, Inc. v. United States of America*, ICSID Case ARB (AF)/00/1, (Objection to Claimant's request of documents of the Respondent the United States of America, 10) (August 17, 2001).

<sup>54</sup> *Id.* 11. Indeed, the U.S.A. observed that following a brief consultation, an archivist provides the requesting person the records within a few hours of its request for review and copying in the National Archives research room.

<sup>55</sup> *ADF Group, Inc. v. United States of America*, ICSID Case ARB (AF)/00/1, (Procedural Order No. 3 concerning the production of documents, § 4) (October 4, 2001).

<sup>56</sup> *Id.* The tribunal also observed that the Respondent was reasonably expected to provide appropriate assistance such as phone calls to the documents custodians to ensure the Claimant's effective and prompt access to the documents.

Claimant to refuse to produce them.<sup>57</sup>

### **C. Producing Documents Originated by the Requesting Party**

Regarding the issue of whether the parties must produce documents originated by the requesting party, the tribunal in the *ADF Group* case was of the view that there was no duty to produce documents originated by and presumably under the control of the requesting party unless they "have upon them information or notations placed there by 'staff' of the requested party."<sup>58</sup>

Finally, it is noteworthy that due to the influence of the civil law system, the general tendency in international arbitration has been to rely more heavily on documentary evidence and written witness and expert statements rather than on oral testimonies.<sup>59</sup>

## **VI. WITNESSES AND EXPERTS: THE CONDUCTION OF ORAL HEARINGS**

**A**S AN INTERNATIONAL LITIGATOR OBSERVED, the expectation at the completion of the written phase is that no more documentary evidence will be admitted, as the objective of the oral stage is to "knit the case together."<sup>60</sup>

The Arbitration Rules and Schedule C empower a tribunal, if it deems it necessary, to call upon the parties to produce witnesses and experts at any stage of the proceeding (Rule 34.2.a of the Arbitration Rules and Article 41.2 of Schedule C). As previously mentioned *supra*, under the UNCITRAL Rules, a tribunal may, at any time during the arbitral proceedings, require the parties to produce evidence, which can include witnesses and experts (Article 24.3). Additionally, under the UNCITRAL Rules, at the request of either party and at any stage of the proceedings, an arbitral tribunal must hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. Therefore, in Chapter 11 proceedings, arbitrators have wide powers to determine,

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<sup>57</sup> *Pope & Talbot Inc. v. Canada* (Procedural Order No. 8, cited in the Investor's response to the objections raised by the Respondent United States of America to the production of documents, § 42), *cf. supra* note 53.

<sup>58</sup> *ADF Group, Inc. v. United States of America*, ICSID Case ARB (AF)/00/1, (Procedural Order No. 3 concerning the production of documents, § 3) (October 4, 2001).

<sup>59</sup> BORN, *supra* note 2, 88.

<sup>60</sup> THOMAS, *supra* note 12, 3 (Quoting the president of one tribunal).

through the use of oral evidence, the veracity of the parties' allegations.

Additionally, the UNCITRAL Rules require that if witnesses are to be heard, each party must communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses they intend to present at least fifteen days before the hearing (Article 25.2).

As a matter of practice, notwithstanding the tribunals' powers to call upon the parties to produce witnesses and experts, "only exceptionally will [they] suggest that a particular witness be designated."<sup>61</sup>

The practice in Chapter 11 disputes has been that the parties submit, during the written phase of the arbitration, the written testimony of the witnesses they consider will support and confirm their version of the facts. Before the oral hearing takes place, the parties communicate to the tribunal, as well as to the other party, the witnesses they intend to examine among all the witnesses of the opposing Party that have submitted written testimonies during the written phase.

Direct examination is not common in Chapter 11 proceedings. Rather, written witness' statements are taken as direct examination so the hearing starts with cross-examination followed by re-direct-examination and in some cases by re-cross-examination.<sup>62</sup>

## **A. Adversarial v. Inquisitorial Styles for the Conduction of Hearings**

Traditionally, continental proceedings are deemed more inquisitorial, whereas common law proceedings are considered more adversarial.<sup>63</sup> In common law systems, the adversarial style of witness and expert examinations prevails. This means that the conduction of the hearings primarily relies on the counsel for each party. In contrast, under the civil law inquisitorial system, it is primarily for the judge to put questions to the witnesses and only after this, do the lawyers get an opportunity to do so.<sup>64</sup>

The Arbitration Rules and Schedule C establish that the members of a tribunal may, during the hearings, put questions to the parties, their agents, counsel and advocates, and ask them for explanations (Rule 32.3 of the Arbitration Rules and Article 39.3 of Schedule C). These rules do not refer to witnesses. This may be construed as suggesting that concerning witness examination, only the parties may advance inquiries. Therefore, it might be said that Arbitration Rules and Schedule C favor

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<sup>61</sup> BORN, *supra* note 2, 88.

<sup>62</sup> THOMAS, *supra* note 12, 4.

<sup>63</sup> FOUCHARD, *supra* note 4, 690.

<sup>64</sup> SANDERS, *supra* note 8, 261.



the application of an adversarial system of examination similar to that used in common law regimes.

This preference is also reflected in Rule 35(5) of the Arbitration Rules and in Article 42 of Schedule C, both of which establish that witnesses and experts must be “examined *by the parties* under the control of [the tribunal’s] [p]resident” (emphasis added). Complementarily, the Arbitration Rules and Schedule C establish that any member of the tribunal may also put questions to witnesses and experts. Hence, even when these rules allow the tribunal to advance questions to the witnesses and experts, they clearly favor the adversarial style for the conduction of the hearings.

The UNCITRAL Rules, on the other hand, only establish that an arbitral tribunal is free to determine the manner in which witnesses are to be examined (Article 25.4). Therefore, in proceedings conducted under these rules, adversarial as well as inquisitorial styles may be equally expected, depending on the parties’ or arbitrators’ preferences.

The adversarial style of conducting hearings is, as we previously mentioned, a legacy from the common law tradition. When applied in arbitral proceedings, many experts have remarked the advantages and preference of this system over the inquisitorial style. As one commentator pointed out, “[a]rbitrators may ask questions at any time but the lawyer who presented the witness knows better than the arbitrator what the witness may testify.”<sup>65</sup>

## B. Oral v. Written Depositions

As in many other arbitration systems, under the Arbitration Rules and Schedule C, a tribunal may admit evidence given by a witness or expert in a written deposition (Rule 36.a of the Arbitration Rules and Article 43.a of Schedule C). Some commentators believe that written depositions enable the tribunal and the parties to direct their questioning more precisely to the issues at stake during the hearings.<sup>66</sup> Others believe that in order to expedite the proceedings, written depositions should be preferred over oral testimonies.<sup>67</sup> Conversely, the contrary opinion holds that “to have the hearing prepared further by full and detailed Witness Statements signed and affirmed by the witnesses is [...] not to be welcomed.”<sup>68</sup> Additionally, some are of the view that one issue to consider when deciding whether to date hearings is that “scheduling hearings in truly international arbitrations is often very difficult.”<sup>69</sup> In our opinion, a

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<sup>65</sup> *Id.* 262.

<sup>66</sup> *Id.* 259.

<sup>67</sup> BORN, *supra* note 2, 701.

<sup>68</sup> SANDERS, *supra* note 8, 263.

<sup>69</sup> BORN, *supra* note 2, 86.

convenient combination of both, oral and written statements is the most recommendable approach. Like in other types of controversies, most litigants prefer oral testimonies when the physical presence of a witness and his or her reactions may be particularly moving for the tribunal.

On this particular matter, under the UNCITRAL Rules, in the absence of an express request by either party, the arbitral tribunal must decide whether to hold hearings or whether the proceedings must be conducted on the basis of documents and other materials (Article 15).

Some believe that, in order to comply with the equality principle, a request for a hearing should not be refused.<sup>70</sup> For this reason, in general arbitration practice, arbitrators do not frequently refuse oral hearings since they are afraid that if they do so their award might be set aside.<sup>71</sup> When assessing the national courts' tendencies, some commentators have pointed out that "[t]here are a few court decisions reported which rejected the claim to set aside an award made by arbitrators who refused to hear witnesses because they deemed it 'completely unnecessary'.<sup>72</sup> However, some experts believe that "[a]s far as presentation of evidence is concerned there may [...] be circumstances which justify making an exception to the principle that each party should have a full opportunity to present its case."<sup>73</sup>

In practice, arbitrators in Chapter 11 proceedings have already refused requests to hold hearings. For example, in the *Marvin Feldman* arbitration,<sup>74</sup> the Tribunal "did not envisage holding a hearing on [such] jurisdictional issues" at the request of Mexico.

Finally, it is worth mentioning that in most of the cases, oral depositions are to be registered in writing. Schedule C expressly requires that the ICSID Secretary-General must keep minutes of all hearings, including those performed in the absence of the arbitral tribunal. Such minutes must include among other references: (i) a summary record of the evidence produced; (ii) a summary record of the statements made by the parties; (iii) a summary record of questions put to the parties by the members of the tribunal, as well as of the replies thereto; and (iv) any order made or announced by the tribunal (Article 44).

### C. "Out-of-Court" Depositions

In arbitrations conducted under the Arbitration Rules or Schedule C,

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<sup>70</sup> SANDERS, *supra* note 8, 251.

<sup>71</sup> *Id.* 252.

<sup>72</sup> *Id.* 252.

<sup>73</sup> *Id.* 253.

<sup>74</sup> *Feldman v. United Mexican States*, ICSID Case ARB (AF)/99/1, (Interim Decision on Preliminary Jurisdictional Issues, § 9) (December 6, 2000).

witnesses and experts may be examined before authorities other than the arbitral tribunal, provided that both parties so agree (Rule 36.b of the Arbitration Rules and Article 43 of Schedule C). In such cases, the Arbitration Rules empower the tribunal to define the subject of the examination, the time limit, the procedure to be followed and other particulars. In a different way, Schedule C only refers to the tribunal's power to define the procedure to be followed without mentioning the subject of the examination and the time limit. The precise intention for this exclusion is not clear. Under the Arbitration Rules and Schedule C, the parties may participate in such examination but they are not compelled to. This may be the case of witness and expert testimonies made before a national court at the request of a disputing party or of the tribunal itself.

Some believe that in arbitral proceedings as well as in trial proceedings there are always suspicions about the trustworthiness of an out of court declaration uttered by someone who cannot be contemporaneously cross-examined and that arbitrators as well as judges frequently discount weight to the evidence presented out of court.<sup>75</sup> Nevertheless, Chapter 11 practitioners maintain that "[t]ribunals have also instructed counsel that technical objections to the admissibility of evidence such as the hearsay rule are not to be awarded [...] [t]hus, technical objections are likely to be met with indifference, if not antipathy."<sup>76</sup>

#### **D. Unwilling Witnesses and Refusals to Produce Witness Statements**

It is accepted that in case of unwilling witnesses "a subpoena to appear in court may be issued and the hearing will take place in accordance with rules prevailing in court proceeding."<sup>77</sup> In Mexico and Canada, arbitration laws provide for court assistance in case of an unwilling witness. The United States' courts are "particularly liberal in permitting judicial assistance to discovery requests by arbitrators."<sup>78</sup>

However, as a practical matter, tribunals' requests are ordinarily limited to documentary evidence. Even when court assistance for the production of witnesses is provided, it is seldom to be used by arbitrators.<sup>79</sup>

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<sup>75</sup> Jack M. Sabatino, *ADR as "litigation lite": procedural and evidentiary norms embedded within alternative dispute resolution*, 47 *Emory L.J.* 1289, (1998), 67

<sup>76</sup> THOMAS, *supra* note 12, 4.

<sup>77</sup> SANDERS, *supra* note 8, 256.

<sup>78</sup> BORN, *supra* note 2, 84.

<sup>79</sup> *Id.*

Arbitral tribunals rather choose to draw negative inferences from the refusal to testify.<sup>80</sup>

Nevertheless, an investor might be expected to request assistance from the national courts for the production of witnesses. For example, Methanex Corporation announced that, in order to prove its allegations as requested by the tribunal in its preliminary award, it would need the marshalling of evidence from third parties.<sup>81</sup> This will obviously entail the national courts' intervention.

In practice, state parties frequently refuse to produce witness statements on a wide variety of excuses that range from excessive burdensome to political-status-arguments. For instance, during the *Marvin Feldman* arbitration, Mexico made it clear that it was their position not to provide statements from heads of state and secretaries of state nor from other senior officials in Chapter 11 proceedings and that it was conceivable that the United States or Canada would not adopt a different position.<sup>82</sup> This position radically departed from that shown in the *Metalclad* arbitration where an ambassador and a secretary of state not only provided statements but appeared to be examined before the Tribunal during the oral hearing.<sup>83</sup> We may assume that in future arbitrations, Mexico will adopt a position similar to that displayed in the *Marvin Feldman* case.

### **E. Who May Participate in the Hearings?**

Under the Arbitration Rules and Schedule C, the oral procedure must consist of the hearing by the tribunal with the parties, their agents, counsel and advocates, and of witnesses and experts (Rule 32.1 of the Arbitration Rules and Article 39.1 of Schedule C). It must be noted that, contrary to several national arbitration rules, these rules allow the parties to render oral testimony during the hearings. This is consistent with the tendencies displayed in other international arbitrations where the tribunals regularly do not exclude testimony from interested parties.<sup>84</sup>

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<sup>80</sup> SANDERS, *supra* note 8, 257.

<sup>81</sup> *Methanex Corp. v. United States of America* (Claimant's request for interpretation of the preliminary award on jurisdiction and admissibility, Point 3) (August 28, 2002).

<sup>82</sup> *Feldman v. United Mexican States*, ICSID Case ARB (AF)/99/1, (Mexico's communication to the tribunal, § 16) (January 11, 2001).

<sup>83</sup> Ms. Julia Carabias, Minister of Environment, Natural Resources and Fisheries and Mr. Horacio Sánchez Unzueta, Ambassador of Mexico before the Vatican.

<sup>84</sup> BORN, *supra* note 2, 91.

According to the Arbitration Rules and Schedule C, a tribunal has the power to decide, with the disputing parties' consent, which other persons besides the parties themselves, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the tribunal may attend the hearings (Rule 32.2 of the Arbitration Rules and Article 39.2 of Schedule C). In relation to these provisions, we must ask: does it mean that the tribunal may only decide upon the attendance of the persons not included in such enunciation? If this is true, does that mean that a tribunal may not exclude a person falling within these categories? Does the expression "during their testimony" allow the tribunal to exclude a person, even when it is included in one of the above-mentioned categories during others' testimonies? If that is true, what is the whole meaning of including the enunciation of those persons when it is obvious that they may not be excluded during their own oral depositions?

On the other hand, UNCITRAL Arbitration Rules establish *a priori* secrecy for the hearing, which may only be overcome by an agreement between the disputing parties. However, under the UNCITRAL Rules, the arbitral tribunal may, without the consent of the parties, require the retirement of any witness or witnesses during the testimony of other witnesses (Article 24.4).

As to the question of whether the witness-parties may attend the hearings, in the *Marvin Feldman* case, Mr. Marvin Roy Feldman Karpa, who was simultaneously a witness and a party, was allowed to remain in the hearing room throughout the hearing.<sup>85</sup>

## F. Experts' Participation

One of the advantages of arbitration is the expertise of the arbitrators. However, international arbitral tribunals frequently appoint experts "to assist them on technical issues of fact and, occasionally, law."<sup>86</sup>

Regarding the participation of experts, Article 1133 of NAFTA establishes that, a tribunal may, at the request of a disputing party or on its own initiative (unless the disputing parties disapprove), appoint one or more experts. However, the participation of experts is limited by certain requirements: (i) it must only be in writing; (ii) only on factual issues concerning environmental, health, safety or other scientific matters; (iii) such issues must have been raised by a disputing party in the corresponding

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<sup>85</sup> *Feldman v. United Mexican States*, ICSID Case ARB (AF)/99/1, (Procedural No. 6 concerning the marshalling of evidence at the hearing on the merits, § 8) (June 19, 2001).

<sup>86</sup> BORN, *supra* note 2, 91.

proceeding; and (iv) it is subject to the terms and conditions that the disputing parties may agree. Nevertheless, Article 1133 itself establishes that these conditions are to be applied without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules.

While the Arbitration Rules are silent as to the issue of experts directly appointed by the arbitrators, under Schedule C, a tribunal may appoint one or more experts, define their terms of reference, examine their reports and hear from them in person (Article 43.c). The UNCITRAL Rules set forward that an arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal (Article 27). Therefore, the limitations established by NAFTA Article 1133 are derogated.

Under the UNCITRAL Rules, once a copy of the expert's report has been communicated to the parties, they have the opportunity to express, in writing, their opinion on the report and at the request by any of them the expert may be heard at a hearing where the parties must have the opportunity to be present and to interrogate him. At this hearing either party may present expert witnesses in order to testify with respect to the points at issue (Article 27). On this particular issue, some believe that experts' oral depositions are quite inefficient since their opinions "should then be distilled from the minutes of the hearing or a stenographic record" and that this seems "less efficient than the usual expert's opinion in writing."<sup>87</sup>

It is also questionable whether the parties are entitled either to jointly refuse the appointment of an expert by the arbitral tribunal or to challenge the experts so appointed.<sup>88</sup> Nevertheless, it is generally accepted that a party's request for the appointment of an expert is not a prerequisite for the tribunal to make such an appointment and that a request from the parties does not bind the tribunal.<sup>89</sup> As far as we are aware, these questions have not been clarified in any of the known Chapter 11 disputes.

The UNCITRAL Rules also establish that the disputing parties must cooperate with the experts by giving them any relevant information or produce for their inspection any relevant documents or goods that they may require of them. In case of any dispute between a party and the experts as to the relevance of the required information or evidence production, the matter must be referred to the arbitral tribunal in order for them to make a determination on the issue (Article 27.2).

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<sup>87</sup> SANDERS, *supra* note 8, 265.

<sup>88</sup> *Id.* 264.

<sup>89</sup> BORN, *supra* note 2, 91.

## G. Administration of Oaths

Under the Arbitration Rules, witnesses and experts must render their testimonies under oath even when the rules refer to it as a "declaration". Article 35 of the Arbitration Rules expressly indicates the precise content of such an oath, which, notwithstanding the rules being silent on this matter, is to be administered by the arbitrators (contrary to what is admitted under several arbitration systems).

While some international tribunals limit themselves to express their expectation that the witness will speak the truth and nothing but the truth,<sup>90</sup> Chapter 11 arbitrators have tended to administer a formal oath when examining witnesses.

## H. Communication between the Parties and the Witnesses

While common law systems accept that the parties may "prepare" witnesses, in most civil law systems this practice is prohibited.<sup>91</sup> Procedural rules applicable to Chapter 11 proceedings are silent on this matter. However, whatever the tribunals decide, the same opportunity must be given to both parties.

In practice, there has been no dispute on this matter. In fact, in virtually all the cases, witness preparation by the parties has been allowed. However, when a witness examination is interrupted for a meal or for the next day, tribunals request that the witness shall not discuss any matters relating to the arbitration with any member of its own party.

## VII. CONFIDENTIALITY REGARDING EVIDENCE IN CHAPTER 11 ARBITRATIONS

**A**RGUMENTS BASED ON CONFIDENTIALITY CONCERNS advanced to resist information disclosure are common in general arbitration proceedings.<sup>92</sup> Chapter 11 disputes are not an exception to this general rule. Confidentiality issues in Chapter 11 arbitrations have arisen in two directions: (i) firstly, regarding the privileges (mainly cabinet and client-attorney privileges) that the parties may claim to refuse the production of evidence; and (ii) secondly, the secrecy of the evidence produced during the arbitral proceedings.

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<sup>90</sup> SANDERS, *supra* note 8, 258.

<sup>91</sup> BORN, *supra* note 2, 702.

<sup>92</sup> FOUCHARD, *supra* note 4, 692.

## A. Privilege Claims in Chapter 11 Disputes

General arbitration practice dictates that whenever a party relies on confidentiality of certain documents to refuse their disclosure, it is open to the arbitral tribunal to decide whether the grounds for not disclosing such documents are valid.<sup>93</sup>

In the *Pope & Talbot* case, Canada refused to produce certain documents upon the grounds that they related to cabinet confidence, relying on the *Canada Evidence Act*<sup>94</sup> (CEA) which establishes that where:

*the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.*<sup>95</sup>

The tribunal determined that the *Canada Evidence Act* was not applicable since: (i) the undated letter tendered by Canada, signed by Mr. Mel Cappe and with the heading of the Clerk of the Privy Council and Secretary of the Cabinet, did not constitute, in the tribunal's opinion, "certifying in writing" in the terms required by the CEA; and (ii) the tribunal could not be considered as a body with powers to "compel" the production of evidence in so far as the UNCITRAL Rules applied, particularly with respect to Article 28(3), which characterizes the intervention of a tribunal in the production of evidence as a mere "invitation".<sup>96</sup>

The tribunal also stated that any reasonable evaluation of a refusal to produce evidence on the ground of privilege "must depend in large part on having some idea of what those documents are."<sup>97</sup> The tribunal continued to observe that "a determination by a tribunal that documents sufficiently identified deserve protection is a very different matter from acquiescence to a simple assertion, without any identification, that they deserve protection."<sup>98</sup> The tribunal considered that simply relying on Canada's assertion that the documents deserved protection might put

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<sup>93</sup> *Id.* 693.

<sup>94</sup> *Canada Evidence Act* (R.S. 1985, c. C-5)

<sup>95</sup> *Pope & Talbot Inc. v. Canada* (Award on Crown privilege and client-solicitor privilege, §§ 1.1 and 1.2) (September 6, 2000).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* § 1.4.

<sup>98</sup> *Id.*



Canada "in an unfairly advantaged position under Chapter 11 by comparison with the United States and Mexico."<sup>99</sup>

Finally, the tribunal not only invited Canada to offer reasons why "in conformity with a general law relating to State secrets" documents in relation to which Canada was alleging privilege should be withheld, but also to identify: (i) document by document; (ii) with the date of each of them; and (iii) indicating the aspect of the dispute, if any, to which each document related.<sup>100</sup>

Notwithstanding this invitation, Canada refused to produce or even identify the documents involved. As a result, the tribunal declared in its Final Award on the Merits that although such refusal did not appear to be prejudicial to the investor, the tribunal deplored the decision of Canada in this matter.<sup>101</sup> The tribunal also confirmed its opinion that Canada's position could well be a derogation of the overriding principle of equality between the parties and the investors of the Parties reflected in Articles 15 of the UNCITRAL Rules and in 1115 of NAFTA, respectively.<sup>102</sup>

However, the tribunal in the S.D. Myers case adopted a different position concerning the application of the CEA and determined that:

*In the absence of the certificate [referring to the Clerk of the Privy Council's certificate], the issuance of which appears to be at CANADA's discretion, the Tribunal likely follow the approach taken by the WTO panel in the Brazil-Canada airplane dispute and, on a 'document-by-document' basis, require CANADA to give sufficient information and justification to sustain privilege for each document (emphasis added).*<sup>103</sup>

This passage is particularly relevant since the tribunal recognized that: (i) the issuance of the Clerk of the Privy Council's is discretionary; and that (ii) *only* in the absence of such a certificate may the tribunal proceed to the "document-by-document" assessment to determine if there are enough grounds for non-disclosure. Therefore, this passage may be taken as accepting that Canada, under the auspices of the CEA, is enti-

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<sup>99</sup> *Id.* § 1.6.

<sup>100</sup> *Id.* § 1.7.

<sup>101</sup> *Pope & Talbot Inc. v. Canada* (Award on the merits phase 2, § 193) (April 10, 2001).

<sup>102</sup> *Id.*

<sup>103</sup> *SD Myers Inc. v. Canada* (Explanatory note to procedural order No. 10, § 5) (November 16, 1999).

tled to exclude from the discovery process entire sets of evidence identified in general terms, by merely issuing –at will– a certificate of privilege and stating that this decision may not be scrutinized.

In the *Marvin Feldman* case Mexico, arguing a prohibition under Mexican law, refused to provide information on a specific taxpayer, which was relevant for the Tribunal to compare treatment received by the Claimant with that of other taxpayers in like circumstances.

In regards to client-attorney privileges, in the *Loewen* case for example, the tribunal determined that the Respondent was entitled to attorney-client communications of the Claimant or either of them directly related to the “issue of duress”.<sup>104</sup>

In the *Pope & Talbot* case, the tribunal came to the conclusion that solicitor-client privilege was not only confined to legal advice given in contemplation of litigation but rather that it extended to communication for the general purpose of “giving or seeking legal advice.”<sup>105</sup>

## B. Secrecy of Evidence in Chapter 11 Disputes

The confidential character of the evidence produced during the arbitral proceedings is a matter that the parties must agree upon. Except for rare references, procedural rules applicable to Chapter 11 arbitrations do not deal with the issue of secrecy of evidence. Article 44 of Schedule C for example establishes that the minutes of the hearings must not be published without the consent of the parties.

In both the *Metalclad* and the *Loewen* case, the tribunals not only made clear that the confidentiality restriction imposed by Article 44 concerning the secrecy of the hearing minutes is primarily directed to the Tribunal but that it must also be understood as creating an obligation binding upon the parties not to publish the minutes of the hearing without the consent of the other party.<sup>106</sup>

As previously mentioned, restricting the disclosure of evidence to the arbitral panel may only constitute a violation of the equality principle and consequently to due process obligations.

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<sup>104</sup> *Loewen Group Inc. et al v. United States of America*, ICSID Case ARB (AF)/98/3 (Decision of the arbitral tribunal on hearing of respondent’s objection to competence and jurisdiction, § 27) (January 5, 2001).

<sup>105</sup> *Pope & Talbot Inc. v. Canada* (Award on Crown privilege and client-solicitor privilege, § 1.9) (September 6, 2000).

<sup>106</sup> *Loewen Group Inc. et al v. United States of America*, ICSID Case ARB (AF)/98/3 (Decision of the arbitral tribunal on hearing of respondent’s objection to competence and jurisdiction, § 25) (January 5, 2001).

It must be accepted however, that once a piece of evidence has been disclosed there cannot be complete certainty as to whether or not that evidentiary item will fall into the public domain. As one commentator recognized “[i]t will never be easy to establish which party is responsible for the document’s release, and it may be difficult for the disclosing party to prove that it suffered loss as a result of any breach by its adversary.”<sup>107</sup>

Moreover, once a document has been disclosed to the parties and the arbitrators it may be made public later through the enforcement of domestic laws or a judicial decision. This actually occurred in the *Eso Australia Resources Ltd. v Plowman* case where an Australian court ruled in favor of a petition made by the Minister of Energy to reveal to the Australian Parliament certain information disclosed during an arbitration between two energy companies and a governmental agency.<sup>108</sup>

We may draw an analogy between this case and the *Mondev* case where the Respondent informed the tribunal that it had been requested under the *Freedom of Information Act* (FOIA) to release certain submissions and correspondence issued by the Respondent itself during the proceedings. The Claimant in that case opposed the release of this information. The tribunal decided that “in general terms the ICSID (Additional Facility) Rules did not purport to qualify statutory obligations of disclosure which might exist for either party” and that “[s]ince it appeared that the FOIA created a statutory obligation of disclosure for the Respondent, the Tribunal rejected the Claimant’s request for the Tribunal to prohibit the Respondent from realizing its submissions and correspondence.”<sup>109</sup>

Finally, we want to draw attention to Article 1129 of NAFTA that establishes that a Party which is not directly involved in a proceeding is entitled to receive the evidence that has been tendered to the tribunal by a disputing Party. It must be observed that the duty of the disputing Party to provide the evidence includes the evidence produced by the investor. Article 1129 requires the Party exercising this right to treat the information as if it were a disputing Party. Therefore, the confidentiality restrictions resting upon the disputing Party are automatically transferred to the requesting Party.

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<sup>107</sup> FOUCHARD, *supra* note 4, 693.

<sup>108</sup> *Eso Australia Resources Ltd. v. Plowman*, 11 Arb. Int’l 235 (1995).

<sup>109</sup> *Mondev International Ltd. v. United States of America* ICSID Case ARB (AF)/99/2 (Final award on the merits, § 29) (October 11, 2002).

## VIII. IN SITU INSPECTIONS

ARTICLE 43(B) OF THE ICSID CONVENTION establishes that, except as the parties otherwise agree, a tribunal may, if it deems necessary at any stage of the proceedings, visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

Rule 34 of the Arbitration Rules also enables an arbitral tribunal at any stage of the proceeding to visit any place connected with the dispute or conduct inquiries there. Conversely, as previously mentioned, if the arbitrations are governed by the Additional Facility Rules and therefore conducted in accordance with the rules of Schedule C, absent an agreement by the parties, a tribunal lacks the power to undertake *in situ* inspections. The UNCITRAL Rules are silent on this matter.

We have no notice of an *in situ* inspection undertaken by any Chapter 11 tribunal.

## IX. PUNISHING REFUSALS TO PRODUCE EVIDENCE: THE TASK OF INTERPRETING SILENCE

IN ACCORDANCE TO RULE 34(3) OF THE ARBITRATION RULES, the disputing parties must cooperate with a tribunal in the production of evidence and the conduction of *in situ* inspections. Rule 34(3) also establishes that a tribunal must take formal note of the failure of a party to comply with these obligations and of any reasons given for such failure.

However, none of the provisions contained in the arbitration rules governing Chapter 11 disputes establish an express sanction for the failure of producing evidence.

As previously stated, in NAFTA countries, the possibility exists to approach national courts with a writ of *subpoena ducis tecum*. Nevertheless, Chapter 11 tribunals have not made use of these mechanisms.

If evidence is not produced after an express request by the tribunal, it is "generally accepted that arbitrators may draw their own conclusions from the refusal [and that] [t]his sanction may even be more harmful for the refusing party than the production of the document and may lead this party to comply with the request."<sup>110</sup>

As stated before, in the *Marvin Feldman* case, the Respondent refused to provide detailed information on the treatment afforded to one of the

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<sup>110</sup> SANDERS, *supra* note 8, 254.

Claimant's competitors. This information was relevant in this case to determine whether the Claimant had been granted national treatment.<sup>111</sup> The tribunal observed, in its final award on the merits, that "the Government of Mexico, as the only party with access to [the relevant] information, [had] not been particularly forthcoming in presenting the necessary evidence" and that "[t]he two files presented to the Tribunal during the hearing [were] incomplete."<sup>112</sup>

The tribunal continued to note that if the Respondent had evidence showing that the other companies were not treated in a more favorable fashion than the Claimant with regard to receiving tax rebates, it was never explained why it was not introduced.<sup>113</sup>

Based on these arguments, the tribunal in the *Marvin Feldman* case concluded that it was "entirely reasonable for the majority of [the] Tribunal to make an inference based on the Respondent's failure to present evidence on the discrimination issue."<sup>114</sup> Consequently, the tribunal found that the Respondent had acted inconsistently with Article 1102.<sup>115</sup>

It must be recognized that: (i) the *Marvin Feldman* tribunal announced from the beginning of the proceedings that if a party did not comply with a request by the tribunal to produce evidence, the arbitrators would be entitled to draw the appropriate inferences;<sup>116</sup> and that (ii) Mexico did not offer substantial reasons for non-disclosure.

In the *S.D. Myers* case, the tribunal determined that "any question relating to the drawing of adverse inferences and/or the discharge of any burden of proof by either party would be determined by the tribunal after consideration of written or oral statements when the evidentiary record [was] closed."<sup>117</sup> In this case, the tribunal seemed to suggest that before making any decision on adverse inferences, it intended to take into account the opinion of the parties with regards to those inferences. However, nothing in the arbitration rules applicable to Chapter 11 proceedings requires consultation.

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<sup>111</sup> *Feldman v. United Mexican States*, ICSID Case ARB (AF)/99/1, (Final award on the merits, § 168) (December 16, 2002).

<sup>112</sup> *Id.* § 174.

<sup>113</sup> *Id.* § 177.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* § 210.

<sup>116</sup> *Feldman v. United Mexican States*, ICSID Case ARB (AF)/99/1, (Procedural Order No. 2 concerning a request for provisional measures and the schedule of the Proceeding, § 8.a.) (May 3, 2000).

<sup>117</sup> *SD Myers Inc. v. Canada* (Procedural Order No. 10 concerning Crown privilege, § 4) (November 16, 1999).

## **X. FINAL REMARK**

**W**E BELIEVE THAT IN THE SUCCESS OF THE NAFTA Chapter 11 regime procedural rules, such as those related to evidence, have a major role. They must provide for an efficient proceeding while ensuring that the truth will be revealed and that the due process principle is respected. To put it in Cicero's words, they must ensure that enough attention is devoted to the weighing of evidence and that at the same time, not too much industry and deep study will be spent on matters that are obscure and difficult and useless as well.