

PROCEDURAL ASPECTS OF NON-DISPUTING PARTY INTERVENTIONS IN CHAPTER 11 ARBITRATIONS

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INTRODUCTION

THE NEGOTIATORS AND DRAFTERS of modern international trade treaties deserve the profound admiration of all who have cause to study or work with their products. Often perceived to be a conservative breed, both in terms of concepts and drafting techniques, it comes as somewhat of a surprise that each new treaty series seems to contain radical notions designed to advance the state of the art.

The NAFTA appears to be the first multi-national free trade treaty to incorporate a separate chapter granting investor protection through a mechanism by which private investors from one state party to the treaty (a "Party") is entitled to pursue claims directly against a host government of another Party on the grounds of breaches of the treaty. The mechanism, which clearly owes its origins to the rapidly developing area of Bilateral Investment Treaties ("BITS"), involves international arbitration under the ICSID or UNCITRAL Rules (at the option of the investor) and provides for the resolution of disputes by independent and impartial arbitral tribunals applying (a) the provisions of the NAFTA itself, and (b) international law.

The remedies available to an investor under the NAFTA are, however, broader in scope than the traditional approach in investment treaties, which involve little more than protection against expropriation. In the NAFTA, the range of obligations accepted by the Parties also includes express provisions relating to national treatment; minimum standards of treatment in accordance with international law; prohibition of performance requirements and limitations on the nationality of directors.

The significance of Chapter 11 can therefore hardly be overstated. It constitutes a unique, far-reaching and comprehensive regime designed to promote and protect the free movement of investment capital within the

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territories covered by the treaty. The *quid pro quo* is that the right of host governments to create regulations in relation to matters such as environmental concerns is spelt out expressly as an exception.

The balance between protection of investment, on the one hand, and the right of governments to impose regulations designed to protect the health of their citizens on the other, is a delicate matter. It is surely destined to be the subject of close scrutiny by Chapter 11 arbitral tribunals over a considerable period of time before the jurisprudence settles down into a readily identifiable pattern. A good deal has already been written about the countervailing pressures that concern the balance between the competing interests in this context. However, at the time of writing this commentary, the total number of fully completed Chapter 11 arbitrations remained in single figures. Accordingly, the remarks that follow are not intended to present a further perspective on the substantive aspects of the debate, but rather a commentary on one particular *procedural* aspect – namely the right of “non-disputing” Parties to intervene in Chapter 11 arbitrations.

This right is created by Article 1128 of the NAFTA, which provides as follows:

On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this agreement.

Coupled with the absence of any other provisions in the treaty giving guidance, the brevity of this provision leaves the Parties, the disputing parties and Chapter 11 arbitral tribunals with an almost blank sheet of paper on many important procedural aspects of non-disputing Party intervention.

It is easy to understand the logic in permitting the non-disputing Parties to intervene on matters of interpretation, because all three States may well have a significant interest in the awards of arbitral tribunals in arbitrations to which they are not disputing parties. However, the drafters may well not have contemplated that interventions pursuant to Article 1128 would become the norm rather than the exception.

The NAFTA Parties are able to monitor the progress of Chapter 11 arbitrations through their right to be provided with the pleadings in each case whether or not they are disputing parties. Furthermore, Article 1129 provides that much of the pre-hearing material submitted to Chapter 11 arbitral tribunals is also made available to the non-disputing Parties:

Documents

3. A Party shall be entitled to receive from the disputing Party, at the cost of the requesting Party, a copy of:

(c) the evidence that has been tendered to the Tribunal; and

(d) the written argument of the disputing parties.

4. A Party receiving information pursuant to paragraph 1 shall treat the information as if it were a disputing Party.

Sub-paragraph 3(b) is noteworthy in that it does not include the *oral* argument (of course, there can only be a "copy" of this if there is a transcript or an electronic recording). This was presumably no accident. Accordingly, there is at least a respectable argument to the effect that sub-paragraph 3(a) was intended to encompass only the documentary evidence and *written* testimony of witnesses. It is thus far from clear whether, technically, oral testimony and argument that has been converted to written form by means of a verbatim transcript that falls within the scope of Article 1129. It may not matter very much in practice, as in modern international arbitration procedures each party is generally required to present all of its direct witness testimony in written form as exhibits to memorials or full pre-hearing briefs. These briefs will in turn contain the parties' submissions on fact and law.

Nevertheless, the silence of Article 1129 on the question of whether or not non-disputing Parties are entitled to participate at hearings appears to have given rise to a divergence of practice between different Chapter 11 arbitral tribunals, as is discussed below. One element of this divergence of practice is different from procedure in the context may have arisen due to the fact that some of the Chapter 11 arbitrations have been held (at the election of the Claimant) under the UNCITRAL Arbitration Rules, which expressly provide that hearings shall take place *in camera*.

PROBLEMS IN PRACTICE

THE INTERVENTION OF THIRD PARTIES in arbitration proceedings inevitably gives rise to potential procedural problems.¹ For example, when certain non-governmental organizations ("NGOs") attempted to join into the *United Parcel Service v. Canada* arbitration, either as additional parties or as *amici curiae*, Mexico's Agent, Hugo Perezcano Diaz, pointed out that:

¹ By no means all of the half-dozen or so NAFTA arbitrations that have gone as far as awards on the merits have suffered from procedural problems due to Article 1128 interventions. For example, in the first "active" Chapter 11 arbitration, *Metalclad*, it appears that the arbitral tribunal expressly welcomed full participation by non-disputing Parties, including their participation at the hearings and delivery of post-hearing briefs, and that the procedural structure established by the arbitral tribunal was not seriously disturbed.

The acceptance of amicus briefs under Article 15 (1) of the UNCITRAL Arbitration Rules is beyond the jurisdiction of the Tribunal because it could obligate the disputing parties to respond to such arguments. Thus, the grant of an apparent minor procedural right could create a substantive issue in dispute.²

In this arbitration, the United States and Mexico each made three submissions, to which the disputing parties replied.³ This undoubtedly prolonged the arbitration and involved the disputing parties in incurring additional costs. The investor complained:

Some comment must ... be made about the attempt by both the United States and Mexico to now place before the Tribunal lengthy but selectively chosen submissions made by them in other cases. The Investor submits that the Tribunal should have no regard for those submissions, arising as they do in other proceedings between other parties, and without the full record of those proceedings being before this Tribunal. It is procedurally unfair to attempt to force the Investor to respond to submissions provided out of the context in which they were raised. Moreover, if either the United States or Mexico wanted to rely upon such submissions, there is no reason why they are being provided at this late date. It is not in respect of new matters arising for the first time at the oral hearing, particularly since all but one of those additional submissions predate it. Fairness and an orderly procedure require that the non-disputing NAFTA Parties comply with the directions of the Tribunal if they wish their submissions to be considered. Accordingly, unless the Tribunal otherwise requires, the Investor does not propose to provide any further response to these additional documents, but requires that, if the Tribunal is to consider them, the Investor be provided with a proper opportunity to respond.⁴

² Letter to the arbitral tribunal in *United Parcel Service of America, Inc. -v- Canada* June 11, 2001 (para. 16).

³ In *Pope & Talbot, Inc. v. Canada*, the United States delivered no less than eight Article 1128 submissions.

⁴ *Investor's Reply to the 1128 Submissions of the U.S. and Mexico* (para. 3).

A further problem may arise where non-disputing Parties wish to deliver written submissions *after* the “record” of the proceedings as between the disputing parties has been closed. Clearly the inherent (and, in UNCITRAL arbitrations, express) right to due process requires that the disputing parties must be given the opportunity to reply to any oral or written submissions entered into the record by non-disputing Parties if the arbitral tribunal is to be expected to take this new material into consideration. This may result in the re-opening of the substantive hearing, or at least the exchange of further written submissions between the disputing parties. If the exchanges of further written submissions are sequential, then the arbitral tribunal’s deliberations will inevitably suffer considerable disruption and delay.

For example, significant procedural complications apparently arose when Mexico intervened with written submission at a late stage in *Ethyl*, after the hearings were closed, and the arbitral tribunal’s deliberations were in progress. The arbitral tribunal had apparently intended to finalize its deliberations for the award on a jurisdiction issue by the middle of March 1998. Mexico delivered its submission without invitation on 11 March. The Tribunal was obliged to change its procedural schedule and give the disputing parties the opportunity to submit further written comments by April 1, 1998. Fortunately, from a procedural viewpoint at least, the case was settled before the arbitral tribunal needed to resolve any subsequent complications.

Late submissions that provoke the reopening of substantive hearings are frustrating for the disputing parties as well as for arbitral tribunals. It is natural for arbitral tribunals to try to eliminate, or at least reduce, the prospect of hearings being reconvened or having additional written briefs submitted. This is partly for reasons of expense for the disputing parties, and partly because the arbitral tribunal will not wish its award to be delayed. The *Pope & Talbot, Inc. -v- Canada* case provides a vivid example. After the Tribunal had delivered its partial award on liability, the Free Trade Commission of the three Parties (“FTC”) issued its now famous “Interpretation” of Article 1105,⁵ which could be understood to contradict the arbitral tribunal’s position as expressed in its liability award. In its subsequent award on the damages phase of the arbitration, the arbitral tribunal headed off any question of reopening the liability hearing, stating *inter alia*:

⁵ Statement of the FTC on NAFTA Article 1105 and the Availability of Arbitration Documents, 31 July 2001. Online: <<http://www.dfait-maeci.gc.ca/tna-nac/documents/NAFTA-Interpr-e.asp>>.

50. The Investor argued in the first place that in international law there was a basic presumption against retroactivity. The Tribunal had already made a finding of fact in relation to breach of Article 1105, and it was fundamentally unfair to seek to revisit that. Further, under the language of Article 1131(2) "an interpretation shall be binding" only referred to the future and not to the past. The Tribunal had already ascertained a breach of Article 1105, and it would be against elementary rules of due process of justice to compel it to revisit its determination.⁶

51. The Tribunal has found this issue ... a difficult question. The position adopted by Canada was not wholly clear. Nevertheless the Tribunal has reached the view that the phrase "shall be binding" in Article 1131(2) is better regarded as mandatory than prospective. Viewed in that light, it is incumbent on the Tribunal to assess the impact of the Interpretation upon its prior findings with respect to Article 1105.

52. Viewing the Interpretation as binding on the Tribunal does not necessitate a finding that it overturns the Tribunal's previous Award under Article 1105. That Award could remain either because the Tribunal's interpretation of Article 1105 is compatible with the Commission's, or, if it is not, because the application of the Interpretation to the facts found by the Tribunal leads to the same conclusion that there was a breach by Canada of its obligations under Article 1105. If upon either basis the answer is in the affirmative, the Tribunal may proceed to award damages. If, however, the conclusion is that, upon those facts, the application of the Interpretation leads to a finding of no breach of Article 1105, the Tribunal may not proceed to award damages.

The FTC's "interpretation" was probably adopted primarily in order to dissuade future arbitral tribunals from attaching precedent value to the *Pope* tribunal's approach to the relationship between Articles 1102 and 1105. To the extent that it may have been aimed at persuading the *Pope* tribunal to change its previous award it was evidently unsuccessful.

In *Methanex*, Professor Sir Robert Jennings was forthright in his comments in a similar situation:

⁶ Award on Damages, May 31, 2002 (paragraph 50, *et seq*)

It would be wrong to discuss these three-Party 'interpretations' of what have become key words of this arbitration, without protesting the impropriety of the three governments making such an intervention well into the process of arbitration, not only after the benefit of seeing the written pleadings of the parties but also virtually prompted by them. In the present case, without even asking for leave, one of the actual Parties to the arbitration has quite evidently organized a démarche intended to apply pressure on the tribunal to find in a certain direction by amending the treaty to curtail investor protections. This is surely against the most elementary rules of the due process of justice. The phrase due process is itself of United States origin and has become international (see NAFTA Article 1110) because the United States has for so long been regarded as the guardian of due process. It is very sad to see this present betrayal of principles of which the United States has long been the revered author and practitioner.⁷

Jennings thus agreed with the position advanced by the investor in *Pope*. It is not difficult to imagine that future Chapter 11 tribunals may adopt a similar approach with regard to Article 1128 submissions, in order to minimize their disruptive effects.

It is not a unique feature of NAFTA Chapter 11 arbitrations that "losing" state parties resort to their sovereign powers in order to provide *ex post facto* "interpretations" of applicable legal provisions in their favour. For example, in *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*,⁸ the tribunal made a partial award in which the respondent was found liable to the claimant in respect of several breaches of a BIT between the Netherlands and the Czech Republic. After the partial award was issued, the Czech Republic initiated consultations with the Netherlands concerning the interpretation of that BIT. They adopted a common position on the interpretation of the treaty, which the Czech Republic subsequently prayed in aid in an attempt to persuade the Tribunal to amend the decision in its partial award when it came to make the Final Award.⁹ The Tribunal agreed that "the common positions, representing the interpretations and application of the Treaty agreed between the contracting parties, are conclusive and binding on the Tribunal".¹⁰

⁷ Part II of the Second Opinion of Professor Sir Robert Jennings, Q.C. in *Methanex*

⁸ Final Award is available online at <<http://www.cetv-net.com>>.

⁹ See: para. 87-93 of the Final Award.

¹⁰ See: para. 217 of the Final Award.

Arbitral tribunals are reluctant to change decisions made pursuant to considerable effort, money and time, and it comes as no surprise that the CME Tribunal showed no enthusiasm for changing its previous findings and interpreted the common positions of the Netherlands and the Czech Republic as supporting its initial approach.¹¹ Because the Tribunal took the view that the interpretation did not affect the substance of its earlier decision, the Tribunal did not have to consider the question of whether or not such an interpretation would have retroactive effect.

There is no express provision in the NAFTA to the effect that FTC interpretations are binding, but this does not mean that they may safely be disregarded. Mexico made the following general comment on the effect of Article 1128 submissions in its letter to the Tribunal in *Methanex*:

1. Mexico agrees with the United States that where there is agreement on a matter of treaty interpretation between the disputing NAFTA Party and the non-disputing NAFTA Parties through their Article 1128 submissions, this “constitutes a practice ... establish[ing] the agreement of the parties regarding [the NAFTA’s] interpretation within the meaning of Article 31(3)(b) of the Vienna Convention,” and that such agreement is “authoritative”. The Treaty has been negotiated and administered by the NAFTA Parties and their shared views, as all of the sovereign States party to the Agreement, should be considered authoritative on a point of interpretation.
2. The International Court of Justice has commented in this regard that: “Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument”.
3. NAFTA Chapter Eleven Tribunals should be loath to diverge from such shared interpretations. As the drafters and signatories to the NAFTA, the Parties stand in a position to both articulate their intent, and to convey policy-based positions that will ensure its proper application, bearing in mind their shared interests in its long-term success and acceptance by the citizens of their respective nations.
4. Each Party seeks to ensure that its investors receive the appropriate level of protection in each of the other Parties as

¹¹ See: para. 218-226, 396-400 of the Final Award.

intended by Chapter Eleven. Each necessarily balances its interests (the protection of its investors vs. the level of its exposure to claims) when formulating its position on interpretative issues. For these reasons, where all three Parties clearly agree on a particular point, their views should be considered highly authoritative by Chapter Eleven Tribunals.

In the same letter, Mexico also stated that:

22. In support of certain of its contentions, the Claimant has cited *S.D. Myers, Inc. v. Canada*, *Metalclad Corporation v. United Mexican States*, *Pope & Talbot v. Canada* and *Ethyl Corp. v. Canada*. Mexico submits that these decisions are of no or little assistance for a number of reasons.

23. As to *Metalclad*, as was noted above, that Award has not only been partially set aside, but has had the vast majority of its reasoning eviscerated as a result of that Tribunal's approach to interpretation which caused it to lose jurisdiction. What remains of the Award are three paragraphs as to the effect of a particular Decree at issue which was found to have been an expropriation. Beyond that limited finding in that limited context (which was not accompanied by any serious analysis of expropriation or any other provisions of Section A of Chapter Eleven), the Award has been set aside.

24. As to *S.D. Myers*, Canada has applied to set it aside in Federal Court in Canada. Moreover, each of the NAFTA Parties has taken issue with certain aspects of its rulings in various proceedings.

25. Likewise, Mexico agrees with the Respondent that the most recent Award in *Pope & Talbot* is unconvincing and based on erroneous statements of fact. In particular, the Tribunal studiously ignored the shared views of the Parties as to the scope and meaning of Article 1105. Moreover, the Tribunal itself acknowledged that it was going beyond (and contrary to) the plain language of the treaty in concluding that the notion of fairness in Article 1105 was "additive"...

26. Having explicitly failed to give effect to the plain language of the treaty, the Award (at least in relation to Article 1105) can be of no assistance to subsequent tribunals. In addition, the *Pope & Talbot* Award misstated Mexico's position in relation to its concurrence with statements made by the United

States and Canada in respect of Article 1105, and, as a result, Mexico requested the Tribunal to issue a corrigendum.

27. As has already been noted, the court reviewing the Metalclad Award unhesitatingly rejected the Pope & Talbot Award as having any persuasive effect in respect of its treatment of Article 1105.

28. As to Ethyl (which is asserted by Methanex as "involv[ing] facts very similar to those here...."), it must be remembered there was no Award on the merits of the claim, and it is of no guidance in this proceeding on non-procedural matters. In the absence of any factual and legal findings, let alone a Final Award, any speculation as to the reasons behind Canada's settlement of the claim does not assist this Tribunal.

The position adopted by Mexico in *Methanex* is by no means the only statement of its kind. It demonstrates not only the Mexican point of view, but also a general tension between the aim of the NAFTA Parties to develop a uniform interpretation of the NAFTA as well as the apparent desire of arbitral tribunals to ensure that disputing parties will receive due process and a just result based on a logical approach to the interpretation of Chapter 11.

In *S. D. Myers v Canada*, the arbitral tribunal envisaged in one of its early procedural orders that:

By consent, the Tribunal will write to the appropriate officials of MEXICO and the UNITED STATES in connection with any possible interventions in this arbitration under NAFTA Article 1128.¹²

The arbitral tribunal attached to the procedural order a draft "letter to governments", to which the disputing parties agreed. In this letter, the arbitral tribunal explained:

My purpose in writing is to enquire whether your Government wishes to make any submissions to the Tribunal in this arbitration; and, if so, to establish an appropriate procedure that will ensure the orderly and expeditious future conduct of the proceedings.¹³

¹² Procedural Order No. 6, dated 4 September 1999 (para. 10).

¹³ *Ibid.*

Shortly before the last procedural meeting (described by the arbitral tribunal as “case management meetings”) and some four months before the substantive hearing in the first (liability) phase, the arbitral tribunal invited Mexico and the United States to participate in both the last case management meeting and the first phase substantive hearing. The invitation was subject to the proviso that submissions (which could be in writing and/or oral) would be taken into consideration by the Tribunal only if they were made within the overall framework of the arbitration previously established in this case by the arbitral tribunal in its Procedural Order No. 1.

Mexico and the United States both sent observers to the last of the first phase case management meetings and the first phase substantive hearing. Mexico delivered a written submission in good time for the disputing parties to reply to it in their pre-hearing opening statements, and also made an oral closing submission after the conclusion of the witness testimony and before the closing statements of the disputing parties.

Before the substantive hearing in the second phase (quantum) hearing, the arbitral tribunal again invited Mexico and the United States to participate, and notified them of the procedural framework that had been established for the second phase of the proceedings. Later, the United States asked the arbitral tribunal to extend the deadline for making submissions in phase two. An extension of nearly one month was granted to each of the non-disputing Parties; but, in the event, although Mexico delivered its submission by the extended deadline, the United States did not deliver its memorandum until three days before the second stage hearing and did not send a representative to that hearing. There was an understandable reason for this delay, and neither the disputing parties nor the arbitral tribunal made any complaint.¹⁴

The disputing parties in *Myers* undoubtedly incurred some additional expense as a result of the Article 1128 interventions. However, with the co-operation of the non-disputing Parties and their respective counsel, the prospect of one or more rounds of additional post-hearing submissions or – even worse – the re-opening of substantive hearings seem to have been avoided in both the liability and quantum phases of the arbitration.

More or less simultaneously, the arbitral tribunal in *Pope & Talbot* was confronted by similar procedural challenges. In that case, unlike the

¹⁴ The second phase hearing started on schedule in Toronto only a few days after transatlantic flights were resumed following the aerial attacks on New York and Washington on September 11, 2001.

Metalclad and *Myers* tribunals, the *Pope* tribunal initially took a tough approach by interpreting Articles 1127, 1128 and 1129 conjunctively. This, in a sense, limited the interventions of the non-disputing Parties to the delivery of written submissions based on the material that they received from the disputing parties pursuant to their rights under Articles 1127 and 1129.

Although the *Pope* tribunal declined to allow the participation of the non-disputing Parties in the hearings, this approach did not prevent a veritable “flood” of Article 1128 submissions. The United States delivered no less than *eight* written submissions in this case.

In summary, it emerges, first, that the right accorded to the non-disputing Parties under the treaty to intervene in Chapter 11 arbitrations can, and sometimes does, give rise to serious procedural difficulties that may, at the very least, cause additional delay and expense to the disputing parties. Secondly, the first group of Chapter 11 tribunals has handled these procedural difficulties in different ways. It is not possible to discern, at this early stage in the history of Chapter 11 disputes, which method is likely to be most effective in the medium or long term.

The robust approach adopted by the *Pope* tribunal has attractions in its potential for minimizing disruption of the proceedings, although it appears that the arbitral tribunal’s refusal to allow the non-disputing Parties to participate at the hearings may have been a factor that led to the “flood” of written submissions. The *Metalclad* tribunal’s “welcome everything” approach seems to have worked without too much difficulty, although the procedural history in that arbitration has not been well-publicized as in the other cases discussed. The approach of the *Myers* tribunal, on the other hand, can be discerned relatively easily by studying the procedural orders that have been posted on a number of different websites.¹⁵ It is possible to view this as a middle-of-the-road approach – namely, to allow the non-disputing Parties a very extensive opportunity to participate, both at hearings and during the written stages, *provided that* they do not disrupt the schedule designed by the arbitral tribunal to govern the overall procedural framework for the arbitration.

Having discussed the actual and potential procedural problems that Article 1128 of the NAFTA presents for the disputing parties and Chapter 11 tribunals, this paper provides a review of some possible solutions.

¹⁵ Amongst others, <<http://www.naftalaw.org>>, <<http://www.appletonlaw.com>>, <<http://www.dfait-maeci.gc.ca/tna-nac/nafta-en.asp>>.

POSSIBLE SOLUTIONS

Disciplined approach to the organization of the proceedings

Articles 1127 and 1129 create a regime under which the notice of claim and other documents relating to the arbitration are communicated directly to non-disputing Parties by the disputing Party, rather than by the arbitral tribunal or anyone else. These provisions also convey the feeling that they were designed to make the participation of non-disputing NAFTA Parties in Chapter 11 arbitrations inter-governmental business.¹⁶

Nevertheless, some Chapter 11 tribunals appear to have seized the initiative from governments in the organization and control of communications under Articles 1127 and 1129. Moreover, they retained this initiative with regard to Article 1128 submissions. It seems that those arbitral tribunals considered that the most practical method of avoiding the potential procedural problems is to eradicate their causes, or at least to minimize their negative consequences as early as possible. Arbitrations are successful in procedural terms only if the arbitral tribunal remains in control and follows a clear procedural strategy. Otherwise, the proceedings may become an endless and expensive "soap opera" of exchanges between the disputing and non-disputing Parties and other intervenors.

The role of an arbitral tribunal in organizing and conducting proceedings, including the intervention of third parties, is thus a normal process and a *conditio sine qua non* of a successful arbitration. This classical approach is adopted in many types of judicial or quasi-judicial disputes between individuals and state parties. For example, Article 21 of the Protocol on the Statute of the Court of Justice of the European Economic Community states:

The Court may require the Parties to produce all documents and to supply all information which the Court considers desirable. Formal note shall be taken of any refusal.

The Court may also require the Member States and institutions not being parties to the case to supply all information which the Court considers necessary for the proceedings.

¹⁶ It might follow logically that the NAFTA Parties should themselves bear the additional costs reasonably incurred by investors as a direct result of Article 1128 interventions by non-disputing Parties? But there appears to be no basis for an arbitral tribunal to assert jurisdiction to make an award of costs against an intervening non-disputing Party.

Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery that was originally established, amended Article 36 of the Convention as follows:

In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

However, the most important element of a disciplined approach is for the arbitral tribunal to establish an overall procedural framework at an early stage of the process. In this context, the key words are *Flexibility*, *Predictability* and *Equality*. *Flexibility* is needed to ensure that the procedure will be designed to deal efficiently and appropriately with the particular issues in dispute (for example, there is no need to have detailed memorials, briefs and witness testimony in the "look-sniff" type of arbitrations, where the issue may be whether or not a cargo of coffee beans in the hold of a ship is in accordance with the contractual specification). *Predictability* is an important aspect of due process; the parties and their counsel must be on the same "wavelength" as the arbitral tribunal in their expectations of what is going to happen, and have at least a broad understanding of the timetable (how and when will the evidence be tested? Will there be cross-examination, and so forth?). *Equality* of treatment is the most fundamental of all the requirements of due process. An arbitral tribunal must not communicate with one of the parties unilaterally; nor must it hear one party's evidence or argument in the absence of the other, and it must give each of the disputing parties a fair opportunity to present their case.¹⁷

If such discipline can be encouraged, or imposed if necessary, and if the non-disputing Parties can be persuaded to accept that it would be grossly unfair to the disputing parties to disrupt Chapter 11 arbitrations, then much of the potential for mischief inherent in the practical application of Article 1128 can be eliminated. One method which arbitral tri-

¹⁷ Note that this does not always mean that *equal time* must be allocated to each party; the relative burdens of proof on each party must be taken into account.

bunals might engage could be to indicate that submissions and other material submitted outside the limits of the procedural schedule, as established by the tribunal, will be neither admitted into the record of the proceedings nor read by the members of the Tribunal. Article 1128 may create an “absolute right” for the non-disputing Parties to deliver written submissions concerning the interpretation of the treaty; but it does not create any obligation on the part of the arbitral tribunal to read them. Nevertheless, a carefully thought out case management should enable an arbitral tribunal to steer its way through the procedural minefield of non-disputing Party interventions.

Limiting the scope of non-disputing Parties’ under Article 1128 submissions

Another technique that might be employed by arbitral tribunals to minimize disruption caused by non-disputing Parties is to limit the scope of the issues on which interventions should be made in individual cases. This concept may be approached in two ways. First, it would ensure that non-disputing Parties will stay within their mandate to intervene; and secondly, to ensure that interventions do not spend many pages covering ground that has been adequately covered in earlier cases and to ensure that non-disputing Parties do not present long arguments on points that have become common ground in the law and folklore of Chapter 11 jurisprudence.

Matters of interpretation

Dealing first with the mandate of the non-disputing Parties, Article 1128 entitles them to “make submissions to a Tribunal on a question of interpretation of this Agreement”. It was clearly not intended that the non-disputing Parties would have a general right to deliver submissions on facts or law relating to the particular issues in individual cases. Nevertheless, it appears to have become the norm for non-disputing Parties not only to deliver submissions on questions of interpretation of the NAFTA, but also to question the facts and legal arguments in specific cases.

On several occasions intervening non-disputing Parties appear to have forgotten that they were indeed *non*-disputing Parties. The following may be considered as prime examples:

...Mexico wishes to caution the Tribunal against reliance on the recent Award in Relation to Damages in *Pope & Talbot v.*

Canada (the “Pope Damages Award”) which the Claimant has tendered as authority on various points.¹⁸

and

...The Claimant’s contention that Canada’s failure to produce the negotiating history “... when the interpretation of those provisions is squarely in issue gives rise to the inference that those documents don’t support Canada’s interpretation,” and its demand that negotiating history be produced in the apparent hope that “additional arguments may be made”, have no proper basis. In effect, the Claimant is demanding production of negotiating history of an agreement to which it is not a party in hope of establishing rights that do not appear on face of the agreement and that the parties to the agreement have confirmed were not intended. (footnotes omitted)¹⁹

and

...Mexico will address the Claimant’s comments that the “Pope Tribunal was not overwhelmed by assistance from representatives of the NAFTA Parties”. As shall be seen, the NAFTA Parties in fact gave the Pope & Talbot Tribunal considerable assistance in Phase 2 of the proceeding. (footnote omitted)²⁰

and

... Mr. Aguilar Álvarez’s statement proffered by the Claimant is based solely on his personal recollection of events that transpired approximately ten years ago, and, therefore, does not meet the generally accepted criteria for travaux préparatoires. It does not even reach the status of an unagreed

¹⁸ *Third Article 1128 Submission of the United Mexican States in United Parcel Service of America, Inc. v. Canada* (August 23, 2002), 4, online: <<http://www.dfait-maeci.gc.ca/tna-nac/documents/Mexico1128SubmissionAug232002>>.

¹⁹ *Ibid.*, 6

²⁰ *Second Article 1128 Submission of the United Mexican States in ADF Group Inc. v. USA* (22 July 2002), 1, online: <<http://www.state.gov/documents/organization/12504.pdf>>.

record produced by a participating state because Mexico does not agree with Mr. Aguilar Álvarez's statement or the conclusions that he sets out.²¹

and

...The Aguilar Declaration is not preparatory work as described in Article 32 of the Vienna Convention. It is neither credible nor relevant. It is an *ex post facto* declaration outlining the recollection of one negotiator and falls far short of careful recordings of conference proceedings which may be considered, if indeed supplementary materials were necessary.²²

and

...In this respect, the Investor's statements - that «if the FTC's 'interpretation' is understood as an attempt to change the scope of Article 1105 retroactively, serious questions would arise as to whether the NAFTA Parties have interpreted Article 1105 'in good faith' by changing its meaning in the midst of litigation» (emphasis in text); that «[i]t would be wrong to discuss these three-Party 'interpretations' of what have become key words of this arbitration, without protesting the impropriety of the three governments making such an intervention well into the process of arbitration» (quoting Sir Robert Jennings); and that «private parties not represented in the discussions of the three executives [...] [were] unable to exercise democratic input [...]» - demonstrate a misunderstanding of the nature of the NAFTA as a treaty, of its provisions and of the Commission's structure and functions.²³

and

...In their post-hearing submissions, all three NAFTA Parties challenged holdings of the Tribunal in *Pope & Talbot* which

²¹ *Article 1128 Submission of Mexico re: FTC Statement on Article 1105 in Methanex, Corp. v. USA* (11 February 2002), 4, online: <<http://www.state.gov/documents/organization/8070.pdf>>.

²² *Third Article 1128 Submission of Canada pursuant to Article 1128 in Methanex, Corp. v. USA* (8 February 2002), 6. Online: <<http://www.state.gov/documents/organization/8060.pdf>>.

²³ *Article 1128 Submission Canada in R. Loewen and Loewen Corp. v. USA* (19 November 2001), 5. Online: <<http://www.state.gov/documents/organization/6327.doc>>.

find that the content of contemporary international law reflects the concordant provisions of many hundreds of bilateral investment treaties. In particular, attention was drawn to what those three States saw as a failure of the Pope & Talbot Tribunal to consider a necessary element of the establishment of a rule of customary international law, namely *opinio juris*.²⁴

It is thus not difficult to conclude that the work of Chapter 11 tribunals would be far more efficiently conducted with a greater degree of procedural discipline on the part of the non-disputing Parties. Professor Todd Weiler aptly observes that:

This provision [Article 1128] significantly modifies the *lis inter partes* that normally exists in an international arbitration, by providing other NAFTA parties with a limited right to make "submissions" to a tribunal "on a question of interpretation" of the NAFTA... What remains to be seen, however, is how strictly future tribunals will require Article 1128 submissions to remain focused on "interpretation" of the NAFTA, rather than being used as a tool for providing third-party support for either of the disputing parties, as appears to have happened in the Ethyl arbitration. In its submissions, Mexico made several fact-specific observations in support of Canada's position that obviously went beyond mere interpretation of the applicable terms of NAFTA. It is submitted that when tribunals are confronted with such excesses in the future, they would be perfectly entitled to ignore such submissions, to the extent that they fail to conform to the standard set under Article 1128. Doing so would preserve the integrity of arbitrations by ensuring that the parties to them remain the primary actors, rather than other NAFTA parties who may have their own trade and investment policy agendas.²⁵

In summary, the medium to long term credibility of the Chapter 11 dispute resolution process may depend on a combination of the willing-

²⁴ *Final Award in Mondev International Limited v. USA* (11 October 2002), 38. Online: <<http://www.state.gov/documents/organization/14442.pdf>>.

²⁵ T. Weiler, "The Ethyl Arbitration: First of Its Kind and a Harbinger of Things to Come," 11 *American Journal of International Arbitration* (2001), 201.

ness of the disputing and non-disputing Parties to adopt a responsible and disciplined approach to their Article 1128 right to intervene on matters of interpretation of the NAFTA treaty. In addition, the will of arbitral tribunals to enforce the undoubted right of the disputing parties to due process must be constant in order to uphold the Parties right to have a proceeding that is not subject to unnecessary disruption and delay.

Repetition and Prolivity

Turning to the second aspect of limiting the scope of Article 1128 submissions, the written submissions of non-disputing Parties have often been quite repetitive and long - sometimes amounting to more than 20 pages. Repetition of arguments drawn from Article 1128 submissions delivered in other cases may be useful where those submissions were not in the public domain at the relevant time. However, this practice is neither necessary nor desirable where the arguments are familiar to members of the NAFTA legal community. It is particularly unacceptable when it occurs in relation to the FTC's interpretations that are in the public domain, and well known to all the participants in any particular Chapter 11 arbitration, including the members of the arbitral tribunal. Both the disputing and non-disputing Parties have stated at some length in their Article 1128 submissions that the FTC's interpretation of Article 1105 is correct, and that the *Pope* tribunal's reasoning was wrong.

So far as oral submissions at substantive hearings are concerned, it should be possible for arbitral tribunals to establish a realistic timetable that will balance the need to give a non-disputing Party sufficient opportunity to present its arguments but discourage repetition. Somewhere between half-an-hour and a full hour should usually be ample. A non-disputing Party will rarely, if ever, expect to present live witness testimony. So far as written submissions are concerned, there is no good reason why a Chapter 11 tribunal should not suggest a "target" page limit (of, say, five to ten pages), but at the same time state that this limit may be exceeded by permission of the arbitral tribunal pursuant to a reasoned application by the non-disputing Party concerned.

Reducing the number of disputed issues

In modern litigation, the objective of *winning* has tended to create a "scorched earth" scenario in which no stone is left unturned, no concessions are made and no issue is left unargued however peripheral and/or manifestly lacking in merit it may be. This tendency often generates huge

expense for the litigants.²⁶ Not long ago one of the authors saw a final quantification of a Claimant's claim at the equivalent of about US\$4 million, followed a few pages later by a claim for costs of over US\$5 million. Moreover, absolute victories are rare, usually expensive and, most importantly, they are not always necessary. In general, litigation attorneys are trained to focus on the facts and on legal rights. They tend to be reluctant to confine the battle to the crucial issues. This is readily understandable in Chapter 11 cases, where it is not easy to predict which of the four – to some extent overlapping – causes of action is most likely to find favour with an arbitral tribunal on a particular set of facts.

The interest of investors who initiate arbitrations under Chapter 11 is obtaining monetary compensation for losses suffered as a result of government intervention in their business affairs. The longer the proceedings last, the more difficult it is for investors to back out when large sums have been spent on the proceedings and when reputations are at stake. Also, it is important to consider that even if the investor wins at the arbitration stage, he or she may still face difficulties in relation to recognition and enforcement of favourable awards at the level of the relevant national courts. In addition, attorneys may unnecessarily prolong the process as they have a forensic interest in establishing points of law for use in future cases, and in ensuring that they do not miss tricks that might win their clients' cases; but not many businessmen really care about fine points of interpretation of the NAFTA. They are looking for prompt and adequate compensation for the losses they believe they have suffered at the hands of a host government, and they have no interest in the cases that may follow.

Furthermore, challenges to arbitral awards in national courts are more likely to occur when such awards impinge not only on the issues of fact or quantification of compensation in particular cases, but also involve public policy matters that are significant for the government concerned. As Professor Benvenisti has written:

An analysis of the jurisprudence of national courts in international matters reveals, however, that there exist other factors, besides the shared legal language and formal independence of the courts, factors that prevent the promise from being fulfilled... [T]he jurisprudence of the national courts is consistent in protecting short-term governmental interests. Judges firmly refuse to live up to the vision of

²⁶ The published claims in respect of costs in Chapter 11 cases demonstrate this proposition clearly.

international lawyers. They are careful not to impinge with their decisions on their governments' international policies and interest....

Note that by refusing to review their Government's conduct in international affairs, the courts deprive the Government of the aura of legitimacy it enjoys in the internal sphere. The lack of review prevents the courts from the opportunity to uphold the legality of the Government's conduct abroad. But neither the Government nor the public at large seem to be troubled by this outcome. Democratic societies which ardently protect the rule of law within their communities seem ready and even willing to grant their executive *carte blanche* to mould their country's external relations unfettered by international law.²⁷

One particular problem is that investors (encouraged by their attorneys) sometimes indulge themselves by trying to establish highly erudite rights under the treaty that none of the three NAFTA governments are ready to acknowledge. In many cases, it is not necessary for an investor to do battle with a host government on a large range of matters of interpretation of the NAFTA. A number of the published cases appear to have been largely fact-driven and, favourable monetary awards could have been secured without taking on the host governments concerned on all of the rights potentially available under the treaty.

Where a claim is likely to succeed under one of the four possible grounds for redress set out in Chapter 11, there seems little to be gained by pursuing claims based on the other three simultaneously. Although the standard for measuring the compensation to be awarded may not be identical under each head, it is not likely to be so disproportionate as to justify the additional expense and time that will be needed to fight the case on all four fronts.

When sensitive areas of potential liability are put into play by an investor, the prospect of a settlement fade and a long and arduous battle looms large. Equally, the prospect of serious interventions by non-disputing Parties under Article 1128 becomes more likely.

An enormous amount of time, energy and money could be saved, including the costs connected with the procedural problems arising from

²⁷ E. Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts" 4 *European Journal of International Law* 161 (1993); J. Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis" 86 *American Journal of International Law* 337-40 (1992).

Article 1128 submissions, if investors and their attorneys would routinely undertake a realistic analysis of the issues of fact and law on which they *really need to win* in order to obtain the monetary compensation claimed.

Some Additional Considerations

Non-disputing Party Interventions are Effectively “For Free”

Article 1128 submissions have become numerous, lengthy and repetitive because there is no real incentive on the non-disputing Parties to make them more relevant and concise. There is nothing in the NAFTA that requires non-disputing Parties to bear the costs disputing parties incur as a result and consequence of their interventions.

For example, the *International Institute for Sustainable Development*, *Communities for a Better Environment*, the *Bluewater Network of Earth Island Institute* and the *Center for International Environmental Law* all applied to intervene in *Methanex Corporation v. USA*. The *Canadian Union of Postal Workers* and the *Council of Canadians* filed **amicus** briefs in *UPS v. Canada*. The *Council of Canadians* also sought to obtain the status of a party to the proceedings; disclosure of the documents submitted by the disputing parties to the arbitral tribunal, and even the right to make submissions concerning the place of arbitration and the jurisdiction of the arbitral tribunal. The *Council of Canadians*, the *Sierra Club of Canada*, and *Greenpeace* endeavoured to join in Canada's challenge to the *Myers Award* in the Canadian Federal Courts.

In *Methanex*, the United States suggested that the arbitral tribunal had the power to accept *amicus* briefs if they could be shown to be relevant and helpful. Mexico opposed the presentation of *amicus* briefs, arguing that they would be subject to more favorable limits than submissions by NAFTA parties under Article 1128. They argued that this act would disturb the balance between civil law and common law institutes in the NAFTA's dispute resolution mechanisms because *amicus* briefs are unknown in the Mexican legal system. Canada suggested that *amicus* briefs should be accepted in order to make Chapter 11 proceedings more transparent.

In the event, the *Methanex* tribunal decided that it had discretion to accept third party submissions.

In *UPS*, Canada and the investor adopted similar position to that of *Methanex*—namely, that the arbitral tribunal had no jurisdiction to allow the NGOs to be joined as parties. However, the arbitral tribunal held that it had discretion to receive written *amicus* briefs if the petitioners had suf-

ficient interest in the proceedings and could assist the arbitration without causing prejudice to the disputing parties.

According to Canada, issues of jurisdiction, place of arbitration and procedural questions may not be disputed by persons or entities that are not parties to the proceedings. The United States joined Canada in submitting that the arbitral tribunal is not authorized to grant petitioners the status of the parties. The United States submitted, as it had done earlier, that under the UNCITRAL Arbitration Rules, arbitral tribunals may accept written submissions of third parties. However, Mexico contended that the arbitral tribunal had no power to accept *amicus* briefs. The UPS tribunal decided that it had power to accept *amicus* briefs from the petitioners, provided that the circumstances and the procedure for making such submissions would be subject to consultations with the disputing parties. The Federal Court of Canada, in dismissing the petition of the NGOs to intervene in *Attorney General of Canada v. Myers, Inc.*, expressed the following reasons:

[18] A party seeking intervenor status must establish three things: it has an interest, that is a direct legal interest, in the outcome of the litigation; its rights will be seriously affected by the litigation; and will bring to the Court a point of view different from those of the parties. Its intervention must constitute an enhancement to the proceedings, not a distraction, and it is not permitted to redefine or expand upon the issues which have been legitimately brought before the Court by the parties to the action. In *Canadian Council of Professional Engineers v. Memorial University of Newfoundland* (1997), 75 C.P.R. (3d) 291 at 294, Rothstein, J. considered these criteria and concluded as follows:

The Court must be concerned with the expeditious and efficient progress of litigation, always having regard to fairness considerations to the parties and indeed to the proposed intervenors. Expeditiousness and fairness considerations, I think, are at the root of the conditions that must be met by proposed intervenors. Where the rights of intervenors are not affected by the litigation and the intervenors are not shown to add anything new to the issues, the Court cannot allow itself to become bogged down with an expansion of participants in the litigation. While some authorities suggest that the rules of court may be

used to avoid or reduce delay or expense, from a practical perspective, the addition of participants will almost inevitably complicate the proceedings and result in some additional time and expense.

[20] I am not satisfied that the moving parties can bring to the Court a point of view with respect to these issues which will, in any material way, be different from that of the parties. The essence of the judicial review application is the correct interpretation of the NAFTA. The proposed intervenors do not have any particular or unique expertise in interpreting international treaty obligations that would assist the Court beyond that which is offered by counsel for Canada, the United States, Mexico, the respondent and the members of the Arbitral Tribunal itself. The social policy concerns of the moving parties, including Canada's trade policy, would not assist in the determination of the legal issues which arise under the Government's application for judicial review.²⁸

The judge dismissed the petition and made an award in respect of costs against the NGOs. He was later fully supported by the decision of the Federal Court of Appeal. This approach is clear and generally reflects the position of the majority of the NAFTA Parties. Although the views of the NAFTA states and their respective judiciaries are not absolutely identical, the common theme has been that third parties have no right to be joined as *parties*, and no absolute right to make *amicus* submissions in NAFTA arbitrations.

But the essential flaw in the system remains. The NAFTA non-disputing Parties have the right to make submissions concerning the interpretation of the treaty; there is no realistic control on how they should exercise that right; and Chapter 11 arbitral tribunals do not appear to have power to award costs against either non-disputing Parties or against other third party interveners.

²⁸ *Order of the Trial Division of the Federal Court of Canada Denying Motion to Intervene by the Council of Canadians, Greenpeace and the Sierra Legal Defence Fund in Attorney General of Canada v. S.D. Myers, Inc.*, 11 April 2001. Online: <http://www.dfait-maeci.gc.ca/tna-nac/documents/myers_reasonorder-e.pdf>.

LESSONS FROM THE EUROPEAN COURT OF JUSTICE?

ALTHOUGH THE SYSTEM OF PROVIDING uniform interpretation of the NAFTA through the FTC is different from the system of preliminary rulings of the European Court of Justice, it may be useful to consider some of the parallel elements. It thus seems appropriate to review the ECJ experience with regard to the limiting scope of Article 1128 submissions, which to a certain extent resemble requests by national courts for preliminary rulings of the ECJ. The ECJ has developed several limits concerning requests for preliminary rulings that might also be adopted by Chapter 11 arbitral tribunals in the context of Article 1128 submissions.

In *Da Costa en Schaake v. Nederlandse Belastingadministratie*, the ECJ stated *inter alia*:

The authority of an interpretation under Article 177 [of the Treaty on the European Community: this Article imposes the obligation to seek preliminary rulings on municipal courts] already given by the Court may deprive the obligation [to seek a preliminary ruling] of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case...²⁹

This statement was confirmed in *CILFIT v. Ministry of Health*. The Court also added:

The same effect, as regards the limits set to the obligation laid down by the third paragraph of Article 177, may be produced where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical... The correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equal-

²⁹ Joined Cases 28-30/62 *Da Costa en Schaake v. Nederlandse Belastingadministratie* [1963] E.C.R. 31 at 38.

ly obvious to the courts of the other Member States and to the Court of Justice.³⁰

It would be difficult for an arbitral tribunal in a Chapter 11 arbitration to deny a disputing party the opportunity to present submissions on issues that are in dispute in any individual arbitration, without violating that party's right to due process. Equally, the way in which Article 1128 is framed appears to give the non-disputing Parties the absolute right to intervene, so long as their interventions relate to matters concerning the interpretation of the treaty. However, there appears to be no good reason why an arbitral tribunal should not impose limitations on the right of the intervening parties to present submissions when it considers that no further arguments are needed, particularly when the issues concerned have been authoritatively settled.

It remains to be seen whether this approach could lead to a generally acceptable means of making Chapter 11 arbitrations more cost-efficient.

A GORDIAN KNOT?

THIS PAPER HAS SO FAR EXAMINED some of the problems that cause delay and disruption during Chapter 11 arbitrations. However, it is important to take notice that some claim that there is a primary cause to the apparent instability within the system. Zachary Eastman mentions several interesting elements:

Undoubtedly, the various Chapter Eleven suits filed to date have hit Canada the hardest. Faced with investor claims totalling more than US\$ 1 billion, the Canadian government has been particularly vulnerable to lawsuits under the NAFTA provisions due to its stringent environmental and health regulations. Following the settlement of the Ethyl Corp. suit, public criticism of Chapter Eleven grew to considerable proportions in Canada and has led the government to seek changes in the law's application.... When the Canadian government paid Ethyl US\$ 13 million in July 1998 and lifted its ban on Ethyl's gasoline additive, MMT, many Canadians criticized Chapter Eleven as a provision through which the claims of foreign investors could effectively undermine health, safety and Environmental policies

³⁰ Case 283/81 *CILFIT v. Ministry of Health* [1982] E.C.R. 3415 at 3420, para.15.

of the State. Canadian critics alleged that the NAFTA, originally portrayed as a means for establishing a common market for goods and services, had instead proved to be a deal that gave multinational corporations the power to erode the laws of signatory countries. Under pressure from environmental, health and consumer protection groups, the Canadian government sought thereafter, to limit the domestic impact of Chapter Eleven... In early 1999, Canadian Trade Minister Sergio Marchi asked his US and Mexican counterparts to review and clarify Chapter Eleven's provision. At a meeting in Ottawa, in February 1999, the US Trade Representative Charlene Barshefsky, Mexican Commerce Secretary Herminio Blanco and Marchi discussed "the rising number of claims" filed by corporations against the three NAFTA member governments. However, Marchi's proposal for adding an interpretative rider to Chapter Eleven that would narrow the grounds on which companies could bring claims for damages and make the dispute settlement process did not receive much support... Near the end of April 1999, the three trade representatives met again, in Ottawa, to reflect on the first five years of the NAFTA and to discuss the future of the trade agreement. Marchi continued to lobby for a change in the application of Chapter Eleven, hoping to convince his US and Mexican counterparts to sign an "interpretative note" to the provision. The note that Marchi proposed would not only narrow the grounds on which companies could bring claims for damages and make the dispute settlement process more transparent, but would retroactively bar companies from bringing such claims. Thus, many Chapter Eleven claims currently pending would, in effect be dismissed..." (footnotes omitted)³¹

Eastman does not say whether Marchi's idea was supported by his colleagues. Nevertheless, this information already provides some food for thought as to why investors in recent Chapter 11 arbitrations have faced so much opposition from the NAFTA Parties,³² as well as NGOs, when they try to obtain redress from host governments. The problem of Article

³¹ Zachary M. Eastman. "NAFTA's Chapter 11. For Whose Benefit?" 16(3) *Journal of International Arbitration* 114-117 (1999).

³² Including, of course, their own governments – who might possibly be expected to support them.

1128 submissions is just one pelement of a complex Gordian knot in which the interests of investors, ordinary citizens, NGOs, diplomats and arbitral tribunals are inextricably intertwined.

The NAFTA Parties and private interest groups pursue their own agendas (which, of course, may be justified and legitimate) without concerning themselves much with the interests and goals of investors (which may also be justified and legitimate). States and NGOs sometimes appear to pursue their goals at the expense of many innocent investors who appear to have acted in good faith. This problem was given particular consideration by the FTC when formulating their idea to impose retroactive interpretations or amendments to Chapter 11 with the objective of limiting the scope of possible recovery by investors.

LEGITIMATE EXPECTATIONS?

THIS STRATEGY INEVITABLY GIVES RISE to consideration of the concept of *legitimate expectations* as a possible ground for advancing a Chapter 11 claim. Although this is more closely related to the topic of substantive rights, it deserves mention in a commentary on *procedural* matters because of its close connection with the status of FTC interpretations. In theory, a claim by an investor based on a breach of his or her alleged legitimate expectation that the NAFTA Parties would not change the rules of the game while it was being played appears to have a number of advantages. Amongst them would be that it would presumably eliminate, or at least reduce, the potential for Article 1128 interventions because it would not involve interpretation of the NAFTA as such. Instead, the merits of the investor's claim would turn on the objectives of the treaty and on the relevant facts.

An investor might present an argument along the following lines:

I accept that the NAFTA Parties have sovereign powers to interpret the treaty. But why should we pay for defects of the legal techniques employed by the governments when they drafted the NAFTA, which permits unexpected interpretations? I do not comment on the relative merits of the Parties' and/or the FTC's submissions. Even if I erred, I interpreted the NAFTA in good faith. I can prove that I behaved reasonably in accordance with all available knowledge I could possess at that time. But because of the Respondent's actions, which I was not able to foresee, I sustained serious damage. My legitimate expectations were frustrated. Thus, I claim compensation. The fact of the frustration of my legitimate

expectations does not depend on the interpretation of the NAFTA, which was provided after I had sustained the damage, even if such interpretation may be correct. The interpretations submitted by the governments, the FTC and third parties may be relevant but only for future arbitrations and not in my case. Why should I respond to these submissions and pay for the prolongation of the arbitration caused by such submissions?

Such an approach would reduce the number of disputed issues. The investor would not seek to introduce the NAFTA legislative history, and would not need to respond to every Article 1128 submission or intervention by other third parties.

This approach would, however, touch on highly sensitive areas for the NAFTA Parties, and it could be expected that they would make strenuous efforts to resist liability on this ground. The NAFTA Parties could be expected to reject *legitimate expectations* as a ground for awarding compensation in a number of different ways. For example, the Claimant's counsel in *ADF Corporation* criticized the attempt of the United States to restrict the investor's cause of action to claims arising in tort:³³

42. As mentioned above, the US has not provided any helpful response to this Tribunal's request for a consideration of possible factors to be used in interpreting and applying Article 1105(1) in the wake of the FTC Interpretation and the Pope Damages Award. Instead, it has clung to a simplistic, and entirely rigid, explanation of how the "customary international law minimum standard of treatment of aliens" should be interpreted. Contrary to the writings of the vast majority of classical international law scholars, such as Vitoria or Grotius, or more recently Lauterpacht, Cheng and Schwarzenberger, the U.S. claims that unless an Investor can fit its claim within the bounds of specific, rigid "tort" compartments (apparently all established by the end of the 19th century), it cannot succeed. This unsupported, and unsupportable, position defies all credulity when applied in an international law – and, even in the common law tort context, is not highly regarded by tort scholars today.

³³ *Post-Hearing Submission of the Claimant ADF Group Inc. on NAFTA Article 1105(1); Damages Award in Pope & Talbot v. Canada.*

In *Methanex*,³⁴ Mexico argued that the concept of legitimate expectations should be limited by a narrow interpretation of the phrase “relating to”, as follows:

7. Mexico agrees with the position of the United States, and disagrees with Methanex’s contention that measures that merely “affect” investors or investments are covered by Chapter Eleven. The phrase “relating to” must be given its distinct meaning, particularly in light of the how the NAFTA and other international trade agreements distinguish between the terms “relating to” and “affect”. At the time the NAFTA was negotiated, GATT jurisprudence drew this distinction. It must be taken that the NAFTA negotiators deliberately selected “relating to” in Article 1101 in order to require something more than a mere “effect” in order before measures could be arbitrable under Chapter Eleven. This point is clear when one reviews other provisions of the NAFTA itself where the modifier “affect” is used in lieu of “relating to” in order to indicate a broader scope of obligation.

8. The significance of this distinction to Chapter Eleven tribunals is that measures that “relat[e] to” investors or investments have a closer degree of connection than measures that merely “affect” them. Under the GATT jurisprudence... , the test adopted for the measure to be found to be “relating to” was that of being “primarily aimed at”. The test adopted for the purposes of Article 1101 must reflect the NAFTA drafters’ intent to require a more direct nexus between the measure and the investor or its investment than mere effect, as evidenced by the text’s considered use of “relating to”.

In summary, where FTC interpretations have been introduced for the specific purpose of limiting the scope of investors’ claims, a claim based on the ground of legitimate expectations may have a superficial attraction in that it would presumably reduce the potential for the non-disputing Parties to intervene pursuant to Article 1128. This is because the issues would be largely factual, not matters of interpretation. Nevertheless, such a strategy by an investor in advancing a Chapter 11 claim would be highly for the NAFTA Parties and this approach might well give rise to more procedural problems than it would solve.

³⁴ Letter from Mexico to the arbitral tribunal in *Methanex Corporation v. United States of America*.

CONCLUSIONS

THE AUTHORS SUGGEST THAT the following broad conclusions may be drawn:

- Since the NAFTA came into effect it has become routine for non-disputing Parties to exercise the Article 1128 right to intervene in Chapter 11 arbitrations, at least to the extent of monitoring the material they are entitled to receive under Article 1127 and 1129, delivering wide-ranging written submissions and (unless excluded by the relevant arbitral tribunal) sending observers to hearings;
- Non-disputing Parties, while not conceding that an arbitral tribunal is entitled to limit their right to intervene *at any stage*, have proved willing to respect the overall procedural framework established by arbitral tribunals provided that they receive adequate notice of the procedural steps that will take place, and sufficient advance information concerning the cases presented by the disputing parties.
- The message for Chapter 11 tribunals is therefore loud and clear. They should be sensitive to the vital interests of the non-disputing Parties in matters that may create persuasive if not binding authority on questions of interpretation of the NAFTA. At the same time they have a duty to recognize the interests of the disputing parties, by minimizing the disruption and cost implications that inevitably arise from Article 1128 interventions.
- Chapter 11 tribunals should also consider ways of encouraging the disputing parties to reduce the range of the issues to those that are essential to establish the right to prospective awards of compensation for aggrieved investors. If the principal basis for a Chapter 11 claim is discrimination on the grounds of national treatment under Article 1102, it should not be necessary also to put forward a claim under Article 1105 or performance requirements – and *vice-versa*. Since Article 1110 identifies the measure of compensation for such cases, different considerations should apply where there is a credible claim in respect of expropriation. But, particularly since a pattern has emerged as to how individual arbitral tribunals are likely to approach claims on their facts, an investor who pursues his or her claim based on all

of the four alternative grounds set out in Chapter 11 can expect the result to be a very expensive proceeding involving multiple and comprehensive Article 1128 submissions from the non-disputing Parties.

- The participation of non-governmental interest groups is also a matter that should be approached by Chapter 11 tribunals with sensitivity. The private nature of the hearings (which is expressly stated in the case of UNCITRAL arbitrations)³⁵ indicates that non-parties to the arbitration should not be invited to attend the hearings without the consent of the disputing parties. However, Chapter 11 tribunals may well be genuinely assisted by receiving written submissions from accredited NGOs and other bodies with a legitimate interest in the issues between the disputing parties. The terms on which such written submissions should be admitted into the record in Chapter 11 arbitrations are a matter for individual arbitral tribunals to determine in specific cases, as is the extent of the material to which they should be given access beyond what is already in the public domain and/or made available with the consent of the disputing parties.
- So far as the procedural aspects of intervention by non-disputing Parties are concerned the key seems to be for arbitral tribunals, with the consent of the disputing parties at a relatively early stage of the proceedings, to invite their participation within the scope of the procedural framework established by the arbitral tribunal. It also helps if that procedural framework is based on the modern practice in international commercial arbitration which limits the arguments to law and fact. In addition, the written witness testimony, delivered well in advance of the substantive hearing. This not only enables the hearing to occupy much less time than would otherwise be the case, but it also protects the non-disputing Parties from being surprised by the introduction of a large quantity of new material at the substantive hearing. If the non-disputing Parties are confronted with surprises at a late stage it may generate an irresistible urge to deliver additional written submissions at a time when the arbitral tribunal has moved on to the deliberations stage. The same pro-

³⁵ UNCITRAL Arbitration Rules, Article 25.4

cedural considerations apply when an arbitral tribunal decides to admit the participation of third parties other than the other NAFTA Parties.

- Finally, a note of caution must be introduced. The “state of the art” in this particular area is changing so rapidly that, by the time this commentary is published, much more water will have passed under the bridge. Prudent readers with a serious interest in ascertaining the current position will wish to carry out their own research. Amongst a number of fruitful sources are the websites of the three NAFTA governments, ICSID’s website (www.worldbank.org/icsid/), www.naftalaw.org, and www.appletonlaw.com.