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Arbitration Under NAFTA
Chapter Eleven: Some Pragmatic Reflections upon the First Case Filed Against Mexico

BY CLYDE C. PEARCE* AND JACK COE, JR.**

I. Introduction

On January 1, 1994, the North American Free Trade Agreement (NAFTA) came into effect.1 On October 2, 1996, Metalclad, an American company,2 notified the United Mexican States (Mexico) of its intention to seek arbitration concerning what it believed were numerous violations of the NAFTA in relation to its investment in the state of San Luis Potosi.3 Its subsequent claim—the first to be filed against Mexico under Chapter Eleven4—led to an arbitration

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2. Metalclad is a publicly traded company (NASDAQ: MTLC).
3. Among other assertions, Metalclad alleged that it and its investment had not received fair and equitable treatment within the meaning of NAFTA Article 1105 and that its investment had been indirectly expropriated within the meaning of Article 1110 through a combination of acts and omissions attributable to the United Mexican States under international law.
4. ARB(AF)/97/1 International Centre for the Settlement of Investment Disputes. For general treatments of Chapter Eleven's dispute resolution regime, see
under ICSID's Additional Facility Rules conducted by a distinguished tribunal. Metalclad sought $90 million and throughout the proceedings, which spanned over three years, Mexico vigorously defended itself, employing many skillful lawyers and other specialists.

Although international arbitration has become commonplace for transnational business, arbitration against a host state under Chapter Eleven has several distinctive features. This Article notes those features while presenting a pragmatic view of Chapter Eleven's arbitration mechanism, generally from the perspective of the claimant's counsel. Customarily, it treats components of the process

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5. The acronym ICSID stands for the International Centre for the Settlement of Investment Disputes.

6. The case was the first to commence under the Additional Facility Rules of ICSID. See ICSID, ADDITIONAL FACILITY FOR THE ADMINISTRATION OF CONCILIATION, ARBITRATION AND FACT-FINDING PROCEEDINGS 33 (1979) Doc. ICSID/11 (reprinting Additional Facility Arbitration Rules) [hereinafter Additional Facility Rules].

7. The members were Benjamin Civiletti, Esq., Professor Sir Elihu Lauterpacht (Tribunal President), and Jose Sequieros, Esq.

8.Measured from the notice of intent to file a claim under NAFTA Article 1119 to the filing of post-hearing briefs in November, 1999. Nine additional months elapsed before the award was transmitted to the parties.

9. Because Metalclad potentially raises a number of important substantive questions, the case has attracted considerable attention. The respective factual and legal arguments of the disputing parties, however, have not been widely published, a fact reflected in some of the existing discussions of the case. See, e.g., Adam Sulkowski, NAFTA's Indirect Expropriation Protections: Will Compensation Be Required When Ecological Protections Are Applied? (An Analysis of Metalclad Corporation's Claims Against Mexico), in 15(2) MEALEY'S INTERNATIONAL ARBITRATION REPORT 23 (Feb. 2000) (substantial reliance on secondary sources). Despite the temptation to explore the substance of the case in detail, that exercise will be better undertaken in a later article now that the award has been rendered.

[Editor's Note: On August 25, 2000, the tribunal in Metalclad issued an award in favor of the claimant. The three arbitrators joined in finding that Mexico had indirectly expropriated the claimant's investment within the meaning of NAFTA Article 1110 and had also failed to accord the investor fair and equitable treatment as required by NAFTA Article 1105. Mexico was ordered to pay nearly $17 million to the investor. Mexico has announced that it will seek nullification of the award before the courts of British Columbia. The award can be downloaded from www.pearcelaw.com, where further information concerning the post-award proceedings can also be found.]
in the order that they arise as the proceedings advance. This Article concludes by suggesting a method of improving Chapter Eleven arbitration.

II. Counsel's Preliminary Assessment of the Merits

Many of the protections given to an investor under NAFTA Chapter Eleven are expressed as broad terms of art, the specific content of which is to be gleaned through the application of standard rules of treaty interpretation and by reference to international law. Some of these undertakings—such as that addressed to expropriation—are illuminated within relatively copious decisional law and learned commentary. Other Chapter Eleven guarantees, such as that requiring fair and equitable treatment, while far from novel, are not the subject of plentifully reported adjudication or the

10. Chapter Eleven arbitral tribunals are instructed to decide matters submitted to them by reference to the NAFTA and “applicable rules of international law,” NAFTA Art. 1131. Article 1105 requires a Party to accord investors of other Parties and their investments “treatment in accordance with international law” and Article 1110 (Expropriation and Compensation) is no doubt expected to be viewed in light of international law. The authors believe that NAFTA contemplates resort to, in addition to the treaty text, both custom and general principles of law recognized in developed legal systems. As to the latter, see generally BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1973).

11. One modern collection of awards has been produced by the Iran-U.S. Claims Tribunal (Claims Tribunal), constituted at the Hague pursuant to the Algiers Accords and in particular the Claims Settlement Declaration. See generally JOHN WESTBERG, INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES 3-4, 293-96 (1991) (discussing and reprinting the Claims Settlement Declaration). It has been suggested by the Canadian and Mexican governments that Claims Tribunal awards should be approached with special care, perhaps bordering on suspicion, because that tribunal's mandate contemplated that recoveries could be granted not only for “expropriations” but also for “other measures affecting property rights.” Claims Settlement Declaration, art. II (emphasis added). The risk of a NAFTA tribunal misunderstanding the basis upon which a Claims Tribunal award rests seems rather remote. Generally, a Claims Tribunal award makes it clear when it depends upon the law of expropriation and supplies authority for its findings. Those aberrant awards that rely on the property interference mandate make little effort to conceal that rationale. Regardless, because tribunal awards are reasoned, typically at great length (often with separate opinions and dissents), subsequent tribunals will be able to assess the individual persuasiveness of the Claims Tribunal awards they encounter. Accordingly, no wholesale discounting of that jurisprudence is warranted.

work of many publicists.\textsuperscript{13} In general, counsel's initial assessment of a prospective claim benefits from sharp jurisprudential demarcations only to a limited extent. The available \textit{travaux preparatoires}, moreover, are highly limited.\textsuperscript{14} In such a setting, the express objects of the NAFTA itself may provide both inspiration and authority.\textsuperscript{15}

Matters of substantive law are in a sense only secondary. In international arbitration, as with other adjudicative processes, the governing law in the abstract is less important than its application to the facts at hand; there is no substitute, therefore, for an assiduous reconstruction of the investment's history and the events giving rise to the investor's injuries. In turn, the harms of purely private authorship must be separated from those attributable to the host state under

\begin{itemize}
\item \textsuperscript{13} But see F. A. Mann, \textit{British Treaties for the Promotion and Protection of Investments}, 52 BRIT. Y.B. INT'L L. 241, 243-44 (1981); Rudolf Dolzer & Margrete Stevens, \textit{Bilateral Investment Treaties} 58-60 (1995).
\item \textsuperscript{15} Consider, for example, the question whether the NAFTA's obligations extend to the acts and omissions of local authorities. NAFTA Article 105 requires the Parties to take "all necessary measures" to ensure NAFTA observance "by state and provincial governments." A literal interpretation of that Article would suggest that local authorities, because they are not expressly mentioned, are excluded from NAFTA discipline. Other NAFTA provisions, however, surgically exclude from NAFTA coverage local government action expressly, suggesting that a general exemption for such action was not intended. See, e.g., NAFTA, Art. 1108(1)(a)(iii). Assuming reasonable doubt remains in light of Article 1108, the question should be resolved in favor of broader coverage, for to exempt municipalities from the international standard imposed by NAFTA would discourage investment rather than "increase substantially investment opportunities in the territories of the Parties," one of the aims set forth in NAFTA Article 102. Moreover, Article 201(2) states that "unless otherwise specified, a reference to a state or province includes local governments of that state or province." The authors believe that the same light may be cast upon the numerous questions of first impression raised by \textit{Metalclad}. Does, for example, the obligation to provided fair and equitable treatment (Article 1105) carry both procedural and substantive protections? Does "fairness," as incorporated into that Article, require that a host state's regulatory framework posses a minimal level of transparency? Based upon the NAFTA's aims alone, an affirmative answer to both questions is warranted, although no provision within the NAFTA directly so states.
\end{itemize}
international law, and the latter must be evaluated both individually and as to their cumulative effects.

Counsel's understanding of the case typically evolves throughout the pre-claim period. As counsel's sifting of the international sources and the pre-claim investigation proceed, refinements in fact and legal support inevitably emerge. Consequently, a rather fluid approach may characterize the initial, pre-notice formulation of the case. Despite the inevitability that theories of recovery and defense will evolve, perhaps well into the hearing and beyond, there is much reason to redouble one's pre-notice efforts and little reason to defer such endeavor. Indeed, by adopting an ample claim extinction period and imposing a six-month delay requirement, the NAFTA


17. That breach of a host state's obligations to an investor can be established by reference to the totality of the acts and omissions of the host state has been accepted by learned tribunals. See, e.g., Biloune v. Ghana Inv. Ctr & Gov't. of Ghana, 95 I.L.R. 183, 209-10 (1993) (expropriation found); Amco v. Indonesia (Resubmitted Case), 1 ICSID REP. 560, 621-22 (administrative denial of justice found).

18. Tribunals sometimes request post-hearing briefs and ask the parties to address therein aspects of the case that remain not fully developed. It is also common for the arbitrators to give counsel assignments during the hearings, such as addressing certain questions in the abstract or as applied to the concrete case at hand. Naturally, such interrogatories may stimulate refinements in each party's theory of the case.

19. Article 1119 of the NAFTA requires a claimant to notify the Party alleged to have breached the NAFTA of its intention to file a claim under Chapter Eleven. That Article specifies the content of the notice that must be delivered to the Party in question at least ninety days before the claim is filed.

20. Ostensible benefits from dedicating resources early in the process include improved bases to pursue settlement and evaluate offers of settlement, enhanced first impressions before the tribunal, and better informed and hence more reasonable disputant expectations.

21. NAFTA Article 1116(2) prohibits an investor from making a claim "if more than three years have elapsed from the date that the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." Article 1117(2) places the same limitations on an investor who claims on behalf of an enterprise. Cases of alleged indirect expropriation, such as Metalclad, may give rise to an unusual defense by a host state, based on the three-year limitation. Indirect takings often come to fruition incrementally; in mounting the defense that a claim is extinct, the host state would be encouraged to argue, uncharacteristically, for the earliest point for calculating the three years, requiring it to establish why taking was complete at that point. Where a number of state acts have occurred that compromise the investment, claimant's counsel must be mindful of the three-year provision. The period, apparently, is not tolled merely by notifying of an intent to file a claim or by ensuing negotiations, but only by filing the claim.
promotes well-considered claims.

III. The Claimant's Non-Arbitral Alternatives

A. Preserving Options

Preferably, the lawyer will become involved with his client's case no later than when the client learns that it has been injured by an apparent breach of Chapter Eleven. At that point, careful coordination should begin between the investor's lead counsel and any host-state counsel; the goals of this collaboration are to facilitate essential fact-finding, to prepare for such negotiations with government officials as may occur, and to avoid precipitous resort to local remedies that may foreclose or negatively influence other avenues.23

B. Negotiation and Consultation

En route to completing due diligence and launching an investment covered by Chapter Eleven, an investor will have had interaction with a number of government officials, or quasi-officials (in the case of state monopolies), whose cooperation and encouragement may have been a critical ingredient in the decision to pursue the enterprise. Accordingly, when an apparent breach of the NAFTA arises, that text's instruction to resort to amicable means24 may coincide well with both an investor's natural inclinations and, in certain settings, its other business interests.25

Its potential for rapid, confidential and cost-effective resolution of the grievance also argues for negotiation, given the resource-

22. NAFTA Article 1120 requires that a claim not be filed until "six months have elapsed since the events giving rise to a claim."

23. See infra note 49 and accompanying text.

24. Article 1118 states, "The disputing parties should first attempt to settle a claim through consultation or negotiation." Whether this language imposes an obligation on the parties or is merely precatory is debatable. Practitioners favoring caution will include in their notice a recitation of the claimant's efforts at consultation or negotiation.

25. To resort first to non-adjudicative, less-adversarial techniques of dispute resolution may be particularly advisable if the prospective claimant has other, still viable, projects within the host state. But strategic considerations also invite prudent attention. In the absence of an agreement between the parties, none of the arbitration rules designated by Article 1120 provides for the subsequent evidentiary exclusion at the arbitral hearing of settlement offers or other communications made in furtherance of negotiation.
intensiveness of the adjudicative alternatives facing the disputants.

C. U.S. Court Litigation

Parties aggrieved in connection with an international transaction, and their counsel, often indulge a homing instinct, causing them to think first of litigation in familiar fora. For U.S. investors, that propensity is understandable. After all, litigation in U.S. courts offers—at least in theory—settled procedures (including wide-ranging discovery), neutral judges, geographic and linguistic suitability, access to a civil jury, reduced dependence on foreign local counsel, and myriad other ostensible advantages.

In relation to NAFTA-based grievances, however, the American domestic court option has been largely foreclosed by the NAFTA's U.S. implementing legislation. The relevant provision is broadly worded, providing in pertinent part that "[n]o person other than the United States... shall have any cause of action or defense under [the NAFTA]."

Even if private actions were not precluded by statute, an American plaintiff would face the other obstacles associated with actions against sovereign states, including those potentially posed by the Foreign Sovereign Immunities Act and the Act of State Doctrine. As the aim would be to rely upon the NAFTA, or

27. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11 (1976). The Act implements the "restrictive" theory of the underlying doctrine by subjecting the general rule of immunity for states and certain state entities to various exceptions. A careful reading of the Act reveals that its exceptions to immunity are intricately and narrowly crafted. For example, immunity is lifted to enforce "rights in property taken in violation of international law," but only where the property in question (or property derived therefrom) is present in the United States in connection with commercial activity or is "owned or operated by an agency or instrumentality... engaged in a commercial activity in the United States." 28 U.S.C. § 1605 (a)(3).
28. As a matter of judicial self-restraint promoted by separation of powers concerns, American courts are reluctant to adjudicate claims that require for their resolution an assessment of the validity of acts done by a sovereign concerning property within that sovereign's own territory. See Restatement (Third) of the Foreign Relations Law of the United States § 433; see generally Gary Born, International Civil Litigation in United States Courts (1996). Beyond this general statement of the Act of State Doctrine one encounters some uncertainty; the putative exceptions remain poorly defined and the U.S. Supreme Court, although narrowing the doctrine's application, has not fully unified the approach. See W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400 (1990) (Act of State Doctrine not applicable unless adjudication would assess validity of sovereign measure; potential embarrassment to foreign state does not implicate the Doctrine).
perhaps the law of nations alone, further questions related to standing and subject matter jurisdiction might also arise. 29

Nevertheless, the core of the Doctrine is sufficiently well established to impede routine cases where an American investor complains of host country measures affecting the enjoyment of property within the host state's territory. See Banco National De Cuba v. Sabbatino, 376 U.S. 398 (1964). Although, the Sabbatino Amendment to the Foreign Assistance Act, 22 U.S.C. § 2370(e)(2) (sometimes called the "Second Hickenlooper Amendment") would appear to exempt from the Doctrine uncompensated takings of property by foreign host states, the Amendment has generally met with narrow constructions in U.S. courts. See, e.g., Empresa Cubana Exportadora De Azucar y Sus Derivados v. Lamborn & Co. Inc., 652 F.2d 231 (2d Cir. 1981) (Amendment intended to apply only if expropriated property found within the United States); but see Ramirez de Arelo v. Weinberger, 745 F.2d 1500, 1541-42 n.180 (D.C. Cir. 1984) (Amendment not limited to property found within the United States), vacated on other grounds, 471 U.S. 1113 (1985). Were private claimants able to bring NAFTA claims in American Courts, perhaps the "treaty exception" would hold the most promise for evading the Doctrine. Indeed, it has been held that expropriation provisions not unlike those of the NAFTA satisfy the exception. See Kalamazoo Spice Extraction Co. v. Provisional Military Gov't. of Socialist Ethiopia, 729 F.2d 422 (6th Cir. 1984) (Doctrine inapplicable when governing treaty supplies clear rules for adjudicating claim).

29. For helpful background reading, see JOHN ROGERS, INTERNATIONAL LAW AND UNITED STATES LAW 74-92; 220-31 (1999). The much discussed notion that a private litigant can assert breaches of international law in U.S. courts flows, prima facie, from the U.S. Constitution's extension of federal judicial power to "all Cases, in Law and Equity, arising under the Constitution, the Law of the United States, and Treaties made, or that shall be made, under their Authority." U.S. CONST. art. III, § 2, cl. 1. For an illustrative list of academic contributions bearing upon the question, see Curtis Bradley & Jack Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 HARV. L. REV. 816, 837 n.151 (1997); William S. Dodge, The Historical Origins of the Alien Tort Statute: A Response to the "Originalists," 19 HASTINGS INT'L & COMP. L. REV. 221 n.2 (1996). A litigant's successful invocation of a treaty not implemented by statute would, as a matter of first principles, depend upon whether the treaty was "self-executing" (a quality delineated by U.S. domestic case law). See, e.g., Asakura v. Seattle, 265 U.S. 332, 340 (1924) (Japan-U.S. FCN treaty should be given effect by the courts; city licensing ordinance discriminating against aliens subject to FCN's provision ensuring "trade [in the United States] . . . upon the same terms as native citizens"). For Professor Rogers the essential question is whether as a matter of international law "the treaty was intended . . . to stipulate the immediate creation of rights cognizable in domestic courts." ROGERS, supra, at 77 (adopting the formulation of Professor Stefan Riesenfeld, The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?, 74 AM. J. INT'L L. 892, 896-97, 900-01 (1980)).

Because the NAFTA has been implemented by statute, as a matter of pure logic, self-execution analysis would seem to be irrelevant; presumably, the controlling construction would be of the implementing statute. But see Made in the USA Foundation v. U.S., 56 F. Supp. 2d 1226, 1236-41 (N.D. Ala. 1999) (whether NAFTA is self-executing discussed in relation to standing to attack NAFTA's constitutionality).

Since the NAFTA requires a host state to accord investors treatment no less favorable than that established in international law, to the extent that violations of
IV. Arbitration Options

A. In General

Arbitration has become a fixture in international trade and investment because it compares favorably to the alternatives.\(^{30}\) It provides a neutral mechanism\(^{31}\) characterized by private proceedings,\(^{32}\) flexible procedures, expert decision-makers,\(^{33}\) relative

customary international law are actionable in U.S. courts, a litigant could in substance assert NAFTA breaches without depending upon it directly. Such an action would not fall cleanly under the Implementing Act’s prohibition. Nevertheless, the extent to which the “law of nations” can be the basis of a private action in U.S. courts is the subject of vigorous academic and judicial debate, inevitably parsing Justice Gray’s often-quoted pronouncement in *Paquete Habana* that “[i]nternational law is part of our law.” The *Paquete Habana*, 175 U.S. 677, 700 (1900). Proponents suggest that if federal common law includes the “law of nations,” it follows that Article III’s “arising under” clause extends to claims alleging, e.g., takings unaccompanied by compensation commensurate with the international standard. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111, 115; *but see* Bradley & Goldsmith, *supra*, at 833-34 (discussing critically the assimilation of customary international law into federal common law).

In principle, the Implementing Act’s prohibition of private NAFTA based claims would not also preclude actions asserting rights under private law, such as those arising out of a contract or concession with a NAFTA Party and governed solely by municipal law, though admittedly confusion might arise given that the NAFTA expressly includes concessions within the definition of “investment.” *See* NAFTA Art. 1139. American courts are in theory equipped to apply foreign law; a Mexican law clause contained in a concession agreement would not affect the court’s jurisdiction, except as one factor in a forum non conveniens analysis. More problematic for the investor seeking access to an American court are the Mexican forum clauses also common to such arrangements. Forum selection clauses are honored by U.S. courts in most cases, leading to dismissal of the action in favor of the parties’ agreed forum. *See* Bremen v. Zapata, 407 U.S. 1 (1972).


31. Neutrality has several facets. Geographically, the oral proceedings need not occur in a place more convenient to one side than the other. Procedurally, rule formulae typically incorporate elements of the civil law and the common law and may, by agreement, be refined by the parties. Tribunal neutrality is also a basic tenet of international arbitration. Under the international standard, tribunal members must be both impartial and independent of the parties. *See* REDFERN & HUNTER, *supra* note 30, at 218-26.

32. Hearings ordinarily are not open to the public. *See*, e.g., UNICITRAL Arbitration Rules, art. 25(4) (“Hearings shall be held in camera unless the parties agree otherwise.”).

33. Each party appoints one arbitrator; under the NAFTA, the disputing parties
finality, and enforceability of the result. For a host state, private adjudication before a learned tribunal within a relaxed procedural framework will often be preferable to defending against litigation in an investor's home state.

**B. Choice of Rules**

An aggrieved investor has a choice of arbitral regimes: proceedings under the UNCITRAL Rules or arbitration under whichever of the ICSID regimes obtains. The latter depends upon whether the host state and the investor's home state are parties to the ICSID Convention. ICSID arbitration, whether Convention-based
or under the Additional Facility, is "administered" as opposed to "ad hoc." In exchange for fees, the institution performs a number of functions and provides a number of services that would otherwise be left to the tribunal or to the parties. It provides a central registry and clearing house for communications to the tribunal and to the other disputants. ICSID, for instance, can provide hearing rooms, interpretation, and transcription. The practice of designating a law-trained staff member to act as tribunal secretary, also a feature of ICSID administration, enables a division of labor that is helpful to the tribunal and to the parties.

It is not clear that by offering an investor UNCITRAL arbitration, NAFTA's drafters necessarily envisioned non-administered arbitration; but that formulation is designed to operate without an institution and no mention is made of institutional assistance. Regardless, the allure of ad hoc (non-administered) arbitration is not irresistible. Ad hoc arbitration places a premium on having administratively adept tribunal presidents and tends to require greater attention to clerical detail on the parts of counsel. Perceived cost savings associated with ad hoc arbitration may be illusory, moreover, because, institutional experience and an institution's service-provider affiliations often cannot readily be matched by private parties.41


38. Nevertheless, nothing in that formulation, or apparently in the NAFTA itself, precludes a proceeding assisted by the Commercial Arbitration and Mediation Center for the Americas (CAMCA) or a similar institution. Indeed, many arbitral institutions have expressed a willingness to administer arbitrations governed by the UNCITRAL Rules and it could be argued that this possibility must have been within the contemplation of the NAFTA's drafters.

39. Presumably, foremost among the perceived advantages of choosing UNCITRAL arbitration are potentially reduced costs, although claimants might also be attracted by that text's familiarity and success in practice. For over two decades, with certain modifications, the UNCITRAL Rules supplied the procedural regime at the Iran-U.S. Claims Tribunal; they have accordingly been tested and discussed far more vigorously than the Additional Facility Rules. See generally DAVID CARON & MATTI PELLONPÄÄ, THE UNCITRAL ARBITRATION RULES AS INTERPRETED AND APPLIED (1995); STEWART BAKER & MARK DAVIS, THE UNCITRAL ARBITRATION RULES IN PRACTICE (1992).

40. Nothing, of course, prevents the appointment of a tribunal secretary, with the parties' permission. Skillful assistance of this type can enhance the practicability of ad hoc proceedings.

41. Located in The World Bank headquarters in Washington, D.C., ICSID provides parties free use of its commodious facilities, both for the oral hearing and
V. Timing Considerations and Prerequisites

A. In General

An investor's claim under NAFTA Chapter Eleven may not be brought until six months have elapsed since "the events giving rise to the claim." At least 90 days before the claim is submitted, the investor must give notice to the respondent state of its intention to file its claim. The latter must contain specified information including the NAFTA provisions alleged to have been breached, the relief sought, and an approximation of damages. Taken together, these articles establish a period presumably intended to facilitate reflection and resort to collaborative means of settlement.

B. Jurisdictional Significance of the Notice of Intent

Among the questions that have arisen in connection with the timing and notice requirements is the extent to which post-notice events can be relied upon by a claimant, either to bolster existing allegations of sub-NAFTA treatment or to found entirely new theories of breach. For example, if after the notice of arbitration is filed, the host state passes a law that, independent of other state measures, appears to substantially curtail the operation of the claimant's investment, may its expropriative effects be submitted to the tribunal as part of the claimant's case?

It might be argued that because the claimant will have set forth in its notice both the NAFTA provisions said to have been breached and the "factual basis for the claim," it ought to be restricted from later introducing theories and facts not delineated in the original notice. Facially, the positive attribute of such a limitation is that it would encourage investors to ensure that their claims are fully ripe; where further governmental acts could be foreseen, claimants would be encouraged to delay their notice so as to formulate it as completely

for tribunal deliberations. A further consideration for the cost-conscious claimant is the Additional Facility Administrative and Financial Rules Article 6 cap on the daily rate paid to the tribunal members and published rates on travel (less than first class) and per diem. The published daily rate for arbitrators is presently U.S. $1,100. In practice, the rate is "otherwise agreed by the parties" to be something higher, but, in the authors' experience, the higher de facto rate is less per hour than a comparable NAFTA UNCITRAL arbitrators' rate, which is set by the arbitrators themselves.

42. NAFTA Art. 1120.
43. Id. Art. 1119.
44. Id.
as practicable. The predictability created by such a rule is admittedly attractive. Nevertheless, based upon countervailing policy concerns and the text itself, the present authors remain unconvinced that this view should be sustained, for it leaves host states too free to punish investors for bringing claims and promotes inefficiencies in the adjudicative process; further, it does not allow for the development of the case over time.\footnote{The investment affected by the measures complained of may be only one of several within the host state or may be part of a broader integrated project. If after the notice is served, other aspects of the operation are subjected to unfair treatment, should the investor not be able to amend its complaint accordingly? Freezing the facts of the case as of the time the notice is served would leave the investor only the option of filing a separate, fresh claim under Chapter Eleven, thus producing at times the artificial exclusion of matters otherwise efficiently dealt with as part of the same case. It would also encourage duplicative, serial proceedings, a result that seems greatly at odds with one of NAFTA’s express aims: to provide “effective procedures for the resolution of disputes.”\textit{Id.} Art. 102.}

\textbf{C. Exhaustion of Local Remedies}

A general precept accepted in international law, the local remedies rule, holds that actions against a state on behalf of a private party are not ripe until that party has sufficiently exhausted avenues of redress available to it in the respondent state’s domestic legal system. Although capable of being eliminated by treaty, the rule retains vitality, especially in the context of an espoused claim.\footnote{Id. Art. 102.} It has also been expressly preserved in some, but not all, modern investment

\textit{That the filing of the notice should confine the tribunal’s jurisdiction \textit{ratione temporis} makes particularly little sense where the impact complained of relates to the same investment that was the subject of the notice. The apparent function of the notice is to alert the host state to the investor’s grievance so that it may be examined, and perhaps satisfactorily addressed so as to obviate arbitration. Counsel is expected to compose the notice without formal discovery and conceivably without having had the benefit of meaningful discussions with the host state. It is a notice, not a comprehensive pleading. Concurrently, the rule formulae designated by Article 1120 give the tribunal sufficient power to prevent prejudicial claim amendments and the belated introduction of theories of recovery.}

\textit{In the \textit{ELSI} case, a distinguished Chamber of the International Court of Justice declined to readily infer non-applicability of the rule:}

The Chamber has no doubt that the parties to a treaty can therein agree that the local remedies rule shall not apply to claims based on alleged breaches of the treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of words making clear an intention to do so.

The NAFTA neither expressly extinguishes nor enforces the local remedies rule. By clear implication, however, the text casts substantial doubt upon the rule's relevance to Chapter Eleven arbitration. Article 1121 requires the investor, as a condition to arbitration, to waive in writing its right to continue any domestic proceeding—in the host state or elsewhere—based upon an alleged breach of the NAFTA. Thus, rather than positing a rule of exhaustion, the NAFTA merely forecloses certain forms of parallel domestic actions and assumes that, if initiated, they may nonetheless be cut short in order to pursue arbitration.

D. The Impact of Domestic Proceedings

Other questions raised by the possibility of domestic proceedings are more challenging. One such question, which will not be fully addressed here, relates to the effect to be given by a NAFTA tribunal to domestic court adjudications. Even in situations where the domestic tribunal did not purport to apply the NAFTA, findings of fact or pronouncements of domestic law will often be relevant. But to what extent should they be given conclusive effect by the tribunal? And what if the domestic court or tribunal purports to apply the NAFTA, and concludes, for example, that no breach has occurred?


49. Annex 1120.1 adds an important qualification in relation to claims against Mexico. It states in pertinent part:

With respect to a submission of a claim to arbitration ... an investor of another Party may not allege that Mexico has breached an obligation under [the Investment Chapter's § A] both in an arbitration under this Section and in proceedings before a Mexican court or administrative tribunal ....

Because it attaches elective consequences to allegations before domestic Mexican fora, the Annex does more than prohibit certain types of parallel proceedings, a restriction already accomplished by Article 1121(2)(b) (requiring waiver of right to initiate or continue proceedings under the law of any Party). An analogous, similarly worded, clause in the Annex is directed to actions brought by Mexican enterprises owned by an investor of another Party. Strictly construed, neither clause requires
The authors' view is that the domestic court proceedings ought not to enjoy in NAFTA arbitration the kinds of preclusive effects that an American-trained lawyer associates with res judicata and collateral estoppel. Such dispositions merely are facts, albeit potentially compelling facts. The tribunal may accord to such rulings such weight as seems appropriate given a range of factors, including but not limited to, the context in which the domestic proceedings were brought, the thoroughness with which the arguments were mutually pursued, the level and competence of the body pronouncing itself, the force of any reasoning that accompanied the decision, and the competence and presumed expertise of the adjudicators in relation to the subject matter in question.

VI. Composing the Tribunal

A. In General

The adage that the arbitral process is only as good as the arbitrators forming the tribunal holds true in relation to NAFTA investment arbitration. Consistent with established practice in international arbitration, the appointment rules established under the NAFTA give the disputing parties a role in the appointment process.

that to render arbitration unavailable the domestic proceedings in question must have been concluded; thus, a NAFTA-based action initiated but thereafter abandoned would appear to bar resort to NAFTA arbitration, although the boundaries of this trap for the unwary have not been tested. Related questions also arise: does the Annex apply to actions that are declaratory or injunctive in nature—that is, to proceedings potentially collateral to arbitration that are otherwise available to an investor despite the waiver requirement of Article 1121? Could Mexico successfully argue that a claimant's invocation of the NAFTA in an amparo action is within Mexico's Annex 1120.1 reservation, so that subsequent arbitration would be foreclosed, even though Article 1121 does not require that the investor waive efforts to obtain such relief? And what if the NAFTA was raised proprio motu in such a proceeding? Such issues should fall to the tribunal to decide as an aspect of its competency to determine its own competency. The Annex's corollary effect should also be noted: having alleged NAFTA breaches before a Chapter Eleven tribunal, a claimant seemingly would be precluded from bringing an action in a Mexican court based upon the same alleged breach.

Thus, an appellate domestic court's confirmation of an inferior court's application of domestic law should appreciably influence a tribunal as to the content of domestic law on the point in question, assuming there was no conflicting authority of equal weight within that domestic system. By contrast, a municipal court's exposition of international law—a subject concerning which the tribunal will often have considerable expertise—would be less influential.

50. NAFTA Art. 1123.
In the normal two-party context, each of the disputing parties appoints an arbitrator. The third arbitrator, who is to preside, is appointed jointly by the two parties.  

B. The Party-Appointed Arbitrators

Experienced practitioners employ diverse approaches in identifying prospective appointees. Some develop short lists and compare and contrast among the prospective, available appointees. Some quickly arrive at one name, and approach others only if that person is unavailable. Most candidates enjoy established reputations, although there is little substitute for word-of-mouth recommendations to corroborate a party’s sense of the candidate’s suitability. In general, the process allows a claimant sufficient time to choose its appointee wisely.

Ordinarily, a number of qualities are desirable in a party-appointed arbitrator. Their other obligations should leave them free to dedicate the sometimes considerable time and energy necessary to master the details of the case and they should possess sufficient patience and vigor to participate fully in the process until an award is signed, however protracted the proceedings may become. Knowledge of the rudiments of international law would seem nearly indispensable, although in the authors’ view, expertise in the commercial field in which the dispute has arisen would not be critical.

It is preferable that the appointee have a working knowledge of the languages in which documentary and oral evidence will likely originate. The availability of high quality interpretation and the obligation of the parties to provide translations of documents

52. See id. The more prevalent approach contemplates that the two party-appointed arbitrators will appoint the presiding arbitrator, although it is customary for the two to seek the views of the appointing parties during the process. See UNCITRAL Arbitration Rules art. 7.1; see also PRINCIPLES AND PRACTICE, supra note 30, at 463-816 (reprinting various international arbitration rules and statutes largely adopting this standard format when three-person tribunals are to serve).


54. Experience with general commercial law and industries analogous to that in question typically equip a candidate sufficiently well, provided he or she is able to become immersed in the case and stands ready to consider the views of experts employed by the parties.
mitigates the deficiencies an arbitrator might have in this respect. The authors would not rule out an otherwise attractive candidate on this basis alone.

Ideally, the appointee’s temperament, reputation, and knowledge of the process will be such that he or she will work well and carry influence with the other arbitrators, particularly the presiding arbitrator. That is not to suggest that the party-appointed arbitrator should be someone predisposed to favoring the appointing party—a view sometimes advanced by practitioners accustomed to certain forms of domestic arbitration. Under the NAFTA, party-appointed arbitrators are not agents or advocates of the parties; instead, they are to be independent, in keeping with the international standard. An arbitrator who departs from that expectation risks being removed from office or, at a minimum, losing credibility with the presiding arbitrator.

In counseling a party, it is therefore more accurate and strategically more useful to posit that a party-appointed arbitrator should be someone capable of being sympathetic to the appointing party’s case who is also equipped to aid the presiding arbitrator in understanding the commercial and jurisprudential elements essential to that case.55

C. The Presiding Arbitrator

The presiding arbitrator will ordinarily have case-management and other duties that exceed those of the other arbitrators, such as enunciating procedural rulings throughout the arbitration and drafting the ultimate award.56 Matters of decorum, efficiency, and procedural fairness are often greatly influenced by the presiding arbitrator’s attitudes and instructions. That person should, therefore, have particular familiarity with the process and adroitness in blending the differing expectations that may arise from diverse legal cultures.

It is also commonplace and desirable in arbitrations involving a

55. Care should be taken to document any contacts with the prospective arbitrator that preceded appointment; good practice dictates that such contacts, if they are to occur at all, should be narrowly circumscribed and should involve no discussion about the facts or merits of the case. Under Article 14 of the Additional Facility Rules, any past and present relationships to a party must be disclosed by the appointee no later than at the first session of the tribunal. Additionally, Article 9 requires an arbitrator to “exercise independent judgment.”

56. See REDFERN & HUNTER, supra note 30, at 246; PRINCIPLES AND PRACTICE, supra note 30, at 230, 252-55.
state that the president have considerable background in international law. In combination with a capacity for clear writing, this attribute promotes authoritative awards likely to be helpful to the parties and non-parties alike.

VII. The Deemed Place of Arbitration:
An Important Juridical Anchor

A. In General

Modern international arbitration theory holds that each proceeding has a juridical “seat” often also referred to as the “place” or “situs” of arbitration. The NAFTA provides that Chapter Eleven arbitration is to be held in the territory of a NAFTA Party. Although not required by the language of the NAFTA, a locale in the third NAFTA state will often be designated in an effort by the tribunal to convey neutrality or as the basis of a compromise between the parties. Under NAFTA Article 1130, ordinarily the situs will also be in a New York Convention state.

The choice of situs is not merely a geographic designation influenced by the convenience of the tribunal and the parties. Under the prevailing view, the situs supplies the lex arbitri, i.e., that body of arbitration law that governs a range of important questions. Moreover, an award will ordinarily be deemed to have been rendered at the situs regardless of where the hearings occurred or where the award was signed; the courts of the situs, in turn, rule upon requests to vacate awards deemed rendered at the situs.

57. See Redfern & Hunter, supra note 30, at 77-91; Principles and Practice, supra note 30, at 52-55, 170-71.

58. At present, that qualification describes all NAFTA states. The requirement anticipates the potential for new NAFTA parties that might not be New York Convention members. The restriction, which is subject to contrary agreement by the disputing parties, is designed to facilitate enforcement of the award; the award for New York Convention purposes generally carries the national affiliation of the situs designated for the arbitration, in principle, irrespective of where the proceedings actually took place. See Redfern & Hunter, supra note 30, at 302-04; Restatement (Third) of the Foreign Relations Law of the United States § 487, cmt. b.


61. See generally Klaus Berger, International Economic Arbitration
B. Practical Consequences—The Metalclad Example

The jurisdictional implications and applicable law associated with traditional-seat theory were apparent in Metalclad. Vancouver, B.C. was designated as the situs. Accordingly, the lex arbitri was rooted in the Model Law as adopted in British Columbia. Although for practical reasons the proceedings took place in Washington, D.C., when procedural issues arose it was British Columbia’s Model Law (as augmented by the NAFTA and the governing rules) to which the parties referred when formulating procedural views. Similarly, under the prevailing view, it would be to that Law and the courts of British Columbia that a dissatisfied party would turn if seeking vacatur of the award.

VIII. Establishing the Initial Procedural Road Map: Organizational Meetings

A. In General

For numerous reasons, participants in a given international arbitration may not come to the process with shared procedural expectations. Modern arbitral practice therefore recognizes the utility of tribunal-conducted meetings occurring at various points before the hearing in chief. The specific procedural and clerical matters that such meetings address vary with the stage at which they occur and the complexity of the dispute. In general, they anticipate the subsequent phases of the proceeding by resolving issues that might later distract the parties and the tribunal.

62. Mexico, for example, sought to have the claimant’s reply entirely stricken on formal grounds related to the brief’s format. The claimant’s response called attention to, inter alia, the Model Law’s maxim that the parties are to be treated with equality and that each is to be given a full opportunity of presenting its case. See MODEL LAW, Art. 18. Mexico’s request was denied.
63. See id., Arts. 6, 34.
B. The Initial Meeting

It would not be unusual for the tribunal, soon after its composition, to gather the parties to hear an outline of their respective cases on the merits, and to solicit their views on the place of arbitration, whether the proceedings should be bifurcated, the extent and manner of discovery, and numerous clerical matters. As discussed in the following section, in Metalclad the question of confidentiality might well have been addressed at the first meeting convened by the tribunal; it was not, and the parties' differing expectations soon became manifest.

IX. Confidentiality as an Illustrative Preliminary Issue

A common but unwarranted notion exists that confidentiality shrouds arbitration in general, and a Chapter Eleven arbitration in particular. Were that true as a general proposition, there would certainly be laudable policies to support it. Yet, none of the rule texts relevant to Chapter Eleven proceedings in fact unambiguously support that view, and the precedent and arbitral practice familiar to the authors seem similarly bereft of any such axiom. Nonetheless, because Metalclad was the first Additional Facility case, the question had not been answered in the context of the Additional Facility Rules. Mexico, through a request for interim measures, placed the issue squarely before the tribunal.

The facts that touched off the interim controversy were as follows. One month after a July 1997 procedural meeting convened by the tribunal in Washington, D.C., Metalclad's CEO discussed in a

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66. Bifurcation leads to certain logically antecedent issues being briefed, argued and decided before others. The technique is often used to isolate for preliminary treatment questions of jurisdiction or liability. Thus, in the case of liability, the question of damages would be addressed in a subsequent proceeding, but only if liability is first established.

67. Wide-ranging discovery as practiced in U.S. federal courts is not the norm in international arbitration, although if the parties agree, they may submit to an analogous regime of their own design. See BERGER, supra note 61, at 430-31; REDFERN & HUNTER, supra note 30, at 330-34.

68. The UNCITRAL Rules make no reference to confidentiality, but do state in Rule 25(4) that oral hearings shall be held in camera unless the parties otherwise agree. Both the ICSID and Additional Facility Rules, (Rule 15 and Article 24, respectively), require that the deliberations of the tribunal be in private and remain secret.

69. Decisions were made on matters such as the filing time for memorial and counter-memorial, witness declarations, costs, official languages, and requests for and production of evidence.
conference call with certain shareholders and brokers some of what had transpired at that first session. Confidentiality had been discussed at the procedural meeting briefly and only regarding deliberations of the tribunal. Long before the case was filed, telephone conferences of the type involved had become a common practice for Metalclad.

Once apprized of the CEO's telephone briefing session, Mexico petitioned the tribunal for an order prohibiting disclosure of any information regarding the case. Mexico contended that Metalclad had already seriously breached the confidentiality rule with its CEO's disclosures. According to Mexico, all matters before the tribunal were sub judice and confidential.

When heard on the matter, Metalclad contested the existence of any implied obligation of confidentiality, noted the absence of any formal agreement on the subject, recounted Mexico's own conduct in contravention of the supposed rule, and questioned how such an order might be framed and enforced given existing legal regimes requiring disclosure of certain information. To a large extent adopting the views of Metalclad, the tribunal declined to issue the order that Mexico sought.

The president, nevertheless, expressed the view that limiting public discussion of the case to a minimum would conduce the orderly

70 In particular, Metalclad replied that Mexican officials—federal, state and local—had widely bruited about their views in the media on facts and theories of the case; that U.S. securities law obligated Metalclad, as a public company, to publicly disclose material information; and that no general rule of confidentiality was violated since none applied. Metalclad observed also that the requirements of the NAFTA, specifically Articles 1127 and 1129, in combination with the United States' Freedom of Information Act, ultimately made confidentiality illusory and difficult to enforce.

71 In his written procedural ruling, the president of the tribunal noted the following considerations: that the order requested by Mexico, and the documentation accompanying it, to the extent it engaged the tribunal's power to issue provisional measures of protection, did not meet the threshold requirements that the applicant party must demonstrate to be successful; that neither the NAFTA nor the ICSID (Additional Facility) Rules contain any express restriction on the freedom of the parties to publicly discuss the arbitration proceedings; that no general principle of confidentiality proscribed public discussion of the arbitration by either party; that no such limitation is written into major arbitral texts such as the UNCITRAL Rules or the draft articles on arbitration adopted by the International Law Commissions; and that Metalclad is obliged by U.S. security laws to provide material information to its shareholders. The President noted the oft-stated expectation that one of the reasons for recourse to arbitration is the avoidance of publicity. But he also pointed out that in the absence of an agreement between the parties, neither is forbidden from public statements.
unfolding of the arbitral process and enhance working relations between the parties.

X. The Written Pleadings

A. In General

Long before the oral hearing, the parties will have exchanged and submitted to the tribunal written submissions. Under the Additional Facility Rules, at least one such round occurs: the claimant’s “memorial,” followed by the respondent’s “counter-memorial.”\textsuperscript{72} If the parties so agree or the tribunal so requires, a second phase of written submissions precedes the hearing.\textsuperscript{73} In the nomenclature of the Additional Facility Rules, the second round of written submissions consists of the claimant’s “Reply” and the respondent’s “Rejoinder.”\textsuperscript{74}

B. The Memorial

The memorial is typically the claimant’s chief moving document. In an Additional Facility arbitration, the principal memorial components are dictated by Article 38 of the Rules, which requires “a statement of relevant facts; a statement of law; and the submissions.” It is not unusual for the written arbitral pleadings to carry various documentary proffers in support of the facts alleged (or denied). These include declarations of persons with personal knowledge of relevant events, correspondence, internal memoranda, and various forms of secondary support, such as newspaper articles or reports by NGOs. Additionally, expert reports on matters such as the content of applicable law, the extent of damages, and similar matters are often tendered as part of the written submission in question.

For the attorney formulating the memorial, the exigencies of case development often create dilemmas. In particular, early indications sometimes suggest a basis for propounding a theory of recovery, the success of which will nonetheless require concrete, firsthand support in place of what may at the time of pleading be plausible but undocumented information. A declarant, for example, may be reluctant to put his account in writing, may seek compensation for

\textsuperscript{72} Additional Facility Rules, art. 38.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
giving a statement, or may encumber the evidence with some other disability.

Should counsel limit the memorial to only those facts and theories of recovery that seem most unshakable, believing in the right to amend the claim as events later warrant? And if counsel does so, but later seeks substantial amendment to the claim, will that prompt a suspicion of "sandbagging"? The alternative, however, is to risk the negative implications that may arise if one or more factual premises underlying the claimant's theory of the case must be abandoned for lack of proof.

Such calculated risks are not exclusive to arbitration, but their evaluation is rendered more complicated by the unpredictable scope of discovery common to arbitration and the difficulties sometimes inherent in gathering evidence against a sovereign state within its own territory. Ultimately, counsel strikes a balance informed by intuition, the avoidance of extremes, and a healthy skepticism for uncorroborated sources.

XI. Post-Brief, Pre-Hearing Conferences: The Marshaling of Evidence and Related Matters

After the pre-hearing written submissions of the parties have been concluded, a conference designed to configure the hearing in chief is often held. This provides in particular an opportunity to accomplish the marshaling of evidence called for in both the Additional Facility and the traditional ICSID Rules. At such a meeting each party may be expected to specify the witnesses it intends to cross-examine at the hearing and, depending on the agreed upon format, anyone whose direct testimony it seeks to elicit; to outline the matters about which the potential witnesses will be questioned; and to address unresolved discovery issues.

In addition, a number of structural elements influencing the format of the hearing are best addressed before the hearing date arrives; these often have strategic implications and give rise to

75. Id., art. 40.
76. ICSID Arbitration Rules, art. 33.
77. Matters warranting careful thought include the manner of witness sequestration, the daily and weekly schedule, the order of oral presentations (opening and closing arguments), whether the parties should anticipate post-hearing briefs, and the question of how a record of the proceedings will be prepared and made available to the disputing parties.
vigorously maintained, differing views. For instance, if more than one language is being used, how will translations during witness examination be done? That is, will a translator provide simultaneous interpretation to the witness, or will it be done sequentially?

XII. The Oral Hearing

A. In General

Modern international arbitration rules acknowledge that, by agreement, the parties may relinquish the oral hearing, resting instead on their written submissions. Viewed solely in light of the costs involved, documents-only proceedings carry an obvious advantage. Yet, the opportunity to participate in an oral hearing is often chief among the expectations the parties carry into the arbitral process; by empowering either party to insist upon a hearing, leading rules texts acknowledge that reality.

78. The Additional Facility Rules, in Article 30, provide for two procedural languages to be used and, unless the tribunal decides otherwise, requires all instruments filed to be in both languages.

79. The distinction carries practical implications. First, in the event of sequential (consecutive) translation, the examiner must exercise special care in framing the questions, breaking them into comestible portions for the translator, and crafting the structure of the questions for maximum results. Second, sequential translation is more time-consuming. In Metalclad, the claimant requested that translation be simultaneous. Although each side had in common a fixed number of days and hours to present their cases, the additional time necessary for sequential translation would have disadvantaged the claimant because most of Mexico's witnesses required examination in Spanish. Mexico countered that only sequential translation would permit it to monitor the accuracy of translation. Solomon-like, the tribunal authorized sequential translation, but allotted extra hours to the claimant, if necessary, that, if taken by the claimant, would also be available pari passu to Mexico.


81. Depending upon the number of witnesses and documents, claimants can expend considerable resources of time and money in the preparation for and conduct of an oral hearing. Just the logistics of getting lawyers, staff, clients, witnesses, files, treatises, pleadings, documents, exhibits, computers and supplies to the place of the oral hearing can be overwhelming. In Metalclad, the claimant spent over $4 million getting from notice through post-hearing brief, with approximately $750,000 attributable to the oral hearing.

82. Both ICSID Rules texts establish a default preference favoring inclusion of an oral hearing. ICSID Rule 29; Additional Facility Rules, art. 36. The latter, for example, states that unless the parties "otherwise agree, the proceeding shall comprise two distinct phases: a written procedure followed by an oral one."
In the authors’ view, an oral hearing is essential to the claimant’s case. The claimant, after all, labors under the burden of proof and faces a sovereign opponent with considerable resources. Especially where witnesses of the Party respondent are also its officials or employees, the hearing may present the claimant’s only opportunity to test—in the presence of the tribunal—witness competence, veracity, and bias. And, just as important, a hearing allows the tribunal to question witnesses directly.

**B. Structure and Planning**

Under modern arbitral practice, the hearing need not be as cumbersome as its domestic litigation counterpart. In preparing for and participating in the hearing, experienced arbitration counsel harness the flexibility of the arbitral method, devising practices that take optimal advantage of the limited time allocated to each side. Many of these techniques will have been determined at the pre-hearing conference; some are unilateral and others are effectuated by agreement of the parties.

With sufficient planning, arbitration hearings can move forward apace; there is no jury and most arbitrators will have substantially digested the parties’ memorials before the hearing. Written witness statements often replace live direct testimony, so that witnesses appears, therefore, that either party—without the consent of the other party, or even despite its objection—can ensure that the tribunal convenes an oral hearing. One might envision a scenario in which the interpretation of documents constitutes the full essence of the claim, rendering an oral hearing superfluous. But even then, if an expert were used, for instance, wisdom might direct one to cross-examine the expert.

83. The burden of proof in international commercial arbitration is not defined with precision in leading rule formulae. In practice, it typically equates to a “balance of the probabilities,” although certain assertions of fact may in effect attract a heightened burden because, e.g., they run counter to a factual or legal presumption adopted by the tribunal. See Redfern & Hunter, supra note 30, at 249; Charles Brower, Evidence Before International Tribunals: The Need for Some Standard Rules, 28 Int’l Law 47, 49 (1994).

84. In the Metalclad case, each party was given an equal, finite amount of time to present its case. In such instances, counsel must artfully parcel his time among several tasks: opening, cross-examination, re-direct, and closing argument.

85. As to certain aspects of the case, for example, counsel might announce an intention to rest on the written submissions or, more dramatically, may abandon a theory of recovery rendered unsupported by witness unavailability. Bilingual counsel may elect to address witnesses in their mother tongue, thus eliminating the delay of consecutive interpretation.

86. The parties may agree to a common timeline of events or to other factual stipulations, which the tribunal will then regard as common ground.
submit only to cross-examination and re-direct, supplemented by the tribunal's own questions. Moreover, tribunals are generally regarded as having the power—indeed, the responsibility—to actively advance the proceedings; accordingly, they can be expected to discourage redundant witnesses, irrelevant cross-examination, and similarly wasteful methods.

Oral presentations by counsel generally open and close the hearing. Despite the lack of a set format for such arguments, some common features can be identified. A typical opening might highlight important common ground and concessions already evident within the opposition's submissions, outline a set of objectives, reintroduce broad themes, and restate counsel's theory of the case. Timelines, elements charts, and similar demonstrative aids are often employed.

Closing arguments typically occupy the final hearing days. They need not be, but often are, elaborate; much naturally depends upon tactical considerations and the apparent preferences of the tribunal.


88. Able to study the direct testimony in advance, each party (and, indeed, the witness to be examined) is afforded greater opportunity for thorough preparation.

89. A countervailing doctrine requires that each party be given a fair opportunity of presenting its case and tribunals that have made plain that each side has a fixed number of hours may be reluctant to question how a disputant has chosen to allocate its time. In general, however, the practitioner must resist any urge to present the entire case afresh. Members of the panel will have read the pleadings and documents before the hearing and will be put off by a rehash. What a tribunal expects is for both parties to cross-examine within the scope of the direct testimony provided in the witness statements and to question competence and veracity where appropriate.

90. Many aspects of international arbitration are subject to no fixed nomenclature. The authors tend to refer to the opening remarks as an "argument" rather than a opening "statement" because in Metalclad, at the time of the oral hearing, all direct evidence had been submitted, thus providing an occasion to argue both facts and evidence to the tribunal. And adducing support for the opening argument in the ensuing cross-examination segues nicely into a strong closing argument.

91. Counsel must gracefully navigate the boundary between a statement of such length that it becomes somniferous and getting into the record what the tribunal members will later read. Whether a post-hearing brief follows may give some guidance. If yes, then favoring terseness does not compromise the record. If no, risking the tribunal's ennui for an appropriate record may be the more judicious course.

92. In Metalclad, the tribunal invited the parties to offer a full treatment of the governing law and its application to the facts at hand. It also circulated to each party,
In general, closings integrate a number of elements. Counsel customarily attempts to show that the objectives initially set out have been fulfilled by underscoring important testimony, by suggesting plausible inferences available to the tribunal, and by demonstrating that the counter-party has failed to prove the facts it has alleged. Ordinarily, there is a linking of the established facts to the governing law; under Chapter Eleven that entails a treatment of the NAFTA’s text as amplified by international law.

A discussion of damages is customarily also a part of each side’s closing, although in highly complex cases involving intricate valuation models, counsel understandably may prefer to rest largely upon expert reports already submitted to the tribunal.

C. Party Intervention

Treated here for convenience is a distinctive feature of NAFTA investment arbitration—the right of a NAFTA Party to make submissions to the tribunal on a question of interpretation of the NAFTA. The provision would seem to rest considerable discretion in the tribunal to regulate the timing and manner of Party submissions. In particular, Article 1128 on its face grants no right to present oral arguments at the hearing (or at any other time), although
during the hearing, a common list of substantive legal questions on which it hoped to receive guidance. The parties addressed the questions both in closing argument and in their post-hearing briefs.

93. A related principle found in many formulae is set forth in UNCITRAL Rules, Article 24.1, which states, “Each party shall have the burden of proving the facts relied upon to support his claim or defence.”

94. NAFTA Article 1135.3 bars awards of punitive damages. The reference within that provision to “monetary damages,” strictly interpreted, might preclude an award based on unjust enrichment, a measure of recovery predicated upon a benefit conferred upon the host state rather than upon injury to the investor.

95. NAFTA Article 1110(2) establishes fair market value as the measure of recovery in cases of expropriation. It provides an illustrative list of factors bearing on that determination but dictates no single valuation method. Because the different valuation approaches can produce radically different recoveries, the appropriate method and accompanying assumptions are ordinarily vigorously debated. For a discussion of arbitral tribunal valuation practices, see William Lieblich, Determinations by International Tribunals of the Economic Value of Expropriated Enterprises, 7 J. INT’L ARB. 37 (1990).

96. Under Article 1129, non-disputing NAFTA states are entitled to receive copies of “the evidence that has been tendered to the Tribunal; and ... the written argument of the disputing parties.” They are thus able to remain informed of the interpretations relied upon by the disputants.

97. NAFTA Art. 1128.
the tribunal could certainly allow Party observations in that form.

A Party’s right to intervene may be a mixed blessing for a claimant. NAFTA Parties are unlikely to endorse interpretations and theories of recovery that enlarge their own exposure to claims. Their involvement in the process is nonetheless to be welcomed. During the seminal stages of NAFTA investment jurisprudence, Party submissions that agree on an interpretative point will presumably be helpful to the tribunal. And such submissions may provide an important check upon fanciful theories of recovery or treaty interpretations proffered by only one NAFTA Party.

In Metalclad, the principal method by which the Parties participated was filing, simultaneously with the disputing parties, post-hearing briefs—a subject that this Article now addresses.

XIII. Post-Hearing Briefs

A. In General

Leading rule texts do not address specifically the question of post-hearing briefs. The simultaneous exchange of such memoranda is nevertheless a common practice. The structure and content of post-hearing submissions will vary with circumstances, although it is not unusual for the tribunal to guide the parties by suggesting topics that remain underdeveloped. Length limits and narrow deadlines may accompany the tribunal’s invitation to address it in writing a final time.

B. The Advantages and Disadvantages

A post-hearing submission, if allowed, also provides an opportunity for a party to supply its views on the proper allocation of costs, typically a matter decided in the tribunal’s award. Although a common feature of the process, post-hearing submissions are not welcomed by all tribunals in all circumstances; counsel, too, must weigh the potential advantages and perils. For example, while additional memoranda may allow a disputant to encapsulate its case in a manner that regains momentum lost at the hearing, both sides will have that opportunity, and neither has in principle either a clarifying or correcting last word. Moreover, such submissions prolong the arbitration, defer the ultimate award, and add to costs. If the tribunal accedes to the procedure based on the request of only one party, that party’s failure to add appreciably to the tribunal’s
understanding of the case may be reflected in its allocation of costs.

From the tribunal's position, allowing some kind of circumscribed additional writing may on balance be beneficial. The disputing parties will likely be further inclined to consider that they have received a fair opportunity to present their respective cases, a sense of the process that discourages subsequent attacks on the award. In a complicated case, the parties' distillations may add to the common ground and may organize, in a coherent way, otherwise diffuse testimonial and documentary evidence.

XIV. The Award

A. In General

The standard model of arbitral practice contemplates that when the tribunal consists of three arbitrators, following the parties' final submissions, the arbitrators will engage in private and confidential deliberations during which each brings an independent and impartial assessment of the case to bear in collaborating toward a final outcome. Agreement by two of the three is required to form the award and, at least under some rules, a dissenting arbitrator is entitled to issue a dissenting opinion.98

B. Awards As Reasoned Instruments

Unlike the practice evident in some U.S. commercial sectors, Chapter Eleven proceedings lead to reasoned awards. The beneficial aspects of reasoned awards are several. They provide guidance to the parties, thus facilitating more informed policy development or business planning. They require the tribunal to advance detailed support for its rulings, thus discouraging awards arising merely out of a general sense of the equities. Finally, when authoritative, they help

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98. Article 53(2) of the Additional Facility Rules provides in pertinent part that "[a]ny member may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent." The parallel provision within the ICSID Rules is Rule 47(3). Like many rule texts, the UNCITRAL Arbitration Rules are silent on the questions of separate and dissenting opinions, which nonetheless have been a standard feature of Iran-U.S. Claims Tribunal Awards. See generally CHARLES BROWER & JASON BRUESCHE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 641 (1998); cf. GEORGE ALDRICH, THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 235 (1996) (analysis of a colleague's separate opinion).
develop the law and inform future tribunals facing similar issues.99
Ironically, the disadvantage of reasoned awards is that the endeavor
that leads to the above-cited benefits adds cost and sometimes
considerable delay to the process.100

XV. Enforcing and Attacking the Award

Not unlike adjudication in general, the international arbitral
mechanism is characterized by a tension between the competing
values of finality and quality control. Any possibilities for post-award
maneuvers delaying the effects of res judicata detract from finality;
however, to the extent that procedural and substantive review is
lacking, the potential for injustice enlarges. Influenced greatly by the
New York Convention, modern international commercial arbitration
law generally strikes the balance in favor of finality, provided a
modicum of jurisdictional and procedural integrity characterized the
proceeding in question. The bases for refusing enforcement of a
Convention award relate primarily to procedural irregularities and
arbitral competency, rather than to substantive errors.101

99. As a matter of juridical formality, no system of precedent operates in
international arbitral jurisprudence. Awards bind only the disputing parties. At
present, the publication of awards is unpredictable. A regime designed to
systematically inform decision-makers would thus require less haphazard publication
and collection of awards than has traditionally occurred. When published, the more
learned expositions of law and reasoning to be found therein tend to enjoy influence
in subsequent proceedings. NAFTA jurisprudence being embryonic, the question of
publication would therefore seem to have significant implications for legal
development. NAFTA Article 1137 and Annex 1137.4 address that issue, although in
a fragmented manner. In the Annex, Canada and the United States each authorize
publication of the awards involving them as parties. Mexico, by contrast, posits that
when it is a disputing party, the governing arbitration rules apply to publication of the
award. Yet the seemingly relevant Additional Facility provisions, Articles 53 and 54,
are silent regarding publication. The ICSID Arbitration Rules, Article 48(5),
preclude ICSID from publishing the award without the parties' consent; no
restriction, however, is imposed upon a party's publication of an award. The
UNCITRAL Rules state that "the award may be made public only with the consent
of both parties," though in context, that provision arguably applies only to the
tribunal, since the other six paragraphs of that article are clearly directed to the
tribunal. See UNCITRAL Arbitration Rules, art. 32(5). Consistent with the earlier
discussion regarding confidentiality, supra notes 68-71 and accompanying text, no
prohibition upon a disputing party's publication of the award—even when Mexico is
a party to the dispute—can be gleaned from the governing texts.

100. Tribunals are composed of professionals whose services are in demand. The
give and take of the drafting process, combined with tribunal members' competing
obligations, may account for several months.

101. The formulation found in the New York Convention's article V has been
replicated, with minor adjustments, in the Model Law, supra note 39. That text forms
For awards falling under the ICSID Convention, the internal annulment proceedings unique to that treaty serve the primary quality control function since, under the Convention, domestic courts are allowed only immunity from execution as a basis for not enforcing an award. The fact that some awards have been annulled under that Convention, understandably, has given rise to apprehension on the parts of certain participants and potential participants. Indeed, the uncertainty that the annulment mechanism engenders may be one influence causing a Chapter Eleven claimant to select UNCITRAL Rules arbitration when eventually the alternative becomes a proceeding under the ICSID Convention.

NAFTA's investment arbitration scheme as it relates to the award relies substantially upon the existing treaty framework, principally the New York and ICSID (Washington) Conventions.

the basis of statutes in approximately thirty jurisdictions, including Canada (separate provincial statutes and federal enactment) and Mexico; it uses the Convention-like grounds to both test set-aside motions (Model Law, art. 34) and to assess award enforcement actions (Model Law, art. 36). A relatively current list of Model Law states can be found at THE FRESHFIELDS GUIDE TO ARBITRATION AND ADR 163 (2d ed. 1999). The public policy exception offers the greatest potential for substantive vetting. But in practice it has been read narrowly. See, e.g., V. V. Veeder, The New York Convention in Common Law Countries and the European Union, in ASA, THE NEW YORK CONVENTION OF 1958, at 117, 126 (Conference Proceedings) ("To my knowledge, no English Court has ever refused to enforce or recognize a foreign arbitration award on the ground of public policy. Under English law generally, public policy is a narrow ground of defence . . . ."); see also PRINCIPLES AND PRACTICE, supra note 31, at 343-45 (surveying American case law as of mid-1996, concluding inter alia that public policy is not implicated by a mere misapplication of the law).

102. ICSID Convention, supra note 37, art. 52
103. Id., art. 55.
105. The present pattern of ICSID Convention membership among the NAFTA Parties precludes resort to arbitration under the Convention. Thus, Chapter Eleven claimants do not now encounter the dilemma. See supra note 36.
106. There are situations that the Inter-American (Panama) Convention would apply rather than the New York Convention. Mexico and the United States are Panama Convention participants; the U.S. reservation to the Panama Convention, apparently not altered under NAFTA, states that when the New York and Panama Conventions both ostensibly apply, the New York Convention will govern unless a majority of the disputing parties "are citizens of a state or states that have ratified or acceded to the Inter-American Convention and are member states of the [OECD]." See U.S. Reservation to Inter-American Convention on International Commercial Arbitration (done at Panama, Jan. 30, 1975), reprinted in PRINCIPLES AND PRACTICE,
Consequently, the pattern of award-related activities following a Chapter Eleven award ought not to vary greatly from the norm.\textsuperscript{107} Thus, as would be the case under modern rule criteria generally, perceived clerical errors and similar matters may be submitted to the tribunal for reconsideration.\textsuperscript{108} Under the Additional Facility and UNCITRAL options, actions to set aside\textsuperscript{109} the award are directed to the courts of the situs; enforcement of the award can be pursued directly at the situs, or elsewhere under the relevant convention.

Despite the standard pattern that the NAFTA's drafters apparently envisioned, the interface between the NAFTA and the New York and Panama Conventions might give rise to interesting interpretive questions. For example, NAFTA Article 1136 provides that "a disputing party shall abide by and comply with an award without delay." In pursuit of an exceedingly summary enforcement proceeding, an award recipient might argue that by this provision the losing NAFTA Party has waived any right to either seek vacatur of the award or to resist enforcement under the grounds found, for example, under Article V of the New York Convention. The facial appeal of the view is diluted by that Article's paragraph 3(b) which, in regulating the timing of enforcement, expressly contemplates that a dissatisfied disputant might attack a Chapter Eleven award in a domestic court. By parity of reasoning, convention refusal grounds should also be available to a disputant, though no express mention is made of such grounds in the NAFTA.\textsuperscript{110}

\textsuperscript{supra} note 31 at 861, 864.

\textsuperscript{107} The authors say "ought not" because the enforcement machinery related to a Chapter Eleven award has yet to be tested.

\textsuperscript{108} See, e.g., Additional Facility Rules, \textsuperscript{supra} note 37, arts. 56 (interpretation of the award), 57 (correction of the award).

\textsuperscript{109} "Set aside," "annul," and "vacate" are equivalent terms referring to award nullification, typically through domestic court proceedings applying statutory and, occasionally, non-statutory grounds.

\textsuperscript{110} That is, references to enforcement under the New York and Inter-American Conventions must impliedly incorporate the refusal grounds to which the enforcement provisions are ordinarily subject. In particular, it is difficult to imagine that the NAFTA Parties wished to leave no defense to enforcement when a tribunal manifestly exceeds its power by, for example, awarding punitive damages in violation of NAFTA Article 1135(3). One would expect that any such relinquishment of sovereign protection—especially by a departure from the existing operation of the arbitration conventions—would have been plainly set out in the NAFTA. Moreover, the alignment with the ICSID Convention that might be said to follow from the supposed waiver of refusal grounds is fictitious because the ICSID Convention, though establishing no list of refusal grounds available to domestic courts, has internal annulment provisions that provide an analogous quality control function.
XVI. Epilogue: Some Thoughts on Beneficial Tinkering

Although the present Chapter Eleven framework for the resolving of investor claims enjoys the traditional benefits associated with international arbitration, it carries the encumbrances of arbitration as well. It is adversarial, costly, time-consuming, and ultimately produces a winner and a corresponding loser, even in close cases in which both sides may have had more to gain by constructing a *via media*. The authors would endorse, therefore, a formalized requirement that the parties pursue mediation before resorting to arbitration. The potential benefits of a properly structured mediation requirement would be numerous; its potential detriments, by contrast, would be few and tolerable.

Institutionalizing pre-arbitration mediation would make involvement in that process predictable and neither side would fear the perception of weakness some associate with unilateral proposals to collaborate. Even if in a given case settlement is not achieved, mediation often clarifies the underlying issues. Moreover, partial settlements—whether formalized or not—may lead to a narrowing of the claims later presented to the arbitral tribunal, thus generating efficiencies throughout the arbitral proceedings. Existing procedural texts could be adopted with few changes, perhaps affording a choice paralleling that seen in the arbitration provisions.

For those disputants determined to obtain an award, a pre-arbitration mediation requirement would compromise that objective

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Thus, equivalence among the three regimes actually requires that the refusal grounds remain operational.

111. The duty to pursue mediation would be triggered by the filing of the notice of intent to file a claim under Article 1119. The mediator would be selected by ICSID and would be someone whose reputation would merit the respect of both disputants.

112. The potential for the process being abused by a tendentious disputant would be limited by placing a time limit on the exercise, waivable by the parties. The ninety-day waiting period is already built into the Chapter Eleven process; under Article 1119, mediation would occur during that period. The three year statute of limitations established under Articles 1116(2) and 1117(2) would be tolled during the mediation process, an effect that can be achieved without substantially amending existing provisions. The added cost detriment would seem to be outweighed by the potential for monumental cost savings in those cases where the process succeeds in settling the dispute.

only to the extent permitted by that party. Nothing, however, would prevent the parties from inviting the same mediator to reconvene them, for instance, after the first round of written submissions, submissions to which the mediator would have been privy. Indeed, in shadow mediation style, the mediator could be retained by the parties for the duration of the proceedings, so that even post-hearing collaboration could occur.

Ultimately, the success of such an initiative will depend more upon the quality of persons appointed to serve as mediators than upon the procedures chosen. The authors would favor a panel whose members were both familiar with mediation technique and, by training and reputation, able to offer authoritative substantive evaluation during the process.


115. Where the amount in controversy is large, the additional costs of employing the shadow mediator might seem particularly warranted when compared to the risks of the win-lose format characterizing arbitration.

116. The authors do not presume that the domestic mediation model developed in the United States can successfully be adopted without adaptation for investor-state disputes. *Cf.* W. A. Wright, *Mediation of Private United States-Mexico Disputes: Will It Work?*, 26 *N.M. L. Rev.* 57, 60-70 (1996) (discussing the importance of respected insiders and intercession in Mexican culture). Mediation, if nothing else, is inherently flexible. It also has a rich tradition in many societies. *See generally* KIMBERLEE KOVACH, *MEDIATION PRINCIPLES AND PRACTICE* 25-26 (2d ed. 2000). This includes, if incipiently, Latin American countries. *See* C. Hehring Netto, *Is There an Expanding Culture That Favours Combining Arbitration, Conciliation or Other Dispute Resolution Procedures?*, in *ICCA, INTERNATIONAL DISPUTE RESOLUTION: TOWARDS AN INTERNATIONAL ARBITRATION CuLTURE* 133, 135 (J. van den Berg ed., 1996) ("The culture of alternative dispute resolution schemes is spreading in Latin America, even if still somewhat hesitantly.").