April 30, 2003

ABA/CBA/BARRA MEXICANA JOINT WORKING GROUP ON DISPUTE SETTLEMENT

RECOMMENDATION ON NON-PARTY PARTICIPATION IN NAFTA C. 11 PROCEEDINGS

INTRODUCTION

The Joint Working Group on Dispute Settlement of the American Bar Association, the Canadian Bar Association and the Barra Mexicana has been examining the matter of the principles which ought to govern participation in c. 11 NAFTA proceedings by persons who are not parties to the dispute. This is a subject matter of present concern because, not only has the issue arisen in several cases, but also because it involves a number of important policy factors relevant to c. 11 proceedings. These include the party and party nature of the proceedings, the potential for issues of fundamental public policy to arise therein, considerations relating to timely disposition and costs of the litigation, confidentiality of materials and different approaches in the legal systems of the NAFTA partners and, most importantly, transparency and its consequent impact on the legitimacy of the process.

The Group has also been concerned with the ground rules that ought to apply where, as has already happened in several cases, participation in c. 11 proceedings by non-parties has been admitted by the relevant tribunal. In those cases, those who have sought to involve themselves have been in the main persons and entities with broad civil society concerns. While this is anticipated to represent a large proportion of those seeking to participate in c. 11 proceedings, the process cannot be closed to other interests. What criteria should therefore generally apply in these various circumstances? Moreover, the modalities of participation in proceedings are interwoven with some of the basic considerations pertaining to the matter of allowing participation by non-parties in the first place. They are therefore reviewed together.

BASIC CONSIDERATIONS

The Group recognized a number of basic considerations which form a sort of matrix within which the specific issues involved must be examined. Those include:

- the type of proceeding envisaged in c. 11, that is investor to state in respect of a specific investment situation
- the general nature of the proceeding as very like an ordinary commercial arbitration
- the time and expense element, particularly for the investor
- the public policy issues of special interest to the impleaded state
- the possible relevance of confidentiality particularly with respect to documents and evidence in the proceedings
- the possibility that broad public interests may not always be represented especially where the impleaded state has different specific concerns
- the acceptability of results where it may be felt public interest type issues have not received sufficient consideration
- the possibility that there may be specific interests of individuals potentially impacted by c. 11 proceedings.
- the trend in other international proceedings and domestic civil cases in the United States and Canada to permit *amicus* type participation
- the different approach in Mexican law based essentially on the confidentiality of proceedings in both civil and arbitral matters
- the fact that no *amicus* type involvement in civil cases is recognized by Mexican law.

One overriding consideration, always mentioned in this context, and which subsumes and extends beyond these various points is the objective of transparency – frankness, openness, obviousness and clarity both for the parties and for the interested public. Transparency gives credibility to the process and to the results in individual cases. It is an overarching theme.

The Group considered various alternative approaches such as excluding non-party participation, permitting it as of right and permitting it where allowed by the domestic rules of the jurisdiction impleaded. It felt, however, that current practice and the various factors outlined above dictated an approach that recognized the potential appropriateness of such participation as a general principle, but leaving to

each Chapter 11 Tribunal, subject to procedural guidelines, the decision as to whether, and to what extent, participation by non parties in particular proceedings is warranted.

THE LEGAL CONTEXT

Article 1120 of the NAFTA provides:

> **"Article 1120: Submission of a Claim to Arbitration**
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> 1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:
>
> (a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;
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> (b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or
>
> (c) The UNCITRAL Arbitration Rules.
>
> 2. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section."

Addressing the options set out in paragraphs (a) and (b) of Article 1120, l., participation by non-parties in c. 11 proceedings under the ICSID Convention or the ICSID Additional Facility Rules would not appear, as yet, to have been in issue. Tribunals constituted under them might be expected to be recognized as having inherent power over the conduct of their proceedings and to seek to ensure that all those with a real interest in the proceedings are heard.

Thus, there is left open in respect of cases where the ICSID Convention or the ICSID Additional Facility Rules might apply the possibility of a decision on non-party participation along the lines of those taken in the past by Tribunals applying the UNCITRAL Rules, the option under paragraph (c). Article 15 of those Rules, which has thus far been given a large and flexible interpretation, is as follows:

> "Article 15. 1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

It may be observed as well, in support of the liberal interpretation that has been given by NAFTA tribunals, that the provision has been interpreted to allow *amicus curiae* briefs in proceedings before the Iran-U.S. Claims Tribunal.

In relation to the broad legal framework that applies, the Group has therefore assumed for present purposes that some general guidelines respecting non-party participation in c. 11 cases that were endorsed by the NAFTA parties, although applicable in the main on the basis of past practice where the UNCITRAL Rules have been relevant, might also be sought to be applied by Tribunals where ICSID or the ICSID Additional Facility Rules are invoked.

EXAMPLES

The Group examined a number of examples of rules which could govern interventions, assuming they are in future admitted as they have already been in several c. 11 cases. These include certain proposals advanced by the European Community in another context but relevant here, the rules applied in the federal courts of the United States, and in Canadian courts, particularly the new rules established for interventions in the Supreme Court of Canada.

There are a number of common elements to these approaches including

- no absolute right to participate should be recognized, the matter being one of discretion for the tribunal
- the person seeking to participate should "add value" to the proceeding in the sense of raising points that might not be, or be inadequately, addressed by the parties
- there would be limitations according to the circumstances on written submissions in terms of timing, the issues to be addressed and whether they could address both law and fact
- whether in exceptional cases oral submissions might be made and their extent would also be a matter of discretion for the tribunal
- while access to documents has already been addressed by the NAFTA parties, there may none the less be a requirement for further tribunal discretion depending on a tribunal's assessment of the need for, and extent of, additional submissions.

SOLUTION

The Group felt that a solution promoting transparency without unduly delaying or diverting the c. 11 proceedings would be consistent with the broad

international context and the objects of the NAFTA. While reference to national rules depending on the state impleaded is an option, the Group felt, on balance, that it would be desirable to have an objective, standard procedure the modalities of which would be known and be readily accessible to potential participants and one that would not result in three different approaches the application of which would be dependent on geography.

The Group also assumed that it would be preferable, indeed realistic as a practical matter, not to envisage any change to the NAFTA, although the proposed Free Trade Agreement for the Americas could involve expanded rules in this regard. Rather there should be established clear principles set out in the form of guidelines to which the NAFTA parties could subscribe and to which c. 11 tribunals could look for direction in exercising the discretion that has currently been recognized to be available in such cases.

These guidelines would be along the lines of the draft attached and based on the following principles:

1. Participation by non-parties in c. 11 proceedings would be at the discretion of the relevant tribunal which ought to have the guidelines to mind in allowing participation as well as being sensitive to the importance of transparency to the legitimacy of the process.

Such participation should not unduly retard the arbitration, potentially severely prejudice a party, result in significant additional expense or raise issues completely unrelated to those put forward by the parties.

The person or group seeking to participate would have to establish a *prima facie* case that its participation will assist in the disposition of the case by bringing a new or refined argument to the context.

The Tribunal should exercise its discretion to set limits in relation to the examination or introduction of documents and evidence as may be dictated by confidentiality and the timely disposition of the case.

Submissions by non-party participants should be in writing but, in exceptional cases, oral submissions may be entertained, both subject to such restrictions as to the tribunal may seem appropriate.

Time limits for the various steps in non-party participation ought to be set out in the guidelines so that all involved in the process know what to expect and the process has a clear time line.

The Group has been moved to recommend the above approach because it will promote better and more generally acceptable results in c. 11 proceedings. In sum, guidelines subscribed to by the NAFTA Parties should provide a framework

whereby a person may be granted the opportunity to participate in c. 11 proceedings in circumstances where that person has an interest in the matter that is the subject of the arbitration or as a practical matter has an interest that may be impaired or impeded by its outcome or has special knowledge or representations that can contribute to an outcome that will be in the public interest.

RECOMMENDATION

Consequently, the Joint Working Group recommends the endorsement by the Bar Associations and consequent transmission to the NAFTA Parties of the following principle to be implemented in accordance with the draft Guidelines attached.

> "A Tribunal constituted under c. 11 of the NAFTA may admit as a participant in proceedings before it a person who is not a party to the dispute giving rise to those proceedings on such conditions as it may determine having regard to that person's particular interest in the matter in issue or to any relevant public interest, including broad policy concerns, that that person seeks to bring to the attention of the Tribunal."

The Joint Working Group, also recommends that, if endorsed by the Bar Associations, this principle, the Report and the draft Guidelines, before transmission to the governments, be reproduced in equally authentic French and Spanish versions.

The Joint Working Group

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for the ABA component

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for the CBA component

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for the Barra Mexicana component

April 30, 2003

APPENDIX

GUIDELINES FOR PARTICIPATION IN CHAPTER 11 PROCEEDINGS

1. A person seeking to be heard in proceedings before a Tribunal constituted under chapter 11 of the NAFTA may make application to the Tribunal at any time after it has been constituted, but no less than 30 days prior to the hearing of the matter in respect of which the application is made, requesting permission to be heard by way of participation in the proceedings.

2. An application to participate shall be accompanied by a statement setting out the following:

    (a) the applicant's interest in the matter, including any relationship it may have with either party,

    (b) a summary of the position the applicant proposes to take on specific issues of fact and law,

    (c) in what respects the position proposed to be taken by the applicant is likely to differ from that of the positions of the parties,

    (d) what special or additional contribution to the proceedings will be made if the applicant is permitted to participate, and

    (e) whether the applicant seeks to be accorded permission to make both written and oral submissions in the proceedings.

3. A tribunal, on receipt of an application to participate and having satisfied itself that the requisite information has been provided, shall communicate copies of the application to the parties who shall have ten days, or such other period as may to the Tribunal appear appropriate, from receipt to respond.

4. If the parties do not object to the application, or, if they agree subject to conditions which the applicant accepts, the Tribunal shall permit the applicant to participate or to participate on accepted conditions if it considers those conditions are otherwise not inconsistent with these Guidelines.

5. Where an application is opposed by either or both parties, they shall, within the time provided for a response, communicate their reasons in writing to the Tribunal and to the applicant and the applicant shall have five days, or such other period as may to the Tribunal appear appropriate, from receipt thereof to reply.

6. Subject to these Guidelines, where an application is opposed and following the expiry of the time for receipt of any reply, the Tribunal shall decide:

    (a) whether to grant the application and allow participation, and

    (b) where the application is granted, on what terms and conditions, including, but not limited to, the nature and extent of submissions, participation in the proceedings may take place.

7. A person who, upon application, is permitted to participate in the proceedings, becomes a participant and

    (a) may be permitted to examine the record in the case subject to such restrictions as the Tribunal may determine;

    (b) shall, where the Tribunal has provided for participation in writing and subject to any terms and conditions it has established, submit a memorandum to the Tribunal with copies to the parties setting out its position in no more than twenty (20) typed pages within such time as may be prescribed by the Tribunal; and

    (c) may, where the Tribunal has provided for oral submissions in addition to the written submissions described in paragraph (b), make such oral submissions immediately following the main oral submissions of the party whose position is closest to that of the participant,

    but the participant shall have no right to make further submissions, either written or oral, to adduce evidence, to examine witnesses, to secure costs or otherwise to participate in the proceedings except in special circumstances and as may be ordered specifically by the Tribunal.