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The Free Trade Commission Statements of October 7, 2003, on NAFTA's Chapter 11: Never-Never Land or Real Progress?

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On Tuesday, October 7, 2003, the NAFTA Free Trade Commission (FTC) issued a series of statements concerning the NAFTA Chapter 11 arbitration process. The Commission, composed of the trade ministers of Canada, Mexico and the United States issued a final communiqué on "NAFTA at 10", as well as specific texts on transparency in the Chapter 11 process. The agreed statements can be found at http://www.dfait-maeci.gc.ca/nafta-alena/celeb2-en.asp and at http://www.ustr.gov/.

In addition, Canada and the United States issued unilateral coordinated statements on public participation in Chapter 11 arbitrations, noting the need to continue working "with" Mexico on this issue before an agreed trilateral statement could be issued.

This brief comment on the statement will look first at what was not done here, then at what was done.

What was not done here?

What the Free Trade Commission did not do in its October statements was any further interpretive statement or note on the substance of the obligations on governments under Chapter 11 of NAFTA. The July 31, 2001, Interpretive Statement (http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp) addressed the interpretation of Article 1105 of NAFTA, as well as procedural matters. (See the IISD analysis at http://www.iisd.org/publications/publication.asp?pno=375) The current statements perpetuate the absence of agreed guidance from the FTC on the key issue of how to interpret Article 1110 on expropriation.

The three NAFTA Parties have established, in 2001, a trilateral Investment Expert Group composed of government officials to continue discussing Article 1110 and other issues of concern. The three NAFTA Parties have apparently not yet agreed on whether a statement is needed, let alone how it should read. This continues to give sustenance to

investors who wish to pursue broad readings of the expropriation provision, under which normal regulatory measures with an economic impact on foreign investors can be challenged under Chapter 11.[1]

What was done in the statements?

Of major concern to followers of Chapter 11 and other investment agreements are the three statements issued on October 7, 2003. Two of these were adopted by the three governments acting as the FTC, and one was issued simultaneously by just Canada and the United States. What is in these statements, and what might they mean in practice?

The first statement is the ***Statement of the Free Trade Commission on Notices of Intent to Submit a Claim to Arbitration***. The Notice of Intent is the first procedural step in initiating an investor-state arbitration under Chapter 11. Yet, Chapter 11 has no agreed format, and offers very limited guidance on the form or content of the Notice. The agreed statement seeks to rectify this by putting in place a standard format for these notices.

However, the text of the statement itself makes it clear that this is only a recommendation to investors, not a legal obligation. Indeed, such an obligation could only be created by an amendment to NAFTA. As such, a failure to use the form or to use it fully cannot create a legal barrier to the subsequent initiation of a formal arbitration.

The format attempts to impose a fairly high degree of "discipline" on the Notice of Intent. In practice, one might see some foreign investors shy away from some of this discipline, to prevent arguments arising later on (as already seen in some arbitrations) that an investor has altered the scope or legal grounds of the claim in a manner that deprives the tribunal of jurisdiction over some or all of the claim. While the specificity it seeks to evoke is valuable, it is unlikely to be successful if the NAFTA Parties subsequently use it to try to limit the scope of an arbitration. Thus, we will have to wait to see if this becomes an effective tool.

The second FTC statement is the ***Statement of the Free Trade Commission on Non-Disputing Party Participation***. In simple terms, it addresses the question of *amicus curiae* or "friends of the court" submissions. In August 2000, IISD initiated a process for seeking permission of the *Methanex v. United States of America* Chapter 11 to submit an *amicus* brief in that case. This approach was also followed by EarthJustice on behalf of itself and other NGOs. (A brief history and links to key documents are found at http://www.iisd.org/pdf/trade_methanex_background.pdf) The petition was opposed by Methanex and Mexico, but supported by the United States and Canada. The Tribunal issued a decision in January 2001 saying it had the jurisdiction to allow such submissions, and was "minded to do so". However, it did not do so at the time. (For a review of the decision, see http://www.iisd.org/pdf/2001/trade_reciel_methanex.pdf) The

[1] The *Metalclad v. Mexico* decision is the leading example of one that gives sustenance to this broad approach to interpreting Article 1110. Other cases, in particular more recent ones, have taken a narrower view. Ultimately, it is likely that certainty in this area will only come about with an official interpretive statement under Chapter 11 that will bind all future tribunals.

Tribunal has since, however, issued a procedural decision indicating it will issue a specific order for the submission of *amicus* briefs in that case.

This new FTC Statement follows on the direction of the *Methanex* tribunal, and that of the *UPS v. Canada* arbitration as well. Importantly, it brings Mexico into a consensus of the three NAFTA Parties that *amicus* submissions are a legitimate part of the Chapter 11 process. This change on Mexico's behalf is to be applauded.

As to the detail of the statement, it again puts in place a procedure that, like the Notice of Intent, can be described as a recommendation to Tribunals and litigating parties, but does not bind anyone legally. This can only be done by expressly including the procedure in the text of the Agreement, as the US did in its Free Trade Agreements with Chile and Singapore.

The details leave the Tribunal with a structured process for receiving *amicus* submissions and determining whether to accept them for the record. They ensure a transparent process for this for potential submitters, and for the arbitrating parties. From the perspective of an organization that has submitted a previous *amicus* request, there is little that seems inherently inappropriate here. Indeed, many of the issues to be addressed under the proposed process were directly addressed in the original IISD submissions in the *Methanex* case. The limit of twenty pages may be a point of contention, but not to the point of making the overall Statement objectionable. That said, what remains noticeably absent is an articulation of the timing for such submissions. This could be an important operational problem for potential *amici*. The ideal timing for submissions would be no sooner than after the litigating parties have made their initial legal pleadings and arguments; this is the schedule the *Methanex* tribunal has indicated it will follow.

Overall, therefore, and subject to an application of the Statement that respects its spirit of participation, this may be a welcome addition. That Mexico has joined in a consensus on this point is most welcome, and should be a persuasive factor in the event investors again challenge the ability of Tribunals to accept *amicus* briefs.

The **third Statement** is from Canada and the United States only, and concerns their commitment to have public proceedings in Chapter 11 arbitrations. In this case, it was not actually a joint statement, but two statements in similar terms issued by Canada and the US. Again, these are not binding on Tribunals. Indeed, previous Tribunals, including the *Methanex* tribunal, have ruled that without the consent of both arbitrating parties they cannot open the process to the public. Again, only an amendment to NAFTA could create a legally binding requirement here. (This is different from the potential to accept *amicus* briefs, which a tribunal can do without the consent of one or even both arbitrating parties.)

This being said, the statement does create at least a clear moral obligation for Canada and the US to actively seek open hearings in cases against them. This should create additional pressures on investors who seek to keep hearings closed, especially as the practice of having open sessions grows. To date, two tribunals have issued orders for their

proceedings to be open to the public, *Methanex v. United States* and *UPS v. Canada*. This statement should encourage more to do so.

Mexico's refusal to join its two NAFTA partners in taking this position stands as a loud and shameful refusal to recognize and join in a fundamental democratic principle of transparency in judicial and quasi-judicial decision-making on matters of public interest.

For those that remain opposed to the investor-state dispute settlement process, these statements will offer little by way of good news. The underlying law is not shored up in any way to reflect the serious concerns that continue to be raised, and the Statements do not legally alter the applicable procedures. Indeed, those opposed to the process would likely argue that by trying to address some of the more controversial procedural elements through what is essentially a set of recommendations, the statements may be seen as lessening some of the public concern in a superficial manner that avoids the real important issues.

For those who are not opposed to the notion of an investor-state process but concerned with its current design, these statements will be welcome developments. However, the degree of welcome will be directly proportional to how they are applied in practice by the tribunals and arbitrating parties, and how they are picked up in other negotiations in the hemisphere and elsewhere in international investment agreements. Much work remains to be done, however, before the totality of the underlying law and procedures of Chapter 11 become fully acceptable when judged by basic criteria of transparency, accountability and legitimacy.

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