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NORTH AMERICAN DISPUTE RESOLUTION

Session Chair – Paul Meyer
United States Speaker – Elliot J. Feldman
Canadian Speaker – John A. Terry

INTRODUCTION

Paul Meyer

MR. MEYER: Good afternoon. This is the session on dispute resolution. My name is Paul Meyer. I am sort of old and new to this organization at the same time. In 1982, I was a Canada-United States Law Institute Scholar to Western.¹ I date back pretty far into the program, but I am new in the sense that I am recently rejoining it. I am on the Advisory Board,² and I bring a different perspective than the trade perspective to some extent. I work in the General Counsel's office of a \$1.75 billion dollar publicly traded multinational corporation.³ Our clients are primarily Fortune 500 companies or their international equivalents.⁴ We specialize in workforce management.⁵ We are an actuarial firm.⁶ In fact, of the 300 largest corporate plans in the world, we serve as the actuarial consultant to about twenty percent of them.⁷ We also do human resource management consulting for companies in areas such as health care, investment advising for pension funds, and executive compen-

¹ See Canada-United States Law Institute, Executive and Advisory Board Biographies, http://cusli.org/about/bios/bio_meyer.html (last visited Sept. 14, 2009).

² *Id.*

³ See *id.* (briefly discussing Paul A. Meyer's current employment with Watson Wyatt Worldwide).

⁴ See WATSON WYATT WORLDWIDE, INC. ANNUAL REPORT (FORM 10-K) (2007), <http://www.watsonwyatt.com/investors/2007AR/downloads/form.pdf> (commenting on the Watson Wyatt's goals and potential clientele).

⁵ See Watson Wyatt, Our Firm – Putting Clients First, <http://www.watsonwyatt.com/ourfirm> (last visited Sept. 14, 2009) (describing Watson Wyatt's services).

⁶ See Watson Wyatt Global, Our History, <http://www.watsonwyatt.com/ourfirm/vision.values.asp> (last visited Sept. 14, 2009).

⁷ See *id.* (commenting on Watson Wyatt's history).

sation. Therefore, we have a fairly broad practice.⁸ We operate in literally every market in the world.⁹

My role in the General Counsel's Office essentially started with a focus in risk management. When we were a \$300 million dollar company, Watson Wyatt brought me in as a litigation guy.¹⁰ At that time, about a third of our litigation was in Canada.¹¹ A peculiar thing, particularly in the actuarial field, is that Canada for many years was the most litigious country in the world.¹²

In my role with the General Counsel's Office, I have been involved in managing litigation over the last fifteen years.¹³ Over the fifteen years, we began to see a different trend in our industry at the same time as the insurance industry. We started to see more and more actuarial malpractice claims.¹⁴ We found ourselves having to explain actuarial aspects of pension law or insurance law to juries in Louisiana, Connecticut, Michigan, and judges in places like Regina, Saskatchewan. These finders of fact really did not know what we were talking about when we discussed complex actuarial concepts.¹⁵

As we progressed in managing complex litigation, we became interested in the potential of arbitration as a way to get a panel that actually understood the subject matter of the claim. In the first test case we did, we were in a case that would have gone to jury trial. Our chief actuary and I convinced the mayor of the city to go to arbitration. We had the federal rules of evidence, we had full discovery, but we also had an independent tribunal. We picked one arbitrator, they picked one, and together we picked a judge. We had at least one person who knew what we were talking about and if they decided we were wrong, we could live with that. I actually tried it myself, and it was the last case I think I tried as primary trial counsel. At the end of the arbitration, the two actuaries on the panel understood what we said. They

⁸ See Watson Wyatt, Our Firm, *supra* note 5 (describing Watson Wyatt's services).

⁹ See Watson Wyatt, Global Locations, http://www.watsonwyatt.com/ourfirm/global_locations.asp (last visited Sept. 14, 2009) (listing every Watson Wyatt consulting office).

¹⁰ See Canada-United States Law Institute, Executive and Advisory Board, *supra* note 1 (stating Paul Meyer joined Watson Wyatt's litigation department in 1994).

¹¹ See Hoover's Profile, Watson Wyatt Worldwide, Inc., <http://www.answers.com/topic/watson-wyatt-company-holdings> (last visited on Sept. 15, 2009) (commenting on Watson Wyatt's prominent role in the North America during the 1990s).

¹² See generally Edward Andrew, John Robson & Owen Lippert, *Law and Markets: Is Canada Inheriting America's Litigious Legacy?* J. OF CAN. STUD. (1999) (commenting on Canada's increasing litigiousness).

¹³ See Canada-United States Law Institute, Executive and Advisory Board, *supra* note 1.

¹⁴ See William D. Hagar & Paul-Noel Chretien, *The Emerging Law of Actuarial Malpractice*, 31 DRAKE L. REV. 831 (1982) (noting that actuarial malpractice claims have greatly increased recently).

¹⁵ See generally *id.* (stating the actuary profession deals with complex business situations).

concluded that we were not liable for malpractice, but should have explained our work better, and ordered us to refund \$10,000 in fees while dismissing the \$3.5 million malpractice claim. When we interviewed the panel after the ruling we were surprised that the one judge on the panel had difficulty with the technical issues, even though they were straight forward from our perspective. This is consistent with our experience in court, where the former prosecutors that typically populate the bench often have difficulty with counterintuitive technical rules. In contrast, the two subject matter experts on the panel completely understood the subtleties of our technical explanation of what occurred.

This has driven us as a standard to accept arbitration as a dispute resolution model. In the handouts I put downstairs, there is an arbitration clause we put in our standard terms and conditions in North America.¹⁶ I have also worked in developing the standard that we use in the western hemisphere, the Asia Pacific, and the United Kingdom, but it all generally follows this approach. We do not believe that arbitration necessarily work well in any form, but it does work well if you put it together right. The way that we want to put it together, that makes sense for what we think will give us a fair shot of explaining our work, is an independent tribunal where we pick one and the other side picks one. Therefore, we know at least one person will have the subject matter expertise that we need. Another rule is there has to be a coherent body of law that they follow. In North America, we follow the ADR Institute of Canada Rules or the American Arbitration Association (AAA) rules.¹⁷ In other countries, I use the United Nations Commercial Trade Rules, the UNCITRAL rules.¹⁸

The final essential element is to have it administered by an organization that is in the business of administering arbitrations. In the United States, we typically choose administration by the AAA;¹⁹ and in Canada, the ADR Insti-

¹⁶ See generally *Watson Wyatt & Co. v. SBC Holdings*, 513 F.3d 646, (6th Cir. 2008) (concerning a dispute over Watson Wyatt's standard arbitration clause).

¹⁷ See American Arbitration Association, Dispute Resolution Services, <http://www.adr.org/drs> (last visited Sept. 15, 2009) (stating AAA is the United States largest alternative dispute resolution provider); see also ADR Institute of Canada, Who We Are What We Do, http://www.adrcanada.ca/about/what_we_do.cfm (last visited Sept. 15, 2009) (commenting on ADR's services provided).

¹⁸ See United Nations on International Trade Law, UNCITRAL Arbitration Rules, <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf> (last visited Sept. 15, 2009) (detailing UNCITRAL's arbitration rules).

¹⁹ See American Arbitration Association, About Us, <http://www.adr.org/about> (last visited Sept. 15, 2009) (stating the AAA performs dispute resolution services in the United States).

tute administers the arbitration.²⁰ In other countries, the International Center for Dispute Resolution administers the arbitration.²¹

We sometimes have to tailor this for different countries. We have come up with different versions for the People's Republic of China,²² and Indonesia,²³ but the same model drives the tailoring. This helps both in keeping the dispute as a private matter between the parties and preventing misinterpretation by media or other parties that lack the full context of what occurred. To sum up, we found that arbitration is not a perfect solution for all circumstances, and we still find ourselves like any big company from time to time in court, but it has worked for us, and we like the way the model goes.

This helps us keep talking to the clients, first by promoting mediation, but even if we are in arbitration, it is a different kind in a less adversary environment that we are usually in. Also, in arbitration, we have confidentiality that we would not have if we were on the docket of a court. Also, we have new clients who ask us to identify pending litigation. Well, if you are in arbitration that becomes a more manageable issue. We have found it is not a perfect solution and we still find ourselves like any big company from time to time in court, but it has worked for us.

Now, one thing I cannot really speak to is trade law or how this will fit into the North American Free Trade Agreement (NAFTA). We have a very qualified panel to do that. One thing I can speak to is the London Court of International Arbitration Rules.²⁴ One of the handouts I printed out is Article 6, which is the Arbitration Selection Rule of the London Court of International Arbitration (LCIA).²⁵ That is a rule that requires your arbitrators to be from a different country than the two parties in the arbitration in a case where you are in an international arbitration.²⁶ Now, from our perspective, that is anathema to what we are trying to achieve because we are trying to achieve

²⁰ See ADR Institute of Canada, *supra* note 17 (commenting on ADR's Canadian services provided).

²¹ See Global Arbitration Reviews, The Asia Pacific Arbitration Review 2008: Singapore, <http://www.globalarbitrationreview.com/reviews/5/sections/10/chapters/81/singapore/> (last visited Sept. 16, 2009) (commenting on arbitration forums in Singapore included the ICDR).

²² See generally Jones Day, Arbitration in China, http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S1603 (last visited Sept. 16, 2009) (detailing arbitration procedures in China).

²³ See generally Badan Arbitrase Nasional Indonesia, Objectives and Scope of Activities, http://www.bani-arb.org/bani_main_eng.html (last visited Sept. 21, 2009) (containing information about a leading arbitration service in Indonesia).

²⁴ See London Court of International Arbitration, The LCIA Rules, http://www.lcia.org/ARB_folder/ARB_DOWNLOADS/ENGLISH/rules.pdf (last visited Sept. 21, 2009) (detailing LCIA arbitration rules).

²⁵ See *id.* at 6 (detailing article 6 of the LCIA rules).

²⁶ See *id.*

subject matter experts. How can you do that if you are dealing with different countries?

For example, we are the investment adviser to a large pension scheme. If we are in a dispute with a pension scheme in the United Kingdom, an arbitrator qualified to practice in the United Kingdom could not appear under the LCIA Rules even if the subject matter would normally be governed under British pension law.²⁷ And it notes that our United Kingdom affiliate has an American parent, LCIA rules would preclude use of an American or a British arbitrator.²⁸ Therefore, you are dealing with United Kingdom legal issues, and United Kingdom customs and practices, and you have to go outside of the United Kingdom and the United States.²⁹ Yet, it gets worse. If you read Article 6, you will see that you cannot use anyone else in the European Union.³⁰ Now you cannot talk to anyone in the European Union who might have subject matter expertise. Can we look to Canada or Australia? We also have a wholly owned affiliate in Canada and Australia.³¹ Does that exclude Canada and Australia? Well, if it does, it also excludes the eighty or ninety other countries where we have affiliates.³²

Who is going to decide this dispute? It cannot be an Albania; they are in the European Union.³³ It might be an Egyptian. Under the LCIA Rules one could end up with kind of a ridiculous solution of you are trying to find people in an unrelated jurisdiction who understand the subject matter. This is inconsistent with a primary basis to choose arbitration, to have disputes resolved by people who are competent to understand complex issues, often based on local laws to ensure a just and reasonable resolution of a dispute.

Now, to make this more relevant here, I guess Elliot will be talking more about NAFTA and how arbitration works with NAFTA, and John will follow him.

²⁷ See *id.* at 11 (detailing that the law applicable in an arbitration (if any) shall be the arbitration law of the seat of arbitration and not the law of either party).

²⁸ See *id.* at 6 (detailing that where the parties are of different nationalities, a sole arbitrator or chairman of the Arbitral Tribunal shall not have the same nationality as any party).

²⁹ See *id.*

³⁰ *Id.*

³¹ See Watson Wyatt, Global Locations, *supra* note 9 (listing every Watson Wyatt consulting office).

³² See *id.*

³³ See generally *Albania Officially Submits EU Candidacy Papers*, EUBUSINESS, Apr. 28, 2009, available at <http://www.eubusiness.com/news-eu/1240921021.43/> (stating Albania has only applied to become a member of the European Union).

UNITED STATES SPEAKER

*Elliot J. Feldman**

MR. FELDMAN: Thank you, Paul. We asked Paul to say something about the London arrangement because that is the end point that I am going to talk about. The governments of Canada and the United States adopted the London rules to resolve softwood lumber disputes arising out of the Softwood Lumber Agreement.³⁴ He characterized it as “absurd,” and I think that is probably a fair characterization.

What I am going to say may help explain how we got there. I have promoted the reform of the North American Free Trade Agreement’s (NAFTA) Chapter 19 for many years.³⁵ I have brought with me a copy of a report we did. I litigated my first Chapter 19 case in 1989,³⁶ and I began to experience and understand both its strengths and weaknesses by 1991. In 2004, my firm, Baker & Hostetler, developed comprehensive analyses of both Chapters 19 and 11 for the Canadian-American Business Council, which organized its annual meeting around presentations of these reports.³⁷

* Elliot J. Feldman is the Leader of Baker Hostetler’s international trade practice. Dr. Feldman is a former Director of the Canadian-American Business Council and a former Special Project Officer and Consultant in the United States Department of Defense. He has been a Fellow of the Woodrow Wilson and Danforth Foundations, the German Marshall Fund of the United States, the Council on Foreign Relations, the Center for European Studies and the Center for International Affairs of Harvard University, and the Lincoln Institute of Land Policy. Dr. Feldman taught at Johns Hopkins University’s School of Advanced International Studies, the University of British Columbia, Brandeis, and Tufts Universities. He is the author of eight books. Dr. Feldman testified five times as an expert witness before the Standing Committee on International Trade of the Canadian House of Commons, twice on the Softwood Lumber dispute between Canada and the United States, twice on the future of NAFTA and its dispute resolution system, and once on the details of legislation pending before the House. His client advice on the Softwood Lumber Agreement has been selected by the Librarian of the Canadian House of Commons as a historic document.

³⁴ See John R. Crook, *United States and Canada Arbitrate a Softwood Lumber Dispute in the London Court of International Arbitration*, 102 A.J.I.L. 192 (2008).

³⁵ See generally CANADA – UNITED STATES LAW INSTITUTE, ANNUAL CONFERENCE PROGRAM 16 (2009), available at http://cusli.org/conferences/annual/annual_2009/documentation/2009_CUSLI_Conference_Program.pdf (commenting on Elliot Feldman’s extensive experience in the North American Free Trade Agreement).

³⁶ See *Fresh, Chilled and Frozen Pork from Canada*, NAFTA SECRETARIAT, March 8, 1991, available at <http://registry.nafta-sec-alena.org/cmdocuments/808bbbf-a78c-416c-9879-08e994c6bea7.pdf>.

³⁷ See THE CANADIAN-AMERICAN BUSINESS COUNCIL AND THE CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, INVESTMENT AND TRADE DISPUTES IN NORTH AMERICA:

Of the two, our Chapter 19 analysis was more important, for it went to the heart of NAFTA itself. For Canadians, NAFTA's purpose was to secure access to the United States market.³⁸ The United States rejected the idea that a free trade zone should not be encumbered by contingency protection measures such as countervailing duties and antidumping and safeguards, but was willing to compromise.³⁹ Without this compromise, there would not have been a free trade agreement.

Prime Minister Paul Martin in Canada liked our Chapter 19 analysis in 2004. His first address in the United States as Prime Minister in Sun Valley called for meetings among the three amigos to give Chapter 19 the new life we set out.⁴⁰ The United States, however, was not interested, and although Mexican President Vicente Fox publicly endorsed the Canadian initiative, American recalcitrance left it without traction.⁴¹ Our report, just shy of a hundred pages, detailed Chapter 19's weaknesses and proposed specific reforms.⁴² All the change necessary was possible without reopening NAFTA.⁴³

The United States, for example, could have moved the NAFTA Secretariat out of the Commerce Department, where it came dangerously under the Department's influence.⁴⁴ Canada could have declined collaboration with the United States to circumvent rules, for example, creating an illegal suspension

INSTITUTIONAL FAILURES AND GOVERNMENT APPREHENSION: DUTIES AND DUMPING: WHAT'S GOING WRONG WITH CHAPTER 19?, *available at* <http://www.for.gov.bc.ca/HET/Softwood/June%202004%20Paper%20by%20Baker%20%20Hos.pdf>.

³⁸ See BELAY SEYOUM, EXPORT-IMPORT THEORY, PRACTICES, AND PROCEDURES 26 (2d. ed. 2009) (stating NAFTA provided Canada with secure access to a large consumer market).

³⁹ See North American Free Trade Agreement, Chapter Nineteen: Review and Dispute Settlement in Antidumping/Countervailing Duty Matters, <http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtplID=152> (last visited Sept. 22, 2009) (detailing NAFTA's Chapter 19 provisions that include protective measures originally rejected by the United States).

⁴⁰ See generally Patrick Brethour, *NAFTA Needs Fixing, PM Says*, TRADE OBSERVATORY, July 9, 2004, <http://www.iatp.org/tradeobservatory/headlines.cfm?refID=36230> (commenting on Paul Martin's intention for NAFTA reform while speaking in Sun Valley, Idaho).

⁴¹ See Stephen J. Powell, *Expanding the NAFTA Chapter 19 Dispute Settlement System: A Way to Declaw Trade Remedy Laws in a Free Trade Area of the Americas?*, 16 LAW & BUS. REV. AM. 2 (Spring 2010).

⁴² See THE CANADIAN-AMERICAN BUSINESS COUNCIL AND THE CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *supra* note 37.

⁴³ See generally Chuck Dittrich, *Trade Policy Forecast*, NAT'L FOREIGN TRADE COUNCIL, Dec. 16, 2008, <http://www.nftc.org/newsflash/newsflash.asp?Mode=View&articleid=2012&Category=All> (commenting on the ability for NAFTA reform without reopening the agreement).

⁴⁴ See NAFTA Secretariat, *Frequently Asked Questions*, <http://www.nafta-sec-alena.org/en/view.aspx?x=283#What%20is%20the%20NAFTA%20Secretariat> (last visited Sept. 22, 2009) (stating that the NAFTA Secretariat is accountable to the NAFTA Free Trade Commission).

of an extraordinary challenge.⁴⁵ The United States could have made timely appointments to panels, and timely payments to panelists for their services. Canada could have refused the appointment of panelists who had been Commerce Department lawyers in NAFTA cases defending the United States. Reforms merely required a commitment to fix things, especially those that were not working because the Parties were not respecting the rules, the law, or their obligations. In the end, there was no such commitment.⁴⁶

Today, five years later, I have reached a different conclusion from my earlier optimistic view of reform. Despite the easy rhetoric that the Free Trade Agreement (FTA) and NAFTA did not contemplate resolving the American complaint over Canadian softwood lumber through Chapter 19, promoted by everyone from Gordon Richie to David Emerson who were eager to reach a settlement with the United States, the opposite is true. Arguably, Chapter 19's purpose was to resolve the softwood lumber dispute. It is simply false that Chapter 19 excluded lumber. It was not softwood lumber that alone broke the back of Chapter 19. The governments broke Chapter 19 through the lumber cases and others. Now, in my view, there remains only one conclusion: Chapter 19 is broken. There is a consequence for Canadians. Chapter 19 is now dangerous, and therefore we should probably abolish it.

I am going to present my remarks in three parts. First, I intend to show that all three dispute resolution mechanisms in NAFTA are effectively dead. Second, I will suggest that they represent an old agenda not usefully the focus of a serious or sustained effort to deepen Canadian-United States relations. Finally, I will suggest that Canada and the United States start over, in a different place, to build relations for the future. For this proposal, I will put the burden on Canada.

The most important of the dispute resolution mechanisms, what I already have suggested many analysts have deemed the essence of NAFTA is Chapter 19,⁴⁷ was created to resolve trade remedy disputes swiftly and outside national court systems that many Canadians thought to be biased.⁴⁸ Chapter 19 was to give North American businesses confidence in fair and swift jus-

⁴⁵ See *Ontario Forest Industries Association v. Government of Canada*, No. 06-989 (D.D.C. 2006).

⁴⁶ See generally Powell, *supra* note 41 (commenting on the deficiencies of Chapter 19 and possible reforms that could improve the dispute resolution process).

⁴⁷ See, e.g., Patrick Macrory, *NAFTA Chapter 19: A Successful Experiment on International Trade Dispute Resolution*, 168 C.D. HOWE INST. COMMENT. 1 (2002) (describing Chapter 19 as the centerpiece of NAFTA's dispute resolution process).

⁴⁸ See John R. Magnus, Tradewins LLC, Presented to American University, Washington College of Law Conference: Lessons from NAFTA Part I: The Softwood Lumber Dispute (Feb. 27, 2006), available at <http://www.worldtradelaw.net/articles/magnuschapter19.pdf> (commenting on the purpose of Chapter 19).

tice.⁴⁹ The United States, however, never liked Chapter 19,⁵⁰ and Canada did not long appreciate its unique value.⁵¹ Both governments eventually were willing to destroy it for what they considered higher priorities.⁵²

NAFTA Article 1904.14 provides that "The rules shall be designed to result in final decisions within three hundred fifteen days of the date on which a request for a panel is made."⁵³ As you can see from this first slide, Canada does not use Chapter 19 as much. Only four cases went to completion during the last eight years,⁵⁴ and parties only filed two more during that period, both terminating without decisions.⁵⁵ More recent Chapter 19 disputes in the United States have taken four years or more, typically much longer than dispute resolution in court proceedings.⁵⁶ The United States extended Chapter 19 into extraordinary challenges almost every time it lost a panel decision, predictably losing every extraordinary challenge,⁵⁷ while Canada, as a matter of principle, never exercised its extraordinary challenge rights.⁵⁸ These slides show the duration of these cases that were supposed to end in three hundred fifteen days by statute.⁵⁹

These are the extraordinary challenges the panel upheld every time except the last one, where the United States and Canada collaborated to suspend the proceedings,⁶⁰ something that I will not discuss at length now but would be happy to if you had questions. This is what happened with the lumber cases and how long they took to resolve, and how many in fact simply terminated with the softwood lumber deal. The United States even used the extraordinary challenge committee process to block an adverse panel outcome in softwood lumber, later to claim a victory in a case it actually lost while abandoning the extraordinary challenge.⁶¹ NAFTA panels originally had the cou-

⁴⁹ See Elliot J. Feldman, *The Next American President: Challenges for the United States and North America*, CENTER FOR UNITED STATES STUDIES AND MINISTÈRE DES RELATIONS INTERNATIONALES UNIVERSITÉ DU QUÉBEC À MONTRÉAL 3 (2009).

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See *id.*

⁵³ NAFTA Secretariat, Rules of Procedure for Article 1904, <http://www.nafta-sec-alena.org/en/view.aspx?conID=653&mtpiID=209> (last visited Sept. 28, 2009).

⁵⁴ See Feldman, *supra* note 49.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See David A. Gantz, *The United States and NAFTA Dispute Settlement: Ambivalence, Frustration and Occasional Defiance*, 06-26 AZ. LEGAL STUD. 356, 380 (2009).

⁵⁸ *Id.*

⁵⁹ See ELLIOT J. FELDMAN, NAFTA CHAPTERS 11, 19, AND 20, 1-5, (2009), available at http://cusli.org/conferences/annual/annual_2009/presentations/Feldman.pdf.

⁶⁰ See *id.* at 3.

⁶¹ See Feldman, *supra* note 49, at 4.

rage to challenge governments; eventually, outside of lumber, they deferred even when the law demanded that they exercise their own authority.⁶²

Although there are startling examples of Chapter 19's failures, by far the most important came through the 2006 softwood lumber agreement, where the United States stalled cases interminably and Canadians eventually were forced to pay one billion dollars to settle legal cases they had won before bi-national panels and in United States courts.⁶³ Just as a notation, the situation for Chapter 19 with Mexico is no better. The data is not entirely reliable because the Secretariat in Mexico does not maintain complete records, but as you can see from this slide, of nine cases brought since 2000, all by Americans, only two panels have reached decisions, none since 2004.⁶⁴ Canadians have not challenged a Mexican trade decision under Chapter 19 since 1996.⁶⁵ Four panels are still pending on behalf of American interests, one dating back to 2005.⁶⁶ Whereas five Mexican challenges to United States decisions at the beginning of NAFTA, in 1994 and 1995, were all completed in about eighteen months.⁶⁷ However, only one panel completed its work in less than two years since 1999.⁶⁸ Of twenty-six panels launched since 2000, only five seem to have completed their work as envisioned in the agreement.⁶⁹ Only one bi-national panel ever completed its work.⁷⁰

Chapter 19 was a gift to Mexico, effectively negotiated by Canada, which Mexico does not seem to have fully appreciated. Indeed the Mexican capitulation after years of conflict over cement, paying \$150 million to end the dispute with the United States, became something of a model for Canadians buying their way out of lumber, consequences of a failed dispute resolution system.

Some critics think Chapter 11, uniquely among the novel NAFTA mechanisms, has been a success, at least on its own terms.⁷¹ Three times, United States corporations extracted awards or settlements from the government of Canada, twice for several million dollars.⁷² The smallest award, in the

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See FELDMAN, *supra* note 59, at 4.

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ *See id.* at 5.

⁶⁸ *See id.*

⁶⁹ *See id.*

⁷⁰ *See id.*

⁷¹ See Elizabeth Whitsitt, *NAFTA fifteen years later: the successes, failures, and future prospects of Chapter 11*, INVESTMENT TREATY NEWS, Feb. 16, 2009, available at <http://www.investmenttreatynews.org/cms/news/archive/2009/02/17/nafta-fifteen-years-later-the-successes-failures-and-future-prospects-of-chapter-11.aspx>.

⁷² *See* Feldman, *supra* note 49, at 4.

Pope and Talbot case, penalized Canada for dilatory tactics.⁷³ However, the last time an investor won anything from Canada was seven years ago.⁷⁴ The United States government has managed to prevail in every case, even when, in more than one case, the law and facts seemed entirely on the side of the Canadian investor.⁷⁵ What critics perceived as a huge threat to governments frequently is now an expensive and protracted dead end for private interests.

Chapter 11's primary purpose was to protect Canadian and American investments in Mexico, where there is a history of government expropriation.⁷⁶ Canadian and American governments were both shocked and resentful to be the subjects of private investor complaints. Mexico, however, has been the subject of many more allegations,⁷⁷ and has been a little less successful than Canada or the United States in defeating them,⁷⁸ paying out over \$50 million dollars in three cases,⁷⁹ the most recent to Archer Daniels Midland in 2007 for \$33.5 million.⁸⁰

Still in all, of fifty-nine Chapter 11 cases filed against the three governments, investors have prevailed only six times. Three Canadian companies tried to recover financial losses from the softwood lumber cases through Chapter 11, arguing that the United States government had applied its trade laws unlawfully and had stolen from these companies hundreds of millions of dollars.⁸¹ The United States argued successfully, before a questionable consolidation tribunal that included the spouse of the President's first cousin, that the existence of Chapter 19 within NAFTA prevented Canadians from seeking damages resulting from the abuse of the trade laws. Thus, Canadian investors, according to the United States, and without protest from the government of Canada, have fewer rights than the citizens of other countries with stand-alone bilateral investment treaties with the United States.

⁷³ See APPLETON ASSOCIATES, BACKGROUNDER: NAFTA AWARD POPE & TALBOT, INC. AND CANADA 1-2, available at <http://www.appletonlaw.com/cases/P&T-Backgrounder.pdf>.

⁷⁴ See FELDMAN, *supra* note 59, at 6.

⁷⁵ *Id.*

⁷⁶ See Adnan Kagalwalla, *NAFTA Chapter 11 Tribunals and Their Impact on Signatory States: A Parallel Judicial System and Its Many Potential Dangers*, 3.1 ENTREPRENEURIAL BUS. L.J. 99 (1998).

⁷⁷ See Feldman, *supra* note 49, at 6.

⁷⁸ *See id.*

⁷⁹ *See generally* Lawrence Herman, *Trade Law Memo – Volume 4 Issue 4 – NAFTA Investment Disputes Grind Along*, CASSEL BROCK LAWYERS (2001), http://www.casselsbrock.com/CBNewsletter/Trade_Law_Memo_Volume_4_Issue_4_NAFTA_Investment_Disputes_Grind_Along (commenting on the low value of Chapter 11 payouts).

⁸⁰ See EIGHTEENTH MEETING OF THE NAFTA ADVISORY COMMITTEE ON PRIVATE COMMERCIAL DISPUTES, MINUTES 6, available at <http://www.nafta-alena.gc.ca/NAFTA/CMFILES/Meeting%20Minutes/Minutes-18th%20meeting-Vancouver.pdf>.

⁸¹ *See* Feldman, *supra* note 49, at 4.

Chapter 20's purpose was a formal and transparent replacement for behind-the-scenes diplomacy.⁸² Deployment was successful in the early FTA years. It was then Chapter 18, but subsequently abandoned.⁸³ More than a decade passed since either Canada or the United States convened a Chapter 20 panel.⁸⁴ Mexico filed a challenge to United States trucking policy in 1998.⁸⁵ The panel ruled in Mexico's favor in 2001.⁸⁶ In 2009, Mexico finally is resorting to retaliatory tariffs because the United States never respected the results of the Chapter 20 process.⁸⁷

Government leaders, occasionally urged to utilize Chapter 20 to revitalize Chapter 19, declined to use Chapter 20.⁸⁸ Instead, they reverted to resolving matters privately, or not at all.⁸⁹ The jury is no longer out. Leaders abandoned Chapter 20.⁹⁰ They manipulated Chapter 11 into a private investor protection diminished by its very presence as part of NAFTA.⁹¹ They crippled Chapter.⁹² Under NAFTA's rules, any party to trade remedy litigation involving the merchandise of one of the NAFTA parties has the right to remove the litigation from courts to a NAFTA Chapter 19 panel.⁹³ Whereas NAFTA panels had once accorded parties a fair shot at vindication against protectionist trade policies, now the parties established that the idea of swift and fair justice no longer exists. Canadian parties in the softwood lumber cases, for the first time in the history of the FTA and NAFTA, took one appeal directly to United States courts,⁹⁴ and a second to United States courts in

⁸² See JOHN KIRTON, NAFTA DISPUTE SETTLEMENT MECHANISMS: AN OVERVIEW 3-4 (2004), available at <http://www.envireform.utoronto.ca/publications/john-kirton/may27-2004.pdf> (commenting on the transparent procedures of Chapter 20).

⁸³ See Gantz, *supra* note 57, at 385 (commenting on FTA Chapter 18 as a model used for NAFTA Chapter 20).

⁸⁴ See WorldTradeLaw.net, NAFTA Chapter 20 Arbitration Panel Reports, <http://www.worldtradelaw.net/nafta20/index.htm> (last visited Oct. 5, 2009) (detailing the last Chapter 20 arbitration decision was issued in 2001).

⁸⁵ See *In the Matter of Cross-Border Trucking Services (Mex. v. U.S.)*, USA-MEX-98-2008-01 6 (2001).

⁸⁶ See *id.* at 81-82.

⁸⁷ See Mexico Trucker Online, *The Extreme Cost of Mexican Tariffs on US Businesses*, <http://mexicotrucker.com/the-extreme-cost-of-mexican-tariffs-on-us-businesses> (last visited Oct. 5, 2009).

⁸⁸ See Gantz, *supra* note 57, at 388-391 (explaining why Chapter 20 has fallen into disuse over the previous decade).

⁸⁹ See *id.* at 392.

⁹⁰ See generally *id.* at 388-391 (commenting on Chapter 20's disuse over the previous decade).

⁹¹ See generally *id.* (commenting on the purpose of Chapter 11).

⁹² See Magnus, *supra* note 48 (commenting on Chapter 19's flaws).

⁹³ NAFTA Secretariat, *Rules of Procedure*, *supra* note 53.

⁹⁴ See COALITION FOR FAIR LABOR IMPORTS, UNITED STATES- CANADA LUMBER TRADE DISPUTE: A BRIEF HISTORY (2009), http://www.fairlumbercoalition.org/doc/dispute_history.pdf.

order to confirm a NAFTA panel decision.⁹⁵ Canadian provincial governments, as a matter of principle, always removed to bi-national panels, but in lumber they had to concede that circumstances now exist when their interests might be better served outside NAFTA.⁹⁶

This repudiation of NAFTA, confirmed in the 2006 softwood lumber agreement's dispute resolution mechanism,⁹⁷ now presents a danger for Canadian interests. United States petitioners remove appeals to NAFTA panels, confident that the dispute will not be resolved for years, while Canadians deposit duties, which may not have legal authorization. As matters now stand with Chapter 11, Canadians might not be able to do anything about it. Although the Coalition for Fair Lumber Imports twice challenged Chapter 19's constitutionality,⁹⁸ today it is more likely to see Chapter 19 as a best friend.

The bilateral international agenda today is not the agenda of the 1980s. Then, the primary concerns were to eliminate tariffs and to facilitate the resolution of trade disputes. The concerns were to enhance trade, and to give the private sector and provincial and state governments greater voices in the resolution of disputes and in the charting of the continent's destiny.

NAFTA largely eliminated the tariffs.⁹⁹ It appears, however, impotent to arrest the protectionist trends arising from the United States Congress that threaten market access not only for Canadians, but also for all trade partners. Without recourse to Chapter 20 and confidence in Chapter 19, NAFTA appears to offer nothing special to assure free trade. Without a more functional Chapter 11, not handicapped by the agreement itself, it does nothing to attract foreign investment.

The bilateral Canadian-American agenda was never only about trade and commerce, but the FTA and the subsequent NAFTA seemed to suck the oxygen out of almost everything else. That is why, as the Government of Canada claims, it had to settle the softwood lumber dispute in such a brutal and costly way, to open up the bilateral relationship to other issues that it concluded were more important, particularly the Western Hemisphere Travel Initiative and the Security and Prosperity Partnership.¹⁰⁰

⁹⁵ See *id.*

⁹⁶ See generally *id.* (commenting on the history of the United States – Canadian Softwood Lumber Dispute).

⁹⁷ See Softwood Lumber Agreement Between The Government of Canada and The Government of the United States of America Art. 14, <http://www.dfait-maeci.gc.ca/controls-contrôles/assets/pdfs/softwood/SLA-en.pdf> (last visited Dec. 25, 2009).

⁹⁸ See Coalition for Fair Labor Imports, *supra* note 94, at 2.

⁹⁹ See, e.g., FedEx Trade Networks, NAFTA Solutions Questions, <http://fedex.com/us/customersupport/ftn/faq/nafta.html> (last visited Oct. 6, 2009).

¹⁰⁰ See United States Department of Homeland Security, *WHTI Land and Sea Final Rule*, http://www.dhs.gov/xlibrary/assets/whti_landseafinalrule.pdf (last visited Dec. 20, 2009); see

Canadians typically interpret their problems with the United States self-righteously. All the metaphors about elephants and mice,¹⁰¹ or sneezes and colds,¹⁰² rest on the idea that the United States is dangerous even when innocent, and Canada is always a victim. Whenever the United States has been willing to create equality through a rule of law, Canada eventually reverted to diplomacy. The hubris of the victim is that it suffers despite being superior. Canada's hubris is a belief that it can persuade the United States to appreciate it more, and outwit the United States at the negotiating table. Canada for its own sake needs to get back to rules, forget about sympathy, and recognize that the agenda has changed.

Today's bilateral agenda is about green technology and competition from Asia.¹⁰³ It is about energy independence and continental security on the ground, with threats more likely from individuals with dangerous luggage than from intercontinental ballistic missiles.¹⁰⁴ The agenda today is about avian flu that could kill thousands in a week and knows no borders or nationalities, not Asian flu that disables millions for days but rarely kills anyone.

NAFTA is ill suited for this new agenda. NAFTA says little about the threats at the border, preoccupied as it is with moving goods, not people, efficiently, and with getting across the border, not protecting it.¹⁰⁵ It is preoccupied with producing more energy, not with diversifying and not with cleaning up the environment. Canada's tar sands might compete admirably with Arab oil, and only when the price is right, but they do not improve carbon emissions. NAFTA is silent on public health,¹⁰⁶ and less and less for a Commonwealth, on the North American continent.

It is not that there is nothing worth saving or improving in NAFTA, but that NAFTA is the wrong architecture for the future. Instead of sighing in relief that President Obama has deferred further discussion of NAFTA reform, Canada should actively promote an alternative. Instead of talking about reform of the dispute systems, Canadians should welcome talking about something else entirely, and starting over again.

Some will draw a contrary conclusion from my analysis. They may agree that NAFTA has failed, but they would prefer enhancing what is left of Canadian and Mexican sovereignty. They see the United States as a threat to their independence. In my view, NAFTA's preservation of competing conti-

also The Security and Prosperity Partnership of North America, <http://www.spp.gov> (last visited Dec. 20, 2009) (commenting on the problems the Softwood Lumber Agreement creates for Canada).

¹⁰¹ See Feldman, *supra* note 49, at 6.

¹⁰² See *id.*

¹⁰³ See *id.* at 7.

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

mental sovereignties, which Chapters 11, 19, and 20 embrace, has become an obstacle to an institutional economic integration that is critical to the future success of all three countries.¹⁰⁷ The economy that has spiraled downward since last September has proved the reality, if not always the attraction, of globalization. Canadian-United States interdependence is inescapable, but largely unmanaged.¹⁰⁸ There should have been a coordinated, coherent North American response to the global financial crisis, but NAFTA has done nothing to enable one. As long as it is the dominant institutional feature on the continent's landscape, there will not be one.

NAFTA was once a bold, inventive beginning, an answer to conventional thinking. The dispute mechanisms were innovative; the inclusion of a developing country, politically and economically, in an exclusive trade area with much more developed countries, was almost experimental, and yet it worked. Today, however, NAFTA is the old convention. It contributes to our prosperity, but does not alleviate economic failure and stands in the way of the new agenda.¹⁰⁹ It sustains a status quo.

Statistics can be deceptive, and we cannot know what might have been without NAFTA. Perhaps the economic results could have been worse. Look at the data on these slides; trade grew with the rest of the world during the last decade, but it did not grow within the North American continent.¹¹⁰ It is reasonable to believe that if NAFTA were the success it should have been, the economic results should have been better, and we should be better equipped to deal with new challenges.

Just compare for a moment NAFTA's internal trade development during this decade, as measured through imports with Europe's. Europe's has been growing.¹¹¹ NAFTA's has not.¹¹² The task, I think, is to appraise the new century's challenges and decide what the parties, Canada, the United States and Mexico, want to do about them. A place to begin may be with President Obama's recent sketch for trade policy.¹¹³

It was short on trade and long on a comprehensive view integrating trade with energy, education, healthcare, and environmental protection.¹¹⁴ It proposed a new agenda in which an understanding of trade does not rest on trade alone. NAFTA occupies political as well as economic space. It has been too successful as a barrier to continental integration, helping preserve multiple

¹⁰⁷ *See id.* at 8.

¹⁰⁸ *See id.*

¹⁰⁹ *See id.*

¹¹⁰ *See FELDMAN, supra note 59, at 7.*

¹¹¹ *See id.* at 8.

¹¹² *See id.*

¹¹³ *See* On the Issues, Barack Obama on Free Trade, http://www.issues2000.org/2008/Barack_Obama_Free_Trade.htm (last visited Oct. 9, 2009).

¹¹⁴ *See id.*

sovereignties at the potential expense of mutual prosperity.¹¹⁵ It is time now to replace the 20th century agenda and figure out what to do about the 21st's.

Canadians have never had greater reasons to be suspicious about the United States than they have had over the last eight years. And yet, Canadians cannot afford the luxury of these justified suspicions. The alternative to deeper North American integration is not a splendid and prosperous isolation, but more a marginalization in the world economy and in world affairs.

Canada now has an opportunity for leadership, but only if it retires pre-occupying debates of the last two centuries. Canada must look not only beyond, but also for now, at least, away from NAFTA. The President has retreated on NAFTA. Canada should seize the moment and embrace President Obama's closing remarks in Ottawa on February 19, his call to "renew and deepen our relationship for the 21st century."¹¹⁶

The architecture of the world's institutions is undergoing profound change, mostly out of necessity. Change, however, is not necessarily the same as invention. The world's financial institutions have to be changed. Canada may provide a model. The world needs a new system for protecting the environment. The world's trading system will evolve and change; the world needs effective ways to combat terrorism. Instead of focusing on incremental change, Canada should declare itself for innovation. It should initiate partnership, not merely in an incremental commitment to climate technology, but in a new and comprehensive treaty for North America.

I am not the first to note what ought to be on the agenda: environmental clean-up linked to trade; green technologies at the heart of commerce; border security that is continental, trustworthy enough at the peripheries to relax the internal borders; financial institutions that at least coordinate in response to pressures from the rest of the world; and genuinely shared security burdens.¹¹⁷ The agenda should not be a compartmentalized list of assignments to different line agencies and ministries. Instead, we must see the agenda as a single responsibility that one treaty might address, one set of institutions coordinated and managed jointly. President Obama has proven already to be a remarkable listener and a flexible pragmatist. He does not have to create or own an idea in order to embrace it.

¹¹⁵ See ROBERT A. PASTOR, *BEYOND NAFTA: THE EMERGENCE AND FUTURE OF NORTH AMERICA I* (2007), available at http://www1.american.edu/ia/cnas/pdfs/workingpaper6_rp.pdf (commenting on the lack of continental integration under NAFTA).

¹¹⁶ See Prime Minister of Canada, President Obama and Prime Minister Harper Vow Joint Effort on North American Economic Recovery, <http://www.pm.gc.ca/eng/media.asp?id=2432> (last visited Oct. 9, 2009).

¹¹⁷ See generally *On the Issues*, *supra* note 113 (commenting on Barak Obama's agenda for his presidency).

As Jessica suggested last night, here is Canada's time and chance.¹¹⁸ Canadians have long imagined themselves greener, more environmentally conscious and socially responsible than Americans.¹¹⁹ Canadians trumpet the rule of law, but routinely retreat to diplomacy. They blame the United States for Chapter 19's failures, without acknowledging their own complicity.¹²⁰ Now, by embracing trade within a greater agenda, they can make themselves indispensable partners without retracing worn out paths.

Canadians like to tout international surveys claiming Canada to be a safer and healthier place to live than the United States.¹²¹ Now Canada should set out to prove it, not by contrasting itself, not by protecting itself as if the United States were diseased, but by being the source of pragmatic, cooperative ideas that could integrate the continent and make it more competitive. A new continental architecture fit for the 21st century is needed, not the reform of NAFTA. Thank you.

¹¹⁸ See generally Canada-United States Law Institute, *supra* note 35 at 21 (noting Jessica LeCroy's speech at the Canada-United States Institute's 2009 annual conference).

¹¹⁹ See *Little Drops, Big Ripples: Canadians are Concerned About What's Going Down Our Drains*, REUTERS, March 20, 2009, <http://www.reuters.com/article/pressRelease/idUS147420+20-Mar-2009+MW20090320> (commenting on Canadian concerns with the environment).

¹²⁰ See generally Gantz, *supra* note 57 at 383 (commenting on the problems the United States has had with NAFTA Chapter 19).

¹²¹ See Vancouver English Centre, Student Safety in Vancouver Canada, <http://www.vec.ca/english/2/safety.cfm> (last visited Oct. 12, 2009) (commenting on how Canada is safer than the United States).

CANADIAN SPEAKER

*John A. Terry**

MR. TERRY: As a Canadian, thanks for the challenge. I am going to disappoint people by not living up to the challenge, at least not this afternoon. You will have to give us a little more time to respond to the challenge.

During our great evening session yesterday, one of the speakers made a point about the rule of law, the importance of rule of law, the fact that Henry King and others at the Institute always focused on the centrality of that principle and its importance in Canada-United States relations.¹²² As a trade lawyer, as a Canadian trade lawyer,¹²³ I am a believer in the rule of law as much as anyone else. I have a lot of sympathy and support for the views that Elliot puts forward on his behalf, and really on behalf of Canada, because he does a lot of work on behalf of Canadians on some of these issues.

It is true that Chapter 19 has not functioned as it should have, but to some extent, again, as a Canadian who looks out and may be too pragmatic on these sorts of things, we have had that same experience with the World Trade Organization. We have had long battles with Brazil, for example, over aircraft subsidies.¹²⁴ We tend to find that despite the dispute mechanisms we have put into place, realpolitik tends to continue to play the role it has always or has traditionally played.¹²⁵ With respect to Chapter 19, I defer to you on

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¹²² See Canada-United States Law Institute, About the Institute – History, <http://cusli.org/about/history.html> (last visited Oct. 12, 2009).

¹²³ See Canada-United States Law Institute, Biographies – John A. Taylor, http://cusli.org/about/bios/bio_terry.html (last visited Oct. 12, 2009).

¹²⁴ See World Trade Organization, Dispute Settlement: Brazil Export Financing Programme for Aircraft, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds46_e.htm (last visited Oct. 12, 2009).

¹²⁵ See John H. Jackson, *The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligations*, 91 AM. J. INT'L L. 60, 61 (1997) (commenting on the role realpolitik had on a WTO dispute settlement).

that point, and frankly I do not practice that much in that particular area. I can see what is broken. I am not sure that the London Court of International Arbitration provisions in the softwood lumber fixed that in that context.¹²⁶ I agree with you on that.

With respect to Chapter 11, though, I am not so sure that I do agree that it is something that does not work. In fact, one of the benefits as we all know that we get from Chapter 11 is that individuals initiate it,¹²⁷ and cost consequences and various things might get in the way of those individuals bringing those complaints. However, those individuals are not going to engage in diplomacy. The individual companies will do what they can to lobby government to try to resolve the dispute, but in the end, if it is in the interest of those companies to go to dispute resolution, they will.

I am going to focus my remarks here on Chapter 11, bearing in mind that Michael did set the table for us this morning with his analysis in his discussion of Chapter 11.¹²⁸ I will try to avoid retreading that ground there. I want to focus on Chapter 11, where we are on Chapter 11, how we got there in terms of that dispute resolution mechanism, and what we predict for the immediate future with respect to some of the key issues dealt with under Chapter 11. Then, I would like to, consistently with what our panel description talked about, come up with a few recommendations. Again, as an archetypal Canadian, these are modest Canadian proposals as opposed to substantial “start-over” reforms. These are things that I, as someone who has practiced substantially in the area of Chapter 11 cases and also in bilateral investment treaty cases internationally,¹²⁹ believe are process questions that might deal with what I see as some of the key problems under Chapter 11.

To start, I would like to talk about where we are right now under Chapter 11. We are at more or less the ten-year mark of making decisions under Chapter 11.¹³⁰ The history divides into three periods, the first going back before the first decision and commencing from the date the North American Free Trade Agreement (NAFTA) was agreed to and put into effect: I call this

¹²⁶ See generally Office of the United States Trade Representative, Tribunal Finds Canada Failed to Cure Breach of the Softwood Lumber Agreement, <http://www.ustr.gov/about-us/press-office/press-releases/2009/september/tribunal-finds-canada-failed-cure-breach-softwood> (last visited Oct. 14, 2009) (commenting on a LCIA decision in a softwood lumber case).

¹²⁷ See North American Free Trade Agreement, Chapter 11: Investment, <http://www.sice.oas.org/trade/nafta/chap-111.asp#Sec.B> (last visited Oct. 14, 2009).

¹²⁸ See generally Canada-United States Law Institute, *supra* note 35 at 13 (stating Michael Lynk spoke earlier in the morning).

¹²⁹ See Torys L.L.P., Our Team: John A. Terry, <http://www.torlys.com/OurTeam/Pages/TerryJohnA.aspx> (last visited Oct. 14, 2009).

¹³⁰ See generally PUBLIC CITIZEN, TABLE OF “CHAPTER 11” FOREIGN INVESTOR-STATE CASES AND CLAIMS (2009), available at <http://www.citizen.org/documents/Ch11CasesChart-2009.pdf>.

the “sleeper” period. Then the next period, I call the “creative” period under Chapter 11. Finally, we are in a subtler period now. You can equate it to Picasso with his stages. I would argue we are settling into more of a mature, subtle Chapter 11.

The sleeper period took place in the negotiation of the NAFTA and immediately following that time because frankly I can tell you from the Canadian perspective I do not think more than a handful of people in Canada understood what Canada was agreeing to when it signed on to Chapter 11. From what I understand from people who were involved in those negotiations, Chapter 11 emerged initially from concerns that focused on energy and on Mexico.¹³¹ Once discussions began in earnest, they were broadened so that eventually, there was a complete table on investment,¹³² and then once during the negotiations, that naturally turned to more or less the United States model of bilateral investment treaty that had been negotiated by that time. At that time, from the Canadian perspective, there were only a handful of bilateral investment treaties that had been negotiated, and Canadians were very unfamiliar with the implications of these.¹³³

I remember at the time I was working with the Ontario government,¹³⁴ and both another young lawyer and I had been working at the time on constitutional negotiations because we were always involved in constitutional negotiations in Canada and dealing with the Quebec issue, et cetera. This other lawyer was working with the Ministry of Intergovernmental Affairs. I was working with the Attorney General.¹³⁵ Once the constitutional stuff was finished, we were turning our mind to the NAFTA issue and advising the Ontario government because the Canadian government was seeking input from the provinces.¹³⁶ This young lawyer I remember at the time was telling everyone, he was really the only person I knew who was focusing on Chapter 11, do you understand what this is going to mean? People would sort of nod their head and say, “we understand, but go back to your desk.” In any event,

¹³¹ See generally, PUBLIC CITIZEN, NAFTA’S THREAT TO SOVEREIGNTY AND DEMOCRACY: THE RECORD OF NAFTA CHAPTER 11 INVESTOR-STATE CASES 1994-2005 vii-viii (2005), available at <http://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf> (commenting on the background of NAFTA Chapter 11).

¹³² See *id.* at 1 (commenting on Chapter 11 rules regarding investment).

¹³³ See SICE: Foreign Trade Information System, Canada: Bilateral Investment Treaties, http://www.sice.oas.org/ctyindex/CAN/CANBITS_e.asp (last visited Oct. 16, 2009) (listing every Canadian bilateral investment treaty, with most occurring after the signing of NAFTA).

¹³⁴ See *Torys L.L.P.*, *supra* note 129.

¹³⁵ See *id.* (commenting on John A. Terry’s previous experience as a constitutional lawyer with the Canadian Government).

¹³⁶ See Chambers and Partners, Person Profile and Rankings: John A. Terry, <http://www.chambersandpartners.com/personprofile.aspx?cpk=403496&ssid=30856> (last visited Oct. 16, 2009) (commenting on John A. Terry’s previous experience in advising the Canadian government on NAFTA Chapter 11 issues).

this young lawyer' name was Barry Appleton.¹³⁷ He went out and wrote a book, *Navigating NAFTA*,¹³⁸ almost as soon as NAFTA came into force. Since then, he has made a NAFTA Chapter 11 career, not only for himself, but also many other Canadian government trade lawyers, and some trade lawyers for Mexico. It has been a very busy and fulfilling NAFTA career because he has been responsible for bringing the lion's share of Chapter 11 claims, particularly against the Canadian government.¹³⁹

Chapter 11 was asleep. We had the provision, the agreement. People did not really appreciate what it meant. What happens then, when people like Barry Appleton and others start getting involved and the more creative period starts? What you have at this point in time is that around the world bilateral investment treaties are beginning to be used by investors, typically for cases such as natural resource expropriations, or hotels being seized, those kinds of situations.¹⁴⁰ These are cases in which multinational corporations headquartered in developed countries are bringing claims against developing countries.¹⁴¹

What is unique about NAFTA is that for the first time we get bilateral investment treaties applied between two *developed* economies, each with a very creative and sophisticated bar of lawyers. We, as North American lawyers, start to look carefully at these provisions, and see them through a new lens, asking more than the typical question of 'has an investment been misappropriated?' We say, "Here is another level of review, maybe a last resort level of judicial review," or, "can we fit this measure within the framework of discrimination,"¹⁴² or, "here is this other clause, fair and equitable treatment."¹⁴³ That is a very broad clause. Let us really try to put this thing to work."

¹³⁷ See Appleton & Associates, Barry Appleton, http://www.appletonlaw.com/files/b_appleton%20bio.pdf (last visited Oct. 16, 2009) (describing Barry Appleton's practice area and previous accomplishments).

¹³⁸ Barry Appleton, *NAVIGATING NAFTA: A CONCISE USER'S GUIDE TO THE NORTH AMERICAN FREE TRADE AGREEMENT* (1994).

¹³⁹ See Appleton & Associates, *supra* note 137.

¹⁴⁰ See PUBLIC CITIZEN, *supra* note 130 (describing the situation around the early Chapter 11 cases).

¹⁴¹ See William S. Dodge, *Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australian-United States Free Trade Agreement*, 39 VAND. J. TRANSNAT'L L. 1, 4 (Jan. 2006) (discussing that Agreements which allow direct claims "invariably result in claims against those [developing] countries").

¹⁴² See Todd Weiler, *The Treatment of SPS Measures Under NAFTA Chapter 11: Preliminary Answers to an Open-Ended Question*, 26 B.C. INT'L & COMP. L. REV. 229, 239-244 (2003) (commenting on the non-discriminatory provisions within Chapter 11).

¹⁴³ See Patrick Dumberry, *The Quest to Define 'Fair and Equitable Treatment' for Investors Under International Law: The Case of the NAFTA Chapter 11 Pope & Talbot Awards*, 3 J. OF WORLD INVESTMENT 657 (2002) (detailing the developments in the proper interpretation to be given to the concept of "fair and equitable treatment").

That is the point where you start to see the interesting cases developing. The first case takes Canadian officials by surprise. Ethyl Corporation, a United States corporation,¹⁴⁴ which I understand was one of the inventors of unleaded gasoline,¹⁴⁵ engages NAFTA to fight a law in Canada that bans the imports and also regulates the intergovernmental trade of a gasoline additive.¹⁴⁶ They bring this claim for \$250 million and settle it for fifteen million dollars,¹⁴⁷ but not before the panel holds a jurisdictional hearing.¹⁴⁸ This established the first real case law in NAFTA, and not before various environmental groups and others awake to this. The first taste of Chapter 11 for the Canadian public or is a sense of a threat to Canada's environmental policy. In the public realm, this starts to frame the perspective of Chapter 11 that Michael talked about this morning.¹⁴⁹

There are two themes from this period. First of all, there is this theme that Chapter 11 is bad for the environment. Three of the key cases brought against each country are environmental cases. It begins with Ethyl¹⁵⁰ and then in Canada there is a second case, SD Myers.¹⁵¹ This is a case brought against the Canadian ban on the export of polychlorinated biphenyls, and it is successful.¹⁵² There is a case brought against Mexico, also another early case, the Metalclad case, which is about Mexico's decision to overturn an earlier decision with respect to a waste management site.¹⁵³ That is a successful case and has strong and broad words about what expropriation means.¹⁵⁴

Then of course there is the Methanex case that really becomes the poster child case through that era,¹⁵⁵ another case involving the ban on a gasoline

¹⁴⁴ E.g., Ethyl Corporation, Locations, <http://www.ethyl.com/About+Ethyl/Locations.htm> (last visited Oct. 16, 2009).

¹⁴⁵ See Michelle Sforza and Mark Vallianatos, *NAFTA and Environmental Laws: Ethyl Corporation v. Government of Canada*, GLOBAL POLICY FORUM, Apr. 1997, <http://globalpolicy.org/component/content/article/212-environment/45381.html>.

¹⁴⁶ See *id.*

¹⁴⁷ See Kavaljit Singh, QUESTIONING GLOBALIZATION 73-74 (2005).

¹⁴⁸ See PUBLIC CITIZEN, *supra* note 130, at 4 (commenting on Canada's loss in the jurisdictional hearing).

¹⁴⁹ See generally Canada-United States Law Institute, *supra* note 35, at 13 (stating Michael Lynk spoke earlier in the morning).

¹⁵⁰ See PUBLIC CITIZEN, *supra* note 130, at 4.

¹⁵¹ See *id.* at 5.

¹⁵² See *Canada (Attorney General) v. S.D. Myers*, [2004] F.C. 38 (Can.).

¹⁵³ PUBLIC CITIZEN, *supra* note 130, at 9.

¹⁵⁴ See Stephen L. Kass and Jean M. McCarroll, *The 'Metalclad' Decision Under NAFTA's Chapter 11*, CARTER LEDYARD & MILBURN LLP, Oct. 27, 2000, available at http://www.clm.com/pubs/pub-990359_1.html (commenting on the definition of 'expropriation' used in the *Metalclad* decision).

¹⁵⁵ See PUBLIC CITIZEN, *supra* note 130, at 2.

additive and the regulation of that gasoline additive.¹⁵⁶ Now that case is not successful: it is an example, as Elliot mentions, of the United States stellar record of defending Chapter 11 cases. The United States successfully defended that case.¹⁵⁷ In my view, that was also a very important decision, not just in that particular case because of the particular facts, because it helped to relieve some of this pressure that North American governments felt was being exerted on Chapter 11 as being something that was always going to be bad for the environment.¹⁵⁸

The second theme through this creative period was the creativity of lawyers coming in and convincing clients to take on big issues. In Canada, we had United Parcel Service going after Canada, Canada Post, and the entire system of international postal regulations.¹⁵⁹ We had claims being brought against United States bans in regulation of beef that had been allegedly contaminated by Mad Cow disease,¹⁶⁰ when the border ban continued longer than it should have.¹⁶¹

Also, you have the cases dealing with the lumber industry,¹⁶² and most dramatically the big claim against the countervailing duty system that Elliot was talking about.¹⁶³ All these cases in my view were cases that were ambitious cases, but when you looked at them in a hardheaded and objective light, which I would argue that the tribunals did in each of these cases, they were cases that were ultimately bound to fail. They were bound to fail if the system was going to work in a way that was going to be balanced, predictable, and based on the particular facts of this case and the particular provisions of the treaty.

I think Elliot and I would probably disagree in that respect on the decision in Canfor¹⁶⁴ and Tembec,¹⁶⁵ but I think it was a reasonable interpretation for the tribunal to come to. These cases, in my view, were overreaching cases, and it was not surprising that a number of these cases failed. The creative

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ See, *Adding Fuel to the Fire*, AM. LAWYER, Aug. 1, 2009, available at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202432562596&slreturn=1&hbxlogin=1> (commenting on the court's decision to uphold an environmental law against Methanex).

¹⁵⁹ See PUBLIC CITIZEN, *supra* note 130, at 5.

¹⁶⁰ See *id.* at 3.

¹⁶¹ See William Vitka, *United States Ban on Canadian Cows Ends*, CBS NEWS, July 18, 2005, available at <http://www.cbsnews.com/stories/2005/06/25/national/main704258.shtml> (stating the United States ban on Canadian cattle lasted for over two years).

¹⁶² See PUBLIC CITIZEN, *supra* note 130.

¹⁶³ See *id.* at 2-4.

¹⁶⁴ See United States Department of State, *Canfor Corporation v. United States of America*, <http://www.state.gov/s/l/c7424.htm> (last visited Oct. 19, 2009).

¹⁶⁵ *Tembec, Inc. v. United States*, No. 05-00028, slip op. (U.S. Ct. Int'l Trade Oct. 13, 2006), available at http://www.cit.uscourts.gov/slip_op/Slip_op06/06-152.pdf.

period affected public debate. People saw Chapter 11 as this bad, problematic mechanism that interfered with the proper exercise of government authority. I think that period has passed.¹⁶⁶

The other thing that happened is that Canada in particular, and to some extent the United States as well, became quite careful in the way it drafted its bilateral investment treaties with other states. This is very unfortunate, in my view, for people who practice in this area and particularly for investors. For example, we have a recent Free Trade Agreement that Canada entered into with Peru.¹⁶⁷ Also, Canada entered into a Foreign Investment Protection Agreement, what we call a FIPA or bilateral investment treaty, with Peru.¹⁶⁸ It is fifty pages long with fifty-two pages of reservations.¹⁶⁹ You compare that to the bilateral investment treaty between the Netherlands and Peru, a seven-page agreement.¹⁷⁰ Guess which one of those is a lot more effective in protecting the interests of Canadian multinational companies investing in Peru: the nice, clear, simple, short one.

I have a lot of appreciation as a lawyer working in this area for short, concise treaties; they are read and understood quickly and have effective provisions. The trouble is that now in Canada, because we got spooked so much by some of these NAFTA cases brought during the creative period, we bring in all these layers and layers of reservations and exceptions that when you are acting for an investor trying to enforce one of these treaties abroad, it becomes problematic.

The third phase that we are in now is this settled phase. I think we have dealt with a number of the key jurisprudential questions. Number one, the jurisprudence has settled on questions like environmental regulation. As long as a measure is nondiscriminatory and for a public purpose, it is not going to be expropriation.¹⁷¹ With the rejection of the Cattlemen's NAFTA

¹⁶⁶ See generally, Public Citizen, NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy, <http://www.citizen.org/publications/release.cfm?ID=7076> (last visited Oct. 19, 2009) (commenting on several problems with Chapter 11).

¹⁶⁷ See Foreign Affairs and International Trade Canada, Canada – Peru Free Trade Agreement, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/andeanandin/can-peru-perou.aspx> (last visited Oct. 19, 2009).

¹⁶⁸ See Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments, Can.-Peru, Nov. 14, 2006, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Canada-Peru10nov06-en.pdf>.

¹⁶⁹ See *id.*

¹⁷⁰ See Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Peru, Neth.-Peru, Dec. 27, 1994, available at http://www.sice.oas.org/Investment/BITSbyCountry/BITs/PER_Netherlands.pdf.

¹⁷¹ See EMMA AIBETT, LARRY KARP, AND CAROL MCAUSLAND, REGULATORY TAKINGS AND ENVIRONMENTAL REGULATION IN NAFTA'S CHAPTER 11 8 (2005), available at http://are.berkeley.edu/courses/EEP131/old_files/lectureNotes/CarolEmmafragment.pdf (stating the court in the *Methanex* decision upheld an environmental regulation since it was non-

claim, settled jurisprudence exists as to when you can bring a claim to have an investment in another jurisdiction.

There have been some findings with respect to damages and lost profits, which I think have made claimants more realistic in assessing their likely success of recovering damages.¹⁷² All of this adds to certainty, creates reasonable expectations that help in terms of parties interacting under this system.

The panel settled the costs issue in a reasonable way. You still do not know, if you are bringing a claim, whether you are going to have costs ordered against you. Many tribunals will just divide costs.¹⁷³ Some tribunals have awarded costs, and those costs awards can be very significant in some cases,¹⁷⁴ but I think that again sets the right balance. If an investor is going to engage this process with a claim that is not a meritorious claim or that is sort of in a gray area leaning towards non-meritorious, they have to understand there will potentially be very significant cost implications.

Another matter relatively settled is issue of judicial review of NAFTA Chapter 11 awards. Particularly in Canada there have been a number of cases in that area.¹⁷⁵ In my view, a fortunate result of that jurisprudence has been that the courts have applied the same deferential approach they always take to international commercial arbitrations by deferring to the decisions of these tribunals.¹⁷⁶ Chapter 11 has also survived a constitutional challenge in Canada,¹⁷⁷ and I do not know whether something like that might happen at some point in the United States, but we are fine at least on the Canadian side on that.

There are still many cases and I respectfully disagree with Elliot in terms of the robustness of the case activity that is out there. There are currently

discriminatory and for a public purpose).

¹⁷² See Jack J. Cole Jr., *Taking Stock of NAFTA Chapter 11 in its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1400-01 (2003) (commenting on the probability of non-recovery in Chapter 11 suits is high).

¹⁷³ See *Methanex Corp. v. United States*, SUBMISSION OF COSTS OF RESPONDENT UNITED STATES OF AMERICA 2 (2004), available at <http://www.naftaclaims.com/Disputes/USA/Methanex/MethenexUSsubReCosts.pdf> (stating that tribunals can apportion costs between parties if it determines the apportionment to be reasonable).

¹⁷⁴ See Whitsitt, *supra* note 71 (commenting on the high costs associated with Chapter 11 litigation).

¹⁷⁵ See Rajeev Sharma and Adam Goodman, *Ontario Court of Appeals Upholds NAFTA Chapter 11 Award*, THE AMERICAN SOCIETY OF INTERNATIONAL LAWYER, Feb. 2005, <http://www.asil.org/insight040214.cfm> (stating the Ontario Court of Appeals upheld NAFTA Chapter 11 awards in a few cases).

¹⁷⁶ *Id.*

¹⁷⁷ Martha, Peden, *NAFTA Tribunals are Constitutional*, CENTRE FOR CONSTITUTIONAL STUDIES, July 26, 2009, <http://www.law.ualberta.ca/centres/ccs/rulings/naftatribunalsareconstitutional.php>.

thirteen cases pending against Canada¹⁷⁸ on a wide range of topics ranging from a business that is being unfairly treated to challenges¹⁷⁹ to pesticide laws¹⁸⁰ to landfill site closings¹⁸¹ to milk-marking provisions.¹⁸² Parties are still bringing a range of different cases. There are currently fewer claims right now against the United States,¹⁸³ and the United States still retains its impressive record of victories.¹⁸⁴ The biggest concern from the United States counsel is what happens if we lose? It is nice to win cases, but as counsel you get more and more nervous when you win each one about what is going to happen the next time because you have a record to protect.

In my view, Chapter 11 is working in that respect. Another example I give in terms of working is we have had in Canada some recent examples of classic or arguably classic expropriation. Michael talked about this in the case of Newfoundland.¹⁸⁵ These classic expropriation cases are ideally suited to being resolved through the Chapter 11 process.

In terms of some of the future issues, one of immediate concern relates to the Buy American provisions and how Chapter 11 might relate to them.¹⁸⁶ This is something we are looking at carefully from Canada's perspective. I have a number of clients who have serious concerns because they are dealing with integrated investments across the border. They are finding that they are being potentially shut out of various contracts on the basis of Canadian content.

There was a previous case, the ADF case, a challenge by a Canadian investor that dealt with this area.¹⁸⁷ It is clear from that case that if it is a case of pure procurement, you cannot bring, for example, a discrimination case, a most favored nation case, or a national treatment case.¹⁸⁸ However, you

¹⁷⁸ Public Citizen, *supra* note 130, at 6-9.

¹⁷⁹ *Id.*

¹⁸⁰ *See id.* at 8 (stating Dow Chemical's challenge to Canadian pesticide bans).

¹⁸¹ *See id.* at 7 (commenting on V.G. Gallo's claim against Northern Ontario for blocking a potential landfill site).

¹⁸² *See generally id.* (commenting on every pending NAFTA Chapter 11 challenge).

¹⁸³ *See id.* at 1-4 (listing only four pending NAFTA Chapter 11 cases against the United States).

¹⁸⁴ *See id.*

¹⁸⁵ *See* NAFTA Claims, AbitibiBowater Inc. v. Canada, http://www.treatyclaims.com/NAFTA/News/Entries/2008/12/18_AbitibiBowater_Inc._v._Canada.html (last visited Oct. 20, 2009).

¹⁸⁶ *See* Anthony Faiola and Lori Montgomery, *Trade Wars Brewing In Economic Malaise: Outrage in Canada as United States Firms Sever Ties To Obey Stimulus Rules*, WASH. POST, May 15, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/05/14/AR2009051404241_pf.html (stating Canadian discontent over the newly enacted 'Buy American' provisions).

¹⁸⁷ *See* United States Department of State, ADF Group Inc. v. United States of American, <http://www.state.gov/s/l/c3754.htm> (last visited Oct. 20, 2009).

¹⁸⁸ *See* PUBLIC CITIZEN, *supra* note 130, at 2.

could potentially bring these types of claims if you are in a situation where the effect of the Buy American provisions has been tantamount to expropriation of result in egregious unfairness. In those kinds of situations, a claimant may potentially a claim under NAFTA Article 1105, Fair and Equitable Treatment,¹⁸⁹ or Article 1110, Expropriation.¹⁹⁰

There are also climate change issues that are going to be coming. Likely these will develop as a subset of the number of the environmental issues that are out there already in Chapter 11 cases. It is inevitable in my mind that climate change legislation will affect some business somewhere in a way that they feel violates Chapter 11 provisions. Even if governments are bringing state-to-state dispute resolution claims, there will be a general tendency among some investors not to want to wait for state-to-state diplomacy or state-to-state dispute resolution, but instead to bring their own Chapter 11 claim.

One of the interesting things I can see coming up in the next year or so is that Canada is likely to finally ratify the ICSID treaty, the Convention of the Settlement of International Disputes.¹⁹¹ This is interesting under NAFTA because, once Canada ratifies ICSID, then both United States and Canada are parties to ICSID.¹⁹² Why does that matter? It matters because if you look at the arbitral provisions under Chapter 11, right now there is no way a dispute can actually go to ICSID proper. We can take disputes to the ICSID Additional Facility Rules,¹⁹³ and we can have them decided under the UNCITRAL rules.¹⁹⁴ However, to use ICSID proper both parties must be parties to ICSID.¹⁹⁵

If an investor decides that it wants to go the ICSID route and there is a decision rendered by the tribunal, there is a specific procedure under ICSID for judicial reviews. This procedure is called the annulment procedure under

¹⁸⁹ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

¹⁹⁰ *Id.*

¹⁹¹ See ICSID CONVENTION, REGULATIONS AND RULES (2006), available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

¹⁹² International Centre of Settlement of Investment Disputes, List of Contracting States and Other Signatories of the Convention, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English> (last visited Nov. 5, 2009).

¹⁹³ See ICSID ADDITIONAL FACULTY RULES (2006), available at http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf.

¹⁹⁴ See United Nations on International Trade Law, UNCITRAL Arbitration Rules (1976), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>.

¹⁹⁵ See The Free Library, *Feds Near Ratification Of ICSID - Important Tool For Canadian Investors Abroad*, [http://www.thefreelibrary.com/Feds Near Ratification Of ICSID - Important Tool For Canadian](http://www.thefreelibrary.com/Feds+Near+Ratification+Of+ICSID+-+Important+Tool+For+Canadian) (last visited Oct. 27, 2009) (commenting on Canada's inability to utilize the ICSID Convention Rules until Canada ratifies the Convention).

which there is a further tribunal appointed through ICSID to deal with requests to annual ICSID tribunal decisions.¹⁹⁶ The threshold of review is much narrower than normal appellate review, but it is very similar to judicial review where a party makes an application to set aside an arbitral award under United States or Canada law.

As a result, once Canada ratifies the ICSID treaty, we potentially may have cases where the review of an arbitral decision is not by a court in Canada, if the arbitration is in Canada, and not by a court in the United States if the arbitration is there, but by a body that is not a court in either Canada or the United States. This could cause concern to the public in Canada because the argument would be that in Canada, not only do we have first of all this international arbitral tribunal deciding a key issue, but also now we cannot even review it by means of our own courts. There was some sense of safeguard in the case of the Metalclad case that at least there was a review under a Canadian court.¹⁹⁷ However, once the ICSID convention is ratified and if a party goes the ICSID route, there will be no review whatsoever by a Canadian or a United States court of that decision.¹⁹⁸

In terms of recommendations, my general sense is that NAFTA is working. We have gone through a lot of bumps and are now at a settled stage. We are also moving into an area where the old idea of a bilateral investment treaty being between developed and developing states is changing all over the world.

We also have trade negotiations that are about to commence between Canada and the European Union.¹⁹⁹ There may well be investment provisions that are contained in that treaty should it come to pass. This all suggests that you can have bilateral investment treaty provisions between developed countries, such as NAFTA, that can work very well.

I want to put on the record the following recommendations. Number one, the NAFTA parties should consider, and Canada and the United States in particular should consider, whether they really want to have parties going an ICSID route where there would be no Canadian and United States review. I do not think any of the governments involved have really turned their mind to that issue. I think they should consider whether they want the ICSID An-

¹⁹⁶ See ICSID CONVENTION, REGULATIONS AND RULES, *supra* note 191, at 26-27.

¹⁹⁷ See PUBLIC CITIZEN, *supra* note 130, at 9-10.

¹⁹⁸ See J. Anthony VanDuzer and Anthony Daimsis, *A Closer Look at Canada's Imminent Accession to the ICSID Convention*, 35 CANADIAN COUNCIL INT'L L. BULL. 4 (2009) (stating that if Canada ratifies the ICSID Convention, Canada will not have recourse to any eventual awards in domestic courts).

¹⁹⁹ See Foreign Affairs and International Trade Canada, Canada-European Union: Comprehensive Economic and Trade Agreement (CETA) Negotiations, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu-report-intro-can-ue-rapport-intro.aspx> (last visited Oct. 27, 2009).

nulment Procedure to apply, or whether they want to agree that the current process of review by the courts of the place of arbitration should continue to apply.

Number two: one of the things that I find working in this area is that the investment arbitration is an expensive and very long process.²⁰⁰ Part of this is because you often get a bifurcation between jurisdiction and merits in many of these cases. The typical respondent state approach is to bring a jurisdictional motion arguing that there is not a proper investment or for some reason the tribunal does not have jurisdiction.²⁰¹ This can often mean that a case takes an extra two years longer than it should.

This is great for lawyers. Clearly, it means more hours and more legal fees. It equally clearly has no benefit for investors and clients. In that respect, I would propose that a rule be adopted creating a presumption that jurisdiction and merits should be heard together unless it is clearly not in the interest of the particular dispute to do so – basically something that would shift the onus to the person wanting to bifurcate the two proceedings to show that it was unfair to hear them together. For example, if the case against the tribunal taking jurisdiction is very strong, it may make no sense for both parties to invest substantial effort in developing their arguments on the merits argument. I would have some sort of onus shifting provision there that forces parties to blend together jurisdiction and merits unless they could establish that it was not the appropriate way to do it.

Also, under Chapter 11, there are two procedures you can use.²⁰² There is an ICSID procedure, which right now is the ICSID Additional Facility Rules,²⁰³ or there is the UNCITRAL procedure.²⁰⁴ Many parties will go for the ICSID route because there is the secretariat based on the World Bank that can help you administer it.²⁰⁵ The UNCITRAL route has a lot of benefits to it, and it is a better route for bringing these cases typically, but there is no secretarial support and there is very little in the way of backup if the other party isn't cooperating. It would be very useful for the parties, if the governments agree and I appreciate it might not be in their interest to do so, to

²⁰⁰ See Peter Clark & Gordon LaFortune, *Why Can't NAFTA Chapter 11 be More Like the WTO?*, TRANSN'L DISP. MGMT., May 2004, available at <http://www.transnational-dispute-management.com/samples/freearticles/tv1-2-article39a.htm> (commenting that Chapter 11 cases can be a long process because of jurisdictional issues).

²⁰¹ See generally *id.* (commenting on delays in Chapter 11 cases caused by jurisdictional issues).

²⁰² North American Free Trade Agreement, *supra* note 189.

²⁰³ ICSID ADDITIONAL FACULTY RULES, *supra* note 193.

²⁰⁴ United Nations on International Trade Law, *supra* note 194.

²⁰⁵ See International Centre for Settlement of Investment Disputes, Organizational Structure of ICSID, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame &FromPage=Organization%20and%20Structure&pageName=Organization> (last visited Oct. 28, 2009).

establish a dispute resolution institution that could support NAFTA Chapter 11 claims brought using either the ICSID or UNCITRAL routes. This would of course require the cooperation of ICSID, which has its own secretariat and establishes its own procedures.²⁰⁶

On the ICSID side, one of the problems when you bring an ICSID proceeding is you bring your request for arbitration, which is essentially your statement of claim.²⁰⁷ Then there is no requirement from the other party to provide a statement of defense right away.²⁰⁸ If the respondent brings a jurisdictional motion, you have to deal with that jurisdictional motion, and you do not see a statement of defense sometimes for two or three years later. Therefore, you do not really know what case you have to meet. In the meantime, you are spending a lot of money and a lot of time just trying to get through the jurisdictional issue. I would like to see the ICSID rules reformed so they would be more like the UNCITRAL rules where you file your request for arbitration and the respondent must file its statement of defence forthwith.²⁰⁹

The other thing that I, as an investor lawyer, find of concern is the limitation periods that currently exist. This is probably something that moves beyond mere process to substance. There is a three-year limitation right now,²¹⁰ and it becomes very complicated and technical for an investor because you have to give six months notice before you actually commence a claim.²¹¹ If an investor has waited for more than two-and-a-half-years after the date it should have been aware of the loss and it has not yet given notice, it is effectively out of luck because the six months will take them past the three-year period. I am aware of cases in which that has tripped up investors, and in my view, it would be very helpful to clarify the provisions around that either to extend the limitation period or simply to provide more clearer precedents and examples for investors that are contemplating bringing these claims. In the end, if the investment treaty mechanism is going to work effectively you need to have it done in a way that simplifies the procedures as much as possible and makes them less costly. These are a few modest proposals, and I look forward to questions. Thanks.

²⁰⁶ See International Centre for Settlement of Investment Disputes, *supra* note 191.

²⁰⁷ See International Centre for Settlement of Investment Disputes, How to File a Request, <http://icsid.worldbank.org/ICSID/ICSID/HowToFileReq.jsp> (last visited Oct. 28, 2009) (stating that the request must contain information that indicates there is a legal dispute, between the two parties, arising directly out of an investment).

²⁰⁸ See generally ICSID ADDITIONAL FACULTY RULES, *supra* note 193 (indicating the ICSID rules do not contain any provisions requiring the opposing party to provide a statement of defense in a timely manner).

²⁰⁹ See United Nations on International Trade Law, *supra* note 194, at 13-14.

²¹⁰ North American Free Trade Agreement, *supra* note 189.

²¹¹ *Id.*

DISCUSSION FOLLOWING THE REMARKS OF ELLIOT J. FELDMAN
AND JOHN A. TERRY

MR. MEYER: Thank you very much. I have a question for either of the panelists. I looked at Elliot's scorecard of the cases brought, and I agree with him in that he has only shown the Chapter 11 cases where it went beyond the notice of intent, because in a lot of these cases, the notice of intent is filed, and basically that is the end of it because the client does not want to get into the more costly part of the process, which is pleadings, et cetera.

Now, if I look at this document, since the North American Free Trade Agreement (NAFTA) came into effect fifteen years ago, twenty-eight cases went beyond the filing a notice of intent,²¹² and I filed notices of intent that were two pages.²¹³ It is not a big deal. Thirteen cases were brought against the United States,²¹⁴ four against Canada,²¹⁵ and eleven against Mexico.²¹⁶ There were twenty-eight cases over the last fifteen years.²¹⁷ As I understand it, six of them went to cash awards against the government. Over fifteen years, once every two-and-a-half years, we have a government paying out.

John, your conclusion intrigues me because you seem to be saying that you still think this thing is for real. I have to tell you as a practitioner I do not think this thing is for real. Parties file many notices of intent and then do not follow up. The environmental movement always focuses on the notices of intent, and then it looks like the sky is falling. There is a lot of bluffing here, and there is a lot of the little boy crying wolf, and at some point, the process loses credibility. I think it has lost credibility.

One of the reasons that it does not go beyond the letter of intent stage is because in Canada, lawyers do a lot of this work on a contingency fee basis. When lawyers try to shop it and get another law firm to take the case and to actually put real money on the table, there are no takers, and therefore the case has lapsed.

You said we are in a different stage now, do you think we have moved away from the contingency fee model to people that actually pay real money? I would like Elliot's view on that.

MR. TERRY: May I go first?

MR. MEYER: Go ahead.

²¹² See generally, PUBLIC CITIZEN, *supra* note 130 (listing every NAFTA Chapter 11 case filed).

²¹³ See generally North American Free Trade Agreement, *supra* note 189 (listing the minimal requirements for the notice of intent).

²¹⁴ See PUBLIC CITIZEN, *supra* note 130 (listing every Chapter 11 case filed against the United States).

²¹⁵ See *id.* (listing every Chapter 11 case filed against Canada).

²¹⁶ See *id.* (listing every Chapter 11 case filed against Mexico).

²¹⁷ See *id.* at 13.

MR. TERRY: First of all, a lot of this is about lawyers and lawyers taking cases on contingency. What I have found happening at the bar is that the real work for lawyers is primarily on some of the bigger bilateral investment treaty cases where you have, for example, Canadian mining companies getting mines expropriated abroad, or major money cases, and there are some significant awards being handed out in respect to that.

I have a claim against Venezuela now.²¹⁸ In the Venezuelan context, parties brought four or five claims against Venezuela. We will see whether they result in judgments or not, because of course there are all sorts of factors in each case and particular facts in the case that are at stake. However, parties bring claims with more frequency against certain other countries around the world because of the processes in those countries; Canada, the United States, and Mexico do not engage in those types of processes.²¹⁹ There should not be an expectation that we should have a decision a year against a government here.

During what I call the creative period, there were expectations about Chapter 11's uses in a number of cases in which there seemed to be theoretically some kind of national treatment issue involved. For example, if you take the words fair and equitable treatment²²⁰ and adopt a very broad interpretation of those, they are applicable to many potential violations. However, tribunals have recently focused on what customary international law says about fair and equitable treatment.²²¹ We are talking about a limited set of egregious circumstances. Let us not start to interfere with fundamental policy decisions about how you run a post office and things like that. In my view, Chapter 11's original focus and concern was Mexico. In the end, probably not a legitimate concern, given how Mexican policies have played out, but it was that traditional bilateral investment treaty concern.

Lawyers tried to elevate it beyond that. They succeeded in some respects but not in others. In my view, it is doing more or less what it should be. Right now, there are thirteen cases,²²² a number of which are currently active right now against the Canadian government.²²³ Some will be successful, and a number will not proceed much further.

²¹⁸ See *Torys L.L.P.*, *supra* note 129.

²¹⁹ See *PUBLIC CITIZEN*, *supra* note 130, at 3-4 (indicating that Canadian companies have only four pending cases against the United States).

²²⁰ North American Free Trade Agreement, *supra* note 189.

²²¹ See Damon Vis-Dunbar, *Canadian First Nations Chief Intervenes in NAFTA Chapter 11 Tobacco Dispute*, INVESTMENT TREATY NEWS, Feb. 27, 2009, <http://www.investmenttreatynews.org/cms/news/archive/2009/02/27/canadian-first-nations-chief-intervenes-in-nafta-chapter-11-tobacco-dispute.aspx> (commenting on United States argument that the definition of 'fair and equitable treatment' should be the same as that under customary international law).

²²² See *PUBLIC CITIZEN*, *supra* note 130 at 6-9.

²²³ See *id.*

You must keep in mind that companies also use these as lobbying techniques and they will bring these cases in an effort to try to overturn laws.²²⁴ To some extent, it serves a purpose there and sometimes even result in changes without there ever being a claim brought. Those are all the examples to my mind as to why NAFTA Chapter 11 is working as it should.

MR. FELDMAN: I really cannot say anything about the contingency fee issue. I have no idea. I had not probably fully appreciated the extent to which I was attacking John's livelihood when I questioned Chapter 11.

There should be a state investor provision, but the provision in NAFTA probably has irreparable flaws. John thinks that the tribunal's assessment was reasonable, but for Chapter 11 there is no discipline on the American abuse of the trade law.

According to that tribunal on which one of the tribunal members chosen by the United States and approved by the International Centre for Settlement of Investment Disputes (ICSID) was the President's first cousin, with the case brought against the President, he refused to recuse,²²⁵ and ICSID said that is okay. That was the tribunal that said you could not question the trade laws through Chapter 11 because of the presence of Chapter 19 in the agreement.²²⁶ Well, then you need an agreement that Chapter 19 does not burden. There needs to be some kind of discipline on the American abuse of the trade laws. That is a state investor question.

I have a reservation about Chapter 11 in that regard and in other regards, and I may also now be putting at risk Paul's livelihood, but if you draw arbitrators off an ICSID list, governments provide all the ICSID lists.²²⁷ If you are a private investor and you argue your case in front of an ICSID tribunal, you argue in front of a tribunal selected, in effect, by governments, states, and those folks who draw their livelihood from being arbitrators. Therefore, when they rule for the investor, the chances of their being included again on the list by their governments become smaller.

Consequently, you are, as an investor, always in a bind about how to choose the arbitrators if you are relying on the ICSID facility. Careful shaping of these kinds of technical rules gives the investors a fair chance. If the

²²⁴ See WESTERN ORGANIZATION OF RESEARCH COUNCILS, NAFTA CHAPTER 11: PUTTING PROFIT BEFORE PEOPLE 1 (2003), available at [http://www.worc.org/userfiles/fs-NAFTA%20chapter%2011\(2\).pdf](http://www.worc.org/userfiles/fs-NAFTA%20chapter%2011(2).pdf).

²²⁵ See generally Tembec's Opposition to the United States' Motion to Dismiss, *Tembec v. United States*, No. 07-CV-1905, 7 (D.D.C. 2008) (discussing the marriage of Mr. Robinson to President George Walker Bush's first cousin Susanne Walker).

²²⁶ See generally *id.*

²²⁷ See ROBERTO DANINO, ICSID Sec'y Gen., MAKING THE MOST OF INTERNATIONAL AGREEMENTS: A COMMON AGENDA (2005), available at <http://www.oecd.org/dataoecd/5/8/36053800.pdf> (stating the parties are constrained by the list of arbitrators appointed by ICSID Contracting States).

investor has a fair chance, then what John has I think quite accurately told us and what you are invoking, then there is an environmental movement that says this is terrible. Chapter 11 of course has been the most controversial of the chapters in NAFTA precisely because people perceived it as that kind of threat.²²⁸

I do not know whether parties bring the cases on contingency and that is why there is no follow-through, but I can certainly say that the cases are enormously expensive.²²⁹ However, the reason that we have the provision is because we do not trust the Court proceedings. I am suggesting we should not necessarily trust the arbitration either.

MR. ROBINSON: Just a small point. You do not have to use the ICSID list.²³⁰

MR. FELDMAN: No, you do not.

MR. ROBINSON: None of the three were on their list.

MR. FELDMAN: If there is a consolidation, which is what we experienced, then you go to the ICSID list, and that is required in Chapter 11.²³¹

MR. ROBINSON: The United Nations Commission on International Trade Law trumps ICSID in Chapter 11 anyway.

MR. FELDMAN: Not if there is a consolidation.²³²

MS. IRISH: Maureen Irish, University of Windsor.²³³ I have a question mainly for Elliot on the problem of overlapping jurisdictions with these various dispute settlement fora. Canada has had this problem. Mexico had this problem as well. Was it really such a good idea for Canada to take softwood lumber to parallel the proceedings in NAFTA and at the World Trade Organization (WTO)? Would not it have been better to choose one or the other?

MR. FELDMAN: I just read an article this week that just appeared in a journal by someone who would appear to be English because he thought our judges were justices. He apparently spent two years in the Department of Foreign Affairs and International Trade as an observer, and developed this article. This was one of his main themes. It is about the softwood lumber history with one or two small errors; it is quite a good analysis.

²²⁸ See Bronwyn Pavey & Tim Williams, *The North American Free Trade Agreement: Chapter 11*, <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/inbrief/prb0254-e.htm> (last visited Oct. 31, 2009) (commenting on the possible threats Chapter 11 poses to governments).

²²⁹ See Clark & LaFortune, *supra* note 200.

²³⁰ See Mark Kantor, *Kantor-Howse Exchange Regarding Restrictions on Public Access to ICSID Arbitrations*, TRANSNATIONAL DISPUTE MANAGEMENT, Feb. 2004, available at http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_57.htm.

²³¹ North American Free Trade Agreement, *supra* note 189.

²³² See Kantor, *supra* note 230.

²³³ See University of Windsor, Maureen Irish: Professor of Law, <http://web4.uwindsor.ca/law/irish> (last visited Oct. 31, 2009) (giving a brief biography of Maureen Irish as a professor at the University of Windsor).

He asked this very question. I will try to track his answer. His answer is in part that some of the things Canada accomplished were not possible without being in both forums. The most important he focuses on is zeroing.²³⁴ We could not have prevailed on zeroing before the NAFTA panel but for the WTO decision. Moreover, we had to finesse the NAFTA panel because twice it said no, and we stalled it while we got WTO decisions. As the WTO moved them along, we were then able to invoke the Charming Betsy doctrine²³⁵ back to the NAFTA panel. That is how we won zeroing. First, it is the only time zeroing has been defeated under United States law, and it was the opening to the Europeans and Japanese to get a broader condemnation of zeroing.²³⁶ He regards this as a very important victory that was only possible by being in both forums.

He neglects the Canadian victory at the WTO on the preliminary determination in subsidies.²³⁷ This is a very controversial area, and Jean Anderson and I have disagreed on this vehemently. Canada won a very resounding victory at the WTO on the preliminary determination and then never followed through on it.²³⁸ It accepted in effect the American argument that going to the final determination mooted it. I thought that was erroneous. I thought it stood on its own and followed up. It was a strategic question, and I did not like the answer, and that would have made a difference as to what kind of benefits there were from the WTO.

The reason the question arises is because of Section 129 in United States law²³⁹ and the American attempt to take the WTO loss and the NAFTA loss and convert them into a victory. We have now answered that question. The United States Court of International Trade has said you cannot do that, and the United States Court of International Trade in effect struck down the use of 129 that way.²⁴⁰ The bad experience that extended the case out a year because the United States in effect went up to the edge but did not break the law in failing to implement the results of the NAFTA panel by using the al-

²³⁴ See Office of the United States Trade Representative, United States – Final Dumping Determination on Softwood Lumber from Canada, <http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/final-dumping-determi> (last visited Oct. 31, 2009) (commenting on the Panel's decision relating to 'zeroing').

²³⁵ See Michael Franck, *The Future of Judicial Internationalism: Charming Betsy, Medellín v. Dretke, and The Consular Rights Dispute*, 86 B.U. L. Rev. 515, 521 (2006) (describing the Charming Betsy Doctrine).

²³⁶ See generally Dan Ikenson, *Zeroing In: Antidumping's Flawed Methodology under Fire*, 11 FREE TRADE BULLETIN (2004) (discussing the effects of the United States losing the WTO decision against Canada).

²³⁷ See *Canadians say WTO Lumber Decision a Big Victory*, CBS NEWS, July 26, 2005, http://www.cbc.ca/canada/story/2002/07/26/softwood2_wto020726.html.

²³⁸ See *id.*

²³⁹ See Uruguay Round Agreements Act, H.R. 5110 Section 129 (1994).

²⁴⁰ See Tembec, *supra* note 165.

leged implementation of the WTO panel the reverse way. The Court of International Trade (CIT) said you could not do that. That problem is gone.

The United States tried very hard to force Canada into a choice of forum, to ask the question you are asking, to make it make a choice. I think it has now lost that argument because of the CIT decision.²⁴¹ Now, the CIT decision came down in July and the Softwood Lumber Agreement (SLA) in October.²⁴² On October 1, the Canadian government said it was going to take a month to sort things out, and it rammed the agreement through on October 12 by amending secretly in seventeen pages of amendments, the terms for entering the agreement into force because it did not have the support of the industry to do it.²⁴³

Also, it accelerated the process because it knew that another decision was coming down from the CIT, that one, the one that would finalize and complete that process, which came down within twenty-four hours of the SLA entry into force.²⁴⁴ The American view is that it did not happen. There were procedural motions filed by the United States to try to erase that resolution. They failed.

MR. SILLS: Mark Sills from Fasken Martin.²⁴⁵ I just wanted to address a comment that Elliot Feldman made. We moved on to the NAFTA, and he said that NAFTA does not address any of the major trade issues of the moment, which revolve around security and related concerns and environmental concerns. From my own experience, I was on the Canadian negotiation team²⁴⁶ and looked at NAFTA on the energy chapter, and I can tell you that the team addressed the National Security provision, as it applies to bilateral trade, long and hard.²⁴⁷

The United States Trade Representative at the time was completely unwilling to contemplate any impairment of the American ability to invoke General Agreement on Tariffs and Trade (GATT) Article 21.²⁴⁸ Since 2001, we

²⁴¹ Coalition for Fair Labor Imports, *supra* note 94 at 5.

²⁴² *Id.*

²⁴³ See generally, UNIVERSITY OF ALBERTA SCHOOL OF BUSINESS, A CN CANADA - US TRADE RELATIONS FORUM: THE CANADA - US SOFTWOOD LUMBER AGREEMENT 2006 4-5 (2007), <http://apps.business.ualberta.ca/wcer/Softwood%20Forum/Media%20Release%201013.pdf> (generally mentioning the industry's lack of support of the Softwood Lumber Agreement).

²⁴⁴ See Tembec, *supra* note 165.

²⁴⁵ See Fasken Martineau, Mark N. Sills: Partner, <http://www.fasken.com/mark-sills/> (last visited Oct. 31, 2009) (giving a brief biography of Mark N. Sills).

²⁴⁶ *Id.*

²⁴⁷ See North American Free Trade Agreement, Chapter 6: Energy and Basic Petrochemicals, <http://www.sice.oas.org/trade/NAFTA/chap-06.asp#Chap.VI> (last visited Oct. 31, 2009) (listing the national security measures contained in NAFTA Chapter 6).

²⁴⁸ See North American Free Trade Agreement, Chapter 21: Exceptions, <http://www.sice.oas.org/trade/NAFTA/chap-21.asp#P.VIII> (last visited Oct. 31, 2009) (listing

faced a lot of measures that in a sense have been sheltered under Article 21 in the GATT, and in fact will impair the Canadian access to American markets in many respects. However, it is not because we did not think of it; it was thought of and it was addressed. The problem was that the American administration of the day was unwilling to contemplate any of GATT's existence in that area. The environmental issue was again addressed long and hard, but environment was at that point considered to be an impediment to a trade agreement.

That is the reality, and that is why the environmental side agreements address the issue. The point is that Canada always wanted to achieve a broader, more comprehensive agreement that it takes two to tango, and in America in 1991, the tango partner simply was not there.

MR. FELDMAN: I have a feeling you are agreeing with me. What I am interpreting you to say is that the architecture of NAFTA does not deal with those things.

MR. SILLS: By design.

MR. FELDMAN: Well, whatever. NAFTA does not deal with those things. However that came about for whatever reason and whatever the negotiating situation was at the time. I am suggesting to you that you have new conditions, a new agenda, and a new President of the United States. If you do not want to be marginalized in the global system, then as Jessica was suggesting, it is your turn and it is your opportunity to be creative and innovative and put on the table something that is new and different. I think if you miss that opportunity, you will miss it forever, and I think Jessica was suggesting something similar. I think that opportunity is here and now. There is a common expectation that Republicans in the United States are free traders and Democrats are protectionist. I have been practicing for twenty years, and the most protectionist period I have experienced in dealing with the United States Trade Representative and the United States Department of Commerce were the last eight with a Republican Congress and a Republican President. You now have a Democratic President, a Democratic Congress, all of the signals of protectionism, and all the suspicions that I think are justified. I think you also have a new opportunity that you personally may be underestimating and Canada would underestimate at its peril.

MR. MEYER: Thank you, Elliot. I would like to thank you all for your participation and interest. I would especially like to thank Elliot and John for a very interesting session.

the general agreements on tariff and trade in NAFTA Chapter 21).

