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Arbitration and the Fisc: NAFTA's "Tax Veto"

William W. Park*

I. INTRODUCTION

"Taxes," said Franklin Roosevelt, "are the dues that we pay for the privileges of membership in an organized society."¹ Harsher tongues describe tax as a form of property seizure.² Somewhere between these competing characterizations of revenue raising—club dues and forced takings—lies a clue to why the North American Free Trade Agreement ("NAFTA") reserves special treatment for investment disputes implicating fiscal matters.³

NAFTA gives foreign investors a right to settle investment disputes by arbitration, a process more politically and procedurally neutral than either host state courts or foreign gunboats.⁴ Without the option to arbitrate, the specter of unfair expropriation might chill cross-border economic cooperation and capital flow.

The dispute resolution process does not apply to all investment controversies, however. If an expropriation claim implicates "taxation measures," the competent

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1. Franklin D. Roosevelt, *Address at Worcester, Mass* (Oct 21, 1936), in Samuel I. Rosenman, ed, *V Public Papers and Addresses of Franklin D. Roosevelt* 522, 523 (Russell & Russell 1938) (paraphrasing Justice Holmes's remark: "Taxes are what we pay for civilized society."). See *Compañía General de Tabaco de Filipinas v Collector of Internal Revenue*, 275 US 87, 100 (1927) (insured Spaniard doing business in Philippines held not subject to tax on payment of certain insurance premiums).
2. One old favorite, ascribed to Mark Twain, asserts that the difference between a tax collector and a taxidermist is that "the taxidermist takes only your skin." A.B. Paine, ed, *Mark Twain's Notebook* 379 (Harper Bros 1935).
3. For ease in reading, this article uses interchangeably the terms "expropriation" and "nationalization."
4. Other dispute resolution mechanisms can be found in NAFTA Ch 19 (anti-dumping and countervailing duty panels) and Ch 20 (controversies among member states over NAFTA's interpretation and application).

fiscal authorities of host and investor countries may block arbitration.⁵ Thus this “tax veto” supplies an initial screening process to determine when taxation constitutes a form of what has been called “creeping expropriation.”⁶ This power to block arbitration serves as a springboard to consider the politically sensitive interaction of revenue raising and national sovereignty.

II. INVESTMENT ARBITRATION UNDER NAFTA

A. OVERVIEW

No supranational court possesses mandatory jurisdiction to decide the appropriate indemnity for nationalized assets.⁷ Litigation in the expropriating country, along with possible assertions of diplomatic protection, remains the default mechanism for adjudicating investment disputes.⁸ One consequence is that without explicit agreement to arbitrate (sometimes neglected or refused), the real or imagined bias of local judges can create a commercial anxiety that often inhibits wealth-creating international transactions.⁹ In response, NAFTA gives foreign investors an automatic right to elect arbitration of claims for improper nationalization, pursuant to rules drafted by either the United Nations or the World Bank. NAFTA thus endorses the long tradition of arbitral dispute resolution underpinning much modern international business law.¹⁰

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5. See NAFTA Art 2103(6), 32 ILM 605, 700 (1993). For the relationship between NAFTA and US law, see 19 USC § 3312, providing that US law prevail in the event of conflict with NAFTA.
 6. Creeping expropriation has been defined as “an unlawful government action depriving the investor of fundamental rights in a project”. See <http://www.opic.gov/finance/products/expropriation.htm> (visited Mar 25, 2001).
 7. The experience of the International Court of Justice (“ICJ”) is limited both by tradition and by jurisdictional constraints. For one commercial case that did reach the ICJ, see *Electronica Sicula SPA (ELSI) (United States v Italy)*, 1989 ICJ 15 (1989) (finding no illegal taking of property when Italy requisitioned plant and equipment owned by US nationals in order to prevent planned liquidation).
 8. In most cases one would expect investors to prefer arbitration to the more cumbersome process of having their country assert diplomatic protection. Exceptions might arise when the legal basis of the claim was weak and the investor state had a degree of clout with the host country.
 9. The perception of litigation bias may be as significant as its reality. A study of US federal civil actions between 1986–94 found that foreigners actually fared better than domestic parties. See Kevin Clermont and Theodore Eisenberg, *Xenophilia in American Courts*, 109 Harv L Rev 1122, 1133–34 (1996). One explanation for this counter-intuitive finding lies in a fear of judicial and jury partiality that leads foreign litigants to settle rather than continue to final judgment unless their cases are particularly strong.
 10. For a general discussion, see Henri C. Alvarez, *Arbitration Under the North American Free Trade Agreement*, 16 Arb Intl 393 (2000).

B. COMPENSATION STANDARDS

The compensation criteria adopted by NAFTA Chapter 11 echo the “prompt, adequate and effective” standards traditionally applied by the United States.¹¹ As a preliminary matter, Chapter 11 permits expropriation only if justified by a public purpose and applied on a non-discriminatory basis.¹² In addition, compensation must be “equivalent to the fair market value” of the investment at the date of expropriation, must be “paid without delay and be fully realizable,” and must bear interest at a commercially reasonable rate until date of actual payment.¹³ If paid other than in a hard currency,¹⁴ compensation must be in an amount which, at market rates of exchange, would convert into a sum no less than the hard currency equivalent of market value on the payment date.

III. ARBITRATION

A. OVERVIEW

While Section A of Chapter 11 sets forth the substantive norms underlying cross-border investment under NAFTA, Section B goes on to provide arbitration as a remedy for a host state’s breach of its duties. Claims may be made either directly by an investor or on behalf of an enterprise owned (directly or indirectly) by the investor.¹⁵

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11. See *Restatement (Third) of the Foreign Relations Law of the United States* § 712, comments c and d, and Reprtr note 2 (1987) stating that for compensation to be “just” it must be “paid at the time of taking,” “in an amount equivalent to the value of the property taken” and “in a form economically usable by the foreign national.” The expression “prompt, adequate and effective” originates in a communication to Mexico from US Secretary of State Cordell Hull on Aug 22, 1933. See *Banco Nacional de Cuba v Chase Manhattan Bank*, 658 F2d 875, 888 (2d Cir 1981). Compare the standard under *Restatement* § 712 with the United Nations’ Charter of Rights and Duties of States Art 2(2)(c), providing that compensation should be “appropriate” as determined under “the domestic law of the nationalizing State and by its tribunals.” See William W. Park, *Legal Issues in the Third World’s Economic Development*, 61 BU L Rev 1321 (1981).
 12. NAFTA Art 1110(1) adopts a four-part structure, requiring that the expropriation (1) have a public purpose (2) be applied on a non-discriminatory basis, (3) “in accordance with due process of law and Article 1105(1)” [“fair and equitable treatment”] and (4) result in “payment of compensation in accordance with paragraphs 2 through 6 [of Article 1110],” which adopt the fair market value standard. 32 ILM at 641 (cited in note 5).
 13. NAFTA Art 1110(2) provides that fair market value “shall not reflect any change in value occurring because the intended expropriation had become known earlier.” *Id.* In other words, compensation will not be affected because market awareness of the pending expropriation drove down the property’s price.
 14. NAFTA Art 1110 speaks of a “G-7 currency,” which includes the currencies of Canada, France, German, Italy, Japan, the United Kingdom, and the United States. 32 ILM at 641 (cited in note 5). For France, Germany, and Italy, members of the European Union’s common currency union, the currency would now be the Euro. By contrast, the United Kingdom at present maintains its own currency.
 15. NAFTA Art 1116, 32 ILM at 642–43 (cited in note 5).

NAFTA permits an aggrieved investor to choose either (i) arbitration supervised by the World Bank's International Centre for the Settlement of Investment Disputes ("ICSID") or (ii) arbitration conducted under rules adopted by the United Nations Commission on International Trade Law ("UNCITRAL").¹⁶ Unless otherwise agreed, the place of arbitration must be in the territory of a country that is a party to both NAFTA and the New York Arbitration Convention.¹⁷

Established under the 1965 Washington Convention ("Convention"), ICSID normally has jurisdiction over investment disputes between a state that is a party to the Convention and an investor from another Convention state.¹⁸ Since Mexico and Canada are not yet parties to the Washington Convention, ICSID must supervise arbitration involving these countries under its "Additional Facility" regime, designed for cases in which the Convention does not apply.

One consequence of the "Additional Facility" regime is that the arbitration law of the arbitral situs may play a significant role when a dissatisfied loser seeks to vacate an award. In pure ICSID arbitration the Washington Convention excludes appeal, thus foreclosing challenges to awards on normal statutory grounds such as fraud or excess of authority.¹⁹ ICSID itself is expected to supply the arbitration's quality control under its ad hoc challenge procedure.²⁰

Under the ICSID Additional Facility regime, however, the litigants use ICSID rules and supervisory personnel outside the Washington Convention framework. The award's finality thus depends on the judicial review mechanisms at the place of arbitration, which in some countries subjects awards to mandatory judicial control.²¹

16. NAFTA Art 1120, 32 ILM at 643 (cited in note 5).

17. See NAFTA Art 1130, referring to a "Party [a NAFTA member] that is a party to the New York Convention." 32 ILM at 645 (cited in note 5).

18. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 4 ILM 532 (1965). See generally, Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* 130-46 (Nijhoff 1995).

19. In the United States it is uncertain how a court would deal with the conflict between the Federal Arbitration Act and the Convention. The US Constitution's Supremacy Clause lists both treaties and federal statutes as the "supreme Law of the Land," without establishing any hierarchy in the event of conflict. See US Const Art VI, cl 2. On some matters statutes clearly override treaties. See, for example, Foreign Investment in Real Property Tax Act § 1125, Pub L No 96-499 (providing that nothing in the Internal Revenue Code "shall be treated as requiring, by reason of any treaty obligation of the United States, an exemption from (or reduction of) any tax imposed" on gains from disposition of US real property interests under IRC § 879). When Congress is silent, courts will normally look to canons of statutory interpretation, such as "last in time" prevails or "the specific restricts the general."

20. See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States Art 52, ICSID *Basic Documents* 25 (1985). See generally W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration* 46-50 (Duke 1992).

21. See NAFTA Art 1136, 32 ILM at 646 (cited in note 5). Language providing for award "finality" would normally mean final as allowed under relevant arbitration laws. See, for example, *M&C Corp v Erwin Behr GmbH & Co, KG*, 87 F3d 844, 847 (6th Cir 1996) (stating that finality provisions in arbitration agreements "merely reflect a contractual intent that the issues joined and resolved in the

Therefore, if a Mexican-US dispute is arbitrated in Canada (a prospect that has already arisen in one Chapter 11 arbitration²²), court scrutiny of the award would be a function of whatever monitoring standards Canadian courts deem appropriate.

Since courts at the place of arbitration may have the last word in an arbitration, care should be taken in selecting an arbitral situs. Courts should exercise a control function over the arbitration's basic procedural integrity (looking at matters such as bias, excess of authority and due process), but should not second guess the arbitrator on the substantive merits of the dispute.²³

arbitration may not be tried de novo in any court" and that waiver provisions in the ICC Rules did not constrain unsuccessful parties from raising defenses to enforcement under the New York Convention). See also *First Nat'l Supermarkets, Inc v Retail, Wholesale & Chain Store Food Employees Union Local 338*, 118 F3d 892, 898 (2d Cir 1997) (parties' agreement that "[r]esort shall not be made to courts . . . except to compel arbitration or enforce award" did not constitute waiver of right to oppose award in court); *Iran Aircraft Industries v Avco Corp*, 980 F2d 141, 145 (2d Cir 1992) (parties' agreement to "final" and "binding" arbitration did not have effect of res judicata judgment against non-prevailing party and did not bar consideration of defenses to enforcement under the New York Convention). Compare the situation in *M&C Corp* above with *Noble China Inc v Lei*, 42 Ont Rep (3d) 69, 87 (1998) (parties were "free to determine" rules of procedure under UNCITRAL Model Law Art 19; parties' exclusion of judicial review foreclosed motion to set aside award under UNCITRAL Model Law Art 34). (The court noted, however, that if there had been evidence of unfairness or bias the result might have been different.) NAFTA Art 1136(3)(b) explicitly contemplates such judicial review, providing that for arbitration under the Additional Facility rules or the UNCITRAL rules, award enforcement may not be sought until a court either dismisses or allows an application to revise, set aside, or annul the award and there is no further appeal, or three months have elapsed without such application being made. 32 ILM at 646 (cited in note 5).

22. See *Metalclad v United Mexican States*, ICSID Case No ARB(AF)/97/1, Award (Aug 30, 2000), 16 ICSID Rev Foreign Inv L S (forthcoming 2001) (finding expropriation without adequate compensation where US subsidiary was prevented by Mexican municipality from operating hazardous waste facility in Mexico). Although hearings were held in Washington, DC, the arbitration's official situs was Vancouver. Mexico petitioned to have the award set aside by the British Columbia Supreme Court in an application filed October 27, 2000, as amended November 14, 2000. See *United Mexican States v Metalclad Corp* (Vancouver Court Registry Case No L 002904, Mr. Justice Tysoe). As present it is uncertain which provincial arbitration statute applies to the vacatur motion. Mexico has argued against application of the International Commercial Arbitration Act on the ground that an arbitration involving a state party exercising a regulatory function is not "commercial," and thus should fall within the catch-all domestic statute with its broad "leave to appeal" provisions. By contrast, characterization of the arbitration by reference to the underlying transaction (a cross-border investment) would place the dispute within the terms of the international act, and would focus court scrutiny principally on whether the arbitrators exceeded their powers. For an interesting discussion of this controversial arbitration, see Clyde Pearce and Jack Coe, *Arbitration under NAFTA Chapter 11: Some Pragmatic Reflections Upon the First Case Filed Against Mexico*, 23 *Hastings Intl & Comp L Rev* 311 (2001).
23. See William W. Park, *Duty and Discretion in International Arbitration*, 93 *Am J Intl L* 805, 808-12, 816-19 (1999).

B. THE "TAX VETO"

If an alleged expropriation is accomplished through "taxation measures," the competent fiscal authorities of the relevant states may veto the investor's right to arbitrate.²⁴ At the time of advising the host state of its intention to commence arbitration, the investor must also submit the tax measure to the appropriate fiscal authorities. The investor may proceed to arbitration only if the competent authorities "do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation."²⁵ This awkwardly drafted "negative deadlock" provision gives the competent authorities six months to decide the question, failing which the investor may proceed to arbitration.²⁶

It is important to note that NAFTA does not suggest that tax matters cannot be arbitrated. Rather, the Treaty says that fiscal authorities in host *and* investor states together may block the arbitral proceedings. A "tax veto" requires unanimity: both competent authorities must "agree that the measure is not an expropriation."²⁷ Thus if the United States is accused of expropriating a Canadian investor's property, investment arbitration would be barred only if both the US Department of the Treasury and the Canadian Department of Finance concluded that no expropriation had taken place.²⁸ Presumably the Canadian authorities would hesitate to acquiesce in the spoliation of a national merely because such theft was dressed in fiscal garb. Thus the capital exporter's government is given a protective role, in that refusal to join the veto authorizes arbitration.

The tax veto by its terms applies only to claims of improper expropriation under NAFTA Article 1110. By contrast, claims for breaches of other host state duties under NAFTA Chapter 11 (such as "fair and equitable treatment" under Article 1105) might escape the jurisdiction of the respective national fiscal authorities.

24. NAFTA Art 2103(6) states that Art 1110 provisions concerning expropriation "shall apply to taxation measures except that no investor may invoke that Article as the basis for a claim [for investment dispute resolution], where it has been determined pursuant to this paragraph that the measure is not an expropriation." 32 ILM at 700 (cited in note 5).

25. It is uncertain (at least to this author) whether an investor's disregard of a competent authority's reference (either in bad faith, or due to an innocent misunderstanding of its duties) would permit sua sponte intervention by tax authorities of the host state.

26. The English language version contains a slight ambiguity, providing for arbitration to go forward "[i]f the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral [by the investor]." 32 ILM at 700 (cited in note 5). To interpret the six-month limit as applying only to competent authorities who agreed to hear the matter (as contrasted to ignoring or refusing to consider the investor's request), would make little sense in this context.

27. NAFTA, Art 2103, 32 ILM at 700 (cited in note 5).

28. See NAFTA Annex 2103.6, 32 ILM at 702 (cited in note 4). The competent authority for the United States would be the Assistant Secretary of the Treasury (Tax Policy), for Canada it would be the Assistant Deputy Minister for Tax Policy, and for Mexico it would be the Deputy Minister of Revenue of the *Secretaría de Hacienda y Crédito Público* (Ministry of Finance and Public Credit). Id.

C. TAX AS TAKING

From one perspective, taxation resembles debt payment, covering government-sponsored services such as roads, schools and military protection.²⁹ The analogy runs into problems, however, when one examines the relationship between the tax and the service. Although fiscal jurisdiction assumes some taxpayer contact with the state, the benefit received is rarely calibrated to the fee paid. In towns where real estate taxes finance public education, wealthy but childless homeowners pay more toward schools than modestly housed residents with large broods.

A contrasting view shared by many taxpayers sees tax as a form of asset seizure, echoed in the longstanding American catch phrase "the power to tax is the power to destroy."³⁰ Fiscal authorities take money from its current owner (the taxpayer) and give it to someone else (the state). Under this view, tax measures inevitably involve an element of expropriation.

This second, harsher, characterization of tax (as a "taking") supplies at least one explanation for the "tax veto." NAFTA's dispute resolution process was not intended to be used against normal taxation. The process would be misused and corrupted if normal fiscal measures gave rise to expropriation claims.

The competing characterizations of tax may be distinctions without a difference, in that both approaches distinguish between normal taxes and the type of punitive measure intended to confiscate foreign investment. The "tax veto" gives the fiscal administrations of host and investor countries the task of making a preliminary cut between normal and abnormal taxes.

The crux of the problem is that not all government takings are outright.³¹ State power can often operate to deprive an owner of property indirectly.³² One form of "creeping expropriation" might involve taxation at levels intended to force abandonment of an enterprise, simply taxing away its economic value. Another strategy might be to subject an investor's competitors to a more favorable tax regime.

29. One remembers Justice Holmes' distinction, in *Compañía General de Tabaco de Filipinas*: a penalty is intended as a "discouragement" to behavior, while a tax "may be part of an encouragement [to actions] when seen in its organic connection with the whole." 275 US at 100 (cited in note 1).

30. The actual original US Supreme Court quotation is: "An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation." *McCulloch v Maryland*, 17 US (4 Wheat) 316, 327 (1819) (holding unconstitutional a Maryland tax on the Second Bank of the United States).

31. See, for example, *Case Concerning the Barcelona Traction, Light and Power Co, Ltd (Belgium v Spain) (2d Phase)*, 1970 ICJ 3, 9 ILM 227 (1970) (Belgian shareholders in Canadian company effectively dispossessed of profitable Spanish assets due to Spanish authorities' refusal to permit transfer of necessary foreign currency). See also V.V. Veeder, *The Lena Goldfields Arbitration: The Historical Roots of Three Ideas*, 47 *Int'l & Comp L Q* 747 (1998) (discussion of *Goldfields v USSR* (Judgment of Sept 3, 1930)).

32. See generally Burns H. Weston, "Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation," 16 *Va J Intl L* 103 (1975).

Such subtler forms of expropriation, while escaping precise definition, involve arbitrarily depriving an investor of wealth through manipulation of the legal system.

In attempting to distinguish normal from excessive taxation, fiscal authorities inevitably can be expected to rely on culturally influenced notions of tax. For example, Americans can be expected to look to the US tax system, based on the same analogic approach used to characterize "income tax" for purposes of the foreign tax credit.³³

D. ANALOGIES IN THE FINANCIAL SERVICES AREA

NAFTA provisions on financial services generally trump inconsistent stipulations in Chapter 11. Nevertheless, within limits, investment disputes may be resolved under the Chapter 11 arbitration mechanism.³⁴ Under Chapter 14, the host state can invoke prudential concerns related to protection of depositors, financial markets and the maintenance of safe and sound financial institutions. On request of a member state, arbitrators must refer the matter to the NAFTA Financial Services Committee ("Committee") for a decision on whether the prudential concerns are valid defenses to an investor's claim, which decision is binding on the tribunal.³⁵

If the Committee makes no decision within sixty days, the host state or the investor's country may request the establishment of a dispute resolution "panel" under the NAFTA's institutional dispute resolution provisions.³⁶ The panel's report, like the Committee's decision, also binds the arbitrators. If no request for such dispute resolution has been made within ten days of the expiration of the sixty days for panel action, the arbitral tribunal may proceed to adjudicate the expropriation claim.

33. See, for example, Treas Reg § 901-2(a), codified at 26 CFR part 1 (§ 1.901-2A) (rev Apr 1, 2000); see also *Bank of America Natl Trust & Savings Assn v United States*, 459 F2d 513, 515 (Ct Cl 1972) ("It is now settled that the question of whether a foreign tax is an "income tax" within § 901(b)(1) must be decided under criteria established by our revenue laws and court decisions, and that the foreign tax must be the substantial equivalent of an income tax as the term is understood in the United States.").

34. Article 1101(3) provides that Chapter 11 "does not apply to measures adopted or maintained by a Party [in other words, a NAFTA country] to the extent that they are covered by Chapter 14 (Financial Services)." 32 ILM at 639 (cited in note 5). A special procedure for investment disputes related to financial services is established under NAFTA Art 1415, 32 ILM at 661 (cited in note 5). This state-to-state adjudicatory regime will be triggered when a country invokes NAFTA Art 1410(1), which says that nothing in Part V (concerning investment) shall prevent a NAFTA Party from "adopting or maintaining reasonable measures for prudential reasons, such as . . . the protection of investors, depositors . . . financial market participants, . . . the maintenance of the safety, [and] soundness . . . of financial institutions, and ensuring the integrity and stability of a [country's] financial system." 32 ILM at 659 (cited in note 5).

35. See NAFTA Art 1415(2), 32 ILM at 661 (cited in note 5). The term "Committee" is defined in annex 2001.2(A). Id at 698. The term "Tribunal" carries over from the Ch 11 adoption of international arbitration taxonomy for the body of arbitrators deciding a particular dispute.

36. See NAFTA Art 2008 et seq (cited in note 5).

E. TAX AND NOTIONS OF SOVEREIGNTY

The “tax veto” derives not only from concern over the line between normal and excessive taxes, but also reflects a perception that loss of taxing power poses a special threat to national sovereignty. Notions of political sovereignty hover around an idea of government power that is supreme and unfettered,³⁷ one aspect of which is the ability to raise revenue by forced levies.³⁸

Sensitivity toward revenue matters predates the modern welfare state. More than five hundred years prior to James Otis’s concerns about the tyranny of “taxation without representation,” fiscal revolt on the other side of the Atlantic forced King John to sign the Magna Charta. Few scholars challenge Lord Mansfield’s “Revenue Rule” articulated in 1775, preventing enforcement of foreign tax judgments.³⁹

Nevertheless, in the context of a treaty that generally admits arbitration of expropriation disputes, it is not entirely self-evident why tax should have special status. Arbitration of *any* nationalization controversy will likely cost the state money, with financial consequences and threats to sovereignty that are functionally similar to loss of taxing power.

For example, environmental regulations constitute no less a sovereign prerogative than tax and finance. Yet no administrative veto prohibits arbitration of disputes implicating environmental measures. Rather, NAFTA simply provides that nothing in Chapter 11 shall be construed as preventing adoption of measures “to ensure that investment activity . . . is undertaken in a manner sensitive to environmental concerns.”⁴⁰

Governments agree to arbitrate expropriation disputes even when the object of the taking may implicate vital national interests, including natural resources and the country’s economic infrastructure. For years it has been commonplace for developing countries to submit investment disputes to arbitration, a practice commended by multinationals seeking a more politically and procedurally neutral forum than host

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37. On sovereignty generally, see W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, in G. Fox and B. Roth, eds, *Democratic Governance and International Law* 239 (Cambridge 2000) (exploring sovereignty of populations in contrast to that of rulers). See also Y. Frank Chiang, *State, Sovereignty, and Taiwan*, 23 *Fordham Intl L J* 959 (2000), Stephen D. Krasner, *Globalization and Sovereignty*, in D. Smith, D. Solinger, and S. Topik, eds, *States and Sovereignty in the Global Economy* (Routledge 1999). Krasner identifies four concepts of sovereignty, relating to (i) a government’s control of activities within and across its borders, (ii) organization of internal political structures, (iii) exclusion of external authority (which he calls “Westphalian” sovereignty, from the 1648 Peace of Westphalia ending the Thirty Years’ War in a way that enhanced the autonomy of German princes), and (iv) one state’s recognition of another.
 38. The English term is derived from the Latin *super*, meaning “above”. Continental scholars sometimes refer to sovereignty as power “above others” (“*au dessus des autres*”) and “highest authority” (“*die hoechste Staatsgewalt*”).
 39. See *Holman v Johnson*, 98 *Engl Rep* 1120 (KB 1775). For later articulations of this principle, see *HM Queen v Gilbertson*, 597 *F2d* 1161 (9th Cir 1979); *United States v Beets*, 80 *F3d* 580 (1st Cir 1996).
 40. See NAFTA Art 1114, 32 *ILM* at 642 (cited in note 5).

state courts.⁴¹ It was exactly this aspiration toward adjudicatory neutrality that led to adoption of NAFTA's investment arbitration regime.

F. THE FUTURE OF TAX ARBITRATION

One risk of NAFTA's "tax veto" is that it may be perceived as placing barriers to non-judicial resolution of fiscal matters at a time when many international organizations urge that arbitration be given a greater role in settling tax controversies. During the past twenty years, proposals have repeatedly been made for arbitration of tax disputes, principally (but not exclusively) in the area of transfer pricing.⁴²

Fiscal authorities in one country often adjust profits earned by multinational enterprises in connection with intra-group sales, services or loans. Sometimes income is allocated to one member of a corporate group without symmetrical income adjustments to the corporate affiliate on the other side of the transaction.⁴³ Inconsistent transfer pricing can mean mismatching of items of income and deduction, with a portion of group profits taxed in the hands of more than one entity.

In the hope of reducing such double taxation, several non-governmental organizations have explored arbitration as a way to resolve divergent national approaches to transfer pricing.⁴⁴ In many instances arbitrators may be able to rationalize inter-company transactions so that income additions to one corporation result in correlative adjustments in affiliated overseas entities. To date, however,

41. See, for example, Wolfgang Peter, *Arbitration and Renegotiation of International Investment Agreements*, (Kluwer 2d ed 1995). Well known examples of expropriation arbitrations include *Libyan American Oil Co (LIAMCO) v Libya*, 482 F Supp 1175 (D DC 1980), vacd without op, 684 F2d 1032 (DC Cir 1981); *Texaco Overseas Petroleum Co (TOPCO)/California Asiatic Oil Co (CALASIATIC) v Libya*, 17 ILM 1 (1978).

42. See, for example, David R. Tillinghast, *Choice of Issues to be Submitted to Arbitration Under Income Tax Conventions*, in H. Alpert and K. van Raad, eds, *Essays on International Taxation* 349 (Kluwer 1993); Gustaf Lindencrona and Nils Mattson, *Arbitration in Taxation* (Kluwer 1981); Jean-Marie Henckaerts, *EC Arbitration Convention for Transfer Pricing Disputes*, 10 J Intl Arb 111 (Sept 1993); Paul R. McDaniel, *NAFTA and Formulary Apportionment*, in Alpert and van Raad, *Essays on International Taxation* at 293; William W. Park, *Finality and Fairness in Tax Arbitration*, 11 J Intl Arb 19 (June 1994).

43. For example, a licensor in the United States may be required to raise from 5 percent to 8 percent a royalty charged to its subsidiary in France. However, tax authorities in Paris may not necessarily admit an additional 3 percent deduction by the French entity.

44. See, for example, International Chamber of Commerce Commission on Taxation, *Arbitration in International Tax Matters*, Doc No 180/438 (May 3, 2000), available online at <http://www.iccwbo.org/home/statements_rules/statements/2000/arbitration_tax.asp> (visited Mar 25, 2001); Organization for Economic Cooperation and Development, *Secretariat Issue Paper on Tax Arbitration* (Jan 1995); International Fiscal Association ("IFA"), *Resolution of Tax Treaty Conflicts by Arbitration*, 18e IFA Congress Seminar Series (Kluwer 1993). Currently IFA is supplementing its prior work by sponsoring an in-depth study of international income tax arbitration under the auspices of IFA's Permanent Scientific Committee.

mandatory income tax treaty arbitration remains an aspiration rather than an achievement.

An interesting conflict might arise if and when income tax treaties include binding pre-dispute arbitration clauses. Some claims might be characterized as falling under both NAFTA and income tax arbitration provisions. For example, an investor might seek a transfer pricing adjustment for a subsidiary corporation. Failure to make such an adjustment might also be characterized as a lack of "fair and equitable treatment" under NAFTA Article 1105, thus giving rise to potential arbitration under both NAFTA and the income tax treaty.

By its own terms, NAFTA can be trumped by income tax treaties. Article 2103 states that "in the event of any inconsistency between this Agreement and any [income tax] convention, that [income tax] convention shall prevail. . . ."⁴⁵ Presumably an arbitration pursuant to an income tax treaty would not be subject to veto under NAFTA.

IV. CONCLUSION

The collision of two principles, each valid when viewed alone, requires a process of line drawing. Resolution of investment disputes presents just such a conflict. On the one hand, foreign investors have a legitimate interest in having expropriation claims settled through a process that is both politically and procedurally neutral. On the other hand, the state has an equally legitimate interest in raising revenue free of frivolous attacks by perennially unhappy taxpayers.

NAFTA's "tax veto" establishes a form of triage to sort through claims that relate to both tax and uncompensated expropriation. The preliminary delineation between reasonable and unreasonable taxation is made by the tax authorities of the relevant states. Arbitral resolution of compensation claims may proceed only if the competent tax authorities fail to agree that the measure is *not* an expropriation.

One might question why the triage must be made administratively. If arbitrators can be trusted with significant national interests, such as those related to expropriation of vital natural resources, it is not evident why there should be a presumption against an arbitral tribunal examining expropriations that implicate tax measures.

Tax authorities, in any event, should be encouraged to use their veto power sparingly. Overly zealous intervention by governments would tear at the fabric of neutral arbitration that underpins much investor confidence in cross-border capital flows.

45. NAFTA Art 2103, 32 ILM at 700 (cited in note 5).

