Interpretive Powers of the NAFTA Free Trade Commission – Necessary Safety Valve or Infringement of the Rule of Law?

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Interpretive Powers of the Free Trade Commission and the Rule of Law

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This contribution reviews the interpretive powers of the NAFTA Free Trade Commission (FTC) and the relationship of such powers with the rule of law. More specifically, it seeks to determine whether such powers promote or hinder the rule of law.[1]

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[1] On this topic, see generally Jeffery Atik, *Repenser NAFTA Chapter 11: A Catalogue of Legitimacy Critiques*, 3 ASPER REV. INT'L BUS. & TRADE L. 215 (2003); Stefan Matiation, *Arbitration with Two Twists: Loewen v. United States and Free Trade Commission Intervention in NAFTA Chapter 11 Disputes*, 24 U. PA. J. INT'L ECON. L. 451 (2003); Charles H. Brower, II, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, 46 VA. J. INT'L L. 347 (2006); Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37 (2003); Charles N. Brower, Charles H. Brower, II & Jeremy K. Sharpe, *The Coming Crisis in the Global Adjudication System*, 19 ARB. INT'L 415 (2003); Mark Clodfelter, *U.S. State Department Participation in International Economic Dispute Resolution*, 42 S. TEX. L. REV. 1273 (2001); Charles H. Brower, II, *Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium*, 29 PEPP. L. REV. 43 (2001); THE FIRST DECADE OF NAFTA: THE FUTURE OF FREE TRADE IN NORTH AMERICA (K. Kennedy ed., 2004); Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INV. & TRADE 357 (2005); Todd Weiler, *NAFTA Investment Arbitration and the Growth of International Economic Law*, 36 CAN. BUS. L.J. 405 (2002); Charles H. Brower, II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43 (2001); Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365 (2003); Todd Weiler, *NAFTA Chapter 11 Jurisprudence, Coming Along Nicely*, 9 SW. J. L. & TRADE AM. 254 (2003); Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193 (2001).

It addresses this topic in three steps: first, it sets out the treaty framework; second, it addresses the FTC's interpretation of 2001; third, it reflects on the effects of the FTC's interpretive powers on the rule of law.

I. TREATY FRAMEWORK

Article 2001 of the NAFTA[2] establishes the FTC, composed of "cabinet level representatives" of the NAFTA parties or their designees. The FTC has the power to supervise the implementation of the NAFTA, oversee its further elaboration, and "resolve disputes that may arise regarding its interpretation or application."[3] Interpretations issued by the FTC "shall be binding" upon Chapter 11 arbitral tribunals pursuant to Article 1131(2). The preceding paragraph of that provision states that Chapter 11 tribunals "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

The interpretation mechanism by a non-judicial or political body provided in Article 2001 of the NAFTA is in no way unique. Similar or identical mechanisms have been introduced by the NAFTA parties in numerous instruments entered into with third States. For example, for Canada: in the Canadian Model Foreign Investment Promotion and Protection Agreement of 2003,[4] and treaties with the European Free Trade Association,[5] Colombia,[6]

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[2] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 612 (1993) [hereinafter NAFTA].

[3] NAFTA Art. 2001(2).

[4] Available at http://www.international.gc.ca, Foreign Affairs and International Trade Canada website.

[5] Free Trade Agreement between Canada and the States of the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland) (in force as of July 1, 2009), Art. 28, available at http://www.international.gc.ca, Foreign Affairs and International Trade Canada website.

Peru,[7] Chile,[8] Costa Rica,[9] Jordan[10] and Israel;[11] for the U.S.: in the 2004 U.S. Model BIT,[12] the CAFTA,[13] the U.S.-Australia Free Trade Agreement,[14] the U.S.-Chile Free Trade Agreement,[15] as

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[6] Canada-Colombia Free Trade Agreement (signed on Nov. 21, 2008), Art. 832, available at http://www.international.gc.ca, Foreign Affairs and International Trade Canada website.

[7] Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments (entered into force on Aug. 1, 2009), Article 50; Canada-Peru Free Trade Agreement (entered into force on Aug. 1, 2009, Art. 837, available at http://www.international.gc.ca, Foreign Affairs and International Trade Canada website.

[8] Canada-Chile Free Trade Agreement (entered into force on July 5, 1997), Art. N-01, available at http://www.international.gc.ca, Foreign Affairs and International Trade Canada website.

[9] Canada-Costa Rica Free Trade Agreement (entered into force on Nov. 1, 2002), Art. XIII.1, available at http://www.international.gc.ca, Foreign Affairs and International Trade Canada website.

[10] Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments (signed on June 28, 2009), Art. 40; Canada-Jordan Free Trade Agreement (signed on June 28, 2009), Art. 13-1, available at http://www.international.gc.ca, Foreign Affairs and International Trade Canada website.

[11] Canada-Israel Free Trade Agreement (entered into force on Jan. 1, 1997), Art. 8.2, available at http://www.international.gc.ca, Foreign Affairs and International Trade Canada website.

[12] Available at http://www.state.gov, the website of the U.S. Department of State.

[13] Dominican Republic-Central American Free Trade Agreement (signed on Aug. 5, 2004), available at http://www.ustr.gov, the website of the Office of the United States Representative.

[14] United States-Australia Free Trade Agreement (entered into force on Jan. 1, 2005), Art. 21.1, available at http://www.ustr.gov, the website of the Office of the United States Representative.

[15] United States-Chile Free Trade Agreement (entered into force on Jan. 1, 2004), Art. 21.1, available at http://www.ustr.gov, the website of the Office of the United States Representative.

well as treaties with Colombia,[16] Korea,[17] Morocco,[18] Oman,[19] Panama,[20] Peru,[21] Rwanda,[22] Singapore[23] and Uruguay;[24] for Mexico: with Japan,[25] the EFTA,[26] the European Union[27] and Israel.[28]

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[16] United States-Colombia Free Trade Agreement (signed on Nov. 22, 2006), Art. 20.1, available at http://www.ustr.gov, the website of the Office of the United States Representative.

[17] United States–Korea Free Trade Agreement (signed on June 30, 2007), Art. 22.2, available at http://www.ustr.gov, the website of the Office of the United States Representative.

[18] United States-Morocco Free Trade Agreement (entered into force on Jan. 1, 2006), Art. 19.2, available at http://www.ustr.gov, the website of the Office of the United States Representative.

[19] United States-Oman Free Trade Agreement (entered into force Jan. 1, 2009), Art. 19.1, available at http://www.ustr.gov, the website of the Office of the United States Representative.

[20] United States-Panama Trade Promotion Agreement (signed on June 28, 2007), Art. 19.2, available at http://www.ustr.gov, the website of the Office of the United States Representative.

[21] United States-Peru Trade Promotion Agreement (entered into force on Feb. 1, 2009), Art. 20.1, available at http://www.ustr.gov, the website of the Office of the United States Representative.

[22] Treaty between the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment (signed on Feb. 19, 2008), Art. 30(3), available at http://www.ustr.gov, the website of the Office of the United States Representative.

[23] United States–Singapore Free Trade Agreement (entered into force on Jan. 1, 2004), Art. 20.1, available at http://www.ustr.gov, the website of the Office of the United States Representative.

[24] Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (entered into force on Nov. 1, 2006), Art. 30(3), available at http://www.ustr.gov, the website of the Office of the United States Representative.

[25] Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership (entered into force on Apr. 1, 2005),

A mechanism providing for interpretive powers also exists in certain international organizations where the charter or other constitutive documents vest power in a body of the organization to provide interpretations of the relevant treaty. The best example of this is the World Trade Organization (WTO),[29] where the Marrakesh Agreement provides that the Ministerial Conference and the General Council have exclusive authority to adopt interpretations of the WTO Agreement.[30] The provision adds that such authority may not be used in a manner that would undermine the procedures for the amendment of the WTO Agreement. The WTO Appellate Body and commentators have taken the view that such interpretations can only clarify the meaning of existing

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Art. 165, available at http://www.sice.oas.org, the website of the Organization of American States dedicated to Foreign Trade Information.

[26] Mexico-European Free Trade Association Free Trade Agreement (entered into force on July 1, 2001), Art. 70, available at http://www.sice.oas.org, the website of the Organization of American States dedicated to Foreign Trade Information.

[27] Mexico-European Union Free Trade Agreement (entered into force on July 1, 2000), Art. 47, available at http://www.sice.oas.org, the website of the Organization of American States dedicated to Foreign Trade Information.

[28] Mexico-Israel Free Trade Agreement (entered into force on July 1, 2000), Art. 10-01, available at http://www.sice.oas.org, the website of the Organization of American States dedicated to Foreign Trade Information.

[29] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter WTO Agreement].

[30] Article IX(2) of the WTO Agreement provides:

> The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.

obligations; they cannot add to or diminish the rights and obligations of WTO members.[31] So far, such power has never been used, perhaps because of the large number of States which compose the interpretive body.[32]

Another example is the Executive Board of the International Monetary Fund (IMF), which has the power to decide questions of interpretation of the IMF Articles that arise between the Fund and a member or among members.[33] That power has been used ten times.[34] Most often the IMF prefers less formal procedures.[35]

Put simply, the topic of interpretive powers vested in non-judicial bodies vastly exceeds the NAFTA. The issues that are raised by the use of the interpretive powers under the NAFTA are potentially relevant for the operation of many other treaties.

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[31] ISABELLE VAN DAMME, TREATY INTERPRETATION BY THE WTO APPELLATE BODY 28 (2009), citing Appellate Body Reports, *EC—Bananas III (Article 21.5—Ecuador II); EC—Bananas II (Article 21.5—US)*, ¶ 383.

[32] *See* VAN DAMME, *supra* note 31, at 26–30; PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANISATION: TEXT, CASES AND MATERIALS 141–42 (2d ed. 2008); JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 123–24 (2d ed. 1997); ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 210 (1998).

[33] Article XVIII of the IMF's original Articles, as drafted at the Bretton Woods Conference of July 1944, now Article XXIX of the IMF, included the following provisions on interpretation: "(a) Any question of interpretation of the provisions of this Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to the Executive Board for its decision."

[34] JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 286–87 (3d ed. 1995).

[35] A number of questions of interpretation have been settled by decisions of the Executive Board and are generally treated with the same level of respect as formal decisions by members of the Fund; *id.* at 287.

II. THE FTC'S INTERPRETATION OF JULY 31, 2001

It is well know that the FTC has made use of its interpretive powers only once thus far, in July 2001 (the "Interpretation").[36] The Interpretation dealt with two topics: first, confidentiality and public access to documents in the record of Chapter 11 arbitrations; second, minimum standards of treatment under Article 1105. This paper will focus on the second aspect of the Interpretation.

The Interpretation provides that Article 1105, which is entitled "minimum standard of treatment," and guarantees investors treatment "in accordance with international law, including fair and equitable treatment and full protection and security," must be understood as a guarantee of treatment according to customary international law, whereby fair and equitable treatment and full protection and security are included in, and not in addition to, the minimum standards. The Interpretation also states that the breach of another provision of the NAFTA, *e.g.*, national treatment, does not in and of itself constitute a breach of fair and equitable treatment under Article 1105.

The Interpretation had been prompted by several arbitral awards that had adopted an expansive reading of Article 1105. In particular, the tribunal in *Metalclad* had held that the Mexican Government had breached Article 1105 by failing to provide a "transparent and predictable framework" to the investor.[37] Further,

[36] Notes of Interpretation of Certain Chapter Eleven Provisions (Free Trade Commission, July 31, 2001), available at http://www.international.gc.ca, Foreign Affairs and International Trade Canada website, and reproduced as Annex 2 to the present volume.

[37] Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, Aug. 30, 2000, 16 ICSID REV. 168, ¶ 100 (2001), available at http://www.ita.law.uvic.ca, the University of Victoria's website on Investment Treaty Arbitration.

the tribunal in *S.D. Myers* had considered that a breach of the national treatment provision[38] was also a breach of Article 1105.[39] Even more so, the *Pope & Talbot* tribunal had held in a partial award that fair and equitable treatment was a self-standing right in addition to the minimum standards.[40] It had relied on the standards provided in bilateral investment treaties (BITs) to reach this conclusion.[41]

The Interpretation was issued at a time when a number of Chapter 11 proceedings were pending. *Pope & Talbot* was in the damage phase following the partial award just mentioned[42] and in *Mondev*,[43] *ADF*,[44] *Waste Management*,[45] *Methanex*[46] and *UPS*[47] notices of arbitration had been filed.

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[38] NAFTA, Art. 1102.

[39] S.D. Myers, Inc. v. Canada, Partial Award, Nov. 13, 2000, 40 I.L.M. 1408, ¶¶ 224–64 (2001), available at http://www.ita.law.uvic.ca, the University of Victoria's website on Investment Treaty Arbitration.

[40] Pope & Talbot, Inc. v. Canada, Award on the Merits of Phase 2, Apr. 10, 2001, 7 ICSID REP. 236, ¶ 110 (2005), available at http://www.ita.law.uvic.ca, the University of Victoria's website on Investment Treaty Arbitration.

[41] THE FIRST DECADE OF NAFTA, *supra* note 1, at 527.

[42] Pope & Talbot, Inc. v. Canada, Award in Respect of Damages, May 31, 2002, 41 I.L.M. 1347 (2002), available at http://www.ita.law.uvic.ca, the University of Victoria's website on Investment Treaty Arbitration.

[43] Mondev International Ltd. v. United States of America, Award, Oct. 11, 2002, 42 I.L.M. 85 (2003), available at http://www.state.gov, the website of the U.S. Department of State.

[44] ADF Group Inc. v. United States of America, ICSID Case No. ARB(AF)/00/1, Award, Jan. 9, 2003, 6 ICSID REP. 470 (2004), available at http://www.ita.law.uvic.ca, the University of Victoria's website on Investment Treaty Arbitration.

[45] Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004, 43 I.L.M. 967 (2004), available at

The *Pope & Talbot* tribunal was disturbed by the Interpretation. It asked itself a number of questions: did the Interpretation change the partial award? Was the Interpretation a true interpretation or a disguised amendment of the NAFTA? Who had the power to answer this question? If it was an amendment, would it bind the arbitral tribunal? Did the fact that Canada was at the same time co-author of the Interpretation and respondent in a pending arbitration have any relevance? In answer, the *Pope & Talbot* tribunal considered that the Interpretation was an amendment of the NAFTA. It held, however, that this characterization had no bearing on the case before it, because the conclusion reached in the partial award would stand even under the regime of the Interpretation.[48] As a result, it proceeded with the merits phase and awarded damages.[49]

Subsequent tribunals have accepted the Interpretation as valid. The tribunal in *Mondev*, for instance, expressly stated that "[t]here is no difficulty in accepting this as an interpretation of the phrase 'in accordance with international law.'"[50] However, it gave no explanation as to why that was so. The *ADF* tribunal, for its part, refused to "embark upon an inquiry into the distinction between an 'interpretation' and an 'amendment' of Article

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http://www.ita.law.uvic.ca, the University of Victoria's website on Investment Treaty Arbitration.

[46] Methanex Corp. v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits, Aug. 9, 2005, 44 I.L.M. 1345 (2005), available at http://www.naftaclaims.com.

[47] United Parcel Service of America, Inc. v. Canada, Award on Jurisdiction, Nov. 22, 2002, 7 ICSID REP. 288 (2005) available at http://www.ita.law.uvic.ca, the University of Victoria's website on Investment Treaty Arbitration.

[48] *Pope & Talbot*, *supra* note 42, ¶ 47.

[49] *Id.* ¶¶ 48–69.

[50] *Mondev*, *supra* note 43, ¶ 121.

1105(1)."[51] It found that, through the FTC, all three NAFTA parties were speaking to the arbitral tribunal and that there could be "[n]o more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA."[52] The *Merrill & Ring* tribunal in 2010 observed that the interpretation appeared "closer to an amendment of the treaty, than a strict interpretation."[53] It drew no consequence from this observation but insisted on the evolutionary nature of the standard.

While not challenging the manner in which the Interpretation was given (but for *Pope & Talbot*, which drew no consequence from it, and for a mention in *Merrill & Ring*), arbitral tribunals have discussed the content and meaning of the Interpretation.[54] Essentially, most tribunals have considered that the minimum standard of treatment is an evolutionary notion, which applies as it stands today[55] and not at the time of the *Neer* decision in 1926—requiring outrageous conduct.[56] At the same

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[51] *ADF*, *supra* note 44, ¶ 177.

[52] *Id.* ¶ 177.

[53] Merrill & Ring Forestry L.P. v. Canada, Award, Mar. 31, 2010, ¶ 192, available at http://www.ita.law.uvic.ca, the University of Victoria's website on Investment Treaty Arbitration.

[54] *Mondev*, *supra* note 43, ¶¶ 100 *et seq.*; *UPS*, *supra* note 47, ¶¶ 175–92; *Waste Management*, *supra* note 45, ¶¶ 89–99; The Loewen Group, Inc. and Raymond L. Loewen v. United States of America, Award, June 26, 2003, 42 I.L.M. 811, ¶¶ 124–28 (2003), available at http://www.naftaclaims.com; Glamis Gold, Ltd. v. United States of America, Award, June 8, 2009, ¶ 599, available at naftaclaims.com.

[55] The *ADF* tribunal agreed with the reasoning in *Mondev* that the minimum standard was an evolutionary one (*ADF*, *supra* note 44, ¶ 89), and the tribunal in *Waste Management* concluded, based on decisions in *S.D. Myers*, *Mondev*, *ADF* and *Loewen*, that the standard was a "flexible one which must be adapted to the circumstances of each case" (*Waste Management*, *supra* note 45, ¶ 98).

[56] Neer v. Mexico, 4 R. INT'L ARB. AWARDS, ¶ 4, at 61–62 (Oct. 15, 1926) ("the treatment of an alien, in order to constitute an international

time, they did not go as far as to adopt the definition of fair and equitable treatment as it is interpreted under certain BITs.[57]

More recently in 2009, the tribunal in *Glamis* appears to have reverted to a narrower notion on the basis that, "although situations may be more varied and complicated today than in the 1920s, the level of scrutiny is the same. The fundamentals of the *Neer* standard thus still apply today . . . ."[58] However, even more recently in 2010, the tribunal in *Merrill & Ring*[59] again adopted a dynamic approach of the applicable minimum standard of treatment.[60] It found that the standard was broader than that defined in *Neer* and protected against "all such acts or behavior that might infringe a sense of fairness, equity and reasonableness."[61]

III. THE EFFECTS OF THE INTERPRETIVE POWER ON THE RULE OF LAW

Having set the scene, it is time to review whether interpretive powers promote or hinder the rule of law.

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delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency").

[57] For a summary of the debate over the meaning of the Interpretation, see David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States - Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679 (2004).

[58] *Glamis*, *supra* note 54, ¶ 616.

[59] *Merrill & Ring*, *supra* note 53.

[60] *Id.* ¶ 193.

[61] *Id.* ¶¶ 210 and 213.

The rule of law is a political ideal; a form of governance. It can be opposed to the "rule of men." It can also be equated to "governance by law." In French, it corresponds to "*état de droit*." The rule of law in the meaning of governance by law must be distinguished from a rule of law in the sense of a legal rule or "*règle de droit*." The violation of a legal rule is not necessarily an infringement of the rule of law.

What elements must be met for the law to rule? Legal theorists have developed three main tests or principles:

- first, *promulgation*: the law must be known and understandable in order to direct the conduct of those subject to the law;

- second, *prospectivity*: the law must apply to future actions and not retroactively;

- third, there must be *congruence* between formulation and implementation. This implies consistency in the application and is linked to the impartiality of adjudicators.[62]

To make it simpler, the rule of law essentially requires predictability through rules that are general, prospective, and clear. The test, articulated in this way, permits a more specific formulation of the question posed here, namely, are interpretive powers beneficial or detrimental to predictability?[63] To answer this

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[62] MATTHEW H. KRAMER, OBJECTIVITY AND THE RULE OF LAW 73–74 (2007). *See also* BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 91–101 (2004); David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 LAW & CONTEMP. PROB. 127 (2004-2005).

[63] For a similar formulation, see F.A. HAYEK, THE ROAD TO SERFDOM 75–76 (1944). On the meaning of the Rule of Law, Hayek said:

> Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its

question, one must distinguish between the existence and the exercise of interpretive powers.

The existence of interpretive powers as an institution, or the fact that the FTC has such powers *in abstracto* and not the manner in which it exercises them *in concreto*, increases the predictability of the law. The interpretation of a norm by the FTC will bind all addressees of that norm and all future NAFTA tribunals, while the interpretation by a NAFTA tribunal will have more limited force. It will bind the parties to the arbitration and may have some *de facto* precedential value.[64] To draw a parallel, the existence of interpretive powers in the European Union, where certain national courts must request interpretations from the European Court of Justice on issues of interpretation of European law, has clearly increased the predictability of European law.[65] Accordingly, the concept of interpretive powers—empowering a designated non-judicial body to interpret a body of law—is beneficial to the rule of law.

> coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.

[64] On precedent in international arbitration, see Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357 (2007); Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. INT'L ARB. 129 (2007).

[65] Consolidated Version of the Treaty on European Union, O.J. (2008/C 115/01) (entered into force on December 1, 2009). Article 19(3) states:

> The Court of Justice of the European Union shall, in accordance with the Treaties . . . give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions.

For a discussion on the interpretive power of the European Court of Justice (also known as the preliminary reference procedure) see SIONAIDH DOUGLAS-SCOTT, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 225–54 (2002); EUROPEAN COURT OF JUSTICE 9–42 (G. De Búrca & J. Weiler eds., 2001); ANTHONY ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE 21–142 (1999).

Nonetheless, the exercise of these powers may undermine the rule of law. Why? Much has been said about such exercise in the context of the Interpretation.[66] Commentators have criticized the exercise of the interpretive power by the FTC on a number of grounds. First, it has been argued that the Interpretation might be an *ultra vires* amendment of NAFTA, as it adds words that are neither in the text nor in the drafting history of Article 1105.[67] Second, some have taken the view that the Interpretation is inconsistent with the ordinary meaning of the words in Article 1105 of the NAFTA and, therefore, is not an interpretation in accordance with Article 31 of the Vienna Convention on the Law of Treaties (VCLT).[68] Third, concerns have been voiced about the fact that the Interpretation intended to apply to pending disputes, which violated the principle of non-retroactivity and the principle that no one may be the judge of his or her own cause.[69] Fourth, it has been argued that the FTC issued the Interpretation "out of the blue," "without any prior public consultation" and without giving "any warning to investors party to ongoing Chapter Eleven

[66] Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, *supra* note 1; Brower, II, *Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium*, *supra* note 1; Brower, II, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, *supra* note 1; Matiation, *supra* note 1; Weiler, *supra* note 1; Alvarez & Park, *supra* note 1.

[67] *See* Charles H. Brower, II, *Fair and Equitable Treatment Under NAFTA's Investment Chapter*, 96 AM. SOC'Y INT'L L. PROC. 9, 9 (2002), cited in Matiation, *supra* note 1, at 480.

[68] Vienna Convention on the Law of Treaties 1969 (signed May 23, 1969, entered into force Jan. 27, 1980), 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Article 31 states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[69] Weiler, *supra* note 1, at 427–28; Brower II, *supra* note 67, cited in Matiation, *supra* note 1, at 482.

arbitrations," which may violate the principle of equal treatment of parties.[70]

While keeping these criticisms in mind, this contribution will focus on the three tests which legal theorists consider must be met for the law to rule. First, it will address promulgation which implies that the law be understandable (A). Promulgation is linked to the clarity of the interpretation. Second, it will look to prospectivity, which prohibits retroactive norms. In our context, this test relates to the distinction between treaty amendment (to which the principle of non-retroactivity applies because the amendment creates a new norm) and treaty interpretation (to which the principle of non-retroactivity does not apply because a true interpretation merely clarifies the content of an existing norm) (B). Third and last, it will review congruence, which calls for consistent application of the law and requires, in particular, impartiality on the part of the adjudicator. Here congruence will refer to the protection of the fundamental rights of the parties in the arbitration (C).

A. Promulgation and Clarity

Predictability, and through it the rule of law, is served by clear legal norms. This means that to further the rule of law, the content of the interpretation must be clear. In other words, an interpretation should not require interpretation.

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[70] *See* Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, *supra* note 1, at 81 (quoting ADF Group, Inc. v. United States of America, Investor's Reply to the Counter-Memorial of the United States on Competence and Liability, Jan. 28, 2002, available at http://www.state.gov, the website of the U.S. Department of State; *see also* Brower, II, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, *supra* note 1.

B. Prospectivity and Non-Retroactivity

Applied to the present context, the second test of the rule of law is linked to the distinction between interpretation and treaty amendment. Article 2202 of the NAFTA provides that the parties may agree on any modification of or addition to the NATFA, which will constitute a part of the NAFTA when it is approved in accordance with the applicable legal procedures of each party. What if the interpretation is a disguised amendment of the NAFTA that does not follow the amendment procedure mandated by Article 2202? Is a tribunal bound only by an interpretation that is a true interpretation under Article 1131(2) as opposed to an interpretation that is in reality an amendment?

Some commentators[71] and the *Pope & Talbot*[72] tribunal have found that the Interpretation was in reality an amendment because it limited the reference to international law in Article 1105 to customary international law. Indeed, under the definition of Article 38 of the Statute of the International Court of Justice,[73]

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[71] Weiler, *supra* note 1, at 428; Brower, II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, *supra* note 1, at 88; Brower, II, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, *supra* note 1, at 348. *See also* Alvarez & Park, *supra* note 1, at 397–98, who state that "[t]o date no satisfactory way has been found to resolve the potential conflict between the requirements for amendment under Article 2202 and the provisions of Article 1131 that permit Free Trade Commission interpretations."

[72] *Pope & Talbot*, *supra* note 42, ¶ 47.

[73] Statute of the International Court of Justice (concluded June 26, 1945, entered into force Oct. 24, 1945) 39 A.J.I.L. SUPP. 215 (1945). Article 38(1) states:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;

international law is generally understood to comprise treaties and general principles of law in addition to customary international law.[74]

At first sight, the distinction between interpretation and amendment appears to provide a helpful tool for the analysis. Upon a closer examination, however, it turns out to be of limited assistance. First, as a practical matter, it will often be difficult to draw the line between a true interpretation and an amendment. Further, pursuant to Articles 39 and 11 of the Vienna Convention on the Law of Treaties, States can amend treaties by "any means if agreed." Because the FTC is an emanation of the States parties to NAFTA,[75] one may consider that an amendment by way of an FTC interpretation amounts to an amendment by the contracting States themselves and, therefore, is binding upon a Chapter 11 tribunal.

However, another problem may arise in this context and change the conclusion just reached. Prospectivity is one of the tenets of the rule of law. Accordingly, the conduct of the host State

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> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[74] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5 (7th ed. 2008) ("Article 38 is generally regarded as a complete statement of the sources of international law"); MALCOLM N. SHAW, INTERNATIONAL LAW 66 (5th ed. 2003) ("Article 38(1) of the Statute of the International Court of Justice is widely recognised as the most authoritative statement as to the sources of international law"); *see also* ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 102 (2009); Alain Pellet, *"Art. 38"*, *in* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 676 (A. Zimmermann et al., eds. 2006); V.D. DEGAN, SOURCE OF INTERNATIONAL LAW 3–8 (1997); TIM HILLER, SOURCEBOOK ON PUBLIC INTERNATIONAL LAW 63–65 (1997).

[75] At least one commentator has argued that the FTC must be seen as a separate and distinct body from the NAFTA parties: Matiation, *supra* note 1, at 477.

of the investment must be measured on the basis of norms in effect when the conduct occurred and not of newly created norms. The latter may happen if the purported interpretation is issued after the conduct and is in reality an amendment. In other words, the relevant norms can have no retroactive effect.[76] The same issue does not arise if the interpretation is a true interpretation, *i.e.*, an interpretation that clarifies what the norm has always been.

C. Congruence and Fundamental Rights

The final test for the rule of law is congruence. It implies consistency in the application of the law and, to reach this objective, an impartial and fair dispute settlement system, *i.e.*, a system that complies with the fundamental procedural rights of the litigants. These rights may be in jeopardy whenever an interpretation that may affect the outcome of that arbitration is rendered in the course of an arbitration. The following discussion assumes that the interpretation is a true interpretation and thus no issue of retroactivity arises.

The difficulty here lies in the two hats worn by the respondent State. That State is at the same time a litigant and a member of the FTC. As a member of the FTC, it contributes to the content of the interpretation. As a litigant, it will benefit from the interpretation if the latter influences the outcome in its favor. This appears to be contrary to due process, specifically contrary to the principle of independence and impartiality of justice, which includes the principle that no one can be the judge of its own cause.[77] It can also be argued that such an interpretation breaches

[76] The principle of non-retroactivity is in particular embodied in Article 28 of the Vienna Convention.

[77] The maxim "*nemo judex in parte sua*" has been widely recognized as a principle of international law. *See, e.g.,* in the U.K., Dimes v. Grand Junction Canal (1852) 3 H.L.C. 759, 793, *per* Lord Campbell, and Frome United

the principle of equal treatment of the parties and the opportunity to be heard of the other party.[78]

The rule stating that interpretations are binding upon arbitral tribunals, *i.e.*, Article 1131(2), does not provide for any time limitation, at least no express limitation. Should it then be interpreted as including an implied limitation pursuant to which a tribunal is only bound by interpretations rendered prior to the start of the arbitration? There are good arguments for an implied time limitation.[79]

First, Article 1115 of the NAFTA provides for a dispute settlement mechanism in accordance with "due process before an impartial tribunal." Second, pursuant to Article 1131(1), the tribunal must apply "this Agreement *and* applicable rules of international law." Fundamental rights, including due process rights, are part of international law.[80] Third, Chapter 11 of the NAFTA seeks to protect non-State actors by granting them substantive and procedural rights, including the right to access

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Breweries Co. v. Bath Justices, [1926] A.C. 586; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 102 (identifying the rule that no one may be judge in his own cause as a general principle that has achieved the status of international law). This principle is also reflected in the IBA Guidelines on Conflicts of Interest in International Arbitration (approved on May 22, 2004 by the Council of the International Bar Association). *See also* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 35 (2008); Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1201 (P. Muchlinski, F. Ortino & C. Schreuer eds., 2008).

[78] As required by Article 1115 of NAFTA.

[79] To avoid misunderstandings, the need for a time limitation does not arise as a result of the non-retroactivity principle but as a result of the necessity to comply with due process.

[80] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 199–206 (2005); *see also* Brower, II, *Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium*, *supra* note 1, at 78 n.249.

arbitration. When interpreting Article 1131(2) in accordance with Article 31(1) of the Vienna Convention, *i.e.*, "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," it would be incongruous to adopt a meaning in breach of the investor's fundamental rights.

IV. CONCLUSION

In conclusion of this analysis, the institution or existence of interpretive powers appears beneficial to the rule of law because it increases predictability of the norms, provided the exercise of these powers meets the following tests.

First, the interpretation itself must be understandable or clear. Otherwise it makes no contribution to predictability and fails the test of promulgation. Second, the interpretive powers must be exercised in such a manner as not to breach the principle of non-retroactivity, which may occur when an interpretation crosses the line and is in effect a disguised treaty amendment rather than a true interpretation. In that case, the interpretation would fail the test of prospectivity. Third, the exercise of the interpretive powers must not breach fundamental procedural rights. Such a breach may occur when an interpretation rendered during the pendency of an arbitration influences the outcome of that arbitration, a situation that would defeat the test of congruence.

If these latter breaches materialize, there is good reason for an arbitral tribunal to disregard the interpretation. Doing otherwise would not only fail to sanction the breach, it would also be an impediment to the rule of law. In all other cases, an arbitral tribunal must apply the interpretation. Doing so will be in conformity with the treaty and will promote the rule of law.