

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE *NORTH AMERICAN FREE TRADE AGREEMENT*
AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES
BETWEEN

MONDEV INTERNATIONAL LTD,

CLAIMANT/INVESTOR

- and -

UNITED STATES OF AMERICA,

RESPONDENT/PARTY

[ICSID Case No. ARB(AF)/99/2]

SECOND SUBMISSION OF CANADA

PURSUANT TO *NAFTA* ARTICLE 1128

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Introduction

1. *NAFTA* Article 1128 entitles a Party to *NAFTA* (“Party”) to make submissions on a question of interpretation of this agreement.¹ On October 24, 2000 the Tribunal authorized Canada and Mexico to make submissions on issues raised by the disputing parties in this phase of the arbitration.²
2. This submission is not intended to address all interpretive issues that may arise in this proceeding. To the extent that it does not address certain issues, Canada’s silence should not be taken to constitute concurrence or disagreement with the positions advanced by the disputing parties.
3. Canada takes no position on any particular issues of fact or on how the interpretations it submits below apply to the facts of this case.

General Principles of Interpretation

4. Article 102(2) of *NAFTA* states that,

The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives ... and in accordance with applicable rules of international law.

[Emphasis Added]

Similarly, Article 1131 of *NAFTA* stipulates,

A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

[Emphasis Added]

5. The applicable rules of international law include the *Vienna Convention on the Law of Treaties*³ (“*Vienna Convention*”), which has been accepted as reflecting customary international law on the interpretation of treaties. Tribunals arbitrating *NAFTA* Chapter Eleven claims to date have agreed that the *Vienna Convention* is an applicable rule of international law within the meaning of *NAFTA* Article 1131.⁴

¹ *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 368 (entered into force 1 January 1994). [“*NAFTA*”]

² *Mondev v. USA*, Order of 24 October 2000, Unreported, at para. 3.

³ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331. (Tab 1)

⁴ *Ibid.* See for example, *Pope & Talbot, Inc. v. Canada* (June 26, 2000), Interim Award – Unreported (UNCITRAL), at paras 65-66. (Tab 2), *S.D. Myers v. Canada* (November 13, 2000), Partial Award – Unreported (UNCITRAL) at paras 200-203. (Tab 3) and *Ethyl*

6. Article 31(1) of the *Vienna Convention* requires that the language of a treaty be interpreted in good faith, in accordance with its ordinary meaning. It must also be interpreted in the context of the object and purpose of the Treaty as a whole, as reflected in its text. Consequently, the words used in *NAFTA* Chapter Eleven are to be interpreted according to their ordinary meaning in light of the object and purpose of the *NAFTA* as a whole.

Procedural Issues – NAFTA Chapter Eleven, Section B

(i) Introduction

7. The consent of the *NAFTA* Parties to arbitrate investor-state disputes is conditioned on the disputing investor meeting the prerequisites to arbitration set out in *NAFTA*. This consent permits investors to arbitrate alleged violations of *NAFTA* Chapter Eleven Section A.
8. The investor must satisfy the conditions precedent in Articles 1121 and 1122. The ordinary meaning of these Articles makes it clear that they contain mandatory requirements that must be satisfied for a Party to have consented to the arbitration.
9. Article 1121 provides that,

Article 1121: Conditions Precedent to Submission of a Claim to Arbitration

1. A disputing investor may submit a claim under Article 1116 to arbitration only if:
 - (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and...
2. A disputing Investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:
 - (a) consent to arbitration in accordance with the procedures set out in this Agreement; and...

[Emphasis Added]

10. Article 31(2) of the *Vienna Convention* requires that effect be given to all parts of a treaty, including the headings. It is apparent from the wording of Article

Corporation v. Canada (1998), Preliminary Award on Jurisdiction – Unreported (UNCITRAL) at paras 51-52. (Tab 4).

1121 that it imposes mandatory pre-requisites on investors intending to submit a claim to arbitration.

11. That these provisions are mandatory is affirmed by the immediate context of the provision. Article 1121 is entitled, “Conditions Precedent to Submission of a Claim to Arbitration”. Furthermore, a disputing Party may submit a claim under Articles 1116 or 1117, “only if”, the investor makes the claim, “in accordance with the procedures set out in this Agreement.”
12. Similarly, Article 1122 states that,

Article 1122: Consent to Arbitration

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.
2. The consent given by paragraph 1 and the submission by a disputing investor of a claim shall satisfy the requirement of:
 - (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;

...

13. As in Article 1121, consent to arbitration only exists if the submission of the claim is, “in accordance with the procedures set out in this Agreement.”
14. It is clear that fulfillment of the conditions precedent is a mandatory obligation.⁵ A Party’s consent to arbitrate is premised on adherence to the procedural requirements of NAFTA.

(ii) NAFTA – Limitation of Claims

NAFTA does not Apply Retroactively

15. It is clear that the Parties intended that *NAFTA* only apply prospectively. Article 2203 of *NAFTA* states that,

⁵ In *Ethyl Corporation v. Canada* (Tab 4) the Tribunal categorised obligations under *NAFTA* Chapter Eleven Section B as either jurisdictional provisions or procedural rules. The Tribunal indicated that the failure to satisfy the former would restrict the authority of the Tribunal to act on the merits of the dispute. Conversely, the failure to meet procedural rules would only result in delay. It is submitted that all of the conditions precedent and procedural requirements specified in *NAFTA* Chapter Eleven B fall into the former category. The decision in *Ethyl, supra* was wrongly decided insofar as it conflicts with this interpretation of these procedural requirements and hence ignores the plain language and context of Articles 1121 and 1122. See *Ethyl, supra* note 4, at paras. 58-61. An interpretation consistent with the requirements of Chapter Eleven Section B is found in *Waste Management Inc. v. United Mexican States, infra* note 14. (Tab 9)

Article 2203: Entry into Force

This Agreement shall enter into force on January 1, 1994, on an exchange of written notifications certifying the completion of necessary legal procedures.

16. Article 28 of the *Vienna Convention* is instructive in interpreting this provision. It states that,

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 28 embodies the well-established principle of international law that treaties are non-retroactive in application unless the content of the treaty indicates otherwise.

17. This principle was outlined in the *Ambatielos Case (Greece v. United Kingdom)* where the International Court of Justice found that,

These points raise the question of the retroactive operation of the Treaty of 1926 and are intended to meet ... "the similar clauses theory", advanced on behalf of the Hellenic Government. ... To accept this theory would mean giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier.⁶

[Emphasis Added]

18. *NAFTA* does not indicate that it is to have any retroactive application. In fact, none of *NAFTA*'s provisions suggest anything other than prospective application. Canada notes that both the preamble as well as the objectives contained in Article 102 are consistent only with prospective application of the *NAFTA*.⁷ It is apparent from the foregoing that *NAFTA* cannot be applied retroactively.
19. This is consistent with the interpretation of the Tribunal in *Feldman v. United Mexican States*. The Tribunal, in the context of a *NAFTA* Chapter Eleven claim, determined that,

⁶ *Preliminary Objection*, [1952] I.C.J. Rep. 7 at 19. (Tab 5)

⁷ *NAFTA*, Preamble, Article 102. The Preamble employs words such as strengthen, create, establish, build, enhance and promote, all of which suggest prospective application. Similarly, the Objectives listed under Article 102 use the words promote, increase, create and establish.

Given that *NAFTA* came into force on January 1, 1994, no obligation adopted under *NAFTA* existed, and the Tribunal's jurisdiction does not extend, before that date. *NAFTA* itself did not purport to have any retroactive effect.⁸

Internal Procedures Cannot Complete a Non-existent Breach

20. The measures of a Party occurring before the implementation of *NAFTA* cannot violate *NAFTA*, as obligations under *NAFTA* did not exist at this time. If there is no initial violation of *NAFTA*, it is impossible for subsequent events to complete a non-existent breach or transform the conduct into a breach of *NAFTA*.
21. The existence of a breach of an international obligation must be determined based on the international law applicable contemporaneous with the breach. In the *Island of Palmas* case Arbitrator Max Humber indicated that,

Both parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.⁹

Although dealing with the juridical scope of a lawful act, it is accepted that this principle may be applied to other areas, including the determination of breach of a treaty.¹⁰

22. In formulating the Draft Articles on State Responsibility, the International Law Commission rejected the notion that an act which did not constitute a breach of international law when it occurred could subsequently be transformed into such a breach. In the *Fifth Report on State Responsibility* the Special Rapporteur Roberto Ago opined that,

It seems beyond doubt that, if an organ acted when the obligation on the State did not exist, the conduct of the organ was entirely legitimate under international law. The superior organs, even if appealed to by the interested parties after the entry into force of the new obligation, to amend the decision of the first organ, are not internationally bound to do so, since the decision in question was in no way contrary to international law at the time. A refusal to rescind that decision would not mean that the initial conduct was not in conformity with the result required by an international obligation then in force; it could not therefore have the effect of completing and making final a breach which had not until that time begun.¹¹

⁸ (2000), Interim Decision on Preliminary Jurisdictional Issues, ICSID Case No. ARB(AF)/99/1 (ICSID), at para. 62. (Tab 6)

⁹ (1928), United Nations: Reports of International Arbitral Awards, vol. II, 831 at 845. (Tab 7)

¹⁰ See: "Fifth Report on State Responsibility" (A/CN.4/291 and ADD.1 and 2) in *Yearbook of the International Law Commission, 1976*, vol. 2, Part 1, (New York, UN, 1977) at 15. (Tab 8)

¹¹ *Ibid*, at 23-24.

23. Measures that occurred prior to the implementation of *NAFTA* cannot constitute a breach of the obligations under *NAFTA*. It follows that domestic court procedures adjudicating the same actions cannot transform such measures into *NAFTA* breaches.

Sub-Articles 1116(2) and 1117(2) – Prescription Period

24. The requirements contained in Articles 1116 and 1117 are conditions precedent to obtaining the consent of a Party to submit to arbitration under Article 1122. Sub-Articles 1116(2) and 1117(2) expressly limit claims to three years. This limitation accrues from the point at which the investor knew or ought to have known about the claims and loss therefrom.
25. The limitation period contained in Articles 1116(2) and 1117(2) is mandatory and relates directly to the jurisdiction of a Tribunal to consider the merits of any claim.¹²
26. In considering Article 1117(2) the *NAFTA* Tribunal in *Feldman* emphasized the importance of these provisions stating that,

It is, therefore, consistent that *NAFTA* has adopted the reception of the notice of arbitration rather than any previous step as the critical point in time which stops the running of the limitation.¹³

[Emphasis Added]

It is apparent that in this instance, the Tribunal considered Article 1117(2) to be a “critical” procedural prerequisite under *NAFTA* Chapter Eleven Section B.

27. Where a disputing party fails to submit a claim to arbitration within three years of the date that it knew or should have acquired knowledge of the breach and loss, that claim is prescribed and cannot later be submitted for *NAFTA* arbitration.

(iii) Article 1119 - Procedural Prerequisites

28. Article 1119 requires an investor to provide advance notice of its intent to submit a claim to arbitration. In particular, Article 1119 states that,

The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify:

...

¹² See: *Introduction*, supra, paras. 7-14 and *Article 1119 - Procedural Prerequisites*, infra, paras. 28-31.

¹³ *Supra* note 8, at para. 45. (Tab 6).

- (b) the provisions of this Agreement alleged to have been breached and any other relevant provisions:
- (c) the issues and the factual basis for the claim:

[Emphasis Added]

- 29. The failure to include alleged breaches in the Notice of Intent to Submit a Claim to Arbitration as required under Article 1119 will prevent a Tribunal from considering this allegation of breach.
- 30. As noted above, the procedural requirements imposed by Articles 1121 and 1122 are fundamental to the consent of a Party to arbitrate. Article 1122(1) requires the submission of a claim to arbitration to conform to the procedures set out in *NAFTA*.
- 31. In consenting to arbitration under Article 1122, a Party relies on the Notice of Intent to ascertain the allegations made by the investor against it. This notice forms the scope of the dispute that the Party consents to submit to arbitration. In essence, it becomes the terms of reference of the arbitration. Consistent with this interpretation, Article 48 of the Additional Facility Rules of ICSID only permits incidental or additional claims if they are within the scope of the arbitration agreement of the parties.
- 32. Canada concurs with the position adopted by the U.S. with respect to these procedural requirements. The proper approach to these requirements was taken by the Chapter Eleven Tribunal in *Waste Management, Inc. v. United Mexican States*. In this decision the Tribunal stated that,

Under *NAFTA* Article 1121 a disputing investor may submit to arbitration proceedings, to quote literally, "Only if" certain prerequisites are met, comprising, in general terms, consent to and waiver of determined rights.

In the light of this Article, it is fulfillment of *NAFTA* Article 1121 conditions precedent by an aggrieved investor that entitles this Tribunal to take cognizance of any claim forming the subject of arbitration held in accordance with the dispute settlement procedure established under Chapter XI of said legal text.¹⁴

The Tribunal indicated that the provisions relating to Article 1121 were conditions precedent and later dismissed the claim because of the claimant's failure to provide sufficient waiver in accordance with *NAFTA* requirements of these provisions.

Substantive Issues - NAFTA Chapter Eleven, Section A

(i) National Treatment – Article 1102

¹⁴ (1999), Final Award, ICSID Case No. ARB (AF)/98/2 (ICSID) at 11 (Tab 9).

33. The relevant provisions of *NAFTA* Article 1102 state:

1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 1102(1) relates to treatment received by an investor whereas Article 1102(2) relates to the treatment of an investor's investment. In all other respects these provisions are identical.

34. There can be no breach of Article 1102 unless the evidence establishes that a Party has accorded less favourable treatment in like circumstances to an investor of another Party when compared to the treatment accorded to domestic investors.
35. To properly assess a claim under Article 1102 a *NAFTA* Tribunal must determine whether the measures *de jure or de facto* resulted in discriminatory treatment of the foreign investor or its investment
36. To make such a finding, the tribunal must determine whether the less favourable treatment accorded to the foreign investment was accorded "in like circumstances" relative to the domestic investment.
37. This inquiry requires an examination of the circumstances in which the treatment was accorded. It is a relative standard and will often largely be a factual determination. The inquiry into like circumstances must be pursued on a case-by-case basis. The inquiry requires a consideration of all the circumstances of the according of treatment.
38. Whether a Party intended to discriminate against a foreign investor does not determine if there is a breach of Article 1102. Instead, the Tribunal should properly limit itself to a determination of whether the measures were inconsistent with *NAFTA*¹⁵.

(ii) *Minimum Standard of Treatment – Article 1105*

Minimum Standard of Treatment is Derived from Customary International Law

¹⁵ *In the Matter of Cross Border Trucking Services* (2001), USA-MEX-98-2008-01 (Ch. 20 Panel), at para 214 (Tab 10).

39. The international minimum standard of treatment is a defined concept at customary international law. Article 1105 expressly adopts the minimum standard of treatment as defined by international law.

40. Paragraph 1 of Article 1105 provides:

Article 1105: Minimum Standard of Treatment

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

Thus, a *NAFTA* Party must accord to investments of other *NAFTA* Parties the treatment that international law requires for the treatment of foreign investments.

41. This approach to Article 1105 is affirmed by examining the immediate context of the provision. Article 31(2) of the *Vienna Convention* requires that effect be given to all parts of a treaty, including the headings. The heading of Article 1105 is “Minimum Standard of Treatment”. The standard of treatment under international law applicable to foreign investment is referred to in the same way as the heading of Article 1105: the international minimum standard.

42. As noted above, Article 1131(1) provides that Chapter Eleven of *NAFTA* is to be interpreted in accordance with the principles of international law. In this instance, these principles are those relating to the minimum standard of treatment with respect to foreign investments.

Threshold for Breach of the International Minimum Standard

43. The concept of an international minimum standard has been well accepted by international legal scholars. The standard was intended to provide a basic level of protection - a “minimum” standard.

44. Brownlie notes that:

...[a] source of difficulty has been the tendency of writers and tribunals to give the international standard a too ambitious content, ignoring the odd standards observed in many areas under the administration of governments with a ‘Western’ pattern of civilisation within the last century or so.¹⁶

45. Other publicists who have written on the issue have confirmed the high threshold for application of the international minimum standard. Malanczuk, for

¹⁶ I. Brownlie, *Principles of Public International Law*, 5th ed. (New York: Oxford University Press, Inc., 1998) E at 528-9 (Tab 11).

example, writes in *Akehurst's Modern Introduction to International Law*¹⁷ that the threshold for the breach of the international minimum standard is the very high one cited in *Neer v. United Mexican States*¹⁸.

46. Commenting on the conduct of Mexican authorities, the Commission in *Neer* said:

The propriety of governmental acts should be put to the test of international standards. The treatment of an alien, in order to constitute an international 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.¹⁹

[Emphasis added]

47. Thus, the Commission postulated a standard for the treatment of foreigners that was clearly a basic standard, meant to protect aliens from patently unreasonable government conduct. The United States-Mexico Claim Commission applied the test in *Neer* consistently in claims brought before it.²⁰
48. Other international bodies have applied the *Neer* standard, referring to it as the “standard habitually practised among civilised nations”²¹ or even “general principles of law.”²² In general, a patently unreasonable set of circumstances is required to found a breach of the minimum standard.
49. The standard has also been expressed as that required by “civilised states”. The benchmark for the international minimum standard, according to Elihu Root, is the conduct of “civilised nations”²³ – it is the “established standard of civilisation.”²⁴ Mann refers to “customary standards of behaviour.”²⁵

¹⁷ P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. (London: Routledge, 1997) at 261 (Tab 12).

¹⁸ *United States (L.F. Neer) v. United Mexican States* (1926), 4 R.I.A.A. 60 (Mexico-U.S. General Claims Commission) [“*Neer*”] (Tab 13).

¹⁹ *Ibid*, para. 4.

²⁰ *United States (Faulkner) v. United Mexican States* (1927), 21 A.J.I.L. 349 (Mexico-US General Claims Commission). (Tab 14) See e.g.: *United States (Chattin) v. United Mexican States* (1928), 22 A.J.I.L. 677 (Mexico-US General Claims Commission), *United States (Roberts) v. United Mexican States*, [1926] Op. Of. Com. 77. (Mexico-US General Claims Commission). and *United States (Way) v. United Mexican States*, (1929), 23 A.J.I.L. 466 (Mexico-US General Claims Commission).

²¹ *France (J. Chevreau) v. Great Britain* (1931), 27 A.J.I.L. 153 (Tribunal). (Tab 15)

²² *Amco Asia Corp. v. Indonesia* (1984), 24 I.L.M. 1022 (ICSID Tribunal) at 1032. (Tab 16)

²³ E. Root, “The Basis of Protection of Citizens Abroad” (1910), 4 Am. J. Int. Law 517 at 521.(Tab 17)

²⁴ *Ibid*.

50. Scholars have suggested that the failure to comply with the international law standard will occur only in circumstances where conduct is flagrant. Brierly states that “misconduct must be extremely gross.”²⁶

51. Similarly, Mann has said that, while a state is entitled to exercise its discretion:

... there comes a point when the exercise of such discretion so unreasonably or grossly offends against the alien’s right to fair and equitable treatment or so clearly deviates from customary standards of behaviour, that international law will intervene.²⁷

Mann’s perspective accords with the *Neer* standard and is consistent with the position of publicists and international tribunals.

52. Further, there is consensus that the domestic law of the host state is unrelated to the international minimum standard for the treatment of aliens.

53. Werner Levi has summarised the absolute nature of the international minimum standard as follows:

A basic principle has been that the alien must be treated according to the ordinary standard of civilised states. Depending upon how a state treats its own nationals, this principle obligates a state to treat aliens better or entitles it to treat them worse. Not equality of treatment of national and aliens, but “whether aliens are treated in accordance with ordinary standards of civilisation” is “the ultimate test of the propriety of acts of authorities in the light of international law.”²⁸

Fair and Equitable Treatment and Full Protection and Security are wholly subsumed in the Minimum Standard of Treatment

54. The international minimum standard in Article 1105 expressly subsumes the concepts of “fair and equitable treatment” and “full protection and security”.²⁹ To suggest that these concepts broaden the customary international law definition of minimum standard of treatment is inconsistent with the ordinary meaning of the article. This conclusion is further reinforced by the drafters use of the term “including” when relating these concepts to the international minimum standard under Article 1105.

²⁵ F. A. Mann, *The Legal Aspect of Money*, 5th ed. (Oxford : Clarendon Press, 1992) at 473. (Tab 18)

²⁶ J. Brierly, *The Law of Nations*, 6th ed. (Oxford: Clarendon Press, 1963) at 276 – 287. (Tab 19)

²⁷ Mann, *supra* note 25 at 472-473. (Tab 18)

²⁸ W. Levi, *Contemporary International Law*, 2nd ed., (Boulder, Col.: Westview Press) at 169. (Tab 20)

²⁹ NAFTA, Article 1105 states “...including fair and equitable treatment and full protection and security” [emphasis added]. See: R. Dolzer & M. Stevens, *Bilateral Investment Treaties* (The Hague: Martinus Nijhoff, 1995) at 60. (Tab 21)

55. In *United Mexican States v. Metalclad Corporation*, Mr. Justice Tysoe, citing the *Myers* tribunal, confirmed this interpretation stating that,

The tribunal in the *Myers* partial award went on to discuss the proper approach to the interpretation of Article 1105:

Article 1105(1) expresses an overall concept. The words of the article must be read as a whole. The phrases ... *fair and equitable treatment* ... and ...*full protection and security* ... cannot be read in isolation. They must be read in conjunction with the introductory phrase ...*treatment in accordance with international law*. (para. 262)

What the *Myers* tribunal correctly pointed out is that in order to qualify as a breach of Article 1105, the treatment in question must fail to accord to international law. Two potential examples are “fair and equitable treatment” and “full protection and security”, but those phrases do not stand on their own. For instance, treatment may be perceived to be unfair or inequitable but it will not constitute a breach of Article 1105 unless it is treatment, which is not in accordance with international law. In using the words “international law”, Article 1105 is referring to customary international law, which is developed by common practices of countries.³⁰

56. In interpreting the scope of Article 1105, it is necessary to look at its text. The words in Article 1105(1) mean that investments of investors of *NAFTA* Parties must be treated in accordance with customary international law relating to the treatment of foreign investments, including “fair and equitable treatment” and “full protection and security to the extent that these concepts comprise part of customary international law.”³¹

Denial of Justice

57. The idea that the international minimum standard might encompass principles of procedural fairness or denial of justice has long been debated. The Harvard Research Draft on International Law, described by Brownlie as the “best definition”³², defines denial of justice as follows:

Denial of justice exists where there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice,

³⁰ (2 May 2001), Vancouver L002904 (B.C.S.C.) at 23. (Tab 22)

³¹ *Ibid*, at 24. See also: *S.D. Myers v. Canada*, *supra* note 4, at paras 262 to 264. (Tab 3) and *United Mexican States v. Metalclad Corporation*, *supra* note 30, at paras 64-65. (Tab 22) in which the Court states its view that the *Pope & Talbot* tribunal stated the wrong test for Article 1105.

³² Brownlie, *supra* note 16, at 532. (Tab 11)

or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.³³

58. In *The Law of Nations*, Brierly describes denial of justice as being properly limited to “an injury involving the responsibility of the state committed by a court of justice.”³⁴ A court may fall below the standard fairly demanded of a civilised state if there are instances of:

...corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive or so manifestly unjust that no court which was both competent and honest could have given it.³⁵

Brierly concludes by stating that even if the term “denial of justice” is interpreted broadly, the “misconduct must be extremely gross.”³⁶

59. Publicists have cautioned against a broad interpretation of denial of procedural justice given that the minimum standard is intended to represent the standard of all civilised nations. Brownlie in particular has noted that with respect to denials of justice, the international minimum standard has been applied ambitiously by tribunals and writers, causing difficulties as follows:

First, the application of the standard may involve decisions upon very fine points of national law and the quality of national remedial machinery. Thus, in regard to the work of the courts, a distinction is sought to be made between error and ‘manifest injustice’. Secondly, the application of the standard seems to contradict the principle that the alien, within some limits at least, accepts the local law and jurisdiction. Thirdly, the concept of denial of justice embraces many instances where the harm to the alien is a breach of local law only and the denial is a failure to reach a non-local standard of competence in dealing with the wrong in the territorial jurisdiction.³⁷

60. The standard to which a *NAFTA* Party is to be held under Article 1105 is an international law standard, which, as pointed out earlier, is a standard that would be applied in a “reasonably developed legal system”. Clearly, it is not a standard of perfection – rather, it engages only for flagrant errors or abuses in the administration of justice.
61. It follows that a single *NAFTA* Party cannot claim that its system alone should be the benchmark, but that the practice of *NAFTA* Parties collectively as well as those of other “developed nations” may provide some guidance as to what meets the standards of a “reasonably developed legal system”.

³³ *Ibid.*

³⁴ J. Brierly, *supra* note 26, at 286 (Tab 19)

³⁵ *Ibid.*, at 287.

³⁶ *Ibid.*

³⁷ Brownlie, *supra* note 16, at 533. (Tab 11)

62. In conclusion, the same high threshold applies to alleged denials of justice as to other allegations of breach of the minimum standard. The conduct of government toward investment must amount to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, an outrage, bad faith or the wilful neglect of duty.

(iii) Expropriation – Article 1110

63. A measure will not breach Article 1110 or require compensation unless it expropriates an investment of an investor or is a measure that is equivalent to expropriation.
64. The term “expropriation” has received extensive consideration in international jurisprudence and commentary. These authorities provide important guidance in interpreting the ordinary meaning of “expropriation” in *NAFTA* Article 1110.
65. The basic concept of expropriation in international law is as follows:

“Expropriation” is the taking by a host state of property owned by an investor and located in the host state, ostensibly for a “public purpose”.³⁸

66. In international law, the difficulty has been to address the various means by which a state can effectively expropriate property without actually taking title to it. As Brownlie explains:

The terminology of the subject is by no means settled, and in any case form should not take precedence over substance. The essence of the matter is the deprivation by state organs of a right of property either as such, or by permanent transfer of the power of management and control.³⁹

It is evident from a review of the jurisprudence and literature, however, that an actual interference with fundamental ownership rights is the most rudimentary pre-requisite to a finding of expropriation. Mere interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required.

67. Governments are not required to compensate investors for mere interference with their property rights. Neither will the denial of “some benefit” associated with property be sufficient for a finding of expropriation. Tribunals have consistently demanded much more than that in order to find that an expropriation occurred.

³⁸ P.E. Comeaux & S.N. Kinsella, *Protecting Foreign Investment Under International Law. Legal Aspects of Political Risk* (New York: Oceana Publications Inc., 1997), at 3. (Tab 23)

³⁹ Brownlie, *supra* note 16, at 534. (Tab 11)

68. In *Starrett Housing v. Islamic Republic of Iran*, the standard for expropriation was whether property rights had been interfered with to “such an extent that these rights are rendered so useless that they must be deemed to have been expropriated.”⁴⁰

69. This approach has been affirmed by *NAFTA* Chapter Eleven Tribunals. For example, in the interim award of *Pope & Talbot* the Tribunal found that,

While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been “taken” from the owner. Thus, the *Harvard Draft* defines the standard as requiring interference that would justify an inference that the owner will not be able to use, enjoy, or dispose of the property... The *Restatement*, in addressing the question whether regulation may be considered expropriation speaks of “action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien’s property.” ... under international law, expropriation requires a “substantial deprivation.”⁴¹

70. A deprivation must be both lasting and substantial to constitute expropriation under Article 1110.

The Whole of Which is Respectfully Submitted,

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40 (1983), 4 Iran-U.S. C.T.R. 122, at 154-155. (Tab 24) Similarly, in *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, the operative standard was deprivation of the “fundamental rights of ownership” for an extended period of time. See: *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran* (1984), 6 Iran-U.S. C.T.R. 219, at 225-226. (Tab 25)

⁴¹ *Supra* note 4, at para.102.(Tab 2)