
NAFTA CHAPTER 11 JURISPRUDENCE: COMING ALONG NICELY

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I. INTRODUCTION

The North American Free Trade Agreement (“NAFTA”) investment claims law experienced significant advances in 2002. Although only a handful of cases have been addressed, seven arbitral awards¹ decided in 2002 provide a reasonably clear picture of what can

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1. The seven arbitral awards include: *Pope & Talbot, Inc. v. Canada* (UNCITRAL), May 31, 2002 (Award on Damages), *available at* <http://www.naftaclaims.com>; *Methanex Corp. v. United States of Am.* (UNCITRAL), Aug. 7, 2002 (Award on Jurisdiction), *available at* <http://www.naftaclaims.com>; *Mondev Int’l Ltd. v. United States of Am.*, (ICSID Additional Facility), Oct. 16, 2002 (Final Award), *available at* <http://www.naftaclaims.com>; *S.D. Myers, Inc. v. Canada* (UNCITRAL), Oct. 21, 2002 (Award on Damages), *available at* <http://www.naftaclaims.com>; *United Parcel Service of Am. v. Canada*, Award on Jurisdiction (UNCITRAL), Nov. 22, 2002 (Award on Jurisdiction), *available at* <http://www.naftaclaims.com>; *Marvin Feldman v. United Mexican*

be expected in future years. This article outlines the four most significant doctrinal developments arising out of these seven awards. These developments include issues of tribunal competence, the content of the *minimum standard of treatment* in Article 1105,² the leading role for the *non-discrimination* standard of Articles 1102³ and 1103,⁴ and the theories of *causation* and *remoteness* (*i.e.*, proximate cause) in damages awards.

Tribunal jurisdiction has been an early battleground in NAFTA disputes, with NAFTA Parties all too eager to challenge the right of an investor to launch a claim, and for the Tribunal to hear it. However, it appears that a definitive approach remains to be confirmed.⁵ The *minimum standard of treatment* found in Article 1105 has emerged as the most controversial NAFTA obligation, eclipsing the duty to compensate for expropriation as the *bête noir* of NAFTA opponents. The *non-discrimination* standard, however, is actually “the one to watch.” Also, in cases where a Chapter 11 breach has been proven, 2002 has also provided some jurisprudence that should prove useful in the years to come.

II. THE SEVEN NAFTA CASES

Before delving into the four doctrinal issues that arise, it is necessary to review the context of the key awards issued in 2002. On May 31, the Tribunal in *Pope & Talbot, Inc. v. Canada*⁶ issued a much anticipated damages award. The award was expected to be significant because it involved an unheralded “second look” at the merits of the claim, as well as some indication of how damages should be awarded

States (ICSID Additional Facility), Dec. 16, 2002 (Final Award), *available at* <http://www.naftaclaims.com>; ADF Group, Inc. v. United States of Am. (ICSID Additional Facility), Jan. 9, 2003 (Final Award), *available at* <http://www.naftaclaims.com>. Actually, an eighth award was decided in 2002, but it is of lesser interest. *See* Waste Mgmt., Inc. v. United Mexican States (ICSID Additional Facility), June 26, 2002 (Award on Jurisdiction), *available at* <http://www.naftaclaims.com> [hereinafter Waste Mgmt.].

2. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 639, 640 [hereinafter NAFTA].

3. *See id.* at 639.

4. *See id.*

5. *See, e.g.*, United Parcel Service of America v. Canada, Award on Jurisdiction (UNCITRAL), Nov. 22, 2002 (Award on Jurisdiction), *available at* <http://www.naftaclaims.com> [hereinafter UPS]; Methanex Corp. v. United States of America (UNCITRAL), Aug. 7, 2002 (Award on Jurisdiction), *available at* <http://www.naftaclaims.com> [hereinafter Methanex].

6. Pope & Talbot, Inc. v. Canada (UNCITRAL), May 31, 2002 (Award on Damages), *available at* <http://www.naftaclaims.com> [hereinafter Pope & Talbot].

for NAFTA breaches that did not constitute an expropriation. The Tribunal delivered much more on the latter than the former. The *Pope* claim involved allegations of the unfair imposition of an export quota regime, which Canada was obliged to impose upon its own softwood lumber producers arising from an agreement with the United States over a long running cross-border trade dispute.⁷ Pope & Talbot is an American investor with affected lumber mills located in British Columbia and was thus subject to the export quota regime.⁸ While the Investor lost its main arguments of its case, it was successful in a claim for breach of Article 1105 *minimum standard of treatment* for the manner in which it was treated after it launched the NAFTA claim.⁹ The three NAFTA governments were clearly displeased with the Tribunal's reasoning in making this conclusion, and the manner in which they attempted to address it was quite controversial.

The Tribunal in the *Methanex Corp. v. United States of America*¹⁰ claim issued its first award based on jurisdiction and admissibility on August 7, 2002.¹¹ The Tribunal dismissed a large portion of the investor's case by rejecting many legal arguments rather than questioning the relevance of the asserted facts.¹² Nonetheless, it also had some very interesting insights about how future preliminary challenges to the competence of a Tribunal should be addressed.

The fall of 2002 also experienced three more NAFTA awards. On October 11, the Tribunal in *Mondev International Limited v. United States of America*¹³ dismissed the investor's claim in its entirety. The claim involved what resembled an expropriation or some other NAFTA violation that occurred before NAFTA was negotiated. The matter concerned a commercial real estate development agreement between the Investor and the City of Boston that was referred to a trial court where the Investor prevailed.¹⁴ The

7. Pope & Talbot, Inc. v. Canada (UNCITRAL), Mar. 25, 1999 (Statement of Claim), available at <http://www.naftaclaims.com>.

8. *Id.*

9. See Pope & Talbot, *supra* note 6, at 1, 4-5.

10. Methanex, *supra* note 5.

11. The claim involves a California measure, which will essentially result in the elimination of a gasoline additive from all use in the state. Methanex makes one of the two primary ingredients for that additive, although not the additive itself. See Methanex Corp. v. United States of America (UNCITRAL), Dec. 3, 1999 (Statement of Claim), at 3-4, available at <http://www.naftaclaims.com>.

12. *Id.*

13. Mondev Int'l Ltd. v. United States of America, (ICSID Additional Facility), Oct. 16, 2002 (Final Award), available at <http://www.naftaclaims.com> [hereinafter *Mondev*].

14. *Id.* at 1.

case was reversed on appeal, heard after the NAFTA was ratified, and it was only this appeal that was effectively the subject of the claim. Concluding that it was not itself a domestic appellate body, the NAFTA Tribunal dismissed the claim but not before providing some very useful *dicta* about the *minimum standard* provision which had vexed the Pope proceedings.¹⁵

Later that same month on October 21, a victorious Investor received the long-awaited news regarding the amount of its damages award. The award was issued by the Tribunal in *S.D. Myers, Inc. v. Canada*,¹⁶ which found Canada liable under NAFTA for its Environment Minister's blatant discrimination when she ignored the advice of her own officials and thereby harmed the business of a U.S. PCB-waste treatment company.¹⁷ Even though this award did not attract the attention that other awards did, it provided confirmation of precisely how damages should be connected to the harm suffered by an Investor.

Before the end of November 2002, the *United Parcel Service of America v. Canada*¹⁸ Tribunal issued an award on jurisdiction, which helped clarify the issues in that case. However, it also seemed to muddy the waters on the issue of Tribunal jurisdiction that the *Methanex* Tribunal recently cleared. The *UPS* arbitration involves a claim of systemic discrimination undertaken by the Canadian government in the expedited parcel business. Canada Post Corporation ("CPC"), a former government department and now state enterprise, maintains a legislative monopoly on the delivery of mail, which UPS has not challenged.¹⁹ The UPS claim addresses how CPC has used its postal monopoly infrastructure, and its preferential (and allegedly secretive) arrangements with Canada's customs administration to compete unfairly in the expedited parcel business with foreign companies, such as UPS.²⁰ The argument essentially declares that international law would not permit a government department to wage an economic war on a private sector competition and, therefore, a state enterprise is forbidden from doing so as well.²¹

15. *Id.*

16. *S.D. Myers, Inc. v. Canada* (UNCITRAL), Oct. 21, 2002 (Award on Damages), available at <http://www.naftaclaims.com> [hereinafter Myers].

17. *See id.* at 4.

18. UPS, *supra* note 5.

19. *Id.* at 4-7.

20. *Id.*

21. *Id.*

To date, UPS is the only claimant to have alleged a breach of NAFTA Chapter 15. One purpose of this Chapter is to prevent monopolies and state enterprises from exercising their delegated powers in a manner that would breach NAFTA Chapter 11 if such activities were being undertaken by the government itself. The Tribunal has concluded that it has jurisdiction to hear this claim under Chapter 15 in relation to the *non-discrimination* provisions of NAFTA Chapter 11 but not in regard to the *minimum standard* provision.²² UPS has already submitted a “revised-amended claim,” and Canada has submitted its statement of defense, both in response to the Tribunal’s award.²³ While Canada had sought yet another jurisdictional hearing, the Tribunal has ordered the case to proceed to the merits phase.²⁴

Finally, just as 2002 wound down, two more NAFTA Tribunals issued final awards, which handed one victory to an Investor, and the other to a NAFTA Party. In *Marvin Feldman v. Mexico*,²⁵ a Tribunal awarded a small amount of damages to a U.S. investor against Mexico for the manner in which Mexico administered an export tax rebate regime.²⁶ The investor claimed significant damages for the expropriation of its business, but obtained a lesser amount because the Tribunal concluded that an expropriation had not occurred. Instead, a majority of the Tribunal opted for the familiar ground of *non-discrimination*, noting that certain inequities were present in the administration of the tax rebate scheme, which Mexico had apparently decided not to explain as being justified in the circumstances.²⁷

The final award in *ADF Group Inc. v. United States of America*²⁸

22. *See id.* at 71.

23. United Parcel Service of America v. Canada (UNCITRAL), December 20, 2002 (Investor’s Revised, Amended Statement of Claim), *available at* <http://www.naftaclaims.com>; United Parcel Service of America v. Canada (UNCITRAL), February 7, 2003 (Canada’s Statement of Defense), *available at* <http://www.naftaclaims.com>.

24. United Parcel Service of America v. Canada (UNCITRAL), February 7, 2003 (Canada’s Second Motion on Jurisdiction and Second Jurisdictional Memorial), *available at* <http://www.naftaclaims.com>; United Parcel Service of America v. Canada (UNCITRAL), April 4, 2003 (Tribunal’s Order Dismissing Canada’s Second Motion on Jurisdiction), *available at* <http://www.naftaclaims.com>.

25. *Marvin Feldman v. United Mexican States* (ICSID Additional Facility), Dec. 16, 2002 (Final Award), *available at* <http://www.naftaclaims.com> [hereinafter *Feldman*].

26. *See id.* at 1.

27. *See id.* at 57-59.

28. *ADF Group, Inc. v. United States of America* (ICSID Additional Facility), Jan. 9, 2003 (Final Award), *available at* <http://www.naftaclaims.com> [hereinafter *ADF*].

was delivered to the parties and the NAFTA legal community during the early days of 2003, but all of its significant legal battles occurred in 2002. The case involved a claim of discrimination by a Quebec-based steel fabricator, which has an expertise in major construction projects. The investor was precluded from participating in a large Virginia highway project because of certain “strings” that were attached by the federal government to its funding of the project.²⁹ After the Virginia government denied the investor a waiver of these “Buy America” style requirements, it submitted a claim for losses stemming from the federal government’s imposition of the funding strings under NAFTA Chapter 11.³⁰ The investor could not challenge the procurement because it was exempted under Article 1108.³¹ The Tribunal essentially concluded that the funding was covered under the procurement exemption and the investor’s claims were accordingly denied.³² The most interesting aspect of the award, however, was the manner in which the Tribunal adopted, and perhaps strengthened the *Mondev* Tribunal’s Article 1105 *minimum standard* analysis, which may well provide the doctrinal basis for years to come.

A. *Tribunal Jurisdiction*

Before examining the merits of the *minimum standard* and *non-discrimination* provisions, it is useful to examine the purpose and duties of NAFTA tribunals. NAFTA Article 1122(1) provides that each NAFTA Party “consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.”³³ Article 1122(2) provides that this open offer of consent shall satisfy the jurisdictional requirements of the world’s three leading arbitral conventions.³⁴ Therefore, the NAFTA Parties have effectively agreed to embrace the terms of NAFTA Chapter 11 as a contract between themselves and every qualifying investor that

29. *See id.* at 20.

30. *See id.* at 29.

31. *See* NAFTA, *supra* note 2, at 640-41.

32. ADF, *supra* note 28, at 98.

33. NAFTA, *supra* note 2, at 644.

34. *See id.* at 644 (stating that “the consent given by paragraph 1 and the submission by disputing investor of a claim to arbitration 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; (b) Article II of the New York Convention for an Agreement in writing; and (c) Article I of the Inter-American Convention for an agreement).

has invested, is in the process of investing, or seeks to invest in their respective territories.

It was expected that the NAFTA governments would not enthusiastically accept early claims brought under this mechanism without holding the vast majority of them to the fire of a jurisdictional challenge. The grounds for all of these challenges, of which only one had been successful (on a split decision) prior to 2002,³⁵ have included the following: (1) that the Party in question never agreed to the type of arbitration before the tribunal (and thus the tribunal would have no business considering it), and (2) that the “procedures” set out in NAFTA were not satisfied.³⁶ This latter argument has generally been brushed aside by tribunals as little more than an assertion of form over substance. The former argument, however, has attracted more serious consideration.

The gist of the first argument is that if the NAFTA Party never consented to arbitrate the particular type of issue placed before the tribunal in a statement of claim, it is unjust to place the Party through the trouble of defending itself because a forum where the investor can air such grievances simply does not exist.³⁷ This argument was made, and lost, before the first NAFTA tribunal in *Ethyl Corp. v. Canada*,³⁸ and also before other tribunals since *Ethyl*.³⁹

All arbitral rules made available to investors under NAFTA Article 1120 contain a provision which vests the tribunal with the authority to determine whether it has jurisdiction to hear the dispute before it.⁴⁰ NAFTA does not modify this power. Therefore, under Article 1120(2) the tribunal’s discretion to decide whether it has jurisdiction to hear a claim is untrammelled.⁴¹

The *Methanex* Tribunal adroitly noted that the “we never agreed to that type of arbitration” argument mentioned above could be

35. *See* Waste Mgmt., *supra* note 1.

36. *See, e.g.*, *Pope & Talbot, Inc. v. Canada* (UNCITRAL), Feb. 24, 2000 (Award on Motion to Dismiss Claim), *available at* <http://www.naftaclaims.com>; *Pope & Talbot, Inc. v. Canada* (UNCITRAL), Aug. 7, 2000 (Award on Motion to Strike Claims), *available at* <http://www.naftaclaims.com>; *Ethyl Corp. v. Canada* (UNCITRAL), June 24, 2000 (Award on Jurisdiction), <http://www.naftaclaims.com> [hereinafter *Ethyl*].

37. *See* *Ethyl*, *supra* note 36, at 39.

38. *See generally id.*

39. For example, in *Pope* this argument was made in the form of a jurisdictional motion. *Pope & Talbot*, *supra* note 6. Moreover, in *Myers*, this contention was made in the form of a defense on the merits of the argument. *Myers*, *supra* note 16.

40. *See* NAFTA, *supra* note 2, at 643.

41. *See id.*

parsed as either an objection to the claim's admissibility or to the Tribunal's jurisdiction to hear the claim.⁴² Objections to admissibility have essentially been framed by submitting that, even if all of the facts alleged were true, the claimant would be unsuccessful. Objections to jurisdiction have been based on the premise that some essential element of the process leading to a claim's submission has been overlooked, and therefore the claim cannot proceed. For objections regarding admissibility, the *Methanex* Tribunal explained that neither NAFTA nor the United Nations Commission on International Trade Law ("UNCITRAL") rules permitted it to dismiss claims on such a basis. Specifically, the Tribunal stated:

Article 21(1) of the UNCITRAL Arbitration Rules does not accord to the Tribunal any power to rule on objections relating to admissibility. There is no express power; and it is not possible to infer any implied power. The most analogous procedure under the UNCITRAL Arbitration Rules would be a partial award on a preliminary issue tried on assumed facts, pursuant to Article 32 of the UNCITRAL Arbitration Rules, or possibly a motion to strike (or "strike out") a pleading for failure to state a cause of action, taken from national court procedures. The first procedure, however, does not relate to jurisdiction; it necessarily assumes the exact opposite; and its existence confirms that it would be inappropriate to imply a like procedure into Article 21. The same is true of the second procedure, even if it were permissible to import that court procedure into a transnational arbitration. The contrary position would produce a curious result in an arbitral procedure where the tribunal's awards on the merits are intended to be "final and binding" (Article 32 of the UNCITRAL Arbitration Rules). As contended by the USA, a decision on "inadmissibility" under Article 21 would be more easily reviewed, de novo, before the state courts of NAFTA Parties; and in that event the procedure before the tribunal would be duplicated at least twice over, for no obviously good purpose.⁴³

According to the *Methanex* Tribunal, which merely made explicit what had been implicit in every past award with similar objections to admissibility, it was simply impossible to dismiss a portion of the case even if the Tribunal expected that an argument would ultimately prove unsuccessful.⁴⁴ The only exception to this rule involves issues that are purely jurisdictional in nature, such as a failure of the claimant to plead that it is (or actually be) an investor of a NAFTA

42. See *Methanex*, *supra* note 5, at 49-58.

43. See *id.* at 54-55.

44. See *id.* at 55-57.

Party. Accordingly, there would be no need to definitively determine the meaning of a substantive NAFTA provision, unless that provision granted jurisdiction under the contract. These provisions include Article 1101,⁴⁵ which defines the Chapter's scope of coverage, and Articles 1116⁴⁶ and 1117,⁴⁷ which establish the conditions under which an investor's claim can be made.

The *Methanex* Tribunal, however, was actually faced with an interesting Article 1101 threshold issue. Article 1101 provides, in pertinent part, "This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party...."⁴⁸ Under Article 1101, the government "measure" at issue must relate to an appropriate investor or investment. Initially, governments had argued before other tribunals that various NAFTA claims did not "relate to" investment because their measures were primarily aimed at trade in goods. These arguments were unsuccessful because tribunals (correctly) focused on the effects of the measure on the business of the investor or investment, rather than the intentions of the government in imposing it. Moreover, some NAFTA provisions, such as Article 1106, explicitly contemplate how measures affecting trade in goods could also affect investments.⁴⁹ However, *Methanex* faced a different problem. *Methanex* claimed that a California measure which would effectively ban the fuel additive methyl tertiary-butyl ether ("MTBE") had caused, and would continue to cause, considerable damage to its U.S. business, which largely involves the contribution of methanol to the production of MTBE.⁵⁰ In essentially every other NAFTA dispute to date, the measure in question has directly impacted the investor or investment, or involved the goods or services provided by that investor or investment. In this case, however, the measure does not even mention methanol; rather it dealt only with a downstream product, namely MTBE.

After engaging in an extensive analysis of the alleged facts, the

45. NAFTA, *supra* note 2, at 639.

46. *Id.* at 643.

47. *Id.*

48. *Id.* at 639.

49. *See, e.g.,* Pope & Talbot, Inc. v. Canada (UNCITRAL), Jan. 26, 2000 (Award on Motion to Dismiss), at 13-14, *available at* <http://www.naftaclaims.com>.

50. *Methanex*, *supra* note 5, at 18.

Methanex Tribunal concluded that the scope of Article 1101 would be too broad if it was interpreted to include any measure that indirectly affected the business of an investor or investment.⁵¹ Instead, the Tribunal concluded that “a legally significant connection” must exist between the measure and the investor or investment.⁵² Essentially, the Tribunal merely employed a *proximate cause* or *remoteness* test, which one could find in the theory of domestic negligence law, at an early stage of the case. In a negligence case, one would expect to see *proximate cause* considered only after it had been established that some duty had been breached. The *Methanex* Tribunal essentially concluded that there was no reason to see if any of the duties contained within Chapter 11 had been breached because the connection between the measure and the investment as one step too far removed. Had Methanex made MTBE, rather than just an ingredient, the result would have been different.

The Tribunal’s solution conveniently allowed it to avoid many controversial political issues involving Methanex’s assertions that the measure was not *fair and equitable* and expropriated its business. It also saved the parties a considerable amount of time and money by ending these arguments at a comparatively early stage. The significance of ending the arguments at an early stage of the proceeding should not be understated. By the time of Methanex’s jurisdictional award, the parties had exchanged extensive arguments involving both the original claim and a significant amendment to it. Accordingly, the Tribunal took the extremely unusual (but wholly understandable) step of ordering Methanex to append sufficient evidence to its re-submitted and amended claim, which would normally only be required only with the exchange of memorials.⁵³ The scope of the new claim was significantly reduced to the issue of *non-discrimination* under Article 1102. Apparently, the Tribunal only permitted the claim to proceed because the parties agreed that if the measure had been imposed with the intent to treat foreigners less favorably than domestic competitors, *proximate cause* would be established between the measure and the losses claimed by the investor.⁵⁴

Accordingly, Methanex was demanded to establish a *prima facie* case through the production of sufficient evidence, demonstrating

51. *Id.* at 70.

52. *Id.*

53. *Id.* at 78.

54. *Id.* at 73.

arbitrary and less favorable treatment compared to its domestic competitors. Methanex has argued that U.S.-based company Archer Daniels Midland (“ADM”), the primary producer of ethanol, which is a competing product of MTBE, succeeded in convincing state officials to impose the measure that favored ADM products over those of other companies, such as Methanex.⁵⁵ Therefore, since ADM and state officials viewed Methanex as a competitor, the Tribunal should as well.⁵⁶ If the Tribunal is satisfied with this new pleading, then it will proceed to hear the full merits of the case. The U.S. has argued that Methanex must do more. It says that the Tribunal has left Methanex no option other than to prove that California politicians and officials specifically intended to harm Methanex when they formulated and imposed their measure. The Tribunal is currently considering these submissions.⁵⁷ If it rejects the more austere U.S. arguments (which it should) the Tribunal will order a merits hearing in which the U.S. will need to prove that its measure was either not discriminatory in effect, or that its imposition by California was justifiable even though it may have had some discriminatory effects.

Three months after the *Methanex* Tribunal provided this crystal-clear road map, the *UPS* Tribunal issued a less compelling jurisdictional award. The *Methanex* Tribunal did not follow the *UPS* Tribunal’s decision even though the *UPS* Tribunal’s oral hearing on the issue of jurisdiction took place only one month before the *Methanex* Tribunal issued its award.⁵⁸ Notably, the *UPS* Tribunal was presented with the same type of “admissibility” objections, styled by Canada as objections to jurisdiction. The *UPS* Tribunal accepted some of Canada’s admissibility arguments by relying on the reasoning of the International Court of Justice (“ICJ”) in the *Oil Platforms* decision.⁵⁹ Consequently, the Tribunal concluded that it must be

55. *Methanex v. United States of America* (UNCITRAL), Nov. 5, 2002 (Re-Submitted, Amended Statement of Claim) at 27-36, available at <http://www.naftaclaims.com>.

56. *Id.*

57. *Methanex v. United States of America* (UNCITRAL), Nov. 5, 2002 (Supplemental Statement of Defense), at 11-17, available at <http://www.naftaclaims.com>; *Methanex v. United States of America* (UNCITRAL), March 31, 2003 (Transcript of Hearing on Fitness of Revised-Amended Statement of Claim), available at <http://www.naftaclaims.com>.

58. It should be noted that Article 1136(1) specifies that the award of a tribunal “shall have no binding force except between the disputing parties and in respect of the particular case.” NAFTA, *supra* note 2, at 643. Nonetheless, tribunals can, and almost also do, have regard to the reasons of those who have trod the same path before them.

59. See *UPS*, *supra* note 5, at 13 (citing *Oil Platforms* (Iran v. U.S.), 1996 I.C.J. Rep.

satisfied that an argument contained within the statement of claim is “capable of constituting a violation” of a particular provision at issue.⁶⁰ The flaw in this reasoning is all too apparent: How can a Tribunal properly come to such a decision without having the opportunity to be fully briefed on the law in question? To decide in the absence of such information is to effectively decide the issue in a vacuum.

What the *UPS* Tribunal appeared to miss is a point clearly noted by the *Methanex* Tribunal. In *Oil Platforms*, the ICJ was not operating under the same type of jurisdiction-granting treaty provision as a NAFTA Tribunal. Under the applicable NAFTA rules, a Tribunal has jurisdiction to hear a claim as soon as the requirements of Articles 1101, and 1116 or 1117 are met through the allegations of fact and law contained within the statement of claim.⁶¹ If an allegation later proves to be substantively false, the claimant will lose, but only after it had “its day in court.”⁶² The ICJ obtains jurisdiction under a treaty that requires more than the submission of a *pro forma* claim for its compulsory jurisdiction to attach.⁶³ Moreover, the ICJ, unlike a NAFTA tribunal, has the authority to entertain objections regarding the admissibility of a claim.⁶⁴

The danger in the approach adopted by the *UPS* Tribunal, in contrast to all prior Tribunals,⁶⁵ is apparent in the reasoning that followed the Tribunal’s decision to hear Canada’s admissibility challenges. Without the benefit of a full briefing on the most challenging substantive issue in NAFTA jurisprudence to date, the *UPS* Tribunal determined that the claimant could not possibly succeed in its claim under Article 1105.⁶⁶ It did so by only focusing on Canada’s characterization of UPS’ argument rather than UPS’ arguments. UPS claimed that if CPC was a government agency, its abusive exercise of its monopoly powers would have been prohibited under customary international law.⁶⁷ Accordingly, the claim would likely have been based on the theory of abuse of rights under customary international law.⁶⁸ However, rather than hearing those

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60. *Id.*

61. *See Methanex, supra* note 5, at 54.

62. *Id.* at 55.

63. *Id.* at 54.

64. *Id.* at 56.

65. *See, e.g., Pope & Talbot, supra* note 6; *Myers, supra* note 16.

66. *See UPS, supra* note 5, at 24-33.

67. *Id.*

68. *See, e.g., F.V. GARCIA-AMADOR, THE CHANGING LAW OF INTERNATIONAL*

arguments in a merits hearing, the Tribunal adopted Canada's allegations and concluded that Canada did not breach Article 1105 because the customary international law rule does not govern domestic competition policy.⁶⁹ In other words, the Tribunal appeared to completely miss the point of the investor's argument. Instead, it decided to knock down the straw man created by Canada's mischaracterization of UPS' Article 1105 arguments, without the benefit of seeing UPS' actual arguments fleshed out in a merits hearing.

B. *Article 1105: The Minimum Standard of Treatment*

NAFTA Article 1105(1) provides that NAFTA Parties must treat investments "in accordance with international law, including fair and equitable treatment and full protection and security."⁷⁰ Article 1131(1) provides that NAFTA Tribunals must "decide the issues in dispute in accordance with [NAFTA] and applicable rules of international law."⁷¹ Article 1105 thus appears to provide tribunals with considerable discretion to determine, based upon the facts of each case, whether the treatment was *fair and equitable* in the ordinary sense of the terms.⁷² The only caveat is that the "international law" by which each Party would abide must be "applicable" to the protection of foreign investment.⁷³ As the *Myers* Tribunal noted:

[A] breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case.

In some cases, the breach of a rule of international law by a host Party may not be decisive in determining that a foreign investor has been denied "fair and equitable treatment", but the fact that a host

CLAIMS 112-13 (Oceana vol. I 1984); BIN CHENG, GENERAL PRINCIPLES OF LAW 132-34 (1987).

69. See UPS, *supra* note 5, at 29-30, 32.

70. NAFTA, *supra* note 2, at 639.

71. *Id.* at 642.

72. See Myers, *supra* note 16, at 65-66.

73. *Id.*

Party has breached a rule of international law that is specifically designed to protect investors will tend to weigh heavily in [favor] of finding a breach of Article 1105.⁷⁴

The majority in the *Myers* Tribunal found that the same facts upon which the investor's national treatment was based could also sustain a breach of Article 1105, given the arbitrary and discriminatory past treatment.⁷⁵ For its part, the Tribunal in *Metalclad Corp. v. United Mexican States*⁷⁶ concluded that a host of procedural defects combined to provide the investor with a non-transparent, unfair, and inequitable regime that contributed to the destruction of the investment.⁷⁷ Meanwhile, the *Pope* Tribunal concluded that based on its analysis of the provision and a host of other bilateral investment treaty provisions, Canada was obliged to provide *fair and equitable* treatment to the investment, above and beyond the treatment that is required by international law.⁷⁸

Faced with these three losses, and with more cases pending, the three NAFTA Parties (acting through the NAFTA Commission, which is exclusively composed of the three trade ministers from each country) issued an "interpretation" of Article 1105 that bureaucrats clearly hoped would reign in the "wayward Tribunals." The statement on interpretation was issued under the authority of Article 1131(2), which provides that "an interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."⁷⁹ The Commission's interpretation provided as follows:

- B. Minimum Standard of Treatment in Accordance with International Law
 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
 2. The concepts of "fair and equitable treatment" and "full

74. *Id.*

75. *Id.* at 66.

76. *Metalclad Corp. v. United Mexican States* (ICSID), Aug. 30, 2000 (Final Award) at 26-32, available at <http://www.naftaclaims.com> [hereinafter *Metalclad*].

77. *Id.* at 26-32.

78. See *Pope & Talbot*, *supra* note 6, at 1.

79. *Id.* at 24. Apparently, this "wayward" appellation applies to any tribunal which deigns not to dismiss an investor's Article 1105 claim in its entirety.

protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).⁸⁰

Somewhat ironically, the first Tribunal to address this new interpretation was a Tribunal that had already completed its analysis of Article 1105. The *Pope* Tribunal was given this distinction because, while it had already found that Canada had breached its obligation to provide *fair and equitable* treatment under Article 1105, the parties to that arbitration had originally agreed to address the subject of damages in a later hearing.⁸¹ Accordingly, Canada argued (with the support of the other two NAFTA Parties) that the *Pope* Tribunal could not award damages for a breach of Article 1105 because Canada and its partners had effectively overruled the previous finding.⁸² This argument was based on the premise that Canada was not retroactively changing the result of the case, so much as it had only joined with the other Parties in stating what the law “had always meant.”⁸³

Not surprisingly, the *Pope* Tribunal was apparently unimpressed with the NAFTA Parties’ attempt to rewrite NAFTA history, and concluded that the Commission’s “interpretation” was really an attempted amendment, using the wrong NAFTA provision and accordingly the wrong process, for making the change to the Article 1105 text.⁸⁴ Nonetheless, rather than provide Canada with a guaranteed judicial review of its award, the *Pope* Tribunal saved its critique of the Commission’s “interpretation” for *obiter dicta*, and applied the text of the Commission’s interpretation instead.⁸⁵

Interestingly enough, the Commission’s statement does not, in and of itself, set any more of a standard for Article 1105 than did the original text. It merely renames “treatment in accordance with international law” as “treatment in accordance with the customary international law minimum standard of treatment of aliens.”⁸⁶ The

80. *See id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Pope & Talbot, *supra* note 6, at 23.

85. *See id.* at 24.

86. Pope & Talbot, Inc. v. The Gov’t of Canada (UNCITRAL), Oct. 10, 2000

true test of the provision remains in its application. On the question of the content of the Article 1105 *minimum standard*, the parties in the *Pope* arbitration essentially reargued their Article 1105 cases before discussing the damages issue. Canada argued that the test of a breach of this standard could be found in a 1926 case that involved a denial of justice claim concerning an American's treatment before a Mexican Court.⁸⁷ The language used in that case suggested that government conduct would violate the *minimum standard* only in cases involving "an outrage, bad faith, willful neglect of duty or insufficiency of government action so far short of international standards that every reasonable and impartial person would recognize its insufficiency."⁸⁸

Pope & Talbot argued that decades of development in international economic law (*e.g.*, through the development of the Bretton Woods system, to the evolution of the GATT into the WTO, and in the conclusion of over two thousand bilateral investment treaties) rendered Canada's test utterly irrelevant.⁸⁹ The same arguments had already been marshaled unsuccessfully by Canada before the *Pope* and *Myers* Tribunals, and the result was no different this time around. The *Pope* Tribunal ridiculed Canada's approach (which had been supported by the other two NAFTA Parties) as an attempt to have the content of the minimum standard "frozen in amber" as of the period immediately following the Mexican Civil War.⁹⁰ Nonetheless, the *Pope* Tribunal concluded that even if this rarefied standard were the appropriate test, Canada's treatment of the investor would *still* have violated Article 1105.⁹¹

Pope & Talbot involved an official who had made a series of arbitrary and unreasonable demands to audit all documents held by the investor and its investment in Canada, requiring truckloads of documents to be shipped from Portland, Oregon, across the mountains, to the interior of British Columbia.⁹² While the official eventually settled for only one truckload of documents being shipped north to Vancouver, it was never clear what legal authority he had to

(Counter Memorial, Second Phase) at 55, available at <http://www.naftaclaims.com>.

87. *Id.* at 57 n.274 (citing United States (L.F. Neer) v. United Mexican States (1926), 4 R.I.A.A. 60 (US-Mexico Claims Commission)).

88. *Id.*

89. *Pope & Talbot*, *supra* note 6, at 23-24.

90. *Id.* at 27.

91. *Id.* at 28.

92. *Id.* at 1, 4-5.

make these demands. However, because he continually held out the threat of withdrawing the investment's quota to ship lumber across the border without the payment of a massive fee, the investor had little choice but to comply.⁹³ Although the results of the audit were considered by the Tribunal at a special hearing to be untrustworthy, the official secretly recommended to the Minister that Pope & Talbot lose some or its entire quota.⁹⁴ Faced with this type of conduct, the Tribunal reasoned:

[After Pope & Talbot submitted its NAFTA claim, Canada] changed its previous relationship with the Investor and the Investment from one of cooperation in running the Softwood Lumber Regime to one of threats and misrepresentation. Figuring in this new attitude were assertions of non-existent policy reasons for forcing them to comply with very burdensome demands for documents, refusals to provide them with promised information, threats of reductions and even termination of the Investment's export quotas, serious misrepresentations of fact in memoranda to the Minister concerning the Investor's and the Investment's actions and even suggestions of criminal investigation of the Investment's conduct. The Tribunal also concluded that these actions were not caused by any [behavior] of the Investor or the Investment, which remained cooperative until the overreaching of the [government's Softwood Lumber Division] became too burdensome and confrontational. One would hope that these actions by the SLD would shock and outrage every reasonable citizen of Canada, [as] they did shock and outrage the Tribunal.⁹⁵

The *Pope* Damages Award created much controversy in NAFTA circles, moving the Tribunals in the *Methanex*, *Mondev*, and *ADF* cases to interrupt their deliberations in order to receive new arguments from their Investors and each of the NAFTA Parties on its impact. None of the four Tribunals, which have since issued awards concerning Article 1105, went further than the *Pope* Tribunal did when it construed the Commission's "interpretation" as an *ultra vires* attempt to amend the NAFTA. Instead, the *Methanex* Tribunal avoided the issue with its Article 1101 analysis; the *UPS* Tribunal

93. *Id.*

94. *Pope & Talbot, Inc. v. The Gov't of Canada* (UNCITRAL), Jan. 7, 2000 (Award on Interim Measures Motion), available at <http://www.naftaclaims.com>. Under Article 1134, the Tribunal had no authority to stop the official from doing what he pleased, but it issued a short ruling which made its concerns clear, and held out the potential that it would entertain a claim for damages based on such treatment. The very existence of the official's memoranda to the Minister did was not made known to either the Tribunal or the Investor until it was mentioned in his testimony one year later.

95. *Pope & Talbot*, *supra* note 6, at 32.

appeared to obey the NAFTA Parties' demands in dismissing the Article 1105 claim before it (without the benefit of receiving sufficient arguments in a merits hearing); and the *Mondev* and *ADF* Tribunals accepted the Commission's interpretation but refused to fall into line as to the actual content of the new Article 1105 standard.

The *Mondev* Tribunal concluded that the Commission's statement had two primary effects. First, it confirmed that the standard of treatment in Article 1105 is a customary international law standard, which would be required of the Parties even in the absence of its inclusion in NAFTA.⁹⁶ Second, the Tribunal confirmed that an investor cannot succeed in a claim under Article 1105 merely by proving that a NAFTA Party has breached an obligation contained within another treaty.⁹⁷

With regard to the first issue, the *Mondev* Tribunal noted that all three NAFTA Parties agreed that Article 1105 conclusively recognized the existence of a customary international law *minimum standard of treatment* for foreign investors and their investments.⁹⁸ Also, it agreed that the standard was an evolutionary one⁹⁹ rather than one which was "frozen in amber."¹⁰⁰ Accordingly, the content of this *minimum standard* should still be determined by recourse to modern international law standards. As the *Mondev* Tribunal noted, "the question is not that of a failure to show *opinio juris* or to amass sufficient evidence demonstrating it. The question rather is: what is the content of customary international law providing for fair and equitable treatment and full protection and security in investment treaties?"¹⁰¹

The *ADF* Tribunal agreed with the *Mondev* approach to the customary international law standard contained in Article 1105 as mandated by the Commission. It provided the following approach to determining the appropriate content of that customarily mandated standard:

96. *Mondev*, *supra* note 13, at 42.

97. *Id.* This does not mean, however, that the existence of another international treaty obligation is irrelevant to interpretation of the content of the Article 1105 standard in any given case. It merely means that a treaty breach, in and of itself, is not sufficient evidence of a breach of Article 1105. One would still need to explain how the actions, which resulted in that treaty breach have the character of a breach of an international economic law principle that protects the rights of traders as investors.

98. *Id.* at 38.

99. *See id.* at 38-39 and 42-43.

100. Pope & Talbot, *supra* note 6, at 27.

101. *Mondev*, *supra* note 13, at 39.

We understand the *Mondev* [Tribunal] to be saying – and we would respectfully agree with it – that any general requirement to accord “fair and equitable treatment” and “full protection and security” must be disciplined by being based upon State practice and judicial or arbitral case law or other sources of customary or general international law.¹⁰²

It is also important to note that the *ADF* Tribunal explicitly decided not to accept the U.S. argument (which was supported by the two other NAFTA Parties) that “a specific rule of customary international law relating to foreign investors and their investments” must be proved (on the basis of providing evidence of both *opinio juris* and State practice) for an Investor to succeed in an Article 1105 claim.¹⁰³ The same arguments were made before, but clearly not accepted by the *Mondev* Tribunal. Instead, the *ADF* Tribunal stated the following:

The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts. It does not appear inappropriate, however, to note that it is not necessary to assume that the customary international law on the treatment of aliens and their property, including investments, is bereft of more general principles or requirements, with normative consequences, in respect of investments, derived from – in the language of *Mondev* – “established sources of international law.”¹⁰⁴

Accordingly, to succeed in a claim for breach of Article 1105, the existence of some narrowly defined customary international law rule need not be established. It is the *existence* of the *minimum standard* which has achieved the status of custom. To understand the *content* of this *minimum standard*, evidence must be provided, which can be drawn from any of the sources of international law set out in Article 38(1) of the *Statute of the Court of International Justice*.¹⁰⁵ This

102. *ADF*, *supra* note 28, at 89.

103. *Id.* at 88.

104. *Id.* at 89. It would appear that the *UPS* Tribunal may have based its reasons on this very point, given its lengthy discussion of the absence of a customary international law rule governing competition policy, discussed above. However, the point is not clear, as the Tribunal never explicitly adopted such an approach.

105. *See* Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055. This list includes: custom (which is composed of the elements of *opinio juris* and State practice), treaty, general principles and the subsidiary sources of international tribunal jurisprudence

evidence will be used by a Tribunal to consider how the terms *fair and equitable* treatment and *full protection and security* should be construed in light of the facts of each case.

Accordingly, after thousands of hours billed to investors and governments and the hard work of many Tribunals, application Article 1105 is essentially right back where it started. All that is known for certain is that as a result of the NAFTA Commission's July 31, 2001 statement,¹⁰⁶ a claim for a breach of Article 1105 will be unsuccessful if it is based solely on the breach of a particular provision found elsewhere in the NAFTA or in another treaty (as opposed to a principled analysis of the conduct underlying that breach and the nature of the international obligation in question). The content of the *minimum standard of treatment* will continue to be shaped by international economic law principles, primarily drawn from the growing jurisprudence of Investor-state Tribunals which are being called upon to explore the meaning *fair and equitable* treatment.

C. *Non-Discrimination*

NAFTA's *most favored nation* and *national treatment* provisions provide greater certainty regarding the types of conduct that will consistently be found to breach NAFTA. Specifically, these provisions can be found in Articles 1102, 1103, and 1104, which provide, in relevant part:

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable 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 favorable 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.
3. The treatment accorded by a Party under paragraphs 1

and the teachings of the most highly qualified international law publicists.

106. *Notes of Interpretation of Certain Chapter 11 Provisions*, NAFTA Free Trade Commission (July 31, 2001).

and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.¹⁰⁷

Article 1103: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party 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 favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.¹⁰⁸

Article 1104: Standard of Treatment

Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.¹⁰⁹

Unlike Article 1105, which establishes specific guidelines regarding a minimum quality of treatment,¹¹⁰ NAFTA's *non-discrimination* standards require Tribunals to undertake a comparative analysis of the treatment received by the investor or the investment. Regarding national treatment, the foreign investor or investment must be provided with the same treatment to that which domestic competitors receive. Concerning *most favored nation* treatment, the foreign investor or investment must be provided with the same treatment as other foreigners receive.

The *Pope* Tribunal articulated a simple and compelling analysis of the *non-discrimination* test in its second merits award that was issued

107. NAFTA, *supra* note 2, at 639.

108. *Id.*

109. *Id.*

110. Myers, *supra* note 16, at 65.

in April 2001.¹¹¹ This analysis essentially consists of three basic elements: (1) identification of the relevant subjects for comparison; (2) consideration of the relative treatment each comparator receives; and (3) consideration of whether any factors exist that justify any deviation in the treatment. Based on GATT jurisprudence and international treaty sources, such as the 1993 OECD *Declaration on National Treatment for Foreign-Controlled Enterprises*, the *Pope* Tribunal concluded that a comparison must be made between the claimant, and/or its investment, and any domestic investors or investments operating in the same business or economic sector.¹¹²

In its 2002 award, the *Feldman* Tribunal similarly started with a similar determination. Specifically, the Tribunal stated that the applicable “universe” of comparable investors and investments was composed of those businesses engaged in the purchase and reselling of cigarettes, rather than a wider group which could have included manufacturers (apparently because the comparison was agreed as between the parties to that dispute).¹¹³ Also, the *ADF* Tribunal, determined that the point of comparison under Article 1102(2) was between steel products held by the Investor (a steel fabricator) versus steel products held by domestic Investors with respect to their potential use in a highway project.¹¹⁴ The Tribunal’s comparison focused on firms operating in the steel fabrication business as its “universe” of comparable investors under Article 1102(1).

Regarding the issue of more or less *favorable treatment*, the *Pope* Tribunal began by noting that two of the primary objectives of NAFTA are to “promote conditions of fair competition and to increase substantially investment opportunities” in the Free Trade Zone.¹¹⁵ Historically, WTO jurisprudence established a similar understanding that the goal of *non-discrimination* obligations is generally to provide effective equality of competitive opportunities.¹¹⁶

111. *Pope & Talbot*, *supra* note 6, at 9-37.

112. *Id.* at 35.

113. *Feldman*, *supra* note 25, at 70.

114. *ADF*, *supra* note 28, at 72.

115. *See* NAFTA, *supra* note 2, at 639.

116. *See, e.g.*, United States Section 337 of the Tariff Act of 1930, Nov. 7, 1989, 36 GATT B.I.S.D. 345 (1990); World Trade Organization Appellate Body, *Japan Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R at 6 (Oct. 4, 1996); World Trade Organization Appellate Body, *Korea Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R at 43 (Jan. 18, 1999); World Trade Organization Panel, *Canada Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R at 10.78 (Jan. 31, 2000).

Accordingly, the investor or investment is entitled to the utmost level of treatment available to *any* other domestic investor or investment operating in *like circumstances*. This comparison is not limited to an evaluation of whether the treatment being received is substantially similar; rather it focuses on the result of the treatment received.¹¹⁷

This rationale was relied upon by the *ADF* Tribunal to dismiss the claim against the U.S., and by the *Feldman* Tribunal to conclude that a *prima facie* claim did exist against Mexico. For the *ADF* Tribunal, it was a matter of evidence, or lack thereof. It concluded that *ADF* had failed to provide “specific evidence concerning the comparative economics of the situation” in order to prove that the competitive position of Canadian-based contractors was disadvantaged, as compared to U.S.-based contractors because of the imposition of the measure.¹¹⁸

The opposite was true for the *Feldman* Tribunal. Feldman had successfully proved that he was subjected to an audit process that was not imposed on his similarly situated primary domestic competitors.¹¹⁹ Furthermore, he was not granted the same tax rebates that his local competitors received.¹²⁰ Accordingly, he established a *prima facie* case of discrimination by showing that a foreigner was not receiving as *favorable treatment* as the utmost treatment being received by its local competitor.¹²¹ It was not necessary for Feldman to prove that he was receiving less *favorable treatment because* he was a foreigner; only that he was a foreigner receiving less favorable treatment than a comparable investor or investment.¹²²

Once a *prima facie* breach of a *non-discrimination* provision has been established, the burden shifts to the respondent government to explain why the difference in treatment is justified.¹²³ If the government can prove that the treatment was different because the comparators were truly not in *like circumstances*, it will have justified the measure.¹²⁴ For example, two firms may be treated differently under environmental protection laws if one has been a consistently

117. See, e.g., Pope & Talbot, *supra* note 6, at 63; Myers, *supra* note 16, at 15-16.

118. *ADF*, *supra* note 28, at 74.

119. *Feldman*, *supra* note 25, at 75.

120. *Id.*

121. *Id.*

122. *Id.* at 75-76.

123. See Pope & Talbot, *supra* note 6, at 35-36.

124. See, e.g., Pope & Talbot, *supra* note 6, at 35-36; In the Matter of Cross-Border Trucking Services v. United States of America (UNCITRAL), Feb. 6, 2001 (Panel Report) at 68-69, available at <http://www.naftaclaims.com>.

serious polluter while the other has been a model corporate citizen.

The *Feldman* Tribunal's award was particularly interesting on this point. It was faced with a phenomenon that is not as uncommon as one would think: a respondent government that simply refused to provide the evidence necessary to rebut the *prima facie* proof of a breach. As the *Feldman* majority correctly noted, an international tribunal is entitled to draw an adverse inference concerning the facts at issue where a respondent refuses to provide sufficient evidence to the contrary.¹²⁵ The Tribunal looked to the international law standard stated by the Appellate Body of the WTO:

... various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defense. *If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.*¹²⁶

The Tribunal found that the claimant had established a presumption and a *prima facie* case, that it had been treated in a different and less favorable manner than several Mexican owned cigarette resellers, and the respondent had failed to introduce any credible evidence into the record to rebut that presumption.¹²⁷

Accordingly, in the face of silence from the Mexican government regarding why it was treating Feldman and his domestic competitors differently, a majority of the Tribunal concluded that Mexico had breached its obligation to provide equal national treatment to Feldman pursuant to Article 1102.¹²⁸ Such a finding is welcome, given that the alternative would have been to reward Mexico for failing to participate fully in the evidence gathering process. Since it is practically impossible for an *ad hoc* international tribunal to compel a

125. See *Feldman*, *supra* note 25, at 73.

126. *Id.* (quoting World Trade Organization Appellate Body, *United States Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R at 14 (May 23, 1997) (emphasis added)).

127. *Id.* "In case a party adduces some evidence which *prima facie* supports his allegation, the burden of proof shifts to his opponent." *Id.* at 73 n.38 (quoting *Asian Agricultural Products Limited v. Republic of Sri Lanka*, 5 ICSID Rep. 245, 272 (1990)).

128. *Id.* at 78.

sovereign country to comply with a discovery request, the drawing of adverse inferences is one of the few ways where a Tribunal can preserve the equality of the parties to arbitration, as required under NAFTA Article 1115.

D. *The Importance of Articles 1116 and 1117 to Damages Claimed*

Unlike many bilateral investment treaties, NAFTA provides a specific scheme to address who is an investor, what is an investment, and how claims can be made by the former in respect of the latter. It is not necessary for a Tribunal to create a legal fiction that the investment enterprise operating in a host state actually adopts the nationality of the entity which owns and/or controls it for the purposes of establishing a claim. NAFTA Article 1139 specifies that an “investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.”¹²⁹ As the *Mondev* Tribunal has noted, this definition is both forward and backward looking.¹³⁰ Not only does it include investors that have investments which no longer exist but also investors whose investments never came to fruition.

Article 1139 also includes an expansive definition of “investment,” which not only includes an “enterprise” but also concepts as nebulous as “an interest in an enterprise that entitles the owner to share in income or profits of the enterprise[,]” “interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory[,]” and “real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes.”¹³¹ It does not include, however, claims to money arising “solely” from “the extension of credit in connection with a commercial transaction” or “commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party.”¹³²

NAFTA Article 1116 permits an investor to bring a claim for damages on its own behalf, while Article 1117 permits an investor to bring a claim on behalf of an investment enterprise. The two provisions, in pertinent part, state:

129. NAFTA, *supra* note 2, at 647-49.

130. *See Mondev*, *supra* note 13, at 26.

131. NAFTA, *supra* note 2, at 648.

132. *Id.*

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
 - a. Section A or Article 1503(2) (State Enterprises), or
 - b. Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.
2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.¹³³

Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:
 - a. Section A or Article 1503(2) (State Enterprises), or
 - b. Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.
2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.¹³⁴

133. *Id.* at 642-43.

134. *Id.*

Under Article 1135(2), damages awarded pursuant to Article 1117 must be paid to the investment enterprise on whose behalf the claim has been made.¹³⁵ Damages awarded under Article 1116 are paid to the claimant investor. As the *Pope* Tribunal noted, in cases where the investment is wholly owned by the investor, any damages suffered by that investment flow directly to the investor.¹³⁶ Accordingly, the investor may simply make a claim under Article 1116 to recoup any damages suffered, directly or indirectly, through its investment. As the *Mondev* Tribunal noted, Article 1117 is used in cases where ownership or control of the investment enterprise is divided.¹³⁷ For example, if an investment enterprise is partially owned by a British investor and partially owned by a U.S. investor, the British investor has no right of recovery under NAFTA. The investment enterprise, however, by virtue of its partial U.S. ownership, does qualify as an investment under the NAFTA and therefore is entitled to recover damages for treatment extended in breach of a relevant NAFTA provision.¹³⁸

The difference between these two provisions is only relevant because three Tribunals that issued awards in 2002 received unanimous arguments from the three NAFTA Parties, which attempted to limit recovery where claims were brought under Article 1116, but not Article 1117. The arguments were based on the false premise that the Parties never intended for investors to recover any losses experienced in their home country that flowed from the treatment of their investments in the host country. This argument proceeded on the basis that Article 1116 was only intended to include situations where the Investor could prove that it had incurred losses on its own behalf in the territory of the host country. If the Investor also neglected to bring a claim on behalf of its investment under Article 1117, its opportunity to recover damages for any improper treatment of its investments in the host territory was lost.

These arguments do not comport with the text or spirit of NAFTA Articles 1116 or 1117. Under the customary international

135. *Id.* at 646-47.

136. *See Pope & Talbot*, *supra* note 6, at 36.

137. *See Mondev*, *supra* note 13, at 27-28.

138. Another example would be the case of an enterprise whose ownership changes hands – between two eligible investors. The new investor would have taken possession with full knowledge of the potential NAFTA claim, and therefore could not be said to have suffered any losses, which would be recoverable under Article 1116. However, the enterprise would still be entitled to recover damages under Article 1117.

law rules of treaty interpretation, the treaty text must be accorded its ordinary meaning, in recognition of its place within the context of the treaty and the objectives of that treaty. As many NAFTA Tribunals concluded, a narrow, textual reading of the NAFTA provisions will conflict with these customary international law rules.¹³⁹

When presented with this type of argument, the *Pope* Tribunal dismissed it as simply unworkable.¹⁴⁰ Pope & Talbot's Canadian subsidiary was wholly owned and controlled by the investor. So long as a causal connection could be established between the breach and a loss experienced by its wholly owned investment enterprise, an Investor could succeed under Article 1116.¹⁴¹

The NAFTA Parties similarly attempted to persuade the *Mondev* Tribunal that the claimant could not recover if a breach was found because it had only made a claim under Article 1116.¹⁴² In dismissing this approach, the Tribunal provided some important advice for future claimants that bears repeating:

Having regard to the distinctions drawn between claims brought under Articles 1116 and 1117, a NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor. There are various ways of achieving this, most simply by treating such a claim as in truth brought under Article 1117, provided there has been clear disclosure in the Article 1119 notice of the substance of the claim, compliance with Article 1121 and no prejudice to the Respondent State or third parties. International law does not place emphasis on merely formal considerations, nor does it require new proceedings to be commenced where a merely procedural defect is involved. In the present case there was no evidence of material nondisclosure or prejudice, and Article 1121 was complied with. Thus the Tribunal would have been prepared, if necessary, to treat *Mondev's* claim as brought in the alternative under Article 1117. In the event, the matter does not have to be decided, since the case can be resolved on the basis of Claimant's standing under Article 1116. But it is clearly desirable in future NAFTA cases that claimants consider carefully whether to bring proceedings under Articles 1116 and 1117, either

139. See, e.g., *Mondev*, *supra* note 13, at 14; *Ethyl*, *supra* note 36, at 25-29; *Myers*, *supra* note 16, at 45-51; See also World Trade Organization Appellate Body, *United States Standards for Reformulated Gasoline*, WT/DS2/AB/R at 17 (May 20, 1996); World Trade Organization Appellate Body, *Japan Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R at 9-12 (Oct. 4, 1996).

140. See *Pope & Talbot*, *supra* note 6, at 36.

141. *Id.*

142. See *Mondev*, *supra* note 13, at 27.

concurrently or in the alternative, and that they fully comply with the procedural requirements under Articles 1117 and 1121 if they are suing on behalf of an enterprise.¹⁴³

Additionally, Article 1117 only addresses claims made on behalf of investment enterprises, a point worthy of discussion since both Tribunals did not address it. The scope of what qualifies as an “investment” under Article 1138 is much broader than the cases of poor treatment for a subsidiary enterprise. Had the NAFTA Parties’ arguments been accepted, it would essentially have become impossible for an investor to succeed in a claim for losses suffered exclusively in relation to a non-enterprise investment in the territory of another NAFTA country. Accordingly, such an interpretation of the NAFTA text would have been completely untenable.

The *Myers* Tribunal seemed to regard Articles 1116 and 1117 as directed to the issue of *proximate cause*. Rather than addressing the 1116/1117 debate on a textual basis, the Tribunal adopted a principled approach that compliments the reasoning of the *Pope* and *Mondev* Tribunals. Canada argued that the investor could not recover any damages for its lost profits because those profits were recorded in Ohio, rather than Canada, making them too remote to any NAFTA breach which befell its investment in Canada.¹⁴⁴ Accordingly, all of Myers’ losses would effectively have been too remote to be recoverable.¹⁴⁵ Basing its position on a few old mixed arbitration cases, the Investor in *Myers* sought to recover the present value of the net income stream that it lost due to the fourteen-month period it and its investment were delayed from entering the Canadian market.¹⁴⁶

After dismissing the arguments of both parties as relatively unhelpful, the Tribunal concluded that the simple test for determining whether damages should be recoverable in a claim brought under

143. *Id.* at 28. The Tribunal also suggested that a future tribunal might consider treating an Article 1116 claim as an Article 1117 claim, if the circumstances so warranted, with an order that the damages be paid directly to the investment enterprise(s) rather than the claimant investor.

144. *See Myers, supra* note 16, at 34-35.

145. *Id.* Canada had also tried to argue that, to the extent the business planned by the investor and investment could be seen as the provision of a cross-border service, no recovery was possible because such activity would be covered under NAFTA Chapter 12 (which contains rules governing the regulation of cross-border services that are not subject to investor-state arbitration). The Tribunal obviously dismissed this argument because it was based on the faulty proposition that merely because two treaty obligations overlap, one must be presumed to somehow “trump” the other – rather than merely applying simultaneously. *See id.* at 35 n.49.

146. *Id.* at 34.

either Article 1116 or Article 1117 is to (1) establish that *causation* exists, and (2) determine that the alleged harm is not too *remote* from the action which constituted a treaty breach.¹⁴⁷ However, while the Tribunal adequately explained why the arguments of the parties were fairly unhelpful, it failed to provide much guidance as to how these tort law concepts of *causation* and *remoteness* (*i.e.*, “proximate cause”) should apply in NAFTA cases.

Regarding *causation*, the Tribunal apparently favored a “but for” test (*e.g.*, but for the breach, would the losses claimed have been incurred?). Concerning *remoteness*, the Tribunal seemed to suggest that one must consider whether the damages claimed are a foreseeable result of the action that led to the breach. These principles can only be distilled, however, from a careful examination of the Tribunal’s treatment of the specific heads of damages claimed.

The primary lesson provided by this Tribunal, however, was that there is absolutely no reason to limit recovery on the basis of the territory where the loss was suffered.¹⁴⁸ If an investor suffers a loss in the U.S. because of the inappropriate manner its investment was treated in Canada, it will be entitled to compensation under NAFTA Article 1116. This is a proposition that the NAFTA governments can be expected to continue to deny for many years in the future. Nonetheless, in terms of handling the Parties’ 1116/1117 argument, the *Myers* Tribunal has provided us all with a great service by recalling basic tort principles in aid of its analysis.

Obviously, an argument that Investors should be precluded from recovering its losses because it neglected to make a claim for harm caused to its investment under Article 1117 is logically inconsistent with the “but for” *causation* and “foreseeability” *remoteness* tests. Why should it matter where the losses were recorded as long as the evidence meets these basic tort law tests? Even though this was the fourth Tribunal to issue a damages award, the *Myers* Tribunal was actually the first tribunal to explicitly identify *causation* and *remoteness* as being of particular importance, and the Tribunal does appear to have applied these principles to arrive at its conclusions (albeit somewhat vaguely). For example, the Tribunal disallowed Myers’ claim for the “loss of opportunity” because such losses are not a foreseeable result of the actions in question.

Ultimately, the Tribunal did an adequate job in determining

147. *Id.* at 33-37.

148. *See id.* at 37.

Myers' net income stream "but for" the actions that constituted a breach of Canada's NAFTA obligations, taking into account the contingencies and exigencies of what would have been Myers' business environment. While one could quibble with some of the choices made, the overall approach was a sound and useful contribution to the all-too-nascent doctrine of damages under NAFTA Chapter 11.

III. CONCLUSION: LOOKING FORWARD

These seven awards have provided NAFTA followers with a considerable amount of material to ponder over the coming years. They have supplied some direction, both good and bad, as well as some fireworks. With these seven awards in hand, it is becoming easier to predict, with some certainty, what types of claims can be brought, and what kind of commitment will be required to see them through to a successful completion. Barring another interpretative surprise statement from the NAFTA Parties, these seven awards have set us off in what, for the most part, appears to be the right direction.