



NAFTA Chapter 11

**Presentation before the Whites Point
Quarry & Marine Terminal Project
Hearing**

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General Goals of NAFTA Chapter 11

- Foster investment liberalization to accompany trade liberalization
- Provide stability and predictability to NAFTA investors and their investments
- Create effective and binding dispute settlement mechanism
- Preamble to the NAFTA is relevant to its content and interpretation
 - promotion of sustainable development
 - acting in a manner consistent with environmental protection and conservation

Scope and Coverage

Applies to measures adopted by any level of Government

- **Measures**: defined as laws, regulations, procedures, requirements or practices
- **Investors**: NAFTA national or enterprise seeking, making or having made a cross border investment
- **Investments**: Broad yet exhaustive definition includes an enterprise, equity, debt security, loan, real estate or other property

Principal Provisions

- Non Discrimination:
 - **National Treatment (Article 1102)**
 - Most-favoured Nation Treatment (Article 1103)
- **Minimum Standard of Treatment (Article 1105)**
- **Performance Requirements (Article 1106)**
- Senior Management & Board of Directors (Article 1107)
- Transfers (Article 1109)
- **Expropriation and Compensation (Article 1110)**
- **Environmental Measures (Article 1114)**

National Treatment

Treat NAFTA investor as favourably as domestic investor

- Object and purpose is to prevent discrimination on the basis of nationality
- Together with the 'most favoured nation' treatment, constitutes the non-discriminatory obligation, which is a core principle of all trade and investment agreement.
- Prohibit both *de facto* and *de jure* discrimination
- Relative standard

Concept of “like circumstances”

- How are the foreign and domestic investors can be compared
- For example, are they in same business sector, in competition and are there any legitimate public policy rationale justifying differential treatment?

Concept of Territorial Application:

- With respect to sub-national entity (e.g, a province), non -discriminatory treatment is based on treatment within the jurisdiction

Applies to all phases of investment

- Establishment, acquisition, expansion, management, conduct, operation and sale

Minimum Standard of Treatment

Requires treatment in accordance with international law, including fair & equitable treatment and full protection & security

In accordance with customary international law:

- Provide for a minimum standard of treatment – an absolute standard
- Not about normal grievances in the normal conduct of business

Emerging components

- Lack of due process of law or denial of justice – e.g., a decision which is a breach of domestic law and is discriminatory against the foreign claimant investor
- Harmful conduct, grossly unfair, capricious, arbitrariness

MST Jurisprudence

Government conduct found to have violated the provision:

- Whether shock or surprise to tribunal leads to justified concerns as to the judicial propriety of the outcome (*Mondev*)
- Manifest injustice in the sense of lack of due process leading to an outcome which offends a sense of judicial propriety (*Loewen*)
- Conduct that is arbitrary, grossly unfair, unjust, or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome that offends judicial propriety (*Waste Management*)

Performance Requirements

Parties may not impose requirements as condition for investment

Parties may not condition receipt of advantage (ie, subsidies and grants) on meeting requirement

Types of conditions prohibited

- Export levels
- Domestic content requirements
- Preferential treatment to domestically produced products
- Transfer of technology and production process specifications to another enterprise

Parties may, however, condition receipt of advantage on certain requirements

- Location of production
- Employment and training of workers

Expropriation & Compensation

NAFTA Party may expropriate subject to following conditions:

- For a public purpose;
- On a non-discriminatory basis;
- In accordance with due process of law
- On payment of compensation equivalent to fair market value

1) Direct expropriation:

- Nationalization, taking of property, transfer of legal title

2) Indirect expropriation:

- Interference with investment without affecting legal title
- Creeping or “de facto”

Indirect Expropriation Analytical Concepts

Concept of deprivation to investor:

- Substantial deprivation of ownership rights, not mere interference

Concept of reasonable expectation of investor:

- Based on objective reasonableness not subjective expectation
- Recognition that conditions are transient and change inevitable

Character of state measure:

- Purpose and context; proportionality of effect of measure on investor considered in relation to purpose of the measure.

In general, non-discriminatory measures designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriation

Expropriation Jurisprudence

- As a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments have been given by the regulating government to the then putative investor contemplating investment that the government would refrain from such regulation.

Methanex v. USA

- The concept of “legitimate expectation” relates within the context of the NAFTA Framework, to a situation where a contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct such that a failure by the NAFTA Party to honour these expectations could cause the investor (or investment) to suffer damages

Thunderbird v. Mexico

Exceptions & Reservations

Measures may be challenged, except to the extent that exceptions or reservations taken:

Article 1108:

- Allows NAFTA Parties to exempt existing measures (Annex I)
- Permits reservation of existing & future measures (Annex II)

Annex I:

- Exempts federal and provincial measures existing prior to entry into force of the NAFTA (January 1, 1994)
- Certain reservations horizontal (cover all sectors), while others specific to sectors and sub-sectors (ie, agriculture, automotive, energy, transportation)

Annex II:

- Canada listed reservations in the areas of aboriginal affairs and social services such as public education and health
- Canada also listed sectors (telecommunications, transport networks and services)

Environmental Measures

- Recognition of impropriety of encouraging investment by relaxing domestic health, safety or environmental standards
- Recognition of the right of each country to take measures to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concern
- Compliance with investment obligations does not affect Sovereign right to adopt environmental measures
 - It is designed to prevent discriminatory action
 - It aims at avoiding arbitrary, disguised restrictions

Dispute Settlement

- Parties encouraged to undertake consultations
- Automatic consent to arbitration
- Process under UNCITRAL or ICSID arbitral rules
- NAFTA Parties have made considerable push for transparency:
 - Open hearings and public submissions
 - Tribunals have accepted amicus curiae
- Tribunals can solely award monetary damages
- Awards are final and binding
- Duration: 2-3 years at a minimum

Further information

- For further information please refer to:
International Trade Agreements and Local Governments: A Guide for Canadian Municipalities www.municipalguide.gc.ca

Information on Chapter 11, including all case law, also available on the website of Foreign Affairs and International Trade at
www.dfait-maeci.gc.ca