

NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) (ARBITRAL TRIBUNAL):  
POPE & TALBOT INC. V . GOVERNMENT OF CANADA (AWARD IN RESPECT OF DAMAGES)  
[May 31,2002]  
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**IN THE MATTER OF AN ARBITRATION  
UNDER CHAPTER ELEVEN OF THE  
NORTH AMERICAN FREE TRADE AGREEMENT**

**BETWEEN**

**POPE & TALBOT INC**

**and**

**GOVERNMENT OF CANADA**

**AWARD  
IN RESPECT OF DAMAGES**

**BY**

**ARBITRAL TRIBUNAL**

The Hon. Lord Dervaird  
(Presiding Arbitrator)

The Hon. Benjamin J. Greenberg Q.C.

Mr. Murray J Belman

**IN THE MATTER OF AN ARBITRATION  
UNDER CHAPTER ELEVEN OF THE  
NORTH AMERICAN FREE TRADE AGREEMENT**

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## A. PROCEDURAL HISTORY

1. The Tribunal issued its Award on the Merits of Phase 2 on April 10, 2001. As, in that Award, the Tribunal determined that Canada had breached its obligation to the Investor under Article 1105 of NAFTA in relation to the Verification Review Episode, and found Canada liable to the Investor for the resultant damages, it was necessary to proceed to a consideration of damages.

2. On April 20, 2001, the Tribunal made an Order setting out the procedure to be followed in this phase. That Order allowed for both parties to furnish a Statement of Claim and Memorial or Answer to the Statement of Claim and Counter Memorial as the case might be. The Tribunal indicated that unless one of the parties requested an oral hearing the Tribunal expected to deal with this part of the proceedings on the materials submitted, but it reserved meantime two days in November 2001. In the event, the Investor indicated that it wished to have an oral hearing.

3. While the procedure set out in the Order of April 20, 2001 was in train, the NAFTA Free Trade Commission ("Commission") on July 31, 2001 made an interpretation in relation to Article 1105 (the "Interpretation"). This was sent to the members of the Tribunal by Canada, and on August 14 the Tribunal asked both parties to make their positions clear as to the effect of the Interpretation on the present case by August 31, 2001 and September 10, 2001.

4. In light of the responses from the parties, the Tribunal on September 17, 2001 invited further responses by way of clarification and asked for further information. The parties did so. Both Mexico and the United States submitted observations under Article 1128 and requested to attend the hearing. The hearing had originally been fixed for two days in November 2001, and the dates were refixed for three days (November 13, 14 and 15, with a continuation if necessary on November 16). The parties agreed that issues as to damages would be treated first and issues as to the matter of the Interpretation be dealt with commencing November 15.

5. A hearing took place on 13, 14 and 15 November. The Investor was represented by Mr. Barry Appleton and Mr. Ian Laird. Canada was represented by Mr. Brian Evernden, Ms. Meg Kinnear and Prof. Don McRae. Each party led two witnesses. For Pope & Talbot they were Mr. Abe Friesen and, as expert, Mr. Howard Rosen. For Canada they were Mr. Dennis Seebach and, as expert, Mr. Jeffrey Harder. Each witness was cross examined. Representatives of Mexico and the United States attended throughout.

6. At the conclusion of the hearing the parties were invited to submit post hearing submissions relating to the damages issue only. Both Mexico and the United States sought and were granted leave to make post hearing written submissions on the Interpretation issue. Those submissions were duly made, and the parties made additional submissions in response thereto.

7. It is appropriate to deal first with issues raised in relation to the Interpretation and its bearing on this arbitration before considering issues of damages. Accordingly, the next several sections deal with those issues and the later sections deal with the remainder of the case.

## B. INTERPRETATION BY THE FREE TRADE COMMISSION OF NAFTA ARTICLE 1105

8. The Tribunal reached its decision on Article 1105 on April 10, 2001 and held that the conduct of Canada in relation to what was called the Verification Review Episode breached Canada's obligation to the Investment under

Article 1105: "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." The interpretation of Article 1105 by the Tribunal is set out in the Award on the Merits Phase 2 at paragraphs 105-118 and its application to the facts put forward by the Investor at paragraphs 120-185.

9. Briefly, the Tribunal determined that, notwithstanding the Language of Article 1105, which admittedly suggests otherwise, the requirement to accord NAFTA investors fair and equitable treatment was independent of, not subsumed by the requirement to accord them treatment required by international law. The Tribunal believed that this interpretation was compelled for three reasons: First, Bilateral Investment Treaties ("BITS") concluded by the NAFTA Parties provide in many instances that investors must "at all times be accorded fair and equitable treatment . . . and shall in no case be accorded treatment less than that required by international law." Since investors from countries signatory to those treaties were thus entitled to fair and equitable treatment without regard to any limitations that might be inherent in international law, NAFTA investors could claim the same rights under the most favoured nation provisions of Article 1103. Consequently the Tribunal concluded that it would make no sense to deny those rights under Article 1105, only to find them revived pursuant to Article 1103.' Secondly, the Tribunal believed that the NAFTA Parties were unlikely to have intended, in Article 1105, to treat each other's investors less favourably than those from other countries. Finally, the Tribunal noted that Article 1102 required each NAFTA Party to accord to other Parties' investor's treatment no less favourable than that it accords to its own investors, a standard obviously unlimited by any conditions that might be incorporated into international law standards.

10. After the Tribunal issued its conclusions on these matters, the Commission on July 31, 2001, adopted the Interpretation which, as far as relevant to this arbitration, includes the following:

Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and re-affirm the meaning of certain of its provisions. . .

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 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.

11. On August 10, 2001, without comment, Canada sent the Interpretation to the members of the Tribunal. On August 14, 2001 the Tribunal wrote to the parties in the following terms:

As Canada has not advised the Tribunal of what it believes to be the implications of the Commission's interpretation for this proceeding, the Tribunal requests both parties to submit their positions on the following questions:

- (1) Should the Commission's interpretation be considered to have retroactive effect on rulings previously made by NAFTA Tribunals?
- (2) If the interpretation is to have a retroactive effect,

- (a) Should the interpretation change the result reached in this proceeding by the Tribunal with regard to "the verification episode?"
- (b) If the answer to (a) is in the affirmative what would be the implications of Article 1103 on the Tribunal's ruling?

12. Having received responses from both parties the Tribunal on September 17, 2001 sent a further fax to the parties in, *inter alia*, these terms:

However, it would be of assistance for the Tribunal to obtain certain further clarification and information from Canada.

In the first place, the Tribunal notes the failure of Canada to respond to the Tribunal's question with regard to the implications of Article 1103 on the NAFTA Commission's interpretation of Article 1105, arguing solely that the Investor had abandoned its right to press a claim based on Article 1103.

As the Commission's Interpretation must have been intended to apply to future cases where waiver might not apply (and would not, unless given retroactive effect, even apply to this one) the Tribunal again requests Canada to provide an answer to the question. The Tribunal's view is well known — the Commission's interpretation would, because of Article 1103, (in the words of Article 32 of the Vienna Convention) produce the absurd result of relief denied under Article 1105 but restored under Article 1103. Nevertheless the Tribunal wishes to know Canada's view on this question before coming to a final conclusion in response to the Commission's interpretation.

In the second place, the Tribunal believes that the effects of the interpretation could depend upon what the Commission considered to be the effects of its interpretation. Without pre-empting at this time the implications properly to be drawn it appears to the Tribunal that if the Commission viewed its Interpretation to have retroactive effect on this case, its actions could be viewed as seeking to overturn a treaty interpretation already made by a NAFTA Chapter 11 Tribunal, Canada acting both as disputing party and as a member of a reviewing body. Consequently the Tribunal wishes to know what caused the Commission to take action in this manner and what the members were told about the effects of their action on this case.

The Tribunal accordingly seeks specifically answers to the following:

- (1) When and by whom was the matter of the interpretation of Article 1105 first raised with the Commission?
- (2) Were the Commission members told that Canada would argue that their interpretation would have any effect in this case?
- (3) Was the Commission presented with any basis for their interpretation apart from the language of Article 1105? For example was any negotiating history provided for their consideration?
- (4) Was the Commission advised of possible conflict between the interpretation it was asked to adopt (or proposed to adopt) and Article 1103?

The parties (and the other NAFTA Parties) were invited to submit comments.

13. After receipt of responses from the parties, the Tribunal sent a further fax to them on October 23, 2001 containing the following:

[The Tribunal] considers that its deliberations at and after the hearing would be assisted if the parties would address the following points on the issue of the NAFTA Commission's Interpretation in relation to Article 1105.

1. In respect that the Tribunal is required by Article 1131 to decide the issue in dispute in accordance with the NAFTA Agreement and applicable rules of international law, and it may be taken as a rule of international law that no-one shall be judge in his own cause, and that the purpose of this arbitral mechanism is under Article 1115 to assure due process before an impartial tribunal, is it correct for the Tribunal to apply an interpretation by the Commission so as to affect an award previously made by the Tribunal whereby it has determined an issue in dispute (namely Canada's liability for a breach of Article 1105) adversely to Canada?

2. Assuming for the purposes of these questions that the Interpretation is to be taken as binding on the Tribunal with retroactive effect on its ruling in respect of the verification issue, and that the Tribunal holds that its earlier ruling is "inconsistent with" or "contrary to" the interpretation of the Commission on Article 1105, by what standard is customary international law to be ascertained?

3. In particular, since Article 1105(1) states that the concepts of "fair and equitable treatment" and "full protection and security" are to be taken as included within the principle of treatment in accordance with international law and the Interpretation is to the effect that these concepts do not require treatment in addition to or beyond that which is required by the customary international law minimum standard, what is to be taken as the content of these concepts as part of customary international law at the time that the NAFTA was negotiated?

4. Views are also invited on the applicability of Article 1102 to the verification issue on the basis of the facts found by the Tribunal. The parties are referred to paragraph 117 of the award by the Tribunal.

14. In response to a fax from Canada dated October 25, 2001 the Tribunal made it clear, on October 26, 2001, that it was concerned about both Articles 1102 and 1103.

15. NAFTA Article 1131: "Governing Law" provides:

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

2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

16. In light of the issues raised by the parties and argued before the Tribunal the principal issues that arise for determination by the Tribunal are the following:

(1) Is the Interpretation put forward by the Commission a valid exercise of the Commission's power of interpretation and so binding on the Tribunal?

- (2) If so, what effect does the Interpretation have in relation to awards already made by a tribunal (the retroactivity issue)?
- (3) The construction and application of the Interpretation.
- (4) The nature and content of customary international law in the context of Article 1105, and its application to the facts of this case.

Each of these will be discussed separately.

### C. IS THE INTERPRETATION PUT FORWARD BY THE COMMISSION A VALID EXERCISE?

17. Whether the Commission acted within its powers in making its Interpretation arises in this way. NAFTA Article 2001(2) states:

The Commission shall:

- (a) supervise the implementation of this Agreement;
- (b) oversee its further elaboration;
- (c) resolve disputes that may arise regarding its interpretation or application;
- ...
- (e) consider any other matter that may affect the operation of this Agreement.

And under Article 1131(2) of NAFTA, all interpretation by the Commission of a provision of the Agreement "shall be binding on a Tribunal established under this Section [B of Chapter Eleven]."

18. At the same time, NAFTA makes separate and different provision in respect of amendment of the Treaty. Article 2202 provides:

#### Amendments

- 1. The Parties may agree on any modification of or addition to this Agreement.
- 2. When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of the Agreement,

19. Accordingly, a modification or addition to the Agreement has to proceed by way of amendment, whereby the Parties must first agree to the modification or addition, and each Party must then obtain formal approval in the appropriate way for that Party, to make such a modification or addition effective.

20. In this case, the Interpretation made by the Commission states that Article 1105 (1) prescribes the "customary international law" minimum standard of treatment, whereas the text of that Article refers rather to treatment in accordance with "international law." It is well accepted that the content of "international law" is a good deal broader than "customary international law." Article 38 of the Statute of the International Court of Justice<sup>2</sup> makes it clear that there are four sources of international law, of which custom is only one.

21. On that basis, the Investor argued that what the Commission had done was to amend Article 1105(1) by inserting the word "customary" before "international law" and thus limiting international law for the purposes of

Article 1105 to one only of its sources. In support of this contention, it produced to the Tribunal a submission made in another NAFTA Chapter 11 proceeding in which the claimant contended that the word "customary" was actually deleted from one of the negotiating texts of NAFTA, and, that at that time, the U.S. negotiators pointed out that "deleting the word would expand the coverage of Article 1105 by bringing in other legal obligations . . ."<sup>3</sup> In the same submission the *Methanex* tribunal was referred to an opinion by Sir Robert Jennings in which he describes the interpretation as "amending the treaty to curtail investor protection."<sup>4</sup>

22. Against that Canada argued that the Interpretation was to be regarded precisely as what it stated it was. At earlier stages of this case, the Tribunal itself had made an interpretation of Article 1105, and so what the Commission had done could properly be said to be within the proper limits of what constituted interpretation.<sup>5</sup> Canada took the further point that it was not within the powers of an arbitral tribunal under Chapter Eleven to challenge that which was issued by the Commission as an interpretation of a provision of the NAFTA. Whether others might in other ways challenge an interpretation as outside the powers of the Commission, such jurisdiction had not been conferred on a tribunal, for which an interpretation is binding by virtue of Article 1131(2).<sup>6</sup>

23. The Tribunal finds the latter argument unpersuasive. Article 1131(1) requires an arbitral tribunal under Chapter 11 to decide the issues in dispute in accordance with NAFTA and applicable rules of international law. If a question is raised whether, in issuing an interpretation, the Commission has acted in accordance with Article 2001, an arbitral tribunal has a duty to consider and decide that question and not simply to accept that whatever the Commission has stated to be an interpretation is one for the purposes of Article 1131(2).

24. This Tribunal must therefore consider for itself whether the Commission's action can properly be qualified as an "interpretation." That question will, of course, depend on what a proper interpretation of Article 1105 might be. In aid of resolving that question, the Tribunal early on sought to determine whether there is a body of negotiating history relating to Article 1105 that might be relevant and, if so, to secure those documents. In this connection, it is necessary to review what has transpired to that end.

#### D. NEGOTIATING HISTORY

25. The interpretation of Article 1105 has proved to be particularly difficult for various tribunals and, indeed, for the NAFTA Parties themselves. This Tribunal has grappled with the stark inconsistencies between the provisions of BITs and corresponding commitments in Article 1105.<sup>7</sup> Other tribunals have laboured over the relationships between Article 1105 and other commitments in Chapter 11 as well as commitments made by the NAFTA Parties in other agreements.<sup>8</sup> And the NAFTA Parties themselves found it necessary to promulgate the Interpretation.<sup>9</sup>

26. Against this background, it is beyond argument that the original texts of Article 1105 and other provisions of Chapter 11 contained ambiguities that had to be resolved by those charged with interpreting those texts. In such cases, it is common and proper to turn to the negotiating history of an agreement to see if that might shed some light on the intentions of the signatories.<sup>10</sup> Given the ambiguities in Article 1105, that inquiry was one that this Tribunal would have been required to make at some point in these proceedings.

27. In the event, the matter of negotiating history arose at an early stage in the proceedings. During the hearings in Montreal in November, 2000, the Tribunal sought to investigate the inconsistencies it saw between the BITs and Article 1105. At that time it asked Canada whether the different formulations were intentional or accidental.<sup>11</sup> In response, Canada referred the Tribunal to a submission of the United States, which asserted that the difference was the product of a conscious decision by the NAFTA Parties to change the approach in the BITs.<sup>12</sup>

28. It was then that the Tribunal asked Canada and, through it, the other NAFTA Parties whether *travaux preparatoires*<sup>13</sup> existed that might support the contention of the United States or otherwise shed light on the matter.<sup>14</sup>

Relying on the assurances of counsel for Canada that they did not,<sup>15</sup> the Tribunal proceeded on that basis.<sup>16</sup> It did, however, ask the question again in a written request, which produced the same result.<sup>17</sup>

29. During the November 2000 hearing, counsel for the Investor reminded the Tribunal that he had previously been advised officially that *travaux* regarding NAFTA did not exist,<sup>18</sup> basing his statement on a letter his office had received from DFAIT dated May 5, 1997.<sup>19</sup>

30. That letter bears examination. It was sent by the Coordinator for Access to Information and Privacy, purportedly in response to a request for documents. The requested documents covered all of NAFTA, not just Chapter 11, and included minutes and records of negotiating meetings and agreed negotiating texts.

31. DFAIT's response to that request stated:

[T]his will confirm that, apart from the actual NAFTA Agreement which is in the public domain, there are no minutes or records of NAFTA negotiating meetings, nor any mutually agreed negotiating texts, which have been or can be released publicly.

32. On its face, that language could admit two interpretations — (1) the documents do not exist or (2) they do (or might exist) but cannot be released publicly. However, Canada's Access to Information Act ("ATIA") resolves this ambiguity. Section 10 of the ATIA provides that when the government refuses to provide a document *other* than on the basis that it does not exist, it must the tell requester —

the specific provision of the Act on which the refusal was based, or where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based if the record existed.

33. Since the May 5, 1997 letter gave none of the information required by section 10 in the event documents do or might exist, the government's refusal could only have been based on its representation that they did not exist.<sup>20</sup>

34. There the matter lay until the last day of the hearings on damages in Washington during November, 2001. In his closing argument, counsel for the Investor introduced the claimant's submission dated September 18, 2001 to the tribunal in *Methanex*.<sup>21</sup> As noted above, that document contained the assertion that one of the principal Chapter 11 negotiators for Mexico recalled that various versions of Article 1105 were circulated and discussed among the negotiators.<sup>22</sup>

35. Later, that individual submitted to the *Methanex* tribunal an eight page declaration giving his recollection of the negotiations and stating his assumption that the drafts he recalled would be found in the "negotiating history" maintained by the NAFTA Parties or in the "archives" of the United States or Canada.<sup>23</sup> In response, the United States made the following statement:

[The] recollection [in the declaration is] unsupported by any of the *travaux* that Mexico or counsel for the United States could locate after a diligent search. Moreover, . . . *travaux* such as those that do exist for the NAFTA "must be used with caution . . . on account of their fragmentary nature."<sup>24</sup>

Mexico also challenged the declaration after its "search of its records of the negotiations."<sup>25</sup>

36. The next contribution to this matter came from, Investor's counsel in this proceeding. By letter dated February 20, 2002, he advised the Tribunal that, in proceedings under NAFTA Chapter 20, the NAFTA Parties admitted to the existence of *travaux*.<sup>26</sup> Specifically, one Chapter 20 tribunal stated:

Canada also relies on the text of the NAFTA more broadly, on the *travaux preparatoires* of the NAFTA, on various other statements and documents said to indicate the intention of the Parties in the period of the negotiations . . .<sup>27</sup>

Another such panel observed that:

Especially, given the negotiating history of NAFTA, which shows that the Parties agreed . . .<sup>28</sup>

37. Based upon much of the foregoing, the Tribunal requested Canada to produce a "record of discussions leading up to agreement upon the final text of Article 1105 of NAFTA, whether such record consists of negotiating drafts or any other matters . . ."<sup>29</sup>

38. That request produced, on April 12, 2002, the submission by Canada of some 1,500 pages of documents, reflecting over 40 different drafts leading up to the version of Article 1105 that appears in NAFTA.<sup>30</sup>

39. The implications of those documents for the interpretation of Article 1105 are described elsewhere in this Award. It is adequate here to say that the Tribunal knows that having the documents would have made its earlier interpretations of Article 1105 less difficult and more focused on the issues before it. In this sense, the failure of Canada to provide the documents when requested in November 2000 was unfortunate. Forcing the Tribunal to chase after the documents as it did is not acceptable.

40. Recall that, in November 2000, counsel for Canada told the Tribunal:

Let me make it easy for everybody. I have been in three or four of these cases, so I happen to know if there are *travaux preparatoires*, and I can tell you that I have not been able to find any.<sup>31</sup>

That assertion was, to put it generously, uninformed. Recall also that DFAIT had earlier told counsel for the Investor that there were "no mutually agreed negotiating texts."<sup>32</sup> That assertion was simply wrong.

41. Canada has not told the Tribunal where the documents resided, or how a diligent search would have failed to find over forty iterations of Chapter 11. The documents themselves show that Canada possessed them at one time. It is not credible that negotiators would have forgotten their existence. Surely the other NAFTA Parties would have been willing to refresh recollections and provide copies. If Canada did not want to release them, it surely knew how not to do so, as the very letter transmitting the documents to the Tribunal included a refusal to provide other documents. Finally, it is almost certain that the documents provided, which included nothing in explication of the various drafts, are not all that exists, yet no effort was made by Canada to let the Tribunal know what, if anything, has been withheld.

42. This incident's injury to the Tribunal's work can now be remedied. But the injury to the Chapter 11 process will surely linger.

#### E. CHARACTERIZING THE "INTERPRETATION"

43. As noted, the Tribunal has been presented with a series of negotiating drafts of Chapter 11, not a full negotiating history, as was requested. Therefore, it cannot reach a fully informed conclusion based upon a complete history. One thing, however, can be said — nowhere in the over forty negotiating texts submitted does the word "customary" appear in qualification of "international law" in what eventually became Article 1105.

44. In the first document furnished, "NAFTA: General Investment Principles," it is stated that "Foreign investment of a Party shall in any event be accorded fair and equitable treatment and in no case less than that required

by international law." Then, in the first 18 drafts considered by the negotiators, the basic formulation of the Model BIT was used.<sup>33</sup> It will be recalled that the Tribunal, and most other observers, concluded that, in that formulation, the international law standard of treatment is "additive" to the requirements for fair and equitable treatment.<sup>34</sup>

45. In the nineteenth draft, dated August 26, 1992, the present formulation of Article 1105 appears for the first time. That change came in what is called a "Lawyers' Revision." No changes were made thereafter in that text, nor has the Tribunal been provided with any documents that might explain the reasons for the change made in the nineteenth draft. The Tribunal notes that, ordinarily, changes of language reflecting changes in policy are not made in lawyers' revisions.

46. The foregoing represents the entirety of what the Tribunal has gleaned from the documents provided. They show that no reference was ever made to customary international law, and, of course, one must accept that the negotiators of NAFTA, as sophisticated representatives of their governments, would have known that, as is made clear in Article 38 of the Statute of the ICJ,<sup>35</sup> international law is a broader concept than customary international law, which is only one of its components. This difference is important. For example, Canada has argued to this Tribunal that customary international law is limited to what was required by the cases of the *Neer* era of the 1920's, whereas international law in its entirety would bring into play a large variety of subsequent developments.<sup>36</sup>

47. For these reasons, were the Tribunal required to make a determination whether the Commission's action is an interpretation or an amendment, it would choose the latter.<sup>37</sup> However, for the reasons discussed below, this determination is not required. Accordingly, the Tribunal has proceeded on the basis that the Commission's action was an "interpretation."

#### **F. EFFECT OF THE INTERPRETATION AT THE PRESENT STAGE OF THE PROCEEDINGS**

48. On April 10, 2001 the Tribunal held that there had been a breach of Article 1105 in respect of the behaviour of Canada in relation to the Verification Review Episode, and held the Investor entitled to damages from Canada in respect thereof. In arriving at that conclusion the Tribunal reached a view as to the proper meaning of Article 1105. Thereafter, the Commission issued its interpretation.

49. Article 1131(2) provides that an interpretation by the Commission "shall be binding on a Tribunal established under this Section." Therefore, the next question is whether the Interpretation has effect at this stage of the proceedings. In this respect, Canada has argued that the Tribunal's Award of April 10, 2001 finding Canada in breach of Article 1105 was not to be treated as a separate, free-standing, award, which could be regarded as a closed chapter of the case. The Tribunal had yet to determine all issues relating to damages in respect of this breach, and, while those determinations might principally relate to issues of causation and quantification of loss, they were critically dependent upon there having been a breach of Article 1105. Canada further argued that, since the Interpretation was not a change but a statement of what Article 1105 had always meant, it was necessary for the Tribunal, in applying the Interpretation, to consider whether its ruling of breach already made was based on a correct interpretation. Canada's position was that because the Tribunal at this stage had to act on the basis of an interpretation of Article 1105, it must apply the Interpretation.

50. The Investor argued in the first place that in international law there was a basic presumption against retroactivity. The Tribunal had already made a finding of fact in relation to breach of Article 1105, and it was fundamentally unfair to seek to revisit that. Further, the language of Article 1131(2) "an interpretation shall be binding" only referred to the future and not to the past. The Tribunal had already ascertained a breach of Article 1105, and it would be again it elementary rules of due process of justice to compel it to revisit its determination. In that context, the Investor referred to the opinion of Sir Robert Jennings cited on page 20 of the *Methanex* letter dated September 18, 2001 discussed above.<sup>38</sup>

51. The Tribunal has found this issue also a difficult question. The position adopted by Canada was not wholly clear. Nevertheless the Tribunal has reached the view that the phrase "shall be binding" in Article 1131(2) is better

regarded as mandatory than prospective. Viewed in that light, it is incumbent on the Tribunal to assess the impact of the Interpretation upon its prior findings with respect to Article 1105.

### G. CONSTRUCTION OF THE INTERPRETATION

52. Viewing the Interpretation as binding on the Tribunal does not necessitate a finding that it overturns the Tribunal's previous Award under Article 1105. That Award could remain either because the Tribunal's interpretation of Article 1105 is compatible with the Commission's, or, if it is not, because the application of the Interpretation to the facts found by the Tribunal leads to the same conclusion that there was a breach by Canada of its obligations under Article 1105. If upon either basis the answer is in the affirmative, the Tribunal may proceed to award damages. If, however, the conclusion is that, upon those facts, the application of the Interpretation leads to a finding of no breach of Article 1105, the Tribunal may not proceed to award damages.

53. The Interpretation concluded that Article 1105 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 other Parties. The Interpretation does not require that the concepts of "fair and equitable treatment" and "full protection and security"<sup>39</sup> be ignored, but rather that they be considered included as part of the minimum standard of treatment that it prescribes. Parenthetically, any other construction of the Interpretation whereby the fairness elements were treated as having no effect, would be to suggest that the Commission required the word "including" in Article 1105(1) to be read as "excluding." Such an approach has only to be stated to be rejected.

54. Therefore, the Interpretation requires each Party to accord to investments of investors of the other Parties the fairness elements as subsumed in, rather than additive to, customary international law.

55. Was the decision made by the Tribunal based on an interpretation different from that made by the Commission? At one level this might appear to be so since the Tribunal expressly referred to the fairness elements as being additions to the requirements of the international law minimum and interpreted Article 1105 to require that covered investors and investments receive the benefits of the fairness elements under ordinary standards applied in the NAFTA countries without any threshold limitation.

56. However, that conclusion alone does not mean that the Tribunal's award was incompatible with the Interpretation. Whether the two are consistent in this case depends on whether the concept behind the fairness elements under customary international law is different from those elements under ordinary standards applied in NAFTA countries.

57. Based upon its submissions in these proceedings<sup>40</sup> and confirmed intentionally in its proposals in the FTAA negotiations," Canada considers that the principles of customary international law were frozen in amber at the time of the *Neer* decision.<sup>42</sup> It was on this basis that it urged the Tribunal to award damages only if its conduct was found to be an "egregious" act or failure to meet internationally required standards.<sup>43</sup>

58. The Tribunal rejects this static conception of customary international law for the following reasons:

59. First, as admitted by one of the NAFTA Parties,<sup>44</sup> and even by counsel for Canada,<sup>45</sup> there has been evolution in customary international law concepts since the 1920's. It is a facet of international law that customary international law evolves through state practice. International agreements constitute practice of states and contribute to the grounds of customary international law.<sup>46</sup>

60. Secondly, since the 1920's, the range of actions subject to international concern has broadened beyond the international delinquencies considered in *Neer* to include the concept of fair and equitable treatment. This development was focused in the work of the OECD on its Draft Convention on the Protection of Foreign Property:<sup>47</sup>

which recognized that that concept was already customary in bilateral agreements then in effect. That draft did not rest upon an effort to discern the ingredients of international law but upon an independent consideration of how host countries should treat foreign owned property. However, the comments to the draft made two observations that are pertinent here: fair and equitable treatment requires treatment at least as good as that accorded by a state to its own nationals and that concept was embodied in "customary" international law.<sup>48</sup>

61. Thirdly, the standard of fair and equitable treatment was central to BITs negotiated since the work of the OECD. Many of those agreements, as the Tribunal has previously observed, require state conduct to be evaluated under the fairness elements apart from the standards of customary international law. And even those that do not provide that those elements are owed independently of the requirements of customary international law do add the fair and equitable treatment protections to those rights formerly protected by customary international law. That is, the BITs are not limited to protection against "international delinquencies."<sup>49</sup>

62. Canada's views on the appropriate standard of customary international law for today were perhaps shaped by its erroneous belief that only some 70 bilateral investment treaties have been negotiated;<sup>50</sup> however, the true number, now acknowledged by Canada,<sup>51</sup> is in excess of 1800.<sup>52</sup> Therefore, applying the ordinary rules for determining the content of custom in international law,<sup>53</sup> one must conclude that the practice of states is now represented by those treaties.<sup>54</sup>

63. The International Court of Justice has moved away from the *Neer* formulation:

Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. . . . It is a willful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety.<sup>55</sup>

64. That formulation leaves out any requirement that *every* reasonable and impartial person be dissatisfied and perhaps permits a hit less injury in the psyche of the observer, who need no longer be outraged, but only surprised by what the government has done. And, of course, replacing the neutral "governmental action" with the concept of "due process" perforce makes the formulation more dynamic and responsive to evolving and more rigorous standards for evaluating what governments do to people and companies.

65. Based upon the foregoing, the Tribunal rejects Canada's contention on the present content of customary international law concerning the protection of foreign property. Those standards have evolved since 1926, and, were the issue necessary to the Tribunal's decision here, it would propose a formulation more in keeping with the present practice of states. However, because the Tribunal concludes that, *even applying Canada's proposed standard*, damages would be owing to the Investor as a result of the Verification Review Episode, that reformulation is unnecessary here.

66. The Tribunal having thus concluded that the Investor is entitled to damages by reason of the breach by Canada of Article 1105, it is unnecessary to consider issues relating to Articles 1102 or 1103 which had been raised following upon the Interpretation. The Tribunal accordingly does not do so.

## H. APPLICATION OF THE INTERPRETATION

67. Applying Canada's view of the customary international law standard embodied in the Interpretation, the Tribunal must determine whether the conduct giving rise to the April 10, 2001 Award under Article 1105 was, to use Canada's term, egregious. The Tribunal finds that it was.

68. A lengthy statement of the facts, as found by the Tribunal, is set out in paragraphs 156-181 of that Award. Briefly, the Tribunal found that when the Investor instituted the claim in these proceedings, Canada's Softwood Lumber Division ("SLD") 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 behaviour of the Investor or the Investment, which remained cooperative until the overreaching of the SLD became too burdensome and confrontational. One would hope that these actions by the SLD would shock and outrage every reasonable citizen of Canada; they did shock and outrage the Tribunal.

69. For these reasons, the Tribunal concludes that the conduct of the SLD in the Verification Review Episode violated the fair and equitable treatment requirement under Article 1105, even using Canada's strict formulation of that requirement.

## I. OTHER ISSUES

### Article 1105 Damages to "Investors"

70. Canada submitted that damages must be confined to those arising out of a breach of Article 1105(1), which, in its terms, refers to an obligation upon each Party to accord the requisite treatment to "investments of investors of another Party."

71. In its written submission, Canada argued that, as Article 1105(1) refers only to investments of investors and not to investors, the Article "bars recovery of damages incurred directly by the Investor."<sup>56</sup> It submitted that there was no finding of harm to the Investor under Article 1105, nor could there be because "the causal link respecting a breach of Article 1105 can only be between the treatment in question and the Investment."<sup>57</sup> It was, therefore, impossible for the Investor to establish that any alleged economic harm it suffered (as opposed to the harm suffered by its Investment) had a sufficient causal link to Canada's breach of Article 1105.

72. However, Counsel for Canada retreated from that position in the hearing.

COUNSEL FOR CANADA: Now, I have not, nor has my client suggested that my friend is totally devoid of remedy in the circumstances of this case. What we have, in essence, is that the only damages recoverable during this phase are those damages, if any, sustained by the investment - I'm sorry, the investor.

ARBITRATOR BELMAN: So if the investor pays Mr. Appleton's legal fees, that counts in your view?

COUNSEL FOR CANADA: It may well do, assuming that you're satisfied that they are appropriate expenditures and all of that sort of thing. However, the claim for incremental loss of revenue is a different matter. . .<sup>58</sup>

73. The Tribunal accordingly proceeds upon the basis that Canada accepts that damages incurred by the Investor may be recoverable where there has been a breach of Article 1105.

### Damages under Articles 1116 and 1117

74. This claim is submitted by the Investor under Article 1116, which provides:

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 . . .

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

Article 1117 provides:

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 . . .

and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

75. Canada submitted an argument along the following lines: Article 1116 provides for claims for loss or damage incurred by an investor, whereas Article 1117 addresses claims for loss or damage incurred by an investment owned or controlled by an investor. Because, as noted, the sole basis for the claim here was Article 1116, the Investor may not recover damages due to injuries to its Investment, and any elements of its claims that are derivative from injuries suffered by the Investment must be disallowed. They would be recoverable under Article 1117, but that claim had not been made.

76. Canada based its contention on —

the customary international law prohibition on shareholders recovering from injuries suffered by a corporation — the so-called *Barcelona Traction* rule. It is well established in customary international law that corporations have a legal existence separate from that of their shareholders. Article 1116 enables investors (those that own or control an investment) to seek relief for injuries that are direct but not derivative.<sup>59</sup>

77. Canada also asserted that Article 1117 on the other hand provides —

a remedy for injuries to enterprises that would otherwise be barred from bringing a claim by the customary international law rule prohibiting claimants from filing international claims against the crown governments. It supplements customary international law by creating a derivative right of action for the benefit of an investor.<sup>60</sup>

78. The submission by Canada was thus that claims under Articles 1116 and 1117 are mutually exclusive, at least in the sense that while an investor might be able to claim by arbitration under Article 1116 when it claimed to have suffered loss and damage *directly* (so seeking to distinguish its loss from loss to the investment), it could not claim under that Article losses it incurs indirectly by virtue of damages to its investment.

79. The difficulty for Canada's position is in the language of the NAFTA. First, Article 1117 is permissive, not mandatory, in its language "may submit to arbitration." It is prohibitory only in that Article 1117(4) states "An investment may not make a claim under this Section.

80. Of greater significance is the language of Article 1121 (1):

A disputing investor may submit a claim under Article 1116 to arbitration only if

(a) . . .

- (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise waive their right to initiate or continue [any other dispute settlement procedures].

In the view of the Tribunal it could scarcely be clearer that claims may be brought under Article 1116 by an investor who is claiming for loss or damage to its interest in the relevant enterprise, which is a juridical person that the investor owns. In the present case, therefore, where the investor is the sole owner of the enterprise (which is a corporation, and thus an investment within the definitions contained in Articles 1139 and 201), it is plain that a claim for loss or damage to its interest in that enterprise/investment may be brought under Article 1116. It remains of course for the Investor to prove that loss or damage was caused to its interest, and that it was causally connected to the breach complained of.<sup>61</sup> But for immediate purposes the important point is that the existence of Article 1117 does not bar bringing a claim under Article 1116.

## J. DAMAGES

81. After due consideration and deliberation, the Tribunal concludes that two heads of damages claimed are not recoverable. They are (1) the value of management time devoted to the claim herein and (2) alleged losses flowing from the seven day shutdown of the Investment's three British Columbia mills in December 1999.

82. The Tribunal considers management time to be a fixed cost. The evidence revealed that the management who were involved in matters covered by the present claim were paid annual salaries that did not vary in respect of the issues or matters to which each of them devoted his or her working time. Therefore, those salaries would have been paid no matter what work related activities those managers undertook. This being the case, no such additional costs were incurred because of the Verification Review Episode, even if those employees were required to work more hours during the year because of that episode.

83. At the commencement of the November 2001 hearing on damages, the Tribunal was in some doubt whether the Verification Review Episode and the consequent possibility of a cutback in the Investment's quota for the following quota year directly caused the shutdown in December 1999. However, the testimony of its president, Mr. A. Friesen, convinced the Tribunal of that causal relationship.

84. The Tribunal was thus required to determine what, if any, loss of profits the Investment suffered as a result of the shutdown. At the same hearing, Canada produced evidence and analyses, based upon the Investment's own records, that convinced the Tribunal that the Investment at all relevant times had inventory sufficient to meet all its sales requirements, notwithstanding that shutdown. Therefore, the thesis advanced by the Investor that the Investment never recovered from that lost production was not borne out by the evidence. In fact, the Investment suffered no loss of profits from the shutdown because it was always able to meet the needs of its customers on a timely basis. There was no convincing evidence that replenishing that inventory cost the Investment more than it would have if the shutdown had not occurred.

85. The heads of damages claimed that the Tribunal finds to be recoverable are (1) out of pocket expenses relating to the Verification Review Episode, including the applicable accountants' and legal fees, as well as the fees and expenses incurred by the Investor in lobbying efforts to counter the actions of the SLD and the consequent possibility of reductions in the Investment's export quotas, and (2) out of pocket expenses directly incurred by the Investor with respect to the Interim Hearing held in January 2002.<sup>62</sup>

86. The following sets out the amounts in U.S. dollars under these heads claimed to have been expended by the Investor and accepted by Canada;

<b>Heads of Damages</b>	<b>Claimed</b>	<b>Accepted by Canada</b>
Investor's out of pocket	\$12,295	\$11,187
Legal fees and disbursements (Appleton)	\$327,118	\$48,970
Accountant's fees and disbursements (Low Rosen)	\$100,818	\$67,972
Lobbyist (ApcoCanada)	\$8,778	0
Legal fees (Barnes & Thornburg, Davis & Co., Stoel, Rives)	\$33,613	0
<b>Total</b>	<b>\$482,622</b>	\$128,129

87. With the agreement of the disputing parties, the Tribunal retained the services of Michael Miller, Esq., Advocate, of Edinburgh, to assist in reviewing the accounts and calculations submitted by them. The Tribunal has reviewed Mr. Miller's Report and, consistent with its conclusions above, recognizes the following sums (in U.S. dollars) as recoverable:

<b>Heads of Damages</b>	<b>Awarded</b>
Investor's out of pocket	\$11,265
Legal fees and disbursements (Appleton)	\$287,924
Accountant's fees and disbursements (Low Rosen)	\$90,404
Lobbyist (ApcoCanada)	\$0
Legal fees (Barnes & Thornburg, Davis & Co., Stoel, Rives)	\$18,053

88. Accordingly, the Tribunal awards the Investor \$407,646 as the principal amount of damages. Interest is claimed by the Investor. NAFTA Article 1135(1)(a) provides that a tribunal "may award . . . monetary damages and any applicable interest." The UNCITRAL Rules are silent on the issue of interest. Canada submitted that, "if the Tribunal finds that the Investor incurred compensable loss or injury, the Tribunal should apply a simple rate of 5% interest in its award."<sup>63</sup> Canada accepted that the Tribunal was not bound by domestic law but referred to the Canadian legal rate of 5% as a "helpful benchmark for setting interest."<sup>64</sup>

89. The Tribunal concludes that the NAFTA provisions are an independent basis for determining interest recovery; otherwise domestic law could prevent the award of any interest. Of course, applicable rules of international law, which are expressly made part of these proceedings by virtue of Article 1131(1), also call for the award of appropriate interest, including compounding, as one of the elements of compensation.<sup>65</sup>

90. In the circumstances, acting pursuant to Article 1131, the Tribunal awards interest on the principal sum at the rate of 5% per annum compounded quarterly as an appropriate rate, starting at December 1, 1999.<sup>66</sup> With that interest, the amount awarded as of May 31, 2002 is \$461,566. Interest on that amount thereafter, is also assessed at 5% per annum, compounded quarterly and *pro rata* within a quarter.

## CONCLUSIONS

91. For the reasons given above the Tribunal orders the Government of Canada to pay the Investor US\$461,566 with interest payable from and after May 31, 2002 until payment in full at the rate of 5% per annum compounded quarterly and *pro rata* within a quarter.

92. All questions as to costs have been reserved. The parties are requested to provide to the Tribunal by June 30, 2002 their proposals in writing for dealing with costs.

/s/

The Honourable Lord Dervaird, Presiding Arbitrator

/s/

The Honourable Benjamin J. Greenberg, Q.C. Arbitrator

/s/

Murray J. Belman, Arbitrator

Dated: May 31, 2002

#### ENDNOTES

1. Canada pointed out that, in this case, the Investor had withdrawn its claim under Article 1103, but that fact is not material to a proper interpretation of Article 1105.
2. At: <http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute/htm>.
3. Letter submission by the claimant in *Methanex Corporation v. United States of America*, September 18, 2001 at 6.
4. *Id.*, at 20.
5. *See*, Nov. 2001 Tr. at 655:17-656:8.
6. *Id.* at 649:18-655:16.
7. *See*, Award on the Merits of Phase 2, April 10, 2001 at ¶¶105-185.
8. *See, e.g., Metalclad Corp. and Mexico*, Award, August 25, 2000 at ¶¶76, 99-101 (failure to provide transparent system of regulation of investment denied investor fair and equitable treatment under international law as required by Article 1105); *reversed in part, United Mexican States v. Metalclad Corp.*, 2001 BCSC 664 at ¶¶62, 72 ("international law" under Article 1105 means "customary" international law; Chapter 11 contains no obligations to provide transparency). *See also, S.D. Myers, Inc. and Canada*, Partial Award, November 13, 2000 at ¶¶258-266 (fair and equitable treatment subsumed in international law standard, but international law includes rules designed to protect investors; denial of national treatment under Article 1102 can be a violation of Article 1105). With these cases in mind, one is bound to agree with Fox and Deane: "The initial arbitral and judicial considerations of Article 1105 have been remarkably divergent." *Foreign Investment Protection under Investment Treaties: Recent Developments under Chapter 11 of the North American Free Trade Agreement*, paper submitted to the Global Construction Superconference, London, Nov. 5-6, 2001. That divergence must, in large part, be due to ambiguities in the text of the provision.
9. That Interpretation, at the very least, was intended to clarify what the NAFTA Parties must have seen as an ambiguity in the words "international law" in Article 1105; the clarification consisted of adding the word "customary" as a modifier. Had the NAFTA Parties not perceived an ambiguity, no interpretation would have been necessary. The Tribunal must note, however, that, of all the problems of interpretation of Article 1105, the scope of the term "international law" should be the least troubling since that term is plain on its face and is defined in the Statute of the ICJ.
10. See Article 32, Vienna Convention on the Law of Treaties:
 

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order . . . to determine the meaning when the interpretation according to Article 31:

  - (a) Leaves the meaning ambiguous or obscure; or
  - (b) Leaves to a result which is manifestly absurd or unreasonable.

11. See Nov. 2000 Tr. Vol. 2 at 41:15-42:10.
12. See *id.* Vol. 3 at 3:24-4:14
13. Blacks Law Dictionary (7<sup>th</sup> Ed.) defines that term as:

(French "preparatory works") Materials used in preparing the ultimate form of an agreement of statute, and esp. of an, international treaty; materials constituting a legislative history.
14. See, Nov. 2000 Tr., Vol. 5 at 2:2-2:18.
15. See *id.*, at 3:20-3:25, Canadian counsel subsequently advised the Tribunal that his comments were restricted to the existence of *travaux* related to Article 1105. See Letter to Tribunal Feb. 22, 2002.
16. See *id.* at 4: 15-4:20
17. The Tribunal's request was made in a faxed letter to the disputing parties dated Sept. 17, 2001, after the Interpretation of the Free Trade Commission in which it asked Canada to advise, *inter alia*, whether the Commission had been presented with any material related to the interpretation, including "negotiating history." None of the NAFTA Parties responded to this question and none provided any negotiating history.
18. See Nov., 2000 Tr. Vol. 5 at 2:20-3:5.
19. Letter from Howard Strauss, Coordinator, Access to Information and Privacy, DFAIT to Patrick Westaway, one of the associates of counsel for the Investor.
20. Indeed, the DFAIT letter concluded: "Our understanding, therefore, is that you would not want to pursue the Access request in your letter of February 7." It is unlikely that a requester would abandon seeking documents that he believed might exist without knowing why they were being withheld.
21. Nov. 2001 Tr. at 759:4-760:4
22. Sept. 18, 2001 letter from Claimant's counsel to *Methanex* tribunal at 6. The matter in issue related to the meaning of "international law" in Article 1105. The recollection of the Mexican negotiator was that a draft of the article using "customary" as a modifier had been considered and rejected by the negotiators. The United States denied the assertion that there was a negotiating draft containing the word "customary" but said nothing about the existence of negotiating history. See submission of the United States to the *Methanex* tribunal dated July 31, 2001 at fn. 1. attached to its Submission to this Tribunal dated Dec. 3, 2001.
23. Attachment to the claimant's Reply Submission dated Nov. 9, 2001, to the *Methanex* tribunal at ¶ 15, submitted by Canada to this Tribunal on March 2002. That claimant's submission also contained the following statement: "[T]he United States steadfastly refuses to produce any negotiating history, including previous drafts of NAFTA, although it acknowledges that these drafts both exist and are in the searchable (but unilateral) possession of the United States." *Id.* Reply Submission at 10.
24. Rejoinder dated Dec. 17, 2001 to Methanex's Reply Submission at 4, submitted to this Tribunal by Canada on March 25, 2002.
25. Letter to the *Methanex* tribunal dated Feb. 11, 2002 at 4, submitted to this Tribunal by Canada on March 25, 2002.
26. Feb. 20, 2002 letter at 3.
27. *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, Final Report of Chapter 20 panel, Dec. 2, 1996 at 71.
28. *In the Matter of Cross-Border Trucking Services*, Final Report of Chapter 20 panel Feb. 6, 2001 at ¶ 121.
29. Letter to the disputing parties dated March 21, 2002.
30. The documents consisted solely of the various drafts of what came to be Chapter 11. There is almost certainly additional material that was available to the Parties during the negotiations, reflecting various views on these drafts, as well as other documents that bear on those views.
31. Nov. 2000 Tr. Vol. 5 at 3:21-25. As noted above, the assertion was later limited to material on Article 1105. On February 22, 2002 Canadian counsel advised the Tribunal: "I provided the foregoing answers [*i.e.*, those in the November, 2000 hearing] to this Tribunal after making inquiries of appropriate and knowledgeable officials and investigating such other avenues as I considered necessary and appropriate to satisfy myself that Canada possessed no such documents."

32. See paragraph 31 above.

33. That text reads:

Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

The drafts used some variations on this text, the principal one being the use of the words "in all other respects as well" in place of "in no case less than." It also appeared that for some time, Mexico preferred to have no reference made to "international law" in the provision.

34. See Award on Merits of Phase 2 at ¶¶ 111-113.

35. See fn. 2 above.

36. Canada has also implicitly made this argument in its proposals on the Free Trade Area of the Americas agreement, where it refers to a failure by states "to meet the minimum standard of treatment if their acts amounted to an outrage, bad faith, willful neglect of duty or an insufficiency of governmental action so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency." See, Canada's Proposal to the FTAA Negotiating Group on Investment, August 2001. The Quoted language is from *Neer*.

37. The Tribunal is not unaware that, in the Eighth Submission of the United States, it argued that the term "international law" in Article 1105 means customary international law, basing itself on the judgment in the *United Mexican States v. Metalclad Corp.*, 2001 BCSC 664. In that decision, Tysoe, J. reached that conclusion without providing any analysis or reasoning. See *id.* at ¶62. Of course, the failure to provide a rationale for the conclusion renders this *ipse dixit* holding of questionable precedential value.

Other observers, beyond Sir Robert Jennings, have expressed serious question whether the Commission's limitation of "international law" customary international law is an interpretation rather than an amendment. In a recent paper, Guillermo Aguilar Alvarez and Prof. W.W. Park stated: "Some observers of NAFTA consider these Interpretations to constitute *de facto* modification of the NAFTA, departing from the meaning of Article 1105 agreed upon at the time NAFTA was concluded. *If so, then the Interpretations would not be binding on a NAFTA tribunal.*" Aguilar Alvarez and Park, *The New Face of Investment Arbitration: Capital Exporters as Host States under NAFTA Chapter 11*. Paper at the 16<sup>th</sup> ICCA Congress, London (May 2002) at 32 (emphasis supplied). See also, Williams, *Challenging Investment Treaty Arbitration Awards – Issues Concerning the Forum*, Paper at the 16<sup>th</sup> ICCA Congress, London (May 2002) at 19-21; VanDuzer, *NAFTA Chapter 11 to Date: The Progress of a Work in Progress*, Paper at NAFTA Chapter 11 Conference, Carleton Univ. Ottawa (Feb. 2002) at 28-29.

38. See ¶ 34 above.

39. As it did in its Award of April 10, 2001, the Tribunal will henceforth use "fairness elements" to refer to both the "fair and equitable treatment" and "full protection and security" requirements of Article 1105.

40. Canada's view was "The conduct of government toward the investment must amount to *gross* misconduct, manifest injustice or, in the classic words of the *Neer* claim, an outrage, bad faith of the willful neglect of duty." Counter Memorial Phase 2 ¶ 309.

41. See, fn. 36, above. As noted there, the language offered by Canada used the precise language of *Neer* to explain what it meant by the customary international law minimum standard of treatment.

42. To recall, the passage from *Neer* relied upon Canada states:

[T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short international standards that every reasonable and impartial man would readily recognize its insufficiency.

1927 Am. J. Int'l L. 555,556.

43. Canada used this term to "encapsulate" what it believed were the standards of customary international law. See, Nov. 2000 Tr., Vol. 2 at 58:8-20

44. See Post Hearing Submission Damages Phase for Mexico at ¶ 8: "Mexico also agrees that the standard is relative and that conduct which may not have violated international law (sic) the 1920s might very well be seen to offend internationally accepted principles today."

45. See Nov. 2001 Tr. at 830:8-11. "We also said that that standard, obviously, develops over time, but that does not take away from the fact that the threshold is high."

46. Brownlie: Principles of Public International Law (5<sup>th</sup> Ed. 1998) p. 12.
47. OECD Publication 23081, Nov. 1967.
48. *Id.* Note 4(a) at 15.
49. As Professor Sir Robert Jennings cogently observed in Opinion furnished by him in another NAFTA case (*Methanex v. United States*) and provided to this Tribunal by the United States, the *Neer* case relied upon for that standard was not one concerned with fair and equitable treatment but with whether the state concerned had committed an "international delinquency."
50. Nov. 2001. Tr. at 730-732.
51. *See* Canada's Post Hearing Submission Arising out of Article 1128, etc. (Damages Phase) at ¶ 14.
52. A. Parra, *Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties*, ICSID News, Vol. 17. No2.
53. As stated by counsel for Canada, "Customary international law is based on the practice of states or diplomatic correspondence." Nov. 2001 Tr. at 731:2-4.
54. Of course, as noted in the Tribunal's April 10, 2001 Award under Article 1105, every NAFTA investor is entitled, by virtue of Article 1103, to the treatment accorded nationals of other states under BITs containing the fairness elements unlimited by customary international law. *See*, ¶ 117. The did not purport to change that fact, nor could it.
55. *Case Concerning Elettronica Sicula S.P.A. (ELSI)*, ICJ 15 at 76.
56. Statement of Defense and Counter Memorial Phase 3 — Damages, at ¶¶ 56-58.
57. *Id.*
58. Nov. 2001 Tr. at 476.
59. Counter Memorial (Damages Phase) at ¶ 51.
60. *Id.* at ¶ 52.
61. The link between the financial fortunes of parent and subsidiary corporations, perhaps obvious on its face, is made express by requirements in most developed countries that majority owned subsidiaries be consolidated in the financial reports of the parent. *See, e.g.*, U.S. Securities and Exchange Commission Regulation S-X, 17 C.F.R. § 210 SA-02; (U.S.) Financial Accounting Standards Board Statement No. 94 (issued 10/87); Canadian Institute of Chartered Accountants Handbook (2002) at § 1590.16.
62. Canada argued that the Interim Hearing expenses should be considered as costs rather than damages. For the reasons stated in the Award of April 10, 2001, the Tribunal considers it more appropriate to treat those expenses as damages
63. Counter Memorial (Damages Phase) at ¶ 145.
64. Reply Counter Memorial (Damages Phase) at ¶ 104.
65. *See, e.g., Award in the Matter of an Arbitration between Kuwait and the American Independent Oil Co. (1981) 21 ILM 976 at ¶ 63; Asian Agricultural Products v. Republic of Sri Lanka (1991) 6 ICSID Rev. FILJ at ¶ 14.*
66. This is the date sought by the Investor. *See* Statement of Claim and Memorial (Damages Phase) at ¶ 30.