NAFTA
Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects

Edited by Todd Weiler

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Dept. of Foreign Affairs and International Trade
Ministère des Affaires étrangères et du Commerce international
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the undertaking itself;" and as embracing "the worth of the enterprise as a whole" or "the total value of the undertaking" including "profit."

In summary, in order to provide the restitution value mandated in the Chorzów Factory case for a state act contrary to international law, consideration of the following elements of any potential damages claim is required:

- The fundamental objective is to wipe-out all the consequences of the illegal act and reestablish the situation which would have existed if that act had not been committed.
- The award of compensation is not limited to the value of the undertaking at the date of loss;
- Restitution value is shown by demonstrating the "probable performance subsequent to the date of loss and prior to the date of the award, based on actual post-taking experience;"
- Compensation for lost profits are included in the calculation of restitution value for unlawful acts; and that
- Consequential damages resulting from the unlawful act should be included in the calculation of restitution value.

F. CAUSATION AND REMOTENESS

Before restitution value can be assigned for any loss, however, two simple tests must be met. First, there must be a direct causal link between the unlawful international conduct and the damages incurred. 47 Second, the damages claimed must be a a reasonably foreseeable consequence of the act that constituted the breach. The first test is a matter of causation. The second test is a matter of what some refer to as proximate cause (others refer to it as "remoteness"). The principle of compensation is a critical element in the international case law with respect to compensation.

The Myers tribunal noted these principles in the following manner:

... compensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific NAFTA provision that has been breached; the economic losses claimed by SDMI must be proved to be those that have arisen from a breach of the NAFTA, and not from other causes. 48

This finding was further confirmed in the dispositive provisions of the Partial Award, when the tribunal ordered:

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48 Myers Partial Award, supra note 1, at 316.
CANADA shall pay to SDM I compensation for such economic harm as is established legally by SDM I to be *directly as a result* of CANADA’s breach of its obligations under Articles 1102 or 1105 of the NAFTA. [emphasis added]49

After dismissing the arguments of both parties as relatively unhelpful, the tribunal concluded that the simple test for proving damages in a claim brought under Article 1116 or 1117 is to (1) establish that *causation* exists, and (2) consider the issue of *remoteness*.50 Even though this was the fourth tribunal to issue a damages award, the Myers tribunal was actually the first to explicitly identify *causation* and *remoteness* as being relevant to any damages analysis. However, while the tribunal adequately explained why the arguments of the parties were unhelpful, it failed to adequately explain how the tort law concepts of *causation* and *remoteness* should apply in NAFTA cases.

Regarding causation, the presumption is that the tribunal intended to apply a “but for” test (e.g., but for the breach, would the losses claimed have been incurred?). The investor sought to recover the present value of the net income stream that it lost due to the 14-month period it and its investment were delayed from entering the Canadian market.51 The Tribunal essentially agreed with this theory, concluding that—but for the imposition of a ban on the export of PCB wastes to the USA—the business established by the investor in Canada would have resulted in profits for it and the investment it controlled in Canada. Myers’ business model was simple: to be invited to an industrial site somewhere in Canada; to remove any trace of PCB wastes from that site; and then to permanently and safely dispose of those wastes. Because the ultimate destruction of these wastes was to take place in Ohio, the export ban imposed by a protectionist Canadian politician made the business unworkable.52

Regarding remoteness, the tribunal heard from Canada that Myers could not recover any damages as a result of lost profits because they were too remote to the actual breach. This was because Myers planned to destroy the wastes in the United States of America, rather than in Canada where the wrongful conduct was committed.53 This argument was predicated on the theory that NAFTA Chapter

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49 *Id.*, at 325.
50 *Id.* at 33–37.
51 *Id.* at 34.
52 The ban breached Articles 1102 and 1105 because it was designed to prevent Myers from running its business, and thus protect Canadian companies. It had nothing to do with protecting the environment.
53 *Myers Partial Award*, *supra* note 1, at paras. 34–35. 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 ser-