

# **NAFTA**

---

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

Edited by

**Todd Weiler**

---

LIBRARY / BIBLIOTHEQUE  
Dept. of Foreign Affairs  
and International Trade  
Ministère des Affaires étrangères  
et du Commerce international  
125 Sussex  
Ottawa K1A 0G2



Transnational Publishers, Inc.  
Ardsley, New York

Published and distributed by Transnational Publishers, Inc.  
Ardsley Park  
Science and Technology Center  
410 Saw Mill River Road  
Ardsley, NY 10502

---

Phone: 914-693-5100  
Fax: 914-693-4430  
E-mail: [info@transnationalpubs.com](mailto:info@transnationalpubs.com)  
Web: [www.transnationalpubs.com](http://www.transnationalpubs.com)

#### **Library of Congress Cataloging-in-Publication Data**

NAFTA investment law and arbitration: past issues, current practice, future prospects / edited by Todd Weiler.

p. cm.

Includes bibliographical references.

ISBN 1-57105-288-7

1. Investments, Foreign—Law and legislation—North America.
  2. Arbitration and award, International.
  3. Canada. Treaties, etc. 1992
- Oct. 7. I. Weiler, Todd.

KDZ744.N34 2004

346.7'092—dc22

2003064564

Copyright © 2004 by Transnational Publisher, Inc.

Manufactured in the United States of America

---

# CONTENTS

---

<i>Dedication</i> .....	<i>iii</i>
<i>Contributors</i> .....	<i>xi</i>
<i>List of Abbreviations</i> .....	<i>xix</i>
<i>Foreword: The Ripples of NAFTA</i>	
José E. Alvarez .....	<i>xxi</i>

## Part I: Introduction

Chapter 1:	The Significance of NAFTA Chapter 11 for the Development of International Economic Law <i>Todd Weiler</i> .....	3
------------	---	---

## Part II: The Primary Obligations

Chapter 2:	Prohibitions Against Discrimination in NAFTA Chapter 11 <i>Todd Weiler</i> .....	27
Chapter 3:	Betrayal, Shock and Outrage—Recent Developments in NAFTA Article 1105 <i>Ian A. Laird</i> .....	49
Chapter 4:	The Jurisprudence of NAFTA Article 1106: The Prohibition Against Performance Requirements <i>Rajeev Sharma</i> .....	77
Chapter 5:	Expropriation and Taxation in the NAFTA <i>William W. Park</i> .....	93

## Part III: Substantive Issues

Chapter 6:	Interpreting Substantive Obligations in Relation to Health and Safety Issues <i>Todd Weiler</i> .....	107
Chapter 7:	Legitimacy, Transparency and NGO Participation in the NAFTA Chapter 11 Process <i>Jeffery Atik</i> .....	135

Chapter 8:	Non-Disputing Party Interventions in Chapter 11 Arbitrations <i>Martin Hunter and Alexei Barbuk</i> . . . . .	151
Chapter 9:	Causation and Damages in NAFTA Investor-State Arbitration <i>Todd Weiler and Luis Miguel Diaz</i> . . . . .	179

**Part IV: Procedural Issues**

Chapter 10:	The Mandate of Chapter 11 Tribunals—Jurisdiction and Related Questions <i>Jack J. Coe, Jr.</i> . . . . .	215
Chapter 11:	Waiver and the Exhaustion of Local Remedies Rule in NAFTA Jurisprudence <i>Andrea K. Bjorklund</i> . . . . .	253
Chapter 12:	Evidentiary Issues in NAFTA Chapter 11 Arbitration: Searching for the Truth Between States and Investors <i>Gustavo Carvajal Isunza and Fernando González Rojas</i> . . . . .	287
Chapter 13:	Arbitrator Selection and Appointment Under NAFTA Chapter 11 <i>Keith E.W. Mitchell</i> . . . . .	313
Chapter 14:	The Choice of the Place of Arbitration Under NAFTA Chapter 11 <i>Peter Kirby</i> . . . . .	341
Chapter 15:	Judicial Review of Investment Arbitration Awards <i>Noah Rubins</i> . . . . .	359

**Part V: Looking Back, Looking Forward**

Chapter 16:	Contrasting Key Investment Provisions of the NAFTA with the United States—Chile FTA <i>David A. Gantz</i> . . . . .	393
Chapter 17:	The Future of NAFTA Investment Arbitration: A Mexican Perspective <i>Leonel Pereznieto and Sergio Puig</i> . . . . .	425

Chapter 18:	The Doha Round and Investment: Lessons from Chapter 11 of NAFTA <i>Bryan Schwartz</i> . . . . .	445
Chapter 19:	Concerning the “But-Approach” in Investment Protection <i>Alan S. Alexandroff</i> . . . . .	463
<i>Epilogue:</i>	Investment Arbitration as a Discipline for Good Governance <i>Thomas Wälde</i> . . . . .	475

**Appendices**

Annex I:	NAFTA Investor-State Cases . . . . .	493
Annex II:	Relevant Provisions of NAFTA . . . . .	503
Annex III:	NAFTA Free Trade Commission Statement of July 31, 2001 . . . . .	541
Annex IV:	NAFTA Free Trade Commission Statement on Non-Disputing Party Participation . . . . .	543
<i>Table of Cases</i>	. . . . .	547
<i>Index</i>	. . . . .	553

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 *Chorzow 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.<sup>47</sup> Second, the damages claimed must be 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.<sup>48</sup>

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

---

<sup>47</sup> *Id.*, Concurring Opinion of Judge Brower, at para. 51.

<sup>48</sup> *Myers Partial Award*, *supra* note 1, at 316.

CANADA shall pay to SDMI compensation for such economic harm as is established legally by SDMI to be *directly as a result* of CANADA's breach of its obligations under Articles 1102 or 1105 of the NAFTA. [emphasis added]<sup>49</sup>

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*.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup>

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.<sup>53</sup> This argument was predicated on the theory that NAFTA Chapter

---

<sup>49</sup> *Id.*, at 325.

<sup>50</sup> *Id.* at 33–37.

<sup>51</sup> *Id.* at 34.

<sup>52</sup> 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.

<sup>53</sup> *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-