THE GRADUATE INSTITUTE | GENEVA
CENTRE FOR TRADE
AND ECONOMIC INTEGRATION

CTEI PAPERS

CTEI-2011-10

CTEI Working Paper

Standards Under the North American Free Trade Agreement: Fair and equitable/minimum standard of treatment, expropriation of rights and contracts, and the standard of compensation and the determination of damages for violations of the fair and equitable/minimum standard of treatment[a]

Kendra Magraw[b], Victorino Tejera[c] and Louis-Philippe Coulombe[d]

[a] This memorandum is a research paper prepared on a pro bono basis by students at the Graduate Institute of International and Development Studies (IHEID) in Geneva. It is a pedagogical exercise to train students in the practice of international trade law or international investment law, not professional legal advice. As a result, this memorandum cannot in any way bind, or lead to any form of liability or responsibility for, its authors, the supervisors of the IHEID trade law clinic or the Graduate Institute.

[b] Graduate Institute of International and Development Studies, Geneva.
[c] Graduate Institute of International and Development Studies, Geneva.
[d] Graduate Institute of International and Development Studies, Geneva.

http://graduateinstitute.ch/ctei/working_papers.html

CTEI PAPERS

CTEI-2011-10

Centre for Trade and Economic Integration (CTEI)

The Centre for Trade and Economic Integration fosters world-class multidisciplinary scholarship aimed at developing solutions to problems facing the international trade system and economic integration more generally. It works in association with public sector and private sector actors, giving special prominence to Geneva-based International Organisations such as the WTO and UNCTAD. The Centre also bridges gaps between the scholarly and policymaking communities through outreach and training activities in Geneva.

www.graduateinstitute.ch/ctei

http://graduateinstitute.ch/ctei/working_papers.html

INSTITUT DE HAUTES ÉTUDES INTERNATIONALES ET DU DÉVELOPPEMENT

GRADUATE INSTITUTE OF INTERNATIONAL AND DEVELOPMENT STUDIES

CP 136 – CH-1211 GENÈVE 21
TÉL +41 22 908 57 00
http://graduateinstitute.ch

Table of Contents

Executive Summary

This memorandum[*] is the result of a request submitted by an organization [hereinafter the "Client"] to the Trade and Investment Law Clinic at the Graduate Institute of International and Development Studies. The Client requested an examination of three areas of the North America Free Trade Agreement [hereinafter "NAFTA"] jurisprudence, based on an analysis of the publicly available documents.

The three subject areas examined are the standard practice concerning the establishment of violations of the Fair and Equitable/Minimum Standard of Treatment [hereinafter "FET/MST"], the standard practice concerning the Expropriation of Rights and Contracts, and the standard practice concerning the standard of compensation and determination of damages for violations of FET/MST.

The arguments of the Parties in the North America Free Trade Agreement NAFTA context are often exportable, since NAFTA as a whole, and in particular the standard for FET/MST and expropriation, are informed by general international law.

First, with regard to the standard practice concerning the FET obligations, the analysis of the submissions revealed five main points of disagreement between the investor and respondent states:

1) The scope of NAFTA Article 1105: whether FET/MST is equivalent to the customary international law minimum standard of treatment;
2) The content of the minimum standard of treatment in NAFTA Article 1105;
3) The threshold for finding a violation of FET/MST;

[*] This memorandum is a research paper prepared on a pro bono basis by students at the Graduate Institute of International and Development Studies (IHEID) in Geneva. It is a pedagogical exercise to train students in the practice of international trade and investment law, not professional legal advice. As a result, this memorandum cannot in any way bind, or lead to any form of liability or responsibility for, its authors, the supervisors of the IHEID trade and investment law clinic or the Graduate Institute.

4) The issue of whether the standard encompasses an obligation not to frustrate the investor's legitimate expectations;
5) The question of whether the standard includes an obligation of transparency and non-discrimination.

The analysis of Parties' position reveal a strong consensus on the idea that NAFTA article 1105 is equivalent to the customary international law [hereinafter "CIL"] MST. It also revealed that the concept of 'fair and equitable treatment' and 'full protection and security' the MST encompasses do not go beyond but rather are subsumed by the customary standard. The United States even goes further and claims that generally, the FET is the equivalent of the CIL MST of aliens.

With regard to the content of the standard, the United States argues strongly that the MST is an overarching standard including a set of definite customary obligations. In their arguments – albeit formulated in less vigorous terms – the other two Parties seem to agree with this idea.

Moreover, all Parties agree that the threshold for finding a violation of the standard's obligations remains high. Canada and the United States argue that it does not contain an obligation to protect the investor's legitimate expectations and that there is no self-standing obligation of transparency and general prohibition against discrimination.

Further, Canada and the United States contend that the MST does not contain an obligation to respect the legitimate expectations of the investor. Without mentionning expectations, Mexico argues that the MST obligation cannot be seen as keeping the State from exercising its regulatory activity.

Finally, Canada and the United States agree that there is no requirement that States do not act in a discriminatory manner and with lack of transparency. Mexico's position seems to diverge from those of the other NAFTA Parties on this question.

In regard to the second submitted question, the Expropriation of Rights and Contracts, the submissions revealed six major issues:

1) The definition of covered investments; that is, which investments are capable of being expropriated under Article 1110 of the NAFTA;
2) The test for indirect expropriation;
3) The regulatory/police power exclusion;
4) The parameters of "reasonable expectations";
5) The circumstances under which a breach of contract may be elevated to a treaty claim;
6) The applicable law for the determination of contract and property rights.

In the NAFTA, "investment" is defined by Article 1139, which the Parties agree is a broad but exhaustive list of protected investments. The major debate surrounds intangible "rights" such as goodwill, market share, market access and customer base. The NAFTA Parties agree that intangibles that are not vested are not protected investments under NAFTA Chapter Eleven or international law.

Another contentious issue in the area of expropriation in rights and contracts surrounds the proper test for indirect expropriations. The Parties vary in their proposed analytical approach; Canada and Mexico endorse the same test, while the United States promulgates a variant approach. The Parties agree, however, that the deprivation required for an action or measure to amount to an expropriation must be "substantial," so as to render the investment "useless" or "valueless," and that mere interference or threat of interference is not sufficient for a finding of expropriation.

Article 1110 contains an important carve-out; there will not be a finding of expropriation if a State takes an action for a public purpose, in a non-discriminatory manner, in accordance with due process of the law and Article 1105 (fair and equitable treatment), and, if necessary, upon payment of compensation. This is referred to as a State's "regulatory power" or "police power." States must be able to pass domestic legislation and regulations in their normal sovereign function that may have an adverse effect on an investment without triggering liability under international law. The issue lies in determining under which circumstances a State is and may properly exercise it regulatory/police power, and when it is a compensable or illegal expropriation. The Parties agree that the exercise of this power involves regulations in the

"public interest" or for a "public purpose," which they argue entail regulations aimed at the public safety, health and the environment. The Parties arguments on this standard are a reflection of their belief of the customary international law of the matter.

Part of the regulatory/police power analysis involves a discussion of the reasonable expectations of the investor. Generally, the Parties agree that an investor's reasonable expectations must be formed against the backdrop of the historical, regulatory and industry-specific context, and that, absent specific representations to that effect, an investor cannot reasonably expect that its industry will not be subject to legislation or regulation. The Parties differ in regard to the context in which they address reasonable expectations, however; the United States considers it to be part of the test for indirect expropriation, whereas Canada and Mexico see it as a factor to be considered when determining whether there was a proper exercise of the regulatory/police power on the part of the State.

In regard to whether an investor can bring a claim for breach of contract before a NAFTA tribunal, the State Parties agree that a simple breach of contract claim cannot be a violation of international law. Instead, there must be a supplemental element present that elevates it to the international plane. Canada and Mexico argue that this additional element includes an expropriatory act; Mexico further feels that a denial of justice would constitute the requisite "additional element." The United States agrees with Mexico in this regard, and also submits that a pretence of form to achieve an internationally wrongful end would elevate a breach of contract claim.

A related issue is the law applicable to the determination and classification of property and contract rights. The Parties agree that the governing law is municipal law to determine whether property rights have been acquired. Canada further considers that this principle reflects general international law.

Regarding the standard of compensation and determination of damages for violations of the FET/MST obligations, this memorandum examines:

1) The contentions of the NAFTA Parties about what should be compensated for breaches of FET/MST obligations;
2) The NAFTA Parties' contentions as to the need of a link of causality between the wrongful acts and the damages claimed;
3) The NAFTA Parties suggestions in terms of interests as a formula of compensation;
4) The methods for determining compensation for FET/MST violations.

Regarding what should be compensated for breaches of FET/MST obligations, there appears to be agreement among the NAFTA Parties that, in the absence of discrimination that also constitutes indirect expropriation or is tantamount to expropriation, a claimant is not entitled to the full market value of the investment which is granted by NAFTA. To this end, all NAFTA Parties approve and endorse the findings of the *Feldman* Tribunal. Also, there appears to be agreement among the Parties in that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. This is the principle established in *Chorzów Factory*.

As to the issue of causality, there appears to be certain agreement between Canada and Mexico about the fact that in order to recover damages for a breach of NAFTA Article 1105, a claimant must first and foremost prove that the breach is the "but for" legal and factual cause of the damages in question. There is no public allegation of the United States in this regard. The reason for that may possibly be that none of the NAFTA cases where the United States has been the respondent has arrived to the step of damages. Regarding interests, there are not many arguments available. There are some isolated conclusions of Canada and Mexico regarding this issue, but no public submission on behalf of the United States. Finally, the same situation presents itself with regard to the methods for determining compensation. There are only a few isolated conclusions of Mexico and the United States, whereas Canada did not make any specific argument in this regard.

Introduction

This memorandum will examine the submissions of the Parties to the NAFTA in relation to the standard practice of three specific areas of NAFTA jurisprudence: the FET/MST, Expropriation of Rights and Contracts, and Standards of Compensation and the Determination of Damages for Violations of FET/MST.

Part I will examine the positions of the Parties concerning the requirements for compliance with the FET/MST. In particular, it will examine the stance of the Parties in regard to: whether the fair and equitable treatment obligation is equivalent to the CIL MST, the content of the CIL MST of aliens, the threshold for finding a violation of the FET/MST, legitimate expectations and the FET/MST obligation, and arbitrariness/discrimination and transparency versus the FET/MST obligation.

Part II will examine the positions of the Parties concerning the requirements of compliance with Expropriation of Rights and Contracts. In particular, it will address: covered investments, the test for indirect expropriation, the regulatory taking/police power exclusion, reasonable investment-backed expectations, the elevation of a breach of contract claim to the international plane, and the applicable law for the determination of contract and property rights.

Part III will analyze the positions of the Parties concerning standard of compensation and determination of damages for violations of the FET/MST. In particular, Part III will examine the standards for compensation, causality, interests, and methods.

Finally, the memorandum will conclude that the positions of the NAFTA Parties reflect not only their views on the standards for the above areas under the NAFTA but, in general, international law as well. The specific issue areas within each of the three overarching categories were selected for analysis specifically because of their applicability outside of the context of NAFTA. The Parties, in regard to the selected issues, frequently support their arguments by reference to or under general international law and frequently state that their arguments reflect

CIL. Therefore, the positions of the Parties on these issues can be exported from the context of NAFTA to other circumstances in which general international law principles are applicable, such as in arbitral proceedings involving bilateral investment treaties [hereinafter "BITs"] that, just like NAFTA, resort to CIL or any other agreement or treaty in which there is a lacuna to be filled by reference to general international law.

The Parties argue that NAFTA Article 1105 relies on CIL. In particular, the Parties argue that the expressions 'fair and equitable treatment' and 'full protection and security' are customary obligations in nature. The United States provides for that matter an extensive demonstration that the FET obligation reflects the CIL standard of treatment of aliens. This reasoning is not only valid for NAFTA Article 1105, but for other international investment agreements that rely on FET.

The text of Article 1110 addressing expropriation is considered by the Parties to be an incorporation of the CIL notion of expropriation and not to grant any additional rights beyond that. Further, the text of Article 1110 was derived substantially from the U.S. Model BITs and share common textual features to many BITs currently in force; therefore, the arguments of the Parties are exportable to BITs with textual similarities as well as to their belief as to what constitutes customary international law.

Neither NAFTA nor most investment treaties provide for formulas of compensation and determination of damages for FET/MST violations. The fact is that NAFTA provisions on FET/MST are not different from those in the majority of BITs. Moreover, tribunals apply similar methods of compensation irrespective of the particular treaty violation. What matters is, therefore, whether there is a violation of an investment treaty provision. When that occurs, it is for the arbitration tribunal to apply the compensation formula that it deems appropriate.

In conducting the above analysis, the authors of this memorandum reviewed the submissions of the State Parties to the NAFTA (Canada, Mexico and the United States) in each NAFTA Chapter Eleven case to date, pending and concluded. This memorandum reflects an exhaustive analysis of every submission of each State Party addressing the overarching three

issues. The analysis herein synthesizes the arguments of the Parties as presented in each applicable submission of the State Party, to one of the three main issues, which often entailed an examination of: the counter-memorial; reply; statement of defense; post-hearing submission; and Article 1128 interventions of NAFTA State Parties (when pertinent).

The submissions of the Parties are publicly available at the governmental website of each State Party. The submissions of the United States are available at: http://www.state.gov/s/l/c3741.htm; the submissions of Canada are available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/gov.aspx?lang=en; and the submissions of Mexico are available at: http://www.economia.gob.mx/swb/en/economia/p_Solucion_Controversias_InvEdo.

This memorandum analyzes the arguments of the State Parties in the following cases, as divided by issue:

ISSUE	COUNTRY	CASES
Standard Practice Concerning Establishment of Violations of the FET.	Canada	• *Gallo* • *Merrill & Ring* • *UPS*
	Mexico	• *Azinian* • *Cargill** • *Feldman* • *GAMI* • *Metalclad* • *Thunderbird* • *Waste Management II*
	United States	• *ADF Group* • *Glamis Gold* • *Grand River* • *Loewen* • *Methanex* • *Mobil* • *Mondev*
Standard Practice for the Expropriation of Rights and Contracts	Canada	• *Chemtura* • *Galllo* • *Ethyl*

		• *Merrill & Ring* • *Pope & Talbot* • *SD Myers*
	Mexico	• *Azinian* • *Cargill** • *Feldman* • *GAMI* • *Metalclad* • *Thunderbird* • *Waste Management II*
	United States	• *Glamis Gold* • *Methanex* • *Mondev*
Standards Practice Concerning Criteria of Compensation and Determination of Damages for Violations of the FET Obligations	Canada	• *Chemtura* • *Gallo* • *Merrill & Ring* • *Pope & Talbot* • *SD Myers*
	Mexico	• *Feldman* • *GAMI* • *Metalclad* • *Thunderbird*
	United States	• *Grand River*

* The submissions for *Cargill* are not publicly available; therefore, Mexico's positions in this case were analyzed *vis-a-vis* the Tribunal's recount of them in the Award.

I. Standard Practice Concerning Establishment of Violations of the FET/MST Obligations

This section will analyze the arguments of the State Parties to the NAFTA in regard to the issue of the FET/MST, on a case-by-case basis by regarding the public submissions of the Parties. FET/MST is governed by Article 1105:

> 1. 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.
>
> 2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7) (b), each Party shall accord to investors of another Party, and to investments of investors of another Party, nondiscriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.
>
> 3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7) (b).

This section will analyze the submissions of the State-party respondent in the following cases:

Canada	• *Gallo* • *Merrill & Ring* • *UPS*
Mexico	• *Azinian* • *Cargill** • *Feldman* • *GAMI* • *Metalclad* • *Thunderbird* • *Waste Management II*

United States	• *ADF Group* • *Glamis Gold* • *Grand River* • *Loewen* • *Methanex* • *Mobil* • *Mondev*

* The submissions for *Cargill* are not publicly available; therefore, Mexico's positions in this case were analyzed *vis-a-vis* the Tribunal's recount of them in the Award.

A. The FET Obligation is Equivalent to the Customary International Law MST

1. Canada

Canada argues that the standard contained in NAFTA Article 1105 is equivalent to the international law minimum standard of treatment. In *Chemtura*, Canada recalls its statement of implementation made on the day the NAFTA came into effect.[1] Canada also relies on the 2001 Free Trade Commission's [hereinafter the "FTC"] Note of Interpretation to support its argument.[2]

In cases heard before the FTC Note of Interpretation was issued, Canada makes the argument that there is agreement between the three NAFTA Parties that FET is included in the MST. For instance, in *Methanex*, Canada argues that "(t)he three NAFTA Parties agree that 'fair and equitable treatment' is explicitly subsumed under the minimum standard of treatment at customary international law [reference to the United States' memorial omitted]. Article 31(3)(b)

[1] *Chemtura,* Counter-Memorial ¶ 667
[2] *Id.* ¶¶ 668, 672; *Gallo*, Statement of Defence ¶ 179; *Gallo*, Counter-Memorial ¶¶ 259-262; *Merrill & Ring*, Counter-Memorial ¶¶ 443-448; *UPS,* Counter-Memorial ¶¶ 901-902; *ADF Group*, 1128 Post-Hearing Submission of Canada ¶4; *Grand River*, 1128 Submission of Canada ¶¶ 4-5; *Loewen*, 1128 Submission of Canada ¶¶ 8-15; *Mobil*, Counter-Memorial ¶¶ 243-245; *Clayton/Bilcon*, Statement of Defence ¶ 92.

of the *Vienna Convention* instructs that such agreement of the Parties regarding the interpretation of this provision shall be taken into account."[3]

However, Canada fails to be consistent on the question of whether the expression "fair and equitable treatment" *beyond* the text of NAFTA Article 1105 generally equates the minimum standard of treatment. In fact, just like the United States,[4] Canada argues that the expressions "fair and equitable treatment" and "full protection and security" are not free standing standards but rather examples of the MST.[5] However, these remarks only seem to be applicable in the context of NAFTA Article 1105. In fact, in *Chemtura*, Canada seems to think that some international instruments may contain different FET standards, the latter not necessarily referring to the customary international law minimum standard of treatment:

> To state a few examples, the Tribunals in *Saluka* and *National Grid* were asked to interpret "free-standing" fair and equitable treatment obligations. [Reference omitted.] Notably, the tribunal in *Saluka* confirmed that customary MST, as distinct from free-standing "fair and equitable treatment" clauses, provided no more than "minimal protection" so that a violation of this standard would require "a relatively higher degree of inappropriateness".[6] Other decisions relied upon by the Claimant expressly found that they were not bound by customary internationa law.[7] [Emphasis added][8]

Canada further states that "(c)ertainly no NAFTA Tribunal has come to the conclusion that customary MST has evolved to such an extent as to make it identical to the free-standing 'fair and equitable treatment' standard found in other treaties."[9] Likewise, in *Mobil*, Canada uses similar language:

> Such awards are not relevant in the context of NAFTA Article 1105 because they apply a different FET standard. Virtually all the non-NAFTA cases cited by the Claimants examine an autonomous FET standard that is not specifically linked to the minimum standard of treatment under customary international law.[10]

---

[3] *Methanex*, Article 1128 Submission on Jurisdiction of Canada ¶ 37.
[4] See subsection 3 below.
[5] *Chemtura,* Counter-Memorial ¶¶672-674. Canada relies on the *Loewen, UPS* and *Mondev* awards; *Merrill & Ring,* Counter-Memorial ¶¶ 449-454.
[6] *Saluka v. the Czech Republic*, Partial Award ¶ 292.
[7] *Azurix v. Argentina,* Award ¶ 361; *CMS v. Argentina,* Final Award ¶ 284; *Duke Energy v. Peru*, Award ¶¶ 333-337.
[8] *Chemtura*, Rejoinder ¶ 150.
[9] *Id.* ¶ 155.
[10] *Mobil*, Counter-Memorial ¶ 258.

Likewise, in *Methanex*, Canada argues:

> […] some have suggested that the term "fair and equitable treatment" envisages conduct that goes beyond the minimum standard and affords a greater breadth of protection to investments than does the customary international law minimum standard.
> […] However, Dolzer and Stevens recognise that such a debate is irrelevant in the context of NAFTA Chapter Eleven where the express words of Article 1105 make it clear that fair and equitable treatment is but one aspect of the international minimum standard of treatment.[11]

Interestingly, however, Canada "agrees with the United States that the phrase ['full protection and security'] 'refers to the minimum level of police protection against criminal conduct that is required as a matter of customary international law.' "[12]

2. Mexico

Mexico argues that the standards included in NAFTA Article 1105 are those imposed by international law. In *Metalclad* and in *Azinian*, it states that the standard encompasses two 'express' components: fair and equitable treatment and full protection and security, and one residual component: other standards of treatment mandated by international law.[13] It relies firstly on a textual interpretation, in light of the directives given by the Vienna Convention on the Law of Treaties [hereinafter the "VCLT"], and argues that the inclusion of the terms "in accordance with international law" in the text of NAFTA Article 1105 indicates clearly that the obligation imposed by the terms "fair and equitable treatment" is that of customary international law.[14] It subsequently applies the same reasoning to "full protection and security".[15] In *Methanex*, it states:

> Mexico concurs with the United States that Article 1105 establishes only an international minimum standard of customary international law in which "fair and equitable treatment" is subsumed. All three NAFTA Parties have clearly so stated in their respective submissions in other Chapter Eleven cases in which the matter has arisen.[16]

---

[11] *Methanex*, Article 1128 Submissions on Jurisdiction of Canada ¶¶ 35-36.
[12] *UPS*, Rejoinder ¶ 295. Canada refers to the United States' statements in *ADF* Group, Post-Hearing Submissions p. 3, see subsection 3 below.
[13] *Metalclad,* Counter-Memorial ¶ 833; *Azinian*, Counter-Memorial ¶ 247.
[14] *Metalclad*, Counter-Memorial ¶ 837; *Azinian*, Counter-Memorial ¶ 251.
[15] *Azinian,* Counter-Memorial ¶¶ 257-261.
[16] *Methanex*, Article 1128 Submission of Mexico p. 4.

In *Pope & Talbot (*as reiterated later in *ADF Group)* Mexico agrees with the position of the United States[17] in the same affair and argues:

> "[F]air and equitable treatment" and "full protection and security" are provided as examples of the customary international law standards incorporated in Article 1105(1). The plain language and structure of Article 1105(1) requires those concepts to be applied as and to the extent that they are recognized in customary international law. They are not to be applied in a subjective and undefined sense without reference to international law standards (…).[18]

Moreover, Mexico relies on the 2001 FTC Note of Interpretation to affirm that NAFTA Article 1105 is equivalent to the MST.[19] Mexico also disagrees with the *Pope & Talbot* Tribunal, which expanded the standard beyond customary international law:

> As the United States has pointed out, the Tribunal acknowledged that its interpretation of Article 1105(1) was not consistent with the plain meaning of Article 1105's text. The decision to depart from the plain meaning of the text, in itself, was interpretative error. The first component of the "General rule of interpretation" of the *Vienna Convention on the Law of Treaties* requires that the NAFTA be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose."
>
> Specifically, the Tribunal plainly erred in interpreting the word "including" to mean "plus," a word with a virtually opposite meaning. [References omitted].[20]

In regard to the 2001 FTC's Note of Interpretation on NAFTA Article 1105, in the case of *Waste Management II*, Mexico quotes the *Mondev* award, where the Tribunal emphasized the importance of applying the concepts of "fair and equitable treatment" and "full protection and security," according to established case law about the MST for aliens under international law. In that regard, Mexico argues that it is not about enabling the Tribunal to determine whether an investor has been treated "fair"[21]:

> The Tribunal has no difficulty in accepting that an arbitral tribunal may not apply its own idiosyncratic standard in lieu of the standard laid down in Article 1105 (1). In

[17] Mexico quotes the United States' submissions in *Pope & Talbot,* Fourth 1128 Submissions of the United States ¶ 3 (albeit erroneously referring to the third United States 1128 submissions).
[18] *Pope & Talbot*, 1128 Post-Hearing Submission of Mexico pp. 3-4; *ADF Group*, 1128 Post-Hearing Submission of Mexico pp. 8-9.
[19] *ADF Group*, Second Article 1128 Submission of Mexico pp. 1-3; *UPS*, Fourth 1128 Submission of Mexico ¶12.
[20] *ADF Group*, Second Article 1128 Submission of Mexico pp. 3-4.
[21] *Waste Management II*, Escrito de Dúplica ¶ 112.

> light of the FTC's interpretation, and in any event, it is clear that Article 1105 was intended to put at rest for NAFTA purposes a long-standing and divisive debate about whether any such thing as a minimum standard of treatment of investment in international law actually exists. Article 1105 resolves this issue in the affirmative for NAFTA Parties. It also makes it clear that the standard of treatment, including fair and equitable treatment and full protection and security, is to be found by reference to international law, i.e., by reference to the normal sources of international law determining the minimum standard of treatment of foreign investors.[22]

To this effect, Mexico also relies on the award in *ADF*,[23] where the Tribunal held: "[…] 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 caselaw or other sources of customary or general international law."[24] The claimant must present clear and convincing evidence in order to establish that the State conduct is prohibited under customary international law.[25] Also, Mexico, referring again to the *ADF* Award, argues that the claimant has the burden to link the claim for violation of Article 1105 to other sources of caselaw[26]: "The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1)."[27]

In *Thunderbird*, Mexico argues that Article 1105 of the NAFTA establishes the MST according to internationally accepted practice,[28] and quotes the *Genin v Estonia* Award, where it states:

> While the content of this standard is not clear, the Tribunal understands it to require an "international minimum standard" that is separate from domestic law, but that is, indeed, a <u>minimum</u> standard. Acts that would violate this minimum standard would include acts showing a willful neglect of duty, an insufficiently of action falling far below international standards, or even subjective bad faith.[29]

---

[22] *Mondev*, Award, 11 October 2002 ¶ 120.
[23] *ADF*, Award, 9 January 2003 ¶ 184.
[24] *Waste Management II*, Escrito de Dúplica ¶ 113.
[25] *Id.* ¶ 114.
[26] *Id.* ¶ 115.
[27] *ADF*, Award, 9 January 2003 ¶ 185.
[28] *Thunderbird*, Escrito de Contestación ¶ 214; *Thunderbird*, Post-Hearing Submission ¶ 201.
[29] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. the Republic of Estonia*, Award ¶ 367. Mexico also indicated, with approval, that the holding of the *Genin v. Estonia* award have been upheld in *Mondev*, *Loewen* and *ADF*. Mexico did not include the beginning of this paragraph in it submissions, which states: "Article II(3)(a) of the [United States-Estonia] BIT requires the signatory governments to treat foreign investment in a "fair and equitable" way. Under international law, this requirement is generally understood to "provide a basic and general standard which is detached from the host State's domestic law." [Reference omitted]."

In the same case of *Thunderbird*,[30] Mexico refers with approval to the ICJ decision in *ELSI*, and indicates that that ICJ case has been cited with approval by the *ADF* and *Mondev* NAFTA tribunals:[31]

> Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the Asylum case, when it spoke of "arbitrary action" being "substituted for the rule of law" (Asylum, Judgment, I.C.J. Reports 1950, 284). It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety […][32]

Also in *Thunderbird*, Mexico refers to the FTC note that clarified that Article 1105 of NAFTA establishes a standard of internationally accepted law. In particular it stipulates: "the concepts of "fair and equitable treatment" and "complete protection and security" do not require any strengthening to achieve the minimum level of treatment of foreigners established by internationally accepted law, or to go further than this."[33]

Furthermore, in its *Loewen* submissions, Mexico stresses that the Article 1105 standard is objective: "(A)rticle 1102 contains a relative standard of national treatment whereas Article 1105 contains an absolute standard, the minimum standard of treatment required by international law."[34] Mexico also argues that the obligation is owed to the investment, not the investor: "the obligation set out in Article 1105(1) is owed to the investment, not to the investor (in contrast with the obligations in Article 1105(2) and Article 1102(2))."[35] Here, the investor's claim under NAFTA Article 1105 consisted essentially in denial of justice (substantial and procedural).[36]

In its post-hearing submission in the *Thunderbird* case, Mexico emphasizes that a violation of the MST requires an act that shocks a sense of judicial propriety. Then, Mexico refers with approval to the Award rendered in *Waste Management II*, which it considers a

---

[30] *Thunderbird*, Rejoinder ¶ 149.
[31] *Id.* ¶ 150.
[32] *Case Concerning Elettronica Sicula S.P.A. (ELSI),* 1989 I.C.J. 15.
[33] *Thunderbird*, Escrito de Contestación ¶ 217.
[34] *Loewen,* Article 1128 Submission of Mexico p. 1.
[35] *Id.* at 2.
[36] *Loewen*, Investor's Notice of Claim pp. 52, 57-58.

particularly important decision.[37] Article 1105 is not an insurance policy against bad business judgments.[38]

> […] despite certain differences of emphasis a general standard for Article 1105 is emerging. Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct 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 which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[39]

Finally, Mexico argues[40] that the *Waste Management II* Award endorses the criteria of the *Genin v Estonia* Tribunal, where it referred to the MST, indicating that it is in fact a minimum standard and, therefore, acts infringing it "would include acts showing a willful neglect of duty, an insufficiently of action falling far below international standards, or even subjective bad faith."[41]

3. United States

In its submissions, the United States affirms that the NAFTA MST that is contained in Article 1105 equates the customary international law minimum standard of treatment for the protection of aliens. Where the United States' submissions are written after July 2001, the Unied States relies on the 2001 FTC Note of Interpretation on Article 1105 to assert that the

[37] *Thunderbird*, Post-Hearing Submission of Mexico ¶ 197.
[38] *Id.* ¶ 198.
[39] *Waste Management*, Award, 30 April 2004 ¶ 98.
[40] *Thunderbird*, Post-Hearing Submission of Mexico ¶ 201.
[41] *Alex Genin v Estonia,* Award ¶ 267.

Commission "made clear that the standards incorporated into Article 1105(1) are those of the customary international law minimum standard of treatment of aliens."[42]

The United States also contends – and does so among others in cases where the submissions were written before the 2001 FTC Note of Interpretation – that the practice of the three NAFTA countries, subsequent to the signature of the Treaty, is practice that can be used as evidence of the interpretation that must be given to the text. For instance, in *Mondev*, the United States asserts:

> As each of the three NAFTA Parties has now confirmed in formal, public submissions to various Chapter Eleven tribunals, "fair and equitable treatment" and "full protection and security" are provided as examples of the customary international law standards incorporated into Article 1105(1), not as obligations more expansive than the standards they illustrate.[43] As each of the three NAFTA Parties has stated, the plain language and structure of Article 1105(1) requires these concepts to be applied as and to the extent that they are recognized in customary international law, and not as obligations to be applied without reference to that law. The agreement among the NAFTA Parties on this point is authoritative. See Vienna Convention on the Law of Treaties, art. 31(3)(b), 1155 U.N.T.S. 331 ("There shall be taken into account . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.") [emphasis added by the United States].[44];[45]

The United States argues likewise in *Loewen*[46] and in *Methanex* where it states:

---

[42] *ADF Group,* Counter-Memorial p. 49; see also *ADF Group*, Rejoinder pp. 33-35; *Loewen,* Rejoinder pp. 111 and 144; *Loewen,* Response of the United States to the Article 1128 Submissions p. 2; *Mondev*, Rejoinder pp. 14-15.

[43] *Mondev*, Counter-Memorial n. 33: "See Second Submission of Canada Pursuant to Article 1128 ¶ 26; *Methanex*, (April 30, 2001) ("Article 1105 incorporates the international minimum standard of treatment recognized by customary international law."); *id*. ¶ 33 ("'fair and equitable treatment' is subsumed in the international minimum standard recognized by customary international law."); *id.* ¶ 39 ("'full protection and security' is subsumed in the international minimum standard recognized by customary international law."); *Methanex*, Letter of Mexico Pursuant to Article 1128 ¶ 9 (transmitted by facsimile May 15, 2001) ("Article 1105 establishes only an international minimum standard of customary international law in which 'fair and equitable treatment' is subsumed."); *id.* ¶ 12 ("Article 1105 . . . clearly indicates that both 'fair and equitable treatment' and 'full protection and security' are included as examples of the customary minimum standard, subsumed therein, and in no way add to it.")."

[44] *Mondev*, Counter-Memorial n. 34: "The three NAFTA Parties also agree that their submissions pursuant to Article 1128 may evidence an agreement as to interpretation within the meaning of Article 31(3)(b). See Second Article 1128 Submission of Canada ¶ 8; Methanex Corp. (Can.) v. United States (April 30, 2001); *Methanex*, Letter of Mexico Pursuant to Article 1128 ¶¶ 1-4. The United States also notes the recent decision of the Supreme Court of British Columbia in *United Mexican States v. Metalclad Corp*., which held that a NAFTA Chapter Eleven Tribunal had exceeded its authority in viewing Article 1105(1) as incorporating a transparency obligation not found in customary international law."

[45] *Mondev*, Counter-Memorial, p. 34.

[46] *Loewen,* Counter-Memorial pp. 175-176.

> In short, the issue before the Tribunal is whether it can conclude that the evidence of State practice before it, as a whole, "establishes the agreement of the parties regarding [the NAFTA's] interpretation." Vienna Convention on the Law of Treaties, art. 31(3)(b). There is no real dispute that it does. […] Under established principles of international law, the NAFTA Parties' agreement as to the interpretation of Article 1105(1) is authoritative. The Tribunal should give effect to the Parties' intent.[47]

In order to make the argument that the Tribunal should interpret NAFTA Article 1105 as equivalent to the international law MST, the United States relies on Canada's statement of implementation published the day the NAFTA came into force, the United States' statements made contemporaneously to the negotiation and entry into force of the treaty, and the positions taken by Mexico in *Azinian* and *Metalclad*.[48]

Interestingly, the United States goes beyond NAFTA Article 1105 and affirms that generally, the expression "fair and equitable treatment" refers to the minimum standard of treatment. For instance, in the *Loewen*, it argues:

> Claimants are correct that the terms "fair and equitable treatment" appear in a large number of bilateral investment treaties. […] That fact alone, however, says nothing about the content of the "fair and equitable treatment" standard. All of the State practice of record before this Tribunal, however, views that standard as a reference to the long-standing customary international law minimum standard of treatment of aliens.[49]

---

[47] *Methanex*, Rejoinder p. 24.

[48] *Id.* at 23-24.

[49] *Loewen*, Rejoinder p. 145. The United States gives a long list of authority in footnote 167, reproduced here in its entirety: "See Counter-Mem. at 171-72 (quoting commentary to OECD 1967 Draft Convention on the Protection of Foreign Property: 'fair and equitable treatment'" standard "conforms in effect to the 'minimum standard' which forms part of customary international law"); *id.* (quoting 1984 report surveying OECD membership on meaning of standard, to similar effect); *id.* at 173 n.92 (quoting 1980 statement by Swiss Department of External Affairs that "fair and equitable treatment" "references the classic principle of international law according to which States must provide foreigners in their territory the benefit of the international 'minimum standard.'"); *id.* at 174 (quoting Canada's 1994 Statement of Implementation of the NAFTA, noting that Article 1105(1) "provides for a minimum absolute standard of treatment, based on long-standing principles of customary international law"); *id.* at 172 n. 90 (quoting 2000 letter of submittal for U.S.-Bahrain bilateral investment treaty: paragraph setting forth "fair and equitable treatment" standard "sets out a minimum standard of treatment based on standards found in customary international law"). The reading of "fair and equitable treatment" in the U.S.-Bahrain letter of submittal is consistent with statements by the United States as to the content of the standard made contemporaneously with the NAFTAs negotiation and entry into force. Dep't of State, Letter of Submittal for U.S.-Armenia Treaty Concerning the Reciprocal Encouragement and Protection of Investment, reprinted in S. Treaty Doc. 103-11 at viii (Aug. 27, 1993); ("Paragraph 3 guarantees that investment shall be granted 'fair and equitable' treatment in accordance with international law . . . . This paragraph sets out a minimum standard of treatment based on customary international law."); accord Dep't of State, Letter of Submittal for U.S.-Moldova Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in S. Treaty Doc. 103-14 at ix (Aug. 25, 1993) (same); Dep't of State, Letter of Submittal for U.S.-Ukraine Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in S. Treaty Doc. 103-37 at ix (Sept. 7, 1994) (same)."

In the counter-memorial of the same affair, the United States argues that this is confirmed by the "historical context of the words 'fair and equitable' in the Article."[50] The United States, in support of this assertion, relies on the 1963 OECD Draft Convention on the Protection of Foreign Property (revised in 1967), in which the Commentary to Article 1 – containing the standard of "fair and equitable treatment" – "noted that the standard reflected the 'well-established principle of international law that a State is bound to respect and protect the property of nationals of other States.' "[51]

The United States further relies on the OECD's Committee on International Investment and Multinational Enterprises' survey realized in 1984 as confirming that OECD members still saw at that time the meaning of "fair and equitable treatment" as referring to principles of customary international law.[52]

The United States also contends that in the following years, an academic debate arose over the meaning of FET obligations as incorporated in treaties without reference to the customary international law standard of treatment. According to the United States, "(t)he prevalent view was that, in such circumstances, the phrase should be viewed as having its traditional meaning as a reference to the international minimum standard of treatment."[53]

Further, the United States also argues that the expression "full protection and security", just like "fair and equitable treatment" does not go beyond the customary international law minimum standard of treatment. Rather, it is an example of what the MST entails. According to the United States, the obligation is breached by the State when it fails to provide the alien/investor with reasonable police security against criminal activity directed at the person and tangible property of the latter.[54] In the *Loewen* Rejoinder Memorial, the United Stattes explains how the *Maffezini* case is inapposite:

---

[50] *Loewen*, Counter-Memorial p. 171.
[51] *Id.*; *See also ADF Group*, Rejoinder p. 42.
[52] *Loewen*, Counter-Memorial p. 172.
[53] *Id.*
[54] *Id.* at 176-177; *See also ADF Group*, Post-Hearing Submission pp. 2-4; *Grand River*, Counter-Memorial p. 90; *Methanex*, Rejoinder pp. 22-23.

> Claimants wrongly assert that *Maffezini v. Kingdom of Spain*, supports their position. […] *Maffezini* involved a state entity's transfer of the claimant's funds in the absence of a legally binding contract formalizing the transaction. In that context, the tribunal found that "these acts amounted to a breach by Spain of its obligation to protect the investment as provided for in Article 3(1) of the Argentine-Spain Bilateral Investment Treaty." Under that article, however, Spain was not required to provide "full protection and security" in accordance with the customary international law minimum standard of treatment, but to protect Argentinean-owned investors and investments in conformity with Spain's own laws.[55]

As to the scope of the MST, the United States contends that it covers *the investment* of the investor and does not go beyond. In *Grand River*, the United States asserts:

> The NAFTA Parties agreed that the minimum standard of treatment obligation under Article 1105(1) would extend only to the "investments of investors of another Party," i.e., the foreign investor's economic stake in the host State. Thus the treatment accorded to matters other than a foreign investor's investment in the host State cannot support a claim under Article 1105(1). This limitation is consistent with the commentary to the OECD Draft Convention on the Protection of Foreign Property, which states that the minimum standard of treatment reflects the "well-established general principle of international law that a State is bound to respect and protect the property of nationals of other States."[56;57]

In that case, the investor essentially argued that he was denied justice and was deprived of a stable and predictable business environment, which he claimed to be part of NAFTA Article 1105 obligations.[58]

---

[55] *Loewen*, Rejoinder pp. 149-150 [citations omitted].

[56] *Grand River*, Counter-Memorial p. 91. The United States cites substantial authority in 'original footnote 326': "OECD Draft Convention on the Protection of Foreign Property, Oct. 12, 1967, *reprinted in* 7 I.L.M. 117 (1968) (emphasis added). Likewise, the 2004 U.S. Model BIT recognizes that the customary international law minimum standard of treatment 'refers to all customary international law principles that protect the *economic* rights and interests of aliens.' 2004 Model BIT, Annex A (emphasis added). Recent Bilateral Investment Treaties ("BITs") and Free Trade Agreements ("FTAs") signed by the United States have included the same language. *See*, *e.g.*, U.S.-Uru. Bilateral Investment Treaty, Nov. 4, 2008, Annex A; U.S.-Rwanda Bilateral Investment Treaty, Feb. 19, 2008, Annex A; U.S.-S. Korea Free Trade Agreement, June 30, 2007, Annex 11-A. *See also* Alireza Falstafi, *The International Minimum Standard of Treatment of Foreign Investors' Property: A Contingent Standard*, 30 SUFFOLK TRANSNT'L L. REV. 317, 356-57 (2007) ('The minimum standard of treatment must operate within the framework of international rules regarding the treatment of foreign investment or property' or risk creating a standard that could 'accommodate *any* claim of responsibility for injury.' Such an approach 'is vulnerable to the substitution of the subjective perception of the observer for the international law on the treatment of foreign investors' property.')"; *see also Grand River*, Rejoinder p. 70.

[57] *Thunderbird,* Article 1128 Submission of the United States ¶ 10.

[58] *Grand River,* Statement of Claim ¶¶ 146-148.

B. The Content of the Customary International Law MST of Aliens

1. Canada

Canada affirms that in order to find a violation of the MST contained in NAFTA Article 1105, the claimant must prove the existence of a particular rule that has been violated. Without referring to it as such, this is equivalent to the "umbrella standard" concept put forth by the United States:[59]

> A Claimant who alleges a breach of Article 1105(1) must first demonstrate the existence of a relevant rule of customary international law and that it forms part of the minimum standard of treatment of aliens. If this is established, the Claimant must then demonstrate that the measure in issue breached this rule of customary international law.[60]

Canada is of the opinion that one of the rules encompassed in the MST is that of denial of justice: "(a) number of NAFTA tribunals have now interpreted customary MST in Article 1105(1). […] For example, there is no doubt that a denial of justice is covered by Article 1105(1)."[61]

In *UPS*, Canada argues that: "[…] the Claimant's case must fail if it cannot demonstrate: 1) that the rules upon which it relies are part of the "accepted content of customary international law" is (sic); and 2) that the customary rule is applicable to foreign investors."[62]

Canada further argues that good faith is not an obligation on its own susceptible of constituting a violation of the MST if not respected. In fact, it argues:

> The Claimant has in particular failed to demonstrate that "good faith" is included as a substantive obligation under customary MST.

[59] See subsection 3 below.
[60] *Gallo*, Statement of Defence ¶180.
[61] *Merrill & Ring,* Rejoinder ¶ 156.
[62] *UPS*, Rejoinder ¶ 282.

As Canada noted in its Counter-Memorial, good faith as a general principle of international law dictates that manner in which existing obligations should be fulfilled, rather than being a source of obligation on its own [reference omitted].[63]

In the *Merrill & Ring* Counter-Memorial, Canada states:

No doubt 'good faith' is a fundamental principle of international law. The *pacta sunt servanda* principle, as reflected in Article 26 of the *Vienna Convention*, states that '[e]very treaty in force is binding upon the parties to it and must be performed in good faith.'[64] It is nonetheless just an auxiliary principle that bears upon the application of other substantive rules. The duty to act in 'good faith' becomes relevant only when invoked in connection with a subject matter that already forms part of the customary international law minimum standard of treatment of aliens. This was explicitly stated by the ICJ in the *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*:

> The principle of good faith is, as the Court has observed, "one of the basic principles governing the creation and performance of legal obligations" (Nuclear Tests, I.C.J. Reports 1974, p. 268, para 46; p. 473, para. 49); it is not in itself a source of obligation where none would otherwise exist.[65;66]

2. Mexico

As mentioned above, in *Azinian* and *Metalclad*, Mexico divides the Article 1105 obligation primarily in two main groups that it associates to international law: the "fair and equitable treatment" and "full protection and security."[67] In *Azinian*, Mexico does not provide a sustained argument as to the content of the FET standard, but rather insists on the lack of clarity as to the expression's meaning. It then argues that the measures taken were fully necessary and

[63] *Merrill & Ring,* Rejoinder ¶¶ 186-187.
[64] Vienna Convention on the Law of Treaties, Article 26.
[65] *Merrill & Ring*, Counter-Memorial n. 495: "Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, [1988] I.C.J. Rep. 69 at 105-106, ¶ 94 (Tab 98)."
[66] *Merrill & Ring*, Counter-Memorial ¶ 491; *see also UPS*, Rejoinder ¶¶ 296 and 298: "If the Claimant is incapable of identifying a single customary legal obligation that Canada owes to foreign investors, it is impossible that Canada has abused it or has failed to carry it out in good faith. After all, a NAFTA Chapter 11 tribunal does not have the power to decide matters *ex aequo et b*ono [reference to UNCITRAL rules omitted]; *Gallo*, Statement of Defence ¶ 196; *Chemtura*, Counter-Memorial ¶¶ 771-775.
[67] *Metalclad,* Counter-Memorial ¶ 283; *Azinian*, Counter-Memorial ¶ 247.

justified and thus cannot be regarded as unfair or unequitable.[68] As to the obligation of full protection and security, Mexico alleges that under international law, this obligation does not create an absolute liability regime against the State for every injury inflicted on foreign property and quotes *AAPL v. Sri Lanka*.[69] Mexico further states that beyond these obligations, the MST "includes all other standards of treatment afforded by customary international law" without specifying their nature.[70]

Mexico also concurs with the position of the United States[71] to the effect that the international law minimum standard of treatment is an 'umbrella concept' encompassing a series of specific rules:

> The international law minimum standard is an umbrella concept incorporating a set of rules that have crystallized over the centuries into customary international law in specific contexts. The relevant principles are part of the customary international law of state responsibility for injuries to aliens. Unlike national treatment, the international law minimum standard is an absolute, rather than relative, standard of international law that defines the treatment a State must accord aliens regardless of the treatment the State accords to its own nationals.[72]

In *Thunderbird*, Mexico, refuting allegations of violation of NAFTA Article 1105, jumps directly to the question of knowing whether its country has committed a denial of justice.[73] Likewise, in its 1128 Submission in the *Loewen* case, under the title "Minimum Standard of Treatment," Mexico only makes submissions on the denial of justice.[74] It seems as if Mexico agrees with the argument that the MST contains a set of definite substantial rules, which includes denial of justice.

Also, important indications of Mexico's position on this issue can be found in its Article 1128 submissions. For instance, in *Methanex*, Mexico agrees with the idea that the subsequent practice of the three State Parties to NAFTA was to be taken into account in the interpretation of

---

[68] *Azinian,* Counter-Memorial, ¶¶ 251-256.
[69] *Id.* ¶ 259.
[70] *Id.* ¶¶ 261-262.
[71] See subsection 3 below.
[72] *Pope & Talbot*, Post-Hearing Article 1128 Submission of Mexico p. 4; *ADF Group*, Post-Hearing Article 1128 Submission of Mexico pp. 8-9.
[73] *Thunderbird*, Rejoinder ¶¶ 140-144.
[74] *Loewen*, Article 1128 Submission of Mexico pp. 15-16.

Article 1105, in conformity with Article 31(3)b) of the VCLT[75]. In fact, Mexico identifies submissions made by the three NAFTA Parties in different legal proceedings with regards to investment as relevant practice.[76] In its submission, Mexico agrees that "Article 1105 establishes only an international minimum standard of customary international law in which 'fair and equitable treatment' is subsumed."[77]

As to denial of justice, in *Waste Management II*, Mexico refers to the writings of Professor Ian Brownlie, indicating that denial of justice is the most common ground for elevating a contractual violation to the international plane.[78] The seriousness of the international law violation arises in the State interference with the alien's access to justice which, therefore, is unable to obtain reparation pursuant to municipal law.[79]

Mexico refers again to the writings of Professor Ian Brownlie, where he has observed that the term "denial of justice" has been given such a variety of definitions that it has little value, and that the claims in which it may be considered as a basis, may be adequately analyzed under other grounds.[80] Mexico also relied on the *Azinian* Award, where it stated:

> A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way […].
> There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of "pretence of form" to mask a violation of international law. In the present case, not only has no such wrong-doing been pleaded, but the Arbitral Tribunal wishes to record that it views the evidence as sufficient to dispel any shadow over the bona fides of the Mexican judgments. Their findings cannot possibly be said to have been arbitrary, let alone malicious.[81;82]

---

[75] *Methanex,* Article 1128 Submission of Mexico ¶¶ 9-12.
[76] *Id.* ¶¶ 10-11.
[77] *Id.* ¶ 9.
[78] *Waste Management II*, Escrito de Contestación ¶ 230 (quoting Ian Brownlie: *"Principles of Public International Law"*, 5 ed., 1998, p. 551 (see original footnote 283)).
[79] *Id.*
[80] *Waste Management II*, Escrito de Dúplica ¶ 122 (citing Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Oxford University Press, 1999), p. 532).
[81] *Azinian*, Award ¶¶ 102-103.
[82] *Waste Management II*, Escrito de Dúplica ¶ 123. Mexico uses an English citation of the *Azinian* Award.

Mexico refers once more to Professor Ian Brownlie for the contention that difficulties arise when parties and tribunals attempt to apply the concept of "denial of justice" in an ambitious way. Basically, it may be tempting for international tribunals to unduly descend to the scope of municipal law, and solve difficult issues of municipal law, when the only issue before them is the range of judicial procedures or other jurisdictional remedies available to aliens that fall below the standard, or if the alien has been given a treatment that shocks the "sense of judicial propriety."[83]

In *Thunderbird*, Mexico contends that, in general, customary international law requires access to adequate mechanisms of defense to challenge governmental acts that affect individual interests.[84] Also in *Thunderbird*, Mexico argues that, when a denial of justice on the part of the State is claimed, the entire justice system must be examined.[85]

Finally, in *Metalclad*, Mexico surprisingly alleges that "(t)he fair and equitable treatment standard requires the Respondent to act in good faith, reasonably, without abuse, arbitrariness or discrimination."[86] This seemingly represents a major difference with the arguments set forth by the other two NAFTA Parties who consistently argue that good faith is not an obligation on its own,[87] and that Article 1105 does not entail a prohibition of lack of transparency.[88]

3. United States

According to the United States, the customary international law minimum standard is not an obligation on its own, but rather an overarching standard containing a set of specific substantial rules. To that effect, the United States affirms in *ADF*:

> The "international minimum standard" embraced by Article 1105(1) is an umbrella concept incorporating a set of rules that over the centuries have crystallized into customary international law in specific contexts. The treaty term "fair and equitable treatment" refers to the customary international law minimum standard of

[83] *Id.* ¶ 124.
[84] *Thunderbird,* Escrito de Contestación ¶ 218.
[85] *Thunderbird,* Escrito de Dúplica ¶ 146.
[86] *Metalclad,* Counter-Memorial ¶ 841.
[87] See subsection 1 above, and subsection 3 below.
[88] See section E below, subsections 1 and 3.

> treatment. The rules grouped under the heading of the international minimum standard include those for denial of justice, expropriation and other acts subject to an absolute, minimum standard of treatment under customary international law. The treaty term "full protection and security" refers to the minimum level of police protection against criminal conduct that is required as a matter of customary international law.
>
> The rules encompassed within the customary international law minimum standard of treatment are specific ones that address particular contexts. There is no single standard applicable to all contexts. The customary international law minimum standard is in this sense analogous to the common-law approach of distinguishing among a number of distinct torts potentially applicable to particular conduct, as contrasted with the civil-law approach of prescribing a single delict applicable to all conduct. As with common-law torts, the burden under Article 1105(1) is on the claimant to identify the applicable rule and to articulate and prove that the respondent engaged in conduct that violated that rule.[89]

In other words, according to the United States, the minimum standard of treatment is not one self-standing obligation, but a set of international law rules that must be identified by the claimant in order to demonstrate that the State has indeed violated the minimum standard of treatment required by NAFTA Article 1105. The United States has been consistent with this reasoning and argues accordingly in *Glamis Gold*,[90] *Loewen*[91] *and Methanex*.[92]

According to the United States, the specific rules that are encompassed in the MST include the obligation not to deny justice to aliens, the obligation to accord full protection and security and the obligation not to expropriate without adequate compensation:

> Currently, this "floor" defines certain categories of treatment that thereby constitute the protection accorded to investments under Article 1105(1). One such category is a State's obligation to prevent a "denial of justice," which arises, for example, when its judiciary administers justice to aliens in a "notoriously unjust"[93] or "egregious"[94]

[89] *ADF Group*, Post Hearing Submission pp. 2-4.
[90] *Glamis Gold,* Counter-Memorial p. 223.
[91] *Loewen*, Counter-Memorial p. 124. After stating that NAFTA Article 1105 standard of treatment equates that of customary international law, the United States continues to defend its case with respect to its obligations regarding "denial of justice" as a specific rule within the customary international law minimum standard of treatment.
[92] *Methanex*, Statement of Defense ¶ 157; *Methanex*, Memorial on Jurisdiction and Admissibility pp. 43-44.
[93] *Grand River,* Counter-Memorial n. 321 (citing "Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 44 (2005) (citing J. Irizarry y Puente, *The Concept of "Denial of Justice" in Latin America*, 43 MICH. L. REV. 383, 406 (1944)); *id.* at 4 ("[A] state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner.") (emphasis omitted); *Chattin Case* (U.S. v. Mex.), 4 R. INT'L ARB. AWARDS 282, 286-87 (1927), *reprinted in* 22 AM. J. INT'L L. 667, 672 (1928) ("Acts of the judiciary ... are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any

> manner "which offends a sense of judicial propriety."[95] Another such standard is a State's responsibility to provide a minimum level of internal security and law and order, which is found in the customary international legal obligation to accord "full protection and security" to investments of investors.[96] The minimum standard of treatment also bars direct and indirect expropriation without prompt, adequate, and effective compensation.[97] NAFTA Chapter Eleven, however, sets out the expropriation obligation in its own provision, Article 1110.[98]

It is worth noting, as an example, that this approach is consistent with the way in which the France-Argentina BIT was written. In fact, Article 3 contains the FET obligation and Article 5 regulates expropriation. Article 5 (paragraph 1), however, starts by restating that Parties should accord just and equitable treatment in conformity with Article 3, before prescribing rules regarding expropriation (paragraph 2), thus stressing the idea that expropriation is part of the just (or fair) and equitable treatment.

In a few instances against the United States, claimants try to argue that the United States did not act in good faith and therefore violated the NAFTA Article 1105. The United States consistently argues, however, that good faith is not an obligation on its own and that, therefore,

---

unbiased man.") (emphasis omitted); D.P. O'Connell, 2 INTERNATIONAL LAW 948 (2d ed. 1970) ("Bad faith and not judicial error seems to be the heart of" a denial of justice claim) (footnotes omitted)).

[94] *Id.* at n. 322 (citing "Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 60 (2005) ("The modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice.")).

[95] *Id.* at n. 323 (citing *Loewen Group v. United States*, Award ¶ 132 (a denial of justice may arise where there has occurred a "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety")).

[96] *Id.* at n. 324 (citing *Asian Agric. Prods., Ltd. v. Rep. of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award ¶¶ 85-86 (June 27, 1990) (finding that Sri Lanka violated the full protection and security obligation under the minimum standard when it failed to take measures which would have prevented harm to farm in the course of counter-insurgency); *Am. Mfg. & Trading, Inc. v. Zaire*, ICSID Case No. ARB/93/1, Award ¶ 6 (Feb. 21, 1997) (explaining that the obligation to provide full protection and security under international law makes it incumbent upon the State receiving an investment to "take all measures necessary" to ensure the physical security of an investment and finding that Zaire violated that obligation when it failed to prevent looting of American Manufacturing's property)).

[97] *Id.* at n. 325 ("*See, e.g.*, OECD DIRECTORATE FOR FIN. AND ENTER. AFFAIRS, WORKING PAPERS ON INTERNATIONAL INVESTMENT NO. 2004/4, "INDIRECT EXPROPRIATION" AND THE "RIGHT TO REGULATE" IN INTERNATIONAL INVESTMENT LAW at 2 (2004) ("It is a well recognized rule of international law that the property of aliens cannot be taken, whether for public purposes or not, without adequate compensation ."); G.C. Christie, *What constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT'L L. 307, 307 (1962) (examining "the question of what constitutes a taking of the kind that brings into operation the widely recognized rule of international law that the property of aliens cannot normally be taken, whether for public purpose or not, without adequate compensation"); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 535-36 (5TH ED. 1998) ("The rule supported by all leading 'Western' governments and many jurists in Europe and North America is as follows: the expropriation of alien property is lawful if prompt, adequate, and effective compesation is provided for.")").

[98] *Id.* at 90; *Grand River*, Rejoinder p. 71; *Methanex*, Rejoinder p. 26 (the United States relies on the fact that the investor has not found a specific obligation incorporated in NAFTA Article 1105 violated by the American measure, consistently with this idea); *Methanex*, Rejoinder p. 26; *see also Glamis Gold*, Counter-Memorial p. 223.

even where a claimant would find bad faith, this would not *per se* amount to a violation of the MST:

> When arguing that the "principle of good faith" is part of the minimum standard of treatment, Claimants mischaracterize the role of "good faith" under customary international law. [Reference omitted] "The principle of good faith is ... 'one of the basic principles governing the creation and performance of legal obligations'; ... [but] it is not in itself a source of obligation where none would otherwise exist."[99] As such, customary international law does not impose a free-standing, substantive obligation of "good faith" that, if breached, can result in State liability. Absent a specific treaty obligation, a Claimant "may not justifiably rely upon the principle of good faith" to support a claim.[100]

Likewise, it argues in *Methanex*:

> Methanex continues to maintain – based in substantial part on an isolated statement in the Nuclear Tests decision – that customary international law imposes a general obligation of "good faith" in all things that relieves arbitrators of the burden of identifying a rule of law governing the conduct at issue. The International Court of Justice, however, has squarely rejected this contention, holding that:
>
> The principle of good faith is, as the Court has observed, "one of the basic principles governing the creation and performance of legal obligations" (Nuclear Tests, I.C.J. Reports 1974, p. 268, para. 46; p. 473, para. 49); it is not in itself a source of obligation where none would otherwise exist.[101]

Therefore, the position of the United States with regard to good faith and the FET/MST is consistent with that of Canada.[102]

Contrary to the principle of good faith, the United States agrees that the denial of justice is an integral part of the minimum standard of treatment. However, it argues that not every wrongdoing of a country's national courts will amount to a denial of justice:

> As the NAFTA Chapter Eleven Panel in *Azinian v. Mexico* stated, "A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to

[99] *Grand River*, Counter-Memorial n. 335 ("*Border and Transborder Armed Actions Case* (Nicar. v. Hond.), 1988 I.C.J. Rep. 69, 105, ¶ 94 (Dec. 20,1988) (emphasis added).").
[100] *Id.* at 94.
[101] *Methanex*, Rejoinder pp. 25-26.
[102] See subsection 1 above.

undue delay, or if they administer justice in a seriously inadequate way."[103] The NAFTA Chapter Eleven Panel in *Mondev v. United States* articulated the doctrine's requirements in the following manner:

> In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subject to unfair and inequitable treatment.[104]

[…]

The doctrine of denial of justice contains within it an exhaustion requirement, i.e., a requirement that recourse to the domestic judicial system be made, unless such recourse is obviously futile.[105] This requirement is understandable, "[s]ince denial of justice implies the failure of a national legal system as a whole to satisfy minimum standards."[106] Thus, a claim cannot lie "until the self-correcting features of the national system have failed."[107]

---

[103] *Grand River*, Counter-Memorial n. 502 ("*Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award ¶¶ 102-03 (Oct. 6, 1999) (The tribunal also indicated that there was "a fourth type of denial of justice, namely the clear and malicious misapplication of the law.")).

[104] *Id.* n. 503 ("*Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award ¶ 127 (Oct. 11, 2002)"); *Id.* at 141.

[105] *Id.* n. 514 ("*See De Caro Case*, 10 R. INT'L ARB. AWARDS 635 (1903) (noting that claimant, M. De Caro, failed to avail himself of his right to appeal to Venezuelan courts and that "before he can appeal to an international tribunal, . . . , he should be prepared to show some actual denial of justice with relation to the subject- matter of his appeal."); *Orinoco Steamship Co. Case*, 9 R. INT'L ARB. AWARDS 180 (1903) (explaining the position of the British Government as being that a denial of justice claim could not be brought until the claimants were "in a position to show that they had exhausted their ordinary legal remedies with a result that a *prima facie* case of failure or denial of justice remained."); *see also Loewen Group v. United States*, Award ¶ 165 (explaining that "the obligation to pursue local remedies in a case in which the alleged violation of international law is founded upon a judicial act" requires "that the claimant is bound to exhaust any remedy which is adequate and effective . . . so long as the remedy is not 'obviously futile.'") (quoting *The Finnish Ships Arbitration Award*, 3 R. INT'L ARB. AWARDS 1480, 1495, 1503-05 (May 9, 1934) and *Nielsen v. Denmark* [1958-1959] Y.B. EUR. COMM'N H.R. 412 at 436, 438, 440, 444).").

[106] *Id.* n. 514 ("JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 130 (2005). *See* Clyde Eagleton, *Denial of Justice in International Law*, 22 AM. J. INT'L L. 538, 557-58 (1928) (describing the requirement that claimants exhaust local remedies as "unquestionably the most important element in the procedure of enforcing state responsibility. It recognizes the independent personality, the exclusive jurisdiction, the so- called sovereignty of the state; and thus aids to reconcile the conflict between sovereignty and international law.").").

[107] *Id.* n. 514 ("PAULSSON at 108 ("For a foreigner's international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself."). *See Loewen Group v. United States*, Award ¶ 156 (explaining, "[t]he purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision.").). *Id.* at 143-144; *see also Grand River*, Rejoinder pp. 89-90; *Loewen*, Rejoinder pp. 106-107.

C. The Threshold for Finding a Violation of the FET/MST

1. Canada

In its pleadings, Canada argues that the threshold for finding a violation of an obligation within the MST is high. In fact, in *Gallo,* Canada argues that "(t)he threshold for a breach of Article 1105 is only reached when the government treats an investment in a manner so manifestly arbitrary or unfair that the treatment rises to a level that is unacceptable from an international perspective."[108] In *Mobil*, Canada states:

> The *Glamis* tribunal summarized the minimum standard of treatment as it currently exists under customary international law:
>
> > [A] violation of the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is *sufficiently egregious and shocking* – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of Article 1105.[109]
>
> In short, NAFTA tribunals since the FTC Note of Interpretation have confirmed that the threshold for a violation of Article 1105 is high and requires an action that amounts to gross misconduct of manifest unfairness such that it breaches the international minimum standard of treatment of aliens [reference omitted].[110]

In *S.D. Myers*, the Canada argues that:

> SDMI's expansive definition of the minimum standard of treatment obligation under Article 1105 is without any basis. It would render meaningless all the other obligations under Chapter Eleven. Mexico's submission supports Canada's position that the Tribunal should caution when deciding whether a regulatory measure taken by a NAFTA Party could amount to denial of treatment in accordance with international law [reference to Mexico's submission omitted] and that such a determination should only be made in egregious cases [reference to Mexico's submission omitted].[111]

---

[108] *Gallo,* Statement of Defence ¶ 182; Canada relies on the FTC Note of Interpretation and on the *Mondev* Award.
[109] *Glamis,* Award ¶ 627.
[110] *Mobil*, Counter-Memorial ¶¶ 247-248.
[111] *S.D. Myers*, Reply of Canada to Investor's Supplementary Memorial ¶ 29; see also *UPS*, Rejoinder ¶¶ 283 and 303; *Merrill & Ring,* Rejoinder ¶145; *Chemtura*, Counter-Memorial ¶¶ 677-680.

2. Mexico

Mexico seemingly agrees with the other NAFTA Parties that the threshold for a violation of Article 1105 is high. For instance, in *UPS*, Mexico argues:

> Since the rules are so basic and modern State action in the ordinary course of events rarely offends the rules arbitral tribunals – including those established under NAFTA Chapter Eleven – have tended to use strong qualifiers to emphasize the strictness of the test that must be met in order to find a breach of the customary standard. Hence, the *Waste Management* tribunal used the terms "*grossly* unfair" and "*wholly* arbitrary," the *GAMI* tribunal referred to the "*outright and unjustified* repudiation" of rules, the *ADF* tribunal spoke of "*idiosyncratic or aberrant*" conduct and the *Mondev* tribunal spoke of "*clearly* improper and discreditable" conduct.[112] This approach is fully consistent with the approach taken by the Chamber of the International Court of Justice in its seminal treatment of the concept of arbitrariness in the famous *ELSI* case.[113]

Mexico further relies on the *Neer* case to support the requirement of a high threshold.[114] For instance, it affirms, in *ADF Group*:

> The reason why Mexico expressed its agreement with the *Neer* standard was that for many years, the leading text-writers on the minimum standard, including present day publicists, have embraced it as one of the leading cases on the international minimum standard:[115]
>
> 3
>
> - Brownlie's most recent edition of *Principles of Public International Law*, published in 1998, cites *Neer* as a leading case.[116]
> - Malanczuk, the editor of the seventh edition of *Akehurst's Modern Introduction to International Law*, published in 1997, refers to the statement from *Neer* quoted above as evidence of the standard, and implies that *bona fide* State action would rarely ever be impugned under it.[117]

[112] *Waste Management II*, Award ¶¶ 95 and 115; *GAMI*, Award ¶104; *ADF Group*, Award ¶189; *Mondev*, Award ¶ 127.
[113] *ELSI,* [1989] ICJ Reports 1950, ¶128.
[114] *Pope& Talbot*, Article 1128 Submission of Mexico pp. 4 and 8; *Pope & Talbot*, Post-Hearing Article 1128 Submission of Mexico pp. 4-5; *ADF Group,* Post-Hearing Article 1128 Submission of Mexico pp. 10-11.
[115] *ADF Group,* Post-Hearing Article 1128 Submission of Mexico n. 34 ("Although the most recent edition of *Oppenheim's International Law* does not cite *Neer*, it does cite other decisions of the General Claims Commission such as the *Roberts* Claim").
[116] I. Brownlie, Principles of Public International Law (5th ed. 1996) at 440.
[117] *Akehurst' s Modern Introduction to International Law*, (7th ed. 1997) (Peter Malanczuk, ed.) at 261. This text also refers to the *Roberts* Claim.

- Shaw's fourth edition of *International Law*, published in 1997, also cites *Neer* (and two other decisions of that General claims Tribunal, *Roberts* and *Garcia*).[118]
- Roth's monograph, *The Minimum Standard of Treatment of International Law Applied to Aliens*, published in 1949, described *Neer* as the decision "which was to be the guiding principle of their [the Mexican-United States General Claims Commission's] jurisdiction."[119] He considered that it constituted "one of the strongest expressions" of the standard, and noted that it was elaborated upon in subsequent cases.[120]
- Eagleton's 1928 thesis, *The Responsibility of States in International Law*, republished in 1970 (Kalus Reprint Co.) also cites *Neer* and *Roberts* and two other General Claims Commission cases that followed their reasoning: *Garza and Garza* (Docket No. 297) and *Faulkner* (Docket No. 47).
- Brierly's *The Law of Nations* cites *Neer* and *Roberts* as the leading cases and notes that the minimum standard is "not an exacting one, nor does it require a uniform degree of governmental efficiency irrespective of circumstances."[121]
- Schwarzenberger also cites the *Neer* Case as firmly upholding the existence of the international minimum standard. He notes that the minimum standard has been applied to:

> ...cases in which the State of residence had failed to safeguard adequately the life, freedom, human dignity, or property in the widest sense, including contractual rights, of foreigners; or in which the local administration, particularly in the prosecution of crimes committed against foreigners, suffered from glaring deficiencies. In substance, this standard approximates to the minimum requirements of the rule of law in the Anglo-American sense of the term...[122] [Emphasis added by Mexico; case references in the passage omitted by Mexico.][123]

Also, in *Loewen,* Mexico shows its approval of the arguments made on the specific obligation relating to the denial of justice:"(t)he strict tests for the local remedies rule and denials of justice formulated in the early part of the last century and applied since then are settled and

[118] Malcolm N. Shaw, *International Law* (4th ed. 1997) at 569-573.
[119] A.R. Roth, The Minimum Standard of Treatment in International Law (1949) at 95.
[120] *Id*. at 96.
[121] J.L. Brierly, *The Law of Nations* (6th ed. 1963, edited by Sir Humphrey Waldock) at 280-281.
[122] Georg Schwarzenberger, International Law as Applied by International Courts and Tribunals, (1957) at 201.
[123] *ADF Group*, Post-Hearing Article 1128 Submissions of Mexico pp. 13-14.

well-accepted, and therefore are properly characterized as rules of customary international law."[124] It further argues that:

> At customary international law, in order to make out a denial of justice, the legal system as a whole must fail.
>
> (…)
>
> When considering whether the acts complained of give rise to a denial of justice, the International Court of Justice's discussion of arbitrariness in international law is instructive of the international tribunal's angle of examination:
>
> > Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the court in the Asylum case, when it spoke of "arbitrary action" being "substituted for 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.[125]

According to Mexico, "the settled litmus test for a denial of justice at customary international law requires an outrage or flagrant disregard of law."[126]

3. United States

In *Mondev*, the United States demonstrates that the threshold for finding a violation of a customary international law rule within the minimum standard is high. In fact, where the investor challenged a decision rendered by a Massachusetts tribunal, the United States argues, as in *Chattin* (Mexico – US General Claims Commission 1927), that the investor "would have to show that the conduct of the Massachusetts courts amounted 'to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man (…).' "[127]

Likewise, in *Loewen*, the United States also argues that for finding a denial of justice, which is an obligation within the minimum standard of treatment, the threshold is very high:

---

[124] *Loewen,* Article 1128 Submission of Mexico p. 3.
[125] *Case Concerning Elettronica Sicula S.p.A.* (ELSI) (United States v. Italy) [1989] I.C.J. Rep.
[126] *Loewen,* Article 1128 Submission of Mexico p. 16.
[127] *Mondev,* Counter-Memorial on Competence and Liability p. 45.

Given the extreme nature of a denial of justice claim, it is no surprise that the standard of proof regarding such claims is exceptionally high. It is not sufficient to show merely that the challenged judicial action or decision was wrong. Rather, under settled rules of international law, "[o]nly a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law."[128];[129]

In the Rejoinder memorial, the United States argues:

[…] Sir Robert Jennings acknowledges that "the cases show that generally speaking it has been applied when the treatment of an alien has been outrageous and so without any doubt a breach of a minimum standard." First Jennings Op. at 17. See also Third Jennings Opinion at 27 (assuming that "the traditional minimum standard" requires a showing of "outrageous treatment"); id. (even if Article 1105 were not limited to the customary international law minimum, "[i]t may . . . readily be agreed that no court or tribunal will lightly or readily find the judicial acts of a respondent State in breach of the requirements of international law.").[130] Claimants' other sources confirm that a charge of denial of justice is an extreme one that is met only in the rarest of circumstances.[131]

---

[128] The United States quotes *Putnam v. United Mexican States*, Opinions of Commissioners 225 (U.S.-Mex. Cl. Comm'n of Sept. 8, 1923).

[129] *Loewen*, Counter-Memorial p. 131.

[130] *Loewen*, Rejoinder n. 129 ("Claimants suggest that Sir Robert Jennings and Sir Ian Sinclair endorse their view that "[t]he United States' 'extreme' formulations of the denial-of-justice standard are vestiges of a past in which only States could protect the rights of aliens through the extreme process of diplomatic espousal." Joint Reply at 95. Their experts' actual statements, however, which claimants quote out of context, say nothing of the sort. See Second Greenwood Op. at ¶ 99 ("the testimony of Loewen's international law experts does not support the conclusions for which it is quoted at this part of the Reply."). Rather, Sir Robert and Sir Ian assert (wrongly, as Professor Greenwood explains) only that international law has changed with respect to the local remedies rule in denial of justice cases; they do not dispute any other aspect of the traditional denial of justice standard. See supra at 91-96; Second Greenwood Op. at ¶ 99 ("What constitutes a denial of justice to an alien is exactly the same irrespective of whether that alien complains of that denial itself or has a claim brought on its behalf[,] and none of the authorities cited by Loewen even hints otherwise.").").

[131] *Id.* n. 130 ("See, e.g., Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad at 339-40 (Kraus Reprint Co. 1970) (1915) (describing as denials of justice "irregularities in the course of judicial proceedings" that are "sufficiently gross so as to become a denial of justice" as well as "grossly unfair or notoriously unjust" decisions); Clyde Eagleton, The Responsibility of States in International Law 114 (1928) (citing "manifest injustice" as the international standard of responsibility of the domestic judicial system); A.O. Adede, "A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law," 14 Can. Y.B. Int'l Law 73, 93 (1976) ("The alien sustains a heavy burden of proving that there was undoubted mistake of substantive or procedural law leading to an adverse decision operating to his prejudice."); J.W. Garner, "International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to Denial of Justice," 1929 BRIT. Y.B. INT'L L. 181, 188 ("manifestly or notoriously unjust" decisions); Article 9, Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, 23 AM. J. INT'L L.133 (Supp. 1929) at 134 & 189, comment to art. 9 ("1929 Harvard Research Draft") ("It may be said that before an international claim ought to be considered well-founded it should be shown that the decision was so palpably unjust that the good faith of the court is open to suspicion."); Sohn & Baxter, 1961 Harvard Draft Convention, at 98, comment to art. 8(a) ("The alien must sustain a heavy burden of proving that there was an undoubted mistake of substantive or procedural law operating to his prejudice.").").

As Professor Greenwood explains, "[c]ontrary to what is said by Loewen, international law sets a high threshold in this respect, recognizing a considerable 'margin of appreciation' on the part of national courts. Thus, the awards and texts make clear that error on the part of the national court is not enough, what is required is 'manifest injustice' or 'gross unfairness' . . . 'flagrant and inexcusable violation' . . . or 'palpable violation' in which 'bad faith not judicial error seems to be the heart of the matter.'" Second Greenwood Op. at ¶ 94.[132]

Where the judicial action in question was mere error, it is not enough that the error had extreme consequences for the claimant, because "judicial error, whatever the result of the decision, does not give rise to international responsibility on the part of the State." Revised Draft on International Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens, Article 3(3), reprinted in García-Amador, Recent Codification of the Law of State Responsibility for Injuries to Aliens 129, 130 [reference omitted].

In short, contrary to claimants' unsupported assertions, the customary international minimum standard applicable to this case is every bit as "extreme" as the United States has indicated. As Judge Tanaka of the International Court of Justice explained in the Barcelona Traction case,

> [i]t is an extremely serious matter to make a charge of a denial of justice vis-a-vis a State. It involves not only the imputation of a lower international standard to the judiciary of the State concerned but a moral condemnation of that judiciary. As a result, the allegation of a denial of justice is considered to be a grave charge which States are not inclined to

[132] *Id.* n. 131 ("The cases cited by claimants are no different. See Joint Reply at 93-97 citing Garrison's Case (U.S. v. Mex.) (1871), 3 Moore's Int'l Arbitrations 3129, 3129 (1898) (an "extreme" case where court "act[ing] with great irregularity" refused Garrison's appeal "by intrigues or unlawful transactions"); see also TLGI Mem. at 75-80 citing Joseph F. Rihani, American Mexican Claims Commission (1942), 1948 AM. MEX. CL. REP. 254, 257-58 (finding decision of the Supreme Court of Justice of Mexico "such a gross and wrongful error as to constitute a denial of justice"); The Texas Company, American Mexican Claims Commission (1942), 1948 AM. MEX. CL. REP. 142, 144 (rejecting claim for failure to show error by Supreme Court of Justice of Mexico "resulting in a manifest injustice"); Bronner (U.S.) v. Mexico (1874), 3 Moore's Int'l Arbitration 3134, 3134 (1898) (finding court decision was "so unfair as to amount to a denial of justice"); Chattin (U.S.) v. Mexico (1927), 4 R.I.A.A. 282, 286-87 (requiring that injustice committed by judiciary rise to the level of "an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man"). Other international cases cited by claimants found denials of justice by courts in equally extreme contexts, though very different from the facts of the instant case, e.g., instances of detention of foreigners, or failure to prosecute violent crimes against foreigners, not in conformity with municipal law. See, e.g., Solomon (U.S.) v. Panama (1933), 6 R.I.A.A. 370, 372-72 (alien's arrest that did not comply with Mexican law found to be a "palpable injustice"); Dyches (U.S.) v. Mexico (1929), 4 R.I.A.A. 458, 461 ("long and unjustified delay" in obtaining justice for the accused alien constituted a denial of justice where delay was contrary to Mexican law); Morton (U.S.) v. Mexico (1929), 4 R.I.A.A. 428, 434 (improper prosecution and inadequate punishment of alien's murderer under Mexican law gave rise to international liability); Kennedy (U.S.) v. Mexico (1927), 4 R.I.A.A. 194, 198 (misapplication of Mexican law in prosecuting crime against alien revealed "negligence in a serious degree" constituting a "denial of justice"); Roberts (U.S.) v. Mexico (1926), 4 R.I.A.A. 77, 80 ("unreasonably long detention" of alien without a trial found to be contrary to Mexican law and, thus, denial of justice).").

make if some other formulation is possible. 1970 I.C.J. at 160 (separate opinion of Judge Tanaka).[133]

D. Legitimate Expectations and the FET/MST

1. Canada

According to Canada, the customary international law minimum standard of treatment does not entail an obligation not to frustrate legitimate expectations of the investor. For instance, it argues in *Merrill & Ring:*

> The "obligation" to protect the legitimate expectations of an investor is not part of the customary international law minimum standard of treatment of aliens. There is no such "obligation" under Article 1105.
>
> In its Memorial, the Investor states that tribunals have been "applying the customary international law obligation to protect legitimate expectations." [Reference to Investor's memorial omitted.] Other than *Metalclad*, [reference omitted], the Investor refers to cases decided in the different context of BITs. As explained above, these cases are not relevant to interpretation of NAFTA Article 1105. Further, the case law cited by the Investor is selective and misleading. It omits the Annulment Committee's conclusion in *CMS v. Argentina* that "[a]lthough legitimate expectations might arise by reason of a course of dealing between the investor and the host State, these are not, as such, legal obligations (…)."[134] In any event, the Investor fails to demonstrate the existence of a general obligation to protect legitimate expectations at international law. […][135]

In many cases, Canada was accused of frustrating legitimate expectations of investors and the latter alleged that this amounted to a violation of Article 1105. Canada's response was to consistently argue that the minimum standard of treatment contains no obligation to respect the investor's expectations. On a uniform basis, Canada argues that the investor has failed to prove the existence of a customary obligation within the standard relating to legitimate expectations. In *Merrill & Ring,* for example, Canada alleges that the investor has not proven the existence of

[133] *Id.* at 113-116; *see also Loewen*, Response of the United States to the Article 1128 submissions pp. 8-9 ("Mexico is also correct that 'the settled litmus test for a denial of justice at customary international law requires an outrage or flagrant disregard of law.' ").
[134] *CMS*, Annulment Proceeding ¶ 89.
[135] *Merrill & Ring,* Counter-Memorial ¶¶ 508-509.

such an obligation, but rather simply relied on the *Tecmed* award, a decision that was not followed by the *Glamis* tribunal.[136] A similar line of reasoning was used in *Mobil*,[137] *UPS*[138] and *Gallo*.[139]

2. Mexico

The analysis of Mexican submissions in NAFTA cases did not reveal Mexico's position on the importance (or not) of legitimate expectations. However, without mentioning legitimate expectations specifically, Mexico does emphasize the State's right to regulate. This position seems to be consistent with the positions of the United States on that matter, which affirm that if States were bound not to frustrate legitimate expectations of investors, they would have to compensate them for every loss of profit due to regulations.[140] For instance, in its 1128 submission in the *SD Myers* case, Mexico argues :

> []NAFTA tribunals must exercise caution in deciding whether a regulatory measure taken by a NAFTA Part y could amount to denial of treatment in accordance with international law. Regulatory measures that affect the economic activities of domestic and foreign investors, positively and negatively, are promultaged daily by the three national governments, and the 95 state or provincial governments, respetively that, between them, are responsible for governance in North America.[141]

In *Metalclad,* Mexico argues that the obligations contained in NAFTA Article 1105 must be read in light with the North American Agreement on Environment Cooperation (NAAEC), wich allows its Parties (the same parties to NAFTA) to regulate in environmental matters – or even imposes the respect of each country's regulation.[142]

Therefore, it appears clearly that without mentioning legitimate expectations directly, Mexico considers that NAFTA Article 1105 does not keep the state from exercising its regulatory activity, even where it affects the investor.

---

[136] *Merrill & Ring*, Rejoinder ¶¶ 192-193.
[137] *Mobil,* Counter-Memorial ¶¶ 252-253 and 268.
[138] *UPS*, Counter-Memorial ¶¶ 941-945, Rejoinder ¶ 296.
[139] *Gallo,* Statement of Defence ¶ 196; *Gallo*, Counter-Memorial ¶ 272.
[140] See subsection 3 below.
[141] *S.D. Myers,* Article 1128 Submission of Mexico ¶ 34.
[142] *Metalclad*, Counter-Memorial ¶¶ 838-841.

3. United States

In *Glamis Gold*, the United States argues that the minimum standard of treatment does not include a prohibition to frustrate legitimate expectations of the investor. It argues: "[i]ndeed, most, if not all, regulatory action is bound to upset the expectations of a portion of the populace. If States were prohibited from regulating in any manner that frustrated expectations – or had to compensate everyone who suffered any diminution in profit because of a regulation – States would lose the power to regulate."[143] Likewise, in *Grand-River*, the Unitd States asserts:

> As a matter of international law, although an investor may develop its own expectations about the legal regime that governs its investment, those expectations do not impose a legal obligation on the State.[144] Even if, unlike in this case, Claimants had entered into a contractual relationship with the Settling States, a mere breach of contract cannot, by itself, amount to a breach of the minimum standard of treatment.[145] To breach the minimum standard of treatment, something more is required, such as a complete repudiation of the contract or a denial of justice in the execution of the contract.[146] NAFTA Chapter Eleven tribunals recognize this point.[147]

---

[143] *Glamis Gold,* Counter-Memorial p. 142.

[144] *Grand River*, Counter-Memorial n. 346 ("*CMS Gas Transmission v. Argentine Rep.,* ICISD No. ARB/01/8, Annulment Proceeding, ¶ 89 (Sept. 25, 2007) ("Although legitimate expectations might arise by reason of a course of dealing between the investor and the host State, these are not, as such, legal obligations.").").

[145] *Id.* n. 347 ("S*ee SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction ¶ 167 (Aug. 6, 2003) (noting "the widely accepted principle . . . that under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law"); *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction ¶ 122 (Jan. 29, 2004) (citing *SGS v. Pakistan* with approval); *Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, art. 4, cmt. ¶ 6, 53rd Sess. [2001] 2:2 Y.B. INT'L L. COMM'N 40, U.N. Doc. A/56/10 ("Of course the breach by a State of a contract does not as such entail a breach of international law."); F.V. García-Amador, Special Rapporteur, *International Responsibility: Fourth Report*, [1959] 2 Y.B. INT'L L. COMM'N 30 ¶ 123, U.N. Doc. A/CN.4/119 (Feb. 26, 1959) ("Diplomatic practice and international case- law have traditionally accepted almost as dogma the idea that the mere non-performance by a State of its obligations under a contract with an alien individual does not in itself necessarily give rise to international responsibility."); F. A. Mann, *State Contracts and State Responsibility*, 54 AM. J. INT'L L. 572, 578 (1960) (pointing out that no States other than Switzerland and France have adopted the view that mere contractual breaches give rise to a breach of international law and that the United States "has, for more than a century and a half, been clearly opposed to it").").

[146] *Id.* n. 348 ("*See Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 4, cmt. ¶ 6, 53rd Sess. [2001] 2:2 Y.B. INT'L L. COMM'N 40, U.N. Doc. A/56/10 ("Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party."); *Compañía de Aguas del Aconquija S.A. v. Argentine Rep.*, ICSID Case No. ARB/97/3, Decision on Annulment ¶ 110 n.78 (July 3, 2002) ("*Vivendi II*") (explaining that the determination of whether particular conduct violates a treaty cannot be satisfied by an examination of that conduct in context of contractual rights and duties alone; also citing ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW 927 (9th ed. 1992): "It is doubtful whether a breach by a state of its contractual obligations with aliens constitutes per se a breach of an international obligation, unless there is some additional element as denial of justice, or

The United States further argues:

> Claimants submit no evidence of State practice establishing a legal obligation not to frustrate an investor's expectations formed at the time the investor made its investment. State practice, in fact, tends to support the opposite view. As Claimants acknowledge, [reference omitted] under customary international law, States may regulate to achieve legitimate objectives to benefit the public welfare and will not incur liability solely because the change interferes with an investor's "expectations" about the state of the business environment.[148] The protection of public health falls squarely within that regulatory authority under international law.[149];[150]

E. Discrimination and Transparency Versus the FET/MST

expropriation, or breach of treaty, in which case it is that additional element which will constitute the basis for the state's international responsibility."). 349 *See Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award ¶ 87 (Nov. 1, 1999) ("NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes."); *Waste Mgmt. V. Mexico*, Award ¶ 115 (explaining that "even the persistent non-payment of debts by a municipality is not equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and ... some remedy is open to the creditor to address the problem").").

[147] *Id.* at 96-97.

[148] *Id.* n. 355 ("*Feldman v. Mexico*, Award ¶ 112 ("Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social consideration. Those changes may well make certain activities less profitable or even uneconomic to continue.").").

[149] *Id.* n. 356 ("*See, e.g.,*LOUIS B. SOHN AND R.R. BAXTER, CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS, FINAL DRAFT WITH EXPLANATORY NOTES, ART. 10(5) (1961), REPRINTED IN F.V. GARCÍA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 204-05 (1974) ("An uncompensated taking of an alien property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health, and morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful."); *see also* OECD Draft Convention on the Protection of Foreign Property, Oct. 12, 1967, *reprinted in* 7 I.L.M. 117, accompanying note to Article 3 ("Article 3 acknowledges, by implication, the sovereign right of a State, under international law, to deprive owners, including aliens, of property which is within its territory in the pursuit of its political, social,or economic ends. To deny such a right would be [to] attempt to interfere with its powers to regulate – by virtue of its independence and autonomy, equally recognized by international law – its political and social existence."). ").

[150] *Id.* at 99.

1. Canada

Likewise, Canada argues that no obligation of transparency lies within the minimum standard of treatment contained in NAFTA Article 1105. The passage contained in the *Merrill & Ring* Rejoinder is illustrative:

> In its Memorial, the Claimant argues that the requirements of "total ransparency" set out by the *Tecmed Tribunal* is the applicable standard, and has reiterated in its Reply that the *Tecmed* award "continues to be cited with approval by arbitral tribunals."
>
> The Claimant has failed to demonstrate that "transparency" forms part of customary MST. The Claimant has provided no other evidence either of State practice, or of *opinio juris* to this effect. Accordingly, its argument to this effect must fail.
>
> The Claimant is at best able to reference the comments of the *Waste Management II* tribunal, which referred not a simple "lack of transparency" but rather, a "complete lack of candour or transparency in the administrative process." Rather establishing "transparency" as an independent element of customary MST, the comment appears illustrative of other behaviour which might breach customary MST [references omitted].[151]

Canada makes consistent arguments in other cases, for example *Gallo*[152] and *UPS*.[153]

2. Mexico

An analysis of Mexican submissions does not reveal the existence of a Mexican position with regards to discrimination and transparency. At most, as stated above,[154] in *Metalclad*, Mexico seems to think that the MST entails a protection against discrimination: "(t)he fair and equitable treatment standard requires the Respondent to act in good faith, reasonably, without abuse, arbitrariness or discrimination."[155]

3. United States

[151] *Merrill & Ring,* Rejoinder ¶¶ 190-191.
[152] *Gallo*, Statement of Defence p. 102.
[153] *UPS,* Statement of Defence ¶ 120; *UPS*, Counter-Memorial ¶¶ 943-944; *UPS*, Rejoinder ¶ 323.
[154] See Section B above, subsection 2.
[155] *Metalclad,* Counter-Memorial ¶841.

With regard to the question of transparency, the United States has been faced with claims asserting that due to an alleged lack of transparency, the government would have breached the MST obligation contained in NAFTA Article 1105. In conformity with its argument that the MST is not a self-standing obligation but an umbrella standard, the United States argues that the MST does not encompass a specific obligation of transparency:

> Claimants fail to demonstrate that the minimum standard of treatment obligates States to provide a "transparent" and "stable" or "predictable" regulatory environment. The authorities cited by Claimants do not demonstrate that "transparency" is protected by the minimum standard of treatment. Claimants' main support for a "transparent" regulatory environment, *Metalclad v. Mexico*, has been set aside on this precise point by the Supreme Court of British Columbia. The Court found that Metalclad had failed to introduce any evidence of any kind "to establish that transparency has become a part of customary international law" and held that the Metalclad tribunal had exceeded its authority because it had "misstated the applicable law to include transparency obligations and then made its decision on the basis of the concept of transparency." [References omitted][156]

In making this assertion, the United States relies on the OECD working paper on international investment no. 2004/3 on the fair and equitable standard in international investment law that states that "[i]n a few cases, Arbitral Tribunals have defined 'fair and equitable treatment' drawing upon a relatively new concept not generally considered a customary international law standard: transparency."[157]

With regard to discrimination, the United States argues that there is not a general obligation of non-discrimination encompassed in the MST:

> [T]he minimum standard of treatment addresses only certain types of discrimination against aliens. In fact, "a degree of discrimination in the treatment of aliens as compared with nationals is, generally, permissible as a matter of customary international law."[158] For example, States routinely limit or deny aliens the right to

[156] *Grand River*, Counter-Memorial pp. 100-101.

[157] *Id.* n. 363 ("[…]OECD DIRECTORATE FOR FIN. AND ENTER. AFFAIRS, WORKING PAPERS ON INTERNATIONAL INVESTMENT NO. 2004/3, FAIR AND EQUITABLE TREATMENT STANDARD IN INTERNATIONAL INVESTMENT LAW at 37 (2004) […]").

[158] *Id.* n. 471 ("ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW: PEACE 932 (9th ed. 1992). *See also* ANDREAS H. ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 83 (1949) ("[T]he principle of equality has not yet become a rule of positive international law, *i.e.*, there is no obligation for a State to treat the aliens like the nationals. A discrimination of treatment between aliens and nationals alone does not yet constitute a violation of international law."); *see also* J.L. BRIERLY, THE LAW OF NATIONS 278 (Sir Humphrey Waldock ed.) (6th ed. 1963) ("In general a person who voluntarily enters the territory of a state not his own must accept the institutions of that state as he finds them. He is not entitled to demand equality of treatment in all respects with the citizens of the state; for example, he is almost always debarred from the political rights of a citizen; he is

vote and the right to work without running afoul of international law.[159] Furthermore, customary international law upholds the right of governments to limit the property rights of aliens within their territories.[160] While States frequently agree to refrain from discriminating against aliens in economic matters by undertaking national treatment and most-favored-nation obligations in their international agreements, they are not required to do so by customary international law.[161] In fact, as one scholar has explained, if the principle of non- discrimination were reflected in customary international law, "most-favored-nation provisions in commercial and other treaties would be superfluous or, by sheer volume, merely declaratory by now," but that is decidedly not the case.[162]

---

commonly not allowed to engage in the coasting trade, or to fish in territorial waters; he is sometimes not allowed to hold land. These and many other discriminations against him are not forbidden by international law.").").

[159] *Id.* n. 472 ("*See* ALWYN V. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 510, 513-14 (1938) ("It is universally accepted that the alien does not, in the absence of treaty or local legislation, have a right to participate in any of the State's political functions or take part with citizens in the formation of its policies. . . . [W]ith respect to the alien's right to engage in economic activity . . . in the absence of treaty, the extent of the alien's right to carry on business within a State is difficult to define. One of the reasons for this may be that general international law does not require States to base their economic legislation upon such principles as the unrestricted activity of private individuals and the free disposition of their property. . . . [O]ne [can] hardly speak of an alien's 'right' to engage in business. . . . In any event, it is well recognized that the State may exclude aliens from certain classes of occupations and professions, reserving these solely to its nationals.") (footnotes omitted); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 502 (6th ed. 2003) ("[I]t is agreed on all hands that certain sources of inequality are admissible. Thus it is not contended that the alien should have political rights in the host state as of right. Moreover, the alien must take the local law as he finds it in regard to regulation of the economy and restriction on employment of aliens . . . ."); J.C. Thomas, *Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators*, 17 ICSID REV- F.I.L.J. 21, 24 (2002) ("At customary international law, a state has considerable freedom to discriminate in the treatment that it accords to other states, to restrict aliens' entry into its territory, and to prohibit them from working or conducting business there.").").

[160] *Id.* n. 473 ("*See The Law of Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners*, 23 AM. J. INT'L L. 133, 147 (Special Supp. 1929) (Comment to Article 5) (Harvard Draft Conventions and Comments on Nationality, Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners and Territorial Waters) ("The local law does not, of course, have to be uniform as to nationals and aliens. For example, it is quite possible for aliens to be denied the privilege of owning real estate . . . ."); ROTH at 165 ("According to general international law, the alien's privilege of participation in the economic life of his State of residence does not go so far as to allow him to acquire private property. The State of residence is free to bar him from ownership of all or certain property, whether movables or realty.") (emphasis omitted); JENNINGS & WATTS at 911-12 ("Thus a state may restrict the rights of aliens to hold property; and far-reaching interference with private property, including that of aliens, is common in connection with such matters as taxation, measures of police, public health, the administration of public utilities and the planning of urban and rural development.").").

[161] *Id.* n. 474 ("*See, e.g.*, ROBERT RENBERT WILSON, THE INTERNATIONAL LAW STANDARD IN TREATIES OF THE UNITED STATES 87 (1953) ("Traditionally . . . states have claimed the right, without infringing international law, to withhold commercial advantages to foreign nationals, vessels, and goods. The granting of trading privileges and advantages has, in general, come through treaties, principally bilateral ones."); Edwin Borchard, *The 'Minimum Standard' of the Treatment of Aliens*, 33 AM. SOC'Y INT'L L. PROC. 51, 56 (1939) ("Equality, then, grants more than the alien or his government can ordinarily ask, for in the absence of treaty there is no rule prohibiting certain discriminations against aliens.").").

[162] *Id.* n. 475 ("*See* Hans W. Baade et al., *Permanent Sovereignty over Natural Wealth and Resources*, *in* ESSAYS ON EXPROPRIATIONS 3, 23-24 (Richard S. Miller & Roland J. Stanger eds., 1967) ("Non-discrimination is not a rule of customary international law. Otherwise, most-favored-nation provisions in commercial and other treaties would be superfluous or, by sheer volume, merely declaratory by now. Nobody claims that this is the case. Since states are free to decide with whom to trade, they must also be free to decide with whom to stop dealing—subject, of course, to as yet unexpired treaty obligations.") (footnote omitted).").

Rather than providing a general prohibition against discrimination, Article 1105(1) prohibits discrimination against the investments of aliens in particular contexts, including denial of justice, full protection and security, and expropriation claims. First, the minimum standard of treatment obligation requires governments to grant aliens access to their courts and judicial remedies on a non-discriminatory basis.[163] Second, the minimum standard of treatment obligation requires governments to "[a]ccord to foreigners to whom damage has been caused by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance the same indemnities as it accords to its own nationals in similar circumstances."[164] Third, the minimum standard of treatment prohibits discrimination against aliens in the taking of property.[165] Because Claimants have not couched their allegations of discrimination in the context of such established rules, and none of the measures they challenge can be found to discriminate against Claimants on their face, they cannot be considered under Article 1105.[166]

---

[163] *Id.* n. 476 ("*See, e.g.*, ROTH at 185-86 (including in a list of minimum requirements that states must extend to aliens under international law, certain "procedural rights," including "freedom of access to court, the right to a fair, non-discriminatory and unbiased hearing, the right to full participation in any form in the procedure, [and] the right to a just decision rendered in full compliance with the laws of the State within a reasonable time"); C.F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 243 (1967) ("Especially in a suit between State and alien it is imperative that there should be no discrimination between nationals and aliens in the imposition of procedural requirements. The alien cannot be expected to undertake special burdens to obtain justice in the courts of the State against which he has a complaint."); Report of the Guerraro Sub-Committee of the Committee of the League of Nations on Progressive Codification 1, *Publications of the League* C.196, M. 70, at 100 (1927) ("Denial of justice is therefore a refusal to grant foreigners free access to the courts instituted in a State for the discharge of its judicial functions, or the failure to grant free access, in a particular case, to a foreigner who seeks to defend his rights, *although in the circumstances nationals of the State would be entitled to such access.*") (emphasis added); *Ambatielos Claim* (Greece v. U.K.), 12 R. INT'L ARB. AWARDS 83, 111 (Mar. 6, 1956) ("The modern concept of 'free access to the Courts' represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a practice which existed in former times and in certain countries, and which constituted an unjust discrimination against foreigners. Hence, the essence of 'free access' is adherence to and effectiveness of the principle of non-discrimination against foreigners who are in need of seeking justice before the courts of the land for the protection and defence of their rights.").").

[164] *Id.* n. 477 ("League of Nations, Bases of Discussion: Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners, League of Nations Doc. C.75.M.69.1929.V, at 107 (1929), reprinted in 2 LEAGUE OF NATIONS CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW [1930], at 529 (Shabtai Rosenne ed., 1975) (Basis of Discussion 21(4)); see also id. at 538 (Basis of Discussion 22(b)) ("A State must accord to foreigners to whom damage has been caused by persons taking part in an insurrection or riot or by mob violence the same indemnities as it accords to its own nationals in similar circumstances.") (emphasis added). See, e.g., Elettronica Sicula S.p.A. (ELSI) Case (U.S. v. Italy), 1989 I.C.J. Rep. 15, ¶ 108 (July 20, 1989) (explaining that the "essential question" when determining whether the protection provided by a domestic authority falls below the full protection and security standard under international law is "whether the local law, either in its terms or its application, has treated [alien] nationals less well than [its own] nationals").").

[165] *Id.* n. 478 ("*See, e.g.*, *Libyan Am. Oil Co. v. Libya*, Award,, 20 I.L.M. 1, 58-59 (1981) (Apr. 12, 1977) ("It is clear and undisputed that non-discrimination is a requisite for the validity of a lawful nationalization. This is a rule well established in international legal theory and practice.") (citation omitted); *Kuwait v. Am. Ind. Oil Co. (AMINOIL)*, 21 I.L.M. 976, 1019, ¶ 87 (Mar. 24, 1982) (considering the question "whether the nationalization of Aminoil was not thereby tainted with discrimination," but finding that there were legitimate reasons for nationalizing Aminoil and not the Arabian Oil Company); *see also* RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 712(1)(b) (1987) ("A state is responsible under international law for injury resulting from . . . a taking by the state of the property of a national of another state that . . . is discriminatory . . . ."); *id.* § 712 cmt. f ("Formulations of the rules on expropriation generally include a prohibition of discrimination . . . .").").

[166] *Id.* at 130-132; *see also Grand River*, Rejoinder pp. 69, 70 and 75.

F. Conclusive Remarks: Application of the Parties' FET/MST Arguments Outside the Context of NAFTA

In their submissions, all three NAFTA Parties defend the idea that the MST contained in NAFTA Article 1105 is equivalent to the customary international minimum standard of treatment. The Parties even go further in affirming that the expression FET contained in NAFTA Article 1105 comes from, and must be interpreted in the light of, customary international law. They also all agree - in more or less express terms depending on the country - that the MST is an umbrella concept that encompasses a set of defined customary international law rules.

All three NAFTA Parties also share the opinion and argue vigorously that the threshold for finding a violation of the customary international law MST is high, often quoting *Neer*[167] and using terms such as "egregious" and "shocking."[168] Moreover, both Canada and the United States argue that there is no requirement to protect legitimate expectations under the customary MST. Mexico does not make explicit arguments on that matter, but states that NAFTA Article 1105 must not be read so as to bar the State's regulatory power. Finally, Canada and the United States agree that the MST does not entail a protection against discriminatory action and lack of transparency.

The analysis of the submissions of the three Parties to NAFTA – thoroughly supported with relevant and convincing authority – establish a set of principles that are necessarily 'exportable' outside of the NAFTA context. For instance, the Parties skilfully defend the idea that the MST contained in NAFTA Article 1105 is equivalent to the customary international law standard, and that the concept of 'fair and equitable treatment' also refers to customary international law.

For that matter, the United States convincingly demonstrates that the customary nature of FET is confirmed by the historical context of the terms 'fair and equitable'.[169] This is made clear by relying the OECD's work, in particular the Commentary to the 1963 OECD Draft Convention on the Protection of Foreign Property, which states that the OECD members viewed at the time

[167] See above pp. 31-37.
[168] See above p. 32.
[169] See above p. 20

FET to be a customary standard under international law.[170] According to Patricia McKinstry Robin, the proliferation of BITs can be seen in different phases. The first phase is characterized by Germany and Switzerland's signature of the first BITs with least developed countries.[171] The second phase is marked by important European activity in the late 1960s and early 1970s with regards to the conclusion of BITs: "During the second stage, in the late 1960's and early 1970's, France, the United Kingdom, the Belgo-Luxembourg Economic Union, the Netherlands, and Norway entered the program (references omitted)."[172] There is therefore no doubt that theses countries – which were all OECD members at the end of the 1960s – had in mind to incorporate the CIL FET standard in their BITs.

Robin further states, in her article written during the mid-1980s, that, at the time, European BITs had become "one of the most common means of protecting foreign investments".[173] Again, these BITs were certainly intended to incorporate the customary international law standard. This period (the mid 1980s) also coincided with the launch of the American BIT program. In fact, the first prototype of American BIT was made in 1982.[174] One can therefore argue that this American prototype was strongly influenced by European BITs.[175] Gudgeon also states that the U.S. Model BIT "was specifically designed to dovetail with efforts of the OECD."[176] Therefore, it appears that the U.S. Model BIT contains the customary international law FET, in the image of the 1967 OECD Draft Convention.

It is thus evident that NAFTA Article 1105 incorporates a standard that is found in other International Investment Agreements. This idea is further strengthened by the similarity in language among many BITs. For instance, the 2004 United States Model BIT contains in its Article 5(1) language that is very close to that contained in NAFTA Article 1105: "Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."[177] Its earlier 1984 version

---

[170] *Id.*
[171] ROBIN, P. M., "The *BIT* Won't Bite: The American Bilateral Investment Treaty Program", *The American University Law Review*, 1984, vol. 33, p. 941.
[172] *Id.*
[173] *Id.* p. 942.
[174] *Id.* p. 933.
[175] *See* GUDGEON, K. S., "United States Bilateral Investment Treaties: Comments on their Origin, Purposes, and General Treatment Standards", *International Tax & Business Lawyer*, 1984, vol. 4, p. 110.
[176] *Id.* p. 111.
[177] United States Model BIT, 2004, available at <http://www.state.gov/documents/organization/117601.pdf>.

is somewhat different but also contains the same 'three component' structure (customary international law, FET, Full protection and security) found in NAFTA Article 1105:

> 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. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.[178]

The same 'three component structure' and the use of these same FET terms in the 1991 Argentina – United States BIT hints to the fact that the standard is the same as that contained in NAFTA: "Investment 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."[179]

The expression 'Fair and Equitable Treatment' simply stated comes up as well in the Argentina – Spain BIT in Article IV(1): "Cada Parte garantizará en su territorio un tratamiento justo y equitativo a las inversions realizadas por inversores de la otre Parte."[180]

The same expression is stated in the Argentina – Netherlands BIT: "Each Contracting Party shall ensure fair and equitable treatment to investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors"[181]; and in the Argentina – Switzerland BIT: "Chaque Partie Contractante assurera sur son territoire un traitement juste et équitable aux investissements des investisseurs de l'autre Partie Contractante."[182]

---

[178] United States Model BIT, 1984, available at < http://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website__faculty__faculty_profiles__jalvarez/documents/documents/ecm_pro_066871.pdf>

[179] Argentina – United States Bilateral Investment Treaty, 1991, article 2a).

[180] Argentina – Spain BIT at article IV(1), available at < http://www.unctad.org/sections/dite/iia/docs/bits/argentina_spain_sp.pdf>

[181] Argentina – Netherlands BIT, article 3(1), available at < http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_argentina.pdf>

[182] Argentina – Switzerland BIT, Article 3(2), available at < http://www.unctad.org/sections/dite/iia/docs/bits/switzerland_argentina_fr.pdf>

In all of these cases, the expression 'fair and equitable' is equivalent to that used in NAFTA Article 1105 and nothing in the text suggests that it could refer to a different standard. Moreover, tribunals should interpret similar language in provisions in different BITs as equivalent obligations. In fact, as stated by Schreuer:[183]

> At the simplest level, it seems plausible that identical or very similar wording in different treaties has the same meaning unless a different meaning can be gathered from the circumstances. The Tribunal in *Enron v. Argentina*[184] said to this effect
>
> > 47. ...Indeed, the interpretation of a bilateral treaty between two parties in connection with the text of another treaty between different parties will normally be the same, unless the parties express a different intention in accordance with international law. A similar logic is found in Article 31 of the Vienna Convention in so far as subsequent agreement or practice between the patties to the same treaty is taken into account regarding the interpretation of the treaty. There is no evidence in this case that the intention of the parties to the Argentina-United States Bilateral Treaty might be different from that expressed in other investment treaties invoked.[185]

Therefore, this reasoning established that NAFTA Article 1105 is exportable outside of the NAFTA context.

In its submissions, one of the Parties – Canada – states, contrary to the United States, that there could be different FET standards in different BITs.[186] However, these statements appear to have been made in an attempt to distinguish the case at hand with previous case law that had interpreted the FET obligation in given BITs in an extensive manner. Canada's contention that the FET obligation may be understood less restrictively in other BITs does not rely on any material evidence that the states party to these BITs would have had the intention to impose on each other a more stringent FET standard.

Therefore, for the reasons mentioned above, the analysis developed by the Parties and reviewed for the purpose of this memorandum is not limited to NAFTA Article 1105.

---

[183] SCHREUER, C., "Diversity and Harmonization of Treaty Interpretation" in FITZMAURICE, M. *et al.*,*Treaty Interpretation and the Vienna Convention on the Law of Treaties*, Martinus Nijhoff, Leiden, 2010.
[184] *Enron v. Argentina***,** Decision on Jurisdiction, 14 January 2004, n. 46.
[185] *Id.* n. 47 ("In the same sense: *Sempra Energy Intl v.* Argentina, Decision on Jurisdiction, 11May 2005 ¶ 144.").
[186] See *supra* pp. 11-12.

II. Standard Practice for the Expropriation of Rights and Contracts

This section will analyze the arguments of the State Parties to the NAFTA in regard to six issues within the ambit of the expropriation of rights and contracts, based on an analysis of the public submissions of the Parties. The six issues that will be examined are: 1) covered investments; 2) the test for indirect expropriation; 3) the regulatory taking/police power exclusion; 4) reasonable expectations; 5) circumstances under which a breach of contract may be elevated to a treaty claim; and 6) applicable law for the determination of contracts and property rights. The analysis will proceed country-by-country for each issue.

Expropriation under the NAFTA is governed by Article 1110, which states in its pertinent part:

> 1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1); and
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6.

This section will analyze the submissions of the State-party respondent in the following cases:

Cases filed against Canada	• *Chemtura* • *Gallo* • *Ethyl* • *Merrill & Ring* • *Pope & Talbot* • *S.D. Myers*

Cases filed against Mexico	• *Azinian* • *Cargill** • *Feldman* • *GAMI* • *Metalclad* • *Thunderbird* • *Waste Management II*
Cases filed against the United States	• *Glamis Gold* • *Methanex* • *Mondev*

* The submissions for *Cargill* are not publicly available; therefore, Mexico's positions in this case were analyzed vis-à-vis the Tribunal's recount of them in the Award.

This section concludes that the State Parties are in agreement over several interpretive issues regarding Article 1110, and their interpretation of these issues can be regarded as their belief of what customary international law is for the international law of expropriation, not just as it relates to interpretation of the NAFTA.

A. Covered Investments

In order for there to be an expropriation under Article 1110, there must be an "investment" capable of being expropriated. The term "investment" in the NAFTA is governed by Article 1139,[187] which all three Parties assert is a broad but exhaustive definition; this is now a

[187] Article 1139 states in its pertinent part:

Investment means:

(a) an enterprise;

(b) an equity security of an enterprise;

(c) a debt security of an enterprise

(i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise;

(d) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise;

(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

generally accepted principle in NAFTA jurisprudence.[188] All Parties agree that only investments under Article 1139 are capable of being expropriated under NAFTA.[189]

The three NAFTA Parties are largely in agreement that investments under Article 1139 cover tangible and intangible property, but not non-vested rights such as goodwill, market access, market share and customer base. Canada and the United States agree that such factors may be taken into consideration for purposes of valuation of an investment only. Mexico asserts that the three Parties have come to a subsequent agreement in this regard based on their NAFTA submissions and 1128 submissions. The Parties believe that their interpretations of "investment" goes beyond the NAFTA text and is a reflection of the standards under customary international law.[190]

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but investment does not mean,

(i) claims to money that arise solely from

(i) 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, or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or

(j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h).

[188] *See*, *e.g.*, *Gallo v. Canada*, Statement of Defence ¶ 208; *Pope & Talbot v. Canada*, Statement of Defence ¶ 154; *Pope & Talbot*, Counter-Memorial ¶ 469; *Chemtura v. Canada*, Rejoinder ¶ 253 ("The definition of 'investment' in Article 1139 is exhaustive. If the alleged interest is not specifically covered, then it does not constitute an 'investment' under NAFTA."); *Feldman v. Mexico*, Article 1128 Submission of Canada ¶ 22; *Feldman v. Mexico*, Counter-Memorial ¶¶ 310-311, 330; *Methanex v. United States*, Rejoinder Memorial on Jurisdiction p. 42.

[189] *Merrill & Ring v. Canada*, Counter-Memorial ¶¶ 725-26; *Feldman v. Mexico*, Counter-Memorial ¶ 325.

[190] *Methanex*, Rejoinder p. 44; *Pope & Talbot*, Counter-Memorial ¶¶ 381, 392; *Pope & Talbot*, Response of Canada to the Article 1128 Submissions; *Pope & Talbot*, First Article 1128 Submission of Mexico ¶ 36.

1. Canada

Canada maintains, in addition to the requirement that an investment fall under Article 1139 in order to be capable of being expropriated, that Article 1110 does not apply to investors; it applies only to "investments of investors of another party."[191] Canada recognizes that real property is an investment[192] under Article 1139, where investment is defined as "real estate, or other property, tangible or intangible."[193]

Canada notes that the NAFTA does not define "property,"[194] and that "[t]he ordinary meaning of 'property' is a thing or possession that a person or entity owns."[195] Canada asserts that under international law, "property" consists of a bundle of rights including "the right to use, the right to enjoy, and the right to destroy or dispose of the property."[196] Canada asserts that these rights "cannot be remote, uncertain, or contingent;"[197] that is, they must be vested rights. Canada further argues that an investor cannot recover damages for the expropriation of a right it never had,[198] and that "[t]he fundamental characteristics of property, be it tangible or intangible, include the ability to acquire, use and own that property to the exclusion of others."[199] Canada states that according to Article 1139, a tribunal may consider an enterprise, an equity security, a debt security, a loan, or an interest entitling its owner to share in income, profits, or assets upon dissolution as investments. These items share attributes in that they are concrete, definite interests that are liable to be bought, sold, traded or borrowed against.[200] Canada asserts that

[191] *Pope & Talbot*, Statement of Defence ¶ 155, 158.
[192] *Gallo*, Statement of Defence ¶ 207.
[193] *Id.* ¶ 208.
[194] *Id.* ¶ 208.
[195] *Chemtura*, Counter-Memorial ¶ 518. Canada does not cite a source for this definition.
[196] *Gallo*, Statement of Defence ¶ 209 (Canada does not cite any source); *Chemtura*, Counter-Memorial ¶ 518 (citing Higgins, Rosalyn, *The Taking of Property by the State: Recent Developments in International Law* (1982) 176 REC. DES COURS 259 at 270 ff; Wortley, B.A., EXPROPRIATION IN PUBLIC INTERNATIONAL LAW (New York: Cambridge University Press, 1959) at 50; *LIAMCO v. Libya* 62 I.L.R. 140 (1981) at 89-92). Canada goes on to argue the definition of "property" in the *Shorter Oxford Dictionary*: "that which ones owns; a thing or things belonging to a person or persons" and "the condition or fact of owning or being owned; the (exclusive) right to the possession, use or disposal of a thing, ownership" (SHORTER OXFORD ENGLISH DICTIONARY, 5th ed. (Oxford University Press, 2002) at 2369 (parenthesis in original)).
[197] *Gallo*, Statement of Defence ¶ 209.
[198] *Merrill & Ring*, Counter-Memorial ¶ 728 (favorably citing *Feldman* as standing for this principle).
[199] *Feldman*, Article 1128 Submission of Canada ¶¶ 24-25 and n. 21 (citing Bruce Ziff, *Principles of Property Law*, (Ontario: Carswell, 1996) pg. 72 for the principle that an owner of intangible property is able to exclude others from its use). *See also Chemtura*, Counter-Memorial ¶ 518 (stating that generally, property can be acquired, owned, and alienated by its owner).
[200] *Chemtura*, Counter-Memorial ¶ 515.

"examples of intangible property recognized at law include rights include trademarks, copyrights, patents and contract rights."[201]

Canada maintains that goodwill, market share, market access, and customers are not investments under Article 1139 and therefore cannot be expropriated.[202] Canada argues that "[c]ustomers, goodwill, and market share are not within the ordinary meaning of tangible or intangible property,"[203] and that "[a]ccess to the market of another NAFTA Party is not something that can be owned or used by an investor to the exclusion of others and therefore lacks the fundamental characteristics of property."[204] Further, Canada asserts that the other NAFTA parties agree with this assessment of what comprises an investment under Article 1139.[205] Canada considers that goodwill is not a vested right, since it cannot stand alone,[206] and that goodwill is rather an element of the value of the enterprise.[207]

Canada argues that the investment must be considered as a whole, instead of isolated "interests."[208] Canada further states that *Pope & Talbot*, *Methanex* and *Feldman* all support the argument that the investment should be "considered as a whole and not artificially parsed for the purpose of an expropriation claim."[209] Further, Canada asserts that this is the standard outside of NAFTA as well:

> Outside of the NAFTA context, other international investment tribunals have also found that an investment must be considered as a whole, and that discrete parts of a

[201] *Feldman*, Article 1128 Submission of Canada ¶ 25. Canada offers no insight as to what "law" it is referring to.
[202] *Chemtura*, Counter-Memorial ¶¶ 500, 505, 510 (favorably citing *Feldman v. Mexico* for establishing that customer base, goodwill and market share are not, in and of themselves, investments and instead may be relevant in the valuation of an enterprise), 516.
[203] *Id.* ¶ 519.
[204] *Feldman*, Article 1128 Submission of Canada ¶ 24.
[205] *Chemtura*, Counter-Memorial ¶ 515.
[206] *Merrill & Ring*, Rejoinder ¶ 257 (citing GILLIAN WHITE, NATIONALISATION OF FOREIGN PROPERTY (Stevens & Sons Limited, 1961) at 49: "[T]he notion of goodwill is too vague to be regarded as a separate property right apart from the enterprise to which it is attached.").
[207] *Id.*; *id.* ¶ 264 ("The Investor provides no authority to support its position that certain elements of an enterprise, such as goodwill or access to the U.S. market, are distinct investments capable of expropriation on their own right.")
[208] *Id.* ¶ 260 ""The Investor's attempts to isolate the alleged 'interest in selling logs at a fair market value on international markets' should not be allowed to distract from the true nature of Merrill & Ring's investment in Canada.").
[209] *Id.* ¶ 264; *Chemtura*, Counter-Memorial ¶ 507 ("[T]he Claimant cannot artificially isolate aspects of its business and claim that these pieces constitute a stand-alone investment under Article 1139.")

> larger investment cannot be parsed for the purposes of analyzing the obligations a State has assumed under a bilateral investment treaty (BIT).[210]

Canada addresses the question of whether "interests" are covered under Article 1110 in *Chemtura*. It is interesting to note that Canada extended its analysis beyond the examination of whether the "investment" is covered under Article 1110 by virtue of whether it is defined as such under Article 1139; Canada seems to use "investment" and "interest" interchangeably in the *Chemtura* Counter-Memorial,[211] before ultimately concluding that the "interest" must be within the scope of definition of "investment" in Article 1139 to be the subject of an expropriation under Article 1110.

Canada concedes that international law "has long recognized that some contractual rights, although intangible, constitute property and are capable of being expropriated."[212] Canada asserts that an example of this is reflected in Article 1139(h), which provides that interests such as concession contracts and "the like" constitute investments under NAFTA, and notes that most arbitral decision in this regard concern the expropriation of long-term concession contracts for the exploitation of natural resources.[213]

2. Mexico

Mexico considers that the NAFTA Parties are in agreement in regard to the scope of "investments" under Article 1139; that is, only the investments listed in Article 1139 are capable of being expropriated and afforded protection under NAFTA.[214] Mexico states that because of the

---

[210] *Chemtura*, Counter-Memorial ¶ 511 (citing *Eastern Sugar v. Czech Republic* and *Joy Mining v. Egypt*). Canada also references the works of Professor Gillian White (NATIONALISATION OF FOREIGN PROPERTY (London : Stevens and Sons, Ltd. 1961) at 49) in paragraph 525 and *Oscar Chinn (UK v. Belgium)* (1934) P.C.I.J. (Series A/B) No. 63, 88) in paragraph 526.

[211] *See id.* ¶ 503, where Canada lays out the methodology it believes the Tribunal should take when addressing a Article 1110 claim (the first step being "Is there an investment capable of being expropriated") and ¶ 505 ("the first step in determining whether Article 1110 has been breached is to determine whether here is an interest capable of being expropriated.").

[212] *Merrill & Ring*, Rejoinder ¶ 251; *see also Pope & Talbot*, Counter-Memorial ¶¶ 473-74 ("Examples of intangible property rights recognized under Canadian law include trademarks, copyrights, patents and contract rights. Intangible property is capable of being acquired and owned by a person. An owner of intangible property is able to exclude others from its use. Unlimited access to the market, as opposed to a contractual right to access a market, is not property. No one can acquire, own or alienate such a right.").

[213] *Id.* Canada does not cite the arbitral awards it is referring to.

[214] *See Feldman*, Counter-Memorial ¶¶ 312-19 (citing the stances taken by the Parties in: *Methanex*, United States Memorial on Jurisdiction and Admissibility pp. 31, 33, and 36; *Methanex*, Reply Memorial of Respondent United

agreement of the three NAFA Parties in regard to this scope, there is, in accordance with Article 31(3)(a) and (b) of the VCLT, "clear subsequent agreement and practice between the Parties to the Treaty regarding the interpretation of the treaty or the application of its provisions."[215]

Mexico states that under Article 1139, the mere expectation of future profits is not an investment, and neither are intangibles such as market share and goodwill.[216] Mexico further argues that a party must have a "domestic legal right to a claim" in order for that right to have been expropriated.[217]

Like Canada, Mexico likewise recognizes that in some circumstances, contract rights may be expropriated under international law.[218] Those circumstances include when there has been an absence of domestic legal remedies, discrimination, and a non-commercial motivation for the termination of a contract.[219]

States of America on Jurisdiction, Admissibility and the Proposed Amendment p. 40; *Methanex*, Article 1128 Submission of the Government of Canada ¶¶ 58-59, 62; *Methanex*, Article 1128 Submission of the United Mexican States ¶¶ 23-24).

[215] *Id.* ¶ 319.

[216] *Id.* ¶ 318; *Cargill*, Award ¶ 333 ("Respondent quotes *Methanex* for support of its position: The USA is correct that Article 1139 does not mention the items claims by Methanex [goodwill, market share and customer base]. But in *Pope & Talbot Inc. v. Canada*, the tribunal held that 'the Investor's access to the U.S. market is a property interest subject to protection under Article 1110.' Certainly, the restrictive notion of property as a material 'thing' is obsolete and has ceded its place to a contemporary conception which includes managerial control over components of a process that is wealth producing. In the view of this Tribunal, items such as goodwill and market share may, as Professor White wrote, 'constitute an element of the value of an enterprise and as such may have been covered by some of the compensation payments.' Hence in a comprehensive taking, these items may figure in valuation. But it is difficult to see how they might stand alone, in a case like the one before the Tribunal.").

[217] *Feldman*, Counter-Memorial ¶ 379 ("For the October-December 1197 rebates to have been "expropriated, CEMSA had to have a domestic legal right to them."). It must be noted that Mexico specifically included a footnote after this statement: "This argument leaves aside the Article 1139 definition of investment issue." Mexico argues this within the context of arguing that there exists an "exhaustion of local remedies" rule and that a NAFTA tribunal had no jurisdiction over a matter *sub judice* (¶ 383: "As this issue is *sub judice*, for obvious reasons, including the limits on this Tribunal's jurisdiction and the embarrassment that could occasion were the international tribunal to make premature determinations that were inconsistent with those made by the domestic courts, no finding of expropriation can be made."); *See also* ¶ 264 ("Mexico recognizes that a domestic court decision on a matter at issue cannot preclude an international tribunal from finding a breach of international law; however, where the elements of the international wrong require the denial of a right recognized in domestic law, the domestic courts' resolution of whether the alleged right exists is authoritative because domestic courts are best equipped to interpret domestic law."); ¶ 371 ("Generally, the international responsibility of a State cannot be engaged unless the measure complained of has been tested at municipal law and thus become final by pronouncement of the highest competent authority.").

[218] *Azinian*, Counter-Memorial ¶¶ 268-270; *Cargill*, Award ¶ 329 (stating that the Respondent contests that a "business opportunity" is an interest "arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory" and that there is no evidence that the interest in question is the type of contract envisioned by Article 1139).

[219] *Azinian*, Counter-Memorial ¶¶ 265-70.

3. United States

The United States agrees that Article 1139 provides an exhaustive list of what may constitute an investment for the purposes of Chapter Eleven, and that at customary international law, a property right or interest must have been taken in order for there to be an expropriation.[220] The United States, in conformity with the views of the other Parties, maintains that market share, goodwill, market access, expectation of future profits and customer base are not property rights or interests, and thus investments capable of being expropriated under Article 1139.[221] Further, the United States argues that they are not property rights or interests that may be the subject to expropriation in customary international law.[222]

For example, in *Methanex*, the United States argues that Methanex did not have an "investment" in the meaning of Article 1139,[223] and that therefore the claim did not fall under the consent of the United States to arbitration.[224] The United States argues that a "business," the original manner by which Methanex defined its investment, does not fall under Article 1139;[225] Methanex subsequently amended its claims to include "enterprise," which the United States concedes is covered by Article 1139,[226] and "market share, goodwill, market access, operations,

---

[220] *Methanex*, Amended Statement of Defense ¶ 392 and n. 621 (referring to Higgins, Rosalyn, *The Taking of Property by the State: Recent Developments in International Law*, 3 R.C.A.D.I. 176, 272 (1983); Dolzer, Rudolph, *Indirect Expropriation of Alien Property*, 1 ICSID REV. F.I.L.J. 41, 41 (1986)). The United States does not expound on what a "property interest" is, merely citing the Free Trade Agreement between Chile and the United States of 6 June 2003 ("An action or series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible *property* right or *property* interest in an investment." (emphasis added by the United States in the footnote)).

[221] *Methanex*, Rejoinder p. 43; *Methanex*, Memorial on Jurisdiction and Admissibility p. 33; *Methanex*, Amended Statement of Defense ¶ 393-394 (citing *Oscar Chinn (U.K. v. Belg.)* 1934 P.C.I.J. ser. A/B, No. 63, 65 (Dec. 12) as having rejected that goodwill and market share are by themselves, property interests that can be expropriated).

[222] *Methanex*, Rejoinder p. 44; *Methanex*, Amended Statement of Defense,¶ 393 and nn. 622-625(citing Gillian White, Nationalisation of Foreign Property 49 (1961); American Society of International Law, The Iran-United States Claim Tribunal: Its Contribution to the Law of State Responsibility 196-97 n. 33 (Richard Lillich & Daniel Magraw eds.), 1998 (citing, *inter alia*, Allahyar Mouri, International Law of Expropriation as Reflected in the Work of the Iran-US Claims Tribunal 58-60 (1994; Rudolf L. Bindschedler, *La protection de la propriété privée en droit international public*, 90 R.C.A.D.I. 179, 223-24 (1956)); *Oscar Chinn (U.K. v. Belg.)* 1934 P.C.I.J. ser. A/B, No. 63, 65, 88 (Dec. 12) ("Favourable business conditions and goodwill are transient circumstances, subject to inevtiable change."); *SA Biovilac NV & European Economic Comm'y*, Case 59/83), [1984] E.C.R. 4057 ¶ 22 (1984); *Kügele (Germ. V. Pol.)*, *reprinted in* Ann. Dig. 1931/32 69 (Upper Silesian Arbitral Tribunal 1932).

[223] *Methanex*, Rejoinder Memorial on Jurisdiction p. 42.

[224] *Methanex*, Statement of Defense ¶ 127.

[225] *Id.*

[226] *Methanex*, Reply Memorial on Jurisdiction, Admissibility, and Proposed Amendment pg. 39.

and customer base," which the United States maintains is not a covered investment.[227] The United States criticizes the decisions in *Pope & Talbot* and *S.D. Myers* to the extent that they can be construed as holding that market access is a property right as contrary to established international legal authority,[228] and argue that neither decision determined that market share constitutes a property right.[229]

Similarly to Canada, the United States concedes that attributes, such as customer base, goodwill and the number of advanced degrees held by the enterprise's employees, can be considered when appraising the value of an expropriated enterprise under Chapter Eleven, but that it does not follow that they are therefore property, especially since they cannot be bought, sold, transferred or expropriated.[230] The United States considers that these intangibles can be the fruits of an investment, but cannot be considered on their own as an investment in a meaningful sense under Articles 1139 and 1110.[231] Further, the United States considers that this is customary international law: "[T]here is ample support for the United States' view that, under customary international law, although goodwill, market share and customer base may all be taken into

---

[227] *Methanex*, Counter-Memorial ¶ 150; *Methanex*, Reply Memorial on Jurisdiction, Admissibility, and Proposed Amendment pp. 39-40; *Methanex*, Rejoinder Memorial on Jurisdiction p. 42; *Methanex*, Amended Statement of Defense ¶ 387.

[228] *Methanex*, Reply Memorial on Jurisdiction, Admissibility, and Proposed Amendment pp. 40-41 ("Neither award, however, supports Methanex's position. Furthermore, to the extent that their analyses deviate from well-established legal authority, this Tribunal should decline to follow those decisions.."). The United States does not specify which "well-established international legal authority" it is referring to, but seems to be referencing the doctrine it cited in support of its argument that market share, market access and goodwill are not investments within the meaning of Chapter Eleven and thusly not protected by Article 1110 – mainly *Oscar Chinn*, *SA Biovilac v. European Economic Commt'y*, *Kügele v. Polish State (Ger. V. Pol.)*, GILLIAN WHITE, NATIONALISATION OF FOREIGN PROPERTY 49 (1961), and Rudolf L. Bindschedler, *La protection de la propriété privée en droit international public*, 90 R.C.A.D.I. 179, 223-24 (1956)). Mexico likewise criticizes the decisions in *Pope & Talbot* and *S.D. Myers* in its Article 1128 submission: "Mexico adds that to the extent that the decisions in *Pope & Talbot* and *S.D. Myers* can be interpreted as supporting Methanex's position, they are incorrect and should not be followed because they failed to interpret Article 1139 correctly." *Methanex*, Article 1128 Submission of the Mexico ¶ 24. Likewise, Canada in its Article 1128 Submission to *Feldman* states that the Tribunal in *Pope & Talbot* erred to the extent that the Tribunal equated "market access" to intangible property. *Feldman*, Article 1128 Submission of Canada ¶ 24.

[229] *Methanex*, Reply Memorial on Jurisdiction, Admissibility and Proposed Amendment pp. 41-42. The United States asserts that *Pope & Talbot* did not address the issue market share, only market access and that the *S.D. Myers* Tribunal did not hold that the investment's market share constituted a property right, but rather that the Tribunal did not address the issue and merely noted in *dictum* that "in legal theory, rights other than property rights may be expropriated" but did not cite supporting authority.

[230] *Id.* at 42; *Methanex*, Amended Memorial on Jurisdiction, p. 43 (citing GILLIAN WHITE, NATIONALISATION OF FOREIGN PROPERTY 49 (1961) as support).

[231] *Methanex*, Reply Memorial on Jurisdiction, Admissibility, and Proposed Amendment p. 42.

account when valuing a business, those items, by themselves, are not capable of being expropriated."[232]

The United States also argues that an allegation that an investment's profits have diminished as a result of a regulatory action is insufficient to support a claim for an expropriation,[233] and favorably cites *S.D. Myers*,[234] *Feldman*[235] and *Pope & Talbot*[236] as establishing this principle, which it considers to be "well-settled" international law.[237]

B. Test for Indirect Expropriation

Direct expropriations are no longer common, and so most expropriation disputes under NAFTA involve "indirect expropriation" or "measures tantamount to expropriation." All three NAFTA Parties agree, and it is part of established NAFTA jurisprudence, that the phrase "measure tantamount to expropriation" does not expand the scope of expropriation beyond that of

---

[232] *Methanex*, Rejoinder p. 43 (citing GILLIAN WHITE, NATIONALISATION OF FOREIGN PROPERTY 49 (1961) ("[T]he notion of goodwill is too vague to be regarded as a separate property right apart from the enterprise to which it is attached. This assumption gains support from the complete absence of any reference to goodwill or business reputation in any of the post-war decrees or compensation agreements examined by the writer. The most that can be said is that goodwill constitutes an element of the value of an enterprise and as such may have been covered by some of the compensation agreements.").

[233] *Methanex*, Amended Statement of Defense ¶ 401.

[234] *Id.* ¶ 298 (quoting *S.D. Myers* Partial Award ¶ 281: "the general body of precedent usually dos not treat regulatory action as amounting to expropriation.")

[235] *Id.* ¶ 398 (quoting the *Feldman* Award ¶ 112: "[G]overnments must be free to act in the broader public interest through protection of the environment . . . . Reasonable government regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this" and "[N]ot all government regulatory activity that makes it difficult for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is an expropriation under Article 1110.")

[236] *Id.* ¶ 400 (quoting *Pope & Talbot* Interim Award of June 26, 2000 ¶ 81: "Even accepting (for the purposes of this analysis) the allegation of the Investor concerning diminished profits, the Tribunal concludes that the degree of interference with the Investment's operations due to the Export Control Regime does not rise to an expropriation (creeping or otherwise) within the meaning of Article 1110. While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether the test is restrictively sufficient to support a conclusion that the property has been 'taken' from the owner.")

[237] *Id.* ¶ 397 (quoting B.A. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 50 (1959) "Whatever may be the remedy of foreigners caught by general changes in the law, if those changes do not in fact dispossess them but merely lessen the value of their holdings or expectations, in the general interest, then bona fide changes in the public interest will not be confiscations, since the owners are left in possession of their property . . . ."; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 535 (1998) ("State measures, prima facie a lawful exercise of powers of government, may affect foreign interest considerable without amounting to expropriation"); G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT'L L. 307, 335 (1962).

international law to create a third and separate category of expropriation.[238] Rather, "measure tantamount to expropriation" means "equivalent to"[239] and is generally treated by tribunals as being the same as indirect expropriation. Therefore, a lot of discussion revolves around the proper test for indirect expropriation and the standards for its constituent parts, especially in regard to the amount of interference or deprivation necessary for a finding of "expropriation."

Canada and Mexico agree on the test for indirect expropriation, while the United States advances its own approach for indirect expropriation, at least in the context of regulatory indirect expropriation, under NAFTA and international law. Nevertheless, all Parties agree that there needs to be a "deprivation," and generally they concur that this deprivation must be "substantial" so as to render the property practically "useless," and that mere interference with a property right is not enough for a finding of expropriation.

1. Canada

Canada agrees with the definition of indirect expropriation that was formulated by the Iran-US Claims Tribunal in *Starrett Housing*:

> It is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.[240]

Canada maintains throughout its submissions that an expropriation occurs when the requirements of Article 1110(1)(a) through (d) are met.[241] Canada asserts that there are three fundamental elements for a finding of indirect expropriation: 1) the action at issue must result in a fundamental interference with or deprivation of the investor's property or property rights; 2) such interference or deprivation is not temporary; and 3) the expropriatory effects are attributable

[238] *Chemtura*, Counter-Memorial ¶ 533. *Pope & Talbot*, Counter-Memorial ¶¶ 384-85, 388; *Pope & Talbot*, First Article 1128 Submission of Mexico ¶¶ 43-44 (stating that if the Parties had intended to create a third category of expropriation, they would have provided for it explicitly in the language of Article 1110); *Glamis Gold*, Counter-Memorial pp. 159-60 fn. 739.
[239] *Pope & Talbot*, Counter-Memorial ¶ 387; *Pope & Talbot*, First Article 1128 Submission of Mexico ¶ 39.
[240] *Chemtura*, Counter-Memorial ¶ 534.
[241] *See*, *e.g.*, *Pope & Talbot*, Counter-Memorial ¶ 359.

to the State. Canada consistently argues that the level of deprivation must be "substantial" in order for a finding of expropriation under Article 1110, which it also believes is the level of interference or deprivation required for an expropriation in international law.[242]

Similarly, in *Gallo*, Canada states that the standard of deprivation under international law is "total or substantial deprivation of fundamental rights of ownership in an investment."[243] Canada asserts that the government measure must interfere with the investment sufficiently "to support a conclusion that the property has been 'taken' from the owner."[244] Further, Canada argues that the level of deprivation required to find "substantial deprivation" is very high.[245] In *Merrill & Ring*, Canada argues that the kind of interference required to find an expropriation must be of a certain nature: "[I]nterference [must be] with the very fundamental aspects of an investment (i.e. its control, management of day-to-day operations, administration, distribution of dividends, appointment of officers, and ownership of property)."[246]

In *Pope & Talbot* and *S.D. Myers*, Canada asserts that governments are not required in international law to compensate investors for mere interference with their property rights, but that there must be an unreasonable interference with the use, enjoyment, and disposal of property;[247] that is, there must be a "significant degree of deprivation of fundamental rights of ownership."[248] Canada states the denial of "some benefit" associated with property will not be sufficient for a

---

[242] *Merrill & Ring*, Counter-Memorial ¶ 731; *Chemtura*, Counter-Memorial ¶ 531.
[243] *Gallo*, Statement of Defence ¶ 217.
[244] *Merrill & Ring*, Counter-Memorial ¶ 733 (quoting *Pope & Talbot*, Interim Award ¶ 102).
[245] *Id.* ¶ 734.
[246] *Id.* ¶ 745.
[247] *Pope & Talbot*, Counter-Memorial ¶ 378 (citing M. Sornarajah, *International Law on Foreign Investment* (Cambridge: Cambridge University Press, 1994) p. 282; R. Higgins, "The Taking of Property by the State: Recent Developments in International Law" (1982) 176 Rec. des Cours 259, 271 ("[t]he tendency is for a diminution in value to remain uncompensated, so long as the rights of use, exclusion and alienation remain."); Harvard Draft, Article 10(3) of *The Draft Convention on the International Responsibility of States for Injuries to Aliens* as cited in L.B. Sohn and R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens* (1961) 55 A.J.I.L. 545, 553 (noting that the Harvard Draft defines the standard as "*unreasonable* interference with the use, enjoyment, or disposal of property so as to justify an interference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of the interference."); *Starrett Housing v. Islamic Republic of Iran*, 4 Iran-U.S. C.T.R. 122, 154-155 (1983) (noting the standard for expropriation was whether property rights had been interfered with to "such an extent that these rights are rendered so useless that they must be deemed to have been expropriated."); *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, 6 Iran-U.S. C.T.R. 219, 225-226 (1984) (noting that the operative standard was deprivation of the "fundamental rights of ownership" for an extended period of time.")).
[248] *Id.* ¶ 372-73 ("[A]n actual interference with fundamental ownership rights is the most rudimentary pre-requisite to a finding of expropriation . . . . Mere interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required.").

finding of expropriation,[249] but instead property rights have to have been interfered with to such an extent that the rights are "so useless" that they must be deemed expropriated.[250]

Similarly, in *S.D. Myers*, Canada argues that in regard to "deprivation," the property rights must be rendered "useless" or the investor must be deprived of "fundamental rights of ownership" - use, enjoyment, and disposal of property - for an extended period of time (although it notes there is no "magic number").[251] Canada concedes that a temporary measure can ripen into an expropriation over time, but that this only happens at the point where there has been a definitive assumption of control on the part of the government.[252] The denial of "some benefit" associated with property is therefore not sufficient for a finding of expropriation and governments are not required to compensate investors for mere interference with property rights.[253] Canada also argues that "at international law, an act of compulsion by the expropriating State is essential to a finding of expropriation."[254]

2. Mexico

Mexico asserts that there are three elements that must be fulfilled for a finding of expropriation which are very similar to the elements that Canada advances (prong 1 and 2 vary slightly): 1) the action at issue results in the substantial interference or deprivation of the investors property or property rights; 2) such interference or deprivation is permanent or irreversible; and 3) the expropriatory effect is attributable to the State.[255] Mexico argues that if

---

[249] *Id.* ¶ 376.
[250] *Id.* ¶ 379.
[251] *S.D. Myers*, Counter-Memorial ¶¶ 408, 414.
[252] *Id.* ¶ 408.
[253] *Id.* ¶ 412.
[254] *Chemtura*, Counter-Memorial ¶ 500.
[255] *Metalclad*, Counter-Memorial ¶ 893 (citing, for prong 1: Mapp, W., *The Iran-United States Claim Tribunal, The First Ten Yeras 1981-1991*, (Manchester University Press, Manchester and New York, 1993) pp. 152 and 153; *Starrett Housing Corporation, Starret Systems, Inc., Starrett Housing International, Inc. V. the Government of the Islamic Republic of Iran*, *Bank Marzaki Iran*, *Bank Omran*, *Bank Mellat*, Internlocutory Award No. I.T.L. 32-24-1 [4 Iran-U.S. C.T.R. 122] of 19 December 1983, 85 *International Law Reports* 359, at page 390; and *Tibbetts Abbett, Mcarthy, Stratton v. TAMAS0AFFA Consulting Engineers of Iran*, et al. (Case No. 7) AWD 141-7-2 [6 Iran-U.S. C.T.R. 219] o f29 June 1984, at page 225; for prong 2: Sohn and Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 A.J.I.L. 550 (1961); *International Technical Products Corporation and ITP Export Corporation v. The Government of the Islamic Republic of Iran and its Agencies*, et al., Award No. 196-302-3 [Iran-U.S. C.T.R. 206] of 28 October 1985, at 240-41; for prong 3: Aldrich, G., *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claim Tribunal*, 88 A.J.I.L. 585 (1994) at 590, 598, 602, and 603; Brower, C.N., *Current Developments in the Law of Expropriation and Compensation: A Preliminary Survey of*

the Claimant cannot identify the date on which the "alleged expropriation crystallized," the Claimant's expropriation case loses muster.[256]

In regard to "deprivation," Mexico maintains that a fundamental principle of the law of expropriation is that there must have been a permanent deprivation of the investor's interests,[257] and that only State actions that interfere substantially with vested rights or deny ownership rights in a permanent manner can be said to give rise to liability to compensate.[258] According to Mexico, a vested right is absolute, in the sense that it does not depend on any condition,[259] and that mere interference with property or property rights are not within the ambit of Article 1110.[260] Mexico contends that permanent deprivation means that all of the economic use and enjoyment of the property is taken, not just its optimal use.[261]

Mexico lists a series of factors that a tribunal should consider when determining whether there has been an expropriation, including: whether there was a joint venture agreement, a transfer of land, a contractual commitment to secure approvals and to irrevocably transfer certain right such as the right of usufruct.[262] Mexico considers that the following factors could indicate that there has been an expropriation: intervention by armed troops or revolutionary guards, threats against the person of the investor's employees, expulsion of management or employees, appointment by the State of a manager or custodian, the taking of a vested right, interference with managerial or financial affairs, and arbitrary regulation.[263]

Awards of the Iran-United States Claims Tribunal, The Int'l Lawyer 639 (1987) at 641; Comeaux, P.e. and Kinsella, N.J., Protecting Foreign Investment Under International Law: Legal Aspects of Political Risk (Oceanan Publications, Inc.); *Cargill*, Award ¶¶ 322-323.

[256] *Metalclad*, Counter-Memorial ¶ 902 ("Perhaps most tellingly, the Claimant cannot point to the date on which the alleged expropriation crystallized."); ¶ 904 ("[i]t is clear that the actions at issue in this case do not fit within the class of actions having expropriatory effect in the terms of (i) the degree of interference, (ii) the attribution of any losses to acts of the State, and (iii) the existence of some action that crystallizes the expropriatory effect.").

[257] *Metalclad*, Escrito de Dúplica ¶ 176.

[258] *Id.* ¶ 186.

[259] *Id.*

[260] *Feldman*, Counter-Memorial ¶ 330.

[261] *Metalclad*, Post-Hearing Submission ¶ 254.

[262] *Id.* ¶ 268.

[263] *Id.* ¶¶ 298-299.

With regard to the duration of the interference, Mexico contends that there is no category of "temporary" expropriations.[264]

In *Azinian*, Mexico addresses the expropriation of contracts in international law. Mexico states that there are three general indicia of an expropriation: 1) the absence of domestic legal remedies; 2) evidence of discrimination; and 3) non-commercial motivation (that is, was the termination of the contract motivated by concerns of poor performance of key obligations and material misrepresentations, or for extrinsic non-commercial considerations).[265]

In *GAMI*, the question was whether an admitted direct expropriation of a Mexican-owned company (GAM) had the effect of being a measure tantamount to expropriation for its shareholders (GAMI). Mexico argues that the only investment that GAMI could identify were its shares, and the only effect of the expropriation on the shares was their loss of value.[266] Mexico argues that if the Tribunal were to find there were an indirect expropriation as a result of the expropriation, that finding would effectively create an obligation in the NAFTA to expropriate, because, each time a State lawfully exercised its sovereign regulatory/police power by expropriating for the public purpose, it would also be required to indirectly expropriate the foreign investments associated with it, and therefore be liable to pay double compensation.[267] Mexico contends that this would transform the NAFTA from an investment protection treaty to a treaty for the bailout of foreign investors at the cost of governments.[268]

3. United States

[264] *Cargill*, Award ¶ 341 (Respondent counters that no such category of "temporary expropriation exits. Respondent cites to numerous NAFTA arbitral awards that it reads to require a permanent deprivation of the economic value of Claimant's investment. Specifically, Respondent quotes the NAFTA arbitral award, that of *Firemen's Fund*, in which the tribunal held: "The taking must be . . . permanent and not ephemeral or temporary.").
[265] *Azinian*, Counter-Memorial ¶¶ 266-270 (citing the Restatement (Third) of Foreign Relations Law of the United States Section 712(2); Mexico submits that this section of the Restatement is generally consistent with the approach taken by international tribunals (Mexico does not elaborate on which tribunals)). It is interesting to note that in regard to the Restatement (Third) of Foreign Relations, Canada asserts that it is *not* a reflective of international law that is accepted by the international community in regard to what constitutes an expropriation. *Feldman*, Article 1128 Submission of Canada ¶¶ 15-16.
[266] *GAMI*, Réplica Posterior a la Audencia ¶ 37.
[267] *Id.* ¶¶ 40-41.
[268] *Id.* ¶ 42.

The United States advances a three-part test for indirect regulatory expropriation. The United States argues that the test is a factual inquiry into the circumstances of a particular case, which involves examining: 1) the economic effect of the action on the Claimant's property; 2) the extent to which the government action interferes with the Claimant's reasonable investment-backed expectations; and 3) the character of the government action.[269] According to the United States, "[b]ecause the inquiry in an expropriation case is so fact specific, and because the three factors listed above are not necessarily the only factors to be considered, the factors are to be balanced, with no factor necessarily receiving more weight than any other."[270] The United States asserts that the Claimant bears the burden of proof,[271] and that the government's actions are presumed to be non-expropriatory.[272]

In regard to the first prong, which the United States feels is often the dispositive factor,[273] the United States argues that the Claimant must be divested of fundamental rights of ownership and the rights must be rendered valueless for there to be an expropriation.[274] For example, in *Glamis Gold*, the United States argues that:

---

[269] *Glamis Gold*, Counter-Memorial pg. 160; *Glamis Gold*, Rejoinder p. 54.
[270] *Glamis Gold*, Rejoinder p. 54.
[271] *Id.* at 54-55 ("A claimant challenging governmental action as expropriatory 'bears a substantial burden.' [citing *E. Enters v. Apfel*, 524 U.S. 498, 520 (1998) (citing *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989)] Determining whether governmental regulatory action constitutes an expropriation involves 'ad hoc, factual inquiries' [citing *Penn Cent. Trasnp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)] and weighing of several factors, including: (1) the economic impact of the regulation; (2) the regulation's interference with reasonable investment-backed expectations; and (3) the character of the governmental action [citing 2004 U.S. Model Bilateral Investment Treaty, ann B ¶ 4; Free Trade Agreements, U.S. – Sing., State Dept. No. 04-36, Exchange of Letters of May 6, 2003, ¶ 4(a); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978)"; *id.* at 55: "Glamis, not the United States, bears the burden of proving that an indirect expropriation has occurred." [Citing UNCITRAL Arbitration Rules, art. 24(1) ("[E]ach party shall have the burden of proving the facts relied on to support his claim or defence"); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS & TRIBUNALS 327 (1987) ("International judicial decisions are not wanting which expressly hold that there exists a general principle of law placing the burden of proof upon the claimant and that this principle is applicable to international judicial proceedings."); *id*. at 334 ("[T]here is in substance no disagreement among international tribunals on the general principle that the burden of proof falls upon the claimant, *i.e.* the plaintiff must prove his contention under penalty of having his case refused." [Internal quotations omitted in original]); Jacomjin J. Van Hof, Commentary on the UNCITRAL Arbitration Rules 160-61 nn. 298-99 (1991)).
[272] *Id.* at 55 (citing M. SORNARAJAH, INTERNATIONAL LAW ON FOREIGN INVESTMENT 385 (2d ed. 2004) ("The starting point must always be that the regulatory interference is presumptively non-compensable."); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 535 (6th ed. 2003) ("State measures, prima facie a lawful exercise of powers of government, may affect foreign interests considerably without amounting to an expropriation."); *Mabo v. Queensland* (1988 83 A.LR. 14 (Austrl.) ¶ 11) (noting a "strong presumption against a legislative intent to confiscate or extinguish vested property rights or interests or land without compensation.").
[273] *Id.* at 56.
[274] *Glamis Gold*, Counter-Memorial p. 161.

> It is a fundamental principle of international law that, for an expropriation claim to succeed, the Claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such an a similar extent and so restrictively as "to support a conclusion that the property has been 'taken' from the owner."[275]

The United States favorably cites *CMS v. Argentina* for the proposition that the enjoyment of the property must be effectively neutralized, and *Starrett Housing v. Iran* for the notion that "'only when the State interferes with property rights to such an extent that these measures are rendered useless' may the measures be deemed expropriatory."[276]

Likewise, in *Methanex*, the United States argues that to find an indirect expropriation, the actions in question must interfere with the use, enjoyment, and disposition of an investor's investments.[277]

The second prong of the United States three-part test will be addressed in part II(D). It is worth noting that the United States generally addresses reasonable expectations in its analysis of whether there has been an indirect expropriation, whereas Mexico and Canada tend to address it in their discussions regarding the regulatory taking/police power exception.

In regard to the third prong, the inquiry involves a consideration of whether the government action constituted a physical invasion or whether it merely impacted property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good, such as, e.g., regulation."[278] Even if those rights are vested, the United States argues, the government may still impose regulatory constraints and the power can be very broad depending on the character of the property rights at issue.[279]

C. Regulatory/Police Power Exclusion

[275] *Id.* at 161 (citing *Pope & Talbot*, Interim Award).
[276] *Id.*
[277] *Methanex*, Statement of Defense ¶ 146.
[278] *Glamis Gold*, Counter-Memorial p. 195.
[279] *Id.* at 196.

The NAFTA Parties all agree that there is a regulatory/police power exclusion in the NAFTA and in customary international law. All three NAFTA Parties assert that there is a line between regulatory measures that are within a State's sovereign "regulatory/police power" – i.e. a non-discriminatory regulation for a public purpose, such as protection of health, safety or the environment – and compensable expropriation in both the NAFTA and in international law. A proper regulatory taking will result in no compensation for the affected party, whereas a measure that is not the exercise of the State's police power is a compensable expropriation. Therefore, the most contentious issue is what constitutes a non-compensable regulatory taking.

All three NAFTA Parties agree that a discriminatory measure would be contrary to the valid exercise of the police power. Canada and Mexico further contend that an "arbitrary" measure would likewise be a compensable action,[280] whereas the United States does not seem to recognize the notion of arbitrariness in this context. All three Parties agree that the exercise of this power involves regulations in the "public interest" or for a "public purpose," which they argue are measures aimed at the public safety, health and the environment. It should be noted that Mexico uses the terminology "right of regulation" whereas the United States and Canada prefer the term "police power."[281]

1. Canada

In *Ethyl*, Canada argues that Article 1110 deals only with the taking of property, and not with regulation at all, because any other interpretation would conflict with the numerous forms of regulation permitted by NAFTA, including regulation for the protection of health and the environment.[282] Canada abandoned this argument in subsequent cases and acknowledged that Article 1110 encompassed regulatory takings as well.

[280] Although in *Merrill & Ring*, in the context of finding a lawful expropriation, Canada criticized the claimant's argument for emphasizing "arbitrariness," which is "not mentioned at all in Article 1110." *Merrill & Ring*, Counter-Memorial ¶ 780.

[281] *See, e.g.*, *Pope & Talbot*, Counter-Memorial ¶ 411 ("The non-arbitrary and non-discriminatory exercise of regulatory power by a state is referred to at international law as a state's regulatory or "police power").

[282] *Ethyl*, Statement of Defence ¶ 93.

Canada contends that a lawful expropriation for the purposes of NAFTA Chapter Eleven is an expropriation that complies with the conditions laid out in Article 1110(1)(a)-(d), which provides that there is no expropriation if there is a public purpose, the taking is in a non-discriminatory manner, it is in compliance with due process of law and Article 1105(1), and upon payment of compensation.[283] Further, Canada asserts that there is no expropriation in the event the State is exercising its regulatory or "police" power recognized under international law.[284]

Canada discusses the requirements of Article 1110(1)(a)-(d) at length in *Gallo.* Canada first considers "public purpose," no definition of which is provided by NAFTA. Canada argues that in international law, "public purpose" has a broad meaning and is not restricted to measures of general application, but that measures of specific or limited application may have a public purpose.[285] Further, Canada argues States are given considerable discretion in reaching their determination of whether a measure is required for a "public purpose" or in the "public interest";[286] so long as it seems plausible and is in good faith, arbitral tribunals may not second guess that determination by weighing it against other competing public purposes.[287]

In regard to Article 1110(1)(b), non-discrimination, Canada asserts that under Article 1110(1)(b), discrimination is referred to on the basis of nationality;[288] if there is no reasonable basis for the difference in treatment between investors of the NAFTA Parties, then the measure is discriminatory.[289] Canada favorably cites the *Feldman* Award for this statement, which does not

[283] *Gallo*, Statement of Defence ¶¶ 204-05.
[284] *Ethyl*, Statement of Defence ¶ 95; *Chemtura*, Counter-Memorial ¶ 572; *Pope & Talbot*, Counter-Memorial ¶ 409.
[285] *Gallo*, Statement of Defence ¶ 231.
[286] *Id.* ¶ 225.
[287] *Id.* ¶¶ 231-32 ("First, at international law, 'public purpose' has a broad meaning and is not restricted to measures of general application. Moreover, a State is afforded considerable discretion in its assessment of whether a measure is required for a public purpose. Measures of specific or limited application may have a public purpose. Second, arbitral tribunals should not second guess the legitimacy of a public purpose by weighing it against other competing public purposes. It is not unusual for public purposes to compete; however, it is for elected governments to determine whether a particular purpose is in the public interest and to weight the merits of competing public purposes."). Under the facts of *Gallo*, Canada argued that protecting water resources and the environment are *bona fide* public purposes, taken for the public good, and therefore lawful under Article 1110(1)(a). *See id.* ¶¶ 225-229.
[288] *Id.* ¶ 233 (citing *Feldman v. Mexico* (ICSID Case No. ARB (AF)/99/1) Award (16 December 2002) ¶ 137, fn 26; Third Restatement of the Foreign Relations Law of the United States, § 712); *Chemtura*, Counter-Memorial ¶ 613 ("The police powers doctrine cannot be relied on if the State discriminates against an alien on the basis of nationality." (quoting Wortely: "Even genuine health planning legislation (. . .) may be abusively operated, for example, if health or quarantine regulations are imposed not bona fide to protect public health, but with the real, though unfavoured, purpose of ruining a foreign trader. When the evidence of such indirect motive is clear, the foreign State concerned may properly protest on the ground that the trader is being unjustifiably deprived of his rights.").
[289] *Gallo*, Statement of Defence ¶ 233.

seem to be derived on a textual interpretation of NAFTA Article 1110(1) or general principles of international law.[290] Canada argues that "[a]t international law, liability is only possible if the measure is discriminatory."[291]

Next, Canada examines the notions of due process of law and Article 1105 in Article 1110(1)(c). Canada states that due process must be consistent with general principles of international law, although the State is afforded discretion to determine how it will ensure "due process of law" for affected investors. There is no requirement that the State employ specific domestic legal procedures.[292] Canada also asserts that with respect to Article 1105, the State is not required to expropriate an investment using a particular method or procedure, and that a denial of justice will only arise when there are grave procedural irregularities in whichever method the State has deemed appropriate for the circumstances.[293]

Canada has extended the criteria for finding a non-compensable expropriation beyond those in listed in Article 1110(1)(a)-(d), arguing that to be lawful, the State must also comply with requirements of general international law, and that, at general international law, there is a

[290] Canada cites *Feldman v. Mexico* (ICSID Case No. ARB (AF)/99/1) Award (16 December 2002) ¶ 137, fn 26 and the Third Restatement of the Foreign Relations Law of the United States § 712) in support of this statement. *Id.* ¶ 233.
[291] *Pope & Talbot*, Counter-Memorial ¶ 426 (citing F.V. Garcia Amador, *State Responsibility*, Y.B. INT'L L. COMM'N Vol. II, pp. 11-12 (1959) (footnotes omitted in Canada's submission)("Even though it has been contended that international law places limits on the State's power to impose taxes, rates and other charges on the property, rights or other interests of aliens, particularly when the measures taken discriminate against the latter, the fundamental lawfulness of this class of measures in the international context, regardless of their nature or scope, has very seldom been disputed. The possibility of the State incurring international responsibility can only arise if the measure is of a discriminatory nature, and practical experience has shown this eventuality to be highly unlikely. The same rule can be said to apply to rights of importers and exporters and to prohibition on import or export of specified merchandise: the State can only be held internationally responsible if the measure is not general but personal and arbitrary.").
[292] *Gallo*, Statement of Defence ¶ 237.
[293] *Id.* ¶ 238.

police power exception that is applicable to the investment law context[294] and to NAFTA Chapter Eleven.[295] Canada believes that:

> [T]he police powers doctrine is a vital component of the international law governing State practice with respect to foreign investment. Indeed, as Aldrich notes, international legal authorities have regularly concluded that "[l]iability does not arise from actions that are non-discriminatory and are within the commonly accepted taxation and police powers of states." The doctrine is consistently said to apply to measures adopted by States to protect public health and the environment[296]…. It is therefore an accepted principle of international law that States are not liable to compensate foreign investors for economic losses incurred as a result of measures designed to protect public health and the environment that fall within the police powers of the State.[297]

In *Pope & Talbot*, Canada argues that a State's regulatory power, or "police power," is an exclusion from expropriation.[298] Canada argues that a State is acting within the proper sphere of its regulatory/police power if it acts in a non-arbitrary and non-discriminatory manner,[299] and that, at international law, liability is only possible if the measure is discriminatory.[300] The consequences the State properly exercising its regulatory/police power is that the State is not required to compensate an investment for loss sustained as a result of the exercise of that

---

[294] *Chemtura*, Counter-Memorial ¶¶ 572-577 (stating that "[b]oth old and new case law supports the application of the police power doctrine in an investment law context" and then referring to the *Bischoff Case*, Arbitral Decision (1903), United Nations, 10 R.I.A.A., Vol. X at 420-1, *J. Parsons (Great Britain) v. United States*, Arbitral Decision (30 November 1925) VI., R.I.A.A. at 165-66, *Sea-Land Services v. The Government of the Islamic Republic of Iran, Ports and Shipping Organization*, Award No. 135-33-1 (22 June 1984), 6 Iran-U.S. C.T.R. 149, 165, and *Emanuel Too v. Greater Modesto Insurance Associates, et al.*, Award No. 460-880-2 (29 December 1989), 23 Iran-U.S. C.T.R. 378, ¶ 26, *Lauder (U.S.) v. Czech Republic* (UNCITRAL) Final Award (3 September 2002, ¶ 198 and *Saluka Investments B.V. v. Czech Republic* (UNCITRAL) Partial Award (17 March 2006) ¶ 262 as support for this argument).

[295] *Id.* ¶ 576 (noting that the NAFTA preamble preserves the State's sovereign right to protect public health and the environment and Articles 1101(4), 1114(1) and 1114(2) demonstrate that the signatories did not intend for non-discriminatory regulatory measures that are designed to protect public health and the environment to amount to an expropriation). Canada then goes on to assert that several NAFTA tribunals have implicitly and explicitly recognized that the police power doctrine applies to Chapter Eleven cases, including the *Feldman* Award at paragraph 163, the *S.D. Myers* First Partial Award at paragraph 281, the Separate Concurring Opinion of Arbitrator Schwartz in *S.D. Myers* at paragraph 214, the *Pope & Talbot* Interim Award at paragraph 99, the *Fireman's Fund* Award paragraph 176, and the *Methanex* Award Part IV, Ch. D paragraphs 1 and 4.

[296] *Id.* ¶¶ 565-566 (quoting Aldrich, George H., *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal* (1994) 88 AM. J. INT'L L. 585 at 609 and referring to Newcombe, Andrew, *The Boundaries of Regulatory Expropriation in International Law* (2005) 20:1 ICSID REV. 1 at 21-22).

[297] *Id.* ¶ 571.

[298] *Pope & Talbot*, Counter-Memorial ¶¶ 409, 425.

[299] *Id.* ¶ 411.

[300] *Id.* ¶ 426 (citing F.V. Garcia Amador, *State Responsibility*, Yearbook of the International Law Commission, Vol. II, pp. 11-12 (1959) (footnotes omitted in original)).

power,[301] even if there is a fundamental deprivation.[302] Canada supports its position by reference to the preamble of the NAFTA, which it contends illustrates that the NAFTA Parties intended to maintain their freedom to regulate.[303]

Canada presents a slightly different framework in *S.D. Myers*. There, Canada refers to the regulatory/police power as an "exception" from state responsibility to compensate in the event of an expropriation.[304] Canada asserts that the government has a wide scope to take measures that negatively affect the value of foreign-owned property, absent evidence of arbitrary and discriminatory elements of the measures,[305] and that there is a presumption in the favor of the government that the State is acting pursuant to its regulatory/police power.[306] Canada argues that "[c]hallenging a state on the basis that it has acted for improper motives is difficult; international law traditionally has granted States broad competence in the definition and management of their economies."[307] Canada argues that the State must only establish that: (i) the measure is not arbitrary; (ii) the measure is not discriminatory; and (iii) the measure must be *bona fide* and bear some plausible relationship to the action taken.[308] The measures will be discriminatory when the

---

[301] *Id.* ¶ 415.
[302] *Id.* ¶ 450.
[303] *Id.* ¶ 416; *Chemtura*, Counter-Memorial ¶ 576 (also referring to Article 1114(1) for support for this contention in ¶ 578).
[304] *S.D. Myers*, Counter-Memorial ¶ 423.
[305] *Id.* ¶ 424 (citing C. Christie, *What Constitutes a Taking of Property Under International Law* 33 B.Y.I.L. 307, 333 (1988); I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon, 1998); B.A. Wortely, *Expropriation in International Law*, at 40-57 (1959) (noting that Wortley argues that as long as a police power measure is *bona fide* and not an abuse of power on the part of the State, a State could go as far as to revoke a concession if it were necessary for the attainment of the regulatory objective.)).
[306] *Id.* ¶ 426 (citing I. Brownlie, Principles of Public International Law, 5th ed. at 535 (Oxford: Clarendon, 1998); Allahya Mouri, The International Law of Expropriation as Reflected in the Work of the Iran-US Claims Tribunal, at 248 (1994) ("Mouri's view of the police power exception is similarly large, especially in the case of emergency or distress situations, "Under the rules of international law, measures taken by Sates or attributable to them are not considered to be wrongful or to depart from international standards of justice which may entail liability for compensation of damages inflicted, if they were taken in a distress or emergency situation reasonably necessary to preserve life and property, or if they were taken to maintain the public order or to regulate the internal affairs of the country, such as to enforce revenue or customs laws, impose exchange control regulations, or preserve or protect the environment, health and safety of the nation." (Emphasis added by Canada); C. Christie, What Constitutes a Taking of Property Under International Law 33 B.Y.I.L. 307 (1988) (no page reference given) ("A State's declaration that a particular interference with an alien's enjoyment of his property is justified by the so-called 'police power' does not preclude an international tribunal from making an independent determination of this issue. But, if the reasons given are valid and bear some plausible relationship to the action taken, no attempt may be made to search deeper to see whether the State was activated by some illicit motive.") (Emphasis added by Canada)).
[307] *Id.* (citing B.H. Weston, "Constructive Takings" under International Law: A Modest Foray into the Problem of Creeping Expropriation, 16 VA. J. INT'L L. 103, 121).
[308] *Id.* ¶ 424 (citing C. Christie, *What Constitutes a Taking of Property Under International Law* 33 B.Y.I.L. 307, 338 (1988).

measures are directed solely at foreigners and do not apply to nationals.[309] Canada asserts that the important legal question is therefore whether a specific state measure can be classified as falling within the sphere of the regulatory/police power.[310]

In *Chemtura*, Canada concedes that the police power doctrine must operate within certain limits so that it is not abused by governments which might enact police measures as a pretext to an expropriation.[311] Canada expands upon the elements that it argues must be asserted as whether the decision was: 1) arbitrary; 2) non-discriminatory; 3) excessive; and 4) made in good faith.[312] In regard to arbitrary measures, Canada states that measures based on valid scientific considerations are not arbitrary,[313] and that "[t]he threshold for demonstrating the validity of the science underlying the [] decisions should not be so high as to require a Tribunal to second-guess the regulatory science upon which policy decisions are made by the State."[314] In other words, Canada argues that the Tribunal should not engage in a *de novo* review of the scientific conclusions relied on, but rather concern itself primarily with an evaluation of the scientific method.[315] Canada refers to *ELSI* as establishing the proposition that: "[a]rbitrariness is not too much something opposed to a rule of law, as something opposed to the rule of law . . . . It is a wilful disregard of due process of law, an act which shocks, or at least surprises, as sense of judicial propriety."[316]

Canada advances that the definition of "excessive," is highly fact dependent, and that "a Tribunal in a police powers context should seek to identify indicia that the impugned measure or

---

[309] *Id.* ¶ 428; *Chemtura*, Counter-Memorial ¶ 613 (quoting Wortley "Even a genuine health and planning legislation . . . may be abusively operated, for example, if health or quarantine regulations are imposed not bona fide to protect public health, but with the real, though unfavoured, purpose of ruining a foreign trader. When the evidence of such indirect motive is clear, the foreign State concerned may properly protest on the ground that the trader is being unjustifiably deprived of his rights.").

[310] *S.D. Myers*, Counter-Memorial ¶ 431 ("This is a case where Canada was acting, in accordance with its obligations under the *Basel Convention*, to regulate the export of PCBs for the reason of safety as well as for environmental and health protection.").

[311] *Chemtura*, Counter-Memorial ¶ 595 (citing Bindschedler, Rudolf L., La protection de la propriété privée en droit international public (1956) 90 REC. DES COURS 173 at 213; Foulloux, Gerard, LA NATIONALISATION ET LE DROIT INTERNATIONAL PUBLIC (Paris: Librairie general de droit et de jurisprudence, 1962) 173-74; Laviec, Jean-Pierre, PROTECTION ET PRMOTION DES INVESTISSEMENTS; ÉTUDE DE DROIT INTERNATIONAL ÉCONOMIQUE (Paris; Presses universitaires de France, 1985) at 165, 169; *Emanuel Too – Award; Saluka – Partial Award* ¶ 258).

[312] *Id.*

[313] *Id.* ¶ 598.

[314] *Id.* ¶ 605.

[315] *Id.* ¶ 606 (favorably citing the *Methanex* Award as establishing this principle).

[316] *Id.* ¶ 596. Canada also states that the *Harvard Draft* echoes this requirement.

process were so out of bounds as to compel the inference that an expropriation had occurred."[317] Canada asserts that decisions based on "complex science and expert assessment" are not excessive.[318] Likewise, Canada argues that evidence of good faith could be based on decisions grounded in scientific policy and sound policy, which it equates with considerations of health, environmental and safety measures.[319]

In regards to which type of government action qualify as proper exercise of a State's "regulatory or police power," Canada states that regulatory measures for the maintenance of health,[320] protection of the environment,[321] and safety[322] are within the police power of the State. More specifically, Canada asserts that conservation of clean air,[323] the refusal to grant approval licenses or refusal to grant export permits,[324] the imposition of export measures for a "good cause,"[325] "health and planning legislation and the concomitant restrictions on the use of property,"[326] regulation of materials with a hazardous nature[327] and accordance with international

[317] *Id.* ¶ 623 (favorably citing *Loewen* for the Tribunal's finding that the Claimants established that the damages awarded by a domestic tribunal "were excessive, and the amounts so inflated as to invite the inference that the jury was swayed by prejudice, passion or sympathy," and further noting that although this comment was made in the context of a denial of justice claim under Article 1105, it applied as well to the police powers context).
[318] *Id.* ¶ 628.
[319] *Id.* ¶¶ 631-632.
[320] *Ethyl*, Statement of Defence ¶ 95 (by prohibiting MMT in gasoline); *S.D. Myers*, Counter-Memorial ¶¶ 423, 431; *Chemtura*, Counter-Memorial ¶¶ 500, 566 (issue in *Chemtura* was the phase-out of all agricultural applications of lindane).
[321] *Ethyl*, Statement of Defence ¶ 95; *Chemtura*, Counter-Memorial ¶¶ 500, 566; *Gallo*, Statement of Defence ¶ 336; *S.D. Myers*, Statement of Defence ¶ 55.
[322] *S.D. Myers*, Counter-Memorial ¶ 431.
[323] *Ethyl*, Statement of Defence ¶ 95.
[324] *S.D. Myers*, Counter-Memorial ¶ 432 (citing *Too v. United States* (Iran- U.S. C.T.R. 378); *Kügele v. Polish State* (6 Ann. Dig. 69 (1931-32) (Upper Selesian Arbitral Tribunal, 1930)); *Pope & Talbot*, Counter-Memorial ¶ 419.
[325] *Pope & Talbot*, Counter-Memorial ¶ 417 (citing F.V. Garcia Amador, *State Responsibility*, Y.B. INT'L L. COMM'N, Vol. II, pp. 11-12 (1959); R. Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID Rev. 41, 64 (1988) ("Export regulations have been introduced in various fields by all states. It would serve no purpose here to spell out in detail the relevant complicated procedures and laws. Two different principles operate this field. The fact that a right to export exists in the absence of specific legislation may be taken to indicate the principle of free export. On the other hand, states have enacted export restrictions whenever they felt that such measures were necessary to protect their economic or their security interests. Thus one may conclude that export restrictions are acceptable 'for good cause' and will have to be qualified as indirect expropriation when taken as arbitrary measures. This would seem to be in accordance, for instance, with the broad scheme contained in the Articles of Agreement of the International Monetary Fund."); and I. Brownlie, *Principles of Public International Law*, 5th ed. (New York: Oxford University Press Inc., 1998) p. 535 ("State measures, prima facie lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation. Thus foreign assets and their use may be subjected to taxation, *trade restrictions involving licensing and quotas*, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation") (Emphasis added by Canada)).
[326] *Id.* ¶ 423 ("Under international law, 'jurists supporting the compensation rule recognize the existence of exceptions, the most widely accepted of which include: a legitimate exercise of police power [which includes] loss caused indirectly by health and planning legislation and the concomitant restrictions on the use of property." (citing

obligations[328] amount to regulations falling under the police power. Canada asserts that the failure to grant permits has only been found a taking when it was accompanied by a contractual obligation on the part of the State to issue the permits.[329] Canada argues that so long as nothing is preventing the investor from carrying on its usual business, and the investor has retained full ownership, control, and management abilities, and has made profits since the inception of the regulatory scheme, there has not been an expropriation.[330] Canada asserts that Chapter Eleven is not a strict liability scheme, in the sense that it would be absurd to find that the State is liable for any regulatory action that resulted in a loss to a foreign investor is a compensable act.[331]

For example, in *S.D. Myers*, Canada states:

> For the purposes of the present fact situation the law is relatively clear: this is a case where Canada was acting, in accordance with its obligations under the *Basel Convention*, to regulate the export of PCBs for the reason of safety as well as for environmental and health protection. The protection of public health and safety is a classic form of the police power, as recognized by leading commentators, such as Wortley, Christies, Sohn, and Baxter.[332]

2. Mexico

Like Canada, Mexico maintains that States have a right to expropriate pursuant to their right to regulate under NAFTA, as long as it does so in conformity with the requirements therein,[333] and international law.[334] Mexico argues that generally, a State will not be held to have made a compensable expropriation when it takes measures in the exercise of its regulatory powers, when the measures are not 1) arbitrary or 2) discriminatory.[335] Further, Mexico suggests

---

B.A. WORTLEY, EXPROPRIATION IN INTERNATIONAL LAW (1959) at 40-57; Jon Johnson, *The North American Free Trade Agreement: A Comprehensive Guide*, Canada Law Books 1994, at 289; Restatement (Third) of United States Foreign Relations § 712).

[327] *S.D. Myers*, Statement of Defence ¶¶ 55, 58 (measure at issue was the transport and disposal of PCB waste).

[328] *S.D. Myers*, Counter-Memorial ¶ 431 (in this instance the *Basel Convention*).

[329] *Pope & Talbot*, Counter-Memorial ¶¶ 423-424.

[330] *Id.* ¶¶ 443-445. Mexico expands upon these examples in its First Article 1128 Submission by referencing, among others, instances of armed force, seizure in the form of interference in the management. *Pope & Talbot*, First Article 1128 Submission of Mexico ¶ 34.

[331] *Pope & Talbot*, Counter-Memorial ¶¶ 465-466.

[332] *S.D. Myers*, Counter-Memorial ¶ 431.

[333] *GAMI*, Escrito de Contestación ¶ 97.

[334] *Metalclad*, Post-Hearing Submission ¶ 274.

[335] *Id.* ¶ 281.

that even a regulation prohibiting the economically optimal use of property will not be a taking if the property can still be put to any reasonable use.[336] Mexico asserts that investors must expect and assume the risk of regulatory measures on the part of the government, even where economic interests are negatively affected.[337] Moreover, Mexico claims that "[i]nternational law has always recognized a State's right to regulate."[338]

Further, in *Metalclad*, which dealt with a municipal regulation that the investor claimed expropriated its investment, Mexico argues that in the case of federal states, the right to regulate exists not only at the federal level, but at the state and municipal levels, which Mexico notes will have different regulatory perspectives.[339]

Mexico also states that actions falling under the right to regulate include actions taken to protect the public interest, including human health[340] and to settle a long-standing trade dispute.[341] In *GAMI*, Mexico argues that valid considerations of public interest include measures regarding "producto[s] alimenticio[s] básico[s] en la alimentación de la población de bajos ingresos," because of "las características de la industria como una de alto impacto social, por su producción y el empleo que genera" as well as the protection of employment and the economic activity of a region.[342] Mexico also states in its Article 1128 Submission in *S.D. Myers* that it generally concurs with the submissions made in paragraphs 399-442 of Canada's Counter-Memorial, which include arguments that the regulatory/police power include measures for public health and safety, health and planning legislation and concomitant restrictions on the use of property, accordance with international obligations, and the refusal to issue approval licenses or grant export permits.[343] Therefore, it could be argued that Mexico believes measures to those effects as falling under the State's right to regulate.

---

[336] *Id.* ¶ 283.
[337] *Id.* ¶ 281.
[338] *Id.* ¶ 273. Mexico does not cite anything in support of this statement.
[339] *Id.* ¶ 274.
[340] *Methanex*, Article 1128 Submission of Mexico ¶ 13 ("Article 1110, which must be interpreted in accordance with the applicable rules of customary international law, incorporates the principle that States generally are not liable to compensate aliens for economic loss resulting from non-discriminatory regulatory measures taken to protect the public interest, including human health.").
[341] *Pope & Talbot*, Article 1128 Submission of Mexico ¶ 59.
[342] *GAMI*, Escrito de Contestación ¶¶ 150, 202.
[343] *S.D. Myers*, Article 1128 Submission of Mexico ¶ 36.

3. United States

The United States maintains that an expropriation is illegal if it is not in conformity with at least one of the four criteria in Article 1110(1)(a)-(d).[344] The United States asserts that it is a general principle of international law that States are not liable to compensate aliens for economic loss incurred as a result of non-discriminatory regulatory measures to protect, *inter alia*, public health and the environment.[345] The United States affords that in certain rare circumstances, which it does not expound on, regulatory measures may be deemed expropriatory.[346] The United States appears to advance the argument that "rare and extraordinary circumstances" entail discrimination.[347]

The United States argues that for a regulatory taking to amount to an expropriation, it must be established that: 1) more than the mere negative impact of the regulation on the investment's profitability (i.e. if only the value of the property or expectations decreased, then there is no taking); and 2) the investor must have a reasonable expectation that the investment would not be subject to any further regulation.[348] Further, the United States argues that for a bona fide regulation in the public interest to be deemed expropriatory, there must be specific assurances to the investor that were abrogated by later regulation.[349]

The United States views the regulatory/police power as an exclusion rather than an exception under international law.[350] In regard to what measures it considers to constitute a valid

---

[344] *Mondev*, Counter-Memorial p. 27.
[345] *Glamis Gold*, Statement of Defense ¶ 57; *Methanex*, Amended Statement of Defense ¶ 410 ("It is a principle of customary international law that, where economic injury results from a *bona fide* regulation within the police powers of a State, compensation is not required (quoting FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 50-51 (1953)).
[346] *Glamis Gold*, Statement of Defense ¶ 56; *Methanex*, Statement of Defense ¶ 152 ("Customary international law recognizes that, absent extraordinary circumstances, States are not liable to compensate aliens for economic losses incurred as a result of a nondiscriminatory action to protect the public health. This rule of customary international law encompasses environmental measures, such as those at issue here, that are taken to protect the public health.").
[347] *Methanex*, Statement of Defense ¶ 152; *Methanex*, Amended Statement of Defense ¶ 411.
[348] *Methanex*, Amended Statement of Defense ¶ 396.
[349] *Glamis Gold*, Counter-Memorial p. 182 (citing *Methanex* and *Feldman* as support for this assertion). The United States also points out that the tribunal in *Feldman* found that the measures were arbitrary, inconsistent, ambiguous, misleading and lacking in transparency, and that the Claimant in that case was denied completely and permanently of economic benefits, but that the tribunal nonetheless dismissed the expropriation claim for lack of evidence of "clear and specific assurances" that Claimant would get a benefit. *Id.* p. 183.
[350] *Methanex*, Rejoinder ¶ 194 ("There is agreement among the disputing parties that 'as a general mater, States are not liable to compensate . . . for economic loss incurred as a result of a nondiscriminatory action to protect the public health.' This principle in public international law is not an exception that applies after expropriation has been found but, rather, is a recognition that certain actions, by their nature, do not engage State responsibility.") (citing

exercise of the State's regulatory/police power, the United States contends that "it is a State's sovereign right to protect public health and the environment,"[351] and that a measure to protect against environmental threats to groundwater and drinking water are a measure to protect public health.[352] As the United States asserts in *Glamis Gold*:

> The type of regulatory measure at issue here – ones intended to protect the public health and the environment – are not, absent rare circumstances not present here, of the type that can be deemed expropriatory. Customary international law recognizes that, as a general matter, States are not liable to compensate aliens for economic loss incurred as a result of non-discriminatory environmental regulatory measures to protect, *inter alia*, the public health.[353]

The United States concedes that customary international law does impose a limited number of substantive constraints on legislative and executive measures, which include the rule of compensation for expropriation, "which the NAFTA Parties specifically incorporated, as modified, in Article 1110" and principles governing State responsibility for injury to aliens relevant to investment, which the NAFTA Parties referenced in Article 1105(1).[354] The United States argues, however, that there is no customary international law standard that requires States to adopt only "good" legislation or decrees.[355]

D. Reasonable [Investment-backed] Expectations

The concept of reasonable expectations is often examined in the context of regulatory taking, although the United States examines it under its proposed test for indirect expropriation, and refers to the concept as "reasonable investment-backed expectations." Canada and Mexico regard "reasonable expectations" as a factor to be considered in regard to regulatory takings.

RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS ¶ 712; I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW at 539 (1998); Louis B. Sohn and R.R. Baxter, *Convention on the International Responsibility of States for Injuries to Aliens, Final Draft with Explanatory Notes*, art. 10(5) (1961), *reprinted in* F.V. GARCÍA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1974); G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 48 BRIT. Y.B. INT'L L. 307, 338 (1962)).

[351] *Mehanex*, Amended Supplementary Statement of Defense ¶ 412; *Glamis Gold*, Statement of Defense ¶ 56.

[352] *Methanex*, Rejoinder ¶ 195.

[353] *Glamis Gold*, Statement of Defense ¶ 56.

[354] *Methanex*, Statement of Defense ¶ 142.

[355] *Id.*

The NAFTA Parties seem to agree that an investor's reasonable expectations must be formed against a backdrop of the historical context, industry wide regulatory scheme and legislative history. Canada and the United States both agree that specific government assurances are necessary in order for an investor to form an expectation beyond those discernable from the historical and regulatory context of a given investment.

1. Canada

Canada argues that the investor's reasonable expectations should be based on the climate in which a given measure was imposed, which includes the historical background.[356] Canada also argues that if an investor invests in an industry or engages in an activity that is extremely hazardous, the investor must have a reasonable expectation of substantial governmental activity and control.[357] Canada asserts that reasonable expectations are contoured by the regulatory environment, State obligations under international agreements,[358] and Canadian export policies.[359] Further, Canada argues that absent a specific commitment to an investor that it would refrain from regulating certain aspects of its operations, the claimant cannot credibly have had any reasonable expectations that it would not be subject to further regulation.[360]

2. Mexico

Mexico asserts that investors must expect and assume the risk of regulatory measures on the part of the government, even ones that negatively affect economic interests.[361] Further, Mexico argues that an alien, in the normal course of business, does not have the reasonable expectation that his contractual rights will be immune from legislative action.[362] In *Metalclad*,

---

[356] *Pope & Talbot*, Counter-Memorial ¶¶ 457-458.
[357] *S.D. Myers*, Statement of Defence ¶ 58; *S.D. Myers*, Counter-Memorial ¶ 397; *Merrill & Ring*, Counter-Memorial ¶ 729 ("In this case the Investor cannot reasonably argue that changes in the law destroyed its investment, since it has been subject to export regulation since 1942.").
[358] Canada also argued in *Pope & Talbot* that it was obliged to impose export fees in order to oblige with its international obligations, of which the Claimant should have been aware. *Pope & Talbot*, Counter-Memorial ¶ 455.
[359] *S.D. Myers*, Counter-Memorial ¶ 397.
[360] *Merrill & Ring*, Counter-Memorial ¶ 721.
[361] *Metalclad*, Post-Hearing Submission ¶ 281.
[362] *Waste Management II*, Escrito de Contestación ¶ 240.

Mexico argues that because Metalclad had no acquired property right, it could not have been deprived of the reasonable expectations that the landfill would open.[363]

3. United States

Like Canada, the United States considers that federal and state regulatory context into which the Claimant invested should be considered known to the investor, and that these should shape their reasonable investment-backed expectations. For example, the United States argues in *Glamis Gold*: "[W]here a broad, pre-existing principle limited the scope of certain property rights, the specific, later-in-time application of that principle was not, and could not be, expropriatory."[364]

The United States further argues that reasonable investment-backed expectations are shaped by: 1) specific government assurances; 2) geographic considerations, such as if the property in question is situated in an area that is regulated by an array of laws; and 3) whether the industry is highly-regulated.[365]

The United States seems to consider that these are reflective in international law:

> [T]ribunals applying international law have held that, in the absence of specific assurances by the host State, an investor can have no reasonable expectation that the State will not regulate or legislate in the public interest in a manner that may affect the value of its investment . . . . Where an investor conducts business in a highly regulated industry, and where its investment could negatively impact important resources – such as environmental, or cultural and historic resources – it is unreasonable for that investor to expect that its investment would not be subject to further regulation to protect those valued resources absent specific assurances to the contrary.[366]

[363] *Metalclad*, Escrito de Dúplica ¶¶ 186-87, 191.
[364] *Glamis Gold*, Counter-Memorial p. 157.
[365] *Id.* at 181.
[366] *Id.*

The United States argues that the Claimant must show "that it acquired its property 'in reliance on the non-existence of the challenged regulation,'[367] and the extent which further regulation was foreseeable."[368] The United States argues that this inquiry into the investor's expectations is an objective one; subjective expectations are irrelevant to the reasonableness of the expectations. Further, the United States argues"[c]onsideration of whether an industry is highly regulated is part of the legitimate expectations analysis,"[369] and that "where an industry is highly regulated, reasonable extensions of those regulations are foreseeable."[370]

The United States emphasizes that "in the absence of specific commitments that the government would refrain from enacting particular measures, an investor can have no reasonable expectation that the government will not so regulate."[371] The United States notes that as a matter of law, agencies are typically granted considerable deference in administering complex regulatory schemes.[372]

E. Elevation of Breach of Contract Claims to the International Plane

The Parties agree that a claim for a simple breach of contract claim cannot be a violation of international law. The Parties agree that contract rights can be expropriated in certain circumstances, but that there must be a supplemental element present that elevates the claim to the international plane. Canada and Mexico argue that there needs to be an expropriatory action for a breach of contract to constitute an expropriation (which Mexico defines as one that meets the criteria under Article 1110). Mexico and the United States further agree that a denial of justice will amount to this additional element. The United States believes that a pretence of form to achieve an internationally wrongful end would likewise elevate a breach of contract claim.

---

[367] *Glamis Gold*, Rejoinder p. 91 (citing U.S. case law, *Good v. United States*, 189 F.3d 1355, 1360 (Fed. Cir. 1999).
[368] *Id.* (citing U.S. case law, *Apollo Fuels, Inc. v. United States*, 381 F.3d 1138, 1349 (Fed. Cir. 2004).
[369] *Id.*
[370] *Id.* at 91, 96.
[371] *Id.* at 96-97 (The United States favorably cites the following passage from *Methanex* as establishing this principle: "[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted with accordance with due process and which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."
[372] *Id.* at 124.

1. Canada

In its submissions, Canada does not directly address the factors necessary to elevate a breach of contract claim to a treaty claim, but in *Merrill & Ring* it notes that Article 1139(h) covers interests in contracts, and contractual rights which have been generally been considered to be capable of expropriation, even though they are intangible.[373] In its Article 1128 Submissions in *Waste Management II*, Canada asserts that mere breaches of contract cannot be deemed an expropriation: "A NAFTA Tribunal does not have jurisdiction to determine contractual claims. A mere breach of a State of its contractual obligations with an investor, does not, in and of itself, constitute a breach of the minimum standard of treatment or an expropriation."[374]

Canada then favorably cites the ruling in *Azinian*, discussed below, as establishing this principle.[375] Canada goes on to state that instead of questioning simply whether there has been a breach of contract, the Tribunal must focus on the NAFTA provision at issue in the claim, and that in order "[t]o find an expropriation under Article 1110, the Tribunal would have to conclude that the State's actions have all the attributes of an expropriation, including a substantial deprivation or substantial interference with the alleged investment. For example, tribunals have found expropriation in certain cases where there has been a taking of assets . . . ."[376]

Since Canada concedes that contracts are covered investments under Article 1139, Canada's position could be interpreted as asserting that a breach of contract can be elevated to a treaty claim if the State has substantially interfered with the contract, or has acted in such a manner as to affect a "taking" of the contract. Canada does not argue, as Mexico does (discussed below), that there needs to be an "additional element" in order for a contract claim to be raised to a treaty claim in so many words, but essentially states the same criteria: there needs to be an expropriatory act in order for a breach of contract claim to constitute an expropriation.

---

[373] *Merrill & Ring*, Rejoinder ¶ 251.
[374] *Waste Management II*, Article 1128 Submission of Canada ¶ 5.
[375] *Id.* ¶ 6 ("As the *Azinian* Tribunal has recognized, 'NAFTA does [. . .] not allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes.'" Citing *Azinian* ¶ 87).
[376] *Id.* ¶ 7. Canada does not cite the cases it refers to where there have been findings of expropriation in the circumstances it mentions.

2. Mexico

Mexico argues that NAFTA does not cover breach of contract claims, absent an "additional element." For example, in *Azinian*, Mexico argues that Chapter Eleven does not provide a remedy for breach of contract claims,[377] and that "[i]t is widely recognized that a claim based on breach of a contract . . . cannot suffice to raise a purely domestic legal dispute to the level of an international claim."[378]

Mexico argues that in order for a breach of contract claim to be heard before a NAFTA tribunal, there must be an "additional element:"[379]

> Thus, the weight of authority and commentary by qualified publicists supports the proposition that a breach of contract claim cannot be elevated to the international level without cogent evidence of a denial of justice or an expropriatory act such as the substantial amendment of the law governing the contract that deprives the contracting party of his rights.[380]

Mexico asserts that the principles of state responsibility do not support a claim for wrongful repudiation of a contract,[381] and that the presumption that a State's municipal activity toward foreigners complies with international law must also extend to the nullification of concession contracts in appropriate circumstances.[382]

In *Waste Management II*, Mexico considers and rejects the notion of "internationalized contracts,"[383] which it states has been heavily criticized in the scholarship.[384] Mexico

---

[377] *Azinian*, Rejoinder ¶ 30.
[378] *Id.* ¶ 36. In support for this assertion, Mexico relies on: Brownlie, Ian, Principles of Public International Law (Clarendon, Oxford University Press) 5th Edition, 1998, at pages. 550-51; Amerasinghe, C.F., State Responsibility for the Injuries to Aliens (Clarendon, Oxford University Press) 1967 at page 77; Feller, A.H., The Mexican Claims Commissions: 1923-1934, (New York: The MacMillan Company) 1935 at page 74; the *Ambatielos* case (cited in Sir Gerald Fitzmaurice, "Hersch Lauterpacht, The Scholar as Judge", 1961 BYIL XX at page 64.
[379] *Id.* ¶¶ 41, 49; *Waste Management II*, Escrito de Contestación ¶¶ 241(i) (noting there must be an "acto arbitrario"for a contract claim to be elevated to the international plane), 243-44 ("Por el contrario, se reconoce que las relaciones contractuales pueden dar lugar a situaciones de incumplimiento o incluso de revocación que, no obstante, no configuran un ilícito internacional, a menos que exista, por ejemplo, una denegación de justicia."); *Waste Management II*, Escrito de Dúplica ¶¶ 65, 75-76.
[380] *Azinian*, Rejoinder ¶ 40.
[381] *Id.* ¶ 33.
[382] *Id.* ¶¶ 45-46.
[383] The theory of internationalized contracts states that some contracts are, "by their very nature 'internationalized' and therefore subject to international law either instead of, or in addition to, the law of the contracting state. This

acknowledges that there are decisions that have dealt with the expropriations of contracts, but these are instances when a State used its sovereign power by methods such as such as legislative modifications or executive decrees to expressly terminate a contract.[385]

Similarly, in *Thunderbird*, Mexico contends that Article 1110 only deals with expropriation in the strict sense of the term; it does not extend to interferences with economic rights or for breach of contract.[386] Mexico argues that *Waste Management* establishes that Article 1110 does not provide a cause of action for breach of contract.[387] The investor must demonstrate that there has been an effective privatization of a right, which has not been remedied by domestically available means (i.e. administrative or judicial proceedings), which have the effect of impairing the exercise of its rights totally or substantially.[388] Mexico states that usually this is in the form of legislation or executive decree that significantly alters the contract conditions or terminates the contract.[389] Mexico asserts that those circumstances can be a violation of international law, because the State used its sovereign power to change the existing juridical situation and alter the agreed-to rights and obligations.[390] Mexico believes that the use of the

---

theory was proposed by René Jean Dupuy as the sole arbitrator in *Texaco v. Libyan Arab Republic (TOPCO)*. *Waste Management II*, Escrito de Contestación ¶ 249, quoting Bowett, Derek W., *Claims Between States and Private Entities: The Twilight Zone of International Law*, 35 CATH. U. L. REV. 929-931 (1986). Other sources cited by Mexico include: Rigaux, F., *Droit public et droit prive dans les relations internationals*, 435 (1977); Wengler, *Les Accords entre Etats et enterprises etrangeres, sont-ils des traits de droit international?*, REV. GEN. DR. INT. PUB., Volume 76 pg. 313 (1972); Verhoeven, *Contrats entre Etats et resortissants d'autres Etats, Le Contrat Economique International: Stabilite et Evolution*, 115, 141 (1975); *Kuwait v. American Independent Oil Co. (Aminoil)*, 21 ILM 976 (1982); Delaume, George, *The Internationalization of Law and Legal Practice: Comparative Analysis as a Basis of law in State Contracts: the Myth of the Lex Mercatoria*, 63 TUL. L. REV. 575-83 (1989).

[384] *Waste Management II*, Escrito de Contestación ¶¶ 248, 261.

[385] *Id.* ¶¶ 241-243; *Waste Management II*, Escrito de Dúplica ¶¶ 68-69.

[386] *Thunderbird,* Escrito Posterior a la Audencia ¶ 220.

[387] *Id.* (citing the Award of 30 April 2004 ¶ 175: "La ley sobre incumplimiento de contratos no se esconde en los intersticios del Artículo 1110 del TLCAN. Por el contrario, es necesario demonstrar la privación efectiva de un derecho, privación no reparada por ningún recurso a disposición de la Demandante, lo que tiene el efecto de impedir el ejercicio de ese derecho a pleno o hasta ciero punto sustancial."). Mexico goes on to refer to the Award in *Generation Ukraine* as support for this and says that its equally applicable to the NAFTA context even though the decision involved the Ukraine-U.S. BIT. *Id.* ¶ 221 (citing *Generation Ukraine*, Award ¶¶ 20.30 and 20.33 (Sept. 16, 2003).

[388] *Id.* ¶ 220.

[389] *Waste Management II*, Escrito de Contestación ¶ 239 ("Los casos en los que la demandante sustenta su reclamación de expropiación involucran al Estado, en su calidad de soberano, como una parte contratante, y que subsecuentemente adopto medidas en esa misma calidad, ya sea por la vía legislative o por decreto ejecutivo que alteraron significativamente las condiciones o dieron los contratos por terminados.")., 241 ("Los casos en los que la demandante se apoya versan sobre acciones legislativas o decretos del ejecutivo que alteraron materialmente o suprimieron los derechos contractuales del extranjero.").

[390] *Id.* ¶ 240, referencing Amerasinghe, *State Breaches of Contracts With Aliens and International Law*, 58 AM. J. INT'L L. 908 (1964), as support for this concept ("Amerasinghe explica que esa conducta puede dar lugar a una violación del derecho internacional, porque al legislar para afectar un contrato del cual se es parte, el Estado utiliza su poder soberano para cambiar las circunstancias jurídicas existents, y alterar los derechos y obligaciones

sovereign power in such a manner is completely distinct from the ordinary conduct that results in the breach of a contract, including the cancelation of that contract, in accordance with the governing legal system.[391] Mexico further argues that a breach of contract, absent an additional element which results in a violation of international law, does not invoke the responsibility of a State for expropriation,[392] except in cases where there is a denial of justice.[393]

3. United States

Like Mexico, the United States maintains that a breach of contract, by itself, cannot be a judiciable claim before a NAFTA tribunal. In *Mondev*, the United States argues, by quoting the tribunal in *Azinian v. Mexico*, that, in order for a breach of contract claim to become a NAFTA claim, a municipal court decision ruling that there had been no breach of contract must of itself constitute a violation of the treaty.[394] There must be either a: i) denial of justice or ii) pretence of form to achieve an internationally wrongful end to elevate the claim to the international sphere.[395] The United States suggests that there can be no expropriation of the rights under a contract if the domestic court decision that found there had been no breach of contract was concordant with

---

pactados."); *id.* ¶ 243(c) (referring to Jennings, *State Contracts in International Law*, British Yearbook of Inernational Law, Oxford University Press, 1961, pg. 156, 181, as establishing that a contract violation needs an extra element to be raised to the international plane, the elements being that where a contract was governed by municipal law and the State, using its legislative power, repudiates, terminates, or alters the contractual relationship).

[391] *Id.* ¶ 240 ("Éste es un poder completamente distinto de una conducta ordinaria que resulta en el incumplimiento de un contrato, o incluso en la cancelación del mismo, conforme al sistema jurídico prevaleciene, y opera en un plano diferente de aquel en el que se desempeñan las partes de un contrato." (emphasis in original)).

[392] *Id.* ¶ 243 ("[E]l incumplimiento de un contrato (en ausencia de otro elemento que resulte en una violación al derecho internacional), no provoca la responsibilidad internacional del Estado por expropiación.").

[393] *Thunderbird*, Escrito de Contestación ¶ 244 ("[L]as relaciones contractuales pueden dar lugar a situaciones de incumplimiento o incluso de revocación que, no obstante, no configuran un ilícito international, a menos que exista, por ejemplo, una denegación de justicia.").

[394] *Mondev*, Counter-Memorial p. 31 (favorably quoting *Azinian v. Mexico* ¶¶ 83 and 99: "[A] foreign investor entitled in principle to protection under NAFTA may enter into contractual relations with a public authority, and may suffer a breach of that authority, and still not be in a position to state a claim under NAFTA. It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints . . . . *What must be shown is that the court decision itself constitutes a violation of the treaty*. Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the validity of the Concession Contract, this would not per se be a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally wrongful end.").

[395] *Id.* (favorably quoting *Azinian v. Mexico* ¶ 99: "What must be shown is that a court decision itself constitutes a violation of a treaty . . . . the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end.").

settled principles of domestic law and was "amply consistent with international standards."[396] The United States does not discuss the international standards it refers to.

F. Applicable Law for the Determination of Contract and Property Rights

The Parties agree that the determination of whether property rights have been acquired is governed by municipal law. Canada considers that this is a principle of general international law, and Mexico asserts that it is recognized in doctrine. The United States does not address whether it believes this reflects a principle of international law, but it cites doctrine in support of its contention.

1. Canada

In *Pope & Talbot*, Canada asserts that Canadian law is the authoritative source for determining whether property rights have been acquired via definitions of property as provided for in Canadian law.[397] Canada believes this reflects a principle of general international law: "At public international law, the *lex situs* and the rules of private international law will determine whether property rights have been acquired."[398]

2. Mexico

Like Canada, Mexico believes that the Mexican legal system defines applicable property rights.[399] Mexico further asserts that "the alleged existence of a reasonable expectation cannot create rights where these do not exist under the local law."[400] In *GAMI*, Mexico asserts that direct

[396] *Id.* p. 31.
[397] *Pope & Talbot*, Counter-Memorial ¶ 471.
[398] *Id.* (citing B.A. Wortley, *Expropriation in International Law* (Cambridge: Cambridge University Press, 1959), pp. 4-8).
[399] *Thunderbird*, Escrito de Contestación ¶ 243 ("El derecho municipal de cada Parte es el que define los derechos mercantiles de los que gozan los particulares. Si la legislación del Estado no establece un derecho para ejercer una determinada actividad commercial, entonces no es susceptible de estar protegida por el capítulo XI del TLCAN ni de ser expropiada."); *Thunderbird*, Escrito de Dúplica ¶ 158.
[400] *Thunderbird*, Escrito de Dúplica ¶ 158.

expropriation is governed by internal domestic law,[401] and in *Waste Management II*, Mexico states that the proper applicable law for determining contractual compliance are municipal law, since international law does not have contract rules.[402] Mexico states: "[L]os doctrinarios más respetados reconocen que corresponde a las leyes municipales regir las circunstancias relativas a la creación, el desempeño y la ejecución de un contrato."[403]

3. United States

Like Canada and Mexico, the United States considers that the rights under agreements are defined by municipal law.[404] For example, the United States said in *Glamis Gold:*

> Whether something constitutes a property right is determined by the relevant domestic law of the State where the property is located – not international law . . . the issue is whether the use that is prohibited by the regulation in question was part of the claimants' 'bundle of rights' when it acquired the property.

The United States goes on to say that property rights that are subject to legal limitations under the domestic law that applies to it at the time the property rights are acquired cannot be expropriated by subsequent additional limitations on those property rights.[405] Further, the United States contends that the scope of property rights is informed by the legislative and regulatory framework existing at the time such rights are acquired.[406] The United States believes that the Tribunals in *Tradex, Feldman* and *Thunderbird* recognized the principle that where "property rights are, from their inception, subject to a broad restriction, a claimant's property right does not

---

[401] *GAMI*, Réplica Posterior a la Audencia ¶ 47.
[402] *Waste Management II*, Escrito de Contestación ¶¶ 233-235 (quoting Bowett p. 933 "el derecho international no contiene reglas sobre contratos."); *Waste Management II*, Escrito de Dúplica ¶ 85.
[403] *Waste Management II*, Escrito de Contestación ¶ 235. Mexico goes on to quote the Commentary to the Harvard Draft Convention on Economic Injuries, p. 569: "No contract or concession exists in a legal vacuum. It draws its binding force, its meaning, and its effectiveness from a legal system, which must be so developed and refined as to be capable of dealing with the great range of problems to which performance and violation of promises give rise . . .").
[404] *Mondev*, Counter-Memorial ¶ 31; *Mondev*, Rejoinder on Competence and Liability p. 48.
[405] *Glamis Gold*, Rejoinder ¶ 11.
[406] *Glamis Gold*, Counter-Memorial pp. 133-134. The United States goes onto cite *Tradex*, *Feldman*, and *Thunderbird* (noting that, due to the existence of a pre-existing legal limitation, the Tribunal held that Mexico could not have expropriated a property interest the Claimant never had) as establishing this principle.

include the right to engage in the activity proscribed by (or right to be relieved from the requirements imposed by) the subsequent application of that restriction."[407]

G. Conclusive Remarks: Application of the Parties' Expropriation Arguments Outside the Context of NAFTA

The Parties arguments above do not apply merely to the NAFTA context. The text of Article 1110 of the NAFTA is substantively very similar to the text of many bilateral investment treaties, such as the Argentina-US BIT, which states:

> 1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation-) except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (2) Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

Moreover, Canada submits that the text of Article 1110 was largely derived from the US Model BIT.[408] In addition, the Parties often argue general international law principles to support their textual arguments, especially in regard to the six issues within expropriation under the NAFTA, discussed above, which were selected for their exportability outside of NAFTA.

Furthermore, the Parties explicitly recognize that expropriation under Article 1110 was intended to be a reflection of customary international law, and nothing further. For example, in *Pope & Talbot*, Canada states:

> The concept of expropriation under Article 1110 does not diverge from the customary principles of international law of expropriation and the ordinary meaning of the text does not suggest that the word chosen were intended to have a wider meaning. In

[407] *Id.* at 135.

[408] *Pope & Talbot*, Counter-Memorial ¶ 391 (The NAFTA negotiators, who manifestly borrowed from the language of previous U.S. BITs, included those cited, elected not to incorporate the language in question. It is fair to surmise that the negotiators preferred not to suggest anything like the broader meaning of expropriation and measure tantamount to expropriation argued by the Investor.")

fact, the language of the provision is not a novel formulation of expropriation. Similar provisions regulating expropriation existed before NAFTA, in BITS and the FTA both of which also reflect the customary international law of expropriation.

As has been noted by Jon Johnson:

> "Like both the FTA and the model BIT, NAFTA 1110(1) prohibits a NAFTA country from directly or indirectly nationalizing or expropriating an investment of an investor of another NAFTA country except for a public purpose, on a non-discriminatory basis, in accordance with due process and on payment of compensation. *This provision states the traditional view of customary international law respecting nationalization or expropriation*."[409]

Likewise, the United States asserts that although "the NAFTA and bilateral investment treaties do indeed grant some rights beyond those provided in customary international law, both the NAFTA and U.S. bilateral investment treaties incorporate the rule of customary international law with respect to what constitutes an expropriation."[410] Further, the United States asserts that:

> The NAFTA's expropriation provision was modeled on the expropriation provision of the bilateral investment treaties ("BITs") that the United States had concluded with many countries. All of the forty-five BITs signed by the United States contain similar language on expropriation, although their exact phasing has varied over time [internal citation omitted]. Despite the variations in expression, the scope of protection provided by the BITs has remained the same, and all of these different formulations have been understood to incorporate the customary international law definition of expropriation, not expand upon it.[411]

These statements by the United States illustrates that the United States' position applies not only in the context of the NAFTA, but likewise in the application of provisions in BITs addressing expropriation and area statement of what the United States believes is customary international law with regard to expropriation.

Mexico has not make statements in the same manner as the United States and Canada in regard to the scope of Article 1110 in relation to customary international law, but it does address

---

[409] *Id.* ¶¶ 381-382.
[410] *Methanex*, Rejoinder Memorial on Jurisdiction p. 43.
[411] *Metalclad*, Article 1128 Submission of the United States ¶ 13. It should be noted that the United States asserts this in the context of the meaning of the phrase "measure tantamount to expropriation.

the scope of Article 1110 in certain contexts. For example, in the context of the debate surrounding the meaning of the phrase "measure tantamount to nationalization or expropriation" in Article 1110, Mexico asserts that Article 1110 does not create a *lex specialis* that goes beyond those concepts enshrined in the customary international law of expropriation. Mexico goes onto state: "The view that Article 1110 was intended simply to codify the existing international law on direct and indirect expropriation was expressed by the United States of America in its 1128 intervention in the second claim to be heard under the NAFTA, *Metalclad v. The United Mexican States*.[412]

In Canada's Response to the 1128 Submissions, Canada seemed to interpret this statement by Mexico as being applicable beyond the categories of expropriation available under Article 1110: "As Mexico notes, the three NAFTA parties concur that NAFTA Article 1110 does not create a *lex specialis* or a different standard of expropriation than that recognized under customary international law."[413]

The regulatory/police power arguments advanced by the Parties are exceptionally noteworthy because Article 1110 does not contain an explicit exclusion for the police or regulatory power. Therefore, the Parties are arguing that the general international law principle is applicable to the NAFTA, and their arguments on the subject matter can be regarded as the Parties' understanding of the regulatory/police power exception under international law.

Canada's statements in *Pope & Talbot* are illustrative in this regard:

> The Investor suggests that Article 1110 is a no-fault compensation mechanism that creates an obligation for governments to compensate most regulatory takings. The Investors position is that NAFTA Article 1110 departs from customary international law because a state's regulatory or police power is not recognized under Art. 1110. If accepted, this means that Article 1110 would call for compensation for every effect that a regulation may have.

---

[412] *Pope & Talbot*, Article 1128 Submission of Mexico ¶ 43 (quoting *Metalclad*, Article 1128 Submission of the United States ¶ 10: "The United States Government believes that it was the intent of the Parties that Article 1110(1) reflect customary international law as to the categories of expropriation. The United States Government reflected that position in its Statement of Administrative Action, transmitted to the Senate during the process of concluding the NAFTA [internal reference omitted]. Neither of the other Parties has ever expressed a view contrary to this United States public statement of intent.").

[413] *Pope & Talbot*, Response of Canada to Article 1128 Submissions ¶ 33.

> The Investor's position is untenable. The exercise of a state of its regulatory power does not amount to an expropriation. This is noted in the comments found in § 712 of the *Third Restatement of the Foreign Relations Law of the U.S.*
>
> [. . .]
>
> At international law, expropriation does not result from bona fide regulation. A state is not required to compensate an investment for any loss sustained by the imposition of a non-discriminatory, regulatory measure.
>
> [. . .]
>
> International law clearly recognizes that the valid exercise of the police power does not constitute an expropriation. This is consistent with the Preamble of NAFTA which states that the Parties are resolved to preserve their flexibility to safeguard the public welfare. It is clear from this statement in the Preamble that the Parties had no intention of diminishing the scope of the police power that exists under international law.[414]

Therefore, by the Parties own assertions, their arguments in the realm of expropriation are not only applicable in the context of NAFTA Article 1110, but to similarly phrased provisions addressing expropriation, such as those contained in BITs, and reflect the Parties' belief as to the customary international law on expropriation.

[414] Pope & Talbot, Counter-Memorial ¶¶ 412-413, 415, 425.

III. Standard Practice Concerning Criteria of Compensation and Determination of Damages for Violations of the FET / MST Obligations

This section will analyze the submissions of the State-party respondent in the following cases:

Canada	• *Chemtura* • *Gallo* • *Merrill & Ring* • *Pope & Talbot* • *SD Myers*
Mexico	• *Feldman* • *GAMI* • *Metalclad* • *Thunderbird*
United States	• *Grand River*

A. What should be compensated?

1. Canada

In *Chemtura*, Canada acknowledges that NAFTA tribunals assessing non-expropiatory breaches have generally relied on CIL principles to determine damages for such breaches. Those tribunals have concluded that such an assessment is fact-driven and discretionary.[415] Here Canada quotes the *Feldman* Tribunal, which said that:

> […] NAFTA provides no further guidance as to the proper measure of damages or compensation for situations that do not fall under Article 1110 (expropriation); the only detailed measure of damages provided in Chapter 11 is in Article 1110(2-3), "fair market value," which necessarily applies only to situations that fall within that Article 1110. It follows that, in case of discrimination that constitutes a breach of Article 1102, what is owed by the responding Party is the amount of loss or damage that is adequately connected to the breach. In the absence of discrimination that also constitutes indirect expropriation or is tantamount to expropriation, a claimant would

[415] *Chemtura*, Counter-Memorial ¶ 952 (referencing *S.D. Myers,* Partial Award, 13 November 2000, ¶¶ 305-309).

> not be entitled to the full market value of the investment which is granted by NAFTA Article 1110. Thus, if loss or damage is the requirement for the submission of a claim, it arguably follows that the Tribunal may direct compensation in the amount of the loss or damage actually incurred.[416]

Also in *Chemtura*, Canada contends that, at CIL, an award of damages seeks to put the investor in the position it would have been had the breach not occurred. That reflects the principle in *Chorzów Factory*[417] "that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."

In the same case, Canada argues that applying the fair market value [hereinafter "FMV"] standard of compensation to non-expropiatory breaches would be ignoring the text of NAFTA: "Fair market value may be an appropriate standard for a non-expropiatory breach if that breach directly caused total loss of the investment."[418] Then, Canada again endorses the findings of the *Feldman* Tribunal.[419]

In *Gallo*, Canada also refers to the *Chorzów Factory* case,[420] and contends that a breach of NAFTA Article 1105 entitles a claimant to compensation in the amount necessary to counteract the consequences of the illegal act that breaches the MST and re-establishes the situation which would have existed but for that illegal act.[421] However, if such a breach does not deprive an investor or enterprise of the entire value of its investment, then the damages will not equal the entire FMV of the investment. Once more, Canada endorses the findings of the *Feldman* Tribunal[422] and states that any such recovery would constitute a windfall to a claimant because the claimant retains ownership of the investment.

According to Canada, even if a measure is found to be a breach of NAFTA Article 1105, an enterprises inability to pursue a domestic legal action does not entitle it to recover the FMV of

---

[416] *Feldman*, Award, 16 December 2002 ¶ 194.
[417] *Case concerning the Factory at Chorzów*, P.C.I.J. Ser. A. No. 17, at 47 (13 Sept. 1928).
[418] *Chemtura*, Counter-Memorial ¶ 955.
[419] *Feldman*, Award, 16 December 2002 ¶ 194.
[420] *Gallo*, Statement of Defence ¶ 253.
[421] *Case concerning the Factory at Chorzów*, P.C.I.J. Ser. A. No. 17, at 47 (13 Sept. 1928).
[422] *Feldman*, Award, 16 December 2002 ¶ 194.

such enterprise. Rather, the claimant is only entitled to compensation for whatever value a domestic cause of action may have had.[423]

In order to recover damages for a breach of Article 1105, a claimant must first and foremost prove that the breach is the "but for" legal and factual cause of the damages in question. Here again, Canada acknowledges sharing the reasoning of *Feldman* and *S.D. Myers*[424] and indicates that the claimant must show that in a hypothetical world where only the allegedly offending measure is assumed away, the claimant would not have suffered the damages in question. Thus, in a case where a claimant alleges that a particular clause of a legislative measure has caused it damages, it must show that if that clause were stricken, and the rest of the legislation left intact, it would not have suffered damages.[425]

Also in *Gallo*, Canada indicates that NAFTA Chapter Eleven does not have a provision that explicitly deals with compensation for non-expropriation breaches. As a result, tribunals have relied on Article 1135: "Final Award" for guidance. Article 1135 allows a tribunal to award either money damages or restitution of property. Accordingly, the primary standard is restitution, whether it be in cash or in kind. And again, Canada refers to the *Chorzów Factory* case, where the Permanent Court of International Justice [hereinafter "PCIJ"] indicated that restitution means damages which, as far as possible, wipe-out all the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[426]

Canada also indicates that it is incorrect to assert that the damages analysis for violations of Article 1105 and Article 1110 is the same. FMV may be appropriate for a non-expropiatory breach if that breach directly caused total loss of the investment, but, quoting the *Feldman* Award, "in the absence of discrimination that also constitutes indirect expropriation or is tantamount to expropriation, a claimant [is] not entitled to the full market value of the investment which is granted by NAFTA Article 1110."[427]

---

[423] *Gallo*, Statement of Defence ¶ 254.
[424] *Feldman*, Award, 16 December 2002 ¶ 194; *S.D. Myers*, Partial Award, 13 November 2000 ¶¶ 305-309.
[425] *Gallo*, Counter-Memorial ¶ 509.
[426] *Id.* ¶ 514.
[427] *Id.* ¶ 515; *Feldman* ,Award, 16 December 2002 ¶ 194.

In *Merrill & Ring*,[428] Canada contends that NAFTA tribunals generally have not applied Article 1110 to assess damages for breach of obligations other than expropriation. Rather, assessment of damages for non-expropriation breaches is a matter for the discretion of the Tribunal.[429] In this regard, Canada quotes the *S.D. Myers* first partial award where it concluded that "[…] the drafters of the NAFTA intended to leave it open to tribunals to determine the measure of compensation appropriate to the specific circumstances of the case, taking into account the principles of both international law and the provisions of NAFTA."[430]

In particular, tribunals assessing damages for non-expropriation breaches have rejected FMV as the measure of compensation. Rather, they have made a fact-specific assessment of the actual loss caused by the breach in question.[431] Referring again to the case of *Feldman*,[432] Canada indicates that absent a finding of expropriation, a tribunal ought not award FMV or going concern value of the investment as damages.[433]

2. Mexico

In *GAMI*, Mexico argues that case law[434] has uniformly established in that the valuation for discounted cash flow is appropriate only when the enterprise under analysis has an operation record with profits during two to three years, on the basis of which may be made reliable projections.[435] It underscores that, in order to predict future performance in a reliable manner, there shall be a record of operations that must be profitable.[436] In that sense, Mexico endorses the interpretation of the *Feldman* Tribunal with respect to non-expropiatory breaches.[437] However, the *Feldman* Tribunal does not refer specifically to damages evaluation in the context of Article 1105

[428] *Merrill & Ring*, Counter-Memorial ¶ 801.
[429] *S.D. Myers*, Partial Award, 13 November 2000 ¶¶ 305-309; *S.D. Myers,* Second Partial Award ¶ 144.
[430] *S.D. Myers*, Partial Award, 13 November 2000 ¶ 309.
[431] *Merrill & Ring*, Counter-Memorial ¶ 802.
[432] *Feldman,* Award, 16 December 2002,¶¶ 194, 198.
[433] *Merrill & Ring*, Counter-Memorial ¶ 802.
[434] Referring to the *Metalclad* Award of 30 August 2000.
[435] *GAMI*, Escrito de Contestación ¶ 292.
[436] *GAMI*, Escrito de Dúplica ¶ 170.
[437] *GAMI*, Escrito de Contestación ¶ 293.

of NAFTA.[438] In any case, that interpretation of the *Feldman* Tribunal is also supported by Mexico in *Thunderbird*.[439]

3. United States

In *Grand River*,[440] the United States sustains that for breaches of NAFTA Chapter Eleven provisions, other than Article 1110, a claimant must demonstrate that the compensation it seeks is "appropriate to the specific circumstances of the case, taking into account the principles of both international law and the provisions of the NAFTA."[441] The United States also argues that arbitral tribunals assessing compensation for violations of NAFTA Articles 1102, 1103 and 1105 (as well as those assessing similar provisions under other international agreements), have looked to the principles of compensation articulated in the *Chorzów Factory*[442] case for guidance. The application of the *Chorzów* principles, however, differs depending upon the facts of each case. In some cases, arbitral tribunals have determined that the FMV formula is an appropriate measure of compensation for non-expropriation claims, but in other instances, tribunals have concluded that it is not.

Finally, the United States argues[443] that in cases where the breaching measure has eliminated nearly all economic value of the investment in the host state, some arbitral tribunals have determined that the FMV formula is an appropriate measure of compensation for non-expropriation claims. In cases where the economic damage caused by the breaching measure did not rise to such a level, the FMV analysis was often abandoned in favor of other measures of compensation[444] so that compensation was awarded only for harm that was proximately caused by the breach.

---

[438] *Feldman*, Award, 16 December 2002 ¶ 194.
[439] *Thunderbird*, Escrito de Contestación ¶ 323.
[440] *Grand River*, Counter-Memorial pp. 163-165.
[441] *Feldman*, Award, 16 December 2002 ¶ 195 (quoting *S.D. Myers*, Partial Award, 13 November 2000 ¶¶ 303-319).
[442] *Case concerning the Factory at Chorzów*, P.C.I.J. Ser. A. No. 17, at 47 (13 Sept. 1928) ("The essential principle contained in the actual notion of an illegal act is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.").
[443] *Grand River*, Counter-Memorial pp. 164-165.
[444] *See*, *e.g.*, *Feldman*, Award, 16 December 2002 ¶¶ 194-198; *Pope & Talbot*, Damages Award ¶¶ 81-85; *S.D. Myers*, Partial Award, 13 November 2000 ¶ 309.

B. Causality

1. Canada

In *Gallo*, Canada contends that in order to recover damages for a breach of Article 1105, a claimant must first and foremost prove that the breach is the "but for" legal and factual cause of the damages in question. Quoting *Feldman*,[445] Canada argues that "in assessing the appropriate compensation standard for non-expropriation breaches, the [*Feldman*] Tribunal stated: 'what is owed by the responding Party is the amount of loss or damage that is adequately connected to the breach.' That is, the Claimant must show that in a hypothetical world where only the allegedly offending measure is assumed away, the Claimant would not have suffered the damages in question."[446]

In *Merrill & Ring*, Canada contends that "[t]he causation requirement also requires that damages not be too remote or speculative; they must be the proximate, direct and immediate consequence of the breach found."[447]

In the case of *Pope & Talbot*, Canada argues that Article 1105 requires NAFTA States to accord a MST to "investments of investors," not to "investors." In this regard, it submits that Article 1105 bars recovery of damages incurred directly by the investor. It is an obligation that relates only to the investments.[448] The causal link respecting a breach of Article 1105 can only be between the treatment in question and the investment. It is, therefore, impossible for an investor to establish that any alleged economic harm it suffered (as opposed to the harm suffered by its investment) has a sufficient causal link to a NAFTA State breach of Article 1105.[449]

[445] *Feldman,* Award, 16 December 2002 ¶ 194.
[446] *Gallo*, Counter-Memorial ¶ 509.
[447] *Merrill & Ring*, Counter-Memorial ¶ 795.
[448] *Pope & Talbot*, Counter-Memorial (Damages Phase) ¶ 56.
[449] *Id.* ¶ 58.

Also in *Pope & Talbot*, Canada contends that an investor must claim under Article 1117 for derivative loss arising out of a breach of Article 1105 and under Article 1116 for direct loss to the investor arising out of the breach of NAFTA Article 1105.[450]

In *S.D. Myers*, Canada argues that Article 1105 refers to obligations relating to investments. That provision requires that "investments of investors," and not "investors" *per se*, be accorded a MST.[451] When considering the ordinary meaning of Article 1105 of NAFTA, it seems clear that only losses with respect to an investment (made or to be made) are compensable. Given that NAFTA obligations relate to the investment of an investor of another Party or to the investor with respect to its investment, compensation for damages arising out of a breach of these obligations must also be with respect to its investment.[452] According to Canada, these conclusions are confirmed by the object and purpose of Chapter Eleven, which is to protect investors when making investments in another NAFTA country and to 'increase substantially investment opportunities in the territory of the Parties' (Article 102 NAFTA). The purpose of Chapter Eleven is not to protect investors' operations in their home country but to protect their investment in the territory of other NAFTA Parties. The investment provisions of NAFTA protect 'investors' with respect to their 'investments.' Other Chapters of NAFTA protect nationals of other NAFTA Parties with respect to other aspects of their operations. For example, Chapter Twelve protects 'investors' that are cross-border service providers.[453]

Finally, in *UPS*, Canada contends that there must be a causal link between the alleged breach and the respective loss:[454] "[…] the Claimant's case must fail unless it can demonstrate proximate causation. The chain of causation requires it to show that the Claimant or UPS Canada is affected when customers abroad choose to send mail through a foreign postal administration instead of shipping with UPS of America. It also requires the Claimant to show that UPS of America incurs damage "by reason of, or arising out of" that supposed breach."[455] According to

[450] *Pope & Talbot*, Reply Counter-Memorial (Damages Phase) ¶ 26.
[451] *S.D. Myers*, Counter-Memorial ¶ 88.
[452] *Id.* ¶ 89.
[453] *Id.* ¶ 93.
[454] *UPS*, Rejoinder (Merits Phase) ¶ 340.
[455] *Id.* ¶ 341.

Canada, a claimant must at least show a correlation between each of the contested measures and the damages claimed.[456]

2. Mexico

In its 1128 Submission in *Pope & Talbot*, Mexico submits that damages can only be awarded for loss or damage that the claimant has shown, through cogent evidence, would not have been suffered "but for" any breach of NAFTA Article 1105.[457]

In *GAMI*, Mexico argues that compensation for violation of NAFTA Article 1105 must correspond to the losses or damages effectively experimented by virtue of such violation or as a consequence thereof.[458]

In *Thunderbird*,[459] Mexico endorses the reasoning of the *S.D. Myers* Tribunal,[460] which pointed out:

> […] damages may only be awarded to the extent that there is a sufficient causal link between the breach of a specific NAFTA provision and the loss sustained by the investor. Other ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the proximate cause of the harm.

In short, in *Thunderbird*, Mexico argues that compensation under Article 1105 of NAFTA must be equivalent to the losses or damages suffered as a consequence of the violation.[461] This is an invocation of general legal principles applicable to the determination of damages, including that of the proximate cause. It differs from the compensation measure for direct or indirect expropriations.[462] International case law applies, in general, to claims for violations of Article

---

[456] *Id.* 343.
[457] *Pope & Talbot*, Artilce 1128 Post-Hearing Article 1128 Submissions (Damages Phase) ¶ 6.
[458] *GAMI*, Escrito de Contestación ¶ 294.
[459] *Thunderbird*, Escrito de Contestación ¶ 324.
[460] *S.D. Myers*, Second Partial Decision, 21 October 2002 ¶ 140.
[461] *Thunderbird*, Escrito de Contestación ¶ 325.
[462] *Thunderbird*, Escrito Posterior a la Audencia ¶ 231.

1105. However, the measure in which legal principles derived of such case law apply to a particular case depends entirely on the nature of each alleged violation and its effects.[463]

Compensations for the FMV can only be applied if it is established that the claimed violation is comparable to a direct or indirect expropriation. If the violation does not arise out of an expropriation, the compensation must be limited to the loss or damage caused by the violation or as a consequence thereof.[464]

Also in *Thunderbird*, Mexico sustains that there is no distinction between lawful or unlawful expropriations. If NAFTA has been violated, the investor has the right to be compensated for the loss or damage caused by the relevant violation, independently of whether the conduct that is the object of the claim is illegal as per the host-State's legislation. If the violation is comparable to an expropriation, the measure of compensation is the FMV. For any other violation, the investor has the right to recover the loss or damage suffered by virtue of the violation or as a consequence thereof.[465] Compensation for violations other than expropriation is generally determined on the date in which the loss or damage is incurred.[466]

3. United States

The United States did not address the issue of causality in any of its public submissions. The reason for that may possibly be that none of the NAFTA cases where the US has been the respondent has arrived to the step of damages.

[463] *Id.* ¶ 232.
[464] *Id.* ¶ 235.
[465] *Id.* ¶ 238.
[466] *Id.* ¶ 239.

C. Interests

1. Canada

In *Merrill & Ring*, Canada argues that NAFTA is silent on awards of interest for breach of Article 1105.[467] Furthermore, it sustains that, at international law, there is no automatic right to an award of interest on damages, and whether an award of interest is appropriate turns on the circumstances of each case and, in particular, on whether interest is necessary to ensure full reparation for the breach found.[468]

In the same case, Canada contends that if a breach of Article 1105 is found in the fact that Federal Timber Export Advisory Committee did not provide written reasons for its decisions, it is arguable that no interest (and indeed no damages) should be awarded because the failure to provide reasons in and of itself does not cause monetary loss.[469] Should the tribunal determine that an award of interest is appropriate, three further elements must be considered: (i) the applicable interest rate; (ii) the date on which the interests begin to accrue; and (iii) whether simple or compound interest should be accorded.[470]

2. Mexico

In *GAMI*, Mexico indicates that NAFTA's Chapter Eleven does not contain rules or guidance on the payment of interests in relation to damages arising out of Article 1105 violations.[471]

3. United States

The United Stated does not address the issue of interests in its public submissions.

---

[467] *Merrill & Ring*, Counter-Memorial ¶ 871.
[468] *Id.* ¶ 873.
[469] *Id.* ¶ 876.
[470] *Id.* ¶ 877.
[471] *GAMI*, Escrito de Dúplica ¶ 202.

D. Methods

1. Canada

As far as published NAFTA Canadian submissions concerns, there is no specific argument regarding methods for determining compensation. Only Mexico and the United States have drafted a few isolated conclusions about that topic.

2. Mexico

In *GAMI*, Mexico indicates that NAFTA's Chapter Eleven does not establish how damages for violations of Article 1105 must be calculated.[472]

In *Metalclad*, Mexico states that there are no methods specified by NAFTA for findings of breach of Article 1105.[473] Therefore, were any breach of Article 1105 is found, the measure of damages has to be tailored to the precise violation identified, and the economic effects caused by the measure.[474]

3. United States

In *Grand River*,[475] the United States sustains that the use of alternative valuation approaches is common, as it allows appraisers to test their methodologies and data. When different valuation approaches produce similar results, the appraiser can be confident of his or her results. Conversely, wildly divergent valuation results indicate problems with the appraiser's valuation methodologies or data.[476]

---

[472] *Id.* ¶ 168.
[473] *Metalclad*, Escrito Posterior a la Audencia ¶ 347.
[474] *Id.* ¶ 348.
[475] *Grand River*, Rejoinder p. 103.
[476] *Id.*

Also in *Grand River*,[477] the United States argues that audited financial statements are essential if they: (i) provide a snapshot of the company's financial performance over a given year; (ii) are certified by an independent auditor and prepared in accordance with generally accepted accounting principles; and (iii) serve as benchmarks for assessing the reliability of underlying sales, financial, and operating data.

E. The *Chorzów* Principle *vis-à-vis* the Fair Market Value Formula

The analysis of NAFTA pleadings shows that not applying the FMV when the investment treaty violation has not deprived the investment of all its value is not incompatible with the *Chorzów* formula or "full reparation principle." The submissions analyzed in this memorandum show that the NAFTA Parties consistently argue that when the treaty violation has not the effect of and expropriation, claimants are not entitled to the full market value of the investment. In other words, unless the investment is deprived of all value, the FMV formula is not applicable. In this regard, Irmgard Marboe has argued:

> [T]he fair market value basis is not always appropriate in international proceedings. Damage caused by an unlawful act of a State may not always be measured appropriately by an estimated price which a hypothetical willing buyer would be ready to pay. Rather, it is important to assess the damage actually incurred by the victim. The approach taken by the PCIJ in *Factory at Chorzów* suggests that the measure of damage must be concrete. This means that the valuation basis is not necessarily a market value basis.[478]

The same author criticizes how some arbitration tribunals have applied the FMV formula for non-expropriatory violations. Specifically, Marbore refers to the case of *CMS v Argentina*,[479] where the Tribunal found that the measures of the Argentine government had not amounted to expropriation but constituted violations of the FET provision and the umbrella clause in the BIT. In that case, the Tribunal determined that since there was not complete destruction of the investment, only the damage caused by the unlawful acts should be calculated.

---

[477] *Grand River*, Rejoinder p. 91.
[478] Irmgard Marboe: Calculation of Compensation and Damages in International Investment Law. Oxford University Press, 2009, pp. 173-174.
[479] *CMS Gas Transmission Company v. Argentina*, Award, 12 May 2005.

In Marbore's words: "[i]t is not entirely comprehensible why the tribunal referred to the fair market value. The standard of reparation under international law and the case *Factory at Chorzów* which were mentioned by the tribunal would not demand this standard." [480]

F. Conclusive Remarks: Exportability of the Parties' Arguments on Damages Outside the Context of NAFTA

In the case of compensation and determination of damages for FET/MST violations, virtually all issues are "exportable" to non-NAFTA scenarios. In fact, the sub-issues analyzed in this memorandum: a) object of compensation; b) the need of a causality link; c) interests; and d) methods for determining compensation, are not exclusive of the NAFTA framework. Whether NAFTA provisions on FET/MST are different from those in BITs does not appear to be of much relevance. Arbitral tribunals tend to apply similar methods of compensation irrespective of the treaty violation. In some cases, the formula for compensation for expropriation has been applied to non-expropriation violations. Therefore, what matters is that there is a violation of an investment treaty provision. When that occurs, it is for the arbitration tribunal to apply the compensation formula that it deems appropriate.

As has been sustained by one of the few commentaries written so far about the issue of damages in international investment law: "[T]he exact type of a violated obligation has proven largely irrelevant to the matter of compensation. This is because the object of compensation is to make good the damage suffered as a result of particular State measure, regardless of what rule this measure has violated.[481] […] On examination of the jurisprudence, it appears that compensation in non-expropriation cases is assessed by reference to loss on the part of the investor, without focusing on the specific provision breached."[482]

[480] Marboe, *supra* note 478 at 173-174.
[481] Sergey Ripinsky with Kevin Williams: *Damages in International Investment Law.* British Institute of International and Comparative Law, 2008, p. 14.
[482] *Id.* p. 90.

Conclusions

1. FET/MST

- There is a strong consensus on the idea that NAFTA Article 1105 is equivalent to the FET/MST and full protection and security obligation it encompasses do not go beyond but rather are subsumed by the standard.

- The United States even goes further and claims that generally, the FET is the equivalent of the customary international law MST of aliens. The United States also argues that MST is an overarching standard including a set of definite customary obligations. Canada and Mexico also seem to agree with this idea.

- The NAFTA Parties agree that the threshold for finding a violation of the FET/MST remains high. Canada and the United States argue that it does not contain an obligation to protect the investor's legitimate expectations and that there is no self-standing obligation of transparency and a prohibition against discrimination.

- The findings of this research with regards to FET/MST are not limited to the context of NAFTA. The NAFTA Parties' arguments reveal that Article 1105 is equivalent to the international law MST and that FET is subsumed in this standard. Moreover, the Parties demonstrate that since the modern investment protection regime was put in place, countries party to BITs intended to integrate the CIL FET standard in their treaties. Further, the wording of Article 1105 is similar to that used in various BITs.

2. Expropriation of Rights and Contracts

- The Parties agree that only investments under Article 1139 are capable of being expropriated. The Parties agree this covers tangible and intangible property, but not non-vested rights such as goodwill, market access, market share and customer base. Canada and the United States argue that such factors may be taken into consideration for

valuation purposes only. The Parties believe that their interpretation of "investment" goes beyond the NAFTA text and is a reflection of the standards under customary international law.

- The Parties have an agreement that the deprivation required for an action or measure to amount to an expropriation must be "substantial," so as to render the investment "useless" or "valueless," and that mere interference or threat of interference is not sufficient.

- There will not be a violation of Article 1110 if a State takes an action for a public purpose, in a non-discriminatory manner, in accordance with due process of the law and FET, and, if necessary, upon payment of compensation.

- The Parties agree that the regulatory/police power applies to NAFTA Chapter Eleven and their arguments on the specifics of the standard are a reflection of their view on the principle in customary international law.

- The Parties agree that the exercise of the regulatory/police power involves regulations or measures in the "public interest" or for a "public purpose," which they argue are measures aimed at the public safety, health and environment.

- There is agreement among the NAFTA Parties in that States must be able pass domestic legislation and regulations in their normal sovereign function that may have an adverse effect on an investment without triggering liability under international law.

- The Parties agree that an investor's reasonable expectations must be formed against the backdrop of the historical, regulatory and industry-specific context, and that, absent specific representations to that effect, an investor cannot reasonably expect that its industry will not be subject to legislation or regulation. The Parties differ in regard to the context in which they address reasonable expectations, however; the United States considers it to be part of the test for indirect expropriation, whereas Canada and Mexico see it as a factor to be considered when determining whether there was a proper exercise of the regulatory/police power.

- The NAFTA Parties agree that a simple breach of contract claim cannot be a violation of international law. Instead, there must be a supplemental element present that elevates it to the international plane. Canada and Mexico argue that there needs to be an exropriatory act for a breach of contract to constitute an expropriation. Mexico and the United States argue that a denial of justice will amount to this additional element. In addition, the United States believes that a pretence of form to achieve an internationally wrongful end would likewise elevate a breach of contract claim.

- The Parties agree that the law governing the determination and classification of property and contract rights is municipal law.

- The Parties arguments in regard to expropriation are not just limited to the context of the NAFTA; by the Parties own submissions, Chapter 1110 on expropriation was based on existing BITs and the Parties believe that the provision reflects and does not extend the customary international law of expropriation.

3. Standards of Compensation for breaches of the FET/MST Obligations

- In the absence of discrimination that also constitutes indirect expropriation or is tantamount to expropriation, a claimant would not be entitled to the full market value of the investment which is granted by NAFTA.

- The NAFTA Parties endorse the findings of the *Feldman* Tribunal. There is agreement among the NAFTA Parties in that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.

- There appears to be agreement between Canada and Mexico about the fact that in order to recover damages for a breach of NAFTA Article 1105, a claimant must first and foremost prove that the breach is the "but for" legal and factual cause of the damages in question.

- Canada and Mexico agree that NAFTA does not provide guidance on payment of interests for damages arising out of FET/MST violations.

- There was no commonality among NAFTA Parties' arguments regarding methods of compensation. There are only some isolated conclusions of Mexico and the United States with regard to the methods for determining compensation.

- In the case of compensation and determination of damages for FET/MST violations, all issues are exportable to non-NAFTA scenarios.

Bibliography

A. Books

BRIERLY, J.L: *The Law of Nations,* 6th ed., 1963, (Sir Humphrey Waldock ed.).

BROWNLIE, Ian: Principles of Public International Law, 5 ed., 1998.

MARBOE, Irmgard: Calculation of Compensation and Damages in International Investment Law. Oxford University Press, 2009.

RIPINSKY, Sergey with WILLIAMS, Kevin: *Damages in International Investment Law.* British Institute of International and Comparative Law, 2008.

ROTH, A.R: The Minimum Standard of Treatment in International Law, 1949.

SCHWARZENBERGER, Georg: International Law as Applied by International Courts and Tribunals, 1957.

SHAW, Malcolm N: *International Law*, 4th ed., 1997.

B. Journal Articles

GUDGEON, K. S., "United States Bilateral Investment Treaties: Comments on their Origin, Purposes, and General Treatment Standards", *International Tax & Business Lawyer*, 1984, vol. 4, pp. 105-135.

SCHREUER, C., "Diversity and Harmonization of Treaty Interpretation" in FITZMAURICE, M. *et al.*, *Treaty Interpretation and the Vienna Convention on the Law of Treaties*, Martinus Nijhoff, Leiden, 2010, 382 p.

ROBIN, P. M., "The *BIT* Won't Bite: The American Bilateral Investment Treaty Program", *The American University Law Review*, 1984, vol. 33, pp. 931-958.

C. Internet sites

NAFTA CLAIMS: <http://www.naftaclaims.com>

UNITED STATES DEPARTMENT OF STATE, *NAFTA Investor-State Arbitration*: <http://www.state.gov/s/l/c3439.htm>

FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, *Nafta – Chapter 11 – Investment*: <http://www.international.gc.ca>

ESTADOS UNIDOS MEXICANOS, *Secretaría de Economía*: <http://www.economia.gob.mx>

D. Awards and Judicial Decisions

1. Arbitration Awards

Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v the Republic of Estonia, ICSID Case No. ARB/99/2. Award, 25 June 2001.

CMS Gas Transmition Company v the Republic of Argentina, ICSID Case No. ARB/01/8, Award of 12 May 2005.

CMS Gas Transmission v. the Republic of Argentina, ICSID Case No.ARB/01/8, Annulment Proceeding, Annulment Decision of 25 September 2007.

Cargill, Incorporated v. the United Mexican States, ICSID Case No. ARB(AF)/05/2 (NAFTA), Award of 18 September 2009.International Treaties:

Saluka Investments BV v. The Czech Republic, UNCITRAL, Partial Award, 17 March 2006.

The United Mexican States v. Metalclad Corporation, 2001 BCSC 664

2. Decisions Rendered by the International Court of Justice

Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989, p. 15.

Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 69.