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Foreign Investment Law and the United States: You Can't Tell the Players without a Score Card

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This is my fourth attempt to review the past year of NAFTA investment disputes. Accordingly, I think it is time to provide a score card for NAFTA spectators that will outline each ongoing dispute and explain its place in the lexicon of this burgeoning area of foreign investment law. In doing so, I will focus my analysis on the most interesting developments that took place in 2002. Although information about certain NAFTA disputes has become more readily available, there are still arbitrations being held in relative obscurity. In such cases, particularly those brought against Mexico, we must make do with whatever is available.

In a nutshell, 2002 saw NAFTA arbitration become more entrenched in the minds of trade law practitioners and public interest lawyers, but it still did not enter into the consciousness of the wider legal community. There is still room for considerable growth, as well as a better understanding of exactly what the process involves. The most notable media treatment came from a television program aired by Bill Moyers on the PBS network. With its terribly flawed and unbalanced analysis of the legal issues involved, the show managed to crystallize opposition to NAFTA among the anti-globalization fringe, which unfortunately seems to include a few notable Democratic Party legislators.

Moving forward, a more balanced and thoughtful consideration of the issues and interests at stake in protecting American investors abroad and in providing a truly secure investment environment at home will hopefully be forthcoming. With this goal in mind, it is time to introduce the players.

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I. Disputes Involving Mexico

A. *Feldman v. Mexico*[1]

The *Feldman* claim was the only claim against Mexico that resulted in a final award in 2002. The investor claimed that Mexico's decision not to provide rebates for taxes paid by the investor for the export of cigarettes from Mexico constituted a creeping expropriation of its business in Mexico.[2] Feldman's Article 1102 claim was based on the fact that its domestic competitors were being granted the rebates at the same time that its rebates were being refused and that these competitors were not being subjected to the same thoroughgoing audits visited upon the investment.[3]

The Tribunal ultimately determined that the impact of the government's action did not sufficiently harm Feldman's investment in Mexico so as to constitute a taking under international law.[4] This finding was based on the fact that Feldman's sales/distribution business (i.e., his "investment") was still functioning. Although the business was no longer exporting cigarettes, it was still selling other commodities, such as alcohol, for export.[5]

The Tribunal also provided an "acquired rights" analysis, which appeared to be based on two premises: (1) that international law did not require the state to permit the "grey market" sale of cigarettes, and (2) that there was never any "right" (presumably under Mexican law) to export cigarettes.[6] At first blush, these premises appear to be at odds with the general principle of freedom of commerce, which is enshrined in NAFTA.[7] The problem with this analysis is that it might be used by a government to avoid paying compensation for exproriatory acts. It would do so by claiming the *Feldman* Tribunal only required proof that the investor lacked any positive "right" to engage in the business that was taken (or that, conversely, international law did not positively require the state to permit such business activity). This cannot be what the *Feldman* Tribunal intended. Such an analysis would essentially negate the usefulness of the expropriation obligation, and could never be supported in an increasingly interdependent world where foreign investment is no longer operated primarily by way of concession agreement with the host state. What the *Feldman* Tribunal was most likely trying to explain was that, given the particular nature of Feldman's cigarette sales business—which was dependent upon the existing tax "loopholes"—he enjoyed no legitimate expectation of being able to exploit the situation indefinitely.

In addition to its progressive Article 1110 analysis the *Feldman* Tribunal provided an articulate and helpful analysis of NAFTA Article 1102 (the national treatment obligation).[8] This analysis was based on the important and correct finding that Article 1102 protects

1. Marvin Feldman v. United Mexican States, Final Award, NAFTA/ICSID(AF) Tribunal, Case No. ARB(AF)/99/1, Dec. 16, 2002, *available at* http://www.naftalaw.org [hereinafter Feldman Award].
2. *Id.* at 3–4.
3. *Id.* at 7.
4. *Id.* at 41.
5. *Id.*
6. *Id.*
7. *See* North American Free Trade Agreement, Jan. 1, 1994, art. 102(1) and preamble [hereinafter NAFTA].
8. One could quibble, however, with the approach taken to determine which investors should be considered to be in "like circumstances" in order to compare whether different treatment was being provided to investors who should not be treated differently. The Tribunal seemed to focus more on the character of the businesses involved, rather than on the more fundamental question of who was actually in competition. This may have been a factor of the evidence and pleadings before it, but one would have liked to see a more detailed analysis of the factors of competition at play (similar to that which can be found in an antitrust law analysis).

investors from all manners of discriminatory treatment—whether intended or not.[9] This conclusion is in concert with WTO jurisprudence on the national treatment rule.

Another notable finding of the Tribunal was that an adverse inference may be drawn against a government that fails to provide sufficient evidence to rebut the prima facie facts established by the claimant. Such findings are rare even in the WTO context, although the Appellate Body itself has approved of the rule.[10] In this case, a majority of the Tribunal concluded that Feldman provided enough evidence to show that his investment had not received tax rebates during the same period that Mexican companies in "like circumstances" were receiving rebates.[11] Mexico simply failed to provide evidence either that there was no effective difference in treatment or that there was a good reason for the difference.[12] Accordingly, Feldman won his Article 1102 claim. Therefore, the Tribunal's award is an important decision that provides notice to governments that they must be open and transparent regarding their treatment of foreigners and domestic competitors. Otherwise, governments must be prepared to face the consequences.

B. *ADAMS ET AL V. MEXICO*[13] AND FRANK V. *MEXICO*[14]

Counsel for *Adams* and other would-be claimants launched their claims in early 2001. This dispute involves allegations of the expropriation of the multiple claimants' Baha beachfront resort properties by Mexico.[15] The claimants appear to have spent the past year and a half trying to establish a Tribunal to hear their claims. The *Adams* claims represent the first informal "class-action style" claim brought by investors under NAFTA. NAFTA does not provide any detailed rules for multiple, unrelated claimants, but Article 1126 does contemplate the establishment of a special Tribunal to hear the consolidated claims of multiple investors involving the same general facts and legal arguments.[16] The provision requires the International Centre for Settlement of Investment Disputes (ICSID) Secretary General, who acts as the Appointing Authority under NAFTA, to designate the members of such a Tribunal upon the request of any party.[17]

Although exactly what has happened in the *Adams* claims remains unclear (which could explain the considerable delay in establishing the Tribunal in 2002), the complications presented by the operation of Article 1126 may have played a role. The new trend of NAFTA Governments refusing to agree to the establishment of any Tribunal on jurisdictional grounds (i.e., that the arbitration was not validly commenced at least to the unilateral satisfaction of the government being sued) seems to have been another factor. Mexico has openly refused to acknowledge the validity of the *Adams* claims and has therefore refused

9. Feldman Award, *supra* note 1, at 181–84.

10. *Id.* at 177. The accompanying note provides as follows: *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, Adopted May 23, 1997, WT/DS33/AB/R, 14. *Accord* Asian Agricultural Products Limited v. Republic of Sri Lanka, ICSID Reports, 246, 272, 1990. ("In case a party adduces some evidence which prima facie supports his allegation, the burden of proof shifts to his opponent.").

11. *Id.* at 73.

12. *Id.*

13. Adams et al. v. United Mexican States, NAFTA/UNCITRAL Proceeding, Feb. 16, 2001, *available at* http://www.naftalaw.org.

14. Robert Frank v. United Mexican States, NAFTA/UNCITRAL Proceeding, *available at* http://www.naftalaw.org.

15. Adams, *supra* note 13, at 4.

16. NAFTA, *supra* note 7, art. 1126.

17. *Id.*

to participate in the appointment process. According to rumors, both Mexico and the U.S. State Department have employed these tactics in other recent cases. If ICSID officials have entertained such arguments, we might have some explanation as to what has taken so long in this particular case.

NAFTA Article 1124 clearly provides that the Appointing Authority must appoint any remaining Tribunal members if ninety days has passed since the commencement of the arbitration and one of the parties has requested him to do so.[18] If the claimant designated the United Nations Commission on International Trade (UNCITRAL) Arbitration Rules for its arbitration, Article 7(1)(b) of those rules provides that the Appointing Authority has thirty days to make the appointment.[19] If he fails to do so, the claimant can request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate a new Appointing Authority.[20] NAFTA Article 1124 provides absolutely no authority for the ICSID Secretary General to question the *bona fides* or jurisdictional basis for a claim.[21] Rather, as Article 21(1) of the UNCITRAL Arbitration Rules provides: "The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement."[22]

In stark contrast to the situation that applies when a claimant chooses the UNCITRAL Rules under NAFTA Article 1120, Article 4 of the ICSID Additional Facility Rules provides that the Secretary General may "approve" the submission of any claim to arbitration using those rules.[23] Under Article 4(2), this approval appears to be based on the Secretary-General's satisfaction that the procedural elements required for obtaining consent to arbitrate have been satisfied between the parties.[24] Accordingly, if one is concerned about the possibility that an ICSID official may want to look over his shoulder as the arbitration is commenced, much less entertain the new refusal-to-appoint tactic recently adopted by Mexico and the State Department, the UNCITRAL Arbitration Rules provide an enticing alternative.

The *Frank* claim was launched in mid-2002, based on a somewhat similar set of facts (i.e., an investor with Baha beachfront property who lost control over it through the allegedly questionable intervention of Mexican officials, the actions of a malevolent, local neighbour, and a lack of legal protection against such treatment).[25] As 2002 closed, a Tribunal did not appear to have been established in that case either.

C. *Calmark Commercial Development Inc. v. Mexico*[26]

At the beginning of 2002, notice of a very interesting NAFTA dispute was provided to Mexico. The claimant alleges that in 1994 an ongoing property dispute was settled by its

18. *Id.* art. 1124.

19. Arbitration Rules, United Nations Commission on International Trade Law [hereinafter UNCITRAL], art. 7 (Dec. 15, 1976).

20. *Id.*

21. NAFTA, *supra* note 7, art. 1124.

22. UNCITRAL, *supra* note 19, art. 21.

23. ICSID Additional Facility Rules, art. 4. Under NAFTA Article 1120, the claimant can choose among the UNCITRAL Rules, the ICSID Convention Rules, or the ICSID Additional Facility Rules. However, because neither Canada nor Mexico have ratified the ICSID Convention, only the UNCITRAL Rules are available in disputes involving all NAFTA Parties, and the ICSID Additional Facility Rules are only available in claims against the United States or involving a U.S investor against Mexico or Canada.

24. *Id.* art. 4(2).

25. Frank, *supra* note 14, at 2–3.

26. Calmark Commercial Development Inc. v. United Mexican States, Notice of Intent to Commence Arbitration, Jan. 11, 2002 (choice of rules not noted), *available at* http://www.naftalaw.org.

former attorneys without any notice to him or his present attorney, who had previously worked with the former attorneys.[27] Various frauds were allegedly committed on the court over the next few years to enable the former lawyer and some acquaintances to collect portions of the allegedly illegal and unauthorized "settlement" and to escape penal liability for their actions.[28] A civil claim against the former lawyers followed and was dismissed at a "preliminary" stage five years later. The crux of the claim appears to involve a mix of alleged improprieties, or gross negligence, on the part of certain members of the judiciary (leading to a substantive denial of justice), combined with complaints of unreasonable delay (contributing to a procedural denial of justice).[29] The claim could thus provide a revealing "update" on the denial of justice jurisprudence of the U.S.-Mexico Claims Commission of the 1920s, which still forms the basis of many of the denial of justice claims made today.

Perhaps the most interesting aspect of this case, however, is the fact that it is for only 400,000 U.S. dollars, an incredibly small amount given the costs of international commercial arbitration.[30] If the claimant is successful and actually receives its costs from a Tribunal, the case could prove that NAFTA can work for small investors too. On the other hand, if a claim is made and eventually won, but costs (for the both the Tribunal fees and the litigation costs) are not awarded, the "victory" will prove to be a tremendously costly one.

D. *Fireman's Fund v. Mexico*[31]

The *Fireman's Fund* claim was launched in the fall of 2001. By the fall of 2002, a Tribunal had been established and was entertaining Mexico's preliminary objections. The facts appear fairly simple. The claimant here held a \$50 million debenture as part of the \$100 million capitalization of a new Mexican bank.[32] The other \$50 million had been issued and subscribed in pesos to various Mexican investors. After the new bank suffered through various financial crises, which likely included the devaluation of the peso, Mexican regulators resolved to reimburse all of the Mexican investors but not the U.S. claimant. The new bank and its Mexican parent bank were eventually dissolved, leaving the U.S. claimant allegedly holding the bag.[33] Given the amounts involved, this is essentially the "anti-Calmark" claim sure to provide years of litigation to come.

E. *GAMI Investments v. Mexico*[34]

GAMI was the part-owner of a large Mexican sugar producer.[35] Its case raises the same kind of trade barrier issues that vex private enterprises the world over, but have heretofore been the province of state-to-state dispute settlement involving export and import quota

27. *Id.* at 7.
28. *Id.* at 8.
29. *Id.* at 3–10.
30. *Id.* at 19.
31. Fireman's Fund v. United Mexican States, NAFTA/ICSID(AF) Notice of Arbitration, Nov. 2, 2001, *available at* http://www.naftalaw.org.
32. *Id.* at 4.
33. *Id.* at 8.
34. GAMI Investments, Inc. v. United Mexican States, NAFTA/UNCITRAL, Notice of Arbitration, Apr. 9, 2002, *available at* http://www.naftalaw.org.
35. *Id.* at 4.

regimes. The first NAFTA case to deal with trade quota systems, *Pope & Talbot v. Canada*, failed to provide a particularly useful analysis of the systems economically harmful effects.[36] Accordingly, it will be interesting to see how this Tribunal fares with claims made under Articles 1102 and 1105.

In its claim, GAMI does not challenge the legitimacy of such regimes or the need for governments to intervene in order to prevent market dynamics from defeating the price inflation for which such regimes are designed. The problem is allegedly that Mexico has not executed that role properly or has done so with gross negligence, causing harm to the business of GAMI's investment in favour of government-owned competitors.[37] To the extent that the investor seeks compensation for Mexico's failure to properly implement and enforce its domestic sugar quota regime, it has a very tough road to hoe (under either Article 1102 or 1105). To the extent that it can prove differential treatment as a result of government conduct, the claim provides a better chance of success.

Where GAMI appears to stand the best chance of success, however, is in the allegedly discriminatory expropriation of the business assets in which it had invested. Although the applicable facts are only sparsely laid out in the claim, after significantly weakening the business in which GAMI was a partial owner, Mexico apparently issued decrees taking the capital assets of the investment enterprise, while at the same time not taking the similar assets of other investors in Mexico.[38] Thus, the most interesting questions will become how to value the investment so taken. Should the valuation be pegged as of the time of the taking (with revenue streams based on weakened past performance) or should an earlier date be selected based on the theory that the previous regulatory failures amounted to creeping expropriation? Or perhaps the Tribunal should stick with the time of the taking, but value the business based upon the revenue streams actually generated after the taking, when Mexico allegedly began to run its sugar price maintenance regime "properly." Given this intriguing scenario and assuming that expropriation is ultimately proved, the Tribunal's reasons for its damages award may prove to be the best part of the whole arbitration for NAFTA watchers.

F. *Waste Management v. Mexico*[39]

The year 2002 also saw the first NAFTA award to earn the appellation "II" behind its abbreviated style of cause. In *Waste Management II*, a Tribunal different in constitution from the first *Waste Management* Tribunal issued a jurisdictional award that was widely expected.[40] A majority of the first Tribunal concluded that the claimant failed to submit a valid waiver of its rights to seek compensation before a Mexican court or Tribunal and that its actions in domestic proceedings subsequent to the commencement of the arbitration confirmed the invalidity of the waiver and thus deprived the Tribunal of jurisdiction to proceed.[41] It

36. Pope & Talbot v. Canada, NAFTA/UNCITRAL, Notice of Arbitration, Mar. 25, 1999, *available at* http://www.naftalaw.org.

37. GAMI, *supra* note 34, at 10.

38. *Id.*

39. Waste Mgmt., Inc. v. United Mexican States, Arbitral Award, NAFTA/ICSID(AF) Tribunal, Case No. ARB(AF)/98/2, June 2, 2000, *available at* http://www.naftalaw.org.

40. Waste Mgmt., Inc. II v. United Mexican States, Award on Jurisdiction for Re-Submitted Claim, NAFTA/ICSID(AF) Tribunal, Case No. ARB(AF)/00/3, June 26, 2002, *available at* http://www.naftalaw.org.

41. Waste Mgmt., *supra* note 39, at 23.

would have been preferable for the Tribunal to permit Mexico to raise the issue of the claimant's pursuit of domestic compensation remedies as a substantive defence, rather than treating such conduct as somehow robbing it of jurisdiction. Construction of the waiver as faulty did nothing more than permit Mexico to take advantage of a minor procedural defect to delay the arbitration by two years. The issue before the *Waste Management II* Tribunal, however, was simply whether it had jurisdiction to proceed, given that the first Tribunal had already once dismissed Waste Management's claim.[42]

The decision was really never in doubt. Mexico argued that the effect of the first Tribunal's award was to conclusively end the controversy between the parties based on the principle of *res judicata*. Regardless, the claimant prevailed by noting that the only issue that was a matter of *res judicata* was the quality of its original waiver document. The merits were left untouched by the first Tribunal, and a new and better waiver letter had been submitted with the new claim. Being that nothing in NAFTA suggests that a claimant can only have "one bite at the apple," there was no reason not to allow the resubmitted claim to go forward. The original arbitration was dismissed only due to an insufficient waiver document and therefore to deprive the claimant of its "day in court" would violate the NAFTA Article 102(1) objective of the establishment of "effective procedures" for dispute settlement.[43]

The most useful finding of the Tribunal in *Waste Management II* was its straight-forward conclusion that NAFTA Chapter 11, unlike many bilateral investment treaties, does not require the exhaustion of local remedies prior to the establishment of an arbitration.[44] It does not even require that the claimant surrender domestic actions for extraordinary relief, such as declaratory or injunctive remedies.[45] Only domestic claims to compensation must be waived for a claim to proceed.[46]

The most important element of the *Waste Management II* jurisdictional award, however, was the revelation that Mexico had apparently compelled its own arbitrator, Guillermo Aguilar Alvarez, to resign. In its award, the Tribunal merely noted: "Following a communication from the Respondent dated 16 November 2001 which did not, however, amount to a challenge, one of the Arbitrators, Mr. Guillermo Aguilar Alvarez, tendered his resignation from the Tribunal."[47]

Of course, this was the same Lic. Alvarez who provided the *Methanex* Tribunal with an affidavit attesting to the fact that the NAFTA negotiators knew the difference between "customary international law" and "international law *simpliciter*" when they drafted NAFTA Article 1105.[48] Apparently the truth of his revelation was too much for the Government of Mexico to bear (especially since Mexico and the other two NAFTA Governments repeatedly claimed the contrary before all of the NAFTA Tribunals and withheld the negotiating documents that would prove otherwise).[49] Accordingly, Lic. Alvarez was apparently asked to fall on his own sword for his unsavoury habit of telling the truth.

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42. Waste Mgmt. II, *supra* note 40, at 27.
43. NAFTA, *supra* note 7, art. 102(1).
44. Waste Mgmt. II, *supra* note 40, at 52.
45. *Id.* at 30.
46. *Id.*
47. *Id.* at 4.
48. Methanex v. United States of America, NAFTA/UNCITRAL Tribunal, Investor's Second Submission re: NAFTA FTC Statement on Article 1105, Nov. 9, 2001, 6–7, *available at* http://www.naftalaw.org.
49. *See, e.g.*, Methanex v. United States of America, NAFTA/UNCITRAL Tribunal, U.S. First Submission re: NAFTA FTA Statement on Article 1105, Oct. 26, 2001, *available at* http://www.naftaclaims.com; U.S. Second Submission re: NAFTA FTC Statement on Article 1105, Dec. 17, 2001, *available at* http://www.

The experience of Guillermo Aguilar Alvarez confirms any doubts that NAFTA arbitration has become a blood sport, at least for the governments defending them. In this regard it is worth noting that even though the number of claims has continued to increase steadily, we have yet to see a single instance where a NAFTA Government has actually exercised its Article 1128 rights to provide arguments in support of its own investor.

G. *Corn Products International v. Mexico*[50] & *International Thunderbird Gaming v. Mexico*[51]

As neither of these two claims have been made public, providing information about them is difficult. Nonetheless, along with the previously mentioned cases, they seem to indicate that a trend is afoot for Mexico to receive an increasing number of the claims filed under NAFTA. The *Thunderbird* claim is an old fashioned investment case involving allegations of the arbitrary and forcible expropriation of the claimants' businesses while its domestic competitors were permitted to operate unmolested.[52] The claim also holds the distinction of being the first claim brought against Mexico by a Canadian firm (albeit one whose main offices are located in San Diego).

The *Corn Products* claim is another offshoot of the long-running battle between the Governments of Mexico and the United States over sugar products and their substitutes, such as the high-fructose corn syrup produced by the claimant's investment in Mexico. It demonstrates the increasing awareness among investors and their counsel that a trade-in-goods measure may simultaneously violate the GATT or a comparable NAFTA provision, while it also breaches NAFTA's investment provisions, to the extent that the measures unduly or improperly impair the investor's ability to operate and enjoy its investments.

For the government officials who began wringing their hands years ago about how NAFTA Chapter 11 was only *really* intended to protect U.S. and Canadian investors in Mexico, this trend may provide some vindication. More cases may eventually be filed against Mexico, but that certainly does not preclude officials from Canada and the United States from being called to task when they breach the very same obligations in their own countries. Favouritism and unfairness are indigenous to more countries than just Mexico. For proof of this statement, we now turn to claims against Canada.

II. Disputes Involving the Government of Canada

A. *Crompton Corp. v. Canada*[53]

Not much appears to have happened in the *Crompton* dispute in 2002 in terms of proceeding to arbitration. The company first delivered a notice of intent to arbitrate in November 2001 concerning Canada's attempt to regulate a pesticide ingredient, Lindane.[54]

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naftaclaims.com; Mexico—Article 1128 Submission re: FTC Statement on Article 1105, Feb. 11, 2002, *available at* http://www.naftaclaims.com.

50. Corn Products International v. United Mexican States, NAFTA/UNCITRAL Proceeding, *available at* http://www.naftalaw.org.

51. Int'l Thunderbird Gaming Corp. v. United Mexican States, NAFTA/UNCITRAL Proceeding. Once made public, *available at* http://www.naftalaw.org.

52. *Id.*

53. Crompton Corp. v. Canada, Notice of Intent, NAFTA Dispute, *available at* http://www.naftalaw.org.

54. *Id.*

Canada apparently convinced the investor to voluntarily suspend its use of the substance on the understanding that a full course of testing and analysis would take place. This never materialized, and the product was subsequently banned.[55] Throughout 2002, the investor and officials continued an unproductive discourse, as two new notices of intent were issued, adding Articles 1103 and 1104 to the claim and purporting additional facts. Presumably the arbitration will be commenced in 2003.

B. *Sun Belt v. Canada*[56] & *Trammel Crow v. Canada*[57]

The *Sun Belt* case holds the distinction of being both the longest running NAFTA dispute, and the one that is clearly going nowhere in a hurry. The dispute involves allegations of outrageous discrimination by numerous members of the British Columbia Government and its judiciary, including alleged connections to mafia members.[58] Despite occasional suggestions from the claimant that the arbitration is proceeding apace, it appears far more likely that the opposite is true. The Government of Canada has provided no indication that the dispute has even reached the arbitration stage as it has for all other claims launched against it.

On the other side of the spectrum was the *Trammel Crow* dispute, which is the only known example of a NAFTA dispute that was settled prior to the commencement of arbitration. The dispute involved a procurement dispute between the investor and Canada Post Corporation (Canada Post), a Canadian state enterprise for whose conduct Canada can be held liable under NAFTA Chapters 11 and 15. Canada Post abruptly terminated a procurement process in which Trammel Crow was one of three participants, claiming it was not bound by NAFTA's procurement rules governed under Chapter 10.[59] Canada Post's claim was based on the highly dubious proposition that it only renewed the contract that had already expired between it and the other two participants in the procurement process. Trammel Crow alleged breaches of national treatment (Article 1102) and fair and equitable treatment (Article 1105), and the case was settled by Canada in the spring of 2002.[60]

C. *United Parcel Service of America* (UPS) *v. Canada*[61]

This much larger claim against Canada, which also involved the activities of Canada Post, was not settled in 2002. Instead, the *UPS* Tribunal entertained a wide-ranging motion by the Government of Canada to dismiss portions of the claim on what Canada phrased as "jurisdictional" grounds.[62] Canada's basic position has been that UPS could not put forth a claim under any provision of Chapter 11for the anti-competitive behaviour of Canada Post because it had harmed its Canadian business. Although the Tribunal would not go

55. *Id.* at 18.
56. Sun Belt Inc. v. Canada, NAFTA Dispute, Notice of Intent, *available at* http://www.naftalaw.org.
57. Trammel Crow Co. v. Canada, Notice of Intent, Dec. 7, 2001, *available at* http://www.naftalaw.org.
58. *Sun Belt*, *supra* note 56, at 8.
59. *Trammel Crow*, *supra* note 57, at 21.
60. *Id.* ¶¶ 32–33.
61. UPS of Am. v. Canada, Award on Jurisdiction, NAFTA/UNCITRAL Tribunal, Nov. 22, 2002, *available at* http://www.naftalaw.org.
62. *Id.* ¶ 13.

nearly that far, it did agree that UPS could not possibly succeed under NAFTA Article 1105 because there was no generally accepted prohibition against anti-competitive behaviour under customary international law.[63]

Rather, the Tribunal concluded that it was possible for UPS to succeed in a claim against Canada under Article 1102 for the way in which Canada Post used its delegated government authority to compete unfairly outside of its mandated monopoly (i.e., by using the powers and facilities granted to it to deliver the mail in an effort to compete ruthlessly in the express courier industry).[64] The basic theory appears to be that if Canada is going to continue to permit Canada Post to use its delegated governmental authority and postal service infrastructure to compete in the express courier industry, the same treatment must be effectively extended to all of its foreign competitors, including UPS.

While nothing is outwardly striking about either of these conclusions, it was nonetheless unfortunate that the Tribunal made them. As will be discussed below, UNCITRAL Tribunals have no authority to issue rulings on objections to admissibility. They only have the authority to rule on their competence to hear a claim, regardless of whether it will eventually be proven to have merit. The Tribunal never provided UPS with an opportunity to address the merits of its Article 1105 or Article 1102 claims. The Tribunal accordingly exceeded its jurisdiction under the NAFTA and UNCITRAL Rules by striking portions of the claim on the basis that it did not believe they would be successful rather than on the basis that it did not have the jurisdiction to hear the claims being made.

D. *S.D. Myers v. Canada*[65]

The *Myers* Tribunal took almost the entire year to provide its damages award. It was faced with some novel arguments from the NAFTA Governments, which had the character, although not the form, of arguments on jurisdiction or admissibility. It was also faced with a very complicated fact pattern (concerning the shape and share of a market that never materialized in Canada, largely because of the Canadian Government's breach). The novel arguments were the following: (1) the claimant could not recover any damages suffered by its investment unless it had brought a claim under both Articles 1116 and 1117, rather than just Article 1116; and (2) to the extent the claimant was acting as a cross-border service provider, it was not entitled to recover damages under the investment chapter.[66]

Both of these arguments were (appropriately) given short shrift by the Tribunal, which concluded that an investor was entitled to any losses suffered as a result of the treatment of its investment. Furthermore, the Tribunal concluded that there was no reason to suspect that Chapter 11 protected the claimant, regardless of whether Chapter 12 (concerning cross-border services) may also have offered some protection.[67] The Tribunal's damages analysis also confirms that it is possible for an investor whose business was stopped before it could become a "going concern" to succeed in a claim for lost profits if he could prove

63. *Id.* ¶ 99.

64. *Id.* ¶ 122.

65. S.D. Myers, Inc. v. Canada, Award on Damages, NAFTA/UNCITRAL Tribunal, Oct. 21, 2002, *available at* http://www.naftalaw.org.

66. *Id.* ¶ 127.

67. *Id.* ¶¶ 123–129 (concerning Chapter 12); ¶¶ 102–122 (regarding the entitlement to recovery of an investor).

that the business model had succeeded in similar circumstances. In this case, the claimant successfully demonstrated how its performance in undertaking the same business in Ohio was relevant to determining how well it might have worked across the border in Ontario.

Just before 2002 drew to a close, the *Myers* Tribunal also issued its final award on costs.[68] With this award, all three Tribunal members seemed to agree that the starting point for their analysis was the principle expressed in Article 40 of the UNCITRAL Arbitration Rules—that the loser should bear the costs of the arbitration. Although the dissenting arbitrator focused more on the "big picture" issues in awarding costs, the majority seemed to focus on the actual conduct of the parties during the arbitration. The majority noted how both parties fought with "exceptional ferocity,"[69] causing the Tribunal to involve themselves more in the details of running the arbitration than one might normally expect for what is supposed to be a consensus-based process. It also noted how the claimant failed in all of his claims for liability and received only a fraction of what he originally claimed.[70]

The majority's award suggests that considerable caution should be exercised by future claimants in framing their arguments and tabulating their claims. It would appear that based on this award, at least the "kitchen sink" approach to pleading and the "shock value" approach to choosing a preliminary damages figure could seriously backfire. On the other hand, one could argue that since multiple claims (under different provisions of NAFTA chapter 11) cannot possibly lead to double-recovery, it is unfair to punish claimants for "trying their luck" with as many provisions as appear applicable (at least until the jurisprudential dust of these early years has settled).

One could also argue, as did the dissenting Arbitrator, Professor Bryan Schwartz, that failing to award a victorious claimant sufficiently will implicitly favour the respondent government, which is far better equipped to handle a hard-fought arbitration than an individual claimant.[71] If NAFTA Governments know that even if they lose, they will likely only be forced to pay slightly more than half of the Tribunal's fees (rather than all of the claimant's litigation costs), they will be even less inclined to settle. If this approach is followed consistently, the implications for small and medium-sized investors seems stark; do not bother to bring a claim unless you have approximately $750,000 for your half of the Tribunal fees (for a long arbitration) coupled with a legal team that is willing to accept a contingency arrangement against a respondent government with comparatively limitless legal resources and no apparent incentive to settle early.

With the issues of damages and costs out of the way, the parties in the *Myers* case can now move to the next phase of their dispute: Canada's attempts to have its own Federal Court overturn the Tribunal's award. While the test for overturning an international arbitral award is as high in Canada as it is in the United States under the *Federal Arbitration Act*, Canada was buoyed in 2001 by its success in joining with Mexico to convince a local Vancouver judge to play "jurisdictional games" with that award. In the *Metalclad* case, the local judge acknowledged that he had no authority to second-guess the merits of the Tribunal's decision, but then inexplicably proceeded to conclude that because he could not

68. S.D. Myers, Inc. v. Canada, Final Award in Respect of Costs, NAFTA/UNCITRAL Tribunal, Dec. 30, 2002, *available at* http://www.naftalaw.org.

69. *Id.* ¶ 47.

70. *Id.* ¶¶ 16–19.

71. *Id.* at Dissenting Opinion, ¶ 63.

agree with the Tribunal's interpretation of Article 1105, the Tribunal somehow exceeded its jurisdiction in making (i.e., lost its competence to make) the award.[72]

Accordingly, Canada will try again (in late 2003) to convince yet another local judge, who may similarly have no particular knowledge of international law, to find that the *Myers* Tribunal erred to such a degree as to have lost jurisdiction to decide an investment dispute for which it was clearly entrusted to resolve. If Canada succeeds in this quest, it will seriously wound its reputation in the international arbitration community, which was set reeling in the wake of the *Metalclad* judgment. The smart money is on *Myers*, however. Regardless of whether the Court is persuaded by Canada's arguments to second-guess the Tribunal, the application of a simple "sniff test" will guide it to the correct result.[73]

In the meantime, the claimant will continue his now eight-year wait for retribution, which one expert international tribunal has already said is due.

E. *Pope & Talbot v. Canada*[74]

The year 2002 also marked the end of the road for the long-running *Pope & Talbot* claim but not without further fireworks. It was the *Pope & Talbot* Tribunal who adopted an "additive approach" to NAFTA Article 1105(1) with its merits award in 2001.[75] The crux of this approach was an observation that the three NAFTA Parties all agreed that NAFTA Chapter 11 was based on the U.S. Model BIT. The language of most BITs between the U.S. and other countries specified that investments were owed not only "treatment in accordance with international law," but also "fair and equitable treatment," "full protection and security,"[76] and treatment that is not "arbitrary and unreasonable," making it appropriate to interpret NAFTA Article 1105 (which required "treatment in accordance with international law, *including* fair and equitable treatment")[77] as also providing for "fair and equitable treatment" apart from whatever treatment was required under international law.[78] The rationale behind this interpretation was essentially that because any investor bringing a claim against the United States would be entitled to this additive approach under the principle of MFN treatment anyway, it made little sense to presume that the NAFTA drafters intended anything less.

As I discussed in my 2001 review article, the NAFTA Governments responded to this interpretation and two other less creative approaches to Article 1105 adopted by the *Myers* and *Metalclad* Tribunals with a July 31, 2001 statement on the interpretation of Article 1105. The statement provided the following:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

72. *See* T. Weiler, "*Metalclad v. Mexico*: A Play in Three Parts" 2 (2001) 685, at 697–701.

73. Of course, even if the Court engages in a thorough-going review of the merits of the Myers claim, the damage to Canada's international reputation will have already been done, regardless of whether the award is ultimately upheld.

74. Pope & Talbot, Inc. v. Canada, Damages Award, NAFTA/UNCITRAL Tribunal, May 31, 2002, *available at* http://www.naftalaw.org [hereinafter Pope Damages Award].

75. Pope & Talbot, Inc. v. Canada, Final Merits Award, NAFTA/UNCITRAL Tribunal, Apr. 10, 2001, *available at* http://www.naftalaw.org.

76. *Id.* ¶ 109.

77. *Id.* ¶ 105 (citing NAFTA, art. 1105(1)).

78. *Id.* ¶ 110.

2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).[79]

While all sitting Tribunals had to come to terms with this statement on interpretation, only the *Pope* Tribunal was instructed by all three NAFTA Governments that even though it had already made its findings of liability on the basis of Article 1105(1), it was obliged to reconsider its liability analysis because it had not yet rendered a damages award in respect of those findings.[80] The Governments' hope was that while a Canadian bureaucrat may have breached the "additive" standard of fair and equitable treatment, his conduct would not be found to rise to (or perhaps "fall below") the level required under the customary international law minimum standard of treatment of aliens. This standard, as argued by the NAFTA Governments, was one that only attracted liability in cases where such conduct constituted "an outrage, bad faith, wilful neglect of duty or insufficiency of government action so far short of international standards that every reasonable and impartial person would recognize its insufficiency."[81]

In early 2002, while the *Pope & Talbot* Tribunal was considering these arguments, the claimant wrote the Tribunal to ask it to reconsider the issue of whether any negotiating drafts existed for Article 1105. Even though Canada (with the tacit support of the other two NAFTA Governments) assured the Tribunal that no *travaux preparatoires* existed for NAFTA, the claimant noted that Canada had made arguments based upon the allegedly non-existent NAFTA *travaux* in another case. Claimant also reminded the Tribunal of the testimony of Lic. Alvarez, during the *Methanex* proceedings, concerning the drafting of Article 1105. Accordingly, the Tribunal wrote to Canada in March 2002 to ask for these *travaux*.[82] Canada responded shortly thereafter, leading to the commentary contained within the Tribunal's May 2002 Damages Award:

> That request produced, on April 12, 2002, the submission by Canada of some 1,500 pages of documents, reflecting over forty different drafts leading up to the version of Article 1105 that appears in NAFTA.
>
> The implications of those documents for the interpretation of Article 1105 are described elsewhere in the Award. It is adequate here to say that the Tribunal knows that having the documents would have made its earlier interpretations of Article 1105 less difficult and more focused on the issues before it. In this sense, the failure of Canada to provide the documents when requested in November 2000 was unfortunate. Forcing the Tribunal to chase after the documents as it did is not acceptable.

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79. NORTH AMERICAN FREE TRADE COMMISSION, STATEMENT ON NAFTA ARTICLE 1105 AND THE AVAILABILITY OF ARBITRATION DOCUMENTS, July 31, 2001, *available at* http://www.naftalaw.org.

80. Pope Damages Award, *supra* note 74, ¶¶ 70–73.

81. This approach can be found in the following claim, concerning a denial of justice to a U.S. national, which resulted in his arbitrary and unjustified incarceration: United States (Chattin) v. United Mexican States (1927), 4 R.I.A.A. 282 (U.S.-Mexico Claims Commission), *available at* http://www.clea.org.uk/cases/summ/Chatthtm.

82. *Pope & Talbot, Inc* v. *Canada*, Decision and Order Concerning Negotiating Texts Relating to the Drafting of NAFTA Article 1105, NAFTA/UNCITRAL Tribunal, Mar. 21, 2002, *available at* http:// www.naftalaw.org.

> Recall that, in November 2000, counsel for Canada told the Tribunal: Let me make it easy for everybody. I have been in three or four of these cases, so I happen to know if there are travaux preparatoires and I can tell you that I have not been able to find any.
>
> That assertion was, to put it generously, uninformed. Recall also that DFAIT had earlier told counsel for the Investor that there were "no mutually agreed negotiating texts. That assertion was simply wrong.
>
> Canada has not told the Tribunal where the documents resided, or how a diligent search would have failed to find over forty iterations of Chapter 11. The documents themselves show that Canada possessed them at one time. It is not credible that negotiators would have forgotten their existence. Surely the other NAFTA Parties would have been willing to refresh recollections and provide copies. If Canada did not want to release them, it surely knew how to do so, as the very letter transmitting the documents to the Tribunal included a refusal to provide other documents. Finally, it is almost certain that the documents provided, which included nothing in explication of the various drafts, are not all that exists, yet no effort was made by Canada to let the Tribunal know what—if anything—had been withheld.
>
> This incident's injury to the Tribunal's work can now be remedied. But the injury to the Chapter 11 process will surely linger.[83]

It will be fascinating to see how future Tribunals deal with the question of the "phantom *travaux*." The question will be of particular interest because neither Canada nor its NAFTA partners have made any of the documents public. In fact, while virtually every other scrap of paper produced by, or for, the *Pope & Talbot* arbitration has been made public (with the exception of strictly business-confidential documents), Canada refuses to make these documents (much less the documents the Tribunal assumed were never revealed) public. The most likely reason for this continued secrecy—which blatantly contradicts the governments' statement on openness and transparency of the Chapter 11 process issued on the same day as the Article 1105 interpretation[84]—is that the entire package of negotiating documents probably does not support what the governments now say was always their understanding of the meaning of the Article 1105 text.

As it turned out, the *Pope & Talbot* Tribunal did not rely heavily on the documents provided to it. It did conclude, however, that if it were necessary to do so, the Tribunal would be prepared to find that the three NAFTA Governments actually attempted to amend Article 1105 with their statement on interpretation.[85] Nonetheless, the Tribunal concluded that the statement was binding upon it, pursuant to NAFTA Article 1131,[86] and proceeded to explain why its existence did not change the result anyway. It noted that international economic law including customary international law had evolved considerably since the decision in the seventy-five-year-old case upon which Canada based its arguments. It also

83. Pope Damages Award, *supra* note 74, ¶¶ 38–42.

84. North American Free Trade Commission, *Statement on NAFTA Article 1105 and the Availability of Arbitration Documents*, July 31, 2001, *available at* http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp. Clause 2(b) provides as follows:

> Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven Tribunal, subject to redaction of: (i) confidential business information; (ii) information which is privileged or otherwise protected from disclosure under the Party's domestic law; and (iii) information which the Party must withhold pursuant to the relevant arbitral rules, as applied.

85. Pope Damages Award, *supra* note 74, ¶ 47.

86. *Id.* ¶ 51.

mentioned how over 2000 BITs currently provide a latticework of international obligations that are binding in respect to the treatment of investors, as well as the significant impact that the *Bretton Woods* institutions and more recently the WTO have had on international economic law.[87]

In the final analysis, however, the Tribunal concluded that even if it applied Canada's suggested standard (which it ridiculed as advocating that the standard be permanently "frozen in amber" [88]), a breach had nonetheless occurred.[89] It followed these stunning findings on liability with a fair but unremarkable damages analysis and an unsurprising costs award.[90]

The costs award seems based on the same approach adopted by a majority of the *Myers* Tribunal. The "loser pays" principle was applied with considerable discretion, taking into account the conduct of the parties during the arbitration rather than the meritorious facts that led to a finding of liability.

III. Disputes Involving the Government of the United States of America

A. *Mondev v. U.S.A.*[91]

Given the timing and importance of the *Pope & Talbot* Damages Award, three Tribunals hearing claims against the United States basically suspended their deliberations to entertain submissions on the decision's impact on the merits of their respective cases. The *Mondev* Tribunal and the *ADF Group* Tribunal addressed the issue in their Final Awards,[92] whereas the *Methanex* Tribunal avoided doing so by dismissing the investor's Article 1105 and Article 1110 claims on jurisdictional grounds.[93]

Because it was dealing with an old-fashioned, customary international law "denial of justice" claim, the *Mondev* Tribunal did not really need to address the Article 1105 controversy as thoroughly as it did. Given that the Tribunal was composed of an international law "dream team" of Judge Stephen Schwebel, Professor James Crawford and Sir Ninian Ste-

87. *Id.* ¶ 59–65.

88. *Id.* ¶ 57

89. Id. ¶ 68, stating:

> [After the Pope & Talbot submitted its NAFTA claim, Canada] changed its previous relationship with the Investor and the Investment from one of cooperation in running the Softwood Lumber Regime to one of threats and misrepresentation. Figuring in this new attitude were assertions of non-existent policy reasons for forcing them to comply with very burdensome demands for documents, refusals to provide them with promised information, threats of reductions and even termination of the Investment's export quotas, serious misrepresentations of fact in memoranda to the Minister concerning the Investor's and the Investment's actions and even suggestions of criminal investigation of the Investment's conduct. The Tribunal also concluded that these actions were not caused by any behaviour of the Investor or the Investment, which remained cooperative until the overreaching of the [Government's Softwood Lumber Division] became too burdensome and confrontational. One would hope that these actions by the SLD would shock and outrage every reasonable citizen of Canada, as they did shock and outrage the Tribunal.

90. Pope & Talbot, Inc v. Canada, Award on Costs, NAFTA/UNCITRAL Tribunal, Nov. 26, 2002, *available at* http://www.naftalaw.org.

91. Mondev Int'l Ltd. v. United States, Final Award, NAFTA/ICSID(AF) Tribunal, Case No. ARB(AF)/99/2, Oct. 11, 2002, *available at* http://www.naftalaw.org [hereinafter Mondev Award].

92. *Id.* ¶ 04.

93. Methanex Corp. v. United States, Award on Jurisdiction and Admissibility, NAFTA/UNCITRAL Tribunal, 7 Aug. 2002, ¶ 17, *available at* http://www.naftalaw.org [hereinafter Methanex Award].

phen, it was very fortuitous they did so nonetheless. Their collective *gravitas* may prove useful in forging a course through the jurisprudential fog into which the Article 1105 debate has been placed.

The *Mondev* Tribunal concluded that the July 31, 2001, NAFTA Commission statement on Article 1105 had two primary effects. First, it confirmed that the standard of treatment described in Article 1105 is a customary international law standard that would be required of the parties even in the absence of its inclusion in NAFTA.[94] Second, the Tribunal confirmed that an investor cannot succeed in a claim under Article 1105 merely by proving that a NAFTA Party breached an obligation contained within another treaty.[95]

With regard to the first issue, the *Mondev* Tribunal noted that all three NAFTA Parties were in agreement that Article 1105 and the Governments' statement on interpretation conclusively recognized the existence of a customary international law minimum standard of treatment for foreign investors and their investments. They also agreed that the standard was an evolutionary one rather than one which was "frozen in amber." Accordingly, it was determined that the content of this minimum standard should still be determined by recourse to modern international law standards. As the *Mondev* Tribunal noted: "Thus, the question is not that of a failure to show *opinio juris* or to amass sufficient evidence demonstrating it. The question rather is: what is the content of customary international law providing for fair and equitable treatment and full protection and security in investment treaties?"[96]

As a result of this conclusion, the Tribunal appeared interested in supporting the *Pope & Talbot* Tribunal in its damages award findings. For example, the *Mondev* Tribunal considered the reasoning of the International Court of Justice in the *ELSI* case as appropriate in understanding the nature of arbitrariness in the exercise of governmental authority (i.e., "a wilful disregard of due process of law . . . which shocks, or at least surprises, a sense of judicial propriety").[97] It did so in the face of criticism by all three governments of a similar finding made by the *Pope & Talbot* Tribunal. It also noted:

> The Tribunal would stress that the word "surprises" does not occur in isolation. The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial Tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international Tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. 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 subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.[98]

94. Mondev Award, *supra* note 91.

95. *Id.* ¶ 121. This does not mean, however, that the existence of another international treaty obligation is irrelevant to interpretation of the content of the Article 1105 standard in any given case (for example: as evidence of State practice).

96. *Id.* ¶ 111.

97. Case Concerning Elettronica Sicula S.P.A. (ELSI), *available at* http://www.mail.icj-cij.org/icjwww/idecisions/isummaries/ielsisummary890720.htm.

98. Mondev Award, *supra* note 91.

After providing this much-needed helping hand for the orderly development of NAFTA Article 1105 jurisprudence, the Tribunal then proceeded to make short work of the claim before it. The claim was essentially a *de facto* appeal from what could be considered an ultimately unfair decision of the Massachusetts Supreme Judicial Court concerning a real estate development deal between the investor and the City of Boston. The city had successfully appealed a jury award against it for tortuous interference with contract, based on a seemingly over-reaching but nonetheless valid immunity statute. The court's decision was the focus of the claim because the underlying events that gave rise to the proceedings predated the application of NAFTA. Accordingly, unless the Tribunal was willing to impugn the immunity statute, which it was not, the claim had limited chances of success. Because the Tribunal concluded that the court merely applied the law and did not commit any act that was itself "arbitrary or discriminatory or unjust,"[99] Mondev lost.

The Tribunal also provided some assistance to future Tribunals in the areas of costs and causation. With regard to costs, the Tribunal sent a clear signal that it was willing to consider the pre-NAFTA events that placed Mondev in its most unenviable position, noting that it had "some sympathy" for the fact that a jury award evidenced that the City of Boston had campaigned to "avoid contractual commitments [it had] freely entered into."[100] This approach appears to be more merits-focused than those of the *Myers* Majority and the *Pope & Talbot* Tribunal. If it is adopted in future cases, some of the policy problems discussed above may be mitigated.[101]

With respect to causation, the *Mondev* Tribunal provided further support to the *Pope & Talbot* and *Myers* Tribunals in similarly dismissing the formulistic arguments of the NAFTA Governments regarding the operation of Articles 1116 and 1117. Article 1116 permits investors to bring claims for losses they have sustained as a result of treatment they or their investments have received. Article 1117 permits investors to bring claims on behalf of their investments if they take the form of enterprises established in the host country. To the *Mondev* Tribunal, it did not appear to matter whether the claim was launched under Article 1116 or 1117, so long as the investment enterprise, rather than the investor, received any damages if Article 1117 was involved.[102] This distinction would be relevant in cases where the enterprise is controlled by a NAFTA investor but owned by a group of investors all of whom may be entitled to a portion of the damages so recovered.

B. *ADF Group v. U.S.A.*[103]

In addition to successfully defending the *Mondev* claim in 2002, the State Department also succeeded in defending the *ADF* claim. The Tribunal's Final Award was made public

99. *Id.* ¶ 156.
100. *Id.* ¶ 159.
101. In fact, the different focus of the *Mondev* Tribunal almost leads one to wonder whether there was something unique about the way the other two arbitrations were prosecuted, which led to the costs awards in question.
102. Mondev Award, *supra* note 91, ¶ 86. The Tribunal also suggested that a future Tribunal might consider treating an Article 1116 claim as an Article 1117 claim, if the circumstances so warranted, with an order that the damages be paid directly to the investment enterprise(s) rather than the claimant investor.
103. ADF Group Inc. v. United States, Final Award, NAFTA/ICSID(AF) Tribunal, Case No. ARB(AF)/00/1, Jan. 9, 2003, *available at* http://www.naftalaw.org [hereinafter ADF Award].

just days into 2003, denying claims under Articles 1102, 1105 and 1106. The claimant alleged that the Federal Government had breached the NAFTA by attaching strings to a grant it provided to the State of Virginia to build a highway interchange. Those strings essentially mimicked the conditions of the *Buy America Act*,[104] which would not have otherwise been in place for the project. ADF was a subcontractor that was told it could not use U.S.-made steel fabricated in its Quebec facilities. It applied for a waiver to complete the subcontract, but was denied.

The crux of the case was the Tribunal's somewhat puzzling determination that the Federal Government's grant was also a "procurement." Article 1108(7)(a) barred the investor from making a claim under Article 1102 for government procurements,[105] and Article 1108(7)(b) did the same for grants.[106] By contrast, Article 1108(8) only barred a claim under Article 1106 for procurements, not grants.[107] Accordingly, the claimant likely thought he had all of his bases covered by pleading both Articles 1102 and 1106, and focusing solely on the federal grant as opposed to the Virginia procurement. Given that the State of Virginia wrote to the investor explaining that it was merely applying a federal measure, the case seemed strong.

Article 1106(1)(b) prohibits the imposition of a requirement "to achieve a given level or percentage of domestic content,"[108] and Article 1106(1)(c) prohibits the imposition of a requirement "to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory."[109] Surely a Federal measure that requires a Canadian investor operating in the U.S. market to abandon its normal practice of using its specialized steel fabrication facilities in Quebec and to find someone to do the work for it in the United States violates Article 1106(1)(b) and (c). To avoid this inevitable conclusion, the Tribunal noted that grants can be treated as procurements under NAFTA Chapter 10 and further determined that the federal grant here was bound up in the Virginia procurement. Thus, the Article 1108 grant/procurement distinction was eliminated and the measure was exempted from coverage under either Article 1102 or Article 1106(1).[110] While the interpretative technique of referring to a definition in one chapter of a treaty for assistance in interpreting the meaning of that term in another chapter is certainly valid, the result in this case is less than satisfying.

Because the Tribunal somehow managed to dismiss the claim under Article 1106(1), the remainder of the investor's case fell quickly. Nonetheless, some of the Tribunal's findings deserve further consideration. The Tribunal concluded that the Article 1108 exemption applied to bar a successful claim under Article 1102, but it also determined that the national treatment case would have failed in any event. In the Tribunal's opinion, because the result was due to the claimant's failure to prove that the impact of the measure was *de facto* discriminatory upon ADF as an investor.[111] While it was obvious that the measure was *de*

104. Buy America Act of 1933, 41 USC § 10 (2003); Buy America Act of 1988, Pub. L. No. 100–418, 102 Stat. 1107 (1988).
105. NAFTA, *supra* note 7, art. 1108(7)(a).
106. *Id.* art. 1108(7)(b).
107. *Id.* art. 1108(8).
108. *Id.* art. 1106(1)(b).
109. *Id.* art. 1106(1)(c).
110. ADF Award, *supra* note 103, ¶¶ 160–65, 170–73.
111. *Id.* ¶¶ 157–58.

jure discriminatory in respect to ADF's goods, the measure additionally applied equally to all of ADF's foreign and domestic competitors. Accordingly, to succeed under Article 1102, ADF needed to prove that the measure had a disparate impact upon it and perhaps even its fellow Canadian competitors operating in the U.S. market. This Article 1102 finding is notable for three reasons. First, it demonstrates a point of convergence between WTO and NAFTA jurisprudence. Second, it provides an important sign post for future cases, such as the lumber cases described below. Third, it provides another indication of how important expert economic evidence may be in future cases.

The fact that NAFTA and WTO jurisprudence may have converged in the ADF case is not surprising, given that the Tribunal Chair was Appellate Body Judge Florentino P. Feliciano. The ADF result is very similar to the result in *Canada—Measures Affecting the Automotive Industry*, where the Appellate Body reversed the panel's GATS Article II (MFN treatment) findings because it had merely applied a "goods analysis" to a services problem.[112] The panel failed to consider whether there was sufficient evidence to demonstrate how the automobile wholesalers were being affected as service providers because of the measure. This analysis was performed to the Appellate Body's satisfaction in *EU—Bananas*.[113]

This finding provides an important signpost for future cases (such as the three lumber disputes described below) because it shows how even a *de jure* discriminatory measure affecting trade-in-goods must nonetheless prove to be discriminatory in result, as applied to investors in comparison with their competitors.[114] While this step may not be particularly difficult to prove (e.g., it would not be unusual to find that a foreign investor has vertically integrated its business to take advantage of production capacity from the "home country"), it must nonetheless be proven. While satisfaction of this further step will likely only be relevant for investment claims involving measures primarily aimed at trade-in-goods, it will likely increase the cost and complexity of the litigation for both sides as it has in the WTO context.

Finally, with respect to the interpretation of Article 1105, the *ADF* Tribunal appeared to agree wholeheartedly with the *Mondev* Tribunal's approach, which treated the NAFTA Governments' interpretative statement as conclusively proving the existence of *a* minimum standard of treatment as a matter of both customary international law and treaty law. And as the *Mondev* Tribunal stated,[115] the *ADF* Tribunal also appeared comfortable leaving the question of how one should *fill the content of that customary standard* open and best left to be considered within the context of the facts of each case.

In so doing, the *ADF* Tribunal dismissed the claimant's approach, which would have essentially imported the stand-alone standard of "fair and equitable treatment" into Article 1105 as the most appropriate content of the customary standard. While the Tribunal was careful only to note that the claimant failed to prove its case solely on this point (rather

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112. Canada—Certain Measures Affecting the Automotive Industry, WT/DS139/R, WT/DS142/R, Feb. 11, 2000, ¶ 10.78 (WTO).

113. European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, Sept. 9, 1997, ¶¶ 229–248 (WTO).

114. In this case, it would appear that since the Tribunal concluded that the goods themselves were "investments" within the meaning of Article 1139 of NAFTA, one can only assume that their clearly discriminatory treatment was saved under Article 1108 of NAFTA, whereas the treatment received by the investor was further analysed with respect to economic evidence of *de facto* discrimination. NAFTA, *supra* note 7, arts. 1108, 1139.

115. Mondev Award, *supra* note 91, ¶ 118.

than that its arguments were untenable),[116] it provided the following approach for determining the appropriate content of the Article 1105 minimum standard:

> We understand [the] *Mondev* Tribunal to be saying—and we would respectfully agree with it—that any general requirement to accord "fair and equitable treatment" and "full protection and security" must be based upon State practice and judicial or arbitral case law or other sources of customary or general international law.[117]

Importantly, the *ADF* Tribunal also explicitly declined to accept the U.S. argument (naturally supported by the two other NAFTA Governments) that "a specific rule of customary international law"[118] relating to foreign investors and their investments must be established on the basis of providing evidence of both *opinio juris* and State practice for an investor to succeed under an Article 1105 claim. The same arguments were made before and similarly rebuffed by the *Mondev* Tribunal. Instead, the *ADF* Tribunal stated the following:

> The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts. It does not appear inappropriate, however, to note that it is not necessary to assume that the customary international law on the treatment of aliens and their property, including investments, is bereft of more general principles or requirements, with normative consequences, in respect of investments, derived from—in the language of Mondev—"established sources of international law."[119]

Accordingly, to succeed in a claim for a breach of Article 1105, it appears that an investor will not need to prove the existence of some narrowly defined customary international law rule. It is the *existence* of the minimum standard that has achieved the status of a customary international law norm. Rather, to fill the *content* of this minimum standard, proof from any of the sources of international law set out in Article 38(1) of the *Statute of the Court of International Justice* must be provided.[120] Obviously, as the *Myers* Tribunal noted three years ago, any such proof should be connected to the promotion or protection of individual economic interests, rather than drawn from public international law, writ large.[121] This proof will be used by a Tribunal to consider how the terms "fair and equitable treatment" and "full protection and security" should be construed in light of the facts of any particular case.

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116. Thus, at paragraph 186 of its Final Award, the *ADF* Tribunal left open the possibility (that was similarly broached upon by both of the *Mondev* and *Pope & Talbot* Tribunals) that a claimant could successfully prove the content of "fair and equitable treatment," or any other aspect of the minimum standard, with a thoroughgoing review of the approximately 2,500 BITs which currently exist among approximately 160 of the world's states. ADF Award, *supra* note 103, ¶ 186.

117. *Id.* ¶ 184.

118. *Id.* ¶ 103.

119. *Id.* ¶ 185. It would appear that the *UPS* Tribunal may have based its reasons on this very point, given its lengthy discussion of the absence of a customary international law rule governing competition policy, discussed above. However, the point is not clear, as the Tribunal never explicitly adopted such an approach.

120. Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055. This list includes: custom (composed of the elements of *opinio juris* and State practice), treaty, general principles and the subsidiary sources of international Tribunal jurisprudence and the teachings of the most highly qualified international law publicists.

121. S.D. Myers, Inc. v. Canada, Merits Award, NAFTA/UNCITRAL Tribunal, Nov. 13, 2000, ¶ 264. *See also* Mondev Award, *supra* note 91, ¶ 120.

C. *Methanex v. U.S.A.*[122]

The Tribunal in the *Methanex* case issued its Award on Jurisdiction and Admissibility in August 2002. With this award, the Tribunal essentially dismissed a large portion of the investor's case. More importantly, however, the Tribunal provided some excellent guidance concerning how future preliminary challenges to the competence of a Tribunal should be addressed.[123] The claim involves a California measure that will essentially ban the use of a particular gasoline additive, methyl tertiary-butyl ether (MTBE). Methanex makes one of the two primary ingredients of MTBE, methanol, rather than the additive itself.

The *Methanex* Tribunal is conducting its arbitration under the UNCITRAL Arbitration Rules. Article 21(1) of those rules vests the Tribunals with authority to determine whether they have jurisdiction (i.e., competence) to hear a claim.[124] NAFTA does not modify this power, and thus the UNCITRAL Arbitration Rules apply exclusively to the issue (as per NAFTA Article 1120(2)).

In conducting its jurisdictional analysis, the *Methanex* Tribunal immediately noted that it had no authority to address objections as to the admissibility of a claim under either the UNCITRAL Arbitration Rules or NAFTA. Only jurisdictional arguments could be considered on a preliminary basis.[125] Objections to admissibility can be distinguished from objections to jurisdiction because the latter involve some essential flaw in the composition of the Tribunal or the nature of the claim. The former involves no more than a simple argument that even if all of the facts alleged were assumed to be true, there still would be no hope of success. As the Tribunal noted in its Award:

> Article 21(1) of the UNCITRAL Arbitration Rules does not accord to the Tribunal any power to rule on objections relating to admissibility. There is no express power; and it is not possible to infer any implied power. The most analogous procedure under the UNCITRAL Arbitration Rules would be a partial award on a preliminary issue tried on assumed facts, pursuant to Article 32 of the UNCITRAL Arbitration Rules, or possibly a motion to strike (or "strike out") a pleading for failure to state a cause of action, taken from national court procedures. The first procedure, however, does not relate to jurisdiction; it necessarily assumes the exact opposite; and its existence confirms that it would be inappropriate to imply a like procedure into Article 21. The same is true of the second procedure, even if it were permissible to import that court procedure into a transnational arbitration. The contrary position would produce a curious result in an arbitral procedure where the Tribunal's awards on the merits are intended to be "final and binding" (Article 32 of the UNCITRAL Arbitration Rules). As contended by the USA, a decision on "inadmissibility" under Article 21 would be more easily reviewable, *de novo*, before the state courts of NAFTA Parties; and in that event the procedure before the Tribunal would be duplicated at least twice over, for no obviously good purpose.[126]

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122. Methanex Corp. v. United States, Award on Jurisdiction and Admissibility, NAFTA/UNCITRAL Tribunal, Aug. 7, 2002, *available at* http://www.naftalaw.org.

123. Based on the fact that its approach succinctly captures the practice of virtually every NAFTA Tribunal to date, the *Methanex* Tribunal's approach should serve as a beacon for future challenges to the jurisdiction of a NAFTA Tribunal to hear the claim before it. This is true notwithstanding the rather unfortunate Jurisdictional Award of the *UPS* Tribunal, issued in November 2002, which dismissed an Article 1105 claim without hearing the merits of the case. UPS v. Canada, Award on Jurisdiction, NAFTA Dispute, Nov. 22, 2002, *available at* http://www.naftalaw.org.

124. UNCITRAL, *supra* note 19, art. 21(1).

125. Methanex Award, *supra* note 93, ¶¶ 108–126.

126. *Id.* ¶ 123.

Accordingly, absent any authority to entertain what are essentially "motions to strike," no need exists at the jurisdictional phase for a Tribunal to definitively ascertain the substance or meaning of any NAFTA provision.[127] The only exceptions are those provisions that essentially grant jurisdiction under the contract (i.e., the NAFTA). Those provisions are in Article 1101, which defines the scope of coverage of the chapter, and Articles 1116 and 1117, which establish the conditions under which a claim can be brought.

With this solid foundation in place, the Tribunal turned to consider NAFTA Article 1101, which provides in part:

1. This Chapter applies to measures adopted or maintained by a Party relating to:
   (a) investors of another Party;
   (b) investments of investors of another Party in the territory of the Party; and
   (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.[128]

Most Article 1101 objections to jurisdiction have been easily defeated on the grounds that just because a measure may be primarily aimed at the regulation of trade-in-goods does not mean that it cannot simultaneously relate to an investor or investment.[129] For Methanex, however, the problem was more complicated. Methanex claimed the measure has caused, and will cause, considerable damage to its methanol business in the United States. In every other NAFTA Chapter 11 dispute, the measure has either directly impacted the investor or investment, or it has directly impacted the goods or services provided by that investor or investment. In this case, however, the measure does not even mention methanol. The measure only addresses a downstream product—MTBE.

Given this peculiar set of facts, and after engaging in an extensive analysis, the Methanex Tribunal concluded that the "net" of Article 1101 would be cast too wide if it was interpreted to include any measure that even indirectly affected the business of an investor or investment. Rather, the Tribunal concluded that "a legally significant connection" must exist between the measure and the investor or investment.[130] In a nutshell, all that the Tribunal really did was employ a proximate cause or remoteness test at the front-end of the case. This solution conveniently allowed the Tribunal to side-step many thorny political issues involving Methanex's assertions that the measure breached NAFTA Articles 1105 and 1110. The parties were also saved a considerable amount of time and money by ending these arguments at a comparatively early stage.

This latter factor should not be taken lightly. By the time the Tribunal issued its Jurisdictional Award, the parties had already spent two years exchanging extensive arguments involving both the original claim and a significant amendment. Accordingly, the Tribunal took the extremely unusual step of ordering Methanex to append sufficient evidence to its re-submitted, amended claim, which would normally only be required at the time memorials would be exchanged.[131] The scope of the new claim was also significantly reduced to the issue of non-discrimination under Article 1102. Apparently, the only reason the Tribunal

127. Id. ¶ 121.

128. NAFTA, *supra* note 7, art. 1101.

129. *See, e.g.*, Pope & Talbot, Inc. v. Canada, Award on Motion to Dismiss re: Whether Measures "Relate to" the Investment, NAFTA/UNCITRAL Tribunal, Jan. 26, 2000, ¶ 33, *available at* http://www.naftalaw.org.

130. Methanex Award, *supra* note 93, ¶ 147.

131. *Id.* ¶ 163.

permitted the claim to proceed was because the parties agreed that if the measure had been imposed with the intent to treat foreigners less favourably than domestic competitors, proximate cause would exist between the measure and the losses claimed by the investor.[132]

Methanex submitted its revised, amended claim before the end of 2002, hoping to establish a *prima facie* case through the production of sufficient evidence to demonstrate that it has been treated less favourably than a domestic competitor (U.S.-based Archer Daniels Midland) for no good reason. Methanex has attempted to make its case by demonstrating how this competitor (the primary producer of ethanol, which is a competing product of MTBE) apparently succeeded in convincing state officials to impose the measure to favour its products over those of companies such as Methanex. Thus, because this competitor viewed Methanex as a competitor, so did State officials and so should the Tribunal.[133] If the Tribunal is satisfied with this fresh pleading, it will proceed to hear the full merits of the case and decide whether the United States can prove how its measure was either not discriminatory as alleged or, alternatively, justifiable despite its apparently discriminatory effects.

D. *Kenex v. U.S.A.*[134]

Canadian hemp products producer Kenex commenced its arbitration against the United States in August 2002. The claim concerns the U.S. Drug Enforcement Agency's decision to ban all trade in any products made from the cannabis plant, regardless of whether the products are in any way harmful. Hemp and marijuana are both derived from different strains of the cannabis plant, although the seeds and oil derived from the former contain less than 0.01 percent of the psycho-active ingredient THC, whereas the latter often contains over 15 percent THC. The former is used in thousands of different foods, cosmetics, oils and clothing products. The latter is used predominantly by high school students and rock concert devotees.

The claimant alleges a breach of Article 1105 because of the arbitrary and unreasonable nature of the measure and the manner of its imposition. The claimant also alleges a breach of Article 1102 because competing seed and oil products from plants such as flax or even poppies from which heroine is derived have not been similarly banned. As 2002 drew to a close, the parties awaited the decision of the U.S. Ninth Circuit Court of Appeals, which issued an injunction in March 2002, stymieing the DEA's attempt to impose the ban through an interpretation of its existing regulations. The DEA, however, is pursuing an amendment to those regulations, apparently in the event that its interpretation is ultimately struck down by the court.

E. *Canfor v. U.S.A.*[135] and *Doman v. U.S.A.*[136] and *Tembec v. U.S.A.*[137]

The U.S. Government also received three notices of intent in the summer of 2002, each concerning the application of its trade remedy laws against Canadian-based lumber com-

132. *Id.* ¶ 151.

133. *See* Methanex's Re-Submitted, Amended Statement of Claim, 5 Nov. 2002, *available at* http://www.naftalaw.org.

134. Kenex Ltd. v. United States, NAFTA/UNCITRAL Arbitration, Aug. 2, 2002, *available at* http://www.naftalaw.org.

135. Canfor Corp. v. United States, NAFTA/UNCITRAL Arbitration, July 9, 2002, *available at* http://www.naftalaw.org.

panies with investments in the United States. These cases are another example of how trade-in-goods measures may also be conceived of as investment measures. Accordingly, while USTR lawyers attempt to defend these measures at the WTO in Geneva, U.S. State Department lawyers have commenced their NAFTA defence here at home. By the end of 2002, the first of these cases, *Canfor*, proceeded to arbitration.

The basis of all of these claims is essentially that the U.S. Government applied its trade remedy laws in an overtly discriminatory and abusive manner, thus transforming a valid exercise of the government's WTO-sanctioned right to impose trade remedy laws on imported goods into a compensable interference with Canadian investors and their investments in the U.S. softwood lumber sector. Because the lumber that has been targeted by these U.S. measures is a form of property that qualifies as an investment under NAFTA Article 1139, and because it is far more likely that Canadian investments in the U.S. lumber sector will be dependent upon the use of targeted lumber than their U.S. competitors, NAFTA Chapter 11 may provide them with a remedy in much the same way as WTO panels have begun to provide a remedy to the Canadian Government (and industry) through successful WTO-challenges of the same measures. The difference is that Canadian companies with investments in the United States may also receive compensation for any harm that has been caused as a result of the imposition of these measures (if their NAFTA claims are successful), whereas mere goods producers located back in Canada will have to be satisfied with the eventual dismantling of the trade remedy actions that have caused them harm suffered in Canada.

F. *Loewen v. U.S.A.*[138]

Finally, as 2002 wound down, there were rumours that a final merits award in the *Loewen* case was imminent. The Tribunal's award was delayed by the completion of Loewen Corporation's emergence from bankruptcy (under the "other" Chapter 11). A second jurisdictional hearing was held to respond to the State Department's motion for dismissal of the claim on the basis that one of the investors, who brought the claim, Loewen Corp., no longer existed as a national of another NAFTA Party (i.e., Canada). The main question is whether it is essential for the investor to retain continuous nationality after the commencement of its claim. If the answer is yes, the Tribunal may conclude that only Ray Loewen, who also made a claim in his own capacity, retains a right to recover damages under NAFTA. Obviously Ray Loewen's entitlement to recover damages may be different from that of the corporation, so perhaps the long wait for the Tribunal's decision was to be expected.

Unsurprisingly, the governments of Canada and Mexico joined in arguing against the investor at the hearing, marshalling arguments in support of the U.S. State Department's position and providing it with an opportunity to essentially "reply" to each government's interpretative submission by agreeing wholeheartedly with them. That these events took

136. Doman Corp. v. United States, NAFTA/UNCITRAL Arbitration, May 1, 2002, *available at* http://www.naftalaw.org.

137. Tembec Corp. v. United States, NAFTA/UNCITRAL Arbitration, May 4, 2002. When they are made available, the documents will be *available at* http://www.naftalaw.org.

138. R. Loewen and Loewen Corp. v. United States, NAFTA/ICSID(AF) Tribunal, Case No. ARB(AF)/98/3, Jan. 5, 2001, *available at* http://www.naftalaw.org.

place is not surprising because, as previously mentioned, in all of the NAFTA cases that have progressed thus far, a NAFTA Government has never tendered arguments in support of its investor. Only two conclusions can be drawn from these facts. Either the NAFTA Governments honestly have failed to find any merit in the arguments made by any investor despite the fact that four have prevailed in at least a portion of their claims and all but one have survived various jurisdictional challenges, or some form of tacit understanding exists between the NAFTA Governments with respect to the exercise of their Article 1128 rights of intervention. Hopefully 2003 will provide a more healthy divergence of views among the governments, proving the second theory wrong.

IV. Conclusion

As 2002 ended, the NAFTA Governments won some and lost some in respect to Chapter 11 dispute settlement. Canada escaped both successful claims against it without being forced to bear a substantial portion of the costs in either case. It also became the first respondent to convince a Tribunal to actually dismiss a portion of a NAFTA claim on the grounds of admissibility (albeit dressed up as "jurisdiction). Mexico appeared to succeed in delaying a number of the disputes brought against it and escaped the *Feldman* arbitration with an almost negligible damages award. The U.S. State Department managed to go two-for-two in defeating claims against the United States and succeeded in having a large portion of the *Methanex* claim thrown out for the lack of a significant legal connection between the measures at issue and the investor and its investment.

On the other hand, many new cases emerged, and the NAFTA Commission's interpretation of Article 1105 apparently failed completely to lower the standard of treatment required of governments under Article 1105. Moreover, Article 1102 appears to be growing in importance as an effective means of ensuring that an effective equality of competitive opportunities exists between foreign investors and their domestic competitors, regardless of whether the measures in question were actually designed for the sole purpose of discrimination. Unless the governments want to raise the ire of the North American business community further by springing another surprise NAFTA interpretation upon them in 2003, it would appear that NAFTA investment arbitration will become a fixture of the North American legal environment.

While such news might make dictatorial government officials and opportunistic politicians a little uneasy, it means only greater security and predictability for our clients and for regulators because we are all beginning to understand that the same kinds of rules that used to be reserved for state-to-state dispute settlement under the GATT and WTO can now be applied by investors on their own behalf anywhere North America[139] using NAFTA arbitration.

139. They may do so as long as they satisfy the requirements of Articles 1101 and 1116 or 1117, which provide that an investor from one NAFTA Party may make a claim on its own behalf, or on behalf of its investment enterprise, operating in the territory of another NAFTA Party. Accordingly, there is now one more factor that must be considered (along with taxes and securities laws) in organizing the corporate structure of a North American business: the potential for bringing a NAFTA claim.