

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE No. ARB(AF)/00/1

BETWEEN:

ADF GROUP INC.

CLAIMANT/INVESTOR

AND

**THE GOVERNMENT OF THE UNITED STATES
OF AMERICA**

RESPONDENT/PARTY

**Second Post-Hearing Submission
of the Investor Responding to Article 1128 Post Hearing Submissions of Canada & Mexico**

1. In accordance with the Tribunal's Orders of June 17, 2002 and July 1, 2002, the Investor respectfully submits these further observations in response to the Second Article 1128 Submissions of Canada and Mexico.

The Effect of an FTC Commission Interpretation

2. Counsel for all NAFTA Parties are in agreement that interpretations of provisions of NAFTA by the Free Trade Commission (the "Commission") are binding on NAFTA Chapter Eleven Tribunals.
3. Counsel for ADF agrees that Commission interpretations issued under Article 2001(2)(c) are indeed binding on NAFTA Chapter Eleven Tribunals. However, we note that NAFTA provides a specific mechanism for its amendment¹, which confirms the fairly obvious conclusion that NAFTA cannot be amended by way of a Commission interpretation. Put another way, its is only *interpretations* issued by the FTC, and not amendments, that are binding on Tribunals.
4. No party seriously contends that the Commission could amend NAFTA by way of an interpretation. Thus, before applying any statement of the Commission as part of the governing law of the arbitration, this Tribunal must determine the threshold issue of whether the Commission statement is in fact an interpretation.
5. NAFTA Article 1131 is no bar to the Tribunal's exercise of its authority to determine whether a Commission statement is an interpretation. On the contrary, Article 1131, requires the Tribunal to arrive at a conclusion on that point. Article 1131 dictates the governing law in Chapter Eleven arbitrations and states, in part, that "[a]n interpretation by the Commission" shall be binding on a Tribunal. Article 1131 does not state that all pronouncements by the Commission are binding on the Tribunal, only interpretations.
6. If a particular Commission pronouncement is an interpretation of a NAFTA provision, it is binding on a Chapter Eleven Tribunal. If it is something other than an interpretation of a provision of NAFTA, it is not binding on a Chapter Eleven Tribunal.
7. This Tribunal must, therefore, address the threshold issue of whether the FTC statement issued on July 31, 2001 is an "interpretation by the Commission" within the meaning of Article 1131 such that it is binding on this Tribunal.
8. In addressing that threshold issue, this Tribunal would not, as the US contends, be assuming "authority to sit in judgement of the NAFTA Parties' acts undertaken pursuant to NAFTA Chapter 20"². Neither would it constitute "look[ing] behind the governing law" as contended by Mexico³. Rather, the Tribunal would be exercising the authority that all tribunals must exercise: that of determining the governing law. This Tribunal must determine whether it is confronted with an interpretation of the Commission in order to determine the governing law.

¹ NAFTA Article 2202.

² US Post Hearing Submission at p. 8

³ Mexico's Second 1128 Submission at p.19.

9. If Counsel for the NAFTA Parties are correct that a Chapter Eleven Tribunal has no authority to address the threshold issue of whether a Commission statement was an interpretation with binding authority under Article 1131, then the Commission would be empowered to amend NAFTA, at least insofar as Chapter Eleven is concerned. That result flies in the face of the specific authority to amend NAFTA set out in Article 2202.

Amendment or Interpretation

10. The authority to amend NAFTA is set out in Article 2202 and is subject to “the applicable legal procedures of each Party” That requirement guarantees legislative oversight by the elected officials of each Party before any amendment is adopted. To interpret an agreement means to construe or to seek out the meaning of that agreement, not to change it. The Investor had never denied the authority of the Commission to interpret provisions of NAFTA. Rather, it suggests that, before applying any Commission interpretation as part of the governing law in this arbitration, the Tribunal must satisfy itself that the statement is in fact an interpretation of a provision of NAFTA within the meaning of Article 1131.
11. Only Canada makes any attempt to argue that the Commission statement was an interpretation and not an amendment, contending that the Pope Tribunal erred in characterizing the Commission statement as an amendment.⁴
12. Canada puts forward three grounds in support of its contention that the Pope Tribunal erred in characterizing the Commission statement as an amendment.
13. First, Canada claims that the Commission statement is “entirely consistent” with (i) the ordinary meaning of the terms of Article 1105; (ii) the context in which the phrases “fair and equitable treatment” and “full protection and security” appear; and (iii) the Canadian Statement of Implementation, North American Free Trade Agreement.⁵
14. There is, quite simply no way to characterise the ordinary meaning of the phrase *the customary international law minimum standard of treatment of aliens* as being “entirely consistent” with that of the phrase *treatment in accordance with international law, including fair and equitable treatment and full protection and security*. Whatever may be said about the technical or legal meaning of these two phrases, their ordinary meanings are worlds apart.
15. The context in which the phrases “fair and equitable treatment” and “full protection and security” appear is not “entirely consistent” with the phrase *the customary international law minimum standard of treatment of aliens*, unless the latter phrase is interpreted to mean something entirely different to the meaning proposed by counsel for Canada. The context of Article 1105 is its place within a sophisticated investor protection scheme, itself contained within a free trade agreement between three developed, industrialised countries with advanced legal systems. Canada contends that, read in context “fair and equitable treatment” and “full protection and security” is merely shorthand for the treatment demanded by the international community of revolutionary Mexico in the 1920’s in respect of aliens. Nothing in NAFTA supports that contextual assertion. NAFTA is not about “aliens” and Chapter

⁴ Canada’s Second 1128 Submission at pp. 5 to 8.

⁵ *Ibid* at p. 6.

Eleven is not about the treatment of aliens. NAFTA Chapter Eleven is about the treatment afforded to investors and their investments.

16. Finally, Canada relies on its own Statement of Interpretation to support its contention that the Commission statement is an interpretation and not an amendment. That Statement of Interpretation merely refers to “a minimum absolute standard” which is “based on long-standing principles of customary international law”. Even if that statement were given any weight, it falls far short of providing support for the Canada’s present position. In addition, this Tribunal should not lose sight of the fact that the entire debate on this point is driven by an effort to determine what the NAFTA Parties intended when they adopted Article 1105. The evidence that would settle that debate quickly and definitively will be found in the *travaux préparatoires* held by the three NAFTA Parties. Canada cannot be heard to claim that its Statement of Implementation supports a particular view of the Parties’ intent when it withholds the evidence that would be conclusive on that point. As noted in the Investor’s Post-Hearing Submission, this Tribunal is entitled to draw a negative inference from the failure of the three NAFTA Parties to bring forward that evidence.⁶
17. Canada’s second ground for claiming that the Commission statement is an interpretation and not an amendment appears to be a claim that the Pope Tribunal erred in finding that Article 1105 was ambiguous, allowing it to have recourse to *travaux préparatoires* under Article 31 of the *Vienna Convention*. Canada argues that Article 1105 is not ambiguous and that recourse to the minimal *travaux préparatoires* that were produced, was improper. If, as Canada claims, Article 1105 is not ambiguous, then one has to wonder why a Commission interpretation was necessary in the first place – in particular, an interpretative note that was as starkly different from the text of Article 1105 as the Commission’s interpretation. Standing on its own, Article 1105 is clear and unambiguous – it does not incorporate the customary international law minimum standard of treatment of aliens. The Commission interpretation injected ambiguity into Article 1105 by asserting that the Article contained provisions that it clearly did not contain. That ambiguity needed resolution, and the Pope Tribunal’s recourse to *travaux préparatoires* was perfectly acceptable under those circumstances.
18. Canada’s third argument is that the Pope Tribunal’s conclusion that the Commission’s interpretation is an amendment is irreconcilable with its finding that Article 1105 is ambiguous. According to Canada, the conclusion that the Commission’s interpretation is an amendment of Article 1105 rests on the premise that Article 1105 is “perfectly clear”. As stated above, standing on its own, Article 1105 is “perfectly clear” – it does not incorporate the customary international law minimum standard of treatment of aliens. Ambiguity arises only when Article 1105 is placed side by side with the Commission’s interpretation. The two are facially irreconcilable, hence the Pope Tribunal’s recourse to *travaux préparatoires*. Once again, the Tribunal should not lose sight of the fact that the evidence that would resolve the clear conflict between the text of Article 1105 and the Commission’s interpretation is within the exclusive control of the Parties and they have declined to produce any of that evidence in the present arbitration.

⁶ Investor’s Post Hearing Submission at paras. 20-23

19. Rather than address the threshold issue of whether the Pope Tribunal properly characterized the Commission as an amendment, Mexico merely “record[s] its disagreement” with the Pope Tribunal’s conclusion without further elaboration⁷. Effectively, Mexico has adopted the same position as the US on this issue. It argues that the Tribunal cannot “second guess” the Commission’s interpretation and consequently does not address the serious question raised by the obvious facial and legal inconsistencies between the Commission’s statement and the plain text of Article 1105.
20. To take Mexico’s position to its logical conclusion, the Commission could eviscerate any Chapter Eleven arbitration (and amend NAFTA along the way) by issuing an “interpretation” which destroys the investor’s claim. The Commission could, for example, decide that Chapter Eleven does not apply to sub-national governments or to claims made resulting from the application of environmental regulations. While those interpretations would be at odds with numerous provisions of NAFTA, including provisions of Chapter Eleven, according to Mexico (and the United States) a Tribunal would be obliged to accept those interpretations as binding. Such a construction of a Chapter Eleven Tribunal’s authority would work a fundamental change to Chapter Eleven, allowing its provisions to be amended and investor rights to be destroyed in a fast-track style not contemplated by NAFTA itself.
21. This Tribunal has a duty to exercise its threshold jurisdiction to examine any statement from the Commission to determine whether it is, in fact, an “interpretation by the Commission” under Article 1131.
22. The Investor reiterates its submission advanced throughout its pleadings that the Commission statement is not an interpretation within Article 1131, does not form part of the governing law for this arbitration and is not binding on this Tribunal.

The Standard for Finding a Breach

23. All NAFTA Parties now appear to be in agreement that, whatever standard is to be applied, it is not a standard that is frozen in amber at the time of the *Neer* decision.
24. In its Post Hearing Submission, the Investor discussed the appropriate standard to be applied in 2002 and will not repeat those arguments here.⁸
25. The positions taken by Canada or Mexico are most interesting in that neither of them support the pigeonhole approach to international claims put forward by the U.S. Both begin with the proposition that a wrong committed by a state in respect of an investor is actionable providing that wrong is of a sufficient magnitude.
26. Canada and Mexico only disagree with the Investor (and among themselves) on the magnitude of the wrong which will trigger liability (the standard for finding a breach).

⁷ Mexico’s Second 1128 Submission at p. 18.

⁸ Investor’s Post Hearing Submission at pp 7-10.

27. The Pope Tribunal found that Canada and Mexico differed on the appropriate threshold for finding a breach of the minimum standard of treatment, with Canada relying on the *Neer* standard and Mexico advocating a more evolved standard⁹.
28. In its present submission, Mexico's position on the standard is unclear. Despite its obvious intent to present a united front with Canada on the issue to this Tribunal, the Mexican submission cannot be considered to be an unambiguous endorsement of Canada's claim that the governing standard is found in *Neer*.
29. Mexico first quotes the following observation of the ICJ in the *Asylum* case:

An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents.¹⁰

30. Mexico then states its own position as follows:

It was this idea of arbitrary action being substituted for the rule of law that Mexico found instructive in *ELSI*. Mexico saw the reference to the *Asylum* Case in *ELSI* as indicative of the kind of State action that could amount to a departure from internationally accepted legal norms and in appropriate circumstances attract State responsibility¹¹.

31. In Mexico's view, the substitution of arbitrary action for the rule of law is "indicative of the kind of State action that could amount to a departure from internationally accepted legal norms and in appropriate circumstances attract State responsibility"¹².
32. It is precisely that type of substitution of arbitrary action for the rule of law by officials of the *Federal Highway Administration* that the Investor complains of.

The whole of which is respectfully submitted
Montreal, August 1, 2002

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⁹ *Pope Damages Award* at para. 59 and fn 44.

¹⁰ Mexico's Post-Hearing Submission at p. 17.

¹¹ *Ibid.*

¹² *Ibid.*

