

IN THE MATTER OF:

**THE LOEWEN GROUP, INC. and
RAYMOND L. LOEWEN,**

Claimants/Investors

v.

THE UNITED STATES OF AMERICA,

Respondent/Party

ICSID Case No. ARB(AF)/98/3

**SECOND SUBMISSION OF THE
GOVERNMENT OF CANADA
PURSUANT TO NAFTA
Article 1128**

27 June 2002

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and International Trade**

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Introduction

1. NAFTA Article 1128 entitles a Party to the NAFTA to make submissions on a question of interpretation of the NAFTA. During the June 6, 2002 Hearing on Jurisdiction (the “Hearing”), the Tribunal gave Canada the opportunity to make submissions to the Tribunal on certain issues raised during this phase of the arbitration.
2. To the extent this submission does not address certain issues, Canada’s silence should not be taken to constitute concurrence or disagreement with the positions advanced by the disputing parties. Nor does Canada take any position on particular issues of fact or on how interpretations it submits apply to the facts of this case.
3. During the Hearing, it was argued that both the ICSID Convention and the collection of BITs had crystallized into customary international law, and thus Tribunals should apply certain aspects of these agreements in NAFTA proceedings. Canada does not agree that either the ICSID Convention or the collection of BITs have crystallized into customary international law.

Sources of International Law

4. There are three primary sources of international law for a NAFTA Chapter Eleven Tribunal to consider: conventional, customary and general principles of international law.
5. Article 38 of the Statute of the International Court of Justice (“ICJ Statute”) is generally regarded as a complete statement of the sources of international law. It states:
 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b) international custom, as evidence of a general practice accepted as law;
 - c) the general principles of law recognized by civilized nations;
 - d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

International Conventions: Consent To Be Bound

6. Consent is central to the creation of international obligations. Treaties are a source of international law only for the States that have ratified them. Article 38 of the ICJ Statute expressly recognized that treaties cannot create obligations for third States who have not consented to be bound.
7. Article 34 of the Vienna Convention, entitled, “General rule regarding third States”, provides that “A treaty does not create either obligations or rights for a third State without its consent.”
8. Aust notes the consensual nature of such obligations:

The general rule is rather obvious: a treaty does not create either obligations or rights for a third state without its consent (Article 34). Similar rules apply in laws of contract, but the rule in the Convention rests firmly on the sovereignty and independence of states. Thus a treaty, whether bilateral or multilateral, cannot, by its own force, impose an obligation on a third state, not modify in any way the legal rights of a third state without its consent.¹

9. During the Hearing, it was argued that the ICSID Convention has been incorporated through NAFTA Article 1120 as a source of arbitral rules. Based on the above, and the fact that neither Canada nor Mexico has signed or ratified the ICSID Convention, this argument must fail. Jurisdiction under the ICSID Convention is limited to disputes between contracting States. Presently, no Chapter Eleven arbitration can proceed on this basis because neither Canada nor Mexico have become a party to this agreement.

Interaction Between Convention And Custom

10. A treaty rule can become a rule of customary international law as noted by Article 38 of the *Vienna Convention*: “Nothing in articles 34 to 37 precludes a rule in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.”
11. However, the conditions for finding that a treaty provision has become a customary international rule are stringent. Canada submits that the provisions at issue in this case contained in the more than 1800 BITs and in the ICSID Convention in existence have not been transformed into rules

¹ Anthony Aust, *Modern Treaty Law and Practice* (New York: Cambridge University Press, 2000) at 207

of customary international law consistent with Article 38(1)(b) of the ICJ Statute.

International Custom, Evidence Of A General Practice Accepted As Law

12. Article 38(1)(b) of the ICJ Statute identifies the two essential elements of custom: practice and *opinio juris*. A rule set forth in a treaty (or series of treaties) can become binding upon a third State as a customary rule of international law only if both of those requirements are met.
13. Canada agrees with the US and Mexico in their earlier submissions before this Tribunal, that, in order to establish a rule of customary international law, there must exist both widespread State practice and *opinio juris*.
14. The North Sea Continental Shelf Cases² are instructive in this regard. In those cases, the International Court of Justice considered whether Article 6 of the Geneva Convention on the Law of the Sea had become customary international law. The Court determined that the provisions at issue had not crystallized emerging customary international law. In doing so, the Court confirmed that conventional obligations can become customary international law, but that “this result is not lightly to be regarded as having been attained.”³
15. Similarly, the Tribunal must determine that the terms of the BITs meet the stringent standards of consistent and widespread practice, as well as the *opinio juris* to find that such terms have become part of customary international law.

A. The “Practice” Requirement

16. The practice requirement has been characterized in the following terms:

- there should be “widespread practice”⁴
- practice must be “both extensive and virtually uniform” where it is asserted that a rule of customary international law has emerged in a short period of time;⁵
- “constant and uniform usage practiced by the States in question”⁶

² *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark) (Federal Republic of Germany v. Netherlands) I.C.J. Reports (1969) 3.

³ *Id.*, at paragraph 71.

⁴ *Id.*

⁵ *Id.*, at paragraph 75.

17. In B. Kishoiyian's article, 'The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law', the author arrives at the following conclusion:

[A] close analysis of the various BITs in this paper has revealed that there is not sufficient consistency in the terms of the investment treaties to find in them support for any definite principle of customary international law. To borrow the logic of the words of the ICJ in the *Asylum Case*, the foregoing analysis of BITs has manifested "so much uncertainty and contradiction, so much fluctuation and discrepancy in the rapid conclusion of BITs, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not easy to discern in all the treaties any constant and uniform usage, accepted as law regulating foreign investment."⁷

18. Again, Canada states that no BIT is enforceable as between the NAFTA Parties. While the NAFTA may deal with investment protection, the fact that the text differs from the provisions of the BITs is significant. Even amongst the BITs, no consistent practice can be found. The variation of terms, and specifically the differences in the scope and nature of access to international arbitration makes it impossible to find a consistent practice. Without such a consistent practice there can be no customary norm.

B. The "Opinio Juris" Requirement

19. The Tribunal must also find that the States are acting out of a sense of legal obligation. A customary norm is comprised of both consistent practice and *opinio juris*.

20. In the *North Sea Continental Shelf* decision, the Court emphasized that *opinio juris* is an essential element in the formation of rules of customary international law. The Court refused to presume the existence of *opinio juris*. This is a basic principle of international law:

Not only must the acts concerned amount to a settled practice. But they must also be such, or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*. **The States concerned must therefore feel that they are conforming to what amounts**

⁶ *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266 at 276-77; also, referring to the *Asylum case*, in *Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)* 1952 I.C.J. 176 at 200.

⁷ In B. Kishoiyian, 'The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law' 14(2) *Northwestern Journal of International Law & Business* (1994), 327 at 372.

to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.⁸ [Emphasis added]

21. Schwarzenberger notes:

It is not sufficient to show that States follow habitually a certain line of conduct, either in doing or not doing something. To prove the existence of a rule of international customary law, it is necessary to establish that States act in this way because they recognize a **legal** obligation to this effect.⁹ [Emphasis added]

22. Ibrahim Shihata, former Secretary-General of ICSID, has written that treaty rules only become rules of customary international law “when there is a general conviction that States must respect the rights based on the customary principle as a matter of legal obligation, i.e., when the repetition of State practice is perfected by an *opinio juris*.”¹⁰

23. In short, without the psychological element proving that the State considers itself legally bound, any act of that State cannot amount to evidence of a rule of customary international law. It is essential to the proper analysis that a Tribunal ensures that both requirements have been met.

24. The Tribunal has been furnished with a copy of the *Pope & Talbot* decision of May 31, 2002 as authority that the network of BITs represents evidence of customary international law. Canada submits that the *Pope & Talbot* Tribunal’s reasoning was flawed in a number of respects and should not be followed.

25. First, the *Pope & Talbot* tribunal failed to provide any analysis of the various BITs so as to ascertain a consistent practice. In fact, as noted above, the texts of these agreements vary considerably.

26. Second, the *Pope & Talbot* Tribunal referred to no *opinio juris* surrounding these agreements and

⁸ *North Sea Continental Shelf Cases*, at paragraph 77.

⁹ Georg Schwarzenberger, *A Manual of International Law* (Milton: Professional Books, 6th ed.) 1976 at 26

¹⁰ Ibrahim F.I. Shihata, ‘The Treaty as a Law-Declaring and Custom Making Instrument’, 22 *Revue Egyptienne de Droit International* 51 at 73.

appeared unaware that such a sense of legal obligation is required before a customary norm can be found. The *Pope & Talbot* Tribunal failed to establish the fundamental pre-conditions to the creation of customary obligations had been met. Therefore, Canada submits that the *Pope and Talbot* Tribunal's conclusions with respect to the status of BITs as crystallizations of customary law should not be followed.

All of which is respectfully submitted,



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