

**IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICA
TRADE AGREEMENT**

ELI LILLY AND COMPANY

v.

GOVERNMENT OF CANADA

(Case No. UNCT/14/2)

SUBMISSION OF MEXICO PURSUANT TO NAFTA ARTICLE 1128

1. Pursuant to NAFTA Article 1128, the Government of Mexico is providing its views on certain matters of interpretation of the NAFTA.
2. No inference should be drawn from the fact that Mexico has chosen to address only some of the issues raised by the disputing parties. Mexico has previously addressed the interpretation of provisions of NAFTA Chapter Eleven in its submissions in other disputes, and Mexico reaffirms those prior submissions.
3. Mexico has taken no position on the facts of this dispute.

Article 1116 and 1117 – Limitation period

4. Mexico concurs with Canada's submissions on the three-year time limit prescribed by Articles 1116(2) and 1117(2), as stated in paragraphs 66 to 80 of the Rejoinder.
5. The NAFTA Parties made their consent to arbitration conditional upon compliance with the procedural requirements established in NAFTA Chapter Eleven, including Article 1116(2) and 1117(2). Mexico agrees, and has previously stated, that a Chapter Eleven arbitral tribunal's jurisdiction *rationae temporis* is reliant on a claimant's compliance with the requirement to submit its claims to arbitration within three years of the date that it first acquired, or ought to have first acquired, knowledge of the alleged breach and knowledge that the investor (or investment, as the case may be) has incurred loss or damage.
6. NAFTA tribunals, such as *Grand River v. the United States* and *Feldman v. Mexico* have recognized that there is a "clear and rigid limitation defense – not subject to any suspension, prolongation or other qualification"¹ introduced by Articles 1116(2) and 1117(2).

¹ *Grand River Enterprise Six Nations Ltd c. United States of America* (UNCITRAL), Decision on Objections to Jurisdiction, 20 July 2006, at para. 29.

7. It follows that neither a continuing course of conduct nor the occurrence of subsequent acts or omissions can renew or interrupt the three-year limitation period once it has commenced to run.

8. Additionally, as Canada has stated at paragraph 75 of its Rejoinder, given that the NAFTA Parties have repeatedly concurred the view that the three-year limitation period cannot be extended by an allegation that the alleged violation has continued, their “clear and consistent position ... on this issue constitutes a ‘subsequent agreement between the parties regarding the interpretation of the treaty’ and/or ‘subsequent practice’ which ‘shall be taken into account’ when interpreting NAFTA.

Article 1105 – Minimum Standard of Treatment

9. Article 1105(1) reads “[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

10. In accordance with the NAFTA Free Trade Commission, “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”.² This statement expressly confirms that the applicable standard in Article 1105(1) is the customary international law minimum standard of treatment, and tribunals established under Chapter 11 should apply it in accordance with Article 1131(2).³

11. As Mexico stated in *Loewen v. The United States of America*, “[c]ustomary international law results from the accretion and broadening of State practice until it assumes widespread acceptance.”⁴ Thus, two requirements must be met to establish the existence of an obligation under the customary international law: State practice and *opinio juris*.⁵ Mexico has consistently maintained that position, in common with both of the other Parties, in subsequent submissions under Article 1128.⁶

² NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001) (FTC Note of Interpretation). The FTC Note of Interpretation also clarified that “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”, and that “A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).”

³ Article 1131(2): An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

⁴ *The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America* (ICSID Case No. ARB(AF)/98/3), Second Article 1128 Submission of the United Mexican States, 9 November 2001 at page 2.

⁵ As explained by the United States in its Second Submission in *Mesa v. Government of Canada* (PCA Case No. 2012-17), this two-element approach has been widely supported by the literature, State practice and decisions of international courts like the International Court of Justice. Second Article 1128 Submission of the United States, 12 June 2015 at paras. 9 - 10.

⁶ See, for example, Mexico’s Article 1128 submission in *Mercer International Inc. v. Government of Canada* dated May 8, 2015 at para.19, Mexico’s second Article 1128 submission in *Mesa Power LLC v. Government of Canada* dated June 12, 2015 at para 9; and Mexico’s Article 1128 submission in *Windstream Energy LLC v.*

12. Mexico agrees with the United States that currently "... customary international law has crystallized a minimum standard of treatment in only a few areas. One such area which is expressly addressed in Article 1105(1), concerns the obligation to provide "fair and equitable treatment". This includes, for example, the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings, such as when a State's judiciary administers justice to aliens in a 'notoriously unjust' or 'egregious' manner "which offends a sense of judicial property" [footnotes omitted].⁷

13. It has been recognized that a State is responsible for the conduct of its legislative, executive and judicial organs, either at the central or sub-central level of government.⁸ However, in the particular case of judicial acts of a State, Mexico has expressed that even when those acts can rise to international responsibility, there are "... fundamental distinctions that international law has made and continues to make between acts of the judiciary and the acts of other organs of the State. International tribunals defer to the acts of municipal courts not only because the courts are recognized as being expert in matters of a State's domestic law, but also because of the judiciary's role in the organization of the State".⁹

14. Thus, because of the particular role of the adjudicative power within the organization of states, Mexico agrees with Canada that, with respect to judicial acts, denial of justice is the only rule of customary international law clearly identified and established so far as part of the minimum standard of treatment of aliens, as explained in paragraphs 231- 245 of the Counter-Memorial of Canada.¹⁰ Thus, if a claimant asserts a breach of Article 1105(1) based on a different concept, that party has the burden of identifying the relevant obligation under the customary international law based on State practice and *opinio juris*.¹¹ However, it should be noted that decisions of international tribunals do not constitute State practice that can assist to identify a rule of customary

Government of Canada dated January 12, 2016 at paras 6 and 7. Mexico's Article 1128 submissions in Mercer, Mesa and Windstream are not available on the web and are thus attached hereto for ease of reference.

⁷ *Mesa v. Government of Canada*, Second Article 1128 Submission of the United States, 12 June 2015 at para. 12.

⁸ Article 4.1. Articles on Responsibility of States for International Wrongful Acts (2001).

⁹ *The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America* (ICSID Case No. ARB(AF)/98/3), Second Article 1128 Submission of the United Mexican States, 9 November 2001, at page 5.

¹⁰ *Eli Lilly and Company v. Government of Canada*, Counter-Memorial of Canada, 27 January 2015.

¹¹ In *Cargill Inc. v. The United Mexican States* (ICSID Case No. ARB (AF)/05/2), the tribunal stated in para. 273: "The Parties disagree, however, as to how that customary standard has in fact, if at all, evolved since that time. The burden of establishing any new elements of this custom is Claimant. The Tribunal acknowledges that the proof of chance in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on Claimant. If Claimant does not provide the Tribunal proof of such evolution, in such an instance, should hold Claimant fails to establish the particular standard asserted."

international law,¹² particularly arbitral decisions that interpret autonomous stand-alone fair and equitable treatment.¹³

15. With respect to “legitimate expectations” of investors, Mexico concurs with Canada’s submissions in paragraphs 275 – 278, and 280-283 of its Counter-Memorial, particularly with respect the following statements:

- “[t]he mere failure to meet an investor’s legitimate expectations does not constitute a breach Article 1105(1)... [T]he unjustified repudiation of specific representations made to the investor in order to induce an investor can be a factor in assessing whether the minimum standard of treatment has been breached...”;¹⁴
- “... states may amend or modify their regulations to achieve legitimate welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor’s ‘expectations’ about the state of regulation in a particular sector”;¹⁵ and
- “...the theory of legitimate expectations has not been proven to be a rule of customary international law...” and “... the requirement that an investor’s legitimate expectations must be based on specific promises or representations to the investor is by no means a “narrow standard” – it is *the* standard”.¹⁶

16. As Canada describes in its Counter-Memorial, NAFTA tribunals have reached the same conclusions in general.¹⁷

¹² See also, *Mesa v. Government of Canada*, Second Article 1128 Submission of the United States, 12 June 2015, at para. 14; *Eli Lilly and Company v. Government of Canada*, Counter-Memorial of Canada, 27 January 2015, at para. 271; and *Mercer International Inc. v. Government of Canada*, Submission of Mexico pursuant 1128 of NAFTA, 8 May 2015, at para. 18.

¹³ In *Glamis Gold v. the United States* the tribunal stated: “Looking, for instance, to Claimant’s reliance on *Tecmed v. Mexico* for various of its arguments, the Tribunal finds that Claimant has not proven that this award, based on a BIT between Spain and Mexico, defines anything other than an autonomous standard and thus an award from which this Tribunal will not find guidance. Article 4(1) of the Spain- Mexico BIT involved in the *Tecmed* proceeding provides that each contracting party guarantees just and equitable treatment conforming with “International Law” to the investments of investors of the other contracting party in its territory. Article 4(2) proceeds to explain that this treatment will not be less favorable than that granted in similar circumstances by each contracting party to the investments in its territory by an investor of a third State. Several interpretations of the requirement espoused in Article 4(2) are indeed possible, but the *Tecmed* tribunal itself states that it ‘understands that the scope of the undertaking of fair and equitable treatment under Article 4(1) of the Agreement described ... is that resulting from an autonomous interpretation’ Thus, this Tribunal finds that the language or analysis of the *Tecmed* award is not relevant to the Tribunal’s consideration.” (Award, 8 June 2009, at para. 610)

¹⁴ *Eli Lilly and Company v. Government of Canada*, Counter-Memorial of Canada, 27 January 2015, at para. 275.

¹⁵ *Id.* at para. 278.

¹⁶ *Id.* at para. 280.

¹⁷ See also, *Dumberry, Patrick; The Protection of Investor’s Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105; Journal of International Arbitration 31, No. 1 (2014)*. “The position adopted by NAFTA tribunals regarding the interpretation of the concept of legitimate expectations

Article 1110 – Expropriation and Compensation.

17. Article 1110(1) of NAFTA reads as follows: “1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.”

18. A claim of expropriation under Article 1110(1), first requires the claimant (in its capacity as an investor of a Party) to establish that it has an “investment” (as defined in Article 1139 “Definitions”) in the territory of the host Party. An investment can only be based on vested legal rights under the legal system of the host Party. Pending legal rights and contingent legal rights cannot constitute an “investment” under NAFTA Article 1139 (Definitions), or for the purposes of Article 1101 (Scope and Coverage) or Article 1110 (Expropriation and Compensation). Rather, there must be valid and subsisting property rights that fall within one or more of the categories listed in Article 1139.

19. When legal rights are declared a nullity, or void *ab initio*, by a court of competent jurisdiction, there cannot be a claim of expropriation. Mexico agrees with Canada that in such case, as a matter of domestic law, the alleged investment never existed for the purposes of Article 1110. In such circumstances a disputing investor would have to establish a claim of “denial of justice” under Article 1105 in order to succeed.

20. *Azinian v. the United Mexican States*, illustrates this point. The Ayuntamiento of Naucalpan de Juárez in the State of Mexico issued an administrative resolution nullifying a municipal waste collection concession on grounds that misrepresentations inducing the granting of the concession rendered it void *ab initio*, notwithstanding that it had been partly performed by

clearly contrasts with the much more liberal approach that has been taken by non-NAFTA tribunals. Thus, only one award supports the view that the concept constitutes a stand-alone element of the FET standard under Article 1105. The majority of NAFTA tribunals have held, on the contrary, that the host state's failure to respect an investor's legitimate expectations does not constitute a breach of the FET standard, but is rather a 'factor' to be taken into account when assessing whether or not other well-established elements of the standard have been breached. Another notable unique feature of NAFTA case law is the fact that tribunals have repeatedly narrowly qualified the concept of legitimate expectations. Tribunals have thus required that an investor's expectations be objective and be based on 'definitive, unambiguous and repeated' specific 'commitments' (or 'assurances') made by the host state to have 'purposely and specifically induced the investment' by the investor. Another illustration of this trend is the fact that NAFTA tribunals have also concluded that legitimate expectations cannot simply be based on the host state's existing domestic legislation on foreign investments at the time when the investor makes its investment. The Glamis award thus emphasized the threshold requirement of a quasi-contractual relationship between the investor and the host state. Finally, unlike non-NAFTA tribunals (including CMS, Enron: Teemed: and many others), no NAFTA tribunal has ever read into the FET standard an obligation for the host state to maintain a stable legal and business environment. These efforts of clarification by NAFTA tribunals have significantly reduced the scope of application of the concept of legitimate expectations. It is no surprise that to date, no NAFTA tribunal has come to the conclusion that a host state stood in violation of an investor's legitimate expectations under Article 1105.” [emphasis added]

the Claimants.¹⁸ The Ayuntamiento's resolution of nullity was upheld on three levels of appeal the Mexican courts, and the Azinian Tribunal made the following finding:

The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. What must be shown is that the court decision itself constitutes a violation of the treaty. Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end.

But the Claimants have raised no complaints against the Mexican courts; they do not allege a denial of justice. Without exception, they have directed their many complaints against the Ayuntamiento of Naucalpan. The Arbitral Tribunal finds that this circumstance is fatal to the claim, and makes it unnecessary to consider issues relating to performance of the Concession Contract. For if there is no complaint against a determination by a competent court that a contract governed by Mexican law was invalid under Mexican law, there is by definition no contract to be expropriated.¹⁹ [Emphasis added]

21. As explained by the Azinian Tribunal, in such circumstances a claimant could only complain of "denial of justice":

A denial of justice could be pleaded if relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way. There is no evidence, or even argument, that any such defects can be ascribed to the Mexican proceedings in this case.

There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of "pretence of form" to mask a violation of international law. In the present case, not only has no such wrongdoing been pleaded, but the Arbitral tribunal wishes to record that it views the evidence as sufficient to dispel any shadow over the bona fides of the Mexican judgments. Their findings cannot possibly be said to have been arbitrary, let alone malicious.²⁰

Application of Article 1110(7)

22. Article 1110(7) does not invite an arbitral tribunal constituted under Section B of Chapter Eleven to determine whether the host Party has complied with Chapter Seventeen when revoking or limiting intellectual property rights owned by an investor of another Party.

¹⁸ See. *Robert Azinian et al v. the United Mexican States*, at paras. 9 – 17.

¹⁹ *Robert Azinian et al v. the United Mexican States*, Award, November 1 1999, at paras. 99 – 100.

²⁰ *Id.* at paras. 102 – 103.

23. The NAFTA is very clear where Chapter Eleven tribunals are vested with authority to consider and apply other provisions of the NAFTA:

- Articles 1116 and 1117 *expressly* provide that an investor of Party may submit a claim that another Party has breached an obligation under (a)... Article 1503(2) (State Enterprises) or (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A [of Chapter Eleven].
- Article 1401(2), (the Scope and Coverage provision in Chapter Fourteen, the Financial Services Chapter) *expressly* provides that "Articles 1109 through 1111, 1113, 1114 and 1211 are hereby incorporated into and made a part of this Chapter. Articles 1115 through 1138 are hereby incorporated into and made a part of this Chapter solely for breaches by a Party of Articles 1109 through 1111, 1113 and 1114, as incorporated into this Chapter".

24. All other dispute settlement under the NAFTA is restricted to Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters) and Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures).

25. Chapter Twenty would apply to a dispute between two or more NAFTA Parties concerning a Party's alleged nonconformity with a requirement of Chapter Seventeen.²¹

26. It will be observed that Chapter Seventeen contains a lengthy, complicated and highly technical description of the Parties' various obligations pertaining to various forms of intellectual property rights.

27. It will also be observed that Chapter Twenty provides for establishment panels of five properly qualified individuals (Article 2010 "Qualification of Panelists"), direct participation by the third (non-disputing) NAFTA Party (Article 2013 "Third Party Participation"), the engagement of experts (Article 2014 "Role of Experts"), the establishment of a scientific review board (Article 2015 "Scientific Review Boards) and a short time frame for rendering panel reports (Article 2016 "Initial Report", and Article 2017 "Final Report").

28. The remedy under Chapter Twenty is based on panel's determinations and recommendations (if any) for the respondent Party to bring itself into compliance with the panel's interpretation of the NAFTA provision at issue²² and that a respondent Party's failure to implement the panel's determinations and recommendations can provide grounds for the complaining Party to seek suspension of benefits.

29. Importantly, a Party cannot be compelled to implement a Chapter Twenty panel's finding, nor can it be compelled to pay financial compensation to the complaining Party or any person or

²¹ NAFTA Article 2004 (Recourse to Dispute Settlement Procedures) and Article 2018(2) (Implementation of Final Report).

²² NAFTA Article 2016(2)(b) (Initial Report).

entity affected by the impugned measure.²³ It also expressly provides that “no Party may provide a right of action under domestic law on the ground that a measure of another Party is inconsistent with this Agreement”.²⁴

30. Mexico submits that if the NAFTA Parties had intended that a Party should be liable to compensate an investor of another Party for an alleged non-compliance with an obligation under Chapter Seventeen, they would have so provided expressly.

31. Mexico further submits that the most a Chapter Eleven arbitral tribunal can do in considering the application of Article 1110(7) is to determine whether or not it is plainly obvious or clear on its face that measure allegedly amounting to termination or limitation of the intellectual property rights at issue is inconsistent with Chapter Seventeen. If not, that would be the end of the inquiry. If there appeared to be a genuine dispute as to whether the impugned measure conforms with the requirements of Chapter Seventeen, in the absence of a finding of nonconformity by a Chapter Twenty dispute settlement panel, the exception stipulated by Article 1110(7) would apply.

Respectfully submitted,

[signed]

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18 March 2016

²³ NAFTA Article 2018 (Implementation of Final Report) and Article 2019 (Non implementation – Suspension of Benefits).

²⁴ NAFTA Article 2021 (Private Rights).