



Pope & Talbot, Inc. v. Canada

Author(s): David A. Gantz

Source: *The American Journal of International Law*, Vol. 97, No. 4 (Oct., 2003), pp. 937-950

Published by: American Society of International Law

Stable URL: <http://www.jstor.org/stable/3133692>

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Peace is better advanced by defendants who acknowledge their atrocities rather than denying the obvious, who accept responsibility rather than blaming their enemies, and who apologize to victims rather than continuing their demonization. Even now, many Bosnian Serbs continue to deny, for instance, that massacres took place at Srebrenica, so that after former Bosnian Serb army officers Momir Nikolić and Dragan Obrenović pleaded guilty in May 2003 to helping plan the Srebrenica massacre, one survivor described feeling a sense of relief that he had not known since the massacre took place.⁷² Admissions and apologies can advance reconciliation and should be commended and probably rewarded. But institutions like the ICTY can impair the very reconciliation that they seek to advance if the rewards that they hand out themselves become a new source of bitterness.

NANCY AMOURY COMBS

Iran–United States Claims Tribunal

Protection of Foreign Investment under the NAFTA Chapter 11—UNCITRAL Arbitration Rules—National Treatment—Performance Requirements—Fair and Equitable Treatment—Expropriation—Damages—Allocation of Costs

POPE & TALBOT, INC. v. CANADA. At <<http://www.dfait-maeci.gc.ca/tna-nac/gov-en.asp>>. NAFTA Chapter 11 Arbitration Tribunal, 2000–2002.

An arbitral tribunal (Tribunal) convened under Chapter 11 of the North American Free Trade Agreement (NAFTA),¹ operating under the UNCITRAL [UN Commission on International Trade Law] Arbitration Rules (UNCITRAL Rules),² determined that Canada had denied Pope & Talbot its right to fair and equitable treatment under NAFTA Article 1105. This violation related to the so-called verification review episode, in which Canada's Softwood Lumber Division (SLD) made especially aggressive requests for Pope & Talbot corporate data shortly after that firm filed its notice of arbitration. The violation was only one, however, and not the most significant, of the numerous violations alleged by Pope & Talbot. Indeed, what is most striking about the proceeding, other than its length,³ is that in a series of five opinions—*Pope & Talbot I–V*⁴—the Tribunal rejected not only all other Article 1105 claims, but claims of discrimination/denial of national treatment under Article 1102, claims regarding imposition of performance requirements in violation of Article 1106, and a claim of expropriation under Article 1110.⁵ Pope & Talbot had valued these claims, in the aggregate, at approximately

⁷² Emir Suljagić, *Truth at The Hague*, N.Y. TIMES, June 1, 2003, §4, at 13.

¹ North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 ILM 289 & 605 (1993) [hereinafter NAFTA].

² 15 ILM 701 (1976), available at <<http://www.uncitral.org>>.

³ Nearly four years (March 25, 1999 to November 26, 2002) from the notice of arbitration to the final decision on costs.

⁴ The principal Pope & Talbot awards are: *Pope & Talbot v. Canada*, Motion to Dismiss (Jan. 26, 2000) (scope and coverage) [hereinafter Pope & Talbot I]; *Pope & Talbot v. Canada*, Interim Award (June 26, 2000), 40 ILM 258 (2001) (expropriation issues, merits) [hereinafter Pope & Talbot II]; *Pope & Talbot v. Canada*, Merits, Phase Two (Apr. 10, 2001) (national treatment and fair and equitable treatment, merits) [hereinafter Pope & Talbot III]; *Pope & Talbot v. Canada*, Damages (May 31, 2002), 41 ILM 1347 (2002), hereinafter Pope & Talbot IV; and *Pope & Talbot v. Canada*, Costs (Nov. 26, 2002) (procedural aspects of fair and equitable treatment, costs) [hereinafter Pope & Talbot V]. All are available on the Web site of the Canadian Department of Foreign Affairs and International Trade at <<http://www.dfait-maeci.gc.ca/tna-nac/gov-en.asp>>. The materials are also accessible—and especially well organized—at <<http://www.naftalaw.org>>. The members of the Tribunal were the Hon. Lord Dervaird (president), Hon. Benjamin J. Greenberg, Q.C., and Murray J. Belman, Esq.

⁵ At least a dozen procedural “orders,” “rulings,” and “decisions” were also issued by the Tribunal in the course of the lengthy proceedings. They primarily related to the confidentiality and disclosure of documents, and to the Canadian government's various efforts to resist disclosure on privilege or other grounds. These latter rulings are not discussed herein, but all can be found (and in chronological order) at <<http://www.naftalaw.org>>. Especially noteworthy are the disputes concerning the confidentiality of certain documents submitted to the Tribunal and improperly released by claimant's counsel; concerning the question of whether Canada was unjustifiably with-

U.S.\$509,000,000.⁶ The amount of damages ultimately awarded—approximately \$462,000, including interest through May 1, 2002, or about 0.1 percent of the amount originally requested—was far less than the cost of the proceeding. During the process, nearly \$7.6 million was expended by the parties: \$1,460,000 on arbitrator fees and other arbitral costs, and \$6,190,000 on attorneys' fees.⁷

In order to implement its obligations under the 1996 United States–Canada Softwood Lumber Agreement (SLA),⁸ Canada promulgated regulations requiring applications for export permits, requiring the payment of fees when the permits were issued, and incorporating a discretionary mechanism for exempting certain exporters from the full fees, with such exemptions to be based on the SLA's annual quota levels.⁹ As noted by the Tribunal, and as the essential background for understanding Canada's export restrictions and the dispute arising out of them, regulations issued under the SLA defined an "established base" (EB), for which there was no export fee, a "lower fee base" (LFB), for which the export fee was U.S.\$0.50 per thousand board feet, and an "upper fee base" (UFB), for which the export fee was U.S. \$1.00 per thousand board feet. The specific amounts were to be allocated among primary lumber producers, remanufacturers, and new entrants, "based on their recent export shipments, and on special criteria for new entrants."¹⁰ The system was to be subject to annual review and adjustments, with the objective of a "flexible and responsive" allocation system.¹¹ The American-owned firm Pope & Talbot charged that this allotment system discriminated against the firm's Canadian subsidiary, and that Canada's actions in implementing the allotment system violated NAFTA Chapter 11's provisions concerning national treatment, minimum standards of treatment, performance requirements, and expropriation.¹²

Pope & Talbot I—The Scope of "Investment Dispute"

In seeking dismissal of the claim, Canada initially argued that the matter at issue—Canada's administration of a quota and fee system applicable to softwood lumber exports to the United States—did not involve an "investment dispute"; the measure complained of had to be "primarily aimed" at investors of another NAFTA party.¹³ The Tribunal concluded, however, that Canada's reading of Chapter 11 was overly narrow:

There is no provision to the express effect that investment and trade in goods are to be treated as wholly divorced from each other. The reference in Section A of Chapter 11 to treatment of investments with respect to the management conduct and operation of investment is wide enough to relate to measures specifically directed at goods produced

holding documents needed by the Tribunal for proper consideration of the issues, including those relating to the negotiating history of key Chapter 11 articles; and concerning Canada's delays in providing information to the Tribunal. It appears that the Tribunal's unhappiness with Canada's less than forthcoming posture on document production was a factor in the Tribunal's determination not to award any portion of the total arbitration costs or attorneys' fees to Canada. See Pope & Talbot V, *supra* note 4, paras. 13–14; *infra* note 94 and accompanying text.

⁶ Notice of Arbitration, Mar. 25, 1999, at 3.

⁷ Pope & Talbot V, *supra* note 4, paras. 6, 18.

⁸ May 29, 1996, 35 ILM 1195 (1996).

⁹ Pope & Talbot I, *supra* note 4, para. 8.

¹⁰ Pope & Talbot II, *supra* note 4, para. 38.

¹¹ *Id.*

¹² Pope & Talbot I, *supra* note 4, para. 8.

¹³ *Id.*, para. 16. This point is important in that it has been raised in a number of other Chapter 11 actions. See David A. Gantz, *Reconciling Environmental Protection and Investor Rights Under Chapter 11 of NAFTA*, 31 ENVTL. L. REP. 10646, 10656–58 (2001). The Tribunal also decided that NAFTA Articles 1139 ("For purposes of this Chapter[,] . . . investment means . . . (a) an enterprise . . .") and 201(1) ("For purposes of this Agreement . . . [,] enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association . . .") established that an "investor" was an "enterprise," which term included "any corporation." Pope & Talbot I, *supra* note 4, para. 18. The Tribunal further decided that Pope & Talbot was "an investor of a Party" and that Pope & Talbot, Ltd. (the Canadian subsidiary) was an investment of an investor (Pope & Talbot). *Id.*

by a particular investment. The provisions for minimum standard of treatment in Article 1105 might well related to similar measures. And Article 1106 in relation to performance requirements makes specific reference to limitations on dealing with goods in certain ways. It appears to the Tribunal accordingly that the language of Section A of Chapter 11 does not support the narrow interpretation of investment dispute which Canada and Mexico seek to advance.¹⁴

The Tribunal also observed that “the fact that a measure may primarily be concerned with trade in goods does not necessarily mean that it does not also relate to investment or investors.”¹⁵ Had the Tribunal accepted Canada’s contention that the quota arrangement was a “measure” relating to trade in goods rather than to investment, the arrangement could probably have been challenged only in an action between the governments under Chapter 20.¹⁶

Pope & Talbot II—Expropriation Under NAFTA Article 1110

In making its expropriation claim under NAFTA Article 1110, Pope & Talbot presented three main arguments. First, Canada’s export control regime, with the various restrictions on, and fees charged with regard to, lumber exports to the United States by Pope & Talbot’s Canadian subsidiary, had “deprived the Investment of its ordinary ability to alienate its product to its traditional and natural market.”¹⁷ Second, expropriation under international law “refers to an act by which governmental authority is used to deny *some* benefit to property.”¹⁸ Third, by reducing the claimant’s quota of lumber that could be exported to the United States without paying a fee, Canada had taken actions that so extensively interfered with claimant’s Canadian production and exports that they were “tantamount to expropriation” in violation of Article 1110.¹⁹

In making its case, Pope & Talbot argued that Article 1110 went beyond customary international law and that the phrase “tantamount to expropriation” expanded on the concepts of an indirect taking and “creeping” expropriation, covering “even non-discriminatory measures of general application which have the effect of substantially interfering with investments of investors of NAFTA Parties.”²⁰ Canada, in defense, argued that the right to sell lumber in the U.S. market was not a property right and that there had been no deprivation of the claimant’s investment, given that Pope & Talbot had continued to export lumber at all relevant times. Moreover, “mere interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required.”²¹ Canada also asserted that “tantamount” simply

¹⁴ Pope & Talbot I, *supra* note 4, para. 26. This holding essentially agrees with, albeit without citing, the approach taken by the panel in *Ethyl Corp. v. Canada* (NAFTA Ch. 11 Arb. Trib. Jun. 24, 1998), 38 ILM 708 (1999); see Alan C. Swan, Case Report: Ethyl Corporation v. Canada: Award on Jurisdiction (Under NAFTA/UNCITRAL), 94 AJIL 159 (2000).

¹⁵ Pope & Talbot I, *supra* note 4, para. 33.

¹⁶ See *id.*, para. 19.

¹⁷ Pope & Talbot II, *supra* note 4, para. 81 (quoting claimant’s memorial).

¹⁸ *Id.*, para. 83 (quoting claimant’s memorial).

¹⁹ *Id.*, paras. 84, 86. Article 1110(1) provides (emphasis added):

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.

²⁰ Pope & Talbot II, *supra* note 4, para. 84.

²¹ *Id.*, paras. 87–88.

meant “equivalent” and did not expand Article 1110’s coverage beyond creeping expropriation to cover regulatory action.²²

The Tribunal rejected Canada’s narrow reading of Article 1110, opining that “the Investment’s access to the U.S. market is a property interest subject to protection under Article 1110.”²³ Regarding the scope of Article 1110, the Tribunal noted: “Regulations can indeed be characterized in a way that would constitute creeping expropriation. . . . Indeed, much creeping expropriation could be conducted by regulation, and a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation.”²⁴ On this basis the Tribunal found that the lumber export control regime was government action within the scope of Article 1110. The Tribunal went on to reject, however, the idea that “those regulatory measures constitute an interference with the Investment’s business activities substantial enough to be characterized as an expropriation under international law,” or that the phrase “tantamount to nationalization or expropriation” broadened the “ordinary concept of expropriation under international law.”²⁵ It was the Tribunal’s view that “[t]antamount’ means nothing more than equivalent.”²⁶

Ultimately, the Tribunal determined that there had been no expropriation:

First of all, there is no allegation that the Investment has been nationalized or that the [export control] Regime is confiscatory. . . . [T]he investor remains in control of the Investment, it directs the day-to-day operations of the Investment, and no officers or employees of the Investment have been detained. . . . Canada does not supervise the work of the officers or employees of the Investment, does not take any part of the proceeds of company sales . . . , . . . does not prevent the Investment from paying dividends to its shareholders, does not interfere with the appointment of directors or management and does not take any other actions ousting the Investor from full ownership and control of his investment.²⁷

The Tribunal considered it significant that Pope & Talbot “continues to export substantial quantities of softwood lumber to the U.S. and to earn substantial profits on those sales.”²⁸ It suggested further that in determining “whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been ‘taken’ from the owner.”²⁹ It also rejected claimant’s efforts to rely on the jurisprudence of the Iran-U.S. Claims Tribunal, since “that tribunal’s mandate expressly extends beyond expropriation to include ‘other measures affecting property rights.’”³⁰

Pope & Talbot II—Performance Requirements Under Article 1106

Pope & Talbot argued that because Canada’s softwood lumber regime effectively required its Canadian subsidiary to export certain amounts of lumber each year or face a reduction of its allotment in future years, the regime imposed a performance requirement barred under

²² *Id.*, para. 89.

²³ *Id.*, para. 96.

²⁴ *Id.*, para. 99.

²⁵ *Id.*, para. 96.

²⁶ *Id.*, para. 104.

²⁷ *Id.*, para. 100.

²⁸ *Id.*, para. 101.

²⁹ *Id.*, para. 102 (citing the Harvard *Draft Convention on the International Responsibility of States for Injuries to Aliens*, Art. 10(3), reprinted in R. R. Baxter & Louis B. Sohn, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 *AJIL* 545, 553 (1961)).

³⁰ *Id.*, para. 104.

NAFTA Article 1106.³¹ The Tribunal, relying on the “ordinary meaning” rule of treaty interpretation contained in Article 31 of the Vienna Convention on the Law of Treaties,³² noted that the granting or maintaining of EB and LFB quotas was undeniably an “advantage” under Article 1106. The Tribunal concluded, however, that there was no violation of Article 1106.

[T]he Regime does not “impose or enforce * * * requirements.” Rather, it is a tariff-rate export restraint regime While the Regime undoubtedly deters increased exports to the U.S., that deterrence is not a “requirement” for establishing, acquiring, expanding, managing, conducting or operating a foreign owned business in Canada.³³

Accordingly, the Tribunal dismissed the Article 1106 claim.³⁴

Pope & Talbot III—National Treatment Under NAFTA Article 1102

In its third and most lengthy opinion, the Tribunal suggested that the analysis of Article 1102³⁵ required interpretation of the terms “investments of investors” and “treatment no less favorable”; a determination as to what “standards should be employed in determining whether the Investment has been denied ‘treatment no less favorable’ than that received by investments of Canadian investors”; and a decision concerning which Canadian investments were “in like circumstances” to the “Investment” (that is, to Pope & Talbot’s Canadian subsidiary).³⁶

The Tribunal first rejected what it called “semantic arguments” made by Canada in an effort to narrow the scope of Article 1102.³⁷ The Tribunal’s view was that “as a general principle of interpretation, use of the plural form does not, without more, prevent application of statutory or treaty language to an individual case.”³⁸ According to the Tribunal, the drafters of NAFTA must have assumed “that Chapter 11 cases would most often involve claims by *individual* investors that they or their investments were being denied national treatment.”³⁹ Moreover, under Article 1102, the “no less favorable” language entailed “the right to treatment equivalent to the ‘best’ treatment to domestic investors or investments in like circumstances.”⁴⁰

While Canada agreed that Article 1102 may be applicable to measures, such as the SLA, that do not facially discriminate against foreign investors or single them out for special treatment, Canada contended that de facto discrimination is properly found only if the measure “disproportionately disadvantages the foreign owned investments or investors.”⁴¹ The Tribunal

³¹ See NAFTA, Art. 1106. The article provides, in pertinent part, that “[n]o Party may impose or enforce any of the following requirements . . . in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment.” It precludes a NAFTA party from requiring investors to, inter alia, “export a given level or percentage of goods or services; . . . to restrict sales of goods or services . . . by relating such sales in any way to the volume or value of its exports or foreign exchange earnings; . . . [or to] condition the receipt or continued receipt of an advantage” by restricting “sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.”

³² *Opened for signature* May 23, 1969, 1155 UNTS 331.

³³ Pope & Talbot II, *supra* note 4, paras. 73, 75.

³⁴ *Id.*, para. 76.

³⁵ Article 1102(2) provides: “Each Party shall accord to investments of investors of another Party treatment no less favorable than it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, management, conduct, operation, and sale or other disposition of investments.”

³⁶ Pope & Talbot III, *supra* note 4, para. 31.

³⁷ The Tribunal rejected Canadian contentions that the language “investments of investors” dictated that a single investment, rather than multiple investments, that had been discriminated against would not be covered, *id.*, para. 38, and that discrimination was not actionable unless the challenged treatment was “disproportionately” in favor of the national investor, *id.*, paras. 71–72.

³⁸ *Id.*, para. 37 (citing NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION §47.34 (6th ed. 2000) (spine title: SUTHERLAND STATUTORY CONSTRUCTION)).

³⁹ *Id.*, para. 38.

⁴⁰ *Id.*, para. 42.

⁴¹ *Id.*, para. 43.

disagreed, relying in part on WTO jurisprudence in the *Bananas*,⁴² *Asbestos*,⁴³ and *Beer* cases,⁴⁴ and in part on the Chapter 11 decision in *S.D. Myers v. Canada*.⁴⁵ In the Tribunal's view, those cases failed "to support the contention of Canada that, where domestic companies are receiving varying treatment from the host government, foreign companies (of NAFTA origin) are entitled only to the treatment accorded the preponderance of those domestic companies."⁴⁶

According to the Tribunal, "[O]nce a difference in treatment between a domestic and a foreign-owned investment is discerned, the question becomes, are they in like circumstances?"⁴⁷ If there is differential treatment between foreign and domestic companies in like circumstances, such differences would "presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA."⁴⁸ Here, there was no question that the claimant's investment in British Columbia was treated differently (that is, made subject to the export control regime) from Canadian domestic lumber investments in the provinces in which the SLA did not apply (that is, in all provinces except Alberta, British Columbia, Ontario, and Quebec). According to the Tribunal, however, the Canadian decision to apply the regime only to the four provinces was "reasonably related to the rational policy of removing the threat of [countervailing duty] actions" and therefore was not motivated by discrimination that was illegal under Article 1102. Those firms in the other provinces were not in like circumstances with the claimant.⁴⁹

Similar conclusions were reached with regard to Canada's differing treatment of existing and new producers, coastal and interior lumber producers in British Columbia, and holders of different levels of quotas under the SLA. These cases did not violate Canada's national treatment obligations, given that there was no discrimination between foreign investors (such as Pope & Talbot) and domestic investors that were similarly situated. Observing that various elements of the regulatory regime reflected a "reasonable nexus" and "rational choice of remedies aimed at avoiding a threat to the SLA," the Tribunal afforded Canada considerable leeway in its difficult efforts to administer that agreement.⁵⁰ Case-by-case analysis was required—that is, "evaluation of the entire fact setting surrounding, in this case, the application of the [softwood lumber regulatory] Regime."⁵¹ The result? Canada did not violate Article 1102 with regard to Pope & Talbot.⁵²

Pope & Talbot III and IV—Fair and Equitable Treatment Under NAFTA Article 1105

The third and fourth opinions in *Pope & Talbot* set forth the most comprehensive interpretation of Article 1105 by a NAFTA tribunal to date. Article 1105(1) provides: "Each Party shall

⁴² *Id.*, paras. 46–55 (discussing Panel Report, European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R/USA (May 22, 1997)).

⁴³ *Id.*, paras. 58–60 (discussing Panel Report, European Communities—Measures Concerning Asbestos and Asbestos Containing Products, WT/DS135/R (Sept. 18, 2000)).

⁴⁴ *Id.*, paras. 61–63 (discussing United States—Measures Affecting Alcoholic and Malt Beverages, June 19, 1992, GATT B.I.S.D. (39th Supp.) at 206 (1993)).

⁴⁵ Partial Award (NAFTA Ch. 11 Arb. Trib. Nov. 12, 2000), 40 ILM 1408 (2001).

⁴⁶ *Pope & Talbot III*, *supra* note 4, para. 66.

⁴⁷ *Id.*, para. 79.

⁴⁸ *Id.*, para. 78. The Tribunal earlier rejected Canada's contention that a higher standard of proof of discrimination should be required for *de facto*, as opposed to *de jure*, discrimination. *Id.*, paras. 70–71.

⁴⁹ *Id.*, paras. 87–88.

⁵⁰ *Id.*, paras. 93, 102, 103.

⁵¹ *Id.*, para. 75.

⁵² *Id.*, para. 104.

accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.” Although Canada and the claimant initially agreed that the provision set out a minimum standard of treatment “that applies apart from the treatment a NAFTA party may accord to its own or to other countries’ investors and investments,” they had different views on the “content of the minimum standard.”⁵³ Canada sought a narrow interpretation of the “fair and equitable treatment” standard, arguing on the basis of older cases that the “minimum standard of treatment” embodied in Article 1105 required “egregious” conduct before the necessary violation of international law could be found, and that Article 1105 thus did not go beyond traditional customary international law principles of fairness.⁵⁴ The claimant contended that the provision should be construed in light of all relevant sources of international law.

There was no disagreement in principle that treaties are a primary source of international law, particularly the various bilateral investment treaties (BITs). As the Tribunal noted, “These treaties evolved over the years into their present form, which is embodied in the [U.S.] Model Bilateral Investment Treaty of 1987. Canada, the UK, Belgium, Luxembourg, France and Switzerland have followed the Model.”⁵⁵ The model BIT specified that “Investment shall be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.”⁵⁶

The Tribunal believed that the above language confirmed the adoption of the “additive character of the fairness elements” of Article 1105.⁵⁷ That is, investors under NAFTA were entitled to the international law minimum, *plus* the fairness elements.⁵⁸ The Tribunal’s acceptance of the “additive” approach was based on its conclusion that the “bilateral commercial treaties negotiated by the United States and other industrialized countries”—upon which Article 1105 was based—represented an evolution of investor rights to include the fairness elements, “no matter what else their entitlement under international law [and] . . . free of any threshold that might be applicable to the evaluation of measures under the minimum standard of international law.”⁵⁹

The Tribunal reached this conclusion even though the language of Article 1105 was different from that of most BITs. The Tribunal rejected the U.S. government’s contention⁶⁰ that the “drafters of NAFTA Chapter 11 ‘excluded any possible conclusion that the parties were diverging from the customary international law concept of fair and equitable treatment’”; the only U.S. argument, which was completely unpersuasive, was that *the language itself was different!*⁶¹ The Tribunal consequently ignored the linguistic differences between the model BIT provision in question (Article II.2) and NAFTA Article 1105, and rejected the idea that the NAFTA parties would have intended in NAFTA “to provide each other’s investments more limited protections than those granted to other countries not involved jointly in a continent-wide endeavor aimed, among other things, at ‘increas[ing] substantially investment opportunities in the territories of the Parties.’”⁶²

⁵³ *Id.*, para 106.

⁵⁴ *Id.*, para. 108.

⁵⁵ *Id.*, para. 111.

⁵⁶ *Id.*, paras. 110–11 (quoting Art. II.2 of the 1987 U.S. “model” BIT, *reprinted in* KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE A-4 (1992). Canada quoted the U.S. model BIT in its phase 2 countermemorial (Oct. 10, 2000, para. 254).

⁵⁷ Pope & Talbot III, *supra* note 4, para. 111.

⁵⁸ *Id.*, para. 110.

⁵⁹ *Id.*, paras. 110–11.

⁶⁰ Under NAFTA Article 1128, any NAFTA government may “make submissions to a Tribunal on a question of interpretation of this Agreement,” and the United States did so on several occasions in the course of the proceeding.

⁶¹ Pope & Talbot III, *supra* note 4, para. 114.

⁶² *Id.*, para. 115.

Having forcefully set out this broad standard for Article 1105, the Tribunal proceeded on its situation-by-situation analysis and, with one relatively minor exception, rejected all of the claimant's allegations that various Canadian actions in administering the SLA violated Article 1105.⁶³ The exception, ironically, had no direct relationship to *any* of the Chapter 11 violations originally raised by Pope & Talbot. Rather, the "verification review episode" was an apparently high-handed and arbitrary "audit" of Pope & Talbot's records that Canada initiated shortly after Pope & Talbot filed its notice of arbitration.⁶⁴

At the time of the verification review episode, Pope & Talbot had been sufficiently concerned that the episode would lead to retaliation against the firm (pending resolution of the arbitration) that it sought protection from the Tribunal through a "Motion for Interim Measures," but the Tribunal had decided, in response, that it lacked jurisdiction to impose such relief.⁶⁵ Later, however—in *Pope & Talbot III*—the Tribunal accepted the company's contention that the verification review episode constituted a violation of fair and equitable treatment under Article 1105. In doing so, the Tribunal variously characterized the SLD's actions as "imperious," based on "naked assertions of authority," and designed to "bludgeon the Investment into compliance."⁶⁶ It also appears to have been important to the Tribunal that in describing the incident, the SLD had effectively lied to Canada's own minister of international trade.⁶⁷ The Tribunal concluded:

It is not for the Tribunal to discern the motivations behind the attitude of the SLD; however, the end result for the Investment was being subjected to threats, denied its reasonable requests for pertinent information, required to incur unnecessary expense and disruption in meeting SLD's requests for information, forced to expend legal fees and probably suffer a loss of reputation in government circles. . . . In its totality, the SLD's treatment of the Investment during 1999 in relation to the verification review process is nothing less than a denial of the fair treatment required by NAFTA Article 1105, and the Tribunal finds Canada liable to the Investor for the resultant damages.⁶⁸

This result was surely distressing to the governments of both Canada and the United States. Canada had convinced the Tribunal that its actions in administering the SLA were non-expropriatory, nondiscriminatory, and—except for the verification review episode—consistent with the requirements of fair and equitable treatment. As a result of that episode, however, Canada came under strong criticism from the Tribunal and was faced with a damages phase—and all as a result of the high-handed actions of certain bureaucrats at the SLD in a peripheral, almost insignificant, aspect of the case. Moreover, the Tribunal found not only that the scope of the fair and equitable treatment language of Article 1105 extended beyond customary international law, but that a peripheral series of government actions, which at most caused some annoyance to the foreign investor, were in themselves a violation of NAFTA's investment provisions, requiring compensation. And as noted above, the United States had already made

⁶³ *Id.*, paras. 121, 123, 124, 128, 155.

⁶⁴ *Id.*, paras. 156–72. Canada's Softwood Lumber Division (SLD) undertook a review of the firm's questionnaire responses submitted as part of the requirements for quota allocations, which was followed by a series of questions and a scheduled verification, including a demand that the relevant documents—several truckloads located in Portland, Oregon, at the firm's corporate headquarters—be transported to Canada so that SLD officials could inspect them. Despite the firm's cooperation, the SLD effectively threatened Pope & Talbot with denial of its export quota under the SLA if it did not comply with the SLD's demands. The SLD also refused to provide the firm with any information on the alleged errors in the data that the company had submitted. *Id.*, paras. 163–67. There is no evidence in the decision, however, that Pope & Talbot was actually denied any benefits under the quota system, or that it was otherwise penalized (ignoring the inconvenience and the costs associated with complying with the SLD's requirements), as a result of the audit.

⁶⁵ *Id.*, paras. 169–70.

⁶⁶ *Id.*, paras. 173–75.

⁶⁷ *Id.*, paras. 177–79.

⁶⁸ *Id.*, para. 181.

an effort, rejected by the Tribunal, to oppose any such expansion of Article 1105's requirement for fair and equitable treatment.

Probably as a direct result of this decision, the NAFTA parties, acting as the Free Trade Commission (Commission) under NAFTA Article 2001,⁶⁹ issued a formal, binding "Interpretation," under Article 1131 (2), of the "minimum standard of treatment in accordance with international law."⁷⁰ The Interpretation stated, in pertinent part:

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 investment of investors of another Party.
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.⁷¹

The *Pope & Talbot* Tribunal felt compelled to deal with this clarification, and did so at great length in *Pope & Talbot IV*—after seeking and receiving the views of the claimant, Canada, and the other NAFTA parties. This decision, entitled "Award in Respect of Damages," is actually devoted primarily to the Interpretation and its effect on the award under Article 1105 rendered in *Pope & Talbot III*.

As a threshold issue, the Tribunal considered whether the Commission, in issuing the Interpretation, had been acting within its powers under Article 1131 (2) or was, instead, using the Interpretation as a guise for amending the treaty—an action that was permitted only under Article 2202 and that would have required the approval of each of the three governments in accordance with their own constitutional procedures.⁷² In this context, the Tribunal rejected Canada's contention that an arbitral tribunal would exceed its powers by challenging the validity of a Commission action under Articles 1131 (2) and 2001. It was the Tribunal's view, instead, that it had a "duty to consider and decide the question."⁷³

The Tribunal then proceeded to a review of the negotiating history of Article 1105 as an aid to proper interpretation.⁷⁴ After this analysis, in which the Tribunal noted that it had at one point been erroneously advised by Canada that no *travaux préparatoires* existed, the Tribunal effectively held Canada responsible for any shortcomings in its earlier analysis of Article 1105: "It is adequate here to say that the Tribunal knows that having the documents [initially withheld and eventually provided by the government of Canada] would have made its earlier interpretations of Article 1105 less difficult and more focused on the issues before it."⁷⁵

The negotiating drafts ultimately provided by Canada were significant in the Tribunal's view because there was no reference in them to "customary international law" even though the negotiators were undoubtedly aware that, "as is made clear in Article 38 of the Statute of

⁶⁹ The Commission comprises cabinet-level representatives of the parties, as specified in Article 2001(1).

⁷⁰ NAFTA Article 1131 (2) states that "[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section." This provision affords the NAFTA parties, if they can agree that issuing an interpretation to a Chapter 11 tribunal is advisable, and if they can agree on a text, the opportunity to direct a tribunal to interpret a treaty provision in a certain manner, subject to the constraints discussed below, *see infra* text accompanying notes 102–103.

⁷¹ NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, Part B (July 31, 2001), at <<http://www.dfait-maeci.gc.ca/tna-nac/gov-en.asp>> (emphasis added). This statement was sent without comment by Canada to the Tribunal ten days after it was issued. *Pope & Talbot IV*, *supra* note 4, para. 11. It left several questions unanswered, including: (1) whether such clarification was applicable to a case in which an opinion on the merits had already been issued, and (2) the scope of the customary international law minimum standard of treatment of aliens, assuming that the reference in NAFTA Article 1131 ("Governing Law") to "this Agreement and applicable rules of international law" means, in the latter instance, as the Parties insisted in the Interpretation, "customary international law."

⁷² *See Pope & Talbot IV*, *supra* note 4, paras. 17–21.

⁷³ *Id.*, para. 23.

⁷⁴ *Id.*, paras. 25–42.

⁷⁵ *Id.*, para. 39.

the [International Court of Justice], international law is a broader concept than customary international law, which is only one of its components.”⁷⁶ The difference, said the Tribunal, “is important. For example, Canada has argued to this Tribunal that customary international law is limited to what was required by the cases of the *Neer* era of the 1920’s, whereas international law in its entirety would bring into play a large variety of subsequent developments.”⁷⁷ On this basis, the Tribunal strongly suggested that if it were required to determine whether the Commission’s action was an interpretation or an amendment, it would chose the latter, but concluded that such a determination was not required in this particular case.⁷⁸

Canada argued that because *Pope & Talbot III* was an interim, rather than final, award in the proceeding, the Tribunal’s award should not be regarded as a “closed chapter” in the case; instead, the Tribunal should “consider whether its ruling of breach already made was based on a correct interpretation.”⁷⁹ The claimant disagreed, but the Tribunal decided that the phrase “shall be binding” in Article 1131 (2) was “better regarded as mandatory than prospective.”⁸⁰ The Tribunal conceded that the Interpretation “requires each Party to accord to investments of investors of the other Parties the fairness elements as subsumed in, rather than additive to, customary international law.”⁸¹ In this regard, the Tribunal recanted its earlier interpretation that the fairness elements were additive.

Nevertheless, taking the Interpretation to be mandatory did not result in a reversal of the award. According to the Tribunal, the original award to the claimant under Article 1105 would fall only if “the concept behind the fairness elements under customary international law is different from those elements under ordinary standards applied in NAFTA countries.”⁸² Most significantly, the Tribunal rejected Canada’s contention that the violation must have been “egregious” based on a static concept of customary international law.⁸³ In fact, as Mexico and Canada had admitted, “[T]here has been evolution in customary international law concepts since the 1920’s. It is a facet of international law that customary international law evolves through state practice. International agreements constitute practice of states and contribute to the grounds of customary international law.”⁸⁴ Moreover, the “range of actions subject to international concern has broadened” since the 1920s, to “include the concept of fair and equitable treatment,” as the Organization for Economic Cooperation and Development (OECD) and others have recognized. This concept was also central to the BITs negotiated since the OECD began dealing with the protection of foreign property. Surely, the more than 1,800 BITs that have been negotiated can be taken to reflect state practice in this area.⁸⁵

What, therefore, is the applicable customary international law standard in determining if there has been a violation of fair and equitable treatment—the 1926 *Neer* standard or some less extreme threshold? The Tribunal, once again, decided not to decide, because even if Canada’s narrow—that is, egregious conduct—standard was applied, damages would be due to

⁷⁶ *Id.*, para. 46.

⁷⁷ *Id.*, para. 46; see *United States (L.F. Neer) v. United Mexican States* (U.S.-Mex. General Claims Comm’n Oct. 15, 1926), 4 R.I.A.A. 60, 3 ILR 213 (1927).

⁷⁸ *Pope & Talbot IV*, *supra* note 4, para. 47.

⁷⁹ *Id.*, para. 49.

⁸⁰ *Id.*, para. 51.

⁸¹ *Id.*, para. 54.

⁸² *Id.*, para. 56.

⁸³ Canada relied on *United States (L.F. Neer) v. United Mexican States*, which was quoted as stating that a breach of international law required treatment amounting “to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.” *Pope & Talbot IV*, *supra* note 4, para. 57 n.42.

⁸⁴ *Pope & Talbot IV*, *supra* note 4, para. 59. This question of evolution of the customary international law standard is discussed in detail in *Mondev Int’l Ltd. v. United States* (NAFTA Ch. 11 Arb. Trib. Oct. 11, 2002), 42 ILM 85 (2003).

⁸⁵ *Pope & Talbot IV*, *supra* note 4, paras. 60–62.

the claimant for the verification review episode. The conduct of the administrative agency, the SLD, was egregious and therefore in violation of Article 1105.⁸⁶

Pope & Talbot IV—Damages

The only detailed measure of damages in Chapter 11 is in Article 1110(2)–(6), and that measure is, by its terms, limited to expropriation and nationalization. Consequently, in seeking to determine damages for a breach of Article 1105, the Tribunal relied on the language in Article 1116 (and also similar language in Article 1117). That article, which was the basis for Pope & Talbot’s original claim, provides, in pertinent part, that “[a]n investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A [of Chapter 11] . . . and that the investor has incurred loss or damage by reason of, or arising out of, that breach.” The claimant did not submit its NAFTA claim under Article 1117, which states that “[a]n investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration” Since, according to Canada, Article 1116 and 1117 claims are mutually exclusive, and international law (*Barcelona Traction*) precludes shareholders from recovering from injuries suffered by a corporation, Canada urged denial of any claim.⁸⁷ In other words, Pope & Talbot should have been suing as an investor on behalf its Canadian subsidiary—a separate legal entity and “a juridical person the investor owns or controls” under Article 1117—rather than seeking direct losses on its own behalf as “an investor of a Party” under Article 1116.

The Tribunal disagreed. It viewed Article 1116 as encompassing “an investor who is claiming for loss or damage to its interest in the relevant enterprise, which is a juridical person that the investor owns,” so that the investor need only prove loss or damage to its interest, and a causal relationship between the loss or damage and the breach.⁸⁸

The Tribunal did not provide criteria to specify what types of damages may be recoverable under Article 1116 for breaches of Article 1105. It did find that two claims of damage were *not* recoverable: (1) the value of management time devoted to the claim, and (2) the alleged losses from the one-week shutdown of the claimant’s British Columbia mills that alleged resulted from the verification review episode.⁸⁹ The damages allowed were limited to (1) out-of-pocket expenses relating to the verification review episode, including accounting and legal fees, and (2) “lobbying efforts to counter the actions of the SLD,” plus out-of-pocket expenses incurred with regard to an interim hearing held by the Tribunal to consider these issues in January 2000.⁹⁰ On this basis, the total damage award was U.S.\$407,646.⁹¹

Pope & Talbot V—Allocation of Costs

In large part because it was not clear who the winning and the losing parties were in this complex arbitration, the Tribunal rejected the basic rule that the losing party should pay

⁸⁶ *Id.*, paras. 65–67.

⁸⁷ *Id.*, paras. 75–78 (citing *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Second Phase, 1970 ICJ REP. 3 (Feb. 5)).

⁸⁸ *Id.*, para. 80.

⁸⁹ Management time, according to the Tribunal, was a fixed cost, so no additional costs were incurred by claimant as a result of the episode. *Id.*, paras. 81–82. The allegations of lost profits as a result of the shutdown were not persuasive because Pope & Talbot’s British Columbia subsidiary “at all relevant times had inventory sufficient to meet all its sales requirements”; therefore, there were no lost profits. *Id.*, para. 84.

⁹⁰ *Id.*, para. 85.

⁹¹ *Id.*, para. 88. Since NAFTA Article 1135(1)(a) specifies that a NAFTA tribunal “may award . . . only . . . money damages and any applicable interest,” and the UNCITRAL Rules are silent on the issue of interest, the Tribunal decided to award Pope & Talbot simple interest at a rate of 5 percent (the rate suggested by Canada), for a total award of \$461,566. Interest on that aggregate amount was to accrue until the date of payment, at 5 percent per annum, compounded quarterly. *Id.*, paras. 89–90.

arbitral costs, and it noted, too, that it had discretion with regard to legal costs.⁹² Looking back on the process, the parties were in agreement that the arbitration had “raised a number of important and novel issues relating to NAFTA Chapter 11. Further, many complex issues of fact and law were raised, and significant procedural issues arose.”⁹³ Although Pope & Talbot received an award, it was less than 1 percent of the amount claimed at earlier stages, and all other claims had failed.

Pope & Talbot sought recovery of all of its costs, whereas Canada argued that the claimant failed with regard to most of its assertions and should therefore pay Canada’s legal fees.⁹⁴ The Tribunal rejected both positions: “[I]t is over [sic] simplistic to treat this case as one where the Investor ‘won’ and therefore should recover costs, or where Canada ‘really won’ having regard to the very limited degree of success of the Investor and should therefore recover costs.”⁹⁵ Rather, “a variety of aspects” must be considered.⁹⁶ “The Tribunal concludes that the success of each party was mixed,” and that each party should therefore bear its own legal costs.⁹⁷

What of the arbitral costs, totaling more than \$1,460,000? The Tribunal directed each party to pay half, except for the verification review episode, the one claim on which Pope & Talbot prevailed. This portion of the costs—estimated by the Tribunal at \$240,000—should be paid entirely by Canada, rather than divided equally.⁹⁸

* * * *

Despite the rejection of most of Pope & Talbot’s claims against the government of Canada, the Tribunal made what may prove to be significant contributions to the interpretation of key NAFTA provisions on national treatment, on fair and equitable treatment (and the extent to which it is limited by “international law”), and on expropriation (particularly the line between indirect expropriation and valid government regulation). In various broadly worded decisions, the Tribunal reviewed, inter alia, NAFTA’s expropriation provisions (although no expropriation was found), analyzed the “national treatment” requirements (although no national treatment violation was identified), construed the “fair and equitable treatment” obligation (while finding only one relatively minor violation by Canada), and opined at length on the difference between a NAFTA “interpretation” and a NAFTA “amendment.” It also issued

⁹² The Tribunal noted in *Pope & Talbot V*, *supra* note 4, para. 4, that under Article 40 of the UNCITRAL Rules:

- (1) Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral Tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
- (2) With respect to the costs of legal representation and assistance referred to in Article 38, paragraph (e), the arbitral Tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs, or may apportion such costs between the parties if it determines that apportionment is reasonable.

⁹³ *Pope & Talbot V*, *supra* note 4, para. 7.

⁹⁴ *Id.*, para. 8.

⁹⁵ *Id.*, para. 9.

⁹⁶ Canada failed on many procedural issues raised and on many of its documentary requests, and caused “particular difficulties” with regard to allegations of the confidentiality of documents and its “reluctance” to produce documents; “Canada simply chose not to comply with the directions of the Tribunal in either respect.” *Id.*, para. 11. Canada also waited until the last moment to produce the *travaux préparatoires*, after having asserted that they did not exist. The claimant raised “important and difficult” issues at a late stage of the proceedings, such as an application to change the place of arbitration, and presented correspondence objected to by Canada—material that the Tribunal did not find to be “particularly helpful.” *Id.*, paras. 15–16.

⁹⁷ *Id.*, para. 17.

⁹⁸ *Id.*, para. 18. Since Pope & Talbot had already paid in its half of the total arbitration costs, Canada was directed to pay that portion—\$120,000—back to the claimant, with interest at 5 percent from the date of the award, compounded quarterly, and pro rata within a quarter.

what at the time was only the second damages award under Chapter 11 (after *Metalclad Corp. v. United Mexican States*).⁹⁹

Notwithstanding the clear directive of NAFTA Article 1136(1) that “[a]n award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case,” the *Pope & Talbot* Tribunal appears to have gone out of its way to provide its views to the parties, the governments, and the public on the proper interpretation of key provisions of NAFTA, whether or not these interpretations were strictly necessary to decide the case before it.¹⁰⁰ In particular, the Tribunal’s analysis of Articles 1105–1110 goes well beyond normal concepts of judicial economy.

The reality is that whether one disapproves of this Tribunal’s expansionist approach, or seeks to distinguish holding and dicta, NAFTA tribunals *do* pay attention to other tribunals’ decisions interpreting and applying the same provisions, including not only NAFTA cases, but also those of the GATT and WTO, usually because the parties invoke these prior cases as being both relevant and instructive.¹⁰¹ Since all NAFTA tribunals know that their awards will be read and cited in future NAFTA litigation under Chapter 11, it is difficult for such tribunals to confine themselves strictly to the case at hand. Perhaps what is most salient for the arbitrators is the ad hoc nature of arbitral tribunals—and the fact that the arbitrators, unlike judges who can be confident that they will be hearing and deciding other cases, never know whether they will have another opportunity to opine on the complex and interesting issues that have been raised in a particular matter.

At the present time, there is no mechanism for resolving interpretive conflicts between panels, other than through the formal “interpretation” process. It has been suggested in this *Journal* that the NAFTA parties should establish an appellate body to reduce or eliminate such conflicts,¹⁰² but such action would require an amendment, not an interpretation, of NAFTA. Pending such politically difficult action, the only likely practical and effective means of correcting erroneous interpretations is thus through the Article 1131(2) approach. If the NAFTA governments issue further “interpretations,” it is possible that other tribunals faced with applying them—like the *Pope & Talbot* Tribunal—will be asked by claimants, or will seek on their own motion, to determine whether such interpretations are more properly characterized as amendments.¹⁰³ Even if interpretations are not challenged as being amendments, they are likely to remain relatively uncommon—so far only one in nearly ten years—due presumably to the need for the NAFTA parties to agree both on the need for an interpretation and then on the language to be used.

Moreover, as is apparent from this case, the July 2001 Interpretation has only shifted the debate into the future. Even if everyone agrees that “fair and equitable treatment” in Article

⁹⁹ See William S. Dodge, Case Report: *Metalclad Corp. v. Mexico*, 95 AJIL 910 (2001). More recently, damages have been awarded in two other cases, *S.D. Myers v. Canada*, Second Partial Award (NAFTA Ch. 11 Arb. Trib. Oct. 21, 2002) and *Feldman Karpa v. United Mexican States* (NAFTA Ch. 11 Arb. Trib. Dec. 16, 2002). All of these cases are available online at <<http://www.naftalaw.org>>.

¹⁰⁰ The most egregious example of this broad-brush tendency is the Tribunal’s opining that the governments’ interpretation of Article 1105 was in fact an (illegal) attempt to amend NAFTA. *Pope & Talbot IV*, *supra* note 4, para. 47.

¹⁰¹ For example, the *Pope & Talbot* Tribunal, in interpreting NAFTA Article 1102, discussed in detail not only the *S.D. Myers* NAFTA decision, but a series of WTO Appellate Body decisions. See *Pope & Talbot III*, *supra* note 4, paras. 46–67.

¹⁰² See Dodge, *supra* note 99, at 918–19. The recently concluded United States–Chile Free Trade Agreement states in Annex 10-H that “[w]ithin three years after the date of entry into force of this Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 10.25 in arbitrations commenced after they establish the appellate body or similar mechanism.” See <<http://www.ustr.gov/new/fta/Chile/final/10.investment.PDF>>.

¹⁰³ The issue was raised before at least one other tribunal, in *Mondev Int’l Ltd. v. United States*, para. 106 (NAFTA Ch. 11 Arb. Trib. Oct. 11, 2002), 42 ILM 85 (2003), but that tribunal avoided the interpretation/amendment issue, determining that the Free Trade Commission’s “interpretation was supported by well-settled principles of treaty interpretation.” Even if most NAFTA tribunals in the future follow *Mondev* and accept Commission interpretations as binding, there is no guarantee that all will do so.

1105 means the standard required by “customary international law,” it still needs to be determined exactly what that means. Canada may persist in arguing, as it has in even more recent cases than *Pope & Talbot*, that the customary international law requirements for fair and equitable treatment were frozen in 1926 with the *Neer* case.¹⁰⁴ The United States, in contrast, has effectively conceded that the minimum standard of customary international law for fair and equitable treatment “has evolutionary potential.”¹⁰⁵ The *Mondev* tribunal has outright opined that “the content of minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s.”¹⁰⁶ As aids to discovering the state of customary international law, the overall relevance of nearly two thousand bilateral investment treaties, dozens of international arbitrations, and various treatises will surely be debated in future NAFTA disputes. Those tribunals will have difficulty ignoring *Pope & Talbot*.

DAVID A. GANTZ

University of Arizona, James E. Rogers College of Law

Foreign affairs power of the United States—federal powers as against those of states—executive branch’s power to settle or waive claims of nationals—preemptive effect of treaties and executive agreements—Holocaust insurance claims

AMERICAN INSURANCE ASS’N V. GARAMENDI. 123 S.Ct. 2374.

Supreme Court of the United States, June 23, 2003.

DEUTSCH V. TURNER CORP. 324 F.3d 692.

United States Court of Appeals for the Ninth Circuit. January 21, 2003, *amended* March 6, 2003.

In 1999, California passed the Holocaust Victim Insurance Relief Act (HVIRA),¹ which required insurers doing business in California to disclose information regarding insurance policies sold, by them or related companies, in Europe between 1920 and 1945. The Ninth Circuit Court of Appeals upheld the statute, rejecting arguments that HVIRA, *inter alia*, was preempted by the federal government’s foreign affairs power and violated the U.S. Constitution’s Commerce Clause.² The appeals court concluded that because the statute was not aimed at a particular country and only incidentally affected U.S. foreign affairs, it did not interfere with the federal government’s power in that sphere.³ The court also concluded that the statute did not inhibit the United States’ ability to speak with “one voice” in the regulation of foreign commerce.⁴ The U.S. Supreme Court granted certiorari⁵ and reversed, holding in *American Insurance Ass’n v. Garamendi*⁶ that HVIRA constituted an impermissible interference with the president’s ability to conduct foreign affairs.⁷

¹⁰⁴ See *Mondev Int’l Ltd. v. United States*, para. 114.

¹⁰⁵ *Id.*, para. 119.

¹⁰⁶ *Id.*, para. 123. Arguably, the *Mondev* decision will be given particular weight by future NAFTA tribunals because Stephen Schwebel, former president and judge of the International Court of Justice, was a member of the tribunal.

¹ CAL. INS. CODE §§13800–13807.

² *Gerling Global Reinsurance Corp. v. Low*, 240 F.3d 739, 742–43 (9th Cir. 2001), *rev’d sub nom.* *Am. Ins. Ass’n v. Garamendi*, 123 S.Ct. 2374 (2003).

³ 240 F.3d at 751–53.

⁴ See *id.* at 746–51. For a related discussion of “one voice,” see *Japan Line, Ltd. v. Los Angeles*, 441 U.S. 434, 448 (1979) (considering whether state regulation of foreign commerce, in addition to the requirements applying to taxation of interstate commerce, prevented the United States from “speaking with one voice” in foreign affairs as a result of the regulation).

⁵ See 71 U.S.L.W. 3470 (Jan. 10, 2003).

⁶ 123 S.Ct. 2374 (2003).

⁷ *Garamendi*, 123 S.Ct. at 2379.