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Article 1105 - Minimum Standard of Treatment

Article 1105 Minimum Standard of Treatment

I Negotiating Text

- A provision relating to the minimum standard of treatment appeared in the earliest negotiating texts leading up to the NAFTA. In the section entitled "Other Provisions: US-Canada or US Only," specific language on the minimum standard was included in the very broad draft of the national treatment provision. This was divided into two paragraphs which read:

4. Investments of nationals and companies of a Party in the territory of another Party shall at all times 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.

5. Without prejudice to paragraph 4, nationals or companies of a Party whose investments suffer losses in the territory of another Party owing to war or other armed conflict, revolution, insurrection or other similar events shall be accorded at least nondiscriminatory treatment by such other Party as regards any measures it adopts in relation to such losses.

(1)

- The January 16, 1992, text contained the same language but made clear that this was a U.S. initiative, setting out the proposed provision under the heading, "Other U.S. Treatment Provisions with no Can, Mex Counterparts." (2) This was repeated in the text dated February 13, 1992. (3)
- In the negotiating draft of February 21, 1992, the text appeared with a number of square brackets under the heading "Other Treatment Provisions." In its revised form, the text read as follows:

MEX USA[1. Investments of investors of a Party in the territory of another Party shall at all times be accorded fair and equitable treatment, MEX[and] shall enjoy full protection and security]USA[and shall ● in no case be accorded treatment less than that required by international law.]

USA CDA[2. Without prejudice to paragraph 4, investors of a Party whose investments suffer losses in the territory of another Party owing to war or other civil strife shall be accorded at least nondiscriminatory treatment by such other Party as regards any measures it adopts in relation to such losses.] (4)

- By March 6, 1992, the square brackets had been removed from around the word "and" preceding "shall enjoy" in the first paragraph and all square brackets were removed from the second paragraph. The provision read:

MEX USA[3. Investments of investors of a Party in the territory of another Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security USA[, all in accordance with international law.]

Without prejudice to paragraph 4, investors of a Party whose investments suffer losses in the territory of another Party owing to conflict or civil strife shall be accorded at least nondiscriminatory treatment by such other Party as regards any measures it adopts in relation to such losses.

(5)

- This text reappeared in the same form in the draft of April 3, 1992, (6) and again on April 15, 1992. (7)
- The square brackets were removed from the first paragraph on May 1, 1992. It now read:

Each Party shall provide at all times to the investments of investors of another Party in its territory full protection and security, fair and equitable treatment, and in all other respects treatment in accordance with international law. (8)

This formulation drew together, and rearranged, the three elements that had appeared in the earlier texts: full protection and security; fair and equitable treatment; and then as a general concept, treatment in accordance with international law. The second paragraph remained unaltered.

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must interpret Article 1105(1) and are thus central to any discussion of this provision.

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b Textual Analysis

The opening phrase of Article 1105 sets out a general proposition: investments of investors of another Party shall be accorded treatment in accordance with international law. Several aspects of this are notable. First, the subject of this protection is investments rather than investors. The first paragraph of Article 1105 is limited to treatment of investments, unlike the second paragraph of Article 1105, and indeed other provisions such as Article 1102 and 1103, which refer to treatment accorded to both investments and investors. This limitation was present even in the earliest drafts of what became Article 1105(1). (63)

Second, Article 1105 stands in sharp contrast with Articles 1102, 1103 and 1104. In each of these other provisions, the measure of treatment is based upon a defined comparator, whether that be domestic investments or foreign investments, both of which must be in like circumstances. Article 1105(1) requires no such comparison. It is instead a requirement to treat the investment of NAFTA investors according to a referenced body of international law; the treatment of other investors is irrelevant to the resulting analysis. This is the underlying policy advanced by Article 1105, and it reflects the history of this provision as an objective standard below which States could not go. (64)

Unlike the comparative standards discussion above, Article 1105 was intended to set an absolute baseline: no matter how badly a given State may treat its own citizens, it must treat foreigners in accordance with an international minimum standard. The intention of the minimum standard of treatment was to create a level of protection that might, in circumstances where the general quality of governance in a given State was sufficiently low, exceed the level of protection afforded to domestic investors. (65)

The outlines of this protection have been debated in numerous Chapter 11 proceedings. One thing is clear: the reference in the first paragraph to “international law” necessarily draws into this provision a body of law – the minimum standard prescribed by international law. Article 1105(1) can thus be conceived as a window through to another set of rules. But what are the rules, and how should they be applied?

Third, and by extension, the concept of “international law” is at the core of Article 1105. As noted above, the negotiating texts show that from the outset the Parties were dealing with three substantive elements: international law; fair and equitable treatment; and full protection and security. Early drafts were arguably ambiguous as to whether the latter two concepts had independent content or were simply examples of “international law.” The final formulation, however, addressed such ambiguities by subsuming fair and equitable treatment, along with full protection and security, into the broader concept of “treatment in accordance with international law.” The first phrase sets out this general obligation (to accord “treatment in accordance with international law”), with the subsidiary clause prefaced by the word “including.” “Fair and equitable treatment” and “full protection and security” are thus provided as non-exclusive examples of the minimum standard of treatment provided at international law. There is, in other words, a hierarchy established by the plain text of Article 1105(1). International law is the generic concept, with the subsidiary clause containing examples of the generic. (66)

As a matter of interpretation, however, this structure does not necessarily settle the content of the provision. To determine the scope of Article 1105(1), it is necessary to ascertain what treatment is mandated by “international law,” including – but not limited to – “fair and equitable treatment” and “full protection and security.” And it is here that the controversy has raged. What is the minimum standard of protection required by international law? What sources of international law are implied? And even within such sources, what specific doctrines can be applied? Two of the NAFTA Parties issued statements concerning this provision at the time when the NAFTA was implemented. The United States, in its Statement of Administrative Action, paraphrased Article 1105(1). (66) Canada's Statement of Implementation further clarified the applicable source of international law by stating:

Article 1105, which provides for treatment in accordance with international law, is intended to assure a minimum standard of treatment of investments of NAFTA investors. National treatment provides a relative standard of treatment while this article provides for a minimum absolute standard of treatment, based on long-standing principles of customary international law. (67)

As noted above, on July 31, 2001, the NAFTA Parties, acting together through the Free Trade Commission, issued a note of interpretation clarifying interpretation of Article 1105. The following sections will discuss the case law prior to the issuance of this note, and then the treatment of this provision following the FTC interpretation.

c Case Law Concerning Basic Concepts

i Phase One: Interpretation of the Minimum Standard of Treatment Prior to July 31, 2001

The first arbitration under Chapter 11 raised the issue of appropriate interpretation of