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Denial of Justice under NAFTA Article 1105:  
A Review of 20 Years of Case Law  

PATRICK DUMBERRY*

Introduction

The ‘fair and equitable treatment’ (FET) standard clause is found in the vast majority of BITs. The standard has been the object of a number of important studies in recent years. Article 1105 of the North American Free Trade Agreement (NAFTA) provides that the Parties must accord to investments of investors treatment ‘in accordance with international law, including fair and equitable treatment’. In the last two decades, Article 1105 has undoubtedly become the most controversial and contested provision of NAFTA Chapter 11.

The present author has explained elsewhere, that the FET standard clause under Article 1105 must be analyzed under specific parameters that do not exist under most other investment treaties. The specificity of Article 1105 is first and foremost the result of the language contained in the provision whereby the NAFTA Parties must accord a ‘fair and equitable treatment’ under ‘international law’ to foreign investors. This explicit reference to ‘international law’ contrasts with the vast majority of BITs which contain

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1 See, the analysis by Ioana Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (Oxford UP 2008) 23.


3 NAFTA was signed by Canada, Mexico and the United States on 17 December 1992 and came into force on 1 January 1994. 32 ILM, 605 (1993).


5 Dumberry, supra n. 4, at 44-46.
FET clauses that do not make any reference to ‘international law’. Moreover, in 2001 under the aegis of the Free Trade Commission (FTC), NAFTA Parties responded to three controversial awards that had been rendered in 2000 (Metalclad,6 S.D. Myers,7 and Pope & Talbot8) on the scope and meaning of Article 1105. It issued the ‘Notes of Interpretation of Certain Chapter 11 Provisions’, which clarified, inter alia, that the FET to be accorded under ‘international law’ constitutes a reference to the minimum standard of treatment under custom.

In fact, under the specific parameters of Article 1105, the FET standard must be considered as one of the elements included in the umbrella concept of the minimum standard of treatment.9 Yet, the concept of the FET standard is not an ‘empty box’; it is itself comprised of different elements. The present author has examined elsewhere which specific elements of protection (for instance, investor’s legitimate expectations, transparency, arbitrary or discriminatory conduct) must be accorded to investors under Article 1105.10 The present article focuses on one ground of complaint which has been consistently raised by claimant investors: allegations of denial of justice and failure to respect due process. There is a consensus amongst scholars that the obligation not to deny justice is one of the elements of the FET standard,11 and that it is part of the minimum standard of treatment under custom.12 In

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6 Metalclad Corporation v. Mexico, ICSID No. ARB(AF)/97/1, Award (30 August 2000), paras. 70, 76.
7 S.D. Myers Inc. v. Canada, UNCITRAL, First Partial Award (13 November 2000), para. 266.
8 Pope and Talbot Inc. v. Canada, UNCITRAL, Award on the Merits of Phase II (10 April 2001).
9 Cargill, Inc. v. Mexico, ICSID no. ARB(AF)/05/02, Award (18 September 2009), para. 296: ‘In summation, the Tribunal finds that the obligations in Article 1105(1) of the NAFTA are to be understood by reference to the customary international law minimum standard of treatment of aliens. The requirement of fair and equitable treatment is one aspect of this minimum standard’ (emphasis added).
11 UNCTAD, Fair and Equitable Treatment 7 (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012), at 62, 80; Tudor, supra n. 1, at 157-163; Diehl, supra n. 2, at 455 ff; Kläger, supra n. 2, at 118, 217 ff.
fact, all NAFTA tribunals have recognized that Article 1105 imposes an obligation not to deny justice.13

Defining what constitutes a denial of justice under international law is no easy task.14 Under international law, a State is responsible for the actions of its courts.15 A denial of justice occurs in the context of the maladministration of the host State’s judicial system toward an investor.16 One important point to highlight is that only ‘gross or manifest instances of injustice’ will be considered a denial of justice.17 Thus, ‘a simple error, misinterpretation or misapplication of domestic law is not per se a denial of

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13. See, for instance, Waste Management, Inc. v. Mexico (“Number 2”), ICSID No. ARB(AF)/00/3, Award (30 April 2004), para. 98. See also, the following awards (not specifically dealing with claims of denial of justice): Methanex Corporation v. United States, UNCITRAL, Award (3 August 2005), Part IV, Chapter C, Page 8, para. 15; S.D. Myers, supra n. 7, para. 134; Glamis Gold, Ltd. v. United States, UNCITRAL, Award (8 June 2009), para. 627; Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada, ICSID No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012), para. 152.

14. J. Paulsson, Denial of Justice in International Law (Cambridge U. Press 2006), at 204-205, provides the following list of instances where tribunals have found a denial of justice: ‘Some denials of justice may be readily recognised: refusal of access to court to defend legal rights, refusal to decide, unconscionable delay, manifest discrimination, corruption, or subservience to executive pressure. (...) No definitive list of instances could be presented, for it would soon be invalidated by new fact patterns, untested forms of organisation of systems of justice, and the boundless capacities of human invention. Recurring instances are unreasonable delay, politically dictated judgments, corruption, intimidation, fundamental breaches of due process, and decisions so outrageous as to be inexplicable otherwise than as expressions of arbitrariness or gross incompetence. A further basic postulate is that some acts or omissions by governmental authorities are sufficiently closely related to the administration of justice that they must also be deemed capable of generating international delinquency under the heading of denial of justice: failures of enforcement, the implementation of sanctions against persons or property without trial, failure of investigation or indictment, lengthy imprisonment without trial, arbitrarily lenient or harsh punishment.’ See also, the comprehensive analysis of case law by Paparinskis, supra n. 2, at 189 ff; UNCTAD, supra n. 11, at 80.


16. Paulsson, supra n. 14, at 4, see also at 62.

17. Newcombe & Paradell, supra n. 12, at 238; Diehl, supra n. 2, at 467; Paulsson, supra n. 14, at 60 (speaking of ‘egregious’ actions by the State and of ‘fundamental violations’ of international law).
justice’. There is indeed a certain threshold for denial of justice to occur. This position has been endorsed by tribunals.

The concept of ‘denial of justice’ is closely interconnected with that of ‘due process’. The requirement of due process is considered by many as an element of the FET standard. Under domestic law, the concept of the ‘rule of law’ is generally considered to encompass a ‘procedural’ dimension which is governed by the principle of ‘due process’, which ‘requires that one to whom the coercive power of the state is to be applied receive notice of the intended application and an opportunity to contest that application before an impartial tribunal’. A denial of justice occurs when a breach of due process in the administration of justice is not corrected by the judicial system.

While the term denial of justice is sometimes used in a much broader way, most scholars limit its scope to the maladministration of the host State’s judicial system. This includes the actions of all agents of the State in the maladministration of justice, and not only actions by judicial officials per se. On the contrary, the concept of due process is not limited to the judicial system; it applies to all forms of governmental decision-making, including...

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18. UNCTAD, supra n. 11, at 80. See also: Newcombe & Paradell, supra n. 12, at 238; Kläger, supra n. 2, at 227; Paulsson, supra n. 14, at 73 ff, 87 ff; Diehl, supra n. 2, at 462, 503.
20. Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Ecuador, UNCITRAL, PCA Case No. 34877, Partial Award on Merits (30 March 2010), para. 244; Joseph Charles, Lemire v. Ukraine, ICSID No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010), para. 249 (footnote 71).
23. Ibid., at 50; Newcombe & Paradell, supra n. 12, at 243.
measures taken by the government (both the executive and legislative branches) and the administration.  

The present article analyses the most salient features of NAFTA case law regarding the content and the scope of the prohibition of denial of justice and the due process obligation under Article 1105. We will examine the reasoning of the Mondev, Loewen, and Waste Management tribunals and address the following three questions:

- How tribunals have interpreted and applied the exhaustion of local remedies rule (Chapter I);
- The different ‘tests’ that have been put forward by tribunals to determine whether or not a denial of justice has been committed (Chapter II);
- The actual scope and contours of the prohibition against denial of justice and the obligation of due process and the different circumstances under which tribunals have concluded that these standards have been breached (Chapters III and IV).

I. Investors Must Exhaust all Effective, Adequate and Reasonably Available Remedies

Before being given the option to claim any denial of justice on the international plane, it is paramount that the investor exhausts all available procedural remedies before local courts. This will allow higher courts to correct any maladministration committed earlier by lower courts. This preliminary requirement is essential since, as stated by one writer, ‘denial of justice arises where a national legal system fails to provide justice – not where there is a single procedural irregularity or misapplication of the law at some level of the judicial system’. In this context, it has been rightly suggested that the exhaustion of local remedies is ‘an inherent material element of the delict’. NAFTA tribunals have given different interpretations to that rule.

27. Diehl, supra n. 2, at 431 ff.
28. For the full analysis, see Dumberry, supra n. 4, 138-170.
29. Newcombe & Paradell, supra n. 12, at 240-241 (emphasis in the original). See also: Diehl, supra n. 2, at 503. For Paulsson, supra n. 14, at 7, ‘international law does not impose a duty on States to treat foreigners fairly at every step of the legal process’, but ‘the duty is to create and maintain a system of justice which ensures that unfairness to foreigners either does not happen, or is corrected’ (emphasis in the original), see also, at 100-130.
30. Paulsson, supra n. 14, at 8, 102 ff.
In *Mondev*, the tribunal made this controversial statement: ‘under NAFTA it is not true that the denial of justice rule and the exhaustion of local remedies rule “are interlocking and inseparable”’. This affirmation has been rightly criticized by scholars for suggesting that an investor claiming denial of justice does not have to exhaust local remedies in domestic courts before undertaking NAFTA arbitration proceedings. Subsequent tribunals have, on the contrary, held that the exhaustion of local remedies is an essential requirement in the context of a denial of justice claim. Yet, the reasoning of some of them remains controversial. A prime example is the *Loewen* award.

In its award, the *Loewen* tribunal made it clear that the conduct of the trial by the Mississippi court constituted a manifest injustice: ‘[w]e have reached the firm conclusion that the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law’. For the tribunal, ‘the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment’. Yet, whether or not such a manifest injustice amounted to a denial of justice in breach of Article 1105 constituted a different question altogether: ‘[w]hether this conclusion results in a violation of Article 1105 depends upon the resolution of Respondent’s submissions still to be considered, in particular the submission that State responsibility arises only when final action is taken by the State’s judicial system as a whole’. Since ‘the trial court proceedings are only part of the judicial process that is available to the parties’, the tribunal proceeded to analyze ‘the rest of the process, and its availability to Loewen’.

The *Loewen* tribunal qualified the exhaustion of local remedies rule as a ‘procedural’ requirement rather than a substantive one, in conformity with the prevailing view amongst writers. Yet, the tribunal’s reasoning suggests that in the context of a claim of denial of justice, the requirement to exhaust

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32. Paulsson, *supra* n. 14, at 111, stating that the tribunal was ‘wrong’.
33. *Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID No. ARB(AF)/98/3, Award (26 June 2003), para. 54. 
34. *Ibid.*, para. 137. *See also*, at paras. 54, 142.
36. *Ibid*.
local remedies is substantive.\textsuperscript{40} The tribunal’s rationale is not at all clear with respect to this pivotal point.\textsuperscript{41} It seems to highlight a distinction between the exhaustion of local remedies rule and some sort of a ‘finality requirement’.\textsuperscript{42} The existence of such distinction has been contested by many writers.\textsuperscript{43} Some of these writers have nevertheless concurred with the tribunal’s position that denial of justice claims must be treated differently than other types of violations of international law insofar as they always require that local remedies be exhausted.\textsuperscript{44} The \textit{Waste Management} tribunal later took a much more convincing approach on this issue. It held that, in the context of denial of justice claims, ‘the notion of exhaustion of local remedies is incorporated into the substantive standard and is not only a procedural prerequisite to an international claim’.\textsuperscript{45}

Less controversially, the \textit{Loewen} tribunal explained the purpose of the exhaustion of local remedies requirement as being to ‘afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision’.\textsuperscript{46} The \textit{Waste Management} tribunal also held that it is the system of justice as a whole which must be assessed (the ‘system must be tried and have failed’)\textsuperscript{47} and ‘not any individual decision in the course of proceedings’.\textsuperscript{48}

Concerning the actual scope of this requirement of exhaustion of local remedies, the \textit{Loewen} tribunal made reference to an ‘obligation to exhaust remedies which are effective and adequate and are reasonably available to the complainant in the circumstances in which it is situated’.\textsuperscript{49} It also added that the assessment of whether or not remedies are ‘reasonable’ must be made ‘in light’ of the investor’s ‘situation’ and must also take its ‘financial and

\textsuperscript{40} Loewen, supra n. 33, paras. 142-157.
\textsuperscript{41} See, the detailed discussion in: Diehl, supra n. 2, at 485-488; Kläger, supra n. 2, at 221; Wallace, supra n. 25, at 691 ff.
\textsuperscript{42} See, B.K. Gathright, ‘A Step in the Wrong Direction: The Loewen Finality Requirement and the Local Remedies Rule in NAFTA Chapter Eleven’, 54 Emory L.J. 1116 (2005); Pulkowski, supra n. 26, at 312.
\textsuperscript{43} Pulkowski, supra n. 26, at 312-314; Diehl, supra n. 2, at 486.
\textsuperscript{44} See, Paulsson, supra n. 14, at 103, 107, 104. Contra: Gathright, supra n. 42; Pulkowski, supra n. 26, at 311 ff.
\textsuperscript{45} Waste Management, supra n. 13, para. 97.
\textsuperscript{46} Loewen, supra n. 33, para. 156.
\textsuperscript{47} Waste Management, supra n. 13, para. 97.
\textsuperscript{48} Ibid.
\textsuperscript{49} Loewen, supra n. 33, paras. 168-170.
The facts of the *Loewen* case can be briefly summarized as follows: Loewen Group Inc. was the defendant before the Mississippi State Court, in a lawsuit involving a commercial dispute with a local American businessman (Mr. O’Keefe), who was a competitor in the funeral home and insurance industry in Mississippi. Mr. O’Keefe sought less than USD 5 million in damages before the Mississippi Court. Loewen was ultimately found guilty. The jury returned a total verdict of USD 500 million, including USD 400 million in punitive damages. According to the claimants, they were later ‘forced to settle the case under conditions of extreme duress’ in an out of court settlement of USD 175 million for a commercial dispute involving transactions worth less than USD 5 million.

As pointed out by one author, the issue in this case was not really whether any appeal procedure existed (which was clearly the case), but rather whether such procedure was reasonably available. Thus, under Mississippi law, unless the losing defendant wishing to pursue an appeal against a judgment posts a (security) bond for which the amount is equal to 125% of the verdict, that judgment remains enforceable by the winning party. In other words, while Loewen could have pursued an appeal proceeding, it clearly ran the risk that its assets would be subject to enforcement procedure if it did not post a bond of USD 625 million. Loewen’s requests to stay enforcement of part of the judgment or to reduce the bond requirement were rejected by both the trial judge and (subsequently) the Mississippi Supreme Court.

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50. *Ibid.*: ‘Availability is not a standard to be determined or applied in the abstract. It means reasonably available to the complainant in the light of its situation, including its financial and economic circumstances as a foreign investor, as they are affected by any conditions relating to the exercise of any local remedy. If a State attaches conditions to a right of appeal which render exercise of the right impractical, the exercise of the right is neither available nor effective nor adequate. Likewise, if a State burdens the exercise of the right directly or indirectly so as to expose the complainant to severe financial consequences, it may well be that the State has by its own actions disabled the complainant from affording the State the opportunity of redressing the matter of complaint. The scope of the need to exhaust local remedies must be considered in the light of these considerations’.


52. Pulkowski, *supra* n. 26, at 318.


54. Paulsson, *supra* n. 14, at 120.
The tribunal recognized that the risk of the immediate execution of the judgment by Mr. O’Keefe was real.\(^{55}\) It also stated that had there been no other alternatives for Loewen but to pursue an appeal in these circumstances, the tribunal would have recognized the unavailability of reasonable remedies.\(^{56}\) But the tribunal concluded that other alternatives were indeed available to Loewen. One option was to file a petition for certiorari and to seek a stay of execution in the US Supreme Court by arguing that the bond requirement violated due process. The tribunal considered this remedy reasonably available and adequate.\(^{57}\) This conclusion is surprising considering the fact that the evidence presented by the expert witnesses from both parties was contradictory on this point.\(^{58}\) Many writers have concluded, on the contrary, that Loewen had in fact exhausted local remedies because of the limited prospects of a successful appeal to the US Supreme Court.\(^{59}\) Moreover, it was later revealed in the context of a request filed by the United States to the tribunal for a ‘supplemental decision’ that Loewen had in fact put forward significant expert evidence showing that any recourse to the Supreme Court had almost no chance of success.\(^{60}\) One writer opined that the tribunal ‘ignored, or possibly simply forgot and overlooked’ several affidavits from Loewen’s adviser on that specific point which made its findings ‘dishonestly removed from reality, and also inaccurate’.\(^{61}\)

The tribunal ruled that Loewen ultimately ‘failed to present evidence disclosing its reasons for entering into the settlement agreement in preference to pursuing other options’.\(^{62}\) This view is debatable.\(^{63}\) In fact, Loewen had presented strong and undisputed evidence as to why it had decided to enter into the settlement agreement.\(^{64}\) Moreover, the tribunal held that ‘although entry into the settlement agreement may well have been a reasonable course for Loewen to take’, it remains that it was not the ‘only course which Loewen

\(^{55}\) Loewen, supra n. 33, para. 208.

\(^{56}\) Ibid., para. 208.

\(^{57}\) Ibid., paras. 214-217.

\(^{58}\) Ibid., para. 211.


\(^{60}\) Loewen v. United States, Claimants’ Article 58 Submissions as to Raymond L. Loewen’s Article 1116 Claim (19 September 2003), para. 5. See also: Paulsson, supra n. 14, at 124.

\(^{61}\) Wallace, supra n. 25, at 692.

\(^{62}\) Loewen, supra n. 33, para. 215.

\(^{63}\) Rubins, supra n. 59, at 22.

\(^{64}\) Loewen, supra n. 60, paras. 5-6.
could reasonably be expected to take. The tribunal’s reasoning on this point has also been criticized by writers. The tribunal’s position is indeed difficult to reconcile with its earlier statement that any assessment of whether or not remedies are ‘reasonable’ must be made in light of an investor’s financial and economic circumstances. The tribunal should have considered the fact that Loewen had been convincingly told by its own legal experts that the settlement was the only reasonable course of action available in view of the fact that chances of success of an appeal to the Supreme Court were close to nil. Ultimately, the general impression one gets from reading the award is that the tribunal was simply not interested in any argument regarding the reasonableness of the settlement. The tribunal’s conclusion (in the form of an obiter dictum) was therefore that no denial of justice had been committed by the United States since Loewen had failed to exhaust local remedies because it did not apply to the US Supreme Court to review the Mississippi proceedings.

II. The Tests Put Forward by Tribunals to Determine Whether or Not a Denial of Justice has Occurred

Two NAFTA tribunals have put forward a general ‘test’ to determine when a denial of justice occurs. The Mondev tribunal first affirmed the obvious point that allegations of denial of justice before a NAFTA Chapter 11 tribunal cannot serve as an appeal mechanism to contest domestic court decisions. Thus, it is not the ‘function of NAFTA tribunals to act as courts of appeal’. The Loewen tribunal also clearly affirmed this point:

Whether the conduct of the trial amounted to a breach of municipal law as well as international law is not for us to determine. A NAFTA claim cannot be converted into an appeal against the decisions of municipal courts.

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65 Loewen, supra n. 33, para. 216.
66 Paulsson, supra n. 14, at 123.
67 Loewen, supra n. 33, paras. 169-170.
68 Thus, the tribunal held that it did not have jurisdiction over the claim because Loewen had not maintained a ‘continuous’ Canadian nationality as a result of a recent corporate reorganization of the company.
69 Loewen, supra n. 33, para. 217.
70 Mondev, supra n. 31, para. 126.
71 Loewen, supra n. 33, para. 134.
The *Mondev* tribunal then noted that the International Court of Justice (ICJ) in the *ELSI* case had described an ‘arbitrary conduct’ as one which displays ‘a wilful disregard of due process of law (...) which shocks, or at least surprises, a sense of judicial propriety’. 72 While the tribunal recognized that the ICJ dealt in that instance with administrative conduct rather than that of the judiciary branch, it nevertheless held that the criterion were ‘useful also in the context of denial of justice’. 73 The tribunal then defined what would constitute a denial of justice in the form of the following ‘test’:

> The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. 74

In other words, for a judicial decision to constitute a denial of justice, it must be ‘clearly improper and discreditable’ in the sense that it would ‘shock or surprise’ any impartial observer and raise ‘justified concerns as to the judicial propriety of the outcome’ of the case.

The test set out in *Mondev* has been subsequently endorsed by the *Waste Management* and *Loewen* tribunals. The *Loewen* tribunal thus referred to ‘manifest injustice’ such as a lack of due process that leads to an outcome which ‘offends a sense of judicial propriety’. 75 For the *Waste Management* tribunal, a denial of justice occurs when a decision by a domestic court is ‘clearly improper and discreditable’ in the sense that it would ‘shock or

73. Ibid.
74. Ibid.
75. *Loewen*, supra n. 33, para. 132.
surprise’ any impartial observer and would raise ‘justified concerns as to the judicial propriety of the outcome’ of the case.76

III. Situations that have been Considered by Tribunals to Constitute a Denial of Justice

NAFTA tribunals have provided several examples of what concretely constitutes a denial of justice under Article 1105. Yet, no NAFTA tribunal has found that the host State has committed a denial of justice. In the following paragraphs, four observations will be made on NAFTA case law.

First, a clear situation of denial of justice arises when the host State does not provide the investor with a ‘fair trial’.77 Thus, the Azinian tribunal held that a denial of justice occurs when a domestic court ‘refuses to entertain a suit’, when it subjects a suit to ‘undue delay’, or, more generally, when a court ‘administer[s] justice in a seriously inadequate way’.78 These important findings were later approved by the Mondev tribunal.79

Second, one important aspect of the obligation to provide a fair trial is related to discrimination against foreign investors. The Loewen tribunal stated that international law requires a State to ‘provide a fair trial of a case to which a foreign investor is a party’,80 and, specifically, to ‘ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice’.81 In the instant case, the Loewen tribunal concluded that the ‘conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law’.82 The tribunal thus noted that the constant reference to Loewen’s Canadian nationality during the trial by Mr. O’Keefe’s counsel was a strategy ‘calculated to appeal to the jury’s sympathy for local home-town interests as against the wealthy and powerful foreign competitor’.83 Counsel also ‘played the race card’ (apparently to appeal to the

76. Waste Management, supra n. 13, para. 95.
77. Loewen, supra n. 33, para. 123.
78. Robert Azinian, Kenneth Davitian, & Ellen Baca v. Mexico, ICSID No. ARB (AF)/97/2, Award (1 November 1999), paras. 102-103.
79. Mondev, supra n. 31, para. 126.
80. Loewen, supra n. 33, para. 123.
81. Ibid.
82. Ibid., para. 54.
83. Ibid., para. 56. See also, para. 63.
black judge and the predominantly African-American jurors\textsuperscript{84}) by suggesting that his client 'did business with black and white people alike whereas Loewen did business with white people'.\textsuperscript{85} The tribunal concluded that there was a 'gross failure on the part of the trial judge to afford the due process due to Loewen in protecting it from the tactics employed by O'Keefe and its counsel'.\textsuperscript{86} The tribunal’s reasoning suggests that a court that permits or fails to take steps in order to prevent one party (or its counsel) from appealing to nationality/racial/class based prejudice breaches its due process obligation. In other words, not only do courts have an obligation not to discriminate against foreign investors themselves, but they also have an obligation to prevent others from using discriminatory practice during a trial.\textsuperscript{87}

The same conclusion was also reached by the \textit{Waste Management} tribunal. In its award, it addressed the claimant’s argument that the litigation strategy adopted by the City of Acapulco itself amounted to a denial of justice in breach of Article 1105. On this point, the tribunal held that ‘a litigant cannot commit a denial of justice unless its improper strategies are endorsed and acted on by the court, or unless the law gives it some extraordinary privilege which leads to a lack of due process’.\textsuperscript{88} There was no such evidence in the instant case: ‘the decisions themselves nor other evidence before the Tribunal suggest that these proceedings involved discrimination, bias on grounds of sectional or local prejudice, or a clear failure of due process’.\textsuperscript{89}

Third, tribunals have concluded that a decision in breach of municipal law does not constitute a denial of justice per se unless it is also discriminatory against a foreign investor.\textsuperscript{90} According to the \textit{Azinian} tribunal, a ‘clear and malicious misapplication of the law’ by the court would also constitute a denial of justice.\textsuperscript{91} This statement was later approved by the \textit{Mondev} tribunal.\textsuperscript{92}

\begin{thebibliography}{99}
\bibitem{84} Ibid., para. 3.
\bibitem{85} Ibid., para. 65.
\bibitem{86} Ibid., para. 87.
\bibitem{87} Ibid. \textit{See also}, at paras. 136-137. The \textit{Loewen} award also suggests that a denial of justice would arise in a situation where a judge fails to redress a ‘large and excessive verdict’ (para. 122) where the amount of compensation awarded by a jury is inflated by bias and prejudice ( paras. 105, 137).
\bibitem{88} \textit{Waste Management}, supra n. 13, para. 131 (emphasis in the original).
\bibitem{89} Ibid., para. 132.
\bibitem{90} \textit{Waste Management}, supra n. 13, para. 97; \textit{Loewen}, supra n. 33, para. 135.
\bibitem{91} \textit{Azinian}, supra n. 78, paras. 102-103.
\bibitem{92} \textit{Mondev}, supra n. 31, para. 126.
\end{thebibliography}
Fourth, NAFTA tribunals have also made a number of findings as to what should not be considered as a denial of justice under Article 1105. In the *Mondev* case, the tribunal analyzed the decision of the Supreme Judicial Court of Massachusetts which had dismissed the contract claim submitted by the claimant’s U.S. company against the City of Boston. It rejected the claimant’s argument that this decision involved a ‘significant and serious departure’ from its previous case law and that it had made ‘new law’. In any event, the tribunal opined that ‘even if it had done so its decision would have fallen within the limits of common law adjudication’. This statement suggests that a court decision which makes a ‘significant and serious departure’ from its previous case law would not amount to a denial of justice under international law. This proposition is in line with the *Azinian* award affirming that no denial of justice occurs in situation where a domestic court makes an error of law. The *Mondev* award also suggests that a court decision on local procedural matters is unlikely to violate Article 1105, except in ‘extreme cases’.

### IV. Situations that have been Considered by Tribunals to Constitute a Breach of Due Process

Two tribunals (*Metalclad* and *Pope & Talbot*) have come to the conclusion that a State had breached its obligation to provide due process to a foreign investor. In the following paragraphs, three observations will be made on NAFTA case law regarding due process.

First, tribunals have examined what constitutes proper State conduct in the context of administrative hearings. While the *Metalclad* case is generally

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96. *Azinian*, supra n. 78, para. 99: ‘[E]ven 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’.
97. *Mondev*, supra n. 31, para. 136: ‘Questions of fact-finding on appeal are quintessentially matters of local procedural practice. Except in extreme cases, the Tribunal does not understand how the application of local procedural rules about such matters as remand, or decisions as to the functions of juries vis-à-vis appellate courts, could violate the standards embodied in Article 1105(1). On the approach adopted by *Mondev*, NAFTA tribunals would turn into courts of appeal, which is not their role’.
analyzed from a lack of transparency standpoint, there are good reasons to believe that the tribunal also found that Mexico had breached its obligation of due process. The tribunal explained that the claimant’s application for a construction permit was denied by the Municipality of Guadalcazar ‘at a meeting of the Municipal Town Council of which Metalclad received no notice, to which it received no invitation, and at which it was given no opportunity to appear’. This passage suggests that the due process obligation is breached whenever an investor is not informed and not invited to a hearing discussing a permit application and whenever it is not given any opportunity to appear and to present evidence before this administrative body. The same conclusion was also reached by the Thunderbird tribunal.

Second, NAFTA tribunals have also examined in some details the scope of the due process obligation existing for States in the specific context of permit approval/renewal. These findings apply more generally to any matters involving administrative bodies. Case law suggests that a State does not breach its due process obligation when mere administrative ‘irregularities’ are committed, unless such irregularities are ‘grave enough to shock a sense of judicial propriety’. Third, as a matter of principle, the ‘administrative due process requirement is lower than that of a judicial process’. In other words, international law is less stringent in terms of the standard of behaviors required of the administration than that required of domestic courts. Yet, NAFTA case law shows that tribunals have in fact been quite demanding regarding the level of conduct required by the host State in order for it to respect its due process obligation. The reasoning of the Metalclad tribunal suggests that an administration breaches its obligation of due process whenever an investor is denied a permit based on reasons that are unrelated to specific existing requirements for issuing that permit. The Thunderbird award supports the proposition that Article 1105 is breached whenever an

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98. See Dumberry, supra n. 4, at 234.
99. Metalclad, supra n. 6, para. 91.
100. Diehl, supra n. 2, at 437.
102. Thunderbird, supra n. 101, para. 200.
103. Ibid.
104. Metalclad, supra n. 6, para. 93, stating that the permit was ‘denied without any consideration of, or specific reference to, construction aspects or flaw of the physical facility’.
administrative order is not ‘adequately detailed and reasoned’, such as, for instance, in cases where an order does not review the evidence presented by a party at a hearing or where the order does not discuss the legal grounds on which that administrative body has based its decision.105

In Pope & Talbot, the tribunal concluded that one aspect of Canada’s implementation of the softwood lumber quota allocation system set up under the 1996 bilateral Canada–United States Softwood Lumber Agreement (dealing with the exports of Canadian softwood lumber to the United States) breached Article 1105. Canada’s Softwood Lumber Division (‘SLD’) created the so-called ‘verification review process’ to determine whether the claimant had received the appropriate allocation of quotas. The tribunal noted that while the implementation of the Agreement was administrated ‘in most instances, in an open and cooperative spirit’106 the verification review process was an entirely different story:

The relations between the SLD and the Investment during 1999 were more like combat than co-operative regulation, and the Tribunal finds that the SLD bears the overwhelming responsibility for this state of affairs. 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. While administration, like legislation, can be likened to sausage making, this episode goes well beyond the glitches and innocent mistakes that may typify the process. 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,

105 Thunderbird, supra n. 101, para. 198. The tribunal stated that it could not find ‘sufficient evidence on the record establishing that the SEGOB proceedings were arbitrary or unfair, let alone so manifestly arbitrary or unfair as to violate the minimum standard of treatment’ (para. 197). Thus, the investor had been given a ‘full opportunity to be heard and to present evidence’ at the administrative hearing (para. 198). The tribunal also could ‘not find anything reproachable about the Administrative Order’. The tribunal described the order as being ‘adequately detailed and reasoned; it review[ed] the evidence presented by Thunderbird at the hearing; and discusses at length the legal grounds on which SEGOB based its determination that the EDM machines were prohibited gambling equipment’ (para. 198).

106 Pope & Talbot, supra n. 8, para. 180.
and the Tribunal finds Canada liable to the Investor for the resultant damages.\textsuperscript{107}

In sum, Canada had breached its obligation to provide due process to the investor.\textsuperscript{108} The reasoning of the tribunal suggests that in a number of circumstances, specific features of an administrative process constitute a breach of the due process requirement under Article 1105:

\begin{itemize}
\item When an investor is ‘subjected to threats’ from an administrative body;\textsuperscript{109}
\item When an administrative body asserts ‘non-existent policy reasons’ to force an investor to comply with ‘very burdensome demands for documents’ having for consequence that the investor is incurring ‘unnecessary expense and disruption’;\textsuperscript{110}
\item When an administrative body refuses to provide the investor with ‘promised information’\textsuperscript{111} and denies its ‘reasonable requests for pertinent information’\textsuperscript{112} on administrative matters.
\end{itemize}

\textsuperscript{107} \textit{Ibid.}, para. 181.

\textsuperscript{108} It should be noted that the tribunal was, however, forced to revisit the issue in its subsequent award (\textit{Pope and Talbot Inc. v. Canada}, UNCITRAL, Award in Respect of Damages (31 May 2002)) as a result of the FTC’s Note of Interpretation. The tribunal reiterated its strong criticism of the verification review process in these words: ‘Briefly, the Tribunal found that when the Investor instituted the claim, in these proceedings, Canada’s Softwood Lumber Division (“SLD”) changed its previous relationship with the Investor and the Investment from one of cooperation in running the Softwood Lumber Regime to one of threats and misrepresentation. Figuring in this new attitude were assertions of non–existent policy reasons for forcing them to comply with very burdensome demands for documents, refusals to provide them with promised information, threats of reductions and even termination of the Investment’s export quotas, serious misrepresentations of fact in memoranda to the Minister concerning the Investor’s and the Investment’s actions and even suggestions of criminal investigation of the Investment’s conduct. The Tribunal also concluded that these actions were not caused by any behaviour of the Investor or the Investment, which remained cooperative until the overreaching of the SLD became too burdensome and confrontational’ (para. 68). The final words of the tribunal were clear as to the egregious nature of the Canada’s actions: ‘[o]ne would hope that these actions by the SLD would shock and outrage every reasonable citizen of Canada; they did shock and outrage the Tribunal’ (para. 68). For the tribunal, SLD’s conduct therefore breached Article 1105 ‘even using Canada’s strict formulation of that requirement’ (para. 69). The tribunal awarded the investor USD 461,566 in compensation.

\textsuperscript{109} \textit{Pope & Talbot, supra} n. 8, para. 181.

\textsuperscript{110} \textit{Pope & Talbot, supra} n. 108, para. 68.

\textsuperscript{111} \textit{Pope & Talbot, supra} n. 8, para. 181.

\textsuperscript{112} \textit{Pope & Talbot, supra} n. 108, para. 68.
Conclusion

The present article has shown that there is a large consensus amongst NAFTA tribunals on a number of issues. All tribunals, for instance, agree that the concepts of denial of justice and due process are stand-alone elements of the FET standard under Article 1105 and that they are part of the minimum standard of treatment under custom. Also, there does not seem to be much disagreement amongst tribunals on the actual scope and contours of these two concepts.

They have thus applied very similar ‘tests’ to determine whether or not host States have committed any denial of justice. These ‘tests’ suggest a high threshold of severity for the finding of a denial of justice; only the gravest cases will be considered in breach of Article 1105. In fact, some tribunals seem to have adopted an ever higher threshold of liability. One example is the Thunderbird tribunal which indicated that Article 1105 requires a ‘gross denial of justice’ that ‘fall[s] below acceptable international standards’. In the present author’s view, a claimant does not need to show the existence of a ‘gross’ denial of justice in order to convince a NAFTA tribunal that a breach of Article 1105 has occurred. Customary international law prohibits ‘simple’ denial of justice by States.

Finally, another notable feature of NAFTA case law is how tribunals have defined the contours of the exhaustion of local remedies rule. In the present author’s view, the Loewen tribunal made a significant development by introducing a subjective test whereby only remedies that are effective, adequate and reasonably available must be exhausted, taking into account the investor’s situation and all other relevant financial and economic circumstances. While the Loewen award has been the object of a torrent of criticism by writers, it remains that one cannot deny the importance of the tribunal’s reasoning (albeit in obiter) on the scope and content of the concept of denial of justice. This is a conclusion that is not unanimous; some have even qualified the award as itself ‘a miscarriage and denial of justice’. Yet, what matters more (at least in the specific context of this article) is what the

113. Thunderbird, supra n. 101, para. 194. Likewise, in Glamis, supra n. 13, paras. 22, 24, 614, 616, 625, 627, the tribunal refers to a ‘gross’ denial of justice and a ‘complete’ lack of due process on several occasions throughout the award. In Cargill, supra n. 9, para. 296, the tribunal also stated that in order for a measure to be considered in breach of the FET, it must, inter alia, ‘involve an utter lack of due process so as to offend judicial propriety’.

114. See, for instance: Wallace, supra n. 25; Rubins, supra n. 59; Pulkowski, supra n. 26, at 291.

115. Paulsson, supra n. 14, at 192.

116. Wallace, supra n. 25, at 696-697, 700; Diehl, supra n. 2, at 492.
tribunal *said* about what constitutes a denial of justice rather than how it actually *failed to apply* these principles to the facts of the case.

Patrick DUMBERRY, *Denial of Justice under NAFTA Article 1105: A Review of 20 Years of Case Law*

**Summary**

This article examines one ground of complaint which has been consistently raised by investors in the context of their claims of breach of the fair and equitable treatment standard under NAFTA Article 1105: allegations of denial of justice by the host State and its failure to respect due process. The present article analyses the most salient features of NAFTA Chapter 11 case law regarding these two concepts. Specifically, this article analyses how NAFTA tribunals have interpreted and applied the exhaustion of local remedies rule. It also examines the different 'tests' that have been put forward by them to determine whether or not a denial of justice has been committed. Finally, this article addresses the actual scope and contours of the prohibition against denial of justice and the obligation of due process and the different circumstances under which tribunals have concluded that these standards have been breached.
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