



# The Prohibition against Arbitrary Conduct and the Fair and Equitable Treatment Standard under NAFTA Article 1105

*Patrick Dumberry\**

University of Ottawa, Ottawa, Canada  
*patrick.dumberry@uottawa.ca*

## Abstract

This article examines how NAFTA tribunals have interpreted and applied the prohibition against arbitrary conduct in the context of claims of breach of the fair and equitable treatment standard under Article 1105. Tribunals have come to the conclusion that this prohibition is a stand-alone element under this provision and that it should also be considered as part of the minimum standard of treatment under custom. This position is no longer denied by NAFTA Parties. NAFTA tribunals have also consistently applied a high threshold of severity requiring that conduct be manifestly arbitrary to conclude that the host State has breached Article 1105. Based on this high threshold, NAFTA tribunals have held that a State conduct in violation of its own municipal law (or a contract) does *not* breach Article 1105. Thus, “something more” than simple illegality is required to constitute a violation of this provision. This article explains what that “something more” is.

## Keywords

arbitrariness – arbitrary conduct – fair and equitable treatment standard – minimum standard of treatment – NAFTA Article 1105

---

\* Ph.D. (Graduate Institute of International Studies, Geneva, Switzerland), Associate Professor, Faculty of Law (Civil Law Section), University of Ottawa, Ottawa, Canada. This article reflects facts current as of June 2013.



































































