

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF  
THE NORTH AMERICAN FREE TRADE AGREEMENT  
AND THE UNCITRAL ARBITRATION RULES**

**BETWEEN:**

**GRAND RIVER ENTERPRISES SIX NATIONS, LTD., JERRY MONTOUR,  
KENNETH HILL and ARTHUR MONTOUR, JR.**

**Claimant/Investor**

**AND:**

**UNITED STATES OF AMERICA**

**Respondent/Party**

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**GOVERNMENT OF CANADA**

**SUBMISSION PURSUANT TO NAFTA ARTICLE 1128**

**JANUARY 19, 2009**

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Departments of Justice and of  
Foreign Affairs &  
International Trade  
Trade Law Bureau  
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## INTRODUCTION

1. Pursuant to Article 1128 of the NAFTA, Canada makes this submission to the Tribunal on the interpretation of certain aspects of Article 1105 that have arisen in *Grand River v. United States of America*.<sup>1</sup>

2. This submission is not intended to address all interpretive issues that may arise in this proceeding. To the extent that Canada does not address certain issues, Canada's silence should not be taken to constitute concurrence or disagreement with the positions advanced by the disputing parties.

### **A breach of a separate international agreement does not establish a breach of Article 1105(1)**

3. The Claimants have argued that because there has been a breach of the Jay Treaty (1794) and the Treaty of Ghent (1814), there has been a violation of Article 1105. However, this is not the case as a breach of a separate international agreement does not establish a breach of Article 1105(1).

4. NAFTA Article 1131(2) states that an interpretation by the Free Trade Commission (FTC) of a NAFTA provision shall be binding on a Tribunal established under Section B of NAFTA Chapter 11.<sup>2</sup> An interpretation by the FTC, in addition to the text of NAFTA and international law, constitute the governing law for Chapter 11 arbitration.<sup>3</sup>

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<sup>1</sup>*Grand River Enterprises Six Nations, Ltd., Jerry Montour, Kenneth Hill and Arthur Montour, Jr. v. United States of America*

<sup>2</sup> See **Article 1131: Governing Law:**

1. A tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

<sup>3</sup> *Ibid.*

5. On July 31, 2001, the three NAFTA Parties, acting as the FTC, issued Notes of Interpretation for Article 1105(1), pursuant to Article 1131(2).<sup>4</sup> These interpretive notes are a clarification and reaffirmation of the meaning of Article 1105(1).<sup>5</sup> They are not an amendment to Article 1105(1). Since these Notes of Interpretation are binding on Tribunals, views expressed by Chapter 11 Tribunals prior to July 31, 2001 that were contrary to these interpretive notes are to be disregarded.<sup>6</sup>

6. The Notes of Interpretation reads, in part:

*3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).<sup>7</sup>*

7. Therefore, under NAFTA, a breach of a separate international agreement, such as the Jay Treaty or the Treaty of Ghent, does not establish a breach of Article 1105(1).

**International Labour Organization Convention 169, and the United Nations Declaration on the Rights of Indigenous People, do not constitute customary international law**

8. The Claimant has argued that because the International Labour Organization (ILO) Convention 169 and the United Nations Declaration on the Rights of Indigenous People (UNDRIP) constitute customary international law, they both fall within the ambit of Article 1105. However, this is not the case as neither instrument meets the legal threshold required for them to be considered customary international law.<sup>8</sup>

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<sup>4</sup> *Notes of Interpretation of Certain Chapter 11 Provisions* (Free Trade Commission, July 31, 2001) [hereinafter *Notes of Interpretation*]

<sup>5</sup> By its own terms, the Commission's *Notes of Interpretation* consist of "interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions." They state not what the provisions of the Treaty are to mean in the future, but what they have always meant.

<sup>6</sup> *The Loewen Group Inc. and Raymond Loewen (Can.) v. United States*, ICSID Case No. ARB(AF)/98/3, ¶ 128 (Award) (June 26, 2003).

<sup>7</sup> See *Notes of Interpretation* supra note 4.

<sup>8</sup> This includes any obligation to consult with indigenous peoples as referred to in the Claimant's Counter-Memorial at ¶¶ 198-190.

9. Article 1105(1) requires that the customary international law minimum standard of treatment to be accorded to investments of investors of another Party.<sup>9</sup>

10. Customary international law is comprised of two elements: (1) a general convergence in the practice of States from which one can extract a norm (standard of conduct); and (2) *opinio juris*: the belief by States that the norm is legally binding on them.<sup>10</sup> State practice is the “objective” element of customary international law, while *opinio juris*, is the “subjective” element of customary international law.<sup>11</sup>

11. The standard of conduct that must be met in order for customary international law to develop is “widespread and uniform state practice”.<sup>12</sup> In other words, State practice must be general (a sufficient number or distribution of States must follow the rule) and uniform (the State practice must be consistent or homogenous).<sup>13</sup> Further, when assessing State practice, States “whose interests [are] specially affected” should be given particular weight.<sup>14</sup>

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<sup>9</sup> See *Notes of Interpretation* supra note 4: 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 investments of investors of another Party.

<sup>10</sup> Aust, A., *Modern Treaty Law and Practice* (Cambridge University Press, 2000) at 10 [hereinafter *Aust*]. Also see Brownlie, Ian, *Principles of Public International Law*, 6<sup>th</sup> ed. (Clarendon Press, 1998) at 6-9 [hereinafter *Brownlie*] at 7-9. Also see *Case Concerning the Continental Shelf, (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, ¶ 27: (“[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States...”).

<sup>11</sup> Currie, J., *Public International Law*, 2<sup>nd</sup> ed. (Irwin Law, 2008) at 188 [hereinafter *Currie*]. Also see *Brownlie* supra note 10 at 6-9.

<sup>12</sup> Currie, J., C. Forcese and V. Oosterveld, *International Law: Doctrine, Practice and Theory* (Irwin Law, 2007) at 121 [hereinafter *Currie et al.*] Also see *Brownlie* supra note 10 at 6-9.

<sup>13</sup> *Brownlie* supra note 10 at 7.

<sup>14</sup> See *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment, I.C.J. Reports 1969*, p. 3, ¶ 73. Judge Lachs, in his dissent, also underscored this point (at 229): “The evidence should be sought in the behaviour of a great number of States, possibly the majority of States, in any case the great majority of the interested States”. See also *Brownlie* supra note 10 at 9-10. See also Malanczuk, Peter, *Akehurst's Modern Introduction to International Law*, Routledge, 1998, 7<sup>th</sup> revised edition, at 42. See also *Restatement (Third) of Foreign Relations Law of the United States* § 102 at 25: (“[State practice]..should reflect wide acceptance among the states particularly involved in the relevant activity.”)

12. *Opinio juris* contemplates a belief on the part of States that their practice is mandatory and required by law.<sup>15</sup> Thus, a court or tribunal will look at the views expressed by States to determine *opinio juris*. These views can be gleaned, for example, from diplomatic correspondence, government press statements, ministerial statements, and speeches before United Nations bodies such as the General Assembly or Security Council.<sup>16</sup>

13. ILO Convention 169 lacks the generality of State practice required to constitute customary international law: as of December, 2008, only 20 out of 193 United Nations member states have ratified ILO Convention 169. Moreover, most parties that have ratified it are in one geographic area: Latin and South America.<sup>17</sup>

14. Similarly, UNDRIP does not meet the generality of State practice threshold and lacks the *opinio juris* required to be considered customary international law. Although 144 of 193 United Nations member States voted in favour of the UNDRIP, States with significant indigenous populations, including Canada, the United States, Australia and New Zealand, all voted against the adoption of the Declaration.<sup>18</sup>

15. Canada's position on the UNDRIP was made clear in Canada's Statement and Explanation of Vote (EOV) made to the United Nations General Assembly. In the EOV, Canada affirmed that UNDRIP is not a legally binding instrument, that its provisions do not represent customary international law, and that it has no legal effect in Canada.<sup>19</sup>

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<sup>15</sup> *Currie et al.*, supra note 12 at 121. Also see *Brownlie* supra note 10 at 8.

<sup>16</sup> *Currie* note 11 at 197. Also see *Brownlie*, supra note 10 at 6.

<sup>17</sup> See ILO Convention 169: <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C169>

<sup>18</sup> In addition, 11 states abstained, and 35 were absent for the vote. The UNDRIP was notable for the fact that 40 states made interventions, and even among those states voting for adoption, the text is subject to varying interpretations as reflected in the states EOVs. This puts into further doubt that the UNDRIP constitutes customary international law.

<sup>19</sup> See Canada's Statement and Explanation of Vote at the United Nations General Assembly Regarding the UN Declaration on the Rights of Indigenous Peoples (Delivered by Ambassador John McNee: New York, September 13, 2007).

16. Since neither the ILO Convention 169 nor the UNDRIP constitute customary international law, the obligations contained in both do not fall within the ambit of Article 1105.

*Respectfully submitted  
on behalf of Canada,*



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Yasmin Shaker  
Counsel for the Government of  
Canada  
January 19, 2009