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Hugo Perezcano Díaz
Consultor Jurídico de Negociaciones

DGCJN.511.06.813.02

Mexico, City, 23 August 2002

Rt. Hon. Justice Sir. Kenneth J. Keith, KBE, President
New Zealand Court of Appeal
Judge's Chambers
Cor. Moleswork & Airkon Streets
Wellington, New Zealand

L. Yves Fortier, C.C., Q.C.
Ogilvy Renault

Barrister & Solicitors
1981 McGuill College Avenue
Montreal, Quebec, Canada

Dean Ronald Cass
Dean's Office

Boston University School of Law
765 Commonwealth Ave., 4th Floor
Boston, Massachusetts 02215

RE: United Parcel Service of America, Inc. v. Government of Canada
<u>NAFTA/UNCITRAL Arbitration Rules Proceeding</u>

THIRD SUBMISSION OF THE UNITED MEXICAN STATES

1. Pursuant to NAFTA Article 1128, the United Mexican States ("Mexico") hereby submits its views on certain issues that arose during the hearing conducted July 29-30. Mexico also re-affirms the views set forth in its submission dated 14 May 2002, and emphasizes that no inference should be drawn from the absence of comment on any issue not addressed herein.

A. Relationship Between Chapters Eleven and Fifteen

2. An issue of special concern to Mexico is the argument presented by the Claimant during the hearing relating to Article 1112. That article provides that, to the extent an obligation of Chapter Eleven conflicts with an obligation of another Chapter, the other Chapter prevails. Based on its theory that there is a "conflict" between Articles 1116, on the one hand, and Chapter Fifteen on the other, the Claimant argued that it should be allowed to allege violations of provisions of Chapter Fifteen not encompassed by Article 1116.

3. Mexico emphasizes that the Claimant has not actually identified any conflict between Chapters Eleven and Fifteen. In this regard, the Tribunal should note that the substantive

SECRETARÍA DE ECONOMÍA
CONSULTORÍA JURÍDICA DE NEGOCIACIONES
ALFONSO REYES NO. 30, PISO 17 • COL. CONDESA • 06179 • MÉXICO, D.F.
TELÉFONO: (5255) 5729-9134 • FAX: (5255) 5729-9310

obligations of Chapter Eleven are set out in Section A of Chapter Eleven; Section B sets out the procedural requirements for arbitrations brought by private investors against NAFTA governments. In particular, Articles 1116 and 1117 describe the substantive obligations that an investor may allege have been breached.

4. Articles 1116 and 1117 do not authorize an investor to allege violations of all of the NAFTA, but rather only a sharply circumscribed subset of the NAFTA's obligations. Accordingly, the fact that Articles 1116 and 1117 do not authorize a claimant to allege violations of all of Chapter Fifteen should not be surprising. It certainly does not create any type of "conflict" between the provisions of Chapters Eleven and Fifteen, because nothing in Chapter Eleven limits the substantive obligations of Chapter Fifteen.

5. In this regard, the Tribunal should recall that the NAFTA is a treaty by and between three governments. The fact that a private investor is authorized only to allege violations of Section A of Chapter Eleven, Article 1503(2), and Article 1502(3)(a) where the monopoly has acted in a manner inconsistent with a government's obligations under Section A, does not impair in any manner the other obligations owed by the NAFTA governments to each other, which are enforceable through the government-to-government dispute settlement procedures of Chapter Twenty.

6. To further illustrate, note that the Chapter Eleven dispute procedure does not allow an investor to allege a violation of the great majority of the NAFTA – for example, NAFTA Annex 300-B (Textile and Apparel Goods), Chapter Four (Rules of Origin), or Chapter Seventeen (Intellectual Property). It cannot be concluded on that basis that there is any conflict between Chapter Eleven and those other chapters; to the contrary, the substantive obligations of the NAFTA governments to each other are not contingent on whether Chapter Eleven permits an investor to assert a violation of those obligations.

B. Scope of Articles 1502(3)(a) and 1503(2)

7. Mexico wishes to comment briefly upon the question discussed during the hearing regarding what it means for a monopoly or state enterprise to exercise "regulatory, administrative or other governmental authority". Mexico agrees with Canada and the United States that the term "governmental authority" in this context means a sovereign power exercised in respect of third persons, as illustrated by the examples given in Articles 1502(3)(a) and 1503(2): *i.e.*, the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges. Mexico also notes that the purpose of these particular provisions, as evidenced by their language ("acts in a manner that is not inconsistent with the Party's obligations"), is to

prevent a NAFTA Party from evading its own obligations through the transfer of governmental authority to a privately-owned organization or a state enterprise.

8. To interpret Articles 1502(3)(a) and 1503(2) as encompassing all activities of any monopoly performing any function formerly performed by a government would require ignoring the language of the provisions – in particular, the requirement to show that the monopoly acted in a manner inconsistent with the Party's obligations.

9. Mexico further observes that the obligation of Article 1502(3)(d) is not incorporated into Article 1502(3)(a). Article 1502(3)(a) is implicated only if a government maintained or designated monopoly acts in a manner inconsistent with the Party's NAFTA obligations, and the obligation of the Parties set forth in Article 1502(3)(d) is triggered only when the conditions of the chapeau of Article 1502(3) are met – namely, that a Party has failed to ensure, "through regulatory control, administrative supervision or the application of other measures," that a monopoly has not engaged in anti-competitive practices. To even arguably reach Article 1502(3)(d) through 1502(3)(a), therefore, a monopoly would have had to have failed to regulate properly another monopoly that it had designated or maintained. Mexico is not aware of any situation in a NAFTA Party in which a monopoly has itself been vested with authority to designate other monopolies.

10. For an alleged violation of Article 1502(3)(a) to be actionable in a Chapter Eleven arbitration, of course, there is a further limitation – the monopoly must have acted in a manner inconsistent with the Party's obligations under Section A of Chapter Eleven. To the extent that a NAFTA Party has failed to ensure that a government maintained or designated monopoly has acted in a manner inconsistent with the Party's NAFTA obligations not arising under Section A, or in a manner inconsistent Article 1502(3)(b), (c), or (d), the exclusive mechanism for dispute settlement is contained in Chapter Twenty.[1]

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[1] Contrary to a suggestion made by the Claimant during the hearing, the reference to Chapter Fourteen in Article 1503(2) does not allow an investor to allege that measure inconsistent with obligations in Chapter Fourteen is a violation of Chapter Eleven. Chapter Fourteen contains its own investor-state dispute settlement procedure, which is similar to, but more limited in scope than, the Chapter Eleven procedure.

C. Caution Regarding the *Pope & Talbot* Awards

11. Finally, Mexico wishes to caution the Tribunal against reliance on the recent Award in Relation to Damages in *Pope & Talbot v. Canada* (the "*Pope* Damages Award") which the Claimant has tendered as authority on various points.

12. As the Tribunal is aware, the *Pope* Damages Award was issued after the submissions by the disputing parties and the non-disputing NAFTA Parties were filed in this proceeding. Mexico urges the Tribunal to review the submissions of the NAFTA Parties in *ADF Group, Inc. v. United States of America* that were filed in response to a request from the *ADF* Tribunal for comments on the *Pope* Damages Award which was rendered after the hearing on the merits in that case[2]. Mexico's submission is attached for ease of reference. The Tribunal will note that Mexico also concurred in the United States' submissions as to the errors and deficiencies in the *Pope* Damages Award which the United States concluded was "poorly reasoned and unpersuasive"[3].

13. The *Pope* Damages Award and the *Pope* Tribunal's earlier Award on the Merits of Phase 2[4] do not disclose that the NAFTA Parties were at all times *ad idem* as to the meaning of Article 1105 and that they had made submissions agreeing with each other that Article 1105(1) should be interpreted in the terms later used by the Free Trade Commission in its binding interpretation of that provision. In fact, even the claimant's position was consistent with that of the NAFTA Parties on the point upon which the *Pope* Tribunal made its initial departure from the otherwise undisputed interpretation of the text – the question of whether the requirement for fair and equitable treatment is included as part of international law, as the Tribunal acknowledged the text of Article 1105 indicates, or whether it is "additive", which the Tribunal believed to be the case in the standard bilateral investment treaty used by the United States prior to negotiation of the NAFTA.

14. In the Damages Award, the *Pope* Tribunal proffered various opinions in *obiter dicta* as to the validity and application of the FTC Interpretation before concluding that, even applying customary international law and the high threshold propounded in *Neer*, Canada should still be held liable under Article 1105(1) for conduct that the Tribunal had earlier held violated a

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[2] See items 21 to 26, inclusive, at http://www.state.gov/s/l/c3754.htm

[3] See *ADF Group, Inc. v. United States of America*, Post-hearing Submission of the Respondent United States of America on Article 1105(1) and *Pope & Talbot*, June 27, 2002, at page 23. Available at www.state.gov/documents/organization/11662.pdf).

[4] *Pope & Talbot, Inc v. Canada*, Award on the Merits of Phase 2, April 10, 2001.

"fairness" standard that it had concluded was "additive" to the minimum standard at international law.

15. In the course of making its *obiter* remark that, if required to do so, it would find the FTC Interpretation to be an amendment rather than an interpretation, the *Pope* Tribunal observed that the word "customary" does not appear in connection with the term "international law" in any of the 40 drafts of Chapter Eleven that Canada produced on the Tribunal's directions. The *Pope* Tribunal further observed that the negotiators of the NAFTA (being "sophisticated representatives of their governments") must be taken to have known that "international law" has a broader meaning than "customary international law" and on that basis purported to conclude that the FTC Interpretation was actually an amendment. The Tribunal also castigated Canada for its alleged failure to produce a complete negotiating history of Chapter Eleven at an earlier stage in the proceeding, and made remarks indicating that it thought there must be more documents, not yet produced, that more fully describe the negotiators' intentions[5].

16. Mexico concurs in the United States' submission to the *ADF* Tribunal on the admissibility of negotiating history:

> ... the *Pope* tribunal's analysis of the NAFTA's negotiating history is erroneous for two reasons. As an initial matter, the *Pope* tribunal erred in resorting to the negotiating history at all. [footnote omitted] The premise for the tribunal's reference to *travaux preparatoires* was its suggestion that the text of Article 1105(1) "contained ambiguities that had to be resolved by those charged with interpreting the texts." [footnote omitted] The *Pope* tribunal's suggestion, however, cannot be reconciled with its *dicta* suggesting that the meaning of Article 1105(1) was so clear that the FTC's interpretation of the provision was an "amendment." If, as the *Pope* tribunal suggested, the article was ambiguous, the FTC acted well within its authority in interpreting it. If it was not — and it certainly is not as interpreted by the FTC — then the *Pope* tribunal had no occasion to resort to secondary means of treaty interpretation such as the negotiating history. [footnote omitted]

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5 *Pope* Damages Award *(supra)* at paragraphs 39 – 41.

> The *Pope* tribunal's conclusions based on that history are without support in any event. After reviewing more than forty drafts of NAFTA Chapter Eleven, the *Pope* tribunal found that the text of Article 1105(1) underwent relatively few changes and none showed, as the investor had contended, that the Parties had considered but rejected a version of the article expressly referencing "customary international law." [footnote omitted] Nonetheless, the *Pope* tribunal inexplicably suggested that the negotiating history supported its view, expressed in dicta, that the FTC interpretation was an "amendment". [footnote omitted] Basing such a result on such a history as this cannot be reconciled with accepted approaches to treaty interpretation. [footnote omitted].[6]

17. Mexico respectfully submits that it would be equally inappropriate for this Tribunal to consider negotiating history of the NAFTA in its interpretation of Article 1105 or any other provision of the NAFTA at issue in this proceeding. Quite apart from the binding effect of the FTC Interpretation, there is no disagreement between the NAFTA Parties as to the meaning of any provision at issue, nor is there any ambiguity in any such provision, either facially or when read in its context and in light of the NAFTA's objects and purpose.

18. The Claimant's contention that Canada's failure to produce the negotiating history "... when the interpretation of those provisions is squarely in issue gives rise to the inference that those documents don't support Canada's interpretation,"[7] and its demand that negotiating history be produced in the apparent hope that "additional arguments may be made"[8], have no proper basis. In effect, the Claimant is demanding production of negotiating history of an agreement to which it is not a party in hope of establishing rights that do not appear on the face of the agreement and that the parties to the agreement have confirmed were not intended.

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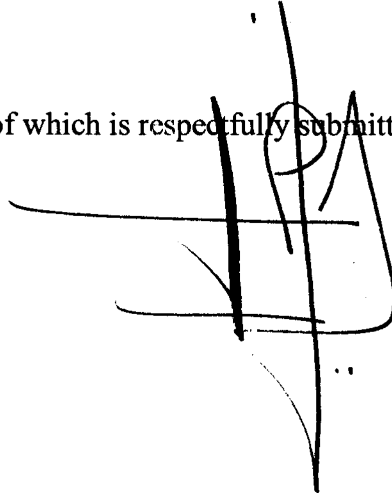
6 United States' Post-hearing submission in *ADF (supra)* at pages 18 and 19. All footnotes are omitted

7 Transcript of the jurisdictional hearing, Day 2, page 233, lines 11 – 16.

8 *Ibid*, lines 17 – 21.

19. Mexico respectfully submits that the requirements of Section 32 of the Vienna Convention for having recourse to preparatory work cannot be met in this case. The application of Article 31 does not leave the meaning of any provision ambiguous or obscure, nor does it lead to a manifestly absurd or unreasonable result.

All of which is respectfully submitted,



c.c. Michael P. Carroll
Barry Appleton
Sylvie Tabet
Alan J. Birnbaum

Hugo Perezcano Díaz
Consultor Jurídico de Negociaciones

DGCJN.511.06.700.02

Washington, D.C., 22 July 2002

Members of the Tribunal
Attn: Ucheora O. Onwuamaergbu
Secretary of the Tribunal
International Centre for Settlement of
Investment Disputes
1818 H. Street N.W.
Washington, D.C. 20433

RE: *ADF, Group Inc., vs. ~~United~~ States of America*
ICSID Case No. ARB(AF)/00/1

SECOND ARTICLE 1128 SUBMISSION OF THE UNITED MEXICAN STATES IN THE MATTER OF ADF GROUP INC. v. UNITED STATES OF AMERICA

Mexico respectfully submits this Article 1128 Submission to inform the Tribunal of its concerns about certain statements made by the *Pope & Talbot* Tribunal and to record Mexico's disagreement with the Tribunal's interpretation of Article 1105 and its suggestion that the *Note of Interpretation* issued by the Free Trade Commission on 31 July 2001 was an amendment rather than an interpretation of the treaty (a point that the Tribunal discussed but did not decide). Having reviewed the Claimant's Post-hearing Submission dated 11 July 2002, Mexico also comments upon certain allegations made therein.

Mexico generally agrees with the United States' analysis of the two *Pope & Talbot* awards (on Liability in Phase 2 and on Damages).[1] Rather than repeat all of the points already made, Mexico will elaborate upon a few issues in order to convey its concerns about the awards.

In doing so, Mexico will address the Claimant's comments that the "Pope Tribunal was not overwhelmed by assistance from representatives of the NAFTA Parties".[2] As shall be seen, the NAFTA Parties in fact gave the *Pope & Talbot* Tribunal considerable assistance in Phase 2 of the

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[1] Mexico has a different perspective than the United States as to the applicability of the *ELSI Case*. However, this difference in views, which shall be explained below, is not material to the issue before this Tribunal.

[2] Claimant's Post-hearing Submission dated 11 July 2002 at paragraph 14.

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CONSULTORÍA JURÍDICA DE NEGOCIACIONES
ALFONSO REYES NO. 30, PISO 17 • COL. CONDESA • 06179 • MÉXICO, D.F.
TELÉFONO: (5255) 5729-9134 • FAX: (5255) 5729-9310

proceeding. Moreover, Mexico was so concerned about what was said in the Tribunal's discussion of Article 1105 in the Award on Liability that it wrote to it requesting that certain statements in the Award concerning Mexico's submissions be corrected. The Tribunal declined to do so.

In issuing the *Note of Interpretation*, the NAFTA Parties exercised a right, expressly reserved to them by Article 1131(2) of the treaty, when acting collectively as the Free Trade Commission, to bind Tribunals as to the governing law of a Chapter Eleven proceeding.

By way of introduction, Mexico also notes that most of what the *Pope & Talbot* Tribunal stated in its Award on Damages was *obiter dictum* because ultimately: (i) it found that it was not required to find that the *Note of Interpretation* was an amendment to the NAFTA,[3] (ii) rather, it applied the *Note* as having mandatory effect,[4] (iii) it retreated from the "additive" interpretation of "fairness elements" articulated in its previous Award on Liability in Phase 2,[5] and (iv) it applied Canada's formulation of the customary international law test formulated in *Neer* and other arbitral cases.[6] Thus, a distinction should be drawn between what that Tribunal said in *obiter* and what it ultimately did in deciding the case.[7]

A. The *Pope & Talbot* Tribunal Created the Interpretative Problem That it Complained of

At the outset, two facts about the Tribunal's first interpretation of Article 1105 warrant mention.

First, the disputing parties were *ad idem* on the fact that the treaty stated that the fair and equitable treatment standard was <u>included</u> within international law.[8] They differed as to the meaning and content of the words "international law", but they agreed that fair and equitable treatment was to be found within it. The Claimant did not argue that fair and equitable treatment

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3 *Pope & Talbot* Award on Damages at paragraph 47.

4 *Id.*, at paragraph 5.1

5 *Id.*, at paragraph 54.

6 *Id.*, at paragraph 65.

7 Post-hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot* dated 27 June 2002 at p. 8.

8 *Pope & Talbot* Award on Liability in Phase 2 at paragraph 109.

or full protection and security were "additive" to international law. This accorded with the ordinary meaning of the words used in the article, which stated that the treatment accorded to investments of investors of another Party must be "treatment in accordance with international law including fair and equitable treatment..."

In its Award on Liability, the Tribunal acknowledged that the text of the article "suggests that those elements are *included* in the requirements of international law" [italics in original] and that both disputing parties subscribed to that view.[9] However, it saw another "possible interpretation" of what it called the "fairness elements" (a short-hand reference to "fair and equitable treatment and full protection and security"). At paragraph 110 of the Award, it commented:

> Another possible interpretation of the presence of the fairness elements in Article 1105 is that they are *additive* to the requirements of international law. That is, investors under NAFTA are entitled to the international law minimum, *plus* the fairness elements. It is true that the language of Article 1105 suggests otherwise, since it states that the fairness elements are included in international law...[Italics in original; underlining added]

The Tribunal's interpretation is thus predicated upon an express acknowledgement that the treaty does not state the standard as the Tribunal would have it.

The second fundamental fact that warrants mention is that Canada, Mexico, and the United States were *ad idem* as to two key interpretative issues: First, they agreed that fair and equitable treatment was to be found within international law. Second, they agreed that the reference to international law was a reference to the international minimum standard at customary international law.

B. The Interpretative Errors in the Award on Liability in Phase 2

As the United States has pointed out, the Tribunal acknowledged that its interpretation of Article 1105(1) was not consistent with the plain meaning of Article 1105's text.[10] The decision to depart from the plain meaning of the text, in itself, was interpretative error. The first component of the "General rule of interpretation" of the *Vienna Convention on the Law of*

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9 *Id.*

10 *Supra* note 7 at pp. 12-13.

Treaties requires that the NAFTA be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose."[11]

Specifically, the Tribunal plainly erred in interpreting the word "including" to mean "plus", a word with a virtually opposite meaning.

As noted, the NAFTA Parties also uniformly expressed the view that the context of Article 1105 meant that the reference to "international law" was a reference to customary international law, even though the word "customary" was not present in the text.

In this regard, the context includes the Article's title ("Minimum Standard of Treatment") a title that has an understood meaning amongst the treatise writers.[12]

Additional context is found in the overall structure of the Chapter. According to Articles 1116-1117, which establish a Tribunal's subject matter jurisdiction, only a limited class of NAFTA obligations can be subjected to investor-State arbitration. (They are found in Section A of the Chapter and two paragraphs in Chapter Fifteen.) As the United States points out, if the words "international law" in Article 1105 were interpreted to encompass all of the Parties' respective international treaty obligations (as opposed to customary international law), the jurisdiction-limiting words of Articles 1116 and 1117 would be rendered without effect because a claimant could allege a breach of any provision of the NAFTA outside of Chapter Eleven or, for that matter, a breach of any other treaty to which the respondent Party was a signatory as being contrary to Article 1105.

The inclusion of two subparagraphs located outside of Chapter Eleven in Articles 1116 and 1117 demonstrates that where the Parties intended other NAFTA obligations to be arbitrable under Chapter Eleven, the Agreement expressly so provides.

For all other NAFTA obligations that are subject to dispute settlement[13], only a NAFTA Party has the necessary standing to allege breaches of the NAFTA and such a dispute would take place

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11 *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 U.N.T.S. 331 ("*Vienna Convention*"), Article 31(1).

12 See the discussion *infra*.

13 With the exception of the special Chapter Nineteen binational review panel process for anti-dumping and countervailing duty cases and certain other chapter-specific processes that are not made subject to general State-to-State dispute settlement.

in a Chapter Twenty State-to-State proceeding.[14] Thus, the rest of the NAFTA is beyond the jurisdiction of a Chapter Eleven Tribunal. If a Tribunal cannot determine a breach of another chapter of the NAFTA, it logically follows that it cannot have the jurisdiction to determine a breach of other international agreements such as the WTO Agreements.

Interpreting Article 1105 to give a Tribunal jurisdiction to determine breaches of all of the Parties' non-customary international law treaty obligations would negate Section B's jurisdictional-limiting provisions and lead to an absurdity. As the United States has pointed out, there would be no need to plead a breach of any other provision of Section A because it would all be subsumed within "international law" under Article 1105.[15]

This would be at odds with the entire structure of the NAFTA, which reserves virtually all obligations exclusively to dispute settlement between the States party to the Agreement pursuant to Chapter Twenty. For this reason, as the Free Trade Commission has confirmed, 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)."[16]

An additional element of the context of the treaty was the Government of Canada's instrument made in connection with the conclusion of the treaty. Shortly prior to the NAFTA's entry into force, Canada dispatched its Statement on Implementation to the other Parties. The Statement's description of Article 1105 stated:

> 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. ...this article provides for a minimum absolute standard of treatment, based on long-standing principles of customary international law...[17]

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[14] With the exception of certain articles that are not subject to dispute settlement at all or that are subject to a special mechanism such as Chapter Nineteen for anti-dumping and countervailing duty disputes.

[15] *Supra* note 7 at 15.

[16] FTC *Note of Interpretation*, 31 July 2001 at paragraph B(3).

[17] *Canada Gazette*, Part I, January 1, 1994 at p. 149. Canada formally transmitted its *Statement on Implementation* to both of the other NAFTA Parties on 29 December 1993.

Canada's contemporaneous statement as to the meaning of the provision has never been challenged by either of the other two NAFTA Parties. To the contrary, both have expressed their agreement with the statement, citing it with approval to NAFTA Tribunals and to the Courts.[18]

In *Pope & Talbot,* Canada argued that since Article 1105 contained a customary international law standard of treatment, based upon the type of allegations made in that case, the conduct in question had to be egregious before State responsibility could arise. (The word "egregious" was used as a shorthand reference to the legal standards identified in the *Neer* and subsequent claims cases involving the treatment of aliens to adjudge the seriousness of the State action that will attract responsibility as a breach of the minimum standard.) The Tribunal rejected this approach on the ground that Canada was addressing the "contents of the requirements of international law, rather than the other factors referred to in Article 1105, namely, 'fair and equitable treatment and full protection and security'."[19]

The Tribunal then compounded its interpretative error by resorting to an extraneous treaty, to which neither Mexico nor Canada was a party, in order to "confirm" its interpretation of Article 1105. At paragraph 111 of the Award, the Tribunal referred to the US "Model Bilateral Investment Treaty of 1987" ("Model B IT"), stating that "Canada, the UK, Belgium Luxembourg, France and Switzerland have followed the Model" which it quoted as stating:

> Investment 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.[20] [Emphasis added]

Rejecting the United States' views as to the meaning of this provision, the Tribunal decided that the inclusion of the phrase "and shall in no case be accorded treatment less than" meant that the Model BIT contained "additive" elements of fairness and that such "additive" elements ought to be read into Article 1105.

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18 For example, the United States cited it with approval in its Fourth Submission to the *Pope & Talbot* Tribunal, dated November 1, 2000, at paragraph 7. See www.state.gov/documents/organization/4098.pdf. Mexico also cited the *Statement* to the British Columbia Supreme Court in the *Metalclad* judicial review application.

19 Award on Liability at paragraph 109.

20 *Id.*, at paragraph 111. In fact, the Tribunal was in error on this point. Canada did not employ the U.S. Model BIT in its pre-NAFTA investment treaties.

In relying on this treaty text to inform its interpretation of the NAFTA, the Tribunal erroneously employed a provision of the U.S. Model BIT to analyze Canada's, or for that matter any NAFTA Party's, obligations under Article 1105. This is not contemplated by:

- Article 31(2)(a) of the *Vienna Convention* ("any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty"),
- Article 31(2)(b) ("any instrument which was made by one or more of the parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty"),
- Article 31(3)(a) ("any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions"),
- Article 31(3)(b) ("any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"), or
- Article 31(3)(c) which permits reference only to other "relevant rules of international law applicable in the relations between the parties". [Emphasis added]

The Tribunal's decision to refer to the U.S. Model BIT does not discuss Mexico in this connection because Mexico did not have a practice, prior to NAFTA, of concluding bilateral investment treaties.[21] (In the late 1980's, Mexico reconsidered a variety of issues relating to international law concerning the rights of aliens).

This further compounded the gravity of the Tribunal's ignoring the requirements of Article 31(3)(c) of the *Vienna Convention*. Neither Canada nor Mexico had a BIT with the United States and therefore, the Model BIT could not be considered to a be a relevant rule of international law "applicable in the relations between the parties."

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21 *Id.* at paragraph 115.

C. The Tribunal's Statements and Omissions Regarding Mexico's Submissions

1. The Implied Failure to Support the United States' Interpretation of Article 1105

As noted above, in the liability phase, both non-disputing NAFTA Parties filed submissions on Article 1105. In its Post-hearing Submission to this Tribunal, the United States has complained that the *Pope & Talbot* Tribunal mischaracterized its Submissions.[22] Mexico has the same concern.

In its Fourth Article 1128 Submission to the *Pope & Talbot* Tribunal, the United States explained, *inter alia*, that Article 1105 was based on the minimum standard of treatment accorded to aliens at customary international law.[23] It also stated that by employing the language used in Article 1105 (*i.e.*, "treatment in accordance with international law, *including* fair and equitable treatment...") "the drafters excluded any possible conclusion that the Parties were diverging from the customary international law concept of fair and equitable treatment."[24]

In its own Submission filed on the same day as the U.S. Submission, Mexico stated that it "concurs in" the U.S. Submission and "expressly adopts" paragraphs 3 and 8, which Mexico then recited in full:

> 3. "[F]air and equitable treatment" and "full protection and security" are provided as examples of the customary international law standards incorporated in Article 1105(1). The plain language and structure of Article 1105(1) requires those concepts to be applied as and to the extent that they are recognized in customary international law. They are not to be applied in a subjective and undefined sense without reference to international law standards....
>
> 8. The international law minimum standard is an umbrella concept incorporating a set of rules that have crystallized over the centuries into customary international law in specific contexts. The relevant principles are part of the customary international law

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22 *Supra* note 7 at footnote 42, p. 17.

23 See Annex 1.

24 Fourth Submission of the United States of America at paragraph 27.

> of state responsibility for injuries to aliens. Unlike national treatment, the international law minimum standard is an absolute, rather than relative, standard of international law that defines the treatment a State must accord aliens regardless of the treatment the State accords to its own nationals.[25] [Footnotes omitted]

At paragraph 114 of Award on Liability, the Tribunal dismissed the United States' submission that the drafters of NAFTA excluded any conclusion that the Parties were diverging from the customary international law standard, noting that the U.S. "supports this contention solely by pointing to the language of Article 1105; it offered no other evidence ... that the NAFTA Parties intended to reject the additive character of the BITs."[26]

The Tribunal's statement was accompanied by footnote 109 which states that "[n]either Mexico nor Canada has subscribed to the version of the intent of the drafters put forward by the United States".

As noted above, Mexico had concurred in the entire U.S. submission, including the "version of intent of the drafters" that the Tribunal says the other Parties did not endorse. (Canada did likewise.) Thus, the three Parties agreed on the basic meaning of Article 1105, that fair and equitable treatment was subsumed in international law, and that the reference to "international law", properly understood in the context of Chapter Eleven and the Agreement as a whole, was a reference to customary international law rules on the treatment of aliens.

Moreover, the two passages of the U.S. Fourth Submission adopted by Mexico expressly stated the central point of the U.S. Submission—that the plain language of the Article 1105 describes fair and equitable treatment as part of customary international law, not as an "additive" requirement that might be derived from other BITs.

As Mexico's submissions are not recorded in the Award, the reader is left with the incorrect impression that Mexico did not agree with the United States. It is this kind of omission that leads a third party such as the Claimant in the instant case to conclude that the "Pope Tribunal navigated its way through the conundrum, with little assistance from the NAFTA Parties".[27]

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[25] See Annex 2.

[26] Award on Liability at *supra* note 8, paragraph 115.

[27] Post-hearing Submission *supra* note 2, at paragraph 16.

Concerned that its position had not been faithfully and correctly stated in the Award, Mexico subsequently wrote the *Pope & Talbot* Tribunal requesting it to issue a *corrigendum*, to correct this point and one other.[28] It is Mexico's understanding that the Tribunal's response is confidential and therefore Mexico is not at liberty to provide a copy of it. However, Mexico can confirm that no correction was made.

The "additive" elements interpretation was devised by the Tribunal acting on its own and contrary to the stated positions of the disputing parties (and the non-disputing NAFTA Parties). In criticizing the United States for failing to adduce evidence of its intention to depart from the Tribunal's interpretation (not shared by the United States), the Tribunal was essentially asking the United States (and the other Parties) to prove the abandonment of an interpretation that was not shared in the first place.

The first that Mexico saw of the novel "additive" interpretation and the criticism of the NAFTA Parties for failing to provide evidence of their intent was in the Award on Liability.

2. Mexico Supported Canada's Position on the Threshold of Article 1105 in the Award on Damages

The only reference to Mexico's submissions on Article 1105 in the damages award is in paragraph 59 and an accompanying footnote in which the Tribunal rejected the *Neer* standard advanced by Canada:

> 59. First, as admitted by one of the NAFTA Parties [footnote 44], and even by counsel for Canada [footnote omitted], there 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

Footnote 44 states:

> *See* Post Hearing Submission Damages Phase for Mexico at ¶8: "Mexico also agrees that the standard is relative and that conduct which may not have violated international law (sic) in the 1920's

28 See Annex 3.

> might very well be seen to offend internationally accepted principles today".[29]

Mexico agrees that customary international law evolves. However, the *Pope & Talbot* Tribunal did not properly describe Mexico's Submission when making its point against Canada.

Mexico's Article 1128 Submission in fact embraced Canada's reliance on the *Neer* Claim, a decision of the Mexico-United States General Claims Commission that in the context of a specific case examined the standard of review to be exercised by the international tribunal and the degree of insufficiency of State action that was required to find a breach of the international minimum standard in that case.

In the *Neer* Claim, the General Claims Commission stated:

> ...the propriety of governmental acts should be put to the test of international standards, and ...that the treatment of an alien, in order to constitute an international delinquency, should amount 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. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards, is immaterial.[30] [Emphasis added]

In *Neer*, a U.S. citizen who was a superintendent of a mine in Mexico, was murdered on his way home from work. It was claimed that the Mexican authorities had shown unwarranted lack of diligence in investigating the offence. The Commission rejected the claim, noting that while it appeared that the "authorities might have acted in a more vigorous and effective way than they did", in the Commission's view, "there is a long way between holding that a more active and more efficient course of procedure might have been pursued, on the one hand, and holding that this record presents such a lack of diligence and of intelligent investigation as constitutes an

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[29] Award on Damages at paragraph 59.

[30] *U.S.A. (L.F. Neer)* v. *United Mexican States*, (1926), RIAA iv. 60 at 61-62. This test is repeatedly cited by the General Claims Commission: see, for example, the *Chattin* and the *Teodoro Garcia* cases. See also C. Eagleton, *Responsibility of States in International Law* (1928); E. Borchard, "The 'Minimum Standard' of the Treatment of Aliens", 38 *Michigan Law Review*, pp. 445 (1940).

international delinquency, on the other hand,"[31] and it was not for an international tribunal to decide whether another course of procedure taken by the local authorities might have been more effective.

The Commission concluded,

> ...the grounds of liability limit ...[the international tribunal's] inquiry to whether there is convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in wilful neglect of their duties, or in a pronounced degree of improper action, or (2) that Mexican law rendered it impossible for them properly to fulfil their task.[32]

In a separate opinion concurring in the result, the American commissioner, Fred K. Nielsen, expressed the proposition that,

> It may perhaps be said with a reasonable degree of precision that the propriety of governmental acts should be determined according to ordinary standards of civilization, even though standards differ considerably among members of the family of nations, equal under the law. And it seems to be possible to indicate with still greater precision the broad, general ground upon which a demand for redress based on a denial of justice may be made by one nation upon another. It has been said that such a demand is justified when the treatment of an alien reveals an obvious error in the administration of justice, or fraud, or a clear outrage...
>
> There may be of course honest differences of opinion with respect to the character of governmental acts, but it seems clear that an international tribunal is guided by a reasonably certain and useful standard if it adheres to the position that in any given case involving an allegation of a denial of justice it can award damages only on the basis of convincing evidence of a pronounced degree of improper governmental administration.[33]

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31 (1926) RIAA, iv. at paragraph 3, at 61.

32 *Id.* at paragraph 5, at 62.

33 *Id.* at 65.

The reason why Mexico expressed its agreement with the *Neer* standard was that for many years, the leading text-writers on the minimum standard, including present day publicists, have embraced it as one of the leading cases on the international minimum standard:[34]

- Brownlie's most recent edition of *Principles of Public International Law*, published in 1998, cites *Neer* as a leading case.[35]
- Malanczuk, the editor of the seventh edition of *Akehurst's Modern Introduction to International Law*, published in 1997, refers to the statement from *Neer* quoted above as evidence of the standard, and implies that *bona fide* State action would rarely ever be impugned under it.[36]
- Shaw's fourth edition of *International Law*, published in 1997, also cites *Neer* (and two other decisions of that General claims Tribunal, *Roberts* and *Garcia*).[37]
- Roth's monograph, *The Minimum Standard of Treatment of International Law Applied to Aliens*, published in 1949, described *Neer* as the decision "which was to be the guiding principle of their [the Mexican-United States General Claims Commission's] jurisdiction."[38] He considered that it constituted "one of the strongest expressions" of the standard, and noted that it was elaborated upon in subsequent cases.[39]
- Eagleton's 1928 thesis, *The Responsibility of States in International Law*, republished in 1970 (Kalus Reprint Co.) also cites *Neer* and *Roberts* and two other General Claims Commission cases that followed their reasoning: *Garza and Garza* (Docket No. 297) and *Faulkner* (Docket No. 47).

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34 Although the most recent edition of *Oppenheim's International Law* does not cite *Neer*, it does cite other decisions of the General Claims Commission such as the *Roberts* Claim.

35 Brownlie, *Principles of Public International Law* (5th ed. 1996) at 440.

36 *Akehurst's Modern Introduction to International Law*, (7th ed. 1997) (Peter Malanczuk, ed.) at 261. This text also refers to the *Roberts* Claim.

37 Malcolm N. Shaw, *International Law*, (4th ed. 1997) at 569-573.

38 A.R. Roth, *The Minimum Standard of Treatment in International Law* (1949) at 95.

39 *Id.* at 96.

- Brierly's *The Law of Nations* cites *Neer* and *Roberts* as the leading cases and notes that the minimum standard is "not an exacting one, nor does it require a uniform degree of governmental efficiency irrespective of circumstances".[40]

- Schwarzenberger also cites the *Neer* Case as firmly upholding the existence of the international minimum standard. He notes that the minimum standard has been applied to:

> ...cases in which the State of residence had failed to safeguard adequately the life, freedom, human dignity, or property in the widest sense, including contractual rights, of foreigners; or in which the local administration, particularly in the prosecution of crimes committed against foreigners, suffered from glaring deficiencies. <u>In substance, this standard approximates to the minimum requirements of the rule of law in the Anglo-American sense of the term</u>...[41] [Emphasis added; case references in the passage omitted]

Since Mexico's submission was being cited by the *Pope & Talbot* Tribunal in support of its rejection of Canada's submission that the *Neer* claim was good law and that the standard articulated in that case should not be applied[42], Mexico considers that it is important that this Tribunal see the entirety of its submission on this issue in order to understand the Tribunal's propensity to cite points that supported its interpretation and application of Article 1105 and to ignore others that did not support it.[43]

Read in context, Mexico's Submission supported Canada's submission on the "threshold" issue rather than being inconsistent with it as the Award implies. The passage quoted by the Tribunal is italicized for ease of reference:

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40 J.L. Brierly, *The Law of Nations,* (6th ed. 1963, edited by Sir Humphrey Waldock) at 280-281.

41 Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, (1957) at 201.

42 At paragraph 57 of its Award on Damages, the Tribunal states that: "Canada considers that the principles of customary international law were frozen in amber at the time of the *Neer* decision. It was on this basis that it urged the Tribunal to award damages only if its conduct was found to be an 'egregious' act or failure to meet internationally required standards."

43 See Annex 4.

The Threshold for Breach of Article 1105

7. Members of the Tribunal challenged counsel for Canada on the question of whether the standard propounded in *Neer* continues, eighty years later, to define the minimum standard of treatment recognized at international law.

8. Mexico submits that the test in *Neer* does continue to apply and concurs in Canada's view that "[t]he conduct of government toward the investment must amount to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, an outrage, bad faith or the willful neglect of duty" [Footnote omitted]. *Mexico also agrees that the standard is relative and that conduct which may not have violated international law[in] the 1920's might very well be seen to offend internationally accepted principles today.*

9. Mexico further submits that useful guidance can be found in the 1989 decision of the Chamber of the International Court of Justice in the *Case Concerning Elettronica Sicula S.P.A. (ELSI).* [Footnote omitted] With respect to arbitrariness, the Court propounded the following test:

> "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the court in the Asylum case, when it spoke of 'arbitrary action' being 'substituted for the rule of law' ... It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety..." [Footnote omitted, emphasis in the original submission]

10. It is clear from this relatively recent observation of the ICJ that the threshold to establish a breach of customary international law continues to be high; one which requires conduct of a very serious nature, amounting to a significant departure from internationally accepted legal norms.

11. Mexico accordingly concurs with Canada's observation that only egregious conduct should be seen to offend Article 1105 and submits that it should be very rare, if ever, that a Party could be found to have breached Article 1105 in the exercise of a legal right,

or by relying on a legal right, unless the law itself falls below the minimum standard.[44]

Mexico directs the Tribunal to these omissions and statements in the *Pope & Talbot* awards because it does not want this or other Tribunals to rely in any way upon poorly reasoned and selectively documented awards. Mexico wishes to ensure that the inaccuracies and misstatements of the *Pope & Talbot* awards not gain currency by reason of repetition by other Tribunals. The Claimant's use of the awards in this case confirms Mexico's earlier concerns which led it to request a *corrigendum*.

Simply put, in *Pope & Talbot* there was no disagreement between the NAFTA Parties as to the proper interpretation of Article of 1105. Unfortunately, the Tribunal failed to publicly acknowledge in either of its awards that the three NAFTA Parties shared the same interpretation of the language of Article 1105.

D. Mexico's View on the *ELSI* Case

Mexico agrees that the *Pope & Talbot* Tribunal erred in applying the *ELSI* Case as evidence of the evolution of customary international law away from the *Neer* standard. The *Pope & Talbot* Tribunal cited the *ELSI* Case for its treatment of arbitrariness at international law. The United States correctly points out that the specific treaty at issue in that proceeding was a Friendship, Commerce and Navigation Treaty that expressly contained a treaty obligation to refrain from the arbitrary or discriminatory treatment of the nationals, corporations or associations of the other High Contracting Party.[45]

Although the FCN Treaty did contain an express prohibition against arbitrary conduct, Mexico considers that in *ELSI* the Chamber was examining arbitrariness as it was understood at general international law. The Chamber relied upon the notion of arbitrariness discussed in the *Asylum* Case[46] and the dissenting opinion of Judge Schwebel expressed concurrence with what he called "the Chamber's classic concept of what is an arbitrary act in international law."[47]

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44 Article 1128 Submission of the United Mexican States at paragraphs 7-11.

45 Post-hearing Submission of Respondent United States of America on NAFTA Article 1105(1) and *Pope & Talbot supra* note 7, at p. 22.

46 *ELSI* Case 1989 I.C.J. Reports 4 at paragraph 128.

47 *Id.*, at p. 96.

Mexico considers that, leaving aside the fact that the specific treaty at issue contained an obligation prohibiting arbitrary action, the ICJ's discussion of arbitrariness is nevertheless instructive as to the standard of review that the international tribunal must employ when examining whether a State has violated the international minimum standard. The key paragraph of the Chamber's judgment, which is quoted in part by the *Pope & Talbot* Tribunal, states:

> 128. Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the *Asylum* case, when it spoke of "arbitrary action" being "substituted for the rule of law" (*Asylum, Judgment, I.C.J. Reports* 1950, p. 284). It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety...[48][Emphasis added]

In the *Asylum Case* to which the Chamber referred, the Court was discussing how an exception might exist to the *Havana Convention on Asylum*'s rule that diplomatic asylum cannot be opposed to the requirements of local justice. The Court observed that:

> An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents.[49]

It was this idea of arbitrary action being substituted for the rule of law that Mexico found instructive in *ELSI.* Mexico saw the reference to the *Asylum* Case in *ELSI* as indicative of the kind of State action that could amount to a departure from internationally accepted legal norms and in appropriate circumstances attract State responsibility.

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[48] The ICJ's comments were made in the context of its analysis of the *Havana Convention on Asylum* which was signed at the sixth Pan-American Conference of 1928 at which the Latin American States declared their resolute opposition to any foreign political intervention. This led the ICJ to comment that it would "be difficult to conceive that these same States had consented, at the very same moment, to submit to intervention in its least acceptable form, one which implies foreign interference in the administration of domestic justice and which in *Asylum* could not manifest itself without casting some doubt on the impartiality of that justice." [At 285.]

[49] *Id.*, at 284.

The *Pope & Talbot* Tribunal focused on the Chamber's use of the word "surprises" as a potential qualifier of the phrase "shocks...a sense of judicial propriety" and discerned in that a movement away from the *Neer* standard.[50] Mexico considers that inference to be unjustified when paragraph 128 of the *ELSI* judgment is read as a whole and the standard's application to the facts of the case is noted at paragraph 129 (and when it is considered that there is no discussion of *Neer* in that Judgment). The key point is that the Chamber accorded deference to the respondent's legal system in applying the standard, finding that even though the mayor's act of requisitioning the factory at issue in the case was unlawful at Italian law as an excess of power, mere domestic illegality did not equate to arbitrariness at international law.[51]

Paragraph 65 of the *Pope & Talbot* Award on Damages confirms in any event that the earlier discussion of the alleged relaxation of the *Neer* standard in *ELSI* is *obiter dictum* because the Tribunal purported to apply Canada's standard and expressed the hope that the actions of Canadian officials that it found violated Article 1105 "would shock and outrage every reasonable citizen of Canada; they did shock and outrage the Tribunal."[52]

E. The *Pope & Talbot* Tribunal's Views on the Interpretation of Article 1105 and the Actions of the Free Trade Commission

Mexico also wishes to record its disagreement with the *Pope & Talbot* Tribunal on the interpretation of Article 1105 and the validity of the *Note of Interpretation* issued by the Free Trade Commission.

Although expressing its opinion that, as urged by the Claimant, the *Note* was an amendment to the NAFTA rather than an interpretation of Article 1105, the Tribunal did not actually make such a finding (although it stated that if it had been required to make such a determination it would have found it to be an amendment).[53]

Moreover, as the United States points out at length in its Submission[54], the Tribunal's claim that it had the authority to second-guess the Free Trade Commission is not sustainable for the

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50 Award on Damages, *supra* note 3 at paragraph 64.

51 See also the Chamber's discussion of the relationship between domestic unlawfulness and arbitrariness at international law at paragraphs 124-127 of the Judgment.

52 *Pope & Talbot* Award on Damages *supra* note 3 at paragraph 68.

53 *Id.*, at paragraph 47.

54 *Supra* note 7 at pp. 8-12.

following reasons: The jurisdiction of a Chapter Eleven Tribunal is confined to the subject matter set out in Articles 1116 and 1117 as the case may be. It is empowered to determine whether a NAFTA Party (in the singular) violated one of the NAFTA obligations listed in those two articles. That is the full extent of its jurisdiction *ratione materiae*. It has no jurisdiction to look behind the governing law which, under Article 1131(2), is plainly stated to include a Commission interpretation that "shall be binding upon a Tribunal".

F. The Tribunal's Statement on the Formation of Customary International Law Was Incomplete

As the United States has pointed out, like the Award on Liability, the Tribunal's Award on Damages was marked by ~~errors in~~ legal analysis. At paragraph 59 of the Award, the Tribunal stated, "[i]nternational agreements constitute practice of states and contribute to the grounds of customary international law". However, it omitted to advert to the elementary requirement of *opinio juris,* the additional element that is commonly agreed to be required to find the existence of a customary rule. At paragraph 63 of its Award, the Tribunal stated:

> Canada's views on the appropriate standard of customary international law for today were perhaps shaped by its erroneous belief that only some 70 bilateral investment treaties have been negotiated; however, the true number, now acknowledged by Canada, is in excess of 1800. Therefore, applying the ordinary rules for determining the content of custom in international law, one must conclude that the practice of states is now represented by those treaties.[55] [Emphasis added]

It is impossible to infer from the existence of a large number of BITs alone that any particular provision therein represents a rule of customary international law merely by reason of its commonality. The Tribunal did not refer to the essential additional requirement of *opinio juris*.[56]

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[55] *Supra* note 3 at paragraph 62.

[56] Brownlie, (at 7 *et seq.*) describes it as a "necessary ingredient", *Oppenheim* at 27 describes *opinio juris* is "essential", *Akehurst's Modern Introduction to International Law* at 44 states, "State practice alone does not suffice; it must be shown that it is accompanied by the conviction that it reflects a legal obligation."

G. The Status of International Law on the Treatment of Aliens Since *Neer*

At paragraph 39 of the Claimant's Post-hearing Submission, the point is made that the international community "established the massive institutional superstructures that remain the constitution of international economic law today, including the Bretton Woods system" and that "[n]umerous GATT rounds led to the founding of the WTO, and enshrinement of more and more detailed rules governing the treatment of foreign economic actors".

Mexico agrees that since World War II there has been an enormous increase in the negotiation and ratification of multilateral, plurilateral and bilateral international conventions that set out the rights and obligations of States (and sometimes non-State actors). However, it is important to distinguish between conventional and customary international law obligations. However, for a conventional obligation to be found to also amount to a customary law obligation, a careful analysis of State practice and *opinio juris* must be undertaken. The ICJ's analysis in the *North Seas Continental Shelf Cases* is indicative of the exacting analysis that is undertaken to discern whether a conventional rule is also a customary rule.[57] Thus, it is of fundamental importance not to confuse the developments in conventional treaty law with customary international law, which though evolving, has lagged far behind treaty law.

Further, notwithstanding that there has been a proliferation of bilateral investment treaties, it has not been established that any even purport to modify the standards of customary international law in relation to this aspect of the treatment of aliens. Certainly, the view of certain U.S. officials has not been to that effect. One official who was involved in the NAFTA investment negotiations regarded the fundamental obligations in Chapter Eleven as being national treatment and most-favored nation treatment, not Article 1105, noting:

> ... the foregoing comparative standards and explicit prohibitions [referring to National Treatment and Most-Favored Nation Treatment] <u>are supplemented by the incorporation of customary international law principles</u> obligating the host government to accord 'fair and equitable treatment' and 'full protection and

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[57] *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark) (Federal Republic of Germany v. Netherlands) I.C.J. Reports (1969) 4.

> security' to investments in its territory. [The article then footnotes a reference to Article 1105(1)][58] [Emphasis added]

Although the Claimant describes *Neer* as outdated, a number of authoritative sources (cited above), including some published within the past few years, have continued to treat *Neer* as a leading illustration of current international law. The simple fact that the *Neer* decision was rendered in 1926 cannot support the conclusion urged by the Claimant that the *Neer* standard no longer represents a leading case on the customary international law standard.

In this regard, Mexico respectfully points out that that the Claimant's references to the Bretton Woods Agreements and the WTO Agreement should not be taken to support any inference that those conventional international law rights and obligations have become part of customary international law relating to the treatment of investment and hence part of Article 1105. [59] The proof that the WTO Agreement is conventional international law is provided by the Organization's extremely detailed procedures for the approval of a State's accession and the length of time that States take to negotiate accession.[60] If the WTO's Members were obliged by customary international law to extend the detailed protections contained in the WTO Agreement to goods and services of other States, there would be no need for a non-Member to negotiate a Protocol of Accession and non-Members would be equally bound by customary international law rules. This is not the case, as evidenced by the recent accession of the People's Republic of China, Taiwan and the proposed accession of Russia, Saudi Arabia and other States.

Moreover, with two exceptions, the WTO agreements do not explicitly address foreign investment disciplines. First, there is a WTO *Agreement on Trade-Related Investment Measures* (TRIMs), which has somewhat of a counterpart in NAFTA Chapter Eleven (in Article 1106), but the focus of that agreement and of Article 1106 is preventing governments from imposing conditions on investment that would result in discriminatory treatment of goods – for example, requirements that an investment use only materials of domestic origin. In this respect, the TRIMs Agreement elaborates on the GATT's trade in goods obligations. In a U.S. GATT challenge to the administration of Canada's *Foreign Investment Review Act*, the GATT Panel pointed out in its Report that; "...the General Agreement does not prevent Canada from exercising its sovereign right to regulate foreign direct investments" and therefore the Panel restricted its inquiry into the administration of Canada's law "solely in light of Canada's trade obligations under the General

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58 Daniel M. Price, "An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement", 27 Int. Law. 727, 729 (1993).

59 Claimant's Submission at paragraph 39.

60 See the Ministerial Decision on the Acceptance of and Accession to the Agreement Establishing the World Trade Organization.

Agreement". [61] The TRIMs Agreement similarly does not address the treatment of foreign investment generally. Second, under the 1995 *General Agreement on Trade in Services* (GATS), member countries agreed, with respect to certain sectors, to allow foreign investors to establish local companies to provide specific types of services. The GATS obligations, however, do not establish the breadth of investment protections that are found in BITs or in NAFTA Chapter Eleven.

The Doha Declaration establishes that the WTO is in the very early stages of developing conventional rules on the relationship between trade and investment. It warrants noting that no decision has even been taken that there even will be a multilateral negotiation on investment, much less how to address the issues in negotiation. Paragraph 20 of the Doha Declaration requires that the Members take a decision by "explicit consensus" as to the "modalities" of any negotiations. The fact that the WTO Members are at a nascent stage of even considering the negotiation of conventional legal rules demonstrates that the WTO has not enshrined detailed rules regarding foreign investors or their investments.

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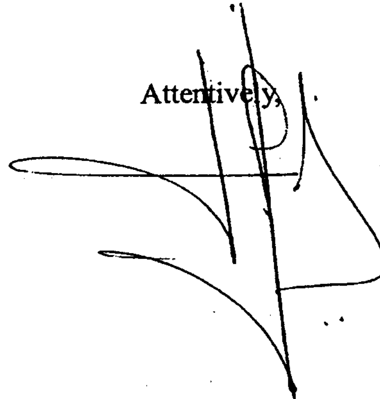
61 See *Canada – Administration of Foreign Investment Review Act*, GATT/BISD 30S/140 at 157.

H. Conclusion

It is respectfully submitted that the *Pope & Talbot* Tribunal's interpretations of Article 1105 and the treaty generally have been flawed and poorly reasoned, have been contrary to the common submissions of the three NAFTA Parties, and should not be followed by this Tribunal.

Attentively,



cc. Barton Legum
Sylvie Tabet
Peter E. Kirby