IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

UNITED PARCEL SERVICE OF AMERICA, INC.,

Claimant/Investor,

-and-

GOVERNMENT OF CANADA,

Respondent/Party.

THIRD SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA"), the United States of America makes this submission on certain questions of interpretation of the NAFTA. Those questions arose in connection with the July 29-30, 2002 hearing on the jurisdictional objections of the Government of Canada. No inference should be drawn from the absence of comment on any issue not addressed here. The United States takes no position on how the interpretive positions it offers below apply to the facts of this case.

Relationship Between Chapters Fifteen and Eleven

2. The three NAFTA Parties agree that Article 1116(1)(b) allows an investor to submit a claim to arbitration for an alleged breach of Article 1502(3)(a) only where the claim is that the respondent NAFTA Party failed to ensure that the subject monopoly acts in a manner that is not inconsistent *with an obligation embodied in a provision of Section A of Chapter Eleven.*[1]

[1] *See, e.g.*, July 29, 2002 Hearing Transcript ("7/29/02 Tr.") at 25, 28-29; Mexico's Submission Under NAFTA Article 1128 ("Mexico Sub."), dated May 14, 2002, ¶ 15(8) at 6; Second Submission of the United States of America ("U.S. Second Sub."), dated May 13, 2002, ¶ 6 at 3.

3. Contrary to certain arguments advanced at the hearing, the three NAFTA Parties' common interpretation of Article 1116(1)(b) is in no way inconsistent with the plain language of Article 1502(3)(a).[2] Article 1502(3)(a) makes clear that a NAFTA Party cannot circumvent any of its obligations under the NAFTA simply by delegating governmental authority to a privately-owned or government monopoly.[3] A violation of Article 1502(3)(a) with respect to any provision in the NAFTA could be subject to State-to-State dispute resolution under Chapter Twenty.[4] By contrast, and as Article 1116(1)(b) explicitly states, a violation of Article 1502(3)(a) is also subject to investor-State dispute resolution under Chapter Eleven, but only with respect to "obligations under Section A" of Chapter Eleven.

4. The contrary interpretation advanced at the hearing would lead to absurd results. Under that interpretation, an investor could submit a claim to investor-State arbitration for acts of a privately-owned or government monopoly alleged to be inconsistent with *any* provision of the NAFTA. By contrast, an investor could submit a claim to investor-State arbitration based on an act by a NAFTA Party or state enterprise only when the NAFTA Party itself or the state enterprise acted inconsistently with an obligation embodied in Section A of Chapter Eleven. There simply is no rational basis for deciding the applicability of Chapter Eleven's dispute resolution mechanism on the basis of whether the subject actor is a monopoly (referenced in Article 1502(3)(a)), rather than the respondent NAFTA Party itself or a state enterprise.[5] The NAFTA Parties did not intend such a distinction. And, indeed, they agree that the text of the NAFTA imposes a uniform and consistent requirement: whether the alleged breach is by a NAFTA Party itself, a referenced monopoly or a state enterprise, acts that are inconsistent with an obligation of the respondent NAFTA Party under Section A must be shown.

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[2] *See* July 30, 2002 Hearing Transcript ("7/30/02 Tr.") at 287-89.

[3] *See* Mexico Sub. ¶ 15(1) at 5 (Article 1502(3)(a) "is designed to ensure that a State does not use a monopoly that exercises delegated powers to take action that would be inconsistent with the Agreement if such action were taken directly by the State itself.").

[4] Certain provisions of the NAFTA, however, are excepted even from the State-to-State dispute resolution mechanism in Chapter Twenty. *See, e.g.*, NAFTA art. 1501(3).

[5] Also, the United States notes that, contrary to Claimant's assertion at the hearing, Article 1503(2) does not provide a basis for a claim under Section B of Chapter 11 for alleged violations of Sections B and C of Chapter 11. *See* 7/30/02 Tr. at 277. The Article 1503(2) reference to Chapter Eleven is to Section A only: as Sir Kenneth noted, *id.* at 280, a state enterprise cannot act in a manner inconsistent with a provision of Section B, which established the process by which NAFTA Parties—not state enterprises—engage in investor-State arbitration under the NAFTA; Section C, which merely includes definitions, prescribes no obligations of any kind.

Delegated "Governmental Authority"[6]

5. The United States agrees with Canada's position at the hearing, with which Mexico also agrees, that a breach of Article 1502(3)(a) may only occur wherever a referenced monopoly "exercises" delegated "governmental authority."[7]

6. Moreover, contrary to certain arguments at the hearing, jurisdiction does not attach over a claim where the averred inconsistency with an obligation embodied in Section A of Chapter Eleven is alleged to result solely from the fact that a monopoly referenced in Article 1502(3)(a) is a monopoly—that is, that the monopoly functions as, possesses the status of, or is authorized to be a sole provider of a good or service.[8] Indeed, otherwise, the requirement that a referenced monopoly exercise delegated "governmental authority" would be entirely superfluous. As noted above (*see* ¶ 2), for a claim to be submitted under Chapter Eleven, the monopoly, in exercising its delegated "governmental authority," must allegedly have acted in a manner that is inconsistent with the respondent NAFTA Party's obligations under Section A of Chapter Eleven.[9]

Relationship Between "Anticompetitive Practices" and NAFTA Articles 1102 and 1105

7. The United States notes that the NAFTA does not define the term "anticompetitive practices," which is a complex term based on concepts of competition and regulation.[10] Accordingly, contrary to a suggestion at the hearing, a showing of "anticompetitive practices" does not, in and of itself, establish that a NAFTA Party has not accorded "treatment no less favorable" in the sense of Article 1102; nor does it establish a violation of the Article 1105 requirement to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment."[11]

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[6] The concept of delegated "government authority" is the same in Articles 1502(3)(a) and 1503(2). Therefore, although the discussion that follows refers only to Article 1502(3)(a), the points made apply equally with respect to Article 1503(2).

[7] *See* 7/29/02 Tr. at 42; Mexico Sub. ¶ 15(6) at 5; U.S. Second Sub. ¶ 8 at 3-4.

[8] *See, e.g.*, 7/29/02 Tr. at 49, 53, 91, 92, 96-97.

[9] At the hearing, questions regarding delegated "governmental authority" were asked based on the example of an operator of a prison. An example of the exercise of "governmental authority" delegated by a NAFTA Party (within the meaning of Article 1502(3)(a)) that also involves procurement by a government agency of a service for governmental purposes could be the contract operation of prisons for law enforcement authorities. Such procurement would be exempted from the application of Article 1502(3) by reason of Article 1502(4).

[10] *See, e.g.*, WTO Working Group on the Interaction Between Trade and Competition Policy, "Overview of Members' National Competition Legislation," Note by the Secretariat (Revisions, July 4, 2001), WT/WGTCP/W/128/Rev.2 (available at www.wto.org/english/tratop_e/comp_e/comp_e.htm).

[11] *See* 7/30/02 Tr. at 261-63.

Losses or Damages of U.S. Subsidiaries of U.S. Investors

8. At the hearing, the Claimant asserted that losses or damages of its U.S. subsidiaries that "flow to" the Claimant are recoverable under Article 1116(1).[12]

9. The United States incorporates here its positions and arguments in paragraphs 2 through 10 of the attached submission made in the case of *Pope & Talbot Inc. v. Canada*: Seventh Submission of the United States of America, dated November 6, 2001. Furthermore, the United States notes that any complaints about export opportunities to Canada denied the Claimant's U.S. subsidiaries are, absent identification of a Canadian investment of those U.S. subsidiaries (which would bring those U.S. subsidiaries into the definition of "investors of a Party"), covered by NAFTA Chapter Twelve, which governs cross-border trade in services, and, therefore, subject to the State-State dispute resolution mechanism embodied in NAFTA Chapter Twenty.

Pope & Talbot Damages Award

10. In response to the Claimant's reliance at the hearing on the May 31, 2002 Award in Respect of Damages issued in the case of *Pope & Talbot Inc. v. Canada*, the United States incorporates here its positions and arguments in the attached submissions made in the case of *ADF Group Inc. v. United States of America*, Case No. ARB(AF)/00/1: (1) Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot*, dated June 27, 2002, at 7-22; and (2) Final Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot*, dated August 1, 2002, at 1-6.

Respectfully submitted,

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August 23, 2002

[12] *See* 7/30/02 Tr. at 222-23.

Attachment A

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

POPE & TALBOT, INC.,

Claimant/Investor,

-and-

GOVERNMENT OF CANADA,

Respondent/Party.

SEVENTH SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA"), the United States of America makes this submission on certain questions of interpretation of the NAFTA. Those questions are raised in the damages-phase memorials of Pope & Talbot, Inc. and the Government of Canada. No inference should be drawn from the absence of comment on any issue not addressed here.

NAFTA Articles 1116 and 1117

2. The United States agrees with Canada that an investor that submits a claim under Article 1116 – and not under Article 1117 – can recover only those losses or damages proximately caused by a breach and incurred by it in its capacity as an investor. An investor that submits a claim under Article 1116 – and not under Article 1117 – cannot recover any losses or damages incurred by "an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly." NAFTA art. 1117(1).

3. Articles 1116 and 1117 of the NAFTA serve distinct purposes. Article 1116 provides recourse for an investor to recover for loss or damage suffered by it. Article 1117 permits an investor to bring a claim on behalf of an investment for loss or damage suffered by that investment.

4. Where the investment is a separate legal entity, such as an enterprise, any damage to the investment will be a derivative loss to the investor, and the investor will have standing to bring a claim under Article 1117. Where the investment is not a separate legal entity, any damage to the investment will be a direct loss to the investor, and the investor will have standing to bring a claim under Article 1116.

5. When an investor files a claim under Article 1116 for direct losses suffered by it, only those losses that were sustained by that investor *in its capacity as an investor* are recoverable.

6. Examples of direct losses sustained by an investor in its capacity as an investor that would give rise to a claim under Article 1116 are, for example, losses suffered as a result of an investor's stockholder shares having been expropriated or losses sustained as a result of the investor having been denied its right to vote its shares in a company incorporated in the territory of another NAFTA Party.

7. Under Article 1135(2)(a) and (b), where a claim is made under Article 1117(1), the award must provide that any restitution be made, or monetary damages be paid, to the enterprise. This prevents the investor from effectively stripping away a corporate asset – the claim – to the detriment of others with a legitimate interest in that asset, such as the enterprise's creditors.[1] Moreover, under Article 1135(2)(c), where a claim is made under Article 1117(1), the award must provide that it is made without prejudice to any person's right (under applicable domestic law) in the relief. If an investor could bring a claim under Article 1116 for losses or damages incurred by an enterprise, both Articles 1117 and 1135(2) would be rendered ineffective, contrary to the customary international law principle of effectiveness.[2]

8. Nothing prevents an investor, in an appropriate case, from submitting claims under both Articles 1116 and 1117. For example, if a NAFTA Party violated Article 1109(1)'s requirement that "all transfers relating to an investment of an investor of

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[1] Indeed, international tribunals have rejected shareholder claims in part because of the difficulty in determining what relief can fairly be granted in light of potential claims by creditors and other interested parties. *See, e.g.*, Eduardo Jiménez de Aréchaga, *Diplomatic Protection of Shareholders in International Law*, 4 Phil. Int'l L.J. 71, 77, 78 (1965).

[2] *See Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6 ¶ 51 (rejecting construction that was "contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness.") (collecting authorities); *accord Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 24 ("It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.").

another Party in the territory of the Party . . . be made freely and without delay," the investor might be able to claim under Article 1116 an injury stemming from interference with its right to be paid corporate dividends, and the investor might be able to claim under Article 1117 an injury relating to its enterprise's inability to make payments necessary for the day-to-day conduct of the enterprise's operations.

9. Thus, while harm to an investment may very well result in harm to the investor, this does not support the contention that – despite the plain language of the NAFTA – an investor can bring a claim under Article 1116 for loss or damage incurred by an enterprise because an enterprise is an investment. Rather, as reflected in Article 1121(1)(b), where an investor incurs loss or damage to its "interest in an enterprise" because of loss or damage incurred by that enterprise, the investor's recourse is to bring a claim under Article 1116 for the loss or damage to its "interest," and a claim under Article 1117 on behalf of the enterprise to recover for the loss or damage incurred by the enterprise.

10. In sum, an investor can make a claim for loss or damage incurred by an enterprise only if the investor submits a claim under Article 1117 on behalf of the enterprise.

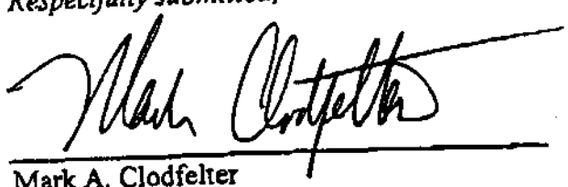
NAFTA Article 1135

11. Article 1135(1) limits the final award to monetary damages and applicable interest or restitution, and costs in accordance with the applicable arbitration rules. Article 1135(3) expressly provides that "[a] Tribunal may not order a Party to pay punitive damages."

12. Under Article 1131(1), in fixing the appropriate amount of monetary damages, Chapter Eleven tribunals must apply "applicable rules of international law."

13. Accordingly, if applicable rules of customary international law do not permit a claimant to recover for particular losses because those losses were not proximately caused by the subject breach, then no damages may be awarded with respect to those losses whether intended or not.

Respectfully submitted,



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Attachment B

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES
BETWEEN

ADF GROUP INC.,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

Case No. ARB(AF)/00/1

POST-HEARING SUBMISSION OF RESPONDENT UNITED STATES OF AMERICA ON ARTICLE 1105(1) AND *POPE & TALBOT*

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June 27, 2002

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IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES
BETWEEN

ADF GROUP INC.,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

Case No. ARB(AF)/00/1

POST-HEARING SUBMISSION OF RESPONDENT UNITED STATES OF AMERICA ON ARTICLE 1105(1) AND *POPE & TALBOT*

In accordance with the Tribunal's order of June 17, 2002, the United States respectfully presents these further observations on Article 1105(1) and the May 31, 2002 Award in Respect of Damages rendered in the case of *Pope & Talbot Inc. v. Canada* (the "*Pope* Damages Award").[1]

In Part I below, the United States responds to the question posed by the Tribunal with respect to Article 1105(1): "what factors or kinds of factors a Chapter Eleven tribunal applying in a concrete case the 'fair and equitable treatment and full protection and security standard' referred to in Article 1105(1), NAFTA, may take into account"? In Part II of this submission, the United States presents its observations on the *Pope* Damages Award.

[1] The United States adopts in this submission the same abbreviations that it used in its Counter-Memorial and Rejoinder.

I. FURTHER OBSERVATIONS WITH RESPECT TO ARTICLE 1105(1)

For the reasons stated below, the United States respectfully submits that the "factors or kinds of factors a Chapter Eleven tribunal applying . . . the 'fair and equitable treatment and full protection and security' standard . . . may take into account"[2] depend upon the rule of the customary international law minimum standard of treatment implicated by the claims asserted. Here, however, no rule of customary international law incorporated into Article 1105(1) addresses the conduct that ADF has claimed to violate that article. Nor has ADF attempted to identify any such rule. Because the relevant factors depend upon the particular rule that is applicable in any given set of circumstances, the absence of such a rule here renders identification of such factors unnecessary. The United States therefore submits that, although Article 1105(1) is "applicable" here because ADF has asserted a claim under that article, no actionable claim of violation of Article 1105(1) has been stated.

The "international minimum standard" embraced by Article 1105(1) is an umbrella concept incorporating a set of rules that over the centuries have crystallized into customary international law in specific contexts.[3] The treaty term "fair and equitable treatment" refers

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[2] June 17, 2002 Letter-Order.

[3] *See* Transcript of Hearing, Apr. 17, 2002, at 758-60 (statement by Mr. Legum); *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 531 (5th ed. 1998) ("there is no single standard but different standards relating to different situations."); *see also id.* at 529 ("The basic point would seem to be that there is no single standard."); 5 CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC 46 (1970) ("The great majority of commentators hold that there exists in this respect an international minimum standard according to which States must accord to foreigners *certain rights* . . . , even where they refuse such treatment to their own nationals.") ("La grande majorité de la doctrine estime qu'il existe à cet égard un standard international minimum suivant lequel les Etats sonts tenus d'accorder aux étrangers *certains droits*, . . . même dans le cas où ils refuseraient ce traitement à leurs nationaux.") (emphasis supplied; translation by counsel).

to the customary international law minimum standard of treatment.[4] The rules grouped under the heading of the international minimum standard include those for denial of justice, expropriation and other acts subject to an absolute, minimum standard of treatment under customary international law.[5] The treaty term "full protection and security" refers to the minimum level of police protection against criminal conduct that is required as a matter of customary international law.[6]

The rules encompassed within the customary international law minimum standard of treatment are specific ones that address particular contexts. There is no single standard

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[4] *See* U.S. Rejoinder at 42 n.62 & accompanying text; *accord* Transcript, Apr. 17, 2002, at 761 (statement by Mr. Legum).

[5] *See, e.g.*, Swiss Dep't of External Affairs, *Mémoire*, 36 ANN. SUISSE DE DROIT INT'L 174, 179 (1980) ("So far as the content of this standard is concerned, we can limit ourselves to describing it as it relates to the property rights of foreigners since article 2 of the BIT addresses 'fair and equitable treatment' of only 'investments.' On this point, it is appropriate to note the following: foreign property can be nationalized or expropriated only upon prompt payment of an effective and adequate indemnity. The foreigner must also have access to the judiciary to defend himself against wrongful acts against his property by individuals. Moreover, the alien may require that his person and his goods be protected by the authorities in the event of riots, in a state of emergency, etc. . . . . The expression 'fair and equitable treatment' encompasses the ensemble of these elements.") ("Pour ce qui est de ce standard, nous pouvons nous borner à en décrire le contenu en ce qui concerne les droits patrimoniaux des étrangers puisque l'article 2 de l'API touche au 'traitement juste et équitable' des seuls 'investissements'. Sur ce point, il convient de faire les constatations suivantes : . . . la propriété étrangère ne peut être nationalisée ou expropriée que moyennant le versement sans retard d'une indemnité effective et adéquate. L'étranger doit également pouvoir accéder aux voies judiciaires pour se défendre contres les atteintes portées à son patrimoine par des particuliers. De plus, il peut exiger que sa personne et ses biens soient protégés par la force publique en cas d'émeutes, lorsqu'il existe un état d'urgence, etc. . . . . L'expression 'traitement juste et équitable' se rapporte à l'ensemble de ces éléments.") (footnotes omitted; translation by counsel).

[6] Tribunals have found the obligation of full protection and security to have been breached only in cases where the criminal conduct involved a physical invasion of the person or property of an alien. *See, e.g.*, *American Manufacturing & Trading, Inc. (U.S.) v. Zaire*, 36 I.L.M. 1531 (1997) (finding violation of protection and security obligation in case involving destruction and looting of property); *Asian Agricultural Products Ltd. (U.K.) v. Sri Lanka*, 30 I.L.M. 577 (1991) (similar finding in case involving destruction of claimant's property); *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24) (similar finding in case involving hostage-taking of foreign nationals); *Chapman v. United Mexican States (U.S. v. Mex.)*, 4 R.I.A.A. 632 (Mex.-U.S. Gen. Cl. Comm'n 1930) (similar finding in case where claimant was shot and seriously wounded); *H.G. Venable (U.S. v. Mex.)*, 4 R.I.A.A. 219 (Mex.-U.S. Gen. Cl. Comm'n 1927) (bankruptcy court indirectly responsible for physical damage to attached property); *Biens Britanniques au Maroc Espagnol (Réclamation 53 de Melilla - Ziat, Ben Kiran) (Spain v. Gr. Brit.)*, 2 R.I.A.A. 729 (1925) (no violation where police protection under the circumstances would not have prevented mob from destroying claimant's store).

applicable to all contexts. The customary international law minimum standard is in this sense analogous to the common-law approach of distinguishing among a number of distinct torts potentially applicable to particular conduct, as contrasted with the civil-law approach of prescribing a single delict applicable to all conduct. As with common-law torts, the burden under Article 1105(1) is on the claimant to identify the applicable rule and to articulate and prove that the respondent engaged in conduct that violated that rule.

Thus, for example, in a case in which a claimant asserts that it has suffered injury as a result of an allegedly unjust court judgment, the factors a tribunal applying Article 1105(1) must take into account are those for an alleged substantive denial of justice: whether the judgment in question effects a "manifest injustice" or "gross unfairness,"[7] "flagrant and inexcusable violation,"[8] or "palpable deviation" in which "[b]ad faith – not judicial error seems to be the heart of the matter."[9] Where a claimant asserts that it suffered injury as a result of the destruction of its property by private citizens, the factors a tribunal applying Article 1105(1) must take into account are those for an alleged denial of full protection and

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[7] J.W. Garner, *International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to Denial of Justice*, 1929 BRIT.Y.B. INT'L L. 181, 183; *see also id.* at 188 ("manifestly or notoriously unjust" decisions).

[8] Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 R.C.A.D.I. 267, 281 (1978).

[9] 2 DANIEL P. O'CONNELL, INTERNATIONAL LAW 948 (2d ed. 1970); *see also, e.g.*, *Garrison's Case (U.S. v. Mex.)* (1871), 3 MOORE'S INT'L ARBITRATION 3129 (1868) (an "extreme" case where court "act[ing] with great irregularity" refused Garrison's appeal "by intrigues or unlawful transactions"); *Rihani*, Am.-Mex. Cl. Comm'n (1942), 1948 Am. Mex. Cl. Rep. 254, 257-58 (finding decision of the Supreme Court of Justice of Mexico "such a gross and wrongful error as to constitute a denial of justice"); *The Texas Company*, Am.-Mex. Cl. Comm'n (1942), 1948 Am. Mex. Cl. Rep. 142, 144 (rejecting claim for failure to show error by Supreme Court of Justice of Mexico "resulting in a manifest injustice"); *Chattin (U.S.) v. Mexico* (1927), 4 R.I.A.A. 282, 286-87 (requiring that injustice committed by judiciary rise to the level of "an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man").

security: whether, under all the circumstances, the police exerted the minimum level of protection against criminal conduct required as a matter of customary international law.[10]

Here, however, ADF asserts that it has suffered injury under Article 1105(1) because the FHWA, admittedly acting in accordance with the regulation's terms and the agency's longstanding administrative policy, applied to its investment a regulation of general application.[11] ADF does not contend that the substance of the regulation was contrary to customary international law.[12] It does not contend that the application of the regulation effected a denial of justice.[13]

Instead, ADF's complaint is that, pursuant to statutory authority, the FHWA promulgated a regulation that was more specific than the terms of the statute that the regulations implemented (*i.e.*, the 1982 Act).[14] It contends that, even though the regulation long preceded its contract bid, it was confused by the existence of a more general standard in the statute and a more specific standard in the implementing regulation.[15] It further asserts that the United States Congress should have acted to resolve the supposed inconsistency

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[10] *See* authorities cited *supra* n.6

[11] *See* Transcript, Apr. 18, 2002, at 905-08 (statement of Mr. Kirby); *see also id.* at 904 ("The way the law was applied--once again, not challenging that that was the way it was done. That's what the regulations say.").

[12] *See id.* at 904 (statement of Mr. Kirby) ("Or because you can well say--they could still have passed it as a rule of origin--as a 100 percent content rule. Theoretically, Congress could have said all manufactured products as well, 100 percent content.").

[13] *See id.* at 911 (statement of Mr. Kirby) ("this isn't a denial of justice case").

[14] *See id.* at 900-04 (statement of Mr. Kirby).

[15] *See id.*; *see also id.* at 901 ("And when he looks at that entire chain, what he sees is a very, very difficult beast to conceptualize, and he is left with either believe what the lowest official tells me and that's it, or believe that that lower official must surely recognize that what he's doing is so different to what the statute requires that we challenge him or we do something else.").

between the general standard in the statute and the more specific one in the regulation.[16] It does not identify any rule of the customary international law minimum standard of treatment of aliens that is implicated by its assertions.

Under these circumstances, the United States submits that the Tribunal's analysis under Article 1105(1) must begin and end with an assessment of whether ADF has articulated a violation of any applicable rule of customary international law. The United States submits that ADF has articulated no such violation. As the United States noted in its Rejoinder (at 32-33), the system of administrative rule-making in the United States grants certain agencies, including the FHWA, the rule-making authority to promulgate specific regulations that implement more general statutory provisions. The United States, of course, has the sovereign right under international law to structure its rule-making organs in this manner. As the International Court of Justice has observed: "No rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today."[17] No breach of customary international law may be stated based on the allegation that the FHWA's regulation was more specific than the congressional statute it implemented.[18]

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[16] *See* Transcript, Apr. 18, 2002, at 889 (statement of Mr. Kirby) ("there is an ongoing duty on the part of Congress to rectify and not to leave that arbitrary application of the laws in the hands of the administrative officials at Federal Highway."); *id.* at 898 (referring to the supposed "duty of Congress to ensure that its laws are properly administered and applied.").

[17] *Western Sahara*, 1975 I.C.J. 12, 43-44 ¶ 94 (Oct. 16).

[18] On various occasions in these proceedings, ADF has argued that the FHWA's promulgation of implementing regulations in 1983 was *ultra vires*. ADF recognized at the hearing, however, that any claim with respect to the promulgation of the regulations could not be entertained under the NAFTA, which did not enter into force until 1994. *See* Transcript, Apr. 18, 2002, at 905-10. In any event, as the United States demonstrated in its pleadings and at the hearing, the regulations were amply within the FHWA's authority and ADF's assertion of *ultra vires* action under municipal law in any case could not, by itself, establish a violation of customary international law. *See* Counter-Mem. at 15-16; Rejoinder at 32-33.

Because ADF's assertions implicate no applicable rule of customary international law, the predicate necessary for determining what factors would be relevant to an analysis under Article 1105(1) is absent. In other words, because the relevant factors depend upon the applicable rule, the absence of such a rule here renders identification of such factors unnecessary!. The absence of an applicable rule should end the Tribunal's analysis under Article 1105(1).

Finally, the United States notes that the foregoing response to the Tribunal's question is based on ADF's position as stated in its pleadings and at the hearing. It is, of course, far too late for ADF to attempt to change its position at this stage of the proceeding. Should ADF nonetheless attempt to do so in its responsive submission, the United States reserves its right to object and to request the opportunity to address any new articulation of ADF's Article 1105(1) claim.

II. OBSERVATIONS ON THE *POPE* DAMAGES AWARD

An award of a Chapter Eleven tribunal has "no binding force except between the disputing parties and in respect of the particular case." NAFTA art. 1136(1). The significance of such an award for another tribunal, therefore, depends among other things upon the persuasiveness of the reasoning expressed in the award.

Although the recent *Pope* award is an "Award in Respect of Damages," it addresses primarily the Free Trade Commission's July 31, 2001 interpretation of Article 1105(1), which was issued after the *Pope* tribunal's award on the merits but before the damages award. The United States, therefore, directs its observations on the *Pope* Damages Award to the tribunal's treatment of the FTC interpretation.

The United States submits that there is no persuasive force to the *Pope* tribunal's suggestion that it need not abide by a Free Trade Commission ("FTC") interpretation of a provision of the NAFTA. In addition to lacking support in the NAFTA or elsewhere, the bulk of the *Pope* Damages Award consists of opinions extraneous to the narrow grounds on which the decision was ultimately based – opinions of the type known in common-law jurisdictions as *obiter dicta* and which are given lesser weight than those on which the decision rests.[19] As the United States demonstrates below, the *Pope* Damages Award merits little consideration for several reasons.

A. The NAFTA Does Not Authorize Chapter Eleven Tribunals To Disregard The Actions Of The Free Trade Commission

The *Pope* tribunal was wrong to suggest in *dicta* that the NAFTA grants it the authority to sit in judgment of the NAFTA Parties' acts undertaken pursuant to NAFTA Chapter Twenty.[20] Although the NAFTA contemplates that both the Free Trade Commission and Chapter Eleven tribunals may have reason to interpret the meaning of a provision of the Agreement, the text of the NAFTA confirms the subsidiary role of Chapter Eleven tribunals *vis-à-vis* the FTC in that regard.

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[19] Indeed, it is noteworthy that the 41-page "Award in Respect of Damages" addresses the subject of damages only in the last nine pages, and begins that brief discussion under a heading styled "Other Issues."

[20] *See Pope* Damages Award ¶¶ 23-24.

In Chapter Twenty, the three NAFTA Parties gave the FTC plenary authority over the implementation and interpretation of the NAFTA generally. Among other things, Chapter Twenty provides that "[t]he Commission *shall* . . . supervise the implementation of this Agreement," and it *shall* resolve, without qualification, "disputes that may arise regarding its interpretation or application[.]" NAFTA art. 2001(2)(a), (c) (emphasis added). The three Parties thus manifested their shared intent "to arrive at a mutually satisfactory resolution" – through the Free Trade Commission – "of *any matter* that might affect [the NAFTA's] operation." *Id.* art. 2003 (emphasis added).

Chapter Eleven, in contrast, authorizes *ad hoc* Chapter Eleven tribunals to settle only a limited range of investment disputes and, likewise, grants each tribunal limited authority over a particular investment dispute and the individual claimant and NAFTA Party involved. *See* NAFTA arts. 1116-1117; art. 1136(1) ("An award made by a Tribunal shall have no binding force except between disputing parties and in respect of the particular case.").[21] Thus, although a tribunal may be called upon to apply a provision of the NAFTA in settling an investment dispute (*see id.* art. 1131(1)), its own interpretation of such a provision does not bind other Chapter Eleven tribunals.

The same is not true, however, of an interpretation by the FTC, which binds all Chapter Eleven tribunals. Indeed, the NAFTA directly addresses the possibility that a Chapter Eleven tribunal may have to apply a provision of the NAFTA as to which the FTC has issued an interpretation. In such a case, the FTC's plenary power overrules a tribunal's authority to interpret particular NAFTA provisions in deciding issues in investment disputes:

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[21] *See also* NAFTA art. 1134 (Chapter Eleven tribunals may not even issue recommendations with respect to the measure alleged to constitute a breach).

"An interpretation by the Commission of a provision of this Agreement *shall be binding* on a Tribunal established under [Section B of Chapter Eleven]."[22] It follows that a Chapter Eleven tribunal may not disregard an interpretation of a provision of the NAFTA by the NAFTA Parties, acting through the FTC pursuant to Chapter Twenty, or interpret that provision in a manner inconsistent with an FTC interpretation.[23] The NAFTA Parties thus expressly limited the powers of Chapter Eleven tribunals with respect to the interpretation of the NAFTA, and made those powers subject to decisions taken by the Free Trade Commission.

Any other result would thwart the intent of the NAFTA Parties and render provisions of the NAFTA ineffective. If, as suggested by the *Pope* tribunal in *dicta*, a Chapter Eleven tribunal could disregard an FTC interpretation that differs from the tribunal's own reading of a NAFTA provision, the aims of Article 1131(2) and Chapter Twenty would be defeated. The FTC's authority under Article 2001 to issue interpretations binding, by virtue of Article 1131(2), on all Chapter Eleven tribunals ensures the consistent and uniform interpretation of the NAFTA. That purpose would not be served if individual Chapter Eleven tribunals could disregard an FTC interpretation based on an *ad hoc* judgment as to whether the FTC was correct in viewing its action as an interpretation. Indeed, principles of international law do

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[22] NAFTA art. 1131(2) (emphasis added). Even the *Pope* tribunal recognized that such an interpretation binds all constituted tribunals, regardless of the phase of the pending arbitration. *See Pope* Damages Award ¶ 51.

[23] Indeed, the NAFTA considers the views of the Parties regarding questions of interpretation to be of significant importance even when not expressed in the form of a binding interpretation under Article 1131(2). *See, e.g.*, NAFTA art. 1128 (allowing non-disputing Parties to make submissions to a tribunal regarding questions of interpretation); *id.* art. 2020 (calling on the NAFTA Parties to seek agreement on an interpretation of the NAFTA when the issue of interpretation arises in a domestic proceeding); *see also id.* art. 1132 (providing that, where a defense is asserted based on a reservation or exception set out in an Annex, an interpretation by the Commission "shall be binding" on a tribunal, and only if no interpretation is submitted shall the tribunal decide the issue).

not endorse such a result, because it would effectively "deprive the [FTC] of an important power which has been entrusted to it by the [NAFTA],"[24] and thereby render provisions of the NAFTA ineffective.[25] In other words, if a Chapter Eleven tribunal were to disregard an FTC interpretation by characterizing it as an amendment, the result would be to override the FTC's interpretation. This would be precisely the reverse of the approach envisioned under the NAFTA, in which the FTC's interpretive authority ranks above that of tribunals, not the other way around.

Indeed, nothing in the text of the NAFTA supports the view that FTC interpretations would be subject to such review by an *ad hoc* tribunal constituted under Chapter Eleven. Where the Parties envisaged a review mechanism – for example, in Article 1136(3), which contemplates ICSID or municipal court proceedings to annul or review final Chapter Eleven awards – the Parties expressly stated their intent. By contrast, no provision of Chapter Twenty nor any provision elsewhere in the NAFTA calls for review of FTC action. Had the parties intended Chapter Eleven tribunals to review and selectively disregard FTC actions, as the *Pope* Damages Award suggests in *dicta*, provisions enabling – or at least referencing –

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[24] *Competence of the General Assembly for the Admission of a State to the United Nations*, 1950 I.C.J. 4, 9 (Mar. 3) ("To hold that the General Assembly has power to admit a State to membership in the absence of a recommendation of the Security Council would be to deprive the Security Council of an important power which has been entrusted to it by the Charter. It would almost nullify the role of the Security Council in the exercise of one of the essential functions of the Organization.").

[25] *See Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6 ¶ 51 (Feb. 3) (collecting authorities supporting "one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness"); *accord Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 24 (Apr. 9) ("It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.").

such review would have been included in the NAFTA.[26] The absence of such provisions refutes the *Pope* tribunal's *dicta*.

In sum, the NAFTA does not permit a Chapter Eleven tribunal to review an interpretation of the NAFTA Parties sitting as the members of the FTC and to disregard it on the ground that the tribunal considers it to be an "amendment." For a Chapter Eleven tribunal to disregard a Free Trade Commission interpretation is thus to exceed the scope of its authority under the NAFTA.

B. The *Pope* Tribunal Erred In Its *Dicta* Interpreting Article 1105(1)

As demonstrated below, the *Pope* tribunal's reasoning in *dicta* with respect to Article 1105(1) is not only contrary to an FTC interpretation binding on this Tribunal, but contrary to established principles of treaty interpretation. It also is based upon a lack of appreciation for how rules of customary international law are established and finds no support in the principal authority relied upon by the *Pope* tribunal.

1. The *Pope* Tribunal Ignored Well-Settled Principles of Treaty Interpretation

As the United States previously demonstrated and the FTC confirmed, the *Pope* tribunal erred in its interpretation of Article 1105(1) in its April 10, 2001 Award on the Merits ("*Pope* Merits Award").[27] This incorrect interpretation, which the *Pope* tribunal

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[26] *Cf., e.g.*, Treaty Establishing the European Community, Mar. 25, 1957, art. 230 (*ex* art. 173), *available at* <http://www.europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf> ("The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission . . . and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.").

[27] *See* Counter-Mem. at 49-50; Rejoinder at 33.

reiterated in its May 31, 2002 Damages Award (but ultimately did not apply), defies established principles of treaty interpretation in several respects.[28]

First, the *Pope* tribunal admitted that its interpretation of Article 1105(1) is inconsistent with the plain meaning of that Article's text.[29] Such an approach flatly disregards the cardinal rule, set forth in the Vienna Convention on the Law of Treaties ("Vienna Convention"), that "[a] treaty shall be interpreted . . . in accordance with the ordinary meaning to be given to the terms of the treaty[.]"[30]

Second, there is no basis in international law for the *Pope* tribunal's analysis of the phrase "international law" in Article 1105(1) based solely on the reference to that term in the Statute of the International Court of Justice, a treaty not related to the NAFTA.[31] To the contrary, customary international law requires that treaty terms be construed "*in their context* and in the light of [the treaty's] object and purpose."[32] That context includes the text of the treaty and certain related instruments, but does not include unrelated treaties.[33]

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[28] *See Pope* Damages Award ¶¶ 9, 44.

[29] *See id.* ¶ 9 ("[T]he Tribunal determined that, notwithstanding the language of Article 1105, ***which admittedly suggests otherwise***, the requirement to accord NAFTA investors fair and equitable treatment was independent of, not subsumed by the requirement to accord them treatment required by international law.") (emphasis added).

[30] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Convention"), art. 31(1).

[31] *See Pope* Damages Award ¶ 46 & n.35 (relying exclusively on Article 38 of the Statute of the International Court of Justice). Contrary to the *Pope* tribunal's approach, Article 38 does not purport to define the term "international law" in any event.

[32] Vienna Convention art. 31(1) (emphasis added).

[33] *See id.* art. 31(2) ("The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text . . . : (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.").

The context of Article 1105(1), which the *Pope* Damages Award does not consider, unequivocally demonstrates that the NAFTA Parties did *not* intend to incorporate the entirety of international law in that provision. Notably, the NAFTA's provisions show that, although the Parties were well aware of the international legal obligations contained in the NAFTA and in other agreements in force between them,[34] they intended to subject to investor-State arbitration only a narrow range of obligations: Articles 1116(1) and 1117(1) provide for investor-State arbitration only of "a claim that another Party has breached an *obligation under . . . Section A or Article 1503(2)* . . . or . . . *Article 1502(3)(a)*[.]" (Emphasis added). Reading Article 1105(1) to encompass *all* international legal obligations would render meaningless the clearly stated limitation in Articles 1116 and 1117. If the NAFTA Parties intended to offer Chapter Eleven arbitration for breaches of any international legal obligation, including those contained in the NAFTA, they would not have drafted Articles 1116 and 1117 as they did.

For example, the NAFTA states various obligations of the NAFTA Parties with respect to sanitary and phytosanitary measures. *See, e.g.*, NAFTA Chapter Seven, Section B, arts. 709-723. The NAFTA, of course, is an international convention within the meaning of Article 38(1)(a) of the Statute of the International Court of Justice, and the obligations with respect to sanitary and phytosanitary measures are obligations in international law as among the NAFTA Parties. Articles 1116(1) and 1117(1) make perfectly clear, however, that the NAFTA Parties did not intend to subject claims of violations of those international law obligations to investor-State arbitration under Chapter Eleven of the NAFTA. Reading

[34] *See* NAFTA art. 103 ("In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency . . . .").

Article 1105(1) to encompass all international legal obligations, including these, cannot be reconciled with the context of the provision.

Similarly, under the *Pope* tribunal's interpretation of Article 1105(1), it would be unnecessary for a claimant under Chapter Eleven to specify that it was bringing a claim under any article of Section A of Chapter Eleven other than Article 1105(1). Rather, under the *Pope* tribunal's reading, a claim of a violation of, for example, Chapter Eleven's national treatment provision would be subsumed in an Article 1105(1) claim. Those incongruous results are not what the NAFTA Parties intended. Indeed, the binding FTC Interpretation has made it clear that "[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)." FTC Interpretation (July 31, 2001) ¶ B(3).

The context of Article 1105(1) further shows that the international legal obligations the NAFTA Parties had in mind in Article 1105(1) were those setting forth minimum standards of treatment of foreign persons and their property in the territory of the host State. NAFTA Article 1105(1) itself reflects the NAFTA Parties' commitment to provide "investments of investors of *another Party*" with the international minimum standard of treatment. The title of the article is "Minimum Standard of Treatment."[35] There is a body of international law that sets forth minimum standards of treatment for property of nationals of a State in the territory of another State. As the FTC observed in its clarification, that body of law is one established under customary international law, and it is known as the customary

[35] *See also* NAFTA art. 1101(1)(a)-(b) (limiting the scope of application of Chapter Eleven, in pertinent part, to "measures maintained or adopted by a Party relating to . . . investments of investors of another Party in the territory of the Party").

international law minimum standard of treatment of aliens.[36] Thus, the context of Article 1105(1) conclusively confirms the correctness of the FTC interpretation and rejects the ill-considered views of the *Pope* tribunal.

Third, the *Pope* tribunal similarly erred in its reliance on provisions of bilateral investment treaties ("BITs") to interpret NAFTA Article 1105(1).[37] Those treaties are not part of the context for interpreting Article 1105(1) as defined by Article 31(2) of the Vienna Convention. The Vienna Convention clearly defines the "context" of a treaty to include only those "agreement[s] . . . which [were] *made between all the parties*" of the treaty and "instrument[s] . . . made by one or more parties . . . and *accepted by the other parties* as an instrument related to the treaty."[38] Neither Mexico nor Canada has entered into a BIT with the United States. Nor has any NAFTA Party accepted, as contemplated by Article 31(2) of the Vienna Convention, the BITs as instruments related to the NAFTA. Therefore, the *Pope* tribunal erred in relying on the BITs as "context" to interpret the NAFTA.

Moreover, there is no foundation in any event for the *Pope* Award's suggestion of "stark inconsistencies" between the BITs' provisions on "fair and equitable treatment" and the text of Article 1105(1).[39] The *Pope* tribunal's reading of those BIT provisions, based in

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[36] *See* FTC Interpretation ¶ B(1)-(2). Contrary to the *Pope* tribunal's erroneous suggestion, the NAFTA Parties did not seek, by issuing the interpretation of Article 1105(1), to modify the phrase "international law." *See Pope* Damages Award at n.9 ("the clarification consisted of adding the word 'customary' as a modifier."); *id.* at n.37 (characterizing the United States' position as arguing "that the term 'international law' in Article 1105 means customary international law"). Rather, in paragraph B(1) of the July 31, 2001 Interpretation, the three NAFTA Parties interpreted the meaning of the obligation agreed to in Article 1105(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."

[37] *See Pope* Merits Award ¶¶ 110- 117; *Pope* Damages Award ¶¶ 9, 27, 44, 61-62.

[38] Vienna Convention art. 31(2) (emphasis added).

[39] *See Pope* Damages Award ¶ 25.

particular on the views of academics regarding United States BITs, is flatly inconsistent with what the United States Department of State repeatedly has advised the United States Senate that provision means in submitting the treaties for constitutionally-required advice and consent: that the provision was intended to require a minimum standard of treatment based on *customary international law*.[40] The United States' understanding of the BITs it negotiated is the same as the understanding of NAFTA Article 1105(1) expressed in the Canadian Statement of Implementation, issued on January 1, 1994, the day the NAFTA entered into force: "Article 1105 . . . provides for a minimum absolute standard of treatment, *based on long-standing principles of customary international law*."[41] The *Pope* tribunal therefore erred in suggesting that there were inconsistencies between the "fair and equitable treatment" provisions of the BITs and Article 1105(1).[42]

Indeed, for all of the reasons stated above, the United States joined Canada and Mexico in late 2000 in a submission to the *Pope* tribunal, stating that the treatment to be accorded to "investments of investors of another Party" under Article 1105(1) is the

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[40] *See* U.S. Rejoinder at nn.59-61 & accompanying text (listing Department of State letters submitting U.S. BITs to Congress that clarify that "'fair and equitable' treatment in accordance with international law. . . . sets out a minimum standard of treatment based on customary international law").

[41] Canadian Statement of Implementation at 149 (Jan. 1, 1994) (emphasis added).

[42] The *Pope* tribunal mischaracterized the United States as having "asserted that the difference [between the text of the BITs and Article 1105(1) of the NAFTA] was the product of a conscious decision by the NAFTA Parties to change the approach in the BITs." *Pope* Damages Award ¶ 27. Rather, the United States explained to the *Pope* tribunal that the NAFTA Parties, in Article 1105(1), merely "chose a formulation that expressly tied fair and equitable treatment to the customary international minimum standard" to exclude any other conclusion in light of the academic debate concerning the meaning of the phrase "fair and equitable treatment" as it appears in the BITs without express reference to customary international law. Fourth Submission of the United States in *Pope & Talbot, Inc. v. Canada* (Nov. 1, 2000) ¶¶ 7-8. Notwithstanding the academic debate, however, neither the U.S. BITs nor NAFTA Article 1105(1) requires treatment beyond the minimum standard of treatment based on customary international law.

minimum standard of treatment of aliens under customary international law.[43] The *Pope* tribunal, however, rejected that interpretation and provided its own interpretation, stating, among other things, that "[n]either Mexico nor Canada has subscribed to the version of the intent of the drafters put forward by the United States."[44] Mexico then responded, noting that the *Pope* tribunal was incorrect, and that all three NAFTA Parties had subscribed to that same interpretation.[45] The *Pope* tribunal never addressed the point raised in Mexico's submission and did not acknowledge it in its Damages Award. Instead, even after the three NAFTA Parties issued their binding interpretation in July 2001, largely to address the *Pope* tribunal's failure to heed to the NAFTA Parties prior statements regarding the interpretation of Article 1105(1), the *Pope* tribunal in its Damages Award concluded in *dicta* that the Parties had attempted to amend the NAFTA.[46]

Finally, 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.[47] The premise for the tribunal's reference to *travaux préparatoires* was its suggestion that the text of Article 1105(1) "contained ambiguities that had to be resolved by those charged with interpreting the texts."[48] The *Pope* tribunal's suggestion, however, cannot be reconciled with its *dicta* suggesting that the meaning of Article 1105(1) was so clear that

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[43] *See* Fourth Submission of the United States in *Pope & Talbot* (Nov. 1, 2000) ¶¶ 7-8.

[44] *Pope* Merits Award ¶ 114 n.109.

[45] *See* Submission of Mexico in *Pope & Talbot* (Apr. 25, 2001) at 1-2 (stating "all three NAFTA Parties pleaded that Article 1105 incorporates only the international minimum standard" and requesting that the *Pope* tribunal issue a *corrigendum* to reflect accurately Mexico's views with regard to the parameters of Article 1105).

[46] *See Pope* Damages Award ¶ 47.

[47] The Vienna Convention permits resort to supplementary means of treaty interpretation only for specified purposes. *See* Vienna Convention art. 32.

[48] *See Pope* Damages Award ¶ 26 & n.10.

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.[49]

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."[50] Nonetheless, the *Pope* tribunal inexplicably suggested that the negotiating history supported its view, expressed in *dicta*, that the FTC interpretation was an "amendment."[51] Basing such a result on such a history as this cannot be reconciled with accepted approaches to treaty interpretation.[52]

2. The *Pope* Tribunal Erred In Its Approach To The Development of Customary International Law Through Treaty-Making

The *Pope* tribunal observed in its award on damages that treaties such as bilateral investment treaties reflect State practice, but it erred by implying that such State practice –

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[49] Vienna Convention art. 32(a)-(b).

[50] *See Pope* Damages Award ¶¶ 38, 43, 46.

[51] *Id.* ¶ 47.

[52] *See* Vienna Convention art. 32; *see also Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* 1995 I.C.J. 5, 21-2 ¶ 41 (Feb. 15) (stating that *travaux* similar to those that do exist for the NAFTA "must be used with caution . . . on account of their fragmentary nature;" where the *final* text did not exclude Qatar's interpretation, the Court was "unable to see why the abandonment of a form of words corresponding to the interpretation given by Qatar to the[] [treaty] should imply that the [treaty] must be interpreted in accordance with Bahrain's thesis."). The *Pope* tribunal also questioned Canada's statement to the claimant that there were "no mutually agreed negotiating texts." *Pope* Damages Award ¶¶ 31, 40. In the United States' view, however, short of the final text of the signed NAFTA itself, there are no such "mutually agreed" texts.

without more – is sufficient to establish a rule of customary international law. *See Pope* Damages Award ¶ 59 ("International agreements constitute practice of states and contribute to the grounds of customary international law."); *id.* ¶ 62 ("the practice of states is now represented by [in excess of 1800 bilateral investment] treaties").

As the United States has previously advised this Tribunal, customary international law, including the minimum standard of treatment of aliens, may evolve over time. *Cf. Pope* Damages Award ¶ 58 (rejecting "static conception of customary international law"). In addition, treaties, including BITs, may constitute a form of State practice as between or among the parties to a given treaty. However, the United States disagrees with the *Pope* Damages Award in that it appears to ascribe legal significance to this form of State practice without further analysis.

It is elemental that a rule may be considered to form part of customary international law only where the rule is established by a general and consistent practice of States *followed by them from a sense of legal obligation.*[53] In other words, a customary international law rule is established by two elements: "a concordant practice of a number of States acquiesced in by others; and a conception that the practice is required by or consistent with the prevailing law (the *opinio juris*)."[54]

In addition, the International Court of Justice has observed that several factors must be considered in assessing whether a *treaty-based* rule reflects *opinio juris* supporting the existence of a customary, rather than simply a treaty-based, obligation. In *North Sea*

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[53] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

[54] CLIVE PARRY, JOHN P. GRANT, ANTHONY PARRY & ARTHUR D. WATTS, ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 82 (1986).

Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), the Court held that, in order for a provision to become part of customary international law, among other things, it must be "a norm-creating provision," one which "is now accepted as [a norm of the general corpus of international law] by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention."[55]

While a bilateral investment treaty may reflect State practice between the two parties to that BIT, the *Pope* tribunal erred in its analysis of the BITs. It made no attempt to analyze either the consistency of State practice in investment treaties or whether any such State practice evidenced the *opinio juris* necessary to establish customary international law.[56] The tribunal does not even mention *opinio juris*, let alone cite any evidence of it. Indeed, as mentioned above, the *Pope* tribunal found "stark inconsistencies between the provisions of BITs and corresponding commitments of Article 1105."[57] Thus, because it failed even to attempt the requisite analysis, the *Pope* tribunal's statement that BITs are State practice cannot support a view that any particular BIT obligation has crystallized into a rule of customary international law.

3. The *Pope* Tribunal Erred In Its Analysis Of Authority Purportedly Supporting Its Award

Finally, the United States notes that the decision of the Chamber of the International Court of Justice in *Elettronica Sicula S.P.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15 (July 20),

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[55] 1969 I.C.J. 3, 41 ¶ 71 (Feb. 20).

[56] *See Pope* Damages Award ¶¶ 59-62.

[57] *Id.* ¶ 25.

does not support the *Pope* tribunal's conclusions with respect to the evolution and content of customary international law.[58]

In *ELSI*, the ICJ interpreted a treaty provision, not replicated in the text of the NAFTA, which prohibited certain "arbitrary" measures.[59] The ICJ was not applying customary international law to the claims of arbitrariness presented in *ELSI*. Thus, contrary to the *Pope* tribunal's suggestion, the decision in *ELSI* cannot reflect an evolution in customary international law. Of course, citation to a single authority applying a conventional standard does not demonstrate the requisite State practice or *opinio juris* necessary to establish the existence of a principle of customary international law.[60] In fact, *ELSI* did not even purport to address customary international law standards requiring treatment of an alien amounting to an "outrage" for a finding of a violation. In any event, ELSI clearly does not establish that any relevant standard under customary international requires mere "surprise."[61] The *Pope* tribunal's approach should be rejected.

CONCLUSION

For the foregoing reasons, the United States respectfully submits that there is no occasion for the Tribunal to identify factors or types of factors relevant to an analysis under

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[58] *See Pope* Damages Award ¶¶ 63-64.

[59] *See ELSI*, 1989 I.C.J. at 72 (quoting Article I of the Supplementary Agreement to the 1948 FCN Treaty between Italy and the United States as follows: "The nationals, corporations and associations of either High Contracting Party shall not be subjected to arbitrary or discriminatory measures . . . ."). Even assuming the *Pope* tribunal's broad view of the meaning of Article 1105(1) is correct (and it is not), because the FCN Treaty in *ELSI* is not in force as between Canada, Mexico and the United States, the *ELSI* cannot provide any rule of decision applicable here. *See* Statute of the International Court of Justice art. 38(1)(a) (stating that the ICJ shall apply "international conventions . . . establishing rules expressly recognized by the contesting states").

[60] *See supra* nn.53-54 and accompanying text.

[61] *See Pope* Damages Award ¶ 64.

Article 1105(1) because ADF's has failed to identify any rule of customary international implicated by its claims. The United States further submits that the Tribunal should not rely on the *Pope* Damages Award as it is poorly-reasoned and unpersuasive.

Respectfully submitted,

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June 27, 2002

Attachment C

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES
BETWEEN

ADF GROUP INC.,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

Case No. ARB(AF)/00/1

FINAL POST-HEARING SUBMISSION OF RESPONDENT UNITED STATES OF AMERICA ON ARTICLE 1105(1) AND *POPE & TALBOT*

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August 1, 2002

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IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES
BETWEEN

ADF GROUP INC.,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

Case No. ARB(AF)/00/1

FINAL POST-HEARING SUBMISSION OF RESPONDENT UNITED STATES OF AMERICA ON ARTICLE 1105(1) AND *POPE & TALBOT*

In accordance with the Tribunal's letter-order of June 17, 2002, and in response to the Article 1128 submissions of Canada and Mexico, the United States respectfully submits these final observations on Article 1105(1) and the *Pope* Damages Award.[1]

I. CANADA'S AND MEXICO'S ARTICLE 1128 SUBMISSIONS ACCORD WITH THE UNITED STATES' VIEWS OF THE ERRORS COMMITTED BY THE *POPE & TALBOT* TRIBUNAL

As ADF itself has acknowledged, the significance of an award rendered by a Chapter Eleven tribunal for another Chapter Eleven tribunal depends principally on the

[1] Except as otherwise noted, the abbreviations used herein are those adopted in the United States' prior pleadings and submissions.

persuasiveness of the award's reasoning.[2] In their Article 1128 submissions, Canada and Mexico agree with the United States that the *Pope* Damages Award is poorly-reasoned in many respects and incorrectly interprets the provisions of the NAFTA. The agreement among the three NAFTA Parties with respect to these misinterpretations may not be disregarded. As recognized in Article 31(3)(a) of the Vienna Convention on the Law of Treaties ("Vienna Convention"), any agreement as to the proper interpretation of the treaty "*shall* be taken into account."[3] In light of the agreement expressed by the NAFTA Parties, the interpretive analysis of the *Pope* Damages Award should not be relied upon by this Tribunal.[4]

As a preliminary matter, all three NAFTA Parties confirm in their submissions that, contrary to the views expressed by the *Pope* tribunal, the NAFTA does not permit a Chapter Eleven tribunal to review an interpretation of the NAFTA Parties, sitting as members of the FTC, and disregard it on the ground that the tribunal considers it to be an "amendment."[5] Thus, there is agreement among the Parties that the *Pope* tribunal erred when it determined that it should question whether the FTC interpretation was binding on it.[6] ADF's suggestion

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[2] Post-Hearing Submission of Claimant ADF Group Inc. on NAFTA Article 1105(1) and the Damages Award in *Pope & Talbot and Canada*, dated July 11, 2002 ("ADF Submission") ¶ 50.

[3] *See* Vienna Convention on the Law of Treaties, May 22, 1969, art. 31(3)(a), 1155 U.N.T.S. 331 ("There *shall* be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions[.]") (emphasis added).

[4] *See* Second Submission of Canada Pursuant to *NAFTA* Article 1128, dated July 19, 2002 ("Can. Submission") ¶ 6; Second Article 1128 Submission of the United Mexican States in the Matter of ADF Group Inc. v. United States of America, dated July 22, 2002 ("Mex. Submission") at 23; Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot*, dated June 27, 2002 ("U.S. Submission") at 7-8.

[5] *See* Can. Submission ¶¶ 7-17; Mex. Submission at 18-19; U.S. Submission at 8-12.

[6] *See generally id.*

that this Tribunal should similarly second-guess the FTC and question whether its interpretation is binding should be rejected.

Furthermore, all three NAFTA Parties agree that the *Pope* tribunal was wrong in suggesting *in dicta* that the FTC Interpretation was an amendment.[7] As the FTC Interpretation makes clear, the interpretation does not change the meaning of Article 1105(1) – it merely clarifies the meaning that the Article has always had.[8] As all three NAFTA Parties have noted, interpreting the words "international law" in Article 1105(1) to refer to all international law, as the *Pope* tribunal suggested, runs afoul of well-established principles of treaty interpretation – notably, by depriving Articles 1116 and 1117 of their effectiveness and by disregarding statements made by Canada contemporaneously with the NAFTA's entry into force.[9] Likewise, all Parties agree that the *Pope* tribunal's "additive" approach to interpreting Article 1105(1) ignores the ordinary meaning of the word "including" in that Article, thus disregarding a cardinal rule of treaty interpretation. The Tribunal, therefore, should reject ADF's suggestion that the FTC interpretation effected an amendment of the NAFTA and somehow "water[ed] down" the protections afforded by Article 1105(1).[10]

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[7] *See* Can. Submission ¶¶ 7, 18-29. *See generally* Mex. Submission at 3-10, 18-19; U.S. Submission at 12-19.

[8] *See* FTC Interpretation of July 31, 2001 chapeau ("[T]he Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to *clarify and reaffirm the meaning* of certain of its provisions[.]") (emphasis added).

[9] *See* Can. Submission ¶¶ 23, 25, 29; Mex. Submission at 4-6; U.S. Submission at 13-15, 17-18. The United States notes that even ADF can explain the *Pope* tribunal's analysis of the meaning of Article 1105(1) only by assuming that the tribunal, without so stating, drew an adverse inference against Canada for Canada's purported failure to produce all of the negotiating history pertaining to Article 1105(1). *See* ADF Submission ¶ 20.

[10] *See* ADF Submission ¶ 49. Contrary to ADF's allegation, the FTC interpretation does not render Article 1105(1) ineffective. As the United States has demonstrated, Article 1105(1), as properly interpreted, provides valuable protections for investors. Without Article 1105(1), for example, an investor would not be able to make a claim for a denial of justice under NAFTA's Chapter Eleven. The fact that ADF cannot make out a claim under Article 1105(1) in no way suggests that the Article is ineffective.

Additionally, all three Parties criticize the *Pope* tribunal's resort to supplementary means of treaty interpretation for purposes of analyzing the meaning of Article 1105(1). For example, all three Parties reject the proposition that bilateral investment treaties are relevant to interpreting the provisions of the NAFTA. Contrary to the *Pope* tribunal's suggestion that the sheer number of BITs could evidence the existence of a rule of customary international law,[11] all three NAFTA Parties agree that State practice alone – without a showing of *opinio juris* – cannot give rise to a rule of customary international law.[12] Because the *Pope* tribunal made no effort to determine the existence of *opinio juris*, its reasoning as to the BITs and customary international law is faulty.[13]

Nor can the provisions of the BITs relied upon by the *Pope* tribunal be viewed as providing "context" for interpreting the NAFTA under the Vienna Convention.[14] As Mexico correctly observes, neither Canada nor Mexico have entered into a BIT with the United States. Under the Vienna Convention, the *Pope* tribunal should not have taken into account

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[11] *See Pope* Damages Award ¶ 62.

[12] *See* Can. Submission ¶¶ 36-38; Mex. Submission at 19; U.S. Submission at 19-21.

[13] In addition, only *consistent* State practice is relevant in this determination. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) ("A rule of law may be considered to form part of customary international law only where the existence of the rule is established by a general and *consistent practice of States* followed by them from a sense of legal obligation.") (emphasis added). The *Pope* tribunal thus erred by relying on the BITs without analyzing whether the BITs upon which they relied contained provisions that reflected consistent State practice.

[14] Vienna Convention art. 31(2) (defining the "context" of a treaty to include only those "agreement[s] . . . which [were] *made between all the parties*" to the treaty and "instrument[s] . . . made by one or more parties . . . and *accepted by the other* parties as an instrument related to the treaty.") (emphasis added).

provisions in the U.S. Model BIT when interpreting Article 1105(1).[15] ADF's attempt similarly to rely on provisions in U.S. BITs should be disregarded.[16]

In addition, the United States notes Canada's agreement that resort to *travaux préparatoires* by the tribunal was inappropriate, as the preconditions for doing so under Article 32 of the Vienna Convention were not satisfied.[17] Because *travaux* are a secondary means of treaty interpretation, the tribunal ought to have resorted to *travaux* only if it could be found that Article 1105(1), considered in light of the primary means of interpretation set forth in Vienna Convention Article 31, was ambiguous.[18] However, Article 1105(1), read as it must be together with the FTC Interpretation,[19] is unambiguous – it clearly states that Article 1105(1) prescribes the customary international law minimum standard of treatment. Thus, the *Pope* tribunal erred in resorting to *travaux* to interpret Article 1105(1).

Having erroneously resorted to *travaux*, the *Pope* tribunal then compounded its error by concluding that the *absence* of the word "customary" in the drafts supported its determination that the FTC Interpretation was an amendment. As both the United States and Canada have observed, this analysis was deeply flawed.[20]

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[15] *See* Mex. Submission at 7; *see also* U.S. Submission at 16.

[16] Moreover, ADF has not provided any evidence in support of its allegation, first set forth in its post-hearing submission, that the terms of two bilateral investment treaties – the U.S.-Albania and the U.S.-Estonia treaties – reflect "evolving" rules of customary international law. *See* ADF Submission ¶ 59.

[17] *See* Can. Submission ¶ 27 (rejecting notion that the FTC interpretation "create[s] 'ambiguity' that Chapter Eleven tribunals must resolve by recourse to *travaux preparatoires*"); U.S. Submission at 18 ("the *Pope* tribunal erred in resorting to the negotiating history at all."); *see also* Mex. Submission at 3-7 (demonstrating that, applying the primary means of interpretation set out in Vienna Convention Article 31, Article 1105(1) is unambiguous and, thus, the analysis presented in the *Pope* Damages Award is unsound).

[18] Vienna Convention art. 32.

[19] *See id.* art. 31(3)(a); NAFTA art. 1131(2).

[20] *See* Can. Submission ¶¶ 19-20; U.S. Submission at 18-19.

For these reasons, ADF's attempt to draw significance from the *Pope* tribunal's discussion of the *travaux* is misplaced. In addition, the United States observes as follows with respect to ADF's extraordinary suggestion that this Tribunal should draw an adverse inference against the United States for its "failure" to provide a negotiating history of Article 1105(1) that ADF never requested the United States to produce and that, as noted above, is irrelevant as a matter of law. The Tribunal will recall that the parties in this case agreed to a detailed procedure for requesting documents in the possession of the other party considered material to a party's case.[21] ADF never invoked that procedure with respect to these documents. Its suggestion that, under these circumstances, an adverse inference can be drawn is unprecedented and insupportable. Unfortunately, this is not the first time that ADF has taken similarly outlandish views of the procedure to be followed in this arbitration.[22]

II. ADF'S NEWLY-PRESENTED ARGUMENTS REGARDING ITS ARTICLE 1105(1) CLAIM ARE BASELESS

In its post-hearing submission on the *Pope* Damages Award, ADF for the first time asserts that the United States violated specific norms of the customary international law minimum standard of treatment of aliens. The Tribunal will recall that ADF's previous written and oral pleadings in this case were based on a theory that Article 1105(1) set forth a

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[21] *See* Procedural Order No. 1, Attachment No. 1, ¶ III.

[22] *See* Letter dated January 30, 2002 from Barton Legum to Tribunal (objecting to ADF's statement that it would introduce new evidence at the hearing and ADF's failure to provide with its written submissions witness statements that were signed and affirmed); April 16, 2002 Tr. at 296:21-298:7 (noting that United States had made thousands of pages of documents available to ADF at its request, but ADF had introduced none of them) (statement of Mr. Clodfelter); Objections to Claimant's Request for Documents of Respondent United States of America (Aug. 17, 2001) at 2-4 (noting that ADF waited until the time began for the United States to prepare its Counter-Memorial before serving the United States with overly broad requests for documents).

new, conventional standard unknown to customary international law. As ADF summarized its position at the hearing:

> I would agree with the proposition that *if we are bringing forward a claim under customary international law*, strict customary international law, it's our burden to prove it. I would suggest that *we are not bringing forward a claim under customary international law*, we're bringing forward a claim under Article 1105, and we're relying on the terms of the treaty.[23]

By contrast, in its post-hearing submission, ADF purports to set forth under "the FTC's customary international law standard . . . factors [that] can be relevant within the context of various fact based scenarios."[24]

The United States objects to ADF's attempt to offer a new theory of its Article 1105(1) claim after the United States has submitted its principal pleadings and after the conclusion of the hearing on competence and liability. ADF's belated attempt to advance new theories and offer new authorities violates the procedures agreed to for this arbitration.[25]

In the event that the Tribunal nonetheless determines to consider ADF's new assertions, the United States respectfully offers the following, brief observations in response. As demonstrated below, the authorities offered by ADF do not support its assertion of a vague, general international obligation to refrain from "arbitrary" or "bad faith" conduct. In

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[23] April 17, 2002 Tr. at 767:3-10 (emphasis added) (statement of Mr. Kirby).

[24] ADF Submission ¶ 64.

[25] *See* Procedural Order No. 1, Attachment 1, ¶ V ("[T]he [p]arties agree[d] that they shall include in or with their written submissions, their legal arguments."); ICSID Additional Facility art. 29(2) ("[T]he Tribunal shall apply any agreement between the parties on procedural matters, which is not inconsistent with any provisions of these Rules, the Additional Facility Rules and the Administrative and Financial Rules . . . ."); *see also* April 17, 2002 Tr. at 745:16-746:15 (same) (statement of Mr. Legum). At the close of the hearing on April 18, 2002, the Tribunal made it clear that the proceedings were completed and that the Tribunal did not expect "anything further" from the parties. *See* Apr. 18, 2002 Tr. at 959:5-10 (statement of President Feliciano). ADF's counsel specifically acknowledged that he had "no difficulty" with the fact that there would be no further submissions absent agreement by the parties or an order from the Tribunal. *See id.* at 959:17-960:1 (statement of Mr. Kirby). There is no such agreement, and the Tribunal's letter-order dated June 17, 2002 does not contemplate an opportunity for ADF to present a new theory of its case. *See* June 17, 2002 letter-order.

any event, there is no evidence here of any conduct that even remotely smacks of "arbitrariness" or "bad faith."

A. The Authorities On "Arbitrary" Conduct Offered By ADF Do Not Establish Any Obligation Implicated Here

It is common ground that the burden of establishing the existence and content of a rule of customary international law rests on the party asserting the existence of the rule.[26] Although ADF discusses at some length an expansive approach to municipal tort law (and argues by extension for a similar approach to international law), it does not seriously dispute – nor can it – that the United States can be held liable under Article 1105(1) only if it has breached an obligation incorporated into that Article and that it is ADF's burden to identify the obligation supposedly breached.[27] As demonstrated below, ADF's belated attempt to identify an obligation that could be the subject of such a breach misses the mark, as none of the authorities it cites support its position:

- ***Behring Fur Seal Arbitration*** **of 1893** – Contrary to ADF's suggestion, this case does not remotely stand for the proposition that "it is a violation of customary international law for a state to act in a discriminatory manner against a foreign national with intent to injure or harm the national or his/her business interests . . . ."[28] The tribunal's award, rather, addresses five specific questions concerning the extent of territorial waters and the ability

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[26] *See* April 17, 2002 Tr. at 767:3-6 ("I would agree with the proposition that if we are bringing forward a claim under customary international law, strict customary international law, *it's our burden to prove it.*") (emphasis added) (statement of Mr. Kirby); Rejoinder at 31-32, n.47; April 16, 2002 Tr. at 501:17-502:10 (statement of Mr. Legum); April 17, 2002 Tr. at 758:5-12 (statement of Mr. Legum); U.S. Submission at 3-4.

[27] *See* ADF Submission ¶¶ 42-47. *But see Land and Maritime Boundary (Cameroon v. Nig.)*, 1998 I.C.J. 275 (June 11) (discussed *infra* at n.50 and accompanying text). Contrary to ADF's suggestion, Professor Fleming (whom ADF cites for its "watertight compartments" notion) does not posit that a tort claimant may prosecute a claim without a cause of action. *See* JOHN G. FLEMMING, THE LAW OF TORTS 7-8 (1998). Rather, Professor Fleming merely observed that new causes of action were recognized over time and that various claims in tort shared fundamental characteristics. *See id.* at 7-8. Lawyers practicing in common-law jurisdictions who have briefed or argued a motion to dismiss for failure to state a claim would find quite puzzling ADF's suggestion that a tort claimant may assert a claim without a recognized cause of action, if that is indeed ADF's position.

[28] ADF Submission ¶ 68.

of a State unilaterally to impose a conservation measure with respect to the high seas.[29] None of those questions even addresses, much less supports, the proposition for which ADF cites the case.[30]

- ***United Nations, Human Rights Committee*, Communication No. 633/1995: Canada 5/5/99, CCPR/C/65/D/633/1995** – This decision dealt with the "right to . . . receive and impart information" articulated in Article 19(2) of the International Covenant on Civil and Political Rights and restrictions on the exercise of that right permissible under Article 19(3).[31] However, ADF's allegations here have nothing to do with any supposed failure to "receive and impart information" within the meaning of Article 19(2) – even assuming that a non-binding Human Rights Committee decision as to that article could be relevant to the content of the customary international law minimum standard of treatment of aliens in any event.

- ***Elettronica Sicula S.P.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15 (July 20)** – ADF duplicates the *Pope* tribunal's error in relying on the decision of the Chamber of the International Court of Justice in *ELSI* as evidencing an obligation under the customary international law minimum standard of treatment. To the contrary, the United States and Mexico agree with Canada that "[t]he *ELSI* decision did not address the minimum standard of treatment under customary international law."[32] Instead, in *ELSI*, the obligation of "arbitrariness" was expressly imposed by treaty. Nor, as each Party has also observed, can *ELSI* be viewed as establishing a standard of mere "surprise" – particularly in light of the Chamber's finding that the facts before it did not establish "arbitrary" conduct.[33]

- **WTO Appellate Body Decisions**[34] – Contrary to ADF's suggestion,[35] these decisions by the WTO Appellate Body are similarly inapposite. Neither addresses an obligation under customary international law. Instead, each applies a specific treaty obligation – namely,

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[29] *See Behring Sea Fur Seal Arbitration (G.B. v. U.S.)*, 1 MOORE'S INT'L ARBITRATIONS 945-55 (Award).

[30] The United States notes that a 1999 paper posted on the Internet erroneously characterizes the *Behring Fur Seals Arbitration* in precisely the same words as those used in ADF's post-hearing submission. *See* Todd Weiler, "'Fair and Equitable Treatment' for Investments: Some Old Cases and Some New," n.5 and accompanying text (1999) *available at* <http://www.carleton.ca/ctpl/abfpapers/invdoc/TodW-UT3a.can.doc>.

[31] *See United Nations, Human Rights Committee*, Communication No. 633/1995: Canada 5/5/99, CCPR/C/65/D/633/1995 (cited in ADF Submission ¶ 69).

[32] Can. Submission ¶ 39; *see also* Mex. Submission at 15 ("the *Pope* tribunal erred in applying the *ELSI* case as evidence of the evolution of customary international law . . . . the Chamber was examining arbitrariness as it was understood at general international law"); U.S. Submission at 16.

[33] *See Pope* Damages Award ¶ 64.

[34] *See US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (October 12, 1998); and *US - Standards for Reformulated and Conventional Gasoline*, WT/DS2/9 (May 20, 1996).

[35] *See* ADF Submission ¶ 67.

the chapeau of GATT Article XX, which explicitly prohibits the application of measures "in a manner which would constitute a means of arbitrary or unjustifiable discrimination" between similarly situated countries.[36] Article 1105(1) neither sets forth any such prohibition nor imposes any general obligation with respect to treaty obligations under the 1994 GATT.[37]

- ***CME Czech Republic, B.V. (Neth.) v. Czech Republic***[38] – In *CME*, the tribunal found a violation of a Dutch-Czech BIT's standards of expropriation, "fair and equitable treatment," and full protection and security, among others. Aside from the finding of expropriation, the tribunal did not explain in any detail the legal rationale behind its findings of violations.[39] It therefore sheds little light on the question before this Tribunal. The *facts* of *CME*, moreover, bear no resemblance to those here – in *CME* the respondent was found to have illegally "coerced" CME through the threat of improper fines and criminal charges against its statutory representatives and executives (among other things), resulting in the "evisceration of the arrangements in reliance upon with the foreign investor was induced to invest."[40] The *CME* award, even if it withstands the ongoing action to set it aside in the Swedish courts, provides little guidance here.[41]

- ***Metalclad Corp. v. United Mexican States*** – To the extent that the *Metalclad* award can be read to suggest that the phrase "fair and equitable" in Article 1105(1) articulates a standard other than the international minimum standard – such as that of transparency – it is wrongly reasoned and should not be followed here.[42] The British Columbia Supreme Court set aside a portion of that award, finding that "no authority was cited or evidence introduced to establish that transparency has become part of customary international law."[43] The court held that the *Metalclad* tribunal had misstated the applicable law to include obligations of transparency which were found outside the substantive obligations of Article 1105(1).[44] The court concluded that, in issuing its award, the tribunal decided a dispute outside the scope of arbitration.[45] *Metalclad* provides no support for ADF's assertions here.

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[36] *See Shrimp Prods.* at 55 ¶ 147; *Reformulated & Conventional Gasoline* at 13.

[37] *See* FTC Interpretation of July 31, 2001 ¶ B(3) ("A determination that there has been a breach of . . . a separate international agreement, does not establish that there has been a breach of Article 1105(1).").

[38] *CME Czech Republic B.V. (Neth.) v. CzechRep.*, Partial Award (Sept. 13, 2001).

[39] *Compare CME* ¶¶ 591-609 (analysis of expropriation claim) *with id.* ¶¶ 610-614 (analysis of "other claims").

[40] *Id.* ¶ 611; *see id.* ¶ 114.

[41] *See, e.g., CzechRep to file complaint against CME Arbitration-Zelinka*, Czech News Agency, 2001 WL 30025494 (Dec. 3, 2001).

[42] *See* ADF Submission ¶¶ 72-73.

[43] *United Mexican States v. Metalclad Corp.*, 2001 BCSC 664 (May 2, 2001) at 25 ¶ 68.

[44] *Id.* at 26 ¶ 70.

[45] *Id.* at 27 ¶ 75.

- *Wena Hotels Ltd. v. Arab Republic of Egypt* – *Wena Hotels* presents a classic case of a violation of the obligation to provide full protection and security – an obligation not at issue in this case.[46] In that case, the Egyptian Hotels Co. (EHC) seized two of Wena's hotels in Egypt. The tribunal found that Egypt had breached its obligations under an Egypt-U.K. BIT by (i) doing nothing to prevent the hotel seizures, although it was aware of EHC's intention to seize the hotels; (ii) doing nothing to protect Wena's investments when the police responded to calls for help during the seizures; (iii) not restoring the hotels to Wena despite its control over EHC both before, during and after the seizures; (iv) failing to prevent damage to the hotels before the hotels' return to Wena; and (v) approving of EHC's actions by failing to impose any substantial sanctions on EHC or its senior officials who were responsible for the seizures.[47] The award does not in any way assist ADF in its attempt to identify a rule of customary international law that could have been breached by the United States here.

In sum, none of the authorities relied upon by ADF supports its assertion that there exists a general international obligation to refrain from "arbitrary" conduct. To the contrary, each of these authorities either applies a specific conventional obligation to that effect, or addresses other obligations that have no bearing on the facts of record here.

B. ADF's Authorities On "Good Faith" Do Not Implicate Any Obligation That Is Applicable Under The Circumstances Presented Here

ADF's attempt to find in customary international law a *general* obligation of "good faith . . . subsumed in the Article 1105(1) obligations undertaken by the U.S. in respect of investors and their investments" is similarly without support.[48] The International Court of Justice has squarely rejected the contention that a general obligation of "good faith" exists, holding that:

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[46] *See, e.g.*, U.S. Submission at 4-5 ("Where a claimant asserts that it suffered injury as a result of the destruction of its property by private citizens, the factors a tribunal applying Article 1105(1) must take into account are those for an alleged denial of full protection and security: whether, under all the circumstances, the police exerted the minimum level of protection against criminal conduct required as a matter of customary international law.").

[47] *See Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID ARB/98/4, ¶ 80-95 (Dec. 8, 2000).

> The principle of good faith is, as the Court has observed, 'one of the basic principles governing the creation and performance of legal obligations' (*Nuclear Tests*, I.C.J. Reports 1974, p. 268, para. 46; p. 473, para. 49); *it is not in itself a source of obligation where none would otherwise exist.*[49]

In *Land and Maritime Boundary (Cameroon v. Nig.)*, 1998 I.C.J. 275 (June 11), the I.C.J. reaffirmed the proper role of good faith articulated above. The Court further noted that there was "no specific obligation in international law" applicable to the conduct at issue in that case, and concluded: "In the absence of any such obligations and of any infringement of Nigeria's corresponding rights, Nigeria may not justifiably rely upon the principle of good faith in support of its submissions."[50]

While it is clear that there is no general obligation of good faith, the United States recognizes that international law does impose obligations of good faith in certain specific circumstances. For example, the United States agrees with ADF that the customary international law rule of *pacta sunt servanda* holds that "[e]very treaty in force is binding on the parties to it and must be performed by them in good faith."[51] Here, of course, the Buy America provisions were not issued to implement treaty obligations. ADF therefore has no basis to contend that the United States performed any treaty obligations in bad faith. No specific obligation of good faith is implicated here, and, as demonstrated below, none of the authorities offered by ADF suggests otherwise:

- ***Nuclear Tests II (Austl. v. Fr.)*, 1974 I.C.J. 253, 268 (Dec. 20)** – In this case, the I.C.J. merely noted and applied the principle of *pacta sunt servanda* stated above to binding

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[48] ADF Submission ¶ 89; *see id.* ¶¶ 86-96.

[49] *Border and Transborder Armed Actions (Nicar. v. Hond.)*, 1988 I.C.J. 69, 105 ¶ 94 (Dec. 20) (emphasis added).

[50] *Land and Maritime Boundary*, 1998 I.C.J. at 297 ¶ 39.

[51] Vienna Convention art. 26; *see* ADF Submission ¶ 88.

unilateral declarations by States.[52] As the Court expressly noted in *Border and Transborder Armed Actions (Nicar. v. Hond.)*, *Nuclear Tests II* does not stand for the proposition that any *general* obligation of good faith exists in customary international law.[53]

- ***AMCO Asia v. Indonesia*, 1 ICSID Rep. 377, 413 (Nov. 20, 1984) (Award)** – This award, which was subsequently annulled on May 16, 1986 (*see id.* at 509), merely applied the principle of *pacta sunt servanda* to an agreement between the claimant and Indonesia concerning an investment in a real estate development.[54] Here, of course, the only agreement between ADF and the United States is their agreement to arbitrate claims properly submitted under Chapter Eleven. Moreover, applying the principle of *pacta sunt servanda* to the only ADF contract concerning the Project (the contract ADF signed with Shirley) would simply hold ADF to the terms of the bargain it struck – supplying steel fabricated entirely in the U.S. *AMCO Asia* does not help ADF.[55]

- ***Fisheries (U.K. v. Norway)*, 1951 I.C.J. 116 (Dec. 18)** – The passage quoted by ADF does not even appear in the text of the I.C.J.'s judgment, which does not even discuss good faith.[56]

- **WTO Appellate Body, *United States - Standards for Reformulated and Conventional Gasoline*, AB-1996-1 WT/DS2/AB/R (April 21, 1996)** – ADF cites this decision for the unremarkable proposition that "the obligation to interpret a treaty in good faith 'has attained the status of a rule of customary or general international law.'"[57] The United States does not dispute that customary international law requires that treaties be interpreted in good faith; indeed, the United States has acknowledged as much by

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[52] *See Nuclear Tests II* (Austl. v. Fr.), 1974 I.C.J. 253, 268 (Dec. 20) (when States make binding unilateral declarations "by which their freedom of action is to be limited," the same principles of good faith performance applicable to treaties apply).

[53] *See supra* n.49 & accompanying text.

[54] *See AMCO Asia v. Indonesia*, 1 ICSID Rep. 377, 492 ¶ 248; *see also id.* at 468 ¶ 189 (describing the legal relationship between Indonesia and AMCO Asia as "a bilateral agreement between the State and the foreign applicant whose application is approved by the State.").

[55] ADF also erroneously attributes to the *AMCO Asia* tribunal a conclusion that, "as a matter of good faith in respect of treaty obligations, the investor was entitled: 'to realize the investment, to operate it with a reasonable expectation to make profit and to have the benefit of the incentives provided by law.'" ADF Submission ¶ 91 (quoting *AMCO Asia*, 1 ICSID Rep. at 493). The passage quoted by ADF, in fact, appears in the tribunal's discussion of vested rights, a ground that the tribunal addressed "independently from *pacta sunt servanda*." *Id.* at 493 ¶ 248.

[56] *Compare* ADF Submission ¶ 92 *with Fisheries (U.K. v. Norway)*, 1951 I.C.J. 116 (Dec. 18).

[57] ADF Submission ¶ 89 (quoting *United States - Standards for Reformulated and Conventional Gasoline* at 17).

repeatedly citing Article 31(1) of the Vienna Convention.[58] However, this principle of treaty interpretation applicable to inter-State relations is neither part of the customary international law minimum standard of treatment of aliens nor otherwise sufficient, by itself, to support a claim under Article 1105(1).

In sum, none of the authorities cited by ADF supports the existence of any obligation of "good faith" that is relevant to ADF's claims under Article 1105(1). Indeed, ADF appears to make its assertions as to good faith in interpreting treaties only as an excuse for it to rehash, once again, its meritless arguments on the meaning of "procurement by a Party," this time adding references to a "conundrum" and characterizing the United States' position as "disingenuous."[59] The United States has responded at length to these baseless arguments, and will not repeat its position here. Instead, it simply notes the following: The "conundrum" here is the one faced by ADF, which contends that procurement measures specifically and admittedly *excepted* from national-treatment and performance-requirement obligations in the NAFTA's chapter on procurement are nonetheless subject to the corresponding obligations in the investment chapter, despite the explicit exception for "procurement by a Party" in Article 1108. The "disingenuous" position here is that of ADF, which complains of a procurement contract specifying that only domestic steel will be purchased by the government, but contends that the specification of what will be purchased is not part of the government's procurement.[60]

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[58] *See* Vienna Convention art. 31(1) ("A treaty shall 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 its object and purpose.").

[59] *See* ADF Submission ¶¶ 93-96.

[60] As the United States has demonstrated in its previous submissions, ADF's reliance on Article 1103 is unavailing. *See* Rejoinder at 38-44; April 16, 2002 Tr. at 516:7-523:9 (statement of Ms. Toole); *id.* at 527:13-533:6 (statement of Mr. Legum); April 18, 2002 Tr. at 922:14-924:3 (response of Mr. Legum to question from Ms. Lamm). Although ADF again refers to Article 1103 in its post-hearing submission, it offers nothing new. The United States therefore rests on its previous arguments and authorities with respect to ADF's contentions based on that article.

C. The Record Here Is Utterly Devoid Of Any Evidence Of "Arbitrary" Or "Bad Faith" Conduct In Any Event

ADF's assertions concerning a general obligation to refrain from "arbitrary" or "bad faith" conduct is beside the point in any event, for the record contains not a shred of evidence to support a finding of such conduct. As the United States has explained repeatedly in these proceedings, the FHWA adopted its regulations in full compliance with the system of administrative rule-making in place in the United States.[61] Contrary to ADF's unsupported contention, there is nothing even remotely arbitrary about the application of the regulations in question. Indeed, ADF does not dispute that for the past nineteen years the regulations have been interpreted and applied consistently.[62] ADF has failed to present any credible challenge to the means by which the FHWA adopted or administered its regulations under United States law.[63]

ADF's vague claims of the absence of good faith are similarly lacking merit as well as being devoid of any factual foundation whatsoever.[64] In international law, of course, "bad faith may not be presumed."[65] ADF asserts that "the Buy America program is not good faith

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[61] *See* April 16, 2002 Tr. at 307:7-309:10 (statement of Mr. Pawlak); Rejoinder at 32-33; Counter-Mem. at 15-16.

[62] *See* ADF Reply ¶ 260 ("FHWA has 'consistently applied its [new] regulations to require that all *manufacturing* . . . processes, including fabrication, take place in the United States' [citation omitted]") (emphasis in original); *see also* Rejoinder at 32.

[63] ADF's suggestion that it was caught by surprise upon learning that the Buy America regulations would apply to its sub-contract is not credible. In fact, within days of signing the sub-contract, ADF had already received a legal opinion on this issue. *See* Letter dated March 22, 1999 from Hal A. Emalfarb to Pierre Paschini. At the hearing in this case, ADF's counsel described the opinion as "not completely ludicrous." April 15, 2002 Tr. at 268:17-18 (statement of Mr. Kirby).

[64] *See* Rejoinder at nn.16, 48.

[65] *See, e.g., Lac Lanoux (Fr. v. Spain)*, 12 R.I.A.A. 283, 305 (Nov. 16, 1957) ("there is a well-established general principle of law according to which bad faith may not be presumed.") (translation by counsel) ("car il est un principe général de droit bien établi selon lequel la mauvaise foi ne se présume pas.").

performance of the NAFTA obligations undertaken by the U.S. and . . . the U.S. is putting forward an interpretation which falls short of a good faith interpretation of the treaty."[66] There is not the slightest evidence to support a finding of anything except the utmost good faith on the part of the United States, and ADF points to none to support its bald assertion. ADF's allegations under Article 1105(1) are unfounded in fact as well as in law, and should be rejected in their entirety.

[66] ADF Submission ¶ 96.

CONCLUSION

For the foregoing reasons, and in light of the many instances of agreement among the NAFTA Parties regarding questions of interpretation of the NAFTA, the United States respectfully submits that the Tribunal should not rely on the *Pope* tribunal's interpretation, presented in *dicta*, of Article 1105(1) as it is poorly-reasoned and unpersuasive.

Respectfully submitted,

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