

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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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 to the customary

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 sont tenus d’accorder aux étrangers *certaines droits*, . . . même dans le cas où ils refuseraient ce traitement à leurs nationaux.”) (emphasis supplied; translation by counsel).

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 applicable to all contexts. The customary international law minimum standard is in this sense analogous to the

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).

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 security: whether, under all the circumstances, the police

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”).

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 between the general standard in the statute and the more

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.").

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

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.

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: “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.

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

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).

Indeed, principles of international law do 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

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.”).

dicta, provisions enabling – or at least referencing – 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 reiterated in its May 31,

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.

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

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

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 . . .").

Chapter Eleven of the NAFTA. Reading 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

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").

law, and it is known as the customary 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

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).

Article 1105(1).³⁹ The *Pope* tribunal’s reading of those BIT provisions, based in 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 minimum standard of

³⁹ See *Pope Damages Award* ¶ 25.

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.

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 the FTC’s interpretation of

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 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 – without

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.

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 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

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).

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), does not

⁵⁵ 1969 I.C.J. 3, 41 ¶ 71 (Feb. 20).

⁵⁶ See *Pope Damages Award* ¶¶ 59-62.

⁵⁷ *Id.* ¶ 25.

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 law 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 Article 1105(1) because ADF's has failed to identify any rule of customary international law implicated by its claims.

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.

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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⁶¹ See *Pope Damages Award* ¶ 64.