IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES

WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS CLAYTON, DANIEL CLAYTON
and
BILCON OF DELAWARE

Investors

v.

GOVERNMENT OF CANADA

Respondent

INVESTORS' RESPONSE TO THE 1128 SUBMISSION OF THE NON-DISPUTING PARTY
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Appleton & Associates
International Lawyers
77 Bloor St West Suite 1800
Toronto, Ontario M5S 1M2

Tel.: (416) 966-8800
Fax: (416) 966-8801
Counsel for the Investors

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1. The Investors submit this response in response to the Non-disputing Party NAFTA Article 1128 submission made by the Government of the United States. This response will address the following:

   (a) The International Law Standard of Treatment;
   (b) The Proper Approach to the Interpretation of the Treaty;
   (c) National Treatment; and
   (d) The Proper Meaning to be given to NAFTA Article 1116.

2. A breach of the international law standard of treatment does not require anything more than a finding of inconsistency with that standard on the part of a NAFTA Party. In light of the facts in this claim, there are clearly violations of NAFTA that are inconsistent with the obligations contained in NAFTA Article 1105 even under the narrow and erroneous NAFTA analysis presented by the Government of the United States in its Article 1128 Submission. Nevertheless, there are some arguments of the Investors that may be affected by some of the interpretive choices proposed by the US Submission and thus require a careful response thereto.

3. With respect to the interpretation of the NAFTA Treaty, the Investors assert that

   (a) The *Vienna Convention on the Law of Treaties* (*Vienna Convention*) is an expression of customary international law. The NAFTA Parties not only did not contract out of custom but through Article 1131 the NAFTA Parties specifically reaffirmed the applicability of the international law rules of treaty interpretation which are codified in the *Vienna Convention.*

   (b) Article 1131, the provision on which the Free Trade Commission Notes of Interpretation (Notes of Interpretation) are based, do not demonstrate any intention on the part of the NAFTA Parties to contract out of the customary international law rules of treaty interpretation contained in Articles 31 and 32 of the *Vienna Convention*. Indeed, Article 1131 confirms the applicability of the international law rules set out in Articles 31 and 32. Thus, it is clear that *Vienna Convention* Articles 31 and 32 are the framework in which the Notes of Interpretation are to be applied.

   (c) The *Vienna Convention* makes clear that where a treaty contains a *lex specialis*, that *lex specialis* applies.[1]

   (d) The Notes of Interpretation on their own terms refer not to a *lex specialis* within the NAFTA that governs modifications of the treaty but instead have included another specific textual provision that governs all modifications to the treaty and another regarding interpretation. As a result, there is no evidence in the Notes of Interpretation, nor in the NAFTA, that is capable of establishing the necessary intent to contract out of the customary international law rules of interpretation as set out in Articles 31 and 32 of the *Vienna Convention*.

[1] See Article 55 of the *Vienna Convention on the Law of Treaties*. (Investors' Book of Authorities Tab CA44).

(e) The NAFTA contains specific rules addressing modification of the treaty. As a result,, the NAFTA provision on which the Notes of Interpretation are based simply do not permit modifications Thus, the Notes of Interpretation cannot modify obligations under the Treaty unless those modifications contained in the Notes of Interpretation are first compliant with the specified treaty process in Article 2202 required for modifications of the treaty.

(f) As a result, the Notes of Interpretation cannot amend the NAFTA but may only govern the interpretation of the treaty in a manner permitted by Articles 31 and 32 of the *Vienna Convention*. Further, the Notes are best understood as constituting evidence regarding a subsequent practice of the state parties. Either way, such conduct must always be subordinate to the ordinary meaning of the treaty words, and cannot lead to a reading of the treaty that contradicts with the treaty's ordinary meaning taking into account all of the considerations mentioned in Article 31 of the *Vienna Convention*. Such subsequent practice of the Parties must be proven by a Party seeking to rely upon it and requires far more evidence than that which has been provided by any NAFTA Party in this arbitration.

(g) The Notes of Interpretation require that the Tribunal direct itself in particular to custom in ascertaining the standard of treatment required by the ordinary meaning of "treatment in accordance with international law including Fair and Equitable Treatment and Full Protection and Security". Custom is a minimum standard of treatment that provides a floor for the interpretation of international law and what is fair and equitable.

(h) Taking into account the Notes of Interpretation, the Tribunal must articulate a standard of treatment that makes sense on an overall basis, taking together all of the relevant provisions of Article 31, guided above all by the ordinary meaning of the words and the objectives of the treaty which are set out in NAFTA Article 102.

(i) The Notes of Interpretation cannot be read to exclude the consideration of sources of law other than custom because of the following:

i. It is well established that treaties and other conventional instruments, indicate possible evidence of custom or may crystallize, codify or clarify custom. It would thus be utterly contradictory to interpret notes that direct the Tribunal to consider custom as excluding the Tribunal from consideration of this kind of normative material.

ii. Such a reading would contradict in any case the ordinary meaning of "international law" in Article 1105 and would thus not under the *Vienna Convention* be a permissible approach to the Notes of Interpretation.

iii. Based on the Notes of Interpretation, a Tribunal is required to pay particular attention to the fusion of the concepts of "fair equitable treatment" with standards of treatment drawn from custom. The Notes

of Interpretation suggest a strong presumption of the harmony of fairness and equity with customary international law standards.

(j) The Notes of Interpretation have a legal effect under NAFTA Article 1131, but that legal effect is controlled and determined by the general customary rules and by other provisions within the text of the NAFTA such as NAFTA Article 2202, which sets out the applicable process for modifications to the treaty.

4. The Investors understand that the Notes of Interpretation were the product of governments responding to public apprehension, given the varying approaches of early NAFTA tribunals, where a completely open-ended conception of fair and equitable tribunal could lead to risks that a state could incur liability even for uniform and conscientious enforcement of laws of general application. It is understandable that governments would be concerned about an impression of unfettered arbitrator discretion and to make explicit their understanding that what is fair and equitable is not a subjective matter but connected to specific international law reference points common beyond the NAFTA itself.

5. The Investors emphasize that they are not challenging any laws of general application, either of Canada or Nova Scotia. Nor are they inviting the Tribunal to impugn the general standards of rule of law and administrative fairness that exist in the Canadian state. The Investors' claim is based on the very unusual treatment provided to Bilcon, which arose due to the specific reaction to the company as an American investor by particular groups and individuals with political power and influence. The standard of treatment asserted by the Investors applies to those acts of misconduct toward a particular economic actor and would in no way put in question the normal or proper operation of Canada's environmental laws, regulations and policies.

6. The Investors address the proper meaning to be given to national treatment within the NAFTA and on the meaning of NAFTA Article 1116.

I. THE INTERNATIONAL LAW STANDARD OF TREATMENT

A. The Proper Meaning to Be Given to NAFTA Article 1105

7. The Government of the United States makes reference to the Notes of Interpretation issued by the NAFTA Free Trade Commission on July 31, 2001. The US suggests at paragraph 4 of its Submission that this Tribunal must give binding interpretative weight to the Notes of Interpretation because of the operation of NAFTA Article 1131.[2]

[2] NAFTA Article 1131(1) confirms that NAFTA Tribunals constituted under Section B of Chapter 11 of NAFTA "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." (Respondent's Book of Authorities Tab RA47).

8. These "applicable rules" include the *Vienna Convention*, which the Parties have found to be representative of the customary rules for the interpretation of a treaty provision to determine the meaning of that treaty provision.[3]

9. The *Vienna Convention* rules are drafted in mandatory language. Article 31 of the *Vienna Convention* requires one interpret a treaty "in good faith" and "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". Article 31(2) sets out the context of a treaty as encompassing the preamble of the treaty, and its annexes.

10. Article 31 of the *Vienna Convention* requires the treaty interpreter to take into account, together with the context of a treaty:

    (a) Any subsequent agreement regarding the interpretation of a treaty;
    (b) Any subsequent practice in the application of the treaty; and
    (c) And relevant rules of international law applicable.[4]

11. Under NAFTA Article 1131(1), the Tribunal is required to apply the rules of treaty interpretation – including the rules embodied in Articles 31 and 32 of the *Vienna Convention* – to clarify the existing provisions of the NAFTA. [5] NAFTA Article 1131 states:

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

12. The NAFTA must be interpreted in a manner consistent with the terms of the NAFTA itself and with applicable rules of international law, such as those codified in Articles 31 and 32 of the *Vienna Convention*. Article 1131(2) says that an interpretation issued by the Free Trade Commission is binding.

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[3] Investors' Memorial, at para. 786. The International Court of Justice has indicated the *Vienna Convention* expresses customary law, *see* recently, *Case Concerning The Gabcikovo-Nagymaros Project (Hungary v. Slovakia)* [1997] I.C.J. Rep. 7, Judgment, 25 September 1997. ["*Gabcikovo-Nagymaros"*], at 38 and 62, paras. 46 and 99 (Respondent's Book of Authorities Tab RA15), *see* the *Eureko Tribunal* observing that the *Vienna Convention* is the "[a]uthoritative codification of the law of treaties … a treaty in force among the very great majority of the States of the world community", *Eureko B.V. v Republic of Poland* , Partial Award and Dissenting Opinion, August 19, 2005, at para. 247, (Investors' Book of Authorities Tab CA8); *see* Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000) at 11 (Investors' Book of Authorities Tab CA283); J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration*, (Oxford University Press, 2012), at para. 2.25. (Investors' Book of Authorities Tab CA293).

[4] *Vienna Convention on the Law of Treaties*, Art. 31(3)(a), (b) and (c) . (Investors' Book of Authorities Tab CA44).

[5] Investors' Memorial, at para. 290. In their Memorial, the Investors explained how by their acceptance to be bound by customary international law in NAFTA Article 1105, the NAFTA Parties accepted the international law standard of treatment.

13. The Investors have made submissions in their Memorial[6] and in their Reply Memorial[7] on the meaning that should be given to NAFTA Article 1105.

14. This Tribunal must pay appropriate regard to the Notes of Interpretation issued by the Free Trade Commission along with the NAFTA text and applicable rules of international law. This requires that the Tribunal consider the words in the text of the treaty and to give them effect.

15. Under Article 31 of the *Vienna Convention*, the Tribunal is required to look at the words contained in the NAFTA first, to see if they are unclear and thus require interpretation. To the extent that NAFTA Article 1105 has wording that is clear on its face, then this tribunal has no need for recourse to interpretation.

16. The NAFTA clearly limits what can be interpreted by way of Article 1131(2). NAFTA Article 2202 sets out a process for modification of the treaty by the Parties. Changes must be agreed and approved in accordance with the applicable legal procedures of each Party. NAFTA Article 2202 states:

> **Article 2202: Amendments**
>
> 1. The Parties may agree on any modification of or addition to this Agreement.
>
> 2. When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement.

17. Thus any modification of the NAFTA requires the assent of democratically-elected representatives sitting in each of the three Parties, following the proper and constitutionally mandated process for treaty ratification of each state. If such a process is not followed, then proposed treaty modifications cannot be given force or effect until they are compliant with the explicit terms of NAFTA Article 2202.

18. Thus the limits on what can be a proper interpretation in NAFTA Article 1131(2) are set out by the wording of NAFTA Article 2202. The Free Trade Commission could never issue a binding statement that is inconsistent with other terms of the treaty, such as NAFTA Article 2202.

19. The NAFTA should be interpreted in such a manner to be consistent with the objects and purpose of the Treaty (as set out in Article 102) as well as to ensure that treaty provisions are read to give effect to them.

20. A Tribunal must look at an interpretation to determine for itself whether the content of that Interpretation is an interpretation or a change. If the "interpretation" constitutes a change, then for it to be binding, it must also comply with the terms of NAFTA Article 2202.

[6] Investors' Memorial at paras. 283-537.
[7] Reply Memorial at paras 166-251.

21. Article 1131 of the NAFTA does not empower the Free Trade Commission to amend the NAFTA as that power is exclusively reserved by Article 2202 only for democratically elected Parliamentarians and members of congress in accordance with appropriate domestic requirements. For example, in the United States a two-thirds majority of the Senate is required to give its assent before a treaty can be adopted or modified. In Mexico, the congress must vote on treaties.

i. The Earlier Attempts to Modify the Treaty

22. There is a history of the NAFTA Trade Ministers overstepping their authority under the NAFTA by attempting to circumvent the legitimate and legal process for modification of this treaty. For example, the first such episode occurred in 1996.

23. NAFTA Article 1108 provides specific time limits on the making of certain reservations to NAFTA Annex I. Such reservations had to be made to the other NAFTA Parties within two years of the January 1, 1994 entry into force of the NAFTA. So the filing of reservations had to be made by January 1, 1996. Such a date was a known variable that did not require, nor permit any interpretation. Despite this clear textual guidance within the treaty text, on March 28, 1996, the NAFTA Trade Ministers issued letters of exchange which they styled as a Free Trade Commission Interpretative Statement to the effect to effect of interpreting the date of March 28, 1996 to be January 1, 1996[8].

24. Despite its purported wording as a binding document, these letters of exchange could never constitute a *bona fide* interpretation of the treaty – as what they purport to do is modify the terms of the NAFTA (by changing the January 1, 1996 deadline to March 29, 1996). Simply, there was nothing to interpret as the deadline date for filing reservations was clearly set out in Article 1108(2).

25. The March 29, 1996 letters of exchange were simply a modification to the wording in Article 1108 of the treaty. In such a circumstance, the NAFTA required amendment to effect such change. Elected government representatives needed to be consulted for there to be binding effect. A mere "interpretative statement" made by appointed members of the executive branch of government could not circumvent the plain meaning of the terms of the treaty.

26. The US 1128 Submission referred to the effect of the Notes of Interpretation made by the Free Trade Commission on July 31, 2001. Similarly, any portion of the Notes of Interpretation issued by the Free Trade Commission which modify the meaning of NAFTA Article 1105 also cannot be binding until they also conform to the procedures required by NAFTA Article 2202 for all modifications of the NAFTA.

27. To the extent that such Notes of Interpretation modify the terms of the treaty, then such statements are an improper and ineffective exercise of powers under NAFTA Article

[8] The set of the letters of exchange have been published in their entirety in Barry Appleton, NAFTA: Legal Text and Interpretive Materials, Volume I (Thomson West Publishing, 2007) Volume I at pages 1154-1165. (Investors' Book of Authorities Tab CA256).

1131(2) because such an act would be inconsistent with the express terms of NAFTA Article 2202 and also NAFTA Article 1131(1).

28. Article 2202 refers to modifications that are agreed and then approved in accordance with the appropriate legal procedures in each Party. The binding interpretation could demonstrate agreement, but it would not constitute an applicable legal procedure for Mexico nor for the United States. Both countries require consent from elected legislative bodies (the Mexican Congress and the US Senate). In Canada, the applicable legal procedure would require more consideration of the nature of the modification to understand what would be involved.

29. No amendments to the NAFTA have been introduced under applicable legal procedures in any of the three NAFTA Parties.

ii. Modifications by the Notes of Interpretation

30. Not every conceivable interpretation made by the Free Trade Commission will be capable of being given effect. Only those interpretations which actually interpret words of the treaty can be given effect. Interpretations which actually amend the treaty are *ultra vires* of the Free Trade Commission and thus violate the rule of law and cannot be given effect.

31. There is a difference between the meaning of the term "international law" and the meaning of the term "customary international law". The term "customary international law" is well known in international law and it refers to a mere subset of the full meaning of the term "international law". There was absolutely no confusion in the use of words "international law" used by the NAFTA framers within NAFTA Article 1105. They explicitly selected these words to provide the wide and general protections to the investments of investors of other NAFTA Parties under international law which included the protections from treaty law, general principles of law and decisions of jurists and tribunals. The wording in NAFTA Article 1105 included the narrower protections provided under customary international law along with these other sources. So the substitution of the broad protections covered by the express wording, with a narrower set of protections appears on its face to constitute a modification of the NAFTA Treaty.

32. The *Vienna Convention* is an expression of customary international law. The NAFTA Parties not only did not contract out of custom but through Article 1131, the NAFTA Parties specifically reaffirmed the applicability of the international law rules of treaty interpretation which are codified in the *Vienna Convention*.

33. The Notes of Interpretation leave unaltered NAFTA Article 1131(1), which directs a tribunal to apply "applicable rules of international law" to NAFTA Chapter 11 disputes. These rules include all the sources enumerated in Article 38(1) of the *ICJ Statute* – not just the rules of customary international law. The primary source of treaty interpretation is the wording of the treaty itself, and NAFTA Article 1131(1) is clear: a tribunal shall apply "applicable rules of international law." A tribunal cannot, on the one hand, be directed to apply all the applicable rules of international law, and, on the other, be restricted to applying only the rules of customary international law. The Notes of

Interpretation said nothing about discontinuing the applicability of NAFTA Article 1131(1) with respect to NAFTA Article 1105(1). As a result, NAFTA Article 1131(1) continues to apply to the entirety of NAFTA Chapter 11. This gives rise to an irresolvable conflict. In such a situation, the strict wording of the treaty itself necessarily trumps a loose interpretation thereof.

34. The Notes of Interpretation cannot amend the NAFTA but may only govern the interpretation of the Treaty. Furthermore, the Notes of Interpretation are best understood as constituting a subsequent agreement or a subsequent practice of the state parties. Either way, such conduct must always be subordinate to the ordinary meaning of the treaty words, and cannot lead to a reading of the Treaty that contradicts its ordinary meaning taking into account all of the considerations mentioned in Article 31 of the *Vienna Convention*.

35. The Notes of Interpretation run counter to the plain and ordinary meaning of NAFTA Article 1105(1). The general rule of treaty interpretation requires that a treaty be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[9] NAFTA Article 1105(1) clearly states that Canada must "accord investments of investors of another Party treatment in accordance with *international law*" – not *customary* international law. The ordinary meaning of "international law" refers to all sources of international law enumerated in Article 38(1) of the *ICJ Statute* – not only customary international law. The drafters of the NAFTA were fluent in the language of international law, and were surely alert to the distinction.[10]

36. In the end, carrying the Notes of Interpretation through to their logical conclusion would deprive the words "fair and equitable treatment" in NAFTA Article 1105(1) of any meaning, thereby leading to an absurd or unreasonable result. This runs counter to one of the most basic tenets of treaty interpretation, by which no words in a treaty are to be deprived of their meaning, or otherwise interpreted, so as to be rendered superfluous.

37. This Tribunal also must take into account the existence of over 2580 bilateral investment treaties, the vast majority of which contain fair and equitable treatment provisions. The overwhelming existence of this widespread acceptance of this obligation makes clear the widespread recognition and acceptance of this obligation by state parties.[11]

38. The Notes of Interpretation have a real legal effect under NAFTA Article 1131, but that legal effect is controlled and determined by the general customary rules and by other provisions within the text of the NAFTA such as NAFTA Article 2202, which sets out the applicable process for modifications to the treaty.

[9] Article 31(1), *Vienna Convention on the Law of Treaties*, (Investors' Book of Authorities Tab CA44).
[10] In the *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Judgement, ICJ Reports 1952 at 105, the court accepted the principle that a legal text should be interpreted to give effect to every word in the text. (Investors' Book of Authorities Tab CA179).
[11] Publically available copies of bilateral investment treaties can be found on Westlaw's bilateral investment treaty service (ICA-BITREATIES).

39. The *Vienna Convention* makes clear that where a treaty contains a *lex specialis*, that *lex specialis* applies.[12] The Notes of Interpretation on their own terms refer not to a *lex specialis* in the NAFTA that governs modifications of the treaty but to another provision regarding interpretation. As a result, there is no evidence on the face of the Notes of Interpretation, nor in the NAFTA, to establish the intent to contract out of customary international law rules of interpretation as set out in articles 31 and 32 of the *Vienna Convention*.

40. As a result, the Notes of Interpretation cannot amend the NAFTA but may only govern the interpretation of the Treaty in a manner permitted by Articles 31 and 32 of the *Vienna Convention*. Further, the Notes of Interpretation are best understood as constituting a subsequent agreement or a subsequent practice of the Parties. Either way, the resulting interpretation must always be subordinate to the ordinary meaning of the treaty words, and cannot lead to a reading of the treaty that contradicts its ordinary meaning taking into account all of the considerations mentioned in Article 31 of the *Vienna Convention*. Such subsequent practice of the Parties must be proved by a Party seeking to rely upon it and requires far more evidence than that which has been provided by any Party in this arbitration.

41. The Notes of Interpretation require that the Tribunal direct themselves in particular to custom in ascertaining the standard of treatment required by the ordinary meaning of "treatment in accordance with international law including Fair and Equitable Treatment and Full Protection and Security". Custom is a minimum standard of treatment that provides a floor for the interpretation of international law and what is fait and equitable.

42. Taking into account the Notes of Interpretation, the Tribunal must articulate a standard of treatment that makes sense on an overall basis, taking together all of the relevant provisions of Article 31, guided above all by the ordinary meaning of the words and the objectives of the Treaty which is set out in NAFTA Article 102.

43. The Notes of Interpretation cannot be read to exclude the consideration of sources of law other than custom because of the following:

    (a) It is well established that treaties and other conventional instruments, are possible evidence of custom or may crystallize, codify or clarify custom. It would thus be utterly contradictory to interpret notes that direct the Tribunal to consider custom as excluding the Tribunal from consideration of this kind of normative material.

    (b) Such a reading would contradict in any case the ordinary meaning of "international law" in Article 1105 and would thus not under the *Vienna Convention* be a permissible approach to the Notes of Interpretation.

    (c) Based on the Notes of Interpretation, a Tribunal is required to pay particular attention to the fusion of the concepts of "fair equitable treatment" with standards of treatment drawn from custom. The Notes of Interpretation

[12] Article 55, *Vienna Convention on the Law of Treaties*, (Investors' Book of Authorities Tab CA44).

suggest a strong presumption of the harmony of fairness and equity with customary international law standards.

44. The Notes of Interpretation have a real legal effect under NAFTA Article 1131, but that legal effect is controlled and determined by the general customary rules and by other provisions within the text of the NAFTA such as NAFTA Article 2202, which sets out the applicable process for modifications to the treaty.

45. Even if there were any lingering doubts about the appropriateness of the Notes of Interpretation in light of a textual analysis of the ordinary wording of NAFTA Article 1105(1), viewing NAFTA Article 1105(1) in light of the objects and purpose of the NAFTA adds further weight to the little likelihood the Parties intended to restrict the meaning of NAFTA Article 1105(1) to just customary international law. NAFTA Article 102(1) sets out the objectives of the NAFTA. These include the following:

(a) Promoting transparency;
(b) Eliminating barriers to trade in, and facilitating the cross-border movement of, goods and services; and
(c) Promoting conditions of fair competition.

There is nothing about interpreting the protections of NAFTA Article 1105(1) to be limited to those recognized only by customary international law that serves to achieve these objectives.

46. Although it is clear on its face that NAFTA Article 1105(1) was never intended to be limited in this way, even in the event that any lingering uncertainty might justify recourse to the *travaux préparatoires* of the NAFTA, this supplementary means of treaty interpretation confirms that NAFTA Article 1105(1) was never intended to exclude general principles of law.

47. Shortly after the Notes of Interpretation were issued, the *Pope & Talbot* Tribunal requested Canada to produce all drafting history materials supporting the intention of the Parties to limit the reference to "international law" in NAFTA Article 1105(1) to "customary international law." In response, Canada produced some 1,500 pages of documents in 43 drafts of Chapter Eleven of the NAFTA. In all those pages and drafts, the Tribunal was unable to detect a single intention by the Parties to restrict the meaning of "international law" in NAFTA Article 1105 to "customary international law."[13]

48. This gives rise to the third key reason why Canada's interpretation of the Notes of Interpretation is not binding on this Tribunal: they do not constitute a valid "interpretation" of NAFTA Article 1105, but, as Professor Charles "Chip" Brower lays out clearly, are instead an "amendment".[14] A valid interpretation would have addressed the logical inconsistency left between NAFTA Articles 1131(1) and 1131(2) – namely, requiring international tribunals on the one hand to decide issues in accordance with

[13] The public version of the negotiating history is available in Volume 3 of Barry Appleton, *NAFTA: Legal Text and Interpretive Materials*, (West Publishing: 2007). (Investors' Book of Authorities Tab CA182).
[14] C.H. Brower II, "Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105" *International Arbitration News*, Summer 2005, (Investors' Book of Authorities Tab CA183).

"applicable rules of international law", and, on the other, requiring them to decide issues only in accordance with customary international law. A valid interpretation would also presumably be reflected in the ordinary meaning of the words of the treaty, and, failing that, at least be supportable by reference to its objects and purposes. At the very least, a valid interpretation would be supportable by reference to the *travaux préparatoires* of the treaty itself. Yet nowhere is any such support to be found for the Notes' interpretation of NAFTA Article 1105(1).

49. It is for this reason that after a detailed review of the drafting history of the NAFTA, the *Pope & Talbot* Tribunal concluded that the substance of the Notes of Interpretation does in fact amount to an "amendment" of the NAFTA, not an "interpretation".[15]

50. The effect of these changes has been examined by Sir Robert Jennings, former president of the International Court of Justice and a noted authority on international law. He considered the impact of the Notes of Interpretation within an expert opinion filed in the *Methanex v. United States* NAFTA arbitration. Sir Robert considered the wording of the interpretation and whether the Notes of Interpretation were an interpretation of words within the NAFTA or whether it constituted a modification of the NAFTA. In coming to his conclusions, Sir Robert noted the wording of Article 1105 and stated that "the words including 'fair and equitable treatment and full protection and security' are part of the actual text of the Article". He set out detailed reasons why he believes that the Notes of Interpretation operated to remove such words.[16]

51. Sir Robert noted that the Notes of Interpretation attempts to modify the text of Article 1105 by importing additional language, in this case the words "aliens" and "customary". Sir Robert found this to amount to "materially changing the text" that in fact "betray[s] the aim of this so-called interpretation" by replacing the "plainly stated requirements" of the article.[17] He went on to state:

> Article 1105 does not provide a rule for the treatment of aliens, nor is it concerned with the customary international law about the treatment of aliens. It is a treaty provision defining the treatment required by the treaty for investments of investors of another party."[18]

52. In general, Sir Robert found that the word customary in the Notes of Interpretation is an interpolation by the Free Trade Commission, as is also the word 'aliens'.[19] This is a "curiously crab-like way of going about an interpretation of a given text. It is as if the Commission's drafters were apprehensive lest there might indeed now be a modern customary law dealing with investors and investments, and it is this that moves them to

[15] *Pope & Talbot Inc v. Government of Canada, NAFTA-UNCITRAL Investor-State Claim, Award on Damages, 31 May 2002* at para. 47, (Investors' Book of Authorities Tab CA39).
[16] Second Opinion of Robert Jennings of 18 September 2001, Part 1. *Methanex v United States*, UNCITRAL (NAFTA) ["Opinion by Sir Robert Jennings"] (Investors' Book of Authorities Tab CA146).
[17] Opinion by Sir Robert Jennings, at 3 (Investors' Book of Authorities Tab CA146).
[18] Opinion by Sir Robert Jennings, at 5 (Investors' Book of Authorities Tab CA146).
[19] Opinion by Sir Robert Jennings, at 5 (Investors' Book of Authorities Tab CA146).

insist so blatantly that it is the former law about the treatment of aliens that, for obvious reasons, they much prefer."[20]

53. Sir Robert concludes his analysis by finding that:

> The issue, in a nutshell, is this: if the three governments are suggesting that NAFTA (and the hundreds of BITs) does *not* require a State to provide fair and equitable treatment, the suggestion is preposterous. It cannot be reconciled with the text of Article 1105(1), nor with any canon of interpretation of international law. If that is indeed the position of the three governments, then the Tribunal should treat the "interpretation as an attempted amendment that has no binding effect." [21]

54. This understanding of the Notes of Interpretation as an "amendment" as opposed to an "interpretation" is an important one. There is nothing indelible about the NAFTA; as NAFTA Article 2202 makes clear, the Parties may agree to amend any of its provisions at any time. An amendment is required where the Parties have reconsidered a fundamental aspect of their agreement, and would like to change it. This, however, requires that all Parties agree, and go through their respective processes to give legal effect to the amended agreement. By contrast, an "interpretation" is required not where a change to a fundamental aspect of an agreement is required, but rather where a mere clarification of, or elaboration upon the terms of that agreement is needed. Unlike a formal "amendment", an "interpretation" is much easier to bring about; rather than requiring the Parties themselves to renegotiate the agreement – a process which can be cumbersome and time-consuming – an "interpretation" may be issued by a subsidiary body – in this case the Free Trade Commission. If the Parties wanted to amend Article 1105(1) of the NAFTA, they were – and indeed still are – fully within their rights to do so. However, an amendment is a serious matter that requires the Parties to follow the proper procedures. In the case of the Notes of Interpretation, the Parties did not follow the proper procedures; rather, they sought to amend the NAFTA through a less cumbersome and more politically expedient channel. This was an improper attempt to circumvent the requirements of the NAFTA, and disguise an "amendment" in the garb of an "interpretation". This amendment is therefore *ultra vires* the powers of the Free Trade Commission, and of no legal force or effect.

55. For all the above reasons, this Tribunal should consider itself at liberty to interpret the meaning of "fair and equitable treatment" as contained in NAFTA Article 1105(1) as an autonomous standard in accordance with all the normal and well-accepted sources of international law – not just customary international law.

iii. The Threshold for the International Standard of Treatment

56. Canada has cited the 1926 decision in *LFH Neer and Pauline Neer (United States v Mexico)* as an expression of the International Law Standard.[22] This claim was presented to the US Mexico Claims Commission by the United States on behalf of the family of Paul Neer, who had been killed in Mexico. The claim held that the Mexican authorities had

[20] Opinion by Sir Robert Jennings, at 5 (Investors' Book of Authorities Tab CA146).
[21] Opinion by Sir Robert Jennings, at 6 (Investors' Book of Authorities Tab CA146).
[22] Canada's Counter Memorial, at paras. 323, 324.

failed to properly prosecute those responsible and reimburse the family of Neer. The Commission held that the failure by the Mexican authorities to apprehend and punish those guilty of the murder of the American national did not violate the international minimum standard on the treatment of aliens. In dictum, the Commission expressed the language that Canada has referenced in its Counter Memorial.

57. The Commission's decision in the *Neer* claim was only relevant in those specific circumstances, and only related to the concept of denial of justice encompassed in cases of indirect responsibility.[23] The American member of the Commission formulated a different test in his Separate Opinion, arguing that the standard for treatment was one of "pronounced degree of improper governmental administration."[24]

58. The *Neer* claim Commission's examination of how "far short" of international standards was Mexico's conduct was never relied on by other international courts or tribunals as enunciating a single standard of review.[25] In addition, specialized commentary made it "clear" that "Neer is relevant only in cases of failure to arrest and punish private actors of crimes against aliens."[26]

59. As noted by the *Merrill & Ring* Tribunal: "A requirement that aliens be treated fairly and equitably in relation to business, trade, and investment […] has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*."[27] The Tribunal continued, and held, "…customary international law has not been frozen in time … it continues to evolve in accordance with the realities of the international community."[28] This evolutionary approach was also endorsed by *Waste Management II*.[29]

60. NAFTA Tribunals have determined that for the purpose of NAFTA Article 1105(1), to the extent that customary law is to be applied, it is to be applied as it stands today.[30]

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[23] Jan Paulsson and Georgios Petrochilos, "Neer-ly Misled?" *ICSID Review – Foreign Investment Law Journal* Vol. 22, No. 2 (2007) at 255-256. Paulsson and Petrochilos cite an extensive quotation from the *Chattin* case, a decision handed down two weeks after *Neer*, to demonstrate that *Chattin* "puts the *Neer* formula in context and shows its proper historical confines…. The *Neer* standard had its place within a system of state responsibility predicated on a distinction between direct and indirect responsibility. The Commission intended the standard to apply only in 'denial of justice' cases." (emphasis added) (Investors' Book of Authorities Tab CA280); *See B.E. Chattin (United States.) v. United Mexican States*, 23 July 1927,at 282, 285 (1927) (Investors' Book of Authorities Tab CA233).

[24] *L. F.H. Neer and Pauline E. Neer (United States.) v. United Mexican States*, 15 October 1926), 4 Rep. Int'l Arb.Awards, at 65. ["*Neer*"] at 65 (Investors' Book of Authorities Tab CA170), *see also* Paulsson and Petrochilos, "Neer-ly Misled?" at 244. (Investors' Book of Authorities Tab CA280).

[25] Paulsson and Petrochilos "Neer-ly Misled?" at 244-245. "[N]o other international court of tribunal (including the claims commissions established by Mexico and other countries in the 1920s, and the Iran United States Claims Tribunal), have relied on *Neer* as enunciating a single standard of review." (Investors' Book of Authorities Tab CA280). There is only one express reference to a minimum standard in the Iran-United States Claims Tribunal, in the Dissenting Opinion of Judge Kashani in *Starrett Housing Corp. v Iran*, 4 Iran-United States CTR 122 (1983-I), but Judge Kashani does not mention Neer. (Investors' Book of Authorities Tab CA281).

[26] Paulsson and Petrochilos "Neer-ly Misled?" at 247. (Investors' Book of Authorities Tab CA280).

[27] *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL Arbitration, Award, 31 March 31 2010, at para. 213(Investors' Book of Authorities Tab CA41).

[28] *Merrill & Ring v Canada*, Award, at para. 193. (Investors' Book of Authorities Tab CA41).

[29] *Waste Management Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004. ["*Waste Management II*"], para 93. (Investors' Book of Authorities Tab CA100).

[30] *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003. ["*ADF*"] at para 179 (Investors' Book of Authorities Tab CA9); *Loewen Group, Inc. and Raymond L. Loewen v. United States of*

Recent jurisprudence suggests that, while it is possible that there may still be some residual difference between the autonomous standard and customary law standard, this difference is fast disappearing.[31]

61. Indeed, a range of investment arbitral awards and decisions seem less interested in the theoretical discussion on the relationship between the "fair and equitable treatment" and the customary international law standard of treatment, and instead, have turned their attention to the content of the "fair and equitable treatment" and "full protection and security" obligations.[32]

62. Judge Stephen Schwebel has remarked that the *Neer* formula is quite "far from" the International Law Standard.[33] He has stated that in his experience as an official of the U.S. Government at the time when the NAFTA was negotiated, there was "no whisper" about the *Neer* criteria.[34] He elaborated on his view that the *Neer* claim was an unpersuasive authority for the interpretation of the International Law Standard:

> The United States, Canada and Mexico apparently rely on the award of the Claims Commission in *Neer* as setting a standard for the interpretation of NAFTA Article 1105. The Claims Commission was an international tribunal. Why should its terse, barely reasoned opinion – which examines no State practice at all – be the fount of customary international law as respects what is an international delinquency, while the judgments of contemporary international tribunals do not influence the content of customary international law in that regard? How is it that the governments of these States in their pleadings in the International Court of Justice invoke prior judgments of the Court, and, if my recollection is correct, awards of international arbitral tribunals but hold them of no account in the evolution of customary international law in the NAFTA context?[35]

America, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003. ["*Loewen*"], (Investors' Book of Authorities Tab CA13).

[31] *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007. ["*Sempra*"] at para 302 (Respondent's Book of Authorities Tab RA66); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* ICSID No. ARB/01/3) Award, 22 May 2007. ["*Enron*"] at para 258 (Respondent's Book of Authorities Tab RA24). *Saluka Investments B.V. v. Czech Republic*, UNCITRAL Arbitration Rules, Partial Award, 17 March 2006, ["Saluka"] at para. 291, (Investors' Book of Authorities Tab CA101) In *Saluka*, the Tribunal noted that "it appears that the difference between the Treaty standard [of fair and equitable treatment] and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real."

[32] *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S., v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008. ["*Rumeli*"], at para. 611 (Respondent's Book of Authorities Tab RA107); *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005. ["*CMS Gas*"], at para. 284 (Investors' Book of Authorities Tab CA20). Stephan Schill summarized the reasons for a "convergence" on the content of fair and equitable treatment and the customary standard, remarking: "First, some tribunals consider that the inclusion of the fair and equitable treatment in the vast web of investment treaties has transformed the standard itself into customary international law. Second, even in the absence of such an explicit transformation, other tribunals interpret the international minimum standard as an evolutionary concept that has developed since the days of traditional international law, thus leveling possible differences between treaty and custom." *See* Stephan Schill, *Fair and Equitable Treatment, the Rule of Law and Comparative Public Law, in International Investment Law and Comparative Public Law*, Stephan Schill, ed. (Oxford University Press, 2010) at 153. (Investors' Book of Authorities Tab CA285).

[33] Judge Stephen M. Schwebel, "Is Neer Far From Fair And Equitable?", Remarks at the International Arbitration Club, London, 5 May 2011. (Investors' Book of Authorities Tab CA273).

[34] Judge Stephen M. Schwebel, "Is Neer Far From Fair And Equitable?" Remarks at the International Arbitration Club, London, 5 May 2011. (Investors' Book of Authorities Tab CA273).

[35] Judge Stephen M. Schwebel, "Is Neer Far From Fair And Equitable?" Remarks at the International Arbitration Club, London, 5 May 2011. (Investors' Book of Authorities Tab CA273).

63. Several academic commentaries have suggested that *Neer* is not controlling at all in cases where government conduct is alleged to have fallen below a minimum standard of treatment.[36] Rather than applying the *Neer* claim, highly-respected commentators have cited to other decisions of the United States-Mexico Claim Commission, such as *Harry Roberts*, issued two weeks after *Neer*, which maintained that the equality of treatment with national detainees "is not the ultimate test of the propriety of the acts of the authorities in the lights of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization".[37]

64. The earliest expression of the *Neer* claim in investment arbitrations was from Canada in the *S.D. Myers* and *Pope & Talbot* disputes.[38] Beginning in the *S.D. Myers* dispute, Canada revived the 1926 award by citing it as reflection of the type of breach that would constitute a violation of the minimum standard of treatment.[39]

65. In the *Pope & Talbot* dispute, Canada referred to the *Neer* claim as the "standard habitually practiced among civilized nations" or even "general principles of law".[40] In Canada's Counter-Memorial in *Pope & Talbot*, Canada had submitted that "[o]ther international bodies have applied the *Neer* standard … the seminal statement of the meaning of the international minimum standard", yet, neither of the two cases cited by Canada to support this argument refer to *Neer*.[41]

66. In any event, neither Tribunal endorsed Canada's submissions that Article 1105(1) required a breach to rise to the level of "an outrage" or "egregiousness".[42] As explained

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[36] For instance, some authors have made general statements that the minimum standard of treatment protects the property of aliens, but the extent of such protections was never tied to the *Neer* case. Roth noted that the threshold of the minimum international standard is the "expression of the common standard which civilized states have observed and still are willing to observe with regard to aliens." *See* A. H. Roth, *The Minimum Standard of International Law Applied to Aliens* (A.W. Sijthoff's Uitgeversmaatschappij N.V., 1949) at 87 (Investors' Book of Authorities Tab CA278); Sir Robert Jennings & Sir Arnold Watts' opined on the international standard of treatment by noting that "[i]t has been repeatedly laid down there exists in this matter a minimum international standard, and that a state which fails to measure up to that standard incurs international responsibility." The editors cite to *Roberts* and not *Neer*. In fact, Sir Robert Jennings and Sir Arnold Watts, eds., *Oppenheim's International Law*, 9th ed., Volume I (Longman: 1996) at 931 (Investors' Book of Authorities Tab CA270); Similarly, the writings of Borchard does not cite to the *Neer* claim as a test of international standards; *see* E. Borchard, "The Minimum Standard of Treatment of Aliens," 38 *Michigan Law Review* 445 (1940), 454-455 (Investors' Book of Authorities Tab CA267).

[37] *Harry Roberts (U.S.A.) v. United Mexican States (Roberts Case),* 4 R. International Arbitration Awards 77, 80 (1926). ["Roberts"] (Investors' Book of Authorities Tab CA232). The *Roberts* claim involved a claim for mistreatment in prison. *See* J.L. Brierly, *The Law of Nations*, 6th ed. (Oxford University Press, 1963) at 280-281 (Investors' Book of Authorities Tab CA264).

[38] Paulsson and Petrochilos "Neer-ly Misled?" at 248. (Investors' Book of Authorities Tab CA280).

[39] *S.D. Myers v Government of Canada*, Canada's Counter Memorial (Merits), dated October 5, 1999, at para. 289. (Investors' Book of Authorities Tab CA266).

[40] Canada's Second Phase Counter-Memorial in *Pope & Talbot v Government of Canada* (October 10, 2000), at paras. 266. (Investors' Book of Authorities CA279).

[41] *Pope & Talbot*, Canada's Counter-Memorial (October 10, 2000), at paras. 258 *et seq.*, see especially paras. 266, 309, 325 (Respondent's Book of Authorities Tab RA56); *see Chevreau* (France v United Kingdom; Beichmann, Sole Arbitrator), 2 Rep. Int'l Arb. Awards 1113, 1123 (1931) (Investors' Book of Authorities Tab CA268); and *Amco v. Indonesia I*, Award, 20 November 1984, 1 ICSID Rep. 413 (1984) at para. 172 (Investors' Book of Authorities Tab CA303), upheld in material part, *Amco v. Indonesia I, Decision on the Application for Annulment*, 16 May 1986, 1 ICSID Rep. 509 (1986), at paras. 59-60 (Investors' Book of Authorities Tab CA275); *see also* Paulsson and Petrochilos "Neer-ly Misled?" at 248. (Investors' Book of Authorities Tab CA280).

[42] *S.D. Myers, Inc. v. Government of Canada, First Partial Award*, 2000 WL 34510032, 13 November 2000. ["*S.D. Myers*"] at para. 263; (Investors' Book of Authorities Tab CA6) The Pope & Talbot Tribunal dismissed Canada's

by Arbitrator Schwartz in his Separate Opinion for *S.D Myers v Canada,*[43] the inclusion of a "minimum standard" in the title was intended to avoid gaps in treaty protections for foreign investors.[44] However, the standard need not require that a party accord the same treatment inflicted on its own nationals, rather, the treatment must be "in accordance with international law".[45] This includes the obligation to provide fair and equitable treatment and full protection and security.[46]

67. In addition to such commentary, NAFTA Tribunals have observed that the minimum standard of treatment and other similar claims concerned the treatment of natural persons and concentrated on denial of justice. For instance, the *Mondev* Tribunal observed that the *Neer* claim was not relevant towards the international standard of treatment of foreign investment when the duty espoused in the *Neer* claim involved Mexico's responsibility for the acts of private parties.[47]

68. Canada has cited several cases as support for its assertion that the threshold for a violation of the International Law Standard is "high", and requires action that amounts to "gross misconduct or manifest unfairness" to breach the international standard of treatment.[48] Canada has overlooked the context of the quotations.[49]

69. For instance, a vast majority of NAFTA and non-NAFTA Tribunals examining "fair and equitable treatment" have contributed to a body of concordant practice to conclude that "[i]t would be surprising if this practice and the vast number of provisions it reflects were

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submission on the requirements of international law, *Pope & Talbot,* Phase 2 Merits, April 10, 2001, at para. 109. (Investors' Book of Authorities Tab CA12).

[43] *S.D. Myers,* Separate Opinion of Prof. Bryan Schwartz, dated November 13, 2000, para. 225. (Investors' Book of Authorities Tab CA158).

[44] *S.D. Myers,* Separate Opinion of Prof. Bryan Schwartz, dated November 13, 2000. (Investors' Book of Authorities Tab CA158).

[45] This responds to the point that in some cases, a home State may treat its nationals less fair than that which international law requires.

[46] *Black's Law Dictionary,* 5th ed. (West Publishing, 1979) at 482 and 535. The plain definition of "equitable" means "[j]ust; conformable to the principles of justice and right." and "fair" means "[h]aving the qualities of impartiality and honesty" and "free from prejudice, favoritism and self-interest." (Investors' Book of Authorities Tab CA271).

[47] *Mondev International Ltd. v. United States,* ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002l. ["*Mondev*"], at para 123. The Tribunal found: "A reasonable evolutionary interpretation of Article 1105(1) is consistent both with the *travaux,* with normal principles of interpretation and with the fact that … the terms 'fair and equitable treatment' and 'full protection and security' had their origin in bilateral treaties in the post-war period. In these circumstances the content of the minimum standard today cannot be limited to the content of customary international law as recognized in the arbitral decisions of the 1920s." (Investors' Book of Authorities Tab CA40).

[48] Canada's Counter Memorial at para. 321 footnote 622.

[49] *See Mondev* Award, at para. 127 (Investors' Book of Authorities Tab CA40). The quote cited by Canada from the Tribunal's analysis on the applicable standard for denial of justice. As such, it does not represent the standard applicable to a threshold for the violation of Article 1105 and its context is limited; *See ADF* Award, at para. 181. The quote cited provides an example of what would not constitute a violation of Article 1105. The Tribunal looked for "something more than simply illegality or lack of authority", but this does not equate to "gross misconduct". Moreover, the *ADF* Tribunal rejected the use of the *Neer* formula in the Award. The Tribunal states: "There appears no logical necessity and no concordant state practice to support the view that the *Neer* formulation is automatically extendible to the contemporary context of treatment of foreign investors and their investments by a host or recipient State." *ADF* Award at para. 190, note 184 (Investors' Book of Authorities Tab CA9): *See* Article 7 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, text in James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge University Press, 2002) (Investors' Book of Authorities Tab 296) at 106; The *Waste Management II* Tribunal surveyed several NAFTA Awards to provide a flexible definition of the elements of Article 1105, but did not mandate the *Neer* formula imposing a "high" threshold for treatment. (Investors' Book of Authorities Tab CA14).

to be interpreted as meaning no more than the *Neer* Tribunal (in a very different context) meant in 1927."[50]

70. In defense of the vast majority of awards that find the *Neer* formula to be inapplicable in the contemporary legal context, Canada has recited the one award that supports its assertions. Indeed, the *Glamis* award stands alone in its finding that the customary international law requires an extremely cautious interpretation of fair and equitable treatment under NAFTA Article 1105.[51]

71. In *Glamis,* a key element of the Tribunal's reasoning was its acceptance of the United States government's interpretation of the minimum standard of treatment of aliens which advocated a limited standard of review under the *Neer* doctrine and a high liability threshold. However, the *Glamis* Tribunal only accepted this reasoning with the understanding that the *Neer* standard could be adapted to more modern considerations.[52] As such, it did acknowledge that "the *Neer* standard, when applied with current sentiments and to modern situations, may find shocking and egregious events not considered to have reached that level in the past."[53]

72. Notwithstanding the outlier *Glamis* Award, other NAFTA Tribunals have deviated from *Glamis* to identify the content of the international customary standard and its relationship with fair and equitable treatment. These NAFTA decisions, such as *Pope & Talbot,*[54] collectively demonstrate that NAFTA Tribunals have generally declined to rely on the extreme adjectives created by the *Neer* formula in describing the state's conduct. For instance, the Investors point out the following evaluations of the meaning of the fair and equitable treatment standard:

(a) *Pope & Talbot* – Award on Merits – rejecting the *Neer* formula, "[F]airness elements under ordinary standards applied in the NAFTA countries, without any threshold limitations that the conduct complained of be 'egregious', 'outrageous', or 'shocking', or otherwise extraordinary."[55]

(b) *Mondev* – Award – rejecting the *Neer* formula, "[I]s intended to provide a real measure of protection to investments and … has evolutionary potential. A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of a particular case."[56]

[50] *Mondev,* Award, para. 117. (Investors' Book of Authorities Tab CA40).
[51] *Glamis Gold, Ltd v. United States of America,* UNCITRAL Arbitration, Award, 8 June 2009. ["*Glamis*"] at paras. 600, 601, 605, 612, and 613. (Investors' Book of Authorities Tab CA116).
[52] *Glamis,* Award at paras. 613. (Investors' Book of Authorities Tab CA116).
[53] *Glamis,* Award at paras. 616. (Investors' Book of Authorities Tab CA116).
[54] *Pope & Talbot,* Award on the Merits, Phase 2, April 10, 2001, paras. 177-181. 54. The Pope & Talbot tribunal found Canada breached Article 1105 through threatening the investor, denying its "reasonable requests for pertinent information" and requiring the investor "to incur unnecessary expense and disruption in meeting [the] request for information." (Investors' Book of Authorities Tab CA12).
[55] *Pope & Talbot,* Award on the Merits, Phase 2, April 10, 2001, paras. 118 (Investors' Book of Authorities Tab CA12).
[56] *Mondev,* Award, para. 119. (Investors' Book of Authorities Tab CA40).

(c) *Merrill & Ring* – Award – rejecting the *Neer* formula, "[E]xcept for cases of safety and due process, today's minimum standard provides for the fair and equitable treatment of aliens within the confines of reasonableness."[57]

(d) *Chemtura* – Award – rejecting the *Neer* formula, "In line with *Mondev*, the Tribunal will take into account of the evolution of international customary law in ascertaining the content of the international minimum standard …[regarding] whether the protection granted … is lessened by a margin of appreciation …. This is not an abstract assessment circumscribed by a legal doctrine about the margin of appreciation of specialized regulatory agencies. It is an assessment that must be *conducted in concreto*."[58]

73. Thus, despite Canada's assertions, NAFTA Tribunals since the issuance of the Notes of Interpretation that have had to consider on their own the applicability of the *Neer* formula have rejected the *Neer* formula, as constituting the with the exception of one outlier, one claim that avoids the debate entirely and the two cases where the disputing parties amongst themselves agreed to apply the *Neer* formula.[59] In addition, almost all of the NAFTA that followed the Notes of Interpretation NAFTA Awards have rejected the idea that the *Neer* formula could be applied to the current content of the customary international law standard of treatment.

74. This, in addition to the aforementioned observations by former International Court of Justice Judge Stephen Schwebel, suggests that the majority of NAFTA Awards that reject the *Neer* formula, "may be more persuasive to the contemporary critic than those in *Glamis Gold*.[60]

75. According to Sir Robert, the re-interpretation of Article 1105 to use the *Neer* standard is misplaced. The *Neer* award is not a proper basis for customary international law:

> But quite apart from the rather startling anachronism of trying to apply to investors and investments in [the 21st century] the standards for the protection of aliens against bandits in 1924, the *Neer* case was not a parallel case to [investor protection] in 1926. The present claim is not a claim based upon a customary law 'international delinquency', but a claim based upon the express terms of the NAFTA Agreement. [61]

76. Sir Robert's criticisms are echoed by Martins Paparinskis in his recent treatise on the *International Minimum Standard of Treatment and Equitable Treatment*.[62] Mr. Paparinskis states that investment arbitration cases do "not raise the issue of the

[57] *Merrill & Ring v Canada*, Award, at para. 213. (Investors' Book of Authorities Tab CA41).
[58] *Chemtura Corporation v. Government of Canada*, Ad Hoc UNCITRAL (NAFTA) Award (August 3, 2010), paras 122, 123 (Investors' Book of Authorities Tab CA111).
[59] Exceptions include the outlier *Glamis* case, the *Loewen* case, which never addressed the *Neer* formula, and those two cases where the disputing parties agreed amongst themselves to adopt the customary international law standard to be the content of fair and equitable treatment. Such an agreement was made in *Cargill, Incorporated v. United Mexican States*, Ad Hoc UNCITRAL (NAFTA) Award, ICSID Case No. ARB(AF)/05/2 (NAFTA), 18 September 2009 at para. 269. (Investors' Book of Authorities Tab CA117) and in *Mobil v. Canada* at para. 135. (Investors' Book of Authorities at Tab CA194).
[60] Judge Stephen M. Schwebel, "Is Neer Far From Fair And Equitable?" Remarks at the International Arbitration Club, London, 5 May 2011. (Investors' Book of Authorities Tab CA273).
[61] Opinion by Sir Robert Jennings. (Investors' Book of Authorities Tab CA146) at 4.
[62] Martins Paparinskis, *The International Minimum Standard of Treatment and Equitable Treatment* (2013: Oxford University Press). (Investors' Book of Authorities Tab CA272).

mistreatment of an alien by the State".[63] Rather, what has to be considered is that fair and equitable treatment is a standard used in hundreds of BITs.[64] As described elsewhere, this standard is a general one that takes into account various elements of international law.

77. The Notes of Interpretation cannot be considered a binding import of the *Neer* standard as this case does not reflect the evolution of customary international law since that case, and there is no proof that *Neer* ever actually represented the customary international law standard. Instead, *Neer* seems to reflect the customary "low water point" to demonstrate the weakest protection of investment rights on account of its very high threshold standard. Indeed, the US – Mexican Claims Commission did not generally adopt the *Neer* standard as reflective of customary international law standards during its sitting. Instead, the Claims Commission appeared to consider consistency with international law in cases such as the *Roberts* claim.[65]

78. In the Memorial, the Investors have made reference to paragraph 39 of the jurisdictional award by the International Court of Justice in *Diallo*, where the International Court says that even *ratione materiae* of diplomatic protection has evolved beyond the traditional minimum standard for treatment of aliens and now includes *inter alia* international human rights[66]. Martins Paparinskis carefully considers the impact of such decisions in his treatise and has specifically relied on decisions taken by the European Court of Human Rights based on international law in his analysis of the international law standard. In light of the International Court's decision in *Diallo*, this Tribunal should also follow such an approach and reject the limits suggested by the Government of the United States on the "autonomous standard".[67]

79. Roland Klager in his treatise on *Fair and Equitable Treatment in International Investment Law* points out, "seeking to resolve current, sophisticated investor–state disputes by means of coarse formulas from the 1920s are seen as equally unhelpful."[68] A standard of customary international law, regardless of what one labels such a standard, cannot be defined in a vacuum and must account for the numerous bilateral investment treaties and treaties of friendship and commerce that incorporate the fair and equitable treatment standard.[69]

iv. The Autonomous "Fair and Equitable Treatment" Standard and the International Law Standard Have Converged

80. If the "fair and equitable treatment" standard is in fact part of customary international law, then it has greatly advanced the international law standard far beyond what Canada

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[63] Paparinskis, at 49. (Investors' Book of Authorities Tab CA272).
[64] Opinion by Sir Robert Jennings. (Investors' Book of Authorities Tab CA146) at 5.
[65] *Roberts* Claim. (Investors' Book of Authorities Tab CA232).
[66] *Ahmado Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, 24 May 2007, I.C.J. Reports 2007 at para. 39. (Investors' Book of Authorities Tab CA282).
[67] Paparinskis, at 80. (Investors' Book of Authorities Tab CA272).
[68] Roland Klager, *Fair and Equitable Treatment in International Investment Law* (Cambridge University Press, 2011) at. 75. (Investors' Book of Authorities Tab CA269).
[69] Klager, at 91 (Investors' Book of Authorities Tab CA269); *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, 29 June 2012 at para. 219. (Investors' Book of Authorities Tab CA277) ["*RDC*"].

would have the Tribunal believe. Indeed, such has been the development of the "fair and equitable treatment" standard in recent years that the plain meaning approach, on the one hand, and, on the other, the minimum standard approach, have largely converged.

81. NAFTA Tribunals have determined that for the purposes of NAFTA Article 1105(1), to the extent that customary law is to be applied, it is to be applied as it stands today.[70] Recent jurisprudence on the "fair and equitable treatment" standard indicates that, while it is possible that there may still be some residual difference between the autonomous standard and customary law standard,[71] this difference is fast disappearing.

82. The *Azurix* Tribunal explained this convergence as follows:

> 1. …the minimum requirement to satisfy the [fair and equitable treatment] standard has evolved…and its content is substantially similar whether the terms are interpreted in their ordinary meaning…or in accordance with customary international law.[72]
>
> 2. …The question whether fair and equitable treatment is or is not additional to the minimum treatment required under international law is a question about the substantive content of fair and equitable treatment and, whichever side of the argument one takes, the answer to the question may in substance be the same.[73]

83. The Tribunal in *CMS Gas* took this one step further, and determined that there is in fact no difference between the autonomous "fair and equitable treatment" standard and the international minimum standard:

> …the treaty standard of fair and equitable treatment…is not different from the international law minimum standard and its evolution under customary law.[74]

84. This view was further adopted by the Tribunal in the *Rumeli* case, which, after noting that there was agreement even between the parties that "fair and equitable" encompasses such concepts as transparency, arbitrary or discriminatory treatment, good faith, and procedural due process,[75] stated as follows:

> The only aspect [of the fair and equitable treatment obligation] is that for Respondent, the concept does not raise the obligation on Respondent beyond the international minimum standard of protection. The Arbitral Tribunal considers that this precision is more theoretical than real. It shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law.[76]

85. Since it is clear that customary international law may be inferred by international jurisprudence, and since that jurisprudence demonstrates that there is now a convergence between the "fair and equitable treatment" standard and the international law standard,

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[70] *ADF* at para. 179, (Investors' Book of Authorities Tab CA9).
[71] *Sempra* at para. 302, (Respondent's Book of Authorities Tab RA66) ; *Enron* at para. 258, (Respondent's Book of Authorities Tab RA24) .
[72] *Azurix Corp. v. Argentine Republic,* ICSID Case No. ARB/01/12, Award, 2006 14 July 2006. [“*Azurix*”] at para. 361, (Investors' Book of Authorities Tab CA1).
[73] *Azurix* at para. 364, (Investors' Book of Authorities Tab CA1).
[74] *CMS Gas* at para. 284, (Investors' Book of Authorities Tab CA20).
[75] *Rumeli* at para. 609, (Respondent's Book of Authorities Tab RA107).
[76] *Rumeli* at para. 611, (Respondent's Book of Authorities Tab RA107).

the question about the impact of the Note of Interpretation is largely academic. Whether "fair and equitable treatment" is an autonomous standard to be interpreted in accordance with all the sources of international law, or whether it is to be understood as restricted to only customary international law, the end result appears to be the same: NAFTA Article 1105(1) requires Canada to accord foreign investors "fair and equitable treatment" in accordance with the plain and ordinary meaning of the term.

86. The Government of the United States, in its Article 1128 submission, states in paragraph 4 that law derived from arbitral decisions that interpret the "autonomous" standard cannot be applied to the interpretation of NAFTA Article 1105. In essence, the United States suggests that the law arising under NAFTA Article 1105 is a *lex specialis* that overrides and excludes the general principles of law applicable under the terms of NAFTA Article 1105. The Investors disagree with the US position.

87. A *lex specialis* cannot override those secondary obligations that unify legal order. Judge Bruno Simma and Dirk Pulkowski state:

> Whether or not the general international law of State responsibility applies is not so much determined by the ordinary meaning of a treaty's terms but by certain background assumptions concerning the structure of the international legal order.[77]

> Since special responsibility regimes are simply considered an aggregate of *leges speciales*, which nonetheless remain part of unified legal order, a fallback on State responsibility is warranted to the extent that that special regime remains tacit.[78]

88. They confirm that the burden of proving the existence of this *lex specialis* falls on the party asserting it:

> According to scholars following a universalistic concept of international law, a presumption in favour of the application of general international law applies... '[I]t is for the party claiming that a treaty has 'contracted out' of general international law to prove it.'[79]

B. The Effect of Most Favoured Nation Treatment Obligations

89. The NAFTA contains an obligation for Most Favoured Nation treatment (MFN) within NAFTA Article 1103. The NAFTA also refers to MFN as one of its interpretative rules and principles underpinning its overall interpretation in Article 102.

90. MFN clauses can identify the content of the state's obligations by use of a variable parameter based on a state's obligations to others. The basis for this better treatment will be the more favourable treatment that is offered by these obligations and must be subject to the terms of any restrictions contained in the terms of the MFN clause.

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[77] Bruno Simma and Dirk Pulkowski, *Leges speciales and Self-Contained Regimes*, in *The Law of International Responsibility*, eds. James Crawford, et al (Oxford University Press, 2010) at 146. (Investors' Book of Authorities Tab CA276).

[78] Simma and Pulkowski, at 146. (Investors' Book of Authorities Tab CA276).

[79] Simma and Pulkowski, at 146. (Investors' Book of Authorities Tab CA276), citing Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge University Press, 2003) at 213. (Investors' Book of Authorities Tab CA274).

91. Martins Paparinskis considers the operation of MFN clauses on the meaning of the international minimum standard in treaties. He concludes that MFN clauses can be applied to substantive obligations. He states: "it should be possible to treat more detailed rules on fair and equitable treatment on the scale of favourability".[80] He then considers the practical ways to assess favourability and concludes that:

> MFN clauses are applicable to incorporate more favourable substantive rules in general and more favourable parts of substantive rules in particular, they do not seem easily applicable to criteria developed by case law. The criterion of 'favourability' can be applied only if matter can be compared on the spectrum of greater and lesser favourability". [81]

92. In an accompanying footnote, Mr. Paparinskis examines cases on favourability. He states that the word favourable means:

> Favourable is 'attended with advantage or convenience', *Oxford English Dictionary* (Volume V, 2nd edn Clarendon Press, Oxford 1989) 774–5; the first meaning of 'advantage' is 'superior position', ibid Volume I 184; and 'superior' is '[i]n a positive or absolute sense (admitting comparison with *more* and *most*): Supereminent in degree, amount, or (most commonly) quality; surpassing the generality of its class or kind', ibid Volume XVII 229; cf *Berschader* Weiler (n 154) [22]; *ICS Inspection and Control Services Limited (United Kingdom) v Argentina*, PCA Case no 2010-9, Award on Jurisdiction, 10 February 2012 [318]–[325]; Paparinskis, 'MFN Clauses and International Dispute Settlement' (n 158) 47–56. [82]

93. Accordingly, if a MFN clause in another treaty obliged Canada to provide treatment to investments of foreign investors that would be advantageous or surpassing the quality of that provided to investments under NAFTA Article 1105, then more favourable treatment would need to be provided by Canada under Article 1103 with respect to the conduct, management, operation, control or disposition of investments of investors in like circumstances.

94. The MFN obligation requires this Tribunal to provide treatment as favourable to the Investors as that provided to other investors who would receive treaty protection for their investments under other investment protection treaties negotiated by Canada. To be invoked, MFN requires the establishment of diversity of nationality. There must be an investment of an investor that receives better treatment in like circumstances than the investments of the Investors in this arbitration claim. So what is necessary is to establish a diversity of nationality.

95. Canada is a party to many bilateral investment treaties with non NAFTA-states. These treaties state the fair and equitable treatment obligation in terms that are similar (or even broader) than NAFTA Article 1105. However, Canada and the other parties to these treaties have not negotiated interpretive notes or other instruments that are claimed to narrow the meaning of Fair and Equitable Treatment in the treaty itself.

[80] Paparinskis at 134. (Investors' Book of Authorities Tab CA272).
[81] Paparinskis at 134. (Investors' Book of Authorities Tab CA272).
[82] Paparinskis at 134 in footnote 162. (Investors' Book of Authorities Tab CA272).

96. If and to the extent that this Tribunal accepts the invocation of the Notes of Interpretation as suggested by the US Government in paragraphs 3 and 4 of its 1128 Submission to narrow the obligations of a NAFTA Party under Article 1105 to less than it otherwise be, that same invocation would result in less favourable treatment being provided to the investor under the NAFTA than to investors of non-NAFTA states parties to Canada's BITs. This constitutes a violation of the Most-Favoured Nation obligation in NAFTA Article 1103. In such a circumstance, the comments of the *Pope and Talbot* tribunal, in REJECTING such a narrowing interpretation, are apposite.[83]

97. Canada has negotiated other treaties with such protections since the coming into force of the NAFTA on January 1, 1994. Each of these treaties uses identical or similar text to Article 1105 of the NAFTA that has not been subject to "amendments" under the Notes of Interpretation. A number of investment treaties have been signed by Canada in which Canada is required to provide foreign investors with this better "autonomous" level of international law treatment. The treaties with these particular formulations are between Canada and: Armenia[84], Barbados[85], Costa Rica[86],Croatia[87], Ecuador[88], Egypt[89], Lebanon[90], Philippines[91], Thailand[92], Trinidad & Tobago[93], Ukraine[94], Uruguay[95], and Venezuela.[96] Each of these treaties, apart from Venezuela[97], offers the following general international law standard of protection to investments of foreign investors covered by the treaty:

> Each Contracting Party shall accord investments or returns of investors of the other Contracting Party
>
> (a) Fair and equitable treatment in accordance with principles of international law, and
> (b) Full protection and security

[83] *Pope & Talbot,* Award in Respect of Damages at para. 47, (Investors' Book of Authorities Tab CA39)
[84] Canada's Foreign Investment Promotion and Protection Agreement with Armenia, brought into force 29 March 1999, article 2(2). (Investors' Book of Authorities Tab CA64).
[85] Canada's Foreign Investment Promotion and Protection Agreement with Barbados, brought into force 17 January 1997, article 2(2). (Investors' Book of Authorities Tab CA63).
[86] Canada's Foreign Investment Promotion and Protection Agreement with Costa Rica, brought into force 29 September 1999, article 2(2). (Investors' Book of Authorities Tab CA71).
[87] Canada's Foreign Investment Promotion and Protection Agreement with Croatia, brought into force 30 January 2001, article 2(2). (Investors' Book of Authorities Tab CA295).
[88] Canada's Foreign Investment Promotion and Protection Agreement with Ecuador, brought into force 6 June 1997, article 2(2). (Investors' Book of Authorities Tab CA68).
[89] Canada's Foreign Investment Promotion and Protection Agreement with Egypt, brought into force 3 November 1997, article 2(2). (Investors' Book of Authorities Tab CA61).
[90] Canada's Foreign Investment Promotion and Protection Agreement with Lebanon, brought into force 19 June 1999, article 2(2). (Investors' Book of Authorities Tab CA65).
[91] Canada's Foreign Investment Promotion and Protection Agreement with Philippines, brought into force 13 November 1996, article 2(2). (Investors' Book of Authorities Tab CA62).
[92] Canada's Foreign Investment Promotion and Protection Agreement with Thailand, brought into 24 September 1998, article 2(2). (Investors' Book of Authorities Tab CA69).
[93] Canada's Foreign Investment Promotion and Protection Agreement with Trinidad & Tobago, brought into force 8 July 1996, article 2(2). (Investors' Book of Authorities Tab CA67).
[94] Canada's Foreign Investment Promotion and Protection Agreement with Ukraine, brought into force 24 July 1995, article 2(2). (Investors' Book of Authorities Tab CA60).
[95] Canada's Foreign Investment Promotion and Protection Agreement with Uruguay, brought into force 2 June 1999, article 2(2). (Investors' Book of Authorities Tab CA70).
[96] Canada's Foreign Investment Promotion and Protection Agreement with Venezuela, brought into force 28 January 1998, article 2(2). (Investors' Book of Authorities Tab CA72).
[97] The Venezuela BIT reads: "Each contracting party shall, in accordance with the principles of international law, accord investments or returns of investors of the other Contracting Party fair and equitable treatment and full protraction and security." (Investors' Book of Authorities Tab CA72).

98. These broader investment protections provided by Canada under the operation of the Treaties that are in force to the investments of other similarly-situated investors from third party states constitute more favourable treatment actually provided by Canada than that provided to Bilcon. Ensuring that such better treatment is incorporated into the NAFTA is consistent with the objectives of the NAFTA.

99. In addition, the definition of an investor and of an investment in each of these third treaties is based upon an near identical model to that contained in Article 1139 of the NAFTA. The wording used in each of these third party treaties says:

> Investor: any natural person possessing the citizenship or of permanently residing in [Country] in accordance with its law or any enterprise incorporated or duly constituted in accordance with applicable laws in [the country] and who makes the investment in [the receiving country] and who does not possess the citizenships of [the receiving country].
>
> Investment means any kind of asset owned or controlled either directly or indirectly through an investor of a third State, by an investor of one Contracting Party in the territory of the other Contracting party in accordance with the latter's laws and, in particular, though not exclusively, includes:
>
> (a) Movables and immovable property and any related property rights such as mortgages, liens or pledges;
> (b) Shares, stock, bonds and debentures or any other form of participation in a company, business enterprise or joint ventures;
> (c) Money, claims to money, and claims to performance under contract having a financial value;
> (d) Goodwill;
> (e) Intellectual property rights;
> (f) Rights conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources.
>
> But does not mean real estate or other property, tangible or intangible, not acquired in the expectation or use for the purpose of economic benefit or other business purposes.
>
> Any change in the form of an investment does not affect its character as an investment.

Thus, investments of investors from any of the enumerated third party states who operated in like circumstances were entitled to more favourable treatment from Canada. And such similar investments received such treatment in the context of the conduct, operation, management or control of their investments.

100. Fair and equitable treatment in accordance with the principles of international law" is simply more favourable to the investments of a foreign investor than the fair and equitable treatment text in Article 1105 if the Notes of Interpretation are given the effect requested by the Government of United States in its 1128 Submission.

101. As a result of the MFN obligation in Article 1103, Canada is required to extend treatment as favourable as Canada already is required to provide to investments of investors from third party states under the "autonomous standard" to the investments of such investors.

102. In any case, the interpretation of NAFTA Article 1105 that the Tribunal adopts cannot have the result that Canada provides less favourable treatment to the Investors than that afforded to investors of non-NAFTA Parties operating in like circumstances under other treaties to which Canada is bound.

103. Viewing the Notes of Interpretation as restricting the ordinary meaning of the international law standard and Fair and Equitable Treatment would have just this effect, since the Notes of Interpretation do not require this restriction. Thus there is no argument under these other treaties for restricting the ordinary meaning of Fair and Equitable Treatment or Full Protection and Security.

104. The application of the MFN clause in this way is consistent with the object and purpose of NAFTA, that of comprehensive economic integration, which as the *Pope & Talbot* Tribunal noted, could not be consistent with a lower standard of treatment than under BITs with states with much less close and interdependent economic relations.

105. The operation of the MFN obligation requires that the Tribunal consider the content of the "autonomous" international law standard that has been considered at length by many other international law tribunals. Accordingly, whether it is provided under NAFTA Article 1105 or under the operation of NAFTA Article 1103, Canada must provide treatment to Bilcon's investments in accordance with the full spectrum of International law including but not limited to customary international law.

106. There is no *lex specialis* within the NAFTA that prohibits this Tribunal from considering, for the purposes of guidance in its interpretive exercise, the decisions of other courts and tribunals interpreting non-NAFTA treaty provisions. Such decisions are among the sources of law in Article 38 of the *Statute of the ICJ*. Obviously, in considering such decisions, a NAFTA tribunal will have to assess their relevance given the object and purpose of the NAFTA. However, the Notes of Interpretation themselves, in referring to custom, suppose some kind of common ground in international law concerning at least the broad parameters of what is fair and equitable. It would be thus highly surprising if the views of other tribunals interpreting this, or closely similar language, in different treaties were of no assistance.

107. The reliance on an MFN clause of the treaty being applied to accord to the investor the standard of fair and equitable treatment guaranteed to investors of other parties through another treaty is not unprecedented.

108. While there has been some debate about the ability to use MFN to address procedural advantages, there has been no debate on the use of MFN clauses to address differences in treatment with respect to substantive treatment provided to foreign investors and their investment. In addition, MFN clauses were found to have substantive effect by international investment Tribunals in at least the following: *MTD v Chile*[98] , in *Siemens v.*

[98] *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004. ["*MTD Equity*"] at para 104 (Investors' Book of Authorities Tab CA21).

Argentina, [99] *Gas Natural SDG v. Argentina*[100], *Suez Santa Fe v. Argentina*[101], *Bershader v. Russia*[102], *Rosinvest v. Russia*[103] and *Société Générale v. Dominican Republic*.[104]

109. The use of MFN with regards to the "fair and equitable" standard is not unprecedented in investment law.[105] In *Rumeli Telekom SA and others v. Kazakhstan* the Tribunal used the MFN requirements of the treaty to apply the fair and equitable standard, eventually finding that:

> That the process that led to the decision of the Working Group lacked transparency and due process and was unfair, in contradiction with the requirements of the fair and equitable treatment principle. Since the Working Group acted as an organ of the State, the violation amounts to a breach of the BIT by the Republic.[106]

As such, it is both necessary and reasonable for the Investors to benefit from treatment from Canada that is fair and equitable by application of the MFN provisions of the NAFTA.

110. In any event, this Tribunal need not actually rule that the Notes of Interpretation are actually an amendment for two reasons:

(a) The content of the customary international law would appear to addresses the specific aspects covered by NAFTA Article 1105 which are the present in this dispute; and

(b) The operation of the MFN treatment obligation in NAFTA Article 1103 needs to be given effect. While the Notes of Interpretation purport to limit the scope of the international law standard from applying to all international law to only customary international law, nothing in the Notes of Interpretation reduce the scope of the MFN clause contained in NAFTA Article 1103 or the interpretative principle of MFN which is a mandatory interpretative rule and principle of the NAFTA set out in Article 102(1).

C. Content of the International Law Standard of Treatment

111. Good faith is an integral part of the international law standard of treatment. The United States contends in paragraph 6 of its Submission that good faith is not an element of the international law standard.

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[99] *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004. ["*Siemens*"] at para 86. (Investors' Book of Authorities Tab CA54).
[100] *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Preliminary Questions on Jurisdiction, 17 June 2005.at para 29, (Investors' Book of Authorities Tab CA257).
[101] *Suez Santa Fe v. Argentina* (Jurisdiction) at paras 63-66. (Respondent's Book of Authorities Tab CA284).
[102] *Vladimir Berschader and Moïse Berschander v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006 at para 181 (Investors' Book of Authorities Tab CA265).
[103] *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, 1 October 2007at paras 124-139 (Investors' Book of Authorities Tab CA261).
[104] *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A. v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008at paras 40-41. (Investors' Book of Authorities Tab CA263).
[105] Klager, at 269 discusses a number of examples of the adoption of MFN clauses by tribunals. (Investors' Book of Authorities Tab CA269).
[106] Rumeli, para 618. (Investors' Book of Authorities Tab CA59) emphasis added.

112. At its core, the International Law Standard is a standard of conduct of the State with respect to foreign investments. In their Memorial, the Investors explained how the duty to act in good faith is the "fundamental norm underpinning international legal responsibility."[107] Also in their Memorial, the Investors identified several NAFTA and non-NAFTA Awards as recognizing that the duty to act in good faith is an independent obligation within the International Law Standard.[108]

113. For instance, the *S.D. Myers* Tribunal said, "Article 1105 imports into the NAFTA the international law requirements of due process, economic rights, *obligations of good faith* and natural justice.[109] Similarly, the *Tecmed* Tribunal said that "the commitment of fair and equitable treatment included in Article 4(1) of the [Spain-Mexico] Agreement is an expression and part of the *bona fide* principle recognized in international law."[110]

D. Protection Against Discrimination

114. NAFTA Tribunals have found that the protections provided to investments of Investors from other NAFTA Parties in NAFTA Article 1105 extend to the protection against nationality-based discrimination: "It is the responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice."[111]

115. In addition, Mr. Klager addresses the place of non-discrimination in his treatise as an "essential element that is inherent in the concept of fair and equitable treatment," that is "strongly supported by arbitral tribunals as an element of fair and equitable treatment."[112] He notes that "the word can be employed neutrally to mean mere differentiation" or it can be taken to mean "an unfair, arbitrary or unreasonable distinction," which he states is the more predominate interpretation in international law.[113]

116. In his scholarly treatise about the meaning of the international standard of treatment, Martins Paparinskis says that non-discrimination is an essential element of the classical international law meaning of the international law standard. He states:

> In the classical international law, the obligation to treat persons and property of aliens in a non-discriminatory manner was well-established....., the historical narrative, starting from the prominent prohibitions of discriminatory administration of justice in particular and the discriminatory conduct in general, suggests that when new rules are developed, they go with, rather than against, the grain of non-discrimination. There are no obvious examples of other customary rules on the treatment of aliens that would permit discrimination. If non-discrimination is accepted as constituting a non-exhaustive core of the international standard of the first half of the twentieth century, the proper question to

[107] Investors' Memorial, at para. 298.
[108] Investors' Memorial, at para. 303.
[109] Investors' Memorial, at para. 302. *S.D. Meyers*, at para. 243 (Investors' Book of Authorities Tab CA6)
[110] Investors' Memorial, at para. 303. *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003. ["*Tecmed*"] para. 153 (Investors' Book of Authorities Tab CA7).
[111] *See Loewen*, Award, at para. 123 (Investors' Book of Authorities Tab CA13); *see Waste Management II*, at para. 98 (Investors' Book of Authorities Tab CA100).
[112] Klager, at 187 and 195 (Investors' Book of Authorities Tab CA269).
[113] Klager, at 188 (Investors' Book of Authorities Tab CA269).

> ask is whether subsequent practice and *opinio juris* in favour of lawfulness of discriminatory conduct have changed the rule.[114]

117. After reviewing the historical development of the law, Mr. Paparinskis concludes that non-discrimination has been and still is part of the international law standard under customary international law. He opines:

> On balance, the role of non-discrimination in the classical law was so great that very clear and consistent practice and *opinio juris* regarding lawfulness of discriminatory conduct would be required to change it. While the treaty-making practice suggests a shift in that direction, it has not yet been expressed in an appropriate form to affect and change customary law. The better view therefore is that discrimination is still a part of the international standard, requiring reasonable justification for different treatment of similar cases. In any event, at least some instances of discrimination may trigger other aspects of the international standard. Conduct motivated by bias and prejudice may be too arbitrary to qualify as undertaken for a public purpose. The same factors could breach the minimal requirements of form. Finally, discrimination may be relevant in terms of procedural propriety; for example, when a State favours another investor in negotiations.[115]

118. For instance, in the *Loewen* NAFTA arbitration, the Tribunal recognized the principle of non-discrimination, and held that this meant conduct that was "free of sectional or local prejudice".[116] The *Waste Management II* Tribunal adopted the language of *Loewen*, and referred to a customary law prohibition on conduct that "is discriminatory and exposes the claimant to sectional or racial prejudice."[117]

E. Arbitrariness

119. A state breaches customary international law obligations when it acts arbitrarily. A state, therefore, breaches its customary international law obligation when it acts on "prejudice or preference rather than on reason or fact."[118]

120. It has been well-established by NAFTA Tribunals that arbitrary measures constitute a breach of the international law standard under NAFTA Article 1105:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed... if the conduct is *arbitrary*...[119]

121. The subsequent *GAMI* NAFTA decision adopted the *Waste Management* Tribunal's description of the standard.[120] In finding that Mexico breached Article 1105 by refusing

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[114] Paparinskis at 246. (footnotes omitted) (Investors' Book of Authorities Tab CA272).
[115] Paparinskis at 247. (footnotes omitted) (Investors' Book of Authorities Tab CA272).
[116] *Loewen*, Award, at para. 123. (Investors' Book of Authorities Tab CA13).
[117] *Waste Management II*, at para. 98. (Investors' Book of Authorities Tab CA100).
[118] *Lauder v. Czech Republic*, Final Award, 2001 WL 347860000 (September 3, 2001) at para. 232. (Investors' Book of Authorities Tab CA17).
[119] *Waste Management, Inc. v. United Mexican States*, Award, 2004 *WL* 3249803 (April 30, 2004) at para. 98. (Investors' Book of Authorities Tab CA14) ["*Waste Management II*"].
[120] *GAMI Investments v. Mexico*, Final Award, 2004 WL 3270068 (November 15, 2004) at para. 95. (Investors' Book of Authorities Tab CA15) ["*GAMI*"].

on irrelevant grounds to issue a permit to construct a landfill, the *Metalclad* decision also applied the principle that arbitrary conduct breaches Article 1105.[121]

122. In the *Metalclad* award, the Tribunal decided Mexico breached its NAFTA Article 1105 obligation by acting on the basis of irrelevant considerations.[122]

123. Other investor-state tribunals have similarly concluded that a state acts arbitrarily or discriminatorily when it acts on the basis of prejudice or preference and not on reason or fact. In *Lauder v. Czech Republic*, for example, the ICSID Tribunal said:

> The Treaty does not define an arbitrary measure. According to Black's Law Dictionary, arbitrary means "depending on individual discretion; ... founded on prejudice or preference rather than on reason or fact".... The measure was arbitrary because it was not founded on reason or fact, nor on the law ... but on mere fear reflecting national preference.[123]

124. The *Pope & Talbot* NAFTA Tribunal also found Canada breached Article 1105 by acting on prejudice rather than on reason or fact. Canada breached the obligation by threatening the investor, denying its "reasonable requests for pertinent information" and requiring the investor "to incur unnecessary expense and disruption in meeting SLD's requests for information."[124]

125. As noted above, both the *Waste Management* and *GAMI* Tribunals recognized an independent obligation under Article 1105 to not act in an arbitrary or discriminatory manner. The *GAMI* tribunal quoted the following passage from *Waste Management II*:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is *arbitrary*, grossly unfair, unjust or idiosyncratic, is *discriminatory* and exposes the claimant to sectional or racial prejudice.[125]

126. In the *Thunderbird* NAFTA claim, the Tribunal characterised "manifest arbitrariness in administration of proceedings as "constituting proof of an abuse of right".[126] Similarly,

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[121] *Metalclad Corporation v. United Mexican States*, Award, 2000 WL 34514285 (August 30, 2000) at paras. 86 and 101: "... the authority of the municipality only extended to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations ... was improper, as was the municipality's denial of the permit for any reason other than those related to the physical construction or defects in the site. The Tribunal therefore holds that Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105." (Investors' Book of Authorities Tab CA16) ["*Metalclad*"].

[122] *Metalclad* at para. 92. (Investors' Book of Authorities Tab CA16).

[123] *Lauder* at paras. 221 and 232. (Investors' Book of Authorities Tab CA17).

[124] *Pope & Talbot*, Award on the Merits Phase 2, April 10, 2001 at paras. 177-181. (Investors' Book of Authorities Tab CA12).

[125] *Waste Management II* at para. 98 (Investors' Book of Authorities Tab CA100), quoted in *GAMI* at para. 89 [emphasis added] (Investors' Book of Authorities Tab CA15).

[126] *International Thunderbird Gaming Corporation v. United Mexican States*, Award, 2006 WL 247692 (January 26, 2006). ["*Thunderbird*"] para 197,(Investors' Book of Authorities Tab CA19).

the *Azinian* Tribunal noted that "clear and malicious misapplication of the law" constitutes denial of justice and abuse of rights.[127]

127. The NAFTA Tribunal in *Loewen found*:

> 132. Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough, even if one applies the [FTC] Interpretation according to its terms.[128]

128. The *Metalclad* Tribunal considered a claim that Mexico breached its Article 1105 obligations through the actions of one of its municipalities. The municipality in question was only legally allowed to consider construction issues when granting or denying building permits. The municipality exceeded that authority when it refused the investor's permit on environmental grounds.[129] In finding that this conduct amounted to a breach of Article 1105, the Tribunal said:

> Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105.[130]

The Tribunal, therefore, found a breach of Article 1105 because Mexico acted on the basis of irrelevant considerations.

129. These cases demonstrate comprehensive broad support among NAFTA tribunals for finding that NAFTA Article 1105 is inclusive of an independent obligation not to act arbitrarily or discriminate against investors from other parties.

130. Non-NAFTA tribunal decisions also demonstrate that the international law standard requires states to avoid acting arbitrarily. As observed by the *CMS* Tribunal "[a]ny measure that might involve arbitrariness ... is in itself contrary to fair and equitable treatment."[131] Similarly, in finding that Poland failed to provide fair and equitable treatment, the *Eureko* Tribunal said Poland "acted not for cause but for purely arbitrary reasons ..."[132]

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[127] *Azinian, Davitian, & Baca v. United Mexican States* ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999. ["*Azinian*"], para 103 (Respondent's Book of Authorities Tab RA5).
[128] *Loewen* at para 132. (Investors' Book of Authorities Tab CA13).
[129] The *Metalclad* tribunal said at para. 86, (Investors' Book of Authorities Tab CA16): "Even if Mexico is correct that a municipal construction permit was required, the evidence also shows that, as to hazardous waste evaluations and assessments, the federal authority's jurisdiction was controlling and the authority of the municipality only extended to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations in the case of what was basically a hazardous waste disposal landfill, was improper, as was the municipality's denial of the permit for any reason other than those related to the physical construction or defects in the site."
[130] *Metalclad* at para. 101. (Investors' Book of Authorities Tab CA16).
[131] *CMS Gas Transmission v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 2005 *WL* 1201002 (May 12, 2005) at para. 290. (Investors' Book of Authorities Tab CA20).
[132] *Eureko* at para. 233. (Investors' Book of Authorities Tab CA8).

131. The *Occidental* Tribunal found that Ecuador breached its obligation to provide fair and equitable treatment by acting in an arbitrary manner.[133]

132. WTO jurisprudence illustrates the kind of actions that have been found to be arbitrary for purposes of international law. In the *US-Shrimp* case, the Appellate Body considered whether a refusal to issue import certificates fell within the general exceptions of GATT Article XX. Measures do not fall within the Article XX exceptions if they amount to "arbitrary discrimination." The US had refused the certificates because the shrimp had not been caught under a particular form of regulatory program. The Appellate Body found that the US arbitrarily discriminated by "requir[ing] countries applying for certification [to import shrimps] ...[to] adopt a comprehensive regulatory program that is essentially the same as the United States' program, without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries."[134]

133. The Appellate Body stated as follows with respect to the US import certification process:

> ...with respect to neither type of certification [for import] is there a transparent, predictable certification process that is followed by the competent United States government officials. The certification processes... consist principally of administrative *ex parte* inquiry or verification by staff...[135]

The Appellate Body also noted that the US provided "no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification is made;"[136] and that "no formal written, reasoned decision, ... is rendered on applications [and] [n]o procedure for review of, or appeal from, a denial of an application is provided."[137]

134. The Appellate Body concluded that "exporting Members applying for certification whose applications are rejected are denied basic fairness and due process, and are discriminated against, *vis-à-vis* those Members which are granted certification."[138] This decision indicates that a process that denies an applicant a meaningful opportunity to respond to arguments against it or denies it a mechanism to appeal an unreasoned decision is arbitrary and unfair.

135. Fundamentally both international human rights law and international investment law "contain rules regarding the treatment of individuals within a State".[139] International human rights law is "a relevant rule for the purposes of interpretation of treaty rules or would provide an appropriate source of analogy," that "may enter the interpretative

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[133] *Occidental Exploration and Production Company v. the Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 2004 WL 3267260 (July 1, 2004), at para. 163, finding that the investor: ... was confronted with a variety of practices, regulations and rules dealing with the question of VAT. ... this resulted in a confusing situation ... it is that very confusion and lack of clarity that resulted in some form of arbitrariness ..." (Investors' Book of Authorities Tab CA18) ["*Occidental*"].

[134] *United States - Import Prohibition of Certain Shrimp and Shrimp Products* - Report of the Appellate Body, WT/DS58/AB/R, October 12, 1998, at para. 177. (Investors' Book of Authorities Tab CA124).

[135] *US - Shrimp* at para. 180. (Investors' Book of Authorities Tab CA124).

[136] *US - Shrimp* at para. 180. (Investors' Book of Authorities Tab CA124).

[137] *US - Shrimp* at para. 180. (Investors' Book of Authorities Tab CA124).

[138] *US - Shrimp* at para. 181. (Investors' Book of Authorities Tab CA124).

[139] Paparinskis, (Investors' Book of Authorities Tab CA272) at 176.

process" because "human rights rules may contain functionally analogous obligations regarding the treatment of investors and investment." [140] It is for this reason that multiple international investment tribunals have drawn on international human rights case law.[141]

136. The protection of individuals from arbitrariness is an objective of international human rights[142] as well as constituting an integral part of the international law standard of treatment within NAFTA Article 1105.The decisions of the European Court of Human Rights support the fact that state conduct will be arbitrary in "the absence of a legitimate aim."[143] It is in this vein that courts have treated procedural safeguards "as elements of lawfulness."[144] The jurisprudence supports the conclusion that "restrictive measures must have some basis in domestic law, and be accessible and foreseeable."[145]

137. Arbitrary state conduct is not tolerated under international human rights law. Despite a wide ambit for public policy considerations, judges closely scrutinize "*ad hoc* abuses and formal and procedural safeguards."[146]

138. When scrutinizing the conduct in question to protect procedural safeguards, decisions arising from international human rights tribunals should be seen as one of the valid "interpretative authorities" to assist international investment treaty tribunals when assessing the administration of justice as protected by "a treaty obligation to provide fair and equitable treatment."[147]

139. Rights protected in international human rights law as related to the administration of justice have been endorsed by international investment tribunals as necessary of protection in the investment context.

140. In *Thunderbird* the Tribunal spoke of a "failure to provide due process (constituting an administrative denial of justice)."[148]In contrast to the international human rights law concept of denial of justice, *Thunderbird* supports the proposition that administrative denials of justice in international investment law can be found in the absence of the exhaustions of domestic remedies. Mr. Paparinskis describes this as follows:

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[140] Paparinskis, (Investors' Book of Authorities Tab CA272) at 8 and 175.
[141] *Mondev v. USA*, para. 141 (Investors' Book of Authorities Tab CA40); *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Separate Opinion, December 2005. (Investors' Book of Authorities Tab CA310) para. 27 (Investors' Book of Authorities Tab CA19); *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 129 (Investors' Book of Authorities Tab CA260).
[142] Paparinskis, at 232 (Investors' Book of Authorities Tab CA272) refers to *Broniowski v. Poland* (App no 31443/96) [GC] (2004) ECHR 2004-V (Investors' Book of Authorities Tab CA298)*; Carbonara and Ventura v. Italy* (App no 24638/94) (2000) ECHR 2000-VI (Investors' Book of Authorities Tab CA299) and *Handyside v UK* (App no 5493/72) (1976) Series A no 24 (Investors' Book of Authorities Tab CA300) He writes: "This is reflected in the case law: "The recent case law has also elaborated the obligations of States to follow their legislative policies, and to ensure that the form of the measures and the procedural safeguards protect from arbitrariness."
[143] Paparinskis, at 233 (Investors' Book of Authorities Tab CA272) citing *Handyside v. UK* (Investors' Book of Authorities Tab CA300) and *Sporrong and Lonnroth v. Sweden* (App nos 7151175 and 7152/75) (1982) Series A no 52 (Investors' Book of Authorities Tab CA304).
[144] Paparinskis, at 236 (Investors' Book of Authorities Tab CA272).
[145] Paparinskis, at 235 (Investors' Book of Authorities Tab CA272).
[146] Paparinskis, at 237 (Investors' Book of Authorities Tab CA272).
[147] Paparinskis, at 181 (Investors' Book of Authorities Tab CA272).
[148] *Thunderbird v. Mexico*, para. 197 (Investors' Book of Authorities Tab CA19).

> The better view of this practice is that parties and Tribunals used 'denial of justice' not as a term of art of the primary rule on the administration of judicial justice but as a descriptive reference to breaches of procedural propriety.[149]

He continues and states that the cases fall "within the international standard's requirements for compliance with certain procedural criteria, but situated outside the international standard's rules on the administration of justice, and therefore do not require full exhaustion of judicial remedies."[150]

F. The Protection Against Abuse of Rights

141. Canada has an obligation within the international law standard of treatment to protect against the abuse of rights which harm the investments of against foreign investors. The *Azinian* NAFTA decision[151] and the writings of eminent scholars such as Prof. Bin Cheng[152] and Sir Hersch Lauterpacht,[153] reinforce this rule as a standalone obligation under customary international law.

142. In his treatise about the central role general principles of law within international law, Professor Bin Cheng has explained that the obligation to act in good faith includes an obligation on the state not to abuse powers. He wrote:

> The principle of good faith requires that every right be exercised honestly and loyally. Any fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated. Such an exercise constitutes an abuse of the right, prohibited by law. [154]

He further explained that:

> "the theory of abuse of rights (*abus de droit*), recognised in principle both by the Permanent Court of International Justice and the International Court of Justice is merely an application of this principle [of good faith] to the exercise of rights."[155]

143. This long-standing principle also applies within the context of abuses of administrative authority. The roots of the principle of abuse of rights date to the foundations of modern international law. In the *Bering Fur Seals* case, the Tribunal accepted that the malicious exercise of a right was an abuse of a state's authority.[156]

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[149] Paparinskis, at 209. (Investors' Book of Authorities Tab CA272).
[150] Paparinskis, at 209. (Investors' Book of Authorities Tab CA272).
[151] *Azinian v. Mexico*, Award, November 1, 1999, 39 ILM 537 (2000) at para. 103. (Respondent's Book of Authorities Tab RA5).
[152] Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1987: Cambridge University Press), at 123. (Investors' Book of Authorities Tab CA75).
[153] Lauterpacht, *The Function of Law in the International Community* (Oxford University Press, 1933) at 289. (Investors' Book of Authorities Tab CA305).
[154] Panizzon, at 31(Investors' Book of Authorities Tab CA259), referencing Cheng, at 121-32 (Investors' Book of Authorities at Tab 75).
[155] Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1987: Cambridge University Press) at 121. (Investors' Book of Authorities Tab CA75).
[156] Cheng, 121-122 (Investors' Book of Authorities Tab CA75), citing *Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering's sea and the preservation of fur seals*, Decision of 15 August 1893 (Investors' Book of Authorities Tab CA308).

144. In considering similar early developments of the law, Sir Hercsh Lauterpacht effectively tied the concept of abuse of rights to the flexible evolution of international law.[157] He demonstrates that the principle allows for international tribunals to ensure that the actions of states are judged in accordance with modern views of morality.[158] As such, from the beginning, the concept of abuse of rights is reasonably similar to an evolving customary international standard.

145. In the context of the international law standard of treatment, the abuse of rights arises in three principal ways, namely:

(a) A state exercises powers in such a way as to hinder an investor in the enjoyment of their rights, resulting in injury to the investor;

(b) A fictitious exercise of a right; or

(c) An abuse of discretion in the exercise of governmental powers. [159]

The NAFTA should be read as preserving and affirming the right to regulate for legitimate purposes but each of these manifestations of governmental action is a fundamental violation of the most longstanding part of the international law standard of treatment.

146. Alexandre Kiss in his article on Abuse of Rights in the *Encyclopedia of Public International Law* agrees with this type of three part abuse of rights taxonomy and concludes that no proof of intention to cause harm is necessary where there is an abuse of discretion, in the exercise of governmental powers. [160] However, such intent is necessary when looking at the fictitious exercise of a right (such as where a right is exercised intentionally for an end that is different from that for which that right was created). [161]

147. The *Azinian* Award confirmed how protection against the abuse of rights was contained within the international law standard guaranteed under NAFTA Article 1105. It stated:

> There is a fourth type of denial of justice, namely clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of "pretence of form" to mask a violation of international law.[162]

148. Patent abuses of administrative decision-making will violate the "fair and equitable treatment" standard. In his Separate Opinion for *Impregilo v Argentina*, Judge Charles N.

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[157] Lauterpacht, at 287 (Investors' Book of Authorities Tab CA305).
[158] Lauterpacht, at 287 (Investors' Book of Authorities Tab CA305).
[159] Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Hart Publishing, 2006).at 30 (Investors' Book of Authorities Tab CA259).
[160] Alexandre Kiss, "Abuse of Rights", *Max Plank Encyclopedia of Public International Law* (vol 1) at paras 5-6. (Investors' Book of Authorities Tab CA301).
[161] *Free Zones of Upper Savoy and the District of Gex* (France v. Switzerland), P.C.I.J., Judgment, 7 June 1932 (Investors' Book of Authorities Tab CA302). Cheng, at 123. (Investors' Book of Authorities Tab CA75).
[162] *Azinian and Mexico* (NAFTA Investor-State Claim) (2000) 39 ILM 537 at para. 103. (Investors' Book of Authorities at Tab RA5).

Brower carefully examined a series of actions by Argentina that were "nothing less than deliberate abuse of administrative power with a political motive."[163]

149. In *Impregilo v Argentina,*[164] the investor was an indirect minority shareholder in AGBA, a company that operated a water and sewerage services concession in the Province of Buenos Aires. The provincial authorities had terminated the contract and transferred the concession to a state-owned entity, listing a host of contract breaches by AGBA as justification for its decision. In response, Impregilo initiated an arbitration under the Argentina-Italy BIT, alleging that various actions by provincial authorities frustrating and terminating AGBA's performance of the concession breached provisions of the BIT, including the obligations on fair and equitable treatment and expropriation.

150. In his Separate Opinion, Judge Brower described a "behavioral pattern": a series of unreasonable legislative and regulatory burdens, delays, unduly extensive information requests and cost-raising tactics on the part of the Province of Buenos Aires – acts that transcended mere "contractual violations" and constituted substantial and undue interference with the investment.[165]

151. In another example, the Tribunal in *PSEG Global, Inc. v. Turkey* had observed that the fair and equitable treatment was essential towards the obligation to afford a stable and predictable legal framework. As such, the fair and equitable treatment obligation was breached due to the abuse of authority displayed by certain State organs and by the delivery of inconsistent administrative acts.[166]

G. Transparency

152. "Transparency is considered to enhance the predictability and stability of the investment relationship and thus to represent an incentive for the promotion of investment".[167] Chapter 18 of the NAFTA is largely dedicated to the importance of transparency. The fair and equitable treatment standard also requires that Canada provide investors with a transparent and fair business environment. The NAFTA Tribunal in *Metalclad* defined the host State's obligation for transparency as including:

> … all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement

[163] Separate Opinion of Judge Charles N. Brower, Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, 21 June 2011, at para. 7. Judge Charles N. Brower concurred with the majority of the Tribunal that had accepted Impregilo's arguments on "fair and equitable treatment". However, he disagreed with the deferential attitude towards government actions, which he believed constituted further violations of Argentina's "fair and equitable treatment" obligations under the treaty. (Investors' Book of Authorities Tab CA258).

[164] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, June 21, 2011. (Investors' Book of Authorities Tab CA291).

[165] Separate Opinion of Judge Charles N Brower, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, June 21, 2011, at para. 12-14, 15: Judge Brower further described events that "fit into the pattern of the Province [of Buenos Aires] disruptive actions", and emphasized how a "series of steps" can culminate into a breach of the "fair and equitable treatment" standard. (Investors' Book of Authorities Tab CA258).

[166] *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Uretim ve Ticaret Limited Sirketi v. Turkey*, ICSID Case No. ARB/02/5, Award, at paras. 246-256, particularly paras. 247-248. (Respondent's Book of Authorities Tab RA59) ["*PSEG*"].

[167] Klager, at 228. (Investors' Book of Authorities Tab CA269).

> should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.[168]

153. The customary international law standard is also breached where a party acts without transparency. As stated by the NAFTA Tribunal in the *Waste Management (II)* dispute, where the "minimum standard of treatment of fair and equitable treatment is infringed ... if the conduct ... involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with ... a complete lack of transparency and candour in an administrative process."[169]

154. The duty of transparency is a broad one, explained by Martins Paparinskis as conduct which is "in apparent breach of domestic law, or justified only by sparse reasoning and sometimes addressing the choice of different means, matters may be be reasonably expected or procedural improprieties."[170] After completing a review of the general concept and application of the obligation, Mr. Paparinskis summaries the appropriate test as one where an investor needs to be provided with "sufficient accessibility in light of local practices, where the investor has relied on competent assistance."[171]

155. Roland Klager also undertakes a significant analysis of transparency obligations under international law, and considers that the "notion of transparency in this context is concerned with the openness and clarity of the host state's legal regime and procedures".[172] This is not surprising as "number of international investment agreements have expressly incorporated transparency obligations" into investment treaties.[173]

H. Full Protection and Security

156. The obligation to provide full protection and security includes an obligation upon governments to provide a stable legal and business environment to foreign investors. For example, the *Azurix v. Argentina* Tribunal noted that the obligation to provide full protection and security includes an obligation to provide a "secure investment environment," noting:

> It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view.[174]

The Tribunal went on to note that the qualifier "full" supports its interpretation of protection and security going beyond the physical realm.[175]

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[168] *Metalclad*, Award, at para. 76. (Investors' Book of Authorities Tab CA16). This transparency obligation was vacated by a reviewing domestic law court which held that transparency was not an independent ground of the international law standard of treatment.
[169] *Waste Management (II)*, Award, at para. 98. (Investors' Book of Authorities Tab CA100).
[170] Paparinskis, at 248, *FN 270-274*, citing *Maffezini, Rumeli, Vivendi II, Tecmed, Saluka, and PSEG*. (Investors' Book of Authorities Tab CA272).
[171] Paparinskis, at 249, FN 287. (Investors' Book of Authorities Tab CA272).
[172] Klager, at 228. (Investors' Book of Authorities Tab CA269).
[173] Klager, at 228. (Investors' Book of Authorities Tab CA269).
[174] *Azurix Corp. v. Argentine Republic*, Award, ICSID Case No. ARB/01/1, 2006 WL 2095870 (July 14, 2006) at para. 408 (Investors' Book of Authorities Tab CA1).
[175] *Azurix Corp. v. Argentine Republic*, Award, ICSID Case No. ARB/01/1, 2006 WL 2095870 (July 14, 2006) at para. 408 (Investors' Book of Authorities Tab CA1).

157. Full protection and security must be read to include protection for the rule of law and fundamental fairness, and the legitimate expectation of an investor to be afforded full protection and security in a manner corresponding to this understanding. This understanding was endorsed by the Tribunal in *Metalclad*.

> Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.[176]

158. The Tribunal in *CMS Gas v. Argentina* said "[t]here can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment."[177]

159. The *Occidental v. Ecuador* Tribunal found that, after Occidental had made investments, Ecuador changed its tax law "without providing any clarity about its meaning and extent" and that the state's "practice and regulations were also inconsistent with [the] changes [to the law]."[178] The *Occidental* Tribunal, therefore, recognized a state may act inconsistently with an investor's legitimate expectations, and breach its obligation to treat an investor fairly and equitably, by failing to adhere to the rule of law by not following its own laws.

160. An interpretation of full protection and security to include an investor's legitimate expectation to benefit from full protection and security such that it reaches beyond the physical security of the investment, to include the rule of law and due process, is consistent with international law.[179]

161. In *Opel Austria*[180], the European Court of First Instance (CFI) took the opportunity to identify that individuals will have their legitimate expectations protected. As Prof. Panizzon comments:

> In *Opel Austria*, the CFI explicitly used general public international law to support its conclusion that the individual economic operator, Opel Austria was entitled to protection of its legitimate expectations and that Austria was entitled to oppose according to the principle of good faith, the creation of a regulation that would become illegal within the few days of Austria's entry into the EEA.[181]

162. The *Paushok v Mongoli* Tribunal noted that other tribunals, included that in *Rumeli* found that "respect of the investor's reasonable and legitimate expectations" are part of the definition of the fair and equitable treatment standard.[182] Therefore one cannot disassociate legitimate expectations with the other factors that make up the Fair and Equitable Treatment standard, which include, "transparency, good faith, conduct that

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[176] *Metalclad Corp*. v. *Mexico*, ICSID Case No. ARB(AF)/97/1 (Award of 30 August 2000), para. 99. (Investors' Book of Authorities Tab CA16).
[177] *CMS Gas Transmission Company v. the Argentine Republic*, ICSID Case No. ARB/01/08, Award, 2005 WL 1201002 (May 12, 2005) at para. 274. (Investors' Book of Authorities Tab CA20).
[178] Occidental Award, para. 84 (Investors' Book of Authorities Tab CA18).
[179] Paparinskis, at 252-3 (Investors' Book of Authorities Tab CA272).
[180] Case T-115/94, *Opel Austria GmbH v Council* [1997] ECR-II-39. (Investors' Book of Authorities CA306)
[181] Panizzon, at 19. (Investors' Book of Authorities CA259).
[182] *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v Mongolia*, UNCITRAL Case, Award on Jurisdiction and Liability, 28 April 2011 (Investors' Book of Authorities Tab CA262).

cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, lacking in due process or procedural propriety."[183]

163. At its core, reasonable expectations related to process is rooted in fairness.[184] The framework for assessing whether or not the expectations were met is set out by an analysis of whether or not the rule of law has been followed. The Tribunal in *LG&E Energy Corp. v. Argentina* said as much when it described legitimate expectations as such:

> [The expectations] are based on the conditions offered by the host state at the time of the investment; they may not be established unilaterally by one of the parties; they must exist and be enforceable by law; in the event of infringement by the host state, a duty to compensate the investor for damages arises except for those caused in the event of state of necessity; however, the investor's fair expectations cannot fail to consider parameters such as business risk or industry's regular patterns.[185]

164. Furthering the argument that an investor's legitimate expectations relate to the legal environment, and its proper operation, the Tribunal in *Parkerings-Compagniet AS* v. *Lithuania* said,

> In principle, an investor has a right to a certain stability and predictability of the legal environment of the investment. The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment.[186]

165. International law at the WTO has also expressed a connection between an investor's legitimate expectations and the requirements of full protection and security and how those translate into a stable and fair environment guided by a commitment to due process.

166. In the *US Section 301* case, the Tribunal looked to the WTO treaty's preamble to stress the critical role of full protection and security to fulfill the multilateral trade objectives of the WTO. The Panel stated:

> 7.75 Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble…
>
> 7.76 The security and predictability in question are of "the multilateral trading system". The multilateral trading system is, per force, composed not only of States but also, indeed

[183] *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v Mongolia*, UNCITRAL Case, Award on Jurisdiction and Liability, 28 April 2011 (Investors' Book of Authorities Tab CA262).
[184] Klager, at 167 (Investors' Book of Authorities Tab CA269).
[185] *LG&E Energy Corp and others v. Argentina*, ICSID Case No. ARB/02/1 (Decision on Liability of 3 October 2006), para. 130 (Investors' Book of Authorities Tab CA104).
[186] *Parkerings-Compagniet AS* v. *Lithuania*, ICSID Case No. ARB/05/8 (Award of 11 September 2007), at para. 333. (Investors' Book of Authorities Tab CA110).

> mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators.[187]

167. Marion Panizzon argues that treaty goals can prove the basis for a "claim of frustration of expectations."[188] Trade between State Parties to the NAFTA would be severely frustrated and hindered if investors could not legitimately expect that their investments would benefit from fair and transparent treatment at the hands of regulators. Any standard but that would lead to an unpredictability and risk that would work against securing the NAFTA's stated objectives of increasing trade and economic opportunity.

I. The Threshold: A Review of the Actual Test

168. Many other Tribunals – NAFTA and non-NAFTA alike – have taken a similar approach, confirming that a violation of "fair and equitable treatment" need not be triggered by an act that can be characterized as "outrageous" or "egregious".[189]

169. Several tribunals have determined that a violation of "fair and equitable treatment" may be triggered by behaviour that is simply "unreasonable".[190] The Tribunal in *Saluka* drew a close relationship between "reasonableness" and "fair and equitable treatment":

> The standard of "reasonableness" has no different meaning in this context than in the context of the "fair and equitable treatment" standard with which it is associated; and the same is true with regard to the standard of "non-discrimination". The standard of "reasonableness" therefore requires…a showing that the State's conduct bears a reasonable relationship to some rational policy, whereas the standard of "non-discrimination" requires a rational justification of any differential treatment of a foreign investor."[191]

170. The nexus between "fair and equitable treatment" and the duty to act "reasonably" was affirmed by the Tribunal in the award in *Continental Casualty*, which stated:

> …the fair and equitable standard is aimed at assuring that the normal law-abiding conduct of the business activity by the foreign investor is not hampered without good reasons by the host government and other authorities.[192]

171. The Tribunals in *MTD Equity*, *Azurix*, and *Siemens* all affirmed that, in the context of "fair and equitable treatment" analysis, what is required is "treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment."[193] Where

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[187] *United States – Sections 301-310 of the Trade Act of 1974, Report of the Panel*, 22 December 1999, WT/DS152/R (Investors' Book of Authorities Tab CA307).
[188] Panizzon, at 158 (Investors' Book of Authorities Tab CA259).
[189] *Pope & Talbot*,Award on the Merits, Phase II (Investors' Book of Authorities Tab CA12); *ADF*, (Investors' Book of Authorities Tab CA9), *Waste Management*, (Investors' Book of Authorities Tab CA100) *GAMI*, (Investors' Book of Authorities Tab CA15).
[190] *Iurii Bogdanov, Agurdino-Invest Ltd., Agurdino-Chimia and JSC v Republic of Moldova*, SCC Arbitration, Arbitral Award, 2004 WL 235957, 22 September 2005, (Investors' Book of Authorities CA106) at 10, *Eureko* at para. 234, (Investors' Book of Authorities Tab CA8).
[191] *Saluka*, para. 460, (Respondent's Book of Authorities Tab RA86).
[192] *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 at para. 254, (Investors' Book of Authorities Tab CA191).
[193] *MTD Equity* at para. 113, (Investors' Book of Authorities Tab CA21); *Azurix* at para. 360, (Investors' Book of Authorities Tab CA1); and *Siemens* at para. 290, (Investors' Book of Authorities Tab CA218).

the treatment in question is seen to be unjust or not even-handed, there may be a violation of "fair and equitable treatment."

172. In light of the findings of recent tribunals such as in *Azurix* and *CMS Gas* that there is a dwindling distinction between the treaty standard of "fair and equitable treatment" and the international minimum standard, the threshold for a breach of NAFTA Article 1105(1) is not as high as the United States would have us believe.

173. Not only does the obligation to accord foreign investors "fair and equitable treatment" require Canada to act in a non-arbitrary and non-discriminatory manner, but it also requires Canada to act reasonably. Where there is no reasonable relationship between Canada's actions and a rational policy, it fails to act reasonably, thereby violating its duty to provide "fair and equitable treatment".

J. The Test is a Flexible One to be Applied in All the Circumstances

174. What amounts to a violation of the "fair and equitable treatment" standard is necessarily specific to each case. Admittedly, there is as of yet no general agreement on the precise content and scope of the customary standard of "fair and equitable treatment". This stems from the inherently supple nature of the standard. There simply is no easy formula that can apply to all cases. As the *Waste Management* Tribunal noted, "the standard is to some extent a flexible one which must be adapted to the circumstances of each case."[194]

175. While this may lead to a certain level of uncertainty as to exactly what constitutes a violation of "fair and equitable treatment", there is at least this much that *is* certain: the more grievous and numerous the violations of these various indicia, the more likely there is to be a violation of the duty to provide "fair and equitable treatment". What is also certain is that the trend has for some time now been evolving towards a higher customary law standard of investment protection from Prof. Schreuer terms "state interference".[195]As a result, there is without questions a higher customary law standard of treatment, incorporating modern notions of administrative fairness and due process of law.

176. Bearing all this in mind, all this Tribunal needs to ask itself is this: in light of all the circumstances of this case, with a view to all the sources of international law, and in the understanding that there has in recent years been a rapid convergence between the autonomous treaty standard of "fair and equitable treatment" and the customary international law standard, has Canada violated its obligation to accord the Investors the type of "fair and equitable treatment" guaranteed by NAFTA Article 1105(1)?

177. As straightforward as this question may seem, at this point in the discussion it still remains somewhat abstract. As the *Mondev* Tribunal pointed out:

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[194] *Waste Management* at para. 99, (Investors' Book of Authorities Tab CA100).

[195] See, for example, C. Schreuer, "Fair and Equitable Treatment in Arbitral Practice" at 370, where he states that there is an "evolving trend towards a higher standard of protection against State interference.", (Investors' Book of Authorities Tab CA180).

> A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.[196]

178. And as the Tribunal in *Rumeli* put it:

> The precise scope of the [fair and equitable treatment] standard is…left to the determination of the Tribunal which will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable.[197]

K. Applying the Law to the Facts in the Bilcon Claim

179. The *RDC v Guatemala* Tribunal, considered situations of abuse of rights in the administrative context, and related the issues to the applicable standards of treatment under Article 1105 of the NAFTA. In *RDC*, the state imposed circular requirements that an investor meet certain conditions as a pre-requisite for others and then the state refused to allow the investor to meet those first conditions. [198]

180. It is reasonable to apply this same reasoning and standard to assess Canada's treatment of Bilcon. This is especially the case with regards to the conclusion that "a complete lack of transparency and candor in an administrative process" is conduct that violates Article 1105. The use of *Waste Management II* as also identified by Martins Paparinskis as the essence of the modern standard for analysis under the international minimum standard.[199] It is important to recall the situation to which Bilcon has been subjected is arbitrary, unfair, and idiosyncratic in addition to lacking in transparency and candor.

181. The specifics of the facts in this case demonstrate the types of breaches of NAFTA Article 1105 taken by Canada have been nothing less than serious, shocking and reprehensible. In addition to the facts which have been pleaded in the Memorial and Reply Memorial,[200] the Investors make reference to the following evidence in Canada's possession which demonstrates that the unnecessarily high standard advanced by the Government of the United States in its 1128 submissions can be met:

(a) Evidence demonstrating that Canada did not follow the objectives and obligations of its environmental regulations and that decisions were made based on irrelevant, arbitrary and capricious criteria while relevant scientific criteria was ignored;[201] and

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[196] *Mondev*, Award at para. 118, (Investors' Book of Authorities Tab CA40).
[197] *Rumeli* at para. 610, (Investors' Book of Authorities Tab CA59).
[198] The *RDC* claim was decided under customary international law as the CAFTA has included limitations on the international law standard of treatment similar to those purportedly imposed by the NAFTA Free Trade Commission Note of Interpretation. (Investors' Book of Authorities Tab CA277).
[199] Paparinskis at Chapter 9, sec 3(2). (Investors' Book of Authorities Tab CA272).
[200] Memorial pages 7-92, and Reply Memorial pages 7-37.
[201] (Investors' Schedule of Documents Tab C402), (Investors' Schedule of Documents Tab C458), (Investors' Schedule of Documents Tab C964), (Investors' Schedule of Documents Tab C969), (Investors' Schedule of Documents Tab C963), (Investors' Schedule of Documents Tab C958), (Investors' Schedule of Documents Tab C950), (Investors' Schedule of Documents Tab C982), (Investors' Schedule of Documents Tab C981), (Investors' Schedule of Documents Tab C980), (Investors' Schedule of Documents Tab C958), (Investors' Schedule of Documents C989), (Investors' Schedule of Documents C960), (Investors' Schedule of Documents Tab C971), (Investors' Schedule of Documents Tab C968), (Investors' Schedule of Documents Tab C973), (Investors' Schedule of Documents Tab C956), International Maritime Organization, *Routeing of Ships, Ship Reporting and*

(b) Evidence demonstrating that misapplication of the regulatory framework prevented the Investors from being treated fairly, equitably and impartially, contrary to the Investors' reasonable expectations.[202]

182. The Investors have consistently made clear that they do not contest, in the words of the United States, "the right of domestic authorities to regulate matters within their borders."[203] The Investors take issue with the abuse of the process that offends the protection afforded to them by international law in the NAFTA. The evidence in this matter demonstrates that Canada did not meet this standard.[204]

II. THE PROPER APPROACH TO THE INTERPRETATION OF THE TREATY

183. The Government of the United States makes reference in footnote 13 of its Submission to subsequent practice of the NAFTA to establish a modification of the NAFTA. While subsequent practice is one relevant consideration that the Tribunal may consider to establish context for interpretation under Article 31 of the *Vienna Convention*, the position advanced by the Government of the United States overstates the relevance of this interpretative tool to the case at hand.

184. In their two volume commentary on the *Vienna Conventions*, Professors Corten and Klein examine the meaning of subsequent practice in Article 31 of the *Vienna Convention*. They identify that this procedure cannot be used to envisage an amendment or a termination to a treaty.[205]

185. Professors Corten and Klein also comment on the importance of Article 31(3)(c) of the *Vienna Convention* which has been relied upon extensively by the European Court of Human Rights which has used general principles of law under Article 28 of the ICJ Statute to interpret article 6(1) of the *European Convention on Human Rights*.[206] A

Related Matters: Amendment of the Traffic Separation Scheme in the Bay of Fundy and Approaches, NAV 48/3/5, 5 April 2002 (Investors' Book of Authorities Tab CA292), International Maritime Organization, *New and Amended Traffic Separation Schemes*, COLREG.2/Circ.52, 6 January 2003 (Investors' Book of Authorities Tab CA297).

[202] (Investors' Schedule of Documents Tab C299), (Investors' Schedule of Documents Tab C605), (Investors' Schedule of Documents Tab C978), (Investors' Schedule of Documents Tab C974), (Investors' Schedule of Documents Tab C966), (Investors' Schedule of Documents Tab C977), (Investors' Schedule of Documents Tab C975), (Investors' Schedule of Documents Tab C991), (Investors' Schedule of Documents Tab C961), (Investors' Schedule of Documents Tab C962), (Investors' Schedule of Documents Tab C970), (Investors' Schedule of Documents C976), (Investors' Schedule of Documents C990), (Investors' Schedule of Documents Tab C995), (Investors' Schedule of Documents C996), (Investors' Schedule of Documents C997), (Investors' Schedule of Documents C994), (Investors' Schedule of Documents C998), (Investors' Schedule of Documents C986), (Investors' Schedule of Documents Tab C983), (Investors' Schedule of Documents Tab C985), (Investors' Schedule of Documents Tab C967), (Investors' Schedule of Documents Tab C965), (Investors' Schedule of Documents Tab C984), (Investors' Schedule of Documents Tab C988), (Investors' Schedule of Documents Tab C987), (Investors' Schedule of Documents C993), (Investors' Schedule of Documents C959), (Investors' Schedule of Documents C972), (Investors' Schedule of Documents C979).

[203] US 1128 submission, para. 5.

[204] (Investors' Schedule of Documents Tab R-057), (Investors' Schedule of Documents Tab R-146), (Investors' Schedule of Documents Tab C 526), (Investors' Schedule of Documents Tab C 657), (Investors' Schedule of Documents Tab C 253), (Investors' Schedule of Documents Tab C 608), (Investors' Schedule of Documents Tab C 627), (Investors' Schedule of Documents Tab C 654).

[205] Oliver Corten and Pierre Klein, eds., *The Vienna Conventions on the Law of Treaties: A Commentary*, Volume I (Oxford University Press, 2011) at 828 (Investors' Book of Authorities Tab CA286). They rely upon the International Court's decision to this effect in *Gabcikovo-Nagymaros* at paras 100 and 114 (Respondent's Book of Authorities Tab RA15).

[206] Corten and Klein, at 828. (Investors' Book of Authorities Tab CA286).

similar approach was followed by the ICJ in the *Oil Platforms* case when they considered the meaning of the use of force under the *United Nations Charter*.[207]

186. Martins Paparinskis considered the supplementary means of interpretation by way of subsequent state practice to see whether it was available to the NAFTA Parties as a means of modify the interpretation of the Treaty at this time pursuant to Article 32 of the *Vienna Convention.*

187. Mr. Paparinskis identifies a number of serious obstacles to the position that has been advanced by the Government of the United States in its 1128 Submission. He starts his analysis by stating:

> If States are unsatisfied with the overly restrictive rules of interpretation in a particular context, they can engage in practice that would change both the relevant customary and treaty rules on interpretation. In the case of investment protection law, States would most likely express such concerns in their pleadings, whether expressly arguing for a more flexible interpretative approach or consistently putting forward and acknowledging as normatively relevant materials that would not qualify as such under the existing rules. Just as in any other instance of attempted changes of international law through practice, it would be necessary to demonstrate the widespread and consistent practice supporting a new rule of customary law, or concordant, common, and consistent subsequent practice supporting a new content of treaty law. There are a number of theoretical and practical problems with this argument.[208]

188. Mr. Paparinskis then identifies four obstacles to the adoption of this position, namely:

> First, the identification of the normative relevance of State practice is distorted by the procedural model of investor–State arbitration. Leaving aside the possible relevance of investors' conduct (to be addressed in the next section), only the pleadings of the States can be taken into account in identifying subsequent practice or new customary law. The dynamic of investor–State arbitrations means that in most cases only the conduct of the respondents will be taken into account for the purpose of identifying the law. These considerations do not exclude the relevance of the analysis of such practice (and perhaps paradoxically make changing the law easier, since respondents are more likely to have similar practice than opposing parties.) Still, it makes it conceptually challenging to 'show [] the common understanding of the parties as to the meaning of the words'.
>
> Second, the analysis of practice would also suffer from empirical distortions. While the ICSID awards may be made public by ICSID with the consent of both parties or by any party on its own (and many ICSID awards are public), in arbitrations conducted under other rules publication usually requires the consent of both parties. While many awards become publicly available in one way or another, it seems impossible to make even an educated guess about the number of confidential awards. Moreover, it is rare for pleadings to be public. Since there may be important nuances in the way the State argues its position, other cases introduced in different ways from having direct legal relevance to constituting mildly persuasive rebuttals of the opponent's argument, the State's view may not be confidently identified only on the basis of the Tribunal's summary. The different approaches to publicity suggest two equally unattractive possibilities of making the argument: either to proceed on the basis of the positions of States contained in all awards

[207] *Oil Platforms (Islamic Republic of Iran v. United States of America),* Preliminary Objection, Judgment, I.C.J. Reports 1996, at page 182 at para. 41 (Investors' Book of Authorities Tab CA133). Corten and Klein refer to the fact that the WTO Appellate Body has also followed a similar approach when interpreting treaties. Corten and Klein, at 829 (Investors' Book of Authorities Tab CA286).

[208] Paparinskis, at 144 – 145 (Investors' Book of Authorities Tab CA272).

> (and therefore probably make erroneous assumptions about the nature and content of State practice), or focus on those positions that may be clearly identified through publicly available pleadings (and attribute disproportionate influence to the practice of NAFTA parties).
>
> Third, even pleadings apparently relying on case law may be explained in terms of the traditional approaches. The case law may be invoked simply as providing an erudite summary regarding the approaches generally taken, similarly to legal writings, and presented to refute a similar argument by the opposing party. The case law of the earlier Tribunals may become relevant in terms of *Vienna Convention* Article 31 and 32 considered above. The earlier Tribunals may have dealt with the same treaty, whether the BIT or the ICSID Convention, or the same custom, explaining therefore the same rule of law. Even if the precise rationale of introduction of particular arguments is not explained, in systemic terms it is plausible to read them in the first instance as going with the grain of established order (by implicitly relying on generic terms, special meaning, and customary law, or simply making an error) rather than as qualitatively changing it.
>
> Fourth, with all the caveats in mind, the pleading practice is at best inconclusive. Some States have expressly argued against the legal relevance of *pari materia* case law. Some States appear to have accepted it. In most cases, the summaries of the arguments in the awards leave the rationale for the introduction of the particular authorities unclear or do not mention the invocation of cases at all. To the extent that the early NAFTA case law can be traced to different perceptions of rules of interpretation, the reaction by NAFTA parties expressed through FTC was to reject any interpretative innovations. The case law regarding the applicability of MFN clauses to procedural rules is the best case study since MFN treatment has no customary law analogue and therefore cannot be explained in terms of implicit reference to custom. However, despite the contrasting approaches taken in case law, two awards have rejected the relevance of earlier cases and adopted different solutions. The lack of protests suggests that States are not willing to defend any new interpretative approaches seriously (*arguendo* assuming that they existed in the first place). [209]

189. Mr. Paparinskis concludes his analysis by stating :

> The procedural and empirical qualifications for identifying the argument with precision, the contradictions within the identifiable practice, and the consistent emphasis by States and Tribunals alike on the application of *Vienna Convention* form the background to this debate. It does not seem possible to maintain that there exists sufficient practice to change either the content of custom or reinterpret the treaty rules of *Vienna Convention on the Law of Treaties*. [210]

Thus Mr. Paparinskis concludes that subsequent state practice, as that advanced in the 1128 submission of the Government of the United State with respect to investor state treaty practice is simply not a reliable or authoritative approach for supplemental interpretation of a treaty like the NAFTA.

III. NATIONAL TREATMENT

190. The United States makes various submissions regarding Article 1102 National Treatment in paragraphs 7 – 11 of its 1128 Submission.

[209] Paparinskis at 145 – 146. (footnote omitted) (Investors' Book of Authorities Tab CA272).
[210] Paparinskis at 146. (footnote omitted) (Investors' Book of Authorities Tab CA272).

191. The US submission is incorrect when it states in paragraph 7 that NAFTA Article 1102 is expressly designed to prohibit discrimination on the basis of nationality. The treaty does not expressly require that the difference in treatment must be motivated by the nationality of the investor or investment. What is required is what the US submission states at the end of paragraph 7 – that the challenged measure must "treat foreign investors or investments less favourably than domestic investor or investments" but this is not necessary to prove that this is done on the express basis of intentionally based nationality based discrimination. Based on the term "less favourable treatment" – the emphasis is on the manner and method of the government actions. The Tribunal in *S.D. Myers* also concluded that the word "treatment" suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent."[211] The Tribunal in *Siemens v Argentina* concurred, finding that intent is "not decisive or essential for a finding of discrimination."[212]

192. The contention of the United States that the National Treatment obligation requires discrimination based on nationality means adopting an approach whereby an investor would have to prove that any difference in treatment is motivated by its nationality.[213] But the NAFTA is about much more than nationality. One reason why the Parties left this intent requirement out of NAFTA Article 1102 is because as a practical matter it is virtually impossible to establish that a government entity, which might be comprised of many different actors with different motivations, actually had "intent" to discriminate.[214]

193. The *Feldman* Tribunal was quick to point out that NAFTA Article 1102 does not require an Investor to demonstrate explicitly that a distinction is a result of their foreign nationality.[215] In support, the *Feldman* Tribunal recalled the *Pope & Talbot* Tribunal's observation that requiring proof of intent would effectively limit NAFTA Article 1102 to *de jure* violations, thereby severely limiting the effectiveness of the National Treatment concept in protecting foreign investors.[216]

194. Accordingly, when assessing compliance of a measure with the National Treatment concept, the *S.D. Myers* Tribunal found the following factors to be: "whether the practical effect of the measure is to create a disproportionate benefit for nationals over non-nationals; whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty.[217]

195. This aligns with the view that a literal interpretation of the NAFTA National Treatment provision prohibits less favourable treatment unrelated to nationality-based

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[211] *S.D. Myers*, First Partial Award, para. 254. (Investors' Book of Authorities Tab CA6).
[212] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, February 6, 2007, at para. 321. (Investors' Book of Authorities Tab CA218).
[213] Government of Canada Counter-Memorial, at para. 401.
[214] Andrea Bjorklund, "National Treatment" in *Standards of Investment Protection,* August Reinisch (ed). (Oxford University Press, 2008) at 49. (Investors' Book of Authorities Tab CA226).
[215] *Feldman v. United Mexican States,* Award, ICSID Case No. ARB(AF)/99/1, 16 December 16 2002. ["*Feldman*"], at para. 181. (Investors' Book of Authorities Tab CA51).
[216] *Feldman*, Award, at para. 183, 184, (Investors' Book of Authorities Tab CA51), *citing to Pope & Talbot,* Award on the Merits of Phase 2, April 10, 2001, paras. 78 and 79. According to the *Pope & Talbot* Tribunal, was that showing discrimination based on nationality would "tend to excuse discrimination that is not facially directed at foreign owned investments." (Investors' Book of Authorities Tab CA12).
[217] *S.D. Myers*, Award, at para. 252. (Investors' Book of Authorities Tab CA6).

discrimination. Accordingly, the findings of the *Occidental* Tribunal serve as a reasonable example of how national treatment provisions must apply to a broader range of disparate impacts than nationality-based discrimination alone.[218]

196. These findings have been echoed in the non-NAFTA context as well. In *Occidental*, in examining the requirements of a similarly worded national treatment provision, the Tribunal found that the Claimant had received less favourable treatment than that accorded to investors of the Respondent State. In reaching its conclusion, the Tribunal held that Ecuador had taken measures in breach of its national treatment obligation even though the Tribunal was "convinced that this has not been done with the intent of discriminating against foreign-owned companies."[219]

197. Rejecting the notion that NAFTA Article 1102 offers foreign investors protection only from invidious discrimination – that is, discrimination an Investor could actually prove was motivated by discriminatory intent based on nationality – Arbitrator Cass, in his Separate Opinion in *UPS*, held that such an interpretation of NAFTA Article 1102 "would be of little value to investors."[220] Professor Cass then went on to say that the requirements of Article 1102 "plainly extend beyond formal parity" and instead "commands an effective parity of foreign and domestic investors and investments."[221] The Majority Decision in *UPS* said nothing to the contrary.

198. The United States position does not fit with the overall architecture of the NAFTA. Specifically, if NAFTA Article 1102 were to be reduced to an obligation not to treat foreign investors less favourably only on the basis of nationality, this provision would become redundant. This is because such an obligation already exists under the customary international law standard of "fair and equitable treatment". It is clear that Article 1102 is not worded so as to be a simple affirmation of customary international law with respect to discrimination towards aliens. That obligation is properly found in NAFTA Article 1105 – not Article 1102.

199. The requirement of the NAFTA is to establish a diversity of nationality rather than proof of intentional nationality-based discrimination. A look at the boundaries on the map and a review of the evidence filed in this claim is sufficient to be able to establish that an Investor or the Investment of a NAFTA Investor is capable of meeting the diversity of nationality requirements which are contained in NAFTA Articles 1102, 1103 and 1104.[222]

200. In addition, there are also good policy reasons that Article 1102 ought not be limited in the way the United States contends. As the Tribunal in *Feldman* noted:

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[218] *Occidental*, First Partial Award, at paras. 176 ff. (Investors' Book of Authorities Tab CA18).
[219] *Occidental*, at para. 177, (Investors' Book of Authorities Tab CA18).
[220] *UPS v. Canada*, Separate Opinion of Dean Ronald A. Cass, 24 May 24 2007 at para. 58, (Investors' Book of Authorities Tab CA89).
[221] *UPS*, Separate Opinion of Dean Ronald A. Cass at para. 59, (Investors' Book of Authorities Tab CA89).
[222] (Investors' Schedule of Documents Tab C957), (Investors' Schedule of Documents Tab C992) contains Canadian government issued maps which along with a review of the evidence on treatment and conduct and operation of the investments can assist in the determination of national boundary based diversity of nationality necessary to access the requirement of NAFTA Article 1102 national treatment issues raised by the Government of the United States in its 1128 Submission.

> …requiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government. It would be virtually impossible for any claimant to meet the burden of demonstrating that a government's motivation for discrimination is nationality rather than some other reason.[223]

201. In the end, the protections of NAFTA Article 1102 are not limited to state actions that are motivated by discriminatory intent based on the nationality of the foreign investor. Such a reading is not only contrary to the plain wording of NAFTA Article 1102, but also runs counter to the objects and purposes, as well as the architecture of the NAFTA. In addition to the good policy grounds for refusing such an interpretation.

IV. THE PROPER MEANING OF NAFTA ARTICLE 1116

202. The United States takes the position in its 1128 Submission, at paragraph 12 and footnotes 15 and 16,[224] that NAFTA Article 1116(2) operates as a form of *lex specialis*.

203. A party's obligations under NAFTA, however, do not exist in isolation from the general international law of State Responsibility.

204. Judge Simma and Dirk Pulkowski have recently observed:

> [L]egal subsystems coexisting in isolation from the rest of international law are inconceivable[225]

205. A derogation from the general regime by way of a *lex specialis* "is accepted only to the extent that such an intention is clearly stated in the treaty."[226] Indeed, this is the approach that the ICJ took in the *ELSI*[227], *Nicaragua*[228] and *Gabcikovo*[229] judgments.[230] NAFTA Article 1116 is therefore to be read with regard to Article 14 of the ILC's *Draft Articles on State Responsibility*, and nothing filed by the US with its 1128 Submission, nor anything from Canada filed in this arbitration, shows that it has 'contracted out' of its obligations under general international law.'[231]

206. The NAFTA also offers protection from various breaches of international law, including continuous breaches. The recent *Mobil* award, citing *UPS*, says:

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[223] *Feldman*, at para. 183, (Respondent's Book of Authorities Tab RA51).
[224] 1128 Submission of the United States of America filed in *Merril & Ring* at para. 14, attached to the current 1128 Submission of the United States of America.
[225] Simma and Pulkowski at 143. (Investors' Book of Authorities Tab CA276).
[226] Simma and Pulkowski at 148. (Investors' Book of Authorities Tab CA276). See also Bruno Simma and Dirk Pulkowski, "Of Planets and the Universe: Self-Contained Regimes in International Law", *The European Journal of International Law* Vol. 17, no.3 (2006) (Investors' Book of Authorities Tab CA287).
[227] *Elettronica Sicula S.p.A. (ELSI), (United States of America v. Italy)*, Judgment, 20 July 1989, I.C.J. Reports 1989 (Investors' Book of Authorities Tab CA309).
[228] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, (*Nicaragua v. United States of America*), International Court of Justice, Judgment of 27 June 1986. (Respondent's Book of Authorities Tab RA16).
[229] *Gabcikovo-Nagymaros*. (Respondent's Book of Authorities Tab RA15).
[230] Simma and Pulkowski at 146-177. (Investors' Book of Authorities Tab CA276).
[231] Simma and Pulkowski at 146. (Investors' Book of Authorities Tab CA276) The article also refers to Pauwelyn at 213. (Investors' Book of Authorities Tab CA274).

> 427. … There is nothing in the language of Article 1116 (1) that convinces us that the provision is directed only to damages that occurred in the past and does not extend, in principle, to damages that are the result of a breach which began in the past (the adoption of the 2004 Guidelines) and continues (the implementation of the 2004 Guidelines).[232]
>
> **FN 458:** The Majority of the Tribunal notes that the question of what was called "continuing breaches" was considered (albeit in the context of how Article 1116(2) of NAFTA applies to continuing breaches) in *UPS v. Canada*. There the tribunal stated that "continuous courses of conduct constitute continuing breaches of legal obligations" (para. 28). The Majority further notes the Claimants' assertion that "no NAFTA tribunal has yet been faced with a continuing treaty violation or continuing investment impairment scenario" (meaning a claim which involves a breach which is still continuing when the claim is filed)[233]

207. The US 1128 Submissions do not address the *Mobil* award.

208. There is also no doubt that Article 1116(2) requires knowledge of both a breach and a loss, and the Parties agree that the determination of whether the Investor had knowledge of a breach or loss is fact-specific. In this case, for example, Canada systematically refused to allow Bilcon to undertake a 'test blast.[234]' It thereby created a "continuous Catch 22" which made it in effect impossible for the Investors to ever meet the government's imposed standard.[235]

209. Canada has also not discharged its burden of showing that prior to June 17, 2005, Bilcon had any actual knowledge of the resulting breach or the loss it sustained. Indeed, it could not possibly have had that knowledge, as Bilcon's loss of its investment in the quarry project did not actually occur until the environmental regulatory process concluded with Ministerial decisions, in 2007.

210. Article 1101 of the NAFTA says clearly that the NAFTA applies to "measures adopted or maintained by a Party.[236]" In international law, continuous breach is merely a measure that is maintained by a party.

211. The commentary to the *ILC Articles on State Responsibility* also explains that the distinction between instantaneous acts and continuing acts is whether the consequences of the measure are known. In its Commentary to Article 14, the ILC states at paragraph 4, for example, that the Inter-American Court of Human Rights has interpreted forced or involuntary disappearance as a continuing wrongful act as long as the fate of the victim is not known.[237] Indeed, the fate of Bilcon's investment was not known until the regulatory process concluded with the Ministers' respective decisions in 2007.

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[232] *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, Decision on Liability and on Principles of Quantum, ICSID Case No ARB/07/4; IIC 566 (2012), 22 May 2012. ["*Mobil*"] at para 427. (Investors' Book of Authorities at Tab CA194).
[233] *Mobil v. Canada* at para 428. (Investors' Book of Authorities at Tab CA194).
[234] Investors' Memorial at paras. 752-763.
[235] For example, (Investors' Schedule of Documents Tab C967), (Investors' Schedule of Documents Tab C965), (Investors' Schedule of Documents Tab C988), (Investors' Schedule of Documents Tab C987).
[236] Investors' Reply Memorial at para. 714 emphasis added.
[237] Jean Salmon, *Duration of the Breach*, in *The Law of International Responsibility*. James Crawford, et al, eds. (Oxford University Press, 2010) at page 389. (Investors' Book of Authorities Tab CA290); citing *Blake v.*

212. To require an investor to launch a NAFTA claim or risk losing their rights the moment an investment project hits a hurdle, suffers an unexpected set-back, or requires an incidental or incremental expenditure due to government action would impose impossible limitations on the protections offered by NAFTA.

213. If "loss or damage" merely means any added expense, then the NAFTA would offer no protection at all, as an Investor would be time-barred the moment it suffered the slightest problem with an investment due to government action or inaction.

214. Even Canada's purported jurisdictional objections confirm that the loss and damage suffered by Bilcon resulted from the Ministerial decisions following the JRP Report. Canada asserts that it is the adopting by the Nova Scotia government of the JRP report that caused all of the loss and damage, such that Canada's own decision was "moot" and did not cause more loss and damage.[238] Bilcon agrees – the loss and damage occurred with these final governmental decisions – not before.

215. As the *UPS* Tribunal observed:

> ...Canada's argument based on Mondev is not well taken. The tribunal in Mondev did not find a continuing course of conduct time-barred. Indeed, it rejected the United States' argument that claims at issue were time-barred. The *dicta* that Canada points us to are neither dispositive of the contentions in Mondev nor on point for this decision. The *dicta* do not relate to a continuing course of conduct that began before and extended past three years before a claim was filed. Instead, the *dicta* relate to a state action that was completed but was subject to challenge in state court. In that instance, the state's action was completed and the information about it known - including the fact that the investor would suffer loss from it - before subsequent court action was complete.[239]

216. The same reasoning was applied by the *Mobil* Tribunal,[240] and is consistent with the ILC's Commentary to Article 14 of the *Articles on State Responsibility*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of May, 2013,

Appleton & Associates International Lawyers
Counsel for the Investors

Guatemala, Judgment of January 24, 1998 (Merits), Inter-Am Ct HR, Series C, No 36 (1998) at 24, at para 67. (Investors' Book of Authorities Tab CA294).

[238] Government of Canada Rejoinder Memorial at paras 81 – 86.

[239] *UPS*, Award, at para. 29. emphasis added (Investors' Book of Authorities Tab CA89).

[240] *Mobil v. Canada* at para 427.(Investors' Book of Authorities at Tab CA194).