

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

IN RE NAFTA CHAPTER ELEVEN/UNCITRAL
CATTLE CASES,

Claimants/Investors,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

**REPLY ON THE PRELIMINARY ISSUE
OF RESPONDENT UNITED STATES OF AMERICA**

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Pursuant to Article 21 of the UNCITRAL Arbitration Rules, and in accordance with Procedural Order No. 1, the United States of America submits this Reply on the Preliminary Issue.

PRELIMINARY STATEMENT

The sole issue before this Tribunal is whether Canadian “investors” who do not have investments in the United States, and who do not seek to make investments in the United States, may invoke the arbitration provisions of the NAFTA’s investment chapter to claim for losses they allegedly have suffered with respect to their investments in Canada. The Claimants’ proposition that the NAFTA should be interpreted to provide such jurisdiction is absurd.

Instead of supporting Claimants' interpretation, as they contend, the uniqueness of Claimants' particular claims, if anything, actually undermines it.¹ Not only have Claimants failed to establish how a treaty's jurisdictional reach can be determined by the unprecedented nature of the claims asserted or the novelty of the jurisdictional theories advanced, the fact that Claimants' claims are unprecedented and novel only highlights in this instance just how farfetched Claimants' claims and theories are.

At bottom, Claimants' interpretation is based on untenable premises. First, that the NAFTA Parties, without so much as a single comment by the Agreement's negotiators, the Parties' respective legislatures, the trade press, or academic commentators, created a revolutionary arbitral mechanism for private parties to resolve cross-border trade disputes. Second, that the NAFTA Parties intended to extend the protections of Chapter Eleven, including its arbitration provisions, to *investors* with respect to their home-country investments, even though the Parties expressly, and concededly, did not extend those protections to those home-country *investments* themselves, a differentiation that makes no sense. Third, that the NAFTA Parties contemplated that each Party actually could regulate the formalities of establishing enterprises in the territories of the *other* Parties.

None of these premises is correct and, in their Reply Memorial, Claimants have failed to address the manifestly absurd and unreasonable results that obtain under an interpretation that would have Chapter Eleven apply to measures relating to "investors"

¹ See Claimants' Reply Memorial on the Preliminary Question (Jan. 30, 2007) ("Claimants' Reply"), ¶ 63 ("Never before has a global claim been launched by such a large segment of any industry, or in respect of governmental discrimination that destroys the conditions of competition existing in one of the completely-integrated markets that were [sic] envisaged for the Free Trade Area."); *id.* ¶ 104 ("Never before has a large segment of an industry banded together to protect their interests as NAFTA investors in [sic] the promise of non-discriminatory participation in an integrated, continental market based upon the Free Trade Area that the Agreement established.").

with respect to their non-foreign investments. Indeed, Claimants' entire argument is that such measures are within Chapter Eleven's scope of application, which is contained in Article 1101(1), because Article 1102(1) – a substantive provision that grants national treatment to investors with respect to “the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments” – applies wherever those investments are located. But not only do Claimants fail to explain how the meaning of Article 1101 is determined by their interpretation of Article 1102(1), they also fail to show that that interpretation is correct in the first place.

All of the Parties to the Agreement have expressly disavowed Claimants' erroneous interpretation. In seeking to overcome the NAFTA Parties' own statements contradicting Claimants' revolutionary interpretation of the NAFTA, Claimants contend that “[s]tatements by the parties, of their alleged intent behind a treaty provision, are neither relevant nor credible.”² Claimants' contention is not only unsupported, it is refuted by all pertinent authority, which, consistent with common sense, holds that the Parties' common and concordant statements of their intent with respect to a treaty provision provide the best evidence of the meaning of that provision. Each of the three NAFTA Parties has specifically disclaimed any intent to provide national treatment to “investors” of the other Parties with respect to investments made in their home territories.

Furthermore, although Claimants purport to rely upon the object and purpose of the NAFTA, they have failed to produce any evidence that the protection of domestic investors of other Parties with respect to their home-country investments was among the Parties' objectives. Given the enormous financial burden that Claimants' interpretation

² *Id.* ¶ 37.

could impose on the NAFTA Parties, it is inconceivable that they would have embraced such an objective without significant consideration, negotiation, and deliberation.

Lacking any direct evidence, Claimants urge this Tribunal to infer that the Parties had such an objective by relying on the language in the NAFTA's Preamble and the general objectives stated in Article 102. But Claimants have failed to establish the link between the degree of economic integration the Parties hoped to achieve with the Agreement and the scope of investor protection in the NAFTA's investment chapter, or any rationale for why the NAFTA Parties would so dramatically depart from their habitual treaty practice.

As discussed below, Chapter Eleven – interpreted in accordance with the relevant rules of international law, the NAFTA Parties' subsequent practice, in context and in light of the Treaty's object and purpose – does not grant national treatment to investors who never invested, and never sought to invest, in the territory of the Respondent NAFTA Party. For all of these reasons, the Tribunal should accept the NAFTA Parties' authentic interpretation of the NAFTA and should reject Claimants' invitation to substitute a new and radical interpretation of the Parties' Agreement.

ARGUMENT

The jurisdiction of international courts and tribunals rests on the common consent of the disputing parties.³ The International Court of Justice, for instance, requires an

³ See, e.g., *Ethyl Corp. v. Canada*, UNCITRAL/NAFTA, Award ¶ 59 (June 24, 1998) (“The sole basis of jurisdiction under NAFTA Chapter 11 in an arbitration under the UNCITRAL Arbitration Rules is the consent of the Parties.”); ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 260 (3d ed. 1999) (noting that arbitral tribunals “may only validly determine those disputes that the parties have agreed that [they] should determine”).

“unequivocal indication of a voluntary and indisputable acceptance” of consent.⁴ The Iran-United States Claims Tribunal similarly has required “express language” establishing a State’s consent to jurisdiction.⁵ And a NAFTA tribunal has likewise concluded that a claimant is “not entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement.”⁶

Claimants here have failed to prove that the United States consented to be sued for money damages by Canadian claimants with respect to their Canadian investments. Claimants have not identified any “express language” in the NAFTA supporting jurisdiction, or any “unequivocal indication of a voluntary and indisputable acceptance” by the United States of arbitration of their claims.

Instead, Claimants point to the absence of the words “in the territory” from Article 1101(1)(a) – which provides that the investment chapter applies to measures that “relate to” investors – and the national treatment obligation set forth in Article 1102(1) – which provides that each NAFTA Party must accord national treatment to investors of another NAFTA Party with respect to their investments – as indicating the NAFTA

⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn-Herz. v. Yugo.), 1993 I.C.J. 325, 342 (Sept. 13) (internal quotation marks omitted); *see also* BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 261 (1987) (observing that “the principle of competence requires that a tribunal should decide [jurisdiction] strictly in accordance with its constitutional law, on pain of nullity”).

⁵ *Grimm v. Iran*, Case No. 71, Award No. 25-71-1 (Feb. 18, 1983), 2 IRAN-U.S. CL. TRIB. REP. 78, 80 (1983) (holding that if Iran and the United States “had intended to bring [the claims] within the ambit of the Tribunal’s jurisdiction, it can be assumed that they would have done so by incorporating express language to that effect.”).

⁶ *Fireman’s Fund Ins. Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Decision on the Preliminary Question ¶ 64 (July 17, 2003) (“[T]he Tribunal does not believe that under contemporary international law a foreign investor is entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement.”). The issue is not, as Claimants erroneously contend, whether international tribunals continue to support the “restrictive interpretation” of treaties in favor of State sovereignty. Claimants’ Reply ¶¶ 111-13. The issue, rather, is that a claimant must produce clear evidence that a respondent (whether a State or a private party) affirmatively consented to arbitration.

Parties' affirmative consent to jurisdiction for claims relating to investors who have made investments outside their respective territories. Claimants thus ask this Tribunal to presume that the mere absence of certain language – language that, in any event, is implicit when the relevant articles are interpreted in context – demonstrates that the NAFTA Parties intended to expand jurisdiction in a radical new fashion. But such a presumption is precisely what international law forbids.⁷

I. Claimants' Suggestion That The NAFTA Parties, Sub Silentio, Derogated From Their Habitual Practice Concerning An Important Treaty Principle Is Absurd And Contrary To The Relevant Rules Of International And U.S. Domestic Law

It is well-accepted that when States intend to depart from common, habitual past practice, they express their intentions clearly. Thus, absent clear language to the contrary, treaties should be construed in accordance with the “common habitual pattern adopted by previous treaties.”⁸ Claimants here, however, brush aside the entire history of investor-State arbitration in the United States (and, indeed, in the rest of the world). They argue that the NAFTA is unique, and that, through the absence of a few words in 1101(1)(a), the United States has agreed to be sued for money damages by Canadian

⁷ See *supra* nn.4-6; see also *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction ¶ 167 (Aug. 6, 2003) (rejecting claimant's argument that the State parties to the bilateral investment treaty (“BIT”) in question, through the “umbrella clause,” consented to arbitrate contract claims, concluding “that the legal consequences that the Claimant would have us attribute to Article 11 of the BIT are so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party, we believe that clear and convincing evidence must be adduced by the Claimant”).

⁸ *Asian Agricultural Prods. Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, 30 I.L.M. 577, 601 (1991) (rejecting the claimant's argument that the parties had deviated from their common habitual treaty practice in the absence of clear evidence in the treaty text or *travaux préparatoires* indicating an affirmative intent to do); see also *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, 1980 I.C.J. 73, 94 (Advisory Opinion of Dec. 20) (relying on headquarters agreements between other parties as an interpretive tool for ascertaining the meaning of the headquarters agreement in dispute, despite the “variety” of those other agreements); ROBERT JENNINGS & ARTHUR WATTS, 1 OPPENHEIM'S INTERNATIONAL LAW § 631 n.2 (9th ed. 1992) (citing cases).

“investors” concerning their investments in Canada.⁹ The common habitual pattern adopted in other investment treaties is that private parties lack standing to bring claims against States for money damages absent actual investment (or, in some circumstances at least, an investment sought to be made)¹⁰ in the territory of the host State.¹¹

International courts and tribunals recognize that a State’s intention to deviate from a well-established treaty principle “would naturally have found direct expression in the [treaty] itself and would not have been left to doubtful interpretation.”¹² The *Loewen* NAFTA Chapter Eleven tribunal thus concluded that “[a]n important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so.”¹³ “Such an intention,” the tribunal observed, “may be exhibited by express provisions which are at

⁹ Claimants’ Reply ¶ 110 (“The Claimants are relying on an obligation that is particular only to the NAFTA, and that – to the Claimants’ knowledge – has no equal in a bilateral investment protection treaty[.]”).

¹⁰ Some, but not all, bilateral investment treaties and investment chapters of free trade agreements provide “pre-establishment” coverage: *i.e.*, extend the agreement’s substantive protections when concrete steps to invest are made, but before an investment is actually established in the territory of a signatory. *See infra* Sec.III.

¹¹ *See* J.W. Salacuse, *The Treatification of International Investment Law: A Victory of Form Over Life? A Crossroads Crossed?*, 3 T.D.M. at 13 (2006) (“[T]here are few instances in international law where a private party may compel a sovereign state to defend the legality of that state’s actions in an international forum and, if it fails to defend itself successfully, pay substantial damages for the injury caused to the private party by such action.”); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 585 (5th ed. 1998) (“[T]he assumption of the classical law that only states have procedural capacity is still dominant and affects the content of most treaties providing for the settlement of disputes which raise questions of state responsibility[.]”).

¹² *Sambiaggio Case*, 10 R.I.A.A. 499, 521 (Italy-Venez. Mixed Cl. Comm’n, 1903); *see also* WTO Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, ¶ 165 (Jan. 16, 1998) (recognizing that an international tribunal cannot “lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation,” and that “[t]o sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling . . . would be necessary”).

¹³ *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award ¶ 160 (June 26, 2003) (citing *Elettronica Sicula SpA (ELSI) Case* (U.S. v. Italy), 1989 I.C.J. 15, 42).

variance with the continued operation of the relevant principle of international law.”¹⁴ “It would be strange indeed,” therefore, “if sub silentio the international rule were to be swept away.”¹⁵

Here, there is no direct expression in the NAFTA of the NAFTA Parties’ intent to discard decades of consistent and habitual treaty practice and, suddenly, allow suits against them for money damages by “investors” who never actually invested in their respective territories. Nor is there any express provision in the NAFTA indicating that the Parties sought to expand the habitual meaning and scope of the national treatment protection contained in Chapter Eleven beyond their habitual practice. It would be unreasonable to conclude that the NAFTA Parties *unwittingly* effected the revolution in investor-State arbitration that Claimants endorse. As the International Court of Justice observed in the *Oil Platforms* case, if the treaty provision at issue “impose[d] actual obligations on the Contracting Parties, obliging them to maintain long-lasting peaceful and friendly relations,” then “the Parties would have been led to point out its importance during the negotiations or the process of ratification.”¹⁶

The need for clear indications by the Parties of a departure from habitual practice is especially pronounced where the departure is as radical and far-reaching as that which would result from Claimants’ interpretation. Under Claimants’ interpretation, not only would the national treatment obligation be extended to investments outside the territorial

¹⁴ *Id.*

¹⁵ *Id.* ¶ 162.

¹⁶ *Case Concerning Oil Platforms* (Iran v. U.S.), 1996 I.C.J. 803, ¶¶ 25, 29 (Decision on Preliminary Objections of Dec. 12) (rejecting Iran’s argument that Article 1 of the 1955 Treaty of Amity, Economic Relations and Consular Rights (“There shall be firm and enduring peace and sincere friendship between the United States and Iran”) “does not merely formulate a recommendation or desire . . . , but imposes actual obligations on the Contracting Parties, obliging them to maintain long-lasting peaceful and friendly relations”).

jurisdiction of the Parties, but every cross-border trade dispute could trigger the investor-State dispute resolution mechanism. Every enterprise that engages in the export of goods and services is an investor in its home country and could suffer losses with respect to its home-country investment as a result of barriers to trade imposed by another State. The international community, however, has negotiated elaborate and carefully designed State-to-State dispute resolution mechanisms for resolving such disputes. It cannot reasonably be argued that the NAFTA Parties created such a mechanism for trader-State arbitration without any record of their consciously doing so.

Clearly, if the NAFTA's obligations had been intended to extend extra-territorially, as Claimants contend, each Party's internal deliberations concerning the NAFTA would have reflected this. This is particularly true with regard to the United States, because domestic U.S. law governing the interpretation of treaties requires the clear expression of any intent to assume extra-territorial obligations. It is a fundamental principle of U.S. domestic law that a "treaty cannot impose unanticipated extraterritorial obligations on those who ratify it."¹⁷

In *Sale v. Haitian Centers Council*, for example, the United States Supreme Court rejected arguments that the United Nations Protocol Relating to the Status of Refugees could be interpreted to impose obligations on the United States with respect to refugees who had not yet entered United States territorial waters. The Court held that the ordinary presumption that acts of Congress do not have extraterritorial application absent clear

¹⁷ *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 183 (1993). This presumption against the extraterritorial extension of treaty obligations is also accepted by international commentators, who have argued that any interpretation of a BIT provision that "would place an obligation on the host State even with respect to property outside of its jurisdiction . . . would be sufficiently extraordinary to merit specific rules expressly stated and accepted by the parties concerned." Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 1999 BRIT. Y.B. INT'L L. 99, 124.

intent applies with special force when interpreting treaties.¹⁸ Because the text and negotiating history of the relevant Convention article were silent on the question of its “possible application to actions taken by a country outside its own borders,” the Supreme Court examined the treaty provisions in context to determine if such an extraterritorial obligation could be inferred.¹⁹ The Court concluded that it would be anomalous to interpret one, but not another, provision of the relevant article as obliging the parties to act extraterritorially, even though neither provision contained clear language obliging the signatories to act only within their territorial jurisdiction.²⁰ The Supreme Court thus concluded that the presumption against extraterritorial application of treaty obligations applied.²¹

Just as Claimants have failed to provide any evidence of the NAFTA Parties’ affirmative intent to depart from their past habitual practice of protecting only investors that have made or seek to make investments in the territory of another treaty partner, Claimants have provided no evidence of any intent on the part of the United States to

¹⁸ *Id.* at 184-88. As the Supreme Court explained in an earlier decision, one of the central purposes of the presumption against the extraterritorial application of statutes is to prevent “unintended clashes between our laws and those of other nations which could result in international discord.” *Equal Employment Opportunity Comm’n v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *accord Smith v. United States*, 507 U.S. 197, 203-04 (1993). If the Tribunal were to construe Article 1102(1) as Claimants suggest, it would impose liability on the United States for measures taken with respect to investments governed by entirely different investment, securities, and commercial laws beyond its jurisdiction and control, and unintended clashes between United States laws and Canada’s or Mexico’s laws in these areas could ensue.

¹⁹ *Sale*, 509 U.S. at 178.

²⁰ *Id.* at 178-80. The provision at issue in that proceeding, Article 33(1), prohibits Contracting States, under certain conditions, from returning refugees to territories in which their life or freedom could be threatened. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 6276, T.I.A.S. No. 6577. The subsequent provision, Article 33(2), recognizes an exception to that obligation for refugees convicted of a serious crime in, or posing a danger to the security of, the country in which they seek refuge. *Id.* The Supreme Court reasoned that it would create an “absurd anomaly” to read Article 33(1) as imposing extraterritorial obligations on the Parties, because it would entitle “[d]angerous aliens on the high seas . . . to the benefits of 33.1,” while “those residing in the country that sought to expel them” would clearly not be entitled to such benefits. *Id.* at 179-80.

²¹ *Id.* at 184-87.

undertake obligations with respect to investors that have made investments outside its territory. The mere *absence* of a few words from a few sub-provisions of the NAFTA cannot, consistent with international and U.S. law, be presumed to signal the NAFTA Parties' affirmative intent to be sued for money damages by "investors" concerning their investments outside of the Parties' respective territories.

II. The Subsequent Practice Of All Three NAFTA Parties Precludes Claimants' Interpretation

Although international courts and tribunals may be called upon to interpret and apply a treaty (typically, as here, to resolve discrete disputes *inter partes*), the authentic interpretation of that treaty remains the exclusive province of the State Parties themselves.²² States may interpret a treaty expressly (*e.g.*, through pleadings, amendments, or interpretive notes) or tacitly (*e.g.*, through subsequent conduct).²³

²² See Vienna Convention on the Law of Treaties, art. 31(3)(b) (stating that subsequent practice of the parties "shall be taken into account, together with the context"); *Report of the International Law Commission to the General Assembly On the Work of its Eighteenth Session*, [1966] 2 Y.B. INT'L L. COMM'N 172, 220, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (observing that there is no hierarchy among the norms of interpretation listed in Article 31 and that those in Article 31(3) "by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them") ("International Law Commission Report"); IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 136 (2d ed. 1984) ("It follows naturally from the proposition that the parties to a treaty are legally entitled to modify the treaty or indeed to terminate it that they are empowered to interpret it. In its advisory opinion in the *Jaworzina* case, the Permanent Court of International Justice ruled as early as 1923 that: ' . . . it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it.'") (quoting *Jaworzina*, 1923 P.C.I.J. (ser. B) No. 8, at 37 (Dec. 6)). See also Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 223 (1958) (observing that "a consistent [subsequent State] practice must come very near to being conclusive as to how the treaty should be interpreted" (emphasis omitted)); *Iran v. United States*, Case No. B1 (Counterclaim), Award No. I.T.L. 83-B1-FT ¶ 109 (Sept. 9, 2004) ("The importance of . . . subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty[.]") (quoting International Law Commission); NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* 254 (7th ed. 2002) ("On désigne par l'expression 'interprétation authentique', celle qui est fournie directement par les parties, par opposition à l'interprétation non authentique, donnée par un tiers.") ("The expression 'authentic interpretation' designates that which is furnished directly by the parties, as opposed to an unauthentic interpretation, which is given by a third party.") (translation by counsel).

²³ See *infra* nn.32-37 and accompanying text.

Here, all three NAFTA Parties have *expressly* interpreted the treaty provisions at issue in this arbitration. The United States has stated that it “has no obligation under the NAFTA with respect to Claimants’ investments in Canada. It neither has the obligation to provide national treatment to those investments, nor the obligation to arbitrate claims relating to them.”²⁴ Mexico, in its Article 1128 submission in this arbitration, has stated that it “agrees with the United States that none of the NAFTA Parties undertook any obligation with respect to investments located outside of its territory or with respect to ‘investors’ who are not seeking to make, are not making and have not made investments in its territory.”²⁵ Canada also has stated that investment agreements such as the NAFTA aim to “protect the interests of Canadian investors *abroad*,”²⁶ and has reiterated its understanding that Chapter Eleven applies only to investors that have made, or that are seeking to make, investments in the territory of another disputing Party.²⁷

Claimants offer two responses to the Parties’ authentic interpretation of the NAFTA, neither of which has any merit. *First*, Claimants baldly assert – without providing any support – that “[s]tatements by the parties, of their alleged intent behind a

²⁴ United States’ Memorial on the Preliminary Issue (Dec. 1, 2006) (“United States’ Memorial”), at 2.

²⁵ Submission of the United Mexican States Pursuant to Article 1128 (Mar. 1, 2007), at 1 (emphasis added) (“Mexico’s 1128 Submission”); *see also* United States’ Memorial at 8-9 (citing similar statements made by Mexico in *Bayview Irrigation Dist. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1). Claimants attempt to distinguish the *Bayview* case on the grounds that the claimants there only made “rudimentary” arguments concerning the extraterritorial application of Article 1102(1), and that those claimants did not allege that an integrated continental marketplace was disrupted by the challenged measures. Claimants’ Reply ¶ 84 n.58. These arguments are irrelevant to the issue at hand: Mexico has repeatedly stated that a claimant must have an investment, or seek to make an investment, in the territory of the Respondent Party in order to submit a claim under NAFTA Chapter Eleven.

²⁶ Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation*, in CANADA GAZETTE 68, 147 (Jan. 1, 1994) (emphasis added).

²⁷ *S.D. Myers, Inc. v. Canada*, NAFTA/UNCITRAL, Government of Canada Counter-Memorial ¶¶ 218-52 (Oct. 5, 1999) (arguing that because the claimant had made no investment in Canada, the claim was outside the scope of Chapter Eleven); *id.* ¶ 259 (“The [Article 1102(1)] obligation does not mean that the national treatment obligation applies to the investor’s activities in its home country. The obligation only applies to the investor with respect to its investment in the foreign country . . .”).

treaty provision, are neither relevant nor credible.”²⁸ This statement reflects a fundamental misconception of treaty interpretation. In fact, “more than anyone, the parties to the treaty are *best* situated to understand the sense of the treaty that they concluded and what they truly intended.”²⁹ As the *Methanex* NAFTA Chapter Eleven tribunal stated, “an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.”³⁰

Second, Claimants contend that the NAFTA Parties never *formally* agreed upon this interpretation of the NAFTA.³¹ Claimants assert that the “NAFTA specifically provides a mechanism whereby the three NAFTA Parties could agree upon [an] interpretation” – through the Free Trade Commission – and suggest that this route is the only means by which the NAFTA Parties may interpret their agreement.³² This is wrong. Nothing in the NAFTA itself, or in international law generally,³³ obligates the NAFTA Parties to interpret the treaty solely through the cabinet-level Free Trade Commission. In fact, the NAFTA Parties can, and routinely do, interpret the treaty in many ways,

²⁸ Claimants’ Reply ¶ 37.

²⁹ Mustafa Kamil Yasseen, *L’interprétation des traités d’après la Convention de Vienne sur le droit des traités*, 151 R.C.A.D.I. 1, 47 (1976) (“[P]lus que personne, les parties au traité sont à même de comprendre le sens du traité qu’elles ont conclu, ce qu’elles ont vraiment voulu.”) (translation by counsel) (emphasis added). Dr. Yasseen served as chairman of the drafting committee of the Vienna Convention on the Law of Treaties. *Id.* at 6.

³⁰ *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Final Award (Aug. 3, 2005), Pt. II, Ch. B, at 9 (quoting International Law Commission Report, vol. 2, at 221, and noting the ICJ’s approval of this passage in the *Kasikili/Sedudu Island Case* (Bots. v. Namib.), 1999 I.C.J. Rep. 1, ¶ 49).

³¹ Claimants’ Reply ¶ 114.

³² *Id.*

³³ The Vienna Convention on the Law of Treaties’ *travaux préparatoires* confirms that “subsequent agreements between the parties regarding the interpretation of a treaty” within the meaning of Article 31(3)(a) does not need to be expressed in any particular form. UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES: OFFICIAL RECORDS, vol. 2 (2001), *Thirteenth Plenary Meeting* 57, ¶ 65 (May 6, 1969); see also ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 191-93 (2000) (reporting State practice of Parties’ agreement of treaty interpretation through informal means).

including through their pleadings and Article 1128 submissions in NAFTA arbitrations; through their official conduct; and through statements to the public, to legislatures, and to the other NAFTA Parties. The suggestion, then, that a “particular formality is required for there to be an agreement” among the NAFTA Parties is incorrect.³⁴ To the contrary, Claimants’ suggestion runs afoul of the Vienna Convention on the Law of Treaties,³⁵ customary international law,³⁶ and has been expressly rejected by the *Methanex* tribunal.³⁷

Thus, even assuming that the text of Articles 1101(1) and 1102(1) supported Claimants’ interpretation, which it does not, the NAFTA Parties’ “concordant, common and consistent” State practice to the contrary would have effected “a tacit or implicit modification of the terms of the treaty.”³⁸ Claimants’ interpretation of the Treaty, therefore, should be rejected.

³⁴ *Methanex* Final Award at Pt. II, Ch. B, at 9-10.

³⁵ *Id.* at 9 (citing Vienna Convention on the Law of Treaties and noting that “[i]t follows from the wording of Article 31(3)(a) that it is not envisaged that the subsequent agreement need be concluded with the same formal requirements as a treaty; and indeed, were this to be the case, the provision would be otiose”).

³⁶ ROBERT JENNINGS & ARTHUR WATTS, 1 OPPENHEIM’S INTERNATIONAL LAW § 630 (9th ed. 1992) (“The parties to a treaty often foresee many of the difficulties of interpretation likely to arise in its application, and in the treaty itself define certain of the terms used. Or they may in some other way and before, during, or after the conclusion of the treaty, agree upon the interpretation of a term, either informally (and executing the treaty accordingly) or by a more formal procedure, as by an interpretive declaration or protocol or a supplementary treaty. Such authentic interpretations given by the parties override general rules of interpretation.”) (quoted with approval in *Methanex* Final Award at Pt. II, Ch. H, at 11).

³⁷ *Methanex* Final Award at Pt. II, Ch. B, at 9 (citing *Kasikili/Sedudu Island Case* (Bots. v. Namib.), 1999 I.C.J. Rep. 1, ¶ 49).

³⁸ IAN SINCLAIR, VIENNA CONVENTION ON THE LAW OF TREATIES 137-38 (2d ed. 1984) (“This course of conduct may, in fact, be taken into account not merely as a means useful for interpreting the Agreement, but also as something more: that is, as a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the juridical situation of the parties and on the rights that each of them could properly claim.”) (quoting *Air Transport Services Agreement Arbitration*, 38 I.L.R. 182, 249).

III. The United States' Interpretation Of The Provisions' Ordinary Meaning In Context Gives Effect To Article 1102(1) And Is The Only Interpretation That Does Not Lead To Absurd Results

The United States' interpretation of Articles 1101(1)(a) and 1102(1) is consistent with the provisions' ordinary meaning in context. Article 1101(1)(a) provides that Chapter Eleven applies to measures that relate to "investors of another Party." An "investor of another Party" is, by definition, a foreign investor. And a foreign investor is "foreign" by virtue of having invested outside of its home country. Just as it would be irrational to refer to investors that have invested in their home countries as foreign investors, it would not be sensible to refer to those investors as "investors of another Party." In the context of an investment treaty, the term "foreign investor" is not ordinarily used because the treaty's provisions typically do not refer to *all* foreign investors, but merely to those foreign investors with the nationality of the other treaty partners. Thus, the term "investor of another Party" is more appropriately used in this context. Just as the phrase "foreign investor" makes sense only in connection with an investment that is foreign from the perspective of the investor's home State, the same is true of the term "investor of another Party." It is thus clear that the jurisdictional provisions of the NAFTA, read in context, confine the scope of the Investment Chapter to those investors that have made, or seek to make, investments in another Party.

In addition, the United States in its Memorial demonstrated that the United States Statement of Administrative Action unequivocally provides that Chapter Eleven only "applies where such firms or nationals make or seek to make *investments in another NAFTA country*."³⁹ The United States similarly noted that, in the Canadian Statement on

³⁹ NORTH AMERICAN FREE TRADE AGREEMENT, IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE

Implementation of the NAFTA, the Government of Canada explained that Chapter Eleven built upon its prior experience with “investment agreements both to protect the interests of Canadian investors abroad and to provide a rules-based approach to the resolution of disputes involving foreign investors in Canada or Canadian investors abroad.”⁴⁰ Both of these instruments provide context for interpreting the Agreement’s provisions⁴¹ and leave no doubt that the Claimants are mistaken in their interpretation. Claimants fail to offer any meaningful response to these arguments, and instead contend that the United States’ interpretation renders provisions of the Agreement superfluous.

Claimants erroneously argue that because Article 1102(2) already allows an investor to submit a claim for damages caused to its investment in the territory of another NAFTA Party, Article 1102(1) would be superfluous unless it protects investors whose investments are located elsewhere.⁴² But Claimants’ proposed interpretation is incorrect: Article 1102(1) retains independent meaning when its geographic reach is properly limited by Article 1101 to protect only investors with investments in the territory of the Respondent Party.

There are several circumstances where an investor might submit a national-treatment claim under Article 1102(1) with respect to its investments in the territory of

ACTION, H.R. DOC. NO. 103-159, Vol. 1, 103d Cong., 1st Sess., at 589 (1993) (emphasis added); *id.* (“Part A [of Chapter Eleven] sets out each government’s obligations with respect to investors from other NAFTA countries and their *investments in its territory.*”) (emphasis added).

⁴⁰ Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation*, in CANADA GAZETTE 68, 147 (Jan. 1, 1994).

⁴¹ Vienna Convention, art. 31(2)(b) (A treaty’s context includes, “any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”) The SAA and the SOI were related to the NAFTA, clarified certain concepts in the Agreement, were submitted by the United States and Canada to their respective legislatures in conjunction with the NAFTA’s conclusion, and have been cited and relied upon by each of the NAFTA Parties. As such, these instruments are part of the Agreement’s context. See IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 129 (2d ed. 1984).

⁴² Claimants’ Reply ¶ 68.

another Party, and where that same investor would not be able to bring that claim on behalf of its investment under 1102(2). Indeed, Article 1102(4) is illustrative in this respect. That provision reads:

For greater certainty, no Party may:

- (a) impose on an *investor* of another Party a requirement that a minimum level of equity in an enterprise *in the territory of the Party* be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or
- (b) require an *investor* of another Party, by reason of its nationality, to sell or otherwise dispose of *an investment in the territory of the Party*.⁴³

These two examples describe measures that relate to an investor's ability to establish, acquire, expand, manage, conduct, operate, and sell or dispose of its investment in the territory of another NAFTA Party. If a State adopts a measure requiring the treatment described in Article 1102(4), it would be the investor, and not the investor's investment, that has been denied national treatment. Thus, the claim would need to be submitted under Article 1102(1), and could not be submitted under Article 1102(2). It is equally clear in those examples that the investor's investment at issue is in the territory of the host State.

Additionally, the NAFTA provides protections to investors before they actually establish an investment in the territory of another NAFTA Party, as long as the investor seeks to make, or is making an investment in that territory.⁴⁴ In such "pre-establishment" situations, measures that relate to the putative investor cannot be challenged under Article

⁴³ NAFTA art. 1102(4) (emphasis added).

⁴⁴ See, e.g., *id.* art. 1102(1) (providing national treatment to investors with respect to the establishment of their investments).

1102(2), because there is not yet any investment that is owed national treatment.⁴⁵ Thus, if a measure violating national treatment interfered with an investor's ability to make a particular investment in the first instance, that measure can only be challenged under 1102(1).⁴⁶ In that case, however, the proposed investment would be in the territory of the host State. As these examples illustrate, the United States' interpretation in no way renders Article 1102(1) superfluous.

Not only does the United States interpretation not render Article 1102(1) superfluous, it is the only interpretation that does not lead to absurd results. Accepting, as Claimants have, that Chapter Eleven's scope is limited by Article 1101(1)(b) to measures that relate to investments that are in the territory of the host State, but contending, as they do, that Article 1101(1)(a) does *not* restrict the scope of the Chapter to measures that relate to investors that have made, or seek to make, an investment in the host State leads to absurd results. If the United States, for example, adopted a measure specifically targeting a Canadian corporation and its Canadian owner, under Claimants' theory, because that measure would not "relate to" an investment in the territory of the United States, the corporation's owner could not challenge that measure on behalf of the corporation. But, according to Claimants, that same measure would "relate to" the corporation's owner, and that so-called "investor" therefore could challenge the measure in its own right. Claimants offer no explanation as to why the Parties would have chosen to provide such unbalanced protection.

⁴⁵ *Id.* art. 1102(2) ("Each Party shall accord to *investments* of investors of another Party treatment . . .").

⁴⁶ *Id.* art. 1102(1) ("Each Party shall accord to *investors* of another Party treatment . . .").

Similarly, as the United States noted in its Memorial, Claimants' construction would lead to absurd results in interpreting the national treatment obligation in Article 1102. The Parties have extended the obligation to accord national treatment to both foreign investments and the foreign investors that own or control those investments. Some measures may relate only to the investor or its investment, but when the offending measure relates to both, there is no reason why the Parties would not have intended for the investor *and* the investment to receive national treatment protection. Indeed, under such circumstances, it would be absurd to offer the protection of the Treaty to the investor, but not to its investment. Yet, under Claimant's interpretation, the United States would be obligated under 1102(1) to accord national treatment to a Canadian investor with respect to its investment in Canada, but would not owe any national treatment obligation under 1102(2) to that same investment.⁴⁷ Claimants have failed to offer any response to this observation that their interpretation would lead to absurd results.⁴⁸

Finally, if Claimants' interpretation of Articles 1101(1) and 1102(1) were correct, any provision in Chapter Eleven that does not include the "in the territory" language could be construed as imposing extraterritorial obligations on the Parties. Such an interpretation could create the absurd possibility that all investments in the Free Trade Area would be subject to two, and potentially three, sets of regulatory formalities. Article 1111(1) provides that nothing in Article 1102 shall prevent the Parties from adopting measures "that prescribe special formalities in connection with the establishment of investments by investors of another Party, such as a requirement that

⁴⁷ United States' Memorial at 13.

⁴⁸ See also *infra* n.20 and surrounding text (discussing the United States Supreme Court's rejection of a similar argument in *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 179-83 (1993)).

investors be residents of the Party or that investments be legally constituted under the laws or regulations of the Party,” as long as such formalities do not materially impair the protections set forth in the Chapter. According to Claimants’ interpretation, this provision – which, like Article 1102(1), lacks an explicit territorial restriction – would enable any NAFTA Party to require that any investor in the Free Trade Area comply with special formalities such as establishing residency in its country or formally registering its investment there, even if the investment were located outside its territory. If Claimants’ reading of the NAFTA were correct, Article 1111(1) would empower the NAFTA Parties to impose significant regulatory hurdles on investors operating investments outside their respective territories in a way that could frustrate, rather than advance, the objectives of the investment chapter.

The United States’ interpretation gives full effect to the operation of Article 1102(1) and avoids the absurd results that would obtain under Claimants’ strained reading of Chapter Eleven.

IV. The United States’ Interpretation Is Consistent With The NAFTA’s Object And Purpose

Claimants’ primary contention is that the national treatment obligation in Article 1102(1) cannot be interpreted as containing a territorial restriction because such a restriction would frustrate the NAFTA Parties’ “over-arching” objectives of enhancing competition, non-discrimination and transparency throughout the “North American Free Trade Area.”⁴⁹ Relying on the general objectives set forth in Article 102 and the NAFTA’s preamble, Claimants erroneously argue that given the degree of economic

⁴⁹ Claimants’ Reply ¶¶ 94, 43.

integration the Parties sought to achieve within the North American Free Trade Area (which they describe as, in effect, eliminating national borders),⁵⁰ the United States' interpretation of Article 1102(1) is inconsistent with the Agreement's goals.⁵¹

As an initial matter, while the NAFTA's Preamble and the objectives set forth in Article 102 may inform the interpretation of specific NAFTA provisions, such general objectives cannot transform the nature of those obligations. As the *ADF* NAFTA Chapter Eleven tribunal observed:

The provision under examination must of course be scrutinized in context; but that context is constituted chiefly by the other relevant provisions of NAFTA. We do not suggest that the general objectives of NAFTA are not useful or relevant. Far from it. Those general objectives may be conceived of as partaking of the nature of *lex generalis* while a particular detailed provision set in a particular context in the rest of a Chapter or Part of NAFTA functions as *lex specialis*. The former may frequently cast

⁵⁰ *Id.* ¶ 64. Although Claimants contend that the NAFTA Parties intended to achieve a level of economic integration that, in effect, eliminated national borders within the Free Trade Area, the Parties clearly did not seek such a level of integration. Article XXIV of the General Agreement on Tariffs and Trade (GATT), to which all three NAFTA Parties are signatories, permits two kinds of regional economic integration arrangements: customs unions and free trade areas. See GATT, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187, Art. XXIV, *reprinted as amended in* B.I.S.D. (IV), 41-44 (1969). While these arrangements are alike in that both allow constituent nations to eliminate trade barriers amongst themselves as long as they do not increase tariffs on non-member countries, they differ in that customs unions require member countries to erect a common external tariff against trade with non-members, while free trade agreements allow their members to retain their own independent tariff schedules. See C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned Into A Battle*, 28 GEO. WASH. J. INT'L L. & ECON. 1, 59 (1994). Thus, "[a] country joining a customs union must literally surrender sovereignty over its tariff power," and the result of this surrender of sovereignty is that the members of a customs union begin to establish a common commercial policy. *Id.* at 59. In contrast, free trade areas do not require a similarly significant surrender of sovereignty or the coordination, or harmonization, of commercial or other policies among member countries. *Id.* at 60. In fact, while there are various provisions in the NAFTA relating to environmental, health and technical standards which urge the Parties to approximate their regulations, the NAFTA Parties did not express an aspiration to harmonize their respective regulations regarding investment. See Frederick M. Abbott, *Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime*, 40 AM. J. COMP. L. 917, 936 (1992). Instead, the NAFTA Parties chose to "maintain their own regulatory schemes" to govern investments in their territories, and thus, Claimants' suggestion that the Parties intended to eliminate borders with respect to the investment promoting aspects of the Agreement is belied by the Agreement's very nature. *Id.*; accord Submission of the Mexico's 1128 Submission ¶ 10.

⁵¹ Claimants' Reply ¶¶ 39-49.

light on a specific interpretive issue; but it is not to be regarded as overriding and superseding the latter.⁵²

The general objectives cited by Claimants shed little light upon the specific preliminary question before this Tribunal. Claimants rest their case on generic principles of economic integration, as well as the Parties' general objectives of promoting trade and investment to support their claim for jurisdiction.⁵³ This approach contravenes the well-accepted principle that general objectives can shed light on treaty provisions, but cannot impose independent obligations on treaty signatories.⁵⁴

Claimants, moreover, fail to provide any textual or extrinsic evidence demonstrating that the Parties sought to achieve their objective of economic integration by expanding the national treatment obligation in Chapter Eleven in the manner that they suggest.⁵⁵ Indeed, granting Claimants the ability to seek money damages against the United States because of the adoption of a ban on certain imports of cattle – which the

⁵² *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award ¶ 147 (Jan. 9, 2003).

⁵³ Claimants, for instance, contend that their “investment decisions [in Canada] were based upon an assumption that the Free Trade Area promised . . . unfettered access to suppliers and customers throughout the Free Trade Area.” Claimants’ Reply ¶ 18. Claimants, however, have failed to show the existence of any such “promise,” failed to show how “reliance” by a non-party to a treaty can impact the jurisdictional scope of that treaty, and failed to show how the economic integration the Parties sought to achieve with the Agreement altered their intent concerning Chapter Eleven’s scope and coverage.

⁵⁴ See *Oil Platforms*, 1996 I.C.J. at ¶¶ 25, 29 (rejecting Iran’s suggestion that Article I of the Treaty of Amity, Economic Relations and Consular Rights of August 15, 1955, which provided for a “firm and enduring peace and sincere friendship” between the parties, conferred any independent obligations on the Parties; finding, rather, that such general language only “throw[s] light on the interpretation of the other Treaty provisions”); *Sale*, 509 U.S. at 178 (holding that the “broad remedial goals” of the United Nations Protocol Relating to the Status of Refugees could not be interpreted to impose extraterritorial obligations on its signatories); WTO Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, 59-60 (Jan. 16, 1998) (finding that the general objective in Article 5.5 of the Agreement on the Application of Sanitary and Phytosanitary measures of achieving “consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection” was a prospective goal that did not establish a legal obligation of consistency on Parties to the agreement); *ADF*, *supra* n.52.

⁵⁵ Claimants’ attempt to distinguish the United States’ authority based on the “*sui generis*” nature of their case rings hollow. Claimants have failed to demonstrate why the fact of their participation in an integrated, continental market, or the consolidated nature of their claims, has any bearing on the Parties’ intent regarding the scope of the Investment Chapter. For this reason, the United States need not dispute the factual evidence Claimants have adduced, or the testimony of their economic expert, Anindya Sen, to demonstrate the degree of integration in the North American market for live cattle.

United States deemed necessary to protect human and animal health – would frustrate the express provisions of Chapter Seven, as well as the Parties’ intention that such disputes be subject to binding State-to-State arbitration.⁵⁶

Claimants fail to demonstrate why the United States’ interpretation of Article 1102(1) is inconsistent with the degree of market integration that the Parties sought to achieve, both by eliminating barriers to trade at their respective borders and by minimizing internal barriers to foreign investment within their respective territories. Claimants’ suggestion that the United States’ interpretation undermines the Agreement’s objectives reveals a fundamental misconception about how the Agreement is structured to achieve those objectives. Furthermore, as set forth below, Claimants’ analysis of the Agreement’s object and purpose misconstrues the Agreement’s stated objectives and preambular context: a fact which is made apparent when those objectives are considered in conjunction with analogous provisions in the United States’ other free trade agreements (FTAs).

First, Claimants misconstrue the NAFTA’s stated objectives. Claimants erroneously conclude that Article 102(1)(c), which refers to increasing investment opportunities “in the territories of the Parties” demonstrates that Chapter Eleven’s protections are not limited to cross-border investments and the investors that make or seek to make those investments. In so arguing, Claimants contrast Article 102(1)(c) with

⁵⁶ NAFTA Article 712 sets forth the NAFTA Parties’ “Basic Right” to take sanitary and phytosanitary measures “necessary for the protection of human, animal or plant life or health in its territory, including a measure more stringent than an international standard, guideline or recommendation.” Article 712 qualifies that “Basic Right” by requiring that such measures be adopted based on scientific principles, in a non-discriminatory manner, and not simply as disguised restrictions on trade. *See* NAFTA arts. 712(3), (4), (6). Claimants strain to fashion their complaints concerning the May 20, 2003 border ban adopted by the United States as investment claims because the Agreement contemplates that disputes of this nature be brought by the Parties and governed by the technical consultation provisions of Article 723, as well as the dispute resolution provisions in Chapter Twenty, which contain no provisions for the issuance of monetary awards to private parties allegedly harmed by such measures.

Article 102(1)(d), which provides for protection of intellectual property rights in “each Party’s territory.” Claimants contend that Article 102(1)(c) formulation refers to improving investment opportunities in the territories globally, while the Article 102(d) formulation refers to protecting certain investments in the territories of the Parties respectively.⁵⁷

There is, however, no difference in meaning between the phrases “in the territories of the Parties” and “in each Party’s territory” – both simply indicate the possessive connection between the Parties and their respective territories. If there is a significant distinction in territorial language in the Article 102 objectives, it is that between Article 102(a), (c), and (d), which all refer to the territories of the Parties, and Article 102(b), which explicitly focuses on promoting conditions of fair competition “in the free trade area.” Thus, the Article 102(1)(c) objective must be construed as expressing a desire to increase investment opportunities for investors of each Party in the territories of the *other* Parties.

Second, contrary to Claimants’ suggestion, the United States’ interpretation of Chapter Eleven is consistent with the NAFTA’s object and purpose. In its Memorial on the Preliminary Issue, the United States demonstrated that the object and purpose of Chapter Eleven is no different from that of bilateral investment treaties (BITs) and investment chapters in other FTAs: *i.e.*, to promote and protect foreign investment by investors of one Party in the territory of another.⁵⁸ By providing protections to investors

⁵⁷ *Id.* ¶ 93.

⁵⁸ See United States’ Memorial at 6-10; see also *Report on the Treaty with the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment*, S. EXEC. REP. 103-8, at 2-3 (1993) (report of Mr. Pell of the Senate Committee on Foreign Relations) (explaining the need for the United States’ bilateral investment treaty program given that the post-war multilateral trade agreement

with respect to their investments in the Respondent State, Chapter Eleven greatly expands the rights of foreign investors in the absence of the Agreement.⁵⁹

As Mexico explained in its NAFTA Article 1128 submission in this proceeding, the NAFTA was designed to allow commercial actors “to take advantage of NAFTA’s trade liberalization by producing goods or services which will then be exported to the territory of another Party” or “to produce goods or services in the territory of another Party by means of an investment.”⁶⁰ While most chapters of the Agreement seek to eliminate traditional barriers to economic integration at the border in the form of tariffs and non-tariff barriers to trade, Chapter Eleven targeted internal barriers to economic integration in the form of investment restrictions.⁶¹ With Chapter Eleven, the United States, Canada, and Mexico sought to allow their investors to tap into new markets; to

agenda had not traditionally protected U.S. investment abroad and noting that the NAFTA “also has investment provisions similar to a bilateral investment treaty”).

⁵⁹ In a report to the United States Congress specifically dedicated to evaluating the content of the NAFTA’s Investment Chapter, the Investment Policy Advisory Committee (“INPAC”) hailed the Chapter’s provisions as promoting “free flows of investment among the three countries by ending many current restrictions in Mexican law on foreign investment and by going beyond the terms of the recent United States-Canada Free Trade Agreement” in “providing for international arbitration for dispute resolution, broadening the scope of covered investments, and prohibiting additional performance requirements not addressed” in that earlier free trade agreement. *See* Investment Policy Advisory Committee, REPORT TO THE UNITED STATES CONGRESS CONCERNING THE INVESTMENT CHAPTER OF THE NORTH AMERICAN FREE TRADE AGREEMENT, 1 (Sept. 14, 1992) (“INPAC Report”). Claimants challenge the United States’ reliance on the “Scope and Coverage” provision of the Canada-U.S. FTA (which provides that the Agreement applies only to “any measure of a Party affecting investment *within or into its territory* by an investor of the other Party”) on the grounds that the NAFTA provided more protection to investors than had that agreement, or prior bilateral investment treaties. *See* Claimants’ Reply ¶ 102; United States’ Memorial at 16, n.41 (emphasis added). But INPAC’s report highlighted the ways in which the NAFTA’s investment chapter expanded upon the Canada-U.S. FTA’s protections for investors, and it did not include among this list any reference to an expanded national treatment obligation with respect to investors as Claimants contend.

⁶⁰ Mexico’s 1128 Submission ¶ 11.

⁶¹ The Industry Sector Advisory Committee for Services (ISAC) (another private sector committee charged with commenting on the Agreement) explained to Congress that while the Agreement’s service chapter eliminated barriers to trade at the border, its Investment Chapter guaranteed U.S. service providers the ability to ensure “on-site delivery” of their products by establishing a local presence in either Canada or Mexico. *See* ISAC, REPORT ON THE NORTH AMERICAN FREE TRADE AGREEMENT, 5 (Sept. 14, 1992) (“ISAC Report”).

increase their efficiency by producing their products and services in the other NAFTA Parties' territories; and to make use of resources, skills, and technology not readily or economically available in their home countries.⁶² The United States' interpretation of Chapter Eleven's scope indeed promotes the Agreement's purpose: it enhances cross-border trade in goods and services, promotes competition in the free trade area, and substantially increases investment opportunities in the territories of the Parties (the Article 102 objectives cited by Claimants), as well as ensures a predictable commercial framework for business planning and investment, and enhances the competitiveness of the Parties' firms in global markets (the preambular resolutions which Claimants emphasize).

Indeed, documents created during the enactment of the NAFTA Implementation Act, an instrument passed in connection with the United States' ratification of the NAFTA, confirm that the United States' interpretation comports with the Agreement's object and purpose.⁶³ The Congressional Budget Office, for instance, noted in its budgetary and economic analysis of the NAFTA, that Chapter Eleven's national treatment and most-favored nation articles "provide that *investors from one NAFTA country with an investment in another* should be treated no less favorably by federal,

⁶² See INPAC Report at 1; see also ISAC Report at 5 ("On balance, the NAFTA's investment provisions represent a strong statement of support for the principle that adequate market access for U.S. service firms abroad must include the right to invest locally on a fair and equitable basis vis-à-vis domestic firms."); *North American Free Trade Agreement: Testimony Before the Subcommittee on Trade, Committee on Ways and Means, House of Representatives*, Statement of Allan I. Mendelowitz, Director of International Trade, Finance, and Competitiveness, General Government Division (Sept. 21, 1993) (explaining that "Canada's main objectives in joining NAFTA were to preserve, clarify, and strengthen the [Canada-U.S. FTA] provisions and to ensure that Canada shares in the benefits that are expected to accrue from increased access to Mexico's traditionally closed economy.").

⁶³ North American Free Trade Agreement Implementation Act, 19 U.S.C. §§ 3301-3473 (2000).

state, or provincial governments than are the investors or investments of the domestic country, or those of any other country.”⁶⁴

And after the main provisions of the Agreement had been negotiated, but prior to its ratification by Congress, the Office of the U.S. Trade Representative produced a pamphlet series extolling the virtues of the Agreement by noting that it enabled investors “to go directly to international arbitration for disputes with the *host government*” and ensured “non-discrimination against U.S. companies establishing, acquiring or operating businesses in Canada or Mexico.”⁶⁵ These contemporaneous statements by a key congressional office and the executive agency charged with negotiating the Agreement suggest that the United States intended that Chapter Eleven would advance the NAFTA’s objectives by promoting *foreign* investment.⁶⁶

Indeed, the only tribunal to have addressed the issue before this Tribunal – *Gruslin v. Malaysia* – supports this conclusion.⁶⁷ Claimants seek to distinguish *Gruslin* by noting that they do not contend that they have investments in the territory of the

⁶⁴ Cong. Budget Office, A BUDGETARY AND ECONOMIC ANALYSIS OF THE NORTH AMERICAN FREE TRADE AGREEMENT, App. A, 109 (July 1993) (emphasis added). The CBO prepared this report at the request of the Senate Committee on Finance to evaluate the effects of the NAFTA on the U.S. economy and the federal budget.

⁶⁵ Office of the U.S. Trade Representative, THE NORTH AMERICAN FREE TRADE AGREEMENT PAMPHLET SERIES, “Dispute Resolution” and “Investment” (Aug. 1992) (emphasis added).

⁶⁶ The INPAC Report focuses on the Chapter’s advances in prohibiting discrimination against *foreign* investment and the positive impacts of *foreign* investment on a host country’s economy by increasing employment, capital, and access to technology. INPAC Report at 8, 1, 5. Furthermore, INPAC specifically considered Chapter Eleven’s national treatment and most-favored nation obligations and made no mention of the expansion of their coverage that Claimants’ suggest. While INPAC described those provisions in Chapter Eleven as more effective than the analogous provisions in earlier BITs in that they “require[] that any future liberalization (e.g. in Mexico’s energy sector) cannot be reversed . . . [and] where state or provincial requirements exist . . . [the] Parties’ investors be treated in the same manner as investors from those states or provinces,” its report does not assert that those provisions are more effective at promoting investment because they protect investors with respect to investments located anywhere in the free trade area, as Claimants suggest. *Id.* at 7. If the Parties had intended to so dramatically expand Chapter Eleven’s national treatment obligation, INPAC would likely have noted that expansion.

⁶⁷ *Gruslin v. Malaysia*, ICSID Case No. ARB/94/1, Award (Nov. 27, 2000).

respondent State.⁶⁸ But Claimants ignore that the *Gruslin* tribunal also addressed the claimant’s argument that “[t]here is no territorial requirement” under Article 25(1) of the ICSID Convention or the provisions of the treaty at issue in that case.⁶⁹ The claimant in *Gruslin* argued that, because of the absence of the words “in the territory” in some provisions of the applicable bilateral investment treaty, he was entitled to claim protection for “investments” that were made outside of the territory of the respondent State.⁷⁰ The tribunal, however, flatly rejected this argument, observing that the meaning of the term “investment” had to be “informed by the stated objects” of the BIT, which included the “creation of favourable conditions for greater economic co-operation for investments by nationals of one party in the territory of the other.”⁷¹ The tribunal also observed that the BIT’s substantive provisions were all “predicated on the same subject matter of investments by nationals of one state party in the territory of the other party.”⁷² It was thus “clear to the Tribunal that the concept of investment [was] to be read as [being] confined to the same defined subject matter of investments by nationals of one contracting party in the territory of the other,” and that “[t]he absence of qualifying words of limitation to the word ‘investment’ . . . itself [did] not broaden the class of investments included by the [BIT].”⁷³

Here, just as in *Gruslin*, one of the NAFTA’s objectives, as shown above, is to increase opportunities for investors of one Party to make investments in the territories of

⁶⁸ Claimants’ Reply ¶ 110.

⁶⁹ *Gruslin* Award ¶ 13.4.

⁷⁰ *Id.* ¶ 13.7.

⁷¹ *Id.* ¶ 13.8.

⁷² *Id.* ¶ 13.9.

⁷³ *Id.* ¶¶ 13.9-13.10.

the other Parties. Accordingly, just as in *Gruslin*, any protection of investors in the NAFTA's Investment Chapter is necessarily "confined to the same defined subject matter of investments by nationals of one contracting state in the territory of the other."⁷⁴

Claimants' attempt to distinguish the only investor-State case addressing this very issue is thus unavailing.⁷⁵

Third, the United States has entered into other FTAs which provide further evidence that there is nothing inherent in the creation of a free trade area that necessitates Claimants' interpretation of Article 1102(1).⁷⁶ Each of those other agreements contains objectives and/or preambular language that are identical or similar to those contained in the NAFTA. For example, an identical objective to that contained in Article 102(1)(c) ("increase substantially investment opportunities in the territories of the Parties") appears in both the Chile-U.S. FTA and the DR-CAFTA.⁷⁷ Both of these FTAs also contain objectives equivalent to those contained in NAFTA Article 102(a) ("eliminate barriers to trade in, and facilitate the cross-border movement of goods and services between the

⁷⁴ *Id.* ¶ 13.9.

⁷⁵ Claimants also argue that they seek protection under Article 1102(1) as *investors*, "separate and apart" from their domestic investments. Claimants' Reply ¶ 66. But this contention ignores the fact that Article 1102(1) specifically protects investors only "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of *investments*." (emphasis added). Therefore, claims by investors cannot be made "separate and apart" from their investments.

⁷⁶ *See, e.g.*, Free Trade Agreement, U.S.-Austl., May 18, 2004 ("Australia FTA"), art. 1.1(1); Free Trade Agreement, U.S.-Jordan, Oct. 24, 2000 ("Jordan FTA"), art. 1.1(1); Free Trade Agreement, U.S.-Bahr., Sept. 14, 2004 ("Bahrain FTA"), art. 1.1(1); Free Trade Agreement, U.S.-Morocco, June 15, 2004 ("Morocco FTA"), art. 1.1; Free Trade Agreement, U.S.-Chile, June 6, 2003 ("Chile-U.S FTA"), art. 1.1; Free Trade Agreement, U.S.-Cent. Am.-Dom. Rep., Aug. 5, 2004 ("DR-CAFTA"), art. 1.1(1); Free Trade Agreement, U.S.-Sing., May 6, 2003 ("Singapore FTA"), art. 1.1(1); *see also Asian Agricultural Prods. Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, 30 I.L.M. 577, 597 (1991) (noting that when interpreting a treaty, "it is proper to consider stipulations of earlier or later treaties in relation to subjects similar to those treated in the treaty under consideration.") (quoting *Elton Case*, Award (Mexico/U.S. General Cl. Comm'n, 1929), 11 Repertory Sec. 2033, at 35).

⁷⁷ DR-CAFTA, art. 1.2(d); Chile-U.S FTA, art. 1.2(d).

territories of the Parties”),⁷⁸ and Article 102(b) (“promote conditions of fair competition in the free trade area”).⁷⁹ Claimants characterize these three objectives as “[p]articularly relevant to this case.”⁸⁰ Claimants also place particular emphasis on the NAFTA Parties’ preambular resolutions to “ENSURE a predictable commercial framework for business planning and investment,” and to “ENHANCE the competitiveness of their firms in global markets” to support their view that national treatment applies to investors that have made investments that are located anywhere in the free trade area.⁸¹ The United States’ other FTAs also contain goals similar to the NAFTA’s of assuring a predictable commercial framework⁸² and enhancing the competitiveness of the Parties’ firms.⁸³

These other FTAs, however, do not extend national treatment to investors that do not have investments or do not seek to make investments in the territory of another Party.⁸⁴ In the DR-CAFTA and Chile-US FTA, for example, the national treatment provisions in the respective investment chapters provide that “[e]ach Party shall accord to investors of [another/the other] Party treatment no less favorable than that it accords, in

⁷⁸ DR-CAFTA, art. 1.2(1)(b); Chile-U.S FTA, art. 1.2(1)(b) (“eliminate barriers to trade in, and facilitate the cross-border movement of goods and services between the Parties”).

⁷⁹ Chile-U.S FTA, art. 1.2(1)(c); DR-CAFTA, art. 1.2(1)(c).

⁸⁰ Claimants’ Reply ¶ 42.

⁸¹ *Id.* ¶ 49.

⁸² *See* DR-CAFTA, preamble (“ENSURE a predictable commercial framework for business planning and investment”); Chile-U.S FTA, preamble (same); *see also* Morocco FTA, preamble (“DESIRING to establish clear rules governing their trade and investment . . .”); Australia FTA, preamble (“PROMOTE a predictable, transparent, and consistent business environment that will assist enterprises to plan effectively and use resources efficiently”).

⁸³ *See* DR-CAFTA, preamble (“ENHANCE the competitiveness of their firms in global markets”); Chile-U.S. FTA, preamble (same); Morocco FTA, preamble (“Seeking to enhance the competitiveness of their enterprises in global markets”); Bahrain FTA, preamble (“Desiring to enhance the competitiveness of their enterprises in global markets”); Jordan FTA, preamble (“Wishing to raise the capacity and international competitiveness of their goods and services”).

⁸⁴ *See* DR-CAFTA, arts. 10.3(1), 10.28; Chile-U.S. FTA, arts. 10.2(1), 10.27; Morocco FTA, arts. 10.3(1), 10.27; Singapore FTA, arts. 15.4(1), 15.1(17); Australia FTA, art. 11.3(1), 11.17(6).

like circumstances, to its own investors with respect to the establishment . . . of investments *in its territory*.”⁸⁵ The inclusion of the “in the territory” language in the national treatment provision pertaining to investors forecloses the argument Claimants make here.

Claimants cannot explain why it would be necessary to extend the scope of the NAFTA’s national treatment obligation in order to achieve the objectives of the NAFTA, while it would not be necessary to do the same to achieve the objectives of the United States’ other FTAs. The fact that the same general objectives and preambular language as that used in the NAFTA is found in other of the United States’ FTAs, which expressly do not extend national treatment to investors that have not made and do not seek to make an investment in the territory of the respondent Party, is further evidence that the absence of the phrase “in the territory” in Article 1102(1) cannot provide the basis for extending the NAFTA’s national treatment obligation in Chapter Eleven.

The United States’ interpretation is entirely consistent with the over-arching object and purpose of the Agreement and the Agreement’s stated objectives. Furthermore, the fact that the United States’ other FTAs contain express territorial restrictions on the national treatment obligations in their investment chapters refutes Claimants’ suggestion that the very nature of an FTA requires the adoption of their interpretation of NAFTA Chapter Eleven.

⁸⁵ DR-CAFTA, art. 10.3(1) (emphasis added); Chile-U.S. FTA, art. 10.2(1) (same). Claimants criticize the United States for referring to other BITs and FTAs as supplementary sources of interpretation. Claimants’ Reply ¶ 103. The International Court of Justice, however, employed just such a method of supplementary interpretation in the *Oil Platforms* case. *Oil Platforms*, 1996 I.C.J. at ¶¶ 25, 29 (Decision on Preliminary Objections of Dec. 12) (interpreting the objective section of a treaty of “Amity, Economic Relations and Consular Relations” between the United States and Iran by comparing that treaty to similar treaties executed by the United States in the same time period).

V. The Negotiating History Of The Treaty Confirms The United States' Interpretation

Claimants incorrectly contend that, in accordance with Article 32 of the Vienna Convention, a Tribunal may resort to supplementary means of interpretation – such as the preparatory texts of a treaty or the circumstances of its conclusion – only where the interpretive approach under Article 31 fails by leading to a result “that is bizarre or incongruous in context.”⁸⁶ Article 32, in fact, explicitly allows reference to supplementary sources of interpretation in order “to confirm the meaning resulting from the application of article 31.”⁸⁷ In this case, supplemental means of interpretation further support the United States' interpretation.

Claimants observe the same facts from the rolling texts that the United States noted in its Memorial – *i.e.*, that an explicit territorial restriction was included in the provisions that would become 1101(1)(a) and 1102(1) until the Lawyers' Revision version of August 26, 1992.⁸⁸ From these facts, Claimants assert that the drafters intended to remove the territorial restriction on investor protections, and that this change was not accidental.⁸⁹ It is entirely implausible, however, that the Parties would have effected such a fundamental change in the scope of Chapter Eleven without any indication of negotiation or discussion.⁹⁰ Not only are the rolling texts devoid of any indication of negotiation or discussion of expanding the territorial scope of Chapter

⁸⁶ Claimants' Reply ¶ 70.

⁸⁷ Vienna Convention on the Law of Treaties, art. 32; *see also Maritime Delimitation and Territorial Questions* (Qatar v. Bahr.), 1995 I.C.J. 6, ¶ 40 (Judgment of Feb. 15); *Territorial Dispute* (Libya v. Chad), 1994 I.C.J. 6, ¶ 55 (Judgment of Feb. 3). Tribunals nevertheless should exercise caution when resorting to preparatory work of a treaty, particularly where the preparatory work may be confusing or inconclusive. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 606 (6th ed. 2003).

⁸⁸ Claimants' Reply ¶¶ 74-80.

⁸⁹ *Id.* ¶¶ 76, 81.

⁹⁰ *See* United States' Memorial at 18-19; *see also supra* Sec.I.

Eleven, there are no contemporaneous or subsequent indications anywhere that the Parties intended such a change.⁹¹

Claimants also note that on August 30, 1992, the “in the territory language” was added back in Article 1102(4)(b).⁹² This change, however, undercuts Claimants’ argument. Article 1102(4) does not prescribe any additional substantive national treatment obligations; rather, it provides two examples for “greater certainty.” As explained above, both of the specific examples provided by Articles 1102(4)(a) and (b) relate to measures that might be imposed on “investors” – *i.e.*, they provide greater certainty regarding the scope of Article 1102(1). Thus, when the territorial restriction was placed in Article 1102(4)(b) – which made it consistent with the territorial restriction in Article 1102(4)(a) – it further emphasized that Article 1102(1) only applies to investors that have made or seek to make an investment in the territory of the respondent Party.

Therefore, contrary to Claimants’ contention, a careful review of the Agreement’s rolling texts reveals that while the Parties deleted the “in the territory” language from Article 1102(1) during the legal scrub, they specifically inserted such a limitation in Article 1102(4)(b) to ensure that the national treatment obligation be understood as applying to investments in each Party’s respective territory.

⁹¹ See *supra* Sec.I; see also *Asian Agricultural Prods. Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, 30 I.L.M. 577, 601 (1991) (observing that “none among the authors referred to by the Parties claimed in his commentary that the Sri Lanka/U.K. Treaty or similar Bilateral Investment Treaties had the . . . [meaning proffered by the claimant]”).

⁹² Claimants’ Reply ¶ 80.

CONCLUSION

For the foregoing reasons, and those set forth in the Memorial, the United States respectfully requests that this Tribunal render an award in favor of the United States, dismissing Claimants' claims in their entirety for lack of jurisdiction. The United States further requests that, pursuant to Article 40 of the UNCITRAL Arbitration Rules, the Tribunal require Claimants to bear all costs of the arbitration, including costs and expenses of counsel, and issue an award making Claimants jointly and severally liable for costs.

Respectfully submitted,

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