

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

ADF GROUP INC.,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

Case No. ARB(AF)/00/1

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

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

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

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

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

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

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

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

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

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

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

⁶ See generally *id.*

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

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

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

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

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

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

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

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

¹¹ See *Pope Damages Award* ¶ 62.

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

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

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

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

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

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

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

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

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

¹⁸ Vienna Convention art. 32.

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

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

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

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

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

²¹ See Procedural Order No. 1, Attachment No. 1, ¶ III.

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

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

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

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

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

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

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

²⁴ ADF Submission ¶ 64.

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

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

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

It is common ground that the burden of establishing the existence and content of a rule of customary international law rests on the party asserting the existence of the rule.²⁶

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

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

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

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

²⁸ ADF Submission ¶ 68.

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

- **United Nations, Human Rights Committee, Communication No. 633/1995: Canada 5/5/99, CCPR/C/65/D/633/1995** – This decision dealt with the “right to . . . receive and impart information” articulated in Article 19(2) of the International Covenant on Civil and Political Rights and restrictions on the exercise of that right permissible under Article 19(3).³¹ However, ADF’s allegations here have nothing to do with any supposed failure to “receive and impart information” within the meaning of Article 19(2) – even assuming that a non-binding Human Rights Committee decision as to that article could be relevant to the content of the customary international law minimum standard of treatment of aliens in any event.
- **Electronica Sicula S.P.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15 (July 20)** – ADF duplicates the *Pope* tribunal’s error in relying on the decision of the Chamber of the International Court of Justice in *ELSI* as evidencing an obligation under the customary international law minimum standard of treatment. To the contrary, the United States and Mexico agree with Canada that “[t]he *ELSI* decision did not address the minimum standard of treatment under customary international law.”³² Instead, in *ELSI*, the obligation of “arbitrariness” was expressly imposed by treaty. Nor, as each Party has also observed, can *ELSI* be viewed as establishing a standard of mere “surprise” – particularly in light of the Chamber’s finding that the facts before it did not establish “arbitrary” conduct.³³
- **WTO Appellate Body Decisions**³⁴ – Contrary to ADF’s suggestion,³⁵ these decisions by the WTO Appellate Body are similarly inapposite. Neither addresses an obligation under customary international law. Instead, each applies a specific treaty obligation – namely,

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

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

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

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

³³ See *Pope Damages Award* ¶ 64.

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

³⁵ See ADF Submission ¶ 67.

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

- ***CME Czech Republic, B.V. (Neth.) v. Czech Republic***³⁸ – In *CME*, the tribunal found a violation of a Dutch-Czech BIT’s standards of expropriation, “fair and equitable treatment,” and full protection and security, among others. Aside from the finding of expropriation, the tribunal did not explain in any detail the legal rationale behind its findings of violations.³⁹ It therefore sheds little light on the question before this Tribunal. The *facts* of *CME*, moreover, bear no resemblance to those here – in *CME* the respondent was found to have illegally “coerced” CME through the threat of improper fines and criminal charges against its statutory representatives and executives (among other things), resulting in the “evisceration of the arrangements in reliance upon with the foreign investor was induced to invest.”⁴⁰ The *CME* award, even if it withstands the ongoing action to set it aside in the Swedish courts, provides little guidance here.⁴¹
- ***Metalclad Corp. v. United Mexican States*** – To the extent that the *Metalclad* award can be read to suggest that the phrase “fair and equitable” in Article 1105(1) articulates a standard other than the international minimum standard – such as that of transparency – it is wrongly reasoned and should not be followed here.⁴² The British Columbia Supreme Court set aside a portion of that award, finding that “no authority was cited or evidence introduced to establish that transparency has become part of customary international law.”⁴³ The court held that the *Metalclad* tribunal had misstated the applicable law to include obligations of transparency which were found outside the substantive obligations of Article 1105(1).⁴⁴ The court concluded that, in issuing its award, the tribunal decided a dispute outside the scope of arbitration.⁴⁵ *Metalclad* provides no support for ADF’s assertions here.

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

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

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

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

⁴⁰ *Id.* ¶ 611; see *id.* ¶ 114.

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

⁴² See ADF Submission ¶¶ 72-73.

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

⁴⁴ *Id.* at 26 ¶ 70.

⁴⁵ *Id.* at 27 ¶ 75.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- ***AMCO Asia v. Indonesia*, 1 ICSID Rep. 377, 413 (Nov. 20, 1984) (Award)** – This award, which was subsequently annulled on May 16, 1986 (*see id.* at 509), merely applied the principle of *pacta sunt servanda* to an agreement between the claimant and Indonesia concerning an investment in a real estate development.⁵⁴ Here, of course, the only agreement between ADF and the United States is their agreement to arbitrate claims properly submitted under Chapter Eleven. Moreover, applying the principle of *pacta sunt servanda* to the only ADF contract concerning the Project (the contract ADF signed with Shirley) would simply hold ADF to the terms of the bargain it struck – supplying steel fabricated entirely in the U.S. *AMCO Asia* does not help ADF.⁵⁵
- ***Fisheries (U.K. v. Norway)*, 1951 I.C.J. 116 (Dec. 18)** – The passage quoted by ADF does not even appear in the text of the I.C.J.’s judgment, which does not even discuss good faith.⁵⁶
- **WTO Appellate Body, *United States - Standards for Reformulated and Conventional Gasoline*, AB-1996-1 WT/DS2/AB/R (April 21, 1996)** – ADF cites this decision for the unremarkable proposition that “the obligation to interpret a treaty in good faith ‘has attained the status of a rule of customary or general international law.’”⁵⁷ The United States does not dispute that customary international law requires that treaties be interpreted in good faith; indeed, the United States has acknowledged as much by

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

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

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

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

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

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

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

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

⁵⁸ See Vienna Convention art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

⁵⁹ See ADF Submission ¶¶ 93-96.

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

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

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

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

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

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

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

⁶⁴ See Rejoinder at nn.16, 48.

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

performance of the NAFTA obligations undertaken by the U.S. and . . . the U.S. is putting forward an interpretation which falls short of a good faith interpretation of the treaty.’⁶⁶

There is not the slightest evidence to support a finding of anything except the utmost good faith on the part of the United States, and ADF points to none to support its bald assertion.

ADF’s allegations under Article 1105(1) are unfounded in fact as well as in law, and should be rejected in their entirety.

⁶⁶ ADF Submission ¶ 96.

CONCLUSION

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

Respectfully submitted,

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