

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.*

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

Pursuant to Article 21 of the UNCITRAL Arbitration Rules, respondent United States of America respectfully objects to the jurisdiction of the Tribunal on the ground that the United States has not consented in the NAFTA's investment chapter to arbitrate claimants' claims. The United States submits this Memorial in accordance with Procedural Order No. 1, which sets forth the parties' agreement to submit the following question to the Tribunal for preliminary treatment:

*Does this Tribunal have jurisdiction to consider claims under NAFTA Article 1116 for an alleged breach of NAFTA Article 1102(1) where all of the Claimants' investments at issue are located in the Canadian portion of the North America Free Trade Area and the Claimants do not seek to make, are not making and have not made investments in the territory of the United States of America?*<sup>1</sup>

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<sup>1</sup> Procedural Order No. 1 ¶ 3.6 (Oct. 20, 2006) (further stipulating that a negative determination of this question will dispose of claimants' claims in their entirety).

## BACKGROUND

Claimants are Canadian nationals engaged in the operation of cattle feedlots and other cattle-related businesses *in Canada*.<sup>2</sup> They seek to challenge the United States' ban on the importation of Canadian cattle that was instituted on May 20, 2003 after the discovery of bovine spongiform encephalopathy ("BSE") in a cow in Alberta, Canada.<sup>3</sup> They maintain that the United States is obligated under NAFTA Article 1102(1) to accord national treatment to Canadian investors with respect to their investments *in Canada*, that the ban breached this obligation, and that by reason of this alleged breach they incurred losses when the profitability and value of their cattle-related investments *in Canada* decreased.<sup>4</sup> Claimants assert that they are eligible to have their claims for damages resolved under the dispute resolution provisions of Chapter Eleven because their investments, even though not located in the United States, are located within the NAFTA free trade area.<sup>5</sup>

The United States 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. As demonstrated below, the NAFTA's terms read in context and in light of the Treaty's object and purpose, leave no doubt that the scope and coverage of NAFTA Chapter Eleven extends only to investors that seek to make, are making or have made investments in the territory of the Respondent State, and to the investments those investors own or

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<sup>2</sup> See, e.g., *Cor Van Raay v. United States*, UNCITRAL, Notice of Arbitration ¶¶ 1-9 (Mar. 16, 2005) ("NOA").

<sup>3</sup> See, e.g., *id.* ¶¶ 9, 58, 68.

<sup>4</sup> See, e.g., *id.* ¶¶ 9, 11, 136.

<sup>5</sup> See e.g., *id.* ¶¶ 13, 136.

control. 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.

Under claimants’ interpretation of Chapter Eleven’s scope, every national of a NAFTA Party that believes its business has been adversely affected by a border measure of another NAFTA Party would be an “investor” entitled to invoke Chapter Eleven’s dispute resolution procedures. Such an interpretation would constitute a radical departure from the obligations that the NAFTA Parties, or any State Party to an international investment agreement, have ever undertaken with respect to foreign investors. It would create an avenue for direct claims against States by foreign nationals for matters that are, like the claims here, quintessentially trade disputes, in clear circumvention of the mechanisms provided in NAFTA Chapter Twenty and elsewhere for the resolution of such disputes through State-to-State dispute settlement procedures. Nothing in the NAFTA supports such a result.

#### ARGUMENT

The jurisdiction of an arbitral tribunal is based on the common consent of the parties to the dispute.<sup>6</sup> In treaty-based investor-State arbitrations such as those under Chapter Eleven, “the arbitrators’ jurisdiction results from the initial consent of the state” expressed in the agreement “and the subsequent consent of the plaintiff, who accepts the arbitrators’ jurisdiction by commencing the arbitration.”<sup>7</sup> In arbitrations governed by

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<sup>6</sup> See, e.g., FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 29 (Emmanuel Gaillard & John Savage eds., 1999); *Ethyl Corp. v. Canada*, UNCITRAL, 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.”).

<sup>7</sup> FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, at 29-30; see also NAFTA art. 1122(1) (“Each Party consents to the submission of a claim to arbitration in accordance with

public international law, international tribunals have repeatedly insisted on an “unequivocal indication” of a ‘voluntary and indisputable’ acceptance” by a sovereign of a tribunal’s jurisdiction.<sup>8</sup> Here, the NAFTA – the instrument delineating the scope of the United States’ consent to arbitration – does not evidence any consent to arbitrate these claims under Chapter Eleven. Accordingly, claimants’ claims must be dismissed for lack of jurisdiction.

The scope of NAFTA Chapter Eleven, including both its substantive and its dispute resolution obligations, is set forth in Article 1101. That Article provides, in relevant part:

1. This Chapter applies to measures adopted or maintained by a Party relating to:
  - (a) investors of another Party;
  - (b) investments of investors of another Party in the territory of the Party[.]

No claim for breach of a Chapter Eleven obligation may be arbitrated unless these fundamental jurisdictional prerequisites are established. As the tribunal in the *Methanex* case stated: “[Article 1101(1)] is the gateway leading to the dispute resolution provisions of Chapter 11. Hence the powers of the Tribunal can only come into legal existence if the requirements of Article 1101(1) are met.”<sup>9</sup>

As Article 1101(1)(b) expressly states, NAFTA Chapter Eleven applies only to those measures relating to “investments of investors of another Party *in the territory of*

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the procedures set out in this Agreement.”); *id.* art. 1121(1) (“A disputing investor may submit a claim . . . to arbitration only if: (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement . . .”).

<sup>8</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Yugo.*), 1993 I.C.J. 325, 342 (Order of Sept. 13); *see also 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.”).

<sup>9</sup> *Methanex Corp. v. United States*, UNCITRAL, First Partial Award ¶ 106 (Aug. 7, 2002).

*the Party*” that has adopted or maintained those measures.<sup>10</sup> Therefore, it is clear on its face that NAFTA Chapter Eleven provides for arbitration of claims only when those investments are located in the territory of the Party that has accorded the treatment.

Accordingly, arbitration of claims alleging the expropriation of *investments* in violation of Article 1110 is provided for only with respect to measures relating to investments in the territory of the expropriating State.<sup>11</sup> Likewise, arbitration of claims for failure to accord *investments* the minimum standard of treatment in breach of Article 1105(1) is provided for only with respect to the treatment of investments in the territory of the State that has adopted the challenged measure.<sup>12</sup> And arbitration of claims for failure to accord *investments* national treatment in breach of Article 1102(2) is provided for only with respect to measures relating to the treatment of *investments* in the territory of the State according the treatment.<sup>13</sup>

Just as Article 1101(1)(b) expressly limits the arbitrability of disputes concerning measures relating to investments, Article 1101(1)(a) limits the arbitrability of disputes concerning measures relating to investors. That is, Article 1101(1)(a) limits the chapter’s scope to disputes relating to investors only with respect to investments *in the territory of the State* that has adopted or maintained the measures at issue. Article 1101(1)(a) cannot be interpreted reasonably any other way.

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<sup>10</sup> NAFTA art. 1101(1)(b) (emphasis added).

<sup>11</sup> NAFTA art. 1110(1) (“No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except . . .”).

<sup>12</sup> NAFTA art. 1105(1) (“Each Party shall accord to investments of investors of another Party treatment in accordance with international law . . .”).

<sup>13</sup> NAFTA art. 1102(2) (“Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment . . . or other disposition of investments.”).

Like all of the provisions of the NAFTA, Article 1101(1)(a) is to be interpreted “in accordance with applicable rules of international law.”<sup>14</sup> Article 31(1) of the Vienna Convention on the Law of Treaties sets forth the cardinal rule of treaty interpretation: a treaty must be interpreted “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.”<sup>15</sup> The relevant context includes the treaty’s text, its preamble and annexes and any related agreements or instruments.<sup>16</sup> For the reasons set forth below, the phrase “investors of another Party” used in Article 1101(1)(a) must be read to mean a national of such Party that seeks to make, is making or has made an investment in the territory of the Party that is subject to the obligations of Chapter Eleven.

NAFTA Chapter Eleven functions like a bilateral investment treaty (“BIT”), that is, an “international legal instrument through which two countries set down rules that will govern investments by their respective nationals in the other’s territory.”<sup>17</sup> Such investment agreements create obligations for a contracting State “only to investors of other contracting states who make investments in its territory.”<sup>18</sup> The purpose of BITs and investment chapters in free trade agreements (“FTAs”) is to promote and protect

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<sup>14</sup> NAFTA art. 102(2); *see also* Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation*, in CANADA GAZETTE 68, 76 (Jan. 1, 1994) (“Paragraph 2 of article 102 affirms a basic provision of customary international law regarding the interpretation of international agreements as set out in the Vienna Convention on the Law of Treaties.”); NAFTA art. 1131(1) (“A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”).

<sup>15</sup> Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331 (“Vienna Convention”). The International Court of Justice has determined that Article 31 is reflective of customary international law. *See, e.g., Kasikili/Sedudu Island (Bots. v. Namib.)*, 1999 I.C.J. 1045, 1059 (Judgment of Dec. 13).

<sup>16</sup> Vienna Convention, art. 31(2).

<sup>17</sup> Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L.J. 67, 67 (2005).

<sup>18</sup> *Id.* at 80.

*foreign* investment: *i.e.*, investment by investors of one Party in the territory of another Party.<sup>19</sup> That this is the purpose of the NAFTA’s investment chapter is clear. One of the NAFTA’s stated objectives, set forth by the Parties in Article 102, is to “increase substantially investment opportunities *in the territories* of the Parties” which evidences, as held by the NAFTA Chapter Eleven tribunal in the *Metalclad* case, the Parties’ specific intent “to promote and increase *cross-border* investment opportunities.”<sup>20</sup>

All three NAFTA Parties, in fact, have confirmed that Chapter Eleven’s purpose is to protect those investors that are seeking to make, are making or have made investments in another NAFTA Party’s territory and the investments of those investors located in another NAFTA Party’s territory. The United States Statement of Administrative Action (“SAA”) – an instrument submitted to Congress in connection with the conclusion of the NAFTA that evidences the intent of the United States with respect to the Treaty’s content – confirms that Chapter Eleven “applies where such firms or nationals make or seek to make *investments in another NAFTA country*.”<sup>21</sup> The United

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<sup>19</sup> See generally, *id.* at 67 (concluding that BITs have to a “significant extent” attained their goal of promoting foreign direct investment); United Nations Conference on Trade and Development, UNCTAD Series on Issues in International Investment Agreements, *Scope and Definition*, Exec. Summ. at 1 (1999) (noting that “most countries have entered into one or more investment agreements that in various ways liberalize, promote, protect or regulate international investment flows,” and that such agreements “typically apply to investment in the territory of one country by investors of another country”); U.S. Model Bilateral Investment Treaty, Preamble (2004) (stating that one of the treaty’s purposes is “to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party . . .”); Free Trade Agreement, U.S.-Cent. Am.-Dom. Rep., art. 1.2(1), Aug. 5, 2004 (“The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment, and transparency, are to . . . substantially increase investment opportunities in the territories of the Parties . . .”); Treaty between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment, Preamble, Oct. 22, 1991 (stating that one of the treaty’s purposes is “to promote greater economic cooperation between [the Parties], with respect to investment by nationals and companies of one Party in the territory of the other Party . . .”).

<sup>20</sup> NAFTA art. 102(1)(c) (emphasis added); *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award ¶ 75 (Aug. 30, 2000) (emphasis added).

<sup>21</sup> NORTH AMERICAN FREE TRADE AGREEMENT, IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-159, Vol. 1, 103d Cong., 1st Sess., at 589 (1993) (emphasis added).

States SAA further specifies that “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*.”<sup>22</sup> Similarly, in a contemporaneous report to Congress, the United States General Accounting Office characterized Chapter Eleven as containing “each signatory’s obligations with respect to any measure of a NAFTA party that affects investment *in its territory* by an investor of another NAFTA party.”<sup>23</sup>

Likewise, in the Canadian Statement on Implementation of the NAFTA, a document similar to and contemporaneous with the United States SAA, the Government of Canada explained that Chapter Eleven built upon Canada’s 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.”<sup>24</sup> In the *S.D. Myers* arbitration, Canada reiterated its understanding that Chapter Eleven applies only to investors that have, or are seeking to make, investments in the territory of the disputing Party.<sup>25</sup>

Mexico has similarly asserted, in the *Bayview Irrigation District* arbitration, that “Chapter Eleven, and the over 2,500 Bilateral Investment Treaties aim to promote and protect foreign investment. They are not treaties to protect . . . the property of one

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<sup>22</sup> *Id.* (emphasis added).

<sup>23</sup> U.S. GENERAL ACCOUNTING OFFICE REPORT TO THE CONGRESS, NORTH AMERICAN FREE TRADE AGREEMENT: ASSESSMENT OF MAJOR ISSUES, Vol. 2 (Sept. 1993) (“GAO REPORT”), at 20 (emphasis added).

<sup>24</sup> Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation*, in CANADA GAZETTE 68, 147 (Jan. 1, 1994).

<sup>25</sup> See *S.D. Myers, Inc. v. Canada*, UNCITRAL, Government of Canada Counter Memorial ¶¶ 218-52 (Oct. 5, 1999) (arguing that because the claimant did not have an investment in Canada the claim was not within 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 . . .”).

state[’s nationals] in that same state.”<sup>26</sup> Mexico further stated, “Chapter Eleven in particular, only applies to investments of investors of a Party in the territory of another Party, and to the investors of another Party insofar as they have made such investments.”<sup>27</sup> Thus, all three Parties to the NAFTA agree that the obligations in Chapter Eleven do not extend to so-called “investors” of a Party that have not invested, and do not intend to invest, in another NAFTA Party, but have invested only in the territory of their home State.

Commentators and practitioners in the field of investor-State arbitration have likewise uniformly confirmed that the object and purpose of the NAFTA’s investment chapter is to protect investors with respect to their investments in the territory of another NAFTA Party.<sup>28</sup>

The object and purpose of promoting and protecting *foreign* investment is advanced only if the treaty is interpreted to provide protections for *foreign* investments and to *foreign* investors who have made or are seeking to make investments in the

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<sup>26</sup> *Bayview Irrigation Dist. v. United Mexican States*, ICSID Case No. ARB(AF)/05/01, Transcript of Hearing on Jurisdiction, Vol. 2 at 268:2-7 (Nov. 15, 2006).

<sup>27</sup> *Bayview Irrigation Dist. v. United Mexican States*, ICSID Case No. ARB(AF)/05/01, United Mexican States Memorial on Jurisdiction ¶ 2(a) (Apr. 19, 2006); *see generally* *Bayview Irrigation Dist. v. United Mexican States*, ICSID Case No. ARB(AF)/05/01, Transcript of Hearing on Jurisdiction, Vol. 1 at 21:12–22:18, 24:10-21, 27:2–28:16, 110:22–111:14 (Nov. 14, 2006); *Id.* Vol. 2 at 255:12–264:14; 268:2-7 (Nov. 15, 2006).

<sup>28</sup> *See, e.g.*, David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulations Under NAFTA’s Chapter 11*, 33 GEO. WASH. INT’L L. REV. 651, 652 (2001) (“Chapter 11 of NAFTA provides a comprehensive series of rights for investors of one NAFTA Party investing and doing business in the territory of another NAFTA Party.”); BAKER & MCKENZIE, *NAFTA HANDBOOK: A PRACTICAL GUIDE FOR DOING BUSINESS UNDER NAFTA* 123 (CCH Inc. 1994) (“Chapter 11 of NAFTA covers investments in one NAFTA country by investors from another NAFTA country . . . .”); *see also* José E. Alvarez, *Foreword: The Ripples of NAFTA*, in *NAFTA INVESTMENT LAW AND ARBITRATION*, xxi – xxxvii (Todd Weiler ed., 2004) (describing the importance of NAFTA Chapter Eleven in the development of the law of foreign direct investment); Jack J. Coe, Jr., *The Mandate of Chapter 11 Tribunals – Jurisdiction and Related Questions*, in *NAFTA INVESTMENT LAW AND ARBITRATION* 240 (Todd Weiler ed., 2004) (noting that Chapter Eleven provided the investor-State dispute settlement mechanism “[i]n an effort to encourage enterprise[s] from one NAFTA state to undertake direct investment in another NAFTA state”).

territory of the other treaty partner. Claimants' contention that NAFTA Chapter Eleven applies to measures that relate to investors that have not made, and do not intend to make, investments in another NAFTA Party cannot be reconciled with the object and purpose of an international investment agreement, like NAFTA Chapter Eleven.

For this reason, an ICSID tribunal refused to interpret a BIT as providing protection for investments that were made in the claimant's home State where the BIT in question did not contain a territorial specification in each of its provisions. In *Gruslin v. Malaysia*, the claimant – much like claimants here – argued that the BIT at issue applied to all investments, regardless of whether or not they were in the territory of the respondent State. In support of this argument, the claimant noted that the words “in the territory” appeared in some provisions of the BIT, but not in others, and thus urged the tribunal to interpret the BIT as having no territorial limitations except where expressly stated.<sup>29</sup> The claimant noted that an express territorial restriction did not appear in the treaty's definition of “investment,” in one subpart of the article on non-discriminatory treatment, and in the article providing the consent of the respondent State to arbitration.

The sole arbitrator rejected the claimant's argument, finding that the meaning of the terms of the agreement in question must be informed by the purpose of the agreement, which included creating favorable conditions for investments by nationals of one Party in the territory of the other Party.<sup>30</sup> The arbitrator noted that the “absence of qualifying words of limitation to the word ‘investment’ in Article 10 [the consent article] itself does not broaden the class of investments included by the [investment agreement].”<sup>31</sup>

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<sup>29</sup> *Gruslin v. Malaysia*, ICSID Case No. ARB/94/1, Award ¶ 13.7 (Nov. 27, 2000).

<sup>30</sup> *Id.* ¶ 13.8.

<sup>31</sup> *Id.* ¶ 13.10.

Claimants here make the same fallacious argument rejected in *Gruslin* – that the absence of express territorial limitations in NAFTA Article 1101(1)(a) should be interpreted to mean that the national treatment obligation in NAFTA Chapter Eleven applies to all investors, regardless of the location of their investments. Claimants’ argument that the United States must arbitrate claims relating only to their investments *in Canada* makes no sense in light of the clear object and purpose of the NAFTA’s investment chapter. For this reason alone, claimants’ claims should be dismissed.

That this Tribunal lacks jurisdiction over claimants’ claims is also clear from the context in which the terms of Article 1101(1)(a) must be read. The term “investor of a Party” in Article 1101(1)(a) cannot be read in isolation and interpreted, as claimants’ suggest, to mean that Chapter Eleven’s scope extends to any investor that has made an investment in its home State. Rather, read in context, the term clearly means an investor that has made, or is seeking to make, an investment in the territory of another NAFTA Party. Indeed, claimants’ counsel himself has confirmed this interpretation, noting in a law review article that NAFTA Article 1101, in conjunction with Articles 1116 to 1121, set forth the necessary elements for a NAFTA Chapter Eleven claim, which include “the existence of: 1) a qualifying NAFTA ‘investor’ *with* (2) an ‘investment’ *in another NAFTA party*.”<sup>32</sup>

The substantive obligations contained in Section A of NAFTA Chapter Eleven provide context for interpreting Article 1101. While most of those obligations address protections for investments, some of them, like Article 1102(1), provide protection for investors. In each instance where the provision obligates a Party to provide a level of

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<sup>32</sup> Todd Weiler, *The Ethyl Arbitration: First of Its Kind and a Harbinger of Things to Come*, 11 AM. REV. INT’L ARB. 187, 189 (2000) (emphasis added).

treatment to investors, it does so only *with respect to* the investor's investments that are in the territory of the State that has adopted or maintained the measure at issue. The NAFTA nowhere obligates a Party to provide a level of treatment to investors that have not made or are not seeking to make investments in another NAFTA Party.

Consequently, it defies logic to interpret Article 1101(1)(a) – the scope and coverage provision – more expansively than the scope of any of the substantive obligations.

Article 1102(1) – the only substantive obligation at issue in these cases – provides:

Each Party shall accord to *investors* of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.<sup>33</sup>

Thus, Article 1102(1), unlike Article 1102(2) or other provisions in the Chapter, extends the national treatment obligation specifically to the treatment of investors. The term “investor of a Party” is defined in Article 1139 as “a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.”<sup>34</sup> The national treatment obligation in Article 1102(1), however, only applies to investors with respect to certain investment activities – *i.e.*, the “establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” Article 1102(1)'s national treatment provision must be read to apply only to investors that have made or are seeking to make investments in another NAFTA Party. Any other reading would lead to absurd results.

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<sup>33</sup> NAFTA art. 1102(1) (emphasis added).

<sup>34</sup> NAFTA art. 1139.

If, for example, a Canadian investor establishes an investment in the United States, in accordance with Article 1102(1) the United States is obligated to accord national treatment to that investor with respect to its investment. In accordance with Article 1102(2), the United States likewise must accord national treatment to the investor's investment.

According to Claimants, if that same Canadian investor establishes an investment in Canada, the United States would be obligated under Article 1102(1) to accord that "investor" national treatment with respect to its investment. It is clear, however, that the United States would have no obligation to accord that Canadian investment national treatment under Article 1102(2). This is because Article 1101(1)(b) expressly provides that the only measures covered by NAFTA Chapter Eleven are those that relate to investments of investors *in the territory* of the Party that adopted or maintained the measure.

Claimants' theory, if accepted, thus would lead to the absurd result that the United States would have no obligation to accord national treatment to Canadian-owned investments in Canada, yet would have an obligation to accord national treatment to Canadian "investors" *with respect to* those very same investments. Such a reading cannot be sustained. The term "investor of a Party" in Article 1101(1)(a) must be read to encompass only those investors of a NAFTA Party that are seeking to make, are making or have made an investment in the territory of another NAFTA Party.<sup>35</sup>

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<sup>35</sup> The NAFTA, moreover, does not prescribe general laws, regulations, and practices governing the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments" throughout the NAFTA territory. Rather, these practices continue to be governed by the domestic laws and regulations of each NAFTA Party, in accordance with the usual presumption that a nation's domestic law applies only within its territorial jurisdiction. *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 297 (6th ed. 2003) ("Jurisdiction is an aspect of sovereignty and refers to judicial, legislative, and administrative competence . . . . The starting point in this part of the

Indeed, any other reading of Article 1102(1) is so implausible that when interpreting this provision, the *ADF* NAFTA Chapter Eleven tribunal presumed that the obligation applies only with respect to an investor when that investor has an investment in the territory of the other treaty partner. As that tribunal explained:

Article 1102 entitles an *investor* of another Party and its investment to equal (in the sense of ‘no less favorable’) treatment, in like circumstances, with a Party’s domestic investors and their investments, from the time of entry and ‘establishment’ or ‘acquisition’ of the investment *in the territory of that Party*, through the ‘management,’ ‘conduct’ and ‘operation’ and ‘expansion’ of that investment, and up to the final ‘sale or other disposition’ of the same investment.<sup>36</sup>

This interpretation comports with the United States’ contemporaneous understanding of the NAFTA’s national treatment obligation. In its report to Congress, the General Accounting Office described the NAFTA’s national treatment obligation in the following terms:

Nondiscriminatory treatment requires a government to treat foreign investors from a particular country no less favorably than its own investors (national treatment) and no less favorably than investors of other countries (most-favored-nation, or MFN, treatment) with respect to *investments in its territory*.<sup>37</sup>

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law is the proposition that, at least as a presumption, jurisdiction is territorial.”); *id.* at 306 (“The governing principle is that a state cannot take measures on the territory of another state by way of enforcement of national laws without the consent of the latter.”). Article 1102(1)’s reference to the treatment that the NAFTA Parties accord to investments must, therefore, be understood as referring to the treatment that the Parties accord to investments *in their own territories*, *i.e.*, national treatment.

<sup>36</sup> *ADF Group, Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award ¶ 153 (Jan. 9, 2003) (emphasis added); *see also* *Champion Trading Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award ¶ 127 (Oct. 27, 2006) (noting, when interpreting the U.S.-Egypt BIT, that “[t]he Parties are in agreement that the application of [the national treatment] clause requires that a foreign company make an investment and/or any associated activity in connection with this investment, in the territory of a Contracting State”); Kenneth J. Vandeveld, *Of Politics and Markets: The Shifting Ideology of the BITs*, 11 INT’L TAX & BUS. LAW. 159, 167 (1993) (explaining that the United States has historically regarded the national treatment and most-favored-nation obligations in its BITs as requiring “each party to provide national and most-favored-nation treatment to nationals and companies of the other party with respect to the right to establish or acquire investment *in the territory* of the first party and with respect to the treatment of covered investment once established”) (emphasis added).

<sup>37</sup> GAO REPORT, at 18 n.7 (emphasis added); *see also* Organization of Economic Cooperation and Development, *National Treatment Instrument*, at [http://www.oecd.org/document/48/0,2340,en\\_2649\\_201185\\_1932976\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/48/0,2340,en_2649_201185_1932976_1_1_1_1,00.html) (“National Treatment’ is the commitment by a country to treat

The fact that the NAFTA Parties intended that the national treatment obligation would apply only with respect to measures taken in their respective territories is further supported by the text of Article 1102(3) and (4). In those provisions, the NAFTA Parties expressly provided, in the interest of “greater certainty,” that no Party may “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,” and that no Party may require investors from another Party to dispose of their investments *in its territory* simply on the grounds of nationality.<sup>38</sup> This language exemplifies the kind of legislation the NAFTA Parties’ sought to prohibit with the national treatment obligation: domestic legislation designed to restrict or burden *foreign* investment, not domestic legislation that adversely affects investors or investments operating exclusively within the territory of another contracting State.<sup>39</sup>

Reviewing the negotiating history of the NAFTA further confirms the meaning of Article 1101(1)(a). The investment chapter of the predecessor Canada-U.S. Free Trade Agreement and the model U.S. BIT served as the basis for negotiations of NAFTA

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enterprises *operating on its territory*, but controlled by the nationals of another country, no less favourably than domestic enterprises in like situations.”) (emphasis added).

<sup>38</sup> NAFTA art. 1102(4)(a) & (b) (emphasis added).

<sup>39</sup> See GAO REPORT, at 19-20 (explaining that the U.S. government’s main objective in concluding the NAFTA’s investment chapter was “to liberalize Mexican restrictions on investment and to lock in legal protections for investors”); see also Richard C. Levin & Susan Erickson Marin, *NAFTA Chapter 11: Investment and Investment Disputes*, 2 NAFTA: L. & BUS. REV. AM. 82, 84 (1996) (noting that prior to the NAFTA negotiations, Mexico maintained certain restrictions on foreign investment in its territory, reserving numerous activities for the state, screening most foreign investment proposals and imposing performance requirements and price controls on some investments); Jean Raby, *The Investment Provisions of the Canada-United States Free Trade Agreement: A Canadian Perspective*, 84 AM. J. INT’L L. 394, 395-97 (1990) (emphasizing that the investment chapter in the U.S.-Canada FTA was negotiated in an effort to eliminate similar restrictions on foreign direct investment contained within the Investment Canada Act).

Chapter Eleven.<sup>40</sup> The Canada-U.S. FTA confines its “Scope and Coverage” to “any measure of a Party affecting investment within or into its territory by an investor of the other Party.”<sup>41</sup> Similarly, the model US BIT in use at that time contained language in its “chapeau” concerning “investment by nationals and companies of one Party in the territory of the other Party” and defined “investment” as “every kind of investment, in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party.”<sup>42</sup> In fact, every BIT and FTA investment chapter to which the United States is a Party likewise restricts its coverage to investors of one Party that has made or is seeking to make investments in the other Party.<sup>43</sup>

If the NAFTA did derogate from the United States’ prior investment agreements in this important respect, one would expect such an expansion to have been accompanied by significant debate and negotiation amongst the NAFTA Parties and subsequent

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<sup>40</sup> GAO REPORT, at 19; *see also* Richard C. Levin & Susan Erickson Marin, *NAFTA Chapter 11: Investment and Investment Disputes*, 2 *NAFTA: L. & BUS. REV. AM.* 82, 83-84 (1996) (noting that the NAFTA imposes “relatively few changes with respect to the investment regime established between the United States and Canada under the CFTA [Canada–U.S. Free Trade Agreement]”).

<sup>41</sup> Free Trade Agreement, U.S.-Can., art. 1601, Jan. 2, 1988, 27 *I.L.M.* 281 (1988).

<sup>42</sup> Draft Model U.S. BIT (Feb. 1992), *reprinted in* RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 240-53 (1995); Draft Model U.S. BIT (Sept. 1987), *reprinted in*, KENNETH J. VANDELDELDE, *UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE*, App. A – 4 (1992).

<sup>43</sup> *See, e.g.*, Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, art. I(1)(a), Nov. 14, 1991 (“‘investment’ means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party . . . .”); Treaty between the United States of America and the Republic of Tunisia Concerning the Reciprocal Encouragement and Protection of Investment, art. I(1)(a), May 15, 1990 (same); Treaty between the United States of America and Jordan Concerning the Encouragement and Reciprocal Protection of Investment, art. I(e), July 2, 1997 (“‘covered investment’ means an investment of a national or company of a Contracting Party in the territory of the other Contracting Party”); Free Trade Agreement, U.S.-Sing., art. 15.1(4), May 6, 2003 (“covered investment means, with respect to a Party, an investment in its territory of an investor of the other Party . . . .”); *id.*, art. 15.1(17) (“investor of a Party means a Party or a national or an enterprise of a Party that is seeking to make, is making, or has made an investment in the territory of the other Party . . . .”); Free Trade Agreement, U.S.-Austl., art. 1.2(3), May 18, 2004 (same definition of “covered investment”); Free Trade Agreement, U.S.-Chile, art. 2.1, June 6, 2003 (same definition of “covered investment”); Free Trade Agreement, U.S.-Cent. Am.-Dom. Rep., art. 2.1, Aug. 5, 2004 (“covered investment means, with respect to a Party, an investment, as defined in Article 10.28 (Definitions), in its territory of an investor of another Party . . . .”).

commentary. Reviewing the negotiating history of the NAFTA demonstrates this was not the case but, rather, confirms the interpretation advanced by the United States.<sup>44</sup>

All drafts of NAFTA Chapter Eleven dated prior to August 26, 1992, which contained what became Article 1101, had language that expressly limited the scope of the chapter to investors of one NAFTA Party that were seeking to make or had made an investment in the territory of another NAFTA Party.<sup>45</sup> For instance, in the August 22, 1992 draft, Article 1101 (then designated at 2101) specified that the investment chapter would apply to measures of Parties affecting “investors of a Party in the establishment,

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<sup>44</sup> Resorting to supplementary means of interpretation of the NAFTA is appropriate here because reviewing the negotiating history confirms the ordinary meaning of the NAFTA’s terms. *See* Vienna Convention, art. 32.

<sup>45</sup> *See, e.g.*, Draft NAFTA Investment Chapter, art. 2101: *Scope and Coverage* (Dec. 1991) (“Subject to paragraphs 2, 3 and 4, this Chapter shall apply to any measure of a Party affecting investment in its territory by an investor of the other Parties.”); Draft NAFTA Investment Chapter, Georgetown Composite, art. Y01: *Scope (and Post Termination Coverage)* (Jan. 16, 1992) (“[T]his [Chapter] . . . shall apply to any measure of a Party affecting [investment in its territory by an investor of the other Parties] . . . .”); Draft NAFTA Investment Chapter, art. Y01: *Scope (and Post Termination Coverage)* (Feb. 13, 1992) (same); Draft NAFTA Investment Chapter, Dallas Composite, art. Y01: *Scope, Coverage and Duration* (Feb. 21, 1992) (same); Draft NAFTA Investment Chapter, Washington Composite, *Scope, Coverage and Duration* (Mar. 6, 1992) (“This Chapter shall apply to investments (of investors of a Party in the territory of another party) . . . .”); Draft NAFTA Investment Chapter, Washington Composite, *Scope, Coverage and Duration* (Apr. 3, 1992) (same); Draft NAFTA Investment Chapter, Ottawa Composite, *Scope, Coverage and Duration*, ¶ 1 (Apr. 15, 1992) (same); Draft NAFTA Investment Chapter, Chapultepec Composite, *Scope, Coverage and Duration*, ¶ 1 (May 1, 1992) (“This Chapter shall apply to [measures affecting] investments (of investors of a Party) in the territory of another party . . . .”); Draft NAFTA Investment Chapter, Toronto Composite, *Scope, Coverage and Duration*, ¶ 1 (May 13, 1992) (same); Draft NAFTA Investment Chapter, Washington Composite, *Scope, Coverage and Duration*, ¶ 1 (May 22, 1992) (“[T]his Chapter shall apply to measures affecting: a) investments (of investors of a Party) in the territory of another party . . . ; and b) investors of a Party in the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in the territory of another Party.”); Draft NAFTA Investment Chapter, Virginia Composite, *Scope, Coverage and Duration*, ¶ 1 (June 4, 1992) (same); Draft NAFTA Investment Chapter, Washington Composite, *Scope, Coverage and Duration*, ¶ 1 (June 15, 1992) (same); Draft NAFTA Investment Chapter, All-Star Composite, *Scope, Coverage and Duration*, ¶ 1 (July 10, 1992) (same); Draft NAFTA Investment Chapter, Treasury Annex Composite, art. 2101: *Scope and Coverage* (July 22, 1992) (same); Draft NAFTA Investment Chapter, Watergate Daily Update, art. 2101: *Scope and Coverage* (Aug. 4, 1992) (same); Draft NAFTA Investment Chapter, Watergate Daily Update, art. 2101: *Scope and Coverage*, (Aug. 11, 1992) (same); Draft NAFTA Investment Chapter, Lawyers’ Revisions, art. 2101: *Scope and Coverage*, (Aug. 22, 1992) (same).

acquisition . . . of investments in the territory of another Party.”<sup>46</sup> Similarly, all drafts of the national treatment provision prior to August 26, 1992 also contained language expressly limiting the obligation to treatment of investors with respect to investments *in its territory*.<sup>47</sup>

The first time this express language was removed from what became Articles 1101(1)(a) and 1102(1) was in the August 26, 1992 “Lawyers’ Revision” of Chapter Eleven.<sup>48</sup> In the “Lawyers’ Revision,” counsel for all three NAFTA Parties performed a “legal scrub” of the chapter. The purpose of a “legal scrub” in any treaty negotiation is to conform language and terminology, as well as to eliminate redundancies and obvious

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<sup>46</sup> Draft NAFTA Investment Chapter, Lawyers’ Revisions, art. 2101(1)(b): *Scope and Coverage* (Aug. 22, 1992).

<sup>47</sup> See, e.g., Draft NAFTA Investment Chapter, Lawyers’ Revisions, art. 2103(1): *National Treatment* (Aug. 22, 1992); see also Draft NAFTA Investment Chapter, Washington Composite, *Treatment of Investments*, art. 1(b) (May 22, 1992) (“Each Party shall accord to an investor of another Party treatment no less favourable than that which it accords, in like circumstances, to its own investors in respect of the establishment . . . or other disposition of investments in its territory.”); Draft NAFTA Investment Chapter, Georgetown Composite, art. XX01: *Establishment and Treatment of Investment* (Jan. 16, 1992) (“Each Party shall accord nondiscriminatory treatment to nationals and companies of another Party in the making of investments in its territory . . . .”); Draft NAFTA Investment Chapter, art. XX01: *Establishment and Treatment of Investment* (Feb. 13, 1992) (same); Draft NAFTA Investment Chapter, Dallas Composite, art. XX01: *Establishment and Treatment of Investments* (Feb. 21, 1992) (“Each Party shall accord nondiscriminatory treatment to an investor of another Party in the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory . . . .”); Draft NAFTA Investment Chapter, Washington Composite, *Treatment of Investments* (Mar. 6, 1992) (same); Draft NAFTA Investment Chapter, Washington Composite, *Treatment of Investments* (Apr. 3, 1992) (same); Draft NAFTA Investment Chapter, Ottawa Composite, *Treatment of Investments*, ¶ 1 (Apr. 15, 1992) (same); Draft NAFTA Investment Chapter, Chapultepec Composite, *Treatment of Investments*, ¶ 1 (May 1, 1992) (same); Draft NAFTA Investment Chapter, Toronto Composite, *Treatment of Investments*, ¶ 1 (May 13, 1992) (same); Draft NAFTA Investment Chapter, Virginia Composite, *Treatment of Investments*, ¶ 1 (June 4, 1992) (same); Draft NAFTA Investment Chapter, Washington Composite, *Treatment of Investments*, ¶ 1 (June 15, 1992) (same); Draft NAFTA Investment Chapter, All-Star Composite, *Treatment of Investments*, ¶ 1 (July 10, 1992) (same); Draft NAFTA Investment Chapter, Treasury Annex Composite, art. 2103: *National Treatment*, ¶ 1 (July 22, 1992) (same); Draft NAFTA Investment Chapter, Watergate Daily Update, art. 2103: *National Treatment* (Aug. 4, 1992) (same); Draft NAFTA Investment Chapter, Watergate Daily Update, art. 2103: *National Treatment* (Aug. 11, 1992) (same).

<sup>48</sup> See Draft NAFTA Investment Chapter, Lawyers’ Revisions, art. 2101(1)(b): *Scope* (Aug. 26, 1992); *id.*, art. 2103(1): *National Treatment*.

conflicts within an agreement. It is not the purpose of a legal scrub to make substantive changes to an agreement's terms, nor is it to radically expand an agreement's scope.

To accept claimants' suggestion that NAFTA Chapter Eleven applies to investors of a NAFTA Party that have not made, are not making, and do not intend to make investments in the territory of another NAFTA Party would require the Tribunal to conclude that the NAFTA Parties intended to fundamentally alter the scope of the investment chapter when they deleted language during the "legal scrub" of Chapter Eleven. The language in question, however, was eliminated without note or comment in the subsequent negotiating texts. Had the Parties intended to radically extend the coverage of the investment chapter beyond the coverage of any previously (or subsequently) negotiated BIT or FTA investment chapter, one would have anticipated that such an amendment would have been the subject of extensive negotiation and commentary, and would not have been made in the "legal scrub." The preparatory work of the NAFTA thus confirms its ordinary meaning and requires dismissal of claimants' claims.

**CONCLUSION**

For the foregoing reasons, the United States respectfully requests that this Tribunal render an award in favor of the United States and against claimants, 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, claimants be required to bear all costs of the arbitration, including costs and expenses of counsel and that an award making claimants jointly and severally liable for costs be issued.

*Respectfully submitted,*

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Mark A. Clodfelter  
*Assistant Legal Adviser*  
Andrea J. Menaker  
*Chief, NAFTA Arbitration Division*  
Keith J. Benes  
Jennifer Thornton  
*Attorney-Advisers*  
*Office of International Claims and*  
*Investment Disputes*  
UNITED STATES DEPARTMENT OF STATE  
Washington, D.C. 20520

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