

## A. Introduction

1. The jurisdictional issue raised by the United States has presented certain fundamental issues of treaty interpretation of significance to the NAFTA Parties. As the Tribunal considers the issues raised by the objection, Mexico respectfully requests that it keep the following observations in mind.
2. Mexico believes that some of the arguments that have been advanced would require the Tribunal to develop the law beyond that to which the three sovereign States have agreed in their Treaty.<sup>1</sup>
3. Professor Brownlie points out at the beginning of his treatise that international law differs from municipal law in terms of its formal and material sources:

It is common for writers to distinguish the formal sources and the material sources of law. The former are those legal procedures and methods for the creation of rules of general application which are binding on the addressees. The material sources provide evidence of the existence of rules which, when proved, have the status of legally binding rules of general application. In systems of municipal law the concept of formal source refers to the constitutional machinery of law-making and the status of the rule established by constitutional law; for example, a statute is binding in the United Kingdom by reason of the principle of the supremacy of Parliament. In the context of international relations the use of the term 'formal source' is awkward and misleading since the reader is put to mind of the constitutional machinery of law-making which exists within states. No such machinery exists for the creation of rules of international law. Decisions of the International Court, unanimously supported resolutions of the General Assembly of the United Nations concerning matters of law, and important multilateral treaties concerned to codify or develop rules of international law, are all lacking the quality to bind states generally in the same way that Acts of Parliament bind the people of the United Kingdom. In a sense 'formal sources' do not exist in international law. As a substitute, and perhaps an equivalent, there is the principle that the general consent of states creates rules of general application. The definition of custom in international law is essentially a statement of this principle...<sup>2</sup> [Emphasis added]

4. The consent of States underlies international law. The "law of treaties," as Brownlie points out, "concerns the question of obligations between individual states: the incidence of obligations resulting from express agreement."<sup>3</sup>

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<sup>1</sup> International tribunals do not have the kind of law-making power that Lord Denning, for example, exemplified in the English courts. Nor are they given the kind of broad authority that domestic courts have in applying constitutional concepts and shaping them to the needs of society in a particular State.

<sup>2</sup> Ian Brownlie, *Principles of Public International Law*, (Oxford University Press, 9<sup>th</sup> ed., 1998) at 1-2.

<sup>3</sup> *Id.*

5. The role of the international tribunal is to apply the law, not to make it.<sup>4</sup> This is not to say that a particularly strong decision, such as a unanimous or almost unanimous decision of the International Court of Justice, cannot assist in the progressive development of the law, but there is an important qualitative difference in applying international law as compared to the common law. This argues in favour of close adherence to the text of a treaty (while giving full effect to it) and declining to accede to arguments that would require the Tribunal to make law.

6. It is Mexico's expectation that a NAFTA Tribunal will adhere to the treaty's text and will not engage in arbitral legislation. This expectation reflects the complex and difficult process of negotiating lengthy multilateral and regional trade agreements and the need to preserve the balance of rights and obligations ultimately arrived at by the negotiators.

## **B. The Issue**

7. Mexico conceives the issue presented to the Tribunal on the facts of this case as essentially the following:

Article 1117 of the NAFTA provided standing, not to the locally incorporated investment (*i.e.*, the US subsidiary, The Loewen Group International, Inc. ("LGII")), but rather to its controlling Canadian shareholder, The Loewen Group, Inc. ("TLGI").

Article 1117(4) precluded LGII, the locally incorporated investment, from commencing the claim against the United States, the State of which it was a national.

The beneficial interest in, and control of, the NAFTA claim has been irrevocably transferred from the former Canadian controlling shareholder to the former US subsidiary in that the proceeds, if any, from the claim will flow from TLGI through Nafcanco to the former LGII, now re-named the Alderwoods Group Inc. Alderwoods has also assumed TLGI's contingency fee agreement with counsel and the cooperation agreement with Raymond L. Loewen. The claimant, TLGI, retains "bare legal title" to the claim. Any proceeds of an Award will be assigned through Nafcanco to Alderwoods in the same fashion as all of the other assets have already been assigned by TLGI.

8. The question for decision is whether the transfer of the beneficial ownership and control of the claim out of Canada into a US corporation results in the severing of the link of nationality between the claim and Canada and therefore potentially in its forfeiture. Included in this issue is whether TLGI's retention of "bare legal title" to the claim suffices to retain the link of Canadian nationality required to maintain the Tribunal's jurisdiction *ratione personae*.

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<sup>4</sup> Like Article 59 of the ICJ Statute, Article 1136(1) of the NAFTA provides that the decision of a tribunal shall be binding only on the disputing parties and in respect of the particular case; it otherwise shall have no binding effect. Brownlie, *supra* note 2, noted that, "The Court applies the law and does not make it, and Article 59 of the Statute in part reflects a feeling on the part of the founders that the Court was intended to settle disputes as they came to it rather than to shape the law." [At 20.]

9. With the exception of the discussion of the chose in action analogy raised during the hearing, Mexico will not address the assignment. (Nor, for the reasons given below, will it address the customary international law on the continuous nationality issue.) Mexico's comments are confined to certain fundamental issues of interpretation. Mexico takes no position on the facts of this dispute and the fact that a legal issue arising in the proceeding is not addressed in this Submission should not be taken to constitute Mexico's concurrence with a position taken by either of the disputing parties.

### **C. The Territorial Foundations of the NAFTA**

10. The NAFTA is based upon the concept of territoriality. Just as the balance of the Agreement's chapters distinguishes between the goods, services and service providers, temporary business travelers, *etc.* of the Parties, Chapter Eleven employs a territorially-based distinction; Section B itself is entitled "Settlement of disputes between a Party and an Investor of Another Party". The operation of the Agreement as a whole is predicated upon distinguishing between goods, services, and investments based upon their origin (in the case of goods) or nationality (in the case of services or investment) and then establishing what treatment must be accorded to them.<sup>5</sup> Accordingly, the origin of goods and the nationality of investors, service providers and even temporary business travelers, plays a fundamental role in the Agreement's operation.

11. In Mexico's view, the link between the Agreement's obligations and nationality means that any decision to disregard that link must have a solid legal foundation. If the Tribunal were to find that the nationality of the claim has changed but that it can still be advanced, there is a risk that other claimants will seek to invoke Chapter Eleven against their own governments, a prospect that clearly offends the plain wording of Section B and the structure of Chapter Eleven.

12. Had TLGI been a United States company at the time of the events that gave rise to the claim, it would not have had the standing to make a claim: *see* Article 1117(4). It was only by virtue of its link of nationality to Canada that it could invoke the jurisdiction of this international Tribunal. It could do so only because it satisfied the Treaty's jurisdictional requirements (*e.g.*, it was an investor of another Party) in terms of standing and it had a claim that fell within the Tribunal's jurisdiction *ratione materiae* (*e.g.*, it alleged that its investment in the United States had been denied national treatment when compared to investments of investors of the United States under Article 1102, that its US investment had been denied treatment in accordance with international law under Article 1105, and that its US investment had been expropriated under Article 1110).

13. Mexico believes that the NAFTA confirms that the nationality link set out in Articles 1116 and 1117 must continue to the end of the arbitration.

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<sup>5</sup> For example, the treatment to be accorded under Article 1105(1) is to investments of investors of another Party (not to investments of the Party itself). This type of distinction is drawn throughout Chapter Eleven, Section A, with the express exception of only two articles, Articles 1106 and 1114, which apply to "all investments in the territory of the Party." *See* Article 1101(1)(c).

14. In particular, Article 1136 deals with “Finality and Enforcement of an Award”. It sets out the legal effect of an Award, the availability of revision, set-aside or annulment procedures, the enforcement of an Award, and then, in paragraph 5, the remedy that is available in the event that a losing disputing Party fails to abide with or comply with an Award.

15. Two aspects of Article 1136 warrant mention. First, any application for judicial review of an Award is to be commenced by a “disputing party”. Reference to the Article 1139 definition shows that that refers to the “disputing investor” (or the disputing Party). Reference in turn to the “disputing investor” definition shows that it is “an investor that makes a claim under Section B”. In Mexico’s view, this connotes a continued connection to the other NAFTA Party because only an investor with that foreign nationality has the standing to make the claim and to commence judicial review proceedings. This link of nationality continues through the post-Award judicial review process, potentially up to the highest court of the place of arbitration.<sup>6</sup>

16. The second aspect of Article 1136 is paragraph 5, which states:

5. If a disputing Party fails to abide by or comply with a final award, the Commission, on delivery of a request by a Party whose investor was a party to the arbitration, shall establish a panel under Article 2008 (Request for an arbitral Panel). The requesting Party may seek in such proceedings:

(a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligation of this Agreement; and

(b) a recommendation that the Party abide by or comply with the final award. [Emphasis added.]

This article provides that after an Award is rendered, a NAFTA Party could commence Chapter Twenty proceedings against the disputing Party in order to assist in the enforcement of the Award in favor of its national. By the words, “A Party whose investor was a party...”, the article speaks of the relationship between the Party and its investor in the present tense and thus contemplates a continued link of nationality throughout the arbitral proceeding. It does not envisage that an investor would change nationality during the arbitration.

17. In Mexico’s respectful submission, this article comports with Section B’s consistent emphasis on the link of nationality between the investor and the Party of which it was an investor when it suffered the alleged breach and then commenced proceedings. Article 1136(5) clearly contemplates that there must be two NAFTA interested Parties at the end of the investor-State proceeding: the Party whose investor was a party to the arbitration and the other disputing Party.

18. If Articles 1116 and 1117 were interpreted to mean that the *dies ad quem* is only the date of presentment of the claim, and that thereafter the Canadian claimant could become a US

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<sup>6</sup> Under Article 1136(3)(b)(ii), the Award is not enforceable until three months after the rendering of the Award or “a court has dismissed or allowed an application to revise, set aside or annul the Award and there is no further appeal.”

national, then Article 1136(5) could result in an absurdity. If the *dies ad quem* is only the date of presentment, Article 1136(5) would contemplate either Canada (with no continuing link of nationality to the claim) commencing a Chapter Twenty proceeding against the US in respect of a claim now owned by a US national or the US commencing a Chapter Twenty claim against itself.

19. In Mexico's view, the interpretation of the Treaty that best comports with the injunction that an interpretation resulting in an absurdity is to be avoided, is the following: Section B, with its emphasis on the link of nationality to a particular NAFTA Party in order to confer standing, (i) admitting of no express exception to, or limitation on, that requirement while a claim is underway, (ii) contemplating the continued link of foreign nationality in order to commence judicial review proceedings, and (iii) contemplating the involvement of the Party of the investor after an Award has been rendered (and indeed, after set-aside judicial proceedings have occurred) in order to secure compliance with the final Award, requires continuous nationality throughout the prosecution of the claim until the matter is finally disposed of under Article 1136.

20. It has been suggested that Article 1109 has some bearing on the nationality issue in that it is said to permit corporate reorganizations of the type that occurred in this case without affecting a Chapter Eleven claim.<sup>7</sup> Article 1109 simply does what it says: It protects the making of transfers relating to an investment of an investor of another Party in the territory of the Party. Transfers are defined in Article 1139 as meaning "transfers and international payments". They are payments of dividends, capital gains, proceeds from the sale of an investment, *etc.* In Mexico's respectful view, Article 1109 has no bearing on the nationality of the investor question which is at issue in this proceeding.

#### **D. The External Legal Relations of One NAFTA Party Do Not Bind Those of Another**

21. During the hearing, considerable emphasis was placed on the fact that the United States is a signatory to the ICSID Convention and that that Convention is listed in NAFTA Article 1120 as a possible source of arbitral rules. It was asserted that by virtue of Article 1120 somehow the other two NAFTA Parties, both non-signatories to the Convention, have "recognized" it and to some extent are bound by it, and that the ICSID Convention was essentially incorporated into the NAFTA by means of the reference to it in Article 1120.

22. The basic principles of the ICSID Convention's model of investor-State arbitration were of interest to NAFTA's drafters, and Mexico accepts that it could be argued that certain aspects of the Convention may reflect one of the requisite elements of customary international law (*e.g.*, State practice). Multilateral treaties with a wide degree of acceptance are the type of treaties that may evidence a rule of customary international law or that could have a particular provision that may be an emerging rule of customary international law. In such a case, the party alleging the existence of the alleged customary rule would also have to prove the requisite elements as set

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Transcript at 144.

out, for example, in the ICJ's judgment in the *North Seas Continental Shelf Cases*.<sup>8</sup> However, it is incorrect to suggest that by reason of Article 1120's reference to the Convention, that Mexico recognized the Convention as a treaty binding upon it or that the Convention was incorporated into the NAFTA:

- *First*, as the plain text of Article 1120(1)(a) states, the ICSID Convention becomes applicable as a source of arbitral rules subject to a proviso: it may apply only if both the disputing Party and the Party of the investor are parties to it. The paragraph merely contemplates that either Canada or Mexico or both may some day accede to the ICSID Convention and, if so, the Convention will replace the ICSID Additional Facility Rules as one of the two possible sets of arbitration rules (the UNCITRAL Arbitration Rules continuing to be available). Until such time, the ICSID Convention cannot create any rights or obligations for the two non-signatory NAFTA Parties.
- *Second*, it is elementary in international law that a non-signatory to a treaty gains no rights and no obligations from that treaty. This principle, stated in Article 34 of the *Vienna Convention on the Law of Treaties*, that a “treaty does not create either obligations or rights for a third State without its consent” is well established. As Sir Ian Sinclair has written: “The maxim *pacta tertiis nec nocent nec prosunt* is supported both by general legal principle and by common sense. In so far as a treaty may bear the attributes of a contract, third States are clearly strangers to that contract.”<sup>9</sup> A more recent commentator, Anthony Aust, making the point that Brownlie made (quoted in the introduction to this Submission) stated to the same effect: “The general rule is rather obvious: a treaty does not create either obligations or rights for a third state without its consent (Article 34). Similar rules apply in laws of contract, but the rule in the Convention rests firmly on the sovereignty and independence of states. Thus a treaty, whether bilateral or multilateral, cannot, by its own force, impose an obligation on a third state, not modify in any way the legal rights of a third state without its consent.”<sup>10</sup>
- *Third*, the word “recognised” as used in Article 38(1)(a) of the Statute of the International Court of Justice when stipulating that treaties shall be applied by the Court,<sup>11</sup> does not connote mere recognition in some sense short of accession, but rather that treaties that are in force between the parties to a dispute before the Court shall be applied by it. As *Oppenheim's International Law* puts it: “The general importance of treaties lies primarily in the fact that the rules established by them, and the rights and obligations to which they give rise, are binding on the parties to the treaty. It is this aspect of treaties which is foremost in Article 38(1)(a) of the Statute of the International Court of Justice which refers to ‘international conventions, whether general or particular, establishing *rules expressly recognised* by the contesting States’.”<sup>12</sup> [Emphasis in original]

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<sup>8</sup> *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark) (Federal Republic of Germany v. Netherlands) I.C.J. Reports (1969) 4.

<sup>9</sup> Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, (Manchester University Press, 2<sup>nd</sup> ed., 1984), at 98-99.

<sup>10</sup> Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2000) at 207.

<sup>11</sup> The Statute states that the Court shall apply “international conventions, whether general or particular, establishing rules expressly recognized by the contesting States.”

<sup>12</sup> *Oppenheim's International Law* (Pearson Education Ltd., 9th ed., 1996) Vol. I at 32.



- *Fourth*, in the context of the ICSID Convention, a recent Award on jurisdiction in the case of *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* specifically addressed this issue.<sup>13</sup> In that case, a Canadian company sought, through its US subsidiary and partner, to invoke the ICSID’s jurisdiction under a bilateral investment treaty between the United States and Sri Lanka. Applying Articles 34-36 of the *Vienna Convention*, and the maxim quoted above, the Tribunal noted that “[t]reaties neither harm nor benefit non-Parties” and that the “ICSID Convention, to which Canada is not a Party, could not be invoked by Canada, nor by a national or company of Canada, such as Mihaly (Canada).”<sup>14</sup> The Tribunal held that an attempt by the Canadian company to transfer title to a claim against Sri Lanka to its US subsidiary could not succeed due to the Canadian company’s inability to invoke the ICSID Convention: “To allow such an assignment to operate in favour of Mihaly (Canada) would defeat the object and purpose of the ICSID Convention and the sanctity of the privity of international agreements not intended to create rights and obligations for non-Parties. Accordingly, a Canadian claim which was not recoverable, nor compensable or indeed capable of being invoked before ICSID could not have been admissible or able to be entertained under the guise of its assignment to the US claimant.”<sup>15</sup>
- *Fifth*, it should be noted that where the NAFTA Parties intended to incorporate an obligation under another treaty into the NAFTA by reference, they did so explicitly. For example, NAFTA Article 301(1) states that “Article III of the GATT ... [is] incorporated into and made part of this Agreement.” Similar language is used in NAFTA Articles 309 and 2102(1). The absence of language of this nature in Article 1120 confirms the points made above: the NAFTA Parties did not intend to incorporate the ICSID Convention into the NAFTA so as to have any legal effect until one of the two non-signatories acceded to it. Even then, it would only have effect for that Party.

23. Mexico has assumed no treaty obligations under the ICSID Convention and has obtained no rights. Article 1120(1)(a) only contemplates the future accession of Mexico and Canada to the ICSID Convention and if that occurs, it will then be available to claimants as a set of arbitral rules.

24. For these reasons, Mexico urges the Tribunal to hold that the only relevant legal obligations at issue in this proceeding are those of the Respondent vis-à-vis the other NAFTA Parties and that, whatever its treaty relations with other States may be, such treaties cannot bind either of the other NAFTA Parties.<sup>16</sup> Similarly, any suggestion that the NAFTA Parties’ inclusion of the ICSID Convention as a potential source of arbitral rules is to be equated to a “recognition” by Mexico of the binding effect of a particular provision of that Convention on non-signatories must be rejected.

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<sup>13</sup> *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award of the Tribunal dispatched to the Parties on 15 March 2002.

<sup>14</sup> *Id.*, at paragraph 23.

<sup>15</sup> *Id.*, at paragraph 24.

<sup>16</sup> Another NAFTA Tribunal (the *Pope & Talbot* Tribunal) fell into this form of error in its Award on Liability of Phase 2 when it held that treaties to which the United States, but not Mexico or Canada, was a signatory should influence the interpretation of the NAFTA insofar as Canada was concerned. This is plainly wrong under Article 32 of the *Vienna Convention*.

## **E. The Relationship Between Diplomatic Protection and the Right of Direct Access to an International Tribunal**

25. During the hearing, considerable argument was directed at the relationship between diplomatic protection and the investor's right of direct access to an international tribunal. Lord Mustill raised this in his exchange with counsel for the United States on the approach taken by Sohn and Baxter in their *Draft Convention on the International Responsibility of States for Injuries to Aliens*.<sup>17</sup> Mexico wishes to comment on this issue because there is a real danger of unintended and perhaps profound consequences if the established rules and principles of diplomatic protection are jettisoned on the rationale that they are "old" and investor-State arbitration is "new". (In fact, mixed arbitration with rights of direct access is not new; it dates back to tribunals established after World War I.<sup>18</sup>)

26. Mexico observes that leading international law treatises do not distinguish between the "international law of investment" and State responsibility:

- Brownlie deals with the treatment of investors and their investments under the general discussion of treatment of aliens in Chapter XXIV: Injury to the Persons and Property of Aliens on State Territory.
- *Oppenheim's* does likewise in Chapter 4: Responsibility of states.

27. Neither treatise even lists "investment" as a separate topic in its index. The issue is treated simply as part of the law of State responsibility regarding the treatment of aliens and as part of the law of diplomatic protection.

28. In Mexico's submission, the right of direct access conferred by Section B of the NAFTA does not in any way alter the interpretation of the Treaty's substantive rights and obligations, which exist at the international plane between the States *inter se*.

29. Although the point is so fundamental as to hardly require mention, given the nature of the issues that are presently before the Tribunal, it warrants noting that the form and expression of the legal obligations set out in Section A of Chapter Eleven does not differ from the rest of the Treaty (which, in general, is subject only to State-to-State dispute settlement). Four points arise:

- First, the vast majority of the rights and obligations set out in Section A are conventional international law and accrue to the States party to the NAFTA solely as a result of the NAFTA negotiations (the balance are the expression in treaty text of customary international law obligations).
- Second, the rights and obligations are held by the Parties alone.
- Third, no legal obligations are imposed upon a would-be claimant by Section A of Chapter Eleven. Would-be and current claimants are not parties to the Treaty.

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<sup>17</sup> Transcript at 68f.

<sup>18</sup> See the Sohn and Baxter excerpt on the *Draft Convention on the International Responsibility of States for Injuries to Aliens* (at pp 188-189), included in the United States' Hearing Book.



30. In the absence of Section B, both under Chapter Twenty and at customary international law, were a NAFTA Party to breach an obligation owed to another Party, it would be the latter that would have the legal right to assert a claim for redress. The point was made by the ICJ, citing established authority, in the *Nottebohm* Case:

Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State. As the Permanent Court of International Justice has said and has repeated, “by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on its behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law” (P.C.I.J., Series A, No. 2. p. 12, and Series A/B, Nos. 20-21, p. 17).<sup>19</sup>

31. All that Section B does, as noted in Article 1115, is create a special right of action (that would not otherwise exist at international law) that can be invoked by the investor of a Party where it alleges that another Party has breached the obligations of Section A. A Chapter Eleven claim, although enforceable by a private party, is based exclusively upon a legal duty owed by one NAFTA Party to another Party.

#### **F. The Putative “World-Wide Web” of Bilateral Investment Treaties (BITs) Does Not Create Customary International Law Obligations**

32. It has been argued during this proceeding that there is a new body of international law regarding the treatment of investment that is different from the treatment traditionally accorded by States to aliens and their property. Mexico disagrees. Obviously, to the extent that the treaties go beyond customary international law protections (for example, by including national treatment and MFN obligations) the parties to such treaties create rights and obligations that do not exist at customary international law. However, these purely conventional obligations are binding only on the contracting States and do not purport to bind other States.

33. Mexico is particularly concerned about the suggestion that the fact that the mere existence of some 1800 BITs in the world means that somehow that the corpus of these treaties creates customary international law obligations. The fact that States may agree to the same or similar obligations through different treaties involving different parties, or even the same obligations through multilateral treaties is not sufficient on its own to build customary international law. Uniformity of State practice —not just of the States concerned, but of the international community— is one of the essential requirements of a customary international law rule, but uniform State practice does not in and of itself create customary international law. This is because, as the United States (and Mexico in its last Article 1128 Submission) pointed out, to establish customary international law there must be State practice and *opinio juris*, the element

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<sup>19</sup> The *Nottebohm Case* (Liechtenstein v. Guatemala) I.C.J. Reports (1955) at 24. The P.C.I.J. cases to which the quoted passage refers as the *Mavrommatis Palestine Concessions (Jurisdiction) Case* and the *Panevezys Saldutiskis Railway Case* (Estonia v. Lithuania).

that the community of States consider a particular practice to be binding as a matter of law. In the absence of *opinio juris*, a rule of customary international law cannot be said to exist.

34. Treaties may in particular circumstances create new rules of customary international law. However, the conditions for finding that they do so are not easily met.

35. The International Court of Justice examined the contention that a treaty (the 1958 *Geneva Convention on the Continental Shelf*) contained emerging customary international law in the *North Sea Continental Shelf Cases*.<sup>20</sup> In that case it was contended that the delimitation article (Article 6) of the *Geneva Convention* crystallized emerging customary international law.

36. The Court rejected this argument, holding that Article 6 was proposed by the International Law Commission “with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary international law”.<sup>21</sup> The Court then made some important comments on how treaties may interact with customary international law:

- A treaty provision which permits reservations to be taken from it is unlikely to be able to be a rule of customary international law: “speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted: -whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour”.<sup>22</sup>
- Thus, the “normal inference would therefore be that any articles that do not figure among those excluded from the faculty of reservation under [the treaty]...were not regarded as declaratory of previously existing or emergent rules of law”.<sup>23</sup>
- Treaty provisions that are permitted to be reserved are generally considered “to have a different and less fundamental status” and “not ... to reflect pre-existing or emergent customary law”.<sup>24</sup>
- A ‘norm-creating’ treaty rule may develop into a customary international law rule: “...a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by

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<sup>20</sup> *Supra* note 7.

<sup>21</sup> *Id.*, at paragraph 62. *Lege ferenda* is the law as it ought to be as opposed to *lege lata*, which is the law which is presently in force.

<sup>22</sup> *Id.*, at paragraph 63.

<sup>23</sup> *Id.*, at paragraph 64.

<sup>24</sup> *Id.*, at paragraph 66.

which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.<sup>25</sup>

- *First*, the provision would have to be potentially of a “norm-creating character such as could be regarded as forming the basis of a general rule of law”.<sup>26</sup> If the rule considered the possibility of derogation, it would be unlikely to be norm-creating.<sup>27</sup>
- *Second*, if there were unresolved controversies as to the exact scope and meaning of the rule, that would raise further doubts as to its potential norm-creating character.<sup>28</sup>
- *Third*, the faculty of making reservations to the rule might not itself prevent the rule from becoming customary international law, but it would add considerably to the difficulty of regarding this result as having been brought about by the treaty.<sup>29</sup>
- *Fourth*, it would be necessary to look for widespread practice by States whose interests were specially affected.<sup>30</sup>
- *Fifth*, the passage of time, though not a bar to the formation of the customary rule is relevant: “an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked: -and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”<sup>31</sup>
- *Finally*, there must be *opinio juris*: “Not only must the acts concerned amount to a settled practice. But they must also be such, or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, *i.e.*, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, *e.g.*, in the field of ceremonial protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.”<sup>32</sup> [Emphasis added]

37. The Court’s recitation of the requirements for establishing a rule of customary law illustrates the error underlying the proposition that the mere existence of different BITs gives rise to a “world-wide web” of new customary international law obligations. This is the antithesis of the examination that a court or tribunal must undertake in order to determine the existence of an alleged rule. Two examples illustrate the point:

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25 *Id.*, at paragraph 71.

26 *Id.*, at paragraph 72.

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*, at paragraph 73.

31 *Id.*, at paragraph 75.

32 *Id.*, at paragraph 77.

- The alleged rule’s existence must be judged against the conduct not of parties to the treaty that is said to manifest the alleged rule, but as against the conduct of non-parties. (This requirement of examining the observance of the alleged rule by non-parties is obviously at odds with the “world-wide web” theory, which asks the Tribunal to infer the existence of customary international law from the mere fact that many investment treaties have been concluded between pairs of States.)
- Moreover, the alleged rule should be of a norm-creating character rather than one from which reservations can be taken.

38. Mexico notes that the recent Award on damages rendered by the Tribunal in *Pope & Talbot, Inc. v. Canada* was cited in support of the “world-wide web” proposition. At paragraph 63 of its Award, the Tribunal stated:

Canada’s views on the appropriate standard of customary international law for today were perhaps shaped by its erroneous belief that only some 70 bilateral investment treaties have been negotiated; however, the true number, now acknowledged by Canada, is in excess of 1800. Therefore, applying the ordinary rules for determining the content of custom in international law, one must conclude that the practice of states is now represented by those treaties.<sup>33</sup> [Emphasis added]

39. With respect to that Tribunal, it is impossible to infer from the existence of a large number of BITs alone that any particular provision therein represents a rule of customary international law merely by reason of its commonality. The Tribunal did not refer to the essential additional requirement of *opinio juris*.<sup>34</sup>

40. In Mexico’s respectful view, the *Pope & Talbot* Tribunal’s failure to observe basic principles of treaty interpretation and its treatment of proving the existence of a customary international law rule does not commend its Awards to this Tribunal. Its Awards have been wrongly decided and should be disregarded.

### **G. Arbitral Authority Suggests That a Chapter Eleven Claim is Not to be Equated With a Chose in Action at Common Law**

41. During the hearing, the Tribunal, in particular, Sir Anthony Mason and Lord Mustill, queried whether a Chapter Eleven claim is analogous to a chose in action at common law.<sup>35</sup>

42. In Mexico’s view, it may be inappropriate to use the domestic law concept of a freely assignable chose in action as an analogy for a NAFTA claim. Mexico notes that even at

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<sup>33</sup> *Id.*, at paragraph 62.

<sup>34</sup> Brownlie, note 2 at 7f (describes it as a “necessary ingredient”), *Oppenheim’s, supra* note 12 at 27 (*opinio juris* is “essential”), *Akehurst’s Modern Introduction to International Law* (7<sup>th</sup> ed.) at 44 (“State practice alone does not suffice; it must be shown that it is accompanied by the conviction that it reflects a legal obligation.”).

<sup>35</sup> Transcript at 30f.

common law, not all actions are freely assignable.<sup>36</sup> It notes further that in ordinary commercial arbitration, a contract that provides for arbitration may be considered to have a form of *intuitus personae* attached to it that precludes its being assigned because the identity of the would-be assignor was a fundamental consideration for concluding the contract.<sup>37</sup>

43. The ICJ posed the issue of the relationship between a foreign investment and the legal relationship that that investment effects with the host State in the *Barcelona Traction Case*. In that case, the Court was concerned with a triangular relationship between Spain (the respondent alleged to have committed numerous violations of international law), Canada (the State of incorporation of the affected company) and Belgium (the State in which the vast majority of the company's shares were owned). The Court addressed the issue as follows:

33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded to them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By the very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination...

35. Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance. In order to bring a claim in respect of the breach of such obligation, a State must first establish its right to do so, for the rules on the subject rest on two suppositions:

"The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach." (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp. 181-182.)

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<sup>36</sup> J. G. Starke, *Assignments of Choses in Action in Australia* (Butterworths 1972) at Chapter 7, "Unassignable choses in action" (at 58f).

<sup>37</sup> *Fourchard, Gaillard, Goldman on International Commercial Arbitration*, edited by Emmanuel Gaillard and John Savage (Kluwer 1999) at 434. To the same effect is the commentary of W. Lawrence Craig, William W. Park, and Jan Paulsson in *International Chamber of Commerce Arbitration* (Ocean Publications, Inc. 1990) at 100.

In the present case it is therefore essential to establish whether the losses allegedly suffered by Belgian shareholders in Barcelona Traction were the consequence of the violation of obligations of which they were the beneficiaries. In other words: has a right of Belgium been violated on account of its' nationals having suffered infringement of their rights as shareholders in a company not of Belgian nationality?

36. Thus, it is the existence or absence of a right, belonging to Belgium and recognized as such by international law, which is decisive for the problem of Belgium's capacity... [The Judgment then cites the *Panevezys Saldutiskis Railway Case* referred to above.]

It follows that the same issue is determinant in respect of Spain's responsibility towards Belgium. Responsibility is the necessary corollary of a right. In the absence of any treaty on the subject between the Parties, this essential issue has to be decided in the light of the general rules of diplomatic protection.<sup>38</sup> [Emphasis added]

44. It has already been noted that Article 1136 contemplates a continued link between the investor making a Chapter Eleven claim and the Party of which it is a national. Since the legal obligations alleged to have been breached by the United States in this case are obligations owed to Canada (as opposed to the investor), the assignability of the claim raises more complex issues than at common law assignment of a chose in action.

45. A hypothetical example illustrates the point. It is beyond dispute that Canada could not have assigned its interest in espousing the *Loewen* claim to Mexico. Mexico had no legal interest in the claim and could not acquire one were Canada minded to attempt to assign the claim to it. The reason why Canada would have had the standing to espouse the claim is because of the genuine link of nationality between TLGI (and Raymond L. Loewen) and Canada. Lacking such a link, Mexico would have no international legal right to espouse the claim and a US objection to such a claim would be sustained.

46. The *Nottebohm Case* illustrates this point. In that case, Guatemala successfully opposed a claim advanced by Liechtenstein after the latter quickly awarded nationality to Nottebohm (a German national who had been resident in Guatemala for some 34 years before he was naturalized by Liechtenstein in a matter of 11 days). The International Court of Justice held that that nationality, which had been conferred "in exceptional circumstances of speed and accommodation," could not be relied upon by Liechtenstein in proceedings against Guatemala.<sup>39</sup> The Court held:

These facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him

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<sup>38</sup> *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain) I.C.J. Reports (1970) 4 at 32-33.

<sup>39</sup> I.C.J. Reports (1955) 4.



and Guatemala, a link which his naturalization in no way weakened. That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations.

Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations – other than fiscal obligations – and exercising the rights pertaining to the status this acquired.<sup>40</sup> [Emphasis added]

47. On the ICJ's reasoning in *Nottebohm*, Mexico could not have exercised diplomatic protection in respect of TLGI or Mr. Loewen because of the absence of any genuine link between them and Mexico. (And, of course, it would be an absurdity for the United States to commence an international claim against itself.)

48. Thus, at the State-to-State level, of the three NAFTA States only Canada possessed the requisite genuine link of nationality.

49. A recent ICSID case suggests that an investor-State claim cannot be assigned in the sense that a chose in action can be assigned. The *Mihaly* Tribunal, noted earlier, specifically considered this issue and concluded that:

24. ...A claim under the ICSID Convention with its carefully structured system is not a readily assignable chose in action as shares in a stock-exchange market or other type of negotiable instruments, such as promissory notes or letters of credit. The rights of shareholders or entitlements of negotiable instruments holders are given different types of types of protection which are not at issue in this case before the Tribunal...

25. This proposition is confirmed by ICSID long-standing practice as is amply demonstrated by the decision in *Klöckner v. Cameroon* (ICSID Case No. ARB/81/2), where all the three Klöckner Corporations ... were named as co-claimants. Besides, ICSID case-law appears settled in the sense that a US company, such as the American Manufacturing and Trading Company in *AMT v. Zaire* (ICSID Case No. ARB/93/1) could not and did not attempt to recover more than the shares represented by its US shareholders. This does not preclude a State Party to the

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<sup>40</sup> *Id.*, at 26.

ICSID Convention from expressly consenting to include under ICSID protection an investment contract it concludes with an international consortium.<sup>41</sup>

50. The *Mihaly* Case actually deals with the converse of the facts of this case. In that case, the Canadian claimant lacked standing from the start (due to Canada's not being a signatory to the Convention) and essentially sought to achieve standing through an assignment to its US subsidiary and partner; here, TLGI had standing to commence the claim but now may have effectively transferred the claim to a person who would have lacked the requisite standing from the start.

51. The settled rules of customary international law are the following:

- A State's right of espousal arises by virtue of an act or omission of another State that adversely affects the interests of the first State. As stated by the Permanent Court of International Justice in a leading case, "it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection."<sup>42</sup>
- At that point, the injury to the alien becomes an injury to its State and the State elevates the claim to the international level.
- The State's claim is founded not on a breach of the other State's domestic law, but rather on a breach of international law.
- No other State that does not possess a genuine link of nationality to the injured person can advance the claim.

52. Article 1115 of the NAFTA has permitted the investor to commence an international claim instead of having to persuade its State to espouse the claim. In Mexico's submission, even with this additional right of action, the NAFTA is consistent with the customary law rules and confirms the requisite element of a continued link of nationality.

All of which is respectfully submitted,

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<sup>41</sup> *Supra* note 13 at paragraphs 24-25. Accordingly, the Tribunal found that while *Mihaly* (Canada) had no claim that could be assigned to *Mihaly* (US), the latter could have a claim the Tribunal had jurisdiction *ratione materiae*. On that issue, the Tribunal resolved that it did not have such jurisdiction and the claim was dismissed.

<sup>42</sup> Series A/B. No. 76, at 16.

**Corrigendum to the Mexican Article 1128 Submission dated July 2, 2002**

Please note the following minor corrections:

At paragraph 29, the word “Four” in the last line of the paragraph should read “Three”.

At paragraph 37, there should be a space between the sentence ending “...pairs of States.”) and the next sentence commencing “Moreover, the alleged rule...”.