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I. INTRODUCTION

Nearly five years ago, the Free Trade Commission (FTC) created by the North American Free Trade Agreement (NAFTA)[1] issued "Notes of Interpretation" (Notes) purporting to restrict the minimum standard of treatment under NAFTA's investment chapter (Chapter 11) to the requirements of customary international law.[2] A controversy ensued regarding the Notes' status as a reasonable interpretation falling within,[3]

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1. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., art. 2001, 107 Stat. 2066, 32 I.L.M. 605, 693 [hereinafter NAFTA] (establishing a Free Trade Commission that consists of cabinet-level representatives of the three NAFTA Parties).

2. NAFTA FTC, Notes of Interpretation of Certain Chapter 11 Provisions, § B (July 31, 2001), *available at* http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp [hereinafter Notes].

3. *See* Loewen Group, Inc. v. United States, Award ¶¶ 125–26, ICSID Case No.

or as an amendment falling outside of,[4] the FTC's mandate. While tribunals and many observers have declared their allegiance to each of the opposing views, few have supported their conclusions with detailed analysis of sources, including NAFTA, the Notes, relevant decisions, or the minimum standard's historical foundation in general principles of law accepted by developed legal systems.[5] Seeking to provide a more complete and nuanced account, this Article draws a distinction between the exclusion of treaty obligations and the exclusion of general

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ARB(AF)/98/3 (NAFTA Ch. 11 Arb. Trib. 2003), *available at* http://www.state.gov/documents/organization/22094.pdf [hereinafter *Loewen* Award]; United Parcel Service of America, Inc. v. Canada, Award on Jurisdiction ¶ 97 (NAFTA Ch. 11 Arb. Trib. 2002), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/Jurisdiction%20Award.22Nov02.pdf [hereinafter *UPS* Award on Jurisdiction]; Mondev Int'l Ltd. v. United States, Award ¶¶ 120–21, ICSID Case No. ARB(AF)/99/2 (NAFTA Ch. 11 Arb. Trib. 2002), *available at* http://www.state.gov/documents/organization/14442.pdf [hereinafter *Mondev* Award]; Michael Ewing-Chow, *Investor Protection in Free Trade Agreements: Lessons from North America*, 5 SING. J. INT'L & COMP. L. 748, 769 (2001); Stefan Matiation, *Arbitration with Two Twists:* Loewen v. United States *and Free Trade Commission Intervention in NAFTA Chapter 11 Disputes*, 24 U. PA. J. INT'L ECON. L. 451, 487–88, 494–95 (2003); J.C. Thomas, *A Reply to Professor Brower*, 40 COLUM. J. TRANSNAT'L L. 433, 454 (2002); Courtney C. Kirkman, Note, *Fair and Equitable Treatment:* Methanex v. United States *and the Narrowing Scope of NAFTA Article 1105*, 34 LAW & POL'Y INT'L BUS. 343, 383, 391 (2002).

4. *See* Pope & Talbot, Inc. v. Canada, Award in Respect of Damages ¶ 47 (NAFTA Ch. 11 Arb. Trib. 2002), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/damage_award.pdf [hereinafter *Pope & Talbot* Award in Respect of Damages]; Second Opinion of Professor Sir Robert Jennings, Q.C., at 4–5 (Sept. 6, 2001), in Methanex Corp. v. United States (NAFTA Arb. Trib. 2005), *available at* http://www.naftaclaims.com/Disputes/USA/Methanex/MethanexResubAmendStateClaimAppend.pdf [hereinafter Second Opinion of Professor Sir Robert Jennings]; Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 397 (2003); Charles H. Brower, II, *Beware the Jabberwock: A Reply to Mr. Thomas*, 40 COLUM. J. TRANSNAT'L L. 465, 486 n.142 (2002) [hereinafter Brower, *Beware the Jabberwock*]; Charles H. Brower, II, *Fair and Equitable Treatment Under NAFTA's Investment Chapter*, 96 AM. SOC'Y INT'L L. PROC. 9, 10 (2002) [hereinafter Brower, *Fair and Equitable Treatment*]; Charles H. Brower, II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 56 n.71 (2001) [hereinafter Brower, *Empire Strikes Back*]; Charles H. Brower, II, *Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium*, 29 PEPP. L. REV. 43, 78 n.249 (2002) [hereinafter Brower, *Fear and Equilibrium*]; Charles N. Brower, *NAFTA's Investment Chapter: Dynamic Laboratory, Failed Experiments, and Lessons for the FTAA*, 97 AM. SOC'Y INT'L L. PROC. 251, 255 (2003) [hereinafter Brower, *Dynamic Laboratory*]; Ian Laird, *Betrayal, Shock and Outrage—Recent Developments in NAFTA Article 1105*, *in* NAFTA INVESTMENT LAW AND ARBITRATION 49, 49 (Todd Weiler ed., 2004); William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1305 (2003); Todd Weiler, *NAFTA Investment Arbitration and the Growth of International Economic Law*, 36 CAN. BUS. L.J. 405, 428–29 (2002) [hereinafter Weiler, *NAFTA Investment Arbitration*]; Todd Weiler, *NAFTA Investment Law in 2001: As the Legal Order Starts to Settle, the Bureaucrats Strike Back*, 36 INT'L L. 345, 347 (2002) [hereinafter Weiler, *Bureaucrats Strike Back*].

5. *See* Matiation, *supra* note 3, at 468–95; Kirkman, *supra* note 3, at 381–92 (providing two of the most comprehensive, yet still incomplete, analyses of the Notes).

principles of law from the minimum standard of treatment. To the extent that the Notes prevent direct incorporation of free-standing treaty obligations into the minimum standard, they constitute a reasonable interpretation,[6] which most tribunals have accepted.[7] To the extent that the Notes exclude general principles of law from the minimum standard, they constitute an *ultra vires* amendment,[8] which virtually all tribunals have ignored.[9] Thus, as is so often the case, a measure of truth lies on each side of the debate.[10]

II. THE MINIMUM STANDARD: TEXT, AMBIGUITIES, AND EARLY CASES

In ratifying NAFTA, Canada, Mexico, and the United States resolved to "ENSURE a predictable commercial framework for business planning and investment,"[11] "increase substantially investment opportunities in the[ir] territories,"[12] and "create effective procedures for...the resolution of disputes."[13] Chapter 11 implements these objectives by identifying the standards for treatment of investors and establishing procedures for arbitration of investor-state disputes.[14]

One may divide Chapter 11 into two sections. The first, Section A, establishes the NAFTA Parties' substantive obligations with respect to each others' investors.[15] For example, Article 1110 permits expropriation and measures tantamount to expropriation only for a public purpose, on a nondiscriminatory basis, in accordance with due

6. *See infra* notes 53–66 and accompanying text.

7. *See infra* notes 46–49 and accompanying text.

8. *See infra* notes 67–92 and accompanying text.

9. *See infra* notes 93–101 and accompanying text.

10. *Cf.* Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1525–26 (2004) (opining that the Notes "occupy a peculiar middle ground between interpretation and law creation"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 cmt. c (1987) [hereinafter RESTATEMENT] (explaining that the distinction between interpretation and amendment "may be imperceptible in some instances"); ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 193 (2003) (observing that the "distinction between interpretation and amendment is not always easy to draw").

11. NAFTA, *supra* note 1, pmbl., 32 I.L.M. at 297.

12. *Id.* art. 102(1)(c), 32 I.L.M. at 297.

13. *Id.* art. 102(1)(e), 32 I.L.M. at 297.

14. *See* Brower, *Empire Strikes Back*, *supra* note 4, at 48.

15. *See* NAFTA, *supra* note 1, arts. 1101–14, 32 I.L.M. at 639–42; *see also* Brower, *Empire Strikes Back*, *supra* note 4, at 48–49; Brower, *Fear and Equilibrium*, *supra* note 4, at 46; Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 40–41 (2003) [hereinafter Brower, *Legitimacy*].

process of law, and upon prompt payment of fair market value (plus interest) in freely transferable funds.[16] Furthermore, Articles 1102 and 1103 establish obligations of nondiscrimination by requiring NAFTA Parties to treat each others' investors no less favorably than they would treat their own investors (national treatment) or investors from third states (MFN treatment) in like circumstances.[17] Finally, and most importantly for purposes of this Article, Section A articulates a minimum standard of treatment for investments, which mandates "treatment in accordance with international law, including fair and equitable treatment."[18]

Section B of Chapter 11 secures the NAFTA Parties' substantive obligations by "establish[ing] a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties...and due process before an impartial tribunal."[19] Thus, investors may submit claims alleging breaches of Section A to arbitration before *ad hoc* tribunals constituted under the ICSID Convention (if the investor's home state and the disputing NAFTA Party are both states parties to that convention),[20] the Additional Facility Rules of ICSID (if *either* the investor's home state or the disputing NAFTA Party is a state party to the ICSID Convention), or the UNCITRAL Arbitration Rules.[21] Once constituted, tribunals must render decisions in accordance with NAFTA and other "applicable rules of international law."[22] In addition, their liberty of decision remains subject to the FTC's competence to issue binding interpretations of (but not amendments to) NAFTA provisions.[23]

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16. *See* NAFTA, *supra* note 1, art. 1110(1)–(6), 32 I.L.M. at 641–42.

17. *See id.* arts. 1102 (national treatment), 1103 (MFN treatment), 32 I.L.M. at 639.

18. *See id.* art. 1105(1), 32 I.L.M. at 639.

19. *Id.* art. 1115, 32 I.L.M. at 642.

20. The "ICSID Convention" means the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159. *See* NAFTA, *supra* note 1, art. 1139, 32 I.L.M. at 647.

21. *See* NAFTA, *supra* note 1, art. 1120(1), 32 I.L.M. at 643. Presently, the United States is a state party to the ICSID Convention, but Canada and Mexico are not. *See* Ethyl Corp. v. Canada, Decision Regarding the Place of Arbitration (Nov. 28, 1997), *reprinted in* 38 I.L.M. 702, 703 n.5 (1999).

22. NAFTA, *supra* note 1, art. 1131(1), 32 I.L.M. at 645.

23. *Compare* NAFTA, *supra* note 1, art. 1131(2), 32 I.L.M. at 645 (authorizing the Free Trade Commission to adopt binding interpretations of NAFTA provisions), *with id.* art. 2202, 32 I.L.M. at 702 (permitting the NAFTA Parties to adopt modifications of or additions to NAFTA provisions, which take effect only after approval "in accordance with the applicable legal procedures of each Party"). *See also Pope & Talbot* Award in Respect of Damages, *supra* note 4, ¶¶ 17–19; Brower, *Empire Strikes Back*, *supra* note 4, at 56 n.71; Brower, *Fair and Equitable*

During the first wave of Chapter 11 claims, Article 1105(1)'s vague text quickly raised interpretive questions, which the investor-driven, uncoordinated dispute settlement process could not resolve to the NAFTA Parties' satisfaction. For disputes arising under Article 1105(1), interpretive debate focused on two phrases: "international law" and "fair and equitable treatment."[24] With regard to "international law," disputes called on tribunals to decide whether the term referred to all sources of international law or whether it contained an unstated restriction to customary international law.[25] With regard to "fair and equitable treatment," disputes required tribunals to identify the proper reference points for assessing the fairness and equity of measures adopted or maintained by host states.[26] Given the dearth of precedent[27] and the substantial dollar amounts in controversy,[28] tribunals undertook a difficult task in the face of intense scrutiny.[29]

Treatment, *supra* note 4, at 10; Brower, *Fear and Equilibrium*, *supra* note 4, at 78 n.249; Brower, *Legitimacy*, *supra* note 15, at 84; David A. Gantz, *International Decision:* Pope & Talbot, Inc. v. Canada, 97 AM. J. INT'L L. 937, 945 (2003); Matiation, *supra* note 3, at 479; Swaine, *supra* note 10, at 1526 n.128; Joel C. Beauvais, Note, *Regulatory Expropriations Under NAFTA: Emerging Principles and Lingering Doubts*, 10 N.Y.U. ENVTL. L.J. 245, 288 n.194 (2002); Kirkman, *supra* note 3, at 372–73.

24. *See* Brower, *Empire Strikes Back*, *supra* note 4, at 53–55; Brower, *Fear and Equilibrium*, *supra* note 4, at 75–77.

25. *See Loewen* Award, *supra* note 3, ¶ 124; Brower, *Empire Strikes Back*, *supra* note 4, at 53–54; Brower, *Fear and Equilibrium*, *supra* note 4, at 75–76; Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1427 (2003); Gaetan Verhoosel, *The Use of Investor-State Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law*, 6 J. INT'L ECON. L. 493, 497–98 (2003).

26. *Loewen* Award, *supra* note 3, ¶ 124; Brower, *Empire Strikes Back*, *supra* note 4, at 54–55; Brower, *Fear and Equilibrium*, *supra* note 4, at 77; Coe, *supra* note 25, at 1427–28.

27. Although bilateral investment treaties (BITs) frequently referred to the obligation of host states to provide "fair and equitable treatment," virtually no case law addressed the meaning of that term before the advent of Chapter 11 disputes. *See* Brower, *Empire Strikes Back*, *supra* note 4, at 54–55; Brower, *Fear and Equilibrium*, *supra* note 4, at 77; *see also* F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 1981 BRIT. Y.B. INT'L L. 241, 243; John A. Westberg & Bertrand P. Marchais, *General Principles Governing Foreign Investment as Articulated in Recent International Tribunal Awards and Writings of Publicists*, *in* IBRAHIM F.I. SHIHATA, LEGAL TREATMENT OF FOREIGN INVESTMENTS 337, 353 (1993).

28. *See* Brower, *Fair and Equitable Treatment*, *supra* note 4, at 9; Brower, *Legitimacy*, *supra* note 15, at 68 (both observing that the Chapter 11 disputes then pending placed "over $2 billion in controversy").

29. *See* Coe, *supra* note 25, at 1385 ("NAFTA's investor-state docket has generated predictably high levels of interest among international law scholars and practitioners. It has also sustained a remarkable collection of observers beyond specialist circles. Numerous critiques have issued from both groups....").

After Mexico successfully defended an arbitration in which Article 1105(1) played a peripheral role,[30] tribunals articulated broad interpretations of the same provision and imposed liability on the respondent states in a series of three cases decided under Chapter 11. In *Metalclad Corp. v. United Mexican States*, the tribunal construed "fair and equitable treatment" to encompass obligations of transparency similar to those articulated in other chapters of NAFTA.[31] Later, in *S.D. Myers, Inc. v. Canada*, the tribunal held that the infringement of any "rule of international law...specifically designed to protect investors will tend to weigh heavily in favour of finding a breach of Article 1105."[32] Applying this logic, a majority of the tribunal held that Canada's "breach of Article 1102 [relating to national treatment] essentially establishe[d] a breach of Article 1105 as well."[33] Finally, in *Pope & Talbot, Inc. v. Canada*, the tribunal held that, despite textual indications to the contrary, fair and equitable treatment requires not only compliance with international law, but also with the "ordinary standards" of fairness "applied in the [domestic legal systems of the] NAFTA countries."[34]

Taken as a whole, the *Metalclad*, *S.D. Myers*, and *Pope & Talbot* awards created both the opportunity and the motive for the FTC to issue an "interpretation" of Article 1105(1). Because the three awards adopted different reference points for evaluating claims under Article 1105(1), the NAFTA Parties could reasonably conclude that circumstances provided the opportunity for much needed clarification of the provision

30. Azinian v. United Mexican States, Award, ICSID Case No. ARB(AF)/97/2 (NAFTA Ch. 11 Arb. Trib. 1999), *available at* http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Robert_Azinian/Robert_Azinian.htm.

31. Metalclad Corp. v. United Mexican States, Award ¶¶ 71, 76, 88, ICSID Case No. ARB(AF)/97/1 (NAFTA Ch. 11 Arb. Trib. 2000), *available at* http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Metalclad/Metalclad.htm. According to some observers, the tribunal directly incorporated the provisions of other chapters into Article 1105. *See, e.g.*, United Mexican States v. Metalclad Corp., 2001 B.C.S.C. 664, ¶¶ 66, 68, 70–73 (2001), *available at* http://www.courts.gov.bc.ca/jdb-txt/sc/01/06/2001bcsc0664.htm; Thomas, *supra* note 3, at 438, 449. In this author's view, the tribunal properly referred to the provisions of other chapters as context for defining the scope of "fair and equitable treatment" under Article 1105(1). *See* Brower, *Beware the Jabberwock*, *supra* note 4, at 468–70.

32. S.D. Myers, Inc. v. Canada, Partial Award ¶ 264 (NAFTA Ch. 11 Arb. Trib. 2000), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/myersvcanadapartialaward_final_13-11-00.pdf [hereinafter *S.D. Myers* Partial Award].

33. *Id.* ¶ 266.

34. Pope & Talbot, Inc. v. Canada, Award on the Merits of Phase 2 ¶¶ 110–13, 118 (NAFTA Ch. 11 Arb. Trib. 2001), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/Award_Merits-e.pdf.

by the FTC.[35] Furthermore, notwithstanding their differences, the three awards arguably marked a trend toward relatively broad interpretations of Article 1105(1).[36] Because this trend developed just as a series of claims approached critical junctures in the Chapter 11 arbitration pipeline, circumstances provided the NAFTA Parties with the motive to use an FTC interpretation as the vehicle to preempt further losses.[37]

III. THE NOTES OF INTERPRETATION: CONTENT AND CONTROVERSY

Surrendering to opportunity and motive, the FTC adopted its first (and, to date, only) Notes of Interpretation on July 31, 2001. The Notes provide, in relevant part, that:

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35. *See* Notes, supra note 2, pmbl. ("Having *reviewed the operation of proceedings conducted under Chapter Eleven* of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven *in order to clarify...the meaning of certain of its provisions*....") (emphasis added); *Pope & Talbot* Award in Respect of Damages, *supra* note 4, ¶ 25 & n.9:

> The interpretation of Article 1105 has proved particularly difficult for various tribunals and, indeed, for the NAFTA Parties themselves. This Tribunal has grappled with the stark inconsistencies between the provisions of BITs and corresponding commitments in Article 1105. Other tribunals have laboured over the relationships between Article 1105 and other commitments in Chapter 11 as well as commitments made by the NAFTA Parties in other agreements. And the NAFTA Parties themselves found it necessary to promulgate the Interpretation.... Had the NAFTA Parties not perceived an ambiguity, no interpretation would have been necessary.

Cf. Brower, *Legitimacy*, *supra* note 15, at 66–68 (discussing the emergence of decisions inconsistently interpreting Article 1105(1) and warning of the threat that doctrinal incoherence poses to institutional legitimacy).

36. *See* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 333 (2d ed. 2004) (explaining that "[i]n the early litigation under NAFTA, there was a clear preference for the expansive interpretation of the phrase [fair and equitable treatment]"); Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2144 (2004) (concluding that the NAFTA Parties adopted the Notes "in response to several broad panel readings of the obligations articulated in...Article [1105(1)]"); Kirkman, *supra* note 3, at 389 (observing that "[p]rior to the issuance of the FTC Interpretation on July 31, 2001, NAFTA jurisprudence indicated a trend towards an expansive view of Article 1105's fair and equitable treatment provision").

37. *See* Second Opinion of Professor Sir Robert Jennings, *supra* note 4, at 4–5; Laird, *supra* note 4, at 55; Brower, *Dynamic Laboratory*, *supra* note 4, at 256; Brower, *Legitimacy*, *supra* note 15, at 81; Ewing-Chow, *supra* note 3, at 769; David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679, 687, 713 (2004); *see also* Methanex Corp. v. United States, Final Award, pt. IV, ch. C, ¶ 18 (NAFTA Ch. 11 Arb. Trib. 2005), *available at* http://www.state.gov/documents/organization/51052.pdf [hereinafter *Methanex* Final Award] (recounting the United States' observation that "every NAFTA claimant in cases pending in 2001 has argued that the FTC interpretation was specifically targeted against it").

> Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment....
>
> The concept[] of "fair and equitable treatment"...do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment....
>
> A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).[38]

Evidently, the Notes represent an effort to "overrule" the *Metalclad*, *S.D. Myers*, and *Pope & Talbot* awards[39] by limiting Article 1105(1) to the obligations established by customary international law.[40] Thus, the first sentence connects the minimum standard of treatment to customary international law. The second sentence excludes from the minimum standard all legal obligations that exceed the scope of customary international law. For good measure, the third sentence provides that the minimum standard does not require compliance with free-standing treaty obligations.

Immediately after their release, the Notes began to generate controversy.[41] Certain objections related to issues of process and timing. Because the Notes appeared "out of the blue," "without any prior public consultation," and without giving "any warning to investors party to ongoing Chapter 11 arbitrations,"[42] some observers have described them as a crude and self-interested form of political intervention designed to

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38. Notes, *supra* note 2, § B.

39. Kirkman, *supra* note 3, at 390; *see also Mondev* Award, *supra* note 3, ¶ 103; Laird, *supra* note 4, at 62, 65; Ewing-Chow, *supra* note 3, at 769; Gantz, *supra* note 37, at 713; Jürgen Kurtz, *A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment*, 23 U. PA. J. INT'L ECON. L. 713, 754–55 (2002); Marc R. Poirier, *The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist*, 33 ENVTL. L. 851, 853 n.10 (2003); Swaine, *supra* note 10, at 1525 n.125; Weiler, *Bureaucrats Strike Back*, *supra* note 4, at 347.

40. Gantz, *supra* note 37, at 687; Gantz, *supra* note 23, at 945; Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, 349 (2004).

41. *See* Gantz, *supra* note 37, at 699; Matiation, *supra* note 3, at 470; *see also* Coe, *supra* note 25, at 1429.

42. Brower, *Legitimacy*, *supra* note 15, at 81 & n.238 (quoting ADF Group, Inc. v. United States, Investor's Reply to the Counter-Memorial of the United States on Competence and Liability ¶ 213, ICSID Case No. ARB(AF)/00/1 (NAFTA Ch. 11 Arb. Trib. 2002), *available at* http://www.state.gov/documents/organization/7920.pdf).

influence the outcome of pending disputes.[43] Other objections raised issues of content. While Article 1105(1) refers to "international law," the Notes narrow that term to embrace only one of its three major components (i.e., "customary international law"), thereby eliminating the foundations of formerly viable claims.[44] Under the circumstances, some observers have accused the FTC of exceeding its interpretive powers and producing an amendment that cannot enter into force without ratification in accordance with the constitutional processes of all three NAFTA Parties.[45]

Compared to the heated debate in academic journals, the decisions of arbitral tribunals seem to reflect much lower levels of criticism for the Notes. Although one tribunal expressed its inclination to view the Notes as an amendment,[46] seven tribunals later declined to challenge the Notes because (1) the tribunals agreed with the Notes in relevant part,[47] (2) the claimants abandoned their challenges to the Notes at oral argument or maintained that they should prevail even under the Notes,[48] or (3) the tribunals felt they lacked competence to opine on the validity of FTC actions.[49] While some observers understandably regard this trend as legitimation of the Notes' promulgation,[50] a close reading of the awards reveals a mixed and more nuanced assessment of the FTC action. As

43. *See, e.g.*, Brower, *Beware the Jabberwock*, *supra* note 4, at 485–87; Brower, *Legitimacy*, *supra* note 15, at 81–82; Charles H. Brower, II, Mitsubishi, *Investor-State Arbitration, and the Law of State Immunity*, 20 AM. U. INT'L L. REV. 907, 924–27 (2005); *see also* Verhoosel, *supra* note 25, at 499 (explaining that because the "'interpretation' was adopted when various Chapter 11 Tribunals were in the process of hearing claims under Article 1105(1)," the FTC's action "understandably caus[ed] fury and concern among those investors as well as fierce debate among many academic observers").

44. *Pope & Talbot* Award in Respect of Damages, *supra* note 4, ¶¶ 20, 25 n.9, 46–47.

45. *See supra* notes 4 & 23 and accompanying text.

46. *Pope & Talbot* Award in Respect of Damages, *supra* note 4, ¶ 47 (dicta).

47. *Methanex* Final Award, *supra* note 37, pt. IV, ch. C, ¶¶ 17, 20; *UPS* Award on Jurisdiction, *supra* note 3, ¶ 97; *Mondev* Award, *supra* note 3, ¶¶ 120–121.

48. GAMI Inv., Inc. v. United Mexican States, Final Award ¶ 92 n.14 (NAFTA Ch. 11 Arb. Trib. 2004), *available at* http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Gami/escritos/GAMI_english.pdf [hereinafter *GAMI* Award]; *Loewen* Award, *supra* note 3, ¶ 127.

49. ADF Group Inc. v. United States, Award ¶ 177, ICSID Case No. ARB(AF)/00/1 (NAFTA Ch. 11 Arb. Trib. 2003), *available at* http://www.state.gov/documents/organization/16586.pdf [hereinafter *ADF* Award]. Another tribunal appeared to accept the Notes without discussion. Waste Mgmt., Inc. v. United Mexican States, Award ¶¶ 90–91, 96–97, ICSID Case No. ARB(AF)/00/3 (NAFTA Ch. 11 Arb. Trib. 2004), *available at* http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Waste_2_management/laudo/laudo_ingles.pdf [hereinafter *Waste Mgmt.* Award].

50. *See, e.g.*, Coe, *supra* note 25, at 1429.

explained below, to the extent that the Notes prevent direct incorporation of free-standing treaty obligations into the minimum standard of treatment, most awards have rightly concurred or acquiesced.[51] To the extent that the Notes of Interpretation exclude general principles of law from the minimum standard of treatment, however, tribunals have quietly ignored and, thus, tacitly rejected them.[52]

IV. EXCLUSION OF FREE-STANDING TREATY OBLIGATIONS: A REASONABLE INTERPRETATION

Whether performed by arbitral tribunals or by the FTC, interpretations of NAFTA provisions must conform to the customary rules of treaty interpretation set forth in the Vienna Convention on the Law of Treaties.[53] Thus, interpretations of NAFTA by tribunals or by the FTC should give effect to the ordinary meaning of terms taken in context and in light of the treaty's object and purpose.[54] However, the

51. *See infra* notes 53–66 and accompanying text.

52. *See infra* notes 93–101 and accompanying text.

53. *See* NAFTA, *supra* note 1, art. 102(2), 32 I.L.M. at 297 (instructing the NAFTA Parties to "interpret and apply the provisions of this Agreement...in accordance with applicable rules of international law"); *id.* art. 1131(1), 32 I.L.M. at 645 (instructing tribunals to do the same).

Tribunals and observers uniformly recognize that the applicable rules include the principles set forth in the Vienna Convention on the Law of Treaties. *See, e.g.*, *UPS* Award on Jurisdiction, *supra* note 3, ¶ 40; Methanex Corp. v. United States, Award on Jurisdiction ¶¶ 97–102 (NAFTA Ch. 11 Arb. Trib. 2002), *available at* http://www.state.gov/documents/organization/12613.pdf; Loewen Group, Inc. v. United States, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction ¶ 51, ICSID Case No. ARB(AF)/98/3 (NAFTA Ch. 11 Arb. Trib. 2001), *available at* http://www.state.gov/documents/organization/3921.pdf; *S.D. Myers* Partial Award, *supra* note 32, ¶¶ 196–204; Pope & Talbot, Inc. v. Canada, Interim Award ¶¶ 65–68 (NAFTA Ch. 11 Arb. Trib. 2000), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/pubdoc7.pdf; *Metalclad* Award, *supra* note 31, ¶ 70; Waste Mgmt., Inc. v. United Mexican States, Award § 9, ICSID Case No. ARB(AF)/98/2 (NAFTA Ch. 11 Arb. Trib. 2000), *available at* http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Waste_1_management/laudo/000602_Laudo_en_ingles.pdf; Ethyl Corp. v. Canada, Award on Jurisdiction ¶¶ 55–56 (NAFTA Ch. 11 Arb. Trib. 1998), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/ethyl6.pdf; Brower, *Beware the Jabberwock*, *supra* note 4, at 468–69; Brower, *Fair and Equitable Treatment*, *supra* note 4, at 9; Brower, *Legitimacy*, *supra* note 15, at 79–80; David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA's Chapter 11*, 33 GEO. WASH. INT'L L. REV. 651, 689–90 (2001); Weiler, *NAFTA Investment Arbitration*, *supra* note 4, at 428.

54. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 340.

Vienna Convention also provides that a "special meaning shall be given to a term if it is established that the parties so intended."[55]

Viewed in isolation, the ordinary meaning of "international law" includes the three principal sources listed in Article 38(1) of the Statute of the International Court of Justice:[56] treaties, customary international law, and general principles of law recognized by the world's principal legal systems.[57] If one takes this as the definition of "international law" for purposes of the minimum standard, the Notes seem to modify Article 1105(1) by excluding treaties,[58] the most important source of international law in the modern era.[59]

Of course, one cannot construe the phrase "international law" in isolation. To the contrary, one must interpret it in context.[60] For Article 1105(1), the relevant context includes Articles 1116 and 1117, which authorize investors to bring claims before *ad hoc* tribunals only for measures alleged to violate obligations established by Section A of Chapter 11 or by two provisions in Chapter 15 of NAFTA.[61] In other words, the NAFTA Parties consented to investor-state arbitration only for claims alleging violations of enumerated NAFTA provisions,[62] but not for claims alleging violations of other NAFTA provisions,[63] much

55. *Id.* art. 31(4). As logic would dictate, the burden of proof rests on the party that seeks to establish a special meaning. AUST, *supra* note 10, at 196.

56. *Methanex* Final Award, *supra* note 37, pt. II, ch. B, ¶ 3; *UPS* Award on Jurisdiction, *supra* note 3, ¶ 77; *Pope & Talbot* Award in Respect of Damages, *supra* note 4, ¶¶ 20, 25 n.9, 46; Gantz, *supra* note 37, at 714; J.C. Thomas, *Investor-State Arbitration Under NAFTA Chapter 11*, 1999 CAN. Y.B. INT'L L. 99, 106; *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5 (6th ed. 2003) ("Article 38 is generally regarded as a complete statement of the sources of international law."); MALCOLM N. SHAW, INTERNATIONAL LAW 66 (5th ed. 2003) ("Article 38(1) of the Statute of the International Court of Justice is widely recognised as the most authoritative statement as to the sources of international law.").

57. Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. Article 38(1)(d) of the ICJ Statute also refers to judicial decisions and the teachings of the most highly qualified publicists "as subsidiary means for the determination of rules of law." Properly understood, that phrase designates judicial decisions and teachings as evidence of international law, but not an independent source of international law. RESTATEMENT, *supra* note 10, § 102(1), § 102 reporters' note 1, § 103(2), § 103 cmt. a.

58. *Pope & Talbot* Award in Respect of Damages, *supra* note 4, ¶¶ 20, 46–47; Kirkman, *supra* note 3, at 383.

59. SHAW, *supra* note 56, at 89.

60. *See supra* note 54 and accompanying text.

61. *See* NAFTA, *supra* note 1, arts. 1116(1), 1117(1), 32 I.L.M. at 642–43; *Mondev* Award, *supra* note 3, ¶ 121 & n.51; Thomas, *supra* note 3, at 449.

62. *UPS* Award on Jurisdiction, *supra* note 3, ¶ 69; *Mondev* Award, *supra* note 3, ¶ 121; Thomas, *supra* note 3, at 449.

63. *Mondev* Award, *supra* note 3, ¶ 121; Thomas, *supra* note 3, at 450.

less the provisions of other treaties.[64] When interpreting Article 1105(1), one should not use it as a vehicle to reincorporate independent treaty provisions because that would subvert Chapter 11's jurisdictional limitations.[65] Thus, whether viewed as context or as evidence of the intent to adopt a special meaning, Articles 1116 and 1117 imply that Article 1105(1)'s reference to "international law" excludes independent treaty obligations. To the extent that they make the same point explicitly, the Notes appear to fall within the bounds of reasonable interpretation.[66]

V. EXCLUSION OF GENERAL PRINCIPLES OF LAW: UNLAWFUL AND INEFFECTIVE AMENDMENT

As stated above, the Notes exclude from the minimum standard of treatment all obligations that exceed the scope of customary international law.[67] Since general principles constitute a source of international law for situations *not* addressed by custom or treaty,[68] the Notes logically exclude general principles as an independent source of obligation under Article 1105(1).[69] Because general principles typically

64. *Mondev* Award, *supra* note 3, ¶ 121; Gantz, *supra* note 37, at 715; Matiation, *supra* note 3, at 487.

65. Thomas, *supra* note 3, at 449–50; Kirkman, *supra* note 3, at 383, 391.

66. *Methanex* Final Award, *supra* note 37, pt. IV, ch. C, ¶ 17; *UPS* Award on Jurisdiction, *supra* note 3, ¶ 97; *Mondev* Award, *supra* note 3, ¶¶ 119–21; Matiation, *supra* note 3, at 487–88, 494–95; Thomas, *supra* note 3, at 449–50; Kirkman, *supra* note 3, at 383, 391. Although Article 1105(1) does not justify direct incorporation of free-standing treaty norms, certain treaty obligations may remain or become pertinent to its interpretation. For example, to the extent that treaties codify existing custom, their content should influence the application of Article 1105(1). RESTATEMENT, *supra* note 10, § 102 reporters' note 5; Matiation, *supra* note 3, at 487. Alternatively, the widespread adoption of multilateral or bilateral treaties may reflect state practice sufficient to influence the development of custom and, thus, the meaning of Article 1105(1). *Mondev* Award, *supra* note 3, ¶¶ 117, 125; *Pope & Talbot* Award in Respect of Damages, *supra* note 4, ¶ 62; RESTATEMENT, *supra* note 10, § 102(3), § 102 cmt. i; Laird, *supra* note 4, at 67; Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 129–30 (2003).

67. *See supra* notes 38 & 40 and accompanying text.

68. RESTATEMENT, *supra* note 10, § 102 cmt. l; SHAW, *supra* note 56, at 93.

69. Alternatively, the Notes might reflect an endorsement of the discredited minority view formerly espoused by Soviet legal scholars that general principles merely constitute a subset of customary international law. *See* SHAW, *supra* note 56, at 94 (attributing this view to Soviet writers, but opining that "most writers are prepared to accept that the general principles do constitute a separate source of law"); *see also* RESTATEMENT, *supra* note 10, § 102 reporters' note 7 (concluding that "the view of Soviet scholars...has not gained acceptance"). Although one might regard the NAFTA Parties' willingness to endorse the former Soviet view as highly improbable, the United States arguably did so in its new Model BIT and in recently concluded

play a limited role in the development of international law,[70] one might treat their omission either as insignificant or as a reasonable interpretation because the NAFTA Parties did not consider such a trivial source of "international law" when drafting Article 1105(1). Such a view would, however, prove unsound because it ignores the important contributions that general principles have made to the law of state responsibility and protection of foreign investment.

While treaties and custom dominate most areas of international law, general principles "have long played an important role in the articulation of the principles of international state responsibility insofar as they concern interference with persons."[71] Likewise, with respect to the protection of foreign investment, general principles have provided much of the "fodder" for claims and, consequently, have acquired a substantial role in shaping the law.[72] For example, when introducing Harvard's Draft Convention on the International Responsibility of States for Injuries to Aliens, Professors Sohn and Baxter described the international minimum standard of treatment in the following terms: "[N]ational treatment may suffice, unless the national standard departs unreasonably from the general principles accepted by the principal legal

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investment and trade agreements, all of which first prescribe "customary international law" as the minimum standard of treatment for covered investments, but then define that standard to include "the principle of due process embodied in the principal legal systems of the world." 2004 United States Model BIT, art. 5(1)-(2)(a), *available at* http://www.state.gov/documents/organization/38710.pdf; Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Oct. 25, 2004, U.S.-Uru., art. 5(1)-(2)(a), *at* http://www.ustr.gov/assets/World_Regions/Americas/South_America/Uruguay_BIT/asset_upload_file583_6728.pdf; Free Trade Agreement, June 15, 2004, U.S.-Morocco, art. 10.5(1)-(2)(a), *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/FInal_Text/Section_Index.html; U.S.–Central American Free Trade Agreement, Aug. 5, 2004, U.S.-Cent. Am.-Dom. Rep., art. 10.5(1)-(2)(a), *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html; Free Trade Agreement, June 6, 2003, U.S.-Chile, art. 10.4(1)-(2)(a), *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html; Free Trade Agreement, May 6, 2003, U.S.-Sing., art. 15.5(1)-(2)(a), *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html.

70. *See* MANLEY O. HUDSON, INTERNATIONAL TRIBUNALS: PAST AND FUTURE 102 (1944); SHAW, *supra* note 56, at 94; Michael Akehurst, *Equity and General Principles of Law*, 25 INT'L & COMP. L.Q. 801, 817 (1976); *see also* RESTATEMENT, *supra* note 10, Part I, Introductory Note, at 18 ("International law is made in two principal ways—by the practice of states ['customary law'] and by purposeful agreement among states (sometimes called ['conventional law'], *i.e.*, law by convention, by agreement."); SORNARAJAH, *supra* note 36, at 93 ("Positivist legal scholars...treat custom and treaty solely as the significant sources of international law.").

71. Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279, 290 (1963).

72. SORNARAJAH, *supra* note 36, at 93–94.

systems."[73] Furthermore, Professors Sohn and Baxter emphasized that they had found it "necessary" to include express references to general principles of law in several provisions,[74] including articles on:

1. justification for state action;[75]
2. arrest and detention;[76]
3. denial of justice;[77]
4. destruction of and damage to property;[78]
5. taking and deprivation of use or enjoyment of property;[79]
6. violation, annulment, and modification of contracts and concessions;[80] and
7. lack of due diligence in protecting aliens.[81]

Contemporaneously, Lord Arnold McNair (former President of the International Court of Justice) and Professor Wolfgang Friedmann of Columbia University commended general principles as the most appropriate source of law for natural resource concessions and other long-term economic arrangements between states and foreign investors,[82] which incorporate elements of public interest and private commerce.[83] In writings of a more recent vintage, Professors Ian Brownlie[84] and Malcolm Shaw[85] discuss the role played by general principles in leading cases frequently cited in the pleadings and decisions of investment claims: *AMCO Asia v. Republic of Indonesia*,[86] the *Barcelona Traction* case,[87] and the *Chorzów Factory* case.[88]

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73. Louis B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 547 (1961).

74. *Id.*

75. Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 4(2), (4), (5), *reprinted in* Sohn & Baxter, *supra* note 73, at 549.

76. *Id.* art. 5(1)(b), *reprinted in* Sohn & Baxter, *supra* note 73, at 549.

77. *Id.* arts. 6(b), 7(f), (k), 8(b), *reprinted in* Sohn & Baxter, *supra* note 73, at 550–51.

78. *Id.* art. 9(2)(c), *reprinted in* Sohn & Baxter, *supra* note 73, at 551.

79. *Id.* art. 10(5)(c), *reprinted in* Sohn & Baxter, *supra* note 73, at 554.

80. *Id.* art. 12(1)(c)-(4)(b), *reprinted in* Sohn & Baxter, *supra* note 73, at 567.

81. *Id.* art. 13(1)(b), *reprinted in* Sohn & Baxter, *supra* note 73, at 575.

82. *See generally* Lord Arnold McNair, Q.C., *The General Principles of Law Recognized by Civilized Nations*, 1957 BRIT. Y.B. INT'L L. 1; Friedmann, *supra* note 71.

83. *See* Brower, *Beware the Jabberwock*, *supra* note 4, at 472–73 (recognizing that investor-state disputes combine elements of private commerce and public regulation); Coe, *supra* note 25, at 1389 (observing that investor-state disputes have "characteristics of inter-state arbitration and of private international commercial arbitration").

84. BROWNLIE, *supra* note 56, at 17–18.

85. SHAW, *supra* note 56, at 95, 97.

86. AMCO Asia v. Indonesia, 23 I.L.M. 351 (ICSID 1984).

87. Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5).

88. Chorzów Factory (F.R.G. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13); 1925 P.C.I.J.

Given their role in developing the law of state responsibility and the minimum standard of treatment for aliens, one would naturally expect general principles to fall within the scope of "international law" for purposes of Article 1105(1). By parity of reasoning, the Notes' exclusion of general principles seem to constitute a significant amendment to Article 1105(1), absent context or clear evidence of a special meaning that repudiates them as a foundation of the minimum standard. In the view of this author, no such context or evidence exists. While Articles 1116 and 1117 contextually indicate a desire to limit the investor-state dispute settlement mechanism to the obligations enumerated in Section A of Chapter 11 and two provisions of Chapter 15,[89] they do not suggest any desire to eliminate the historical foundation of the minimum standard enumerated in Article 1105(1).

Turning from context to drafting history, one still finds no evidence of the intent to develop a special meaning of "international law" that excludes general principles from the scope of Article 1105(1). After the Notes appeared, the *Pope & Talbot* tribunal requested Canada to supply all drafting history supporting the NAFTA Parties' alleged intent to restrict "international law" to custom for purposes of Article 1105(1).[90] In some 1,500 pages of documents supplied by Canada, reflecting over forty drafts of Chapter 11, the tribunal could find no use of the word "customary" to qualify "international law" in the provision that became Article 1105(1).[91]

In short, when used to describe the minimum standard of treatment for aliens, the ordinary and historically accepted meaning of "international law" includes general principles of law. None of the relevant context qualifies that meaning for purposes of Article 1105(1). Nor does drafting history disclose the intent to exclude general principles from the scope of Article 1105(1). Because the Notes restrict "international law" to the obligations imposed by customary international law, they logically purport to exclude general principles as an independent source and, thus, to amend Article 1105(1).[92]

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89. *See supra* notes 61–66 and accompanying text.

90. *Pope & Talbot* Award in Respect of Damages, *supra* note 4, ¶ 37.

91. *Id.* ¶¶ 43, 46; *see also* SORNARAJAH, *supra* note 36, at 337.

92. Two other possibilities exist: First, the drafters of the Notes may not have sought to amend Article 1105(1), but may have overlooked the historical role of general principles in developing the minimum standard. Second, even if they recognized the significance of those principles in developing the minimum standard, they may have surrendered to the careless

If the Notes so clearly amend Article 1105(1), one must account for the apparent reluctance of tribunals to challenge their validity. Although most tribunals have openly accepted or acquiesced in the Notes' exclusion of independent treaty obligations from the minimum standard,[93] they have quietly revolted against the elimination of general principles as a source of "international law" for purposes of Article 1105(1). Instead of opining on the Notes in this context, tribunals have simply ignored them and continued to apply general principles as a reference point in evaluating claims under Article 1105(1). For example, the tribunals in *ADF Group Inc. v. United States* and in *Mondev International Ltd. v. United States* expressly referred to "the general principles of law recognized by civilized nations"[94] and "the principles of justice recognized by the principal legal systems of the world"[95] in their analysis of claims under Article 1105(1). For its part, the tribunal in *Loewen Group, Inc. v. United States* defined the minimum standard to include "generally accepted standards of the administration of justice."[96]

Although they did not explicitly refer to general principles, the tribunals in *Waste Management, Inc. v. United Mexican States* and in *GAMI Investments, Inc. v. United Mexican States* both held that states may violate the minimum standard through "idiosyncratic" conduct or through violations of "natural justice."[97] Because "idiosyncratic" conduct suggests a departure from general principles and because many observers equate "natural justice" with general principles,[98] one may reasonably conclude that the *Waste Management* and *GAMI* tribunals

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tendency of modern international lawyers to "relegate into 'custom' all those important norms that cannot be supported by treaties." Martti Koskenniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946, 1947–48 (1990). It seems unlikely, however, that the Notes' drafters would admit to such inattentiveness, or that Chapter 11 observers would find the lack of care any more reassuring than a calculated effort to modify NAFTA's text.

93. *See supra* notes 46–49 and accompanying text.

94. *ADF* Award, *supra* note 49, ¶ 185 & n.176 (indicating that Article 1105(1) does not incorporate only "discrete, specific rules applicable to limited contexts" and suggesting that it also encompasses "more general principles or requirements," including "the general principles of law recognized by civilized nations").

95. *Mondev* Award, *supra* note 3, ¶127 & n.57 (recalling the reliance on general principles by the Draft Convention on the International Responsibility of States for Injuries to Aliens, *supra* note 75, and formulating a similar test based on "generally accepted standards of the administration of justice").

96. *Loewen* Award, *supra* note 3, ¶ 133 (quoting *Mondev* Award, *supra* note 3).

97. *Waste Mgmt.* Award, *supra* note 49, ¶ 98; *GAMI* Award, *supra* note 48, ¶¶ 89, 96.

98. *See, e.g.*, BROWNLIE, *supra* note 56, at 16; SHAW, *supra* note 56, at 94; Akehurst, *supra* note 70, at 814 n.75.

understood general principles to fall within the scope of "international law" for purposes of Article 1105(1). Additionally, while not explicitly mentioning general principles, the tribunal in *United Parcel Service of America, Inc. v. Canada*, defined the minimum standard not by reference to "customary international law," but by reference to "the general body of international law,"[99] a phrase which many would construe to include both custom and general principles.[100]

Thus, instead of endorsing the Notes, the awards of Chapter 11 tribunals seem to ignore the FTC's action as applied to general principles of law. Despite the FTC's clear restriction of Article 1105(1) to customary international law, six tribunals have explicitly or implicitly continued to regard general principles as a source of law when evaluating claims under that provision. In so doing, they have offered partial vindication to those who described the Notes as an *ultra vires* amendment that has no binding effect and that tribunals should ignore until ratified by the three NAFTA Parties in accordance with their constitutional processes.[101]

VI. CONCLUSION

Until now, most assessments of the Notes and their application by Chapter 11 tribunals have devoted little attention to detail or nuance. Closer examination reveals that tribunals have given the Notes a mixed reception. To the extent that the Notes prevent the direct incorporation of free-standing treaty obligations into the minimum standard, one may greet them as a reasonable interpretation, as most tribunals have done. By contrast, to the extent that the Notes purport to exclude general principles from the minimum standard, one may regard them as an unlawful and ineffective attempt to amend Article 1105(1). Consistent with this view, tribunals have quietly led a partial revolt against the FTC's action by continuing to treat general principles as a source of "international law" under the minimum standard despite contrary instructions so clearly expressed by the Notes of Interpretation.

99. *UPS* Award on Jurisdiction, *supra* note 3, ¶ 77.

100. *See* BROWNLIE, *supra* note 56, at 18 ("The rubric [general principles of international law] may refer to rules of customary law, [and] to general principles of law....").

101. *See supra* notes 4, 23 & 45 and accompanying text.

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