

IN THE ARBITRATION UNDER CHAPTER TEN OF THE
UNITED STATES-PANAMA TRADE PROMOTION AGREEMENT AND THE ICSID CONVENTION

BRIDGESTONE LICENSING SERVICES, INC., AND
BRIDGESTONE AMERICAS, INC.

Claimants

-and-

THE REPUBLIC OF PANAMA,

Respondent.

ICSID CASE NO. ARB/16/34

THIRD SUBMISSION OF THE UNITED STATES OF AMERICA

1. The United States of America hereby makes this third submission pursuant to Article 10.20.2 of the United States-Panama Trade Promotion Agreement (“U.S.-Panama TPA” or “Agreement”), which authorizes a non-disputing Party to make oral and written submissions to a Tribunal regarding the interpretation of the Agreement. The United States does not take a position on how the interpretation applies to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

Article 10.5 (Minimum Standard of Treatment, including Denial of Justice)

2. Article 10.5 (Minimum Standard of Treatment) of the Agreement provides in relevant part:

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world;

3. As a threshold matter, Article 10.5.1 requires a Party to accord “treatment” to a covered investment. Article 10.5.1 differs from other substantive obligations (*e.g.*, 10.3, 10.4 and 10.6) in that it obligates a Party to accord treatment only to a “covered investment.”¹ The minimum standard of treatment under Article 10.5.1 includes the obligation to provide “fair and equitable treatment,” which, as explained in 10.5.2(a), includes the customary international law obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. Therefore, to establish a breach of Article 10.5.1 on the basis of denial of justice, a claimant must establish that the treatment accorded to its covered investment rose to the level of a denial of justice under customary international law.

4. Denial of justice in its historical and “customary sense” denotes “misconduct or inaction of the judicial branch of the government” and involves “some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process.”² A denial of justice may occur in instances such as when the final act of a State’s judiciary constitutes a “notoriously unjust”³ or “egregious”⁴ administration of justice “which offends a sense of judicial propriety.”⁵ More specifically, a denial of justice exists where there is, for example, an “obstruction of access to courts,” “failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment.”⁶ A manifestly unjust judgment is one that amounts to a travesty of justice or is

¹ Emphasis added. Commentators with respect to the similarly worded text under NAFTA Article 1105(1) agree that the obligation to accord the minimum standard of treatment applies only to investments. *See, e.g.*, MEG N. KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER THE NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1105-17 (2008 Supp.) (“Several aspects of this are notable. First, the subject of this protection is investments rather than investors. The first paragraph of Article 1105 is limited to treatment of investments, unlike the second paragraph of Article 1105, and indeed other provisions such as Article 1102 and 1103, which refer to treatment accorded to both investments and investors. This limitation was present even in the earliest drafts of what became Article 1105(1).”).

² EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 330 (1925) (“BORCHARD”); J.L. BRIERLY, THE LAW OF NATIONS 286-87 (Sir Humphrey Waldock ed., 6th ed. 1963) (defining a denial of justice as “an injury involving the responsibility of the state committed by a court of justice”).

³ JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 44 (2005) (“PAULSSON”) (citing J. Irizarry y Puente, *The Concept of “Denial of Justice” in Latin America*, 43 MICH. L. REV. 383, 406 (1944)); *id.* at 4 (“[A] state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner.”) (emphasis omitted); *B.E. Chattin (U. S. v. Mexico)*, 4 R.I.A.A. 282, 286-87 (1927), reprinted in 22 AM. J. INT’L L. 667, 672 (1928) (“Acts of the judiciary . . . are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man.”) (emphasis omitted).

⁴ PAULSSON at 60 (“The modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice.”).

⁵ *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 132 (June 26, 2003) (“*Loewen Award*”) (a denial of justice may arise where there has occurred a “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety”); *Mondev Int’l Ltd. v. United States of America*, NAFTA/ICSID Case ARB(AF)/99/2, Award ¶ 127 (Oct. 11, 2002) (finding that the test for a denial of justice was “not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome[.]”); *see also generally Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)* 1970 I.C.J. 3, 144 (Feb. 5) (separate opinion by Tanaka, J.) (“*Barcelona Traction*”) (explaining that “denial of justice occurs in the case of such acts as- ‘corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it, . . . But no merely erroneous or even unjust judgment of a court will constitute a denial of justice”) (citations omitted).

⁶ Harvard Research Draft, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, art. 9, 23 AM. J. INT’L L. SP. SUPP. 131, 134 (1929) (“*Harvard Draft*”).

grotesquely unjust.⁷ As the United States has explained elsewhere, to be manifestly unjust a court decision must amount “to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man[.]”⁸ Instances of denial of justice also have included corruption in judicial proceedings, discrimination or ill-will against aliens, and executive or legislative interference with the freedom or impartiality of the judicial process.⁹ At the same time, erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law.¹⁰ In this connection, it is well-established that international tribunals, such as U.S.-Panama TPA Chapter Ten tribunals, are not empowered to be supranational courts of appeal on a court’s application of domestic law.¹¹

Articles 10.3 and 10.4 (National Treatment and Most-Favored-Nation Treatment)

5. Article 10.3 provides in relevant part (emphases added):

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

⁷ Harvard Draft at 178 (noting that a “manifestly unjust judgment” is one that is a “travesty upon justice or grotesquely unjust”); *Eli Lilly and Co. v. Canada*, NAFTA/ICSID Case No. UNCT/14/2, Supplemental Submission of the United States of America ¶ 5 (June 8, 2016).

⁸ *Eli Lilly and Co. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/14/2, Supplemental Submission of the United States of America ¶ 5 (June 8, 2016); *Mondev Int’l Ltd. v. United States of America*, NAFTA/ICSID, Case No. ARB(AF)/99/2, Counter-Memorial on Competence and Liability of Respondent United States of America, at 45 (June 1, 2001) (citing *B.E. Chattin (U. S. v. Mexico)*, 4 R.I.A.A. 282, 286-87 (1927)).

⁹ Harvard Draft at 175.

¹⁰ *Id.* at 134 (“An error of a national court which does not produce manifest injustice is not a denial of justice.”); PAULSSON at 81 (“The erroneous application of national law cannot, in itself, be an international denial of justice.”); PATRICK DUMBERRY, *THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105* at 229 (2013) (noting that a simple error, misinterpretation or misapplication of domestic law is not per se a denial of justice) (internal quotes omitted); BORCHARD at 196 (explaining that a government is not responsible for the mistakes or errors of its courts and that: “[A]s a general rule the state is not liable for the acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort.”); Christopher Greenwood, *State Responsibility for the Decisions of National Courts, in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS* 61 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004) (“[I]t is well established that a mistake on the part of the court or an irregularity in procedure is not in itself sufficient to amount to a violation of international law; there must be a denial of justice.”).

¹¹ *Apotex Inc. v. United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction and Admissibility ¶ 278 (June 14, 2013) (“[I]t is not the proper role of an international tribunal established under NAFTA Chapter Eleven to substitute itself for the U.S. Supreme Court, or to act as a supranational appellate court.”); *Robert Azinian et. al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award ¶ 99 (Nov. 1, 1999) (“The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA.”); *Waste Management Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/00/3, Final Award ¶ 129 (Apr. 30, 2004) (“[T]he Tribunal would observe that it is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of amparo in respect of the decisions of the federal courts of NAFTA parties.”); *Barcelona Traction* at 158 (explaining that erroneous decisions of municipal law cannot constitute a denial of justice because the interpretation of municipal law “does not belong to the realm of international law. If an international tribunal were to take up these issues and examine the regularity of the decisions of municipal courts, the international tribunal would turn out to be a ‘*cour de cassation*’, the highest court in the municipal law system. An international tribunal, on the contrary, belongs to quite a different order; it is called upon to deal with international affairs, not municipal affairs.”).

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

6. Article 10.4 provides (emphases added):

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

7. Articles 10.3 (National Treatment) and 10.4 (Most-Favored-Nation Treatment) require the Parties to the Agreement to accord to investors of the other Party and to covered investments treatment no less favorable than that accorded to a Party's own investors and investments, or the investors or investments of a non-Party, respectively, to the extent they are in like circumstances. If a Party does not "accord . . . treatment" to an investor of the other Party or to a covered investment, there can be no breach of these provisions.¹²

8. Articles 10.3 and 10.4 are intended to prevent discrimination on the basis of nationality between domestic investors (or investments) and investors (or investments) of the other Party, in the case of Article 10.3, and between investors (or investments) of the other Party and investors (or investments) of a non-Party, in the case of Article 10.4, that are in "like circumstances." They are not intended to prohibit all differential treatment among investors or investments. Rather, they are designed only to ensure that the Parties do not treat entities that are "in like circumstances" differently based on nationality.¹³

9. As the United States has previously explained in the NAFTA context, one of the steps required to establish a National Treatment violation is to identify domestic investors or investments in like circumstances (sometimes referred to as "comparators") with the claimant or claimant's investments.¹⁴ If the claimant does not identify any domestic investor or investment as allegedly being in like circumstances, no violation of Article 10.3 can be established.

¹² *United Parcel Service of America Inc. v. Canada*, NAFTA/ICSID Case No. UNCT/02/1, Award on the Merits ¶ 83(a) (May 24, 2007).

¹³ *Loewen Award* ¶ 139 (accepting in the NAFTA context that "Article 1102 [National Treatment] is direct[ed] *only* to nationality-based discrimination . . .") (emphasis added); *Mercer Int'l Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Award ¶ 7.7 (Mar. 6, 2018) ("*Mercer Award*") ("accept[ing]" the positions of the United States and Mexico that the National Treatment and Most-Favored Nations obligations are intended to prevent discrimination on the basis of nationality).

¹⁴ *Apotex Holdings Inc. and Apotex Inc., v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/12/1, Counter-Memorial on Merits and Objections to Jurisdiction of Respondent United States of America ¶ 324 (Dec. 14, 2012).

10. The steps required to establish a Most-Favored-Nation Treatment violation are the same as those required to establish a National Treatment violation, except that the applicable comparators are investors or investments of non-Parties.¹⁵ Thus, as is the case for a claim under Article 10.3, if a claimant does not identify such non-Party investors or investments as allegedly being in like circumstances with the claimant or claimant’s investments, no violation of Article 10.4 can be established.

11. As the United States has previously explained in the context of the National Treatment obligation in the NAFTA (Article 1102), the ordinary meaning of the term “like products” in trade agreements such as the General Agreement on Tariffs and Trade 1994 (“GATT 1994”) is not the same as “like circumstances.”¹⁶ The phrase “in like circumstances” contemplates that broad account be taken of the circumstances of the treatment, the investor and the investment.¹⁷ This is a fact-specific inquiry, requiring consideration of more than just the business or economic sector, but also the legal and regulatory frameworks which apply to or govern the conduct of investors or investments (including any relevant policy objectives), among other possible relevant characteristics.¹⁸

12. Articles 10.3 and 10.4 of the U.S.-Panama TPA address discrimination on the basis of the *nationality of investors and their investments*, and do not address discrimination based on the origin of goods. As a result, decisions interpreting the term “like products” in the GATT 1994 are inapposite in ascertaining whether an investor or an investment has been accorded less favorable treatment within the meaning Articles 10.3 and 10.4 of the U.S.-Panama TPA.¹⁹

Article 10.16.1 (Proximate Causation)

13. Article 10.16.1 provides in relevant part (emphases added):

¹⁵ *Mercer Award* ¶ 7.10.

¹⁶ *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Amended Statement of Defense of Respondent United States of America, at 128 (Dec. 5, 2003) (“*Methanex*, U.S. Amended Statement of Defense”) (explaining with respect to the national treatment obligation in NAFTA Article 1102, that, “[g]iven the significant differences between the texts, the contexts and the objects and purposes here, there is no basis for reading Article 1102 to incorporate a GATT ‘like products’ analysis. For these reasons, the GATT and WTO authorities cited by Methanex are inapposite.”).

¹⁷ *Methanex*, U.S. Amended Statement of Defense, at 126 (“Depending on the treatment in question, the product produced by an investment might be *part of* the relevant circumstances contemplated by Article 1102 – or it might not be.”) (emphasis in original).

¹⁸ *Mesa Power Group v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America, ¶ 13 (July 25, 2014) (citing *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Award on the Merits Phase 2, ¶ 75 (Apr. 10, 2001) (“It goes without saying that the meaning of the term [‘in like circumstances’] will vary according to the facts of a given case. By their very nature, ‘circumstances’ are context dependent and have no unalterable meaning across the spectrum of fact situations.”)).

¹⁹ *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, Part IV, Ch. B, ¶¶ 29-35, 37 (Aug. 3, 2005) (“the text and the drafters’ intentions, which it manifests, show that trade provisions were not to be transported to investment provisions. Accordingly, the Tribunal holds that Article 1102 [National Treatment] is to be read on its own terms and not as if the words ‘any like, directly competitive or substitutable goods’ appeared on it.”); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Rejoinder of Respondent United States of America ¶¶ 164-165 (Apr. 23, 2004).

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

- (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached [a relevant obligation] and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
- (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim (i) that the respondent has breached [a relevant obligation] and (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

14. As the United States has previously explained with respect to substantively identical language in NAFTA Articles 1116(1) and 1117(1), the ordinary meaning of “by reason or arising out of” requires an investor to demonstrate proximate causation.²⁰ In this connection, NAFTA tribunals have consistently imposed a requirement of proximate causation under NAFTA Articles 1116(1) and 1117(1). For example, the *S.D. Myers* tribunal held that damages may only be awarded to the extent that there is a “sufficient causal link” between the breach of a specific NAFTA provision and the loss sustained by the investor,²¹ and then subsequently clarified that “[o]ther ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the *proximate* cause of the harm.”²²

15. Indeed, proximate causation is an “applicable rule[] of international law” that under the U.S.-Panama TPA Article 10.22.1 must be taken into account in fixing the appropriate amount, if any, of monetary damages.²³ Article 10.16.1 contains no indication that the Agreement Parties

²⁰ *William Ralph Clayton et al. v. Government of Canada*, NAFTA/PCA Case No. 2009-04, Submission of the United States of America ¶¶ 23-27 (Dec. 29, 2017); *Methanex, U.S. Amended Statement of Defense* ¶ 213; *Grand River Enterprises Six Nations LTD, et al. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America, at 174-75 (Dec. 22, 2008) (“Claimants must show that the compensation they seek ‘is proved to have a sufficient causal link with the specific NAFTA provision that has been breached’ and ‘not from other causes.’ ‘[T]he harm must not be too remote’ and ‘the breach of the specific NAFTA provision must be the *proximate* cause of the harm.’”) (quoting from the first and second partial awards in *S.D. Myers v. Government of Canada*) (footnotes omitted); *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Seventh Submission of the United States of America ¶¶ 2, 13 (Nov. 6, 2001) (only damages proximately caused by a breach may be recovered); *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America ¶ 12 (Sept. 18, 2001) (a tribunal’s task is limited to assessing whether there has been a breach and whether the investor or investment suffered loss or damages proximately caused by such a breach).

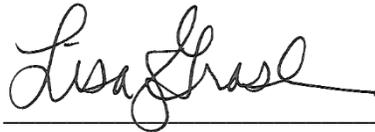
²¹ *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 316 (Nov. 13, 2000).

²² *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Second Partial Award ¶ 140 (Oct. 21, 2002). See also *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award in Respect of Damages ¶ 80 (May 31, 2002) (holding that under NAFTA Article 1116 the claimant bears the burden to “prove that loss or damages was caused to its interest, and that it was causally connected to the breach complained of[]”); *Archer Daniels Midland Co. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/04/05, Award ¶ 282 (Nov. 21, 2007) (requiring a “sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such an injury.”).

²³ See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, art. 31, comment 10 (2001) (“ILC Draft Articles”). See also *Administrative Decision No. II (U.S. v. Germany)*, 7 R.I.A.A. 23, 29 (1923) (proximate cause is “a rule of general application both in private and public law – which clearly the parties to the Treaty had no intention of abrogating”); *United States Steel Products (U.S. v. Germany)*, 7 R.I.A.A. 44, 54-55, 58-59, 62-63 (1923) (rejecting on proximate cause grounds a group of

intended to vary from this established rule.²⁴ Accordingly, any loss or damage cannot be based on an assessment of acts, events, or circumstances not attributable to the alleged breach.²⁵ Injuries that are not sufficiently “direct,” “foreseeable,” or “proximate” may not, consistent with applicable rules of international law, be considered when calculating a damage award.²⁶

Respectfully submitted,



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claims seeking reimbursement for war-risk insurance premiums); *Dix Case (U.S. v. Venezuela)*, 9 R.I.A.A. 119, 121 (undated) (“International as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure.”); *H. G. Venable (U.S. v. Mexico)*, 4 R.I.A.A. 219, 225 (1927) (construing the phrase “originating from” as requiring that “only those damages can be considered as losses or damages caused by [the official] which are immediate and direct results of his [action]”). *See also* BIN CHENG, *GENERAL PRINCIPLES OF INTERNATIONAL LAW* 244-45 (1953) (“it is ‘a rule of general application both in private and public law,’ equally applicable in the international legal order, that the relation of cause and effect operative in the field of reparation is that of proximate causality in legal contemplation”).

²⁴ *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)* 1989 I.C.J. 15, ¶ 50 (Judgment of July 1989) (“Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with [by an international agreement], in the absence of any words making clear an intention to do so.”); *Loewen Award* ¶¶ 160, 162 (“It would be strange indeed if sub silentio the international rule were to be swept away.”).

²⁵ *See* ILC Draft Articles, art. 31, comment 9 (noting that the language of Article 31(2) providing that injury includes damage “caused by the internationally wrongful act of a State,” “is used to make clear that the subject matter of reparation is, globally, the injury *resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.*”) (emphasis added).

²⁶ ILC Draft Articles, art. 31, comment 10 (explaining that causality in fact is a necessary but not sufficient condition for reparation: “There is a further element, associated with the exclusion of injury that is too ‘remote’ or ‘consequential’ to be the subject of reparation. In some cases, the criterion of ‘directness’ may be used, in others ‘foreseeability’ or ‘proximity’. . . . The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act[.]”) (footnotes omitted).