

IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ICSID ARBITRATION RULES

LEGACY VULCAN, LLC

Claimant

-and-

UNITED MEXICAN STATES,

Respondent.

ICSID CASE NO. ARB/19/1

SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA), the United States of America makes this submission on questions of interpretation of the NAFTA. The United States does not take a position, in this submission, on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

Article 1105 (Minimum Standard of Treatment)

2. Article 1105(1) requires each Party to “accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

3. On July 31, 2001, the Free Trade Commission (“Commission”), comprising the NAFTA Parties’ cabinet-level representatives, issued an interpretation reaffirming that “Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.”¹ The Commission clarified that 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 the customary international law minimum standard of treatment of aliens.”² The Commission also confirmed that “a breach of another provision of the NAFTA, or of a separate international

¹ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions ¶ B.1 (July 31, 2001) (“FTC Interpretation”).

² *Id.* ¶ B.2.

agreement, does not establish that there has been a breach of Article 1105(1).”³ The Commission’s interpretation “shall be binding” on tribunals established under Chapter Eleven.⁴

4. The Commission’s interpretation thus confirms the NAFTA Parties’ express intent to establish the customary international law minimum standard of treatment as the applicable standard in NAFTA Article 1105. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts.⁵ The standard establishes a minimum “floor below which treatment of foreign investors must not fall.”⁶

5. Customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation. This two-element approach—State practice and *opinio juris*—is the standard practice of States and international courts, including the International Court of Justice.⁷

³ *Id.* ¶ B.3.

⁴ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, art. 1131(2) (1993).

⁵ A fuller description of the U.S. position is set out in *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America (Nov. 13, 2000); *ADF Group Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/00/1, Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot* (June 27, 2002); *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Sept. 19, 2006); *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Dec. 22, 2008).

⁶ *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 259 (Nov. 13, 2000) (“*S.D. Myers* First Partial Award”); *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 615 (June 8, 2009) (“*Glamis* Award”) (“The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community.”); see also Edwin Borchard, *The “Minimum Standard” of the Treatment of Aliens*, 33 AM. SOC’Y OF INT’L L. PROC. 51, 58 (1939).

⁷ See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, 122 (Feb. 3) (“*Jurisdictional Immunities of the State*”) (“In particular . . . the existence of a rule of customary international law requires that there be ‘a settled practice’ together with *opinio juris*.”) (citing *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, 1969 I.C.J. 44, ¶ 77 (Feb. 20) (“*North Sea Continental Shelf*”)); see also *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, ¶ 27 (June 3) (“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States[.]”). See also Draft Conclusions on Identification of Customary International Law, A/73/10, International Law Commission (2018) (“ILC Draft Conclusions on Identification of Customary International Law”), Conclusion 2 (“To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).”); *id.* Commentary ¶ 1 (“This methodology, the ‘two-element approach’, underlies the draft conclusions and is widely supported by States, in case law, and in scholarly writings.”).

6. Relevant State practice must be widespread and consistent⁸ and be accepted as law, meaning that the practice must also be accompanied by a sense of legal obligation.⁹ “[T]he indispensable requirement for the identification of a rule of customary international law is that *both* a general practice and acceptance of such practice as law (*opinio juris*) be ascertained.”¹⁰ A perfunctory reference to these requirements is not sufficient.¹¹

7. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate, under this two-step approach, that a rule of customary international law exists. In its decision on *Jurisdictional Immunities of the State (Germany v. Italy)*, the ICJ emphasized that “[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States,” and noted as examples of State practice relevant national court decisions or domestic legislation dealing with the particular issue alleged to be the norm of customary international law, as well as official declarations by relevant State actors on the subject.¹²

⁸ See, e.g., *North Sea Continental Shelf*, 1969 I.C.J. at 43 (noting that in order for a new rule of customary international law to form, “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”); ILC Draft Conclusions on Identification of Customary International Law, Conclusion 8 and commentaries (citing authorities).

⁹ *North Sea Continental Shelf*, 1969 I.C.J. at 44 (“Not only must the acts concerned amount to a settled practice, but they must also be such, or be 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 necessitatis*. 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 and 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.”); ILC Draft Conclusions on Identification of Customary International Law, Conclusion 9 and commentaries (citing authorities).

¹⁰ ILC Draft Conclusions on Identification of Customary International Law, Commentary on Part Three (emphasis added); see also *id.* Conclusion 2, Commentary ¶ 4 (“As draft conclusion 2 makes clear, the presence of only one constituent element does not suffice for the identification of a rule of customary international law. Practice without acceptance as law (*opinio juris*), even if widespread and consistent, can be no more than a non-binding usage, while a belief that something is (or ought to be) the law unsupported by practice is mere aspiration; it is the two together that establish the existence of a rule of customary international law.”).

¹¹ See PATRICK DUMBERRY, *THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105*, at 115 (2013) (observing that the tribunal in *Merrill & Ring* failed “to cite a single example of State practice in support of” its “controversial findings”); UNCTAD, *FAIR AND EQUITABLE TREATMENT – UNCTAD SERIES ON ISSUES IN INTERNATIONAL AGREEMENTS II*, at 57 (2012) (“The *Merrill & Ring* tribunal failed to give cogent reasons for its conclusion that MST made such a leap in its evolution, and by doing so has deprived the 2001 NAFTA Interpretive Statement of any practical effect.”).

¹² *Jurisdictional Immunities of the State*, 2012 I.C.J. at 122-23 (discussing relevant materials that can serve as evidence of State practice and *opinio juris* in the context of jurisdiction immunity in foreign courts). See also ILC Draft Conclusions on Identification of Customary International Law, Conclusion 6(2) (“Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct ‘on the ground’; legislative and administrative acts; and decisions of national courts.”); Comments from the United States on the International Law Commission’s Draft Conclusions

8. As all three NAFTA Parties agree,¹³ the burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*.¹⁴ “The party which relies on a custom . . . must prove that this custom is established in such a manner that it has become binding on the other Party.”¹⁵ Tribunals applying the minimum standard of treatment obligation in Article 1105 have confirmed that the party seeking to rely on a rule of customary international law must establish its existence. The tribunal in *Cargill Inc. v. United Mexican States*, for example, acknowledged that

the proof of change in a custom is not an easy matter to establish. However, *the burden of doing so falls clearly on Claimant*. If Claimant does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task.

on the Identification of Customary International Law as Adopted by the Commission in 2016 on First Reading at 17 (under cover of diplomatic note dated Jan. 5, 2018) (explaining that while resolutions adopted by an international organization or at an intergovernmental conference “may provide relevant information regarding a potential rule of customary international law, . . . [such] resolutions must be approached with a great deal of caution,” including because “many resolutions of international organizations and conferences are adopted with minimal debate and consideration and through procedures (such as by consensus) that provide limited insight into the views of particular States.”); *id.* at 18 (noting that national court decisions are not themselves sources of international law (except where they may constitute State practice), but rather are sources that may help elucidate rules of law where they accurately compile and soundly analyze evidence of State practice and *opinio juris*).

¹³ See, e.g., *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Canada’s Rejoinder on the Merits ¶ 147 (July 2, 2014) (“[I]t is a well-established principle of international law that the party alleging the existence of a rule of customary international law bears the burden of proving it. Thus, the burden is on the Claimant to prove that customary international law has evolved to include the elements it claims are protected.”) (footnote omitted); *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Second Submission of the United States of America ¶ 13 (June 12, 2015) (“the burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*.”); *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Second Submission of Mexico Pursuant to NAFTA Article 1128, ¶ 9 (June 12, 2015) (concurring with the United States’ position that the burden is on a claimant to establish a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*). As explained below (see *infra* paragraph 14), pursuant to the customary international law principles of treaty interpretation reflected in the Vienna Convention on the Law of Treaties, the Tribunal must take into account this common understanding of the Parties.

¹⁴ *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20); see also *North Sea Continental Shelf*, 1969 I.C.J. at 43; *Glamis Award* ¶¶ 601-02 (noting that the claimant bears the burden of establishing a change in customary international law, by showing “(1) a concordant practice of a number of States acquiesced in by others, and (2) a conception that the practice is required by or consistent with the prevailing law (*opinio juris*).”) (citations and internal quotation marks omitted).

¹⁵ *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, 1952 I.C.J. 176, 200 (Aug. 27) (“The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.”) (citation and internal quotation marks omitted); *S.S. “Lotus” (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, at 25-26 (Sept. 27) (holding that the claimant had failed to “conclusively prove” the “existence of . . . a rule” of customary international law).

Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.¹⁶

9. Once a rule of customary international law has been established, the claimant must then show that the respondent State has engaged in conduct that violates that rule.¹⁷ A determination of a breach of the minimum standard of treatment “must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.”¹⁸ Chapter Eleven tribunals do not have an open-ended mandate to “second-guess government decision-making.”¹⁹ A failure to satisfy requirements of domestic law does not necessarily violate international law.²⁰ Rather, “something more than simple illegality or lack of authority under the domestic law of a state is

¹⁶ *Cargill Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/2, Award ¶ 273 (Sept. 18, 2009) (“*Cargill Award*”) (emphasis added). The *ADF*, *Glamis*, and *Methanex* tribunals likewise placed on the claimant the burden of establishing the content of customary international law. See *ADF Group, Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/00/1, Award ¶ 185 (Jan. 9, 2003) (“*ADF Award*”) (“The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts.”); *Glamis Award* ¶ 601 (“As a threshold issue, the Tribunal notes that it is Claimant’s burden to sufficiently” show the content of the customary international law minimum standard of treatment); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Part IV, Chapter C ¶ 26 (Aug. 3, 2005) (citing *Asylum (Colombia v. Peru)* for placing burden on claimant to establish the content of customary international law, and finding that claimant, which “cited only one case,” had not discharged burden).

¹⁷ *Feldman v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) (“[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.”) (citation omitted).

¹⁸ *S.D. Myers* First Partial Award ¶ 263.

¹⁹ *S.D. Myers* First Partial Award ¶ 261 (“When interpreting and applying the ‘minimum standard,’ a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.”); *Glamis Award* ¶ 779 (“It is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency.”); *International Thunderbird Inc. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 127 (Jan. 26, 2006) (“*Thunderbird Award*”) (reasoning that States have “wide discretion” with respect to how they carry out policies in the context of gambling operations).

²⁰ *ADF Award* ¶ 190 (“[T]he Tribunal has no authority to review the legal validity and standing of the U.S. measures here in question under *U.S. internal administrative law*. We do not sit as a court with appellate jurisdiction with respect to the U.S. measures. Our jurisdiction is confined by NAFTA Article 1131(1) to assaying the consistency of the U.S. measures with relevant provisions of NAFTA Chapter 11 and applicable rules of international law.”) (emphasis in original, citations omitted); see also *GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 97 (Nov. 15, 2004) (“The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law.”); *Thunderbird Award* ¶ 160 (“[I]t is not up to the Tribunal to determine how [the state regulatory authority] should have interpreted or responded to the [proposed business operation], as by doing so, the Tribunal would interfere with issues of purely domestic law and the manner in which governments should resolve administrative matters (which may vary from country to country).”).

necessary to render an act or measure inconsistent with the customary international law requirements. . . .”²¹ Accordingly, a departure from domestic law does not in-and-of-itself sustain a violation of Article 1105.

10. States may decide expressly by treaty to make policy decisions to extend protections under the rubric of “fair and equitable treatment” and “full protection and security” beyond that required by customary international law.²² The practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 1105 in which “fair and equitable treatment” and “full protection and security” are expressly tied to the customary international law minimum standard of treatment.²³ Thus, arbitral decisions interpreting “autonomous” fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 1105(1).²⁴ Likewise, decisions of international courts and arbitral tribunals interpreting “fair and equitable treatment” as a concept of customary international law are not themselves instances of “State practice” for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice.²⁵ A formulation of a purported rule

²¹ *ADF Award*, ¶ 190.

²² See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 2007 I.C.J. 582, ¶ 90 (May 24) (“The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.”).

²³ FTC Interpretation ¶ B.1 (“Article 1105(1) prescribes the customary international law minimum standard of treatment); see also *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 176 (Jan. 12, 2011) (noting that an obligation under Article 1105 of the NAFTA “must be determined by reference to customary international law, not to standards contained in other treaties or other NAFTA provisions, or in other sources, unless those sources reflect relevant customary international law”). While there may be overlap in the substantive protections ensured by NAFTA and other treaties, a claimant submitting a claim under the NAFTA, in which fair and equitable treatment is defined by the customary international law minimum standard of treatment, still must demonstrate that the obligations invoked are in fact a part of customary international law.

²⁴ See, e.g., *Glamis Award* ¶ 608 (concluding that “arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom”); *Cargill Award* ¶ 278 (noting that arbitral “decisions are relevant to the issue presented in Article 1105(1) only if the fair and equitable treatment clause of the BIT in question was viewed by the Tribunal as involving, like Article 1105, an incorporation of the customary international law standard rather than autonomous treaty language.”).

²⁵ See, e.g., *Glamis Award* ¶ 605 (“Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law. They can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation.”) (footnote omitted); *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, 2018 I.C.J. 507, ¶ 162 (Oct. 1) (“The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia’s argument based on legitimate expectations thus cannot be sustained.”). All three NAFTA Parties further agree that decisions of arbitral tribunals are not evidence in themselves of customary international law. See, e.g.,

of customary international law based entirely on arbitral awards that lack an examination of State practice and *opinio juris* fails to establish a rule of customary international law as incorporated by Article 1105(1).

11. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, which is expressly addressed in Article 1105(1), concerns the obligation to provide “fair and equitable treatment.” The “fair and equitable treatment” obligation includes, for example, the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. Other such areas concern the obligation to provide “full protection and security,” which is also expressly addressed in Article 1105(1), and the obligation not to expropriate covered investments, except under the conditions specified in Article 1110.

12. The concept of “legitimate expectations” is not a component element of “fair and equitable treatment” under customary international law that gives rise to an independent host State obligation. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors’ expectations; instead, something more is required.²⁶ An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment.

NAFTA Article 1103 Does Not Alter the Substance of the Fair and Equitable Treatment Obligation Under Article 1105(1)

13. The most-favored-nation (“MFN”) treatment provision in Article 1103 cannot be used to expand the scope of fair and equitable treatment. As noted above, the Commission’s July 31,

Mesa Power Group LLC v. Government of Canada, NAFTA/UNCITRAL, Second Submission of the United States of America ¶ 14 (June 12, 2015) (“Decisions of international courts and tribunals do not constitute State practice or *opinio juris* for purposes of evidencing customary international law.”); *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Second Submission of Mexico Pursuant to NAFTA Article 1128 ¶ 10 (June 12, 2015) (“Mexico concurs with Canada’s submission that decisions of arbitral tribunals are not themselves a source of customary international law.”); *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Canada’s Response to 1128 Submissions ¶ 11 (June 26, 2015) (“Canada has explained at length in its pleadings as to why decisions of international investments tribunals are not a source of State practice for the purpose of establishing a new customary norm.”).

²⁶ See, e.g., *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America 96 (Dec. 22, 2008) (“As a matter of international law, although an investor may develop its own expectations about the legal regime that governs its investment, those expectations do not impose a legal obligation on the State.”). See also *Azinian v. Mexico*, NAFTA/ICSID Case No. ARB/(AF)/97/2, Award ¶ 87 (Mar. 24, 1997) (“NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes.”); *Waste Management, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/00/3, Award ¶ 115 (Apr. 30, 2004) (explaining that “even the persistent non-payment of debts by a municipality is not equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and . . . some remedy is open to the creditor to address the problem.”); PATRICK DUMBERRY, *THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105*, at 159-60 (2013) (“In the present author’s view, there is little support for the assertion that there exists under customary international law any obligation for host States to protect investors’ legitimate expectations.”).

2001 interpretation of the NAFTA confirmed that “Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.”²⁷ The Commission clarified that “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 the customary international law minimum standard of treatment of aliens.”²⁸ The Commission also stated that “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).”²⁹

14. The three NAFTA Parties have confirmed, through subsequent submissions commenting on the Commission’s interpretation, that the most-favored-nation treatment obligation under Article 1103 does not alter the substantive content of the fair and equitable treatment obligation under Article 1105(1).³⁰ Pursuant to customary international law principles of treaty interpretation, as reflected in Article 31(3)(a)-(b) of the Vienna Convention on the Law of Treaties, “[t]here shall be taken into account, together with context, (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; [and] (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; . . .”³¹ In accordance with these

²⁷ Free Trade Commission, Interpretation of NAFTA, July 31, 2001, at 2.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Mesa Power Group, LLC v. Canada*, NAFTA/PCA Case No. 2012-17, Canada’s Rejoinder on the Merits ¶ 152 (July 2, 2014) (“The Claimant is misguided in suggesting that the substantive content of Article 1105 is modified by Article 1103, Chapter 11’s MFN provision, through the incorporation of standards of treatment found in other treaties. All three NAFTA Parties have consistently rejected this proposition. The FTC Note is binding on this Tribunal and mandates that it interpret Article 1105(1) as providing for the customary international law standard of treatment of aliens and nothing else. As a matter of law, the provisions of other treaties, and other clauses in NAFTA including the MFN clause are, therefore, irrelevant.”); *Mesa Power Group, LLC v. Canada*, NAFTA/PCA Case No. 2012-17, Submission of the United States ¶ 10 (July 25, 2014); *Apotex Holdings Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/12/1, U.S. Counter-Memorial on Merits and Objection to Jurisdiction ¶¶ 385-89 (Dec. 14, 2012); *Chemtura Corp. v. Canada*, NAFTA/UNCITRAL, Submission of the United States ¶¶ 2-9 (July 31, 2009); *Chemtura Corp. v. Canada*, NAFTA/UNCITRAL, Submission of Mexico ¶¶ 3-5 (July 31, 2009). See also *Pope & Talbot, Inc. v. Canada*, NAFTA/UNCITRAL, Letter from M. Kinnear to Tribunal 3-4 (Oct. 1, 2001); *Pope & Talbot, Inc. v. Canada*, NAFTA/UNCITRAL, Letter from H. Perezcano Díaz to Tribunal 1 (Oct. 1, 2001); *Pope & Talbot, Inc. v. Canada*, NAFTA/UNCITRAL, Sixth Submission (Corrected) of the United States of America ¶ 2 (Oct. 2, 2001).

³¹ Vienna Convention on the Law of Treaties, art. 31(3)(a)-(b), May 23, 1969, 1155 U.N.T.S. 331; see also International Law Commission, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries, Conclusion 3, UN Doc. A/73/10 (2018) (“Subsequent agreements and subsequent practice under Article 31, paragraph 3(a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.”); *id.*, cmt. 3 (“By describing subsequent agreements and subsequent practice under article 31, paragraph 3(a) and (b), as ‘authentic’ means of interpretation, the Commission recognizes that the common will of the parties, which underlies the treaty, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusion of the treaty.”).

principles, the Tribunal must take into account the NAFTA Parties' common understanding, as evidenced by these submissions.³²

Article 1103 (Most-Favored-Nation Treatment)

15. Article 1103 requires each Party to accord to investors of another Party, and their investments, “treatment no less favorable than that it accords, in like circumstances, to” investors, or investments of investors, “of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”

16. To establish a breach of MFN treatment under Article 1103, a claimant has the burden of proving that it or its investments: (1) were accorded “treatment”; (2) were in “like circumstances” with identified investors or investments of a non-Party or another Party; and (3) received treatment “less favorable” than that accorded to those identified investors or investments.

17. Thus, if a claimant does not identify investors or investments of a non-Party or another Party as allegedly being “in like circumstances” with the claimant or its investment, no violation of Article 1103 can be established. The MFN clause of the NAFTA expressly requires a claimant to demonstrate that investors or investments of another Party or a non-Party “in like circumstances” were afforded more favorable treatment. Ignoring the “in like circumstances” requirement would serve impermissibly to excise key words from the Agreement.

18. With respect to the third component of an MFN claim, a claimant must also establish that the alleged non-conforming measures that constituted “less favorable” treatment are not subject to the exceptions contained in Annex IV of the NAFTA. In particular, all Parties took an exception “to Article 1103 for *treatment* accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement.” (Emphasis added). In this connection, as the United States has previously explained, “Article 1103 is not a

³² See, e.g., *Clayton v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2009-04, Award on Damages ¶¶ 379 (Jan. 10, 2019) (“[T]he consistent practice of the NAFTA Parties in their submissions before Chapter Eleven tribunals . . . can be taken into account in interpreting the provisions of NAFTA. Thus, the NAFTA Parties’ subsequent practice militates in favour of adopting the Respondent’s position on this issue[.]”); *Mobil Investments Canada Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility ¶¶ 103, 104, 158, 160 (July 13, 2018) (explaining that the approach advocated by claimant had “clearly been rejected by all three NAFTA Parties in their practice subsequent to the adoption of NAFTA,” as evidenced by “their submissions to other NAFTA tribunals,” and that “[i]n accordance with the principle enshrined in Article 31(3)(b) of the Vienna Convention on the Law of Treaties, 1969, the subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the interpretation of the treaty, is entitled to be accorded considerable weight.”); *Canadian Cattlemen for Fair Trade v. United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction ¶¶ 188, 189 (Jan. 28, 2008) (explaining that “the available evidence cited by the Respondent,” including submissions by the NAFTA Parties in arbitration proceedings, “demonstrates to us that there is nevertheless a ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications[.]’”); International Law Commission, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries, Conclusion 4, cmt. 18, UN Doc. A/73/10 (2018) (stating that subsequent practice under Article 31(3)(b) of the Vienna Convention “includes not only official acts at the international or at the internal level that serve to apply the treaty . . . but also, *inter alia*, . . . statements in the course of a legal dispute . . .”).

choice-of-law clause.”³³ Rather, it addresses “the actual ‘treatment’ accorded with respect to an investment of another Party as compared to that accorded to other foreign-owned investments.”³⁴

Limitations on Loss or Damage

Causation

19. Articles 1116 and 1117 allow an investor to recover loss or damage incurred “by reason of or arising out of” a breach of an obligation under NAFTA Chapter Eleven, Section A. In this connection, an investor may recover such damages only to the extent that they are established on the basis of satisfactory evidence that is not inherently speculative.³⁵

20. The ordinary meaning of Articles 1116 and 1117 requires an investor to establish the causal nexus between the alleged breach and the claimed loss or damage.³⁶ It is well-established that “causality in fact is a necessary but not a sufficient condition for reparation.”³⁷ The standard for factual causation is known as the “but-for” or “*sine qua non*” test whereby an act causes an outcome if the outcome would not have occurred in the absence of the act. This test is not met if the same result would have occurred had the breaching State acted in compliance with its obligations.³⁸

³³ *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Response of Respondent United States of America to Methanex’s Submission Concerning the NAFTA Free Trade Commission’s July 31, 2001 Interpretation at 9 (Oct. 26, 2001).

³⁴ *Id.*

³⁵ As the International Law Commission has recognized, a State responsible for an internationally wrongful act shall compensate for the resulting damage caused “insofar as [that damage] is established.” International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 36(2) (2001) (“ILC Draft Articles”). Specifically, as the ILC observes, “[t]ribunals have been reluctant to provide compensation for claims with inherently speculative elements.” *Id.*, cmt. 27 (citing cases); *see also S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Second Partial Award ¶ 173 (Oct. 21, 2002) (“*S.D. Myers* Second Partial Award”) (“to be awarded, the sums in question must be neither speculative nor too remote.”); *Mobil Investments Canada Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum ¶¶ 437-39 (May 22, 2012) (accord).

³⁶ H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 422 (2d ed. 1985) (noting that it is generally the claimant’s burden to “persuade the tribunal of fact of the existence of causal connection between wrongful act and harm”); *see Islamic Republic of Iran v. United States of America*, AWD 601-A3/A8/A9/A14/B61-FT ¶ 153 (July 17, 2009), 38 Iran-U.S. C.T.R. 197, 223 (“Iran, as the Claimant, is required to prove that it has suffered losses . . . and that such losses were *caused by* the United States”) (emphasis added).

³⁷ ILC Draft Articles, art. 31, cmt. 10 (2001). The Iran-U.S. Claims Tribunal reaffirmed this principle in the remedies phase of Case A/15(IV) when it held that it must determine whether the “United States’ breach caused ‘factually’ the harm . . . and that that loss was also a ‘proximate’ consequence of the United States’ breach.” *Islamic Republic of Iran v. United States of America*, AWD 602-A15(IV)/A24-FT ¶ 52 (July 2, 2014) (“A/15(IV) Award”).

³⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 I.C.J. 40, ¶ 462 (Feb. 26); A/15(IV) Award ¶ 52 (“[I]f one were to reach the conclusion that both tortious (or obligation-breaching) and non-tortious (obligation-compliant) conduct of the same person would have led to the same result, one might question that the tortious (or obligation-breaching) conduct was *condicio sine qua non* of the loss the claimant seeks to recover.”).

21. The ordinary meaning of the term “by reason of, or arising out of” also requires an investor to demonstrate proximate causation. Proximate causation is an “applicable rule[] of international law” that under Article 1131(1) must be taken into account in fixing the appropriate amount of monetary damages.³⁹ Articles 1116 and 1117 contain no indication that the NAFTA Parties intended to vary from this established rule. Indeed, all three NAFTA Parties have expressed their agreement that proximate causation is a requirement under NAFTA Chapter Eleven.⁴⁰

22. NAFTA tribunals have, moreover, consistently imposed a requirement of proximate causation under Articles 1116 and 1117. 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,⁴¹ 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.”⁴² In *Pope & Talbot*, the tribunal held that under Article 1116 the claimant bears the burden to “prove that loss or damage was caused to its interest, and that it was causally connected to the breach

³⁹ See ILC Draft Articles, art. 31, cmt. 10. 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 claims seeking reimbursement for war-risk insurance premiums); *Dix (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 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”).

⁴⁰ See, e.g., *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Amended Statement of Defense of the United States of America ¶ 213 (Dec. 5, 2003); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Fourth Submission of the United Mexican States ¶ 2 (Jan. 30, 2004) (“Mexico agrees . . . that Chapter Eleven incorporates a standard of proximate cause through the use of the phrase ‘has incurred loss or damage by reason of, or arising out of’ a Party’s breach of one of the NAFTA provisions listed in Articles 1116 and 1117.”) (footnote omitted); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Second Submission of Canada Pursuant to NAFTA Article 1128, ¶ 47 (Apr. 30, 2001) (“The ordinary meaning of the words ‘by reason of, or arising out of’ establishes that there must be a clear and direct nexus between the breach and the loss or damage incurred.”). See also *Resolute Forest Products, Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-3, Second Submission of the United States of America ¶ 31 (Apr. 20, 2020) (“The ordinary meaning of the term ‘by reason of, or arising out of’ also requires an investor to demonstrate proximate causation.”); *Resolute Forest Products, Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-3, Comments of the Government of Canada in Response to the Second NAFTA Article 1128 Submission of the United States of America and the United Mexican States ¶ 5 (May 8, 2020) (“[T]he United States’ submission with respect to limitations on loss or damage is in agreement with Canada’s submissions. Inherent to the NAFTA requirement that recovery be limited to loss or damage ‘by reason of, or arising out of’ a breach is the need for the Claimant to show both factual causation and proximate causation.”). As explained above (see *supra* paragraph 14), pursuant to the customary international law principles of treaty interpretation reflected in the Vienna Convention on the Law of Treaties, the Tribunal must take into account this common understanding of the Parties.

⁴¹ *S.D. Myers* First Partial Award ¶ 316.

⁴² *S.D. Myers* Second Partial Award ¶ 140 (emphasis in original).

complained of.”⁴³ The *ADM* tribunal required “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.”⁴⁴

Under Article 1116, an investor may recover only for loss or damage incurred in its capacity as an investor

23. The relief available for claims submitted under Article 1116 is limited to damages incurred by an “investor” in its capacity as an investor—seeking to make, making, or having made an “investment” in the territory of another NAFTA Party. Canada, Mexico, and the United States have expressed a common view on this approach.⁴⁵

24. Under Article 1116, the NAFTA Parties consented to arbitration only where a claimant is an “investor” of another NAFTA Party alleging that it “has incurred loss or damage by reason of, or arising out of” a breach by the respondent Party of one or more Chapter 11, Section A obligations.⁴⁶ “Investor of a Party” is defined in Article 1139 as “a Party or state enterprise thereof, or a national or enterprise of such Party, that seeks to make, is making or has made an investment.” Reading Articles 1116 and 1139 together, an “investor” may recover for “loss or damage” incurred in “seek[ing] to make, making, or [having] made an investment.” Article 1116

⁴³ *Pope & Talbot Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award in Respect of Damages ¶ 80 (May 31, 2002).

⁴⁴ *Archer Daniels Midland Co. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/04/05, Award ¶ 282 (Nov. 21, 2007).

⁴⁵ *United Mexican States v. Cargill, Inc.*, 2011 ONCA 622, ¶ 55 (Oct. 4, 2011) (“[B]oth Canada and the United States appeared as interveners on the appeal. They supported Mexico’s position on the basis that all three Parties to the NAFTA have agreed on a common view of the interpretation of Article 1116: that it limits an investor’s damages ‘to those incurred in its capacity as an investor in seeking to make, making or having made an investment in the territory of another NAFTA Party.’”). See also *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Canada’s Counter-Memorial (Damages Phase) ¶ 83 (June 7, 2001) (“In the case of a Chapter 11 claim, an investor can only be compensated for losses *with respect to its investment* [Claimant] cannot receive compensation under Chapter 11 for its cross-border service activities but is limited to compensation for its losses in its capacity as an investor.” (emphasis in original)); *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America ¶ 8 (Sep. 18, 2001) (“When an investor files a claim under Article 1116 for direct losses suffered by it, only those losses that were sustained by that investor *in its capacity as an investor* are recoverable.” (emphasis in original)); *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United Mexican States (Damages Phase) ¶ 45 (Sep. 12, 2001) (“an investor claiming in its own right under Article 1116 may only claim compensation for loss or damage suffered *qua* investor in the territory of the host Party, not for loss or damage suffered in its capacity as a cross-border service provider or in its capacity as a trader in goods.”). As explained above (see *supra* paragraph 14), pursuant to the customary international law principles of treaty interpretation reflected in the Vienna Convention on the Law of Treaties, the Tribunal must take into account this common understanding of the Parties.

⁴⁶ A claim may also be brought by an investor on its own behalf under Chapter 11 with respect to certain Chapter 15 obligations not relevant to this case. See Article 1116(1)(b) (permitting a claim to be submitted to arbitration for alleged breaches of Article 1503(2), which refers to the manner in which private and state-owned monopolies may exercise regulatory, administrative or other governmental authority, and Article 1502(3)(a), which ensures that any privately owned monopoly that a Party designates and any government monopoly that it maintains or designates acts in a manner not inconsistent with the Party’s obligations under the NAFTA).

does not provide recovery for claims of loss or damage sustained by a claimant in any capacity other than as an “investor.”

25. The focus on the investor and its investment is further confirmed by Article 1101, which clarifies that the investment must be in the territory of the Respondent Party. Article 1101 expressly limits the “scope and coverage” of Chapter 11 to those “measures” adopted or maintained by a Party “relating to” “investors of another Party” (Article 1101(l)(a)) and to “investments of investors of another Party in the territory of the Party” (Article 1101(1)(b)). Given that Article 1139 defines “investor of a Party” as one “that seeks to make, is making or has made an investment,” Article 1101 makes clear that the scope and coverage of the protections of NAFTA Chapter 11, including Article 1116, extends to “investors” only to the extent that they have made or intend to make “investments” in the territory of another NAFTA Party.⁴⁷ Article 1101 has been described as the “gateway leading to the dispute resolution provisions of Chapter 11,” whose requirements limit the powers of a Chapter 11 arbitral tribunal.⁴⁸

26. Finally, the definition of “investment” in Article 1139 also establishes limits that can affect the scope of damages available to a NAFTA Chapter 11 claimant. NAFTA Article 1139 sets forth an exhaustive list of categories of assets that constitute “investments” for the purposes of NAFTA Chapter 11. Assets falling outside this exhaustive list do not constitute “investments,” and therefore loss or damage incurred with respect to such assets, which are not themselves “investments,” or proceeds of “investments,” cannot be the basis for an “investor” to bring a claim for “loss or damage” under Article 1116. Furthermore, Article 1139(i) expressly excludes from the definition of “investment” certain kinds of assets. For example, “investment does not mean . . . claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party.”

27. Moreover, Article 1139(h)(ii), which incorporates into the definition of “investment” those “interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under . . . contracts where remuneration depends substantially on the production, revenues or profits of an enterprise,” does not treat “revenues or profits” as “investments” in themselves. Instead, “revenues or profits” are elements of the type of contract that may (as an example) give rise to “interests that arise from the commitment of capital or other resources in the territory” of the respondent State—with the “interests,” not the “revenues or profits,” constituting the “investment” under NAFTA Article 1139. Indeed, without these limitations, any income arising from a claimant’s exports to entities located in the respondent State might be characterized as an “investment” under Article 1139, and under such a characterization, all exporters would be free to bring “investment” claims under

⁴⁷ *Bayview Irrigation District et al. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/1, Award (on Jurisdiction) ¶ 105 (June 19, 2007) (“in order to be an ‘investor’ under Article 1139 one must make an investment in the territory of another NAFTA State, not in one’s own.”).

⁴⁸ *Methanex Corp. v. United States*, NAFTA/UNCITRAL, First Partial Award ¶ 106 (Aug. 7, 2002). *See also* *Bayview Irrigation District et al. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/1, Award (on Jurisdiction) ¶ 85 (June 19, 2007) (Article 1101 “defines the ‘scope and coverage’ of the entirety of Chapter Eleven . . .”).

Chapter 11 regardless of whether they are making, have made, or seek to make an investment in the territory of the respondent Party.

28. Taken together, for claims brought on a claimant's own behalf, Articles 1101, 1116, and 1139 limit the damages available in a NAFTA Chapter 11 arbitration to those suffered by a claimant in its capacity as "investor" that has made, is making, or seeks to make an "investment"—as that term is defined by the NAFTA—in the territory of another NAFTA Party.

Under Article 1116, an investor may recover only loss or damage that it incurred directly

29. Each claim by an investor must fall within either NAFTA Article 1116 or NAFTA Article 1117 and is limited to the type of loss or damage available under the Article invoked.⁴⁹ Article 1116(1) permits an investor to present a claim for loss or damage incurred by the investor itself:

An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation . . . and that the *investor* has incurred loss or damage by reason of, or arising out of, that breach. (emphasis added)

30. Article 1117(1), in contrast, permits an investor to present a claim on behalf of an enterprise of another Party that it owns or controls for loss or damage incurred by that enterprise:

An investor of a Party, *on behalf of an enterprise of another Party* that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that another Party has breached an obligation . . . and that the *enterprise* has incurred loss or damage by reason of, or arising out of, that breach. (emphasis added)

31. Articles 1116 and 1117 serve to address discrete and non-overlapping types of injury.⁵⁰ Where the investor seeks to recover loss or damage that it incurred *directly*, it may bring a claim under Article 1116. Where the investor seeks to recover loss or damage to an enterprise that the investor owns or controls, the investor's injury is only *indirect*. Such a derivative claim must be brought, if at all, under Article 1117.⁵¹ However, Article 1117 is applicable only where the loss

⁴⁹ An investor may bring separate claims under both Articles 1116 and 1117; however, the relief available for each claim is limited to the article under which that particular claim falls.

⁵⁰ See North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. I, 103d Cong., 1st Sess., at 145 (1993) ("Articles 1116 and 1117 set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of direct injury to an investor, and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by an investor.").

⁵¹ See, e.g., Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 824-25 (Chester Brown ed., 2013) (noting that Article 24(1)(a), nearly identically worded to NAFTA Article 1116(1), "entitles a claimant to submit claims for loss or damage suffered directly by it in its capacity as an investor," while Article 24(1)(b), nearly identically worded to NAFTA Article 1117(1) "creates a derivative right of action, allowing an investor to claim for losses or damages suffered not directly by it, but by a locally organized company that the investor owns or controls").

or damage has been incurred by “*an enterprise of another Party* that is a juridical person that the investor owns or controls directly or indirectly.” (Emphasis added). Article 1117 does not apply where the alleged loss or damage is to an enterprise of a non-Party or of the same Party as the investor.

32. The United States’ position on the interpretation and functions of Articles 1116(1) and 1117(1) is long-standing and consistent.⁵² The United States therefore agrees with Canada⁵³ and Mexico⁵⁴ that investors must allege direct damage to recover under Article 1116 and that indirect damage to an investor, based on injury to an enterprise the investor owns or controls, may only be claimed, if at all, under Article 1117.⁵⁵

33. The distinction between Articles 1116 and 1117 was drafted purposefully in light of two existing principles of customary international law addressing the status of corporations. The first of these principles is that no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares. This is so because, as reaffirmed by the International Court of Justice in *Diallo*, “international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders.”⁵⁶ As the *Diallo* Court further reaffirmed, quoting *Barcelona Traction*: “a wrong done to the company frequently causes prejudice to its shareholders.” Nonetheless, “whenever a shareholder’s interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have

⁵² See, e.g., *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America ¶¶ 6-10 (Sept. 18, 2001) (“Articles 1116 and 1117 of the NAFTA serve distinct purposes. Article 1116 provides recourse for an investor to recover for loss or damage suffered by it. Article 1117 permits an investor to bring a claim on behalf of an investment for loss or damage suffered by that investment.”); *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Seventh Submission of the United States of America ¶¶ 2-10 (Nov. 6, 2001); *GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Submission of the United States of America ¶¶ 2-18 (June 30, 2003); *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Submission of the United States of America ¶¶ 4-9 (May 21, 2004).

⁵³ See, e.g., *William Ralph Clayton & Bilcon of Delaware Inc. et al. v. Government of Canada*, NAFTA/UNCITRAL, Government of Canada Counter-Memorial on Damages ¶ 28 (June 9, 2017); *id.* n.50 (authorities cited including Canada’s prior statements on same); *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Counter-Memorial (Damages Phase) ¶¶ 108-109 (June 7, 2001).

⁵⁴ See, e.g., *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United Mexican States (Damages Phase) ¶¶ 41-45 (Sept. 12, 2001) (explaining that Article 1116 allows an investor to bring a claim for loss or damage suffered by the investor and that Article 1117 allows an investor to bring a claim for loss or damage on behalf of an enterprise (that the investor owns or controls) for loss or damage suffered by the enterprise); *GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Statement of Defense ¶¶ 167(e) and (h) (Nov. 24, 2003); *Alicia Grace v. United Mexican States*, NAFTA/ICSID Case No. UNCT/18/4, Statement of Defense ¶¶ 529-37 (June 1, 2020).

⁵⁵ As explained above (see *supra* paragraph 14), pursuant to the customary international law principles of treaty interpretation reflected in the Vienna Convention on the Law of Treaties, the Tribunal must take into account this common understanding of the Parties.

⁵⁶ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 2010 I.C.J. 639, ¶¶ 155-156 (Judgment of Nov. 30) (noting also that “[t]his remains true even in the case of [a corporation] which may have become unipersonal”).

been infringed.”⁵⁷ Thus, only *direct* loss or damage suffered by shareholders is cognizable under international law.⁵⁸

34. How a claim for loss or damage is characterized is therefore not determinative of whether the injury is direct or indirect. Rather, as *Diallo* and *Barcelona Traction* have found, what is determinative is whether the right that has been infringed belongs to the shareholder or the corporation.

35. Examples of claims that would allow a shareholding investor to seek direct loss or damage include where the investor alleges that it was denied its right to a declared dividend, to vote its shares, or to share in the residual assets of the enterprise upon dissolution.⁵⁹ Another example of a direct loss or damage suffered by shareholders is where the disputing State wrongfully expropriates the shareholders’ ownership interests—whether directly through an expropriation of the shares or indirectly by expropriating the enterprise as a whole.⁶⁰

36. The second principle of customary international law against which Articles 1116 and 1117 were drafted is that no international claim may be asserted against a State on behalf of the State’s own nationals.⁶¹

37. Article 1116 adheres to the principle of customary international law that shareholders may assert claims only for *direct* injuries to their rights.⁶² Article 1117, by contrast, provides a

⁵⁷ *Id.* ¶ 156 (quoting *Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, 1970 I.C.J. 3, ¶ 44 (Second Phase, Judgment of Feb. 5) (“*Barcelona Traction*”). See also *Barcelona Traction* ¶ 46 (“[A]n act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected.”).

⁵⁸ See *Barcelona Traction* ¶ 47 (“Whenever one of his direct rights is infringed, the shareholder has an independent right of action.”). The United States notes that some authors have asserted or proposed exceptions to this rule.

⁵⁹ *Id.* In such cases, the Court in *Barcelona Traction* held that the shareholder (or the shareholder’s State that has espoused the claim) may bring a claim under customary international law.

⁶⁰ Under Article 1110, an expropriation may either be direct or indirect, and acts constituting an expropriation may occur under a variety of circumstances. Determining whether an expropriation has occurred therefore requires a case-specific and fact-based inquiry.

⁶¹ ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM’S INTERNATIONAL LAW: PEACE* 512-513 (9th ed. 1992) (“[F]rom the time of the occurrence of the injury until the making of the award, the claim must continuously and without interruption have belonged to a person or to a series of persons (a) having the nationality of the state by whom it is put forward, and (b) not having the nationality of the state against whom it is put forward.”) (footnote omitted).

⁶² Article 1116(1) derogates from customary international law only to the extent that it permits individual investors (including minority shareholders) to assert claims that could otherwise be asserted only by States. See, e.g., *Nottebohm (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4, 24 (Judgment of Apr. 6) (“[B]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his 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[.]”) (internal quotation omitted); F.V. GARCÍA-AMADOR ET AL., *RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 86 (1974) (“[I]nternational responsibility had been viewed as a strictly ‘interstate’ legal relationship. Whatever may be the nature of the imputed act or omission or of its consequences, the injured interest is in reality always vested in the State alone.”); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 585 (5th ed. 1998) (“[T]he assumption of the classical law that only states have procedural

right to present a claim for *indirect* injury not otherwise found in customary international law,⁶³ where a claimant alleges injury to “an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly.” Were shareholders to be permitted to claim under Article 1116 for indirect injury, Article 1117’s limited carve out from customary international law would be superfluous. Moreover, it is well-recognized that an international agreement should not be held to have tacitly dispensed with an important principle of international law “in the absence of words making clear an intention to do so.”⁶⁴ Nothing in the text of Article 1116 suggests that the NAFTA Parties intended to derogate from customary international law restrictions on the assertion of shareholder claims.⁶⁵

38. Article 1117(1) creates a right to present a claim based on indirect injury in certain specific circumstances, *i.e.*, where the alleged loss or damage is incurred by “an enterprise of another Party that is a juridical person that the investor owns or controls” The NAFTA does not, however, permit an investor to recover for indirect injuries that fall outside the scope of Article 1117(1), including where the alleged loss or damage is incurred by an enterprise of a non-Party or of the same Party as the investor.

Respectfully submitted,



Lisa J. Grosh
Assistant Legal Adviser
John D. Daley
Deputy Assistant Legal Adviser
Nicole C. Thornton
Chief of Investment Arbitration

capacity is still dominant and affects the content of most treaties providing for the settlement of disputes which raise questions of state responsibility, in spite of the fact that frequently the claims presented are in respect of losses suffered by individuals and private corporations.”).

⁶³ See Daniel M. Price & P. Bryan Christy, III, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, in *THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS* 165, 177 (Judith H. Bello et al. eds., 1994) (explaining that “Article 1117 is intended to resolve the *Barcelona Traction* problem by permitting the investor to assert a claim for injury to its investment even where the investor itself does not suffer loss or damage independent from that of the injury to its investment.”).

⁶⁴ *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 Group, Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 160 (June 26, 2003); *see also id.* ¶ 162 (“It would be strange indeed if sub silentio the international rule were to be swept away.”).

⁶⁵ As noted, the United States expressly drew a distinction between direct and indirect injury in its Statement of Administrative Action. North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. I, 103d Cong., 1st Sess., at 145 (1993)

Nathaniel E. Jedrey
Attorney Adviser
Office of International Claims and
Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

June 7, 2021