

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF  
THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE RULES OF  
THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT  
DISPUTES**

**BETWEEN:**

**ODYSSEY MARINE EXPLORATION, Inc.**

**Claimant**

**AND:**

**UNITED MEXICAN STATES**

**Respondent**

**ICSID CASE NO. UNCT/20/1**

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**NON-DISPUTING PARTY SUBMISSION OF THE  
GOVERNMENT OF CANADA PURSUANT TO  
NAFTA ARTICLE 1128**

**November 2, 2021**

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## **I. INTRODUCTION**

1. The Government of Canada makes this submission pursuant to Article 1128 of the North American Free Trade Agreement (“NAFTA”),<sup>1</sup> which authorizes non-disputing Parties to make submissions to a tribunal on a question of interpretation of the NAFTA.
2. Through this submission, Canada provides its views on certain questions of interpretation of the NAFTA. This submission is not intended to address all interpretative issues that may arise in this proceeding. To the extent that certain issues raised by the disputing parties have not been addressed in this submission, no inference should be drawn from Canada’s silence.
3. Canada does not, through this submission, take a position on issues of fact or on the application of these submissions to the facts of this dispute.

## **II. NAFTA ARTICLE 1102 (NATIONAL TREATMENT)**

4. NAFTA Article 1102 sets out the obligation to accord national treatment to “investors” and “investments of investors” of another NAFTA Party. In particular, it requires a NAFTA Party to accord to investors or investments of another NAFTA Party treatment “no less favourable” than it accords to its own investors or investments “in like circumstances”.
5. A claimant making a claim under Article 1102 bears the burden of demonstrating that: (1) the Party accorded both the claimant or its investment and the domestic comparator “treatment [...] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments”;<sup>2</sup> (2) the Party accorded

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<sup>1</sup> *North American Free Trade Agreement*, 17 December 1994, (1993) 32 I.L.M. 289, 605.

<sup>2</sup> *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL) Award, 31 March 2010 (“*Merrill & Ring – Award*”), ¶¶ 79 and 81-82; *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007 (“*UPS – Award*”), ¶ 83(a); *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/01) Decision on Responsibility, 15 January 2008 (“*Corn Products – Decision on Responsibility*”), ¶ 117.

the alleged treatment “in like circumstances”;<sup>3</sup> and (3) the treatment accorded to the claimant or its investment was “less favourable” than that accorded to the comparator investor or investment.<sup>4</sup> It is well established that the burden of proving each constituent part of a national treatment claim rests exclusively with the party asserting it. The claimant therefore bears the responsibility of demonstrating all of the elements of an Article 1102 claim. The NAFTA Parties agree that this burden never shifts to the respondent.<sup>5</sup>

6. This analysis has to be conducted in light of the object and purpose of Article 1102, which is to prevent discriminatory treatment based on the nationality of an investor or its investment.<sup>6</sup> NAFTA tribunals have recognized that the central object of Article 1102 is to prevent nationality-based discrimination, not to prevent all measures that result in

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<sup>3</sup> *UPS – Award*, ¶ 83; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003 (“*Loewen – Award*”), ¶ 139; *Archer Daniels Midland Company et al. v. United Mexican States* (ICSID Case No. ARB(AF)/04/5) Award, 21 November 2007 (“*ADM – Award*”), ¶ 205; *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000 (“*S.D. Myers – Partial Award*”), ¶ 252; *Corn Products – Decision on Responsibility*, ¶ 117.

<sup>4</sup> *UPS – Award*, ¶ 83(c); *Corn Products – Decision on Responsibility*, ¶ 117.

<sup>5</sup> See for example, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Second Submission of the United States of America, 12 June 2015 (“*Mesa – Second Article 1128 Submission of the U.S.*”), ¶ 4; *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Second Submission of Mexico Pursuant to NAFTA Article 1128, 12 June 2015 (“*Mesa – Second Article 1128 Submission of Mexico*”), ¶ 7; *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Submission of the United States of America, 8 May 2015 (“*Mercer – Submission of the U.S.*”), ¶ 13; *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Submission of Mexico Pursuant to Article 1128 of NAFTA, 8 May 2015 (“*Mercer – Submission of Mexico*”), ¶ 11.

<sup>6</sup> In past NAFTA Chapter Eleven arbitrations, all three NAFTA Parties have agreed that the national treatment obligation is designed to protect against discrimination on the basis of nationality. See for example, on behalf of the United States: *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Submission of the United States of America, 7 April 2000, ¶ 3; *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Counter-Memorial on Merits and Objections to Jurisdiction of Respondent United States of America, 14 December 2012, ¶ 323; *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Submission of the United States of America, 25 July 2014, ¶ 11; *Mercer – Submission of the U.S.*, ¶¶ 10-11. On behalf of Mexico: *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Submission of the United Mexican States, 3 April 2000, ¶¶ 67, 69; *United Parcel Service v. Canada* (UNCITRAL) Submission of the United Mexican States, 20 October 2005, ¶ 7; *Cargill, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/05) Rejoinder of the Respondent, 2 May 2007, ¶ 286; *Mercer – Submission of Mexico*, ¶¶ 11 and 15. On behalf of Canada: *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Canada’s Counter Memorial, 29 March 2000, ¶ 166; *United Parcel Service v. Canada* (UNCITRAL) Counter Memorial (Merits Phase), 22 June 2005, ¶ 585; *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Canada’s Counter-Memorial and Reply on Jurisdiction, 28 February 2014, ¶ 354; *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Canada’s Counter-Memorial, 22 August 2014, ¶¶ 25 and 360.

differences in treatment.<sup>7</sup> Therefore, there can be no breach of Article 1102 unless the evidence establishes that a host State has treated foreign investors or investments that are in like circumstances to domestic investors or investments less favourably on the basis of their nationality.

7. In carrying out a national treatment analysis, the first step is to establish that the government accorded “treatment” to the investor or its investments. In particular, the alleged treatment must be with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of its investment.

8. The second element that a claimant must establish is that the treatment accorded to it and the treatment of its identified comparators was accorded “in like circumstances”. This element is a precondition to a finding of less favourable treatment, since treatment can only be less favourable within the meaning of Article 1102 if it is accorded in like circumstances.<sup>8</sup>

9. Article 1102 is concerned with the question of whether treatment was accorded “in like circumstances”, not whether it was accorded to “like investors”. Determining the existence of “like circumstances” is not merely a matter of determining whether investors operate in the same business or economic sector or pursue the same activity. Rather, it requires a detailed consideration of the particular facts of each case and an examination of the totality of the circumstances in which treatment was accorded in order to determine whether those circumstances are “like”.<sup>9</sup> As NAFTA tribunals have noted, treatment is not accorded in like circumstances if differences in treatment between domestic and foreign

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<sup>7</sup> See for example, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Award, 6 March 2018 (“*Mercer – Award*”), ¶¶ 7.7-7.10; *Loewen – Award*, ¶ 139; *ADM – Award*, ¶¶ 193, 205; *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009 (*Cargill – Award*), ¶¶ 217.

<sup>8</sup> *ADM – Award*, ¶ 196.

<sup>9</sup> *Merrill & Ring – Award*, ¶ 88; *UPS – Award*, ¶ 87: (holding that the determination of whether treatment was accorded in like circumstances “will require consideration ... of all the relevant circumstances in which the treatment was accorded.”). *Pope & Talbot Inc. v. Canada* (UNCITRAL) Award on the Merits of Phase 2, 10 April 2001 (“*Pope & Talbot – Award on the Merits Phase 2*”), ¶ 75: (“Circumstances are context dependent.”)

investors or investments are plausibly connected to legitimate public policy objectives.<sup>10</sup> Tribunals have also found that treatment may not be accorded in like circumstances if domestic and foreign investors or investments are subject to different legal regimes, as may be the case if they are located in different jurisdictions.<sup>11</sup>

10. Third, a claimant must prove that the treatment accorded to it or its investment was “less favourable” than the treatment accorded to domestic comparators.<sup>12</sup>

### **III. NAFTA ARTICLE 1105 (MINIMUM STANDARD OF TREATMENT)**

#### **A. NAFTA Article 1105(1) Guarantees Treatment in Accordance with the Customary International Law Minimum Standard of Treatment**

11. Article 1105(1) requires the NAFTA Parties to accord to investments of investors the customary international law minimum standard of treatment. The NAFTA Free Trade Commission confirmed this interpretation in its July 31, 2001 *Notes of Interpretation* (the “FTC Notes”), which state:

1. 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.
2. 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.

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<sup>10</sup> *S.D. Myers – Partial Award*, ¶¶ 248, 250; *Pope & Talbot – Award on the Merits Phase 2*, ¶¶ 78, 79, 87-88; *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Final Award, 15 November 2004, ¶ 114. See also, *Merrill & Ring – Award*, ¶ 88; *Cargill – Award*, ¶¶ 206, 207.

<sup>11</sup> *Grand River – Award*, ¶ 166; *Methanex – Final Award*, Part IV, Chapter B, p. 9, ¶¶ 18-19; *UPS – Award*, ¶¶ 102, 116; *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1) Award, 9 January 2003 (“*ADF – Award*”), ¶ 156; *Pope & Talbot - Award on the Merits Phase 2*, ¶¶ 84-88; *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Award, 25 August 2014, ¶¶ 8.15, 8.42 and 8.54.

<sup>12</sup> Canadian Statement on Implementation: North American Free Trade Agreement, Vol. 128, no. 1, Ottawa: Canada Gazette, 1994, at 148; United Nations Conference on Trade and Development, UNCTAD/ITE/IIT/11 (Vol. IV) National Treatment (United Nations: New York and Geneva, 1999) at 37.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).<sup>13</sup>
12. As NAFTA Article 1131(2) indicates and subsequent NAFTA tribunals have confirmed, the FTC Notes represent the definitive interpretation of Article 1105(1) and are binding on all tribunals constituted under NAFTA Chapter Eleven.<sup>14</sup>
13. The reference to customary international law in the FTC Notes clarifies that Article 1105 does not create an open-ended obligation but rather is an “objective” standard of treatment for investors as determined by the rules of customary international law.<sup>15</sup>

**B. Establishing the Existence of a Rule of Customary International Law Requires Proof of State Practice and *Opinio Juris***

14. It is well established that the disputing party alleging the existence of a rule of customary international law has the burden of proving it.<sup>16</sup> In order to establish a rule of

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<sup>13</sup> NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, s. 2.1.

<sup>14</sup> NAFTA Article 1131(2) provides that “an interpretation by the [Free Trade] Commission of a provision of [the NAFTA] shall be binding on a Tribunal established under this Section”. NAFTA tribunals have consistently recognized that the Note of Interpretation is binding on them. *See for example Glamis – Award*, ¶ 599; *Thunderbird – Final Award*, ¶ 192 et seq; *Methanex – Final Award*, Part IV, Chapter C, ¶ 20; *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 (“*Mondev – Award*”), ¶ 100 et seq; *Loewen – Award*, ¶ 126; *Waste Management Inc. v. United Mexican States* (ICSID No. ARB(AF)00/3) Award, 30 April 2004, ¶ 90 et seq; *Cargill – Award*, ¶¶ 135, 267-268; *ADF – Award*, ¶ 176; *Mercer – Award*, ¶ 7.50.

<sup>15</sup> *Mondev – Award*, ¶ 120: (“The Tribunal has no difficulty in accepting that an arbitral tribunal may not apply its own idiosyncratic standard in lieu of the standard laid down in Article 1105(1)”; *Cargill – Award*, ¶ 268: (“Article 1105(1) requires no more, no less, than the minimum standard of treatment demanded by customary international law.”); *Chemtura – Award*, ¶ 121: (“it is not disputed that the scope of Article 1105 [...] must be determined by reference to customary international law.”); *Mobil Investments Canada Inc. and Murphy Oil Company v. Canada*, ICSID Case No. ARB(AF)/07/04, Decision on Liability and Principles of Quantum, 22 May 2012 (“*Mobil – Decision on Liability and Principles of Quantum*”), ¶ 153: (“It is not the function of an arbitral tribunal established under NAFTA to legislate a new standard which is not reflected in the existing rules of customary international law.”); *Windstream Energy LLC v. Government of Canada* (UNCITRAL) Award, 27 September 2016, ¶ 356: (“In other words, as stated by the FTC, the treatment required is not “in addition to or beyond” that which is required by the customary international law standard, but one that is in accordance, or consistent, with the standard, while remaining “fair and equitable” and providing “full protection and security.”)

<sup>16</sup> *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States)*, Judgment, 27 August 1952, ICJ Reports (1952) 176, p. 200, citing Colombian-Peruvian Asylum Case,

customary international law, a claimant must provide evidence of consistent, substantial and widespread State practice accompanied by an understanding that such practice is required by law (*opinio juris sive necessitates*).<sup>17</sup>

15. In the 1969 *North Sea Continental Shelf* case, the International Court of Justice stated that “[n]ot 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.”<sup>18</sup> The ICJ more recently elaborated that such evidence may include, for example, the judgments of national courts, domestic legislation, or statements made by States.<sup>19</sup> The weight to be accorded to this evidence will depend on the particular circumstances of the case, including the overall context and the nature of the alleged rule.<sup>20</sup>

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Judgment, 20 November 1950, ICJ Reports (1950) 266, p. 276: (“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.”); Ian Brownlie, “Principles of Public International Law”, 7th ed. (Oxford: Oxford University Press, 2008), p. 12: (“In practice the proponent of a custom has a burden of proof the nature of which will vary according to the subject-matter and the form of the pleadings.”); *ADF – Award*, ¶ 185: (“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 the current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts.”)

<sup>17</sup> *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002, ¶ 84. See also, *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, [1969] I.C.J. Rep. 4 (“*North Sea Continental Shelf – Judgment*”), ¶ 74: (it is “an indispensable requirement” to show that “State practice, including that of States whose interests are specifically 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.”); *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Judgment, 27 June 1986, ¶ 207: (“For a new customary rule to be formed, not only must the acts concerned ‘amount to settled practice’, but they must be accompanied by *opinio juris sive necessitates*. Either the States taking such action or the other States in a position to react to it must have behaved so that their conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.’”).

<sup>18</sup> *North Sea Continental Shelf – Judgment*, ¶ 77.

<sup>19</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, [2012] I.C.J. Reports 99, Judgment, 3 February 2012, ¶ 55. See also, United Nations, *Draft Conclusions on Identification of Customary International Law with Commentaries*, 13 January 2018, p. 125.

<sup>20</sup> Brownlie, p. 128.



16. Although investment arbitration awards may contain valuable analysis of State practice and *opinio juris* in relation to a particular rule of custom, they cannot themselves substitute for actual evidence of State practice and *opinio juris*. As the Tribunal in *Glamis Gold* noted, awards of international tribunals can “serve as illustrations of customary international law if they involve an examination of customary international law,” but they “do not constitute State practice and thus cannot create or prove customary international law.”<sup>21</sup>

**C. NAFTA Article 1105 Is Not an Invitation for Tribunals to Second Guess Government Policy and Decision Making**

17. A determination that there has been a breach of the minimum standard of treatment under Article 1105 must begin by considering the rules regarding treatment of investments of investors that have crystallized into customary international law. Currently only a few rules have crystallized to become part of the minimum standard of treatment. These include, for example, the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings and the obligation to provide full protection and security to investments of investors.

18. Further, any such determination must be made in light of the “high measure of deference that international law generally extends to the right of domestic authorities to

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<sup>21</sup> *Glamis – Award*, ¶ 605. See also, *Cargill – Award*, ¶ 277: (“It is important to emphasize, however, as Mexico does in this instance that the awards of international tribunals do not create customary international law but rather, at most, reflect customary international law. Moreover, in both the case of scholarly writings and arbitral decisions, the evidentiary weight to be afforded such sources is greater if the conclusions therein are supported by evidence and analysis of custom.”).

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regulate within their own borders.”<sup>22</sup> Article 1105 is not an invitation to NAFTA tribunals to second-guess government policy and decision-making.<sup>23</sup>

**D. The Customary International Law Minimum Standard of Treatment Does Not Protect an Investor’s Legitimate Expectations**

19. There is no general obligation under the customary international law minimum standard of treatment, and therefore under Article 1105, to protect an investor’s legitimate expectations. The mere fact that a State takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of the customary international law standard of treatment, even if there is loss or damage to the investment as a result.

20. NAFTA tribunals have rejected the proposition that the minimum standard of treatment protects against any action that is inconsistent with an investor’s legitimate expectations.<sup>24</sup>

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<sup>22</sup> *S.D. Myers – Partial Award*, ¶ 263. See also, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016, ¶ 553: (“In reviewing this alleged breach, the Tribunal must bear in mind the deference which NAFTA Chapter 11 tribunals owe a state when it comes to assessing how to regulate and manage its affairs”). The submissions of that NAFTA Parties also reflect their agreement that the threshold for demonstrating a violation of Article 1105 is high. See *Bilcon of Delaware et al v. Government of Canada* (UNCITRAL) Counter Memorial of Canada, 9 December 2011, ¶ 321: (“[T]he threshold for proving a violation of that standard is extremely high”); *Mesa – Second Article 1128 Submission of Mexico*, ¶ 8: (“Mexico concurs in Canada’s submissions that the Bilcon tribunal [...] correctly held that the threshold for establishing a breach of the minimum standard of treatment at customary international law is high”); *Mesa – Second Article 1128 Submission of the U.S.*, ¶ 20: (“ [...] there is a high threshold for Article 1105 to apply”).

<sup>23</sup> See for example, *S.D. Myers – Partial Award*, ¶¶ 261-263: (explaining that “a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making”); *Glamis – Award*, ¶ 762: (holding that “it is not for an international tribunal to delve into the details of and justifications for domestic law”); *Chemtura – Award*, ¶¶ 123, 134 (holding that the Article 1105 analysis must take into account “the fact that certain agencies manage highly specialized domains involving scientific and public policy determinations”); *Windstream – Award*, ¶¶ 344, 376; *Merrill & Ring – Award*, ¶ 236; *Global Telecom Holdings S.A.E. v. Government of Canada* (ICSID Case No.ARB/16/16) Counter-Memorial on Merits & Damages, 26 February 2018, ¶¶ 342-343.

<sup>24</sup> There is no evidence of an obligation at customary international law not to frustrate the investor’s expectations. At most, some tribunals have considered that under Article 1105 an investor’s expectations could be a relevant (though non-determinative) factor where a NAFTA Party’s conduct “creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.” See *Thunderbird – Final Award*, ¶ 147. See also, *Mobil – Decision on Liability and*

21. Therefore, the mere fact that a State regulates in a manner which negatively affects an investment or interferes with an investor’s expectations, including its expectations of profits, does not, without more, fall below the customary international law minimum standard of treatment. While a State’s decisions or actions may at times be perceived as unfair or inequitable by an investor, Article 1105(1) is “not intended to provide foreign investors with blanket protection from this kind of disappointment.”<sup>25</sup>

**E. NAFTA Article 1105 Does Not Extend Beyond the Physical Protection and Security of Investments**

22. Interpreting the phrase “protection and security” in accordance with Article 31(1) of the Vienna Convention requires consideration of the ordinary meaning of the terms in their context and in light of their object and purpose.<sup>26</sup> In this regard, the dictionary definitions of the words “protection” and “security” point to a general meaning of safety from physical harm, injury or impairment.<sup>27</sup>

23. The full protection and security (“FPS”) standard was historically “developed in the context of physical protection and security of the company’s officials, employees or facilities”,<sup>28</sup> and “notions of ‘protection and constant security’ or ‘full protection and

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*Principles of Quantum*, ¶ 152; *Glamis – Award*, ¶ 621; *Grand River – Award*, ¶ 140; *Merrill & Ring – Award*, ¶ 233.

<sup>25</sup> *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* (ICSID Case No. ARB (AF)/97/2) Award, 1 November 1999, ¶ 83.

<sup>26</sup> *Vienna Convention on the Law of Treaties*, U.N.T.S., Vol. 1155 (1969) done at Vienna on 23 May 1969, entered into force on 27 January 1980, Article 31(1), available at: [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

<sup>27</sup> As defined in the Oxford dictionary, the word “protection” means “[t]he action of protecting, or the state of being protected”, and to “protect” means “[k]eep safe from harm or injury”. “Harm” defined as “[p]hysical injury, especially that which is deliberately inflicted” and “injure” as “[d]o physical harm or damage to (someone)” or “[h]arm or impair (something)”. “Security” is in turn defined as “[t]he state of being free from danger or threat”, with “danger” defined as “[t]he possibility of suffering harm or injury” and “threat” defined as “[a] statement of an intention to inflict pain, injury, damage, or other hostile action on someone in retribution for something done or not done” or “[a] person or thing likely to cause damage or danger”. See: Lexico, a collaboration between Dictionary.com and Oxford University Press, available at: <https://www.lexico.com/>.

<sup>28</sup> *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Award, 22 May 2007, ¶¶ 284-287; *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16) Award, 28 September 2007, ¶¶ 321-324. See also, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve*

security’ in international law have traditionally been associated with situations where the physical security of the investor or its investment is compromised.”<sup>29</sup> Numerous investment tribunals have recognized that the FPS standard is intended to provide physical protection and security for investments.<sup>30</sup>

24. The NAFTA Parties’ recent treaty practice also confirms the shared understanding that the FPS obligation does not extend beyond the obligation to provide the level of police protection required under customary international law, i.e. physical protection and security of foreign investors and their investments.<sup>31</sup>

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*Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Award, 19 January 2007, ¶¶ 258-259.

<sup>29</sup> *BG Group Plc. v. The Republic of Argentina* (UNCITRAL), Final Award, 24 December 2007 (“*BG Group – Final Award*”), ¶ 324.

<sup>30</sup> *Saluka Investments B.V. (The Netherlands) v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006, ¶¶ 483-484; *BG Group – Final Award*, ¶¶ 323-328; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16) Award, 29 July 2008, ¶ 668; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal, S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/19); *AWG Group v. The Argentine Republic* (UNCITRAL) Decision on Liability, 30 July 2010, ¶ 179; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1) Award, 22 September 2014, ¶¶ 622-623: (“While some investment treaty tribunals have extended the concept of full protection and security to an obligation to provide regulatory and legal protections, the more traditional, and commonly accepted view, as confirmed in the numerous cases cited by Respondent is that this standard of treatment refers to protection against physical harm to persons and property.”); *Crystallex – Award*, ¶¶ 632-633; *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia* (PCA Case No. 2015-40) Award, 29 March 2019, ¶ 267: (“[T]he standard of full protection and security requires the host state to exercise due diligence in the provision of physical protection to foreign investments. Unless the relevant treaty clause explicitly provides otherwise, the standard of full protection and security does not extend beyond physical security nor does it extend to the provision of legal security.”); *Infinito Gold – Award*, ¶ 623: (“The Tribunal’s view is that, absent treaty language indicating that legal security is covered, the FPS standard is intended to ensure physical protection and integrity of the investor and its property within the territory of the host State.”).

<sup>31</sup> See *Protocol replacing the North American Free Trade Agreement with the Agreement between Canada, the United States of America, and the United Mexican States*, 30 November 2018, Can. T.S. 2020 No.5 (entered into force 1 July 2020) (“CUSMA”), Annex 14-B, Article 14.6(2)(b): (“The obligations in paragraph 1 to provide ... ‘full protection and security’ requires each Party to provide the level of police protection required under customary international law.”).

#### IV. NAFTA ARTICLE 1110 (EXPROPRIATION AND COMPENSATION)

##### A. To Bring a Claim of Expropriation a Claimant Must Establish the Existence of a Vested Property Right

25. NAFTA Article 1110(1) reflects the customary international law standard with respect to expropriation.<sup>32</sup> It provides that no Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory, or take a measure tantamount to nationalization or expropriation of such an investment, except for a public purpose; on a non-discriminatory basis; in accordance with due process of law and Article 1105(1); and on payment of compensation in accordance with paragraphs 1110(2) through 1110(6).

26. The first step in assessing whether there has been a breach of Article 1110 is to identify the specific investment alleged to have been expropriated.<sup>33</sup> Any expropriation analysis must begin with determining whether there is a valid property right capable of being expropriated.<sup>34</sup> This assessment is distinct and separate from the jurisdictional requirement that the claimant establish the existence of an investment that satisfies the definition in NAFTA Article 1139. In other words, a claimant that alleges a breach of NAFTA Article 1110 must not only establish the existence of an investment within the

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<sup>32</sup> *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Award, 8 June 2009 (“*Glamis – Award*”), ¶ 354; *ADM – Award*, ¶ 237.

<sup>33</sup> *Generation Ukraine v. Ukraine* (ICSID Case No. ARB/00/9) Award, 16 September 2003, ¶ 6.2: (“Since expropriation concerns interference in rights in property, it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when allegedly expropriatory acts occurred.”); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Award, 27 August 2009, ¶ 442.

<sup>34</sup> *Crompton (Chemtura) Corp. v. Government of Canada* (UNCITRAL) Award, 2 August 2010 (“*Chemtura – Award*”), ¶ 242; *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award, 4 April 2016 (“*Crystallex – Award*”), ¶ 659; *Infinito Gold Ltd. v. Republic of Costa Rica* (ICSID Case No. ARB/14/5) Award, 03 June 2021 (“*Infinito Gold – Award*”), ¶¶ 705-706. See also Rosalyn Higgins, “The Taking of Property by the State: Recent Developments in International Law”, 176 R.C.A.D.I. 259, 272 (1982) (“[O]nly *property* deprivation will give rise to compensation.”) (*emphasis in original*); Rudolf Dolzer, “Indirect Expropriation of Alien Property”, 1 ICSID Review, Foreign Investment Law Journal 41, 41 (1986) (“Once it is established in an expropriation case that the object in question amounts to ‘property,’ the second logical step concerns the identification of ‘expropriation’”).

meaning of NAFTA Article 1139 but must also establish that such investment is capable of being expropriated.<sup>35</sup>

27. A determination of whether there is a property right capable of being expropriated must be made in light of the domestic law of the Party in question.<sup>36</sup> In this respect,

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<sup>35</sup> *Accession Mezzanine & al. v. Hungary* (ICSID Case No. ARB/12/3) Award, 17 April 2015 (“*Accession Mezzanine – Award*”), ¶ 75 (“the question of whether a protected investment [...] is capable of being expropriated must be answered by reference to [the expropriation article] of the BIT and the general international law on expropriation.”); *Merrill & Ring – Award*, ¶ 139: (“The first question the Tribunal must decide is whether the Investor’s claim concerning expropriation relates to an investment as defined under the NAFTA treaty. NAFTA Chapter Eleven contains a broad definition of “investment” as Article 1139 makes quite evident. [...] However, the Tribunal is mindful that the protection [against expropriation] under international law has traditionally been understood within certain limits [...]”). See also *Emmis et al. v. Hungary* (ICSID Case No. ARB/12/2) Decision on Respondent’s Application for Bifurcation, 13 June 2013, ¶ 43: (“it is of fundamental importance that the Tribunal identify precisely whether, and if so which investments of Claimants are capable of giving rise to their expropriation claim.”) (emphasis added). According to an UNCTAD report, a failure to identify an investment that is capable of being expropriated “may lead to unintended consequences as a result of its breadth [...] [and] may deviate from the original intention of the contracting States, clash with domestic tradition and complicate the process of valuation.” See UNCTAD Series on International Investment Agreements II – Expropriation: A Sequel, 2012, pp. 125 and 131; *European Media Ventures SA v. Czech Republic* (UNCITRAL) Partial Award on Liability, 8 July 2009, ¶ 63; *Accession Mezzanine et al. v. Hungary* (ICSID Case No. ARB/12/3) Decision on Respondent’s Notice of Jurisdictional Objections and Request for Bifurcation, 8 August 2013, ¶ 39(2)(a): (“The Tribunal is required to identify whether and which investments of Claimants may properly give rise to an expropriation claim [...]”).

<sup>36</sup> Campbell McLachlan, Laurence Shore and Matthew Weiniger, “International Investment Arbitration: Substantive Principles (2<sup>nd</sup> ed.)” (Kluwer Law International, May 2017) (“*McLachlan, Shore & Weiniger*”), ¶ 8.64: (“The property rights that are the subject of protection under the international law of expropriation are created by the host State law.”); Zachary Douglas, “The International Law of Investment Claims” (Cambridge University Press, January 2010), ¶ 102: (“whenever there is a dispute about the scope of the property rights comprising the investment, or to whom such rights belong, there must be a reference to a municipal law of property.”); *EnCana Corporation v. Republic of Ecuador* (UNCITRAL) Award, 3 February 2006, ¶ 184: (“Unlike many BITs there is no express reference to the law of the host State. However, for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador.”); *Emmis International Holding, B.V. Emmis Radio Operating, B.V. Mem Magyar Electronic Media Kereskedelmi Es Szolgaltato KFT v. Hungary* (ICSID Case No. ARB/12/2) Award, 16 April 2014 (“*Emmis – Award*”), ¶¶ 161-162: (“In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law. Public international law does not create property rights.”); *Accession Mezzanine – Award*, ¶ 75; *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5) Award, 13 March 2015, ¶ 116: (“Expropriation under international law undoubtedly contemplates property rights existing under national law that have been taken by the State.”); *Vestey Group Ltd v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/06/4) Award, 15 April 2016, ¶ 257; *Lion Mexico Consolidated L.P. v. United Mexican States* (ICSID Case No. ARB(AF)/15/2) Decision on Jurisdiction, 30 July 2018, ¶ 231: (“NAFTA does not offer a definition of the term ‘intangible real estate’ used in its Art. 1139(g). Absent such definition, to determine whether an investor holds ‘intangible real estate’, it is necessary to refer to the law of the host state.”); *América Móvil S.A.B. de C.V. v. Republic of Colombia* (ICSID Case

international tribunals have generally recognized that domestic courts interpreting legal rights under domestic law should be accorded deference.<sup>37</sup> Only legal rights that have vested under the applicable domestic law are capable of being expropriated. A potential property right or one that is conditional, in that it may or may not materialize depending on a future event, is not vested and is not capable of being expropriated.<sup>38</sup>

28. Canada notes that the NAFTA Parties have recently confirmed their shared understanding of the state of international law as it relates to expropriations by providing in Annex 14-B of the Canada-United States-Mexico Agreement (“CUSMA”) that “[a]n action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.” A

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No. ARB(AF)/16/5) Award, 7 May 2021, ¶ 319; *Infinito Gold – Award*, ¶ 705: (“If no valid rights exist under domestic law, there can be no expropriation.”) and ¶ 711. Canada’s Model FIPA explicitly provides that whether an investment constitutes a tangible or intangible property right must be made in light of the relevant domestic law. Canada Model FIPA, available at: [https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021\\_model\\_fipa-2021\\_modele\\_apie.aspx?lang=eng#article-9](https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng#article-9) (Article 9(4) provides that: “A measure of a Party cannot violate this Article unless it expropriates a covered investment that is a tangible or intangible property right under the domestic law of the Party in which the investment was made. This determination requires the consideration of relevant factors, such as the nature and scope of the tangible or intangible property right under the applicable domestic law of the Party in which the investment was made”)

<sup>37</sup> *Eli Lilly and Company v. Government of Canada* (UNCITRAL) Final Award, 16 March 2017, ¶¶ 221, 224: (“[A] NAFTA Chapter Eleven tribunal is not an appellate tier in respect of the decisions of the national judiciary. It is not the task of a NAFTA Chapter Eleven tribunal to review the findings of national courts and considerable deference is to be accorded to the conduct and decisions of such courts.”); *Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6) Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, ¶ 583; *Mr. Frank Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23) Award, 8 April 2013 ¶ 417.

<sup>38</sup> *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002, ¶¶ 118 and 152; *Eureko B.V. v. Republic of Poland* (UNCITRAL) Partial Award, 19 August 2005, ¶ 151; *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL) Final Award, 26 January 2006 (“*Thunderbird – Final Award*”), ¶ 208; *Merrill & Ring – Award*, ¶ 142; *Emmis – Award*, ¶ 168; *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50) Award, 4 September 2020, ¶ 470: (“[A] finding of expropriation must be premised on a showing that ‘Claimants must have held a property right of which they have been deprived.’ The property right or asset in question ‘must have vested (directly or indirectly) in the claimant for him to seek redress.’”) and ¶ 472: (“[A]bsent any established right that was abrogated by Government interference, the fact that Government conduct may have impacted a company business plan does not itself amount to expropriation, even if the end result ultimately is that the company was unable to survive financially.”) (emphasis in original).

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footnote further clarifies that “[f]or greater certainty, the existence of a property right is determined with reference to a Party’s law.”<sup>39</sup>

**B. NAFTA and Customary International Law Recognize that the Valid Exercise of a State’s Police Powers Does Not Constitute an Expropriation**

29. For there to be an expropriation, a property right must have been taken.<sup>40</sup> In other words, there must be a taking of fundamental ownership rights, either directly or indirectly, that causes a substantial deprivation of economic value of the investment.<sup>41</sup> Mere interference with an investor’s use or enjoyment of the benefits associated with property is insufficient to constitute an expropriation at international law, as reflected in Article 1110(1).<sup>42</sup>

30. In considering allegations that the State has “taken” or “expropriated” the investor’s property through its regulatory powers, consideration must also be given to the State’s police power, which is a well recognized concept at customary international law: a host State is not required to compensate an investor for any loss caused by the imposition of a non-discriminatory, regulatory measure designed and applied to protect legitimate public

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<sup>39</sup> CUSMA, Annex 14-B, ¶ 1.

<sup>40</sup> *McLachlan, Shore & Weiniger*, ¶ 8.68: (“In fact, the central element is that property must be ‘taken’ by State authorities or the investor must be deprived of it by State authorities.”); *Glamis – Award*, ¶ 356: (“There is for all expropriations, however, the foundational threshold inquiry of whether the property or property right was in fact taken.”); *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000 (“*S.D. Myers – Partial Award*”), ¶ 280: (“In general, the term ‘expropriation’ carries with it the connotation of a ‘taking’ by a governmental-type authority of a person’s ‘property’ with a view to transferring ownership of that property to another person, usually the authority that exercised its *de jure* or *de facto* power to do the ‘taking’”).

<sup>41</sup> *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Interim Award, 26 June 2000 (“*Pope & Talbot – Interim Award*”), ¶ 102: (“The test is whether that interference is sufficiently restrictive to support a conclusion that the property has been ‘taken’ from the owner.”); *Glamis – Award*, ¶ 357; *Grand River Enterprises Six Nations, Ltd. et al v. United States of America* (UNCITRAL) Award, 12 January 2011, (“*Grand River – Award*”), ¶ 148; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB (AF)/00/2) Award, 29 May 2003, ¶ 115.

<sup>42</sup> *Glamis – Award*, ¶¶ 356-357: (“The Tribunal agrees with these statements and thus begins its analysis of whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures ‘substantially impair[ed] the investor’s economic rights, i.e. ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings.”); *Pope & Talbot – Interim Award*, ¶¶ 101-102; *S.D. Myers – Partial Award* ¶¶ 281-282.



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welfare objectives, as such measures do not constitute an expropriation.<sup>43</sup> This principle allows governments the necessary flexibility to regulate without having to pay compensation for every effect of regulation.<sup>44</sup>

31. Again, Canada notes that the NAFTA Parties have recently confirmed their shared understanding that, under the current state of international law concerning expropriation, “[n]on-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances”.<sup>45</sup>

Dated this 2nd day of November, 2021.      *Respectfully submitted on behalf of Canada,*



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<sup>43</sup> See e.g., *Methanex Corporation v. United States of America* (UNCITRAL) Fourth Submission of The Government of Canada, 30 January 2004, ¶ 14; *Methanex Corporation v. United States of America* (UNCITRAL) Final Award on Jurisdiction and Merits, 3 August 2005 (“*Methanex – Final Award*”), Part IV, Chapter D, ¶ 7; *S.D. Myers – Partial Award*, ¶¶ 263 and 281-282; *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18) Decision on Jurisdiction and Liability, 14 January 2010, ¶¶ 273, 505; *Suez, Sociedad General de Aguas de Barcelona SA, and InterAgua Servicios Integrales del Agua SA v. The Argentine Republic* (ICSID Case No. ARB/03/17) Decision on Liability, 30 July 2010, ¶ 128: (“As numerous cases have pointed out, in evaluating a claim of expropriation it is important to recognize a State’s legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation.”); *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) Award, 8 July 2016, ¶ 305; *Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/19) Award, 30 October 2017, ¶¶ 7.17-7.22.

<sup>44</sup> See e.g., *Chemtura – Award*, ¶ 266: (holding that Canada’s regulation of the pesticide lindane was a non-discriminatory measure motivated by health and environmental concerns and that a measure “adopted under such circumstances is a valid exercise of the State’s police powers and, as a result, does not constitute an expropriation”).

<sup>45</sup> CUSMA, Annex 14-B, ¶ 3(b).