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

KOCH INDUSTRIES, INC. AND KOCH SUPPLY & TRADING, LP,

Claimants

-and-

CANADA,

Respondent.

ICSID CASE NO. ARB/20/52

SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA" or "the Agreement"), 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 interpretations offered below apply to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.[*]

Burden of Proof (Article 1131)

2. Article 1131 provides in relevant part that the Tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

3. General principles of international law concerning the burden of proof in international arbitration provide that a claimant has the burden of proving its claims, and if a respondent raises any affirmative defenses, the respondent must prove such defenses.[1]

[*] In footnotes to this submission, the symbol ¶ denotes the relevant paragraph(s) of the referenced document and the symbol § denotes the relevant section(s) of the referenced document.

[1] BIN CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS 334 (2006) ("[T]he general principle [is] that the burden of proof falls upon the claimant[.]"); *Marvin Roy Feldman Karpa v.*

4. In the context of an objection to jurisdiction, the burden is on the claimant to prove the necessary and relevant facts to establish that a tribunal has jurisdiction to hear its claim. Further, it is well-established that where "jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage."[2] As the tribunal in *Bridgestone v. Panama* stated when assessing Panama's jurisdictional objections regarding a claimant's purported investments under the U.S.-Panama Trade Promotion Agreement, "[b]ecause the Tribunal is making a final finding on this issue, the burden of proof lies fairly and squarely on [the claimant] to demonstrate that it owns or controls a qualifying investment."[3]

Definition of "Investment" (Article 1139)

5. Article 1139 provides an exhaustive, not illustrative, list of what constitutes an investment for purposes of NAFTA Chapter Eleven.[4]

United Mexican States, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) ("*Feldman* Award") ("[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." (quoting Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, at 14, WT/DS33/AB/R (May 23, 1997))).

[2] *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award ¶ 61 (Apr. 15, 2009); *Vito G. Gallo v. Canada*, NAFTA/PCA Case No. 2008-03, Award ¶ 277 (Sept. 15, 2011) (citation omitted) ("Both parties submit, and the Tribunal concurs, that the maxim 'who asserts must prove,' or *actori incumbit probatio*, applies also in the jurisdictional phase of this investment arbitration: a claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional phase[.]"); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction ¶ 2.8 (June 1, 2012) (finding "that it is impermissible for the Tribunal to found its jurisdiction on any of the Claimant's CAFTA claims on the basis of an assumed fact (i.e., alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent). The application of that 'prima facie' or other like standard is limited to testing the merits of a claimant's case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal's jurisdiction directly depends, such as the Abuse of Process, Ratione Temporis and Denial of Benefits issues in this case."); *see also Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections ¶ 118 (Dec. 13, 2017) ("*Bridgestone Licensing Services* Decision") (stating that "[w]here an objection as to competence raises issues of fact that will not fall for determination at the hearing of the merits, the Tribunal must definitively determine those issues on the evidence and give a final decision on jurisdiction."); *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award ¶ 250 (Oct. 22, 2018) (finding that "[t]he Claimants bear the onus of establishing jurisdiction under the BIT and under the ICSID Convention. The onus includes proof of the facts on which jurisdiction depends.").

[3] *Bridgestone Licensing Services* Decision, ¶ 153. *See also Westmoreland Mining Holdings LLC v. Government of Canada*, NAFTA/ICSID Case No. UNCT/20/3, Final Award ¶ 193 (Jan. 31, 2022) ("If the Claimant cannot establish, on the balance of probabilities, those facts which are critical to founding jurisdiction, there is no jurisdiction.").

[4] *See Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 82 (Jan. 12, 2011) ("*Grand River* Award") ("NAFTA's Article 1139 is neither broad nor open-textured. It prescribes an exclusive list of elements or activities that constitute an investment for purposes of NAFTA."). All

Article 1139(g)

6. Article 1139(g) includes within the definition of "investment" "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes[.]" In this connection, Chapter Eleven tribunals have consistently declined to recognize as "property" mere contingent "interests."[5] Moreover, it is appropriate to look to the law of the host State for a determination of the definition and scope of the "property right" at issue.[6]

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three NAFTA Parties agree on this. *See e.g., Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America, at 32 (Nov. 13, 2000) ("Article 1139 of the NAFTA identifies an exhaustive list of property rights and interests that may constitute an 'investment' for purposes of Chapter Eleven. None of the property rights or property interests identified in the definition of 'investment' in Article 1139, however, encompass a mere hope that profits may result from prospective sales[.]"); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Second Submission of Canada Pursuant to NAFTA Article 1128, ¶ 59 (Apr. 30, 2001) ("The definition of 'investment' in NAFTA Article 1139 . . . is exhaustive, not illustrative."); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Second Submission of Mexico Pursuant to NAFTA Article 1128, ¶ 19 (May 15, 2001) ("[A]n investment as defined in Article 1139 . . . while inclusive of several categories, is also exhaustive.").

[5] *See Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA/UNCITRAL, Award ¶¶ 142, 257-58 (Mar. 31, 2010) ("*Merrill & Ring* Award") (finding that "[e]xpropriation cannot affect potential interests[,]" and that the expectation of contracts executed in the future was an "uncertain expectation, like the goodwill considered in Oscar Chinn, [that] does not appear to provide a solid enough ground on which to construct a legitimately affected interest"); *Bayview Irrigation District v. United Mexican States,* ICSID Case No. ARB(AF)/05/1, Award ¶ 118 (June 19, 2007) (finding no property rights where, among other things, exploitation or use of the water requires the grant of a concession under Mexican law, which such concession does not guarantee the existence or permanence of the water); *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 208 (Jan. 26, 2006) ("*Thunderbird* Award") ("[C]ompensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited."); *Feldman* Award ¶ 118 (finding no "right" to tax rebates where the right was conditioned upon presentation of certain invoices); *see also Methanex Corp. v. United States*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Part IV, Chapter D ¶ 17 (Aug. 3, 2005) ("*Methanex* Final Award") (noting that "items such as goodwill and market share may . . . in a comprehensive taking . . . figure in valuation," "[b]ut it is difficult to see how they might stand alone" as an investment under Article 1139).

[6] *See, e.g.*, Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 R.C.A.D.I. 259, 270 (1982) (for a definition of "property . . . [w]e necessarily draw on municipal law sources"). It is well-established under U.S. law, for example, that that revocable government-granted licenses do not confer property interests that give rise to claims for compensation. *See Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981) ("*Dames & Moore*") (holding that attachments subject to "revocable" and "contingent" licenses, which the President could nullify, did not provide the plaintiff with any "property" interest that would support a constitutional claim for compensation); *Mike's Contracting, LLC v. United States*, 92 Fed. Cl. 302, 310 (Ct. Fed. Cl. 2010) ("*Mike's Contracting*") (holding that helicopter airworthiness certificates, subject to U.S. Federal Aviation Administration revocation or suspension, were not property interests that could give rise to a takings claim). This is particularly true when a person voluntarily enters a heavily regulated field.

Article 1139(h)

7. Article 1139(h) includes within the definition of "investment" "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 (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise[.]"

8. To qualify as an investment under Article 1139(h), more than the mere commitment of funds is required. An investor must also have a cognizable "interest" that arises from the commitment of those resources. Specifically, Article 1139(h)(i) states that such interests might arise from, for example, turnkey or construction contracts or concessions. Similar interests might arise, according to Article 1139(h)(ii), from "contracts where remuneration depends substantially on the production, revenues or profits of an enterprise."

9. Not every economic interest that comes into existence as a result of a contract, however, constitutes an "interest" as defined in Article 1139(h). Article 1139(i) specifically excludes from the definition of "investment" "claims to money that arise solely from (i) 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, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d)." Article 1139(j) likewise excludes "any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h) [of the definition of 'investment' in Article 1139]."

Minimum Standard of Treatment (Article 1105)

10. 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."

11. 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."[7] 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."[8] The Commission also confirmed 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)."[9] The Commission's interpretation "shall be binding" on tribunals established under Chapter Eleven.[10]

12. 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.[11] The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[12]

13. 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

[7] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions ¶ B.1 (July 31, 2001).

[8] *Id.* ¶ B.2.

[9] *Id*. ¶ B.3.

[10] NAFTA Article 1131(2).

[11] 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) ("*Grand River* U.S. Counter-Memorial").

[12] *S.D. Myers, Inc. v. Canada,* NAFTA/UNICTRAL, First Partial Award ¶ 259 (Nov. 13, 2000) *("S.D. Myers* First Partial Award"); *Glamis Gold Ltd. v. United States,* NAFTA/UNCITRAL, Award ¶ 615 (June 8, 2009) *("Glamis Gold* 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) ("Borchard 1939").

opinio juris—is the standard practice of States and international courts, including the International Court of Justice.[13]

14. Relevant State practice must be widespread and consistent[14] and be accepted as law, meaning that the practice must also be accompanied by a sense of legal obligation.[15] "[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."[16] A perfunctory reference to these requirements is not sufficient.[17]

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[13] *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* International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 2, UN Doc. A/73/10 (2018) ("ILC Draft Conclusions on Identification of Customary International Law") ("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.").

[14] *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).

[15] *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).

[16] 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.").

[17] *See* ILC Draft Conclusions on Identification of Customary International Law, Conclusion 2, Commentary ¶ 2 ("A general practice and acceptance of that practice as law (*opinio juris*) are the two constituent elements of customary international law: together they are the essential conditions for the existence of a rule of customary international law. *The identification of such a rule thus involves a careful examination of available evidence to establish their presence in any given case*." (emphasis added)); *id.*, Conclusion 3, Commentary ¶ 2 ("Whether a general practice that is

15. 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 Court 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.[18]

16. 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. 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.[19] Thus, arbitral decisions interpreting "autonomous" fair and equitable

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accepted as law (accompanied by *opinio juris*) exists must be carefully investigated in each case, in the light of the relevant circumstances."); *id.* Conclusion 3, Commentary ¶ 6 ("[T]o identify the existence and content of a rule of customary international law each of the two constituent elements must be found to be present, and . . . this calls for an assessment of evidence for each element."); PATRICK DUMBERRY, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105, at 116 (2013) ("DUMBERRY") (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 the MST made such a leap in its evolution, and by doing so has deprived the 2001 NAFTA Interpretive Statement of any practical effect.").

[18] *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 jurisdictional 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 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*).

[19] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions ¶ B.1 (July 31, 2001). ("Article 1105(1) prescribes the customary international law minimum standard of treatment . . . ."); s*ee also Grand*

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).[20]

17. Moreover, 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.[21] While the NAFTA Parties consented to allow investor-State tribunals to decide issues in dispute in accordance with the Agreement and applicable rules of international law, they did not consent to delegate to Chapter Eleven tribunals the authority to develop the content of customary international law, which must be determined solely through a thorough examination of State practice and *opinio juris*. Thus, a formulation of a purported rule of customary

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River Award ¶ 176 (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.

[20] *See, e.g., Glamis Gold* 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, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/2, Award ¶ 278 (Sep. 18, 2009) ("*Cargill* Award") (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").

[21] *See, e.g., Glamis Gold* 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.*, *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Second Submission of the United States of America ¶ 14 (June 12, 2015) ("*Mesa* Second U.S. Submission") ("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) ("*Mesa* Second Submission of Mexico") ("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.").

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).

18. As all three NAFTA Parties agree,[22] 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*.[23] "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."[24] 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.

[22] *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* Second U.S. Submission ¶ 13 ("[T]he 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* Second Submission of Mexico ¶ 9 (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 in paragraph 38, 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.

[23] *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 Gold* 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).

[24] *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.[25]

19. 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.[26] 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."[27] Chapter Eleven tribunals do not have an open-ended mandate to "second-guess government decision-making."[28] A failure to satisfy requirements of domestic law does not necessarily violate international law.[29] Rather,

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[25] *Cargill* Award ¶ 273 (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 Gold* 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* Final Award, Part IV, Chapter C ¶ 26 (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).

[26] *Feldman* Award ¶ 177 ("[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).

[27] *S.D. Myers* First Partial Award ¶ 263. *See also Resolute Forest Products Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-13, Award ¶ 744 (July 25, 2022) ("Arbitral tribunals adjudicating fair and equitable treatment claims, whether under Article 1105 or under similar investment treaty provisions, have consistently exercised caution in approaching claims of violation of minimum treatment standards, especially in respect of State actions on matters of domestic policy that generally are treated with deference.").

[28] *Id.* at ¶ 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 Gold* 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."); *Thunderbird* Award ¶ 127 (reasoning that States have "wide discretion" with respect to how they carry out policies in the context of gambling operations).

[29] *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, Final 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

"something more than simple illegality or lack of authority under the domestic law of a state is necessary to render an act or measure inconsistent with the customary international law requirements. . . ."[30] Accordingly, a departure from domestic law does not in-and-of-itself sustain a violation of Article 1105.

Fair and Equitable Treatment

20. 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 in accordance with the principle of due process embodied in the principal legal systems of the world. 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.

Denial of Justice in Criminal, Civil or Administrative Adjudicatory Proceedings

21. Denial of justice in its historical and "customary sense" denotes "misconduct or inaction of the judicial branch of the government" and involves "some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process."[31] Aliens have no cause for complaint at international law about a domestic system of law provided that it conforms to "a reasonable standard of civilized justice" and is fairly administered.[32] "Civilized

("[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).").

[30] *ADF* Award ¶ 190.

[31] EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 330 (1919) ("BORCHARD 1919"); J.L. BRIERLY, THE LAW OF THE NATIONS 287 (6th ed., 1963) (defining a denial of justice as "an injury involving the responsibility of the state committed by a court of justice").

[32] BORCHARD 1919, at 198 ("Provided the system of law conforms with a reasonable standard of civilized justice and provided that it is fairly administered, aliens have no cause for complaint in the absence of an actual denial of justice.") (footnote omitted).

justice" has been described as requiring "[f]air courts, readily open to aliens, administering justice honestly, impartially, [and] without bias or political control."[33]

22. A denial of justice may occur in instances such as when the final act of a State's judiciary constitutes a "notoriously unjust"[34] or "egregious"[35] administration of justice "which offends a sense of judicial propriety."[36] More specifically, a denial of justice may exist where there is, for example, an "obstruction of access to courts," "failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment."[37] Instances of denial of justice also have included corruption in judicial proceedings, discrimination or ill-will against aliens, and executive or legislative interference with the freedom of impartiality of the judicial process.[38] At the same time, erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law.[39] Similarly, neither the

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[33] Borchard 1939, at 63.

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

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

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

[37] Harvard Research Draft, The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, art. 9, 23 AM. J. INT'L L. SP. SUPP. 131, 134 (1929). The commentary notes that a "manifestly unjust judgment" is one that is a "travesty upon justice or grotesquely unjust." *Id*. at 178.

[38] *Id*. at 175.

[39] *Id*. at 134 ("An error of a national court which does not produce manifest injustice is not a denial of justice."); PAULSSON at 81 ("The erroneous application of national law cannot, in itself, be an international denial of justice."); DUMBERRY at 228 (noting that a simple error, misinterpretation or misapplication of domestic law is not *per se* a denial of justice) (internal quotes omitted); BORCHARD 1919, at 196 (explaining that a government is not responsible

evolution nor development of "new" judge-made law that departs from previous jurisprudence within the confines of common law adjudication, implicates a denial of justice.[40] Finally, the conferral of sovereign immunity protections on the host State government under municipal law does not, in general, effect a denial of justice, though it may do so if it is applied in a manner that discriminates against an investor on the basis of nationality.[41]

23. Non-final judicial acts cannot be the basis for claims under Chapter Eleven of the NAFTA, unless recourse to further domestic remedies is obviously futile or manifestly ineffective. An act of a domestic court that remains subject to appeal has not ripened into the type of final act that is sufficiently definite to implicate state responsibility.

24. It is not enough for a claimant to allege the "absence of a reasonable prospect of success or the improbability of success, which are both less strict tests."[42] As the tribunal in *Apotex Inc. v. United States of America* explained: "whether the failure to obtain judicial finality may be excused for 'obvious futility' turns on the *unavailability* of relief by a higher judicial authority, not on measuring the likelihood that the higher judicial authority would have granted the desired

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for the mistakes or errors of its courts and that: "[A]s a general rule the state is not liable for the acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort."); Christopher Greenwood, *State Responsibility for the Decisions of National Courts, in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 61 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004) ("[I]t is well established that a mistake on the part of the court or an irregularity in procedure is not in itself sufficient to amount to a violation of international law; there must be a denial of justice.").

[40] *See Mondev* Award ¶¶ 131, 133 (finding, in response to the claimant's allegation that a decision of the Massachusetts Supreme Court involved a "significant and serious departure" from its previous jurisprudence, it doubtful that the court "made new law . . . [b]ut even if it had done so its decision would have fallen within the limits of common law adjudication. There is nothing here to shock or surprise even a delicate judicial sensibility.").

[41] *See, e.g.*, Charles de Visscher, *Le déni de justice en droit international*, 52 R.C.A.D.I. 367, 395 (1935) (translation by counsel) ("[O]ne cannot consider a denial of justice the absence of judicial or administrative recourse against the measures taken by the higher authorities of the State, the legislature or the government, as long as this absence results from the general legislation of the State and not from a measure of discrimination against aliens." ["on ne saurait assimiler à un déni de justice l'absence de recours judiciaire ou administrative contre les mesures prises par les autorités supérieures de l'Etat, la législature ou le gouvernement, en tant que cette absence résulte de la législation générale de l'Etat et non d'une mesure de discrimination contre les étrangers."]); ALWYN V. FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 228 (reprint 1970) (1938) ("[T]here are other cases in which it cannot be said that any international obligation has been violated by the failure to give a remedy. This is true, for example, when complaints are directed against the highest authorities of the State; for as most states do not furnish adequate remedies in such cases it seems difficult to deduce from any 'general principles of law' an international duty to provide means of redress.").

[42] C.F. AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 206 (2nd. ed. 2004); *see also* BORCHARD 1919, at 824 (explaining that a claimant is not "relieved from exhausting his local remedies by alleging . . . a pretended impossibility or uselessness of action before the local courts").

relief."[43] NAFTA Chapter Eleven tribunals are neither meant to, nor are they well equipped to, determine the likelihood of a successful result in exhausting domestic remedies.

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25. As noted, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. In contrast, concepts such as legitimate expectations and non-discrimination are not component elements of "fair and equitable treatment" under customary international law that give rise to independent host State obligations.

Legitimate Expectations

26. 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.[44] 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.

Non-Discrimination

27. Similarly, the customary international law minimum standard of treatment set forth in Article 1105(1) does not incorporate a prohibition on economic discrimination against aliens or a

[43] *Apotex Inc v. United States*, NAFTA/ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility ¶ 276 (June 14, 2013) (emphasis in original).

[44] *See, e.g.*, *Grand River* U.S. Counter-Memorial at 96 ("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."); DUMBERRY at 159-60 ("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."). Indeed, NAFTA tribunals have declined to find breaches of Article 1105 even where the claimant's purported expectations arose from a contract. *See also Azinian v. United Mexican States,* NAFTA/ICSID Case No. ARB(AF)/97/2, Award ¶ 87 (Nov. 1, 1999) ("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 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").

general obligation of non-discrimination.[45] As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.[46] To the extent that the customary international law minimum standard of treatment incorporated in Article 1105(1) prohibits discrimination, it does so only in the context of other established customary international law rules, such as prohibitions against discriminatory takings,[47] access to judicial remedies or treatment by the courts,[48] or the obligation of States to provide full

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[45] *See Grand River* Award ¶¶ 208-209 ("The language of Article 1105 does not state or suggest a blanket prohibition on discrimination against alien investors' investments, and one cannot assert such a rule under customary international law. States discriminate against foreign investments, often and in many ways, without being called to account for violating the customary minimum standard of protection . . . [N]either Article 1105 nor the customary international law standard of protection generally prohibits discrimination against foreign investments.").

[46] *See Methanex* Final Award, Part IV, Chapter C ¶¶ 25-26 (explaining that customary international law has established exceptions to the broad rule that "a State may differentiate in its treatment of nationals and aliens," but noting that those exceptions must be proven rules of custom, binding on the Party against whom they are invoked); *see also* ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW: PEACE 932 (9th ed. 1992) ("[A] degree of discrimination in the treatment of aliens as compared with nationals is, generally, permissible as a matter of customary international law."); Borchard 1939, at 56 ("The doctrine of absolute equality – more theoretical than actual – is therefore incompatible with the supremacy of international law. The fact is that no state grants absolute equality or is bound to grant it. It may even discriminate between aliens, nationals of different states, *e.g.*, as the United States does through treaty in the matter of the ownership of real property in this country."); ANDREAS ROTH, MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 83 (1949) ("[T]he principle of equality has not yet become a rule of positive international law, i.e., there is no obligation for a State to treat the aliens like the nationals. A discrimination of treatment between aliens and nationals alone does not yet constitute a violation of international law.").

[47] *See, e.g.*, *BP Exploration Co. (Libya) Ltd. v. Libya*, 53 I.L.R. 297, 329 (Ad Hoc Arb. 1974) ("[T]he taking . . . clearly violates public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character."); *Libyan American Oil Co. (LIAMCO) v. Libya*, 62 I.L.R. 140, 194 (Ad Hoc Arb. 1977) ("It is clear and undisputed that non-discrimination is a requisite for the validity of a lawful nationalization. This is a rule well established in international legal theory and practice."); *Kuwait v. American Independent Oil Co. (AMINOIL)*, 66 I.L.R. 518, 585 (Ad Hoc Arb. 1982) (considering the question "whether the nationalization of Aminoil was not thereby tainted with discrimination," but finding that there were legitimate reasons for nationalizing one company and not the other); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712(1)(b) (AM. LAW INST. 1987) ("A state is responsible under international law for injury resulting from . . . a taking by the state of the property of a national of another state that . . . is discriminatory . . . ."); *id.* at § 712 cmt. f ("Formulations of the rules on expropriation generally include a prohibition of discrimination . . . .").

[48] *See, e.g.*, C.F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 243 (1967) ("Especially in a suit between State and alien it is imperative that there should be no discrimination between nationals and aliens in the imposition of procedural requirements. The alien cannot be expected to undertake special burdens to obtain justice in the courts of the State against which he has a complaint."); BORCHARD 1919, at 334 (A national's "own government is justified in intervening in his behalf only if the laws themselves, the methods provided for administering them, and the penalties prescribed are in derogation of the principles of civilized justice as universally recognized or if, in a specific case, they have been wrongfully subverted by the courts so as to discriminate against him as an alien or perpetrate a technical denial of justice."); *Report of the Guerrero Sub-Committee of the Committee of the League of Nations on Progressive Codification 1*, League of Nations Doc. C.196M.70, at 100 (1927) ("Denial of justice is therefore a refusal to grant foreigners free access to the courts instituted in a State for the discharge of its judicial functions, or the failure to grant free access, in a particular case, to a foreigner who seeks to defend his rights, *although in the circumstances nationals of the State would be entitled to such access*.") (emphasis added); *Ambatielos (Greece v. United Kingdom)*, 12 R.I.A.A. 83, 111 (Com. Arb. 1956) ("The modern

protection and security and to compensate aliens and nationals on an equal basis in times of violence, insurrection, conflict or strife.[49] Moreover, investor-State claims of nationality-based discrimination are governed exclusively by the provisions of Chapter Eleven that specifically address that subject (Articles 1102 and 1103), and not Article 1105(1).[50]

Expropriation and Compensation (Article 1110)

28. Article 1110(1) provides that "[n]o 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" unless the conditions specified in subparagraphs (a) through (d) are satisfied. If an expropriation does not conform to each of the specified conditions, it constitutes a breach of Article 1110. Any such breach requires compensation in accordance with Article 1110(2).[51]

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concept of 'free access to the Courts' represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a practice which existed in former times and in certain countries, and which constituted an unjust discrimination against foreigners. Hence, the essence of 'free access' is adherence to and effectiveness of the principle of non-discrimination against foreigners who are in need of seeking justice before the courts of the land for the protection and defence of their rights.").

[49] *See, e.g.*, *The Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers (United States, Reparation Commission)*, 2 R.I.A.A. 777, 794-95 (1926); League of Nations, *Bases of Discussion: Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners*, League of Nations Doc. C.75.M.69.1929.V, at 107, 116 (1929), *reprinted in* SHABTAI ROSENNE, LEAGUE OF NATIONS CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW [1930], 526-42 (1975) (Basis of Discussion No. 21 includes the provision that a State must "[a]ccord to foreigners to whom damage has been caused by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance the same indemnities as it accords to its own nationals in similar circumstances." Basis of Discussion No. 22(b) states that "[a] State must accord to foreigners to whom damage has been caused by persons taking part in an insurrection or riot or by mob violence the same indemnities as it accords to its own nationals in similar circumstances.").

[50] *See Mercer Int'l Inc. v. Canada,* ICSID Case No. ARB(AF)/12/3, Award ¶ 7.58 (Mar. 6, 2018) ("So far as concerns the Claimant's claims of 'discriminatory treatment' contrary to NAFTA Article 1105(1), the Tribunal's [*sic*] agrees with the non-disputing NAFTA Parties' submissions that such protections are addressed in NAFTA Articles 1102 and 1103, rather than NAFTA Article 1105(1)."); *Methanex* Final Award, Part IV, Ch. C ¶¶ 14-17, 24 (explaining that the impact of the "FTC interpretation of [NAFTA] Article 1105" was not to "exclude non-discrimination from NAFTA Chapter 11" but "to confine claims based on alleged discrimination to Article 1102, which offers full play for a principle of non-discrimination").

[51] As the tribunal in *British Caribbean Bank v. Belize* confirmed with respect to very similar treaty language: "at no point does the Treaty, being a *lex specialis*, distinguish between lawful and unlawful expropriation. . . . Once the violation of the Treaty provisions regarding expropriation is established, the State has breached the Treaty." The tribunal, noting that the language "specifically negotiated" by the treaty parties required that compensation "*shall* amount to the . . . fair market value of the investment expropriated before the expropriation," found no room for interpreting this language to allow for another standard of compensation in the event of a breach. *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18, Award ¶¶ 260-62 (Dec. 19, 2014) (emphasis added).

29. As a threshold matter, and as the *Glamis* tribunal recognized, the term "expropriation" in Article 1110(1) "incorporates by reference the customary international law regarding that subject."[52] In this connection, it is a principle of customary international law that in order for there to have been an expropriation, a property right or property interest must have been taken.[53] As such, and given that Article 1110(1) protects "investments" from expropriation, the first step in any expropriation analysis must begin with an examination of whether there is an investment capable of being expropriated.[54] It is necessary to look to the law of the host State[55] for a determination of the definition and scope of the alleged property right or property interest at issue, including any applicable limitations.[56] Assessing whether a license, permit, or similar instrument gives rise to property rights or interests that are capable of being expropriated is a case-by-case inquiry, involving examination of the instrument at issue, as well as the nature and extent of rights, if any, conferred by the instrument under the host State's domestic law.[57]

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[52] *Glamis Gold* Award ¶ 354.

[53] *See, e.g.,* Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law,* 176 R.C.A.D.I. 259, 272 (1982) ("Higgins") ("[O]nly *property* deprivation will give rise to compensation.") (emphasis in original); Rudolf Dolzer, *Indirect Expropriation of Alien Property,* ICSID REVIEW: FOREIGN INV. L.J. 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.'"); *Glamis Gold* Award ¶ 356 ("There is for all expropriations, however, the foundational threshold inquiry of whether the property or property right was in fact taken."). This principle of customary international law is reflected in 2012 U.S. Model Bilateral Investment Treaty, ann. B (*Expropriation*) ¶ 2.

[54] Notably, the NAFTA, in contrast with other treaties, does not list intellectual property rights or "licenses, authorizations, permits, and similar rights" as among investments covered under Article 1139. *See, e.g.*, 2012 U.S. Model Bilateral Investment Treaty art. 1 (listing intellectual property rights as well as licenses, authorizations, permits, and similar rights conferred pursuant to domestic law as possible forms of "investment"); Dominican Republic-Central America-United States Free Trade Agreement art. 10.28 (signed at Washington Aug. 5, 2004), 43 I.L.M. 514 (CAFTA-DR) (same).

[55] *See, e.g.*, Higgins 270 (for a definition of "property . . . [w]e necessarily draw on municipal law sources"); CAMPBELL MCLACHLAN, LAURENCE SHORE, & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES ¶ 8.64 (2d ed. 2017) ("The property rights that are the subject of protection under the international law of expropriation are created by the host State law. Thus, it is for the host State law to define the nature and extent of property rights that a foreign investor can acquire."); *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award ¶ 184 (Feb. 3, 2006) ("[F]or 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 . . . .").

[56] *See Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Rejoinder of Respondent United States of America, at 11 (Mar. 15, 2007) ("*Glamis Gold* U.S. Rejoinder") (agreeing with expert report of Professor Wälde that in an instance where property rights are subject to legal limitations existing at the time the property rights are acquired, any subsequent burdening of property rights by such limitations does not constitute an impairment of the original property interest).

[57] For example, under U.S. law, it is well established that revocable government-granted licenses or permits do not confer property interests that give rise to claims for compensation. *See, e.g.*, *Dames & Moore*, 453 U.S. at 674 n.6

30. Article 1110 provides for protections from two types of expropriations, direct and indirect.[58] A direct expropriation occurs "where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure."[59]

31. An indirect expropriation occurs "where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."[60] Determining whether an indirect expropriation has occurred requires a case-by-case fact-based inquiry that considers, among other factors: (i) the economic impact of the governmental action; (ii) the extent to which that action interferes with distinct, reasonable-investment-backed expectations; and (iii) the character of the government action.[61]

32. With respect to the first factor, for an expropriation claim to succeed, the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic

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(holding that attachments subject to "revocable" and "contingent" licenses, which the President could nullify, did not provide the plaintiff with any "property" interest that would support a constitutional claim for compensation); *Mike's Contracting*, 92 Fed. Cl. at 310 (holding that helicopter airworthiness certificates, subject to U.S. Federal Aviation Administration revocation or suspension, were not property interests that could give rise to a takings claim); *Conti v. United States*, 291 F.3d 1334, 1340 (Fed. Cir. 2002) ("[C]ourts have held that no property rights are created in permits and licenses."); *see also 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 ¶ 227 (Dec. 14, 2012) (stating that "property 'must be capable of exclusive possession or control,'" and that, where the purported investor has "no power . . . to prevent the government from exercising its statutory authority to withhold or revoke [the instrument in question]," the investor cannot "exclude" the government from those instruments, and they thus "lack the requisite exclusivity that would confer a cognizable 'property interest' under U.S. law").

[58] As the United States has previously explained, the phrase "take a measure tantamount to nationalization or expropriation" explains what the phrase "indirectly nationalize or expropriate" means; it does not assert or imply the existence of an additional type of action that may give rise to liability beyond those types encompassed in the customary international law categories of "direct" and "indirect" nationalization or expropriation. *Metalclad Corp. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/97/1, Submission of the United States of America ¶¶ 9-14 (Nov. 9, 1999). *See also Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Interim Award ¶¶ 103-04 (June 26, 2000) ("*Pope & Talbot* Interim Award") (rejecting the claimant's argument that "tantamount to expropriation" provides protections beyond those provided by customary international law; *see also* id. ¶ 96); *S.D. Myers* First Partial Award ¶ 286 ("In common with the *Pope & Talbot* Tribunal, this Tribunal considers that the drafters of the NAFTA intended the word 'tantamount' to embrace the concept of so-called 'creeping expropriation,' rather than to expand the internationally accepted scope of the term expropriation."); *Cargill* Award ¶ 372 ("Article 1110, in using the terms 'expropriation' and 'tantamount to expropriation', incorporates this customary law of expropriation."). *See also* Kenneth Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation*, 278 (2010) ("Some BITs refer to measures 'tantamount' or 'equivalent' to expropriation to describe indirect expropriation.") (footnotes omitted).

[59] 2012 U.S. Model Bilateral Investment Treaty, ann. B (*Expropriation*) ¶ 3. The expropriation annex to the U.S. Model BIT was intended to reflect customary international law. *Id.*, ¶ 1.

[60] 2012 U.S. Model BIT ann. B (*Expropriation*) ¶ 4.

[61] *See id.* ¶ 4(a).

value of its investment, or interfered with it to such a similar extent and so restrictively as "to support a conclusion that the property has been 'taken' from the owner."[62]

33. The second factor requires an objective inquiry of the reasonableness of the claimant's investment-backed expectations. Whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation[63] or the potential for government regulation in the relevant sector.

34. The third factor considers the nature and character of the government action, including whether such action involves physical invasion by the government or whether it is more regulatory in nature (*i.e.*, whether "it arises from some public program adjusting the benefits and burdens of economic life to promote the common good").[64]

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[62] *Pope & Talbot* Interim Award ¶ 102; *see also Glamis Gold* Award ¶ 357 ("[A] panel's analysis should begin with determining whether the economic impact of the complained of measures is sufficient to potentially constitute a taking at all: '[I]t must first be determined if the Claimant was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto ... had ceased to exist.' 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.'") (citations omitted); *Grand River* Award ¶¶ 149-50 (citing the *Glamis Gold* Award); *Cargill* Award ¶ 360 (holding that a government measure only rises to the level of an expropriation if it affects "a radical deprivation of a claimant's economic use and enjoyment of its investment" and that a "taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property . . . (i.e., it approaches total impairment)").

[63] *See Methanex* Final Award, Part IV, Ch. D ¶ 9 (noting that no specific commitments to refrain from regulation had been given to Methanex, which "entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons. Indeed, the very market for MTBE in the United States was the result of precisely this regulatory process"); *Grand River* Award ¶¶ 144-45 ("The Tribunal also notes that trade in tobacco products has historically been the subject of close and extensive regulation by U.S. states, a circumstance that should have been known to the Claimant from his extensive past experience in the tobacco business. An investor entering an area traditionally subject to extensive regulation must do so with awareness of the regulatory situation. Given the circumstances—including the unresolved questions involving the Jay Treaty and U.S. domestic law, and the practice of heavy state regulation of sales of tobacco products—the Tribunal holds that Arthur Montour could not reasonably have developed and relied on an expectation, the non-fulfillment of which would infringe NAFTA, that he could carry on a large-scale tobacco distribution business, involving the transportation of large quantities of cigarettes across state lines and into many states of the United States, without encountering state regulation."); *Glamis Gold* U.S. Rejoinder at 91 ("Consideration of whether an industry is highly regulated is a standard part of the legitimate expectations analysis, and . . . where an industry is already highly regulated, reasonable extensions of those regulations are foreseeable.").

[64] *Glamis Gold* U.S. Rejoinder at 109 (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

35. However, under international law, where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory.[65] This principle in public international law, referred to as the police powers doctrine, is not an exception that applies after an expropriation has been found but, rather, is a recognition that certain actions, by their nature, do not engage State responsibility.[66] The United States is aware of no general and consistent State practice and *opinio juris* establishing that a State must show that the action at issue was proportionate, in addition to being a *bona fide*, non-discriminatory regulation. Accordingly, the police powers doctrine has no proportionality requirement.

Limitations on Claims for Loss or Damage (Articles 1116 & 1117)

Causation and Damages

36. Article 1116 allows 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.[67]

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[65] *See, e.g.*, *Glamis Gold* Award ¶ 354 ("A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory. . . .") (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712, cmt. (g) (1987)); *Chemtura Corp. v. Government of Canada*, NAFTA/UNCITRAL, Award ¶ 266 (Aug. 2, 2010) (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"); *Methanex* Final Award, Part IV, Ch. D ¶ 7 (holding that as a matter of general international law, "a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process" will not ordinarily be deemed expropriatory or compensable); Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 791-792 (Chester Brown ed., 2013) (discussing observation included in Annex B, paragraph 4(b) of U.S. 2012 Model BIT that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation."). This observation was first included in the 2004 U.S. Model BIT and has been echoed in subsequent U.S. investment agreements.

[66] *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 539 (5th ed. 1998) ("Cases in which expropriation is allowed to be lawful in the absence of compensation are within the narrow concept of public utility prevalent in laissez-faire economic systems, i.e. exercise of police power, health measures, and the like."); G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT'L L., 307, 338 (1962) ("If, however, such prohibition can be justified as being reasonably necessary to the performance by a State of its recognized obligations to protect the public health, safety, morals or welfare, then it would normally seem that there has been no 'taking' of property.").

[67] 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

37. The ordinary meaning of Article 1116 requires an investor to establish the causal nexus between the alleged breach and the claimed loss or damage.[68] It is well established that "causality in fact is a necessary but not a sufficient condition for reparation."[69] 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.[70]

38. 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.[71] Article 1116 contains no indication that the NAFTA Parties

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Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 36(2) (2001) ("ILC State Responsibility Articles"). Specifically, as the International Law Commission observes, "[t]ribunals have been reluctant to provide compensation for claims with inherently speculative elements." *Id.*, Commentary ¶ 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).

[68] 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).

[69] ILC State Responsibility Articles, art. 31, Commentary ¶ 10. 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").

[70] *See 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.").

[71] *See* ILC State Responsibility Articles, art. 31, Commentary ¶ 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

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.[72] In accordance with the customary international law principles of treaty interpretation reflected in Article 31(3)(a)-(b) of the Vienna Convention on the Law of Treaties, the Tribunal must take into account this common understanding of the Parties.[73]

39. NAFTA tribunals have consistently imposed a requirement of proximate causation under Article 1116. 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

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LAW 244-45 (1987) ("[I]t 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").

[72] *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.").

[73] *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 officials 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 . . . .").

sustained by the investor,[74] 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."[75] 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 complained of."[76] 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."[77]

40. Accordingly, any loss or damage cannot be based on an assessment of acts, events or circumstances not attributable to the alleged breach.[78] Events that develop subsequent to the alleged breach may increase or decrease the amount of damages suffered by a claimant. At the same time, injuries that are not sufficiently "direct," "foreseeable," or "proximate" may not, consistent with applicable rules of international law, be considered when calculating a damage award.[79] Tribunals should exercise caution also because compensation for injuries not caused by the breach may, depending on the circumstances, be construed as intending to deter or punish the conduct of the disputing State, contrary to Article 1135(3).[80]

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[74] *S.D. Myers* First Partial Award ¶ 316.

[75] *S.D. Myers* Second Partial Award ¶ 140 (emphasis in original).

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

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

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

[79] As the commentary to the ILC State Responsibility Articles explains, causality in fact is a necessary but not sufficient condition for reparation: "There is a further element, associated with the exclusion of injury that is too 'remote' or 'consequential' to be the subject of reparation. In some cases, the criterion of 'directness' may be used, in others 'foreseeability' or 'proximity'. . . . The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act[.]" ILC State Responsibility Articles, art. 31, Commentary ¶ 10 (footnotes omitted).

[80] NAFTA Article 1135(3) expressly provides that "[a] Tribunal may not order a Party to pay punitive damages." *See also* ILC State Responsibility Articles, art. 36, Commentary ¶ 4 ("[A]rticle 36 is purely compensatory, as its title indicates . . . . It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character.") (citing the *Velásquez Rodriguez*, Compensatory Damages case, where "the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages (Series C, No. 7 (1989))").

Loss or damage incurred directly

41. 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.[81] An investor that has not incurred loss or damage by reason of, or arising out of, a Party's alleged breach cannot submit a claim to arbitration under NAFTA Chapter Eleven.

42. 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)

43. 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)

44. Articles 1116 and 1117 serve to address discrete and non-overlapping types of injury.[82] 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.[83] However, Article 1117 is applicable only where the loss

[81] 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.

[82] *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.").

[83] *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

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.

45. The United States' position on the interpretation and functions of Articles 1116(1) and 1117(1) is long-standing and consistent.[84] The United States therefore agrees with Canada[85] and Mexico[86] 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.[87]

46. 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

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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").

[84] *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); *Legacy Vulcan, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB/19/1, Submission of the United States of America ¶¶ 29-38 (June 7, 2021).

[85] *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).

[86] *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).

[87] As explained above in paragraph 38, 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.

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."[88] 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 been infringed."[89] Thus, only *direct* loss or damage suffered by shareholders is cognizable under international law.[90]

47. 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.

48. 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.[91] 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.[92]

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[88] *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").

[89] *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.").

[90] *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.

[91] *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.

[92] 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.

49. 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.[93]

50. Article 1116 adheres to the principle of customary international law that shareholders may assert claims only for *direct* injuries to their rights.[94] Article 1117, by contrast, provides a right to present a claim for *indirect* injury not otherwise found in customary international law,[95] 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."[96] Nothing in the

[93] 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).

[94] 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 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.").

[95] 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.").

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

text of Article 1116 suggests that the NAFTA Parties intended to derogate from customary international law restrictions on the assertion of shareholder claims.[97]

51. 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.

Contributory Fault

52. It is well established that a claimant may not be awarded reparation for losses to the extent of its contribution to such losses, and nothing in the NAFTA indicates otherwise. Article 39 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts provides: "In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."[98]

Respectfully submitted,

[signed]

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[97] 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)

[98] ILC State Responsibility Articles, art. 39. *See also id.*, Commentary ¶ 1 ("Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with articles 1 and 28, but *where the injured State, or the individual victim of the breach, has materially contributed to the damage by some wilful or negligent act or omission*. Its focus is on situations which in national law systems are referred to as 'contributory negligence', 'comparative fault', 'faute de la victime', etc." (emphasis added)).

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