**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

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

**Claimants**

**v.**

**CANADA**

**Respondent**

**(ICSID Case No. ARB/20/52)**

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# CLAIMANTS' RESPONSE TO THE SUBMISSION OF THE UNITED STATES OF AMERICA UNDER ARTICLE 1128 OF THE NAFTA

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## I. INTRODUCTION

1. Koch Industries, Inc. (**Koch**) and Koch Supply & Trading, LP (**KS&T**) (collectively, the **Claimants**), respectfully submit their comments on the interpretative submissions made by the Government of the United States of America dated 28 October 2022 pursuant to Article 1128 of the North American Free Trade Agreement (**NAFTA** or **Agreement**) (**NAFTA 1128 Submission**).

2. In its Submission, the United States has provided its views on the allocation of the burden of proof under NAFTA Article 1131; on the meaning of "investment" under Article 1139(g) and (h); as well as on the interpretation of Article 1105 (on the Minimum Standard of Treatment), Article 1110 (on Expropriation and Compensation), and Article 1116 (titled "Claim by an Investor of a Party on Its Own Behalf"), as well as contributory fault under customary international law.

3. The Claimants maintain in their entirety the arguments and submissions contained in their Memorial and Reply with respect to the interpretation of these provisions. These comments are limited to some of the interpretative issues raised in the United States' Submission and do not extend to any question of fact involved in the present dispute.

## II. PRELIMINARY OBSERVATIONS ON ARTICLE 1128 SUBMISSIONS

4. Before addressing some of the interpretative points raised in the United States' Submission, the Claimants set out their position on the interpretative weight that may be ascribed to the arguments made in the United States' NAFTA 1128 Submission as well as the position taken by other NAFTA Parties in previous 1128 submissions.

5. Whilst Article 1128 of the NAFTA allows a non-disputing NAFTA Party to make submissions on a question of interpretation arising under the Agreement, such submissions have no binding effect on the Tribunal as such. Article 2001(2)(c) of the NAFTA provides a specific mechanism for the joint interpretation of the NAFTA by the three NAFTA Parties by the Free Trade Commission. According to Articles 1131(2) and 1132(2) of the NAFTA, the interpretation adopted by the Commission shall be binding upon an arbitral tribunal.[1] Where, however, the Commission has not adopted an interpretation, it falls upon the Arbitral Tribunal, pursuant to Article 1131(1), to "decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

6. In the present case, with the exception of the "Notes of Interpretation of Certain Chapter 11 Provisions" dated 31 July 2001 concerning the interpretation of Article 1105, the Parties have not deployed the treaty-specific mechanism for the joint interpretation of any of the other provisions involved in the present proceedings. Thus, whatever the professed legal position of a NAFTA Party may be on the interpretation of a particular

[1] Article 2001(2)(c) provides that the Free Trade Commission "shall (…) resolve disputes that may arise regarding its interpretation or application", Claimants' Exh.**CL-204**. According to Article 1131(2), "An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section." Article 1132(2) contains a provision to the same effect with regard to the interpretation of the Annexes, Claimants' Exh. **CL-204**.

NAFTA provision, such interpretation cannot *ipso jure* become binding upon the Tribunal unless formalized through the procedure of the Free Trade Commission.

7. Moreover, the Claimants note that the United Mexican States (**Mexico**) has elected not to exercise its right under Article 1128 of the NAFTA to present its views on the interpretation of the provisions involved in the present proceedings.

8. In the Claimants' view, the legal submissions made by two out of the three NAFTA Parties cannot constitute evidence of "subsequent agreement" or "subsequent practice" within the meaning of the customary rule reflected in Article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties (**VCLT**), insofar as this rule requires evidence of practice or agreement by *all* parties to the treaty.[2] To the extent that the Tribunal does not have before it evidence of the common understanding by all three NAFTA Parties, Article 1128 submissions by one Party are simply not enough to evidence a "subsequent agreement" or "subsequent practice" for the purposes of the customary rules governing treaty interpretation.

9. Much less weight can be ascribed to the views advanced by a NAFTA non-disputing Party under Article 1128, where that Party's submissions materially differ or contradict another Party's interpretation of the same provision. The Claimants note that such is the case here, where the United States' position does not necessarily align with the position taken by Canada on the precise content of different provisions in question.

10. Finally, the Claimants do not agree with the United States' sweeping proposition that, where "all three NAFTA Parties have expressed their agreement" on a specific point of interpretation under the NAFTA, "the Tribunal must take into account this common understanding of the Parties" in accordance with the customary international law principles of treaty interpretation reflected in Article 31(a)-(b) of the VCLT.[3] This argument ignores some of the basic rules and principles governing treaty interpretation, insofar as the threshold for establishing the common intent of the parties to a treaty through subsequent agreement or practice is quite high.

11. Notably, the United States refers to the International Law Commission's (**ILC**) draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties. According to draft Conclusion 4, paragraph 2, the "statements [made] in the course of a legal dispute" may constitute "subsequent practice" under Article 31(3(b) of the VCLT.[4]

12. In the Claimants' view, whether or not statements made in the course of a legal dispute by *all* NAFTA Parties gives rise to "subsequent practice" is a question that needs to be examined on a case-by-case basis and cannot simply be assumed. As acknowledged

[2] 'Revised Draft Articles on the Law of Treaties', reproduced in *Yearbook of the International Law Commission*, 1966, Vol. II, p. 222 commentary (15) to draft Article 27, Claimants' Exh. **CL-205**: "The text provisionally adopted in 1964 spoke of a practice which 'establishes the understanding of all the parties'. By omitting the word 'all' the Commission did not intend to change the rule. It considered that the phrase 'the understanding of the parties' necessarily means 'the parties as a whole'."

[3] NAFTA 1128 Submission, para. 38.

[4] NAFTA 1128 Submission, p. 22, fn 73.

*(continued)*

by the NAFTA tribunal in *Cargill v. Mexico*, "the weight of these statements needs to be assessed in light of their position as respondents at the time of the statement."[5]

13. Moreover, the United States selectively quotes from the ILC's work, but fails to mention draft Conclusion 9(1), which qualifies the interpretative weight that may be ascribed to subsequent practice by reference to certain qualitative characteristics. It states, in particular, states that "[t]he weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3 [VCLT], depends, *inter alia*, on its clarity and specificity."[6] In addition, Conclusion 9(2) states that "the weight of subsequent practice under article 31, paragraph 3 (b) [VCLT], depends, *inter alia*, on whether and how it is repeated."

14. It follows that, in order to take into account the submissions of the three NAFTA Parties as evidence of "subsequent practice" within the meaning of Article 31(3)(b) VCLT, that practice must display certain qualitative characteristics (such as clarity, specificity and frequency) that evidence a "concordant practice embracing all the parties and showing their common understanding of the meaning of the treaty."[7]

15. In the same vein, international dispute settlement bodies have applied stringent criteria in determining whether "subsequent practice" or "subsequent agreement" exists for interpretative purposes. Notably, in its commentary to draft Conclusion 9, the ILC refers to the report of the Appellate Body of the World Trade Organization (**WTO**) in the case of *Japan — Alcoholic Beverages II*, which stated that:

> "the essence of subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant."[8]

16. Interpreting this statement, the ILC observed that:

> "subsequent practice under article 31, paragraph 3 (b), requires more than one "act or pronouncement" regarding the interpretation of a treaty; rather *action of such frequency and uniformity that it warrants a conclusion that the parties have reached a settled agreement regarding the interpretation of the treaty*. Such a threshold would imply that subsequent practice under

[5] *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 275, Claimants' Exh. **CL-54**.

[6] "Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties" reproduced in ILC, *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, p. 70, Conclusion 9, paragraph 1, Claimants' Exh. **CL-206**.

[7] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Separate opinion of President Yusuf*, *I.C.J. Reports 2020*, p. 352, Claimants' Exh. **CL-207**: "the practice of an individual party or of only some parties as an element of interpretation is on a quite different plane from a concordant practice embracing all the parties and showing their common understanding of the meaning of the treaty. Subsequent practice of the latter kind evidences the agreement of the parties as to the interpretation of the treaty and is analogous to an interpretative agreement." citing *Yearbook of the International Law Commission*, 1964, Vol. II, p. 204, para. 13.

[8] WTO Appellate Body Report, *Japan — Taxes on Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted on 1 November 1996, pp. 12–13 (internal references omitted), Claimants' Exh. **CL-208**.

*(continued)*

> article 31, paragraph 3 (b), requires a broad-based, settled and qualified form of common practice in order to establish agreement among the parties regarding interpretation."[9]

17. Thus, it is not enough merely to cite to previous NAFTA 1128 submissions and argue that they amount to "subsequent practice" within the meaning of Article 31(3)(b). If those pleadings do not satisfy the criteria prescribed by customary law, they cannot be accorded interpretative weight. By way of example, in the NAFTA case of *B-Mex v. Canada*, the Ontario Superior Court of Justice referred to *Japan — Alcoholic Beverages II* and dismissed the argument that the NAFTA 1128 submissions made by all three NAFTA Parties were sufficient to meet the standard for "subsequent practice" under Article 31(3)(b) VCLT as they lacked the necessary frequency and consistency.[10] A similar conclusion was reached by the Ontario Court of Appeal in *Cargill v. Mexico*, which dismissed previous NAFTA 1128 submissions as not sufficient to amount to "subsequent agreement" on a matter of interpretation.[11]

18. In light of the foregoing, the Claimants are of the view that the existence of "subsequent agreement" or "subsequent practice" within the meaning of the customary rule reflected in Article 31(3)(a) and (b) VCLT cannot simply be assumed on the basis of some references to prior NAFTA 1128 submissions. Rather, customary law requires the "concordant, common and consistent" practice by all NAFTA Parties with sufficient clarity, specificity, frequency and uniformity to evidence the common intention of all Parties to the Agreement on a particular interpretation.

19. In the Claimants' view, neither the United States nor Canada have been able to evidence this sort of subsequent practice or agreement in the present case. With these observations in mind, the Claimants set out below their position on some of the interpretative issues raised in the United States' Submission.

## III. BURDEN OF PROOF (ARTICLE 1131)

20. The United States first argues that, in accordance with Article 1131 and general principles of international law, "a claimant has the burden of proving its claims, and if a respondent raises any affirmative defenses, the respondent must prove such defenses."[12] In the context of an objection to jurisdiction, the United States also contends that "the burden is on the claimant to prove the necessary and relevant facts

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[9] ILC, *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, pp. 72-73, comment (8) (emphasis added) , Claimants' Exh. **CL-206**.

[10] *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Judgment of Ontario Superior Court, 20 July 2020 para. 217, Claimants' Exh. **CL-209**: "submissions made by the NAFTA parties are insufficient to constitute a subsequent practice. Unlike in *Cattlemen*, *Bilcon* and *Mobil II*, where legal submissions were found to constitute subsequent practice, this is the first case in which the NAFTA parties have offered unanimous submissions on the interdependency of Articles 1119 and 1121".

[11] *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Decision on the Application to set aside award (Ontario Court of Appeal), 4 October 2011, para. 84, Claimants' Exh. **CL-210**: "if that position of the three Parties was a clear, well-understood, agreed common position, in accordance with Article 31(3)(b) of the [VCLT] (…) it would be an error of jurisdiction for the tribunal to fail to give effect to that interpretation of the relevant provisions of Chapter 11. However, that does not appear to be the case."

[12] NAFTA 1128 Submission, para. 3.

*(continued)*

to establish that a tribunal has jurisdiction to hear its claim."[13] The United States further argues that "the burden of proof lies fairly and squarely on [the claimant] to demonstrate that it owns or controls a qualifying investment" for the purposes of deciding a jurisdictional objection.[14]

### A. Factual burden

21. The Claimants agree with the United States' Submission that, "as a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of that fact".[15] As explained in the Reply, this rule applies to questions of jurisdiction as it applies to the merits of a claim, notably insofar as it applies to the factual basis of an assertion of jurisdiction that must be proved as part-and-parcel of a claimant's case.[16]

22. That being said, the Claimants do not bear an unqualified burden to disprove whatever assertion the Respondent chooses to put forward in its submissions. Pursuant to the general principle of *actori incumbit onus probandi*, it is incumbent upon the Respondent to produce evidence sufficient to establish its objections to jurisdiction.[17] In that sense, the *factual* burden of proof is shared between the parties. As stated in *Spence v. Costa Rica*,

> "The burden is therefore on the Claimants to prove the facts necessary to establish the Tribunal's jurisdiction. If that can be done, the burden will shift to the Respondent to show why, despite the facts as proved by the Claimants, the Tribunal lacks jurisdiction."[18]

23. The Claimants have discharged their factual burden, providing ample evidence in their written submissions to demonstrate that the Tribunal has jurisdiction over this dispute *ratione voluntatis*, *ratione temporis*, *ratione personae*, and *ratione materiae*[19] including on the basis of the fact that the Claimants made qualifying investments under NAFTA Article 1139.[20] The burden has therefore shifted to the Respondent to rebut the Claimants' established position.

24. By contrast, and as explained in the Reply, the Respondent has failed to discharge its own burden to prove the facts underlying its objection that emission allowances do not qualify as "property" within the meaning of NAFTA Article 1139(g), or that the Claimants did not hold any other "interests arising from the commitment of capital" in

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[13] NAFTA 1128 Submission, para. 4.

[14] NAFTA 1128 Submission, para. 4, citing *Bridgestone Licensing Services, Inc. and Bridgestone Americas Inc. v. Republic of Panama*, ICSID Case No. ARB 16/34, Decision on Expedited Objections, 13 December 2017, para. 153.

[15] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 660, para. 54, Claimants' Exh. **CL-211**.

[16] Claimants' Reply, para. 240, citing *Spence International Investments, LLC, Berkowitz, et al. and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, para. 239, Respondent's Exh. **RL-6**.

[17] Claimants' Reply, para. 242, and references in fn 337.

[18] *Spence International Investments, LLC, Berkowitz, et al. and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, para. 239, Respondent's Exh. **RL-6**.

[19] Claimants' Memorial, paras. 295-335.

[20] Claimants' Memorial, paras. 320-324.

*(continued)*

the territory of Canada under NAFTA Article 1139(h).[21] Moreover, the Respondent has failed to demonstrate its assertion that the Tribunal lacks jurisdiction *ratione personae* under NAFTA and the ICSID Convention.[22]

### B. Legal burden

25. As far as the *legal* burden of proof is concerned, the Claimants maintain their position that neither a claimant nor a respondent bears the legal burden of proving jurisdiction.[23] In accordance with recognized principles of international law, it is for the tribunal to determine, on the basis of the evidence before it whether or not it has jurisdiction and the scope of that jurisdiction. As stated by the International Court of Justice (**ICJ**),

> "Although a party seeking to assert a fact must bear the burden of proving it (…), this has no relevance for the establishment of the Court's jurisdiction, which is a 'question of law to be resolved in the light of the relevant facts' (...). That being so, there is no burden of proof to be discharged in the matter of jurisdiction. Rather, it is for the Court to determine from all the facts and taking into account all the arguments advanced by the Parties, 'whether the force of the arguments militating in favour of jurisdiction is preponderant, and to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it'."[24]

26. For these reasons, it falls upon the Tribunal to ascertain the factual and legal basis of its jurisdiction, based on the preponderance of the arguments advanced by the Parties.

## IV. DEFINITION OF "INVESTMENT" (ARTICLE 1139)

27. In the Memorial, the Claimants explained how the requirements for jurisdiction *ratione materiae* under the NAFTA have been satisfied, including under Article 1139(g) ("property tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes") and Article 1139(h) ("interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory").[25]

28. The Claimants maintain these submissions which will not be repeated here. The next paragraphs will focus on some of the interpretative points raised in the United States' Submission on the interpretation of Article 1139, especially subparagraphs (g) and (h).

### A. General observations on the interpretation of Article 1139

29. The United States argues that Article 1139 of the NAFTA provides an exhaustive, not illustrative, list of what constitutes an investment for the purposes of Chapter Eleven.[26]

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[21] Claimants' Reply, paras. 243-329.

[22] Respondent's Counter-Memorial, Section III.E and Claimants' Reply, paras. 390-398.

[23] Claimants' Reply, para. 239.

[24] *Fisheries Jurisdiction (Spain v. Canada), Judgment of 4 December 1998*, pp. 450-451, paras. 37-38 (references omitted), Claimants' Exh. **CL-212**.

[25] Claimants' Memorial, paras. 319-323.

[26] NAFTA 1128 Submission, para. 5.

*(continued)*

The Claimants note, however, that the terms "such as" and "including" in the text of Article 1139(h) make clear that this provision is not limited to the specific examples mentioned in sub-paragraphs (i) and (ii), and may therefore encompass other kinds of "interests arising from the commitment of capital or resources", beyond the text of subparagraphs (i) and (ii).

30. In its Submission, the United States also refers to the case of *Grand River v. United States of America* for the proposition that the definition of an "investment" in Article 1139 is "neither broad nor open-textured."[27] Leaving aside the fact that the circumstances of *Grand River* are inapposite to the factual matrix of the present dispute, this statement flatly contradicts the US Government's own understanding of Article 1139 at the time of adoption of the NAFTA, when the US Administration expressly acknowledged that the term "investment" in Article 1139 is "broadly defined".[28]

31. Besides, whether or not Article 1139 provides a "closed list" of what counts as an "investment" for the purposes of the NAFTA does not mean that the terms of Article 1139 must be interpreted restrictively, or in such a manner as to read into these terms additional requirements which have no basis in the text of the NAFTA.[29] As the arbitral tribunal recognized in the case of *Mondev v. United States of America*,

> "there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties."[30]

32. The same principle holds true for the interpretation of an "investment" under NAFTA. Given that the definitional provisions of Article 1139 set out the parameters of the Tribunal's jurisdiction *ratione materiae*, *personae* and *loci*, Article 1139 must be interpreted in accordance with the customary rules of treaty interpretation reflected in Articles 31 to 33 of VCLT. Consequently, they must be interpreted in good faith, in their ordinary meaning, in their context and in the light of their object and purpose, taking into account all other elements of treaty interpretation.

33. The text of Article 1139 provides a detailed list of those elements that may qualify as "investments". Article 1139 uses broadly-formulated concepts, such as an "enterprise", an "interest" in an enterprise, "other property, tangible or intangible" and "interests arising from the commitment of capital or other resources". In light of these broadly-worded concepts, it has rightly been pointed out in the literature that, even though

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[27] NAFTA 1128 Submission, fn 4, citing *Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award, 12 January 2011, para. 82, Claimants' Exh. **CL-160**.

[28] Message from the President of the United States, in "North American Free Trade Agreement, Texts of Agreement, Implementing Bill, Statement of Administrative Action and Required Supporting Statements" (U.S. Government Printing Office, Washington, 1993) p. 140 ("'Investment' is broadly defined in Article 1139, and both existing and future investments are covered."), Claimants' Exh. **CL-213**.

[29] *Waste Management Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 85 Claimants' Exh. **CL-213**. ("Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law (…) or otherwise.")

[30] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 43, Claimants' Exh. **CL-56**.

*(continued)*

Article 1139 provides a "closed list" of defined investments, the list "is so comprehensive (…) that it is difficult to conceive of an investment covered under the open-list approach that would not be encompassed in the closed list[] of [the NAFTA]."[31] In the same vein, previous NAFTA tribunals have emphasized the "breadth of the definitional scope of the critical term 'investment' under Article 1139" and the "equally capacious meaning" of an "enterprise" under Article 201(1).[32] In *Merrill & Ring v. Canada*, for example, the tribunal recognized that "NAFTA Chapter Eleven contains a broad definition of 'investment' as Article 1139 makes quite evident."[33]

34. The provisions of Article 1139 must also be read in their context, which informs the general meaning of an "investment" for NAFTA purposes.[34] For instance, the use of several illustrative examples in Article 1139(h) indicates that the meaning of "interests arising from the commitment of capital or other resources" is open-ended. The exclusions set out in Article 1139(i) also provide relevant context, as they confirm the Parties' understanding that Article 1139 was intended to have a broad scope, subject to a narrow set of exclusions. Thus, in *Cargill v. Mexico* the tribunal noted that, "although there are exclusions, the Article 1139 definition of 'investment' is broad and inclusive."[35]

35. Pursuant to Article 102(2) of the NAFTA, Article 1139 must also be read in light of the aims and objectives of the NAFTA.[36] According to the Preamble, the NAFTA Parties resolved to "strengthen the special bonds of friendship and cooperation among [the NAFTA Parties'] nations" and "ensure a predictable commercial framework for business planning and investment". These aims are further elaborated in Article 102(1) of the NAFTA, which refers *inter alia* to the aims of *(a)* "facilitat[ing] the cross-border movement of, goods and services between the territories of the Parties"; (b)

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[31] Barton Legum, 'Defining Investment and Investor: Who is Entitled to Claim?', in William W. Park (ed), *Arbitration International* (Oxford University Press 2006, Volume 22 Issue 4), p. 523, Claimants' Exh. **CL-214**. *See also* "Article 1110 – Expropriations and Compensation", in Meg Kinnear, Andrea Kay Bjorklund, et al., *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11, Supplement No. 1* (Kluwer Law International 2006), pp. 1110-36, Respondent's Exh. **RL-23** ("investment is defined broadly but exhaustively in Article 1139"); Daniel M. Price, An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement, *The International Lawyer*, 1993, Vol. 27, No. 3, p. 728, Claimants' Exh. **CL-215**.: "Investment is defined very broadly in article 1139".

[32] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, paras. 152-153, Claimants' Exh. **CL-57**.

[33] *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Case No. UNCT/07/1, ICSID Administrated, Award, 31 March 2010, para. 139, Claimants' Exh. **CL-19**.

[34] In *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, para. 207, the tribunal affirmed that Article 1139(g) cannot "be approached by divorcing the concept of 'property' from its context, and applying it in the abstract." Claimants' Exh. **CL-216**.

[35] *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, paras. 147, 352 and 358, Claimants' Exh. **CL-54** (holding that "business income, particularly when it is associated with a physical asset in the host country, is an investment within the meaning of Article 1139 both as an element of a larger investment involving the physical asset and as an investment in and of itself.")

[36] Article 102(2) of the NAFTA reads as follows: "The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.", Claimants' Exh. **CL-204**. In *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, para. 207, the tribunal affirmed that "Article 1139(g) (…) must be understood as a whole, by reference to the objects and purposes of NAFTA Chapter Eleven", Claimants' Exh. **CL-216**..

*(continued)*

"promot[ing] conditions of fair competition in the free trade area"; and (c) "increas[ing] substantially investment opportunities in the territories of the Parties".

36. These aims are key to grasping the meaning of "investment" under Article 1139. The objectives to "increase" investment opportunities, "facilitate" the cross-border movement of goods and services and "promote" conditions of fair competition indicate that "investments" were meant to have a broad meaning, with a view to fostering cross-border economic exchanges in the free trade area. By adopting a common set of rules for the protection of investments, the NAFTA Parties envisaged a business-oriented definition of "investment" that ensures a "predictable commercial framework" and facilitates "business planning". Thus, the term "investment" under Article 1139 must be interpreted and applied in a manner that takes into consideration the evolving business needs and practices of commerce. To give an example, the tribunal in *Methanex v. United States of America* rejected as obsolete "the restrictive notion of property" as a material "thing", and instead applied a "contemporary conception which includes managerial control over components of a process that is wealth producing."[37]

37. For these reasons, the Claimants submit that an interpretation of Article 1139 in line with customary rules of treaty interpretation indicates that the meaning of "investment" under NAFTA is broad and must not be interpreted in an unduly restrictive manner.

### B. Article 1139(g)

38. With respect to Article 1139(g), the United States argues that "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."[38] Both the Claimants and Respondent agree on this approach,[39] which is consistent with prior NAFTA jurisprudence on the matter.[40]

39. The Claimants note, however, that the United States' references to the judgments of US courts with respect to government-granted licenses are not relevant to the determination of the facts at issue in these proceedings.[41] Both Parties agree that the property interests and interests associated with emission allowances should be examined principally on the basis of Ontario law. Besides, the United States has failed to explain why the different types of interests mentioned in its Submission from the case-law of US courts — such as "helicopter airworthiness certificates" or "attachments" — are somehow relevant to the analysis that should come to bear in the present dispute.

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[37] *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, 3 August 2005, part IV.D, para. 17, Claimants' Exh. **CL-89**.

[38] NAFTA 1128 Submission, para. 6. The Submission refers, at fn 6, to an academic authority in support of its position. However, the United States has omitted a salient part from that quote, which is worth reproducing in full: for a definition of "property", "[w]e necessarily draw on municipal law sources *and on the general principles of law*." (Emphasis added.) Rosalyn Higgins, "The Taking of Property by the State: Recent Developments in International Law" (1982) *R.C.A.D.I.* Vol. 176, p. 270. Relying on this authority, the tribunal in *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, fn 78, accepted that U.S. law was "informative in defining 'property'" , Claimants' Exh. **CL-216**.

[39] Claimants' Reply, paras. 247-248; Respondent's Counter-Memorial, paras. 135-136; Respondent's Rejoinder, para. 122.

[40] *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Decision on Jurisdiction, 30 July 2018, para. 231, Claimants' Exh. **CL-217**.

[41] NAFTA 1128 Submission, fn 6.

*(continued)*

40. Moreover, the Claimants note that, whilst the domestic law of the relevant Contracting Party provides the obvious and necessary starting point for the application of Article 1139(g) in a given case, it is certainly not dispositive of the question whether a particular right or interest qualifies as "property" for the purposes of Article 1139(g).

41. In particular, the Claimants note that the NAFTA does not specifically define "property" as being governed by the domestic law of the Parties.[42] In recognition of this point, NAFTA tribunals have also interpreted the term "property" on the basis of customary rules of treaty interpretation.[43] For example, the tribunal in *Methanex v. United States* rejected "the restrictive notion of property" as a material "thing", and applied a "contemporary conception which includes managerial control over components of a process that is wealth producing."[44] In *Apotex v. United States of America*, the tribunal also recognized that "the critical enquiry" under Article 1139(g) turns to the "inherent nature" of the asset in question and the nature of the investor's rights over that property.[45]

42. Outside the NAFTA context, international courts and tribunals have interpreted the terms "property" and "possession" as autonomous legal concepts independent from formal classifications under domestic law.[46] Similarly, in *Emmis v. Hungary* the tribunal stressed that the term "property" should be not be narrowly construed:

> "There is no doubt, as the Treaty definitions emphasise, that the notion of property or assets *is not to be narrowly circumscribed*. (…) This is confirmed by the Treaties which include within their definition of assets qualifying as investments numerous other rights in addition to 'movable and immovable property as well as any other rights in rem.' This is unsurprising, since the definition of investment must apply compendiously to assets created under the law of the different municipal legal systems of the Contracting States. It is not to be circumscribed by technical distinctions that

[42] Annex 20.1 of the NAFTA provides country-specific definitions of "nationals" and "territory" by reference to specific domestic law acts of the United States and Mexico. No country-specific definition is provided for the meaning of "property".

[43] In this connection, see Canada's own interpretation of the term "property" in *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Canada's Counter-Memorial (20 January 2015), para. 468: "The NAFTA does not define the terms "property" or "interest." At international law, the term "property" refers to the right to use, enjoy and dispose of a property. However, "property" does not normally include rights that are contingent or that have not been acquired."

[44] *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, 3 August 2005, part IV.D, para. 17, Claimants' Exh. **CL-89**.

[45] *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, paras. 215-217, 219, 224, Claimants' Exh. **CL-216**.

[46] E.g., IACtHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* Judgment of August 31, 2001 (Merits, Reparations and Costs), para. 144, Claimants' Exh. **CL-218** (""Property" can be defined as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value"); ECtHR (Grand Chamber), App. No. 33202/96, *Beyeler v. Italy*, Judgment (5 January 2000), para. 100, Claimants' Exh. **CL-219**. ("the concept of "possessions" in the first part of Article 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision.")

*(continued)*

> may have a different import under different municipal legal systems. The test is substantive, not technical."[47]

43. It is on that basis that the Claimants argued in their Reply that the concept of "property" has been given an expansive interpretation in international law.[48]

44. Essentially, the restrictive interpretation of the term "property" in NAFTA Article 1139(g) advanced by the United States in its 1128 Submission mirrors the equally restrictive interpretation of the same provision advanced by Canada in its Rejoinder. In particular, the Respondent has criticized the Claimants' position on the expansive interpretation of property as "unsupported" by the legal authorities provided in support, on the basis that the relevant cases "involved a locally established enterprise with a physical presence in the host state".[49]

45. This reductionist reading of Article 1139(g) proceeds from a *non sequitur*. The physical presence of the investor in the territory of the host State is irrelevant to the interpretation of the term "property" and to the question of whether the Claimants made an "investment" under Article 1139(g). As explained in the Reply, having a physical presence or fixed place of business is irrelevant and unnecessary to demonstrate that KS&T contributed through its commitment of capital and resources in Ontario through holdings in intangible property and its emissions allowances business.[50] There is simply no requirement for a physical presence of the property-holder in Canada nor is there a need for the Claimants to establish any kind of activity that goes beyond the making of that type of investment contemplated under Article 1139(g) or (h).[51]

46. Apart from these interpretive points, the Claimants submit that emission allowances *do* constitute "property" both under Article 1139(g) of the NAFTA and under Ontario law. The Claimants have provided extensive expert evidence to show that an Ontario judge applying the typical framework of analysis adopted in such court proceedings would find that emission allowances constitute property under the law of Ontario in light of the specific provisions of the 2016 Climate Change Mitigation and Low-carbon Economy Act (**Cap and Trade Act**) and the related Cap and Trade Program Regulation, taking into account international practices.[52]

47. In this regard, the Claimants note that the United States' submission adds little to the discussion before the Tribunal, as both Parties agree that the question whether emission allowances amount to "property" under Ontario law is a question that has not yet been considered by Ontario courts, and stands to be determined in accordance with the interpretative rules followed by judges in Ontario in light of the specific dispositions of

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[47] *Emmis International Holding BV v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, para. 163 (emphasis added, internal references omitted) , Claimants' Exh.**CL-10**. *See also Certain German Interests in Polish Upper Silesia, PCIJ Series A, No 7, 1926*, p. 44, Claimants' Exh. **CL-220**.

[48] Claimants' Reply, para. 248, fn 343 and references therein.

[49] Respondent's Rejoinder, fn 299.

[50] Claimants' Reply, para. 371.

[51] Claimants' Reply, para. 355.

[52] Expert Report of Professor de Beer (15 July 2022), **CER-3**; Expert Report of Professor Michael Mehling (15 July 2022), **CER-**4; *see also* Climate Change Mitigation and Low-carbon Economy Act, 2016, S.O. 2016, **CL-5.**

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the Cap and Trade Act.[53] In so doing, Ontario courts are not "expanding the definition of property" in Ontario, but rather recognizing the legal implications of the legislative regime expressly devised by the Ontario legislature, including the nature of allowances as the object of property rights.

48. The mere fact that Canadian courts have not yet been called to opine on the implications of the legal regime Ontario established in 2016 and which the new Ontario government summarily cancelled in 2018 does not mean that the status of allowances as "property" is a question that should be resolved in the Respondent's favour. To the contrary, the determination of the legal status of carbon allowances under Ontario property law should be conducted in a manner analogous to the methodology that an Ontario court would ordinarily apply, which is a question of fact to be considered by the Tribunal with the assistance of expert evidence put forward by the Parties. As the Claimants have explained, the appropriate approach is for the Tribunal to consider on the basis of expert evidence whether a Canadian court would conclude that emission allowances amount to a property right.[54]

49. It is therefore for the Tribunal to assess, on the basis of the evidence available before it and the balance of probabilities, whether emission allowances amount to "property" within the meaning of NAFTA Article 1139(g).

### C. Article 1139(h)

50. In the Memorial and Reply, the Claimants also argued that they held interests arising from the commitment of capital and other resources (including business development, marketing and trading activities and the commitment of capital through the purchase of carbon allowances from public auctions), which amounted to a commitment of resources to economic activities in Ontario's territory and therefore qualify as "investments" within the meaning of Article 1139(h).[55]

51. In its Submission, the United States contends that in order to qualify as an investment under Article 1139(h), "more than the mere commitment of funds is required", as an investor "must also have a cognizable 'interest' that arises from the commitment of those resources".[56] The United States points out that Article 1139(h)(i) states that such interests might arise "for example", from "turnkey or construction contracts or concessions", whereas "[s]imilar interests might arise, according to Article 1139(h)(ii), from 'contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.'"[57]

52. The Claimants agree with the United States' interpretation, which is grounded on the plain text of Article 1139(h). The Claimants would add, however, that that the term "interest" in Article 1139(h) carries a broad ordinary meaning that extends far beyond the realm of contracts. A dictionary definition for this term points to a "legal share in

[53] Respondent's Counter-Memorial, para. 138; Claimants' Reply, para. 238; Respondent's Rejoinder, para. 122.

[54] Claimants' Reply, paras. 250-296.

[55] Claimants' Memorial, para. 323 *See also* Claimants' Reply, paras. 311ff.

[56] NAFTA 1128 Submission, para. 8.

[57] NAFTA 1128 Submission, para. 8 (emphases added).

*(continued)*

something" and to any right, privilege, power or immunity (taken individually or in aggregate).[58] NAFTA Article 1139(h) has therefore been understood to operate as a "catch-all" category of investment.[59]

53. The United States' reading of Article 1139(h) may be contrasted with the contortionist interpretation of the same provision advanced by Canada. Whilst the Respondent does not seem to take issue with the Claimants' position that they have committed capital and resources giving rise to certain "interests" capable of qualifying as "investments" within the meaning of Article 1139(h),[60] it nevertheless advances an overly restrictive construction of Article 1139(h), designed with the sole purpose of excluding the Claimants' "interests" from the protective scope of the NAFTA.

54. The very different interpretation of Article 1139(h) put forward by Canada in this case is yet another manifestation of the diversity of views as between the NAFTA Parties with regard to interpretation of a key provision of NAFTA and of the absence of any "subsequent agreement" or "practice" between them within the meaning of the customary rules of treaty interpretation reflected in Article 31(3)(a) and (b) VCLT.

55. Indeed, the Respondent has sought to strain the ordinary meaning of Article 1139(h), by amalgamating the different elements found in the *chapeau* and subparagraphs (i) and (ii) of this Article into *cumulative* conditions that must be concurrently met for an "interest" to qualify as a protected "investment". Drawing on the so-called "common features" of the examples set forth in Article 1138(h)(i) and (ii), the Respondent has devised a long list of so-called "requirements" that a given "interest" must meet in order to qualify as "investment" under Article 1139(h), which are nowhere to be found in its text.[61] This cherry-picking exercise has resulted in an artificial concept of "investment" under Article 1139(h) which is much stricter than any of the definitions found in subparagraphs (h)(i) and (h)(ii) taken alone. By elevating all of the elements found in subparagraphs (h)(i) and (h)(ii) to cumulative "specific requirements", and by grafting into Article 1139(h) conditions which are not there, the Respondent has essentially deprived Article 1139(h) of its *effet utile* and has sought to erase the words "such as" from the *chapeau*. The *chapeau*, however, uses the terms "such as" (in French, "*par exemple en raison de*"; in Spanish: "*entre otros conforme a*") to denote that the items mentioned in subparagraphs (h)(i) and (h)(ii) are merely examples of an "economic

[58] "Interest", in Bryan A. Garner (Editor in Chief), *Black's Law Dictionary*, 11th ed (2019), Claimants' Exh. **CL-171**. *See also* Claimants' Reply, para. 313.

[59] UNCTAD, Scope and Definition, UNCTAD Series on Issues in International Investment Agreements II, U.N. Doc. No. UNCTAD/DIAE/IA/2010/2 (2011), p. 33, Claimants' Exh. **CL-172**. *See also* Claimants' Reply, para. 313.

[60] C.f. Canada's Rejoinder, para. 156: "While KS&T may have expended funds to purchase emission allowances in Ontario auctions, the mere expenditure of funds, even in connection with an "interest", does not suffice to qualify as an investment under Article 1139(h)."

[61] First, the Respondent argues that a qualified interest "arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory" may only relate to a contract (Respondent's Counter-Memorial, para. 163; Respondent's Rejoinder, para. 150). Second, the Respondent argues (drawing on the text of subparagraph (h)(i)), that a qualified "interest" under Article 1139(h) must arise from contracts involving "the presence of an investor's property in the territory" of the host State (Respondent's Counter-Memorial, para. 161). Third, the Respondent argues (drawing on the text of subparagraph (h)(ii)), that a qualified "interest" under Article 1139(h) requires the "physical or established corporate presence [of the investor] in the host State's territory", especially when the foreign investor "owns or finances 'enterprises' located in the host state" (Respondent's Rejoinder, para. 153). Finally, the Respondent argues that a qualified "interest" under Article 1139(h) "must be longer-term and include an important commitment of capital contributing to the economic development of the host State" (Respondent's Rejoinder, para. 150 and Counter-Memorial, para. 160).

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activity". Moreover, the Respondent has sought to narrow down the scope of Article 1139(h) by arguing that "interests" qualifying under that provision can only relate to contracts.[62] This restrictive interpretation, however, ignores the fact that the *chapeau* of Article 1139(h) does not contain the term "contracts" and does not refer to "contractual interests" before the words "such as".

56. It follows that there is genuine inconsistency in the interpretation of Article 1139(h) between the NAFTA Contracting Parties, and it would be wrong to assume that a "subsequent agreement" or "subsequent practice" exists on this issue. In this connection, NAFTA tribunals have understood Article 1139(h) to cover anything amounting to "an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract *or other legal instrument*".[63] Insofar as Canada itself has endorsed this proposition in its pleadings in another NAFTA matter,[64] it is incongruous to narrow down Article 1139(h) specifically to contractual interests.

## V. MINIMUM STANDARD OF TREATMENT (ARTICLE 1105)

57. In its Submission, the United States goes on to make a number of observations concerning the identification, meaning and scope of the "fair and equitable treatment" (**FET**) required by NAFTA Article 1105 ("Minimum Standard of Treatment") "in accordance with international law".

### A. Identification of customary minimum standard of treatment

58. The United States points out that according to all three NAFTA Parties, the burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law.[65]

59. The Claimants agree that it is in the first place for the party asserting that a particular rule of customary international law exists to prove the existence of the rule, subject to the principle *jura novit curia*. As stated by the tribunal in *Windstream v. Canada*,

> "the minimum standard of treatment contained in Article 1105(1) of NAFTA is indeed a rule of customary international law, as interpreted by the FTC in its Notes of Interpretation. The issue therefore is not whether the rule exists, but rather how the content of a rule that does exist – the minimum standard of treatment in Article 1105(1) of NAFTA – should be established. The Tribunal is therefore unable to accept the Respondent's argument that the burden of proving the content of the rule falls exclusively on the Claimant.

[62] Claimants' Reply, para. 345.

[63] See, e.g., *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award (31 March 2010), para. 142, Claimants' Exh. **CL-19** (emphasis added).

[64] *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Canada's Counter-Memorial (20 January 2015), para. 469, Claimants' Exh. **CL-87.**

[65] NAFTA 1128 Submission, para. 18.

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> In the Tribunal's view, it is for each Party to support its position as to the content of the rule with appropriate legal authorities and evidence."[66]

60. In line with this principle, the Claimants have carefully considered NAFTA tribunals' findings on the modern content of the FET standard, as reflected in the Respondent's own published approaches, and demonstrated each claim within this framework.[67]

61. The United States further posits that the decisions of international courts and arbitral tribunals interpreting FET as a concept of customary "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."[68] That being said, the Claimants note that the United States itself has not identified any primary materials to evidence State practice and *opinio juris* to substantiate its understanding of customary international law, and has instead referred extensively to the interpretations of international courts and tribunals as elements that help understand the scope and meaning of customary international law.

62. The Claimants agree that the decisions of arbitral tribunals established under NAFTA do not amount *per se* to State practice for the purposes of determining the status of customary international law. Nevertheless, such decisions can contribute to the Parties' understanding of the content of the customary minimum standard of treatment, insofar as judicial and arbitral decisions constitute "subsidiary means for the determination of rules of law", within the meaning of Article 38(1)(d) of the Statute of the International Court of Justice—to which all NAFTA Parties are also parties.

63. Similarly, the ILC has stated that the "[d]ecisions of international courts and tribunals (…) concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules."[69] In its comments to the ILC, the United States has recognized that whilst the decisions of courts and tribunals "are not themselves sources of international law", they are "sources that may help elucidate rules of law where they accurately compile and soundly analyse evidence of State practice and *opinio juris*."[70] In this sense, arbitral decisions can be helpful in identifying the content of the law and are regularly relied upon by other NAFTA tribunals for that purpose.[71]

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[66] *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016, para. 350, Claimants' Exh. **CL-63**.

[67] Claimants' Memorial, Part IV.B; Claimants' Reply, paras. 414-510.

[68] NAFTA 1128 Submission, para. 17.

[69] "Draft conclusions on identification of customary international law", reproduced in *Yearbook of the International Law Commission, 2018, vol. II, Part Two*, p. 149, Conclusion 13(1), and commentary (3), Claimants' Exh. **CL-221**: "those decisions in which the existence of rules of customary international law is considered and such rules are identified and applied, may offer valuable guidance for determining the existence or otherwise of rules of customary international law."

[70] "Identification of customary international law — Comments and observations received from Governments" (14 February 2018) UN Doc. A/CN.4/716, p. 49, Claimants' Exh. **CL-222**.

[71] *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016, para. 351, Claimants' Exh. **CL-63** ("In the circumstances [where neither Party has produced evidence of actual State practice and *opinio juris* establishing custom], the Tribunal must rely on other, indirect evidence in order to ascertain the content of the customary international law minimum standard of treatment; the Tribunal cannot simply declare *non liquet*. Such indirect evidence

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## B. Scope of minimum standard of treatment

64. The United States considers that customary international law has crystallized to establish a minimum standard of treatment only in a few areas, including the obligation to provide FET, as expressly stated in NAFTA Article 1105(1).[72] The Claimants agree with this general proposition, but disagree on various aspects of the FET standard set out in the United States' Submission. The Claimants offer their observations below, whilst maintaining their previous submissions on the scope and meaning of NAFTA Article 1105.

### 1. Denial of justice in criminal, civil or administrative adjudicatory proceedings

65. According to the United States, the obligation to accord FET includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.[73]

66. The Claimants agree with this general proposition, as set out in detail in their written pleadings.[74] The Claimants further agree with the United States that "a denial of justice may exist where there is for example, an 'obstruction of access to courts'" or a "failure to provide those guarantees which are indispensable to the proper administration of justice", which is an apt description of the circumstances that led to the present dispute, where the Ontario legislature expressly removed the availability of judicial redress, and denied the Claimants fundamental access to justice.

67. Nevertheless, the Claimants strongly disagree with the United States' position that "the conferral of sovereign immunity protections on the host State government under municipal law does not, in general, effect a denial of justice" unless it is done a manner that discriminates against an investor on the basis of nationality.[75] The United States' position echoes the Respondent's interpretation of Article 1105, whereby "domestic laws limiting State liability do not necessarily amount to a denial of justice".[76]

68. Whilst the Claimants accept the United States' position that the targeted discrimination of foreign nationals that prevents them from accessing local courts will amount to a separate breach of the minimum standard of treatment,[77] it is the Claimants' position that a government cannot shield itself from international responsibility by creating immunities in its favour from judicial review. As explained in the Reply, State immunity provisions cannot immunize a State against unlawful behaviour as a matter of international law, and the authorities cited by both NAFTA Parties are wholly

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includes, in the Tribunal's view, decisions taken by other NAFTA tribunals that specifically address the issue of interpretation and application of Article 1105(1) of NAFTA, as well as relevant legal scholarship.")

[72] NAFTA 1128 Submission, para. 20.

[73] NAFTA 1128 Submission, paras. 20-22.

[74] Claimants' Memorial, paras. 375-380; Claimants' Reply, paras. 417-426, 456-459.

[75] NAFTA 1128 Submission, para. 22.

[76] Respondent's Counter-Memorial, paras. 196ff; Respondent's Rejoinder, paras. 213ff.

[77] C.f. NAFTA 1128 Submission, para. 27, accepting that discrimination against foreigners in access to judicial remedies and treatment by local courts will amount to a breach of the minimum standard of treatment, and authorities in fn 48.

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inapposite to the facts of this case.[78] It is a fundamental principle of international law that a responsible State cannot rely on the provisions of its internal law as justification for failure to comply with its obligations under the law of State responsibility.[79] To hold otherwise would also be at odds with the avowed objective of the NAFTA to "create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes" (Article 102(1)(e)), as it would enable NAFTA Parties to evade their international responsibility under NAFTA through blanket immunity conferred by domestic legislation.

69. In this connection, the Claimants cannot fail to notice that the United States' Submission on this point is entirely unsupported by judicial or arbitral authority. The only authorities the United States was able to produce in support of this egregious proposition are two academic sources dated 1935 and 1938,[80] respectively. Whilst this might have been the position under customary law a century ago, it is hardly sustainable today. To use the standard articulated by the United States itself, these two sources can hardly be relied upon as persuasive evidence of "widespread and consistent" State practice accompanied by a "sense of legal obligation".[81]

2. Legitimate expectations

70. The United States further asserts that the concept of "legitimate expectations" is not a component element of the FET standard under NAFTA Article 1105 and customary international law.[82] In its view, such legitimate expectations impose no obligations on the host State under the minimum standard of treatment.

71. Notwithstanding the United States' position on the matter, the Claimants recall that NAFTA tribunals have consistently recognised that, "[i]n applying [the fair and equitable treatment standard under Article 1105] it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[83] Moreover, the Claimants consider that the determination of what is "fair and equitable" in a dispute between a foreign investor and a governmental authority is an inherently fact-specific enquiry which requires an examination of all the relevant circumstances of each case. As stated in *Bilcon v. Canada,*

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[78] Claimants' Reply, paras. 465-467.

[79] ILC, "Articles on Responsibility of States for Internationally Wrongful Acts", reproduced in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, pp. 36 and 94, Article 32, Claimants' Exh. **CL-51**. Moreover, according to Article 3, "[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."

[80] NAFTA 1128 Submission, fn 41.

[81] NAFTA 1128 Submission, para. 14.

[82] NAFTA 1128 Submission, para. 26.

[83] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98, Claimants' Exh. **CL-12**. Similarly, the tribunal in *Glamis Gold v. United States* held that a breach of an investor's legitimate expectations could constitute a breach of Article 1105(1) "where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct. In this way, a State may be tied to the objective expectations that it creates in order to induce investment." *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), para. 621, Claimants' Exh. **CL-18,** citing *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006), para. 147, Claimants' Exh. **CL-17**.

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> "[t]he formulation [of Article 1105] recognises the requirement for tribunals to be sensitive to the facts of each case, *the potential relevance of reasonably relied-on representations by a host state*, and a recognition that injustice in either procedures or outcomes can constitute a breach."[84] (Emphasis added.)

72. In *Windstream v. Canada*, the Respondent also accepted that a breach of "clear and explicit representations made (…) in order to induce the investment" could be a "relevant factor" in assessing whether a measure amounts to the type of egregious behaviour prohibited by the customary international law minimum standard of treatment".[85] A similar obligation is stipulated in Article 8.10, paragraph 4, of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (**CETA**), whereby

> "When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated."

73. In light of the foregoing, it is untenable to suggest that legitimate expectations are irrelevant to the determination of a breach of the minimum standard of treatment under Article 1105 of the NAFTA. In line with previous NAFTA decisions interpreting Article 1105, it is entirely appropriate for the Tribunal to reach its conclusions on the Claimants' claims, taking into account the fact that Ontario's conduct created reasonable and justifiable expectations on the part of the Claimants, who acted in reliance of this conduct and suffered significant damages as a result.

### 3. Discrimination

74. In its Submission, the United States further argues that the customary minimum standard of treatment under NAFTA Article 1105 "does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination."[86]

75. The Claimants note, in line with the United States' position on the matter, that economic discrimination is a matter that is generally regulated by Articles 1102 and 1103 of the NAFTA. That does not mean, however, that discrimination is not addressed in other parts of NAFTA Chapter Eleven, as evidenced for example by Article 1110(1)(b).

76. Moreover, the Claimants agree with the United States that NAFTA Article 1105(1) *does* prohibit discrimination in the context of certain established customary rules, including discriminatory takings, discriminatory denial of access to judicial remedies or treatment by courts, or the obligation of States to provide full protection and security

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[84] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability, 17 March 2015, para. 444, Claimants' Exh. **CL-52**.

[85] *Windstream Energy, LLC v. Government of Canada*, UNCITRAL, Government of Canada, Rejoinder Memorial (6 November 2015), paras. 208-209, Claimants' Exh. **CL-62**.

[86] NAFTA 1128 Submission, para. 27.

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and compensate aliens and nationals on an equal basis in case of violence, insurrection or civil strife.[87] In the Claimants' view, the key principle that may be gleaned from the instances of non-discrimination encompassed in NAFTA Article 1105 is that the customary minimum standard of treatment protects foreign nationals from conduct that results in targeted discrimination against them on manifestly arbitrary grounds.

77. As explained in the Claimants' Memorial,[88] this understanding of the customary minimum standard of treatment finds ample support in the jurisprudence of NAFTA tribunals, which have held that "the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct (. . .) is discriminatory and exposes the claimant to sectional or racial prejudice"[89] or "wilful targeting".[90]

78. This has also been the position adopted by the Respondent itself in Article 8(1)(c) and (d) of Canada's Model Foreign Investment Promotion and Protection Agreement (2021) (FIPA) on the minimum standard of treatment, whereby "[a] Party breaches this obligation only if a measure constitutes (…) manifest arbitrariness" or "targeted discrimination on manifestly wrongful grounds such as gender, race or religious beliefs".[91] It therefore seems incongruous to argue that targeted discrimination of aliens is not prohibited by the customary minimum standard of treatment.

## VI. EXPROPRIATION (ARTICLE 1110)

### A. Scope of application

79. In its Submission, the United States makes a series of unsubstantiated allegations concerning the scope of application of Article 1110. According to the United States, Article 1110 on expropriation "incorporates by reference the customary international law regarding that subject".[92] On that basis, the United States argues that "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."[93] It follows, for the United States, that the first step is to examine "whether there is an investment capable of being expropriated", and that subsequently the tribunal must "look to the

[87] NAFTA 1128 Submission, para. 27.

[88] Claimants' Memorial, paras. 367ff.

[89] E.g. *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, Claimants' Exh. **CL-12**.

[90] E.g. *Cargill Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, (18 September 2009), para. 300 , Claimants' Exh. **CL-54** (The Tribunal finds this willful targeting, by its nature, to be a manifest injustice.") See also *id*., paras. 300, 303, 387, 550.

[91] Canada's Model Foreign Investment Promotion and Protection Agreement (2021) ("FIPA"), Article 8, Claimants' Exh. **CL-60**; *see also* Canada-European Union Comprehensive Economic and Trade Agreement, Article 8.10, Claimants' Exh. **CL-61**.

[92] NAFTA 1128 Submission, para. 29.

[93] NAFTA 1128 Submission, para. 29 (emphasis added).

*(continued)*

law of the host State for a determination of the definition and scope of the alleged property right or property interest at issue, including any applicable limitations."[94]

80. This interpretation is untenable and legally flawed for a number of reasons.

81. As a preliminary matter, the Claimants do not dispute that Article 1110(1) incorporates customary international law rules on expropriation.[95] However, it is well-established that the more general rules of customary international law can apply only to the extent that they are not displaced by the provisions of the NAFTA as *lex specialis*.[96] Contrary to the specific language used in Article 1105 in order to incorporate the minimum standard of treatment from customary international law through a general *renvoi*, the language of Article 1110 makes clear that the NAFTA prescribes, for the most part, a treaty-based framework of protection that is more specific than that available under customary international law. It follows, that the United States' repeated references to customary law standards and concepts on this point are simply unavailing.

82. The Claimants further recall that Article 1110(1) provides that "[n]o Party may directly or indirectly nationalize or expropriate an *investment*". It does not refer to a "property right or property interest" as the United States appears to suggest. Whilst it is the Claimants' position that their assets qualified as "property" rights within the meaning of Article 1139(g), the language of Article 1110(1) extends well beyond the taking of "property" to *any* asset or interest that qualifies as an "investment" under Article 1139(a)-(h) of the NAFTA, including "interests" under Article 1139(h). To hold otherwise would amount to re-writing the plain text of Article 1110 of the NAFTA.

83. Moreover, the United States' suggestion that there are certain types of "investments" under NAFTA which are not capable of being expropriated seeks to conflate two legal enquiries which are analytically distinct, namely, whether a particular right or interest qualifies as an "investment" for the purposes of Article 1139; and whether a measure amounts to expropriation within the meaning of Article 1110. As explained in the Reply and Memorial, this reductionist interpretation finds no support in the jurisprudence of NAFTA tribunals or a good faith interpretation of Article 1110.[97]

### B. Police powers doctrine

84. The United States further submits that, "where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory."[98] For the United States, 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."[99]

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[94] NAFTA 1128 Submission, para. 29 (internal references omitted).

[95] Claimants' Reply, paras. 525-528.

[96] *Ibid.*, and authorities cited in fns 844-846.

[97] Claimants' Memorial, paras. 416-417; Claimants' Reply, paras. 517-528.

[98] NAFTA 1128 Submission, para. 35.

[99] *Ibid.*

*(continued)*

85. The Claimants do not contest, as a general matter, that the police powers doctrine applies to measures adopted by States to protect "public order, health or morality".[100] Nor is it disputed that NAFTA tribunals have recognized and applied the police powers doctrine to NAFTA Chapter Eleven claims.[101]

86. As the Claimants have explained, however, the police powers doctrine is subject to certain intrinsic limitations.[102] The police powers doctrine cannot be invoked as a *carte blanche* that immunises a measure from judicial scrutiny and exempts it *as such* from the prohibition of expropriation without compensation under NAFTA Article 1110.[103]

87. Canada has admitted as much in its submissions in another NAFTA matter:

> "the police powers doctrine is meant to 'operate within certain limits so that it is not abused by governments who might enact police measures as a pretext to an expropriation.' (…) Canada explicitly acknowledges that the police powers doctrine is not 'absolute in nature' and that it has the potential to be abused by unscrupulous governments. However, when the four checks and balances are applied to this case - i) non-arbitrary; ii) non-discriminatory; iii) not excessive; and iv) good faith - it is clear that [the impugned measure] was a legitimate exercise of Canada's police power."[104]

88. In the Claimants' view, the analysis of the "excessiveness" and "good faith" character of the measure put forward by Canada in *Chemtura v. Canada* is substantially the same as analysing the reasonableness and proportionality of the measure in question.

89. Indeed, a high measure of deference under the "police powers" doctrine risks rendering the obligation set out in NAFTA Article 1110(1) nugatory: *by definition*, a lawful yet compensable expropriation presupposes a measure taken for a legitimate public purpose, on a non-discriminatory basis and in accordance with due process of law. If the police power doctrine were to be read in an overly expansive manner, it would essentially deprive Article 1110(1) of any practical meaning, in that there could never be a compensable *de facto* expropriation arising from a regulatory measure.

90. It follows that the police powers doctrine falls to be applied within certain intrinsic limitations. One of these limitations is that the measure in question has to be reasonable and proportionate. As explained in the Memorial, where an expropriation is challenged for lack of legitimate public purpose, the respondent must be in a position to explain the public purpose for which the expropriation was undertaken and satisfy a *prima facie*

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[100] Claimants' Memorial, para. 413; Claimants' Reply, paras. 565-575.

[101] Claimants' Reply, para. 568.

[102] Claimants' Memorial, para. 412; Claimants' Reply, paras. 565-575.

[103] *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt I*, PCA Case No. 2012-07, Final Award, 23 December 2019, para. 230, Claimants' Exh. **CL-197** ("the police power defence is not *carte blanche*; a State's actions must be justified, meet the international standards of due process, and *inter alia* be proportional to the threat to public order to which it purports to respond.")

[104] *Chemtura Corporation v. Government of Canada*, UNCITRAL, Respondent's Rejoinder Memorial (10 July 2009), paras. 280-281, Claimants' Exh. **CL-223**. (Emphases added.)

*(continued)*

burden of proving that the acquisition of the particular property was reasonably related to the fulfilment of that purpose.[105]

91. This has also been the consistent approach of investment arbitral tribunals. As noted by the tribunal in *Tecmed v. Mexico*, the tribunal must determine whether there is a "reasonable relationship of proportionality" between the expropriatory measures and any alleged public purpose.[106] Several other arbitral tribunals have referred to the principle of proportionality as a test to distinguish between the legitimate exercise of regulatory or "police powers" (with no correlated duty to compensate) and regulatory takings (that are subject to a duty to compensate), such as *Azurix v. Argentina*,[107] *PL Holdings v. Poland*,[108] *LG&E v Argentina*,[109] and *Novenergia II v. Spain*,[110] to name a few.[111] As stated in *Olympic Entertainment v. Ukraine*:

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[105] Claimants' Memorial, para. 430.

[106] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 122, Claimants' Exh. **CL-84**. See also

[107] *Azurix Corp. v. Argentina,* ICSID Case No. ARB/01/12, Award, 14 July 2006, paras. 310-312, Claimants' Exh. **CL-113**. The tribunal found that the public purpose criterion alone would be "insufficient" and suggested that it should be complemented by other criteria, such as the principle of proportionality that provides "useful guidance for purposes of determining whether regulatory actions would be expropriatory".

[108] *PL Holdings S.a.r.l. v. Poland, SCC Case No. V 2014/163*, Partial Award, 28 June 2017, para. 355, 373, 384-389, 391, Claimants' Exh. **CL-224**. After finding that the measures had a "similar effect" to expropriation, the tribunal applied the proportionality principle as "understood in largely similar terms across jurisdictions" and concluded that there had been an expropriation as the measure was disproportionate. In its view, "the principle of proportionality requires that a measure taken not be excessive in relation to the purposes meant to be served."

[109] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentina,* ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 189 and 195, Claimants' Exh. **CL-225**. The tribunal accepted the State's "right to adopt measures having a social or general welfare purpose (…) without any imposition of liability". That was "except in cases where the State's action is obviously disproportionate to the need being addressed. The proportionality to be used when making use of this right was recognized in *Tecmed*, which observed that 'whether such actions or measures are proportional to the public interest presumably protected thereby and the protection legally granted to investments, taking into account that the significance of such impact, has a key role upon deciding the proportionality.'"

[110] *Novenergia II - Energy & Environment (SCA), SICAR v. Spain,* SCC Case No. 2015/063, Final Award, 15 February 2018, paras. 732–737, especially paras. 734 *et seq,* Claimants' Exh. **CL-226**. The tribunal stated that: "assuming, *arguendo*, that the application of the police powers doctrine were applicable in the ECT context, the challenged measures would still qualify as expropriatory and compensable measures. The public purpose of the challenged measures is questionable because the measures were not proportionate and alternatives were available.'"

[111] Other tribunals qualifying the regulatory powers by reference to the principle of proportionality, include: *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 197, Claimants' Exh. **CL-227** (the tribunal found that the pesification measures were not expropriatory because they were "reasonable in light of Argentina's economic and monetary emergency and proportionate to the aim of facing such an emergency."); *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, paras. 236-243, Claimants' Exh. **CL-228** (noting that measures can amount to expropriation if they are "unreasonable, i.e. arbitrary, discriminatory, disproportionate or otherwise unfair" and stressing "[t]he need for reasonableness and proportionality of State measures interfering with private property"); *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland,* UNCITRAL, Award, 14 February 2012, para. 569, Claimants' Exh. **CL-229** ("[t]he Tribunal agrees with the Parties that a host state's regulatory and/or administrative actions must be taken (i) in good faith, (ii) for a public purpose, (iii) in a way proportional to that purpose, and (iv) in a non-discriminatory manner"); *Bank Melli Iran and Bank Saderat Iran v. Bahrain*, PCA Case No. 2017-25, Final Award, 9 November 2021, para. 637, Claimants' Exh. **CL-198** (in a case where the gravity and multiplicity of the regulator's errors called into question the true intend behind the impugned measures, the five-member tribunal stated that "[w]hen scrutinizing the purported regulatory conduct, the Tribunal must focus its analysis on the evidence (or the lack thereof) of the connection between the impugned measures and the investor's unlawful activities. It should also analyze whether the measures were arbitrary, discriminatory, disproportionate and contrary to the requirements of due process."); *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 296, Claimants' Exh. **CL-106** ("the idea is to determine whether the measure had a reasonable nexus with the declared public purpose or in other words, was at least capable of furthering that purpose.")

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> "the Tribunal is of the view that the condition of proportionality must be included in the test for a valid exercise of the police powers doctrine. Proportionality has become an important factor in international investment law and the substantive protections that it provides for investors.103 It is bound up in the concepts of fairness and equity which are commonly reflected in the substantive standards included in investment treaties."[112]

92. In its Submission, the United States argues that it is not "aware" of any "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" and on that basis considers that "the police powers doctrine has no proportionality requirement."[113] For Canada, "the principle of proportionality is not recognized as part of the minimum standard of treatment of aliens under customary international law" and should not be read into the expropriation analysis under NAFTA Article 1110.[114]

93. These arguments are beside the point. In interpreting Article 1110, the question is not whether the principle of proportionality has crystalized into a separate norm under customary international law, nor whether it forms part of the customary minimum standard of treatment incorporated under Article 1105. Rather, the question is on what basis a NAFTA tribunal can distinguish between a regulatory taking that substantially deprives a foreign investor of the value of its "investment" – and is therefore subject to a duty to compensate – and the non-compensable exercise of regulatory powers by a host State. That is the "hard question", to which neither the United States nor Canada have been able to provide an adequate answer in the course of these proceedings.[115]

94. In answering that question, the Claimants' position is clear. The analysis of the reasonableness and proportionality of the measure is intrinsic to the concept of "police powers". Unless Canada and the United States believe that the police powers doctrine provides them with a self-judging carve-out from Article 1110 (*quod non*), a tribunal must somehow be in a position to assess whether the measure is legitimate or not. In this connection, reasonableness and proportionality may come to bear in several ways.

95. On the one hand, reasonableness and proportionality are relevant to assessing the professed public policy objective underlying the impugned measure. Both Canada and the United States accept that, for a measure to be justified under the "police powers" doctrine, it has to be *bona fide*. But neither of them explicates the basis upon which the *bona fide* character of the measure falls to be examined. As recognized by Canada and the European Union Member States in Annex 8-A, paragraph 3, of CETA, a measure that bears no reasonable nexus to its professed public policy objectives, or its impact is

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[112] *Olympic Entertainment Group AS v. Ukraine*, PCA Case No. 2019-18, Award, 15 April 2021, para. 90, Claimants' Exh. **CL-198.**

[113] NAFTA 1128 Submission, para. 35.

[114] Canada's Rejoinder, para. 259: "The Claimants' attempt to import a broad proportionality test into an expropriation analysis under NAFTA Article 1110 ignores that the principle of proportionality is not recognized as part of the minimum standard of treatment of aliens under customary international law and, in the context of police powers, was not mentioned in either the U.S. Restatement of Foreign Relations Law or the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (on which the Claimants rely). It must therefore be rejected."

[115] Claimants' Reply, paras. 567-567.

*(continued)*

so severe in light of its purpose that it appears manifestly excessive, cannot possibly be characterized as a legitimate exercise of the police powers doctrine.[116] The same position is recognized in Annex B.13(1)(c) of the 2004 Canada Model BIT.[117]

96. Tellingly, the United States itself accepts in its Submission that a measure will not be considered as a "taking" of property when it is "*reasonably necessary* to the performance by a State of its recognized obligations to protect public health, safety, morals or welfare".[118] Thus, on the United States' own account, an assessment of the reasonableness and necessity of the measure is required, as a minimum, in order to examine whether a measure may be justified under the police powers doctrine.

97. On the other hand, both the United States and Canada accept that in determining whether an indirect expropriation has occurred, it is appropriate to look at the "economic impact" of the measure; the "duration" of the measure; the "extent" to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations; and the "character of the measure or series of measures".[119] Whilst the Claimants accept that these are relevant factors to determining whether a *de facto* expropriation has occurred, neither the United States nor Canada have explained how these factors should be weighed and assessed against one another. It stands to logic that a legal analysis of the qualitative and quantitative characteristics of a given measure requires an examination of the connection between the measure itself (its character, duration, impact and effects) in relation to its professed objectives. That is precisely what the test of reasonableness and proportionality requires.

## VII. CAUSATION (ARTICLE 1116)

98. In its Submission, the United States also lays out its interpretation on the standard of causation required by NAFTA Article 1116.

99. As far as the standard of factual causation is concerned, the Claimants and the Respondent converge on the proposition that the test is met when the identified breach constitutes the 'but for' cause in the chain of causation.[120] Such also seems to be the position of the United States.[121] The Claimants further agree with the United States

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[116] CETA, Annex 8-A, paragraph 3: "For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.", Claimants' Exh. **CL-230**.

[117] Whereby: "Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation." Claimants' Exh. **CL-231**

[118] NAFTA 1128 Submission, fn 66, quoting from G.C. Christie, *What Constitutes a Taking of Property under International Law*, 28 BYIL 307, 338 (1962). In *Chemtura Corporation v. Government of Canada*, UNCITRAL, Respondent's Counter-Memorial (20 October 2008), p. 217, fn 680, Claimants' Exh. **CL-90**, the Respondent relied on the same authority, referring to the "validity and plausible relationship of the reasons with the action taken."

[119] NAFTA 1128 Submission, paras. 31-34; Canada 2004 Model BIT, Annex B.13(1)(b), Claimants' Exh. **CL-231**; Model Foreign Investment Promotion and Protection Agreement, Article 9(3), Claimants' Exh. **CL-60**.

[120] Respondent's Counter-Memorial, para. 294; Claimants' Reply, para. 619.

[121] NAFTA 1128 Submission, para. 37.

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that factual causation is a necessary but not sufficient condition, and that an additional element is required — sometimes referred to as legal causation.

100. With respect to the standard of legal causation, the Claimants agree with the United States that the ordinary meaning of the term "by reason of, or arising out of" in Article 1116 of the NAFTA requires a "sufficient link", which is normally understood as proximate causation.[122] The Claimants further agree that the standard of proximate causation has been endorsed by previous tribunals.[123] The United States refers to the NAFTA tribunal's findings in *S.D. Myers v. Canada*, which stated that:

> "damages may only be awarded to the extent that there is a sufficient causal link between the breach of a specific NAFTA provision and the loss sustained by the investor. Other 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."[124]

101. It also bears mention that the *S.D. Myers* tribunal did not adopt an overly restrictive approach to proximate causation. On the contrary, the *S.D. Myers* tribunal referred to the arbitral award in the *Shufeldt Claim*, which recognized that under international law, a wrongdoer is under an obligation to pay compensation for "damages and prejudice which result directly or indirectly from the non-fulfilment or infringement" of its obligations.[125] The *S.D. Myers* tribunal also rejected the notion that Article 1116 of the NAFTA precludes the recovery of damages depending on whether they are direct or indirect. It stated that:

> "a debate as to whether damages are direct or indirect is not appropriate. If they were caused by the event, engage Chapter 11 and are not too remote, there is nothing in the language of Article 1139 that limits their recoverability."[126]

102. Furthermore, the Claimants point out that the standard of foreseeability has been recognized as an appropriate criterion in distinguishing compensable damages from injury that too "remote" or "consequential" to be the subject of reparation—a point recognized by the Respondent itself.[127] According to the second report on State responsibility prepared by the ILC Special Rapporteur Arangio-Ruiz, who first drafted

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[122] NAFTA 1128 Submission, paras. 37-38; Claimants' Reply, paras. 621 and 624, referring to "an uninterrupted and proximate logical chain" and "a chain of causality [which is] proximate".

[123] E.g. *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Award, 28 March 2011, paras. 163 and 170, Claimants' Exh. **CL-200**, analysed in Claimants' Reply, paras. 622ff.

[124] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002, para. 140, Claimants' Exh. **CL-232**. *See also SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Award, 22 May 2014, para. 346 ("La cause et le préjudice doivent être reliés par un enchaînement d'événements."), Claimants' Exh. **CL-233**.

[125] *Ibid.*, para. 152, quoting from *Shufeldt claim (Guatemala, USA)*, Decision, 24 July 1930, United Nations Reports of International Arbitral Awards (**UNRIAA**), Vol. II, at page 1099, Claimants' Exh. **CL-234**. The *Schufeld* tribunal also recognized that damage (in that case, lost profits) can be claimed where it "may reasonably be supposed to have been in the contemplation of both parties *as the probable result of a breach of it*." (Emphasis added.)

[126] *Ibid.*, para. 160.

[127] Canada's Rejoinder, paras. 290-291 ("in order to recover damages, a claimant must prove that "the wrongful conduct was a sufficient, proximate, adequate, foreseeable or direct cause of the injury."); Canada's Counter-Memorial, para. 294 (referring to "foreseeable" cause).

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the relevant chapter on reparation in what eventually became the ILC's Articles on Responsibility of States for Internationally Wrongful Acts (**ARSIWA**):

> "[p]redictability prevails in judicial practice (…) It does not, therefore, seem correct to exclude predictability from the requisites for determining causality for the purposes of compensation. At most it can be said that the possibility of foreseeing the damage on the part of a reasonable man in the position of the wrongdoer is an important indication for judging the 'normality' or 'naturalness' which seems to be an undeniable prerequisite for identifying the causality link"[128]

103. According to the Special Rapporteur, reparation is due even where the injury is "removed in time or space" from the wrongful act, so long as the causality relationship can be established with certainty.[129] In support of this view, the Special Rapporteur referred — just as the Claimants in this case and the arbitral tribunal in *Lemire v. Ukraine II* did[130] — to the 1923 decision of the U.S.-German Mixed Commission, which stated that:

> "It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of. – It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no breach in the chain and the loss can be clearly, unmistakably and definitely traced, link by link, to Germany's act (…) All indirect losses are covered provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed."[131]

104. Ultimately, the ILC recognized the standard of foreseeability and the wrongdoer's intention as relevant factors in assessing proximate causation in Article 31 of ARSIWA. In the commentary to this provision, the ILC reasoned as follows:

> "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'. But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question (…)."[132]

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[128] "Second report on State responsibility" by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, UN Doc. A/CN.4/425, reproduced in *Yearbook of the International Law Commission*, 1989, Vol. II, Part One, p. 13, paras. 38-39, Claimants' Exh. C**L-235**. See also *ibid.*, p. 14, para. 42(ii): "Damages must be *fully* paid in respect of injuries for which the wrongful act is the exclusive cause, even though they may be linked to that act not by an immediate relationship but by *a series of events each exclusively linked with each other by a cause-and-effect relationship*." (Emphasis in original.) and para. 43: "Causation is thus to be presumed not only in the presence of a relationship of "proximate causation". It is to be presumed whenever the damage is linked to the wrongful act by a chain of events which, however long, is uninterrupted."

[129] *Ibid.*, p. 14, fn 85, citing J. Personnaz, *La réparation du préjudice en droit international public* (Paris, 1939), p. 129.

[130] C.f. Claimants' Reply, para. 622; *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 166, Claimants' Exh. **CL-200.**

[131] *Mixed Claims Commission (United States and Germany), Administrative Decision No. II, 1 November 1923,* UNRIAA, Vol. VII, pp. 29-30, Claimants' Exh. **CL-236**.

[132] "Articles on Responsibility of States for Internationally Wrongful Acts", reproduced in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 93, commentary (10) to Article 31 (internal references omitted). Claimants' Exh. **CL-51.**

105. In this regard, the ILC referred to the *Naulilaa Case*, which presented a series of events between the injury suffered and the wrongful act. The case arose from Germany's wrongful attack against Portugal's colonies in Angola, which in turn led to a revolt of indigenous tribes against Portuguese authority; following, an internal insurgency, the indigenous tribes started to pillage and loot the area and massacred thousands of local villagers, whilst the survivors suffered a famine as a result of drought. On the merits, the tribunal found Germany liable for the wrongful attack. With respect to reparation, the tribunal recognized that the obligation to compensate extends to damages which may be linked to the wrongful act through a series of events, but limited that obligation only to the extent that the wrongdoer could *foresee* the consequences of its actions, which are not exceptional or unusual in the circumstances. The Commission held that

> "*it would not be equitable for the victim to bear the burden of damage which the author of the initial unlawful act foresaw and perhaps even wanted*, simply under the pretext that, in the chain linking it to his act, there are intermediate links. Everybody agrees, however, that, even if one abandons the strict principle that direct damage alone is indemnifiable, one should nevertheless necessarily rule out, for fear of leading to an inadmissible extension of liability, *the damage that is connected to the initial act only by an unforeseen chain of exceptional circumstances which occurred only because of a combination of causes alien to the author's will and not foreseeable on his part.*"[133] (Emphases added.)

106. The foregoing analysis makes clear that the test of foreseeability is an *objective* one.[134] A close review of the legal authorities makes clear that legal causation looks at the loss suffered by the injured party and seeks to establish whether the injury in question can be traced back, link by link, to the wrongful act, and whether the wrongdoer could have reasonably foreseen (or actually intended[135]) the consequences of its actions. Such is the case here, where Ontario adopted a measure, the effects of which was objectively foreseeable to the reasonable person at the time when the measure was adopted.

## VIII. CLAIM FOR LOSS OR DAMAGE BY AN INVESTOR (ARTICLES 1116 AND 1117)

107. In its Submission, the United States contends that "[t]he NAFTA does not (…) 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."[136] In the United States' view, a foreign investor

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[133] *Portuguese Colonies case (Naulilaa incident)*, UNRIAA, vol. II, p. 1031 (unofficial translation into English from the French original based on the translation provided in the Second report on State responsibility by Mr. Gaetano Arangio-Ruiz, filed as Claimants' Exh. C**L-235**, at p. 13, with a minor correction), Claimants' Exh. **CL-237**.

[134] Claimants' Reply, para. 625, citing *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (16 September 2015), para. 383, Claimants' Exh. **CL-201** ("a wrongful act may cause a particular damage as a matter of fact. However, *if the factual link between the act and the damage is composed of an atypical chain of events that could objectively not have been foreseen to ensue from the act, the damage may not be recoverable*.")

[135] The Claimants note that the United States' Submission refers to the *Dix Case*, UNRIAA, vol. IX, p. 121, which referred to the deliberate intention to injure as an element to be taken into account in establishing proximate causation: "Governments like individuals are responsible only for the proximate and natural consequences of their acts. International as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure."

[136] NAFTA 1128 Submission, para. 51.

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may bring a claim under Article 1116 only where it "seeks to recover loss or damage that it incurred *directly*".[137] By contrast, where the investor seeks to "recover loss or damage to an enterprise that the investor owns or controls", such injury is said to be "indirect".[138] In the United States' view, such a "derivative claim" may only be brought under Article 1117, which enables an investor of a Party to bring a claim that another Party has breached an obligation under the NAFTA "on behalf of an enterprise of [that other] Party that is a juridical person that the investor owns or controls directly or indirectly". By contrast, Article 1117 "does not apply", according to the United States, "where the alleged loss or damage is to an enterprise of a non-Party or of the same Party as the investor."[139]

108. These arguments echo the Respondent's position that one of the Claimants (Koch Industries) lacks standing under NAFTA Article 1116, allegedly because "it has failed to plead that it incurred any cognizable loss or damage by reason of, or arising out of, the alleged breaches of Articles 1105 and 1110".[140]

109. The Claimants position is already set out in detail in their Reply and need not be repeated here, especially as far as the factual evidence is concerned.[141] Suffice to say that Article 1116 of the NAFTA entitles "[a]n investor of a Party" to submit to arbitration "a claim that another Party has breached an obligation under Section A" and that "the investor has incurred loss or damage by reason of, or arising out of, that breach." As explained in the Memorial, Koch is a U.S. privately held company that 100% owns KS&T (a U.S. company organized under the laws of Delaware), in addition to other companies incorporated in Canada.[142] Koch has indirectly suffered loss or damage by reason of the drop in value of its 100%-owned affiliate KS&T and the latter's directly-held investment in Ontario as a result of Ontario's measures. By this measure alone, Koch has a stake in the present proceedings and an independent right to compensation for breaches of NAFTA Chapter Eleven for which the Respondent is responsible under the NAFTA and international law.[143] The fact that Koch's damages overlap with those of KS&T is of no issue from the point of view of standing, as long as the Tribunal avoids awarding double recovery.

## IX. CONTRIBUTORY FAULT

110. Finally, the Claimants note that the United States' Submission refers to "contributory fault" and quotes from Article 39 of the ILC's ARSIWA without offering any legal analysis.[144] In any event, the Claimants are of the view that the United States'

[137] NAFTA 1128 Submission, para. 44 (emphasis added).

[138] NAFTA 1128 Submission, para. 44.

[139] NAFTA 1128 Submission, paras. 43-44.

[140] Canada's Counter-Memorial, paras. 172-173; Canada's Rejoinder, paras. 172-176.

[141] Claimants' Reply, paras. 392-398.

[142] Claimants' Memorial, paras. 5 and 322.

[143] Claimants' Reply, para. 392.

[144] NAFTA 1128 Submission, para. 52.

*(continued)*

submission on this point is not relevant to the matters at hand, insofar as the legal principle it asserts is inapposite to the factual circumstances of this case.[145]

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London, United Kingdom

Respectfully submitted,

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[145] Claimants' Reply, paras. 667-678.