The formatting of the appended submission has been modified in order to comply with Section 508. The version of the submission that was originally filed by the United States is available on the Department of State's website.

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

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

ODYSSEY MARINE EXPLORATION, INC.,

Claimant

-and-

UNITED MEXICAN STATES,

Respondent.

ICSID CASE NO. UNCT/20/1

SUBMISSION OF THE UNITED STATES OF AMERICA

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

Standing to Bring a Claim and Limitations on Damages (Articles 1116 & 1117)

2. The NAFTA Chapter Eleven provisions that govern the question of a claimant's standing to bring a claim on behalf of itself and on behalf of an enterprise, as well as limitations on damages for such claims, are Articles 1116 and 1117, respectively. The following sections pertain to the proper interpretation of aspects of Articles 1116(1) and 1117(1).

Limitations on Claims for Loss or Damage under Articles 1116(1) and 1117(1)

3. Each claim by an investor must fall within either NAFTA Article 1116 or NAFTA Article 1117 and is limited to the type of loss or damage available under the article invoked.[2] Article 1116(1) permits an investor to present a claim for loss or damage incurred by the investor itself:

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

[1] The United States understands that Dr. Jeffrey Seminoff separately submitted a witness statement in this arbitration at the request of one of the parties concerning a 2015 meeting that he attended at the Southwest Fisheries Science Center of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA Fisheries).

[2] As further discussed in paragraph 14, *infra*, an investor may bring separate and distinct claims under both Articles 1116 and 1117; however, the relief available for each claim is limited to the article under which that particular claim falls and in any event cannot lead to double recovery.

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

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

5. Articles 1116 and 1117 serve to address discrete and non-overlapping types of injury.[3] Where the investor seeks to recover loss or damage that it incurred directly, it may bring a claim under Article 1116. Where the investor seeks to recover loss or damage to an enterprise that the investor owns or controls, the investor's injury is only indirect. Such a derivative claim must be brought under Article 1117.[4] However, Article 1117 is applicable only where the loss or damage has been incurred by "an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly." (Emphasis added). Article 1117 does not apply where the alleged loss or damage is to an enterprise of a non-Party or of the same Party as the investor.

[3] *See* North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. I, 103d Cong., 1st Sess., at 146 (1993) ("Articles 1116 and 1117 set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of direct injury to an investor, and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by the investor.").

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

6. The United States' position on the interpretation and functions of Articles 1116(1) and 1117(1) is long-standing and consistent.[5] The United States agrees with Canada[6] and Mexico[7] that investors must allege direct damage to recover under Article 1116 and that indirect damage to an investor, based on injury to an enterprise the investor owns or controls, may only be claimed, if at all, under Article 1117. Pursuant to customary international law principles of treaty interpretation, as reflected in Article 31(3)(a)-(b) of the Vienna Convention on the Law of Treaties, "[t]here shall be taken into account, together with context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; [and] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . . ."[8] In accordance with these principles, the Tribunal must take into account the NAFTA Parties' common understanding, as evidenced by these submissions.[9]

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

[6] *See*, *e.g.*, *William Ralph Clayton & Bilcon of Delaware Inc. et al. v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2009-04, Government of Canada Counter-Memorial on Damages ¶ 28 (June 9, 2017); *id*. n.50 (authorities cited including Canada's prior statements on same); *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Counter-Memorial (Damages Phase) ¶¶ 108-109 (June 7, 2001).

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

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

7. The distinction between Articles 1116 and 1117 was drafted purposefully in light of two existing principles of customary international law addressing the status of corporations. The first of these principles is that no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares. This is so because, as reaffirmed by the International Court of Justice in Diallo, "international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders."[10] As the Diallo Court further reaffirmed, quoting Barcelona Traction: "a wrong done to the company frequently causes prejudice to its shareholders." Nonetheless, "whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed."[11] Thus, only direct loss or damage suffered by shareholders is cognizable under international law.[12]

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

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

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

[12] *See Barcelona Traction*, 1970 I.C.J. ¶ 47 ("Whenever one of his direct rights is infringed, the shareholder has an independent right of action."). The United States notes that some authors have asserted or proposed exceptions to this rule.

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

9. Examples of claims that would allow a shareholding investor to seek direct loss or damage include where the investor alleges that it was denied its right to a declared dividend, to vote its shares, or to share in the residual assets of the enterprise upon dissolution.[13] Another example of a direct loss or damage suffered by shareholders is where the disputing State wrongfully expropriates the shareholders' ownership interests—whether directly through an expropriation of the shares or indirectly by expropriating the enterprise as a whole.[14]

10. The second principle of customary international law against which Articles 1116 and 1117 were drafted is that no international claim may be asserted against a State on behalf of the State's own nationals.[15]

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

[14] As discussed in more detail below at ¶¶ 23-31, under Article 1110, an expropriation may either be direct or indirect.

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

11. Under these background principles, a common situation is left without a remedy under customary international law. Investors often choose to make an investment through a separate enterprise, such as a corporation, incorporated in the host State. If the host State were to injure that enterprise in a manner that does not directly injure the investor/shareholders, no remedy would ordinarily be available under customary international law. In such a case, the loss or damage is only directly suffered by the enterprise. As the investor has not suffered a direct loss or damage, it cannot bring an international claim. Nor may the enterprise maintain an international claim against the State of which it is a national under the principle of non-responsibility.[16]

12. Article 1117(1) addresses this issue by creating a right to present a claim not found in customary international law.[17] Where the investment is an enterprise of another Party,[18] an investor of a Party that owns or controls the enterprise may submit a claim on behalf of the enterprise for loss or damage incurred by the enterprise. However, minority shareholders who do not own or control the enterprise may not bring a claim for loss or damage under Article 1117, thereby reducing the risk of multiple actions with respect to the same disputed measures.

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[16] Some investment treaties allow an investment to assume the nationality of the investor that owns or controls that investment pursuant to ICSID Article 25(2)(b), therefore permitting an enterprise to bring a claim on its own behalf even though it was constituted under the laws of the disputing Party. *See, e.g.,* U.S.-Argentina Bilateral Investment Treaty, S. TREATY DOC. NO. 103-2, 103d Cong., 1st Sess., art. VIII(8) (1994) ("For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention."); Energy Charter Treaty, art. 26(7), Apr. 16, 1998 (entry into force), 2080 U.N.T.S. 95; 34 I.L.M. 360 (1995).

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

[18] *See* NAFTA Article 1139 ("enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there"); NAFTA Article 201 ("enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association").

13. Article 1116, in contrast, adheres to the principle of customary international law that shareholders may assert claims only for direct injuries to their rights.[19] Were shareholders to be permitted to claim under Article 1116 for indirect injury, Article 1117's limited carve out from customary international law would be superfluous. Moreover, it is well-recognized that an international agreement should not be held to have tacitly dispensed with an important principle of international law "in the absence of words making clear an intention to do so."[20] Nothing in the text of Article 1116 suggests that the NAFTA Parties intended to derogate from customary international law restrictions on the assertion of shareholder claims.[21]

[19] Article 1116(1) derogates from customary international law only to the extent that it permits individual investors (including minority shareholders) to assert claims that could otherwise be asserted only by States. *See, e.g.*, *Nottebohm* (*Liechtenstein v. Guatemala*), 1955 I.C.J. 4, 24 (Judgment of Apr. 6) ("[B]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law[.]") (internal quotation omitted); F.V. GARCÍA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES BY ALIENS 86 (1974) ("[I]nternational responsibility had been viewed as a strictly 'interstate' legal relationship. Whatever may be the nature of the imputed act or omission or of its consequences, the injured interest is in reality always vested in the State alone."); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 585 (5th ed. 1998) ("[T]he assumption of the classical law that only states have procedural capacity is still dominant and affects the content of most treaties providing for the settlement of disputes which raise questions of state responsibility, in spite of the fact that frequently the claims presented are in respect of losses suffered by individuals and private corporations.").

[20] *Elettronica Sicula S.p.A. (ELSI)* (*U.S. v. Italy*) 1989 I.C.J. 15, ¶ 50 (Judgment of July 1989) ("Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with [by an international agreement], in the absence of any words making clear an intention to do so."); *Loewen Group, Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 160 (June 26, 2003); *see also id.* at ¶ 162 ("It would be strange indeed if sub silentio the international rule were to be swept away.").

[21] As noted earlier, the United States expressly drew a distinction between direct and indirect injury in its Statement of Administrative Action. *See supra*, note 3.

14. Finally, the United States notes that Article 1117(3) makes clear that nothing prevents an investor that owns or controls an enterprise, in an appropriate case, from submitting claims under both Articles 1116 and 1117.[22] However, under Article 1135(2)(a) and (b), where a claim is made under Article 1117(1), the award must provide that any restitution be made, or monetary damages be paid, to the enterprise. Moreover, any damages awarded under each Article must be distinct and non-overlapping in order to avoid double-recovery.[23]

"Control" of an Enterprise

15. As noted above, Article 1117 authorizes an investor of a Party to bring a claim on behalf of an enterprise that the investor "owns or controls directly or indirectly." The NAFTA does not define "control." The omission of a definition for "control" accords with long-standing U.S. practice, reflecting the fact that determinations as to whether an investor controls an enterprise will involve factual situations that must be evaluated on a case-by-case basis.[24]

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[22] For example, if a NAFTA Party violated Article 1109(1)'s requirement that "all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay," the investor might be able to claim under Article 1116 damages stemming from interference with its right to be paid corporate dividends. If the investor owns or controls the enterprise, it might also be able to claim under Article 1117 damages relating to its enterprise's inability to make payments necessary for the day-to-day conduct of the enterprise's operations. A minority or non-controlling shareholder under such a scenario, however, could submit only a claim for direct damages – the loss of dividends – under Article 1116.

[23] *See, e.g.*, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, 1116-8 (Kinnear, Bjorklund and Hannaford, eds.; Jan 2006) ("Derivative damages raise a concern about double recovery. If an enterprise were indeed to suffer loss or damage due to a breach of Section A of Chapter 11, damages to the enterprise could be awarded under Article 1117. If an investor pursuing a claim on its own behalf could also recover for the diminution in the value of the interest it owned, the injury might be recompensed twice.").

[24] *See Hearing Before the Committee on Foreign Relations of the United States Senate on the Bilateral Investment Treaties with Argentina, Armenia, Bulgaria, Ecuador, Kazakhstan, Kyrgyzstan, Moldova, and Romania*, S. Hrg. 103-292, 103rd Cong., 1st Sess. (Sept. 10, 1993), Responses of the U.S. Department of State to Questions Asked by Senator Pell, at 27 (the term "control" is left undefined in U.S. Model BITs "because these [determinations] involve factual situations that must be evaluated on a case-by-case basis"); *see also* KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 116 (2009) ("a determination of whether an investor controls a company requires factual determinations that must be made on a case by case basis").

Causation and Damages

16. Articles 1116 and 1117 allow an investor to recover loss or damage incurred "by reason of or arising out of" a breach of an obligation under NAFTA Chapter Eleven, Section A. In this connection, an investor may recover such damages only to the extent that they are established on the basis of satisfactory evidence that is not inherently speculative.[25]

17. The ordinary meaning of Articles 1116 and 1117 requires an investor to establish the causal nexus between the alleged breach and the claimed loss or damage.[26] It is well-established that "causality in fact is a necessary but not a sufficient condition for reparation."[27] The standard for factual causation is known as the "but-for" or "sine qua non" test whereby an act causes an outcome if the outcome would not have occurred in the absence of the act. This test is not met if the same result would have occurred had the breaching State acted in compliance with its obligations.[28]

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

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

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

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

18. The ordinary meaning of the term "by reason of, or arising out of" also requires an investor to demonstrate proximate causation. Proximate causation is an "applicable rule[] of international law" that under Article 1131(1) must be taken into account in fixing the appropriate amount of monetary damages.[29] Articles 1116 and 1117 contain no indication that the NAFTA Parties intended to vary from this established rule. Indeed, all three NAFTA Parties have expressed their agreement that proximate causation is a requirement under NAFTA Chapter Eleven.[30] As explained above in paragraph 6, pursuant to the customary international law of treaty interpretation reflected in the Vienna Convention on the Law of Treaties, the Tribunal must take into account this common understanding of the Parties.

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[29] *See* ILC Draft Articles, art. 31, cmt. 10. *See also Administrative Decision No. II (U.S. v. Germany)*, 7 R.I.A.A. 23, 29 (1923) (proximate cause is "a rule of general application both in private and public law – which clearly the parties to the Treaty had no intention of abrogating"); *United States Steel Products (U.S. v. Germany)*, 7 R.I.A.A. 44, 54-55, 58-59, 62-63 (1923) (rejecting on proximate cause grounds a group of claims seeking reimbursement for war-risk insurance premiums); *Dix (U.S. v. Venezuela)*, 9 R.I.A.A. 119, 121 (undated) ("International as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure."); *H. G. Venable (U.S. v. Mexico)*, 4 R.I.A.A. 219, 225 (1927) (construing the phrase "originating from" as requiring that "only those damages can be considered as losses or damages caused by [the official] which are immediate and direct results of his [action]"). *See also* BIN CHENG, GENERAL PRINCIPLES OF LAW 244-45 (1987) ("[I]t is 'a rule of general application both in private and public law,' equally applicable in the international legal order, that the relation of cause and effect operative in the field of reparation is that of proximate causality in legal contemplation").

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

19. NAFTA tribunals have consistently imposed a requirement of proximate causation under Articles 1116 and 1117. The S.D. Myers tribunal held that damages may only be awarded to the extent that there is a "sufficient causal link" between the breach of a specific NAFTA provision and the loss sustained by the investor,[31] and then subsequently clarified that "[o]ther ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the proximate cause of the harm."[32] In Pope & Talbot, the tribunal held that under Article 1116 the claimant bears the burden to "prove that loss or damage was caused to its interest, and that it was causally connected to the breach complained of."[33] The ADM tribunal required "a sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such an injury."[34]

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

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

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

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

20. Accordingly, any loss or damage cannot be based on an assessment of acts, events or circumstances not attributable to the alleged breach.[35] Events that develop subsequent to the alleged breach may increase or decrease the amount of damages suffered by a claimant. At the same time, injuries that are not sufficiently "direct", "foreseeable", or "proximate" may not, consistent with applicable rules of international law, be considered when calculating a damage award.[36] Tribunals should exercise caution also because compensation for injuries not caused by the breach may, depending on the circumstances, also be construed as intending to deter or punish the conduct of the disputing State, contrary to Article 1135(3). [37]

Environmental Measures (Article 1114(1))

21. Article 1114(1) provides that:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

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

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

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

22. Article 1114(1) informs the interpretation of other provisions of NAFTA Chapter Eleven, including Articles 1105 and 1110, and shows that Chapter Eleven was not intended to undermine the ability of governments to take measures based upon environmental concerns, even when those measures may affect the value of an investment, if otherwise consistent with the Chapter.

Expropriation and Compensation (Article 1110)

23. Article 1110(1) provides that "[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment" unless specified conditions are satisfied.

24. As a threshold matter, the Glamis tribunal recognized that the term "expropriation" in Article 1110(1) "incorporates by reference the customary international law regarding that subject."[38] In this connection, it is a principle of customary international law that in order for there to have been an expropriation, a property right or property interest must have been taken.[39] As such, and given that Article 1110(1) protects "investments" from expropriation, the first step in any expropriation analysis must begin with examination of whether there is an investment capable of being expropriated.[40] It is appropriate to look to the law of the host State[41] for a determination of the definition and scope of the property right or property interest at issue, including any applicable limitations.[42]

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[38] *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 354 (June 8, 2009).

[39] *See, e.g.,* Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law,* 176 R.C.A.D.I. 259, 272 (1982) ("[O]nly *property* deprivation will give rise to compensation.") (emphasis in original); Rudolf Dolzer, *Indirect Expropriation of Alien Property,* ICSID REVIEW: FOREIGN INV. L.J. 41, 41 (1986) ("Once it is established in an expropriation case that the object in question amounts to 'property,' the second logical step concerns the identification of 'expropriation.'"). This principle of customary international law is reflected in 2012 U.S. Model Bilateral Investment Treaty, ann. B (*Expropriation*) ¶ 2.

[40] *Glamis Gold Ltd.*, Award ¶ 356 ("There is for all expropriations, however, the foundational threshold inquiry of whether the property or property right was in fact taken."). *See also* authorities cited *supra*, note 40.

[41] *See, e.g.*, Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 263, 270 (1982) (for a definition of "property . . . [w]e necessarily draw on municipal law sources"); CAMPBELL MCLACHLAN, LAURENCE SHORE, & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES ¶ 8.64 (2d ed. 2017) ("The property rights that are the subject of protection under the international law of expropriation are created by the host State law. Thus, it is for the host State law to define the nature and extent of property rights that a foreign investor can acquire."); *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award ¶ 184 (Feb. 3, 2006) ("[F]or there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them . . . .").

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

25. Article 1110 provides for protections from two types of expropriations, direct and indirect.[43] A direct expropriation occurs "where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure."[44] The second is indirect expropriation. An expropriation that does not conform to each of the specific conditions set forth in Article 1110(1), paragraphs (a) through (d), constitutes a breach of Article 1110. Any such breach requires compensation in accordance with Article 1110(2).

[43] As the United States has previously explained, the phrase "take a measure tantamount to nationalization or expropriation" explains what the phrase "indirectly nationalize or expropriate" means; it does not assert or imply the existence of an additional type of action that may give rise to liability beyond those types encompassed in the customary international law categories of "direct" and "indirect" nationalization or expropriation. *Metalclad Corp. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/97/1), Submission of the United States of America ¶¶ 9-14 (Nov. 9, 1999). *See also Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Interim Award ¶¶ 103-04 (June 26, 2000) (rejecting the claimant's argument that "tantamount to expropriation" provides protections beyond those provided by customary international law; *see also* id. ¶ 96); *S.D. Myers*, First Partial Award ¶ 286 ("In common with the *Pope & Talbot* Tribunal, this Tribunal considers that the drafters of the NAFTA intended the word 'tantamount' to embrace the concept of so-called 'creeping expropriation,' rather than to expand the internationally accepted scope of the term expropriation."); *Cargill Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/2, Award ¶ 372 (Sept. 18, 2009) ("Article 1110, in using the terms 'expropriation' and 'tantamount to expropriation', incorporates this customary law of expropriation."). *See also* Kenneth Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation*, 278 (2010) ("Some BITs refer to measures 'tantamount' or 'equivalent' to expropriation to describe indirect expropriation.") (footnotes omitted).

[44] 2012 U.S. Model Bilateral Investment Treaty, ann. B (*Expropriation*) ¶ 3.

26. However, under international law, where an action is a bona fide, non-discriminatory regulation, it will not ordinarily be deemed expropriatory.[45] This principle in public international law 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.[46]

27. An indirect expropriation occurs "where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."[47] Determining whether an indirect expropriation has occurred requires a case-by-case fact-based inquiry that considers, among other factors: (i) the economic impact of the governmental action; (ii) the extent to which that action interferes with distinct, reasonable-investment-backed expectations; and (iii) the character of the government action.[48]

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[45] *See, e.g.*, *Glamis Gold Ltd.*, Award ¶ 354 (quoting the RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712, cmt. (g) (1987) ("A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory. . . .")); *Chemtura Corp. v. Government of Canada*, NAFTA/UNCITRAL, Award ¶ 266 (Aug. 2, 2010) (holding that Canada's regulation of the pesticide lindane was a non-discriminatory measure motivated by health and environmental concerns and that a measure "adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation"); *Methanex Corp. v. United States of America,* NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Part IV, Ch. D ¶ 7 (Aug. 3, 2005) (holding that as a matter of general international law, "a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process" will not ordinarily be deemed expropriatory or compensable); Caplan & Sharpe at 791-792 (discussing observation included in Annex B, paragraph 4(b) of U.S. 2012 Model BIT that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation."). This observation was first included in the 2004 U.S. Model BIT and has been echoed in subsequent U.S. investment agreements.

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

[47] 2012 U.S. Model BIT ann. B (*Expropriation*) ¶ 4.

[48] *See*, 2012 U.S. Model BIT ann. B (*Expropriation*) ¶ 4(a), which is intended to reflect customary international law.

28. With respect to the first factor, for an expropriation claim to succeed, the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as "to support a conclusion that the property has been 'taken' from the owner."[49]

29. The second factor requires an objective inquiry of the reasonableness of the claimant's expectations, which "depend in part on the nature and extent of governmental regulation in the relevant sector."[50]

[49] *Pope & Talbot*, Interim Award ¶ 102; *see also Glamis Gold Ltd.*, Award ¶ 357 ("[A] panel's analysis should begin with determining whether the economic impact of the complained of measures is sufficient to potentially constitute a taking at all: '[I]t must first be determined if the Claimant was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto ... had ceased to exist.' The Tribunal agrees with these statements and thus begins its analysis of whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures 'substantially impair[ed] the investor's economic rights, *i.e.* ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings.'") (citations omitted); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶¶ 149-50 (Jan. 12, 2011) (citing the *Glamis* Award); *Cargill*, Award ¶ 360 (holding that a government measure only rises to the level of an expropriation if it affects "a radical deprivation of a claimant's economic use and enjoyment of its investment" and that a "taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property . . . (i.e., it approaches total impairment)").

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

30. The third factor considers the nature and character of the government action, including whether such action involves physical invasion by the government or whether it is more regulatory in nature (i.e., whether "it arises from some public program adjusting the benefits and burdens of economic life to promote the common good").[51]

31. Where a State proclaims that it is enacting a non-discriminatory statute or regulation for a bona fide public purpose, courts and tribunals rarely question that characterization.[52] The Restatement (Third) of Foreign Relations, for instance, notes that the public purpose requirement "has not figured prominently in international claims practice, perhaps because the concept of public purpose is broad and not subject to effective reexamination by other states."[53] In sum, the concept of a "public purpose" is a broad one, and it is not appropriate to search for a State's alleged ulterior motives when a State has articulated plausible reasons for enacting the measures in question.

Minimum Standard of Treatment (Article 1105)

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

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

[52] *See* Louis B. Sohn and R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 555-56 (1961) ("It is not without significance that what constitutes a 'public purpose' has rarely been discussed by international tribunals and that in no case has property been ordered restored to its former owner because the taking was considered to be other than for a public purpose. This unwillingness to impose an international standard of public purpose must be taken as reflecting great hesitancy upon the part of tribunals and of States adjusting claims through diplomatic settlement to embark upon a survey of what the public needs of a nation are and how these may best be satisfied."); Burns H. Weston, *Constructive Takings Under International Law: A Modest Foray Into the Problem of "Creeping Expropriation,"* 16 VA J. INT'L L. 103, 121 (1975) (explaining that, under international law, there is a "necessary presumption that States are 'regulating' when they say they are 'regulating,' and they are especially to be honored when they are explicit in this regard"); *see also* Christie, 38 BRIT. Y.B. INT'L L. at 332 ("But it certainly would seem that if the facts are such that the reasons actually given are plausible, search for unexpressed 'real' reasons is chimerical. No such search is permitted in municipal law, and the extreme deference paid to the honour of States by international tribunals excludes the possibility of supposing that the rule is different in international law.").

[53] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 712, cmt. e (1987).

33. On July 31, 2001, the Free Trade Commission ("Commission"), comprising the NAFTA Parties' cabinet-level representatives, issued an interpretation reaffirming that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party."[54] The Commission clarified that the concepts of "fair and equitable treatment" and "full protection and security" do "not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[55] The Commission also confirmed that "a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."[56] The Commission's interpretation "shall be binding" on tribunals established under Chapter Eleven.[57]

34. The Commission's interpretation thus confirms the NAFTA Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in NAFTA Article 1105. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts.[58] The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[59]

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

[55] *Id.* at ¶ B.2.

[56] *Id*. at ¶ B.3.

[57] NAFTA Article 1131(2).

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

[59] *S.D. Myers*, First Partial Award ¶ 259; *Glamis Gold Ltd.*, Award ¶ 615 ("The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community."); *see also* Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 AM. SOC'Y OF INT'L L. PROC. 51, 58 (1939) ("Borchard 1939").

35. Customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation. This two-element approach—State practice and opinio juris—is the standard practice of States and international courts, including the International Court of Justice.[60]

36. Relevant State practice must be widespread and consistent[61] and be accepted as law, meaning that the practice must also be accompanied by a sense of legal obligation.[62] "[T]he indispensable requirement for the identification of a rule of customary international law is that both a general practice and acceptance of such practice as law (opinio juris) be ascertained."[63] A perfunctory reference to these requirements is not sufficient.[64]

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

[61] *See, e.g.*, *North Sea Continental Shelf*, 1969 I.C.J. at 43 (noting that in order for a new rule of customary international law to form, "State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved"); ILC Draft Conclusions on Identification of Customary International Law, Conclusion 8 and commentaries (citing authorities).

[62] *North Sea Continental Shelf*, 1969 I.C.J. at 44 ("Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."); ILC Draft Conclusions on Identification of Customary International Law, Conclusion 9 and commentaries (citing authorities).

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

[64] *See* PATRICK DUMBERRY, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105, at 115 (2013) (observing that the tribunal in *Merrill & Ring* failed "to cite a single example of State

37. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate, under this two-step approach, that a rule of customary international law exists. In its decision on Jurisdictional Immunities of the State (Germany v. Italy), the ICJ emphasized that "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States," and noted as examples of State practice relevant national court decisions or domestic legislation dealing with the particular issue alleged to be the norm of customary international law, as well as official declarations by relevant State actors on the subject.[65]

practice in support of" its "controversial findings"); UNCTAD, FAIR AND EQUITABLE TREATMENT – UNCTAD SERIES ON ISSUES IN INTERNATIONAL AGREEMENTS II, at 57 (2012) ("The *Merrill & Ring* tribunal failed to give cogent reasons for its conclusion that MST made such a leap in its evolution, and by doing so has deprived the 2001 NAFTA Interpretive Statement of any practical effect.").

[65] *Jurisdictional Immunities of the State*, 2012 I.C.J. at 122-23 (discussing relevant materials that can serve as evidence of State practice and *opinio juris* in the context of jurisdictional immunity in foreign courts). *See also* ILC Draft Conclusions on Identification of Customary International Law, Conclusion 6(2) ("Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts."); Comments from the United States on the International Law Commission's Draft Conclusions on the Identification of Customary International Law as Adopted by the Commission in 2016 on First Reading at 17 (under cover of diplomatic note dated Jan. 5, 2018) (explaining that while resolutions adopted by an international organization or at an intergovernmental conference "may provide relevant information regarding a potential rule of customary international law, . . . [such] resolutions must be approached with a great deal of caution," including because "many resolutions of international organizations and conferences are adopted with minimal debate and consideration and through procedures (such as by consensus) that provide limited insight into the views of particular States."); *id.* at 18 (noting that national court decisions are not themselves sources of international law (except where they may constitute State practice), but rather are sources that may help elucidate rules of law where they accurately compile and soundly analyze evidence of State practice and *opinio juris*).

38. States may decide expressly by treaty to make policy decisions to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law.[66] The practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 1105 in which "fair and equitable treatment" and "full protection and security" are expressly tied to the customary international law minimum standard of treatment.[67] Thus, arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 1105(1).[68]

39. Moreover, decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary international law are not themselves instances of "State practice" for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice.[69] A formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and opinio juris fails to establish a rule of customary international law as incorporated by Article 1105(1).

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

[67] NAFTA Interpretation ¶ B.1 ("Article 1105(1) prescribes the customary international law minimum standard of treatment . . . .); s*ee also Grand River*, Award ¶ 176 (noting that an obligation under Article 1105 of the NAFTA "must be determined by reference to customary international law, not to standards contained in other treaties or other NAFTA provisions, or in other sources, unless those sources reflect relevant customary international law"). While there may be overlap in the substantive protections ensured by NAFTA and other treaties, a claimant submitting a claim under the NAFTA, in which fair and equitable treatment is defined by the customary international law minimum standard of treatment, still must demonstrate that the obligations invoked are in fact a part of customary international law.

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

[69] *See, e.g., Glamis Gold Ltd.*, Award ¶ 605 ("Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law. They can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-

40. As all three NAFTA Parties agree,[70] the burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and opinio juris.[71] "The party which relies on a custom . . . must prove that this custom is established in such a manner that it has become binding on the other Party."[72] Tribunals applying the minimum standard of treatment obligation in Article 1105 have confirmed that the party seeking to rely on a rule of customary international law must establish its existence. The tribunal in Cargill Inc. v. United Mexican States, for example, acknowledged that

based, or autonomous, interpretation.") (footnote omitted); *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, 2018 I.C.J. 507, ¶ 162 (Oct. 1) ("The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia's argument based on legitimate expectations thus cannot be sustained."). All three NAFTA Parties further agree that decisions of arbitral tribunals are not evidence in themselves of customary international law. *See, e.g.*, *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Second Submission of the United States of America ¶ 14 (June 12, 2015) ("Decisions of international courts and tribunals do not constitute State practice or *opinio juris* for purposes of evidencing customary international law."); *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Second Submission of Mexico Pursuant to NAFTA Article 1128 ¶ 10 (June 12, 2015) ("Mexico concurs with Canada's submission that decisions of arbitral tribunals are not themselves a source of customary international law."); *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Canada's Response to 1128 Submissions ¶ 11 (June 26, 2015) ("Canada has explained at length in its pleadings as to why decisions of international investments tribunals are not a source of State practice for the purpose of establishing a new customary norm.").

[70] *See, e.g., Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Canada's Rejoinder on the Merits ¶ 147 (July 2, 2014) ("[I]t is a well-established principle of international law that the party alleging the existence of a rule of customary international law bears the burden of proving it. Thus, the burden is on the Claimant to prove that customary international law has evolved to include the elements it claims are protected.") (footnote omitted); *Mesa Power*, Second Submission of the United States of America ¶ 13 ("[T]he burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*."); *Mesa Power*, Second Submission of Mexico Pursuant to NAFTA Article 1128 ¶ 9 (concurring with the United States' position that the burden is on a claimant to establish a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*). As explained in paragraph 16, pursuant to the customary international law principles of treaty interpretation reflected in the VCLT, the Tribunal must take into account this common understanding of the Parties.

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

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

> the proof of change in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on Claimant. If Claimant does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task. Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.[73]

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

41. Once a rule of customary international law has been established, the claimant must then show that the respondent State has engaged in conduct that violates that rule.[74] A determination of a breach of the minimum standard of treatment "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[75] Chapter Eleven tribunals do not have an open-ended mandate to "second-guess government decision-making."[76] A failure to satisfy requirements of domestic law does not necessarily violate international law.[77] Rather, "something more than simple illegality or lack of authority under the domestic law of a state is necessary to render an act or measure inconsistent with the customary international law requirements. . . ."[78] Accordingly, a departure from domestic law does not in-and-of-itself sustain a violation of Article 1105.

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

[75] *S.D. Myers*, First Partial Award ¶ 263.

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

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

[78] *ADF Group,* Award ¶ 190.

Fair and Equitable Treatment

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

43. As discussed below, the concepts of legitimate expectations, non-discrimination, transparency, and good faith are not component elements of "fair and equitable treatment" under customary international law that give rise to independent host State obligations.

Legitimate Expectations

44. The concept of "legitimate expectations" is not a component element of "fair and equitable treatment" under customary international law that gives rise to an independent host State obligation. The United States is aware of no general and consistent State practice and opinio juris establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations; instead, something more is required.[79] An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment.

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

Non-discrimination

45. Similarly, the customary international law minimum standard of treatment set forth in Article 1105(1) does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination.[80] As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.[81] To the extent that the customary international law minimum standard of treatment incorporated in Article 1105(1) prohibits discrimination, it does so only in the context of other established customary international law rules, such as prohibitions against discriminatory takings,[82] access to judicial remedies or treatment by the courts,[83] or the obligation of States to provide full protection and security and to compensate aliens and nationals on an equal basis in times of violence, insurrection, conflict or strife.[84] Moreover, investor-State claims of nationality-based discrimination are governed exclusively by the provisions of Chapter Eleven that specifically address that subject (Articles 1102 and 1103), and not Article 1105(1).[85]

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

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

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

taking by the state of the property of a national of another state that . . . is discriminatory . . . ."); *id.* at § 712 cmt. f ("Formulations of the rules on expropriation generally include a prohibition of discrimination . . . .").

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

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

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

Transparency

46. The concept of "transparency" also has not crystallized as a component of "fair and equitable treatment" under customary international law giving rise to an independent host-State obligation.[86] The United States is aware of no general and consistent State practice and opinio juris establishing an obligation of host-State transparency under the minimum standard of treatment.

Good Faith

47. The principle that "every treaty in force is binding on the parties to it and must be performed by them in good faith" is established in customary international law,[87] not in Chapter Eleven of the NAFTA. As such, claims alleging breach of the good faith principle in a Party's performance of its NAFTA obligations do not fall within the limited jurisdictional grant afforded in Section B.[88]

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[86] *See United Mexican States v. Metalclad Corp.*, [2001] 89 B.C.L.R. 3d 359, 2001 BCSC 664, ¶¶ 68, 72 (Can. B.C.S.C.) (holding that "[n]o authority was cited or evidence introduced [in the *Metalclad* arbitration] to establish that transparency has become part of customary international law," and that "there are no transparency obligations contained in [NAFTA] Chapter 11"); *Feldman*, Award ¶ 133 (finding that "it is doubtful that lack of transparency alone rises to the level of violation of NAFTA and international law," and holding the British Columbia Supreme Court's decision in *Metalclad* to be "instructive"); *Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/07/1, Award ¶¶ 208, 231 (Mar. 31, 2010) (stating that "a requirement for transparency may not at present be proven to be part of the customary law standard, as the judicial review of *Metalclad* rightly concluded," though speculating that it might be "approaching that stage").

[87] *See* VCLT, art. 26 (reflecting the customary international law principle).

[88] *See, e.g., Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, 1986 I.C.J. 14, 135-36, ¶¶ 270-271 (June 27) (holding, with respect to a claim based on customary international law duties alleged to be "implicit in the rule *pacta sunt servanda*," that "the Court does not consider that a compromissory clause of the kind included in Article XXIV, paragraph 2, of the 1956 FCN Treaty, providing for jurisdiction over disputes as to its interpretation or application, would enable the Court to entertain a claim alleging conduct depriving the treaty of its object and purpose").

48. Furthermore, it is well established in international law that good faith is "one of the basic principles governing the creation and performance of legal obligations," but "it is not in itself a source of obligation where none would otherwise exist."[89] As such, customary international law does not impose a free-standing, substantive obligation of "good faith" that, if breached, can result in State liability.[90] Accordingly, a claimant "may not justifiably rely upon the principle of good faith" to support a claim, [91] absent a specific treaty obligation, and the NAFTA contains no such obligation.

[89] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 1988 I.C.J. 69, 105, ¶ 94 (Dec. 20) (internal quotation marks omitted).

[90] This consistent and longstanding position has been articulated in repeated submissions by the United States to NAFTA tribunals. *See, e.g., Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2012-17, Submission of the United States of America, ¶ 7 (July 25, 2014) ("It is well established in international law that good faith is 'one of the basic principles governing the creation and performance of legal obligations,' but 'it is not in itself a source of obligation where none would otherwise exist.'"); *William Ralph Clayton & Bilcon of Delaware Inc. et al. v. Government of Canada,* NAFTA/UNCITRAL, PCA Case No. 2009-04, Submission of the United States of America, ¶ 6 (Apr. 19, 2013) (same); *Grand River,* Counter-Memorial of Respondent United States of America at 94 ("[C]ustomary international law does not impose a free-standing, substantive obligation of 'good faith' that, if breached, can result in State liability. Absent a specific treaty obligation, a Claimant 'may not justifiably rely upon the principle of good faith' to support a claim."); *Canfor Corp. v. United States of America*, NAFTA/UNCITRAL, Reply on Jurisdiction of Respondent United States of America, at 29 n.93 (Aug. 6, 2004) ("[Claimant] appears to argue that customary international law imposes a general obligation of 'good faith' independent of any specific NAFTA provision. The International Court of Justice, however, has squarely rejected that notion, holding that 'the principle of good faith . . . is not in itself a source of obligation where none would otherwise exist'.").

[91] *Land and Maritime Boundary (Cameroon v. Nigeria)*, Judgment, 1998 I.C.J. 275, 297, ¶ 39 (June 11).

Full Protection and Security

49. In addition to the fair and equitable treatment rule, another rule included as part of the minimum standard of treatment is the obligation to provide full protection and security. The United States has long maintained that this obligation to accord "full protection and security" requires that each Party provide the level of police protection required under customary international law.[92] Although, as discussed above, arbitral decisions are not evidence of State practice, the vast majority of cases in which the customary international law obligation of full protection and security was found to have been breached are those in which a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien.[93]

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[92] *See, e.g.*, U.S. 2004 and 2012 Model Bilateral Investment Treaties, Art. 5 (Minimum Standard of Treatment), paragraph 2: "For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: . . . (b) "full protection and security" requires[s] each Party to provide the level of police protection required under customary international law."

[93] *See, e.g.*, *American Mfg. & Trading, Inc. v. Zaire,* ICSID Case No. ARB/93/1 (1997), *reprinted in* 36 I.L.M. 1531 (1997) (failure to prevent destruction and looting of property constituted violation of protection and security obligation); *Asian Agric. Products Ltd. v. Sri Lanka,* ICSID Case No. ARB/87/3 (1990) *reprinted in* 30 I.L.M. 577 (1991) (destruction of claimant's property violated full protection and security obligation); *United States Diplomatic and Consular Staff in Tehran (United States v. Iran*), 1980 I.C.J. 3 (May 24) (failure to protect foreign nationals from being taken hostage violated most constant protection and security obligation); *Chapman v. United Mexican States (United States v. Mexico)*, 4 R.I.A.A. 632 (Mex.-U.S. Gen. Cl. Comm'n 1930) (lack of protection found where claimant was shot and seriously wounded); *H.G. Venable (United States. v. Mexico)*, 4 R.I.A.A. 219 (Mex.-U.S. Gen. Cl. Comm'n 1927) (bankruptcy court indirectly responsible for physical damage to attached property); *Biens Britanniques au Maroc Espagnol (Reclamation 53 de Melilla - Ziat, Ben Kiran) (Spain v. Great Britain)*, 2 R.I.A.A. 729 (1925) (reasonable police protection would not have prevented mob from destroying claimant's store). Other cases are in accord. *See, e.g., Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award ¶ 632 (Apr. 4, 2016) (holding that the "full protection and security" treaty standard "only extends to the duty of the host state to grant physical protection and security"); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic,* ICSID Case No. ARB/03/19, Decision on Liability ¶ 173 (July 30, 2010) (holding that "the full protection and security standard primarily seeks to protect investment from physical harm"); *Saluka Investments B.V. v. Czech Republic,* UNCITRAL, Partial Award, ¶ 484 (Mar. 17, 2006) ("[T]he 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force."). *See also, e.g.*, Article 7(1) of the *Responsibility of the State for injuries caused in its territory to the person or property of aliens: Revised draft, reprinted in* F.V. GARCIA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 129, 130 (1974) ("The State is responsible for the injuries caused to an alien by illegal acts of individuals, whether isolated or committed in the course of internal disturbances (riots, mob violence or civil war), if the authorities were manifestly negligent in taking the measures which, in view of the circumstances, are normally taken to prevent the commission of such acts.").

50. The obligation to provide "full protection and security" does not, for example, require States to: (i) prevent economic injury inflicted by third parties;[94] (ii) provide for legal security;[95] (iii) provide for stability of a State's legal environment; or (iv) guarantee that aliens or their investments are not harmed under any circumstances. Such interpretations would impermissibly extend the duty to provide "full protection and security" beyond the minimum standard under customary international law, as the United States has consistently maintained.

National Treatment (Article 1102)

51. Paragraphs 1 and 2 of Article 1102 (National Treatment) provide that each Party shall accord to investors of another Party or their investments "treatment no less favorable than that it accords, in like circumstances," to its own investors and their investments "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

52. To establish a breach of national treatment under Article 1102, a claimant has the burden of proving that it or its investments: (1) were accorded "treatment"; (2) were in "like circumstances" with domestic investors or investments; and (3) received treatment "less favorable" than that accorded to domestic investors or investments. As the UPS v. Canada tribunal noted, "[t]his is a legal burden that rests squarely with the Claimant. That burden never shifts . . . ."[96]

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[94] *See, e.g.*, *Methanex Corp. v. United States of America*, Reply Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment, at 38-39 (Apr. 12, 2001) ("Indeed, if the full protection and security requirement were to extend to an obligation to 'protect foreign investments from economic harm inflicted by third parties,' . . . Article 1105(1) would constitute a very substantial enlargement of that requirement as it has been recognized under customary international law."); *Methanex Corp. v. United States of America*, Rejoinder Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment, at 39 (June 27, 2001) (accord); *Loewen Group, Inc. v. United States of America*, NAFTA/ICSID Case No. ARB (AF)/98/3, Counter-Memorial of the United States of America, at 179-80 (Mar. 30, 2001) (accord).

[95] *Omega Eng'g LLC and Mr. Oscar Rivera v. Republic of Panama*, U.S.-Panama Trade Promotion Agreement and U.S.-Panama Bilateral Investment Treaty/ICSID Case No. ARB/16/42, Submission of the United States of America ¶ 23 (Feb. 3, 2020).

[96] *United Parcel Service of America Inc. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/02/1, Award on the Merits ¶ 84 (May 24, 2007).

53. Article 1102 is intended to prevent discrimination on the basis of nationality between domestic investors (or investments) and investors (or investments) of the other Party, that are in "like circumstances." It is not intended to prohibit all differential treatment among investors or investments. Rather, it is designed only to ensure that the Parties do not treat entities that are in "like circumstances" differently based on nationality.[97]

54. All three NAFTA Parties have demonstrated their agreement regarding this interpretation of Article 1102 — clearly and specifically — over a period of many years, in submissions made in a number of different proceedings.[98] As explained above in paragraph 6, pursuant to the customary international law principles of treaty interpretation reflected in the Vienna Convention on the Law of Treaties, the Tribunal must take into account this common understanding of the Parties.

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[97] *Loewen Group*, Award ¶ 139 (accepting that "Article 1102 [National Treatment] is direct[ed] *only* to nationality-based discrimination") (emphasis added); *Mercer*, Award ¶ 7.7 (accepting the positions of the United States and Mexico that the National Treatment and Most-Favored Nations obligations are intended to prevent discrimination on the basis of nationality).

[98] *See, e.g.*, for the United States: *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/12/1, Counter-Memorial on Merits and Objection to Jurisdiction of Respondent United States of America ¶ 323 (Dec. 14, 2012) ("Article 1102 is not intended to prohibit all differential treatment among investors and investments, but to ensure that the NAFTA Parties do not treat investors and investments 'in like circumstances' differently based on their NAFTA-Party nationality."); *Mercer Int'l Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of the United States of America ¶ 10 (May 8, 2015) (Articles 1102 and 1103 "are intended to prevent discrimination on the basis of nationality. They are not intended to prohibit all differential treatment among investors or investments. Rather, they are designed to ensure that nationality is not the basis for differential treatment, in accordance with the provisions of the NAFTA"); *Vento Motorcycles, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/17/3, Submission of the United States of America ¶ 4 (Aug. 23, 2019) (accord); *Resolute Forest Products, Inc.*, Second Submission of the United States of America ¶ 4 (accord). For Mexico: *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Supplemental Submission of the United Mexican States, at 3 (May 25, 2000) ("[T]he objective of Article 1102 is to prohibit discrimination between investors of the Parties on the basis of their nationality."); *Mercer Int'l Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of Mexico Pursuant to Article 1128 of NAFTA ¶ 11 (May 8, 2015) ("Mexico, Canada and the United States have consistently maintained that: the national treatment obligation is intended to prevent discrimination against investors of the other Parties (and their investments) on the basis of nationality; . . . ."); *Resolute Forest Products, Inc. v. Canada*, NAFTA/PCA Case No. 2016-13, Second Submission of the United Mexican States ¶ 3 (Apr. 23, 2020) (accord). For Canada: *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Fourth Submission of the Government of Canada Pursuant to NAFTA Article 1128 ¶ 5 (Jan. 30, 2004) (Article 1102 "prohibits treatment which discriminates on the basis of the foreign investment's nationality."); *Mercer Int'l Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Government of Canada's Reply to 1128 Submissions ¶ 2 (June 12, 2015) ("[T]he NAFTA Parties agree that: . . . NAFTA Articles 1102 (National Treatment) and 1103 (Most-Favoured Nation) only prohibit discrimination on the basis of nationality; . . . ."); *Vento Motorcycles, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/17/3, Non-Disputing Party Submission of the Government of Canada Pursuant to Article 1128 ¶ 7 (Aug. 23, 2019) (accord).

55. Nationality-based discrimination under Article 1102 may be de jure or de facto. De jure discrimination occurs when a measure on its face discriminates between investors or investments in like circumstances based on nationality. De facto discrimination occurs when a facially neutral measure with respect to nationality is applied in a discriminatory fashion based on nationality. A claimant is not required to establish discriminatory intent.

56. As indicated above, the appropriate comparison is between the treatment accorded to a claimant or its investment, on one hand, and the treatment accorded to a domestic investor or investment in like circumstances, on the other. It is therefore incumbent upon the claimant to identify domestic investors or investments in like circumstances as comparators. If the claimant does not identify any domestic investor or investment as allegedly being in like circumstances, no violation of Article 1102 can be established.

57. Determining whether a domestic investor or investment identified by a claimant is in "like circumstances" with the claimant or its investment is a fact-specific inquiry. As one tribunal observed, "[i]t goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations."[99] The United States understands the term "circumstances" to denote conditions or facts that accompany treatment as opposed to the treatment itself. Thus, identifying appropriate comparators for purposes of the "like circumstances" analysis requires consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other possible relevant characteristics. When determining whether a claimant was in "like circumstances" with comparators, it or its investment should be compared to a domestic investor or investment that is alike in all relevant respects but for nationality of ownership. Moreover, whether treatment is accorded in "like circumstances" under Article 1102 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare objectives.

[99] *See, e.g.*, *Pope & Talbot Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award on the Merits of Phase 2 ¶ 75 (Apr. 10, 2001).

58. Nothing in Article 1102 requires that investors or investments of investors of a Party, regardless of the circumstances, be accorded the best, or most favorable, treatment given to any domestic investor or any investment of a domestic investor. Rather, the appropriate comparison is between the treatment accorded a foreign investment or investor and a domestic investment or investor in like circumstances. This is an important distinction intended by the Parties. Thus, the Parties may adopt measures that draw distinctions among entities without necessarily violating Article 1102.

Respectfully submitted,

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