

IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE  
NORTH AMERICAN FREE TRADE AGREEMENT  
AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES BETWEEN

MERCER INTERNATIONAL INC.,

*Claimant/Investor*

-and-

GOVERNMENT OF CANADA,

*Respondent/Party.*

ICSID CASE NO. ARB(AF)/12/3

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**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 a question of interpretation of the NAFTA. The United States does not take a position, in this submission, on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

Article 1503(2) (Delegation of Authority to State Enterprises)

2. An investor submitting a claim to arbitration under Articles 1116 or 1117 based on an alleged breach of Article 1503(2) must establish certain jurisdictional requirements in addition to those required of a Chapter Eleven claimant not alleging a breach of Article 1503(2). One such requirement is that the actions of the state enterprise that are the subject of the claim involve an exercise of “regulatory, administrative or other governmental authority that the Party has *delegated* to” that state enterprise.<sup>1</sup> NAFTA Note 45 provides that a “delegation,” for these purposes:

includes a legislative grant, and a government order, directive or other act[,] *transferring* to the monopoly [or state enterprise], or *authorizing* the exercise by the monopoly [or state enterprise] of, governmental authority.<sup>2</sup>

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<sup>1</sup> North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, art. 1503(2), 32 I.L.M. 289 (1993) (emphasis added) [hereinafter NAFTA].

<sup>2</sup> NAFTA Note 45 (emphasis added). Although Note 45 refers to NAFTA Article 1502(3), the same definition of “delegation” should apply in Article 1503(2), given that both refer to delegations of “regulatory, administrative or other governmental authority.” See *United Parcel Service of America, Inc. v. Government of Canada*,

Accordingly, if a state enterprise is acting under authority that is not delegated – *i.e.*, if the authority is exercised without an affirmative transfer or authorization of governmental authority by the NAFTA Party – then a Chapter Eleven tribunal lacks jurisdiction to hear any claim of breach of Article 1503(2).

3. Article 1503(2) provides examples of “regulatory, administrative or other governmental authority” that may be delegated. These include “the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.” These examples confirm that the term “other governmental authority” means the authority of the NAFTA Party in its *sovereign capacity*; a state enterprise is not exercising “governmental authority” merely because it acts as a commercial participant in the marketplace.<sup>3</sup>

#### Articles 1116(2) and 1117(2) (Limitations Period)

4. All claims under NAFTA Chapter Eleven must be brought within the three-year limitations period set out in Articles 1116(2) and 1117(2).<sup>4</sup> Specifically, Articles 1116(2) and 1117(2) require a claimant to submit a claim to arbitration within three years of the “date on which” the investor or enterprise “first acquired, or should have first acquired, knowledge” of (i) the alleged breach, and (ii) loss or damage incurred by the claimant or enterprise.

5. An investor or enterprise *first* acquires knowledge of an alleged breach and loss at a particular moment in time; that is, under Articles 1116(2) and 1117(2), knowledge is acquired as of a particular “date.” Such knowledge cannot *first* be acquired at multiple points in time or on a recurring basis. As such, a continuing course of conduct does not renew the limitations period under Articles 1116(2) and 1117(2), once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby.

6. As the *Grand River* tribunal recognized, where a “series of similar and related actions by a respondent state” is at issue, an investor cannot evade the limitations period by basing its claim on “the most recent transgression” in that series.<sup>5</sup> To allow an investor to do so would “render

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NAFTA/UNCITRAL, Award on the Merits ¶ 69 (May 24, 2007) (applying the definition of “delegation” in Note 45 to Article 1503 as well as Article 1502(3)) (“*UPS Award*”).

<sup>3</sup> See, e.g., *UPS Award* ¶¶ 72, 73-78 (stating that the “provision[] operate[s] only where the ... enterprise exercises the defined authority and not where it exercises other rights or powers). This conclusion is also consistent with the customary international law of State responsibility. See, e.g., *Report of the International Law Commission on the work of its fifty-third session*, U.N. GAOR Supp. No. 10 art. 5, U.N. Doc. A/56/10 (2001), reprinted in, [2001] 2 Y.B. INT’L. COMM’N 26, U.N. Doc. A/CN.4/Ser.A/2001/Add.1 (pt. 2) (stating customary international law rule as follows: “The conduct of a person or entity which is not an organ of the State . . . but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”).

<sup>4</sup> The claims limitation period has been described as “clear and rigid” and not subject to any “suspension,” “prolongation,” or “other qualification.” *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction ¶ 29 (July 20, 2006) (“*Grand River Decision on Objections to Jurisdiction*”); *Feldman v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002) (“*Feldman Award*”).

<sup>5</sup> *Grand River Enterprises v. United States*, Decisions on Objections to Jurisdiction ¶ 81.

the limitations provisions ineffective[.]”<sup>6</sup> An ineffective limitations period would fail to promote the goals of ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential respondents and third parties. Accordingly, once a claimant *first* acquires (or should have first acquired) knowledge of breach and loss, subsequent transgressions by the State Party arising from a continuing course of conduct do not renew the limitations period under Article 1116(2) or Article 1117(2).

7. In the context of national treatment and most-favored-nation treatment claims, if an investor or investment receives treatment that is less favorable than treatment provided to comparators in like circumstances, in accordance with Articles 1102 and 1103, the breach would occur on the later of the date that (1) the *first* comparator in like circumstances received treatment, or (2) the investor or investment received less favorable treatment. Accordingly, where a comparator in like circumstances receives treatment prior to the less favorable treatment accorded to an investor or investment, the limitations period would commence on the date the investor or investment received its treatment, to the extent that on that date the claimant knew or should have known of the breach and of the alleged damage or loss. The relevant date for this claims limitation period is not reset if the investor or investment is accorded less favorable treatment than a second comparator in like circumstances that receives treatment later in time.

#### Article 1108 (Reservations and Exceptions)

8. NAFTA Article 1108 exempts “procurement by a Party or state enterprise” from Chapter Eleven’s obligations with respect to national treatment and most-favored-nation treatment.<sup>7</sup> The term “procurement” is not defined in the NAFTA. The ordinary meaning of the term on its face, however, encompasses any and all forms of procurement by a NAFTA Party.<sup>8</sup> This reading is confirmed by the French- and Spanish-language versions of the NAFTA, which each use the generic term for “purchases” in those languages.<sup>9</sup> Further, the term “procurement” as used in Article 1108(7)(a) includes specifications in a procurement contract that are integral parts of a procurement project.<sup>10</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> Article 1108(7) reads, in pertinent part: “Articles 1102, 1103 and 1107 do not apply to: (a) procurement by a Party or a state enterprise[.]”

<sup>8</sup> See *ADF Group Inc. v. United States of America*, NAFTA/ICSID Case No. ARB (AF)/00/1, Award ¶ 161 (Jan. 9, 2003); see also *UPS Award* ¶¶ 131-35 (finding that certain services provided by Canada Post pursuant to a commercial fee-for-service contract constituted procurement under Article 1108(7)).

<sup>9</sup> See, e.g., NAFTA art. 1108(7) (“Les articles 1102, 1103 et 1107 ne s’appliquent pas: a) aux *achats* effectués par une Partie . . .”) (emphasis added); *id.* (“Los Artículos 1102, 1103 y 1107 no se aplican a: (a) las *compras* realizadas por una parte . . .”) (emphasis added); see also Vienna Convention on the Law of Treaties, May 23, 1969, art. 33(3), 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (“The terms of the treaty are presumed to have the same meaning in each authentic text.”).

<sup>10</sup> See, e.g., *ADF Group Inc. v. United States*, NAFTA/ICSID Case No. ARB (AF)/00/1, Rejoinder of Respondent United States of America on Competence and Liability at 6-8 (Mar. 29, 2002) (“the provisions incorporated into ADF’s sub-contract specifying what to buy for the Project were an integral part of the procurement for the Project.”).

## Article 1102 (National Treatment) and 1103 (Most-Favored-Nation)

9. Articles 1102 (National Treatment) and 1103 (Most-Favored-Nation Treatment) require the NAFTA Parties to accord no less favorable treatment to investors and investments of another Party to the extent they are in like circumstances with a Party's own investors and investments or those of a third country.

10. These articles 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.<sup>11</sup>

11. All three NAFTA Parties agree that Articles 1102 and 1103 prohibit only nationality-based discrimination.<sup>12</sup> The Parties' common, concordant, and consistent position constitutes the authentic interpretation of Articles 1102 and 1103 and, under the Vienna Convention on the Law of Treaties, "shall be taken into account, together with the context."<sup>13</sup>

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<sup>11</sup> *Loewen Group Inc. & Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB (AF)/98/3, Award ¶ 139 (accepting that "Article 1102 is direct[ed] only to nationality-based discrimination . . .") (emphasis added) ("Loewen Award").

<sup>12</sup> See, e.g., *Apotex Holdings Inc. and Apotex Inc. v. United States*, 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."); *Pope & Talbot v. 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."); *Methanex Corp. v. United States*, 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."). With respect to the Parties' positions regarding nationality-based discrimination and Article 1103, see, e.g., *Apotex Holdings Inc. and Apotex Inc.*, Counter Memorial on Merits and Objections to Jurisdiction of Respondent United States of America ¶ 325 ("Establishing a violation of Article 1103 is the same as establishing a violation of Article 1102, except that the applicable comparator in step two is a *foreign* investor or its investments."); *Mesa Power LLC v. Government of Canada*, NAFTA/PCA Case No. 2012-17, Submission of Mexico Pursuant to NAFTA Article 1128, ¶ 14 (July 25, 2014) ("The discrimination prohibited by Article 1103 must be on the basis of nationality, and therefore differing treatment of two investors of the same nationality cannot constitute a violation of Article 1103."); *Bilcon et al. v. Government of Canada*, NAFTA/UNCITRAL, Government of Canada Rejoinder ¶ 169 (Mar. 21, 2013) ("[I]n order to make out a claim under Articles 1102 and 1103, the Claimants must show that they suffered discriminatory treatment on the basis of their nationality.").

<sup>13</sup> See Vienna Convention, art. 31(3)(b), (stating that subsequent practice of the parties "shall be taken into account, together with the context"); *Report of the International Law Commission on the work of its eighteenth session*, [1966] 2 Y.B. INT'L L. COMM'N 169, 220, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (observing that there is no hierarchy among the norms of interpretation listed in Article 31 and that those in Article 31(3) "by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them") [hereinafter International Law Commission Report]; *Canadian Cattlemen for Fair Trade v. United States*, NAFTA/UNCITRAL, Award on Jurisdiction ¶¶ 188, 189 (Jan. 28, 2008) (emphasis omitted) ("[T]he available evidence cited by the Respondent 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[.]'" (emphasis removed); see also Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 223 (1958) (observing that "a consistent [subsequent State] practice must come very near to being conclusive as to how the treaty should be interpreted" (emphasis omitted)); *Iran v. United States*, Case No. B1 (Counterclaim), Award No. ITL 83-B1-FT ¶ 109 (Sept. 9, 2004) ("The importance of . . .

12. Nationality-based discrimination under Articles 1102 and 1103 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.<sup>14</sup>

13. Nothing in the text of Articles 1102 or 1103 suggests a shifting burden of proof. Rather, the burden to prove a violation of these articles, and each element of its claim, rests and remains squarely with the claimant.<sup>15</sup>

#### Article 1105 (Minimum Standard of Treatment)

14. Article 1105 is titled “Minimum Standard of Treatment.” 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.”

15. 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.”<sup>16</sup> The Commission clarified that the concept of “fair and equitable treatment” does “not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”<sup>17</sup> The Commission’s interpretation “shall be binding” on tribunals established under Chapter Eleven.<sup>18</sup>

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subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty[.]” (quoting International Law Commission); NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, DROIT INT’L PUBLIC 254 (7th ed. 2002) (“On désigne par l’expression ‘interprétation authentique’, celle qui est fournie directement par les parties, par opposition à l’interprétation non authentique, donnée par un tiers.”) (“The expression ‘authentic interpretation’ designates that which is furnished directly by the parties, as opposed to an unauthentic interpretation, which is given by a third party.”) (translation by counsel).

<sup>14</sup> See *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Second Submission of the United States of America ¶ 3 (May 25, 2000) (“If the measure, whether in law or in fact, does not treat foreign investors or investments less favorably than domestic investors or investments on the basis of nationality, then there can be no violation of Articles 1102 or 1103[.]”). A claimant is not required to establish discriminatory intent. See, e.g., *Grand River Enters. Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Rejoinder of Respondent United States of America, at 67 (May 13, 2009) (“[T]he requirement to show discrimination on the basis of nationality under Article 1102 does not require a showing of discriminatory intent. Rather, a Claimant must establish that a measure either on its face, or as applied, favors nationals over non-nationals.”).

<sup>15</sup> *UPS Award* ¶ 84 (holding that the failure of a claimant to establish the requisite elements of a claim of breach of Article 1102 “will be fatal to its case,” that this legal burden “rests squarely with the Claimant,” and that this “burden never shifts to the [NAFTA] Party[.]”).

<sup>16</sup> NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions ¶ B.1 (July 31, 2001) (“FTC Interpretation”).

<sup>17</sup> *Id.* ¶ B.2.

<sup>18</sup> NAFTA art. 1131(2).

16. 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.<sup>19</sup> The standard establishes a minimum “floor below which treatment of foreign investors must not fall.”<sup>20</sup>

17. 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.” This includes, for example, the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings, such as when a State’s judiciary administers justice to aliens in a “notoriously unjust”<sup>21</sup> or “egregious”<sup>22</sup> manner “which offends a sense of judicial propriety.”<sup>23</sup>

18. Other such areas concern the obligation to provide “full protection and security,” as also addressed in Article 1105(1), and the obligation not to expropriate covered investments, except under the conditions specified in Article 1110, neither of which are at issue in this case.

19. 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 “widely endorsed in the literature” and “generally adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice.”<sup>24</sup> Relevant State practice must be widespread and consistent<sup>25</sup> and be accepted as law,

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<sup>19</sup> A fuller description of the U.S. position is set out in *Methanex v. United States*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America (Nov. 13, 2000); *ADF Group Inc. v. United States*, 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*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Sept. 19, 2006); *Grand River Enters. Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Dec. 22, 2008).

<sup>20</sup> *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 259 (Nov. 13, 2000); see also *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 615 (June 8, 2009) (“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.”) (“*Glamis Award*”); Edwin Borchard, *The “Minimum Standard” of the Treatment of Aliens*, 33 PROC. AM. SOC’Y OF INT’L L. 51, 58 (1939) (“Borchard”).

<sup>21</sup> JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 44 (2005) (citing J. Irizarry y Puente, *The Concept of “Denial of Justice” in Latin America*, 43 MICH. L. REV. 383, 406 (1944)) (“PAULSSON”); *id.* at 4 (“[A] state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner.”) (emphasis omitted); *Chattin Case (U.S. v. Mex.)*, 4 R. INT’L ARB. AWARDS 282, 286-87 (1927), reprinted in 22 AM. J. INT’L L. 667, 672 (1928) (“Acts of the judiciary . . . are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man.”) (emphasis omitted).

<sup>22</sup> PAULSSON at 60 (“The modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice.”).

<sup>23</sup> *Loewen Award* ¶ 132 (a denial of justice may arise where there has occurred a “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety”).

<sup>24</sup> See Michael Wood (Special Rapporteur), *Second Report on Identification of Customary International Law* ¶ 21, A/CN.4/672, International Law Commission (May 22, 2014) (“ILC second report on the identification of customary

meaning that the practice must also be accompanied by a sense of legal obligation.<sup>26</sup> Moreover, the twin requirements of State practice and *opinio juris* “must both be identified . . . to support a finding that a relevant rule of customary international law has emerged.”<sup>27</sup>

20. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate that a rule of customary international law exists, most recently in its judgment in *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*.<sup>28</sup> There, 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.<sup>29</sup>

21. State practice confirms that there is no “categorical rule” under customary international law requiring non-discrimination.<sup>30</sup> As the *Methanex* tribunal observed:

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international law”); see also *id.*, Annex, Proposed Draft Conclusion 3 (stating that in order to determine the “existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law”); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, 122 (Feb. 3) (“In particular . . . the existence of a rule of customary international law requires that there be ‘a settled practice’ together with *opinio juris*.”); *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, 29-30 (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[.]”); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 14, 97 (June 27) (“[T]he Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and *opinio juris* of States.”).

<sup>25</sup> See, e.g., *North Sea Continental Shelf (Germany v. Denmark/Netherlands)*, 1969 I.C.J. 3, 43 (Feb. 20) (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”) (“*North Sea Continental Shelf* Judgment”); ILC second report on the identification of customary international law, Draft Conclusion 9 and commentaries (citing authorities).

<sup>26</sup> *North Sea Continental Shelf* Judgment 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 second report on the identification of customary international law, Draft Conclusion 10 with commentaries (citing authorities).

<sup>27</sup> ILC second report on the identification of customary international law ¶¶ 22-23 (also noting that these requirements are “indispensable for any rule of customary international law properly so called”) (emphasis added).

<sup>28</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99 (Feb. 3).

<sup>29</sup> *Id.* at 122-23 (discussing relevant materials that can serve as evidence of State practice and opinion juris in the context of jurisdictional immunity in foreign courts) (citing *Continental Shelf Libya*, 1985 I.C.J.).

<sup>30</sup> See OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 315 (1991) (“SCHACHTER”); ALWYN V. FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 506-07 (1970) (“Finally, the equality argument is utterly erroneous in so far as it pretends that aliens are entitled to be put on the same footing as nationals in every respect, for this reason: in the present state of international law, a State has not only the right to

As to the question of whether a rule of customary international law prohibits a State, in the absence of a treaty obligation, from differentiating in its treatment of nationals and aliens, international law is clear. In the absence of a contrary rule of international law binding on the States parties, whether of conventional or customary origin, a State may differentiate in its treatment of nationals and aliens.”<sup>31</sup>

22. With respect to economic rights, the relevant context here, State practice permits numerous forms of discrimination against aliens that do not violate customary international law. Aliens, for example, may be excluded from certain occupations or sectors of the economy or certain geographical areas of the country without infringing any principle of international law.<sup>32</sup> Further, “onerous restrictions may be imposed on ‘the property rights of aliens in certain national resources, e.g., national vessels, national mines, and other kinds of property.’”<sup>33</sup> International law upholds the right of governments to limit – or forbid altogether – foreign ownership of real

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impose differences in treatment between its *ressortissants* and foreigners; but it has also the right to create, within certain limits, distinctions between the *ressortissants* of different foreign nations. It may, for example, prevent aliens from acquiring title to land, from engaging in certain professions . . . . These and many other permissible restrictions combine to demonstrate that the concept of equality is incompatible with State practice and will swiftly lead to error in the handling of concrete cases.” (footnotes omitted) (“FREEMAN”).

<sup>31</sup> *Methanex v. United States*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Part IV, Chapter C, ¶ 25 (Aug. 3, 2005) (“*Methanex* Final Award”).

<sup>32</sup> See SCHACHTER at 315; see also ANDREAS ROTH, MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 156-57 (1949) (“A State may exercise a large control over the pursuits, occupations and modes of living of the inhabitants of its domain. In so doing, it may doubtless subject resident aliens to discrimination without necessarily violating any principle of international law. According to general international law, the States . . . may . . . reserve the exercise of economically gainful occupations to their own nationals and exclude aliens completely.”) (“ROTH”); J.L. BRIERLY, LAW OF NATIONS 278 (1963) (“In general a person who voluntarily enters the territory of a state not his own . . . is commonly not allowed to engage in the coasting trade, or to fish in territorial waters; he is sometimes not allowed to hold land. These and many other discriminations against him are not forbidden by international law.”); ROBERT JENNINGS & ARTHUR WATTS, 1 OPPENHEIM’S INTERNATIONAL LAW 905 (9<sup>th</sup> ed. 1992) (“The local state has a broad measure of discretion in its treatment of aliens – subject to its treaty obligations, which are now extensive. Thus it can, unless prevented by treaty from doing so, exclude aliens from certain professions and trades[.]”) (“1 OPPENHEIM’S”); MYRES MCDUGAL et al., HUMAN RIGHTS AND WORLD PUBLIC ORDER 740 (1980) (“Aliens may be forbidden to engage in enumerated business enterprises.”) (“MCDUGAL”).

<sup>33</sup> MCDUGAL at 740 (quoting Borchard).



property within their territory.<sup>34</sup> Aliens thus enjoy no general right under international law to freely engage in economic activity.<sup>35</sup>

23. Customary international law does prohibit discrimination under certain circumstances. These include prohibitions against discriminatory takings<sup>36</sup> or access to judicial remedies or treatment by the courts,<sup>37</sup> as well as the obligation of States to compensate aliens and nationals

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<sup>34</sup> See *Rio Grande Irrigation & Land Co., Ltd. (United Kingdom) v. United States*, 6 R.I.A.A. 131, 136 (1923) (applying the United States Alien Law of 1887); *Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT'L L. 140, 147 (Comment to Article 5) (Special Supp. 1929) (Harvard Draft Conventions and Comments on Nationality, Responsibility of States for Injuries to Aliens and Territorial Waters) ("Harvard Draft") ("The local law does not, of course, have to be uniform as to nationals and aliens. For example, it is quite possible for aliens to be denied the privilege of owning real estate . . ."); Borchard, at 54 ("It is well known that aliens may be denied numerous privileges, such as the ownership of real property . . ."); ROTH at 165 ("According to general international law, the alien's privilege of participation in the economic life of his State of residence does not go so far as to allow him to acquire private property. The State of residence is free to bar him from ownership of all or certain property, whether movables or realty."); 1 OPPENHEIM'S at 911-12 ("Thus a state may restrict the rights of aliens to hold property; and far-reaching interference with private property, including that of aliens, is common in connection with such matters as taxation, measures of police, public health, the administration of public utilities and the planning of urban and rural development.") (footnote omitted).

<sup>35</sup> FREEMAN at 513-14 ("[W]ith respect to the alien's right to engage in economic activity . . . in the absence of treaty, the extent of the alien's right to carry on business within a State is difficult to define. One of the reasons for this may be that general international law does not require States to base their economic legislation upon such principles as the unrestricted activity of private individuals and the free disposition of their property. . . . [O]ne [can] hardly speak of an alien's 'right' to engage in business. . . . In any event, it is well recognized that the State may exclude aliens from certain classes of occupations and professions, reserving these solely to its own nationals.") (footnote omitted).

<sup>36</sup> See, e.g., *BP Exploration Co. (Libya) Ltd. v. Libya*, 53 I.L.R. 297, 329 (Lagergren 1974) ("the 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 (Mahmassani 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, ¶ 87 (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 THE LAW OF FOREIGN RELATIONS § 712 (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.* §712 cmt. f ("Formulations of the rules on expropriation generally include a prohibition of discrimination . . .").

<sup>37</sup> See, e.g., *Ambatielos (Greece v. United Kingdom)*, 12 R.I.A.A. 83, 111 (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."); BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD at 334 (a national's "own government is justified in intervening in his behalf only if the laws themselves, the methods provided for administering them, and the penalties prescribed are in derogation of the principles of civilized justice as universally recognized or if, in a specific case, they have been wrongfully subverted by the courts so as to discriminate against him as an alien or perpetrate a technical denial of justice."); 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.").

on an equal basis for damages incurred during such times of violence, insurrection, conflict or strife.<sup>38</sup> Other than in these limited circumstances, however, no established rule of customary international law has emerged to prohibit economic discrimination against aliens.<sup>39</sup>

24. For all these reasons, regulatory action may violate “fair and equitable treatment” under the minimum standard of treatment only as that term is understood in customary international law.<sup>40</sup>

25. States may decide expressly by treaty to extend protections under the rubric of “fair and equitable treatment” and “full protection and security” beyond that required by customary international law. Extending such protections through “autonomous” standards in any particular treaty represents a policy decision by a State, rather than an action taken out of a sense of legal obligation. That practice 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.<sup>41</sup> 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.<sup>42</sup> Likewise, decisions of international courts and arbitral tribunals interpreting “fair and equitable treatment” as a concept of customary international law are not themselves instances of “State

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<sup>38</sup> 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 Drawn up in the 1929 Preparatory Committee of the Conference for the Codification of International Law*, League of Nations Doc. C.75.M.69.1929.V at 104-23 (1929), reprinted in 2 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.”).

<sup>39</sup> *Methanex* Final Award, Part IV, Chapter C, ¶ 25.

<sup>40</sup> See, e.g., *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 194 (Jan. 26, 2006) (“*Thunderbird* Award”); see also *Glamis Gold Ltd. v. United States of America*, Counter-Memorial of Respondent United States of America, at 218-262 (Sept. 19, 2006) (discussing the customary international law minimum standard of treatment in the context of regulatory action); *Glamis Gold Ltd. v. United States of America*, Rejoinder of Respondent United States of America, at 139-243 (Mar. 15, 2007) (same).

<sup>41</sup> FTC Interpretation ¶ B.1 (“Article 1105(1) prescribes the customary international law minimum standard of treatment . . . .”); see also *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 176 (Jan. 12, 2011) (noting that 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.

<sup>42</sup> See, e.g., *Glamis* Award ¶ 608 (concluding that “arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom”).

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.<sup>43</sup>

26. Thus, the NAFTA Parties expressly intended Article 1105(1) to afford the minimum standard of treatment to covered investments, as that standard has crystallized into customary international law through general and consistent State practice and *opinio juris*. For alleged standards that are not specified in the treaty, a claimant must demonstrate that such a standard has crystallized into an obligation under customary international law.

27. To do so, 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*.<sup>44</sup> “The party which relies on a custom,” therefore, “must prove that this custom is established in such a manner that it has become binding on the other Party.”<sup>45</sup> Tribunals applying Article 1105(1) of NAFTA Chapter Eleven 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. Mexico*, for example, acknowledged that

the proof of change in a custom is not an easy matter to establish. However, *the burden of doing so falls clearly on Claimant*. If the 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.<sup>46</sup>

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<sup>43</sup> See *id.* ¶ 605 (“Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law. They can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation.”) (footnote omitted); see also M. H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 202 (1998) (noting that while such decisions may contribute to the formation of customary international law, they are not appropriately considered as evidence of “State practice”).

<sup>44</sup> *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20); see also *North Sea Continental Shelf Judgment* at 43 (“[A]n indispensable requirement [of showing a new rule of customary international law] would be that within the period in question, short though it might be, 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.”); *Glamis Award* ¶¶ 601-02 (noting that the claimant bears the burden of establishing a change in customary international law, by showing “(1) a concordant practice of a number of States acquiesced in by others, and (2) a conception that the practice is required by or consistent with the prevailing law (*opinio juris*).”) (citations and international quotation marks omitted).

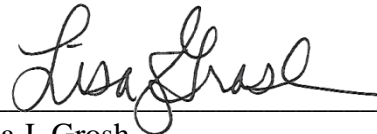
<sup>45</sup> *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, 1952 I.C.J. 176, 200 (Aug. 27) (“The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.”) (citation and internal quotation marks omitted); *Case of the 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).

<sup>46</sup> *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award ¶ 273 (Sept. 18, 2009) (emphasis added). The *ADF*, *Glamis Gold*, and *Methanex* tribunals likewise placed on the claimant the burden of establishing the content of customary international law. See also *ADF Group Inc. v. United States of America*, 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 Award* ¶ 601

28. Once a rule of customary international law has been established, the claimant must show that the State has engaged in conduct that violates that rule.<sup>47</sup> Determining 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.”<sup>48</sup>

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*Respectfully submitted,*



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(“As a threshold issue, the Tribunal notes that it is Claimant’s burden to sufficiently” show the content of the customary international law minimum standard of treatment); *Methanex* Final Award, Part IV, Chapter C ¶ 26 (citing *Asylum (Colombia v. Peru)* for placing burden on claimant to establish the content of customary international law, and finding that claimant, which “cited only one case,” had not discharged burden).

<sup>47</sup> *Feldman* Award ¶ 177 (“[I]t is a generally accepted canon of evidence in civil law, common laws, 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.”) (citing Appellate Body Report, *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, at 14, WT/DS33/AB/R (May 23, 1997)).

<sup>48</sup> *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 263 (Nov. 13, 2000); *Thunderbird* Award ¶ 127 (noting that states have a “wide regulatory ‘space’ for regulation,” can change their “regulatory polic[ies],” and have “wide discretion with respect to how [they] carr[y] out such policies by regulation and administrative conduct”).