IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT, CHAPTER FOURTEEN OF THE UNITED STATES-MEXICO-CANADA AGREEMENT, AND THE ICSID ARBITRATION RULES

FINLEY RESOURCES, INC., MWS MANAGEMENT, INC., AND PRIZE PERMANENT HOLDINGS, LLC,

Claimants

-and-

UNITED MEXICAN STATES,

Respondent.

ICSID CASE NO. ARB/21/25

SUBMISSION OF THE UNITED STATES OF AMERICA

---

1. Pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA"), Article 14.D.7(2) of the United States-Mexico-Canada Agreement ("USMCA"), and Section 24 of Procedural Order No. 1, the United States of America makes this submission on questions of interpretation of the NAFTA and the USMCA. 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.[*]

Delegation of Authority to State Enterprises (NAFTA Article 1503(2) and USMCA Article 22.3)

2. Pursuant to NAFTA Article 1503(2) and USMCA Article 22.3, the conduct of a state enterprise can be attributed to a Party if (i) the conduct involves the exercise of regulatory,

[*] 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.

administrative, or other governmental authority;[1] and (ii) such authority has been delegated to the state enterprise by the Party.[2]

3. 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.[3] (Emphases added.)

4. Similarly, footnote 5 of Chapter Fourteen of the USMCA provides that:

> For greater certainty, governmental authority is delegated to any person under the Party's law, including through a legislative grant or a government order, directive, or other act *transferring or authorizing* the exercise of governmental authority. (Emphases added.)

5. Accordingly, under the definitions set out in NAFTA Note 45 and footnote 5 of Chapter Fourteen of the USMCA, if a state enterprise is acting under authority that is not delegated (*i.e.*, if the authority is exercised without a transfer or authorization of governmental authority by the NAFTA or USMCA Party), such conduct is not the subject of a Party's obligations under Chapter Eleven of the NAFTA or Chapter Fourteen of the USMCA.

---

[1] This is consistent with customary international law, as reflected in the International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) ["ILC Draft Articles"]. If conduct is to be regarded as an act of the State for purposes of international responsibility, "the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage." ILC Draft Articles art. 5, Comment. 5. Moreover, "[b]eyond a certain limit, what is regarded as 'governmental' depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances." *Id*., art. 5, Comment. 6.

[2] *Id*., art. 5 ("The conduct of a person or entity which is not an organ of the State under article 4 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.").

[3] 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*, NAFTA/ICSID Case No. UNCT/02/1, 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"].

6. NAFTA Article 1503(2) and footnote 10 of USMCA Chapter 22 provide 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 "regulatory, administrative, or other governmental authority" means the authority of the NAFTA or USMCA Party in its sovereign capacity.[4]

Consent and Waiver (NAFTA Article 1121 and USMCA Annex 14-C(1))

7. A State's consent to arbitration is paramount.[5] Indeed, given that consent is the "cornerstone" of jurisdiction in investor-State arbitration,[6] it is axiomatic that a tribunal lacks jurisdiction in the absence of a disputing party's consent to arbitrate.[7]

8. USMCA Annex 14-C(1) provides that "[e]ach Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA," for certain alleged breaches of the NAFTA that arose while that

[4] *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"). Thus, what is dispositive is that the state enterprise is exercising the particular authorities delegated to it.

[5] *See, e.g.*, ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 74 (2009) ("Arbitral tribunals constituted to hear international or transnational disputes are creatures of consent. Their source of authority must ultimately be traced to the consent of the parties to the arbitration itself."); *AsiaPhos Ltd. & Norwest Chemicals Pte Ltd. v. People's Republic of China*, ICSID Case No. ADM/21/1, Award ¶ 59 (Feb. 16, 2023) ("[T]he jurisdiction of any arbitral tribunal should be based on the clear and unambiguous consent of both parties to have their dispute resolved by arbitration. This applies, in particular, in investment disputes where one of the parties is a sovereign State, which generally enjoys jurisdictional immunity from being sued in any kind of proceedings outside of its own State courts. Only where a State has waived its jurisdictional immunity by expressing its consent to have a dispute resolved by international arbitration in a clear and unambiguous manner does an arbitral tribunal have jurisdiction to decide on that dispute.") (internal citations omitted).

[6] As explained by the Executive Directors of the International Bank for Reconstruction and Development (World Bank) when submitting the then-draft ICSID Convention to the World Bank's Member Governments, "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre." Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ¶ 23 (Mar. 18, 1965).

[7] *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction ¶ 71 (July 15, 2016) ["*Renco* Partial Award"] ("It is axiomatic that the Tribunal's jurisdiction must be founded upon the existence of a valid arbitration agreement between Renco and Peru."). *See also* CHRISTOPH SCHREUER, *Consent to Arbitration*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 831 (Peter Muchlinski et al., eds. 2008) (explaining that "[l]ike any form of arbitration, investment arbitration is always based on agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal's jurisdiction."); CHRISTOPHER F. DUGAN ET AL., INVESTOR STATE ARBITRATION 219 (2008) (explaining also that "[t]he consent of the parties is the basis of the jurisdiction of all international arbitration tribunals").

treaty was in force.[8] An agreement to arbitrate is formed upon the investor's consent to arbitrate in accordance with the procedures provided in Section B of NAFTA Chapter 11.[9] Thus, the USMCA Parties have explicitly conditioned their consent upon satisfaction of the relevant procedural requirements detailed in the NAFTA. All three USMCA Parties have expressed agreement on this point in relation to similar consent language included in NAFTA Article 1122.[10]

9. The procedures required to engage the NAFTA Parties' consent and form the agreement to arbitrate are found principally in NAFTA Articles 1116-1121. Moreover, by conditioning their consent in USMCA Annex 14-C(1) on the procedures established in NAFTA Section B, the USMCA Parties explicitly made the satisfaction of these procedures jurisdictional (not admissibility) requirements.

[8] USMCA Annex 14-C(3) provides that such consent expires three years after the NAFTA's termination.

[9] NAFTA Article 1121(1)(a) and (2)(a).

[10] *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 ¶ 2 (July 26, 2014) ["*Mesa Power* U.S. Submission"] (stating that pursuant to Article 1122, no Chapter Eleven claim may be submitted to arbitration unless the required procedures were satisfied); *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 on Damages ¶ 22 (Dec. 29, 2017) ("Under Article 1122, the scope of a NAFTA Party's consent to arbitrate an investment dispute is conditioned on compliance with the procedural requirements of Chapter Eleven."); *Resolute Forest Products Inc. v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2016-13, Submission of the United Mexican States pursuant [to] NAFTA Article 1128, ¶¶ 2, 3 (June 14, 2017) (noting its agreement with Canada that consent to arbitration cannot be established pursuant to Article 1122 unless the claim has been brought in accordance with NAFTA's procedural requirements); *Detroit Int'l Bridge Co. v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2012-25, Submission of the United Mexican States pursuant [to] Article 1128 of NAFTA ¶ 3 (Feb. 14, 2014) (stating that Article 1122's offer to arbitrate required compliance with the requirements of Article 1121); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Second Submission of Canada pursuant to NAFTA Article 1128, ¶ 52 (Apr. 30, 2001) (explaining that "the NAFTA Parties' consent to investor-State dispute settlement" is conditioned upon "*accordance with* the procedures set out in this Agreement" (emphasis in original) and that the "[f]ailure to observe these requirements means that an investor cannot access the dispute settlement mechanism under Section B of Chapter Eleven."); *Mondev Int'l Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Second Submission of the Government of Canada Pursuant to NAFTA Article 1128, ¶¶ 7-31 (July 7, 2001) (accord). Pursuant to Article 31(3)(a)-(b) of the Vienna Convention on the Law of Treaties, this subsequent agreement or subsequent practice of the NAFTA Parties "shall be taken into account." Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 art. 31(3) (a)-(b) ("There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation[.]"). Although NAFTA Article 1131(2) also provides a manner by which the NAFTA Parties may interpret the NAFTA, nothing in that article states that it is the exclusive means by which the Parties may interpret the Agreement.

10. NAFTA Article 1121, entitled "Conditions Precedent to Submission of a Claim to Arbitration" states in relevant part:

> 1. A disputing investor may submit a claim under Article 1116 only if:
>
> (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and
>
> (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.
>
> 2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:
>
> (a) consent to arbitration in accordance with the procedures set out in this Agreement; and
>
> (b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.
>
> 3. A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.

11. Because the waiver requirements under Article 1121 are among the requirements upon which the Parties have conditioned their consent, a valid and effective waiver is a precondition to the Parties' consent to arbitrate claims, and accordingly to a tribunal's jurisdiction, under

USMCA Annex 14-C.[11] The purpose of the waiver provision is to avoid the need for a respondent State to litigate concurrent and overlapping proceedings in multiple forums with respect to the same measure, and to minimize not only the risk of double recovery, but also the risk of "conflicting outcomes (and thus legal uncertainty)."[12]

12. Similar to provisions found in many of the United States' other international investment agreements,[13] NAFTA Article 1121 is a "no U-turn" waiver provision. As such, it permits claimants to elect to pursue any proceeding (including in domestic court) without relinquishing their right to assert a subsequent claim through arbitration.[14] However, Article 1121 makes clear that as a condition precedent to the submission of a claim to arbitration, a claimant must submit an effective waiver together with its Notice of Arbitration. The date of the submission of an effective waiver is the date on which the claim has been submitted to arbitration for purposes of Articles 1120 and 1137, assuming all other relevant procedural requirements have been satisfied.

13. Compliance with the Article 1121 waiver obligation entails both formal and material requirements.[15] Regarding the formal requirements, the waiver must be in writing and "clear,

---

[11] *See Waste Management, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/98/2, Award §§ 16, 31 (June 2, 2000) ["*Waste Management I* Award"]; *Renco* Partial Award ¶ 73 ("[C]ompliance with Article 10.18(2) is a condition and limitation upon Peru's consent to arbitrate. Article 10.18(2) contains the terms upon which Peru's non-negotiable offer to arbitrate is capable of being accepted by an investor. Compliance with Article 10.18(2) is therefore an essential prerequisite to the existence of an arbitration agreement and hence the Tribunal's jurisdiction."). *See also Detroit International Bridge Co. v. Government of Canada*, NAFTA/PCA Case No. 2012-25, Award on Jurisdiction ¶¶ 291, 336-337 (Apr. 2, 2015) ["*Detroit Bridge* Award"]; *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, CAFTA/ICSID Case No. ARB/09/17, Award ¶¶ 79-80 (Mar. 14, 2011) ["*Commerce Group* Award"]; *Railroad Development Corp. v. Republic of Guatemala*, CAFTA-DR/ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction under CAFTA Article 10.20.5, ¶ 56 (Nov. 17, 2008) ["*Railroad Development* Decision on Jurisdiction"].

[12] *Int'l Thunderbird Gaming Corp. v. United Mexican States,* NAFTA/UNCITRAL, Award ¶ 118 (Jan. 26, 2006) ["*Thunderbird* Award"] ("[t]he consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure."); *see also Waste Management I* Award § 27 ("when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the *double benefit* in its claim for damages") (emphasis added).

[13] For example, waiver provisions similar to Article 1121 of NAFTA can be found in Article 10.18.2 of the U.S.-Peru TPA, Article 10.18.2 of the Dominican Republic-Central American Free Trade Agreement ("CAFTA-DR"), and Article 26 of the 2012 U.S. Model Bilateral Investment Treaty.

[14] Any such subsequent arbitration claim would be subject to the three-year limitations period for claims under NAFTA Articles 1116(2) and 1117(2).

[15] *Waste Management I* Award § 20; *see also Renco* Partial Award ¶ 73; *Commerce Group* Award ¶¶ 79-80.

explicit and categorical."[16] As the *Renco* tribunal stated, interpreting a waiver provision in the U.S.-Peru Trade Promotion Agreement similar to Article 1121 of the NAFTA, the waiver provision requires an investor to "definitively and irrevocably" waive all rights to pursue claims in another forum once claims are submitted to arbitration with respect to a measure alleged to have breached the Agreement.[17] NAFTA Article 1121 is thus "intended to operate as a 'once and for all' renunciation of all rights to initiate claims in a domestic forum, whatever the outcome of the arbitration (including whether the claim is dismissed on jurisdictional or admissibility grounds or on the merits)."[18] That is, the waiver requirement seeks to give the respondent State certainty, from the very start of arbitration, that the claimant is not pursuing and will not pursue proceedings in another forum with respect to the measures challenged in the arbitration. Accordingly, a waiver containing any conditions, qualifications or reservations will not meet the formal requirements and will be ineffective.

14. As to the material requirements, a claimant must act consistently and concurrently with the written waiver by abstaining from initiating or continuing proceedings with respect to the measures alleged to constitute a Chapter Eleven breach in another forum as of the date of the submission of the waiver and thereafter. As the *Waste Management I* tribunal held:

> the act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued. . . . [I]t is clear that the waiver required under NAFTA Article 1121 calls for a show of intent by the issuing party vis-à-vis its waiver of the right to initiate or continue any proceedings whatsoever before other courts or tribunals with respect to the measure allegedly in breach of the NAFTA provisions. Moreover, such an abdication of rights ought to have been made effective as from the date of submission of the waiver . . . .[19]

[16] *Waste Management I* Award § 18; *see also Renco* Partial Award ¶ 74.

[17] *See Renco* Partial Award ¶¶ 95-96. *See also Waste Management I* Award § 19 ("It was from [the date of the notice of request for arbitration] that the Claimant was thus obliged, in accordance with the waiver tendered, to abstain from initiating or continuing any proceedings before other courts or tribunals with respect to those measures pleaded as constituting a breach of the provisions of the NAFTA.").

[18] *See Renco* Partial Award ¶ 99 (interpreting the similar waiver provision in Article 10.18 of the U.S.-Peru TPA).

[19] *Waste Management I* Award § 24 (emphasis added).

15. As the tribunal in *Commerce Group* explained in relation to a similar provision contained in CAFTA-DR Chapter Ten, "[a] waiver must be more than just words; it must accomplish its intended effect."[20] Thus, if a claimant initiates or continues proceedings with respect to the measure in another forum despite meeting the formal requirements of filing a waiver, the claimant has not complied with the waiver requirement, and the tribunal lacks jurisdiction over the dispute.[21]

16. Article 1121 also requires a claimant's waiver to encompass "any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to" in both Article 1116 and Article 1117, with certain limited, specified exceptions. The phrase "with respect to" should be interpreted broadly. This construction of the phrase is consistent with the purpose of this waiver provision: to avoid the need for a respondent State to litigate concurrent and overlapping proceedings in multiple forums, and to minimize not only the risk of double recovery, but also the risk of "conflicting outcomes (and thus legal uncertainty)."[22] As the tribunal in *Commerce Group* observed, the waiver provision permits other concurrent or parallel domestic proceedings where claims relating to different measures at issue in such proceedings are "separate and distinct" and the measures can be "teased apart."[23]

17. For a waiver to be and remain effective, any juridical person or persons that a claimant directly or indirectly owns or controls, or that directly or indirectly owns or controls the claimant, must likewise abstain from initiating or continuing proceedings in another forum as of the date of filing the waiver (and thereafter) with respect to the measures alleged to constitute a

---

[20] *Commerce Group* Award ¶ 80.

[21] *Id.* at ¶ 115 (noting that the waiver was invalid and lacked "effectiveness" because claimants failed to discontinue domestic proceedings in El Salvador, so there was no consent of the respondent and the tribunal lacked jurisdiction); *see also Detroit Bridge* Award ¶ 336.

[22] *Thunderbird* Award ¶ 118 (In construing the waiver provision under the NAFTA, the tribunal held, "[o]ne must also take into account the rationale and purpose of that article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.").

[23] *Commerce Group* Award ¶ 111-112 (holding that the waiver barred the claimant from pursuing a claim in a domestic proceeding that was "part and parcel" of its claim in a pending CAFTA-DR arbitration, because the measures subject to the claims in the respective proceedings could not be "teased apart"). NAFTA Article 1121 does not require a waiver of domestic proceedings where the measure at issue in the NAFTA arbitration is, for example, only tangentially or incidentally related to the measure at issue in the domestic proceedings.

Chapter Eleven breach. To allow otherwise would permit a claimant to circumvent the formal and material requirements under Article 1121 through affiliated corporate entities, thereby rendering the waiver provision ineffective. This in turn would frustrate the purpose of this waiver provision mentioned in the preceding paragraph of this submission.

18. If all formal and material requirements under Article 1121 are not met, the waiver is ineffective and will not engage the respondent State's consent to arbitration or the tribunal's jurisdiction *ab initio*. A tribunal is required to determine whether a disputing investor has provided a waiver that complies with the formal and material requirements of Article 1121. However, the tribunal itself cannot remedy an ineffective waiver. The discretion whether to permit a claimant to either proceed under or remedy an ineffective waiver lies with the respondent State as a function of its general discretion to consent to arbitration.[24]

19. Where an effective waiver is filed subsequent to the Notice of Arbitration but before constitution of the tribunal, the claim will be considered submitted to arbitration on the date on which the effective waiver was filed, assuming all other requirements have been satisfied, and not the date of the Notice of Arbitration. However, where a claimant files an effective waiver subsequent to the constitution of the tribunal, the only available relief (unless the respondent State agrees otherwise) is the dismissal of the arbitration, as the tribunal would have been constituted before the proper submission of the claim to arbitration, and thus without the consent of the respondent State as contemplated in Article 1122(1). Under such circumstances, the tribunal would lack jurisdiction *ab initio*.

Limitations Period (NAFTA Articles 1116(2)/1117(2) and USMCA Annex 14-E(4)(b))

20. NAFTA Articles 1116(2) and 1117(2) provide that an investor may not make a claim if "more than three years have elapsed from the date on which the [investor/enterprise] first

[24] *Waste Management I* Award § 31 (holding that the waiver deposited with the first notice of arbitration did not satisfy NAFTA Article 1121 and that this defect could not be made good by subsequent action on the part of the claimant). *See also Renco* Partial Award ¶ 173; *Railroad Development* Decision on Jurisdiction ¶ 61 (finding that "the Tribunal has no jurisdiction without agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver" and that "[i]t is for the Respondent and not the Tribunal to waive a deficiency under [CAFTA-DR] Article 10.18 or to allow a defective waiver to be remedied").

acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the [investor/enterprise] has incurred loss or damage."

21. USMCA Annex 14-E(4)(b) is similarly worded and provides that no claim shall be submitted to arbitration if "more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under paragraph 2 and knowledge that the claimant (for claims brought under paragraph 2(a)) or the enterprise (for claims brought under paragraph 2(b)) has incurred loss or damage."

22. NAFTA Articles 1116(2)/1117(2) and USMCA Annex 14-E(4)(b) impose a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute arising under the respective agreements.[25] As is made explicit by NAFTA Articles 1116(2)/1117(2) and USMCA Annex 14-E(4)(b), the Parties to those agreements did not consent to arbitrate an investment dispute if "more than three years have elapsed from the date on which the [investor/claimant/enterprise] first acquired, or should have first acquired, knowledge of the . . . breach" alleged and "knowledge that the [investor/claimant/enterprise] has incurred loss or damage." Accordingly, a tribunal must find that a claim satisfies the requirements of, *inter alia*, NAFTA Articles 1116/1117 or USMCA Annex 14-E(4), respectively, in order to establish a Party's consent to (and therefore the tribunal's jurisdiction over) an arbitration claim under such provision. Because the claimant bears the burden of proof with respect to the factual elements

[25] *See, e.g.*, *Resolute Forest Products, Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility ¶¶ 82-83 (Jan. 30, 2018) ["*Resolute* Decision on Jurisdiction and Admissibility"] (holding that compliance with the time bar specified in NAFTA Articles 1116 and 1117 "goes to jurisdiction"); *Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility ¶¶ 314, 335 (June 14, 2013) ["*Apotex* Award"] (parties treated the United States' time-bar objection as a jurisdictional issue, and the tribunal expressly found that NAFTA Article 1116(2) deprived it of "jurisdiction *ratione temporis*" with respect to one of the claimant's alleged breaches); *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Procedural Order No. 2 (Revised) ¶ 18 (May 31, 2005) (finding that that "an objection based on a limitation period for the raising of a claim is a plea as to jurisdiction for purposes of Article 21(4)" of the UNCITRAL Arbitration Rules (1976)). *See also Corona Materials, LLC v. Dominican Republic*, CAFTA/ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA ¶ 280 (May 31, 2016) (finding that the tribunal lacks jurisdiction due to application of the time-bar); *Spence Int'l Invests., LLC, Berkowitz et al. v. Republic of Costa Rica*, CAFTA/ICSID Case No. UNCT 13/2, Interim Award (Corrected) ¶¶ 235-236 (May 30, 2017) ["*Berkowitz* Interim Award"] (addressing the time-bar defense as a jurisdictional issue).

necessary to establish jurisdiction,[26] the claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.[27]

23. The limitations period is a "clear and rigid" requirement that is not subject to any "suspension," "prolongation," or "other qualification."[28] An investor *first* acquires knowledge of an alleged breach and loss under NAFTA Articles 1116(2)/1117(2) or USMCA Annex 14-E(4)(b) as of a particular "date." Such knowledge cannot *first* be acquired at multiple points in time or on a recurring basis. As the *Grand River* tribunal recognized,[29] subsequent transgressions by a Party arising from a continuing course of conduct do not renew the limitations period once an investor knows, or should have known, of the alleged breach and loss or damage incurred thereby.[30]

24. Thus, 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."[31] To allow an investor to do so would "render the limitations provisions

[26] *Apotex* Award ¶ 150. *See also Vito G. Gallo v. Government of Canada*, NAFTA/UNCITRAL, Award ¶ 277 (Sept. 15, 2011) ("[A] claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional stage . . . ."); *Mesa Power Group, LLC v. Government of Canada*, NAFTA/PCA Case No. 2012-17, Award ¶ 236 (Mar. 24, 2016) ("It is for the Claimant to establish the factual elements necessary to sustain the Tribunal's jurisdiction over the challenged measures."); *see also Phoenix Action, Ltd. v. Czech Republic,* ICSID Case No. ARB/06/5, Award ¶¶ 58-64 (Apr. 15, 2009) (summarizing relevant investment treaty arbitral awards and concluding that "if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established *prima facie*] at the jurisdictional stage"); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction ¶¶ 190-192 (Nov. 14, 2005) (finding that claimant "has the burden of demonstrating that its claims fall within the Tribunal's jurisdiction"); *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction ¶ 79 (Apr. 22, 2005) (acknowledging claimant had to satisfy the burden of proof "required at the jurisdictional phase").

[27] *Berkowitz* Interim Award ¶¶ 163, 239, 245-246.

[28] *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"]; *Marvin Feldman v. Mexico*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002) ["*Feldman* Award"]; *Apotex* Award ¶ 327 (quoting *Grand River* Decision on Objections to Jurisdiction).

[29] *See Grand River* Decision on Objections to Jurisdiction ¶ 81.

[30] *See Resolute* Decision on Jurisdiction and Admissibility ¶ 158 ("[W]hether a breach definitively occurring and known to the claimant prior to the critical date continued in force thereafter is irrelevant.").

[31] *Grand River* Decision on Objections to Jurisdiction ¶ 81.

ineffective[.]"[32] 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. An ineffective limitations period would also undermine and in effect change the State Party's consent because, as noted above, the Parties did not consent to arbitrate an investment dispute if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach and knowledge that the claimant has incurred loss or damage.

25. With regard to knowledge of "incurred loss or damage" under NAFTA Articles 1116(2)/1117(2) and USMCA Annex 14-E(4)(b), a claimant may have knowledge of loss or damage even if the amount or extent of that loss or damage cannot be precisely quantified until some future date.[33] Moreover, the term "incurred" broadly means "to become liable or subject to."[34] Therefore, an investor may have "incurred" loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate.[35]

26. As noted, NAFTA Articles 1116(2)/1117(2) and USMCA Annex 14-E.4(b) each require a claimant to submit a claim to arbitration within three years of the "date on which the [investor/claimant/enterprise] first acquired, or *should have first acquired*, knowledge" of (i) the alleged breach, and (ii) loss or damage incurred by the investor/claimant/enterprise. (Emphasis added). For purposes of assessing what a claimant should have known, the United States agrees

---

[32] *Id.* Thus, although a legally distinct injury can give rise to a separate limitations period, a continuing course of conduct does not extend the limitations period. Moreover, while events taken outside of the three-year limitations period may be taken into account as "background facts" or "factual predicates[,]" such factual predicates cannot serve as the legal basis for the claim. *See Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 348 (June 8, 2009) ["*Glamis Gold* Award"].

[33] *See Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award ¶ 87 (Oct. 11, 2002) ["*Mondev* Award"] ("A claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.").

[34] "Incur," MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/incur (last visited Aug. 23, 2023); *see also United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999) (finding that to "incur" means to "become liable or subject to" and that "a person may become 'subject to' an expense before she actually disburses any funds").

[35] *Grand River* Decision on Objections to Jurisdiction ¶ 77; *see also Berkowitz* Interim Award ¶ 213 (finding "the date on which the claimant first acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred").

with the reasoning of the *Grand River* tribunal: "a fact is imputed to [*sic*] person if by exercise of reasonable care or diligence, the person would have known of that fact."[36] As that tribunal further explained, it is appropriate to "consider in this connection what a reasonably prudent investor should have done in connection with extensive investments and efforts such as those described to the Tribunal."[37] Similarly, as the *Berkowitz* tribunal held, endorsing the reasoning in *Grand River* with respect to the identically worded limitations provision in the CAFTA-DR, "the 'should have first acquired knowledge' test . . . is an objective standard; what a prudent claimant should have known or must reasonably be deemed to have known."[38]

National Treatment (NAFTA Article 1102 and USMCA Article 14.4)

27. Paragraphs 1 and 2 of NAFTA Article 1102 (National Treatment) and paragraphs 1 and 2 of USMCA Article 14.4 (National Treatment) have almost identical language providing 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 or their investments "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[39]

28. To establish a breach of national treatment under NAFTA Article 1102 or USMCA Article 14.4, 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 with respect to the specific activities delineated in NAFTA Article 1102 and USMCA Article

[36] *Grand River* Decision on Objections to Jurisdiction ¶ 59.

[37] *Id*. ¶ 66 ("In the Tribunal's view, parties intending to participate in a field of economic activity in a foreign jurisdiction, and to invest substantial funds and efforts to do so, ought to have made reasonable inquiries about significant legal requirements potentially impacting on their activities . . . . This is particularly the case in a field that the prospective investors know from years of past personal experience to be highly regulated and taxed by state authorities.").

[38] *Berkowitz* Interim Award ¶ 209.

[39] USMCA Article 14.4(1) includes the words "in its territory." *See* USMCA Article 14.4(1) ("Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.").

14.4. As the *UPS v. Canada* tribunal noted, "[t]his is a legal burden that rests squarely with the Claimant. That burden never shifts . . . ."[40]

29. NAFTA Article 1102 and USMCA Article 14.4 are 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." These provisions are not intended to prohibit all differential treatment among investors or investments. Rather, they are designed only to ensure that the Parties do not treat entities that are in "like circumstances" differently based on nationality.[41]

30. All three NAFTA/USMCA 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.[42] Pursuant to the customary

[40] *UPS* Award ¶ 84 (May 24, 2007).

[41] *The Loewen Group, Inc. v. United States of America,* NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 139 (June 26, 2003) ["*Loewen* Award"] (accepting that "Article 1102 [National Treatment] is direct[ed] *only* to nationality-based discrimination") (emphasis added); *Mercer Int'l Inc. v. Government of Canada,* ICSID Case No. ARB(AF)/12/3, Award ¶ 7.7 (Mar. 6, 2018) ["*Mercer* Award"] (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).

[42] *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) ("*Apotex Holdings* U.S. Counter-Memorial") ("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. v. Government of Canada,* NAFTA/PCA Case No. 2016-13, Second Submission of the United States of America ¶ 4 (Apr. 20, 2020) (accord); *Odyssey Marine Exploration, Inc. v. United Mexican States*, NAFTA/ICSID Case No. UNCT/20/1, Submission of the United States of America ¶ 53 (Nov. 2, 2021). 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. Government of 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

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.

31. 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 NAFTA Article 1102 or USMCA Article 14.4 can be established.

32. 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."[43] 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 associated with the treatment, among other possible relevant characteristics. Whether treatment is accorded in "like circumstances" under NAFTA Article 1102 or USMCA Article 14.4 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare objectives.[44] When determining whether a

---

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); *Odyssey Marine Exploration, Inc. v. United Mexican States*, NAFTA/ICSID Case No. UNCT/20/1, Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128 ¶ 6 (Nov. 2, 2021).

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

[44] USMCA Article 14.4(4) expressly states: "For greater certainty, whether treatment is accorded in 'like circumstances' under this Article depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives." As a general practice, the United States uses the words "for greater certainty" in its international trade and investment

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.

33. Nothing in NAFTA Article 1102 or USMCA Article 14.4 requires that investors of a Party or their investments, 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 NAFTA Article 1102 or USMCA Article 14.4.

Minimum Standard of Treatment (NAFTA Article 1105 and USMCA Article 14.6)

34. NAFTA 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."

35. 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."[45] 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."[46] The Commission also confirmed that "a breach of another provision of the NAFTA, or of a separate international

agreements to introduce confirmation of the intended meaning of the relevant provision. The phrase "for greater certainty" signals that the text it introduces reflects the understanding of the United States and the other treaty parties of what the relevant provision would mean, even if the text following the phrase were absent. Such meaning is therefore applicable to other instances of the same provision that do not include the clarifying text. Thus, the clarification in USMCA Article 14.4(4) applies equally to the use of "like circumstances" in NAFTA Article 1102.

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

[46] *Id.* ¶ B.2.

agreement, does not establish that there has been a breach of Article 1105(1)."[47] The Commission's interpretation "shall be binding" on tribunals established under Chapter Eleven.[48]

36. Likewise, USMCA Article 14.6(1) requires each Party to "accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." "For greater certainty," this provision "prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments."[49] "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."[50] Specifically, "'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."[51] Moreover, "[a] determination that there has been a breach of another provision of [the USMCA], or of a separate international agreement, does not establish that there has been a breach of this Article [14.6]."[52]

37. The Commission's interpretation confirms the NAFTA Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in NAFTA Article 1105. Similarly, USMCA Article 14.6 establishes the USMCA Parties' express intent to prescribe the customary international law minimum standard of treatment as the applicable standard in that Article. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in

[47] *Id*. ¶ B.3.

[48] NAFTA Article 1131(2).

[49] USMCA, art. 14.6(2).

[50] *Id*.

[51] *Id.*, art. 14.6(2)(a).

[52] *Id*., art. 14.6(3).

specific contexts.[53] The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[54]

Methodology for Determining the Content of Customary International Law

38. Customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation. In Annex 14-A to the USMCA,[55] the USMCA Parties expressly confirmed their understanding of and adherence to this two-element approach—State practice and *opinio juris*—which is the standard approach of States and international courts, including the International Court of Justice.[56]

39. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate, under this two-element approach, that a rule of customary international law exists. In its decision on *Jurisdictional Immunities of the State* (*Germany v.*

---

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

[54] *S.D. Myers, Inc. v. Canada,* NAFTA/UNICTRAL, First Partial Award ¶ 259 (Nov. 13, 2000) ["*S.D. Myers* First Partial Award"]; *Glamis Gold* 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"].

[55] USMCA Annex 14-A ("The [USMCA] Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Article 14.6 (Minimum Standard of Treatment) results from a general and consistent practice of States that they follow from a sense of legal obligation. The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens.").

[56] *See Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, 122 (Feb. 3) ["*Jurisdictional Immunities of the State*"] ("In particular . . . the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*.") (citing *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*), 1969 I.C.J. 44, ¶ 77 (Feb. 20) ["*North Sea Continental Shelf*"]; *see also Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, ¶ 27 (June 3) ("It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States[.]"). *See also* International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 2, UN Doc. A/73/10 (2018) ["ILC Draft Conclusions on Identification of Customary International Law"] ("To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)."); *id.*, Commentary ¶ 1 ("This methodology, the 'two-element approach', underlies the draft conclusions and is widely supported by States, in case law, and in scholarly writings.").

Italy), the Court emphasized that "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States," and noted as examples of State practice relevant national court decisions or domestic legislation dealing with the particular issue alleged to be the norm of customary international law, as well as official declarations by relevant State actors on the subject.[57]

40. States may decide expressly by treaty as a matter of policy to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law.[58] The practice of adopting such autonomous standards is not relevant to ascertaining the content of NAFTA Article 1105 or USMCA Article 14.6, in which "fair and equitable treatment" and "full protection and security" are expressly tied to the customary international law minimum standard of treatment.[59] 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

[57] *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.").

[58] *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.").

[59] *See* NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions ¶ B.1 (July 31, 2001) ("Article 1105(1) prescribes the customary international law minimum standard of treatment . . . ."); USMCA Article 14.6(2) ("For greater certainty, paragraph 1 [referring to fair and equitable treatment] prescribes the customary international law minimum standard of treatment of aliens.") and Ch. 14, footnote 6 ("This Article [14.6] shall be interpreted in accordance with Annex 14-A (Customary International Law)"); s*ee also Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 176 (June 12, 2011) ¶ 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.

evidence of the content of the customary international law standard required by NAFTA Article 1105(1) and USMCA Article 14.6(1).[60]

41. 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.[61] While the NAFTA and USMCA Parties consented to allow investor-State tribunals to decide issues in dispute in accordance with the agreements and applicable rules of international law, they did not consent to delegate to arbitral tribunals the authority to develop the content of customary international law, which must be determined solely through a thorough examination of State practice and *opinio juris*. Thus, the decisions of arbitral tribunals do not establish rules of customary international law, and decisions regarding the content of customary international law are only persuasive to the extent that they include an examination of State practice and *opinio juris* that itself can be relied upon to identify a rule of customary international law as incorporated in NAFTA Article 1105(1) and USMCA Article 14.6(1).

---

[60] *See, e.g., Glamis Gold* Award ¶ 608 (concluding that "arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom"); *Cargill, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/2, Award ¶ 278 (Sep. 18, 2009) ["*Cargill* Award"] (noting that arbitral "decisions are relevant to the issue presented in Article 1105(1) only if the fair and equitable treatment clause of the BIT in question was viewed by the Tribunal as involving, like Article 1105, an incorporation of the customary international law standard rather than autonomous treaty language").

[61] *See, e.g., Glamis Gold* Award ¶ 605 ("Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law. They can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation.") (footnote omitted); *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, 2018 I.C.J. 507, ¶ 162 (Oct. 1) ("The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia's argument based on legitimate expectations thus cannot be sustained."). All three NAFTA Parties further agree that decisions of arbitral tribunals are not evidence in themselves of customary international law. *See, e.g.*, *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Second Submission of the United States of America ¶ 14 (June 12, 2015) ("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.").

42. 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*.[62] "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."[63] Tribunals applying the minimum standard of treatment obligation in NAFTA Article 1105 have confirmed that the party seeking to rely on a rule of customary international law must establish its existence. The tribunal in *Cargill*, *Inc. v. United Mexican States*, for example, acknowledged that:

> the proof of change in a custom is not an easy matter to establish. However, *the burden of doing so falls clearly on Claimant*. If Claimant does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task. Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.[64]

---

[62] *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20); *see also North Sea Continental Shelf*, 1969 I.C.J. at 43; *Glamis Gold* Award ¶¶ 601-602 (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).

[63] *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).

[64] *Cargill* Award ¶ 273 (emphasis added). The *ADF*, *Glamis*, and *Methanex* tribunals likewise placed on the claimant the burden of establishing the content of customary international law. *See ADF Group, Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/00/1, Award ¶ 185 (Jan. 9, 2003) ["*ADF* Award"] ("The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts."); *Glamis Gold* Award ¶ 601 ("As a threshold issue, the Tribunal notes that it is Claimant's burden to sufficiently" show the content of the customary international law minimum standard of treatment); *Methanex Corp. v. United States of America,* NAFTA/UNCITRAL, Final Award, Part IV, Chapter C ¶ 26 (Aug. 23, 2005) ["*Methanex* Final Award"] (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).

43. Once a rule of customary international law has been established, a claimant must then show that the respondent State has engaged in conduct that violates that rule.[65] 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."[66] International tribunals do not have an open-ended mandate to "second-guess government decision-making."[67] A failure to satisfy requirements of domestic law does not necessarily violate international law.[68] 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. . . ."[69] Accordingly, a departure from domestic law does not in-and-of-itself sustain a violation of NAFTA Article 1105 or USMCA Article 14.6.

[65] *Feldman* Award ¶ 177 ("[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.") (citation omitted).

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

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

[68] *ADF* Award ¶ 190 ("[T]he Tribunal has no authority to review the legal validity and standing of the U.S. measures here in question under *U.S. internal administrative law*. We do not sit as a court with appellate jurisdiction with respect to the U.S. measures. Our jurisdiction is confined by NAFTA Article 1131(1) to assaying the consistency of the U.S. measures with relevant provisions of NAFTA Chapter 11 and applicable rules of international law.") (emphasis in original, citations omitted); *see also GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Final Award ¶ 97 (Nov. 15, 2004) ("The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law."); *Thunderbird* Award ¶ 160 ("[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).").

[69] *ADF* Award ¶ 190.

Obligations that Have Crystallized into the Minimum Standard of Treatment

44. 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 NAFTA Article 1105(1) and USMCA Article 14.6(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.[70] This obligation is discussed in more detail below.

45. Other areas included within the minimum standard of treatment concern the obligation to provide "full protection and security," which is also expressly addressed in NAFTA Article 1105(1) and USMCA Article 14.6(1),[71] and the obligation not to expropriate covered investments, except under the conditions specified in NAFTA Article 1110 and USMCA Article 14.8.

Denial of Justice in Criminal, Civil or Administrative Adjudicatory Proceedings

46. Denial of justice in its historical and "customary sense" denotes "misconduct or inaction of the judicial branch of the government" and involves "some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process."[72] A domestic system of law that conforms to "a reasonable standard of civilized justice" and is fairly administered cannot give rise to a complaint by a foreign investor under international law.[73] "Civilized justice" has been described as requiring "[f]air courts, readily open to aliens, administering justice honestly, impartially, [and] without bias or political control."[74]

---

[70] USMCA Article 14.6(2)(a) expressly states that: "'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world[.]"

[71] USMCA Article 14.6(2)(b) expressly provides that: "'full protection and security' requires each Party to provide the level of police protection required under customary international law."

[72] EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 330 (1919) ["BORCHARD 1919"]; J.L. BRIERLY, THE LAW OF THE NATIONS 286 (6th ed., 1963) (defining a denial of justice as "an injury involving the responsibility of the state committed by a court of justice").

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

[74] Borchard 1939 at 63.

47. A denial of justice may occur in instances such as when the final act of a State's judiciary constitutes a "notoriously unjust"[75] or "egregious"[76] administration of justice "which offends a sense of judicial propriety."[77] More specifically, a denial of justice exists where there is, for example, an "obstruction of access to courts," "failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment."[78] Instances of denial of justice also have included corruption in judicial proceedings, discrimination or ill-will against foreigners, and executive or legislative interference with the freedom of impartiality of the judicial process.[79] At the same time, erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law.[80] Similarly, neither the

---

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

[76] 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.").

[77] *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"); *Mondev* Award ¶ 127 (finding that the test for a denial of justice was "not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome[.]"); *see also Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain),* 1970 I.C.J. 3 (Feb. 5), Separate Opinion of Judge Tanaka, at 144 ["Separate Opinion of Judge Tanaka"] (explaining that "denial of justice occurs in the case of such acts as- 'corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it, . . . But no merely erroneous or even unjust judgment of a court will constitute a denial of justice'") (citations omitted).

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

[79] *Id*. at 175.

[80] *Id*. at 134 ("An error of a national court which does not produce manifest injustice is not a denial of justice."); PAULSSON at 81 ("The erroneous application of national law cannot, in itself, be an international denial of justice."); Patrick Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105, 229 (2013) ["Dumberry"] (noting that a simple error, misinterpretation or misapplication of domestic law is not *per se* a denial of justice) (internal quotes omitted, emphasis added); BORCHARD 1919 at 196 (explaining that a government is not responsible for the mistakes or errors of its courts and that: "[A]s a general rule the state is not liable for the acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort."); Christopher Greenwood, *State Responsibility for the Decisions of National Courts, in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 61 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004) ("[I]t is well established that a mistake on the part of the court or an irregularity in procedure is not in itself sufficient to amount to a violation of international law; there must be a denial of justice.").

evolution nor development of "new" judge-made law that departs from previous jurisprudence within the confines of common law adjudication, implicates a denial of justice.[81]

48. The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence,[82] the particular nature of judicial action,[83] and the unique status of the judiciary in both international and municipal legal systems. As a result, the actions of domestic courts are accorded a greater presumption of regularity under international law than are legislative or administrative acts.[84]

---

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

[82] *See e.g.,* Separate Opinion of Judge Tanaka at 154 ("One of the most important political and legal characteristics of a modern State is the principle of judicial independence."). Judge Tanaka went on to explain that what distinguishes the judiciary from other organs of government is the "social significance of the judiciary for the settlement of conflicts of vital interest as an impartial third party and, on the other hand, from the extremely scientific and technical nature of judicial questions, the solution of which requires the most highly conscientious activities of specially educated and trained experts. The independence of the judiciary, therefore, despite the existence of differences in degree between various legal systems, may be considered as a universally recognized principle in most of the municipal and international legal systems of the world. It may be admitted to be a 'general principle of law recognized by civilized nations' (Article 38, paragraph 1(c), of the Statute)." *Id*. at 155-156.

[83] *See, e.g.,* Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63(3) INT'L. & COMP. L.Q. 867, 876-877 (2014) ["Douglas"] (explaining that the "rationality inherent in decision-making through adjudication, coupled with the opportunity afforded to affected parties to present reasoned arguments during the course of that decision-making process, . . . sets adjudication apart from other institutions of social ordering within the State," and that an authoritative decision by a domestic adjudicative body "cannot be disturbed by an international court or tribunal simply on the basis that a more rational set of reasons was available to that . . . body. . . . International law is deferential to the particular virtues of adjudication by respecting the integrity of the process and the outcomes it produces.") (footnotes omitted).

[84] *Loewen Group, Inc. and Raymond Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Response of the United States of America to the Submissions of Claimants Concerning Matters of Jurisdiction and Competence, at 8 (July 7, 2000) ("[U]nlike actions of the executive or the legislature, judicial acts can violate customary international law obligations in only the most extreme and unusual of circumstances . . . ."), *citing* T. BATY, THE CANONS OF INTERNATIONAL LAW 127 (1930) ("It is true that courts are organs of the nation; but they are not its organs in the sense in which the executive and the legislature are."); *id.*, at 9-10 ("Given the unique status of the judiciary in both international and municipal legal systems, the actions of domestic courts are accorded a far greater presumption of regularity under international law than are legislative or administrative acts."); BORCHARD 1919 at 195-96 (because "[i]n well-regulated states, the courts are more independent of executive control than any other authorities . . . [,] the state is not liable for the acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort."); ALWYN V. FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 33 (1938) ("[T]he question of proof of illegal action will be more difficult [with respect to judicial action] than is the case with other organs of the State."). The United States distinguishes between judicial action and other forms of government action as a matter of domestic law. For example, the U.S. Supreme Court has long recognized liability for legislative and regulatory actions that violate the economic protections of the U.S. Constitution, but has never recognized liability for judicial action under those same provisions. *See, e.g.,* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110

Indeed, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice.[85]

49. In this connection, it is well-established that international tribunals, such as those hearing disputes brought pursuant to the Annexes to USMCA Chapter Fourteen, are not empowered to be supranational courts of appeal on a court's application of domestic law.[86] Thus, an investor's

---

HARV. L. REV. 1055, 1075 n.121 (1997); Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1453 (1990) (observing with disapproval that "[t]he few scholars to have seriously addressed the issue have generally argued that it would be catastrophic to subject the courts to the same constitutional constraints as the legislative and executive branches . . . ."). The status of U.S. law has not changed. *See Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection et al.*, 560 U.S. 702 (2010); *Shinnecock Indian Nation v. United States*, 112 Fed. Cl. 369, 385 (2013) ("a theory of judicial takings . . . has not been adopted in the federal courts.").

[85] *Azinian v. United Mexican States*, NAFTA/ICSID Case No. ARB/(AF)/97/2, Award ¶ 99 (Mar. 24, 1997) ["*Azinian* Award"] ("The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. What must be shown is that the court decision itself constitutes a violation of the treaty. Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end."); *Mohammad Ammar Al Bahloul v. Republic of Tajikistan*, SCC Case No. V(064/2008), Partial Award on Jurisdiction and Liability ¶ 237 (Sept. 2, 2009) ("[I]t is not the role of this Tribunal to sit as an appellate court on questions of Tajik law. Suffice it to say, we do not find the Tajik court's application of Tajik law on this issue to be malicious or clearly wrong, and therefore find no basis for Claimant's claim of denial of justice."). *See also* PAULSSON at 81-84. Deference must be accorded to domestic courts on matters of domestic law. *See, e.g.*, *Loewen Group, Inc. and Raymond Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Second Submission of the United Mexican States, at 5-6 (Nov. 9, 2001) ("International tribunals defer to the acts of municipal courts not only because the courts are recognized as being expert in matters of a State's domestic law, but also because of the judiciary's role in the organization of the State."); *id.*, *Loewen Group, Inc. and Raymond Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Response of the United States of America to the November 9, 2001 Submissions of the Governments of Canada and Mexico Pursuant to NAFTA Article 1128, at 6 (Dec. 7, 2001) ("The United States agrees with Mexico that customary international law recognizes distinctions between acts of the judiciary and acts of other organs of the state and accords great deference to judicial acts"); *Eli Lilly and Company v. Government of Canada*, NAFTA/UNCITRAL, Government of Canada Counter-Memorial ¶ 231 (Jan. 27, 2015) (explaining that the rule that there must be a very serious failure in the "administration of justice before a State can be found in violation of international law for the domestic law decisions of its domestic courts" stems from "the recognition of the independence of the judiciary and the great deference afforded to domestic courts acting in their *bona fide* role of adjudication and interpretation of a State's domestic law.").

[86] *Apotex* Award ¶ 278 ("[I]t is not the proper role of an international tribunal established under NAFTA Chapter Eleven to substitute itself for the U.S. Supreme Court, or to act as a supranational appellate court."); *Azinian* Award ¶ 99 ("The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA."); *Waste Management Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/00/3, Award ¶ 129 (Apr. 30, 2004) ["*Waste Management II* Award"] ("[T]he Tribunal would observe that it is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of amparo in respect of the decisions of the federal courts of NAFTA parties."); Separate Opinion of Judge Tanaka at 158 (explaining that erroneous decisions of municipal law cannot constitute a denial of justice because the interpretation of municipal law "does not belong to the realm of international law. If an

claim challenging judicial measures under NAFTA Article 1105(1) or USMCA Article 14.6(1) is limited to a claim for denial of justice under the customary international law minimum standard of treatment.[87] *A fortiori*, domestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law.

50. Moreover, the international responsibility of States may not be invoked with respect to non-final judicial acts,[88] unless recourse to further domestic remedies is obviously futile or manifestly ineffective. International tribunals have found that further remedies were obviously futile where there "was no justice to exhaust."[89] It is not enough for a claimant to allege the "absence of a reasonable prospect of success or the improbability of success, which are both less

---

international tribunal were to take up these issues and examine the regularity of the decisions of municipal courts, the international tribunal would turn out to be a '*cour de cassation*', the highest court in the municipal law system. An international tribunal, on the contrary, belongs to quite a different order; it is called upon to deal with international affairs, not municipal affairs.").

[87] The USMCA Parties have explicitly conditioned their consent to arbitration upon satisfaction of certain procedural requirements. For example, USMCA Article 14.D.5(1)(b) provides that "[n]o claim shall be submitted to arbitration under this Annex [14-D] unless: . . . (b) the claimant or the enterprise obtained a final decision from a court of last resort of the respondent or 30 months have elapsed from the date the proceeding [before a competent court or administrative tribunal of the respondent] was initiated[.]" (internal citations omitted) The 30-month period referenced in Article 14.D.5(1)(b) does not set a standard relevant to denial of justice. Rather, this provision sets forth the conditions that must be met before an investor may submit a claim to arbitration under Annex 14-D (*i.e.*, the investor must initiate a proceeding before the court or administrative tribunal of the respondent state with respect to the measures alleged to constitute a breach referred to in Article 14.D.3, and 30 months must have elapsed from the date such proceeding was initiated without a final decision). These conditions do not apply to a claim brought under paragraph 2 of Annex 14-E.

[88] *See Apotex* Award ¶ 282 ("[A] claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself."); *Loewen* Award ¶ 156 ("The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision."); PAULSSON at 108 ("For a foreigner's international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself."); Douglas at 894 (explaining that "international responsibility towards foreign nationals for acts and omissions associated with an adjudicative procedure can only arise at the point at which the adjudication has produced its final result; it is only at that point that a constituent element of that responsibility has been satisfied, which is the existence of damage to the foreign national.").

[89] *Robert E. Brown Case (United States v. United Kingdom)*, 6 R.I.A.A. 120, 129 (Nov. 23, 1923) (excusing claimant's failure to exhaust because there was "no justice to exhaust" where "[a]ll three branches of the Government conspired to ruin [claimant's] enterprise"); *see also Finnish Ships Arbitration (Finland v. United Kingdom)*, 3 R.I.A.A. 1480, 1495, 1503-5 (May 9,1934) (rule excusing failure to appeal where reversal was "hopeless" is "most strictly construed, and if substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief") (quoting BORCHARD 1919 at 824).

strict tests."[90] As the tribunal in *Apotex Inc. v. United States of America* explained: "whether the failure to obtain judicial finality may be excused for 'obvious futility' turns on the unavailability of relief by a higher judicial authority, not on measuring the likelihood that the higher judicial authority would have granted the desired relief."[91]

51. In this connection, while it is not controversial that acts of State organs, including acts of State judiciaries, are attributable to the State,[92] there will be a breach of NAFTA Article 1105(1) and USMCA Article 14.6(1) based on judicial acts (*e.g.*, a denial of justice) only if the justice system *as a whole* produces a denial of justice (*i.e.*, when there has been a decision of the court of last resort available).[93] As the United States has elsewhere explained, while:

> [t]he lower court decision, in and of itself, may be attributable to the State pursuant to article 4 [of the ILC Draft]; whether it constitutes, in and of itself, an internationally wrongful act is a separate question, as recognized in article 2. Except in extraordinary circumstances, there is no question of breach of an international obligation until the lower court decision becomes the final expression of the court system as a whole, *i.e.*, until there has been a decision of the court of last resort available in the case.[94]

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

[91] *Apotex* Award ¶ 276.

[92] ILC Draft Articles, art. 4(1) ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.").

[93] *See* ILC Draft Articles, Commentary to Chapter II, Attribution of Conduct to a State, ¶ 4 (noting that the fact that conduct can be attributed to the State "says nothing . . . about the *legality* or otherwise of that conduct") (emphasis added); International Law Commission, Special Rapporteur, *Second Report on State Responsibility*, U.N. Doc. A/CN.4/498 (July 19, 1999) (by James Crawford) ¶ 75 (explaining that "[t]here are . . . cases where the obligation is to have a *system* of a certain kind, *e.g.* the obligation to provide a fair and efficient system of justice. There, systematic considerations enter into the question of breach, and an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act.") (emphasis in original).

[94] Draft Articles on State Responsibility, Comments and Observations Received from Governments, International Law Commission, 53d Sess., U.N. Doc. A/CN.4/515 (2001) at 26 (comments of the United States on Draft Article 15).

52. As Judge Aréchaga, former President of the International Court of Justice, likewise observed, States are internationally liable only for judicial decisions of "a Court of last resort, all remedies available having been exhausted."[95] Thus, decisions of lower courts that may be corrected on appeal, for example, have not produced a denial of justice and cannot be the basis of a NAFTA Chapter Eleven or a USMCA Chapter Fourteen claim.

Obligations that Have Not Crystallized into the Minimum Standard of Treatment

Due Process in Administrative Decision-Making

53. The United States is aware of no general and consistent State practice and *opinio juris* establishing that the customary international law minimum standard of treatment requires States to provide the same level of due process rights in administrative decision-making as in adjudicatory proceedings.[96] To the contrary, any assessment of administrative decision-making under the minimum standard of treatment must acknowledge "the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[97]

Legitimate Expectations

54. 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

[95] Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century,* 159 RECUEIL DES COURS 281-82 (1978) (emphasis added) (quoted with approval in the *Loewen* Award ¶ 153); *Norwegian Loans* (*France v. Norway*), 1957 I.C.J. 9, 39 (July 6) (Separate Opinion of Judge Lauterpacht) ("[H]owever contingent and theoretical these remedies may be, an attempt ought to have been made to exhaust them.").

[96] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/12/1, Award ¶¶ 9.22-9.25, 9.27 (Aug. 25, 2014) ["*Apotex Holdings* Award"] (rejecting claim based on alleged failure by the United States to provide adequate due process in decision-making by the U.S. Food and Drug Administration, including because claimants had failed to establish that elements of due process that may be relevant in "proceedings of a formal adjudicative character" were part of the customary international law minimum standard of treatment as applied to administrative decision-making).

[97] *S.D. Myers* First Partial Award ¶ 263; *Apotex Holdings* Award ¶¶ 9.37-9.39.

investors' expectations; instead, something more is required.[98] 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. USMCA Article 14.6(4) expressly provides for greater certainty that "the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach" of the minimum standard of treatment.[99]

Non-Discrimination

55. Similarly, the customary international law minimum standard of treatment set forth in NAFTA Article 1105(1) and USMCA Article 14.6(1) does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination.[100] As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.[101] To the extent that the customary international law

---

[98] *See, e.g.*, *Grand River* U.S. Counter-Memorial at 96 ("As a matter of international law, although an investor may develop its own expectations about the legal regime that governs its investment, those expectations do not impose a legal obligation on the State."); DUMBERRY at 159-60 ("In the present author's view, there is little support for the assertion that there exists under customary international law any obligation for host States to protect investors' legitimate expectations."). Indeed, NAFTA tribunals have declined to find breaches of Article 1105 even where the claimant's purported expectations arose from a contract. *See also Azinian* Award ¶ 87 ("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 II* Award ¶ 115 (explaining that "even the persistent non-payment of debts by a municipality is not to be 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").

[99] USMCA Article 14.6(4).

[100] *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.").

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

minimum standard of treatment incorporated in NAFTA Article 1105(1) and USMCA Article 14.6(1) prohibits discrimination, it does so only in the context of other established customary international law rules, such as prohibitions against discriminatory takings,[102] access to judicial remedies or treatment by the courts,[103] 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.[104] Moreover, investor-State claims of nationality-based

---

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.").

[102] *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 . . . .").

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

[104] *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.").

discrimination under NAFTA are governed exclusively by NAFTA Articles 1102 and 1103, which specifically address that subject, and not Article 1105(1).[105] Similarly, investor-State claims of nationality-based discrimination under the USMCA are governed exclusively by USMCA Articles 14.4 and 14.5, and not Article 14.6(1).

Transparency

56. 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.[106] 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

57. The principle that "every treaty in force is binding on the parties to it and must be performed by them in good faith" (*i.e.*, *pacta sunt servanda*) is established in customary international law,[107] not in Chapter Eleven of the NAFTA or Chapter Fourteen of the USMCA. The good faith principle applies between the States Parties to the treaty and does not extend to third parties outside of the treaty relationship. As such, it is not an obligation owed to investors, and claims alleging breach of the good faith principle in a Party's performance of its NAFTA or

[105] *See Mercer* Award ¶ 7.58 ("So far as concerns the Claimant's claims of 'discriminatory treatment' contrary to NAFTA Article 1105(1), the Tribunal's [*sic*] agrees with the non-disputing NAFTA Parties' submissions that such protections are addressed in NAFTA Articles 1102 and 1103, rather than NAFTA Article 1105(1)."); *Methanex* Final Award, Part IV, Ch. C ¶¶ 14-17, 24 (explaining that the impact of the "FTC interpretation of [NAFTA] Article 1105" was not to "exclude non-discrimination from NAFTA Chapter 11" but "to confine claims based on alleged discrimination to Article 1102, which offers full play for a principle of non-discrimination").

[106] *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").

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

USMCA obligations do not fall within the limited jurisdictional grant afforded in Chapter Eleven and Chapter Fourteen, respectively.[108]

58. 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."[109] As such, customary international law does not impose a free-standing, substantive obligation of "good faith" that, if breached, can result in State liability.[110] Accordingly, a claimant "may not justifiably rely upon the principle of good faith" to support a claim absent a specific treaty obligation,[111] and neither the NAFTA nor the USMCA contain such obligations.

---

[108] *See, e.g., Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, 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 [such] a claim"). *See also Mobil Investments Canada Inc. v. Canada*, NAFTA/ICSID Case No. ARB/15/6, Decision on Jurisdiction and admissibility ¶ 170 (July 13, 2018) ["*Mobil Investments* Decision on Jurisdiction"] (explaining, in discussing the good faith principle, that "Chapter Eleven of NAFTA confers upon the Tribunal jurisdiction only with regard to disputes concerning alleged breaches of Chapter Eleven itself. While the Tribunal is empowered by Article 1131(1) of NAFTA to 'decide the issues in dispute in accordance with this agreement and applicable rules of international law', that does not give it the jurisdiction to hear a dispute concerning an alleged breach not of Chapter Eleven but of other rules of international law.").

[109] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 1988 I.C.J. 69, 105, ¶ 94 (Dec. 20) (internal quotation marks omitted); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, 1998 I.C.J. 275, 297, ¶ 39 (June 11) ["*Land and Maritime Boundary*"]. *See also Mobil Investments* Decision on Jurisdiction ¶ 168 ("[B]oth Parties, as well as Mexico and the United States are clear that the principle of good faith forms part of international law and is relevant to the manner in which a State is required to perform its treaty obligations, but that it does not constitute a separate source of obligation where none would otherwise exist. The Tribunal agrees with this view which is based upon clear statements to that effect by the International Court of Justice.").

[110] *See, e.g., Mesa Power* U.S. Submission ¶ 7 ("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* U.S. Counter-Memorial 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'.").

[111] *Land and Maritime Boundary* ¶ 39.

Respectfully submitted,

Lisa J. Grosh
Assistant Legal Adviser
John D. Daley
Deputy Assistant Legal Adviser
David M. Bigge
Chief of Investment Arbitration
Mary T. Muino
Attorney Adviser
Office of International Claims and
Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

August 31, 2023