IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

BETWEEN:

LEGACY VULCAN, LLC.

Claimant

AND:

UNITED MEXICAN STATES

Respondent

ICSID CASE NO. ARB/19/1

NON-DISPUTING PARTY SUBMISSION OF THE GOVERNMENT OF CANADA PURSUANT TO NAFTA ARTICLE 1128

June 7, 2021

Departments of Justice and
Global Affairs Canada
Trade Law Bureau
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario
K1A 0G2
CANADA

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I. INTRODUCTION

1. The Government of Canada makes this submission pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA"),[1] which authorizes non-disputing Parties to make submissions to a tribunal on a question of interpretation of the NAFTA.

2. This submission is not intended to address all interpretative issues that may arise in this proceeding, or take a position on the matters of interpretation below as applied to the facts of this dispute. To the extent that certain issues raised by the disputing parties have not been addressed in this submission, no inference should be drawn from Canada's silence.

II. NAFTA ARTICLE 1105 (MINIMUM STANDARD OF TREATMENT)

A. NAFTA Article 1105(1) Guarantees Treatment in Accordance with the Customary International Law Minimum Standard of Treatment

3. Article 1105(1) requires the NAFTA Parties to accord to investments of investors of another NAFTA Party the customary international law minimum standard of treatment. The NAFTA Free Trade Commission's July 31, 2001 *Note of Interpretation* (the "FTC Note") confirmed that:

> 1. 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.
>
> 2. 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.

[1] *North American Free Trade Agreement*, 17 December 1994, (1993) 32 I.L.M. 289, 605 ("*NAFTA*").

> 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).[2]

4. As NAFTA Article 1131(2) indicates, and subsequent NAFTA tribunals have confirmed, the FTC Note represents the definitive interpretation of Article 1105(1) and is binding on all tribunals constituted under NAFTA Chapter Eleven.[3]

5. The reference to customary international law in the FTC Note confirms that Article 1105 does not create an open-ended obligation or invite a subjective interpretation of what is fair and equitable treatment. Instead, Article 1105 refers to an objective standard of treatment for investors, the minimum standard of treatment at customary international law,[4]

[2] NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, 31 July 2001, available at https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng.

[3] *NAFTA*, Article 1131(2) provides that "an interpretation by the [Free Trade] Commission of a provision of [the NAFTA] shall be binding on a Tribunal established under this Section". NAFTA tribunals have consistently recognized that the FTC Note is binding on them. *See* for example *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Award, 8 June 2009 ("*Glamis – Award*"), ¶ 599; *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) Award, 26 January 2006 ("*Thunderbird – Award*"), ¶ 192; *Methanex Corporation v. United States of Am*erica (UNCITRAL) Final Award, 3 August 2005, Part IV - Chapter C, ¶ 20; *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 ("*Mondev – Award*"), ¶ 100; *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003 ("*Loewen – Award*"), ¶ 126; *Waste Management Inc. v. United Mexican States* (ICSID No. ARB(AF)00/3) Award, 30 April 2004, ¶ 90; *Cargill, Incorporated v. United Mexican States*, (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009 ("*Cargill – Final Award*"), ¶¶ 135, 267-268; *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1) Award, 9 January 2003 ("*ADF – Award*"), ¶ 176; *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Award, 6 March 2018, ("*Mercer – Award*"), ¶ 7.50.

[4] *Mondev – Award*, ¶ 120: ("The Tribunal has no difficulty in accepting that an arbitral tribunal may not apply its own idiosyncratic standard in lieu of the standard laid down in Article 1105(1)"); *Cargill – Final Award*, ¶ 268 ("Article 1105 requires no more, no less, than the minimum standard of treatment demanded by customary international law"); and ¶ 276 (" […] significant evidentiary weight should not be afforded to autonomous clauses inasmuch as it could be assumed that such clauses were adopted precisely because they set a standard other than that required by custom"); *Crompton (Chemtura) Corp. v. Government of Canada* (UNCITRAL) Award, 2 August 2010 ("*Chemtura – Award*"), ¶ 121: ("It is not disputed that the scope of Article 1105 […] must be determined by reference to customary international law."); *Mobil Investments Canada Inc. and Murphy Oil Company v. Canada* (ICSID Case No. ARB(AF)/07/04) Decision on Liability and Principles of Quantum, 22 May 2012 ("*Mobil – Decision on Liability and on Principles of Quantum*"), ¶ 153: ("It is not the function of an arbitral tribunal established under NAFTA to legislate a new standard which is not reflected in the existing rules of customary international law"); *Windstream Energy LLC v. Government of Canada* (UNCITRAL) Award, 27 September 2016, ("*Windstream – Award*"), ¶ 356: ("In other words, as stated by the FTC, the treatment required is not 'in addition to or beyond' that which is required by the customary international law standard, but one that is in accordance, or consistent, with the standard, while remaining 'fair and equitable' and providing 'full protection and security'").

which is a "floor below which treatment of foreign investors must not fall."[5]

B. Establishing the Existence of a Rule of Customary International Law Requires Proof of State Practice and *Opinio Juris*

6. It is well established that a disputing party alleging a rule of customary international law bears the burden of proving its existence.[6] To establish that a rule is part of the minimum standard of treatment at customary international law, a claimant must therefore provide evidence of consistent and widespread State practice accompanied by an understanding that such practice is required by a rule of law (*opinio juris sive necessitates*).[7]

7. In the 1969 *North Sea Continental Shelf* case, the International Court of Justice stated that "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[8] The ICJ more recently

[5] *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000 ("*S.D. Myers – Partial Award*"), ¶ 259.

[6] *Case Concerning Rights of Nationals of the United States of America in Morocco* (*France v. United States*) Judgment, [1952] I.C.J Reports 176, p. 200, citing *Colombian-Peruvian Asylum Case* Judgment, I.C.J Reports, [1950] 266, p. 276: ("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"); Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford University Press, 2008) ("*Brownlie*"), p. 12: ("In practice the proponent of a custom has a burden of proof the nature of which will vary according to the subject-matter and the form of the pleadings"); *Cargill – Final Award*, ¶ 273: ("The burden of establishing any new elements of this custom is on Claimant. […] If Claimant does not provide the Tribunal with the 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.").

[7] *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002, ¶ 84; *ADF – Award*, ¶¶ 271-273; *North Sea Continental Shelf Cases* (*Federal Republic of Germany v. Denmark*; *Federal Republic of Germany v. Netherlands*), [1969] I.C.J. Reports 4 ("*North Sea Continental Shelf – Judgment*"), ¶ 74: (It is "an indispensable requirement" to show that "State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved"); *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), [1986] I.C.J. Reports 14, ¶ 207: (" […] for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the *opinio juris sive necessitates*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'").

[8] *North Sea Continental Shelf – Judgment*, ¶ 77.

elaborated that such evidence may include, for example, the judgments of national courts, domestic legislation, or statements made by States.[9] The weight to be accorded to this evidence will depend on the particular circumstances of the case, including the overall context and the nature of the alleged rule.[10]

8. Although investment arbitration awards may contain valuable analysis of State practice and *opinio juris* in relation to a particular rule of custom, they do not themselves constitute evidence of State practice and *opinio juris*. As the tribunal in *Glamis Gold* correctly noted, awards of international tribunals can "serve as illustrations of customary international law if they involve an examination of customary international law," but they "do not constitute State practice and thus cannot create or prove customary international law."[11]

C. NAFTA Article 1105 Is Not an Invitation for Tribunals to Second Guess Government Policy and Decision Making

9. A determination that there has been a breach of the minimum standard of treatment under Article 1105 must begin by considering the rules regarding treatment of investments of investors that have crystallized into customary international law. Currently only a few rules have crystallized to become part of the minimum standard of treatment. These include, for example, the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings and the obligation to provide full protection and security to investments of investors.

10. Further, any such determination must be made in light of the "high measure of deference that international law generally extends to the right of domestic authorities to

[9] *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*) Judgment, [2012] I.C.J. Reports 99. *See also* United Nations, *Draft Conclusions on Identification of Customary International Law with Commentaries*, 13 January 2018, p. 125, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf.

[10] *Brownlie*, p.128.

[11] *Glamis – Award*, ¶ 605. *See also Cargill – Final Award*, ¶ 277: ("It is important to emphasize, however, as Mexico does in this instance, that the awards of international tribunals do not create customary international law but rather, at most, reflect customary international law. Moreover, in both the case of scholarly writings and arbitral decisions, the evidentiary weight to be afforded such sources is greater if the conclusions therein are supported by evidence and analysis of custom").

regulate within their own borders."[12] Article 1105 is not an invitation to NAFTA tribunals to second-guess government policy and decision-making.[13] While a State's decisions or actions may at times be perceived as unfair or inequitable by an investor, Article 1105(1) is "not intended to provide foreign investors with blanket protection from this kind of disappointment."[14]

D. The Customary International Law Minimum Standard of Treatment Does Not Protect an Investor's Legitimate Expectations

11. There is no general obligation under the customary international law minimum standard of treatment, and therefore under Article 1105, to protect an investor's legitimate expectations. The mere fact that a State takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of the customary international law standard of treatment, even if there is loss or damage to the investment as a result.

12. NAFTA tribunals have rejected the proposition that the minimum standard of treatment protects against any action that is inconsistent with an investor's legitimate

[12] *S.D. Myers – Partial Award*, ¶ 263. *See also Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016, ¶ 553: ("In reviewing this alleged breach, the Tribunal must bear in mind the deference which NAFTA Chapter 11 tribunals owe a state when it comes to assessing how to regulate and manage its affairs"). The submissions of that NAFTA Parties also reflect their agreement that the threshold for demonstrating a violation of Article 1105 is high. *See Bilcon et al v. Government of Canada*, Counter Memorial of Canada, 9 December 2011, ¶ 321: ("[T]he threshold for proving a violation of that standard is extremely high"); *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL), 1128 Second Submission of Mexico Pursuant to NAFTA Article 1128, 12 June 2015, ¶ 8: ("Mexico concurs in Canada's submissions that the *Bilcon* tribunal […] correctly held that the threshold for establishing a breach of the minimum standard of treatment at customary international law is high"); *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL), 1128 Second Submission of the United States of America, 12 June 2015, ¶ 20: (" […] there is a high threshold for Article 1105 to apply").

[13] *See* for example, *S.D. Myers – Partial Award*, ¶¶ 261-263: (explaining that "a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making"); *Glamis – Award*, ¶ 762: (holding that "it is not for an international tribunal to delve into the details of and justifications for domestic law"); *Chemtura – Award*, ¶¶ 123, 134 (holding that the Article 1105 analysis must take into account "the fact that certain agencies manage highly specialized domains involving scientific and public policy determinations"); *Windstream – Award*, ¶¶ 344, 376; *Merrill & Ring – Award*, ¶ 236; *Global Telecom Holdings S.A.E. v. Government of Canada* (ICSID Case No.ARB/16/16) Counter-Memorial on Merits & Damages, 26 February 2018, ¶¶ 342-343.

[14] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* (ICSID Case No. ARB (AF)/97/2) Award, 1 November 1999, ¶ 83.

expectations.[15] Moreover, tribunals have recognized that the fair and equitable treatment standard at customary international law "is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made."[16]

13. Therefore, the mere fact that a State regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not, without more, fall below the customary international law minimum standard of treatment.

III. NAFTA ARTICLE 1103 (MOST-FAVORED NATION TREATMENT)

A. A Claimant Must Prove the Three Essential Elements of Article 1103

14. NAFTA Article 1103 requires a NAFTA Party to accord to investors and investments of another NAFTA Party treatment that is no less favourable than the treatment it accords, in like circumstances, to investments and investors of another NAFTA Party or of a non-Party. The purpose of this provision is to prevent nationality-based discrimination, not to prevent all measures that result in differences in treatment.[17]

[15] There is no evidence of an obligation at customary international law not to frustrate the investor's expectations. At most, some tribunals have considered that under Article 1105 an investor's expectations could be a relevant (though non-determinative) factor where a NAFTA Party's conduct "creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages." *Thunderbird – Award*, ¶ 147. *See also Mobil – Decision on Liability and on Principles of Quantum*, ¶ 152; *Glamis – Award*, ¶ 621; *Grand River Enterprises Six Nations, Ltd. et al v. United States of America* (UNCITRAL) Award, 12 January 2011, ("*Grand River – Award*"), ¶ 140; *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Award, 31 March 2010 ("*Merrill & Ring – Award*"), ¶ 233.

[16] *Mobil – Decision on Liability and on Principles of Quantum*, ¶ 153.

[17] *See* for example, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Counter-Memorial on Merits and Damages, 17 April 2019, ¶¶ 250, 251; *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Rejoinder Memorial on Merits and Damages, 4 March 2020, ¶¶ 90, 92, 94, 96, 97-100; *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) 1128 Submission of the United States of America, 14 June 2017, ¶15; *Loewen – Award*, ¶ 139: (accepting that "Article 1102 [National Treatment] is direct[ed] only to nationality-based discrimination") (emphasis added); *Mercer – Award*, ¶ 7.7 (accepting the positions of the United States and Mexico that the National Treatment and Most-Favored Nations obligations are intended to prevent discrimination on the basis of nationality).

15. A claimant asserting a violation of Article 1103 bears the burden of demonstrating all of the elements of a NAFTA Article 1103 claim.[18]

16. Article 1103 cannot be applied in the abstract. For a claimant to make out a claim under Article 1103, it bears the burden of showing that: (1) the Party accorded both the claimant or its investment and the comparators (investors or investments of investors of a third State) "treatment […] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments"; (2) the Party accorded the alleged treatment "in like circumstances"; and (3) the treatment accorded to the claimant or its investment was "less favourable" than that accorded to the comparator investor or investments.[19]

17. In carrying out an 1103 analysis, the first step is to establish that the government accorded "treatment" to the investor or its investments. In particular, the alleged treatment must be with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of its investment.[20]

18. The second element that a claimant must establish is that the treatment accorded to it and the treatment of the identified comparators, investors or investments of investors of a third State, was accorded "in like circumstances". This element is a precondition to a

[18] *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007 ("*UPS – Award on the Merits*"), ¶ 84: ("[The] legal burden . . . rests squarely with the Claimant. That burden never shifts to the Party, here Canada."). *See also Thunderbird – Award*, ¶ 176. *See also* Campbell McLachlan, Laurence Shore, Matthew Weiniger, "International Investment Arbitration: Substantive Principles" 2nd ed. (Oxford University Press 2017), ¶ 7.275. Indeed, it is well established in international law that the burden of proving a fact on which a claim is based rests with the party asserting it. *See Maritime Delimitation in the Black Sea* (*Romania* v. *Ukraine*) Judgment, [2009] I.C.J. Reports 86, ¶ 68, citing *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (*Malaysia/Singapore*) Judgment, [2008] I.C.J. Reports 31, ¶ 45; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*) Judgment, [2007] I.C.J. Reports 128, ¶ 204; *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) Jurisdiction and Admissibility Judgment, [1984] I.C.J. Reports, 437, ¶ 101.

[19] *UPS – Award on the Merits*, ¶ 83*; S.D. Myers – Partial Award*, ¶ 252*; Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/01) Decision on Responsibility, 15 January 2008, ¶ 117. The only difference in the language in NAFTA Article 1103 (Most-Favored-Nation Treatment) and NAFTA Article 1102 (National Treatment) is that the relevant comparator treatment is with respect to the investors and investments of a third State.

[20] *UPS – Award on the Merits*, ¶ 83(a).

finding of less favourable treatment, since treatment can only be compared if it is accorded in like circumstances.

19. Determining the existence of "like circumstances" is not merely a matter of determining whether investors, or their investments, operate in the same business or economic sector, or whether they are "like". Rather, the analysis requires a detailed consideration of the particular facts of each case and an examination of the totality of the circumstances in which the treatment was accorded in order to determine whether those circumstances are "like".[21] In this regard, NAFTA tribunals have also taken into consideration distinctions in treatment between investors or investments that are plausibly connected to legitimate public welfare objectives,[22] and have given important weight to whether investors or investments are subject to like legal requirements.[23]

20. There is nothing in the text of Article 1103 suggesting that the question of "in like circumstances" is a defence to be asserted by the NAFTA Party responding to a claim.[24] It is plain on the face of the text that the existence of treatment "in like circumstances" is a constituent element of the obligation, not an exception to its application.

21. Third, a claimant must establish that the treatment accorded to it or its investment was "less favourable" than the treatment accorded to its identified comparators (investors or investments of investors of a third State). Based on its ordinary meaning, the phrase "no

[21] *UPS – Award on the Merits*, ¶ 87: (holding that the determination of whether treatment was accorded in like circumstances "will require consideration […] of all the relevant circumstances in which the treatment was accorded"); *Pope & Talbot Inc. v. Canada* (UNCITRAL) Award on the Merits of Phase 2, 10 April 2001 ("*Pope & Talbot – Award on the Merits Phase 2*"), ¶ 75: (explaining that "'circumstances' are context dependent").

[22] *S.D. Myers – Partial Award*, ¶¶ 248, 250; *Pope & Talbot – Award on the Merits Phase 2*, ¶ 79; *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Final Award, 15 November 2004, ¶ 114; *Merrill & Ring – Award*, ¶ 88.

[23] *Grand River – Award*, ¶ 166; *UPS – Award on the Merits*, ¶¶ 116-119; *ADF – Award*, ¶ 156; *Pope & Talbot - Award on the Merits Phase* 2, ¶¶ 75, 77-79, 84-88; *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Award, 25 August 2014, ¶¶ 8.15, 8.42 and 8.54; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/05) Award, 21 November 2007, ¶ 197.

[24] *UPS – Award on the Merits*, ¶ 84.

less favourable" requires treatment that is at least as favourable as the treatment accorded to the relevant comparator to which it is being compared.[25]

B. NAFTA Article 1103 Does Not Allow for the Importation of Substantive or Procedural Rights from Other Treaties Absent Different Treatment

22. All three NAFTA Parties agree that Article 1103 does not allow for the importation of substantive obligations or procedural rules contained in other international investment treaties absent different treatment accorded in like circumstances.[26]

23. For Article 1103 to apply, there must be an actual instance of more favourable treatment of an investor of a third party. Substantive obligations and procedural rights in other international treaties are not actual "treatment" of investors. Hypothetical treatment that may result from a treaty cannot give rise to a breach of the most-favoured nation obligation.

24. The text of Annex IV of the NAFTA supports this interpretation. Annex IV states:

> Canada takes an exception to Article 1103 for treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement.

25. By including an exception for "treatment accorded under agreements" involving certain sectors and entered into after NAFTA, the provision confirms that Article 1103 is

[25] *Canadian Statement on Implementation: North American Free Trade Agreement*, 1994, Canada Gazette Part I, Vol. 128, 148, 1 January 1994. Also see United Nations Conference on Trade and Development, National Treatment, UNCTAD/ITE/IIT/11 (Vol. IV), (United Nations: New York and Geneva, 1999), p. 37.

[26] This understanding of the NAFTA Parties is reflected in the text of the Canada-United States-Mexico Agreement ("CUSMA") which replaced the NAFTA. CUSMA, Article 14.D.3, footnote 22: ("For the purposes of this paragraph: (i) the 'treatment' referred to in Article 14.5 (Most-Favored-Nation Treatment) excludes provisions in other international trade or investment agreements that establish international dispute resolution procedures or impose substantive obligations; and (ii) the 'treatment' referred to in Article 14.5 only encompasses measures adopted or maintained by the other Annex Party, which for greater clarity may include measures adopted in connection with the implementation of substantive obligations in other international trade or investment agreements."; *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Government of Canada's Rejoinder on the Merits, 2 July 2014, ¶ 42; *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) 1128 Submission of the Unites Mexican States, 12 June 2015, ¶ 13.

concerned with *treatment* that may be accorded pursuant to other treaties, not with the treaties themselves.

26. The NAFTA Parties considered the specific relationship between Article 1103 and Article 1105 in past NAFTA cases and unanimously agreed that Article 1103 cannot be used to alter the substantive content of the minimum standard of treatment obligation of Article 1105, or to broaden the fair and equitable treatment obligation beyond treatment which is required by the customary international law minimum standard of treatment of aliens.[27]

IV. NAFTA ARTICLES 1116 (CLAIM BY AN INVESTOR OF A PARTY ON ITS OWN BEHALF) AND 1117 (CLAIM BY AN INVESTOR OF A PARTY ON BEHALF OF AN ENTERPRISE)

A. NAFTA Articles 1116(1) And 1117(1) Distinguish Between Direct And Indirect Claims

27. NAFTA Chapter Eleven provides standing to an investor to bring a claim for a breach of the Agreement in two distinct situations: (1) under Article 1116 if "the investor has incurred loss or damage by reason of, or arising out of [the] breach"; and, (2) under Article 1117 if an investment that the investor "owns or controls" has "incurred loss or damage, by reason of, or arising out of [the] breach".

[27] *Crompton* (*Chemtura*) *Corp. v. Government of Canada* (UNCITRAL) Canada's Counter Memorial, 20 October 2008, ¶¶ 860-873, *Crompton* (*Chemtura*) *Corp. v. Government of Canada* (UNCITRAL) Canada's Rejoinder, 10 July 2009, ¶¶ 232-239; *Crompton* (*Chemtura*) *Corp. v. Government of Canada* (UNCITRAL) 1128 Submission of the United Mexican States, 31 July 2009, ¶¶ 2, 4-5; *Crompton* (*Chemtura*) *Corp. v. Government of Canada* (UNCITRAL) 1128 Submission of the United States of America, 31 July 2009, ¶¶ 2-9. *See* also *Pope & Talbot Inc. v. Canada* (UNCITRAL) Canada's Reply Letter to the Tribunal, 1 October 2001, p. 3; *Pope & Talbot Inc. v. Canada* (UNCITRAL) Sixth Submission (Corrected) of the United States of America's, 2 October 2001, ¶ 2 (concurring with Canada Article 1103 cannot be relevant to, or constitute an issue with respect to, the interpretation of Article 1105); *Pope & Talbot Inc. v. Canada* (UNCITRAL) United Mexican States' Letter to the Tribunal, 1 October 2001, p.1 (concurring with Canada Article 1103 cannot be relevant to, or constitute an issue with respect to, the interpretation of Article 1105); *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Canada's Rejoinder on the Merits, 2 July 2014, ¶ 42; *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant to NAFTA Article 1128, 25 July 2014, ¶ 13. *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) 1128 Submission of the United States of America, 25 July 2014, ¶ 10.

28. Under Article 1116, an investor may bring a direct claim for a breach of the obligations set forth in Section A of NAFTA Chapter Eleven if the investor itself has suffered loss or damage as a result of the breach.

29. Article 1117 applies in cases where the investment is an enterprise that the investor "owns or controls, directly or indirectly." It permits an investor to commence arbitration on behalf of an enterprise that is a juridical person incorporated in the host State. Under that provision, the investor can bring a claim for loss or damage that the enterprise has incurred as a result of a breach of the obligations set forth in Section A of NAFTA Chapter Eleven. Claims brought under Article 1117 are indirect, or "derivative", claims because the investor bringing the claim has not suffered damages directly but is claiming for damages on behalf of a separate juridical person that is the investment.[28] A claim for loss suffered by an investment that is an enterprise can only be brought under Article 1117. In that case, any damages awarded are paid to the enterprise and not the investor.[29]

30. All three NAFTA Parties have agreed on this distinction between direct claims that can be brought under Article 1116 (which, in the case of an investor that is a shareholder, does not include loss sustained as a result of the loss to the enterprise) and the indirect claims that can be brought under Article 1117.[30] The consistent positions of the NAFTA

[28] A claim is direct if it concerns treatment of and loss by the shareholder that is separate and distinct from the treatment of the enterprise itself. On the other hand, a claim is derivative if the shareholder was affected simply as a consequence of the treatment of the corporation. In the latter case, a shareholder does not have any independent right of action under international law with respect to reflective losses it may have suffered as a result of the treatment of the corporation.

[29] In addition, such claims must comply with the other jurisdictional requirements under NAFTA Article 1121(1) including the requirement that both the investor and the enterprise must provide a waiver in writing of their right to initiate or continue other proceedings with respect to the impugned measure before any administrative tribunal, court, or other dispute settlement procedure.

[30] The United States explained as follows in its third party submissions in *Pope & Talbot v. Government of Canada* (UNCITRAL) Seventh Submission of the United States of America, 6 November 2001, ¶¶ 3-4, 6, 9: ("Articles 1116 and 1117 of the NAFTA serve distinct purposes [...]. Where the investment is a separate legal entity, such as an enterprise, any damage to the investment will be a derivative loss to the investor, and the investor will have standing to bring a claim under Article 1117. Where the investment is not a separate legal entity, any damage to the investment will be a direct loss to the investor, and the investor will have standing to bring a claim under Article 1116 […]. Examples of direct losses sustained by an investor in its capacity as an investor that would give rise to a claim under Article 1116 are, for example, losses suffered as a result of an investor's stockholder shares having been expropriated or losses sustained as a result of the investor having been denied its right to vote its shares in a company incorporated in the territory of another NAFTA Party." The United States further confirmed that: "while harm to an investment may very well result in harm to the

Parties on the proper interpretation of Articles 1116 and 1117 constitute an authentic interpretation which, pursuant to Article 31(3) of the *Vienna Convention on the Law of Treaties* ("VCLT"), "shall be taken into account" in interpreting these provisions.[31]

31. Article 1117 contemplates a specific and limited derogation from the customary international law rule that a claim cannot be asserted by a shareholder for loss to the corporation in which it holds shares.[32] Without Article 1117, an investor that is a shareholder could not assert an indirect claim for an injury to the corporation in which it invested. Article 1116, for its part, does not derogate from customary international law: a claimant shareholder cannot pursue claims for loss or damage to the corporation in which it invested.[33] Under Article 1116, the investor is limited to claiming its own loss suffered by reason of the breach, not reflective losses resulting from damage to the corporation.

B. Damages Must be "By reason of, or arising out of" the Breach

32. The ordinary meaning of the terms "by reason of, or arising out of" in Articles 1116 and 1117 requires an investor to demonstrate a sufficient causal link between the alleged

investor, this does not support the contention that – despite the plain language of the NAFTA – an investor can bring a claim under Article 1116 for loss or damage incurred by an enterprise because an enterprise is an investment.") *See also Legacy Vulcan LLC v. United Mexican States* (ICSID Case No. ARB/19/1) Counter-Memorial of the United Mexican States, 23 November 2020, ¶¶ 465-475; *Bilcon of Delaware et al v. Government of Canada* (UNCITRAL) Counter-Memorial Submission of Canada on Damages, 9 June 2017, ¶ 28; *Bilcon of Delaware et al v. Government of Canada* (UNCITRAL) 1128 Submission of the United States of America on Damages, 29 December 2017, ¶¶ 2-4; *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Memorial of United Mexican States on Jurisdictional Objections, 30 May 2017, ¶ 13; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) First 1128 Submission of the United Mexican States, 16 October 2000, ¶ 21.

[31] *Vienna Convention on the Law of Treaties*, 1969, C.T.S. 1980/37; 1156 U.N.T.S. 331, Article 31(3).

[32] Under international law, corporate entities are separate and distinct from their owners, and have their own assets, rights, and liabilities. Only the entity whose rights have been infringed may seek redress. If harm is done to a corporate entity, while a shareholder may likewise be harmed, that in itself is not enough under international law to grant a shareholder a right to seek compensation for measures taken against a corporation. *See Case Concerning the Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*) Second Phase Judgment, [1970] I.C.J. Reports 3, ¶ 44. More recently, the ICJ affirmed that separate legal personality of corporations is a general principle of international law (*Case Concerning Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), Preliminary Objections Judgment, [2007] I.C.J. Reports 582, ¶¶ 61, 63).

[33] *See for example, Mondev – Award*, ¶ 79: "Faced with this detailed scheme [of Articles 1116 and 1117], there does not seem to be any room for the application of any rules of international law dealing with the piercing of the corporate veil or with derivative actions by foreign shareholders.

breach and the alleged loss to the investor (under Article 1116) or to the enterprise (under Article 1117).

33. This requirement reflects customary international law principles of State responsibility which require the State to compensate for injury *caused* by an internationally wrongful act.[34] Moreover, under customary international law, compensation may not be awarded for damages that are too remote, indirect or uncertain – the damages must be proximately caused by the breach.[35] Injuries that are not sufficiently "direct", "foreseeable", or "proximate" consequences of the alleged breach cannot form part of a damage award.

34. All three NAFTA Parties have expressed their agreement that Articles 1116 and 1117 should be interpreted to require proximate causation between the alleged breach and the alleged loss to the investor (under Article 1116) or to the enterprise (under Article 1117).[36]

35. NAFTA tribunals have also interpreted Articles 1116 and 1117 as requiring a "sufficient causal link between the breach of a specific NAFTA provision and the loss sustained by the investor",[37] "a sufficiently clear direct link between the wrongful act and

[34] International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, with Commentaries (2001), article 31, pp. 91-92.

[35] As the International Law Commission has recognized, a State responsible for an internationally wrongful act shall compensate for the resulting damage caused "insofar as [that damage] is established." Specifically, as the ILC observes, "[t]ribunals have been reluctant to provide compensation for claims with inherently speculative elements." *See* International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with Commentaries (2001), article 36(2), pp. 98, 104. *See also S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Second Partial Award, 21 October 2002, ("*S.D. Myers – Second Partial Award*"), ¶173: ("[…] to be awarded, the sums in question must be neither speculative nor too remote."); *Mobil – Decision on Liability and on Principles of Quantum*, ¶¶ 437-439.

[36] *See* for example *Bilcon of Delaware et al v. Government of Canada* (UNCITRAL) Counter Memorial Submission of Canada, 9 December 2011, ¶¶ 45-46; *Bilcon of Delaware et al v. Government of Canada* (UNCITRAL) Damages Rejoinder Submission of Canada, 6 November 2017, ¶ 58; *Bilcon of Delaware et al v. Government of Canada* (UNCITRAL) 1128 Submission of the United States of America, 29 December 2017, ¶¶ 23-27. *See also Cargill Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Rejoinder of the Respondent, 2 May 2007, ¶ 470.

[37] *S.D. Myers – Partial Award*, ¶¶ 140, 316.

the alleged injury",[38] and that "the harm must not be too remote, or that the breach of the specific NAFTA provision must be the proximate cause of the harm."[39]

C. Under Article 1116, the Investor Must Have Suffered Loss in its Capacity as an Investor

36. An investor may only recover for loss or damage that the investor incurred in its capacity as an investor seeking to make, making or having made an "investment" in the territory of the other Party.

37. In accordance with the rules of treaty interpretation in Article 31 of the VCLT, Article 1116 must be read in context of other relevant provisions of NAFTA, including Article 1101 (which defines the scope of the Chapter) and Article 1139 (which defines "investment", "investor of a Party", and "investments of an investor of a Party").

38. "Investor of a Party" is defined in Article 1139 as a "Party or state enterprise thereof, or a national or enterprise of such Party, that seeks to make, is making or has made an investment." The rights established in Section A (a breach of which may cause loss or damage) apply to "investors of another Party" and to "investments of investors of another Party." Additionally, Article 1101 limits the scope of Chapter Eleven, in pertinent part, "to measures adopted or maintained by a Party relating to: (a) investors of another Party; [and] (b) investments of investors of another Party in the territory of the Party." In other words, the Chapter applies to investors only to the extent of their investment in the territory of the other NAFTA Party. Investors are thus "explicitly linked to their investments."[40]

39. As the Tribunal in *Archer Daniels Midland Company v. The United Mexican States* ("*ADM*") noted:

> […] the protection [of Chapter Eleven] applies only to measures relating to investments of investors of one Party that are in the

[38] *ADM – Award*, ¶ 282.

[39] *S.D. Myers – Second Partial Award*, ¶ 140. *See also Metalclad Corp. v. United Mexican States* (ICSID Case No. ARB(AF)/97/1) Award, 30 August 2000, ¶ 115 (rejecting damages because they were "too remote and uncertain").

[40] *The Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January 2008, ¶ 112.

> territory of the party that has adopted or maintained such measures. In a case such as the one at bar, this would exclude investments of ADM […] located outside of Mexico, even if such investments are destined to promote fructose sales in Mexico.[41]

40. When reading Articles 1101, 1116 and 1139 together, it is clear that an investor may only recover for damages it incurred in its capacity as an investor seeking to make, making, or having made, an investment in the territory of the other Party.[42]

41. In most cases, direct and foreseeable loss incurred by an investor with respect to its investment in the territory of another NAFTA Party will not extend to damages suffered outside the territory of that NAFTA Party. Moreover, as the tribunal in *UP and C.D. Holding Internationale v. Hungary* noted, "the payment of damages resulting from a breach

[41] *ADM – Award*, ¶ 273 (emphasis added).

[42] The NAFTA Parties are in agreement on this point. *See*, for example, the submissions of the NAFTA Parties in *The United Mexican States v. Cargill, Inc*., 2011 ONCA 622, Factum of the Unites States of America, 31 January 2011, ¶ 5: ("An analysis of the text of NAFTA Chapter 11, guided by the interpretive principles of the Vienna Convention on the Law of Treaties ('VCLT'), demonstrates that the relief available for claims submitted under Article 1116 is limited to damages incurred by an 'investor' for damages incurred in its capacity as an investor – seeking to make, making, or having made an 'investment' in the territory of another NAFTA Party. Indeed, Canada, Mexico and the United States have expressed a common view on this approach."); *The United Mexican States v. Cargill, Inc*., 2011 ONCA 622, Factum of the United Mexican States, ¶ 76: ("To the extent that the obligations apply to an investor of another Party, they are owed only in its capacity as a person who has made, is making or seeks to make an investment in the territory of the respondent Party."); *The United Mexican States v. Cargill, Inc*., 2011 ONCA 622, Factum of Canada, 31 January 2011, ¶ 27: ("Section A and Article 1101 provide important additional context. The rights established in Section A (the infringement of which may cause loss or damage) apply to "investors of another Party" and to "investments of investors of another Party", while Article 1101 applies the Chapter to "investments of investors of a Party in the territory of another Party", in other words, to investors only to the extent of their foreign investments"). The agreement of the NAFTA Parties was noted by the Court of Appeal in its decision on set-aside. *See The United Mexican States v. Cargill, Incorporated*, 2011 ONCA 622, Award, 4 October 2011, ¶ 83: ("In my view, it is clear that NAFTA tribunals understand that the damages that may be awarded for Chapter 11 claims must be in relation to breaches that affect a claimant's investment in the host country and therefore affect the investor as an investor. That is the common position of the NAFTA Parties as well". *See also The United Mexican States v. Cargill, Incorporated*, 2010 ONSC 4656, Factum of the United Mexican States, 25 May 2010, ¶ 149: ("Mexico does not dispute that it is possible for losses to be suffered by an investor outside Mexico, and it is possible for those losses to be the subject of a claim for damages under Chapter Eleven – provided that those losses arise in relation to an investment located in Mexico, and are suffered in the claimant's capacity as an investor in Mexico." *See also* the submissions of the NAFTA Parties in *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Canada's Counter Memorial, 5 October 1999, ¶ 458; *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) 1128 Submission of the United States of America, 18 September 2001, ¶ 8; *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant to NAFTA Article 1128, 12 September 2001, ¶ 36.

of the treaty serves to compensate an investor for losses it has actually suffered – not for losses suffered by third parties over which the tribunal has no jurisdiction."[43]

Dated this 7th day of June, 2021.

Respectfully submitted
on behalf of Canada,

Sylvie Tabet
Heather Squires
Michelle Hoffmann
Global Affairs Canada
Trade Law Bureau
125 Sussex Drive
Ottawa, Ontario
CANADA K1A 0G2

[43] *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary* (ICSID Case No. ARB/13/35) Award, 9 October 2018, ¶¶ 587-588, citing *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/3) Award 16 June 2010, § 12-50; *Asian Agricultural Products Ltd. v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3) Final Award, 27 June 1990, ¶ 95.