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

ESPIRITU SANTO HOLDINGS, LP AND L1BRE HOLDING, LLC,

Claimants

-and-

UNITED MEXICAN STATES,

Respondent.

ICSID CASE NO. ARB/20/13

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA" or "the Agreement"), the United States of America makes this submission on questions of interpretation of the NAFTA. The United States does not take a position, in this submission, on how the 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.[*]

Legality of Investment (Article 1139)

2. While Article 1139 does not expressly provide that each type of investment must be made in compliance with the laws of the host state, it is implicit that the protections in Chapter Eleven only apply to investments made in compliance with the host state's domestic law at the time that

[*] 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.

the investment is established or acquired.[1] As a general matter, however, trivial violations of the applicable law will not put an investment outside the scope of Article 1139.[2]

National Treatment (Article 1102)

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

4. To establish a breach of national treatment under Article 1102, a claimant has the burden of proving that it or its investments: (1) were accorded "treatment"; (2) were in "like circumstances" with domestic investors or investments; and (3) received treatment "less

[1] This requirement is necessarily implied, for example, in the definition of "enterprise," the first item listed in Article 1139, which is defined at Article 201 as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association." *See also* CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES ¶ 6.110 (2nd ed. 2017) ("MCLACHLAN") ("[A]n investment that is made in breach of the laws of the host State will not qualify as an investment under an investment treaty. *This will be the case even where the applicable treaty does not contain an express requirement of compliance with the laws of the host State*." (emphasis added)). *See also Ampal-American Israel Corp. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction ¶ 301 (Feb. 1, 2016) (concluding, in applying a treaty that lacked an express legality requirement (the United States-Egypt bilateral investment treaty), that "[i]t is a well-established principle of international law that a tribunal constituted on the basis of an investment treaty has no jurisdiction over a claimant's investment which was made illegally in violation of the laws and regulations of the Contracting State."); *Mamidoil Jetoil Greek Petroleum Products S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award ¶¶ 359-60 (Mar. 30, 2015) ("[T]he Tribunal shares the widely-held opinion that investments are protected by international law only when they are made in accordance with the legislation of the host State. States accept arbitration and accept to waive part of their immunity from jurisdiction to encourage and protect investments in international conventions. In doing so, they cannot be expected to have agreed to extend that mechanism to investments that violate their laws; likewise, it cannot be expected that States would want illegal investments by their nationals to be protected under those international conventions. This principle . . . applies to the substance of the protection when the relevant international instrument, such as the ECT in this case, does not specifically refer to a requirement of legality."); *Blusun S.A. v. Italian Republic*, ICSID Case No. ARB/14/3, Award ¶ 264 (Dec. 27, 2016) ("[I]t is true that the ECT does not lay down an explicit requirement of legality, but the Tribunal concludes that it does not cover investments which are actually unlawful under the law of the host state at the time they were made because protection of such investments would be contrary to the international public order.").

[2] *See, e.g., Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction ¶¶ 85-86 (Apr. 29, 2004) (noting, in a dispute under a treaty that included an express legality requirement, that "to exclude an investment on the basis of . . . minor errors would be inconsistent with the object and purpose of the Treaty"); *Metal-Tech Ltd v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award ¶ 165 (Oct. 4, 2013) (stating with respect to the underlying treaty's legality requirement that "the subject-matter scope of the legality requirement" covers issues including "non-trivial violations of the host State's legal order").

favorable" than that accorded to domestic investors or investments. As the *UPS v. Canada* tribunal noted, "[t]his is a legal burden that rests squarely with the Claimant. That burden never shifts . . . ."[3]

5. Article 1102 is intended to prevent discrimination on the basis of nationality between domestic investors (or investments) and investors (or investments) of the other Party, that are in "like circumstances." It is not intended to prohibit all differential treatment among investors or investments. Rather, it is designed only to ensure that the Parties do not treat entities that are in "like circumstances" differently based on nationality.[4]

6. All three NAFTA Parties have demonstrated their agreement regarding this interpretation of Article 1102 — clearly and specifically — over a period of many years, in submissions made in a number of different proceedings.[5] Pursuant to the customary international law principles of

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

[4] *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).

[5] *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.

treaty interpretation reflected in the Vienna Convention on the Law of Treaties, the Tribunal must take into account this common understanding of the Parties.[6]

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

8. 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."[7] 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 Article 1102 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare

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30, 2004) (Article 1102 "prohibits treatment which discriminates on the basis of the foreign investment's nationality"); *Mercer Int'l Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Government of Canada's Reply to 1128 Submissions ¶ 2 (June 12, 2015) ("[T]he NAFTA Parties agree that: . . . NAFTA Articles 1102 (National Treatment) and 1103 (Most-Favoured Nation) only prohibit discrimination on the basis of nationality; . . . ."); *Vento Motorcycles, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/17/3, Non-Disputing Party Submission of the Government of Canada Pursuant to Article 1128 ¶ 7 (Aug. 23, 2019) (accord); *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).

[6] Although the United States is not a party to the Vienna Convention, it has recognized since at least 1971 that the Convention is an "authoritative guide" to treaty law and practice. *See* Letter of Submittal from Secretary of State Rogers to President Nixon transmitting the Vienna Convention on the Law of Treaties (Oct. 18, 1971), S. Ex. L. 92d Cong., 1st Sess., *reprinted in* 65 DEP'T ST. BULL. No. 1694, at 684, 685 (Dec. 13, 1971).

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

objectives. When determining whether a claimant was in "like circumstances" with comparators, it or its investment should be compared to a domestic investor or investment that is alike in all relevant respects *but for* nationality of ownership.

9. Nothing in Article 1102 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 Article 1102.

Minimum Standard of Treatment (Article 1105)

10. 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."

11. 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."[8] 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."[9] The Commission also confirmed that "a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."[10] The Commission's interpretation "shall be binding" on tribunals established under Chapter Eleven.[11]

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

[9] *Id.* ¶ B.2.

[10] *Id*. ¶ B.3.

[11] NAFTA Article 1131(2).

12. The Commission's interpretation thus confirms the NAFTA Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in NAFTA Article 1105. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts.[12] The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[13]

13. Customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation. This two-element approach—State practice and *opinio juris*—is the standard practice of States and international courts, including the International Court of Justice.[14]

[12] 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").

[13] *S.D. Myers, Inc. v. Government of Canada,* NAFTA/UNICTRAL, First Partial Award ¶ 259 (Nov. 13, 2000) ("*S.D. Myers* First Partial Award"); *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 615 (June 8, 2009) ("*Glamis Gold* Award") ("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").

[14] *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.").

14. Relevant State practice must be widespread and consistent[15] and be accepted as law, meaning that the practice must also be accompanied by a sense of legal obligation.[16] "[T]he indispensable requirement for the identification of a rule of customary international law is that *both* a general practice and acceptance of such practice as law (*opinio juris*) be ascertained."[17] A perfunctory reference to these requirements is not sufficient.[18]

15. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate, under this two-step approach, that a rule of customary international law exists. In its decision on *Jurisdictional Immunities of the State* (*Germany v. Italy*), the ICJ emphasized that "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States," and noted as examples

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

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

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

[18] ILC Draft Conclusions on Identification of Customary International Law, Commentary on Part Two, Conclusion 2, Commentary ¶ 2 (noting that the identification of a rule of customary international law "involves a careful examination of available evidence" to establish a general practice and acceptance of that practice as law (*opinio juris*)); *id.* Conclusion 3, Commentary ¶ 1 (noting that "determining the existence and content of a rule of customary international law" from evidence of the two constituent elements of customary international law requires a "systematic and rigorous analysis"). *See also* PATRICK DUMBERRY, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105, at 116 (2013) ("DUMBERRY") (observing that the tribunal in *Merrill & Ring* failed "to cite a single example of State practice in support of" its "controversial findings"); UNCTAD, FAIR AND EQUITABLE TREATMENT – UNCTAD SERIES ON ISSUES IN INTERNATIONAL AGREEMENTS II, at 57 (2012) ("The *Merrill & Ring* tribunal failed to give cogent reasons for its conclusion that the MST made such a leap in its evolution, and by doing so has deprived the 2001 NAFTA Interpretive Statement of any practical effect.").

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.[19]

16. States may decide expressly by treaty to make policy decisions to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law.[20] The practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 1105 in which "fair and equitable treatment" and "full protection and security" are expressly tied to the customary international law minimum standard of treatment.[21] Thus, arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of

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

[20] *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.").

[21] 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 . . . ."); s*ee also Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 176 (Jan. 12, 2011) ("*Grand River* Award") (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.

customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 1105(1).[22]

17. 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 as subsidiary means for determining State practice when they include an examination of such practice.[23] While the NAFTA Parties consented to allow investor-State tribunals to decide issues in dispute in accordance with the Agreement and applicable rules of international law, they did not consent to delegate to Chapter 11 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, a formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and *opinio juris* fails to establish a rule of customary international law as incorporated by Article 1105(1).

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[22] *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").

[23] *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.").

18. As all three NAFTA Parties agree,[24] 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*.[25] "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."[26] Tribunals applying the minimum standard of treatment obligation in Article 1105 have confirmed that the party seeking to rely on a rule of customary international law must establish its existence. The tribunal in *Cargill Inc. v. United Mexican States*, for example, acknowledged that:

> [T]he 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 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.[27]

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[24] *See, e.g.*, *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Canada's Rejoinder on the Merits ¶ 147 (July 2, 2014) ("[I]t is a well-established principle of international law that the party alleging the existence of a rule of customary international law bears the burden of proving it. Thus, the burden is on the Claimant to prove that customary international law has evolved to include the elements it claims are protected.") (footnote omitted); *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Second Submission of the United States of America ¶ 13 (June 12, 2015) ("[T]he burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*."); *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Second Submission of Mexico Pursuant to NAFTA Article 1128 ¶ 9 (June 12, 2015) (concurring with the United States' position that the burden is on a claimant to establish a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*). As explained in paragraph 6 above, pursuant to the customary international law principles of treaty interpretation reflected in the Vienna Convention on the Law of Treaties, the Tribunal must take into account this common understanding of the Parties.

[25] *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 ¶¶ 601-02 (noting that the claimant bears the burden of establishing a change in customary international law, by showing "(1) a concordant practice of a number of States acquiesced in by others, and (2) a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)") (citations and internal quotation marks omitted).

[26] *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).

[27] *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

19. Once a rule of customary international law has been established, the claimant must then show that the respondent State has engaged in conduct that violates that rule.[28] 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."[29] Chapter Eleven tribunals do not have an open-ended mandate to "second-guess government decision-making."[30] A failure to satisfy requirements of domestic law does not necessarily violate international law.[31] 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

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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 on Jurisdiction and Merits, Part IV, Chapter C ¶ 26 (Aug. 3, 2005) ("*Methanex* Final Award") (citing *Asylum (Colombia v. Peru)* for placing the burden on claimant to establish the content of customary international law, and finding that claimant, which "cited only one case," had not discharged the burden).

[28] *Feldman v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) ("*Feldman* Award") ("[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).

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

[30] *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."); *Int'l Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 127 (Jan. 26, 2006) ("*Thunderbird* Award") (reasoning that States have "wide discretion" with respect to how they carry out policies in the context of gambling operations).

[31] *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).").

requirements. . . ."[32] Accordingly, a departure from domestic law does not, in and of itself, sustain a violation of Article 1105.

Fair and Equitable Treatment

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

* * *

Due Process in Administrative Decision-Making

21. 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 due process in administrative decision-making as in adjudicatory proceedings.[33] 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."[34]

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

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[32] *ADF* Award ¶ 190.

[33] *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).

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

Legitimate Expectations

23. The concept of "legitimate expectations" is not a component element of "fair and equitable treatment" under customary international law that gives rise to an independent host State obligation. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations; instead, something more is required.[35] 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.

Non-Discrimination

24. Similarly, the customary international law minimum standard of treatment set forth in Article 1105(1) does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination.[36] As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.[37] To

[35] *See, e.g.*, *Grand River* U.S. Counter-Memorial at 96 (Dec. 22, 2008) ("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 v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/97/2, Award ¶ 87 (Nov. 1, 1999) ("NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes."); *Waste Management v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/00/3, Award ¶ 115 (Apr. 30, 2004) (explaining that "even the persistent non-payment of debts by a municipality is not equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and . . . some remedy is open to the creditor to address the problem").

[36] *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.").

[37] *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,

the extent that the customary international law minimum standard of treatment incorporated in Article 1105(1) prohibits discrimination, it does so only in the context of other established customary international law rules, such as prohibitions against discriminatory takings,[38] access to judicial remedies or treatment by the courts,[39] 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.[40] Moreover, investor-State claims of nationality-based

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MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 83 (1949) ("[T]he principle of equality has not yet become a rule of positive international law, i.e., there is no obligation for a State to treat the aliens like the nationals. A discrimination of treatment between aliens and nationals alone does not yet constitute a violation of international law.").

[38] *See, e.g.*, *BP Exploration Co. (Libya) Ltd. v. Government of the Libyan Arab Republic*, 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. Government of the Libyan Arab Republic*, 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 . . . .").

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

[40] *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

discrimination are governed exclusively by the provisions of Chapter Eleven that specifically address that subject (Articles 1102 and 1103), and not Article 1105(1).[41]

Transparency

25. 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.[42] 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

26. The principle that "every treaty in force is binding on the parties to it and must be performed by them in good faith" is established in customary international law,[43] not in Chapter Eleven of the NAFTA. The good faith principle applies as 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

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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.").

[41] *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").

[42] *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").

[43] *See* Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 (reflecting the customary international law principle).

performance of its NAFTA obligations do not fall within the limited jurisdictional grant for investor-State disputes afforded in Section B.[44]

27. 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."[45] As such, customary international law does not impose a free-standing, substantive obligation of "good faith" that, if breached, can result in State liability.[46] Accordingly, a claimant "may not justifiably rely upon the principle of good faith" to support a claim,[47] absent a specific treaty obligation, and the NAFTA contains no such obligation.

Expropriation and Compensation (Article 1110)

28. Article 1110(1) provides that "[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment" unless the conditions specified in subparagraphs (a) through (d) are satisfied. If an expropriation does not conform to

[44] *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 a claim alleging conduct depriving the treaty of its object and purpose").

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

[46] *See, e.g., Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2012-17, Submission of the United States of America ¶ 7 (July 25, 2014) ("It is well established in international law that good faith is 'one of the basic principles governing the creation and performance of legal obligations,' but 'it is not in itself a source of obligation where none would otherwise exist.'"); *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 (Dec. 22, 2008) ("[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'.").

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

each of the specified conditions, it constitutes a breach of Article 1110. Any such breach requires compensation in accordance with Article 1110(2)-(6).[48]

29. As a threshold matter, and as the *Glamis* tribunal recognized, the term "expropriation" in Article 1110(1) "incorporates by reference the customary international law regarding that subject."[49] In this connection, it is a principle of customary international law that in order for there to have been an expropriation, a property right or property interest must have been taken.[50] As such, and given that Article 1110(1) protects "investments" from expropriation, the first step in any expropriation analysis must be an examination of whether there is an investment capable of being expropriated.[51] It is necessary to look to the law of the host State[52] for a determination of the definition and scope of the alleged property right or property interest at issue, including

[48] As the tribunal in *British Caribbean Bank v. Belize* confirmed with respect to very similar treaty language: "at no point does the Treaty, being a *lex specialis*, distinguish between lawful and unlawful expropriation. . . . Once the violation of the Treaty provisions regarding expropriation is established, the State has breached the Treaty." The tribunal, noting that the language "specifically negotiated" by the treaty parties required that compensation "*shall* amount to the . . . fair market value of the investment expropriated before the expropriation," found no room for interpreting this language to allow for another standard of compensation in the event of a breach. *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18, Award ¶¶ 260-62 (Dec. 19, 2014) (emphasis added).

[49] *Glamis Gold* Award ¶ 354.

[50] *See, e.g.*, Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law,* 176 R.C.A.D.I. 259, 272 (1982) ("Higgins") ("[O]nly *property* deprivation will give rise to compensation.") (emphasis in original); Rudolf Dolzer, *Indirect Expropriation of Alien Property,* ICSID REVIEW: FOREIGN INV. L.J. 41, 41 (1986) ("Once it is established in an expropriation case that the object in question amounts to 'property,' the second logical step concerns the identification of 'expropriation.'"); *Glamis Gold* Award ¶ 356 ("There is for all expropriations, however, the foundational threshold inquiry of whether the property or property right was in fact taken."). This principle of customary international law is reflected in 2012 U.S. Model Bilateral Investment Treaty, ann. B (*Expropriation*) ¶ 2.

[51] Notably, the NAFTA, in contrast with other treaties, does not list intellectual property rights or "licenses, authorizations, permits, and similar rights" as among investments covered under Article 1139. *See, e.g.*, 2012 U.S. Model Bilateral Investment Treaty art. 1 (listing intellectual property rights as well as licenses, authorizations, permits, and similar rights conferred pursuant to domestic law as possible forms of "investment"); Dominican Republic-Central America-United States Free Trade Agreement art. 10.28 (signed at Washington Aug. 5, 2004), 43 I.L.M. 514 (CAFTA-DR) (same).

[52] *See, e.g.*, Higgins 270 (for a definition of "property . . . [w]e necessarily draw on municipal law sources"); MCLACHLAN ¶ 8.64 ("The property rights that are the subject of protection under the international law of expropriation are created by the host State law. Thus, it is for the host State law to define the nature and extent of property rights that a foreign investor can acquire."); *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award ¶ 184 (Feb. 3, 2006) ("[F]or there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them . . . .").

any applicable limitations.[53] Assessing whether a license, permit, or similar instrument gives rise to property rights or interests that are capable of being expropriated is a case-by-case inquiry, involving examination of the instrument at issue, as well as the nature and extent of rights, if any, conferred by the instrument under the host State's domestic law.[54]

30. Article 1110 provides for protections from two types of expropriations, direct and indirect.[55] A direct expropriation occurs "where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure."[56]

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

[54] For example, under U.S. law, it is well established that revocable government-granted licenses or permits do not confer property interests that give rise to claims for compensation. *See, e.g.*, *Dames & Moore*, 453 U.S. 654, 674 n.6 (1981) (holding that attachments subject to "revocable" and "contingent" licenses, which the President could nullify, did not provide the plaintiff with any "property" interest that would support a constitutional claim for compensation); *Mike's Contracting LLC v. United States*, 92 Fed. Cl. 302, 310 (2010) (holding that helicopter airworthiness certificates, subject to U.S. Federal Aviation Administration revocation or suspension, were not property interests that could give rise to a takings claim); *Conti v. United States*, 291 F.3d 1334, 1340 (Fed. Cir. 2002) ("[C]ourts have held that no property rights are created in permits and licenses."); *see also Apotex Holdings* U.S. Counter-Memorial ¶ 227 (Dec. 14, 2012) (stating that "property 'must be capable of exclusive possession or control,'" and that, where the purported investor has "no power . . . to prevent the government from exercising its statutory authority to withhold or revoke [the instrument in question]," the investor cannot "exclude" the government from those instruments, and they thus "lack the requisite exclusivity that would confer a cognizable 'property interest' under U.S. law").

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

[56] 2012 U.S. Model Bilateral Investment Treaty, ann. B (*Expropriation*) ¶ 3. The expropriation annex to the U.S. Model BIT was intended to reflect customary international law. *Id.* ¶ 1.

31. An indirect expropriation occurs "where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."[57] Determining whether an indirect expropriation has occurred requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the governmental action; (ii) the extent to which that action interferes with distinct, reasonable-investment-backed expectations; and (iii) the character of the government action.[58]

32. With respect to the first factor, for an expropriation claim to succeed, the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as "to support a conclusion that the property has been 'taken' from the owner."[59]

33. The second factor requires an objective inquiry of the reasonableness of the claimant's investment-backed expectations. Whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation[60] or the potential for government regulation in the relevant sector.

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[57] 2012 U.S. Model Bilateral Investment Treaty ann. B (*Expropriation*) ¶ 4. *See also Lone Pine Resources Inc. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/15/2, Final Award ¶ 495 (Nov. 21, 2022) ("The concept of expropriation is well settled under customary international law as requiring either a direct taking or an outright transfer or seizure of the investor's property (direct expropriation) or a substantial deprivation, i.e., total or near-total deprivation, of the investor's property, without a formal transfer of title or outright seizure (indirect expropriation).").

[58] 2012 U.S. Model Bilateral Investment Treaty ann. B (*Expropriation*) ¶ 4(a).

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

[60] *See Methanex* Final Award, Part IV, Ch. D ¶ 9 (noting that no specific commitments to refrain from regulation had been given to Methanex, which "entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the

34. The third factor considers the nature and character of the government action, including whether such action involves physical invasion by the government or whether it is more regulatory in nature (*i.e.*, whether "it arises from some public program adjusting the benefits and burdens of economic life to promote the common good").[61]

35. However, under international law, where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory.[62] This principle in public international law, referred to as the police powers doctrine, is not an exception that applies after an expropriation has been found but, rather, is a recognition that certain actions, by their nature, do not engage State responsibility.[63] The United States is aware of no general and consistent

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vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons. Indeed, the very market for MTBE in the United States was the result of precisely this regulatory process"); *Grand River* Award ¶¶ 144-45 ("The Tribunal also notes that trade in tobacco products has historically been the subject of close and extensive regulation by U.S. states, a circumstance that should have been known to the Claimant from his extensive past experience in the tobacco business. An investor entering an area traditionally subject to extensive regulation must do so with awareness of the regulatory situation. Given the circumstances—including the unresolved questions involving the Jay Treaty and U.S. domestic law, and the practice of heavy state regulation of sales of tobacco products—the Tribunal holds that Arthur Montour could not reasonably have developed and relied on an expectation, the non-fulfillment of which would infringe NAFTA, that he could carry on a large-scale tobacco distribution business, involving the transportation of large quantities of cigarettes across state lines and into many states of the United States, without encountering state regulation."); *Glamis Gold* U.S. Rejoinder at 91 ("Consideration of whether an industry is highly regulated is a standard part of the legitimate expectations analysis, and . . . where an industry is already highly regulated, reasonable extensions of those regulations are foreseeable.").

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

[62] *See, e.g.*, *Glamis Gold* Award ¶ 354 ("A state is not responsible, however, 'for loss of property or for other economic disadvantage resulting from bona fide . . . regulation . . . if it is not discriminatory.'") (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712, cmt. (g) (1986)); *Chemtura Corp. v. Government of Canada*, NAFTA/UNCITRAL, Award ¶ 266 (Aug. 2, 2010) (holding that Canada's regulation of the pesticide lindane was a non-discriminatory measure motivated by health and environmental concerns and that a measure "adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation"); *Methanex* Final Award, Part IV, Ch. D ¶ 7 (holding that as a matter of general international law, "a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process" will not ordinarily be deemed expropriatory or compensable); Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 791-792 (Chester Brown ed., 2013) (discussing observation included in Annex B, paragraph 4(b) of U.S. 2012 Model BIT that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation."). This observation was first included in the 2004 U.S. Model BIT and has been echoed in subsequent U.S. investment agreements.

[63] *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 539 (5th ed. 1998) ("Cases in which expropriation is allowed to be lawful in the absence of compensation are within the narrow concept of public utility prevalent in laissez-faire economic systems, i.e. exercise of police power, health measures, and the like."); G.C.

State practice and *opinio juris* establishing that a State must show that the action at issue was proportionate, in addition to being a *bona fide*, non-discriminatory regulation. Accordingly, under public international law, the police powers doctrine has no proportionality requirement.

Respectfully submitted,

[Signed]

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March 21, 2023

Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT'L L., 307, 338 (1962) ("If, however, such prohibition can be justified as being reasonably necessary to the performance by a State of its recognized obligations to protect the public health, safety, morals or welfare, then it would normally seem that there has been no 'taking' of property.").