IN THE MATTER OF AN ARBITRATION UNDER ANNEX 14-C OF THE CANADA-UNITED STATES-MEXICO AGREEMENT, CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

BETWEEN:

SILVER BULL RESOURCES, INC.

Claimant

AND:

UNITED MEXICAN STATES

Respondent

ICSID CASE NO. ARB/23/24

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

September 5, 2025

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

TABLE OF CONTENTS

I. INTRODUCTION....1

II. THE CUSMA PROTOCOL, CUSMA ANNEX 14-C AND NAFTA CHAPTER ELEVEN SECTION A....1

A. The CUSMA Protocol Terminated the NAFTA, Releasing the NAFTA Parties from the Substantive Obligations of NAFTA Chapter Eleven 1

B. CUSMA Annex 14-C Provides a Right to Bring a Claim for Breach Only if the Breach Occurred Prior to the Termination of the NAFTA on July 1, 2020....4

C. Footnote 21 of Annex 14-C of CUSMA Does Not Support an Interpretation that the Consent to Arbitrate Provided under CUSMA Annex 14-C Extends to Alleged Continuous Breaches Occurring after July 1, 2020 7

III. NAFTA ARTICLE 1116(1) – TIME BAR....9

IV. NAFTA ARTICLES 1102 AND 1103....10

A. The Meaning of "Like Circumstances" under NAFTA Articles 1102 and 1103....10

V. NAFTA ARTICLE 1105....12

A. NAFTA Article 1105(1) Guarantees Treatment in Accordance with the Customary International Law Minimum Standard of Treatment 12

B. Establishing the Existence of a Rule Of Customary International Law Requires Proof of State Practice and Opinio Juris....13

C. The Customary International Law Minimum Standard of Treatment Does Not Protect an Investor's Legitimate Expectations 14

D. NAFTA Article 1105 Does Not Extend Beyond the Physical Protection and Security Of Investments....15

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, and as a Party to the Canada-United States-Mexico Agreement ("CUSMA"), the successor agreement to the NAFTA.

2. This submission is not intended to address all interpretative issues that may arise in this proceeding. To the extent that certain issues raised by the disputing parties have not been addressed in this submission, Canada's silence should not be taken to constitute concurrence or disagreement with the positions advanced by the disputing parties.

3. Canada does not take a position on issues of fact or on how the interpretations it submits below apply to the facts of this dispute.

II. THE CUSMA PROTOCOL, CUSMA ANNEX 14-C AND NAFTA CHAPTER ELEVEN SECTION A

A. The CUSMA Protocol Terminated the NAFTA, Releasing the NAFTA Parties from the Substantive Obligations of NAFTA Chapter Eleven

4. On July 1, 2020, CUSMA entered into force. The Protocol Replacing the North American Free Trade Agreement with the Agreement between Canada, the United States of America, and the United Mexican States (the "Protocol") specifically states:

> Upon entry into force of this Protocol, the CUSMA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the CUSMA that refer to provisions of the NAFTA.

5. When CUSMA superseded NAFTA on July 1, 2020, the NAFTA was terminated, and no provision of NAFTA continued to apply except as provided in the CUSMA. As a result, upon termination of NAFTA, the NAFTA Parties were released from their

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

obligations under that treaty, consistent with customary internatioftnal law as articulated in Article 70(1)(a) of the *Vienna Convention on the Law of Treaties* ("VCLT"). According to Article 70(1)(a) of the VCLT, "unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty…releases the parties from any obligation further to perform the treaty." As explained below, neither the NAFTA, nor the Protocol, nor the CUSMA provide otherwise, and the NAFTA Parties did not otherwise agree.

6. The NAFTA did not contain a survival (or sunset) clause, which are commonly found in bilateral investment treaties. When treaty parties intend for certain substantive obligations of the treaty to remain in force for a certain period of time following the treaty's termination, they have included such a provision, as Canada, the United States and Mexico have done in many bilateral investment treaties to which they are a party.[2] The NAFTA Parties did not include such a survival clause in NAFTA and as a result, NAFTA obligations, including the substantive obligations in NAFTA Chapter Eleven, did not remain in force upon the treaty's termination. If the NAFTA Parties had intended for NAFTA Chapter Eleven substantive obligations to continue to apply after termination, they would have adopted clear language in the CUSMA Protocol or in the CUSMA, stating that NAFTA Chapter Eleven's substantive obligations "continue to be effective" or "continue

[2] See for e.g., *Agreement between the Government of Canada and the Government of the People's Republic of China for the promotion and reciprocal protection of investments*, Article 35.3: "3. With respect to investments made prior to the date of termination of this Agreement, Articles 1 to 34, as well as paragraph 4 of this Article, shall continue to be effective for an additional fifteen-year period from the date of termination." See also, *United States – Morocco Free Trade Agreement*, Article 1.2(4): "4. Notwithstanding paragraph 3, for a period of ten years beginning on the date of entry into force of this Agreement, Articles VI and VII of the Treaty shall not be suspended: (a) in the case of investments covered by the Treaty as of the date of entry into force of this Agreement; or (b) in the case of disputes that arose prior to the date of entry into force of this Agreement and that are otherwise eligible to be submitted for settlement under Article VI or VII." See also, *Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment*, Article 22.3 " 3. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments." See also, *Agreement between the Government of the Republic of France and the Government of the United Mexican States on the Reciprocal Promotion and Protection of Investments*, Article 13(3): "In case of termination of the period of validity of this Agreement, investments made while it was in force shall continue to enjoy the protection of its provisions for an additional period of fifteen years."

to apply" for a specified period of time from the date of termination.[3] They did not. In contrast to CUSMA Article 34.1 (Transitional Provision from NAFTA 1994), which states that "Chapter Nineteen of NAFTA 1994 shall continue to apply […]", there is no equivalent provision providing for the continued application of NAFTA's substantive investment provisions. The Parties intentionally did not use the phrase "shall continue to apply" in relation to Section A of NAFTA Chapter Eleven in Article 34.1, Annex 14-C, or anywhere else in CUSMA.

7. Likewise, the CUSMA Protocol does not provide a survival clause. It provides that the CUSMA supersedes NAFTA "without prejudice to those provisions set forth in the CUSMA that refer to provisions of the NAFTA". It is impermissible to read into the "without prejudice" phrase survival commitments for Section A of NAFTA Chapter Eleven, Article 1502(3) and Article 1503(2)(a) that do not exist.

8. Instead, as explained in the next section, the NAFTA Parties negotiated and set out a specific remedy for investors holding a "legacy investment" in CUSMA Annex 14-C (Legacy Investment Claims and Pending Claims). Annex 14-C provides for the Parties' consent to the submission of a claim to arbitration in accordance with NAFTA Section B with respect to a legacy investment for three years following NAFTA's termination. It does not provide for the survival of the substantive obligations set out in Section A of Chapter Eleven and Chapter Fifteen; it merely allows for alleged breaches occurring prior to NAFTA's termination to be arbitrated under Section B of NAFTA Chapter Eleven for a prescribed period. The intentional absence of a survival clause in the NAFTA or CUSMA Protocol demonstrates that there was no agreement between Canada, Mexico, and the United States to extend NAFTA's investment obligations.

9. The subsequent practice of all three CUSMA Parties is evidence of the Parties' agreement that the CUSMA Protocol and CUSMA Annex 14-C do not permit claims based

[3] *See, e.g.*, Canada-China FIPA, Article 35.3, and 2012 U.S. Model Bilateral Investment Treaty, Article 22.3: "3. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments."

on an alleged NAFTA breach that occurred after the NAFTA was terminated.[4] According to VCLT Article 31(3)(b), the tribunal must take into account, "together with context, […] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

10. The tribunal in *TC Energy v. United States* was therefore correct in its finding that since the CUSMA Parties did not agree to extend Section A of NAFTA Chapter Eleven beyond 30 June 2020, no such extension may be implied through the offer to arbitrate in Annex 14-C and a claimant's request for arbitration.[5]

B. CUSMA Annex 14-C Provides a Right to Bring a Claim for Breach Only if the Breach Occurred Prior to the Termination of the NAFTA on July 1, 2020

11. CUSMA Annex 14-C prescribes the CUSMA Parties' limited consent to arbitrate claims pertaining to a "legacy investment" for a transition period of three years following CUSMA's entry into force. In particular, paragraphs 1 and 3 set out the scope of the CUSMA Parties' consent to arbitration:

---

[4] Each of the CUSMA Parties has publicly stated that it did not consent in Annex 14-C to the submission of claims for alleged breaches of NAFTA obligations that occurred after the NAFTA terminated. *See, e.g. TC Energy Corporation and TransCanada Pipelines Ltd. v. United States of America* (ICSID Case No. ARB/21/63), Mexico's Submission Pursuant to Article 1128 of NAFTA, 11 September 2023, ¶ 5; *Legacy Vulcan, LLC v. United Mexican States* (ICSID Case No. ARB/19/1), Second Submission of the United States of America, 21 July 2023, ¶¶ 8-12; *Legacy Vulcan, LLC v. United Mexican States* (ICSID Case No. ARB/19/1), Mexico's Counter-Memorial on the Ancillary Claim, 19 December 2022, ¶¶ 407-14; *Legacy Vulcan, LLC v. United Mexican States* (ICSID Case No. ARB/19/1), Mexico's Rejoinder on the Ancillary Claim, 21 April 2023, ¶¶ 258-87; *Ruby River Capital LLC v. Canada* (ICSID Case No. ARB/23/5), Contre-Mémoire sur le Fond et Mémoire sur la Compétence du Canada, 15 July 2024, ¶ 262; *Alberta Petroleum Marketing Commission v. United States of America* (ICSID Case No. UNCT/23/4), United States Memorial on Preliminary Objections, 15 October 2024, ¶ 66, fns. 86-87; *Alberta Petroleum Marketing Commission v. United States of America* (ICSID Case No. UNCT/23/4), Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128, 15 January 2025, ¶ 9; *Access Business Group LLC v. United Mexican States* (ICSID Case No. ARB/23/15), Non-Disputing Party Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128, 28 March 2025, ¶ 9; *Goldgroup Resources, Inc. v. United Mexican States*, ICSID Case No. ARB/23/4, Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128, 23 June 2025, ¶ 9; *Cyrus Capital Partners, L.P. and Contrarian Management, LLC v. United Mexican States* (ICSID Case No. ARB/23/33), Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128, 15 July 2025.

[5] *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America* (ICSID Case No. ARB/21/63), Award, 12 July 2024, ¶¶ 199-207.

> 1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under: (a) Section A of Chapter 11 (Investment) of NAFTA 1994;
>
> (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and
>
> (c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.[6]
>
> […]
>
> 3. A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.

12. Applying the general rule of treaty interpretation, the ordinary meaning of the terms above, in their context and in light of the treaty's object and purpose, confirms that CUSMA Annex 14-C does not provide the Parties' consent to arbitrate an alleged breach of the NAFTA's substantive investment provisions that occurred after the NAFTA was terminated.

13. Paragraph 3 provides that the Parties' consent to arbitrate claims for alleged breaches of specific obligations of the NAFTA "shall expire three years after the termination of NAFTA 1994". As the tribunal in *TC Energy* correctly held, the purpose of Annex 14-C was not to extend the substantive obligations in Section A of NAFTA beyond the termination of NAFTA, but only the consent for the procedural remedy provided under Section B of NAFTA.[7] Because Section A obligations ceased to apply on 30 June 2020, the offer to arbitrate contained in Article 1 of Annex 14-C is only maintained in respect of breaches that occurred prior to the expiry of NAFTA.[8]

---

[6] CUSMA Annex 14-C, paragraph 1 (footnotes 20 and 21 omitted).

[7] *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America* (ICSID Case No. ARB/21/63), Award, 12 July 2024 (*TC Energy – Award*), ¶153.

[8] *TC Energy – Award*, ¶156.

14. Under the NAFTA, an investor had three years to submit a claim to arbitration from the date of actual or presumed knowledge of the alleged breach and damage,[9] provided that it filed a Notice of Intent to submit a claim 90 days prior, and six months had elapsed since the events giving rise to the claim and its submission to arbitration.[10] Without the extension of consent in Annex 14-C, CUSMA would have deprived the right of a NAFTA investor to bring a claim for a breach that had occurred when NAFTA was in force.

15. Further, footnote 20 to Paragraph 1 of Annex 14-C of the CUSMA does not support the interpretation that NAFTA's substantive obligations extend beyond the date of termination of NAFTA. [11] Footnote 20 clearly indicates that the provisions listed, including Chapter 11 of NAFTA, "apply to such a claim", *i.e.* claims that are submitted in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and the requirements of Paragraph 1 of Annex 14-C. In other words, if a claim fails to allege a breach of an obligation under Section A of Chapter 11 (Investment) of NAFTA which occurred when such obligation was in force, it does not qualify as a "claim" within the meaning of footnote 20 to Paragraph 1. The "for greater certainty" language contained in footnote 20 cannot be interpreted to show an agreement to extend the temporal scope of Section A.[12] The ordinary meaning of these terms is rather to confirm the existence of an existing rule, not to introduce new obligations.

16. Relevant context also supports the foregoing interpretation of Annex 14-C. For instance, CUSMA Article 14.2.3 states that "this Chapter, except as provided for in Annex 14-C […] does not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement." This confirms

[9] NAFTA Articles 1116(2), 1117(2).

[10] NAFTA Articles 1119 and 1120.

[11] Footnote 20 to Paragraph 1 of Annex 14-C of the CUSMA provides the following : "For greater certainty, the relevant provisions in Chapter 2 (General Definitions), Chapter 11 (Section A) (Investment), Chapter 14 (Financial Services), Chapter 15 (Competition Policy, Monopolies and State Enterprises), Chapter 17 (Intellectual Property), Chapter 21 (Exceptions), and Annexes I-VII (Reservations and Exceptions to Investment, Cross-Border Trade in Services and Financial Services Chapters) of NAFTA 1994 apply with respect to such a claim."

[12] *TC Energy – Award*, ¶ 162,

that measures taken by a CUSMA Party prior to July 1, 2020 are subject only to NAFTA Chapter Eleven's substantive obligations, while measures taken after July 1, 2020 are subject to the substantive obligation of CUSMA Chapter 14. Otherwise, CUSMA Parties would have been subject to distinct sets of substantive obligations vis-à-vis investors and investments of the other Parties, as well as distinct dispute settlement mechanisms, under separate international trade agreements for a period of three years following CUSMA's entry into force. Such a result would run counter to the Parties' intention to have CUSMA supersede the NAFTA, as articulated in the CUSMA Preamble: the Parties "REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement."[13]

C. Footnote 21 of Annex 14-C Of CUSMA Does Not Support an Interpretation that the Consent to Arbitrate Provided under CUSMA Annex 14-C Extends to Continuous Breaches Occurring after July 1, 2020

17. Footnote 21 of Paragraph 1 of the Annex 14-C of CUSMA provides the following: "Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts)." As it is clear from its plain wording, footnote 21 addresses specific situations where an eligible Mexican or American investor has a right to claim under both Annex 14-C and paragraph 2 of Annex 14-E of CUSMA. In such cases, the United States and Mexico opted to avoid the risk of parallel arbitration based on both annexes by constraining the investor to exclusively assert the Annex 14-E claims under CUSMA.

18. Footnote 21 does not support the interpretation that the substantive protections offered by NAFTA Chapter 11 to continue to apply after July 1, 2020 for a continuing breach which commenced before the termination date. The plain wording of footnote 21

[13] CUSMA Preamble, ¶ 3. *See also*, Protocol replacing the North American Free Trade Agreement with the agreement between Canada, the United States of America, and the United Mexican States ("1. Upon entry into force of this Protocol, the CUSMA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the CUSMA that refer to provisions of the NAFTA.") (Emphasis added).

is limited to the specific situation it addresses which could arise from a measure that was adopted while NAFTA was in force and which continued after CUSMA entered into force. In such an instance, an investor could have a claim under Annex 14-C for the portion of the breach that occurred while NAFTA was in force as well as a claim under Annex 14-E for the portion of the breach that occurred after CUSMA entered into force. The U.S. argued in *TC Energy* that in such cases, footnote 21 operates to restrict such claimants to relying on Annex 14-E, and the CUSMA's substantive obligations.[14] This interpretation was confirmed by the tribunal in *TC Energy*, which noted that "[f]ootnote 21 does therefore not necessarily presuppose that Chapter 11 remains in force after 30 June 2020: the parties may have wanted to avoid the uncertainties described above and the potential parallel arbitrations."[15]

19. An interpretation of Annex 14-C that would allow claims for breaches that post-date the termination of NAFTA would run counter to Article 13 of the ILC Articles which reads "[a]n act of a State does not constitute a breach of an international obligation *unless the State is bound by the obligation in question at the time the act occurs*"[16] This is also contrary to Article 70.1 VCLT, which provides that "(1) [u]nless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (a) releases the parties from any obligation further to perform the treaty". The NAFTA Parties have been released from their substantive obligations under Section A of Chapter 11 of NAFTA since July 1st , 2020 and a measure adopted while the NAFTA was in force, and which continues to apply after the

[14] *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America (II), ICSID Case No. ARB/21/63*, Respondent's Reply to Claimants' Observations on Respondent's Request for Bifurcation, 2 March 2023, ¶ 31

[15] *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America* (ICSID Case No. ARB/21/63), 12 July 2024, ¶ 167. The tribunal in *TC Energy* further held that in case of a continuous breach, a tribunal composed under NAFTA would not have jurisdiction to assess parts of that breach which occurred after the NAFTA termination "The Claimants have in this respect pointed to what they view as the absurdity of an outcome preventing a claimant having suffered a continuous or composite breach from recovering the largest part of its loss when it was suffered under NAFTA. It is true that a NAFTA tribunal would in case of a continuous or composite breach have no jurisdiction to assess the parts of that breach occurring after the NAFTA termination."

[16] The International Law Commission's Articles on State Responsibility, Article 13.

entry into force of CUSMA, can only constitute a breach of NAFTA and form the basis of a claim under Annex 14-C if the breach in question materialized before July 1st, 2020, regardless of the continued application of the measure past that date.

III. NAFTA ARTICLE 1116(1) – TIME BAR

20. Article 1116(2) requires an investor to submit a claim to arbitration within three years of the date on which the investor "first acquired, or should have acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." All parties to the NAFTA have acknowledged that the inclusion of the word "first" before the phrase "acquired knowledge" was a deliberate drafting choice intended to mark the date on which knowledge is acquired.[17]

21. The limitation period provided in Article 1116(2) has been described as a "clear and rigid limitation defense, which […] is not subject to any suspension, prolongation or other qualification."[18] NAFTA tribunals have held that neither a continuing breach nor the occurrence of similar or related acts or omissions may renew the limitation period under Article 1116(2).[19] Where a series of similar and related actions by a respondent state is at stake, a claimant cannot extend the limitation period by basing its claim on the most recent breach, as that would "render the limitations provisions ineffective".[20]

---

[17] *Merrill & Ring Forestry L.P. v. Canada* (UNCITRAL) 1128 Submission of the United States, 14 July 2008, ¶ 5, RLA-17; (emphasis in original). *See also*, on *Merrill & Ring Forestry L.P. v. Canada* (ICSID Case No. UNCT/07/1) Mexico's 1128 Submission, 2 April 2009. *See also*, *DIBC v. Government of Canada* (UNCITRAL, PCA Case No. 2012-25), Canada's Memorial on Jurisdiction and Admissibility, 15 June 2013, ¶¶ 192-193.

[18] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (NAFTA/UNCITRAL), Decision on Objections to Jurisdiction, 20 July 2006, ¶ 29. *Marvin Roy Feldmand Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award, 16 December 2002, ¶ 63 ("NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defence which, as such, is not subject to any suspension […], prolongation or other qualification. Thus the NAFTA legal system limits the availability of arbitration within the clear-cut period of three years.").

[19] *Apotex Inc. v. United States of America* (ICSID Case No. UNCT/10/2), Award on Jurisdiction and Admissibility, 14 June 2013 ("Apotex – Award on Jurisdiction and Admissibility"), ¶¶ 325, 327.

[20] *Grand River Enterprises Six Nations, Ltd. v. United States* (NAFTA/UNCITRAL), Decision on Objections to Jurisdiction, 20 July 2006, ¶ 81.

22. Furthermore, knowledge that the investor or investment has suffered some damage suffices for the limitation period to start running even though the full extent of the damage is not yet known.[21] Once an investor first acquires (or should have first acquired) knowledge of breach and that they have incurred loss or damage, a continuing course of conduct by the host State does not renew the limitation period in Article 1116(2).

IV. NAFTA ARTICLES 1102 AND 1103

A. The Meaning of "Like Circumstances" under NAFTA Articles 1102 and 1103

23. NAFTA Article 1102 requires a NAFTA Party to accord to "investors" and "investments of investors" of another NAFTA Party treatment "no less favourable" than it accords, in like circumstances, to its own investors or investments. NAFTA Article 1103 requires a NAFTA Party to give investors and investments of another NAFTA Party treatment that is no less favorable than the treatment it accords, in like circumstances, to investments and investors of another NAFTA Party or of a non-Party. The only difference in the language of Articles 1102 and 1103 is that for Article 1103, the relevant comparator is with respect to the investments and investors of a third State, as opposed to investments and investors of the host state. The test, and the burden of proving each constituent element of the test, is otherwise the same for both articles.

24. There are three distinct elements which an investor must establish to prove that a Party has acted in a manner inconsistent with its obligations under NAFTA Articles 1102 and 1103. These are : (1) the Party accorded treatment to the claimant with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other dispositions of investments; (2) the Party accorded the alleged treatment "in like

[21] *See, e.g., Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award, 11 October 2002, ¶ 87 ("A claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear."); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (NAFTA/UNCITRAL), Decision on Objections to Jurisdiction, 20 July 2006, ¶¶ 77-78; *Resolute Forest Products Inc. v. Canada* (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 165.

circumstances"; and (3) the treatment accorded to the claimant or its investment was "less favourable" than that accorded to the comparator investor or investments.[22]

25. Under the relevant test, the Tribunal must therefore look at whether treatment was accorded "in like circumstances", not whether it was accorded to "like investors". Analysing the likeness of the comparators does not simply entail looking at whether the investors operate in the same business or economic sector or pursue the same activity.[23] Determining the existence of "like circumstances" requires analyzing the entirety of the factual context, as well as the legal context in which the treatment was accorded.[24]

26. As NAFTA tribunals have noted, treatment is not accorded "in like circumstances" if differences in treatment between domestic and foreign investors or investments are plausibly connected to legitimate public policy objectives.[25] As well, if investors or investments are subject to different legal regimes, such as where they are located in different jurisdictions, tribunals have found that to weigh against a finding of "like circumstances".[26]

---

[22] *United Parcel Service of America Inc. v. Government of Canada* (ICSID Case No. UNCT/02/1) Award on the Merits, 24 May 2007, ¶ 83; *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000 ("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.

[23] *Merrill & Ring Forestry L.P. v. Government of Canada* (ICSID Case UNCT/07/1), Award, 31 March , 2010 ("Merrill & Ring – Award"), ¶ 88**.**

[24] *Pope & Talbot* (UNCITRAL), 10 April 2001 ("Pope & Talbot – Award on the Merits of Phase 2"), ¶¶ 74-79.

[25] *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Final Award, 15 November 2004; S.D. Myers –Partial Award, ¶¶ 248 and 250; Pope & Talbot – Award on the Merits of Phase 2, ¶¶ 78-79; ¶ 114; Merrill & Ring – Award, ¶ 88; *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009 ("Cargill – Award"), ¶ 206.

[26] *Grand River Enterprises Six Nations, Ltd. et al v. United States of America* (UNCITRAL) Award, 12 January 2011, ¶ 166; UPS – Award, ¶ 116; *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Award, 25 August 2014 ("Apotex III –Award"), ¶¶ 8.15, 8.42, and 8.54.

V. NAFTA ARTICLE 1105

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

27. Article 1105(1) requires the Parties to accord to investments of investors of another Party customary international law minimum standard of treatment. This is confirmed by the NAFTA Free Trade Commission's July 31, 2001 Note of Interpretation ("FTC Note"), which state:

> 2. Minimum Standard of Treatment in Accordance with International Law
>
> 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.
>
> 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).

28. 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 tribunals constituted under NAFTA Chapter Eleven.[27]

[27] NAFTA Article 1131(2) (Governing Law) 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*, *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Award, 8 June 2009 ("Glamis – Award"), ¶ 599; ; *Methanex Corporation v. United States of America* (UNCITRAL) Final Award, 3 August 2005 ("Methanex – Final Award"), Part IV, Chapter C, ¶ 20; *Mondev International Ltd. v. The United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 ("Mondev –Award"), ¶ 100; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), 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*

29. The reference to customary international law in the FTC Note confirms that Article 1105 refers to an objective standard of treatment for investors, the minimum standard of treatment at customary international law,[28] which is a "floor below which treatment of foreign investors must not fall.[29]

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

30. It is well established that a disputing party alleging a rule of customary international law bears the burden of proving its existence.[30] To establish that a rule is part of the minimum standard of treatment at customary international law, a claimant must 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*).[31]

Inc. v. Government of Canada (ICSID Case No. ARB(AF)/12/3) Award, 6 March 2018 ("Mercer – Award"), ¶ 7.50.

[28] 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 and 276; *Crompton (Chemtura) Corp. v. Government of Canada* (UNCITRAL) Award, 2 August 2010 ("Chemtura – Award"), ¶ 121; *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

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

[30] Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States), [1952] I.C.J Reports 176, Judgment, p. 200, citing Colombian-Peruvian Asylum Case, [1950] I.C.J Reports, 266, Judgment, p. 276; 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.").

[31] *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, Judgment, 20 February 1969 ("North Sea Continental Shelf – Judgment"), ¶ 74; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Reports 14, Judgment, 26 November 1984, ¶ 207: ("[F]or 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

31. Although investment arbitration awards may contain valuable analysis of State practice and *opinio juris* in relation to a particular rule of custom, they cannot themselves substitute for actual evidence of State practice and *opinio juris*. As the Tribunal in *Glamis Gold* 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."[32]

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

32. 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. On the contrary, the International Court of Justice, in *Obligation to Negotiate Access to Pacific Ocean* (Bolivia v. Chile), recognized that the principle of legitimate expectations does not exist in general international law.[33] 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.

33. NAFTA tribunals have rejected the proposition that the minimum standard of treatment protects against any action that is inconsistent with an investor's legitimate expectations.[34] NAFTA Parties have also taken the position that the concept of legitimate

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'").

[32] Glamis – Award, ¶ 605. See also, Cargill – 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.").

[33] *Obligation to Negotiate Access to Pacific Ocean* (Bolivia v. Chile) (Judgment of 1 Oct. 2018) ¶¶ 160–2.

[34] 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." See , *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, (ICSID Case No.

expectations is not a component element of the element of 'fair and equitable treatment' under customary international law that gives rise to an independent host State obligation.[35]

34. Therefore, the mere fact that a State regulates in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, cannot, without more, fall below the customary international law minimum standard of treatment.[36] 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." [37]

D. NAFTA Article 1105 Does Not Extend Beyond the Physical Protection and Security of Investments

35. The full protection and security ("FPS") standard at customary international law was historically "developed in the context of physical protection and security of the company's officials, employees or facilities",[38] and "notions of 'protection and constant security' or 'full protection and security' in international law have traditionally been associated with situations where the physical security of the investor or its investment is

ARB(AF)/07/04), Decision on Liability and on Principles of Quantum (redacted), 22 May 2012, and on Principles of Quantum, ¶ 152; *Glamis Gold, Ltd. v. United States of America, Final* Award, 21 November , 2022, ¶ 621; *Grand River Enterprises Six Nations, Ltd. et al v. United States of America* (UNCITRAL) Award, 12 January 2011, ¶ 140; Merrill & Ring – Award, ¶ 233.

[35] *See*, *Lone Pine v. Canada* (ICSID Case No. UNCT/15/2), US Submission on NAFTA article 1128, 16 August 2017, ¶ 19.30 *infra*. *See also*, *Espíritu Santo Holdings, LP and L1bre Holding, LLC v. United Mexican States* (ICSID Case No. ARB/20/13), Canada 1128 Submission, 21 March 2023, ¶¶ 12-14. *Odyssey Marine Exploration, Inc. v. United Mexican States* (ICSID Case No. UNCT/20/1), Canada 1128 Submission, 2 November 2021, ¶¶ 19-21.

[36] *Mobil Investments et al. v. Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶ 153.

[37] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* (ARB(AF)97/2) Award, 1 November 1999 ("Azinian – Award"), ¶ 83.

[38] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Award, 22 May 2007, ¶¶ 284-287 "There is no doubt that historically this particular standard has been developed in the context of physical protection and security of the company's officials, employees or facilities"; *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16) Award, 28 September 2007, ¶¶ 321-324. See also, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Award, 19 January 2007, ¶¶ 258-259.

compromised."[39] Numerous investment tribunals have recognized that the FPS standard is intended to provide physical protection and security for investments.[40] The obligation incumbent on the host state under the FPS standard is an obligation of due diligence, as opposed to strict liability.[41]

36. The NAFTA Parties' treaty practice also confirms the shared understanding that the FPS obligation does not extend beyond the obligation to provide the level of police protection required under customary international law, i.e. physical protection and security of foreign investors and their investments.[42]

[39] *BG Group Plc. v. The Republic of Argentina* (UNCITRAL), Final Award, 24 December 2007 ("BG Group– Final Award"), ¶ 324.

[40] *Saluka Investments B.V. (The Netherlands) v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006, ¶¶ 483-484; BG Group – Final Award, ¶¶ 323-328; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikayson Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16) Award, 29 July 2008, ¶ 668; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal, S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/19); *AWG Group v. The Argentine Republic* (UNCITRAL) Decision on Liability, 30 July 2010, ¶ 179; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1) Award, 22 September 2014, ¶¶ 622-623: ("While some investment treaty tribunals have extended the concept of full protection and security to an obligation to provide regulatory and legal protections, the more traditional, and commonly accepted view, as confirmed in the numerous cases cited by Respondent is that this standard of treatment refers to protection against physical harm to persons and property.").

[41] *Saluka Investments BV v. Czech Republic* (UNCITRAL, Partial Award of 17 March 2006) ¶ 484; *AWG Group Ltd. v. The Argentine Republic* (UNCITRAL), Decision on Liability, 30 July 2010, ¶¶162-164.

[42] See: CUSMA, Article 14.6(2)(b) ("The obligations in paragraph 1 to provide … 'full protection and security' requires each Party to provide the level of police protection required under customary international law.").

September 5, 2025

Respectfully submitted
on behalf of Canada,

[Signed]

Sylvie Tabet
Dayeon Min

Global Affairs Canada
Trade Law Bureau
125 Sussex Drive
Ottawa, Ontario
CANADA K1A 0G2