

IN THE ARBITRATION UNDER
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT,
THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES,
AND CANADA,
AND THE ICSID ARBITRATION RULES

SILVER BULL RESOURCES, INC.

Claimant

-and-

UNITED MEXICAN STATES,

Respondent.

ICSID CASE NO. ARB/23/24

SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 1128 of the North American Free Trade Agreement (“NAFTA”), Article 14.D.7(2) of the United States-Mexico-Canada Agreement (“USMCA”), and Section 27 of Procedural Order No. 1, the United States of America makes this submission on questions of interpretation of the NAFTA and the USMCA. The United States does not take a position in this submission on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.¹

¹ 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.

USMCA Annex 14-C

2. A State's consent to arbitration is paramount.² Indeed, given that consent is the “cornerstone” of jurisdiction in investor-State arbitration,³ it is axiomatic that a tribunal lacks jurisdiction in the absence of a disputing party's consent to arbitrate.⁴

3. Paragraph 1 of USMCA Annex 14-C provides the USMCA Parties' consent to the submission of claims for breaches of certain NAFTA obligations that allegedly occurred after the NAFTA entered into force and before it was terminated. That paragraph states:

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

² See, e.g., ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 74 (2009) (“Arbitral tribunals constituted to hear international or transnational disputes are creatures of consent. Their source of authority must ultimately be traced to the consent of the parties to the arbitration itself.”); *AsiaPhos Ltd. & Norwest Chemicals Pte Ltd. v. People's Republic of China*, ICSID Case No. ADM/21/1, Award ¶ 59 (Feb. 16, 2023) (“[T]he jurisdiction of any arbitral tribunal should be based on the clear and unambiguous consent of both parties to have their dispute resolved by arbitration. This applies, in particular, in investment disputes where one of the parties is a sovereign State, which generally enjoys jurisdictional immunity from being sued in any kind of proceedings outside of its own State courts. Only where a State has waived its jurisdictional immunity by expressing its consent to have a dispute resolved by international arbitration in a clear and unambiguous manner does an arbitral tribunal have jurisdiction to decide on that dispute.”) (internal citations omitted).

³ As explained by the Executive Directors of the International Bank for Reconstruction and Development (World Bank) when submitting the then-draft ICSID Convention to the World Bank's Member Governments, “[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre.” Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ¶ 23 (Mar. 18, 1965).

⁴ *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction ¶ 71 (July 15, 2016) (“It is axiomatic that the Tribunal's jurisdiction must be founded upon the existence of a valid arbitration agreement between Renco and Peru.”). See also CHRISTOPH SCHREUER, *Consent to Arbitration*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 831 (Peter Muchlinski et al., eds. 2008) (explaining that “[l]ike any form of arbitration, investment arbitration is always based on agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal's jurisdiction.”); CHRISTOPHER F. DUGAN ET AL., *INVESTOR STATE ARBITRATION* 219 (2008) (explaining also that “[t]he consent of the parties is the basis of the jurisdiction of all international arbitration tribunals”).

inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.⁵

Paragraph 3 of Annex 14-C provides that claims may be submitted under Paragraph 1 for three years after the NAFTA's termination.⁶

4. Consent to arbitration in Annex 14-C was limited to claims alleging breach of obligations under the NAFTA. Those obligations terminated on July 1, 2020, when the NAFTA was superseded by the USMCA. There could be no breach of the NAFTA's obligations after it terminated because the NAFTA no longer imposed obligations on the Parties. As explained in Article 13 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, "[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."⁷ Thus, Annex 14-C necessarily permits only claims for breaches of the NAFTA that are alleged to have occurred while the NAFTA was in force. The USMCA Parties did *not* consent in Annex 14-C to the submission of claims based on conduct that occurred *after* the NAFTA terminated.⁸

5. Paragraphs 1 and 2 of Annex 14-C closely resemble NAFTA Articles 1116(1)/1117(1) and 1122.⁹ Long before they began negotiating the USMCA, the United States, Canada, and Mexico all agreed that the text of these NAFTA provisions functioned to bar claims based on events occurring while the NAFTA was not in force.¹⁰ The tribunal in *Feldman v. United*

⁵ Agreement Between the United States of America, the United Mexican States, and Canada ("USMCA") Annex 14-C ¶ 1 (footnotes omitted).

⁶ *See id.* ¶ 3.

⁷ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 13, U.N. Doc. A/56/10 (2001).

⁸ *See TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America*, USMCA/ICSID Case No. ARB/21/63, Award ¶ 177 (July 12, 2024) ("*TC Energy Award*") ("[T]he ordinary meaning of Annex 14-C is that consent to arbitrate was established until 30 June 2023 for facts capable of constituting a breach of NAFTA while NAFTA was in force.").

⁹ A detailed analysis of these similarities is available in the U.S. submissions in *TC Energy. TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America*, USMCA/ICSID Case No. ARB/21/63, U.S. Memorial on Preliminary Objection ¶¶ 67–71 (June 12, 2023).

¹⁰ For Canada: *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Submission of the Government of Canada ¶ 18 (Oct. 6, 2000) ("[I]nvestors are limited as to the claims they may

Mexican States reached the same conclusion more than 20 years ago, explaining: “Since NAFTA, and a particular part of NAFTA at that, delivers the only normative framework within which the Tribunal may exercise its jurisdictional authority, the scope of application of NAFTA in terms of time defines also the jurisdiction of the Tribunal *ratione temporis*.”¹¹ Scholars have also long been in accord on this point.¹² There is no reason to interpret the nearly identical language in Annex 14-C any differently.

6. Whether claims are based on events occurring before the NAFTA entered into force or after it terminated, the jurisdictional flaw is the same: the NAFTA’s obligations were not binding

bring. They may bring only claims arising from a breach of NAFTA. . . . A measure may only potentially violate NAFTA if the measure is effective or continues to be effective on or after the NAFTA entered into force, January 1, 1994.”). For *Mexico: Bayview Irrigation District v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/1, Mexico’s Memorial on Jurisdiction ¶ 120 n.90 (Apr. 19, 2006) (“[A]lleged acts or omissions of Mexico that occurred before the entry into force of the NAFTA on 1 January 1994 are beyond the Tribunal’s jurisdiction *ratione temporis*.”); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Mexico’s Counter-Memorial on Preliminary Questions ¶ 232 (Sept. 8, 2000) (“It is open to an investor of another Party to claim compensation (subject to compliance with Section B, including the applicable limitation period) for breaches of Section A occurring after NAFTA’s entry into force, whether they are entirely ‘new’ measures or continuing measures that became breaches of Section A when NAFTA entered into force. However, Chapter Eleven does not entitle an investor of another Party to claim compensation ‘for loss or damage by reason of, or arising out of’ an obligation under Section A before such obligations came into existence.”) (emphasis in original). For the *United States: Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, U.S. Rejoinder on Competence and Liability at 5 (Oct. 1, 2001) (“[I]t is now undisputed that this Tribunal is competent to hear only claims for alleged breaches of Chapter Eleven based on acts or omissions of the United States that occurred after NAFTA’s entry into force.”); *Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, U.S. Counter-Memorial on Competence and Liability at 21 (June 1, 2001) (“[A]s the *Feldman* tribunal correctly found, because no Party was bound by an obligation under the NAFTA prior to January 1, 1994, acts or omissions that took place prior to that date cannot constitute breaches of the NAFTA.”).

¹¹ *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶ 62 (Dec. 6, 2000).

¹² See, e.g., Meg Kinnear et al., *Article 1116 – Claim by an Investor of a Party on its Own Behalf*, in INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 at 1116-28 (2006) (“In *Feldman v. Mexico*, the tribunal made clear that the ‘scope of application of NAFTA in terms of time’ defined the jurisdiction of the tribunal *ratione temporis*. It held that no obligations adopted under NAFTA existed before January 1, 1994, and thus its jurisdiction did not extend before that date.”) (internal citations omitted); BORZU SABAHI ET AL., INVESTOR-STATE ARBITRATION 423 ¶ 12.28 (2d ed. 2019) (“Where the BIT dispute resolution provision limits the scope of admissible claims to violations of the treaty’s substantive provisions, there is no practical difference between temporal jurisdiction and the temporal application of substantive treaty provisions.”); CHRISTOPH H. SCHREUER, ET AL., THE ICSID CONVENTION: A COMMENTARY, *Article 25 - Jurisdiction* ¶ 510 (2d ed. 2009) (“A clause in a treaty or in legislation providing for consent may be broad and refer to investment disputes in general terms. Or it may be restricted to disputes concerning alleged violations of the document containing the consent. If consent to arbitration contained in a treaty is limited to violations of that treaty, the date of the treaty’s entry into force is also necessarily the date from which acts and events are covered by consent to jurisdiction. For instance, under the NAFTA and under the ECT the scope of the consent to arbitration is limited to claims arising from alleged breaches of the respective treaties. In that case the entry into force of the substantive law also determines the tribunal’s jurisdiction *ratione temporis* since the tribunal may only hear claims for violation of that law.”) (internal citations omitted).

on the Parties at the relevant time and, accordingly, a claimant cannot allege a breach of those obligations. The *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States* (“*TC Energy*”) tribunal concurred: “the situation in this case is not conceptually different than that which led the *Feldman* tribunal to decline jurisdiction: for the same reasons why a treaty-based tribunal has no jurisdiction on breaches pre-dating the treaty, it equally lacks jurisdiction on breaches post-dating its termination.”¹³

7. The NAFTA terminated and the USMCA entered into force on July 1, 2020.¹⁴ The default position in customary international law, reflected in Article 70(1)(a) of the Vienna Convention on the Law of Treaties (“VCLT”), is that “[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 . . . releases the parties from any obligation further to perform the treaty.”¹⁵

8. The NAFTA did not contain a survival provision binding the Parties to continue performing its obligations for a period post-termination. Nor did the USMCA Parties make such a commitment, explicitly or implicitly, with respect to the NAFTA’s obligations in the USMCA. Thus, once the NAFTA terminated and the USMCA entered into force, the USMCA Parties ceased to be bound by the NAFTA’s obligations, including the substantive investment obligations in Section A of NAFTA Chapter 11. Accordingly, because these obligations terminated upon the NAFTA’s termination, there can be no breach based on post-termination

¹³ *TC Energy* Award ¶ 207.

¹⁴ Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada ¶ 1 (“Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA.”). *See also* USMCA Annex 14-C, ¶¶ 3, 5-6 (discussing the “termination of NAFTA 1994”).

¹⁵ Vienna Convention on the Law of Treaties, art. 70(1)(a), May 23, 1969, 1155 U.N.T.S. 331 (“VCLT”). Although the United States is not a party to the VCLT, 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).

conduct and no claim based on such conduct can be submitted to arbitration under Paragraph 1 of Annex 14-C.¹⁶

9. Annex 14-C did not extend the NAFTA's substantive investment obligations. As noted above, paragraphs 1 and 2 of Annex 14-C closely resemble NAFTA Articles 1116(1)/1117(1) and 1122, which are part of the investor-State dispute resolution framework established in Section B of NAFTA Chapter 11, and are not part of the substantive investment obligations detailed in NAFTA Chapter 11, Section A. As the *TC Energy* tribunal explained:

The purpose of Annex 14-C to extend the consent of NAFTA parties to arbitrate claims that arose prior to NAFTA's termination is reflected in the treaty structures of USMCA and NAFTA, which both include a set of substantive rules for the treatment of investments, found in the body of Chapter 14 of USMCA and Section A of Chapter 11 in NAFTA, and a set of jurisdictional and procedural rules for the arbitration of disputes concerning the substantive rules, found in Annex 14-C, 14-D, and 14-E of USMCA and Section B of Chapter 11 in NAFTA.¹⁷

10. The tribunal therefore concluded that "Annex 14-C . . . simply sets forth USMCA parties' consent to arbitrate certain claims," and "Annex 14-C addresses only procedural matters and does not impose substantive investment obligations."¹⁸

11. Further, Annex 14-C must be interpreted in light of the object and purpose of the treaty in which it appears, as reflected in VCLT Article 31(1).¹⁹ The USMCA Parties expressly resolved

¹⁶ *TC Energy Award* ¶ 146 ("[T]he USMCA parties could have agreed to make an exception to [the] general rule [under VCLT Article 70(1)] by extending the offer to arbitrate, by extending the substantive provisions of NAFTA, or both. The ordinary terms of Annex 14-C indicate that they agreed to extend the offer to arbitrate. They did however not agree to also extend Section A."); *id.* ¶ 151 ("Annex 14-C therefore establishes an exception to the expiry of Chapter 11. Because the scope of Annex 14-C is procedural (the offer to arbitrate), that exception has to be understood as an exception to the expiry of the offer to arbitrate. On the face of the text of Annex 14-C, it cannot be also understood as an exception to the termination of Section A (hence a provision operating as a sunset clause based on which Section A would have been extended for three years)."); *id.* ¶ 152 ("Annex 14-C is therefore only an exception to the expiration of NAFTA in respect to the offer to arbitrate. It is not an exception to the termination of Section A.").

¹⁷ *Id.* ¶ 93.

¹⁸ *Id.* ¶ 94.

¹⁹ VCLT, art. 31(1) provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

in the Preamble to “REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement” to support trade and economic growth in the region.²⁰ The USMCA Protocol similarly states that the USMCA “shall supersede the NAFTA.”²¹ Among other changes, the USMCA included updated investment obligations and a new investor-State dispute settlement regime in Chapter 14 that were different in scope than those in the NAFTA. The ordinary meaning of Annex 14-C is consistent with the USMCA’s object and purpose because it guarantees that claims based on conduct occurring after the USMCA’s replacement of the NAFTA will be governed by the substantive investment obligations and dispute settlement regime in USMCA Chapter 14.

12. The United States has explained in more detail its interpretation of Annex 14-C to the USMCA in its submissions in support of its preliminary objection in [*TC Energy Corp. & TransCanada PipeLines Limited v. United States*, ICSID Case No. ARB/21/63](#), which are available on the ICSID website. The tribunal in *TC Energy* upheld the U.S. preliminary objection in a thorough and well-reasoned award confirming the interpretation of Annex 14-C set forth above.²²

13. The three USMCA Parties all agree that Annex 14-C permits only claims based on conduct occurring while the NAFTA was in force. In addition to its submissions in the *TC Energy* case, the United States has also taken this position in the *Alberta Petroleum Marketing Commission v. United States* (“APMC”), *Legacy Vulcan v. United Mexican States* (“Legacy Vulcan”), *Amerra Capital Management and others v. United Mexican States*, *Coeur Mining, Inc. v. United Mexican States*, *Access Business Group LLC v. United Mexican States* (“Access Business”), *Goldgroup Resources, Inc. v. United Mexican States*, and *Cyrus Capital Partners v. United Mexican States* (“Cyrus Capital Partners”) arbitrations.²³ Mexico has expressed its

²⁰ Preamble to the USMCA ¶ 3.

²¹ Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada ¶ 1.

²² See *supra* note 8.

²³ *Alberta Petroleum Marketing Commission v. United States of America*, USMCA/ICSID Case No. UNCT/23/4, U.S. Memorial on Its Preliminary Objections ¶¶ 9-98 (Oct. 15, 2024); *Legacy Vulcan, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB/19/1, Second Submission of the United States of America ¶¶ 8-12 (July 21, 2023); *Amerra Capital Management and others v. United Mexican States*, USMCA/ICSID Case No. UNCT/23/1,

agreement with the U.S. position in the *TC Energy, Legacy Vulcan, Cyrus Capital Partners, APMC*, and *Access Business* arbitrations.²⁴ Canada likewise confirmed its agreement with this interpretation of Annex 14-C in *APMC, Access Business*, and *Ruby River v. Canada*, where it observed that there is “consensus among the USMCA Parties” on this issue.²⁵

14. VCLT Article 31(3) reflects the important role that the States Parties play in the interpretation of their treaties by requiring interpreters to take into account “(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;” and “(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”²⁶

Submission of the United States of America ¶¶ 2-9 (Dec. 17, 2024); *Coeur Mining, Inc. v. United Mexican States*, USMCA/ICSID Case No. UNCT/22/1, Submission of the United States of America ¶¶ 2-6 (Feb. 12, 2024); *Access Business Group LLC v. United Mexican States*, USMCA/ICSID Case No. ARB/23/15, Submission of the United States of America ¶¶ 2-13 (Mar. 28, 2025); *Goldgroup Resources, Inc. v. United Mexican States*, USMCA/ICSID Case No. ARB/23/4, Submission of the United States of America ¶¶ 4-18 (June 23, 2025); *Cyrus Capital Partners, L.P. and Contrarian Capital Management, LLC, v. United Mexican States*, USMCA/ICSID Case No. ARB/23/33, Submission of the United States of America ¶¶ 2-15 (July 15, 2025).

²⁴ See, e.g., *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America*, USMCA/ICSID Case No. ARB/21/63, Mexico’s Submission Pursuant to Article 1128 of NAFTA ¶ 5 (Sep. 11, 2023) (“This consent [in Annex 14-C] is limited to the submission of a ‘claim’ alleging a ‘breach of an obligation under ... Section A of Chapter 11 (Investment) of NAFTA 1994.’ A breach of a Treaty can only occur if that Treaty is in force. The NAFTA ceased to be in force as of July 1, 2020, and therefore a violation of Section A of Chapter 11 (Investment) of NAFTA was no longer possible as of that date.”); *Legacy Vulcan, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB/19/1, Mexico’s Counter-Memorial on the Ancillary Claim ¶¶ 407-14 (Dec. 19, 2022); *Legacy Vulcan, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB/19/1, Mexico’s Rejoinder on the Ancillary Claim ¶¶ 258-87 (Apr. 21, 2023); *Cyrus Capital Partners, L.P. and Contrarian Capital Management v. United Mexican States*, USMCA/ICSID Case No. ARB/23/33, Mexico’s Memorial on Jurisdiction ¶¶ 77-90 (June 4, 2024); *Alberta Petroleum Marketing Commission v. United States of America*, USMCA/ICSID Case No. UNCT/23/4, Mexico’s Submission Pursuant to Article 1128 of NAFTA ¶¶ 3-33 (Jan. 15, 2025); *Access Business Group LLC v. United Mexican States*, USMCA/ICSID Case No. ARB/23/15, Mexico’s Memorial on Objections to Jurisdiction ¶¶ 70-71 (Nov. 29, 2024).

²⁵ *Ruby River Capital LLC v. Government of Canada*, USMCA/ICSID Case No. ARB/23/5, Contre-Mémoire Sur Le Fond Et Mémoire Sur La Compétence Du Canada ¶ 262 (July 15, 2024) (English translation) (French original: “d’un consensus parmi les Parties à l’ACEUM”). See also *id.* ¶ 182 (“Annex 14-C of the USMCA . . . does not allow [Claimant] to submit to arbitration a claim relating to events giving rise to liability after June 30, 2020.”) (English translation) (French original: “l’annexe 14-C de l’ACEUM . . . ne lui permet pas de soumettre à l’arbitrage une plainte portant sur des faits générateurs de responsabilité postérieurs au 30 juin 2020.”); *Alberta Petroleum Marketing Commission v. United States of America*, USMCA/ICSID Case No. UNCT/23/4, Canada’s Submission Pursuant to Article 1128 of NAFTA ¶¶ 4-18 (Jan. 15, 2025); *Access Business Group LLC v. United Mexican States*, USMCA/ICSID Case No. ARB/23/15, Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128 ¶¶ 4-16 (Mar. 28, 2025).

²⁶ VCLT, art. 31(3).

15. In accordance with customary international law as reflected in VCLT Article 31(3), the Tribunal must take into account the USMCA Parties’ common understanding of Annex 14-C.²⁷

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

16. NAFTA Articles 1116(2) and 1117(2) provide that an investor may not make a claim if “more than three years have elapsed from the date on which the [investor/enterprise] first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the [investor/enterprise] has incurred loss or damage.”

17. NAFTA Articles 1116(2) and 1117(2) impose a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute.²⁸ Accordingly, a tribunal must find that a claim satisfies the requirements of, *inter alia*, NAFTA Articles 1116(2) and 1117(2) in order to establish a Party’s consent to (and therefore the tribunal’s jurisdiction over) an

²⁷ See, e.g., *Alicia Grace et al. v. United Mexican States*, NAFTA/ICSID Case No. UNCT/18/4, Final Award ¶¶ 473-74 (Aug. 19, 2024) (“[T]he concurring statements submitted by the Non-Disputing Parties in the course of this arbitration alongside the positions of Mexico regarding dual nationals are to be understood as subsequent practice for the purposes of Article 31(3)(b) of the VCLT. . . . [I]n light of the common understanding of the NAFTA Parties regarding the application of the dominant and effective nationality test, the Tribunal finds compelling to proceed with its jurisdictional analysis within this framework.”); *Mobil Investments Canada Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility ¶¶ 103, 104, 158, 160 (July 13, 2018) (explaining that the approach advocated by claimant had “clearly been rejected by all three NAFTA Parties in their practice subsequent to the adoption of NAFTA,” as evidenced by “their submissions to other NAFTA tribunals,” and that “[i]n accordance with the principle enshrined in Article 31(3)(b) of the Vienna Convention on the Law of Treaties, 1969, the subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the interpretation of the treaty, is entitled to be accorded considerable weight”); *Canadian Cattlemen for Fair Trade v. United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction ¶¶ 188-89 (Jan. 28, 2008) (explaining that “the available evidence cited by the Respondent,” including submissions by the NAFTA Parties in arbitration proceedings, “demonstrates to us that there is nevertheless a ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications’”).

²⁸ See, e.g., *Resolute Forest Products, Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility ¶¶ 82-83 (Jan. 30, 2018) (“*Resolute* Decision on Jurisdiction and Admissibility”) (holding that compliance with the time bar specified in NAFTA Articles 1116 and 1117 “goes to jurisdiction”); *Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility ¶¶ 314, 335 (June 14, 2013) (“*Apotex* Award”) (parties treated the United States’ time-bar objection as a jurisdictional issue, and the tribunal expressly found that NAFTA Article 1116(2) deprived it of “jurisdiction *ratione temporis*” with respect to one of the claimant’s alleged breaches); *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Procedural Order No. 2 (Revised) ¶ 18 (May 31, 2005) (finding that “an objection based on a limitation period for the raising of a claim is a plea as to jurisdiction for purposes of Article 21(4)” of the UNCITRAL Arbitration Rules (1976)). See also *Corona Materials, LLC v. Dominican Republic*, CAFTA/ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA ¶ 280 (May 31, 2016) (finding that the tribunal lacks jurisdiction due to application of the time-bar); *Berkowitz et al. v. Republic of Costa Rica*, CAFTA/ICSID Case No. UNCT 13/2, Interim Award (Corrected) ¶¶ 235-236 (May 30, 2017) (“*Berkowitz* Interim Award”) (addressing the time-bar defense as a jurisdictional issue).

arbitration claim under such provision. Because the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction,²⁹ the claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.³⁰

18. The limitations period is a “clear and rigid” requirement that is not subject to any “suspension,” “prolongation,” or “other qualification.”³¹ An investor *first* acquires knowledge of an alleged breach and loss under NAFTA Articles 1116(2) and 1117(2) as of a particular “date.” Such knowledge cannot *first* be acquired at multiple points in time or on a recurring basis. As the *Grand River* tribunal recognized,³² subsequent transgressions by a Party arising from a continuing course of conduct do not renew the limitations period once an investor knows, or should have known, of the alleged breach and loss or damage incurred thereby.³³

19. Thus, where a “series of similar and related actions by a respondent state” is at issue, an investor cannot evade the limitations period by basing its claim on “the most recent transgression” in that series.³⁴ To allow an investor to do so would “render the limitations

²⁹ *Apotex* Award ¶ 150. See also *Vito G. Gallo v. Government of Canada*, NAFTA/PCA Case No. 2008-03, Award ¶ 277 (Sept. 15, 2011) (“[A] claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional stage”); *Mesa Power Group, LLC v. Government of Canada*, NAFTA/PCA Case No. 2012-17, Award ¶ 236 (Mar. 24, 2016) (“It is for the Claimant to establish the factual elements necessary to sustain the Tribunal’s jurisdiction over the challenged measures.”); *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award ¶¶ 58-64 (Apr. 15, 2009) (summarizing relevant investment treaty arbitral awards and concluding that “if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established *prima facie*] at the jurisdictional stage”); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction ¶¶ 190-192 (Nov. 14, 2005) (finding that claimant “has the burden of demonstrating that its claims fall within the Tribunal’s jurisdiction”); *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction ¶ 79 (Apr. 22, 2005) (acknowledging claimant had to satisfy the burden of proof “required at the jurisdictional phase”).

³⁰ *Berkowitz* Interim Award ¶¶ 163, 239, 245-246.

³¹ *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction ¶ 29 (July 20, 2006) (“*Grand River* Decision on Objections to Jurisdiction”); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002) (“*Feldman* Award”); *Apotex* Award ¶ 327 (quoting *Grand River* Decision on Objections to Jurisdiction).

³² See *Grand River* Decision on Objections to Jurisdiction ¶ 81.

³³ See *Resolute* Decision on Jurisdiction and Admissibility ¶ 158 (“[W]hether a breach definitively occurring and known to the claimant prior to the critical date continued in force thereafter is irrelevant.”).

³⁴ *Grand River* Decision on Objections to Jurisdiction ¶ 81.

provisions ineffective[.]”³⁵ An ineffective limitations period would fail to promote the goals of ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential respondents and third parties. An ineffective limitations period would also undermine and in effect change the NAFTA Parties’ consent because, as noted above, the NAFTA Parties did not consent to arbitrate an investment dispute if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach and knowledge that the claimant has incurred loss or damage.

20. With regard to knowledge of “incurred loss or damage” under NAFTA Articles 1116(2) and 1117(2), a claimant may have knowledge of loss or damage even if the amount or extent of that loss or damage cannot be precisely quantified until some future date.³⁶ Moreover, the ordinary meaning of the term “incurred” is “to become liable or subject to.”³⁷ Therefore, an investor may have “incurred” loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate.³⁸

21. As noted, NAFTA Articles 1116(2) and 1117(2) require a claimant to submit a claim to arbitration within three years of the “date on which the [investor/enterprise] first acquired, or *should have first acquired*, knowledge” of (i) the alleged breach, and (ii) loss or damage incurred by the investor/enterprise. (Emphasis added.) For purposes of assessing what a claimant should have known, the United States agrees with the reasoning of the *Grand River* tribunal: “a fact is

³⁵ *Id.* Thus, although a legally distinct injury can give rise to a separate limitations period, a continuing course of conduct does not extend the limitations period. Moreover, while events taken outside of the three-year limitations period may be taken into account as “background facts” or “factual predicates[.]” such factual predicates cannot serve as the legal basis for the claim. *See Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 348 (June 8, 2009) (“*Glamis Gold* Award”).

³⁶ *See Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award ¶ 87 (Oct. 11, 2002) (“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.”).

³⁷ “Incur,” MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/incur> (last visited Aug. 29, 2025); *see also United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999) (finding that to “incur” means to “become liable or subject to” and that “a person may become ‘subject to’ an expense before she actually disburses any funds”).

³⁸ *Grand River* Decision on Objections to Jurisdiction ¶ 77; *see also Berkowitz* Interim Award ¶ 213 (finding “the date on which the claimant first acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred”).

imputed to [*sic*] person if by exercise of reasonable care or diligence, the person would have known of that fact.”³⁹ As that tribunal further explained, it is appropriate to “consider in this connection what a reasonably prudent investor should have done in connection with extensive investments and efforts such as those described to the Tribunal.”⁴⁰ Similarly, as the *Berkowitz* tribunal held, endorsing the reasoning in *Grand River* with respect to the identically worded limitations provision in the Dominican Republic-Central America Free Trade Agreement,⁴¹ “[t]he ‘should have first acquired knowledge’ test . . . is an objective standard; what a prudent claimant should have known or must reasonably be deemed to have known.”⁴²

National Treatment (Article 1102)

22. 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 and their investments “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”

23. 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 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”⁴³

³⁹ *Grand River* Decision on Objections to Jurisdiction ¶ 59.

⁴⁰ *Id.* ¶ 66 (“In the Tribunal’s view, parties intending to participate in a field of economic activity in a foreign jurisdiction, and to invest substantial funds and efforts to do so, ought to have made reasonable inquiries about significant legal requirements potentially impacting on their activities This is particularly the case in a field that the prospective investors know from years of past personal experience to be highly regulated and taxed by state authorities.”).

⁴¹ Dominican Republic-Central America Free Trade Agreement (signed at Washington Aug. 5, 2004), 43 I.L.M. 514 (CAFTA-DR).

⁴² *Berkowitz* Interim Award ¶ 209.

⁴³ *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).

24. 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.⁴⁴

25. 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.⁴⁵ As explained above in paragraphs 14-15 pursuant to the

⁴⁴ *The Loewen Group, Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 139 (June 26, 2003) (accepting that “Article 1102 [National Treatment] is direct[ed] *only* to nationality-based discrimination”) (emphasis added); *Mercer International Inc. v. Government of Canada*, NAFTA/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).

⁴⁵ 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) (“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 International 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 International Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of Mexico Pursuant to Article 1128 of NAFTA ¶ 11 (May 8, 2015) (“Mexico, Canada and the United States have consistently maintained that: the national treatment obligation is intended to prevent discrimination against investors of the other Parties (and their investments) on the basis of nationality;”); *Resolute Forest Products, Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-13, Second Submission of the United Mexican States ¶ 3 (Apr. 23, 2020) (accord). For Canada: *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Fourth Submission of the Government of Canada Pursuant to NAFTA Article 1128 ¶ 5 (Jan. 30, 2004) (Article 1102 “prohibits treatment which discriminates on the basis of the foreign investment’s nationality.”); *Mercer International 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).

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.

26. Nationality-based discrimination under Article 1102 may be *de jure* or *de facto*. *De jure* discrimination occurs when a measure on its face discriminates between investors or investments in like circumstances based on nationality. *De facto* discrimination occurs when a facially neutral measure with respect to nationality is applied in a discriminatory fashion based on nationality. A claimant is not required to establish discriminatory intent.

27. 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.

28. 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.”⁴⁶ 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, among other possible relevant characteristics. 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. Moreover, whether treatment is accorded in “like circumstances” under Article 1102 depends on the totality of the

⁴⁶ See, e.g., *Pope & Talbot Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award on the Merits of Phase 2 ¶ 75 (Apr. 10, 2001).

circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare objectives.

29. Nothing in Article 1102 requires that investors or investments of investors of a Party, 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 made by the Parties. Thus, the Parties may adopt measures that draw distinctions among entities without necessarily violating Article 1102.

Most-Favored-Nation Treatment (Article 1103)

30. The requirements for establishing a breach of Most-Favored-Nation (“MFN”) Treatment under Article 1103 are the same as for establishing a National Treatment breach under Article 1102, except that the applicable comparators are investors or investments of another Party or non-Parties.⁴⁷ Thus, as is the case under Article 1102, if a claimant does not identify such investors or investments as allegedly being in like circumstances with the claimant or its investment, no violation of Article 1103 can be established. Once it has identified comparators, the claimant then has the burden of proving that it or its investments: (1) were accorded “treatment”; (2) were in “like circumstances” with the identified comparators; and (3) received treatment “less favorable” than that accorded to the identified comparators.

31. Thus, if a claimant does not identify investors or investments of a non-Party or another Party as allegedly being “in like circumstances” with the claimant or its investment, no violation of Article 1103 can be established. Article 1103 expressly requires a claimant to demonstrate that investors or investments of another Party or a non-Party “in like circumstances” were afforded more favorable treatment. Ignoring the “in like circumstances” requirement would serve impermissibly to excise key words from the Agreement.

⁴⁷ *Mercer Award* ¶ 7.10 (“[T]he requirements for establishing a violation of NAFTA Article 1103 are the same as establishing a violation of NAFTA Article 1102, except that the applicable comparator, in like circumstances, is a foreign . . . investor or investment.”).

Minimum Standard of Treatment (Article 1105)

32. NAFTA Article 1105(1) requires each Party to “accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.” Article 1105(1) differs from other substantive obligations in NAFTA Chapter Eleven, such as those in Articles 1102, 1103, and the second paragraph of Article 1105, in that it obligates a Party to accord treatment only to “investments.”⁴⁸

33. On July 31, 2001, the Free Trade Commission (the “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.”⁴⁹ 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.”⁵⁰ 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).”⁵¹ The Commission’s interpretation “shall be binding” on tribunals established under NAFTA Chapter Eleven.⁵²

34. 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

⁴⁸ See, e.g., Meg N. Kinnear et al., *Article 1105 – Minimum Standard of Treatment*, in INVESTMENT DISPUTES UNDER NAFTA, AN ANNOTATED GUIDE TO CHAPTER 11, at 1105-17 (2006) (“Several aspects of this are notable. First, the subject of this protection is investments rather than investors. The first paragraph of Article 1105 is limited to treatment of investments, unlike the second paragraph of Article 1105, and indeed other provisions such as Article 1102 and 1103, which refer to treatment accorded to both investments and investors. This limitation was present even in the earliest drafts of what became Article 1105(1).”).

⁴⁹ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions ¶ B.1 (July 31, 2001) (“NAFTA FTC”).

⁵⁰ *Id.* ¶ B.2.

⁵¹ *Id.* ¶ B.3.

⁵² NAFTA art. 1131(2).

reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts.⁵³ The standard establishes a minimum “floor below which treatment of foreign investors must not fall.”⁵⁴

Methodology for Determining the Content of Customary International Law

35. Customary international law results from a general and consistent practice of States⁵⁵ that they follow from a sense of legal obligation.⁵⁶ “[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.”⁵⁷ A perfunctory reference to

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

⁵⁴ *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 259 (Nov. 13, 2000) (“*S.D. Myers First Partial Award*”); *Glamis Gold Award* ¶ 615 (“The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community.”); see also Edwin Borchard, *The “Minimum Standard” of the Treatment of Aliens*, 33 AM. SOC’Y OF INT’L L. PROC. 51, 58 (1939) (“Borchard, *Minimum Standard of the Treatment of Aliens*”).

⁵⁵ See, e.g., *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, 1969 I.C.J. 3, 43 (Feb. 20) (“*North Sea Continental Shelf*”) (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”); International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 8 and commentaries, U.N. Doc. A/73/10 (2018) (citing authorities) (“ILC Draft Conclusions on Identification of Customary International Law”).

⁵⁶ *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).

⁵⁷ 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

these requirements is not enough; instead, a claimant must provide evidence sufficient to establish that both requirements are met.⁵⁸ This two-element approach—State practice and *opinio juris*—is the standard approach of States and international courts, including the International Court of Justice.⁵⁹

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

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.”).

⁵⁸ See ILC Draft Conclusions on Identification of Customary International Law, Conclusion 2, Commentary ¶ 2 (“A general practice and acceptance of that practice as law (*opinio juris*) are the two constituent elements of customary international law: together they are the essential conditions for the existence of a rule of customary international law. *The identification of such a rule thus involves a careful examination of available evidence to establish their presence in any given case.*” (emphasis added)); *id.*, Conclusion 3, Commentary ¶ 2 (“Whether a general practice that is accepted as law (accompanied by *opinio juris*) exists must be carefully investigated in each case, in the light of the relevant circumstances.”); *id.* Conclusion 3, Commentary ¶ 6 (“[T]o identify the existence and content of a rule of customary international law each of the two constituent elements must be found to be present, and . . . this calls for an assessment of evidence for each element.”); PATRICK DUMBERRY, *THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105*, at 116 (2013) (“DUMBERRY, FAIR AND EQUITABLE TREATMENT STANDARD”) (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.”).

⁵⁹ 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*, 1969 I.C.J. at 44, ¶ 77); see also *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, 29, ¶ 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 ILC Draft Conclusions on Identification of Customary International Law, Conclusion 2 (“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.”).

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.⁶⁰

37. States may decide expressly by treaty as a matter of policy to extend protections under the rubric of “fair and equitable treatment” and “full protection and security” beyond that required by customary international law.⁶¹ The practice of adopting such autonomous standards is not relevant to ascertaining the content of NAFTA 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.⁶² Thus, arbitral decisions interpreting “autonomous” fair and equitable treatment and full protection and security provisions in other treaties, outside the

⁶⁰ *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*).

⁶¹ *See Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 2007 I.C.J. 582, 615, ¶ 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.”).

⁶² NAFTA FTC ¶ B.1. (“Article 1105(1) prescribes the customary international law minimum standard of treatment . . .”); *see also Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 176 (Jan. 12, 2011) (“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.

context of customary international law, cannot constitute evidence of the content of the customary international law standard required by NAFTA Article 1105(1).⁶³

38. Moreover, decisions of international courts and arbitral tribunals interpreting “fair and equitable treatment” as a concept of customary international law are not themselves instances of “State practice” for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice.⁶⁴ While the NAFTA Parties consented to allow investor-State tribunals to decide issues in dispute in accordance with the NAFTA and applicable rules of international law, they did not consent to delegate to NAFTA Chapter Eleven tribunals the authority to develop the content of customary international law, which must be determined solely through a thorough examination of State practice and *opinio juris*. Thus, the decisions of arbitral tribunals do not establish rules of customary international law, and arbitral decisions regarding the content of customary international law are only persuasive to the extent that they include an examination of State

⁶³ 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”).

⁶⁴ 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/PCA Case No. 2012-17, Second Submission of the United States of America ¶ 14 (June 12, 2015) (“*Mesa Second U.S. Submission*”) (“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/PCA Case No. 2012-17, Second Submission of Mexico Pursuant to NAFTA Article 1128 ¶ 10 (June 12, 2015) (“*Mesa Second Submission of Mexico*”) (“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/PCA Case No. 2012-17, 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.”).

practice and *opinio juris* that itself can be relied upon to identify a rule of customary international law as incorporated in NAFTA Article 1105(1).

39. As all three NAFTA Parties agree,⁶⁵ 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*.⁶⁶ “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.”⁶⁷ Tribunals applying the minimum standard of treatment obligation in NAFTA Article 1105 have confirmed that the party seeking to rely on a rule of customary international law must establish its existence. The tribunal in *Cargill Inc. v. United Mexican States*, for example, acknowledged that:

the proof of change in a custom is not an easy matter to establish. However, *the burden of doing so falls clearly on Claimant*. If Claimant does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task. Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.⁶⁸

⁶⁵ See, e.g., *Mesa Power Group LLC v. Government of Canada*, NAFTA/PCA Case No. 2012-17, 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* Second U.S. Submission ¶ 13 (“[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* Second Submission of Mexico ¶ 9 (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 above in paragraphs 8-9, pursuant to the customary international law principles of treaty interpretation reflected in the VCLT, the Tribunal must take into account this common understanding of the Parties.

⁶⁶ *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).

⁶⁷ *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) (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. 7) (holding that the claimant had failed to “conclusively prove[]” the “existence of . . . a rule” of customary international law).

⁶⁸ *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*

40. Once a rule of customary international law has been established, a claimant must then show that the respondent State has engaged in conduct that violates that rule.⁶⁹ 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.”⁷⁰ NAFTA Chapter Eleven tribunals do not have an open-ended mandate to “second-guess government decision-making.”⁷¹ A failure to satisfy requirements of domestic law does not necessarily violate international law.⁷² Rather,

States of America, NAFTA/ICSID Case No. ARB(AF)/00/1, Award ¶ 185 (Jan. 9, 2003) (“*ADF Award*”) (“The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts.”); *Glamis Gold Award* ¶ 601 (“As a threshold issue, the Tribunal notes that it is Claimant’s burden to sufficiently” show the content of the customary international law minimum standard of treatment); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Part IV, Chapter C ¶ 26 (Aug. 3, 2005) (“*Methanex Final Award*”) (citing *Asylum (Colombia v. Peru)* for placing burden on claimant to establish the content of customary international law, and finding that claimant, which “cited only one case,” had not discharged that burden).

⁶⁹ *Feldman Award* ¶ 177 (“[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.”) (citation omitted).

⁷⁰ *S.D. Myers First Partial Award* ¶ 263. See also *Resolute Forest Products Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-13, Award ¶ 744 (July 25, 2022) (“Arbitral tribunals adjudicating fair and equitable treatment claims, whether under Article 1105 or under similar investment treaty provisions, have consistently exercised caution in approaching claims of violation of minimum treatment standards, especially in respect of State actions on matters of domestic policy that generally are treated with deference.”).

⁷¹ *S.D. Myers First Partial Award* ¶ 261 (“When interpreting and applying the ‘minimum standard,’ a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.”); *Glamis Gold Award* ¶ 779 (“It is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency.”); *Thunderbird Award* ¶ 127 (reasoning that States have “wide discretion” with respect to how they carry out policies in the context of gambling operations).

⁷² *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).”).

“something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements”⁷³ Accordingly, a departure from domestic law does not in-and-of-itself sustain a violation of NAFTA Article 1105.

Obligations that Have Crystallized into the Minimum Standard of Treatment

41. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, which is expressly addressed in NAFTA Article 1105(1), concerns the obligation to provide “full protection and security.”

42. The United States has long maintained that the obligation to accord “full protection and security” requires that each Party provide the level of police protection required under customary international law.⁷⁴ Although, as discussed above, arbitral decisions are not evidence of State practice, the vast majority of cases in which the customary international law obligation of full protection and security was found to have been breached are those in which a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien.⁷⁵

⁷³ ADF Award ¶ 190.

⁷⁴ See, e.g., U.S. 2004 and 2012 Model Bilateral Investment Treaties, art. 5 (Minimum Standard of Treatment), ¶ 2: “For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: . . . (b) ‘full protection and security’ requires each Party to provide the level of police protection required under customary international law.”

⁷⁵ See, e.g., *American Mfg. & Trading, Inc. v. Zaire*, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997), reprinted in 36 I.L.M. 1534 (1997) (failure to prevent destruction and looting of property constituted violation of protection and security obligation); *Asian Agric. Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Award (June 27, 1990), reprinted in 30 I.L.M. 580 (1991) (destruction of claimant’s property violated full protection and security obligation); *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, 1980 I.C.J. 3 (May 24) (failure to protect foreign nationals from being taken hostage violated most constant protection and security obligation); *Chapman v. United Mexican States (United States v. Mexico)*, 4 R.I.A.A. 632 (Mex.-U.S. Gen. Cl. Comm’n 1930) (lack of protection found where claimant was shot and seriously wounded); *H.G. Venable (United States v. Mexico)*, 4 R.I.A.A. 219 (Mex.-U.S. Gen. Cl. Comm’n 1927) (bankruptcy court indirectly responsible for physical damage to attached property); *Biens Britanniques au Maroc Espagnol (Reclamation 53 de Melilla - Ziat, Ben Kiran) (Spain v. Great Britain)*, 2 R.I.A.A. 729 (1925) (reasonable police protection would not have prevented mob from destroying claimant’s store). Other cases are in accord. See, e.g., *Certain Iranian Assets (Iran v. United States)*, 2023 I.C.J. 51, 116, ¶ 190 (Mar. 30) (“The Court considers that the core of the obligation to afford the most constant protection and security under the Treaty of Amity concerns the protection of property from physical harm. .

43. Another area included within the minimum standard of treatment concerns the obligation to provide “fair and equitable treatment,” which is also expressly addressed in NAFTA Article 1105(1). The “fair and equitable treatment” obligation includes, for example, the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.

Obligations that Have Not Crystallized into the Minimum Standard of Treatment

44. As noted, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. 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.⁷⁶ An investor may

. . . The Court observes that the most constant protection and security standard is of particular practical significance and relevance in the form of protection of property from physical harm by third parties.”); *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award ¶ 632 (Apr. 4, 2016) (holding that the “full protection and security” treaty standard “only extends to the duty of the host state to grant physical protection and security”); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability ¶ 173 (July 30, 2010) (holding that “the full protection and security standard primarily seeks to protect investment from physical harm”); *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award ¶ 484 (Mar. 17, 2006) (“[T]he ‘full security and protection’ clause is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force.”). *See also, e.g.*, Article 7(1) of the *Responsibility of the State for injuries caused in its territory to the person or property of aliens: Revised draft*, reprinted in F.V. GARCIA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 129, 130 (1974) (“The State is responsible for the injuries caused to an alien by illegal acts of individuals, whether isolated or committed in the course of internal disturbances (riots, mob violence or civil war), if the authorities were manifestly negligent in taking the measures which, in view of the circumstances, are normally taken to prevent the commission of such acts.”).

⁷⁶ *See, e.g.*, *Grand River* U.S. Counter-Memorial at 96 (“As a matter of international law, although an investor may develop its own expectations about the legal regime that governs its investment, those expectations do not impose a legal obligation on the State.”); DUMBERRY, FAIR AND EQUITABLE TREATMENT STANDARD 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”).

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.

45. 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.⁷⁷ As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.⁷⁸ To 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,⁷⁹ access to judicial remedies or treatment by the courts,⁸⁰ or the obligation of States to provide full

⁷⁷ 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.”).

⁷⁸ 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, *Minimum Standard of the Treatment of Aliens* at 56 (“The doctrine of absolute equality – more theoretical than actual – is therefore incompatible with the supremacy of international law. The fact is that no state grants absolute equality or is bound to grant it. It may even discriminate between aliens, nationals of different states, e.g., as the United States does through treaty in the matter of the ownership of real property in this country.”); ANDREAS ROTH, *MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS* 83 (1949) (“[T]he principle of equality has not 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.”).

⁷⁹ See, e.g., *BP Exploration Co. (Libya) Ltd. v. Libya*, 53 I.L.R. 297, 329 (Ad Hoc Arb. 1974) (“[T]he taking . . . clearly violates public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character.”); *Libyan American Oil Co. (LLAMCO) v. Libya*, 62 I.L.R. 140, 194 (Ad Hoc Arb. 1977) (“It is clear and undisputed that non-discrimination is a requisite for the validity of a lawful nationalization. This is a rule well established in international legal theory and practice.”); *Kuwait v. American Independent Oil Co. (AMINOIL)*, 66 I.L.R. 518, 585 (Ad Hoc Arb. 1982) (considering the question “whether the nationalization of Aminoil was not thereby tainted with discrimination,” but finding that there were legitimate reasons for nationalizing one company and not the other); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712(1)(b) (AM. LAW INST. 1987) (“A state is responsible under international law for injury resulting from . . . a taking by the state of the property of a national of another state that . . . is discriminatory”); *id.* at § 712 cmt. f (“Formulations of the rules on expropriation generally include a prohibition of discrimination”).

⁸⁰ 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*

protection and security and to compensate aliens and nationals on an equal basis in times of violence, insurrection, conflict or strife.⁸¹ Moreover, investor-State claims of nationality-based discrimination are governed exclusively by the provisions of Chapter Eleven that specifically address that subject (Articles 1102 and 1103), and not Article 1105(1).⁸²

46. The United States is also unaware of State practice or *opinio juris* supporting an assertion that the minimum standard of treatment under customary international law prohibits, without more, acts that could generally be described as “arbitrary” or “unreasonable.”⁸³

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 I*, 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.”).

⁸¹ 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], 529 & 538 (1975) (Basis of Discussion No. 21 includes the provision that a State must “[a]ccord to foreigners to whom damage has been caused by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance the same indemnities as it accords to its own nationals in similar circumstances.” Basis of Discussion No. 22(b) states that “[a] State must accord to foreigners to whom damage has been caused by persons taking part in an insurrection or riot or by mob violence the same indemnities as it accords to its own nationals in similar circumstances.”).

⁸² 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’s 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”).

⁸³ See, e.g., *Glamis Gold U.S. Counter-Memorial* at 216, 227 (rejecting claimant’s assertion that the minimum standard of treatment under customary international law requires a State to “refrain from acting in an arbitrary or unjust manner”); *ADF Group U.S. Post-Hearing Submission* at 21-22 (distinguishing the treaty at issue in the ICJ’s decision in *ELSI*, which included an express reference to “arbitrary” conduct, from the provision in the NAFTA requiring the minimum standard of treatment under customary international law).

Respectfully submitted,

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September 5, 2025