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 UNCITRAL ARBITRATION RULES (1976)

AMERRA CAPITAL MANAGEMENT LLC,
AMERRA AGRI FUND LP,
AMERRA AGRI OPPORTUNITY FUND LP, AND
JP MORGAN CHASE BANK NATIONAL ASSOCIATION ON BEHALF OF THE
JP MORGAN CHASE RETIREMENT PLAN,

Claimants

-and-

UNITED MEXICAN STATES,

Respondent.

ICSID CASE NO. UNCT/23/1

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA"), Article 14.D.7(2) of the United States-Mexico-Canada Agreement ("USMCA"), and Section 24 of Procedural Order No. 1, the United States of America makes this submission on questions of interpretation of the NAFTA and the USMCA. The United States does not take a position, in this submission, on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.[*]

USMCA Annex 14-C

2. Paragraph 1 of USMCA Annex 14-C provides the USMCA Parties' consent, with respect to "legacy investments," to the submission of claims for breaches of certain NAFTA obligations

[*] 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.

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:
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> (a) Section A of Chapter 11 (Investment) of NAFTA 1994;
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> (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and
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> (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.[1]

Paragraph 3 of Annex 14-C provides that claims may be submitted under Paragraph 1 for three years after the NAFTA's termination.[2]

3. The USMCA Parties did *not* consent in Annex 14-C to the submission of claims based on conduct that occurred *after* the NAFTA terminated.[3] Indeed, 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 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."[4]

[1] USMCA Annex 14-C, ¶ 1 (footnotes omitted).

[2] *See* USMCA Annex 14-C, ¶ 3.

[3] *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.").

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

4. The NAFTA terminated and the USMCA entered into force on July 1, 2020.[5] 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."[6]

5. 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 Eleven. Accordingly, because these obligations terminated upon the NAFTA's termination, there can be no breach based on post-termination conduct and no claim based on such conduct can be submitted to arbitration under Paragraph 1 of Annex 14-C.[7]

6. 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

[5] Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada ("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").

[6] Vienna Convention on the Law of Treaties ("VCLT"), art. 70(1)(a), May 23, 1969, 1155 U.N.T.S. 331. 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).

[7] *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."); ¶ 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)."); ¶ 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.").

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.[8]

7. 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 publicly available submissions in the *Alberta Petroleum Marketing Commission v. United States* and *Legacy Vulcan v. United Mexican States* arbitrations.[9] Mexico has expressed its agreement with the U.S. position in the *Legacy Vulcan* and *TC Energy* arbitrations.[10] Canada likewise confirmed its agreement with this interpretation of Annex 14-C in *Ruby River v. Canada*, where it observed that there is "consensus among the USMCA Parties" on this issue.[11]

8. VCLT Article 31(3) recognizes 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."[12]

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[8] *See supra* note 3.

[9] *Alberta Petroleum Marketing Commission v. United States of America*, USMCA/ICSID Case No. UNCT/23/4, U.S. Memorial on Its Preliminary Objection ¶¶ 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).

[10] *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).

[11] *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: "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.").

[12] VCLT, art. 31(3).

9. In accordance with VCLT Article 31(3), the Tribunal must take into account the USMCA Parties' common understanding of Annex 14-C.[13]

Definition of "legacy investment"

10. The USMCA Parties' consent in Paragraph 1 of Annex 14-C is limited to claims "with respect to a legacy investment." Paragraph 6(a) of Annex 14-C defines "legacy investment" as "an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement." Paragraph 6(b) further provides that "'investment', 'investor', and 'Tribunal' have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994."

11. The claimant bears the burden of establishing a "legacy investment" within the meaning of Paragraph 6 of Annex 14-C.[14] This necessarily includes establishing that the alleged investment was "in existence on the date of entry into force of [the USMCA]."[15] In the absence

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[13] *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) ("*Canadian Cattlemen* Award") (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[.]'").

[14] *Bridgestone Licensing Services, et al. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections ¶ 153 (Dec. 13, 2017). *See also* G.A. Res. 31/98, UNCITRAL Arbitration Rules, Article 24 (1976) ("Every party shall have the burden of proving the facts relied on to support his claim or defence."); BIN CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS 334 (2006) ("[T]he general principle [is] that the burden of proof falls upon the claimant[.]"); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) ("*Feldman* Award") ("[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence[.]") (quoting Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, at 14, WT/DS33/AB/R (May 23, 1997)).

[15] USMCA Annex 14-C, ¶ 6(a).

of a "legacy investment," the claimant's claims are outside the scope of the USMCA Parties' consent to arbitration in Paragraph 1 of Annex 14-C and the tribunal lacks jurisdiction over them.

Definition of "Investment" (NAFTA Article 1139)

12. NAFTA Article 1139 (Definitions) provides an exhaustive, not illustrative, list of what constitutes an "investment" for purposes of NAFTA Chapter Eleven.[16] By its ordinary meaning, an "investment" also has several hallmark characteristics.[17] These characteristics, which reflect not only legal interest but also economic interest, may include the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and/or duration.[18] NAFTA

[16] *See Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 82 (Jan. 12, 2011) ("*Grand River* Award") ("NAFTA's Article 1139 is neither broad nor open-textured. It prescribes an exclusive list of elements or activities that constitute an investment for purposes of NAFTA."). All three NAFTA Parties agree on this. *See e.g., Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America, at 32 (Nov. 13, 2000) ("Article 1139 of the NAFTA identifies an exhaustive list of property rights and interests that may constitute an 'investment' for purposes of Chapter Eleven. None of the property rights or property interests identified in the definition of 'investment' in Article 1139, however, encompass a mere hope that profits may result from prospective sales[.]"); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Second Submission of Canada Pursuant to NAFTA Article 1128, ¶ 59 (Apr. 30, 2001) ("The definition of 'investment' in NAFTA Article 1139 . . . is exhaustive, not illustrative."); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Second Submission of Mexico Pursuant to NAFTA Article 1128, ¶ 19 (May 15, 2001) ("[A]n investment as defined in Article 1139 . . . while inclusive of several categories, is also exhaustive.").

[17] *See, e.g.*, *Patel Engineering Ltd. v. The Republic of Mozambique*, PCA Case No. 2020-21, Final Award ¶ 293 (Feb. 7, 2024) ("[T]he asset must indeed qualify as an investment, by meeting the objective and inherent features which are shared by all investments."); *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB(AF)/11/1, Award ¶ 80 (Apr. 30, 2014) ("*Nova Scotia* Award") ("No matter what the forum, the ordinary meaning of investment in the relevant bilateral investment treaty derives from something more than a list of examples and calls for an examination of the inherent features of an investment.").

[18] The hallmark characteristics of an investment – described as "well-established features" representing the "minimum requirements for an investment" – have been broadly applied in both ICSID and non-ICSID arbitrations. *See Nova Scotia* Award ¶ 84. For ICSID cases, *see Nova Scotia* Award ¶¶ 81, 92-97 ("The term investment carries inherent features as part of its ordinary meaning and these must be taken into account by the Tribunal" and "[a] commitment to simply pay money in the future after delivery of goods is inadequate to be considered as the contribution which forms the basis of an investment."); *Poštova Banka, A.S. and Istrokapital SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Award ¶ 360 (Apr. 9, 2015); *KT Asia Investment Group BV v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award ¶ 170 (Oct. 17, 2013); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction ¶ 52 (July 23, 2001). For non-ICSID cases, *see Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Award ¶ 155 (Aug 3, 2022) ("[I]nherent in the act of 'investing' is an objective element: a requirement of a positive act that involves some sort of contribution to acquire the asset or enhance its value, coupled with an expectation or desire that the asset will produce a return over a period of time, with the possibility or risk that it may not do so (with the result that the contribution might be forfeited in part or in whole)"); *Romak SA v. Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award ¶ 207 (Nov. 26, 2009) ("[T]he term 'investments' under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk[.]") (emphasis in original); *see also* CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 217, 229, 262 (2d ed. 2017) ("MCLACHLAN") ("In a non-ICSID case, the notion of 'investment' in a BIT still has two aspects: (a) *a legal aspect*—the asset belonging to the claimant, being an asset of the type listed in the BIT; and (b) *an economic*

Chapter Eleven protected "investments," as that term is commonly understood, and did not protect transactions in which the alleged investor lacked an economic interest.

NAFTA Article 1139(g)

13. NAFTA Article 1139(g) includes within the definition of "investment" "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes[.]" NAFTA Chapter Eleven tribunals have consistently declined to recognize as "property" mere contingent "interests."[19] Moreover, it is appropriate to look to the law of the host State for a determination of the definition and scope of the property right at issue.[20]

NAFTA Article 1139(h)

14. NAFTA Article 1139(h) includes within the definition of "investment" "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise[.]"

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aspect—'a commitment of resources' or 'contributions that have created such . . . assets'.[] Both elements must be present to constitute an investment.") (citations omitted); ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 163-64, ¶ 340 (2009) ("[A]n investment, in order to qualify for investment treaty protection, must incorporate certain legal and economic characteristics. . . . It is essential that an investment have *both* the requisite legal and economic characteristics[.]") (emphasis in original).

[19] *See Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA/UNCITRAL, Award ¶¶ 142, 257-58 (Mar. 31, 2010) ("*Merrill & Ring* Award") (finding that "[e]xpropriation cannot affect potential interests[,]" and that the expectation of contracts executed in the future was an "uncertain expectation, like the goodwill considered in Oscar Chinn, [that] does not appear to provide a solid enough ground on which to construct a legitimately affected interest"); *Bayview Irrigation District v. United Mexican States,* ICSID Case No. ARB(AF)/05/1, Award ¶ 118 (June 19, 2007) (finding no property rights where, among other things, exploitation or use of the water requires the grant of a concession under Mexican law, which concession does not guarantee the existence or permanence of the water); *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 208 (Jan. 26, 2006) ("*Thunderbird* Award") ("[C]ompensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited."); *Feldman* Award ¶ 118 (finding no "right" to tax rebates where the right was conditioned upon presentation of certain invoices); *see also Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Part IV, Chapter D ¶ 17 (Aug. 3, 2005) ("*Methanex* Final Award") (noting that "items such as goodwill and market share may . . . in a comprehensive taking . . . figure in valuation," "[b]ut it is difficult to see how they might stand alone" as an investment under Article 1139).

[20] *See, e.g.*, Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 R.C.A.D.I. 259, 270 (1982) (for a definition of "property . . . [w]e necessarily draw on municipal law sources").

15. To qualify as an investment under Article 1139(h), the investor must show not only that it has made a "commitment of capital or other resources in the territory of a Party to economic activity in such territory" but also that it has a cognizable "interest" arising from its commitment of such capital or resources. Specifically, Article 1139(h)(i) states that such interests might arise from, for example, turnkey or construction contracts or concessions. Similar interests might arise, according to Article 1139(h)(ii), from "contracts where remuneration depends substantially on the production, revenues or profits of an enterprise."

16. As the text of Article 1139 makes clear, not every economic interest that comes into existence as a result of a contract constitutes an "interest" as defined in Article 1139(h). In addition to the limitations on qualifying interests discussed in the preceding paragraph (*i.e.*, the requirement that the interest arise from "the commitment of capital or other resources in the territory of a Party to economic activity in such territory"), Article 1139(i) and (j) exclude certain types of interests from the definition of "investment." Article 1139(i) excludes from the definition of "investment" "claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d)." Article 1139(j) likewise excludes "any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h) [of the definition of 'investment' in Article 1139]."

Legality of investment

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

at the time that the investment is established or acquired.[21] As a general matter, however, trivial violations of the applicable law will not put an investment outside the scope of Article 1139.[22]

Limitations Period (NAFTA Article 1116(2))

18. NAFTA Article 1116(2) provides that an investor may not make a claim if "more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."

19. NAFTA Article 1116(2) imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute.[23] Accordingly, a tribunal must find that a

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

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

[23] *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*

claim satisfies the requirements of, *inter alia*, NAFTA Article 1116(2) in order to establish a Party's consent to (and therefore the tribunal's jurisdiction over) an arbitration claim under such provision. Because the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction,[24] the claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.[25]

20. The limitations period is a "clear and rigid" requirement that is not subject to any "suspension," "prolongation," or "other qualification."[26] An investor *first* acquires knowledge of an alleged breach and loss under NAFTA Article 1116(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,[27] 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.[28]

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).

[24] *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").

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

[26] *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"); *Feldman* Award ¶ 63; *Apotex* Award ¶ 327 (quoting *Grand River* Decision on Objections to Jurisdiction).

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

[28] *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.").

21. 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."[29] To allow an investor to do so would "render the limitations provisions ineffective[.]"[30] 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.

22. With regard to knowledge of "incurred loss or damage" under NAFTA Article 1116(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.[31] Moreover, the ordinary meaning of the term "incurred" is "to become liable or subject to."[32] 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.[33]

23. As noted, NAFTA Article 1116(2) requires a claimant to submit a claim to arbitration within three years of the "date on which the investor first acquired, or *should have first acquired*, knowledge" of (i) the alleged breach, and (ii) loss or damage incurred by the investor/enterprise.

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

[30] *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").

[31] *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.").

[32] "Incur," MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/incur (last visited Nov. 8, 2023); *see also United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999) (finding that to "incur" means to "become liable or subject to" and that "a person may become 'subject to' an expense before she actually disburses any funds").

[33] *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").

(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 imputed to [*sic*] person if by exercise of reasonable care or diligence, the person would have known of that fact."[34] 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."[35] 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,[36] "the 'should have first acquired knowledge' test . . . is an objective standard; what a prudent claimant should have known or must reasonably be deemed to have known."[37]

Minimum Standard of Treatment (NAFTA Article 1105)

24. 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."[38]

25. 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

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

[35] *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.").

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

[37] *Berkowitz* Interim Award ¶ 209.

[38] *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).").

the minimum standard of treatment to be afforded to investments of investors of another Party."[39] 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."[40] 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)."[41] The Commission's interpretation "shall be binding" on tribunals established under NAFTA Chapter Eleven.[42]

26. The Commission's interpretation thus confirms the NAFTA Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in NAFTA Article 1105. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts.[43] The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[44]

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

[40] *Id.* ¶ B.2.

[41] *Id*. ¶ B.3.

[42] NAFTA Article 1131(2).

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

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

Methodology for Determining the Content of Customary International Law

27. Customary international law results from a general and consistent practice of States[45] that they follow from a sense of legal obligation.[46] "[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."[47] A perfunctory reference to these requirements is not enough; instead, a claimant must provide evidence sufficient to establish that both requirements are met.[48] This two-element approach—State practice and

[45] *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").

[46] *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).

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

[48] *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") (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.").

opinio juris—is the standard approach of States and international courts, including the International Court of Justice.[49]

28. 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 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.[50]

29. 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.[51] The practice of adopting such autonomous standards

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[49] *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.").

[50] *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*).

[51] *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

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.[52] Thus, arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by NAFTA Article 1105(1).[53]

30. 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.[54] While the NAFTA Parties consented to allow investor-State tribunals to decide issues

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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.").

[52] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions ¶ B.1 (July 31, 2001). ("Article 1105(1) prescribes the customary international law minimum standard of treatment . . . ."); s*ee also Grand River* Award ¶ 176 (noting that an obligation under Article 1105 of the NAFTA "must be determined by reference to customary international law, not to standards contained in other treaties or other NAFTA provisions, or in other sources, unless those sources reflect relevant customary international law"). While there may be overlap in the substantive protections ensured by NAFTA and other treaties, a claimant submitting a claim under the NAFTA, in which fair and equitable treatment is defined by the customary international law minimum standard of treatment, still must demonstrate that the obligations invoked are in fact a part of customary international law.

[53] *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").

[54] *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

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 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).

31. As all three NAFTA Parties agree,[55] 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*.[56] "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."[57] 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:

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.").

[55] *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.

[56] *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).

[57] *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. 27) (holding that the claimant had failed to "conclusively prove" the "existence of . . . a rule" of customary international law).

> 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.[58]

32. 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.[59] 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."[60] NAFTA Chapter Eleven tribunals do not have an open-ended mandate to "second-guess government decision-making."[61] A failure to satisfy requirements of domestic law does not necessarily violate international law.[62] Rather,

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

[59] *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).

[60] *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.").

[61] *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).

[62] *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

"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 . . . ."[63] 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

33. 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 "fair and equitable treatment." The "fair and equitable treatment" obligation includes, for example, the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world. This obligation is discussed in more detail below.

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

35. 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.[64] 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

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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).").

[63] *ADF* Award ¶ 190.

[64] *See, e.g.*, U.S. 2004 and 2012 Model Bilateral Investment Treaties, Art. 5 (Minimum Standard of Treatment), paragraph 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[s] each Party to provide the level of police protection required under customary international law."

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.[65]

36. The obligation to provide "full protection and security" does not, for example, require States to: (i) prevent economic injury inflicted by third parties;[66] (ii) provide for legal security;[67] (iii) provide for stability of a State's legal environment; or (iv) guarantee that aliens or their investments are not harmed under any circumstances. Such interpretations would impermissibly

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[65] *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. . . . 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.").

[66] *See, e.g.*, *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Reply Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment, at 38-39 (Apr. 12, 2001) ("Indeed, if the full protection and security requirement were to extend to an obligation to 'protect foreign investments from economic harm inflicted by third parties,' . . . Article 1105(1) would constitute a very substantial enlargement of that requirement as it has been recognized under customary international law."); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Rejoinder Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment, at 39 (June 27, 2001) (accord); *Loewen Group, Inc. v. United States of America*, NAFTA/ICSID Case No. ARB (AF)/98/3, Counter-Memorial of the United States of America, at 179-80 (Mar. 30, 2001) (accord).

[67] *Omega Eng'g LLC and Mr. Oscar Rivera v. Republic of Panama*, U.S.-Panama Trade Promotion Agreement and U.S.-Panama Bilateral Investment Treaty/ICSID Case No. ARB/16/42, Submission of the United States of America ¶ 23 (Feb. 3, 2020).

extend the duty to provide "full protection and security" beyond the minimum standard under customary international law, as the United States has consistently maintained.

Denial of Justice in Criminal, Civil, or Administrative Adjudicatory Proceedings

37. Denial of justice in its historical and "customary sense" denotes "misconduct or inaction of the judicial branch of the government" and involves "some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process."[68] A domestic system of law that conforms to "a reasonable standard of civilized justice" and is fairly administered cannot give rise to a complaint by a foreign investor under international law.[69] "Civilized justice" has been described as requiring "[f]air courts, readily open to aliens, administering justice honestly, impartially, [and] without bias or political control."[70]

38. A denial of justice may occur in instances such as when the final act of a State's judiciary constitutes a "notoriously unjust"[71] or "egregious"[72] administration of justice "which offends a sense of judicial propriety."[73] More specifically, a denial of justice exists where there is, for example, an "obstruction of access to courts," "failure to provide those guarantees which are

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[68] EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 330 (1919) ("BORCHARD 1919"); J.L. BRIERLY, THE LAW OF THE NATIONS 287 (6th ed., 1963) (defining a denial of justice as "an injury involving the responsibility of the state committed by a court of justice").

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

[70] Borchard 1939, at 63.

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

[72] PAULSSON at 60 ("The modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice.").

[73] *Loewen Group, Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 132 (June 26, 2003) ("*Loewen* Award") (a denial of justice may arise where there has occurred a "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety"); *Mondev Int'l Ltd. v. United States*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award ¶ 127 (Oct. 11, 2002) (finding that the test for a denial of justice was "not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome[.]"); *see also Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain),* 1970 I.C.J. 3 (Feb. 5), Separate Opinion of Judge Tanaka, at 144 ("Separate Opinion of Judge Tanaka") (explaining that "denial of justice occurs in the case of such acts as— 'corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it, . . . But no merely erroneous or even unjust judgment of a court will constitute a denial of justice'") (citations omitted).

generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment."[74] Instances of denial of justice also have included corruption in judicial proceedings, discrimination or ill-will against foreigners, and executive or legislative interference with the freedom of impartiality of the judicial process.[75] At the same time, erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law.[76] Similarly, neither the evolution nor development of "new" judge-made law that departs from previous jurisprudence within the confines of common law adjudication, implicates a denial of justice.[77]

39. The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence,[78] the particular nature of judicial action,[79] and the unique status of the judiciary in both international

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

[75] *Id*. at 175.

[76] *Id*. at 134 ("An error of a national court which does not produce manifest injustice is not a denial of justice."); PAULSSON at 81 ("The erroneous application of national law cannot, in itself, be an international denial of justice."); DUMBERRY at 228 (noting that a simple error, misinterpretation or misapplication of domestic law is not *per se* a denial of justice) (internal quotes omitted); BORCHARD 1919, at 196 (explaining that a government is not responsible for the mistakes or errors of its courts and that: "[A]s a general rule the state is not liable for the acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort."); Christopher Greenwood, *State Responsibility for the Decisions of National Courts, in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 61 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004) ("[I]t is well established that a mistake on the part of the court or an irregularity in procedure is not in itself sufficient to amount to a violation of international law; there must be a denial of justice.").

[77] *See Mondev Int'l Ltd. v. United States*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award ¶¶ 131, 133 (Oct. 11, 2002) (finding, in response to the claimant's allegation that a decision of the Massachusetts Supreme Court involved a "significant and serious departure" from its previous jurisprudence, it was doubtful that the court "made new law . . . [b]ut even if it had done so its decision would have fallen within the limits of common law adjudication. There is nothing here to shock or surprise even a delicate judicial sensibility.").

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

[79] *See, e.g.,* Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63(3) INT'L. & COMP. L.Q. 867, 876-877 (2014) ("Douglas") (explaining that the "rationality inherent in decision-making through adjudication, coupled with the opportunity afforded to affected parties to present reasoned arguments during the course of that decision-making process, . . . sets adjudication apart from other institutions of social ordering within the State," and that an authoritative decision by a domestic adjudicative body

and municipal legal systems. As a result, the actions of domestic courts are accorded a greater presumption of regularity under international law than are legislative or administrative acts.[80] Indeed, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice.[81]

"cannot be disturbed by an international court or tribunal simply on the basis that a more rational set of reasons was available to that . . . body. . . . International law is deferential to the particular virtues of adjudication by respecting the integrity of the process and the outcomes it produces.") (footnotes omitted).

[80] *Loewen Group, Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Response of the United States of America to the Submissions of Claimants Concerning Matters of Jurisdiction and Competence, at 8 (July 7, 2000) ("[U]nlike actions of the executive or the legislature, judicial acts can violate customary international law obligations in only the most extreme and unusual of circumstances . . . ."), *citing* T. BATY, THE CANONS OF INTERNATIONAL LAW 127 (1930) ("It is true that courts are organs of the nation; but they are not its organs in the sense in which the executive and the legislature are."); *id.*, at 9-10 ("Given the unique status of the judiciary in both international and municipal legal systems, the actions of domestic courts are accorded a far greater presumption of regularity under international law than are legislative or administrative acts."); BORCHARD 1919 at 195-96 (because "[i]n well-regulated states, the courts are more independent of executive control than any other authorities . . . [,] the state is not liable for the acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort."); ALWYN V. FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 33 (1938) ("[T]he question of proof of illegal action will be more difficult [with respect to judicial action] than is the case with other organs of the State."). The United States distinguishes between judicial action and other forms of government action as a matter of domestic law. For example, the U.S. Supreme Court has long recognized liability for legislative and regulatory actions that violate the economic protections of the U.S. Constitution, but has never recognized liability for judicial action under those same provisions. *See, e.g.,* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1075 n.121 (1997); Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1453 (1990) (observing with disapproval that "[t]he few scholars to have seriously addressed the issue have generally argued that it would be catastrophic to subject the courts to the same constitutional constraints as the legislative and executive branches . . . ."). The status of U.S. law has not changed. *See Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection et al.*, 560 U.S. 702 (2010); *Shinnecock Indian Nation v. United States*, 112 Fed. Cl. 369, 385 (2013) ("a theory of judicial takings . . . has not been adopted in the federal courts.").

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

40. It is well-established that international tribunals, such as those hearing disputes brought pursuant to NAFTA Chapter Eleven, are not empowered to be supranational courts of appeal on a court's application of domestic law.[82] Thus, an investor's claim challenging judicial measures under NAFTA Article 1105(1) is limited to a claim for denial of justice under the customary international law minimum standard of treatment. *A fortiori*, domestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law.

41. Moreover, the international responsibility of States may not be invoked with respect to non-final judicial acts,[83] unless recourse to further domestic remedies is obviously futile or manifestly ineffective. International tribunals have found that further remedies were obviously futile where there "was no justice to exhaust."[84] It is not enough for a claimant to allege the

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Canada, NAFTA/UNCITRAL, Government of Canada Counter-Memorial ¶ 231 (Jan. 27, 2015) (explaining that the rule that there must be a very serious failure in the "administration of justice before a State can be found in violation of international law for the domestic law decisions of its domestic courts" stems from "the recognition of the independence of the judiciary and the great deference afforded to domestic courts acting in their *bona fide* role of adjudication and interpretation of a State's domestic law.").

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

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

[84] *Robert E. Brown Case (United States v. United Kingdom)*, 6 R.I.A.A. 120, 129 (Nov. 23, 1923) (excusing claimant's failure to exhaust because there was "no justice to exhaust" where "[a]ll three branches of the

"absence of a reasonable prospect of success or the improbability of success, which are both less strict tests."[85] As the tribunal in *Apotex Inc. v. United States of America* explained: "whether the failure to obtain judicial finality may be excused for 'obvious futility' turns on the unavailability of relief by a higher judicial authority, not on measuring the likelihood that the higher judicial authority would have granted the desired relief."[86]

42. While it is not controversial that acts of State organs, including acts of State judiciaries, are attributable to the State,[87] there will be a breach of NAFTA Article 1105(1) based on judicial acts (*e.g.*, a denial of justice) only if the justice system *as a whole* produces a denial of justice (*i.e.*, when there has been a decision of the court of last resort available).[88] As the United States has elsewhere explained, while:

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

Government conspired to ruin [claimant's] enterprise"); *see also Finnish Ships Arbitration (Finland v. United Kingdom)*, 3 R.I.A.A. 1480, 1495, 1503-5 (May 9, 1934) (rule excusing failure to appeal where reversal was "hopeless" is "most strictly construed, and if substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief") (quoting BORCHARD 1919 at 824).

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

[86] *Apotex* Award ¶ 276 (emphasis in original).

[87] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 4(1), U.N. Doc. A/56/10 (2001) ("ILC Draft Articles") ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.").

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

> system as a whole, *i.e.*, until there has been a decision of the court of last resort available in the case.[89]

43. As Judge Aréchaga, former President of the International Court of Justice, likewise observed, States are internationally liable only for judicial decisions of "a Court of last resort, all remedies available having been exhausted."[90] Thus, decisions of lower courts that may be corrected on appeal, for example, have not produced a denial of justice and cannot be the basis of a NAFTA Chapter Eleven claim.

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. In contrast, concepts such as legitimate expectations and good faith, which are discussed in more detail below, are not component elements of "fair and equitable treatment" under customary international law that give rise to independent host State obligations.

Legitimate Expectations

45. 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.[91] An investor may develop its own

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

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

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

expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment.

Good Faith

46. The principle that "every treaty in force is binding on the parties to it and must be performed by them in good faith" (*i.e.*, *pacta sunt servanda*) is established in customary international law,[92] not in NAFTA Chapter Eleven. The good faith principle applies between the States Parties to the treaty and does not extend to third parties outside of the treaty relationship. As such, it is not an obligation owed to investors, and claims alleging breach of the good faith principle in a Party's performance of its NAFTA obligations do not fall within the limited jurisdictional grant afforded in Chapter Eleven.[93]

47. Furthermore, it is well established in international law that good faith is "one of the basic principles governing the creation and performance of legal obligations," but "it is not in itself a source of obligation where none would otherwise exist."[94] As such, customary international law does not impose a free-standing, substantive obligation of "good faith" that, if breached, can

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").

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

[93] *See, e.g., Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 14, 135-36, ¶¶ 270-271 (June 27) (holding, with respect to a claim based on customary international law duties alleged to be "implicit in the rule *pacta sunt servanda*," that "the Court does not consider that a compromissory clause of the kind included in Article XXIV, paragraph 2, of the 1956 FCN Treaty, providing for jurisdiction over disputes as to its interpretation or application, would enable the Court to entertain [such] a claim"). *See also Mobil Investments Canada Inc. v. Canada*, NAFTA/ICSID Case No. ARB/15/6, Decision on Jurisdiction and admissibility ¶ 170 (July 13, 2018) (explaining, in discussing the good faith principle, that "Chapter Eleven of NAFTA confers upon the Tribunal jurisdiction only with regard to disputes concerning alleged breaches of Chapter Eleven itself. While the Tribunal is empowered by Article 1131(1) of NAFTA to 'decide the issues in dispute in accordance with this agreement and applicable rules of international law', that does not give it the jurisdiction to hear a dispute concerning an alleged breach not of Chapter Eleven but of other rules of international law").

[94] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 1988 I.C.J. 69, 105, ¶ 94 (Dec. 20) (internal quotation marks omitted); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, 1998 I.C.J. 275, 297, ¶ 39 (June 11) ("*Land and Maritime Boundary*"). *See also Mobil Investments Canada Inc. v. Canada*, NAFTA/ICSID Case No. ARB/15/6, Decision on Jurisdiction and admissibility ¶ 168 (July 13, 2018) ("[B]oth Parties, as well as Mexico and the United States are clear that the principle of good faith forms part of international law and is relevant to the manner in which a State is required to perform its treaty obligations, but that it does not constitute a separate source of obligation where none would otherwise exist. The Tribunal agrees with this view which is based upon clear statements to that effect by the International Court of Justice.").

result in State liability.[95] Accordingly, a claimant "may not justifiably rely upon the principle of good faith" to support a claim absent a specific treaty obligation,[96] and the NAFTA contains no such obligation.

Expropriation and Compensation (NAFTA Article 1110)

48. Article 1110(1) provides that "[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment" unless the conditions specified in subparagraphs (a) through (d) are satisfied. If an expropriation does not conform to each of the specified conditions, it constitutes a breach of Article 1110. Any such breach requires compensation in accordance with Article 1110(2)-(6).[97]

49. As a threshold matter, and as the *Glamis* tribunal recognized, the term "expropriation" in Article 1110(1) "incorporates by reference the customary international law regarding that subject."[98] It is a principle of customary international law that in order for there to have been an expropriation, a property right or property interest must have been taken.[99] As such, and given

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[95] *See, e.g., Mesa Power Group, LLC v. Government of Canada,* NAFTA/PCA Case No. 2012-17, Submission of the United States of America ¶ 7 (July 25, 2014) ("It is well established in international law that good faith is 'one of the basic principles governing the creation and performance of legal obligations,' but 'it is not in itself a source of obligation where none would otherwise exist.'"); *Clayton & Bilcon of Delaware Inc. et al. v. Government of Canada,* NAFTA/UNCITRAL, PCA Case No. 2009-04, Submission of the United States of America, ¶ 6 (Apr. 19, 2013) (same); *Grand River* U.S. Counter-Memorial at 94 ("[C]ustomary international law does not impose a free-standing, substantive obligation of 'good faith' that, if breached, can result in State liability. Absent a specific treaty obligation, a Claimant 'may not justifiably rely upon the principle of good faith' to support a claim."); *Canfor Corp. v. United States of America*, NAFTA/UNCITRAL, Reply on Jurisdiction of Respondent United States of America, at 29 n.93 (Aug. 6, 2004) ("[Claimant] appears to argue that customary international law imposes a general obligation of 'good faith' independent of any specific NAFTA provision. The International Court of Justice, however, has squarely rejected that notion, holding that 'the principle of good faith . . . is not in itself a source of obligation where none would otherwise exist'.").

[96] *Land and Maritime Boundary*, 1988 I.C.J. at 297, ¶ 39.

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

[98] *Glamis Gold* Award ¶ 354.

[99] *See, e.g.*, Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law,* 176 R.C.A.D.I. 259, 272 (1982) ("[O]nly *property* deprivation will give rise to compensation.") (emphasis in original); Rudolf Dolzer, *Indirect Expropriation of Alien Property,* ICSID REVIEW: FOREIGN INV. L.J. 41, 41 (1986) ("Once it is established in an expropriation case that the object in question amounts to 'property,' the second logical step

that Article 1110(1) protects "investments" from expropriation, the first step in any expropriation analysis must be an examination of whether there is an investment capable of being expropriated. It is necessary to look to the law of the host State[100] for a determination of the definition and scope of the alleged property right or property interest at issue, including any applicable limitations.[101]

50. Article 1110 provides for protections from two types of expropriations, direct and indirect.[102] A direct expropriation occurs "where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure."[103]

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concerns the identification of 'expropriation.'"); *Glamis Gold* Award ¶ 356 ("There is for all expropriations, however, the foundational threshold inquiry of whether the property or property right was in fact taken."). This principle of customary international law is reflected in 2012 U.S. Model Bilateral Investment Treaty, Annex B (*Expropriation*) ¶ 2.

[100] *See, e.g.*, Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law,* 176 R.C.A.D.I. 259, 270 (1982) (for a definition of "property . . . [w]e necessarily draw on municipal law sources"); MCLACHLAN ¶ 8.64 ("The property rights that are the subject of protection under the international law of expropriation are created by the host State law. Thus, it is for the host State law to define the nature and extent of property rights that a foreign investor can acquire."); *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award ¶ 184 (Feb. 3, 2006) ("[F]or there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them . . . .").

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

[102] As the United States has previously explained, the phrase "take a measure tantamount to nationalization or expropriation" explains what the phrase "indirectly nationalize or expropriate" means; it does not assert or imply the existence of an additional type of action that may give rise to liability beyond those types encompassed in the customary international law categories of "direct" and "indirect" nationalization or expropriation. *See, e.g.*, *Metalclad Corp. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/97/1, Submission of the United States of America ¶¶ 9-14 (Nov. 9, 1999). *See also Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Interim Award ¶¶ 103-05 (June 26, 2000) ("*Pope & Talbot* Interim Award") (rejecting the claimant's argument that "tantamount to *** expropriation" provides protections beyond those provided by customary international law); *see also* id. ¶ 96; *S.D. Myers* First Partial Award ¶ 286 ("In common with the *Pope & Talbot* Tribunal, this Tribunal considers that the drafters of the NAFTA intended the word 'tantamount' to embrace the concept of so-called 'creeping expropriation,' rather than to expand the internationally accepted scope of the term expropriation."); *Cargill* Award ¶ 372 ("Article 1110, in using the terms 'expropriation' and 'tantamount to expropriation', incorporates this customary law of expropriation."). *See also* KENNETH VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY AND INTERPRETATION, 278 (2010) ("Some BITs refer to measures 'tantamount' or 'equivalent' to expropriation to describe indirect expropriation.") (footnotes omitted).

[103] 2012 U.S. Model Bilateral Investment Treaty, Annex B (*Expropriation*) ¶ 3. The expropriation annex to the U.S. Model BIT was intended to reflect customary international law. *Id.* ¶ 1.

51. An indirect expropriation occurs "where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."[104] Determining whether an indirect expropriation has occurred requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the governmental action; (ii) the extent to which that action interferes with distinct, reasonable-investment-backed expectations; and (iii) the character of the government action.[105]

52. With respect to the first factor, for an expropriation claim to succeed, the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as "to support a conclusion that the property has been 'taken' from the owner."[106]

53. The second factor requires an objective inquiry of the reasonableness of the claimant's investment-backed expectations. Whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation[107] or the potential for government regulation in the relevant sector.

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

[105] 2012 U.S. Model Bilateral Investment Treaty, Annex B (*Expropriation*) ¶ 4(a); *see also* USMCA Annex 14-B (*Expropriation*).

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

[107] *See Methanex* Final Award, Part IV, Ch. D ¶ 9 (noting that no specific commitments to refrain from regulation had been given to Methanex, which "entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or

54. The third factor considers the nature and character of the government action, including whether such action involves physical invasion by the government or whether it is more regulatory in nature (*i.e.*, whether "it arises from some public program adjusting the benefits and burdens of economic life to promote the common good").[108]

55. However, under international law, where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory.[109] This principle in public international law, referred to as the police powers doctrine, is not an exception that applies after an expropriation has been found but, rather, is a recognition that certain actions, by their nature, do not engage State responsibility.[110] The United States is aware of no general and consistent

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

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

[109] *See, e.g.*, *Glamis Gold* Award ¶ 354 ("A state is not responsible, however, 'for loss of property or for other economic disadvantage resulting from bona fide . . . regulation . . . if it is not discriminatory.'") (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712, cmt. (g) (1986)); *Chemtura Corp. v. Government of Canada*, NAFTA/PCA Case No. 2008-01, Award ¶ 266 (Aug. 2, 2010) (holding that Canada's regulation of the pesticide lindane was a non-discriminatory measure motivated by health and environmental concerns and that a measure "adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation"); *Methanex* Final Award, Part IV, Ch. D ¶ 7 (holding that as a matter of general international law, "a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process" will not ordinarily be deemed expropriatory or compensable); Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 791-792 (Chester Brown ed., 2013) (discussing observation included in Annex B, paragraph 4(b) of U.S. 2012 Model BIT that "[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."). This observation was first included in the 2004 U.S. Model BIT and has been echoed in subsequent U.S. investment agreements.

[110] *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 539 (5th ed. 1998) ("Cases in which expropriation is allowed to be lawful in the absence of compensation are within the narrow concept of public utility prevalent in *laissez-faire* economic systems, i.e. exercise of police power, health measures, and the like."); G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT'L L. 307, 338 (1962) ("If, however, such prohibition can be justified as being reasonably necessary to the performance by a State of its recognized obligations to protect the public health, safety, morals or welfare, then it would normally seem that there has been no 'taking' of property.").

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

Claims Based on Judicial Measures

56. Judicial measures may give rise to a claim for denial of justice under NAFTA Article 1105(1), as noted in a previous section of this submission. Decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants, however, do not give rise to a claim for expropriation under Article 1110.[111]

57. Of course, where a judiciary is not separate from other organs of the State and those organs (executive or legislative) direct or otherwise interfere with a domestic court decision so as to cause an effective expropriation, these executive or legislative acts may form the basis of a separate claim under NAFTA Article 1110, depending on the circumstances. Were it otherwise, States might seek to evade international responsibility for wrongful acts by using the courts as the conduit of executive or legislative action.

Limitations on Claims for Loss or Damage (NAFTA Article 1116)

Causation and Damages

58. NAFTA Article 1116 allows an investor to recover loss or damage incurred "by reason of, or arising out of," a breach of an obligation under NAFTA Chapter Eleven, Section A. An investor may recover such damages only to the extent that they are established on the basis of satisfactory evidence that is not inherently speculative.[112]

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[111] *See, e.g.*, *Loewen* Award ¶ 141 (noting that claimants' expropriation claim based on judicial acts "adds nothing to the claim based on Article 1105. In the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if Loewen establishes a denial of justice under Article 1105.").

[112] As the International Law Commission has recognized, a State responsible for an internationally wrongful act shall compensate for the resulting damage caused "insofar as [that damage] is established." ILC Draft Articles, art. 36(2). Specifically, as the International Law Commission observes, "[t]ribunals have been reluctant to provide compensation for claims with inherently speculative elements." *Id.*, Commentary ¶ 27 (citing cases); *see also S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Second Partial Award ¶ 173 (Oct. 21, 2002) ("*S.D. Myers* Second Partial Award") ("to be awarded, the sums in question must be neither speculative nor too remote."); *Mobil Investments Canada Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum ¶¶ 437-39 (May 22, 2012) (accord).

59. The ordinary meaning of Article 1116 requires an investor to establish the causal nexus between the alleged breach and the claimed loss or damage.[113] It is well established that "causality in fact is a necessary but not a sufficient condition for reparation."[114] The standard for factual causation is known as the "but-for" or "*sine qua non*" test whereby an act causes an outcome if the outcome would not have occurred in the absence of the act. This test is not met if the same result would have occurred had the breaching State acted in compliance with its obligations.[115]

60. The ordinary meaning of the term "by reason of, or arising out of" also requires an investor to demonstrate proximate causation. Proximate causation is an "applicable rule[] of international law" that under NAFTA Article 1131(1) must be taken into account in fixing the appropriate amount of monetary damages.[116] Article 1116 contains no indication that the NAFTA Parties intended to vary from this established rule. Indeed, all three NAFTA Parties have expressed their agreement that proximate causation is a requirement under NAFTA Chapter

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[113] H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 422 (2d ed. 1985) (noting that it is generally the claimant's burden to "persuade the tribunal of fact of the existence of causal connection between wrongful act and harm"); *see Islamic Republic of Iran v. United States of America*, AWD 601-A3/A8/A9/A14/B61-FT ¶ 153 (July 17, 2009), 38 Iran-U.S. C.T.R. 197, 257 ("Iran, as the Claimant, is required to prove that it has suffered losses . . . and that such losses were *caused by* the United States.") (emphasis added).

[114] ILC Draft Articles, art. 31, Commentary ¶ 10. The Iran-U.S. Claims Tribunal reaffirmed this principle in the remedies phase of Case A/15(IV) when it held that it must determine whether the "United States' breach caused 'factually' the harm . . . and that that loss was also a 'proximate' consequence of the United States' breach." *Islamic Republic of Iran v. United States of America*, AWD 602-A15(IV)/A24-FT ¶ 52 (July 2, 2014), 39 IRAN-U.S. C.T.R. 359, 381 ("A/15(IV) Award").

[115] *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 I.C.J. 40, ¶ 462 (Feb. 26); A/15(IV) Award ¶ 52 ("[I]f one were to reach the conclusion that both tortious (or obligation-breaching) and non-tortious (obligation-compliant) conduct of the same person would have led to the same result, one might question that the tortious (or obligation-breaching) conduct was condicio sine qua non of the loss the claimant seeks to recover.").

[116] *See* ILC Draft Articles, art. 31, Commentary ¶ 10. *See also Administrative Decision No. II (U.S. v. Germany)*, 7 R.I.A.A. 23, 29 (1923) (proximate cause is "a rule of general application both in private and public law – which clearly the parties to the Treaty had no intention of abrogating"); *United States Steel Products (U.S. v. Germany)*, 7 R.I.A.A. 44, 54-55, 58-59, 62-63 (1923) (rejecting on proximate cause grounds a group of claims seeking reimbursement for war-risk insurance premiums); *Dix (U.S. v. Venezuela)*, 9 R.I.A.A. 119, 121 (undated) ("International as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure."); *H. G. Venable (U.S. v. Mexico)*, 4 R.I.A.A. 219, 225 (1927) (construing the phrase "originating from" as requiring that "only those damages can be considered as losses or damages caused by [the official] which are immediate and direct results of his [action]"). *See also* BIN CHENG, GENERAL PRINCIPLES OF LAW 244-45 (1987) ("[I]t is 'a rule of general application both in private and public law,' equally applicable in the international legal order, that the relation of cause and effect operative in the field of reparation is that of proximate causality in legal contemplation.").

Eleven.[117] In accordance with the customary international law principles of treaty interpretation reflected in VCLT Article 31(3)(a)-(b), the Tribunal must take into account this common understanding of the Parties.[118]

61. NAFTA tribunals have consistently imposed a requirement of proximate causation under Article 1116. The *S.D. Myers* tribunal held that damages may only be awarded to the extent that there is a "sufficient causal link" between the breach of a specific NAFTA provision and the loss sustained by the investor,[119] and then subsequently clarified that "[o]ther ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the *proximate* cause of the harm."[120] In *Pope & Talbot*, the tribunal held that under Article 1116 the claimant bears the burden to "prove that loss or damage was caused to its interest, and that it was causally connected to the breach complained of."[121] The *ADM* tribunal required "a sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such an injury."[122]

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[117] *See, e.g., Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Amended Statement of Defense of the United States of America ¶ 213 (Dec. 5, 2003); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Fourth Submission of the United Mexican States ¶ 2 (Jan. 30, 2004) ("Mexico agrees . . . that Chapter Eleven incorporates a standard of proximate cause through the use of the phrase 'has incurred loss or damage by reason of, or arising out of' a Party's breach of one of the NAFTA provisions listed in Articles 1116 and 1117.") (footnote omitted); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Second Submission of Canada Pursuant to NAFTA Article 1128, ¶ 47 (Apr. 30, 2001) ("The ordinary meaning of the words 'by reason of, or arising out of establishes that there must be a clear and direct nexus between the breach and the loss or damage incurred."). *See also Resolute Forest Products, Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-3, Second Submission of the United States of America ¶ 31 (Apr. 20, 2020)) ("The ordinary meaning of the term 'by reason of, or arising out of' also requires an investor to demonstrate proximate causation."); *Resolute Forest Products, Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-3, Comments of the Government of Canada in Response to the Second NAFTA Article 1128 Submission of the United States of America and the United Mexican States ¶ 5 (May 8, 2020) ("[T]he United States' submission with respect to limitations on loss or damage is in agreement with Canada's submissions. Inherent to the NAFTA requirement that recovery be limited to loss or damage 'by reason of, or arising out of' a breach is the need for the Claimant to show both factual causation and proximate causation.").

[118] *See supra* paragraphs 8-9 & n.13.

[119] *S.D. Myers* First Partial Award ¶ 316.

[120] *S.D. Myers* Second Partial Award ¶ 140 (emphasis in original).

[121] *Pope & Talbot Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award in Respect of Damages ¶ 80 (May 31, 2002).

[122] *Archer Daniels Midland Co. v. United Mexican States,* NAFTA/ICSID Case No. ARB(AF)/04/05, Award ¶ 282 (Nov. 21, 2007).

62. Accordingly, any loss or damage cannot be based on an assessment of acts, events or circumstances not attributable to the alleged breach.[123] Events that develop subsequent to the alleged breach may increase or decrease the amount of damages suffered by a claimant. At the same time, injuries that are not sufficiently "direct," "foreseeable," or "proximate" may not, consistent with applicable rules of international law, be considered when calculating a damage award.[124] Tribunals should exercise caution also because compensation for injuries not caused by the breach may, depending on the circumstances, be construed as intending to deter or punish the conduct of the disputing State, contrary to NAFTA Article 1135(3).[125]

Contributory Fault

63. It is well established that a claimant may not be awarded reparation for losses to the extent of its contribution to such losses, and nothing in the NAFTA indicates otherwise. This is reflected in Article 39 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, which provides: "In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."[126]

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[123] *See* ILC Draft Articles, art. 31, Commentary ¶ 9 (noting that the language of Article 31(2) providing that injury includes damage "caused by the internationally wrongful act of a State," "is used to make clear that the subject matter of reparation is, globally, the injury *resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act*") (emphasis added).

[124] As the commentary to the ILC State Responsibility Articles explains, causality in fact is a necessary but not sufficient condition for reparation: "There is a further element, associated with the exclusion of injury that is too 'remote' or 'consequential' to be the subject of reparation. In some cases, the criterion of 'directness' may be used, in others 'foreseeability' or 'proximity'. . . . The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act[.]" ILC Draft Articles, art. 31, Commentary ¶ 10 (footnotes omitted).

[125] NAFTA Article 1135(3) expressly provides that "[a] Tribunal may not order a Party to pay punitive damages." *See also* ILC Draft Articles, art. 36, Commentary ¶ 4 ("[A]rticle 36 is purely compensatory, as its title indicates . . . . It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character.") (citing the *Velásquez Rodriguez*, Compensatory Damages case, where "the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages (Series C, No. 7 (1989))").

[126] ILC Draft Articles, art. 39. *See also id.*, Commentary ¶ 1 ("Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with articles 1 and 28, but *where the injured State, or the individual victim of the breach, has materially contributed to the damage by some wilful or negligent act or omission*. Its focus is on situations which in national law systems are referred to as 'contributory negligence', 'comparative fault', 'faute de la victime', etc.") (emphasis added).

Respectfully submitted,

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

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