

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

MESA POWER GROUP, LLC,

*Claimants/Investors,*

*-and-*

GOVERNMENT OF CANADA,

*Respondent/Party.*

(PCA Case No. 2012-17)

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**SECOND SUBMISSION OF THE UNITED STATES OF AMERICA**

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1. The United States of America hereby makes this submission pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA), which authorizes non-disputing Parties to make submissions to a tribunal on a question of interpretation of the Agreement. This submission contains the United States' observations on certain questions of interpretation of NAFTA arising from the March 17, 2015 Award in the NAFTA Chapter Eleven case *Bilcon v. Canada*.<sup>1</sup> The United States does not, through this submission, take a position on how the following interpretation applies to the facts of the above-captioned case. No inference should be drawn from the absence of comment on any issue not addressed below.

Article 1102 (National Treatment)

2. Article 1102 requires the NAFTA Parties to accord no less favorable treatment to investors and investments of another Party to the extent they are in like circumstances with a Party's own investors and investments.

3. The purpose of Article 1102 is to protect against *nationality-based* discrimination. Article 1102 is not intended to prohibit all differential treatment among investors and

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<sup>1</sup> *Bilcon of Delaware et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Merits (Mar. 17, 2015) ("*Bilcon Award*"). See also Letters from the Tribunal President to the Parties dated May 15 and May 26, 2015 (inviting, on behalf of the Mesa Tribunal, non-disputing Party submissions on the *Bilcon Award* and Dissenting Opinion by June 12, 2015).

investments, but to ensure that the NAFTA Parties do not treat investors in like circumstances differently based on their NAFTA-Party nationality. A claimant must establish that the measure, whether in law or in fact, treats foreign investors or investments less favorably than domestic investors or investments on the basis of nationality.<sup>2</sup> All three NAFTA Parties agree on this point.<sup>3</sup> The Parties' common, concordant, and consistent position constitutes the authentic interpretation of Article 1102 and, under the Vienna Convention on the Law of Treaties,<sup>4</sup> "shall be taken into account, together with the context."<sup>5</sup>

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<sup>2</sup> The requirement to show discrimination on the basis of nationality under Article 1102 does not require a showing of discriminatory intent. Rather, a Claimant must establish that a measure either on its face, or as applied, favors nationals over non-nationals.

<sup>3</sup> See, e.g., *Mesa Power Group, LLC v. Canada* ("Mesa"), PCA Case No. 202-17, Counter-Memorial and Reply on Jurisdiction of Canada ¶ 354, n. 700 (Feb. 28, 2014) (noting NAFTA Party agreement that "the very purpose of Article 1102 . . . is to prevent discriminatory treatment based on the nationality of an investor or its investment"); *Mesa*, Article 1128 Submission of the United States ¶ 11 (July 25, 2014) ("NAFTA's national treatment provision, Article 1102, is designed to prohibit discrimination on the basis of nationality."); *Mercer International Inc. v. Canada* ("Mercer"), NAFTA/ICSID Case No. ARB(AF)/12/3, Article 1128 Submission of Mexico ¶ 11 (May 8, 2015) ("Mexico, Canada and the United States have consistently maintained that . . . the national treatment obligation is intended to prevent discrimination against investors of the other Parties (and their investments) on the basis of nationality."); *Pope & Talbot, Inc. v. Canada* ("Pope & Talbot"), Second Article 1128 Submission of the United States ¶ 3 (May 25, 2000) ("If the measure, whether in law or fact, does not treat foreign investors or investments less favorably than domestic investors or investments on the basis of nationality, then there can be no violation of Article 1102 and a Tribunal should proceed no further."); *Pope & Talbot*, Fifth Article 1128 Submission of Mexico at 2-3 (Dec. 1, 2000) (concurring with the United States that "[t]he objective of the national treatment provision is to prohibit discrimination against foreign investors and investments, in law and in fact, on the basis of nationality"); *Pope & Talbot*, Canada – Response to Phase Two Post-Hearing Submissions of the Mexico and the United States ¶¶ 8-9 (Dec. 15, 2000) (agreeing with the United States and Mexico that "[i]f the measure, whether in law or in fact, does not treat foreign investors or investments less favorably than domestic investors or investments on the basis of nationality, then there can be no violation of Article 1102 and a Tribunal should proceed no further").

<sup>4</sup> Although the United States is not a party to the Vienna Convention on the Law of Treaties, it has recognized since at least 1971 that the Convention is the "authoritative guide" to treaty law and practice. See Letter from Secretary of State Rogers to President Nixon transmitting the Vienna Convention on the Law of Treaties, Oct. 18, 1971, reprinted in 65 DEP'T OF ST. BULL. 684, 685 (1971).

<sup>5</sup> Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 115 U.N.T.S. 331, art. 31(3)(a), (b) ("There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provision; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation[.]"). See also *Report of the International Law Commission on the work of its eighteenth session*, [1966] 2 Y.B. INT'L L. COMM'N 169, 220, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (observing that there is no hierarchy among the norms of interpretation listed in Article 31 and that those in Article 31(3) "by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them"); *Canadian Cattlemen for Fair Trade v. United States* ("Canadian Cattlemen"), NAFTA/UNCITRAL, Award on Jurisdiction ¶¶ 188, 189 (Jan. 28, 2008) ("[T]he available evidence cited by the Respondent 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[.]'" (emphasis removed); Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 223 (1958) (observing that "a consistent [subsequent State] practice must come very near to being conclusive as to how the treaty should be interpreted") (emphasis omitted); *Iran v. United States*, Case No. B1 (Counterclaim), Award No. I.T.L. 83-B1-FT ¶ 109 (Sept. 9, 2004) ("The importance of . . . subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty[.]") (citing International Law Commission).

4. The *Bilcon* tribunal properly recognized that a claimant has “the affirmative burden of proving” that it or its investments: (1) were accorded “treatment”; (2) were in “like circumstances” with domestic investors or investments; and (3) received treatment “less favorable” than that accorded to domestic investors or investments.<sup>6</sup> The tribunal, however, failed to apply these factors properly. In particular, the tribunal failed to adequately address nationality-based discrimination when determining whether the Claimants were in like circumstances with alleged comparators. The foreign investor or foreign-owned investment should be compared to a domestic investor or domestically owned investment that is like in all relevant respects but for nationality of ownership. Instead, the tribunal provided an overly broad interpretation of like circumstances and gave inadequate weight to all relevant characteristics, as required under Article 1102.<sup>7</sup> The tribunal also improperly placed the burden on Canada to justify the “differential and adverse treatment accorded to Bilcon[.]”<sup>8</sup> Having failed to apply the “like circumstances” test properly to find nationality-based discrimination, the *Bilcon* tribunal should not have proceeded to place the burden on Canada to justify differential treatment. The burden to prove each element of a claim under Article 1102 rests and remains squarely with the claimant.<sup>9</sup> The NAFTA Parties agree on this point.<sup>10</sup>

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<sup>6</sup> *Bilcon* Award ¶¶ 717, 718 (citing *United Parcel Service of America, Inc. v. Government of Canada* (“*UPS*”), NAFTA/UNCITRAL, Award ¶¶ 83-84 (May 24, 2007)).

<sup>7</sup> *Id.* ¶¶ 691-93 (citing *Occidental Exploration and Production Co. v. Ecuador*, LCIA Case No. UN3467, Final Award ¶ 173 (July 1, 2004) (concluding erroneously that oil producers and flower producers were in “like situations”)); *see also Mesa*, Article 1128 Submission of the United States ¶ 13 (“The phrase ‘like circumstances’ ensures that comparisons are made with respect to investors or investments on the basis of relevant characteristics. This is a fact-specific inquiry, requiring consideration of more than just the business or economic sector, but also the legal and regulatory frameworks which apply to or govern the conduct of investors or investments (including any relevant policy objectives), among other possible characteristics.”)

<sup>8</sup> *Id.* ¶¶ 723-24.

<sup>9</sup> *See UPS* Award ¶ 84 (holding that the failure of a claimant to establish the requisite elements of a claim of breach of Article 1102 “will be fatal to its case,” that this legal burden “rests squarely with the Claimant,” and that this “burden never shifts to the [NAFTA] Party”).

<sup>10</sup> *See, e.g., Mesa*, Counter-Memorial and Reply on Jurisdiction of Canada ¶ 353 (Feb. 28, 2014) (“The burden falls squarely on claimant’s shoulders, and it does not shift[.]”); *Mesa*, Article 1128 Submission of the United States ¶ 15 (July 25, 2014) (“Nothing in the text of Article 1102 suggests a shifting burden of proof. The burden to prove a violation of Article 1102 thus rests with the claimant to prove each element of its claim.”); *Mercer*, Counter-Memorial of Canada ¶ 357, n. 694 (Aug. 22, 2014) (stating that the burden of proof with respect to Articles 1102 and 1103 “rests squarely with the Claimant” and “never shifts to the [NAFTA] Party”); *Mercer*, Article 1128 Submission of the United States ¶ 13 (May 8, 2015) (“Nothing in the text of Articles 1102 or 1103 suggests a shifting burden of proof. Rather, the burden to prove a violation of these articles, and each element of its claim, rests and remains squarely with the claimant.”); *Mercer*, Article 1128 Submission of Mexico ¶ 11 (May 8, 2015) (“Mexico, Canada and the United States have consistently maintained that . . . the claimant bears the onus of proving all elements required to establish a breach of the national treatment obligation, and this onus does not shift to the respondent State simply because there is an apparent difference between the treatment accorded to the claimant and the treatment accorded to the domestic or third party investor (or investment)[.]”).

## Article 1105 (Minimum Standard of Treatment)

5. Article 1105 is titled “Minimum Standard of Treatment.” 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.”

6. On July 31, 2001, the Free Trade Commission (“Commission”), comprising the NAFTA Parties’ cabinet-level representatives, issued an interpretation reaffirming that “Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.”<sup>11</sup> The Commission clarified that the concept of “fair and equitable treatment” does “not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”<sup>12</sup> The Commission’s interpretation “shall be binding” on tribunals established under Chapter Eleven.<sup>13</sup>

7. The *Bilcon* tribunal correctly acknowledged that:

- (1) The Commission’s interpretation of Article 1105(1) constitutes an “authentic interpretation” of the Agreement by the NAFTA Parties<sup>14</sup> and is “binding and conclusive” on Chapter Eleven tribunals, in accordance with NAFTA Article 1131(2);<sup>15</sup>
- (2) Chapter Eleven tribunals “are bound to interpret and apply” Article 1105(1) “in accordance with customary international law” and thus may not apply sources of international law beyond customary international law when interpreting and applying Article 1105(1);<sup>16</sup> and
- (3) The concepts of “fair and equitable treatment” and “full protection and security” in Article 1105(1) “cannot be regarded as ‘autonomous’ treaty norms that impose additional requirements above and beyond what the minimum standard requires.”<sup>17</sup>

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

<sup>12</sup> *Id.* ¶ B.2.

<sup>13</sup> NAFTA art. 1131(2).

<sup>14</sup> *Bilcon* Award ¶ 430 (citing Article 31(3)(a) of the Vienna Convention on the Law of Treaties and the FTC Interpretation).

<sup>15</sup> *Id.* ¶ 430 (citing NAFTA Article 1131(2)).

<sup>16</sup> *Id.* ¶ 441.

<sup>17</sup> *Id.* ¶ 432.

8. Despite these acknowledgements, the *Bilcon* tribunal failed to apply customary international law when interpreting and applying Article 1105(1).<sup>18</sup> Specifically, as addressed below, the *Bilcon* tribunal failed to recognize that the burden is on a claimant to establish the existence and applicability of a rule of customary international law, and failed to determine whether the *Bilcon* Claimants had met that burden. In addition, the *Bilcon* tribunal incorrectly adopted standards from prior NAFTA Chapter Eleven awards, which are not founded in State practice and *opinio juris*.

9. Customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation. This two-element approach – State practice and *opinio juris* – is “widely endorsed in the literature and generally adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice.”<sup>19</sup>

10. Relevant State practice must be widespread and consistent<sup>20</sup> and be accepted as law, meaning that the practice must also be accompanied by a sense of legal obligation.<sup>21</sup> The twin requirements of State practice and *opinio juris* “must *both* be identified . . . to support a finding

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<sup>18</sup> *Bilcon* Award ¶¶ 427-604.

<sup>19</sup> See Michael Wood (Special Rapporteur), *Second Report on Identification of Customary International Law* ¶ 21, A/CN.4/672, International Law Commission (May 22, 2014) (“ILC second report on the identification of customary international law”); see also *id.*, Annex, Proposed Draft Conclusion 3 (stating that in order to determine the “existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law”); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, 122 (Judgment of Feb. 3) (“In particular . . . the existence of a rule of customary international law requires that there be ‘a settled practice’ together with *opinio juris*.”); *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, 29-30 (Judgment of 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[.]”); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 14, 97 (Judgment of June 27) (“[T]he Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and *opinio juris* of States.”).

<sup>20</sup> See, e.g., *North Sea Continental Shelf (Germany v. Denmark/Netherlands)*, 1969 I.C.J. 3, 43 (Judgment of Feb. 20) (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”) (“*North Sea Continental Shelf* Judgment”); ILC second report on the identification of customary international law, Draft Conclusion 9 and commentaries (citing authorities).

<sup>21</sup> *North Sea Continental Shelf* Judgment 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 second report on the identification of customary international law, Draft Conclusion 10 with commentaries (citing authorities).

that a relevant rule of customary international law has emerged.”<sup>22</sup> A perfunctory reference to these requirements is not sufficient.<sup>23</sup>

11. The International Court of Justice has cited the types of evidence that can be used to demonstrate that a rule of customary international law exists. In its recent judgment in *Jurisdictional Immunities of the State*, for example, the Court identified as examples of State practice relevant national court decisions and 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.<sup>24</sup> 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.”<sup>25</sup>

12. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, which is expressly addressed in Article 1105(1), concerns the obligation to provide “fair and equitable treatment.” This includes, for example, the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings, such as when a State’s judiciary administers justice to aliens in a “notoriously unjust”<sup>26</sup> or

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<sup>22</sup> ILC second report on the identification of customary international law ¶¶ 22-23 (citing these requirements as “indispensable for any rule of customary international law properly so called”) (emphasis added).

<sup>23</sup> The *Bilcon* tribunal, for example, approvingly quoted the following *obiter dicta* from the *Merrill & Ring* award:

A requirement that aliens be treated fairly and equitably in relation to business, trade and investment is the outcome of this changing reality and as such it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*. In the end, the name assigned to the standard does not really matter. What matters is that the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness.

*Bilcon* Award ¶ 435 (citing *Merrill & Ring Forestry L.P. v. Government of Canada* (“*Merrill & Ring*”), NAFTA/UNCITRAL, Award ¶ 210 (Mar. 31, 2010)). The *Merrill & Ring* tribunal cited no State practice or *opinio juris* to support its conclusion. See PATRICK DUMBERRY, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105 at 115 (2013) (observing that the tribunal failed “to cite a single example of State practice in support of” its “controversial findings”) (emphasis in original); 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 MST made such a leap in its evolution, and by doing so has deprived the 2001 NAFTA Interpretive Statement of any practical effect.”). The tribunal’s statement, therefore, is the erroneous opinion of a single *ad hoc* tribunal and has no relevance for determining the content of customary international law in general or of Article 1105(1) in particular.

<sup>24</sup> *Jurisdictional Immunities of the State*, 2012 I.C.J. at 122-23 (discussing relevant materials that evidence State practice and *opinio juris* in the context of jurisdictional immunity in foreign courts) (citing *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, 1985 I.C.J. 13).

<sup>25</sup> *Id.*

<sup>26</sup> JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 44 (2005) (citing J. Irizarry y Puente, *The Concept of “Denial of Justice” in Latin America*, 43 MICH. L. REV. 383, 406 (1944)) (“PAULSSON”); *id.* at 4 (“[A] state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner.”) (emphasis omitted); *Chattin Case (U.S. v. Mex.)*, 4 R. INT’L ARB. AWARDS 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, willful neglect of duty, or insufficiency of action apparent to any unbiased man.”) (emphasis omitted).

“egregious”<sup>27</sup> manner “which offends a sense of judicial propriety.”<sup>28</sup> Other such areas concern the obligation to provide “full protection and security,” as also addressed in Article 1105(1), and the obligation not to expropriate covered investments, except under the conditions specified in NAFTA Article 1110.

13. For alleged standards that are not specified in the treaty, a claimant must demonstrate that such a standard has crystallized into an obligation under customary international law. To do so, 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*.<sup>29</sup> “The party which relies on a custom,” therefore, “must prove that this custom is established in such a manner that it has become binding on the other Party.”<sup>30</sup> The *Cargill* tribunal, for example, acknowledged that:

the proof of change in a custom is not an easy matter to establish. However, *the burden of doing so falls clearly on Claimant*. If the 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.<sup>31</sup>

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<sup>27</sup> 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.”).

<sup>28</sup> *Loewen Group, Inc. et al. v. United States*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 132 (June 26, 2003) (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”).

<sup>29</sup> *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Judgment of Nov. 20); *see also North Sea Continental Shelf Judgment* at 43 (“[A]n indispensable requirement [of showing a new rule of customary international law] would be that within the period in question, short though it might be, 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.”); *Glamis Gold Ltd. v. United States* (“*Glamis*”), NAFTA/UNCITRAL, Award ¶¶ 601-02 (June 8, 2009) (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 international quotation marks omitted).

<sup>30</sup> *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, 1952 I.C.J. 176, 200 (Judgment of Aug. 27) (“The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.”) (citation and internal quotation marks omitted); *S.S. “Lotus” (France v. Turkey)*, 1927 PCIJ (ser. A) No. 10, at 25-26 (Judgement of Sept. 27) (holding that the claimant had failed to “conclusively prove” the “existence of . . . a rule” of customary international law).

<sup>31</sup> *Cargill, Inc. v. Mexico*, NAFTA/ICSID Case No. ARB(AF)/05/2, Award ¶ 273 (Sept. 18, 2009) (emphasis added). The *ADF*, *Glamis Gold*, and *Methanex* tribunals likewise placed on the claimant the burden of establishing the content of customary international law. *See ADF Award* ¶ 185 (“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 Award* ¶ 601 (“As a threshold issue, the Tribunal notes that it is Claimant’s burden to sufficiently” show the content of the customary international law minimum standard of treatment); *Methanex Corp. v. United States* (“*Methanex*”), NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, Part IV, Chapter C ¶ 26 (Aug. 3, 2005) (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 burden).

The three NAFTA Parties agree on this point.<sup>32</sup>

14. Decisions of international courts and tribunals do not constitute State practice or *opinio juris* for purposes of evidencing customary international law. Such decisions can be relevant, however, for determining State practice and *opinio juris* when they include a thorough examination of these elements of customary international law.<sup>33</sup>

15. The *Bilcon* tribunal’s application of Article 1105 does not reflect customary international law demonstrated by State practice and *opinio juris*. Instead, the tribunal relied primarily on an arbitral award that contains little or no examination of State practice and *opinio juris*.

16. Specifically, the *Bilcon* tribunal adopted the minimum standard of treatment proffered by the *Waste Management II* tribunal:<sup>34</sup>

Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard

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<sup>32</sup> See, e.g., *Mercer*, Counter-Memorial of Canada ¶ 470 (Aug. 22, 2014) (“The Claimant bears the burden of establishing the existence of a rule of customary international law and that Canada has breached that rule.”); *Mercer*, Article 1128 Submission of the United States ¶ 27 (May 8, 2015) (“[T]he burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*[.]”); *Mercer*, Article 1128 Submission of Mexico ¶ 18 (May 8, 2015) (“[T]he burden is on the claimant to establish the existence of an obligation under customary international law that meets the requirements of State practice and *opinio juris*.”); *Bilcon*, Counter-Memorial of Canada ¶ 318 (Dec. 9, 2011) (“[T]here can be no violation of Article 1105 unless the Claimants discharge the burden of establishing the existence of a rule that is recognized as part of the customary international law minimum standard of treatment of aliens through *opinio juris* and State practice, and of demonstrating that Canada breached that customary rule”) (emphasis omitted); *Glamis*, Counter-Memorial of the United States at 222 (Sept. 19, 2006) (“The burden is on the claimant to establish the existence of a rule of customary international law. . . . The claimant also bears the burden of demonstrating that the State has engaged in conduct that violated that rule.”) (emphasis omitted); *Waste Management II*, Escrito de Dúplica ¶ 114 (Mar. 5, 2003) (“La demandante debe ofrecer evidencia clara y convincente para establecer que la conducta de la que se queja está prohibida por el derecho internacional consuetudinario.”) / (“The claimant must provide clear and convincing evidence to establish that the conduct about which it complains is prohibited under customary international law.”) (translation by counsel).

<sup>33</sup> See *Glamis Award* ¶ 605 (“Arbitral awards . . . 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.”) (citation omitted); M. H. Mendelson, *The Formation of Customary International Law*, 272 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 155, 202 (1998) (noting that while such decisions may contribute to the formation of customary international law, they are not appropriately considered evidence of “State practice”).

<sup>34</sup> *Bilcon Award* ¶ 588.

it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.<sup>35</sup>

This formulation of the minimum standard of treatment, by its terms, is based entirely on other arbitral awards, rather than on an examination of State practice and *opinio juris*. The *Bilcon* tribunal nonetheless adopted the *Waste Management II* standard as the “epitome of the minimum standard.”<sup>36</sup>

17. Indeed, a majority of the *Bilcon* tribunal “specifically applie[d]” the *Waste Management II* standard to the facts of the case,<sup>37</sup> concluding that Canada breached Article 1105(1) in part by:

- (1) Upsetting Claimants’ “reasonable expectations,” which Claimants had relied upon when making their investment.<sup>38</sup>
- (2) Failing to provide Claimants “reasonable notice” before adopting a standard of evaluation of Claimants’ project;<sup>39</sup> and
- (3) Departing in “fundamental ways from the standard of evaluation required by the laws of Canada[.]”<sup>40</sup>

In each instance, the *Bilcon* tribunal failed to identify an applicable rule of customary international law on which to base its decision.

18. *First*, the tribunal improperly concluded that “[t]he reasonable expectations of the investor are a factor to be taken into account in assessing whether the host state breached the international minimum standard of treatment of fair and equitable treatment under Article 1105 of NAFTA.”<sup>41</sup> Because the *Bilcon* tribunal cited no State practice or *opinio juris* for this finding, it was erroneous to conclude that “reasonable expectations” are part of the customary international law minimum standard of treatment. A claimant’s “expectations” are not a component element of “fair and equitable treatment” under the 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

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<sup>35</sup> *Bilcon* ¶ 442 (quoting *Waste Management Inc. v. Mexico* (“*Waste Management II*”), NAFTA/ICSID Case No. ARB(AF)00/3, Award ¶¶ 98-99 (April 30, 2004)). As the *Bilcon* tribunal observes, the *Waste Management II* tribunal’s formulation of the minimum standard of treatment merely “applies intensifying adjectives” to “categories of potentially nonconforming conduct.” *Id.* ¶ 443.

<sup>36</sup> *Id.* ¶ 588.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* ¶ 594.

<sup>39</sup> *Id.*

<sup>40</sup> *Bilcon* Award ¶ 594; *id.* ¶ 602 (“The Tribunal at this stage simply holds that the applicant was not treated in a manner consistent with Canada’s own laws, including the core evaluative standard under the *CEAA* and the standards of fair notice required by Canadian public administrative law.”).

<sup>41</sup> *Id.* ¶ 455.

of treatment not to frustrate investors' "expectations." An investor may develop expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment.<sup>42</sup> Instead, something more is required than the mere interference with those expectations.<sup>43</sup> As Professor McRae noted in his Dissenting Opinion, "disappointment is not a basis for finding a violation of Article 1105."<sup>44</sup>

19. *Second*, the *Bilcon* tribunal found that Canada failed to provide Claimants "reasonable notice" before adopting a standard of evaluation of Claimant's project.<sup>45</sup> As the *Apotex III* tribunal recognized, however, the failure to provide notice may form part of a denial of justice, but it is not a "free-standing rule[] of customary international law."<sup>46</sup> The relevant question, rather, is "whether the specific procedural protections claimed by the Claimants . . . are part of the customary international law minimum standard of treatment of aliens required by NAFTA Article 1105(1)."<sup>47</sup> The *Bilcon* tribunal failed to address that issue when adopting this standard.

20. *Third*, the *Bilcon* tribunal concluded that Canada had breached Article 1105(1) because the government's review of the Claimants' proposed project "departed in fundamental ways from the standard of evaluation required by the laws of Canada[.]"<sup>48</sup> As the tribunal recognized, a

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<sup>42</sup> *Mobil Investments Canada Inc. & Murphy Oil Corp. v. Canada*, NAFTA/ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum ¶ 153 (May 22, 2012) ("[The fair and equitable treatment] standard does not require a State to maintain a stable legal and business environment for investments[.] . . . [T]here is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor. Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made[.]"); see also *Robert Azinian et al. v. Mexico* ("Azinian"), NAFTA/ICSID Case No. ARB(AF)/97/2, Award ¶ 83 (Nov. 1, 1999) ("It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints. . . . NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.").

<sup>43</sup> See, e.g., *Grand River*, Counter-Memorial of the United States at 96-97 (Dec. 22, 2008) ("As a matter of international law, although an investor may develop its own expectations about the legal regime that governs its investment, those expectations do not impose a legal obligation on the State." Even when such expectations arise out of a legal commitment, "[t]o breach the minimum standard of treatment, something more is required, such as a complete repudiation of the contract or a denial of justice in the execution of the contract.") (citations omitted). NAFTA tribunals have recognized this point. See *Azinian* Award ¶ 87 ("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 II* Award ¶ 115 ("[E]ven the persistent non-payment of debts by a municipality is not equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and . . . some remedy is open to the creditor to address the problem.").

<sup>44</sup> *Bilcon* Dissenting Opinion of Professor Donald McRae ¶ 41 (Mar. 10, 2015) (citing *Azinian* Award ¶ 83).

<sup>45</sup> *Bilcon* Award ¶ 594.

<sup>46</sup> *Apotex III* Award ¶ 9.23 (Aug. 25, 2014); *id.* ¶¶ 9.21-23 (observing that, in the context of a criminal, civil or administrative adjudicative proceedings, "notice" is a relevant factor for "determining whether the proceeding is fair.") (citation omitted).

<sup>47</sup> *Id.* ¶ 9.27.

<sup>48</sup> *Bilcon* Award ¶ 594; *id.* ¶ 602.

determination of a breach of Article 1105(1) “must be made in 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.”<sup>49</sup> Accordingly, “there is a high threshold for Article 1105 to apply,” and “[r]oom must be left for judgment to be used to interpret legal standards and apply them to the facts.”<sup>50</sup> The *Bilcon* tribunal stated:

Even when state officials are acting in good faith there will sometimes be not only controversial judgments, but clear-cut mistakes in following procedures, gathering and stating facts and identifying the applicable substantive rules. State authorities are faced with competing demands on their administrative resources and there can be delays or limited time, attention and expertise brought to bear in dealing with issues. The imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard.<sup>51</sup>

21. Having recognized the deference owed to a NAFTA Party’s interpretation of its domestic law, however, the *Bilcon* tribunal failed to afford Canada any such deference. Instead, the tribunal made its own *de novo* determination of the “standard of evaluation required by the laws

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<sup>49</sup> *Bilcon* Award ¶ 440 (citing *S.D. Myers, Inc. v. Canada* (“*S.D. Myers*”), NAFTA/UNCITRAL, Partial Award ¶ 263 (Nov. 13, 2000)); see also *International Thunderbird Inc. v. Mexico* (“*Thunderbird*”), NAFTA/UNCITRAL, Award ¶ 127 (Jan. 26, 2006) (A State “has wide discretion with respect to how it carries out such policies by regulation and administrative conduct.”); *S.D. Myers*, Partial Award ¶ 261 (Nov. 13, 2000) (“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.”); *Chemtura Corp. v. Canada* (“*Chemtura*”), NAFTA/ICSID Case No. UNCT/13/2, Award ¶ 153 (Aug. 2, 2010) (recognizing, in the context of a review process evaluating the environmental and public health impacts of a pesticide, that “it is not for the Tribunal to judge the correctness or adequacy of the scientific results”). NAFTA also recognizes a State’s sovereign right regulate or take other action to protect public health and the environment. NAFTA Article 1114 (Environmental Measures) states in paragraph 1 that “[n]othing in this Chapter shall be construed to prevent a Party from adopting maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.” Article 1114 shows that Chapter Eleven was not intended to undermine the ability of governments to take regulatory actions, including actions based upon environmental concerns, even when that regulation may affect the value of an investment.

<sup>50</sup> *Bilcon* Award ¶ 437.

<sup>51</sup> *Id.* The tribunal offered the following rationale:

First, third-party adjudicators must, in applying the international minimum standard, take into account that domestic authorities may have more familiarity with the factual and domestic legal complexities of a situation. Secondly, domestic authorities may also enjoy distinctive kinds of legitimacy, such as being elected or accountable to elected authorities. Thirdly, the NAFTA parties have expressly chosen not only to provide a third-party dispute settlement machinery, but to make it directly accessible to investors. Third-party adjudicators may have their own advantages including independence and detachment from domestic pressures.

*Id.* ¶ 439.

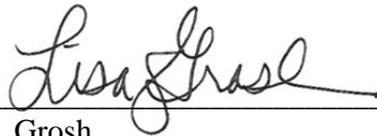
of Canada[.]”<sup>52</sup> International tribunals, however, do not sit as appellate courts with authority to review the legality of domestic measures under a Party’s own domestic law.<sup>53</sup>

22. A failure to satisfy requirements of national law, moreover, does not necessarily violate international law.<sup>54</sup> Rather, “something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1).”<sup>55</sup> As Professor McRae observed in his Dissenting Opinion in *Bilcon*:

[T]he NAFTA standard is not the domestic law standard and a NAFTA claim must meet the NAFTA standard. Showing that domestic law could have been violated does not mean that there has been a violation of Article 1105.<sup>56</sup>

Accordingly, a departure from domestic law could not in and of itself sustain a violation of Article 1105(1). Any breach of Article 1105(1) must be grounded in conduct by a NAFTA Party that breaches the customary international law minimum standard of treatment.

*Respectfully submitted,*



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<sup>52</sup> *Bilcon* Award ¶ 594.

<sup>53</sup> See, e.g., *ADF Group, Inc. v. United States* (“ADF”), NAFTA/ICSID Case No. ARB(AF)/00/1, Award ¶ 190 (Jan. 9, 2003) (acknowledging that the tribunal “do[es] not sit as a court with appellate jurisdiction with respect to U.S. measures”); *Mondev International Ltd. v. United States*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award ¶ 136 (Oct. 11, 2002) (acknowledging same).

<sup>54</sup> *ADF* Award ¶ 190 (“[T]he Tribunal has no authority to review the legal validity and standing of U.S. measures here in question under U.S. internal administrative law. (emphasis in original) We do not sit as a court with appellate jurisdiction with respect to the U.S. measures. (citation omitted) Our jurisdiction is confined by NAFTA Article 1131(1) to assaying the consistency of the U.S. measures with relevant provisions of NAFTA Chapter 11 and applicable rules of international law.”); see also *GAMI Investments, Inc. v. Mexico* NAFTA/UNCITRAL, 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).”).

<sup>55</sup> *ADF* Award ¶ 190.

<sup>56</sup> *Bilcon* Dissenting Opinion of Professor Donald McRae ¶ 42.