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

LONE PINE RESOURCES INC.,

Claimant/Investor

-and-

GOVERNMENT OF CANADA,

Respondent/Party.

ICSID CASE NO. UNCT/15/2

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA), the United States of America makes this submission on questions of interpretation of the NAFTA. The United States does not take a position, in this submission, on how the interpretations offered below apply to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

Article 1139 (Definition of "Investment")

2. Article 1139 provides an exhaustive, not illustrative, list of what constitutes an investment for purposes of NAFTA Chapter Eleven.[1] As the *Grand River* tribunal recognized, "on jurisdictional aspects, NAFTA awards are more relevant and appropriate than decisions in non-NAFTA investment cases."[2]

[1] *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. *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*., Second 1128 Submission of Canada ¶ 59 (Apr. 30, 2001) ("The definition of 'investment' in NAFTA Article 1139 . . . is exhaustive, not illustrative."); *Methanex Corp*., Second 1128 Submission of Mexico ¶ 19 (May 15, 2001) ("[A]n investment as defined in Article 1139 . . . while inclusive of several categories, is also exhaustive.").

[2] *Grand River Enterprises* Award ¶ 61. As the *Grand River* tribunal further recognized, non-NAFTA cases interpreting different definitions of investment invoked to support a broad construction of "investment" have "little value in constructing NAFTA." *Grand River Enterprises* Award ¶ 70.

Article1139(g)

3. Article 1139(g) defines "investment" as "real estate or other property, tangible or intangible, acquitted in the expectation or used for the purpose of economic benefit or other business purposes[.]" In this connection, Chapter Eleven tribunals have consistently declined to recognize as "property" mere contingent "interests."[3] 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.[4]

Article 1139(h)

4. Article 1139(h) defines "investment" as "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[.]"

5. To qualify as investment under Article 1139(h), more than the mere commitment of funds is required. An investor must also have a cognizable "interest" that arises from the commitment of those 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." Not every economic interest that comes into existence as a result of a contract, however, constitutes an "interest" as used in Article

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[3] *See Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA/UNCITRAL, Award ¶¶ 142, 257-58 (Mar. 31, 2010) (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* Award ¶ 118 (finding no property rights where, among other things, exploitation or use of the water requires the grant of a concession under Mexican law, which such 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) ("[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."); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 118 (Dec. 16, 2002) (finding no "right" to tax rebates where the right was conditioned upon presentation of certain invoices); *see also Methanex Corp.*, Final Award on Jurisdiction and Merits, Part IV, Chapter D ¶ 17 (Aug. 3, 2005) (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) ("*Methanex* Final Award").

[4] *See, e.g.*, Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 263, 270 (1982) (for a definition of "property . . . [w]e necessarily draw on municipal law sources"). It is well-established under U.S. law, for example, that that revocable government-granted licenses do not confer property interests that give rise to claims for compensation. *See Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981) (holding that attachments subject to "revocable" and "contingent" licenses, which the President could nullify, did not provide the plaintiff with any "property" interest that would support a constitutional claim for compensation); *Mike's Contracting, LLC v. United States*, 92 Fed. Cl. 302, 310 (Ct. Fed. Cl. 2010) (holding that helicopter airworthiness certificates, subject to U.S. Federal Aviation Administration revocation or suspension, were not property interests that could give rise to a takings claim). This is particularly true when a person voluntarily enters a heavily regulated field.

1139(h). For example, Article 1139(h) does not recognize as "investments" claims to money that arise solely from commercial contracts for the sale of goods or services. Article 1139(i) specifically excludes from the definition of "investment" such interests.

Article 1101 ("Relating to" Requirement)

6. Article 1101(1) requires that the challenged measures adopted or maintained by a NAFTA Party "relate to" an investor of another NAFTA Party, or to that investor's investments. The "relating to" requirement cannot be satisfied by the mere, or incidental, effect that a challenged measure had on a claimant. Rather, there must have been a legally significant connection between the measure and the investor or its investment.[5] Otherwise, untold numbers of domestic measures that simply have an economic impact on a foreign investor or its investment would pass through the Article 1101(1) threshold.[6] As the *Methanex* tribunal aptly observed, "[a] threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all."[7]

7. Whether a challenged measure bears a "legally significant connection" to a foreign investor or investment depends on the facts of a given case. Negative impact of a challenged measure on a claimant, without more, does not satisfy the standard. Rather, a "legally significant connection" requires a more direct connection between the challenged measure and the foreign investor or investment.

Article 1110 (Expropriation and Compensation)

8. 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 specified conditions are satisfied.

[5] *See Methanex v. United States of America*, NAFTA/UNCITRAL First Partial Award, ¶ 147 (Aug. 7, 2002) (finding that "the phrase 'relating to'. . . signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them") ("*Methanex* First Partial Award"). *See also Bayview Irrigation District, et al. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/1, Award ¶ 101 (June 19, 2007); *William Ralph Clayton et al. v. Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction and Liability ¶ 240 (Mar. 17, 2005).

[6] NAFTA Chapter Eleven tribunals have consistently found that the mere effect of a challenged measure on a claimant, without more, does not satisfy the "relating to" requirement of Article 1101(1). *See*, *e.g.*, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/12/1, Award ¶ 6.13 (Aug. 25, 2014) (finding "something more than a mere 'effect' from the measure is required to overcome the jurisdictional threshold in NAFTA Article 1101(1)" and that the *Cargill* tribunal was not seeking to apply a different legal interpretation of NAFTA Article 1101(1) from the tribunals in *Methanex* and *Bayview*).

[7] *Methanex* First Partial Award ¶ 137.

9. As a threshold matter, the *Glamis* tribunal recognized that the term "expropriation" in Article 1110(1) "incorporates by reference the customary international law regarding that subject."[8] In this connection, it is a principle of customary international law that in order for there to have been an expropriation, a property right or property interest must have been taken.[9] International courts have rejected claims that a customer base, or goodwill, by themselves, are property that can be the subject of an expropriation. For instance, in the *Oscar Chinn* case before the Permanent Court of International Justice, the Court denied an expropriation claim for failure to identify a property right.[10] In that case, a British river carrier operator claimed that the Belgian Congo had expropriated its property when it increased government funding for a state-owned competitor which resulted in that competitor being granted a *de facto* monopoly. In denying the claim, the Court held that it was "unable to see in [claimant's] original position – which was characterized by the possession of customers . . . anything in the nature of a genuine vested right."[11] The Court reasoned that "[f]avourable business conditions and goodwill are transient circumstances, subject to inevitable changes."[12]

10. As such, and given that Article 1110(1) protects "investments" from expropriation, the first step in any expropriation analysis must begin with an examination of whether there is an investment capable of being expropriated.[13] Again, it is appropriate to look to the law of the host

[8] *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 354 (June 8, 2009) ("*Glamis*, Award")

[9] *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*, 1 ICSID REVIEW, FOR. INVESTMENT L.J. 41, 41 (1986) ("Once it is established in an expropriation case that the object in question amounts to 'property,' the second logical step concerns the identification of 'expropriation.'"). This principle of customary international law is reflected in 2012 U.S. Model Bilateral Investment Treaty, ann. B (*Expropriation*) ¶ 2 ("2012 U.S. Model BIT").

[10] (U.K. v. Belg.), 1934 P.C.I.J. (ser. A/13) No. 63, at 88 (Dec. 12).

[11] (U.K. v. Belg.), 1934 P.C.I.J. (ser. A/13) No. 63, at 88 (Dec. 12).

[12] (U.K. v. Belg.), 1934 P.C.I.J. (ser. A/13) No. 63, at 88 (Dec. 12); *see also* Rudolf L. Bindschedler, *La protection de la propriete privee en droit international public*, 90 R.C.A.D.I. 179, 223-24 (1956) ("La clientèle, notion intimement liée à celle de la liberté du commerce et de l'industrie, n'est pas plus que cette derrière susceptible d'appropriation.") ("Clientele, a notion intimately linked to that of liberty of commerce and industry, is no more capable of expropriation than the latter.") (emphasis omitted; translation by counsel); *c.f.*, *Methanex* Final Award, Part IV, Ch. D ¶ 17 (Aug. 3, 2005) (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).

[13] *Glamis*, Award ¶ 356 ("There is for all expropriations, however, the foundational threshold inquiry of whether the property or property right was in fact taken."). *See, also 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*, 1 ICSID REVIEW, FOR. INVESTMENT L.J. 41, 41 (1986) ("Once it is established in an expropriation case that the object in question amounts to 'property,' the second logical step concerns the identification of 'expropriation.'").

State[14] for a determination of the definition and scope of the property right or property interest at issue, including any applicable limitations.[15]

11. Article 1110 provides for protections from two types of expropriations, direct and indirect.[16] A direct expropriation occurs "where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure."[17]

12. 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."[18] 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.[19]

13. 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."[20]

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[14] *See, e.g.*, Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 263, 270 (1982) (for a definition of "property . . . [w]e necessarily draw on municipal law sources").

[15] *See Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Rejoinder of Respondent United States of America, at 11 (Mar. 15, 2007) ("*Glamis*, 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).

[16] As the United States has previously explained, the phrase "take a measure tantamount to nationalization or expropriation" explains what the phrase "indirectly nationalize or expropriate" means; it does not assert or imply the existence of an additional type of action that may give rise to liability beyond those types encompassed in the customary international law categories of "direct" and "indirect" nationalization or expropriation. *Metalclad Corp. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/97/1), Submission of the United States of America ¶¶ 9-14 (Nov. 9, 1999). *See also Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL Interim Award ¶¶ 103-04 (June 26, 2000) (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, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 286 (Nov. 13, 2000) ("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 Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/2 ¶ 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).

[17] 2012 U.S. Model Bilateral Investment Treaty, ann. B (*Expropriation*) ¶ 3 ("2012 U.S. Model BIT").

[18] 2012 U.S. Model BIT ann. B (*Expropriation*) ¶ 4.

[19] *See*, 2012 U.S. Model BIT ann. B (*Expropriation*) ¶ 4(a), which is intended to reflect customary international law.

[20] *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Interim Award ¶ 102 (June 26, 2000) ("*Pope & Talbot* Interim Award"); *see also Glamis*, Award ¶ 357 ("[A] panel's analysis should begin with determining

14. The second factor requires an objective inquiry of the reasonableness of the claimant's expectations, which "depend in part on the nature and extent of governmental regulation in the relevant sector."[21]

15. 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").[22]

16. Under international law, where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory.[23] This principle in public international law is not

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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* Award); *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award ¶ 360 (Sept. 18, 2009) ("*Cargill* Award") (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)").

[21] *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 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*, 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.").

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

[23] *See, e.g.*, *Glamis* Award ¶ 354 (quoting the RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712, cmt. (g) (1987) ("A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory. . . .")); *Chemtura Corp. v. Government of Canada*, NAFTA/UNCITRAL, Award (Aug. 2, 2010) ¶ 266 (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

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.[24]

17. Where a State proclaims that it is enacting a non-discriminatory statute or regulation for a *bona fide* public purpose, courts and tribunals rarely question that characterization.[25] The Restatement (Third) of Foreign Relations, for instance, notes that the public purpose requirement "has not figured prominently in international claims practice, perhaps because the concept of public purpose is broad and not subject to effective reexamination by other states."[26] In sum, the concept of a "public purpose" is a broad one, and it is not appropriate to search for a State's alleged ulterior motives when a State has articulated plausible reasons for enacting the measures in question.

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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 and Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT: An Article-by-Article Analysis*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 791-792 (Chester Brown ed., 2013) (discussing observation included in Annex B, paragraph 4(b) of U.S. 2012 Model BIT that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation."). This observation was first included in the 2004 U.S. Model BIT and has been echoed in subsequent U.S. investment agreements.

[24] *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW at 539 (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.") (emphasis added); 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.") (emphasis added).

[25] *See* Louis B. Sohn and R.R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens," 55 Am. J. Int'l L. 545, 555-56 (1961) ("It is not without significance that what constitutes a 'public purpose' has rarely been discussed by international tribunals and that in no case has property been ordered restored to its former owner because the taking was considered to be other than for a public purpose. This unwillingness to impose an international standard of public purpose must be taken as reflecting great hesitancy upon the part of tribunals and of States adjusting claims through diplomatic settlement to embark upon a survey of what the public needs of a nation are and how these may best be satisfied."); Burns H. Weston, *Constructive Takings Under International Law: A Modest Foray Into the Problem of "Creeping Expropriation," 16* VA J. INT'L L. 103, 121 (1975) (explaining that, under international law, there is a "necessary presumption that States are 'regulating' when they say they are 'regulating,' and they are especially to be honored when they are explicit in this regard"); *see also* G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT'L L. 307, 332 (1962) ("But it certainly would seem that if the facts are such that the reasons actually given are plausible, search for unexpressed 'real' reasons is chimerical. No such search is permitted in municipal law, and the extreme deference paid to the honour of States by international tribunals excludes the possibility of supposing that the rule is different in international law.").

[26] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 712, cmt. e (1987).

Article 1105 (Minimum Standard of Treatment)

18. 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."

19. 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."[27] 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."[28] The Commission's interpretation "shall be binding" on tribunals established under Chapter Eleven.[29]

20. 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.[30] The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[31]

21. 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." The "fair and equitable treatment" obligation includes, for example, the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.

22. Other such areas concern the obligation to provide "full protection and security," which is also addressed in Article 1105(1), but which is not at issue in this case. The minimum standard

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

[28] *Id.* ¶ B.2.

[29] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, art. 1131(2) (1993).

[30] 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) ("*Glamis*, U.S. Counter-Memorial") ; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Dec. 22, 2008).

[31] *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 259 (Nov. 13, 2000); *Glamis*, 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, 33 AM. SOC'Y OF INT'L L. PROC.").

of treatment also includes the obligation not to expropriate covered investments, except under the conditions specified in Article 1110, which is addressed in greater detail above.

23. 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."[32]

24. Relevant State practice must be widespread and consistent[33] and be accepted as law, meaning that the practice must also be accompanied by a sense of legal obligation.[34] The twin requirements of State practice and *opinio juris* "must *both* be identified . . . to support a finding that a relevant rule of customary international [law] has emerged."[35] A perfunctory reference to these requirements is not sufficient.[36]

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[32] *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"); *see also* Michael Wood (Special Rapporteur), Fourth Report on Identification of Customary International Law ¶ 31 & Annex at 21, A/CN.4/695 (Mar. 8, 2016) (proposing minor modifications to Draft Conclusion 3); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, 122 (Feb. 3) ("In particular . . . the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*.") (citing *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, 1969 I.C.J. 44, ¶ 77 (Feb. 20)); *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, 29-30 (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[.]").

[33] *See, e.g.*, *North Sea Continental Shelf*, 1969 I.C.J. at 43 (noting that in order for a new rule of customary international law to form, "State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; -- and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved"); ILC Second Report on the Identification of Customary International Law, Draft Conclusion 9 and commentaries (citing authorities).

[34] *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 Second Report on the Identification of Customary International Law, Draft Conclusion 10 with commentaries (citing authorities).

[35] 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).

[36] *See* PATRICK DUMBERRY, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105 at 115 (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

25. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate that a rule of customary international law exists, most recently in its decision on *Jurisdictional Immunities of the State* (*Germany v. Italy*).[37] In that case, the ICJ emphasized that "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States," and noted as examples 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.[38]

26. 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.[39] An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. 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 than the interference with those expectations.[40]

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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.").

[37] *Jurisdictional Immunities of the State*, 2012 I.C.J. 99.

[38] *Id.* at 122-23 (discussing relevant materials that can serve as evidence of State practice and *opinio juris* in the context of jurisdiction immunity in foreign courts).

[39] *See, e.g., Mesa Power Group, LLC v. Government of Canada*, NAFTA/UNICTRAL, Government of Canada Response to 1128 Submissions ¶ 12 (June 26, 2015) (concurring with the United States that there is no obligation not to frustrate investors' expectations under the minimum standard of treatment); DUMBERRY at 158-60 ("there is little support for the assertion that there exists under customary international law any obligation for host States to protect investors' legitimate expectations."). Similarly, the customary international law minimum standard of treatment set forth in Article 1105(1) does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination. *See Grand River Enterprises Six Nations Ltd. v United States of America*, NAFTA/UNCITRAL, Award ¶¶ 208-09 (Jan. 12, 2011) ("The language of Article 1105 does not state or suggest a blanket prohibition on discrimination against alien investors' investments, and one cannot assert such a rule under customary international law. States discriminate against foreign investments, often and in many ways, without being called to account for violating the customary minimum standard of protection . . . [N]either Article 1105 nor the customary international law standard of protection generally prohibits discrimination against foreign investments."); ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW: PEACE 932 (9th ed. 1992) ("a degree of discrimination in the treatment of aliens as compared with nationals is, generally, permissible as a matter of customary international law.").

[40] *See, e.g., Grand River*, U.S. Counter-Memorial, at 96-97 ("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."). NAFTA tribunals have recognized this point. *See Robert Azinian et al. v. United Mexican States*, 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.").

27. In fact, tribunals discussing State practice confirm that expectations about a particular legal regime do not preclude a State from taking future regulatory action. States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's "expectations" about the state of regulation in a particular sector. Further, as the *Mobil v. Canada* tribunal explained:

> [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.… What the foreign investor is entitled to under Article 1105 is that any changes are consistent with the requirements of customary international law on fair and equitable treatment.[41]

For all these reasons, regulatory action may only violate "fair and equitable treatment" under the minimum standard of treatment as that term is understood in customary international law.[42]

28. States may decide expressly by treaty to make policy decisions to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law.[43] The practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 1105 in which "fair and equitable treatment" and "full protection and security" are expressly tied to the customary international law minimum

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[41] *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) (noting also that "[i]t is not the function of an arbitral tribunal established under NAFTA to legislate a new standard which is not reflected in the existing rules of customary international law. The Tribunal has not been provided with any material to support the conclusion that the rules of customary international law require a legal and business environment to be maintained or set in concrete."); *see also Azinian* Award ¶ 83 ("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.").

[42] *See, e.g.*, *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 193-94 (Jan. 26, 2006) ("*Thunderbird* Award"); *see also Glamis*, U.S. Counter-Memorial at 218-262 (discussing the customary international law minimum standard of treatment in the context of regulatory action); *Glamis*, U.S. Rejoinder at 139-243 (same).

[43] *See Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, at p. 615, para. 90 ("The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.").

standard of treatment.[44] 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 Article 1105(1).[45] Likewise, 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.[46] A formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and *opinio juris*, fails to establish a rule of customary international law as incorporated by Article 1105(1).

29. Thus, the NAFTA Parties expressly intended Article 1105(1) to afford the minimum standard of treatment to covered investments, as that standard has crystallized into customary international law through general and consistent State practice and *opinio juris*. A claimant must demonstrate that alleged standards that are not specified in the treaty have crystallized into an obligation under customary international law.

30. To do so, as all three NAFTA Parties agree,[47] the burden is on the claimant and claimant alone to establish the existence and applicability of a relevant obligation under customary

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[44] FTC Interpretation ¶ B.1 ("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.

[45] *See, e.g., Glamis*, 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*, ICSID Case No. ARB(AF)/05/2, Award ¶ 278 (Sept. 18, 2009) (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.").

[46] *See, e.g., Glamis*, 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). All three NAFTA Parties further agree that decisions of arbitral tribunals are not evidence in themselves of customary international law. *See, e.g., Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Second Submission of Mexico Pursuant to NAFTA Article 1128 ¶ 10 (June 12, 2015) ("Mexico concurs with Canada's submission that decisions of arbitral tribunals are not themselves a source of customary international law.").

[47] *See, e.g., Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Government of Canada Rejoinder on the Merits (July 2, 2014) ¶ 147 ("[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); *id*., Second Submission of Mexico Pursuant to NAFTA Article 1128 (June 12, 2015) ¶ 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*); *id*., Second Submission

international law that meets the requirements of State practice and *opinio juris.*[48] "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."[49] Tribunals applying 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. Mexico*, 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.[50]

31. Once a rule of customary international law has been established, the claimant must then show that the State has engaged in conduct that violates that rule.[51] Determining a breach of the minimum standard of treatment therefore "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

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of the United States of America ¶ 12 (June 13, 2015). *See also id*. ¶ 8 ("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.").

[48] *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*, 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).

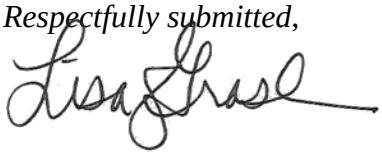
[49] *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, 1952 I.C.J. 176, 200 (Aug. 27) ("The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.") (citation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

[50] *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) ("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*, 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 burden).

[51] *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).

matters within their own borders."[52] Chapter Eleven tribunals do not have an open-ended mandate to "second-guess government decision-making."[53]

Respectfully submitted,



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

[53] *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."); *International Thunderbird Inc. v. Mexico*, NAFTA/UNCITRAL, Award ¶ 127 (Jan. 26, 2006) (reasoning that States have "wide discretion" with respect to how they carry out policies in the context of gambling operations).