

IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE  
NORTH AMERICAN FREE TRADE AGREEMENT  
AND THE UNCITRAL ARBITRATION RULES, 1976

RESOLUTE FOREST PRODUCTS INC.,

*Claimant*

*-and-*

GOVERNMENT OF CANADA,

*Respondent.*

PCA CASE No. 2016-13

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**SECOND 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 interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

**Article 1102 (National Treatment)**

2. Paragraphs 1 and 2 of Article 1102 (National Treatment) provide that each Party shall accord to investors of another Party or their investments “treatment no less favorable than that it accords, in like circumstances,” to its own investors and their investments “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” Paragraph 3 of Article 1102 provides that “treatment,” as used in paragraphs 1 and 2, “means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.”

3. To establish a breach of national treatment under Article 1102, a claimant has the burden of proving that it or its investments: (1) were accorded “treatment”; (2) were in “like circumstances” with domestic investors or investments; and (3) received treatment “less favorable” than that accorded to domestic investors or investments. As the *UPS v. Canada*

tribunal noted, “[t]his is a legal burden that rests squarely with the Claimant. That burden never shifts . . . .”<sup>1</sup>

4. Article 1102 is intended to prevent discrimination on the basis of nationality between domestic investors (or investments) and investors (or investments) of the other Party, that are in like circumstances. It is not intended to prohibit all differential treatment among investors or investments. Rather, it is designed only to ensure that the Parties do not treat entities that are in like circumstances differently based on nationality.<sup>2</sup>

5. All three NAFTA Parties have demonstrated their agreement regarding this interpretation of Article 1102 — clearly and specifically — over a period of many years, in submissions made in a number of different proceedings.<sup>3</sup> Pursuant to customary international law principles of treaty interpretation, as reflected in Article 31(3)(a)-(b) of the Vienna Convention on the Law of Treaties, “[t]here shall be taken into account, together with context, (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; [and] (b) Any subsequent practice in the application of the treaty which establishes

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<sup>1</sup> *United Parcel Service of America Inc. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/02/1, Award on the Merits ¶ 84 (May 24, 2007).

<sup>2</sup> *Loewen Group, Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 139 (June 26, 2003) (accepting that “Article 1102 [National Treatment] is direct[ed] *only* to nationality-based discrimination”) (emphasis added); *Mercer International Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Award ¶ 7.7 (Mar. 4, 2018) (accepting the positions of the United States and Mexico that the National Treatment and Most-Favored Nations obligations are intended to prevent discrimination on the basis of nationality).

<sup>3</sup> *See, e.g.*, for the United States: *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/12/1, Counter-Memorial on Merits and Objection to Jurisdiction of Respondent United States of America ¶ 323 (Dec. 14, 2012) (“Article 1102 is not intended to prohibit all differential treatment among investors and investments, but to ensure that the NAFTA Parties do not treat investors and investments ‘in like circumstances’ differently based on their NAFTA-Party nationality.”); *Mercer Int’l Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of the United States of America ¶ 10 (May 8, 2015) (Articles 1102 and 1103 “are intended to prevent discrimination on the basis of nationality. They are not intended to prohibit all differential treatment among investors or investments. Rather, they are designed to ensure that nationality is not the basis for differential treatment, in accordance with the provisions of the NAFTA”); *Vento Motorcycles, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/17/3, Submission of the United States of America ¶ 4 (Aug. 23, 2019) (“Article 1102 is intended to prevent discrimination on the basis of nationality between domestic investors (or investments) and investors (or investments) of the other Party, that are in ‘like circumstances.’ It is not intended to prohibit all differential treatment among investors or investments.”). For Mexico: *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Supplemental Submission of the United Mexican States, at 3 (May 25, 2000) (“[T]he objective of Article 1102 is to prohibit discrimination between investors of the Parties on the basis of their nationality.”); *Mercer Int’l Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of Mexico Pursuant to Article 1128 of NAFTA ¶ 11 (May 8, 2015) (“Mexico, Canada and the United States have consistently maintained that: the national treatment obligation is intended to prevent discrimination against investors of the other Parties (and their investments) on the basis of nationality; . . .”). For Canada: *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Fourth Submission of the Government of Canada Pursuant to NAFTA Article 1128, ¶ 5 (Jan. 30, 2004) (Article 1102 “prohibits treatment which discriminates on the basis of the foreign investment’s nationality.”); *Mercer Int’l Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Government of Canada’s Reply to 1128 Submissions ¶ 2 (June 12, 2015) (“[T]he NAFTA Parties agree that: . . . NAFTA Articles 1102 (National Treatment) and 1103 (Most-Favoured Nation) only prohibit discrimination on the basis of nationality; . . .”); *Vento Motorcycles, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/17/3, Non-Disputing Party Submission of the Government of Canada Pursuant to Article 1128, ¶ 7 (Aug. 23, 2019) (“[T]here can be no breach of Articles 1102 or 1103 unless the evidence establishes that a host State has treated foreign investors or investments that are in like circumstances to domestic investors or investments (or those of a third State in the case of Article 1103) less favourably on the basis of their nationality.”).

the agreement of the parties regarding its interpretation; . . . .”<sup>4</sup> In accordance with these principles, the Tribunal must take into account the NAFTA Parties’ common understanding of Article 1102, as evidenced by their submissions in this and past arbitrations.<sup>5</sup>

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

7. As indicated above, the appropriate comparison is between the treatment accorded to a claimant or its investment, on one hand, and the treatment accorded to a domestic investor or investment in like circumstances, on the other. It is therefore incumbent upon the claimant to identify domestic investors or investments in like circumstances as comparators. If the claimant does not identify any domestic investor or investment as allegedly being in like circumstances, no violation of Article 1102 can be established.

8. Determining whether a domestic investor or investment identified by a claimant is in like circumstances with the claimant or its investment is a fact-specific inquiry. As one tribunal observed, “[i]t goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, ‘circumstances’ are context dependent and have no

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<sup>4</sup> Vienna Convention on the Law of Treaties, art. 31(3)(a)-(b), May 23, 1969, 1155 U.N.T.S. 331; *see also* International Law Commission, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries, Conclusion 3, UN Doc. A/73/10 (2018) (“Subsequent agreements and subsequent practice under Article 31, paragraph 3(a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.”); *id.*, cmt. 3 (“By describing subsequent agreements and subsequent practice under article 31, paragraph 3(a) and (b), as ‘authentic’ means of interpretation, the Commission recognizes that the common will of the parties, which underlies the treaty, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusion of the treaty.”).

<sup>5</sup> *See, e.g., Clayton v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2009-04, Award on Damages ¶¶ 379 (Jan. 10, 2019) (“[T]he consistent practice of the NAFTA Parties in their submissions before Chapter Eleven tribunals . . . can be taken into account in interpreting the provisions of NAFTA. Thus, the NAFTA Parties’ subsequent practice militates in favour of adopting the Respondent’s position on this issue[.]”); *Mobil Investments Canada Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility ¶¶ 103, 104, 158, 160 (July 13, 2018) (explaining that the approach advocated by claimant had “clearly been rejected by all three NAFTA Parties in their practice subsequent to the adoption of NAFTA,” as evidenced by “their submissions to other NAFTA tribunals,” and that “[i]n accordance with the principle enshrined in Article 31(3)(b) of the Vienna Convention on the Law of Treaties, 1969, the subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the interpretation of the treaty, is entitled to be accorded considerable weight.”); *Canadian Cattlemen for Fair Trade v. United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction ¶¶ 188, 189 (Jan. 28, 2008) (explaining that “the available evidence cited by the Respondent,” including submissions by the NAFTA Parties in arbitration proceedings, “demonstrates to us that there is nevertheless a ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications[.]’”); International Law Commission, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries, Conclusion 4, cmt. 18, UN Doc. A/73/10 (2018) (stating that subsequent practice under Article 31(3)(b) of the Vienna Convention “includes not only official acts at the international or at the internal level that serve to apply the treaty . . . but also, *inter alia*, . . . statements in the course of a legal dispute . . .”).

unalterable meaning across the spectrum of fact situations.”<sup>6</sup> The United States understands the term “circumstances” to denote conditions or facts that accompany treatment as opposed to the treatment itself. Thus, identifying appropriate comparators for purposes of the “like circumstances” analysis requires consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other possible relevant characteristics. When determining whether a claimant was in like circumstances with comparators, it or its investment should be compared to a national investor or investment that is alike in all relevant respects *but for* nationality of ownership. Moreover, whether treatment is accorded in like circumstances under Article 1102 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare objectives.

9. Nothing in Article 1102 requires that investors or investments of investors of a Party, regardless of the circumstances, be accorded the best, or most favorable, treatment given to any domestic investor or any investment of a domestic investor. Rather, the appropriate comparison is between the treatment accorded a foreign investment or investor and a domestic investment or investor *in like circumstances*. This is an important distinction intended by the Parties. Thus, the Parties may adopt measures that draw distinctions among entities without necessarily violating Article 1102.

10. As a general matter, the national treatment obligation under Article 1102 does not prohibit a NAFTA Party from adopting or maintaining measures that apply to or affect only a part of its national territory. Rather, the obligation prohibits nationality-based discrimination between domestic and foreign investors (or investments of foreign and domestic investors) that are in like circumstances. Any suggestion to the contrary misconstrues the obligation as one to provide nationally uniform treatment. The Parties, all of whom are geographically, politically and economically diverse nations, did not intend such a result.<sup>7</sup>

11. Article 1102(3) pertains to state and provincial measures only, and thus serves to determine what “treatment” by a state (or province) is the relevant reference point. The provision recognizes that states and provinces may have different standards for in-state (or in-province) and domestic out-of-state (or out-of-province) investors or their investments. Where a state (or province) accords different treatment to in-state (or in-province) investors or their

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<sup>6</sup> See, e.g., *Pope & Talbot Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award on the Merits of Phase 2, ¶ 75 (Apr. 10, 2001).

<sup>7</sup> See, e.g., *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Government of Canada Submission Respecting Post-Hearing Article 1128 Submissions Filed by the United Mexican States and the United States of America ¶¶ 24, 27-28 (June 1, 2000) (“[A]s the NAFTA parties indicate, Article 1102 does not prevent the NAFTA Parties from implementing location-based measures to achieve regulatory objectives. Where location-based measures exist, NAFTA Article 1102 is not breached simply because an investment *within* the location is not accorded the same treatment accorded investors or investments *outside* the location.”) (emphasis added); *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Supplemental Submission of the United Mexican States, at 3, 6 (May 25, 2000) (“Mexico concurs in the view that Article 1102 does not prevent the NAFTA Parties from implementing location-based measures to achieve regulatory objectives.”); *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America ¶ 5 (Apr. 7, 2000) (“The national treatment obligation does not, as a general matter, prohibit a Party from adopting or maintaining measures that apply to or affect only a part of its national territory. Any suggestion to the contrary misconstrues the obligation to provide ‘national treatment’ – whose object and purpose are to prevent nationality-based discrimination – as an obligation to provide ‘nationally uniform treatment.’”).

investments and domestic out-of-state (or out-of-province) investors or their investments, investors from another NAFTA Party in like circumstances, or their investments, are entitled to receive the better of the treatment accorded by the state or province.<sup>8</sup>

12. However, Article 1102(3) should not be construed as preventing a state or province from adopting or maintaining measures that apply only to investors or their investments operating (or seeking to operate) in that state or province. An investor cannot rest its claim under Article 1102(3) on the fact that a domestic enterprise operating in another state or province receives a different or greater benefit or is subject to a different or lesser burden unless the investor can show that it is in like circumstances with that enterprise.

### **Article 1105 (Minimum Standard of Treatment)**

13. 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.”

14. 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>9</sup> The Commission clarified that the concepts of “fair and equitable treatment” and “full protection and security” do “not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”<sup>10</sup> The Commission also confirmed that “a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).”<sup>11</sup> The Commission’s interpretation “shall be binding” on tribunals established under Chapter Eleven.<sup>12</sup>

15. 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

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<sup>8</sup> See North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. 1 (1993) at 140-141 (“Article 1102 provides that the treatment provided by state and provincial governments to investors from other NAFTA countries and their investments must be no less favorable than the most favorable treatment they provide to domestic investors and their investments.”).

<sup>9</sup> NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions ¶ B.1 (July 31, 2001) (“FTC Interpretation”).

<sup>10</sup> *Id.* ¶ B.2.

<sup>11</sup> *Id.* ¶ B.3.

<sup>12</sup> North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, art. 1131(2) (1993).

specific contexts.<sup>13</sup> The standard establishes a minimum “floor below which treatment of foreign investors must not fall.”<sup>14</sup>

16. 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. Other such areas concern the obligation to provide “full protection and security,” which is also expressly addressed in Article 1105(1), and the obligation not to expropriate covered investments, except under the conditions specified in Article 1110.

17. 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>15</sup>

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

<sup>14</sup> *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 259 (Nov. 13, 2000) (“*S.D. Myers* First Partial Award”); *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 615 (June 8, 2009) (“*Glamis* Award”) (“The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community.”); see also Edwin Borchard, *The “Minimum Standard” of the Treatment of Aliens*, 33 AM. SOC’Y OF INT’L L. PROC. 51, 58 (1939) (“Borchard, *Minimum Standard of Treatment*”).

<sup>15</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”); 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[.]”).

18. Relevant State practice must be widespread and consistent<sup>16</sup> and be accepted as law, meaning that the practice must also be accompanied by a sense of legal obligation.<sup>17</sup> 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.”<sup>18</sup> A perfunctory reference to these requirements is not sufficient.<sup>19</sup>

19. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate, under this two-step approach, that a rule of customary international law exists. In its decision on *Jurisdictional Immunities of the State (Germany v. Italy)*, 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.<sup>20</sup>

20. As discussed below, the concepts of good faith, proportionality, and non-discrimination are not component elements of “fair and equitable treatment” under customary international law that give rise to independent host State obligations.

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<sup>16</sup> 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, Proposed Draft Conclusion 9 and commentaries (citing authorities).

<sup>17</sup> *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, Proposed Draft Conclusion 10 and commentaries (citing authorities).

<sup>18</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>19</sup> 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 in *Merrill & Ring* failed “to cite a single example of State practice in support of” its “controversial findings”); UNCTAD, *FAIR AND EQUITABLE TREATMENT – UNCTAD SERIES ON ISSUES IN INTERNATIONAL AGREEMENTS II*, at 57 (2012) (“The *Merrill & Ring* tribunal failed to give cogent reasons for its conclusion that MST made such a leap in its evolution, and by doing so has deprived the 2001 NAFTA Interpretive Statement of any practical effect.”).

<sup>20</sup> *Jurisdictional Immunities of the State*, 2012 I.C.J. at 122-23 (discussing relevant materials that can serve as evidence of State practice and *opinio juris* in the context of jurisdiction immunity in foreign courts).

## Good Faith

21. The principle that “every treaty in force is binding on the parties to it and must be performed by them in good faith” is established in customary international law,<sup>21</sup> not in Section A of NAFTA Chapter Eleven. As such, claims alleging breach of the good faith principle in a party’s performance of its NAFTA obligations do not fall within the limited jurisdictional grant afforded in Section B.<sup>22</sup>

22. Furthermore, it is well established in international law that good faith is “one of the basic principles governing the creation and performance of legal obligations,” but “it is not in itself a source of obligation where none would otherwise exist.”<sup>23</sup> As such, customary international law does not impose a free-standing, substantive obligation of “good faith” that, if breached, can result in State liability.<sup>24</sup> Accordingly, a claimant “may not justifiably rely upon the principle of good faith” to support a claim, absent a specific treaty obligation, and the NAFTA contains no such obligation.<sup>25</sup>

## Proportionality

23. The United States has long observed that State practice and *opinio juris* do not establish that the minimum standard of treatment of aliens imposes a general obligation of proportionality on States.<sup>26</sup> To the contrary, and as noted below, the minimum standard of treatment affords

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<sup>21</sup> See Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 1980 (reflecting the customary international law principle).

<sup>22</sup> See, e.g., *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, 1986 I.C.J. 14, 135-136, ¶¶ 270-271 (June 27) (holding, with respect to a claim based on customary international law duties alleged to be “implicit in the rule *pacta sunt servanda*,” that “the Court does not consider that a compromissory clause of the kind included in Article XXIV, paragraph 2, of the 1956 FCN Treaty, providing for jurisdiction over disputes as to its interpretation or application, would enable the Court to entertain a claim alleging conduct depriving the treaty of its object and purpose”).

<sup>23</sup> *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 1988 I.C.J. 69, 105 (Dec. 20) (internal quotation marks omitted).

<sup>24</sup> This consistent and longstanding position has been articulated in repeated submissions by the United States to NAFTA tribunals. See, e.g., *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2012-17, Submission of the United States of America ¶ 7 (July 25, 2014) (“It is well established in international law that good faith is ‘one of the basic principles governing the creation and performance of legal obligations,’ but ‘it is not in itself a source of obligation where none would otherwise exist.’”); *Clayton v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2009-04, Submission of the United States of America ¶ 6 (Apr. 19, 2013) (same); *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America 94 (Dec. 22, 2008) (“[C]ustomary international law does not impose a free-standing, substantive obligation of ‘good faith’ that, if breached, can result in State liability. Absent a specific treaty obligation, a Claimant ‘may not justifiably rely upon the principle of good faith’ to support a claim.”); *Canfor Corp. v. United States of America*, NAFTA/UNCITRAL, Reply on Jurisdiction of Respondent United States of America, at 29 n.93 (Aug. 6, 2004) (“[Claimant] appears to argue that customary international law imposes a general obligation of ‘good faith’ independent of any specific NAFTA provision. The International Court of Justice, however, has squarely rejected that notion, holding that ‘the principle of good faith . . . is not in itself a source of obligation where none would otherwise exist.’”).

<sup>25</sup> *Land and Maritime Boundary (Cameroon v. Nigeria)*, 1998 I.C.J. 275, 297, ¶ 39 (June 11).

<sup>26</sup> *Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Submission of the United States ¶ 9 (Sep. 22, 2014); see also *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Rejoinder of the United States



every State “wide discretion with respect to how it carries out [its] policies by regulation and administrative conduct”<sup>27</sup> and tribunals do “not have an open-ended mandate to second-guess government decision-making.”<sup>28</sup>

### Non-Discrimination

24. Similarly, the customary international law minimum standard of treatment set forth in Article 1105 does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination.<sup>29</sup> As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.<sup>30</sup> To the extent that the customary international law minimum standard of treatment incorporated in Article 1105 prohibits discrimination, it does so only in the context of other established customary international law rules, such as prohibitions against discriminatory takings,<sup>31</sup> access to

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188-93 (Mar. 15, 2007) (explaining that “even if [claimant] were able to demonstrate that the . . . measures were ‘[un]necessary, [un]suitable,’ or ‘[dis]proportionate,’ that would not support a finding of a violation of the international minimum standard [of treatment].”); *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Transcript of Hearing, at 19 (Aug. 17, 2007) (arguing that claimant had not supported its position on the minimum standard of treatment with evidence of State practice or *opinio juris*, nor could it have done so because “[i]t cannot seriously be argued that the practice of States has been to subject their legislative and administrative rulemaking to standards such as these.”).

<sup>27</sup> *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 127 (Jan. 26, 2006).

<sup>28</sup> *S.D. Myers* First Partial Award ¶ 261 (Nov. 13, 2000).

<sup>29</sup> See *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶¶ 208-209 (Jan. 12, 2011) (“*Grand River Award*”) (“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.”).

<sup>30</sup> See *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Part IV, Chapter C ¶¶ 25-26 (Aug. 3, 2005) (“*Methanex Final Award*”) (explaining that customary international law has established exceptions to the broad rule that “a State may differentiate in its treatment of nationals and aliens,” but noting that those exceptions must be proven rules of custom, binding on the Party against whom they are invoked); see also ROBERT JENNINGS & ARTHUR WATTS, *OPENHEIM’S INTERNATIONAL LAW: PEACE* 932 (9th ed. 1992) (“[A] degree of discrimination in the treatment of aliens as compared with nationals is, generally, permissible as a matter of customary international law.”); Borchard, *Minimum Standard of Treatment* at 56 (“The doctrine of absolute equality – more theoretical than actual – is therefore incompatible with the supremacy of international law. The fact is that no state grants absolute equality or is bound to grant it. It may even discriminate between aliens, nationals of different states, e.g., as the United States does through treaty in the matter of the ownership of real property in this country.”); ANDREAS ROTH, *MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS* 83 (1949) (“[T]he principle of equality has not yet become a rule of positive international law, *i.e.*, there is no obligation for a State to treat the aliens like the nationals. A discrimination of treatment between aliens and nationals alone does not yet constitute a violation of international law.”).

<sup>31</sup> See, e.g., *BP Exploration Co. (Libya) Ltd. v. Libya*, 53 I.L.R. 297, 329 (1974) (“[T]he taking . . . clearly violates public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character.”); *Libyan American Oil Co. (LIAMCO) v. Libya*, 62 I.L.R. 140, 194 (1977) (“It is clear and undisputed that non-discrimination is a requisite for the validity of a lawful nationalization. This is a rule well established in international legal theory and practice.”); *Kuwait v. American Independent Oil Co. (AMINOIL)*, 66 I.L.R. 518, 585 (1982) (considering the question “whether the nationalization of Aminoil was not thereby tainted with

judicial remedies or treatment by the courts,<sup>32</sup> or the obligation of States to provide full protection and security and to compensate aliens and nationals on an equal basis in times of violence, insurrection, conflict, or strife.<sup>33</sup>

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25. 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.<sup>34</sup> 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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discrimination,” but finding that there were legitimate reasons for nationalizing one company and not the other); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712 (1987) (“A state is responsible under international law for injury resulting from . . . a taking by the state of the property of a national of another state that . . . is discriminatory . . .”); *id.* § 712 cmt. f (“Formulations of the rules on expropriation generally include a prohibition of discrimination . . .”).

<sup>32</sup> *See, e.g.*, C.F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 243 (1967) (“Especially in a suit between State and alien it is imperative that there should be no discrimination between nationals and aliens in the imposition of procedural requirements. The alien cannot be expected to undertake special burdens to obtain justice in the courts of the State against which he has a complaint.”); EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 334 (1919) (A national’s “own government is justified in intervening in his behalf only if the laws themselves, the methods provided for administering them, and the penalties prescribed are in derogation of the principles of civilized justice as universally recognized or if, in a specific case, they have been wrongfully subverted by the courts so as to discriminate against him as an alien or perpetrate a technical denial of justice.”); *Report of the Guerrero Sub-Committee of the Committee of the League of Nations on Progressive Codification 1*, League of Nations Doc. C.196M.70, at 100 (1927) (“Denial of justice is therefore a refusal to grant foreigners free access to the courts instituted in a State for the discharge of its judicial functions, or the failure to grant free access, in a particular case, to a foreigner who seeks to defend his rights, *although in the circumstances nationals of the State would be entitled to such access.*”) (emphasis added); *Ambatielos (Greece v. United Kingdom)*, 12 R.I.A.A. 83, 111 (Mar. 6, 1956) (“The modern concept of ‘free access to the Courts’ represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a practice which existed in former times and in certain countries, and which constituted an unjust discrimination against foreigners. Hence, the essence of ‘free access’ is adherence to and effectiveness of the principle of non-discrimination against foreigners who are in need of seeking justice before the courts of the land for the protection and defence of their rights.”).

<sup>33</sup> *See, e.g.*, *The Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers* (United States, Reparation Commission), 2 R.I.A.A. 777, 794-95 (1926); League of Nations, *Bases of Discussion: Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners*, League of Nations Doc. C.75.M.69.1929.V, at 107 (1929), *reprinted in* SHABTAI ROSENNE, LEAGUE OF NATIONS CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW [1930], 526-42 (1975) (Basis of Discussion No. 21 includes the provision that a State must “[a]ccord to foreigners to whom damage has been caused by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance the same indemnities as it accords to its own nationals in similar circumstances.” Basis of Discussion No. 22(b) states that “[a] State must accord to foreigners to whom damage has been caused by persons taking part in an insurrection or riot or by mob violence the same indemnities as it accords to its own nationals in similar circumstances.”).

<sup>34</sup> *See Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 2007 I.C.J. 582, ¶ 90 (May 24) (“The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.”).

standard of treatment.<sup>35</sup> 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).<sup>36</sup> 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.<sup>37</sup> 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).

26. 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.

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<sup>35</sup> FTC Interpretation ¶ B.1 (“Article 1105(1) prescribes the customary international law minimum standard of treatment . . . .); *see 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.

<sup>36</sup> *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*, NAFTA/ICSID Case No. ARB(AF)/05/2, Award ¶ 278 (Sept. 18, 2009) (“*Cargill Award*”) (noting that arbitral “decisions are relevant to the issue presented in Article 1105(1) only if the fair and equitable treatment clause of the BIT in question was viewed by the Tribunal as involving, like Article 1105, an incorporation of the customary international law standard rather than autonomous treaty language.”).

<sup>37</sup> *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); *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, 2018 I.C.J. 507, ¶ 162 (Oct. 1) (“The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia’s argument based on legitimate expectations thus cannot be sustained.”). All three NAFTA Parties further agree that decisions of arbitral tribunals are not evidence in themselves of customary international law. *See, e.g., Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Second Submission of the United States of America ¶ 14 (June 12, 2015) (“Decisions of international courts and tribunals do not constitute State practice or *opinio juris* for purposes of evidencing customary international law.”); *Mesa Power Group LLC v. Government of Canada*, NAFTA/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.”); *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Canada’s Response to 1128 Submissions ¶ 11 (June 26, 2015) (“Canada has explained at length in its pleadings as to why decisions of international investments tribunals are not a source of State practice for the purpose of establishing a new customary norm.”).

27. As all three NAFTA Parties agree,<sup>38</sup> the burden is on the claimant and the claimant alone 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>39</sup> “The party which relies on a custom . . . must prove that this custom is established in such a manner that it has become binding on the other Party.”<sup>40</sup> Tribunals applying the minimum standard of treatment obligation in Article 1105 have confirmed that the party seeking to rely on a rule of customary international law must establish its existence. The tribunal in *Cargill Inc. v. United Mexican States*, for example, acknowledged that

the proof of change in a custom is not an easy matter to establish. However, *the burden of doing so falls clearly on Claimant*. If Claimant does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task. Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.<sup>41</sup>

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<sup>38</sup> See, e.g., *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Government of Canada Rejoinder on the Merits ¶ 147 (July 2, 2014) (“[I]t is a well-established principle of international law that the party alleging the existence of a rule of customary international law bears the burden of proving it. Thus, the burden is on the Claimant to prove that customary international law has evolved to include the elements it claims are protected.”) (footnote omitted); *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, 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*); *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Second Submission of the United States of America ¶ 13 (June 12, 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.”).

<sup>39</sup> *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).

<sup>40</sup> *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).

<sup>41</sup> *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).

28. 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.<sup>42</sup> An alleged breach of the minimum standard of treatment must be assessed “in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.”<sup>43</sup> Chapter Eleven tribunals do not have an open-ended mandate to “second-guess government decision-making.”<sup>44</sup>

### **Limitations on Loss or Damage**

29. Articles 1116 and 1117 allow an investor to recover loss or damage incurred “by reason of or arising out of” a breach of an obligation under NAFTA Chapter Eleven, Section A. In this connection, an investor may recover such damages only to the extent that they are established on the basis of satisfactory evidence that is not inherently speculative.<sup>45</sup>

30. The ordinary meaning of Articles 1116 and 1117 requires an investor to establish the causal nexus between the alleged breach and the claimed loss or damage.<sup>46</sup> It is well-established that “causality in fact is a necessary but not a sufficient condition for reparation.”<sup>47</sup> The

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<sup>42</sup> *Feldman v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) (“[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).

<sup>43</sup> *S.D. Myers* First Partial Award ¶ 263.

<sup>44</sup> *S.D. Myers* First Partial Award ¶ 261 (“When interpreting and applying the ‘minimum standard,’ a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.”); *Glamis* Award ¶ 779 (“It is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency.”); *International Thunderbird Inc. v. United Mexican States*, 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).

<sup>45</sup> As the International Law Commission has recognized, a State responsible for an internationally wrongful act shall compensate for the resulting damage caused “insofar as [that damage] is established.” International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 36(2) (2001) (“ILC Draft Articles”). Specifically, as the ILC observes, “[t]ribunals have been reluctant to provide compensation for claims with inherently speculative elements.” *Id.*, cmt. 27 (citing cases); see also *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Second Partial Award ¶ 173 (Oct. 21, 2002) (“*S.D. Myers* Second Partial Award”) (“to be awarded, the sums in question must be neither speculative nor too remote.”); *Mobil Investments Canada Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (May 22, 2012) ¶¶ 437-39 (accord).

<sup>46</sup> H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 422 (2d ed. 1985) (noting that it is generally the claimant’s burden to “persuade the tribunal of fact of the existence of causal connection between wrongful act and harm”); see *Islamic Republic of Iran v. United States of America*, AWD 601-A3/A8/A9/A14/B/61-FT ¶ 153 (July 17, 2009), 38 Iran-U.S. C.T.R. 197, 223 (“Iran, as the Claimant, is required to prove that it has suffered losses . . . and that such losses were caused by the United States”) (emphasis added).

<sup>47</sup> ILC Draft Articles, art. 31, cmt. 10 (2001). The Iran-U.S. Claims Tribunal reaffirmed this principle in the remedies phase of Case A/15(IV) when it held that it must determine whether the “United States breach caused

standard for factual causation is known as the “but-for” or “*sine qua non*” test whereby an act causes an outcome if the outcome would not have occurred in the absence of the act. This test is not met if the same result would have occurred had the breaching State acted in compliance with its obligations.<sup>48</sup>

31. The ordinary meaning of the term “by reason of, or arising out of” also requires an investor to demonstrate proximate causation. Proximate causation is an “applicable rule[] of international law” that under Article 1131(1) must be taken into account in fixing the appropriate amount of monetary damages.<sup>49</sup> Articles 1116 and 1117 contain no indication that the NAFTA Parties intended to vary from this established rule. Indeed, all three NAFTA Parties have expressed their agreement that proximate causation is a requirement under NAFTA Chapter Eleven.<sup>50</sup>

32. NAFTA tribunals have, moreover, consistently imposed a requirement of proximate causation under Articles 1116 and 1117. The *S.D. Myers* tribunal held that damages may only be awarded to the extent that there is a “sufficient causal link” between the breach of a specific NAFTA provision and the loss sustained by the investor,<sup>51</sup> and then subsequently clarified that “[o]ther ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the *proximate* cause of the harm.”<sup>52</sup> In *Pope & Talbot*, the tribunal held that under Article 1116 the claimant bears the burden to “prove

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‘factually’ the harm and that that loss was also a ‘proximate’ consequence of the United States’ breach.” *Islamic Republic of Iran v. United States of America*, AWD 602-A15(IV)/A24-FT ¶ 52 (July 2, 2014) (“A/15(IV) Award”).

<sup>48</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 I.C.J. 40, ¶ 462 (Feb. 26); A/15(IV) Award ¶ 52 (“[I]f one were to reach the conclusion that both tortious (or obligation-breaching) and non-tortious (obligation-compliant) conduct of the same person would have led to the same result, one might question that the tortious (or obligation-breaching) conduct was *condicio sine qua non* of the loss the claimant seeks to recover.”).

<sup>49</sup> See ILC Draft Articles, art. 31, cmt. 10. See also *Administrative Decision No. II (U.S. v. Germany)*, 7 R.I.A.A. 23, 29 (1923) (proximate cause is “a rule of general application both in private and public law – which clearly the parties to the Treaty had no intention of abrogating”); *United States Steel Products (U.S. v. Germany)*, 7 R.I.A.A. 44, 54-55, 58-59, 62-63 (1923) (rejecting on proximate cause grounds a group of claims seeking reimbursement for war-risk insurance premiums); *Dix (U.S. v. Venezuela)*, 9 R.I.A.A. 119, 121 (undated) (“International as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure.”); *H. G. Venable (U.S. v. Mexico)*, 4 R.I.A.A. 219, 225 (1927) (construing the phrase “originating from” as requiring that “only those damages can be considered as losses or damages caused by [the official] which are immediate and direct results of his [action]”). See also BIN CHENG, GENERAL PRINCIPLES OF LAW 244-45 (1953) (“it is ‘a rule of general application both in private and public law,’ equally applicable in the international legal order, that the relation of cause and effect operative in the field of reparation is that of proximate causality in legal contemplation”).

<sup>50</sup> See, e.g., *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Amended Statement of Defense of the United States of America ¶ 213 (Dec. 5, 2003); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Fourth Submission of the United Mexican States ¶ 2 (Jan. 30, 2004) (“Mexico agrees . . . that Chapter Eleven incorporates a standard of proximate cause through the use of the phrase ‘has incurred loss or damage by reason of, or arising out of’ a Party’s breach of one of the NAFTA provisions listed in Articles 1116 and 1117.”) (footnote omitted); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Second Submission of Canada Pursuant to NAFTA Article 1128, ¶ 47 (Apr. 30, 2001) (“The ordinary meaning of the words ‘by reason of, or arising out of’ establishes that there must be a clear and direct nexus between the breach and the loss or damage incurred.”).

<sup>51</sup> *S.D. Myers* First Partial Award ¶ 316.

<sup>52</sup> *S.D. Myers* Second Partial Award ¶ 140.

that loss or damage was caused to its interest, and that it was causally connected to the breach complained of.”<sup>53</sup> The *ADM* tribunal required “a sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such an injury.”<sup>54</sup>

33. Accordingly, any loss or damage cannot be based on an assessment of acts, events or circumstances not attributable to the alleged breach.<sup>55</sup> Injuries that are not sufficiently “direct”, “foreseeable”, or “proximate” consequences of the alleged breach may not, consistent with applicable rules of international law, be considered when calculating a damage award.<sup>56</sup>

*Respectfully submitted,*



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April 20, 2020

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<sup>53</sup> *Pope & Talbot Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award in Respect of Damages ¶ 80 (May 31, 2002).

<sup>54</sup> *Archer Daniels Midland Co. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/04/05, Award ¶ 282 (Nov. 21, 2007).

<sup>55</sup> See ILC Draft Articles, art. 31, cmt. 9 (noting that the language of Article 31(2) providing that injury includes damage “caused by the internationally wrongful act of a State,” “is used to make clear that the subject matter of reparation is, globally, the injury *resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.*”) (emphasis added).

<sup>56</sup> As the commentary to the ILC Draft Articles explains, causality in fact is a necessary but not sufficient condition for reparation: “There is a further element, associated with the exclusion of injury that is too “remote” or “consequential” to be the subject of reparation. In some cases, the criterion of “directness” may be used, in others “foreseeability” or “proximity”. . . . The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act[.]” ILC Draft Articles, art. 31, cmt. 10 (footnotes omitted).