IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE
UNITED STATES-KOREA FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES, 1976

MASON CAPITAL, L.P
MASON MANAGEMENT LLC,

Claimants,

-and-

GOVERNMENT OF THE REPUBLIC OF KOREA,

Respondent.

PCA CASE NO. 2018-55

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. The United States of America hereby makes this submission pursuant to Article 11.20.4 of the United States-Korea Free Trade Agreement ("KORUS" or "Agreement"), which authorizes a non-disputing Party to make oral and written submissions to a Tribunal regarding the interpretation of the Agreement. The United States does not take a position on how the interpretations apply to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

Article 11.1 (Scope and Coverage)

2. Article 11.1.1 begins "[t]his Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of the other Party; (b) covered investments." In this connection, Article 1.4, which sets forth the general definitions of terms used in the KORUS, provides that "measure includes any law, regulation, procedure, requirement, or practice." Article 11.1.3 further provides:

> For purposes of this Chapter, **measures adopted or maintained by a Party** means measures adopted or maintained by:
>
> (a) central, regional, or local governments and authorities; and

(b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.[1]

"Measures Adopted or Maintained by a Party"

3. Article 11.1.3(a) confirms that measures adopted or maintained by any government or authority of a Party are attributable to that Party. The term "governments and authorities" means the organs of a Party, consistent with the principles of attribution under customary international law.[2] As the text of Article 11.1.3(a) makes clear, this rule of attribution applies to any State organ at the central, regional, or local level of government. The text of Article 11.1.3(a) does not draw distinctions based on the type of conduct at issue.[3]

4. Pursuant to Article 11.1.3(b), attribution of conduct of a non-governmental body to a Party requires that both (i) the conduct is governmental in nature and (ii) the measures adopted or maintained by the non-governmental body are undertaken "in the exercise of powers *delegated* by" the government or an authority of a Party.[4] (Emphasis added.) Article 16.9 of the KORUS defines "delegation," for purposes of the chapter on competition-related matters, as including, *inter alia*, "a legislative grant, and a government order, directive, or other act, transferring to the . . . state enterprise, or authorizing the exercise by the . . . state enterprise of, governmental authority." If the conduct of a non-governmental body falls outside the scope of the relevant delegation of authority, such conduct is not a "measure[] adopted or maintained by a Party" under Article 11.1.

5. A non-governmental body such as a state enterprise may exercise regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges. These examples illustrate circumstances in which a non-governmental body such as a state enterprise is exercising governmental authority delegated by a Party in its sovereign capacity.

"Relating to"

6. The "relating to" requirement of Article 11.1.1 cannot be satisfied by the mere, or incidental, effect that a challenged measure had on a claimant. Rather, there must have been a

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[1] United States-Korea Free Trade Agreement ("KORUS"), art. 11.1.3, June 30, 2007 (entered into force Mar. 15, 2012) (emphasis in original).

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

[3] *See* ILC Draft Articles, art. 4, cmt. 6 ("It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as *acta iure gestionis*.").

[4] *See* ILC Draft Articles, art. 5 ("The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.").

"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 11.1.1 threshold.[6] As the *Methanex* tribunal aptly observed with respect to the analogous NAFTA Article 1101(1), "[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.

8. Thus, for example, the *S.D. Myers* tribunal found that "the requirement that the import ban be 'in relation' to SDMI and its investment in Canada is easily satisfied," given that the measure "was raised to address specifically the operations of SDMI and its investment."[8] In *Bilcon*, the tribunal found a legally significant connection where the challenged measure was the rejection by the Nova Scotia and the Canadian federal governments of a quarry project that was to be developed and operated pursuant to an agreement between the claimants and their Canadian joint-venture partner.[9] The tribunal in *Cargill, Inc. v. Mexico* found that the import permit requirement at issue "directly affected" and "constituted a legal impediment to carrying on the business of Cargill de Mexico in sourcing HFCS in the United States and re-selling it in Mexico."[10]

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[5] *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, First Partial Award, ¶ 147 (Aug. 7, 2002) [hereinafter *Methanex* First Partial Award] (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"); *see also Bayview Irrigation District, et al. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/1, Award, ¶ 101 (June 9, 2007); *William Ralph Clayton & Bilcon of Delaware Inc. et al. v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2009-04, Award, ¶ 240 (Mar. 17, 2015) [hereinafter *Bilcon* Award].

[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; *see also Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, ¶ 242 (Jan. 30, 2018) ("[A] measure which adversely affected the claimant in a tangential or merely consequential way will not suffice for this purpose.").

[8] *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 234 (Nov. 13, 2000) [hereinafter *S.D. Myers* First Partial Award].

[9] *Bilcon* Award, ¶¶ 5, 12, 237, 239, 241. During the licensing process, the claimants acquired the entire partnership. *Id.* ¶ 8.

[10] *Cargill Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/2, Award, ¶¶ 173, 175 (Sept. 18, 2009) [hereinafter *Cargill* Award] .

Article 11.5 (Minimum Standard of Treatment)

9. Article 11.5 provides that "[e]ach party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."[11] This provision "prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments."[12] Specifically, "'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."[13] And, "'full protection and security' requires each Party to provide the level of police protection required under customary international law."[14]

10. This text demonstrates the Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in Article 11.5. 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. The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[15]

11. Annex 11-A to the KORUS addresses the methodology for determining whether a customary international law rule covered by Article 11.5 has crystallized. The Annex expresses the Parties' "shared understanding that 'customary international law' generally and as specifically referenced in Article 11.5 . . . results from a general and consistent practice of States that they follow from a sense of legal obligation." Thus, in Annex 11-A the Parties confirmed their understanding and application of this two-element approach—State practice and *opinio juris*—which is the standard practice of States and international courts, including the International Court of Justice.[16]

12. 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

[11] KORUS art. 11.5.1.

[12] KORUS art. 11.5.2.

[13] KORUS art. 11.5.2(a).

[14] KORUS art. 11.5.2(b).

[15] *S.D. Myers* First Partial Award, ¶ 259; *see also Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 615 (June 8, 2009) [hereinafter *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."); Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 AM. SOC'Y OF INT'L L. PROC. 51, 58 (1939).

[16] *See Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, 122 (Feb. 3) [hereinafter *Jurisdictional Immunities of the State*] ("In particular . . . the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*.") (citing *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, 1969 I.C.J. 44, ¶ 77 (Feb. 20) [hereinafter *North Sea Continental Shelf*]); *see also Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, ¶ 27 (June 3) [hereinafter *Continental Shelf*] ("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[.]").

law exists. In its decision on *Jurisdictional Immunities of the State (Germany v. Italy)*,[17] 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.[18]

13. The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*.[19] "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."[20] Tribunals applying the minimum standard of treatment obligation in Article 1105 of NAFTA Chapter Eleven, which likewise affixes the standard to customary international law,[21] 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.[22]

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[17] *Jurisdictional Immunities of the State* at 99.

[18] *Id.* at 122-23 (quoting *Continental Shelf* ¶ 27) (discussing relevant materials that can serve as evidence of State practice and *opinio juris* in the context of jurisdictional immunity in foreign courts); *see also* International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, U.N. Doc. A/73/10, Conclusion 6 (2018) ("Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts.").

[19] *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20) [hereinafter *Asylum*]; *see also North Sea Continental Shelf* at 43; *Glamis* Award, ¶¶ 601-602 (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).

[20] *Rights of Nationals of the United States of America in Morocco (France v. United States)*, 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); *Case of the 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).

[21] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions ¶ B.1 (July 31, 2001) [hereinafter FTC interpretation].

[22] *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) [hereinafter *ADF* Award] ("The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to

14. Once a rule of customary international law has been established, a claimant must then show that the respondent State has engaged in conduct that violates that rule.[23] Determining a breach of the minimum standard of treatment "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[24] A failure to satisfy requirements of domestic law does not necessarily violate international law.[25] Rather, "something more than simple illegality or lack of authority under the domestic law of a state is necessary to render an act or measure inconsistent with the customary international law requirements. . . ."[26] Accordingly, a departure from domestic law does not in-and-of-itself sustain a violation of Article 11.5.

15. 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.[27] The practice of adopting such autonomous standards

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prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts."); *Glamis* Award ¶ 601 (noting "[a]s a threshold issue . . . that it is Claimant's burden to sufficiently" show the content of the customary international law minimum standard of treatment); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award, Part IV, Ch. C ¶ 26 (Aug. 3, 2005) [hereinafter *Methanex* Final Award] (citing *Asylum* 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).

[23] *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) [hereinafter *Feldman* Award] ("[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.") (citation omitted).

[24] *S.D. Myers* First Partial Award ¶ 263; *see also Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2012-17, Award, ¶ 505 (Mar. 24, 2016) ("when defining the content of [the minimum standard of treatment] one should . . . take into consideration that international law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs."); *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award, ¶ 127 (Jan. 26, 2006) [hereinafter *Thunderbird* Award] (noting that states have a "wide regulatory 'space' for regulation," can change their "regulatory polic[ies]," and have "wide discretion" with respect to how to carry out such policies by regulation and administrative conduct).

[25] *ADF* Award ¶ 190 ("[T]he Tribunal has no authority to review the legal validity and standing of the U.S. measures here in question under *U.S. internal administrative law*. We do not sit as a court with appellate jurisdiction with respect to the U.S. measures. Our jurisdiction is confined by NAFTA Article 1131(1) to assaying the consistency of the U.S. measures with relevant provisions of NAFTA Chapter 11 and applicable rules of international law.") (emphasis in original, citations omitted); *see also GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 97 (Nov. 15, 2004) ("The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law."); *Thunderbird* Award ¶ 160 ("[I]t is not up to the Tribunal to determine how [the state regulatory authority] should have interpreted or responded to the [proposed business operation], as by doing so, the Tribunal would interfere with issues of purely domestic law and the manner in which governments should resolve administrative matters (which may vary from country to country).").

[26] *ADF* Award, ¶ 190.

[27] *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.").

is not relevant to ascertaining the content of Article 11.5 in which "fair and equitable treatment" and "full protection and security" are expressly tied to the customary international law minimum standard of treatment.[28] 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 11.5.[29] 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.[30] 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 11.5.

Fair and Equitable Treatment

16. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, expressly addressed in Article 11.5.2(a), concerns the obligation to provide "fair and equitable treatment," which includes "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."

17. As discussed below, the concepts of legitimate expectations, good faith, nondiscrimination, transparency, and proportionality are not component elements of "fair and

[28] FTC Interpretation ¶ B.1 ("Article 1105(1) prescribes the customary international law minimum standard of treatment . . . .); *see also Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award, ¶ 176 (Jan. 12, 2011) [hereinafter *Grand River* Award] (noting that an obligation under Article 1105 of the NAFTA "must be determined by reference to customary international law, not to standards contained in other treaties or other NAFTA provisions, or in other sources, unless those sources reflect relevant customary international law"). While there may be overlap in the substantive protections ensured by NAFTA and other treaties, a claimant submitting a claim under the NAFTA, in which fair and equitable treatment is defined by the customary international law minimum standard of treatment, still must demonstrate that the obligations invoked are in fact a part of customary international law.

[29] *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* Award ¶ 278 (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.").

[30] *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)*, Judgment, 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.").

equitable treatment" under customary international law that give rise to independent host State obligations.

Legitimate Expectations

18. 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.[31] 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. For this reason, Article 11.5.4 clarifies that, "[f]or greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result."

Good Faith

19. 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,[32] not in Chapter 11, Section A of the KORUS. As such, claims alleging breach of the good faith principle in a party's performance of its KORUS obligations do not fall within the limited jurisdictional grant afforded in Section B.[33]

20. 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."[34] As such, customary international law does not impose a free-standing, substantive obligation of "good faith" that, if breached, can result in State liability.[35] Accordingly, a claimant "may not justifiably rely upon the principle of

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[31] *See* PATRICK DUMBERRY, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105 158–59 (2013) ("In the present author's view, there is little support for the assertion that there exists under customary international law any obligation for host States to protect investors' legitimate expectations."). Nor can any obligation of "legitimate expectations" be derived from a general principle of "good faith." A general principle of international law that does not impose any substantive obligations on a State toward foreign investors cannot itself create *additional* State obligations toward such investors.

[32] See Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 (reflecting the customary international law principle).

[33] *See, e.g., Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, 1986 I.C.J. 14, 135-36, ¶¶ 270-271 (June 27) (holding, with respect to a claim based on customary international law duties alleged to be "implicit in the rule *pacta sunt servanda*," that "the Court does not consider that a compromissory clause of the kind included in Article XXIV, paragraph 2, of the 1956 FCN Treaty, providing for jurisdiction over disputes as to its interpretation or application, would enable the Court to entertain a claim alleging conduct depriving the treaty of its object and purpose").

[34] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 1988 I.C.J. 69, 105, ¶ 90 (Dec. 20) (internal quotation marks omitted).

[35] 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.'"); *William Ralph Clayton & Bilcon of*

good faith" to support a claim, absent a specific treaty obligation, and the KORUS contains no such obligation.[36]

Non-Discrimination

21. Similarly, the customary international law minimum standard of treatment set forth in Article 11.5 does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination.[37] As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.[38] To the extent that the customary international law minimum standard of treatment incorporated in Article 11.5 prohibits discrimination, it does so only in the context of other established customary international law rules, such as prohibitions against discriminatory takings,[39] access to

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Delaware Inc. et al. v. Government of Canada, NAFTA/UNCITRAL, 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) [hereinafter *Grand River* Counter-Memorial] ("[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.'.").

[36] *Land and Maritime Boundary (Cameroon v. Nigeria)*, Judgment, 1998 I.C.J. 275, 297, ¶ 39 (June 11).

[37] *See Grand River* 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.").

[38] *See Methanex* Final Award, Part IV, Chapter C ¶¶ 25-26 (explaining that customary international law has established exceptions to the broad rule that "a State may differentiate in its treatment of nationals and aliens," but noting that those exceptions must be proven rules of custom, binding on the Party against whom they are invoked); *see also* ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW: PEACE 932 (9th ed. 1992) ("[A] degree of discrimination in the treatment of aliens as compared with nationals is, generally, permissible as a matter of customary international law."); Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 AM. SOC'Y OF INT'L L. PROC. 51, 56 (1939) ("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.").

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

judicial remedies or treatment by the courts,[40] 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.[41] Moreover, general investor-State claims of nationality-based discrimination are governed exclusively by the provisions of Chapter Eleven that specifically address that subject, and not Article 11.5.1.[42]

Transparency

22. The concept of "transparency" also has not crystallized as a component of "fair and equitable treatment" under customary international law giving rise to an independent host-State

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nationalizing one company and not the other); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712(1)(b) (AM. LAW INST. 1987) ("A state is responsible under international law for injury resulting from . . . a taking by the state of the property of a national of another state that . . . is discriminatory . . . ."); id. § 712 cmt. f ("Formulations of the rules on expropriation generally include a prohibition of discrimination . . . .").

[40] *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 (Com. Arb. 1956) ("The modern concept of 'free access to the Courts' represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a practice which existed in former times and in certain countries, and which constituted an unjust discrimination against foreigners. Hence, the essence of 'free access' is adherence to and effectiveness of the principle of non-discrimination against foreigners who are in need of seeking justice before the courts of the land for the protection and defence of their rights.").

[41] *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.").

[42] *See Mercer Int'l Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, ¶ 7.58 (Mar. 6, 2018) [hereinafter *Mercer* Award] ("So far as concerns the Claimant's claims of 'discriminatory treatment' contrary to NAFTA Article 1105(1), the Tribunal's [*sic*] agrees with the non-disputing NAFTA Parties' submissions that such protections are addressed in NAFTA Articles 1102 and 1103, rather than NAFTA Article 1105(1)."); *Methanex* Final Award, Part IV, Ch. C, ¶¶ 14-17, 24 (analyzing the text of NAFTA Article 1105, and explaining that the impact of the "FTC interpretation of [NAFTA] Article 1105" was not to "exclude non-discrimination from NAFTA Chapter 11" but "to confine claims based on alleged discrimination to Article 1102, which offers full play for a principle of non-discrimination").

obligation.[43] The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation of host-State transparency under the minimum standard of treatment.

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.[44] To the contrary, the minimum standard of treatment affords every State "wide discretion with respect to how it carries out [its] policies by regulation and administrative conduct"[45] and tribunals do "not have an open-ended mandate to second-guess government decision-making."[46]

Full Protection and Security

24. As noted above, Article 11.5.2(b) provides that "full protection and security" requires each Party to provide the level of police protection required under customary international law.[47]

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[43] *See United Mexican States v. Metalclad Corp.*, [2001] 89 B.C.L.R. 3d 359, 2001 BCSC 664, ¶¶ 68, 72 (Can. B.C.S.C.) (holding that "[n]o authority was cited or evidence introduced [in the *Metalclad* arbitration] to establish that transparency has become part of customary international law," and that "there are no transparency obligations contained in [NAFTA] Chapter 11"); *Feldman* Award ¶ 133 (finding that "it is doubtful that lack of transparency alone rises to the level of violation of NAFTA and international law," and holding the British Columbia Supreme Court's decision in Metalclad to be "instructive"); *Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/07/1, Award, ¶¶ 208, 231 (Mar. 31, 2010) (stating that "a requirement for transparency may not at present be proven to be part of the customary law standard, as the judicial review of *Metalclad* rightly concluded," though speculating that it might be "approaching that stage").

[44] *Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Submission of the United States, ¶ 9 (Sept. 22, 2014); *see also Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Rejoinder of the United States 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.").

[45] *Thunderbird* Award, ¶ 127.

[46] *S.D. Myers* First Partial Award, ¶ 261.

[47] In this connection, while arbitral decisions are not in and of themselves evidence of State practice, the vast majority of cases in which the customary international law obligation of full protection and security was found to have been breached are those in which a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien. *See, e.g.*, *American Mfg. & Trading, Inc. v. Zaire*, ICSID Case No. ARB/93/1 (1997), *reprinted in* 36 I.L.M. 1531 (failure to prevent destruction and looting of property constituted violation of protection and security obligation); *Asian Agric. Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3 (1991), *reprinted in* 30 I.L.M. 577 (destruction of claimant's property violated full protection and security obligation); *United States Diplomatic and Consular Staff in Tehran (United States v. Iran*), Judgment, 1980 I.C.J. 3 (May 24) (failure to protect foreign nationals from being taken hostage violated most constant protection and security obligation); *Chapman v. United Mexican States (United States v. Mexico)*, 4 R.I.A.A. (Mex.-U.S. Gen. Cl. Comm'n 1930) (lack of protection found where claimant was shot and seriously wounded); *H.G. Venable (United States v. Mexico)*, 4 R.I.A.A. 219 (Mex.-U.S. Gen. Cl. Comm'n 1927) (bankruptcy court indirectly responsible for physical damage to attached property); *Biens Britanniques au Maroc Espagnol*

This obligation does not, for example, require States to prevent economic injury inflicted by third parties,[48] nor does it require States to guarantee that aliens or their investments are not harmed under any circumstances. Such interpretations would impermissibly extend the duty to provide "full protection and security" beyond the minimum standard of treatment under customary international law.

Article 11.3 (National Treatment)

25. Article 11.3 provides in relevant part that each party shall accord to investors of the other Party and to covered investments "treatment no less favorable than that it accords, in like circumstances, to its own investors [and to investments in its territory of its own investors] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[49]

26. To establish a breach of national treatment under Article 11.3, 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.[50]

(Reclamation 53 de Melilla - Ziat, Ben Kiran) (Spain v. Great Britain), 2 R.I.A.A. 729 (1925) (reasonable police protection would not have prevented mob from destroying claimant's store). Other cases are in accord. *See, e.g., Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award ¶ 632 (Apr. 4, 2016) (holding that the "full protection and security" treaty standard "only extends to the duty of the host state to grant physical protection and security"); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability ¶ 173 (July 30, 2010) (holding that "the full protection and security standard primarily seeks to protect investment from physical harm"); *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, ¶ 484 (Mar. 17, 2006) ("[T]he 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force."). *See also, e.g.*, Article 7(1) of the *Responsibility of the State for injuries caused in its territory to the person or property of aliens: Revised draft, reprinted in* F.V. GARCIA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 129, 130 (1974) ("The State is responsible for the injuries caused to an alien by illegal acts of individuals, whether isolated or committed in the course of internal disturbances (riots, mob violence or civil war), if the authorities were manifestly negligent in taking the measures which, in view of the circumstances, are normally taken to prevent the commission of such acts.").

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

[49] KORUS art. 11.3.

[50] As the United States has elsewhere explained with respect to the otherwise identical national treatment obligation in NAFTA article 1102, this provision is "intended to prevent discrimination on the basis of nationality" and to "ensure that nationality is not the basis for differential treatment." *Mercer Int'l Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of the United States, ¶ 10 (May 8, 2015); *see also Apotex Holdings Inc. v. United States of America*, Case No. ARB(AF)/12/1, Counter-Memorial on Merits and Objections to

27. Article 11.3 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.[51] Nationality-based discrimination under Article 11.3 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.

28. 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 as comparators. If the claimant does not identify any domestic investor or investment as allegedly being in like circumstances, no violation of Article 11.3 can be established.

29. Determining whether a domestic investor or investment identified by a claimant is in "like circumstances" to the claimant or its investment is a fact-specific inquiry. As one tribunal observed in the context of a similar national treatment provision in the NAFTA, "[i]t goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations."[52] 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.

30. When determining whether a claimant is in like circumstances with comparators, it or its investment should be compared to a domestic investor or investment that is alike in all relevant respects but for nationality of ownership. Moreover, whether treatment is accorded in "like circumstances" under Article 11.3 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare objectives.

Jurisdiction of Respondent United States, ¶ 324 (Dec. 14, 2012); *cf. Gramercy Funds Management LLC v. Peru*, ICSID Case No. UNCT/18/2, Submission of the United States, ¶ 49 n.91 (June 21, 2019) (interpreting the United States-Peru Trade Promotion Agreement).

[51] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 139 (June 26, 2003) [hereinafter *Loewen* Award] (accepting in the NAFTA context that "Article 1102 [National Treatment] is direct[ed] *only* to nationality-based discrimination") (emphasis added); *Mercer* Award, ¶ 7.7 (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).

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

31. Nothing in Article 11.3 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 investment. The appropriate comparison is between the treatment accorded a foreign 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 11.3.

Article 11.4 (Most-Favored-Nation Treatment)

32. The requirements for establishing a breach of Most-Favored-Nation Treatment ("MFN") under Article 11.4 are the same as for establishing a National Treatment breach under Article 11.3, except that the applicable comparators are investors or investments of non-Parties.[53] Thus, as is the case under Article 11.3, if a claimant does not identify such non-Party investors or investments as allegedly being in like circumstances with the claimant or its investment, no violation of Article 11.4 can be established. Once it has identified comparators, the claimant then has the burden of proving that it or its investments: (1) were accorded "treatment"; (2) were in "like circumstances" with the identified non-Party investors or investments; and (3) received treatment "less favorable" than that accorded to the identified non-Party investors or investments.

33. A claimant must meet the basic requirement of Article 11.4 to identify a comparator "in like circumstances." Unlike many investment treaties, the MFN clause of the KORUS expressly requires a claimant to demonstrate that investors of a non-Party "in like circumstances" were afforded more favorable treatment. Ignoring the "in like circumstances" requirement would serve impermissibly to excise key words from the Agreement.

34. Nor can Article 11.4 be used to alter the substantive content of the fair and equitable treatment obligation under Article 11.5. As noted in the submissions on Article 11.5 above, Article 11.5.2 clarifies 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. Article 11.5.3 further clarifies that a "breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article." A claimant must also establish that the alleged non-conforming measures that constituted "less favorable" treatment are not subject to the reservations contained in Annex II. In particular, both Parties reserved "the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement."[54]

Article 11.16 (Limitations on Loss or Damage)

35. KORUS Article 11.16(a)(ii) provides that a party may submit a claim to arbitration where the claimant has incurred loss or damage "by reason of, or arising out of, that breach." In this

[53] *Mercer* Award, ¶ 7.10.

[54] KORUS, Annex II, Schedule of the United States, at II-US-9; Annex II, Schedule of Korea, at II-Korea-11.

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.[55]

36. The ordinary meaning of Article 11.16(a)(ii) requires an investor to establish the causal nexus between the alleged breach and the claimed loss or damage.[56] It is well established that "causality in fact is a necessary but not a sufficient condition for reparation."[57] The standard for factual causation is known as the "but-for" or "*sine qua non*" test whereby an act causes an outcome if the outcome would not have occurred in the absence of the act. This test is not met if the same result would have occurred had the breaching State acted in compliance with its obligations.[58]

37. Furthermore, as the United States has previously discussed with respect to substantively identical language in NAFTA Articles 1116(1) and 1117(1), the ordinary meaning of "by reason of, or arising out of" requires an investor to demonstrate proximate causation.[59] NAFTA

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[55] As the International Law Commission has recognized, a State responsible for an internationally wrongful act shall compensate for the resulting damage caused "insofar as [that damage] is established." ILC Draft Articles, art. 36(2). Specifically, as the 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) [hereinafter *S.D. Myers* Second Partial Award] ("to be awarded, the sums in question must be neither speculative nor too remote."); *Mobil Investments Canada Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, ¶¶ 437-39 (May 22, 2012) (accord).

[56] 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 also Islamic Republic of Iran v. United States of America*, AWD 601-A3/A8/A9/A14/B/61-FT, Partial Award, ¶ 153 (July 17, 2009), 38 IRAN-U.S. CL. TRIB. REP. 197, 223 (2009) ("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).

[57] ILC Draft Articles, art. 31, cmt. 10. The Iran-U.S. Claims Tribunal reaffirmed this principle in the remedies phase of Case A/15(IV) when it held that it must determine whether the "United States breach caused 'factually' the harm . . . and that that loss was also a 'proximate' consequence of the United States' breach." *Islamic Republic of Iran v. United States of America*, AWD 602-A15(IV)/A24-FT ¶ 52 (July 2, 2014), IRAN-U.S. CL. TRIB. [hereinafter A/15(IV) Award].

[58] 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."). *See also 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, Judgment, ¶ 462 (Feb. 26).

[59] *William Ralph Clayton & Bilcon of Delaware Inc. et al. v. Government of Canada*, NAFTA/PCA Case No. 2009-04, Submission of the United States, ¶¶ 23-27 (Dec. 29, 2017); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Amended Statement of Defense of Respondent United States ¶ 213 (Dec. 5, 2003); *Grand River* Counter-Memorial, at 174-75 (Dec. 22, 2008) ("Claimants must show that the compensation they seek 'is proved to have a sufficient causal link with the specific NAFTA provision that has been breached' and 'not from other causes.' '[T]he harm must not be too remote' and 'the breach of the specific NAFTA provision must be the *proximate* cause of the harm.'") (quoting from the first and second partial awards in *S.D. Myers v. Government of Canada*) (footnotes omitted); *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Seventh Submission of the United States of America ¶¶ 2, 13 (Nov. 6, 2001) (only damages proximately caused by a breach may be recovered); *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States, ¶ 12 (Sept. 18, 2001) (a tribunal's task is limited to assessing whether there has been a breach and whether the investor or investment suffered loss or damages proximately caused by such a breach).

tribunals have consistently imposed a requirement of proximate causation under NAFTA Articles 1116(1) and 1117(1). For example, 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,[60] 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."[61]

38. Indeed, proximate causation is an "applicable rule[] of international law" in fixing the appropriate amount, if any, of monetary damages.[62] Article 11.16.1 contains no indication that the Parties intended to vary from this established rule,[63] and, indeed, KORUS Article 11.22.1 provides that "the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." Accordingly, any loss or damage cannot be based on an assessment of acts, events, or circumstances not attributable to the alleged breach. [64] Injuries that are not sufficiently "direct," "foreseeable," or "proximate" may not, consistent with applicable rules of international law, be considered when calculating a damage award.[65]

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

[61] *S.D. Myers* Second Partial Award, ¶ 140; *see also Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award in Respect of Damages, ¶ 80 (May 31, 2002) (holding that under NAFTA Article 1116 the claimant bears the burden to "prove that loss or damages was caused to its interest, and that it was causally connected to the breach complained of[]"; *Archer Daniels Midland Co. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/04/05, Award, ¶ 282 (Nov. 21, 2007) (requiring a "sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such injury.").

[62] *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 Case (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* at 225 (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 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 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").

[63] *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, Judgment, 1989 I.C.J. 15, ¶ 50 (July 20) ("Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with [by an international agreement], in the absence of any words making clear an intention to do so."); *Loewen* Award ¶¶ 160, 162 ("It would be strange indeed if *sub silentio* the international rule were to be swept away.").

[64] *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).

[65] ILC Draft Articles, art. 31, cmt. 10 (explaining that 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[.]") (footnotes omitted).

39. The obligation for a claimant to undertake reasonable mitigation measures is a well-established principle of international law.[66] Investor-state Tribunals have relied on this general principle of international law in the calculation of damages.[67] The duty to mitigate imposes both positive and negative obligations on a claimant: the claimant must both take steps to minimize loss that would otherwise flow from the respondent's breach, and refrain from taking steps that may unjustifiably increase its losses.[68]

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[66] *See, e.g.*, *Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 7 I.C.J. 1997, ¶ 80 (Sept. 25) (finding that "an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided."); *Report and Recommendations Made by the Panel of Commissioners Appointed to Review the Well Blowout Control Claim*, ¶ 54 UN Doc. S/AC.26/1996/5/ Annex (Dec. 18, 1996) (stating that "under general principles of international law relating to mitigation of damages . . . the Claimant was not only permitted but indeed obligated to take reasonable steps . . . in order to mitigate the loss, damage or injury being caused . . . ."); ILC Draft Articles, art. 31, cmt. 11 ("Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. . . . [A] failure to mitigate by the injured party may preclude recovery to that extent.").

[67] *See, e.g., EDF Int'l, et al. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, ¶¶ 1301-1305 (June 11, 2012); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, ¶ 303 (Mar. 14, 2003) [hereinafter *CME* Award]; *Middle East Cement Shipping and Handling Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, ¶ 167 (Apr. 12, 2002).

[68] *See* G.H. Treitel, *Remedies for Breach of Contract*, *in* 7 INT'L ENCYC. COMP. LAW 75, 76 (1976) ("The 'duty' to mitigate loss may be said to have two aspects. First, the plaintiff may be bound to take positive steps to minimize the loss which would otherwise flow from the defendant's default. Secondly, he may be bound to refrain from taking steps . . . which in view of the default may unjustifiably augment the loss").