IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ICSID ADDITIONAL FACILITY RULES BETWEEN

VENTO MOTORCYCLES, INC.,

Claimant

-and-

UNITED MEXICAN STATES,

Respondent.

ICSID CASE NO. ARB(AF)/17/3

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) and 1103 (Most-Favored-Nation Treatment)

2. Article 1102 (National Treatment) provides 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." Article 1103 (Most-Favored-Nation Treatment) provides 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 investors of any other Party or of a non-Party or their investments "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

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.[1] As the *UPS v. Canada* tribunal noted, "[t]his is a legal burden that rests squarely with the Claimant. That burden never shifts. . . ."[2]

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.[3] 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.

5. 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 1102 can be established.

6. 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 unalterable meaning across the spectrum of fact situations."[4] 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 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

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[1] As the United States has elsewhere explained, this provision is "intended to prevent discrimination on the basis of nationality" and to "ensure that nationality is not the basis for differential treatment." *See, e.g., 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).

[2] *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).

[3] *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) ("*Loewen* Award") (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) ("*Mercer* Award") (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).

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

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.

7. 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 national investor or any investment of a national. The appropriate comparison is between the treatment accorded a foreign investment or investor and a national 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.

8. The requirements for establishing a breach of Most-Favored-Nation Treatment under Article 1103 are the same as for establishing a National Treatment breach under Article 1102, except that the applicable comparators are investors or investments of another Party or non-Parties.[5] Thus, as is the case under Article 1102, if a claimant does not identify such investors or investments as allegedly being in like circumstances with the claimant or its investment, no violation of Article 1103 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 comparators; and (3) received treatment "less favorable" than that accorded to the identified comparators.

Article 1105 (Minimum Standard of Treatment)

9. Article 1105 is titled "Minimum Standard of Treatment." Article 1105(1) requires each Party to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

10. 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."[6] 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."[7] The Commission also confirmed that "a breach of another provision of the NAFTA, or of a separate international

[5] *Mercer* Award ¶ 7.10 ("[T]he requirements for establishing a violation of NAFTA Article 1103 are the same as establishing a violation of NAFTA Article 1102, except that the applicable comparator, in like circumstances, is a foreign . . . investor or investment.").

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

[7] *Id.* ¶ B.2.

agreement, does not establish that there has been a breach of Article 1105(1)."[8] The Commission's interpretation "shall be binding" on tribunals established under Chapter Eleven.[9]

11. The Commission's interpretation thus confirms the NAFTA Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in NAFTA Article 1105. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts.[10] The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[11]

12. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, which is expressly addressed in Article 1105(1), concerns the obligation to provide "fair and equitable treatment." 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.

13. 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."[12]

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[8] *Id.* ¶ B.3.

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

[10] A fuller description of the U.S. position is set out in *Methanex Corp. v. United States*, 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., et al. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Dec. 22, 2008).

[11] *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*").

[12] *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

14. Relevant State practice must be widespread and consistent[13] and be accepted as law, meaning that the practice must also be accompanied by a sense of legal obligation.[14] 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."[15] A perfunctory reference to these requirements is not sufficient.[16]

15. 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, most recently in its decision on *Jurisdictional Immunities of the State* (*Germany v. Italy*).[17] In that case, the ICJ emphasized that "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States," and noted as examples of State practice relevant national court decisions or domestic legislation dealing with the particular issue alleged to be the norm of customary international law, as well as official declarations by relevant State actors on the subject.[18]

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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[.]").

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

[14] *North Sea Continental Shelf*, 1969 I.C.J. at 44 ("Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."); ILC Second Report on the Identification of Customary International Law, Draft Conclusion 10 with commentaries (citing authorities).

[15] 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).

[16] *See* PATRICK DUMBERRY, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105 at 115 (2013) ("DUMBERRY") (observing that the tribunal in *Merrill & Ring* failed "to cite a single example of State practice in support of" its "controversial findings"); UNCTAD, FAIR AND EQUITABLE TREATMENT – UNCTAD SERIES ON ISSUES IN INTERNATIONAL AGREEMENTS II at 57 (2012) ("The *Merrill & Ring* tribunal failed 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.").

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

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

16. As discussed below, the concepts of legitimate expectations, good faith, non-discrimination and transparency are not component elements of "fair and equitable treatment" under customary international law that give rise to independent host State obligations.

Legitimate Expectations

17. 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.[19] An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. The 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

18. 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,[20] 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.[21]

19. 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."[22] As such, customary international law does not impose a free-standing, substantive obligation of "good faith" that, if breached, can result in State liability.[23] Accordingly, a claimant "may not justifiably rely upon the principle of

[19] *See* DUMBERRY at 158-59 ("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.

[20] *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).

[21] *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").

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

[23] 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 NAFTA contains no such obligation.[24]

Non-Discrimination

20. 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.[25] As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.[26] 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,[27] 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, at 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.'.").

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

[25] *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.").

[26] *See Methanex Corp.*, 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, 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."); 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.").

[27] *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

judicial remedies or treatment by the courts,[28] 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.[29]

Transparency

21. 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 obligation.[30] The United States is aware of no general and consistent State practice and *opinio*

(1982) (considering the question "whether the nationalization of Aminoil was not thereby tainted with 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 . . . .").

[28] *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.").

[29] *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.").

[30] *See United Mexican States v. Metalclad Corp*., 2001 BCSC 664, ¶¶ 68, 72 (British Columbia Supreme Court, May 2, 2001) (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"); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 133 (Dec. 16, 2002) ("*Feldman* Award") (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.*

juris establishing an obligation of host-State transparency under the minimum standard of treatment.

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22. 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.[31] 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 standard of treatment.[32] 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).[33] 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.[34] A formulation of a purported rule

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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").

[31] *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.").

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

[33] *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.").

[34] *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 ¶ 162 (Oct. 1, 2018) ("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

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).

23. 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.

24. As all three NAFTA Parties agree,[35] 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*.[36] "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."[37] 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

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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 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.").

[35] *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); *id*., Second Submission of Mexico Pursuant to NAFTA Article 1128 (June 12, 2015) ¶ 9 (concurring with the United States' position that the burden is on a claimant to establish a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*); *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Second Submission of the United States of America ¶ 13 (June 13, 2015). *See also id*. ¶ 8 ("Specifically, as addressed below, the *Bilcon* tribunal failed to recognize that the burden is on a claimant to establish the existence and applicability of a rule of customary international law, and failed to determine whether the *Bilcon* Claimants had met that burden.").

[36] *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).

[37] *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).

> 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.[38]

25. 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.[39] 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."[40] Chapter Eleven tribunals do not have an open-ended mandate to "second-guess government decision-making."[41]

Article 1116(1) (Continuous Nationality)

26. Article 1116(1) provides, in pertinent part, that "[a]n *investor of a Party* may submit to arbitration under this Section a claim that *another Party* has breached an obligation under" Chapter Eleven, Section A.[42]

[38] *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).

[39] *Feldman* Award ¶ 177 ("[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.") (citation omitted).

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

[41] *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."); *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).

[42] NAFTA art. 1116(1) (emphasis added).

27. An investor must be a national of a Party other than the respondent NAFTA Party continuously at three critical dates and at all times between them: the time of the purported breach, the submission of a claim to arbitration, and the resolution of the claim.[43]

Time of the Purported Breach

28. As provided in Article 1116, in pertinent part, an investor of a Party may submit to arbitration a claim that "*another Party* has breached" an obligation under Chapter 11, Section A.[44] Article 1101 (Scope and Coverage) clarifies that Chapter Eleven applies to measures adopted or maintained by a Party relating to, *inter alia*, "investors of *another Party*" and "investments of investors of *another Party* in the territory of the Party[.]"[45]

29. Thus, because the substantive obligations of Section A apply to "investors of *another Party*," or "investments of investors of *another Party* in the territory of the Party," the investor must be "an investor of *another* Party," *i.e.,* a Party other than the respondent Party at the time of the purported breach. If the requisite difference in nationality does not exist, there can be no breach, as there was no obligation under Chapter Eleven, Section A, at the time of the purported breach. And pursuant to Article 1116, what may be submitted to arbitration under Chapter Eleven, Section B, are claims that the respondent State "*has breached*" an obligation under Section A.[46]

Submission of the Claim to Arbitration

30. Article 1116(1) permits an investor of a Party to "submit to arbitration under this Section [*i.e.*, Section B] a claim that another Party has breached an obligation" under Chapter Eleven, Section A.[47] Accordingly, the investor must also be a national of a Party other than the respondent NAFTA Party at the time of submission of the claim to arbitration.

Date of the Resolution of the Claim

31. An investor must also be a national of a Party other than the respondent Party through the resolution of the claim. Article 1116 refers to submitting a claim under Chapter Eleven, Section B, which encompasses relevant dispute settlement procedures leading up to, during, and through the resolution of a claim. Multiple articles in Section B concerning aspects of the dispute settlement process subsequent to the submission of a claim refer to the "disputing investor" or

[43] In the case of Article 1117(1), an investor of another Party must own or control directly or indirectly the relevant enterprise continuously between the critical dates discussed herein.

[44] NAFTA art. 1116(1) (emphasis added).

[45] NAFTA art. 1101(1) (emphasis added).

[46] NAFTA art. 1116(1) (emphasis added).

[47] Article 1137(1) clarifies the time when a claim is submitted to arbitration; namely, when the request for arbitration or notice of arbitration is received – either by the ICSID Secretary General or the disputing Party, depending on the instrument and rules under which the claim is submitted.

the "disputing parties."[48] "Disputing parties" are defined in Article 1139 as a "disputing investor" and the "disputing [NAFTA] Party," and a "disputing investor" is further defined as an investor "that makes a claim under Section B" (i.e., "an investor of *another Party*").

32. Article 1136(5), for example, provides that a "Party whose investor was a party to the arbitration" can invoke the procedures of NAFTA Chapter Twenty and seek a decision from a panel established by the Free Trade Commission enforcing the award against the "disputing Party." The procedure established by this provision, which is analogous to a traditional espousal claim, assumes a continuing connection between an investor of a Party other than the respondent Party and such non-disputing Party through the time of the award, so as to allow that non-disputing Party to pursue a State-to-State arbitration on behalf of the investor.

* * *

33. The conclusions above are consistent with the well-established principle of international law[49] that an individual or entity cannot maintain an international claim against its own State.[50] As the United States has long maintained[51] with respect to the rule of "continuous nationality," and as the tribunal in *Loewen v. United States of America* explained: "In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as *dies a quo*, through the date of the resolution of the claim, which

[48] For example, Articles 1124 (Constitution of a Tribunal), Article 1125 (Agreement to Appointment of Arbitrators), Article 1126 (Consolidation), Article 1130 (Place of Arbitration), Article 1134 (Interim Measures of Protection), and Article 1136 (Finality and Enforcement of an Award), among other provisions, all refer to the "disputing investor" or the "disputing parties."

[49] NAFTA art. 1131(1) ("Governing Law") provides that a Chapter Eleven tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

[50] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXTS, AND COMMENTARIES 264–265 (2002).

[51] *See* U.N. Int'l Law Commission, *Comments and Observations Received by Governments*, at 41-43, U.N. Doc. A/CN.4/561 (Jan. 27, Apr. 3 and 12, 2006) (comments of the United States of America on Draft Article 5 of the ILC Draft Articles on Diplomatic Protection) (urging that the ILC Draft Articles state that nationality must be continuously maintained from the date of injury to the date of the resolution of the claim); *accord Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Memorial of the United States of America on Matters of Jurisdiction and Competence Arising from the Restructuring of The Loewen Group, Inc., at 10-20 (Mar. 1, 2002); *B-Mex, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/16/3, Second Submission of the United States of America ¶ 9 (Aug. 17, 2018); *Ballantine v. Dominican Republic*, CAFTA-DR/PCA Case No. 2016-17, Submission of the United States of America ¶ 6 (July 6, 2018).

date is known as the *dies ad quem*."[52] In the absence of continuous nationality of the claimant as set forth above, a tribunal lacks jurisdiction over the relevant claim.[53]

Article 1116(2) (Limitations Period)

34. All claims under Article 1116(1) must be submitted to arbitration within the three-year limitations period set out in Article 1116(2). The claims limitation period is "clear and rigid" and not subject to any "suspension," "prolongation," or "other qualification."[54] Specifically, Article 1116(2) requires a claimant to submit a claim to arbitration within three years of the "date on which the" investor "first acquired, or *should have first acquired*, knowledge" of (i) the alleged breach, and (ii) loss or damage incurred by the investor.[55]

35. For purposes of assessing what a claimant should have known, the United States agrees with the reasoning of the *Grand River* Tribunal: "a fact is imputed to [*sic*] person if by exercise of reasonable care or diligence, the person would have known of that fact."[56] As that Tribunal further explained, it is appropriate to "consider in this connection what a reasonably prudent investor should have done in connection with extensive investments and efforts such as those described to the Tribunal."[57] Similarly, as the *Berkowitz* Tribunal held, endorsing the reasoning in *Grand River* with respect to the identically worded limitations provision in the CAFTA-DR, "the 'should have first acquired knowledge' test . . . is an objective standard; what a prudent claimant should have known or must reasonably be deemed to have known."[58]

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[52] *Loewen* Award ¶ 225; *see* ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW: PEACE 512-13 (9th ed. 1992) ("[F]rom the time of the occurrence of the injury until the making of the award, the claim must continuously and without interruption have belonged to a person or to a series of persons (a) having the nationality of the state by whom it is put forward, and (b) not having the nationality of the state against whom it is put forward.") (footnote omitted). In this connection, the *Loewen* tribunal in dismissing Raymond Loewen's Article 1117 claim for lack of jurisdiction also noted that he had failed to show the requisite ownership or control at the time of TLGI's restructuring (i.e., through to the resolution of the claim). *Loewen* Award, at 69-70. *See also* Andrea K. Bjorklund, *Commentary on NAFTA Chapter 11: Article 1117, in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 503, n.193 (Chester Brown ed. 2013).

[53] *Loewen* Award, at 69-70 (deciding, in the dispositif, that the tribunal had no jurisdiction due to a lack of continuous nationality).

[54] *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction ¶ 29 (July 20, 2006); *see also Feldman* Award ¶ 63.

[55] NAFTA art. 1116(2) (emphasis added).

[56] *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction ¶ 59 (July 20, 2006)

[57] *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction ¶ 66 (July 20, 2006) ("In the Tribunal's view, parties intending to participate in a field of economic activity in a foreign jurisdiction, and to invest substantial funds and efforts to do so, ought to have made reasonable inquiries about significant legal requirements potentially impacting on their activities…. This is particularly the case in a field that the prospective investors know from years of past personal experience to be highly regulated and taxed by state authorities.").

[58] *Spence International Investments LLC, Berkowitz, et al. v. Republic of Costa Rica*, CAFTA/ICSID Case No. UNCT/13/2, Interim Award (Corrected) ¶ 209 (May 30, 2017).

Article 1139 (Definition of "Investment")

36. Article 1139 provides an exhaustive, not illustrative, list of what constitutes an investment for purposes of NAFTA Chapter Eleven.[59]

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

38. To qualify as investment under Article 1139(h), more than the mere commitment of funds is required. An investor must also have a cognizable "interest" that arises from the commitment of those resources. Specifically, Article 1139(h)(i) states that such interests might arise from, for example, turnkey or construction contracts or concessions. Similar interests might arise, according to Article 1139(h)(ii), from "contracts where remuneration depends substantially on the production, revenues or profits of an enterprise."

39. Not every economic interest that comes into existence as a result of a contract, however, constitutes an "interest" as defined in Article 1139(h). Article 1139(i) specifically excludes from the definition of "investment" "claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d)." Article 1139(j) likewise excludes "any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h) [of the definition of 'investment' in Article 1139]."

Limitations on Loss or Damage

40. Article 1116(1) allows an investor to recover "loss or damage by reason of, or arising out of" a breach of Chapter Eleven, Section A. In this connection, an investor may recover such

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

damages only to the extent that damages are established on the basis of satisfactory evidence that is not inherently speculative.[60]

41. Moreover, an investor may only recover for loss or damage that the investor incurred in its capacity as an *investor of a Party*. "Investor of a Party" is defined in Article 1139 as a "Party or state enterprise thereof, or a national or enterprise of such Party, that seeks to make, is making or has made an investment." Additionally, Article 1101 limits the scope of Chapter Eleven, in pertinent part, "to measures adopted or maintained by a Party relating to: (a) investors of another Party; [and] (b) investments of investors of another Party in the territory of the Party."

42. Thus, reading Articles 1101, 1116 and 1139 together, it is clear that an investor may only recover for damages it incurred in its capacity as an investor seeking to make, making, or having made, an investment *in the territory of the other Party*.[61]

43. Finally, the definition of "investment" in Article 1139 also limits the scope of damages available to a NAFTA Chapter Eleven claimant. As explained above, Article 1139 provides an exhaustive list of what constitutes "investments." Assets falling outside this list or expressly excluded from it are not "investments," and therefore loss or damage incurred with respect to such assets, which are not themselves "investments," cannot be the basis for an "investor" to claim "loss or damages" under Article 1116. For example, Article 1139(i) excludes from the definition of "investment" "claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party."

44. Moreover, Article 1139(h)(ii), which incorporates into the definition of "investment" those "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under . . . contracts where remuneration depends substantially on the production, revenues or profits of an enterprise," does not treat "revenues or profits" as "investments" in themselves. Instead, "revenues or profits" are elements of the type of contract that may (as an example) give rise to "interests that arise from the

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[60] 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). 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 (Oct. 21, 2002) ¶173 ("to be awarded, the sums in question must be neither speculative nor too remote."); *Mobil Investments Canada Inc. & Murphy Oil Corp. 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).

[61] *See United Mexican States v. Cargill, Inc*., Factum of the Intervenor United States of America in the Court of Appeal for Ontario at 6-7 (Jan. 31, 2011); *see also Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award on Jurisdiction (June 19, 2007) ¶ 105 ("in order to be an 'investor' under Article 1139 one must make an investment in the territory of another NAFTA State, not in one's own"); *Canadian Cattlemen for Fair Trade v. United States of America*, Award on Jurisdiction ¶ 126 (Jan. 28, 2008) (observing that the definition of "investor" is inextricably linked with the definition of "investments", "which Article 1101 limits to 'foreign investments,' – that is to say, investments of a party in the territory of another Party whose measure is at issue").

commitment of capital or other resources in the territory" of the respondent State – with the "interests," not the "revenues or profits," constituting the "investment" under NAFTA Article 1139. Indeed, without these limitations, any income arising from a claimant's exports to entities located in the respondent State might improperly be characterized as an "investment" under Article 1139, and under such characterization, all exporters would be free to bring "investment" claims under Chapter Eleven regardless of whether they are making, have made, or seek to make an investment in the territory of the respondent Party.[62] Such claims are not, for the reasons herein provided, covered under Chapter Eleven.

Respectfully submitted,

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August 23, 2019

[62] As the *Apotex I/II* Tribunal recognized, "NAFTA Article 1139(h)'s focus on interests arising from the commitment of capital in the host State to economic activity in such territory – excludes simple cross-border trade interests. Something more permanent is necessary." *Apotex Inc. v. United States of America* (NAFTA/UNCITRAL), Award on Jurisdiction and Admissibility ¶ 233 (June 14, 2013).