IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

BETWEEN:

ESPIRITU SANTO HOLDINGS, LP, AND L1BRE HOLDING, LLC

Claimants

AND:

UNITED MEXICAN STATES

Respondent

ICSID CASE NO. ARB/20/13

NON-DISPUTING PARTY SUBMISSION OF THE GOVERNMENT OF CANADA PURSUANT TO NAFTA ARTICLE 1128

March 21, 2023

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I. INTRODUCTION

1. The Government of Canada makes this submission pursuant to Article 1128 of the *North American Free Trade Agreement* ("NAFTA"), which authorizes non-disputing Parties to make submissions to a tribunal on a question of interpretation of the NAFTA.

2. This submission is not intended to address all interpretative issues that may arise in this proceeding. To the extent that it does not address certain issues, Canada's silence should not be taken to constitute concurrence or disagreement with the positions advanced by the disputing parties. Canada takes no position on any particular issues of fact or on how the interpretations it submits below apply to the facts of this case.

II. NAFTA ARTICLES 1116 (CLAIM BY AN INVESTOR OF A PARTY ON ITS OWN BEHALF) AND 1117 (CLAIM BY AN INVESTOR OF A PARTY ON BEHALF OF AN ENTERPRISE)

A. Investments under the NAFTA Must Be Made in Accordance with the Applicable Domestic Laws of the Host State at the Time the Investment is Acquired or Established

3. Chapter Eleven of the NAFTA defines "investors" and their "investments",[1] and includes substantive provisions outlining the protections for investors and their investments with respect to the establishment and acquisition of those investments.[2] While the NAFTA does not expressly provide that protected investments are only those made "in accordance with the laws of the host state",[3] it would be contrary to the object and purpose of the agreement to expand its protections to an investment that is in contravention of a host state's domestic law at the time that the investment is established or acquired. The absence of language expressly referring to the legality of the investment should not be interpreted

[1] *NAFTA*, Article 1101(1) (Scope and coverage) and Article 1139 (Definitions).

[2] *See for example, NAFTA*, Article 1102 (National Treatment) and Article 1103 (MFN Treatment).

[3] *See NAFTA*, Articles 1116 and 1117.

to mean that the NAFTA's protections apply to all investments, such as those made contrary to the domestic law of the host state.

4. As investment tribunals have held, the requirement for an investment to be established in accordance with the domestic laws of the host state at the time the investment was made is a condition precedent for the investor to gain protection under an investment treaty, even in the absence of express language in the treaties.[4] Such a requirement is consistent with well-established principles of international law, including the principle of good faith,[5] and the principle of *nemo auditur pro priam turpitudinem allegans* (i.e. no one shall be heard, who invokes his own guilt).[6] Recognizing the existence of rights arising from illegal acts would violate the "respect for the law" which is a principle of international public policy.[7]

[4] *Plama Consortium Limited v. Bulgaria* (ICSID Case No. ARB/03/24) Award, 27 August 2008 ("*Plama – Award* "), ¶ 138, Operating under the Energy Charter Treaty (ECT), which does not contain an "in accordance with host State law clause", the tribunal noted that the lack of such a provision does not suggest that ECT's protections would apply to "all kinds of investments, including those contrary to domestic or international law."; *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) Award, 15 April 2009, ¶¶ 101, 138, referring to the above approach with approval, the tribunal stated that "it is the Tribunal's view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT"; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24) Award, 18 June 2010, ¶¶ 123-124. The Tribunal stated that there "are general principles that exist independently of specific language to this effect in the Treaty", including that:

> [A]n investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; [] if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention [;] [or] if it is made in violation of the host State's law.

See also, Carlos Sastre and others v. United Mexican States (ICSID Case No. UNCT/20/2) Award, 21 November 2022, ¶¶ 337-338, wherein the Tribunal found that the investment at issue was not protected under the NAFTA because the investor had "obtained the rights of possession, use and enjoyment of the property without complying with any of the Mexican law requirements for non-Mexicans to make investments in *ejidos* and restricted zones".

[5] *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26) Award, 2 August 2006 ("*Inceysa – Award*"), ¶ 231; *Plama – Award*, ¶¶ 141-143.

[6] *See Inceysa – Award*, ¶¶ 240-242; *Plama – Award*, ¶¶ 141-143.

[7] *World Duty Free Company Limited v. The Republic of Kenya* (ICSID Case No. ARB/00/7) Award, 4 October 2006, ¶¶ 139, 161.

III. ARTICLE 1105 (MINIMUM STANDARD OF TREATMENT)

A. NAFTA Article 1105(1) Guarantees Treatment in Accordance with the Customary International Law Minimum Standard of Treatment

5. Article 1105(1) requires the Parties to accord to investments of investors of another Party the customary international law minimum standard of treatment. The NAFTA Free Trade Commission's July 31, 2001 Note of Interpretation ("FTC Note") confirmed that the concepts of "fair and equitable treatment" and "full protection and security" under Article 1105(1) "do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[8]

6. As NAFTA Article 1131(2) indicates, and subsequent NAFTA tribunals have confirmed, the FTC Note represents the definitive interpretation of Article 1105(1) and is binding on tribunals constituted under NAFTA Chapter Eleven.[9]

7. The reference to customary international law in the FTC Note confirms that Article 1105 refers to an objective standard of treatment for investors, the minimum

[8] NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, 31 July 2001, § B (3).

[9] *NAFTA* Article 1131(2) (Governing Law) provides that "an interpretation by the [Free Trade] Commission of a provision of [the NAFTA] shall be binding on a Tribunal established under this Section". NAFTA tribunals have consistently recognized that the FTC Note is binding on them. *See Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Award, 8 June 2009 ("*Glamis – Award*"), ¶ 599; *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) Award, 26 January 2006 ("*Thunderbird – Award*"), ¶ 192; *Methanex Corporation v. United States of America* (UNCITRAL) Final Award, 3 August 2005 ("*Methanex – Final Award*"), Part IV, Chapter C, ¶ 20; *Mondev International Ltd. v. The United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 ("*Mondev – Award*"), ¶ 100; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), 26 June 2003 ("*Loewen – Award*"),¶ 126; *Waste Management Inc. v. United Mexican* States (ICSID No. ARB(AF)00/3) Award, 30 April 2004, ¶ 90; *Cargill, Incorporated v. United Mexican States*, (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009 ("*Cargill – Final Award*"), ¶¶ 135, 267-268; *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1) Award, 9 January 2003 ("*ADF – Award*"), ¶ 176; *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Award, 6 March 2018 ("*Mercer – Award*"), ¶ 7.50.

standard of treatment at customary international law,[10] which is a "floor below which treatment of foreign investors must not fall."[11]

B. Establishing the Existence of a Rule of Customary International Law Requires Proof of State Practice and *Opinio Juris*

8. It is well established that a disputing party alleging a rule of customary international law bears the burden of proving its existence.[12] To establish that a rule is part of the minimum standard of treatment at customary international law, a claimant must provide evidence of consistent and widespread State practice accompanied by an understanding that such practice is required by a rule of law (*opinio juris sive necessitates*).[13]

[10] *Mondev – Award*, ¶ 120: ("The Tribunal has no difficulty in accepting that an arbitral tribunal may not apply its own idiosyncratic standard in lieu of the standard laid down in Article 1105(1)"); *Cargill – Final Award*, ¶¶ 268 and 276; *Crompton (Chemtura) Corp. v. Government of Canada* (UNCITRAL) Award, 2 August 2010 ("*Chemtura – Award*"), ¶ 121; *Mobil Investments Canada Inc. and Murphy Oil Company v. Canada* (ICSID Case No. ARB(AF)/07/04) Decision on Liability and Principles of Quantum, 22 May 2012 ("*Mobil – Decision on Liability and on Principles of Quantum*"), ¶ 153: ("It is not the function of an arbitral tribunal established under NAFTA to legislate a new standard which is not reflected in the existing rules of customary international law"); *Windstream Energy LLC v. Government of Canada* (UNCITRAL) Award, 27 September 2016 ("*Windstream – Award*"), ¶ 356.

[11] *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000 ("*S.D. Myers – Partial Award*"), ¶ 259.

[12] *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States)*, [1952] I.C.J Reports 176, Judgment, p. 200, citing *Colombian-Peruvian Asylum Case*, [1950] I.C.J Reports, 266, Judgment, p. 276; Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford University Press, 2008) ("Brownlie"), p. 12: ("In practice the proponent of a custom has a burden of proof the nature of which will vary according to the subject-matter and the form of the pleadings"); *Cargill – Final Award*, ¶ 273: ("The burden of establishing any new elements of this custom is on Claimant. […] If Claimant does not provide the Tribunal with the 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.").

[13] *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002, ¶ 84; *ADF – Award*, ¶¶ 271-273; *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*), [1969] I.C.J. Reports 4, Judgment, 20 February 1969 ("*North Sea Continental Shelf – Judgment*"), ¶ 74; *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), [1986] I.C.J. Reports 14, Judgment, 26 November 1984, ¶ 207: ("[F]or a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the *opinio juris sive necessitates*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'").

9. In the 1969 *North Sea Continental Shelf* case, the International Court of Justice (ICJ) stated that "[n]ot 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."[14] The ICJ more recently elaborated that such evidence may include, for example, the judgments of national courts, domestic legislation, or statements made by States.[15] The weight to be accorded to this evidence will depend on the particular circumstances of the case, including the overall context and the nature of the alleged rule.[16] Although investment arbitration awards may contain valuable analysis of State practice and *opinio juris* in relation to a particular rule of custom, they do not themselves constitute evidence of State practice and *opinio juris*.[17]

C. NAFTA Article 1105 Is Not an Invitation for Tribunals to Second Guess Government Policy and Decision-Making

10. An analysis of whether there has been a breach of the minimum standard of treatment under Article 1105 must begin by considering the rules regarding treatment of investments of investors that have crystallized into customary international law. Currently only a few rules have crystallized to become part of the minimum standard of treatment. These include, for example, the obligation not to deny justice in criminal, civil, or

[14] *North Sea Continental Shelf – Judgment*, ¶ 77.

[15] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, [2012] I.C.J. Reports 99, Judgment, 3 February 2012, ¶ 55. *See also*, United Nations, *Draft Conclusions on Identification of Customary International Law with Commentaries*, 13 January 2018, p. 125.

[16] *Brownlie*, p. 128.

[17] *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."); *Cargill – Final Award*, ¶ 277: ("[T]he awards of international tribunals do not create customary international law but rather, at most, reflect customary international law. Moreover, in both the case of scholarly writings and arbitral decisions, the evidentiary weight to be afforded such sources is greater if the conclusions therein are supported by evidence and analysis of custom").

administrative adjudicatory proceedings and the obligation to provide full protection and security to investments of investors.

11. Further, any such analysis must be made in light of the "high measure of deference that international law generally extends to the right of domestic authorities to regulate within their own borders."[18] Article 1105 is not an invitation to NAFTA tribunals to second-guess government policy and decision-making.[19]

D. The Customary International Law Minimum Standard of Treatment Does Not Protect an Investor's Legitimate Expectations

12. There is no general obligation under the customary international law minimum standard of treatment, and therefore under Article 1105, to protect an investor's legitimate expectations. The mere fact that a State takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of the customary international law standard of treatment, even if there is loss or damage to the investment as a result.

[18] *S.D. Myers – Partial Award*, ¶ 263. *See also*, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016 ("*Mesa – Award*"), ¶ 553: ("In reviewing this alleged breach, the Tribunal must bear in mind the deference which NAFTA Chapter 11 tribunals owe a state when it comes to assessing how to regulate and manage its affairs"). The submissions of NAFTA Parties also reflect their agreement that the threshold for demonstrating a violation of Article 1105 is high. *See Bilcon et al v. Government of Canada* (PCA Case No. 2009-04), Counter Memorial of Canada, 9 December 2011, ¶ 321: ("[T]he threshold for proving a violation of that standard is extremely high"); *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Second Submission of Mexico Pursuant to NAFTA Article 1128, 12 June 2015 ("*Mesa – Second Article 1128 Submission of Mexico*"), ¶ 8: ("Mexico concurs in Canada's submissions that the Bilcon tribunal […] correctly held that the threshold for establishing a breach of the minimum standard of treatment at customary international law is high"); *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Second Article 1128 Submission of the United States of America, 12 June 2015 ("*Mesa – Second Article 1128 Submission of the U.S.*"), ¶ 20: (" […] there is a high threshold for Article 1105 to apply").

[19] *See e.g., S.D. Myers – Partial Award*, ¶¶ 261-263: (explaining that "a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making"); *Glamis – Award*, ¶ 762: (holding that "it is not for an international tribunal to delve into the details of and justifications for domestic law"); *Chemtura – Award*, ¶¶ 123, 134: (holding that the Article 1105 analysis must take into account "the fact that certain agencies manage highly specialized domains involving scientific and public policy determinations"); *Windstream – Award*, ¶¶ 344 and 376; *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Award, 31 March 2010 ("*Merrill & Ring – Award*"), ¶ 236.

13. NAFTA tribunals have rejected the proposition that the minimum standard of treatment protects against any action that is inconsistent with an investor's legitimate expectations.[20] Moreover, tribunals have recognized that the fair and equitable treatment standard at customary international law "is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made."[21]

14. Therefore, the mere fact that a State regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not, without more, fall below the customary international law minimum standard of treatment. While a State's decisions or actions may at times be perceived as unfair or inequitable by an investor, Article 1105(1) is "not intended to provide foreign investors with blanket protection from this kind of disappointment."[22]

E. The Customary International Law Minimum Standard of Treatment Does Not Protect Against Breach of Contract

15. A mere breach by a State of its contractual obligations with an investor, does not, in and of itself, constitute a breach of the minimum standard of treatment. This was recognized by the *Glamis* tribunal, as well as other NAFTA tribunals, which said "mere contract breach, without something further such as denial of justice or discrimination,

[20] There is no evidence of an obligation at customary international law not to frustrate the investor's expectations. At most, some tribunals have considered that under Article 1105, an investor's expectations could be a relevant (though non-determinative) factor where a NAFTA Party's conduct "creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages." *See Thunderbird – Award*, ¶ 147. *See also, Mobil – Decision on Liability and on Principles of Quantum*, ¶ 152; *Glamis – Award*, ¶ 621; *Grand River Enterprises Six Nations, Ltd. et al v. United States of America* (UNCITRAL) Award, 12 January 2011 ("*Grand River – Award*"), ¶ 140; *Merrill & Ring – Award*, ¶ 233.

[21] *Mobil – Decision on Liability and on Principles of Quantum*, ¶ 153.

[22] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* (ARB(AF)97/2) Award, 1 November 1999 ("*Azinian – Award*"), ¶ 83.

normally will not suffice to establish a breach of Article 1105."[23] A tribunal's analysis should therefore be based on whether the State's actions fell below the customary international law standard; and not simply on the question of whether there was a breach of contract.

IV. ARTICLE 1110 (EXPROPRIATION AND COMPENSATION)

16. NAFTA Article 1110(1) reflects the customary international law standard with respect to expropriation.[24] It provides that no Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment, except for a public purpose; on a non-discriminatory basis; in accordance with due process of law and Article 1105(1); and, on payment of compensation in accordance with paragraphs 2 through 6 of Article 1110.

17. The first step in analysing whether there has been a breach of Article 1110 is to identify the specific investment alleged to have been expropriated.[25] Any expropriation analysis must begin with determining whether there is a valid property right capable of being expropriated.[26]

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[23] *Glamis – Award*, ¶ 620. *See also*, *Azinian – Award*, ¶ 87; *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Final Award, 15 November 2004 ("*GAMI – Award*"), ¶ 101.

[24] *Glamis – Award*, ¶ 354: ("The inclusion in Article 1110 of the term 'expropriation' incorporates by reference the customary international law regarding that subject."); *Archer Daniels Midland Company et al. v. United Mexican States* (ICSID Case No. ARB(AF)/04/5) Award, 21 November 2007 ("*Archer Daniels – Award*"), ¶ 237.

[25] *Generation Ukraine v. Ukraine* (ICSID Case No. ARB/00/9) Award, 16 September 2003, ¶ 6.2: ("Since expropriation concerns interference in rights in property, it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when allegedly expropriatory acts occurred."); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Award, 27 August 2009, ¶ 442.

[26] *Chemtura – Award*, ¶ 242; *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award, 4 April 2016, ¶ 659; *Infinito Gold Ltd. v. Republic of Costa Rica* (ICSID Case No. ARB/14/5) Award, 03 June 2021 ("*Infinito Gold – Award*"), ¶¶ 705-706. *See also*, Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 R.C.A.D.I. 259, 272 (1982) ("[O]nly *property* deprivation will give rise to compensation.") (*emphasis* in original); Rudolf Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID Review, Foreign Investment Law Journal

18. A determination of whether there is a property right capable of being expropriated requires a *renvoi* to the domestic law of the Party in question.[27] In this respect, international tribunals have generally recognized that domestic courts interpreting legal rights under domestic law should be accorded deference.[28] Only legal rights that have vested under the applicable domestic law are capable of being expropriated. A potential property right or

41, 41 (1986) ("Once it is established in an expropriation case that the object in question amounts to 'property,' the second logical step concerns the identification of 'expropriation.'").

[27] Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, (Kluwer Law International, 2nd Ed. 2017), ¶ 8.64: ("The property rights that are the subject of protection under the international law of expropriation are created by the host State law."); Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), p. 52, ¶ 102: ("whenever there is a dispute about the scope of the property rights comprising the investment, or to whom such rights belong, there must be a reference to a municipal law of property."); *EnCana Corporation v. Republic of Ecuador* (UNCITRAL) Award, 3 February 2006, ¶ 184: ("Unlike many BITs there is no express reference to the law of the host State. However, for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador."); *Emmis International Holding, B.V. Emmis Radio Operating, B.V. Mem Magyar Electronic Media Kereskedelmi Es Szolgaltato KFT v. Hungary* (ICSID Case No. ARB/12/2) Award, 16 April 2014 ("*Emmis – Award*"), ¶¶ 161-162: ("In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law. Public international law does not create property rights."); *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt v. Hungary* (ICSID Case No. ARB/12/3) Award, 17 April 2015, ¶ 75; *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5) Award, 13 March 2015, ¶ 116: ("Expropriation under international law undoubtedly contemplates property rights existing under national law that have been taken by the State."); *Vestey Group Ltd v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/06/4) Award, 15 April 2016, ¶ 257; *Lion Mexico Consolidated L.P. v. United Mexican States* (ICSID Case No. ARB(AF)/15/2) Decision on Jurisdiction, 30 July 2018, ¶ 231: ("NAFTA does not offer a definition of the term 'intangible real estate' used in its Art. 1139(g). Absent such definition, to determine whether an investor holds 'intangible real estate', it is necessary to refer to the law of the host state."); *América Móvil S.A.B. de C.V. v. Republic of Colombia* (ICSID Case No. ARB(AF)/16/5) Award, 7 May 2021, ¶ 319; *Infinito Gold – Award*, ¶ 705: ("If no valid rights exist under domestic law, there can be no expropriation."), and ¶ 711.

[28] *Eli Lilly and Company v. Government of Canada* (ICSID Case No. UNCT/14/2) Final Award, 16 March 2017, ¶¶ 221, 224: ("[A] NAFTA Chapter Eleven tribunal is not an appellate tier in respect of the decisions of the national judiciary. It is not the task of a NAFTA Chapter Eleven tribunal to review the findings of national courts and considerable deference is to be accorded to the conduct and decisions of such courts."); *Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6) Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, ¶ 583; *Mr. Frank Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23) Award, 8 April 2013, ¶ 417.

one that is conditional, in that it may or may not materialize, is not vested and is not capable of being expropriated.[29]

19. Canada notes that the NAFTA Parties have recently confirmed their shared understanding of the state of international law as it relates to expropriations by providing in Annex 14-B of the Canada-United States-Mexico Agreement ("CUSMA") that "[a]n action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment." A footnote further clarifies that "[f]or greater certainty, the existence of a property right is determined with reference to a Party's law."[30]

V. NAFTA ARTICLE 1108 (RESERVATIONS AND EXCEPTIONS)

20. In NAFTA Chapter Eleven, the Parties carved out policy space with respect to the use of their procurement powers. In particular, they decided to exclude procurement from the coverage of certain of the significant obligations in Chapter Eleven. Reflecting this decision, Article 1108(7)(a) provides that Article 1102 (amongst other articles in Chapter Eleven) "does not apply to procurement by a Party or a state enterprise."

21. Article 1108(7)(a) applies when: (1) the measure constitutes or involves procurement; and (2) the measure was adopted or maintained by a Party or a state

[29] *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002, ¶¶ 118 and 152; *Eureko B.V. v. Republic of Poland* (UNCITRAL) Partial Award, 19 August 2005, ¶ 151; *Thunderbird – Award*, ¶ 208; *Merrill & Ring – Award*, ¶ 142; *Emmis – Award*, ¶ 168; *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50) Award, 4 September 2020, ¶ 470: ("[A] finding of expropriation must be premised on a showing that 'Claimants must have held a property right of which they have been deprived.' The property right or asset in question 'must have vested (directly or indirectly) in the claimant for him to seek redress.'"), and ¶ 472: ("[A]bsent any *established* right that was abrogated by Government interference, the fact that Government conduct may have impacted a company business plan does not itself amount to expropriation, even if the end result ultimately is that the company was unable to survive financially.") (*emphasis* in original).

[30] *CUSMA*, Annex 14-B, ¶ 1.

enterprise. When both of these conditions are met, the obligations in Article 1102, among others, do not apply.[31]

22. Chapter Eleven does not define "procurement." The ordinary meaning of the term has, however, been specifically considered by NAFTA tribunals.[32] For example, in *Mercer v. Canada* the tribunal determined "that the phrase 'procurement by a Party or a state enterprise', in its context and in the light of NAFTA's object and purpose, signifies the buying of goods or services for or by a State or a state enterprise".[33] The tribunal confirmed that "[i]t is a broad term."[34]

23. The majority of the tribunal in *Mesa v. Canada* similarly held that the notion of procurement was broad: "In its ordinary meaning, 'procure' […] means 'to get; to gain; to come into possession of.' The French and Spanish texts of the NAFTA use the generic term for 'purchases' in Article 1108".[35] The majority determined that Article 1108(7)(a) contains no limitations, such as a requirement that procurement be of services or goods for the government's own use.[36] The NAFTA tribunal in *Resolute v. Canada* also recently confirmed that "the ordinary meaning of procurement [under Article 1108(7)(a)] is broad."[37]

24. NAFTA tribunals have also determined that the applicability of Article 1108(7)(a) must be done in advance of considering the merits of claims under Article 1102. If a tribunal finds that Article 1108(7)(a) applies, then it may dispense with a claim under

[31] *ADF – Award*, ¶ 162.

[32] *ADF – Award*, ¶ 162*; Mesa – Award*, ¶ 420; *Mercer – Award*, ¶ 6.35; *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007 ("*UPS – Award*"), ¶¶ 121-136; *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Final Award, 25 July 2022 ("*Resolute – Award*"), ¶¶ 380-390.

[33] *Mercer – Award*, ¶ 6.35.

[34] *Mercer – Award*, ¶ 6.34.

[35] *Mesa – Award*, ¶ 407.

[36] *Mesa – Award*, ¶ 424.

[37] *Resolute – Award*, ¶ 381.

Article 1102 without the need to conduct any further analysis. As explained by the NAFTA tribunal in *Resolute v. Canada*:

> The Tribunal notes that nearly all the paragraphs of Article 1108 start with the same formulation, listing Chapter 11 Articles that 'do not apply' to certain measures or treatment listed therein or provided in Annexes I to III to NAFTA. In the case of Article 1108(7), it means that if the Tribunal were to find that some of the Assistance Measures are 'procurement', 'subsides' or 'grants', the obligations provided under NAFTA Article 1102 would 'not apply' to them. As such, the Tribunal deems it appropriate to start with the analysis of Article 1108(7), before turning to the analysis under Article 1102(3) as applicable. This is also the approach adopted by other NAFTA Chapter 11 tribunals, including in *Mesa* and *Mercer*.[38]

25. Therefore, a NAFTA tribunal should determine the applicability of Article 1108(7)(a) in advance of considering an alleged breach of Article 1102.

VI. NAFTA ARTICLE 1102 (NATIONAL TREATMENT)

26. NAFTA Article 1102 sets out the obligation to accord national treatment to "investors" and "investments of investors" of another NAFTA Party. In particular, it requires a NAFTA Party to accord to investors of another NAFTA Party, or their investments, treatment "no less favourable" than it accords to its own investors or their investments "in like circumstances".

27. A claimant making a claim under Article 1102 bears the burden of demonstrating that: (1) the Party accorded both the claimant or its investment and the domestic comparator "treatment […] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments";[39] (2) the Party accorded

[38] *Resolute - Award*, ¶ 371. *See also*, *Mercer – Award*, ¶ 6.50 and *Mesa – Award*, ¶ 465.

[39] *Merrill & Ring – Award*, ¶¶ 79 and 81-82; *UPS – Award*, ¶ 83(a); *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/01) Decision on Responsibility, 15 January 2008 ("*Corn Products – Decision on Responsibility*"), ¶ 117.

the alleged treatment "in like circumstances";[40] and (3) the treatment accorded to the claimant or its investment was "less favourable" than that accorded to the comparator investor or investment.[41] It is well established that the burden of proving each constituent part of a national treatment claim rests exclusively with the party asserting it. The claimant therefore bears the responsibility of demonstrating all of the elements of an Article 1102 claim. The NAFTA Parties agree that this burden never shifts to the respondent.[42]

28. This analysis has to be conducted in light of the object and purpose of Article 1102, which is to prevent discriminatory treatment based on the nationality of an investor or its investment.[43] NAFTA tribunals have recognized that the central object of Article 1102 is to prevent nationality-based discrimination, not to prevent all measures that result in differences in treatment.[44] Therefore, there can be no breach of Article 1102 unless the

[40] *UPS – Award*, ¶ 83; *Loewen – Award*, ¶ 139; *Archer Daniels – Award*, ¶ 205; *S.D. Myers – Partial Award*, ¶ 252; *Corn Products – Decision on Responsibility*, ¶ 117.

[41] *UPS – Award*, ¶ 83(c); *Corn Products – Decision on Responsibility*, ¶ 117.

[42] *See for example, Mesa – Second Article 1128 Submission of the U.S.*, ¶ 4; *Mesa – Second Article 1128 Submission of Mexico*, ¶ 7; *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Submission of the United States of America, 8 May 2015 ("*Mercer – Submission of the U.S.*"), ¶ 13; *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Submission of Mexico Pursuant to Article 1128 of NAFTA, 8 May 2015 ("*Mercer – Submission of Mexico*"), ¶ 11.

[43] In past NAFTA Chapter Eleven arbitrations, all three NAFTA Parties have agreed that the national treatment obligation is designed to protect against discrimination on the basis of nationality. *See for example*, on behalf of the United States: *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Submission of the United States of America, 7 April 2000, ¶ 3; *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Counter-Memorial on Merits and Objections to Jurisdiction of Respondent United States of America, 14 December 2012, ¶ 323; *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Submission of the United States of America, 25 July 2014, ¶ 11; *Mercer – Submission of the U.S.*, ¶¶ 10-11. On behalf of Mexico: *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Submission of the United Mexican States, 3 April 2000, ¶¶ 67, 69; *United Parcel Service v. Canada* (UNCITRAL) Submission of the United Mexican States, 20 October 2005, ¶ 7; *Cargill, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/05) Rejoinder of the Respondent, 2 May 2007, ¶ 286; *Mercer – Submission of Mexico*, ¶¶ 11 and 15. On behalf of Canada: *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Canada's Counter Memorial, 29 March 2000, ¶ 166; *United Parcel Service v. Canada* (UNCITRAL) Counter Memorial (Merits Phase), 22 June 2005, ¶ 585; *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Canada's Counter-Memorial and Reply on Jurisdiction, 28 February 2014, ¶ 354; *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Canada's Counter-Memorial, 22 August 2014, ¶¶ 25 and 360.

[44] *See for example, Resolute - Award*, ¶ 546, *Mercer – Award*, ¶¶ 7.7-7.10; *Loewen – Award*, ¶ 139; *Archer Daniels – Award*, ¶¶ 193, 205; and *Cargill – Final Award*, ¶ 217.

evidence establishes that a host State has treated foreign investors, or investments, that are in like circumstances to domestic investors, or investments, less favourably on the basis of their nationality.

29. In carrying out a national treatment analysis, the first step is to establish that the government accorded "treatment" to the investor or its investments. In particular, the alleged treatment must be with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of its investment.[45]

30. The second element that a claimant must establish is that the treatment accorded to it and the treatment of its identified comparators was accorded "in like circumstances". This element is a precondition to a finding of less favourable treatment, since treatment can only be less favourable within the meaning of Article 1102 if it is accorded in like circumstances.[46]

31. Article 1102 is concerned with the question of whether treatment was accorded "in like circumstances", not whether it was accorded to "like investors". Determining the existence of "like circumstances" is not merely a matter of determining whether investors operate in the same business or economic sector or pursue the same activity. Rather, it requires a detailed consideration of the particular facts of each case and an examination of the totality of the circumstances in which treatment was accorded in order to determine whether those circumstances are "like".[47] As NAFTA tribunals have noted, treatment is not accorded in like circumstances if differences in treatment between domestic and foreign investors or investments are plausibly connected to legitimate public policy objectives.[48]

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[45] *UPS – Award*, ¶ 83; *Merrill & Ring – Award*, ¶ 79; *Corn Products – Decision on Responsibility*, ¶ 117.

[46] *Resolute – Award*, ¶ 558 and *Archer Daniels – Award*, ¶ 196.

[47] *Merrill & Ring – Award*, ¶ 88; *UPS – Award*, ¶ 87: (holding that the determination of whether treatment was accorded in like circumstances "will require consideration … of all the relevant circumstances in which the treatment was accorded."); *Pope & Talbot Inc. v. Canada* (UNCITRAL) Award on the Merits of Phase 2, 10 April 2001 ("*Pope & Talbot – Award on the Merits Phase 2*"), ¶ 75: ("Circumstances are context dependent.").

[48] *S.D. Myers – Partial Award*, ¶¶ 248, 250; *Pope & Talbot – Award on the Merits Phase 2*, ¶¶ 78-79, 87-88; *GAMI – Award*, ¶ 114. *See also*, *Merrill & Ring – Award*, ¶ 88; *Cargill – Final Award*, ¶¶ 206-207.

Tribunals have also found that treatment may not be accorded in like circumstances if domestic and foreign investors or investments are subject to different legal regimes, as may be the case if they are located in different jurisdictions.[49]

32. Third, a claimant must prove that the treatment accorded to it or its investment was "less favourable" than the treatment accorded to domestic comparators.[50]

Dated this 21st day of March, 2023.

Respectfully submitted
on behalf of Canada,

[Signed]

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[49] *Resolute - Award*, ¶¶ 575-576, *Grand River – Award*, ¶ 166; *Methanex – Final Award*, Part IV, Chapter B, p. 9, ¶¶ 18-19; *UPS – Award*, ¶¶ 102, 116; *ADF – Award*, ¶ 156; *Pope & Talbot - Award on the Merits Phase 2*, ¶¶ 84-88; *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Award, 25 August 2014, ¶¶ 8.15, 8.42 and 8.54.

[50] Canadian Statement on Implementation: North American Free Trade Agreement, Vol. 128, no. 1, Ottawa: Canada Gazette, 1994, at 148; United Nations Conference on Trade and Development, UNCTAD/ITE/IIT/11 (Vol. IV) National Treatment (United Nations: New York and Geneva, 1999) at 37.