

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

ELI LILLY AND COMPANY,

*Claimant/Investor,*

*-and-*

GOVERNMENT OF CANADA,

*Respondent/Party.*

(Case No. UNCT/14/2)

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**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.

**Articles 1116(2) and 1117(2) (Limitations Period)**

2. All claims under NAFTA Chapter Eleven must be brought within the three-year limitations period set out in Articles 1116(2) and 1117(2).<sup>1</sup> Specifically, Articles 1116(2) and 1117(2) require a claimant to submit a claim to arbitration within three years of the “date on which the” investor or enterprise “first acquired, or should have first acquired, knowledge” of (i) the alleged breach, and (ii) loss or damage incurred by the claimant or enterprise.

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<sup>1</sup> The claims limitation period has been described as “clear and rigid” and not subject to any “suspension,” “prolongation,” or “other qualification.” *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction ¶ 29 (July 20, 2006); *Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002).

3. Articles 1116 and 1117, as their titles indicate, concern claims by an “investor of a Party,” which is defined in Article 1139 as “a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.” The time limitations period in Articles 1116(2) and 1117(2) must therefore relate to the particular investment for which the investor seeks a remedy for the breach and loss. The time limitations period thus runs from when the investor first acquires knowledge of the alleged breach and loss in connection with that particular investment.

4. An investor or enterprise *first* acquires knowledge of an alleged breach and loss at a particular moment in time; that is, under Articles 1116(2) and 1117(2), knowledge is acquired as of a particular “date.” Such knowledge cannot *first* be acquired at multiple points in time or on a recurring basis. As the *Grand River* tribunal recognized,<sup>2</sup> a continuing course of conduct by the host State does not renew the limitations period under Articles 1116(2) and 1117(2), once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby. Accordingly, once a claimant *first* acquires (or should have first acquired) knowledge of breach and loss, subsequent transgressions by the State Party arising from a continuing course of conduct do not renew the limitations period under Articles 1116(2) or Article 1117(2).

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

5. 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.”

6. On July 31, 2001, the Free Trade Commission (“Commission”), comprising the NAFTA Parties’ cabinet-level representatives, issued an interpretation reaffirming that “Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.”<sup>3</sup> The Commission clarified that the concept of “fair and equitable treatment” does “not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”<sup>4</sup> The Commission also confirmed that “a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).”<sup>5</sup> The Commission’s interpretation “shall be binding” on tribunals established under Chapter Eleven.<sup>6</sup>

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<sup>2</sup> *Grand River*, Decision on Objections to Jurisdiction ¶ 81 (explaining that where a “series of similar and related actions by a respondent state” is at issue, an investor cannot evade the limitations period by basing its claim on “the most recent transgression” in that series and also finding that to allow an investor to do so would “render the limitations provisions ineffective”).

<sup>3</sup> NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions ¶ B.1 (July 31, 2001) (“FTC Interpretation”).

<sup>4</sup> *Id.* ¶ B.2.

<sup>5</sup> *Id.* ¶ B.3.

<sup>6</sup> North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, art. 1131(2) (1993).

7. 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.<sup>7</sup> The standard establishes a minimum “floor below which treatment of foreign investors must not fall.”<sup>8</sup>

8. 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. This obligation is discussed in more detail below.

9. Other such areas concern the obligation to provide “full protection and security,” which is also addressed in Article 1105(1), but which is not at issue in this case. The minimum standard of treatment also includes the obligation not to expropriate covered investments, except under the conditions specified in Article 1110, which is also addressed in greater detail below.

10. Customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation. This two-element approach – State practice and *opinio juris* – is “widely endorsed in the literature” and “generally adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice.”<sup>9</sup>

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<sup>7</sup> A fuller description of the U.S. position is set out in *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America (Nov. 13, 2000); *ADF Group Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/00/1, Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot* (June 27, 2002); *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Sept. 19, 2006); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Dec. 22, 2008).

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

<sup>9</sup> See Michael Wood (Special Rapporteur), *Second Report on Identification of Customary International Law* ¶ 21, A/CN.4/672, International Law Commission (May 22, 2014) (“ILC Second Report on the Identification of Customary International Law”); see also *id.*, Annex, Proposed Draft Conclusion 3 (stating that in order to determine the “existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law”); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, 122 (Feb. 3) (“In particular . . . the existence of a rule of customary international law requires that there be ‘a settled practice’ together with *opinio juris*.”) (citing *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, 1969 I.C.J. 44, ¶ 77 (Feb. 20)); *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, 29-30 (June 3) (“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States[.]”).

11. Relevant State practice must be widespread and consistent<sup>10</sup> and be accepted as law, meaning that the practice must also be accompanied by a sense of legal obligation.<sup>11</sup> The twin requirements of State practice and *opinio juris* “must both be identified . . . to support a finding that a relevant rule of customary international law has emerged.”<sup>12</sup> A perfunctory reference to these requirements is not sufficient.<sup>13</sup>

12. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate that a rule of customary international law exists, most recently in its decision on *Jurisdictional Immunities of the State (Germany v. Italy)*.<sup>14</sup> 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.<sup>15</sup>

13. The concept of “legitimate expectations” is not a component element of “fair and equitable treatment” under customary international law that gives rise to an independent host State obligation.<sup>16</sup> An investor may develop its own expectations about the legal regime

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<sup>10</sup> See, e.g., *North Sea Continental Shelf*, 1969 I.C.J. at 43 (noting that in order for a new rule of customary international law to form, “State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; -- and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved”); ILC Second Report on the Identification of Customary International Law, Draft Conclusion 9 and commentaries (citing authorities).

<sup>11</sup> *North Sea Continental Shelf*, 1969 I.C.J. at 44 (“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.”); ILC Second Report on the Identification of Customary International Law, Draft Conclusion 10 with commentaries (citing authorities).

<sup>12</sup> ILC Second Report on the Identification of Customary International Law ¶¶ 22-23 (citing these requirements as “indispensable for any rule of customary international law properly so called”) (emphasis added).

<sup>13</sup> 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.”).

<sup>14</sup> *Jurisdictional Immunities of the State*, 2012 I.C.J. 99.

<sup>15</sup> *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).

<sup>16</sup> See, e.g., *Mesa Power Group, LLC v. Government of Canada*, NAFTA/UNICTRAL, Government of Canada Response to 1128 Submissions ¶ 12 (June 26, 2015) (concurring with the United States that there is no obligation not to frustrate investors’ expectations under the minimum standard of treatment); DUMBERRY at 158-59 (“there is

governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations; instead, something more is required than the interference with those expectations.<sup>17</sup> Moreover, the concept of "legitimate expectations" is particularly inapt in the context of judicial measures. For the reasons explained below, a judicial action interpreting domestic law cannot form the basis of a claim under Article 1105(1) unless it rises to the level of a denial of justice. Thus, that same judicial measure cannot violate Article 1105(1) because it merely frustrated an investor's "legitimate expectations."

14. Similarly, the customary international law minimum standard of treatment set forth in Article 1105(1) does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination.<sup>18</sup> As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.<sup>19</sup> To

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little support for the assertion that there exists under customary international law any obligation for host States to protect investors' legitimate expectations.").

<sup>17</sup> See, e.g., *Grand River*, U.S. Counter-Memorial, at 96-97 ("As a matter of international law, although an investor may develop its own expectations about the legal regime that governs its investment, those expectations do not impose a legal obligation on the State." Even when such expectations arise out of a legal commitment, "[t]o breach the minimum standard of treatment, something more is required, such as a complete repudiation of the contract or a denial of justice in the execution of the contract."). NAFTA tribunals have recognized this point. See *Robert Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award ¶ 87 (Nov. 1, 1999) ("NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes.").

<sup>18</sup> See *Grand River Enterprises Six Nations Ltd. v United States of America*, NAFTA/UNCITRAL, Award ¶¶ 208-09 (Jan. 12, 2011) ("The language of Article 1105 does not state or suggest a blanket prohibition on discrimination against alien investors' investments, and one cannot assert such a rule under customary international law. States discriminate against foreign investments, often and in many ways, without being called to account for violating the customary minimum standard of protection . . . [N]either Article 1105 nor the customary international law standard of protection generally prohibits discrimination against foreign investments.").

<sup>19</sup> See *Methanex v. United States of America*, NAFTA/UNCITRAL, Final Award, Part IV, Chapter C ¶¶ 25-26 (Aug. 3, 2005) (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, 33 AM. SOC'Y OF INT'L L. PROC. 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) ("ROTH") ("[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."); J.L. BRIERLY, THE LAW OF NATIONS 278 (Sir Humphrey Waldock ed.) (6th ed. 1963) ("BRIERLY") ("In general a person who voluntarily enters the territory of a state not his own must accept the institutions of that state as he finds them. He is not entitled to demand equality of treatment in all respects with the citizens of the state; for example, he is almost always debarred from the political rights of a citizen; he is commonly not allowed to engage in the coasting trade, or to fish in territorial waters; he is sometimes not allowed to hold land. These and many other discriminations against him are not forbidden by international law.").

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 the prohibitions against denial of justice<sup>20</sup> and unlawful expropriation,<sup>21</sup> as well as the obligation of full protection and security.<sup>22</sup> Moreover, general investor-State claims of nationality-based discrimination are governed exclusively by the provisions of Chapter Eleven that specifically address that subject, not Article 1105(1).<sup>23</sup>

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<sup>20</sup> See, e.g., ROTH at 185-86 (including in a list of minimum requirements that states must extend to aliens under international law, certain “procedural rights,” including “freedom of access to court, the right to a fair, non-discriminatory and unbiased hearing, the right to full participation in any form in the procedure, [and] the right to a just decision rendered in full compliance with the laws of the State within a reasonable time”); 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.”); Report of the Guerraro Sub-Committee of the Committee of the League of Nations on Progressive Codification 1, Publications of the League C.196, M. 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. INT’L ARB. AWARDS 83, 111 (Mar. 6, 1956) (“The modern concept of ‘free access to the Courts’ represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a practice which existed in former times and in certain countries, and which constituted an unjust discrimination against foreigners. Hence, the essence of ‘free access’ is adherence to and effectiveness of the principle of non-discrimination against foreigners who are in need of seeking justice before the courts of the land for the protection and defence of their rights.”).

<sup>21</sup> See, e.g., *Libyan American Oil Co. (LIAMCO) v. Libya*, Award, 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, ¶ 87 (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 THE LAW OF FOREIGN RELATIONS § 712 (1987) (“A state is responsible under international law for injury resulting from . . . a taking by the state of the property of a national of another state that . . . is discriminatory . . . .”); *id.* § 712 cmt. f (“Formulations of the rules on expropriation generally include a prohibition of discrimination . . . .”).

<sup>22</sup> 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], at 529 (1975) (Basis of Discussion 21(4)); see also *id.* at 538 (Basis of Discussion 22(b)) (“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.”). See also *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, 1989 I.C.J. 15, 65 (July 20) (explaining that the “essential question” when determining whether the protection provided by a domestic authority falls below the full protection and security standard under international law is “whether the local law, either in its terms or its application, has treated [alien] nationals less well than [its own] nationals”).

<sup>23</sup> See *Methanex*, Final Award, Part IV, Chapter C ¶ 24 (explaining that the impact of the “FTC interpretation of Article 1105” was not to “exclude non-discrimination from NAFTA Chapter 11” but “to confine claims based on alleged discrimination to Article 1102, which offers full play for a principle of non-discrimination.”); *Methanex*, U.S. Amended Statement of Defense ¶¶ 356-365 (explaining that unlike Articles 1102 and 1103, which provide a relative standard of protection, Article 1105(1) signals an absolute, minimum standard of treatment and that, had the Parties intended to incorporate a general obligation of non-discrimination in Article 1105(1), they would have included exceptions in Article 1108 to exempt from Article 1105(1)’s ambit the discriminatory activities they considered permissible. Otherwise, permissible measures could be rendered violations under Article 1105(1), rendering ineffective the exceptions set forth in Article 1108)).

15. States may decide expressly by treaty to make policy decisions to extend protections under the rubric of “fair and equitable treatment” and “full protection and security” beyond that required by customary international law. 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.<sup>24</sup> Thus, arbitral decisions interpreting “autonomous” fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 1105(1).<sup>25</sup> Likewise, decisions of international courts and arbitral tribunals interpreting “fair and equitable treatment” as a concept of customary international law are not themselves instances of “State practice” for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice.<sup>26</sup>

16. 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.

17. To do so, as all three NAFTA Parties agree,<sup>27</sup> the burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that

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<sup>24</sup> FTC Interpretation ¶ B.1 (“Article 1105(1) prescribes the customary international law minimum standard of treatment . . . .); see also *Grand River*, Award ¶ 176 (noting that Article 1105 of the NAFTA “must be determined by reference to customary international law, not to standards contained in other treaties or other NAFTA provisions, or in other sources, unless those sources reflect relevant customary international law”). While there may be overlap in the substantive protections ensured by NAFTA and other treaties, a claimant submitting a claim under the NAFTA, in which fair and equitable treatment is defined by the customary international law minimum standard of treatment, still must demonstrate that the obligations invoked are in fact a part of customary international law.

<sup>25</sup> See, e.g., *Glamis*, Award ¶ 608 (concluding that “arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom”); *Cargill Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award ¶ 278 (Sept. 18, 2009) (noting that arbitral “decisions are relevant to the issue presented in Article 1105(1) only if the fair and equitable treatment clause of the BIT in question was viewed by the Tribunal as involving, like Article 1105, an incorporation of the customary international law standard rather than autonomous treaty language.”). 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.”).

<sup>26</sup> See, e.g., *Glamis*, Award ¶ 605 (“Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law. They can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation.”) (footnote omitted).

<sup>27</sup> See, e.g., *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Government of Canada Rejoinder on the Merits (July 2, 2014) ¶ 147 (“[I]t is a well-established principle of international law that the party alleging the existence of a rule of customary international law bears the burden of proving it. Thus, the burden is on the Claimant to prove that customary international law has evolved to include the elements it claims are protected.”) (footnote omitted); *Id.*, Second Submission of Mexico Pursuant to NAFTA Article 1128 (June 12, 2015) ¶ 9 (concurring with the United States’ position that the burden is on a claimant to establish a relevant obligation under

meets the requirements of State practice and *opinio juris*.<sup>28</sup> “The party which relies on a custom,” therefore, “must prove that this custom is established in such a manner that it has become binding on the other Party.”<sup>29</sup> Tribunals applying Article 1105 have confirmed that the party seeking to rely on a rule of customary international law must establish its existence. The tribunal in *Cargill Inc. v. Mexico*, for example, acknowledged that

the proof of change in a custom is not an easy matter to establish. However, *the burden of doing so falls clearly on Claimant*. If the Claimant does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task. Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.<sup>30</sup>

18. Once a rule of customary international law has been established, the claimant must then show that the State has engaged in conduct that violates that rule.<sup>31</sup> Determining a breach of the minimum standard of treatment “must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders.”<sup>32</sup>

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customary international law that meets the requirements of State practice and *opinio juris*); *Id.*, Second Submission of the United States of America ¶ 12 (June 12, 2015). *See also id.* ¶ 8 (“Specifically, as addressed below, the *Bilcon* tribunal failed to recognize that the burden is on a claimant to establish the existence and applicability of a rule of customary international law, and failed to determine whether the *Bilcon* Claimants had met that burden.”).

<sup>28</sup> *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20); *see also North Sea Continental Shelf*, 1969 I.C.J. at 43; *Glamis*, Award ¶¶ 601-02 (noting that the claimant bears the burden of establishing a change in customary international law, by showing “(1) a concordant practice of a number of States acquiesced in by others, and (2) a conception that the practice is required by or consistent with the prevailing law (*opinio juris*).”) (citations and internal quotation marks omitted).

<sup>29</sup> *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, 1952 I.C.J. 176, 200 (Aug. 27) (“The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.”) (citation and internal quotation marks omitted); *S.S. “Lotus” (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, at 25-26 (Sept. 27) (holding that the claimant had failed to “conclusively prove” the “existence of . . . a rule” of customary international law).

<sup>30</sup> *Cargill*, Award ¶ 273 (emphasis added). The *ADF*, *Glamis*, and *Methanex* tribunals likewise placed on the claimant the burden of establishing the content of customary international law. *See ADF Group, Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/00/1, Award ¶ 185 (Jan. 9, 2003) (“The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts.”); *Glamis* Award ¶ 601 (“As a threshold issue, the Tribunal notes that it is Claimant’s burden to sufficiently” show the content of the customary international law minimum standard of treatment); *Methanex*, Final Award, Part IV, Chapter C ¶ 26 (citing *Asylum (Colombia v. Peru)* for placing burden on claimant to establish the content of customary international law, and finding that claimant, which “cited only one case,” had not discharged burden).

<sup>31</sup> *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).

<sup>32</sup> *S.D. Myers*, First Partial Award ¶ 263.



19. Finally, the FTC Interpretation makes clear that a “determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of” the minimum standard of treatment.<sup>33</sup> Thus, even if a claimant were to establish that Article 1110 or a provision of Chapter Seventeen has been breached, that determination does not itself establish a breach of Article 1105(1).

### Claims for Judicial Measures

20. As noted above, the obligation to provide “fair and equitable treatment” under Article 1105(1) includes, for example, the customary international law obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.<sup>34</sup> Denial of justice in its historical and “customary sense” denotes “misconduct or inaction of the judicial branch of the government” and involves “some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process.”<sup>35</sup> Aliens have no cause for complaint at international law about a domestic system of law provided that it conforms to “a reasonable standard of civilized justice” and is fairly administered.<sup>36</sup> “Civilized justice” has been described as requiring “[f]air courts, readily open to aliens, administering justice honestly, impartially, [and] without bias or political control[.]”<sup>37</sup>

21. A denial of justice may occur in instances such as when the final act of a State’s judiciary constitutes a “notoriously unjust”<sup>38</sup> or “egregious”<sup>39</sup> administration of justice “which offends a sense of judicial propriety.”<sup>40</sup> More specifically, a denial of justice exists where there is, for

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<sup>33</sup> FTC Interpretation ¶ B.3.

<sup>34</sup> See, e.g., 2012 U.S. Model BIT Article 5(2) (Minimum Standard of Treatment) (noting that “[f]or greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment” and that the obligation to provide “fair and equitable treatment” “includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world[.]”).

<sup>35</sup> EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS* 330 (1925) (“BORCHARD”); BRIERLY at 286-87 (defining a denial of justice as “an injury involving the responsibility of the state committed by a court of justice”).

<sup>36</sup> BORCHARD at 198 (“Provided the system of law conforms with a reasonable standard of civilized justice and provided that it is fairly administered, aliens have no cause for complaint in the absence of an actual denial of justice.”) (footnote omitted).

<sup>37</sup> Borchard, 33 AM. SOC’Y OF INT’L L. PROC. at 63.

<sup>38</sup> JAN PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 44 (2005) (“PAULSSON”) (citing J. Irizarry y Puente, *The Concept of “Denial of Justice” in Latin America*, 43 MICH. L. REV. 383, 406 (1944)); *id.* at 4 (“[A] state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner.”) (emphasis omitted); *Chattin Case (United States v. Mexico)*, 4 R. INT’L ARB. AWARDS 282, 286-87 (1927), *reprinted in* 22 AM. J. INT’L L. 667, 672 (1928) (“Acts of the judiciary . . . are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man.”) (emphasis omitted).

<sup>39</sup> PAULSSON at 60 (“The modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice.”).

<sup>40</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 132 (June 26, 2003) (a denial of justice may arise where there has occurred a “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety”);

example, an “obstruction of access to courts,” “failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment.”<sup>41</sup> Instances of denial of justice also have included corruption in judicial proceedings, discrimination or ill-will against aliens, and executive or legislative interference with the freedom of impartiality of the judicial process.<sup>42</sup> At the same time, erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law.<sup>43</sup> Similarly, neither the evolution nor development of “new” judge-made law that departs from previous jurisprudence within the confines of common law adjudication, implicates a denial of justice.<sup>44</sup>

22. The international responsibility of States may not be invoked with respect to non-final judicial acts,<sup>45</sup> unless recourse to further domestic remedies is obviously futile or manifestly

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*Mondev Int’l Ltd. v. United States of America*, NAFTA/ICSID Case ARB(AF)/99/2, Award ¶ 127 (Oct. 11, 2002) (finding that the test for a denial of justice was “not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome[.]”); see also generally *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)* 1970 I.C.J. 3 (Feb. 5) Separate Opinion of Judge Tanaka, at 144 (“Separate Opinion of Judge Tanaka”) (explaining that “denial of justice occurs in the case of such acts as- ‘corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it, . . . But no merely erroneous or even unjust judgment of a court will constitute a denial of justice’”) (citations omitted).

<sup>41</sup> Harvard Research Draft, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, art. 9, 23 AM. J. INT’L L. SP. SUPP. 131, 134 (1929). The commentary notes that a “manifestly unjust judgment” is one that is a “travesty upon justice or grotesquely unjust.” *Id.* at 178.

<sup>42</sup> *Id.* at 175.

<sup>43</sup> *Id.* at 134 (“An error of a national court which does not produce manifest injustice is not a denial of justice.”); PAULSSON at 81 (“The erroneous application of national law cannot, in itself, be an international denial of justice.”); DUMBERRY at 228 (noting that a simple error, misinterpretation or misapplication of domestic law is not per se a denial of justice) (internal quotes omitted); BORCHARD at 196 (explaining that a government is not responsible for the mistakes or errors of its courts and that: “[A]s a general rule the state is not liable for the acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort.”); Christopher Greenwood, *State Responsibility for the Decisions of National Courts*, in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 61 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004) (“Greenwood”) (“[I]t is well established that a mistake on the part of the court or an irregularity in procedure is not in itself sufficient to amount to a violation of international law; there must be a denial of justice.”).

<sup>44</sup> See *Mondev*, Award ¶¶ 131, 133 (finding, in response to the claimant’s allegation that a decision of the Massachusetts Supreme Court involved a “significant and serious departure” from its previous jurisprudence, it doubtful that the court “made new law . . . [b]ut even if it had done so its decision would have fallen within the limits of common law adjudication. There is nothing here to shock or surprise even a delicate judicial sensibility.”).

<sup>45</sup> See *Apotex Inc. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 282 (June 14, 2013) (“[A] claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself.”); *Loewen*, Award ¶ 156 (“The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision.”); PAULSSON at 108 (“For a foreigner’s international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself.”); Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63(3) INT’L. & COMP. L.Q. 28 (2014)

ineffective. The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence,<sup>46</sup> the particular nature of judicial action,<sup>47</sup> and the unique status of the judiciary in both international and municipal legal systems. As a result, the actions of domestic courts are accorded a greater presumption of regularity under international law than are legislative or administrative acts.<sup>48</sup> Indeed, as a matter of customary international law, international tribunals

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(“Douglas”) (explaining that “international responsibility towards foreign nationals for acts and omissions associated with an adjudicative procedure can only arise at the point at which the adjudication has produced its final result; it is only at that point that a constituent element of that responsibility has been satisfied, which is the existence of damage to the foreign national.”).

<sup>46</sup> See e.g., Separate Opinion of Judge Tanaka at 154 (“One of the most important political and legal characteristics of a modern State is the principle of judicial independence.”). Judge Tanaka went on to explain that what distinguishes the judiciary from other organs of government is the “social significance of the judiciary for the settlement of conflicts of vital interest as an impartial third party and, on the other hand, from the extremely scientific and technical nature of judicial questions, the solution of which requires the most highly conscientious activities of specially educated and trained experts. The independence of the judiciary, therefore, despite the existence of differences in degree between various legal systems, may be considered as a universally recognized principle in most of the municipal and international legal systems of the world. It may be admitted to be a ‘general principle of law recognized by civilized nations’ (Article 38, paragraph 1(c), of the Statute).” *Id.* at 154.

<sup>47</sup> See, e.g., Douglas at 10-11 (explaining that the “rationality inherent in decision-making through adjudication, coupled with the opportunity afforded to affected parties to present reasoned arguments during the course of that decision-making process, . . . sets adjudication apart from other institutions of social ordering within the State,” and that an authoritative decision by a domestic adjudicative body “cannot be disturbed by an international court or tribunal simply on the basis that a more rational set of reasons was available to that . . . body. . . . International law is deferential to the particular virtues of adjudication by respecting the integrity of the process and the outcomes it produces.”) (footnotes omitted).

<sup>48</sup> *Loewen Group, Inc. and Raymond Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Response of the United States of America to the Submissions of Claimants Concerning Matters of Jurisdiction and Competence, at 8 (July 7, 2000) (“[U]nlike actions of the executive or the legislature, judicial acts can violate customary international law obligations in only the most extreme and unusual of circumstances[.]” *citing* T. BATY, *THE CANONS OF INTERNATIONAL LAW* 127 (1930) (“It is true that courts are organs of the nation; but they are not its organs in the sense in which the executive and the legislature are.”); BORCHARD 195-96 (because “[i]n well-regulated states, the courts are more independent of executive control than any other authorities . . . [.] the state is not liable for the acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort.”); ALWYN V. FREEMAN, *INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* 33 (1938) (“[T]he question of proof of illegal action will be more difficult [with respect to judicial action] than is the case with other organs of the State.”). See also *Loewen*, Response of the United States of America to the Submissions of Claimants Concerning Matters of Jurisdiction and Competence, at 9 (July 7, 2000) (“Given the unique status of the judiciary in both international and municipal legal systems, the actions of domestic courts are accorded a far greater presumption of regularity under international law than are legislative or administrative acts.”), *available at* <http://www.naftaclaims.com/disputes/usa/Loewen/LoewenUSSuppMemorialJurisdiction.pdf> (last visited March 18, 2016). The United States distinguishes between judicial action and other forms of government action as a matter of domestic law. For example, the U.S. Supreme Court has long recognized liability for legislative and regulatory actions that violate the economic protections of the U.S. Constitution, but has never recognized liability for judicial action under those same provisions. See, e.g., Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1075 n.121 (1997); Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1453 (1990) (observing with disapproval that “[t]he few scholars to have seriously addressed the issue have generally argued that it would be catastrophic to subject the courts to the same constitutional constraints as the legislative and executive branches . . .”). The status of U.S. law has not changed. See *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection et al.*, 560 U.S. 702 (2010); *Shinnecock*

will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice.<sup>49</sup>

23. In this connection, it is well-established that international tribunals such as NAFTA Chapter Eleven tribunals are not empowered to be supranational courts of appeal on a court's application of domestic law.<sup>50</sup> Thus, an investor's claim challenging judicial measures under Article 1105(1) is limited to a claim for denial of justice under the customary international law minimum standard of treatment. *A fortiori*, domestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law. Moreover, an investor bringing an Article 1105(1) claim may not invoke an

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*Indian Nation v. United States*, 112 Fed. Cl. 369, 385 (2013) (“a theory of judicial takings . . . has not been adopted in the federal courts.”).

<sup>49</sup> *Azinian*, Award ¶ 99 (“The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. What must be shown is that the court decision itself constitutes a violation of the treaty. Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end.”); *Mohammad Ammar Al Bahloul v. Republic of Tajikistan*, SCC Case No. V(064/2008), Partial Award on Jurisdiction and Liability ¶ 237 (Sept. 2, 2009) (“[I]t is not the role of this Tribunal to sit as an appellate court on questions of Tajik law. Suffice it to say, we do not find the Tajik court’s application of Tajik law on this issue to be malicious or clearly wrong, and therefore find no basis for Claimant’s claim of denial of justice.”). See also PAULSSON at 82. All three NAFTA Parties agree on the deference to be accorded to domestic courts on matters of domestic law. See, e.g., *Loewen Group, Inc. and Raymond Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Second Submission of the United Mexican States, at 5-6 (Nov. 9, 2001) (“International tribunals defer to the acts of municipal courts not only because the courts are recognized as being expert in matters of a State’s domestic law, but also because of the judiciary’s role in the organization of the State.”); *id.*, Response of the United States of America to the November 9, 2001 Submissions of the Governments of Canada and Mexico Pursuant to NAFTA Article 1128, at 6 (Dec. 7, 2001) (“The United States agrees with Mexico that customary international law recognizes distinctions between acts of the judiciary and acts of other organs of the state and accords great deference to judicial acts”); *Eli Lilly and Company v. Government of Canada*, NAFTA/UNCITRAL, Government of Canada Counter-Memorial ¶ 231 (Jan. 27, 2015) (explaining that the rule that there must be a very serious failure in the “administration of justice before a State can be found in violation of international law for the domestic law decisions of its domestic courts” stems from “the recognition of the independence of the judiciary and the great deference afforded to domestic courts acting in their *bona fide* role of adjudication and interpretation of a State’s domestic law.”).

<sup>50</sup> *Apotex*, Award ¶ 278 (“[I]t is not the proper role of an international tribunal established under NAFTA Chapter Eleven to substitute itself for the U.S. Supreme Court, or to act as a supranational appellate court.”); *Azinian*, Award ¶ 99 (“The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA.”); *Waste Management Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/00/3, Final Award ¶ 129 (Apr. 30, 2004) (“[T]he Tribunal would observe that it is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of amparo in respect of the decisions of the federal courts of NAFTA parties.”); Separate Opinion of Judge Tanaka at 158 (explaining that erroneous decisions of municipal law cannot constitute a denial of justice because the interpretation of municipal law “does not belong to the realm of international law. If an international tribunal were to take up these issues and examine the regularity of the decisions of municipal courts, the international tribunal would turn out to be a ‘*cour de cassation*’, the highest court in the municipal law system. An international tribunal, on the contrary, belongs to quite a different order; it is called upon to deal with international affairs, not municipal affairs.”).

alleged host State violation of an international obligation owed to another State or its home State, for example an obligation contained in another treaty or another Chapter of NAFTA such as Chapter Seventeen.<sup>51</sup> A violation of that Chapter, which is subject to the State-to-State dispute resolution provisions of NAFTA Chapter Twenty, may be the basis of a claim by one NAFTA Party against another, but that violation does not provide a separate cause of action for an investor, who may only bring claims against a host Party for alleged breaches of Chapter Eleven, Section A. And, as stated previously, the FTC Interpretation provides that a “determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of” the minimum standard of treatment.<sup>52</sup>

24. For the foregoing reasons, judicial measures may form the basis of a claim under the customary international law minimum standard of treatment under Article 1105(1) only if they are final<sup>53</sup> and if it is proved that a denial of justice has occurred. Were it otherwise, it would be impossible to prevent Chapter Eleven tribunals from becoming supranational appellate courts on matters of the application of substantive domestic law, which customary international law does not permit.<sup>54</sup> Nor may judicial measures be challenged under Article 1105(1) for violating another rule of international law. Such a result would extend the obligations of the NAFTA Parties well beyond the customary international law minimum standard of treatment and what they consented to under Article 1105(1), as reflected in the FTC Interpretation.

#### **Article 1110 (Expropriation and Compensation)**

25. Article 1110(1) provides that no NAFTA Party may expropriate or nationalize an investment of an investor of another NAFTA Party (directly or indirectly) except for a public purpose; in a non-discriminatory manner; in accordance with due process of law; and on payment of compensation in accordance with paragraphs 2 through 6 of Article 1110.

26. Article 1110(1) protects “investments” from expropriation. Thus, the first step in any expropriation analysis must begin with an examination of whether there is an investment capable

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<sup>51</sup> See Douglas at 32 (explaining in the context of a hypothetical (a national court decision inconsistent with the New York Convention), that an adjudicatory decision inconsistent with an international rule may give rise to State responsibility vis-à-vis other States, but that a foreign national must present a claim pursuant to the fair and equitable treatment standard of an investment treaty, which in turn must be approached as a denial of justice claim); see also *id.* at 33 (“The obligations to accord various minimum standards of treatment to foreign nationals in general international law and investment treaties do not operationalize [a general right to reparation for damage caused when States do not comply with their international obligations to other States]”).

<sup>52</sup> FTC Interpretation ¶ B.3.

<sup>53</sup> See Greenwood at 64 (explaining that it is “inherently implausible that States would intend” for interlocutory or non-final decisions of domestic courts to be subject to challenge on the international plane,” which would have the effect of “set[ting] aside the entire system of checks and balances within the national judicial system.”).

<sup>54</sup> See Douglas at 33 (explaining that an exercise of adjudicative power can give rise to State responsibility through the medium of a denial of justice and that “[a]ny other approach would serve to vest international tribunals with appellate jurisdiction over the substantive outcomes in domestic adjudicative procedures.”).

of being expropriated.<sup>55</sup> Moreover, it is appropriate to look to the law of the host State for a determination of the definition and scope of the “property right” at issue.<sup>56</sup>

27. Patents properly granted in accordance with domestic law are intellectual property rights that qualify as investments under Article 1139(g), when those investments are made in the territory of another NAFTA Party.<sup>57</sup> Patents confer on holders for a limited time certain exclusive rights, including the right to exclude others from the marketplace, in exchange for disclosure of their invention. Patents are properly granted in cases in which an invention is adequately disclosed that is new, involve an inventive step (is non-obvious), and is capable of industrial application (is useful).<sup>58</sup> Like other property rights that qualify as investments, patent rights are protected from expropriation in accordance with Article 1110.

28. The obligation not to expropriate except as set forth in Article 1110(1) reflects customary international law and forms part of the customary international law minimum standard of treatment. A State is, of course, responsible under international law for acts committed by any of its organs.<sup>59</sup> Judicial measures applying domestic law may give rise to a claim for denial of justice under the circumstances described above with respect to Article 1105(1). As previously explained, a denial of justice may exist where there is, for example, an obstruction of access to courts, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. Additional instances of denial of justice have included corruption in judicial proceedings and executive or legislative interference with the freedom of impartiality of the judicial process.

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<sup>55</sup> *Glamis*, Award ¶ 356 (“There is for all expropriations, however, the foundational threshold inquiry of whether the property or property right was in fact taken.”).

<sup>56</sup> See, e.g., Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 263, 270 (1982) (for a definition of “property . . . [w]e necessarily draw on municipal law sources”).

<sup>57</sup> See *Bayview Irrigation District et al. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/1, Award (on Jurisdiction) ¶ 105 (June 19, 2007) (“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*, NAFTA/UNCITRAL, Award on Jurisdiction ¶ 126 (Jan. 28, 2008); *Grand River*, Award ¶ 87 (NAFTA Chapter Eleven is applicable “only to investors of one NAFTA Party who seek to make, are making, or have made an investment in another NAFTA Party: absent those conditions, both the substantive protection of Section A and the remedies provided in Section B of Chapter Eleven are unavailable to an investor”).

<sup>58</sup> See 35 U.S.C. §§ 101-103, 112 (2016); Canadian Patent Act, R.S.C. 1985, c P-4 §§ 2, 28.2(1), 28.3 (2016). See also NAFTA, art. 1709(1). 35 U.S.C § 101 provides that: “whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.” Sections 102-103 require a patented invention be novel and non-obvious and Section 112 addresses disclosures.

<sup>59</sup> Articles on Responsibility of States for Internationally Wrongful Acts, art. 4(1) (“The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”). This follows from the fact that, internationally, “the principle of the separation of powers is not followed in any uniform way.” Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) with Commentaries, Commentary to art. 4, at ¶ 6.

29. Separately, decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants do not give rise to a claim for expropriation under Article 1110(1). It is therefore not surprising that commentators have acknowledged the particular “dearth” of international precedents on whether judicial acts may be expropriatory.<sup>60</sup> Moreover, the United States has not recognized the concept of “judicial takings” as a matter of domestic law.<sup>61</sup>

30. Of course, where a judiciary is not separate from other organs of the State and those organs (executive or legislative) direct or otherwise interfere with a domestic court decision so as to cause an effective expropriation, these executive or legislative acts may form the basis of a separate claim under Article 1110, depending on the circumstances. Were it otherwise, States might seek to evade international responsibility for wrongful acts by using the courts as the conduit of executive or legislative action.

#### Article 1110(7)

31. Article 1110(7) provides that: “This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).” The question of Article 1110(7)’s scope is a matter of first impression for a Chapter Eleven tribunal. Article 1110(7) must be interpreted in accordance with its ordinary meaning in its context and in light of the object and purpose of the treaty.<sup>62</sup>

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<sup>60</sup> Parvan P. Parvanov & Mark Kantor, *Comparing U.S. Law and Recent U.S. Investment Agreements: Much more similar than you might expect*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010-2011 801 (Sauvant, ed. 2012) (“Judicial improprieties may in theory form the basis for a claim under international law for expropriation. However, it is far more common for an investor to pursue that claim under the customary international law principle of ‘denial of justice,’ which is often considered part of the international minimum standard of treatment . . . . Given the dearth of precedents, our analysis of judicial expropriations under international law could end right here.”); see also MARTINS PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT 208 (2013) (expressing the view that “while taking of property through the judicial process could be said to constitute expropriation, the rules and criteria to be applied for establishing the breach should come from denial of justice”).

<sup>61</sup> It was the position of the United States Government in *Stop the Beach Renourishment* that the concept of a judicial taking should not be adopted under the Just Compensation Clause, and that continues to be the position of the United States. In *Stop the Beach*, only four Supreme Court Justices would have recognized that judicial actions taken by states may be subject to a Just Compensation (or Takings) Clause analysis under the United States Constitution. Plurality opinions do not form binding precedent. See *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Envtl. Protection*, 560 U.S. 702 (2010).

<sup>62</sup> See Vienna Convention on the Law of Treaties (“VCLT”), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969), art. 31 (“[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”). While the United States is not a party to the VCLT, it has recognized since at least 1971 that the Convention is the “authoritative guide” to treaty law and practice. See Letter from Secretary of State Rogers to President Nixon, Transmitting the Vienna Convention on the Law of Treaties, Oct. 18, 1971, reprinted in 65 DEP’T OF ST. BULL. 684, 685 (1971). The International Court of Justice has determined that VCLT Article 31 is reflective of customary international law. See, e.g., *Kasikili/Sedudu Island (Botswana v. Namibia)*, 1999 I.C.J. 1045, 1059 (Dec. 13).

32. The ordinary meaning of Article 1110(7) is that it excludes the listed measures from the scope of Article 1110, establishing a “safe harbor,” to the extent those measures are consistent with Chapter Seventeen. Specifically, the provision preserves the ability of the NAFTA Parties to adopt or maintain intellectual property laws, consistent with Chapter Seventeen, even where those measures might be claimed to contravene Article 1110. As some commentators have recognized, in the absence of such a provision, investors might allege that any revocation of a patent under domestic law constitutes an expropriation requiring compensation or restitution. “The mischief that such a claim would cause domestic intellectual property regimes is evident.”<sup>63</sup>

33. Article 1110(7) therefore should not be read as an element of an investor’s claim under Article 1110(1) or as a jurisdictional hook that allows a Chapter Eleven tribunal to examine whether alleged breaches of Chapter Seventeen by a NAFTA Party constitute an expropriation of intellectual property rights. Nor should Article 1110(7) be read as an invitation to review a NAFTA Party’s measures, each time they arise, for consistency with Chapter Seventeen.

34. Instead, a tribunal must first analyze whether an expropriation in violation of international law has occurred with respect to the standard set out in Article 1110(1). In fact, a NAFTA Party’s conduct may be inconsistent with Chapter Seventeen, yet not be expropriatory. Thus, a claimant must first demonstrate an expropriation has otherwise occurred pursuant to Article 1110(1). If the claimant is successful in so demonstrating, the disputing NAFTA Party may invoke Article 1110(7) as a safe refuge, provided that the challenged measures were taken consistent with Chapter Seventeen. If the disputing NAFTA Party does so, a Chapter Eleven tribunal may then assess the consistency of the relevant measure with those provisions of Chapter Seventeen so placed in issue.

35. This interpretation is confirmed by the context and structure of Article 1110, which is entitled “Expropriation and Compensation.” The Article’s first paragraph outlines the nature and scope of the obligation on NAFTA Parties not to expropriate covered investments, except in accordance with the stated conditions. The Article’s second through sixth paragraphs outline the requirements for providing compensation in the event of an expropriation. Paragraph 7 of Article 1110 begins with the phrase “[t]his Article,” clearly referring back to the obligations contained in paragraphs 1-6. Thus, the structure is plain that if a NAFTA Party’s measures did not first implicate “[t]his Article” (*i.e.*, paragraphs 1-6), there would be no reason to examine whether the conduct is excluded from the scope of Article 1110(1) by virtue of Article 1110(7).

36. This interpretation is also consistent with the context and structure of NAFTA Chapters Eleven and Seventeen. Chapter Eleven tribunals are tribunals of limited jurisdiction,<sup>64</sup> and

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<sup>63</sup> M. KINNEAR, A. BJORKLUND, ET AL., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, SUPPLEMENT NO. 1, MARCH 2008 1110-56 (Kluwer Law International 2006) (“Absent a provision such as Article 1110(7), one can imagine an investor claiming that the issuance of a compulsory license or the revocation, limitation or creation of intellectual property rights effectively expropriated its investment, resulting in an obligation on the host government to compensate for the loss caused by its measures or to provide restitution of the intellectual property rights. The mischief that such a claim would cause domestic intellectual property regimes is evident. Presumably the drafters of NAFTA included Article 1110(7) to avoid any such argument.”).

<sup>64</sup> Chapter Eleven tribunals have jurisdiction only to assess claims of a breach of a NAFTA Party’s obligations under Chapter 11 Section A (or Article 1503(2), or 1502(3)(a) where a monopoly has acted in a manner inconsistent with a Party’s obligations under Section A). See NAFTA, arts. 1116(1), 1117(1); *United Parcel Service of America Inc. v.*



investors may allege a breach of a NAFTA Party's obligations under Chapter Eleven Section A. Chapter Seventeen obligations, by contrast, are subject to the State-State dispute settlement provisions of NAFTA Chapter Twenty.<sup>65</sup> Thus, Article 1110(7) should not be read to provide a NAFTA Chapter Eleven tribunal with jurisdiction to review alleged inconsistencies or breaches of Chapter Seventeen absent a threshold determination by a tribunal that an expropriation has otherwise occurred pursuant to Article 1110(1).

37. Finally, this interpretation is consistent with the purpose of the provision as a "safe harbor." To interpret Article 1110(7) as an element of an investor's claim for expropriation or a jurisdictional hook to assess the consistency of a NAFTA Party's measures with Chapter Seventeen, absent an *a priori* determination that an expropriation has occurred under Article 1110(1), would defeat the purpose of the provision by encouraging such claims. This outcome would subject the obligations set forth in Chapter Seventeen routinely to challenge by investors.

38. In view of the foregoing, the United States offers its views on the interpretation of some provisions of NAFTA Article 1709 (Patents).

### **Article 1709**

39. Article 1709(1) provides that the NAFTA Parties "shall make patents available for any inventions, whether products or processes, in all fields of technology, provided that such inventions are new, result from an inventive step and are capable of industrial application." The Article also clarifies that the term "capable of industrial application" may be deemed to be synonymous with the term "useful."

40. Article 1709(1) thus establishes that, subject to certain permissible exclusions from patentability,<sup>66</sup> each Party shall make available patents with respect to patent applications that disclose an invention that satisfy three requirements, one of which is commonly referred to as the

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*Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction ¶ 62 (Nov. 22, 2002) (dismissing the investor's claims based on breaches of NAFTA provisions outside of Chapter Eleven and finding that "[s]ubstantive terms elsewhere in the Agreement do not contradict the grant of jurisdiction even if they provide obligations broader than the scope of investor-State dispute resolution"); *Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Interim Decision on Jurisdiction ¶ 61 (Dec. 6, 2000) (noting that the tribunal's jurisdiction was "limited to claims arising out of an alleged breach of an obligation under Section A of Chapter Eleven of the NAFTA. Thus, the Tribunal does not have, in principle, jurisdiction to decide upon claims arising because of an alleged violation of general international law or domestic . . . law"); *Grand River*, Award ¶ 71 ("This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA. As the *Methanex* Tribunal warned, 'interpreting Article 1131(1) to create a jurisdiction extending beyond Section A of Chapter 11 would indeed be to transform it . . . into an unqualified and comprehensive jurisdictional regime, in which there would be no limit *ratione materiae* to the jurisdiction of a tribunal established under Chapter 11 NAFTA.'") (footnote and internal quotations omitted).

<sup>65</sup> NAFTA Article 2004 provides that "[e]xcept for the matters covered in Chapter Nineteen. . . and as otherwise provided in this Agreement, the dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004."

<sup>66</sup> See NAFTA, art. 1709(2)-(3).

“utility” requirement. To satisfy the utility requirement, such inventions must be “capable of industrial use” or “useful.” The NAFTA does not prescribe any particular definition of the terms, “capable of industrial application,” or “useful,” but the text notes that these two terms may be deemed to be synonymous. Article 1709(1) provides each NAFTA Party with the flexibility to determine the appropriate method of implementing the requirements of Chapter Seventeen, including the utility requirement in Article 1709(1), within its own legal system and practice.

41. Article 1709(1) must be interpreted in accordance with its ordinary meaning in its context and in light of the object and purpose of the treaty.<sup>67</sup> Reference to the domestic laws and practice of the NAFTA Parties is not dispositive when ascertaining the ordinary meaning of the “utility” requirement under Article 1709(1).<sup>68</sup> The Parties retain discretion to change or refine their domestic law, but that discretion is not without limits. Were it otherwise, the obligation stated in 1709(1) would be without meaning or effect. A NAFTA Party may not apply requirements or conditions that would vitiate the obligation to make patents available for inventions that meet the requirements, including the “utility” requirement, of Article 1709(1).

42. Article 1709(7) obligates the Parties, subject to certain other provisions of Article 1709, to make patents “available and patent rights enjoyable without discrimination as to the field of technology, the territory of the Party where the invention was made and whether the products are imported or locally produced.”

43. Differential effects of a measure on a particular sector, even if shown, do not necessarily prove discrimination as to the field of technology within the meaning of Article 1709(7).<sup>69</sup> As a WTO Panel Report found with respect to the identically worded Article 27.1 of the TRIPS Agreement, *de facto* discrimination in most legal systems involves both the presence of differentially disadvantageous effects of a measure and the existence of discriminatory objectives.<sup>70</sup> Without these “basic elements of a discrimination claim” the Panel did not find a breach under the TRIPS Agreement.<sup>71</sup>

44. Article 1709(8) provides that a Party may revoke a patent only when, *inter alia*, “grounds exist that would have justified a refusal to grant the patent[.]” Thus, if a court, in determining whether to revoke a patent, finds that “grounds exist” that would have provided the Party’s

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<sup>67</sup> See VCLT, art. 31 (“[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

<sup>68</sup> The United States observes that the disputing parties in this matter have proffered interpretations and characterizations of U.S. law relating to utility and the closely related requirement of enablement, i.e. the requirement that an application disclose the invention in a manner sufficiently clear and complete for a person skilled in the art to make or use the invention. See e.g., U.S. Constitution, Article I, Section 8, Clause 8; 35 U.S.C. § 101 (2016); 35 U.S.C. § 112(a) (2016); *Brenner v. Manson*, 383 U.S. 519 (1966); *In re Fisher*, 421 F.3d 1365 (Fed. Cir. 2005); *ALZA v. Andrx Pharmaceuticals*, 603 F.3d 935 (Fed. Cir. 2010); *In Re '318 Patent Infringement Litigation*, 583 F.3d 1317 (Fed. Cir. 2009); *Rasmusson v. SmithKline Beecham Corp.*, 413 F.3d 1318 (Fed. Cir. 2005). The United States does not endorse either Party’s interpretations or characterizations of U.S. law, or their characterizations of the relevance of U.S. law in this case.

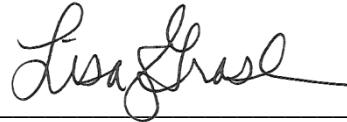
<sup>69</sup> Indeed, in certain circumstances, formally identical treatment of technologies may be discriminatory.

<sup>70</sup> Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R, ¶ 7.101 (Mar. 17, 2000).

<sup>71</sup> *Id.* ¶ 7.105.

patent examining authority to refuse to grant the patent, then revocation of that patent would not be inconsistent with Article 1709(8). Article 1709(8) does not mean that courts are limited to reviewing the specific grounds of refusal before the patent examiner; the use of the present tense “exist” in Article 1709(8) confirms this interpretation. Nor can it mean that NAFTA Parties are required to freeze their intellectual property laws indefinitely from the date of review of a given patent. Article 1709(8) allows for evolution of patent law.

*Respectfully submitted,*



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