IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE 2010 UNCITRAL ARBITRATION RULES
BETWEEN

WINDSTREAM ENERGY LLC, INC.

Claimant/Investor,

-and-

GOVERNMENT OF CANADA,

Respondent/Party.

SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA"), the United States of America hereby makes this submission on questions of interpretation of the NAFTA. The United States does not, through this submission, take a position on how the following interpretation applies to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

Article 1110 (Expropriation and Compensation)

2. Article 1110 provides that no State Party to the NAFTA may expropriate or nationalize (directly or indirectly) an investment of an investor of another Party in its territory except for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate and effective compensation; and in accordance with due process of law and Article 1105(1) of the NAFTA.[1]

[1] Several of the United States' views on the interpretation of Article 1105(1) are provided herein.

3. Once the scope of the property interest, including applicable limitations,[2] has been established, determining whether an indirect expropriation has occurred requires a case-by-case, fact based inquiry that considers, among other factors: (i) the economic impact of the government action; (ii) the extent to which that action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.[3]

4. With respect to the first factor, for an expropriation claim to succeed, the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as "to support a conclusion that the property has been 'taken' from the owner."[4]

5. The second factor requires an objective inquiry of the reasonableness of the claimant's expectations, which "depend in part on the nature and extent of governmental regulation in the relevant sector."[5]

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[2] *See Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Rejoinder of Respondent United States of America, at 11 (Mar. 15, 2007) ("*Glamis*, U.S. Rejoinder") (agreeing with expert report of Professor Wälde that in an instance where property rights are subject to legal limitations existing at the time the property rights are acquired, any subsequent burdening of property rights by such limitations does not constitute an impairment of the original property interest).

[3] 2012 U.S. Model Bilateral Investment Treaty, ann. B, ¶ 4(a) ("2012 U.S. Model BIT"); 2004 U.S. Model Bilateral Investment Treaty, ann. B, ¶ 4(a) ("2004 U.S. Model BIT").

[4] *Pope & Talbot v. Government of Canada,* NAFTA/UNCITRAL, Interim Award ¶ 102 (June 26, 2000) ("*Pope & Talbot* Interim Award"); *see also Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 357 (June 8, 2009) ("*Glamis* Award") ("[A] panel's analysis should begin with determining whether the economic impact of the complained of measures is sufficient to potentially constitute a taking at all: '[I]t must first be determined if the Claimant was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto ... had ceased to exist.' The Tribunal agrees with these statements and thus begins its analysis of whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures 'substantially impair[ed] the investor's economic rights, *i.e.* ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings.'") (citations omitted); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶¶ 149-50 (Jan. 12, 2011) ("*Grand River* Award") (citing the *Glamis* Award); *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award ¶ 360 (Sept. 18, 2009) ("*Cargill* Award") (holding that a government measure only rises to the level of an expropriation if it affects "a radical deprivation of a claimant's economic use and enjoyment of its investment" and that a "taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property . . . (i.e., it approaches total impairment)").

[5] *See Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, Part IV, Ch. D ¶ 9 (Aug. 3, 2005) ("*Methanex* Final Award") (noting that no specific commitments to refrain from regulation had been given to Methanex, which "entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons. Indeed, the very market for MTBE in the United States was the result of precisely this regulatory process"); *Grand River* Award ¶¶ 144-45 ("The Tribunal also notes that trade in tobacco products has historically been the subject of close and extensive

6. The third factor considers the nature and character of the government action, including whether such action involves physical invasion by the government or whether it is more regulatory in nature (i.e., whether "it arises from some public program adjusting the benefits and burdens of economic life to promote the common good").[6]

7. In considering whether nondiscriminatory regulatory actions by host States constitute an expropriation, tribunals "remain reluctant to second-guess the host State's decision to enact economic legislation or pass regulations to address a matter of legitimate public welfare."[7]

Article 1105(1) (Minimum Standard of Treatment)

8. 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."

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regulation by U.S. states, a circumstance that should have been known to the Claimant from his extensive past experience in the tobacco business. An investor entering an area traditionally subject to extensive regulation must do so with awareness of the regulatory situation. Given the circumstances—including the unresolved questions involving the Jay Treaty and U.S. domestic law, and the practice of heavy state regulation of sales of tobacco products—the Tribunal holds that Arthur Montour could not reasonably have developed and relied on an expectation, the non-fulfillment of which would infringe NAFTA, that he could carry on a large-scale tobacco distribution business, involving the transportation of large quantities of cigarettes across state lines and into many states of the United States, without encountering state regulation."); *Glamis*, U.S. Rejoinder, at 91("Consideration of whether an industry is highly regulated is a standard part of the legitimate expectations analysis, and . . . where an industry is already highly regulated, reasonable extensions of those regulations are foreseeable.").

[6] *Glamis*, U.S. Rejoinder, at 109 (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

[7] Lee M. Caplan and Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT: An Article-by-Article Analysis, in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 791-792 (Chester Brown ed., 2013) (discussing observation included in Annex B, paragraph 4(b) of U.S. 2012 Model BIT that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation."). This observation was first included in the 2004 U.S. Model BIT and has been echoed in subsequent investment agreements. *See e. g.*, Dominican Republic-Central America Free Trade Agreement, Annex 10-C ¶ 4(b); United States-Rwanda Bilateral Investment Treaty, Annex B; United States-Chile Free Trade Agreement, Annex 10-D; Letter exchange between George Yeo, Minister for Trade and Industry, Singapore, and Robert B. Zoellick, United States Trade Representative (May 6, 2003) (accompanying the United States-Singapore Free Trade Agreement); United States-Korea Free Trade Agreement, Annex 11-B; United States-Peru Trade Promotion Agreement, Annex 10-B; United States-Colombia Free Trade Agreement, Annex 10-B. *See also Methanex* Final Award, Part IV, Ch. D ¶ 7 (holding that as a matter of general international law, a "a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process" will not ordinarily be deemed expropriatory or compensable).

9. 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."[8] 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."[9] 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)."[10] The Commission's interpretation "shall be binding" on tribunals established under Chapter Eleven.[11]

10. 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.[12] The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[13]

11. 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." This includes, for example, the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings such as when the final act of a State's judiciary constitutes a "notoriously unjust"[14] or "egregious"[15] administration of justice "which offends a sense of judicial propriety."[16]

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

[9] *Id.* ¶ B.2.

[10] *Id.* ¶ B.3.

[11] NAFTA Art. 1131(2).

[12] 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*, 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) ("*Glamis*, U.S. Counter-Memorial"); *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) ("*Grand River*, U.S. Counter-Memorial").

[13] *S.D. Myers, Inc. v. Government of Canada,* NAFTA/UNCITRAL, First Partial Award ¶ 259 (Nov. 13, 2000) ("*S.D. Myers* First Partial Award"); *Glamis* Award ¶ 615 ("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).

[14] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 44 (2005) (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

12. 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 addressed above.

13. Customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation. This two-element approach – State practice and *opinio juris* – is "widely endorsed in the literature" and "generally adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice."[17]

14. Relevant State practice must be widespread and consistent[18] and be accepted as law, meaning that the practice must also be accompanied by a sense of legal obligation.[19]

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omitted); *Chattin Case (United States of America 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).

[15] 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.").

[16] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award ¶ 132 (June 26, 2003) ("*Loewen* Award") (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").

[17] *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 (Judgment of Feb. 3) ("In particular . . . the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*."); *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, 29-30 (Judgment of 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[.]"); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 14, 97 (Judgment of June 27) ("[T]he Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and *opinio juris* of States.").

[18] *See, e.g., North Sea Continental Shelf (Germany v. Denmark/Netherlands)*, 1969 I.C.J. 3, 43 (Judgment of Feb. 20) (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).

[19] *North Sea Continental Shelf*, 1969 I.C.J. 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,

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."[20] A perfunctory reference to these requirements is not sufficient.[21]

15. 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).[22] 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.[23]

16. 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.[24] An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. The 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 mere interference with those expectations.[25]

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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).

[20] 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).

[21] *See* PATRICK DUMBERRY, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105 at 115 (2013) (observing that the tribunal in *Merrill & Ring* failed "to cite a single example of State practice in support of" its "controversial findings"); UNCTAD, Fair and Equitable Treatment – UNCTAD Series on Issues in International Agreements II at 57 (2012) ("The *Merrill & Ring* tribunal failed to give cogent reasons for its conclusion that MST made such a leap in its evolution, and by doing so has deprived the 2001 NAFTA Interpretive Statement of any practical effect.").

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

[23] *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).

[24] DUMBERRY at 158-59 ("In the present author's view, there is little support for the assertion that there exists under customary international law any obligation for host States to protect investors' legitimate expectations.").

[25] *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.

17. In fact, tribunals discussing State practice confirm that expectations about a particular legal regime do not preclude a State from taking future regulatory action. States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's "expectations" about the state of regulation in a particular sector. Further, as the *Mobil v. Canada* tribunal recently explained:

> [The fair and equitable treatment] standard does not require a State to maintain a stable legal and business environment for investments[.]... [T]here is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor. Article 1105 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. ... What the foreign investor is entitled to under Article 1105 is that any changes are consistent with the requirements of customary international law on fair and equitable treatment.[26]

For all these reasons, regulatory action may only violate "fair and equitable treatment" under the minimum standard of treatment to the extent provided for under customary international law.[27]

18. States may decide expressly by treaty to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law. Extending such protections through "autonomous" standards in any particular treaty represents a policy decision by a State, rather than an

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ARB(AF)/97/2, Award ¶ 87 (Nov. 1, 1999) ("*Azinian* Award") ("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.").

[26] *Mobil Investments Canada Inc. & Murphy Oil Corp. v. Canada*, NAFTA/ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum ¶ 153 (May 22, 2012) (noting also that "[i]t 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. The Tribunal has not been provided with any material to support the conclusion that the rules of customary international law require a legal and business environment to be maintained or set in concrete."); *see also Azinian* Award ¶ 83 ("It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints. . . . NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.").

[27] *See, e.g., International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 194 (Jan. 26, 2006) ("*Thunderbird* Award"); *see also Glamis*, U.S. Counter-Memorial, at 218-262 (discussing the customary international law minimum standard of treatment in the context of regulatory action); *Glamis*, U.S. Rejoinder, at 139-243 (same).

action taken out of a sense of legal obligation. That practice 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.[28] Thus, arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 1105(1).[29] Likewise, decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary international law are not themselves instances of "State practice" for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice.[30]

19. 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 has crystallized into an obligation under customary international law.

20. To do so, the burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*.[31] "The party which relies on a custom," therefore, "must

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[28] 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.

[29] *See, e.g., Glamis* Award ¶ 608 (concluding that "arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom"); *Cargill* Award ¶ 278 (noting that arbitral "decisions are relevant to the issue presented in Article 1105(1) only if the fair and equitable treatment clause of the BIT in question was viewed by the Tribunal as involving, like Article 1105, an incorporation of the customary international law standard rather than autonomous treaty language.").

[30] *See 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); *see also* M. H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 202 (1998) (noting that while such decisions may contribute to the formation of customary international law, they are not appropriately considered as evidence of "State practice").

[31] *Asylum Case (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Judgment of 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 international quotation marks omitted).

prove that this custom is established in such a manner that it has become binding on the other Party."[32] 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.[33]

21. 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.[34] 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."[35]

22. Finally, the FTC note makes clear that a "determination that there has been a breach of another provision of" the NAFTA "does not establish that there has been a breach of" the minimum standard of treatment.[36] Moreover, national treatment and most-

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[32] *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, 1952 I.C.J. 176, 200 (Judgment of 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); *The Case of the S.S. "Lotus" (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, at 25-26 (Sept. 27) (holding that the claimant had failed to "conclusively prove" the "existence of . . . a rule" of customary international law).

[33] *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*, ICSID Case No. ARB(AF)/00/1, Award ¶ 185 (Jan. 9, 2003) ("*ADF* Award") ("The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to 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 (Aug. 3, 2005) (citing *Asylum Case (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).

[34] *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) ("[I]t is a generally accepted canon of evidence in civil law, common laws, 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).

[35] *S.D. Myers* First Partial Award ¶ 263; *Thunderbird* Award ¶ 127 (noting that states have a "wide regulatory 'space' for regulation," can change their "regulatory polic[ies]" and have "wide discretion" with respect to how to carry out such policies by regulation and administrative conduct).

[36] FTC Interpretation ¶ B.3.

favored-nation treatment, are not customary international law obligations. Rather, these are treaty obligations binding on the NAFTA Parties only by virtue of the Parties' agreement to the NAFTA. Thus establishing that Article 1102 or 1103 has been breached does not establish a breach of Article 1105(1).

Article 1108(7) (Procurement Exception)

23. NAFTA Article 1108(7) exempts "procurement by a Party or state enterprise" from Chapter Eleven's obligations with respect to national treatment and most-favored-nation treatment.[37] In interpreting the meaning of this and other NAFTA Chapter 11 articles, NAFTA Article 1131(1) requires that Chapter Eleven tribunals "decide the issues in dispute in accordance with this Agreement and applicable rules of international law." Article 102(2) requires the NAFTA to be interpreted "in accordance with applicable rules of international law." Thus, the NAFTA requires Chapter Eleven tribunals to apply rules of customary international law both in interpreting the NAFTA's provisions and as a rule of decision in the cases before them. There is no basis to apply this requirement differently to so-called "carve out" clauses such as Article 1108(7) than any other NAFTA Chapter 11 provision.

24. The preeminent codification of customary international law on the interpretation of treaties is Articles 31 through 33 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Convention").[38] Article 31(1) of the Vienna Convention sets forth the cardinal rule in construing international agreements such as the NAFTA: they must be interpreted "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."[39] The context includes the treaty's text, its preamble and annexes and any related agreements or instruments.[40] Consistent with Article 31, treaties must be construed to avoid unreasonable results.[41]

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[37] Article 1108(7) reads, in pertinent part: "Articles 1102, 1103 and 1107 do not apply to: (a) procurement by a Party or a state enterprise[.]"

[38] Although the United States is not a party to the Vienna Convention on the Law of Treaties, it has recognized since at least 1971 that the Convention is the "authoritative guide" to treaty law and practice. See Letter of Submittal, from Secretary of State Rodgers to President Nixon transmitting the Vienna Convention on the Law of Treaties, October 18, 1971, Ex. L. 92d Cong., 1st Sess. at 1.

[39] *Accord Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, 1952 I.C.J. 93, 104 (Judgment of July 22) ("[The Court] must seek the interpretation which is in harmony with a natural and reasonable way of reading the text.").

[40] Vienna Convention art. 31(2).

[41] *See, e.g., Polish Postal Service in Danzig*, 1925 P.C.I.J. (ser. B) No. 11, at 39 (May 16) ("It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.") (emphasis added); 1 L. OPPENHEIM, INTERNATIONAL LAW § 554(1), (3) (H. Lauterpacht ed., 8th ed. 1955) ("All treaties must be interpreted according to their reasonable, in contradistinction to their literal, sense. . . . If, therefore, the meaning of a provision is ambiguous, the reasonable meaning is to be preferred to the unreasonable, the more reasonable to the less reasonable.").

25. The term "procurement" is not defined in the NAFTA.[42] The ordinary meaning of the term, however, encompasses any and all forms of procurement by a NAFTA Party. Consistent with the ordinary meaning of the term "procurement," the exception under Article 1108(7) applies to treatment accorded at all stages of the procurement process.

Articles 1102 (National Treatment) and 1103 (Most Favored Nation Treatment)

26. Articles 1102 (National Treatment) and 1103 (Most-Favored-Nation Treatment) require the NAFTA Parties to accord no less favorable treatment to investors and investments of another Party to the extent they are in like circumstances with a Party's own investors and investments or those of a third country.

27. These articles are intended to prevent discrimination on the basis of nationality. They are not intended to prohibit all differential treatment among investors or investments. Rather, they are designed to ensure that nationality is not the basis for differential treatment, in accordance with the provisions of the NAFTA.[43]

28. All three NAFTA Parties agree that Articles 1102 and 1103 prohibit only nationality-based discrimination.[44] The Parties' common, concordant, and consistent position constitutes the authentic interpretation of Articles 1102 and 1103 and, under the

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[42] *See, ADF* Award ¶ 161 (noting that "governmental procurement refers to the obtaining by purchase by a governmental agency or entity of title to or possession of, for instance, goods, supplies, materials and machinery"); *see also UPS v. Government of Canada*, NAFTA/UNCITRAL, Award ¶¶ 131-35 (May 24, 2007) ("*UPS* Award") (finding that certain services provided by Canada Post pursuant to a commercial fee-for-service contract constituted procurement under Article 1108(7)).

[43] *Loewen* Award ¶ 139 (accepting that "Article 1102 is direct[ed] *only* to nationality-based discrimination . . . .") (emphasis added) .

[44] *See, e.g., Apotex Holdings Inc. and Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/12/1, Counter-Memorial on Merits and Objection to Jurisdiction of Respondent United States of America ¶ 323 (Dec. 14, 2012) ("*Apotex III*, U.S. Counter-Memorial") ("Article 1102 is not intended to prohibit all differential treatment among investors and investments, but to ensure that the NAFTA Parties do not treat investors and investments 'in like circumstances' differently based on their NAFTA-Party nationality."); *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Supplemental Submission of the United Mexican States, at 3 (May 25, 2000) ("*Pope & Talbot*, Mexico Supplemental Submission") ("[T]he objective of Article 1102 is to prohibit discrimination between investors of the Parties on the basis of their nationality."); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Fourth Submission of the Government of Canada Pursuant to NAFTA Article 1128 ¶ 5 (Jan. 30, 2004) ("*Methanex*, Canada Fourth Article 1128 Submission") (Article 1102 "prohibits treatment which discriminates on the basis of the foreign investment's nationality."). With respect to the Parties' positions regarding nationality-based discrimination and Article 1103, *see, e.g., Apotex III*, U.S. Counter-Memorial ¶ 325 ("Establishing a violation of Article 1103 is the same as establishing a violation of Article 1102, except that the applicable comparator in step two is a *foreign* investor or its investments."); *Mesa Power LLC v. Government of Canada*, NAFTA/PCA Case No. 2012-17, Submission of Mexico Pursuant to NAFTA Article 1128, ¶ 14 (July 25, 2014) ("*Mesa*, Mexico Article 1128 Submission") ("The discrimination prohibited by Article 1103 must be on the basis of nationality, and therefore differing treatment of two investors of the same nationality cannot constitute a violation of Article 1103.").

Vienna Convention on the Law of Treaties, "shall be taken into account, together with the context."[45]

29. To establish a breach of Article 1102, a claimant has the burden of proving that it or its investments: (1) were accorded "treatment"; (2) were in "like circumstances" with domestic investors or investments; and (3) received treatment "less favorable" than that accorded to domestic investors or investments." As the Tribunal noted in *UPS v. Canada*, "[t]his is a legal burden that rests squarely with the Claimant. That burden never shifts . . . ."[46] The NAFTA Parties agree on this point.[47] Establishing a violation of Article 1103 is the same as establishing a violation of Article 1102, except that the applicable comparator in step two is an investor or investments of a third State.

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[45] *See* Vienna Convention, art. 31(3)(b), (stating that subsequent practice of the parties "shall be taken into account, together with the context"); *Report of the International Law Commission on the work of its eighteenth session*, [1966] 2 Y.B. INT'L L. COMM'N 169, 220, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (observing that there is no hierarchy among the norms of interpretation listed in Article 31 and that those in Article 31(3) "by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them"); *Canadian Cattlemen for Fair Trade v. United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction ¶¶ 188, 189 (Jan. 28, 2008) ("[T]he available evidence cited by the Respondent demonstrates to us that there is nevertheless a 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications[.]'") (emphasis omitted); *see also* Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 223 (1958) (observing that "a consistent [subsequent State] practice must come very near to being conclusive as to how the treaty should be interpreted" (emphasis omitted)); *Islamic Republic of Iran v. United States of America*, Case No. B1 (Counterclaim), Award No. ITL 83-B1-FT ¶ 109 (Sept. 9, 2004), 38 IRAN-U.S. CL. TRIB. REP. 77, 116 ("The importance of . . . subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty[.]") (quoting International Law Commission); NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, DROIT INT'L PUBLIC 254 (7th ed. 2002) ("On désigne par l'expression 'interprétation authentique', celle qui est fournie directement par les parties, par opposition à l'interprétation non authentique, donnée par un tiers.") ("The expression 'authentic interpretation' designates that which is furnished directly by the parties, as opposed to an unauthentic interpretation, which is given by a third party.") (translation by counsel).

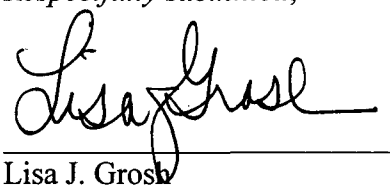
[46] *UPS* Award ¶ 84.

[47] *See, e.g., Mesa Power LLC v. Government of Canada*, NAFTA/PCA Case No. 2012-17, Counter-Memorial and Reply on Jurisdiction of Canada ¶ 353 (Feb. 28, 2014) ("The burden falls squarely on claimant's shoulders, and it does not shift[.]"); *Mesa Power LLC v. Government of Canada*, NAFTA/PCA Case No. 2012-17, Submission of the United States of America ¶ 15 (July 25, 2014) ("Nothing in the text of Article 1102 suggests a shifting burden of proof. The burden to prove a violation of Article 1102 thus rests with the claimant to prove each element of its claim."); *Mercer International Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Government of Canada Counter-Memorial ¶ 357, n.694 (Aug. 22, 2014) (stating that the burden of proof with respect to Articles 1102 and 1103 "rests squarely with the Claimant" and "never shifts to the [NAFTA] Party"); *Mercer*, Submission of the United States of America ¶ 13 (May 8, 2015) ("Nothing in the text of Articles 1102 or 1103 suggests a shifting burden of proof. Rather, the burden to prove a violation of these articles, and each element of its claim, rests and remains squarely with the claimant."); *Mercer International Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of Mexico Pursuant Article 1128 of NAFTA ¶ 11 (May 8, 2015) ("Mexico, Canada and the United States have consistently maintained that . . . the claimant bears the onus of proving all elements required to establish a breach of the national treatment obligation, and this onus does not shift to the respondent State simply because there is an apparent difference between the treatment accorded to the claimant and the treatment accorded to the domestic or third party investor (or investment)[.]").

30. Nothing in Article 1102 or Article 1103 requires that investors or investments of investors of a Party, regardless of the circumstances, be accorded the best or most favorable treatment given to any national or third State investor or investment. The appropriate comparison is between the treatment accorded the NAFTA Party's investment or investor and a national or third State investment or investor *in like circumstances*. This is an important distinction intended by the Parties. Thus, a NAFTA Party may adopt measures that draw distinctions among entities without necessarily violating Article 1102 or Article 1103.

31. The United States understands the term "circumstances" to denote conditions or facts that *accompany* treatment as opposed to the treatment itself. Thus, identifying appropriate comparators for purposes of the "in like circumstances" analysis under Article 1102 and Article 1103 is a highly fact-specific inquiry, requiring consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other possible relevant characteristics.[48] Simply being in the same sector, or selling the same product, is not alone sufficient to demonstrate like circumstances. When determining whether the claimants were in like circumstances with alleged comparators, the NAFTA Party's investor or investment should be compared to a national or third State investor or investment that is alike in all relevant respects but for nationality of ownership.

Respectfully submitted,



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[48] *See, e.g., Pope & Talbot v. Government of Canada*, Award on the Merits of Phase 2, NAFTA/UNCITRAL ¶ 75 (Apr. 10, 2001) ("It goes without saying that the meaning of the term ['in like circumstances'] will vary according to the facts of a given case. By their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations.").