

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

BETWEEN:

**Alicia Grace; Ampex Retirement Master Trust; Apple Oaks Partners, LLC;
Brentwood Associates Private Equity Profit Sharing Plan; Cambria Ventures, LLC;
Carlos Williamson-Nasi in his own right and on behalf of Axis Services, Axis
Holding, Clue and F. 305952; Carolyn Grace Baring; Diana Grace Beard; Floradale
Partners, LLC; Frederick Grace; Frederick J. Warren; Frederick J. Warren IRA;
Gary Olson; Genevieve T. Irwin; Genevieve T. Irwin 2002 Trust; Gerald L. Parsky;
Gerald L. Parsky IRA; John N. Irwin III; José Antonio Cañedo-White in his own
right and on behalf of Axis Services, Axis Holding and F. 305952; Nicholas Grace;
Oliver Grace III; ON5 Investments, LLC; Rainbow Fund, L.P.; Robert M. Witt;
Robert M. Witt IRA; Vista Pros, LLC; Virginia Grace**

Claimants

AND:

UNITED MEXICAN STATES

Respondent

ICSID CASE NO. UNCT/18/4

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

August 24, 2021

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Global Affairs Canada
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I. INTRODUCTION

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

2. This submission is not intended to address all interpretative issues that may arise in this proceeding, or to take a position on the matters of interpretation below as applied to the facts of this dispute. To the extent that certain issues raised by the disputing parties have not been addressed in this submission, no inference should be drawn from Canada’s silence.

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

A. Dual National Claimants May Only Bring a NAFTA Claim if Their Dominant and Effective Nationality is Not of the Respondent State

3. NAFTA Chapter Eleven sets out specific nationality requirements to bring a claim. The requirements are set out in Articles 1116 and 1117.

1. NAFTA Articles 1116 and 1117 Do Not Permit an Investor of a Party to Bring a Claim Against the Same Party

4. According to Article 31(1) of the Vienna Convention, “[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.”² The terms of Articles 1116 and 1117 are clear. They provide, in relevant part, that “[a]n *investor of a*

¹ *North American Free Trade Agreement*, 17 December 1994, (1993) 32 I.L.M. 289, 605 (“NAFTA”).

² *Vienna Convention on the Law of Treaties*, U.N.T.S., Vol. 1155 (1969) done at Vienna on 23 May 1969, entered into force on 27 January 1980 (“*VCLT*”), Article 31(1).

Party” may submit to arbitration a claim that “another Party” has breached an obligation under Section A of Chapter Eleven.³

5. Both provisions rely on the concepts of an “investor of a Party” bringing a claim against “another Party.” The term “another” makes clear that a claim can only be made by an investor of *one* Party against a *different* Party. This is supported by the dictionary definition of the term “another” which is “not the same”, “*different*”.⁴ The provisions therefore do not allow claims under NAFTA Chapter Eleven where an investor is a national of the Party against which they wish to bring a claim.⁵ Thus, a claimant, whether bringing a claim on their own behalf or on behalf of an enterprise that the claimant owns or controls, cannot be of the same nationality of the Party against which the claimant brings a claim (i.e. referred herein as “diversity of nationality”).

³ NAFTA Article 1116(1) provides, “An *investor of a Party* may submit to arbitration under this Section a claim that *another Party* has breached an obligation under: (a) Section A [...]” (*emphasis added*). Similarly, Article 1117(1) provides, in relevant part, that “[a]n *investor of a Party*, on behalf of an enterprise of *another Party* that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the *other Party* has breached an obligation under: (a) Section A [...]” whereby, the term ‘*the other Party*’ is referring back to the term ‘*another Party*’. (*emphasis added*).

⁴ As defined in the Oxford dictionary, the word “another” means “Not this, not the same, a different.” and “By giving prominence to the fact that this is *not* that already considered: A different.” (See: Oxford English Dictionary, available at: <https://www.oed.com/view/Entry/8102>); “Used to refer to a *different* person or thing from one already mentioned or known about.” (See: Lexico, a collaboration between Dictionary.com and Oxford University Press, available at: <https://www.lexico.com/definition/another>) (*emphasis added*).

⁵ Tribunals have also reasoned that the NAFTA was “clearly intended to protect investors of one Contracting Party against practices occurring in one of the other Contracting Parties [...]” See: *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Final Award, 26 June 2003 (“*Loewen – Final Award*”), ¶ 223. See also: *GAMI Investments, Inc. v. Government of the United Mexican States* (UNCITRAL) Final Award, 15 November 2004 (*GAMI – Final Award*), ¶¶ 38, 122. The tribunal in *GAMI* noted that the majority shareholders of a Mexican corporation were Mexican nationals and, unlike the claimant (a U.S. national) did not have standing under Chapter Eleven of the NAFTA.

6. The context of Articles 1116 and 1117⁶ and the object and purpose of the NAFTA⁷ support this interpretation. The scope of NAFTA Chapter Eleven specifies that nearly all of the Chapter's disciplines are in respect of a Party's measures relating to investors of *another* Party.⁸ As such, the NAFTA does not establish a domestic investment framework for domestic investors.

7. Moreover, the NAFTA's requirement for diversity of nationality in order for a claimant to have standing to bring a claim is consistent with the well-established principle of international law that an individual or entity cannot maintain an international claim against its own State (i.e. the rule of non-responsibility).⁹

**2. The Tribunal Must Decide Issues in Accordance with
Applicable Rules of International Law, Including Customary
International Law Rules on Determining a Claimant's
Dominant and Effective Nationality**

8. The situation where an investor of a Party possesses, at the same time, the nationality of a NAFTA Party (home State) and the nationality of the respondent/host State ("dual nationals") is not expressly addressed in the NAFTA. In the absence of guidance in

⁶ NAFTA Preamble, recitals 3 and 5, provide that NAFTA is intended to "Create an expanded and secure market for the goods and services produced in their territories; [...] [and] Ensure a predictable commercial framework for business planning and investment".

⁷ NAFTA Article 102 (Objectives) "1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to: (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; [...] [and] (c) increase substantially investment opportunities in the territories of the Parties".

⁸ NAFTA Article 1101(1) (Scope and Coverage): "This Chapter applies to *measures adopted or maintained by a Party* relating to: (a) *investors of another Party*; (b) *investments of investors of another Party* in the territory of the Party; (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party" (*emphasis added*).

⁹ *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 13 April 1930, League of Nations, Treaty Series, vol. 179, p. 89, No. 4137, Article 4; See: *The Carlyle Group L.P. and others v. Kingdom of Morocco* (ICSID Case No.ARB/18/29) Submission of the United States, 4 December 2020, ¶ 6, with respect to the analogous provision under the U.S.-Morocco BIT, citing to: Robert Jennings & Arthur Watts, "Oppenheim's International Law, Volume I: Peace", 9th edition, London: Longman, 1992, pp. 512-513. See also: Z.R. Rode, "Notes and Comments: Dual Nationals and the Doctrine of Dominant Nationality", *The American Journal of International Law* (1959) pp. 139, 141.

the NAFTA, there can be no presumption that NAFTA establishes a *lex specialis* for claims by dual nationals or that such claims are necessarily permitted. It is well-recognized that “[a]n important principle of international law should [not] be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so.”¹⁰ The only intention made clear by Articles 1116 and 1117 is that an investor may not bring a claim against its own Party.

9. NAFTA Article 1131 requires that the Tribunal decide issues in dispute in accordance with the NAFTA and “applicable rules of international law,” which include principles of customary international law.¹¹ In the absence of specific language addressing claims by dual nationals, NAFTA and other investment tribunals have considered whether certain claims by dual nationals are allowed by reference to the concept of predominant nationality under customary international law.¹² Under the rule, a dual national’s standing

¹⁰ *Case Concerning Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, I.C.J. Reports 1989, Judgement, 20 July 1989, p.42, ¶ 50 (“Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.”); *Loewen – Final Award*, ¶¶ 160, 162 (“It would be strange indeed if sub silentio the international rule were to be swept away.”).

¹¹ This provision may be used for “gap-filling” where the treaty might not specifically address an issue or where the treaty is otherwise silent, including on the issue of dual nationality. See: *Methanex Corporation v. United States of America* (UNCITRAL) Final Award, 3 August 2005 (“*Methanex – Final Award*”), Part IV, Chapter B, ¶ 29; *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/1) Decision on Responsibility, 15 January 2008, ¶ 76; *Archer Daniels Midland Company et al. v. United Mexican States* (ICSID Case No. ARB(AF)/04/5) Award, 21 November 2007 (“*Archer Daniels – Award*”), ¶ 195.

¹² Legal commentators have noted that a ‘general rule’ has emerged in investor-State dispute settlement, whereby tribunals apply the dominant and effective nationality rule when the treaty is silent on the issue standing of dual national claimants. See: Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles*. 2nd ed. (Kluwer Law International, 2017) (“*McLachlan, Shore & Weiniger*”), §§ 5.92, 5.89-5.96. See also: Noah D. Rubins et.al, *Investor-State Arbitration* (Oxford University Press, 2008), p. 304; Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) (“*Douglas (2009)*”), p. 321. Recent cases that have strayed from this general rule have both been overturned on appeal and are nevertheless interpreting specific language of a text that is not relevant to the NAFTA. See: *Serafin Garcia Armas et al. v. Republic of Venezuela* (UNCITRAL) Decision on Jurisdiction, 15 December 2014; *Serafin Garcia Armas et al. v. Republic of Venezuela*, Cour d'appel de Paris, Decision, 3 June 2020.

is determined on the basis of their *dominant and effective nationality*,¹³ i.e. a claimant is prohibited from making a claim against their State of dominant and effective nationality.

10. Therefore, Canada agrees that:

the rule set forth in *United States ex rel. Mergé v. Italian Republic*, and adopted by *Iran v. United States, Case No. A/18*, provides a rule of decision that governs [NAFTA] Chapter Eleven tribunals by virtue of Article 1131(1) (...). This rule in effect states that the principle of “non-responsibility” must yield to the principle of “dominant and effective” citizenship which the claim is brought by or on behalf of a dual citizen whose “dominant and effective” citizenship is not that of the defending State. In other words, a State is not responsible for a claim asserted against it by one of its own citizens, *unless the claimant is a dual citizen whose dominant and effective citizenship is that of the other State*.¹⁴

11. Thus, when a potential NAFTA claimant with the nationality of one contracting State also has the nationality of the host/respondent State, the tribunal must determine the State to which the claimant is most closely attached by “his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future”.¹⁵ A claimant does not have standing to bring a NAFTA claim if their dominant and effective nationality is that of the respondent State.

¹³ *Nottebohm Case (second phase)*, I.C.J. Reports 1955, Judgement of April 6th, 6 April 1955 (“*Nottebohm Case*”), pp. 23-24. *Mergé Case – Decision No. 55*, Italian-United States Conciliation Commission, Decision, 10 June 1955, ¶¶ 243-246. *Iran-United States Claims Tribunal, Case No. A/18-FT*, 5 Iran-U.S. CL. Tribunal Rep. 251 (1984-1), ¶ 510. See: *Marvin Roy Feldman Karpa v. United Mexican State* (ICSID Case No. ARB(AF)/99/1) Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, ¶¶ 30-32; *Manuel Garcia Armas et al. v. Republic of Venezuela* (UNCITRAL) Award, 13 December 2019, ¶ 741; *Enrique Heemsen and Jorge Heemsen v. Venezuela* (PCA Case No. 2017) Decision on Jurisdiction, 29 October 2019, ¶¶ 439-440.

¹⁴ *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), United States 1128 Submission, 6 October 2000, ¶ 8 (*Emphasis added*).

¹⁵ See: *Nottebohm Case*, p. 24. The International Court of Justice ultimately determined that there was an absence of bond of attachment between Liechtenstein and Mr. Nottebohm. See: *Nottebohm Case*, p. 25. As noted by the International Court of Justice in the *Nottebohm* decision at p. 24, the purpose of the inquiry is to determine whether the home State is sufficiently close, so that the nationality conferred upon him, compared to any other nationality, was *real and effective*.

12. This rule ensures that an investor of a NAFTA Party, who is a dual national of more than one NAFTA Party, is not placed at an advantage over other investors of that Party, all the while ensuring that the dual national is not denied the possibility of bringing a NAFTA claim altogether.

13. Furthermore, a claimant must not be a dominant and effective national of the respondent State at the points in time that diversity of nationality is required under the NAFTA. For example, the NAFTA expressly requires that the investor must be of another Party at the time of the alleged breach¹⁶ and at the time of submitting its claim.¹⁷ Should the investor’s dominant and effective nationality be determined to be that of the respondent State at those points in time, the claim may not proceed.

B. An Investor of a Party May Make a Claim for Reflective Loss Only under Article 1117 and Not under Article 1116

1. Under NAFTA Article 1116, Investors May Only Recover Losses They Incur, Not Losses Their Investments Incur

14. Article 1116 provides a right for an investor of a Party to bring a claim on its own behalf on the ground that “the investor has incurred loss or damage.” Consistent with the ordinary meaning of the provision, and general principles of corporate law recognized by domestic legal systems and customary international law, an investor can only claim under

¹⁶ See: NAFTA Article 1101(1) (Scope and Coverage): “This Chapter applies to *measures adopted or maintained by a Party* relating to: (a) *investors of another Party*; (b) *investments of investors of another Party* in the territory of the Party; (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party” (*emphasis added*). Thus, in order to have standing to initiate a NAFTA Chapter 11 claim in the first place, the claimant must have been a protected investor (i.e. investor of another Party) *at the time of the breach* (i.e. when the Party adopts or maintains a measure). See also: *Michael Ballantine and Lisa Ballantine v. Dominican Republic* (UNCITRAL) Submission of the United States of America, 6 July 2018, ¶ 3.

¹⁷ The language of NAFTA Articles 1116 and 1117, set out above, provides that an “investor of a Party” can submit a claim under Chapter 11. This requires that a claimant be an “investor of a Party”, *on the date that the claimant initiates the claim* (*emphasis added*). See: *Michael Ballantine and Lisa Ballantine v. Dominican Republic* (UNCITRAL) Submission of the United States of America, 6 July 2018, ¶ 4.

Article 1116 for losses that it has incurred, not for losses incurred by an enterprise it owns and controls.¹⁸

15. Indeed, a corporation has a separate legal personality from its shareholders and thus shareholders cannot generally bring claims for “reflective loss”, i.e. a loss incurred by the individual shareholder that is inseparable from the general loss of the corporation for wrongs done to it.¹⁹ This principle was recognized by the International Court of Justice (“ICJ”) in the *Barcelona Traction* case²⁰, where it held that “[s]o long as the company is in existence the shareholder has no right to the corporate assets.”²¹ While harm to an enterprise frequently harms the shareholder as well, this is not enough to grant a shareholder a right to seek compensation for measures taken against a corporation.²²

16. Further, arbitral tribunals have recognized that the principle of separate legal personality of an incorporated enterprise and its shareholders applies in investment arbitration except to the extent the relevant investment treaty has derogated from it.²³ Nothing in the text of Article 1116 indicates that the NAFTA Parties intended to derogate from the general principle of separate legal personality between investors and their

¹⁸ See: *Bilcon of Delaware et al. v. Government of Canada* (PCA Case No. 2009-04), Award on Damages, 10 January 2019 (“*Bilcon – Damages Award*”) ¶ 389 (“Articles 1116 and 1117 are to be interpreted to prevent claims for reflective loss from being brought under Article 1116. This follows from the wording of Article 1116 in its context, which includes Articles 1121 and 1135. Moreover, the Tribunal takes account of the common position of the NAFTA Parties in their submissions to Chapter Eleven tribunals.”).

¹⁹ David Gaukrodger, “Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency. A Preliminary Framework for Policy Analysis”, OECD Working Papers on International Investment, No. 2013/3, OECD Investment Division, 2013 (“*Gaukrodger, 2013*”), pp. 13, 15 and 24.

²⁰ *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, I.C.J. Reports 1970, Judgment of 5 February 1970, p. 3 (“*Barcelona Traction*”), ¶¶ 37-49.

²¹ *Barcelona Traction*, ¶ 41. See also: *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, I.C.J. Reports 2007, Judgment of 24 May 2007, p. 582, ¶¶ 61-64, 105.

²² *Barcelona Traction*, ¶ 44.

²³ *HICEE B.V. v. The Slovak Republic* (UNCITRAL), Partial Award, 23 May 2011, ¶ 147; *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic* (ICSID Case No. ARB/13/8) Award, 9 April 2015, ¶ 230 (“[T]he ‘default position’ in international law is that a company is legally distinct from its shareholders. The foregoing implies that as an independent legal entity, a company is granted rights over its *own* assets, which it alone is capable of protecting.”) (*Emphasis in the original*).

enterprise.²⁴ The NAFTA Parties only agreed to derogate from this principle to the extent set out in Article 1117.

2. The Context of NAFTA Article 1116 Confirms that NAFTA Does Not Permit an Investor to Recover Losses Suffered by Its Investment

17. Article 1116 must be interpreted in the context of Article 1117. Article 1117 applies in cases where the investment is an enterprise that the investor “owns or controls, directly or indirectly.” It permits an investor to commence arbitration on behalf of an enterprise that is a juridical person incorporated in the host State. Claims brought under Article 1117 are indirect, or “derivative”, claims because the investor bringing the claim has not suffered damages directly but is claiming for damages on behalf of a separate juridical person that is the investment.²⁵ Consistent with the difference in compensable damage under Articles 1116 and 1117, Article 1135(2) mandates that any damages awarded with respect to an Article 1117 claim are paid to the enterprise and not to the investor.²⁶ Article 1117 thus contemplates a specific and limited derogation from the customary international law rule that a claim cannot be asserted by a shareholder for loss to the enterprise in which it holds shares. Without Article 1117, an investor that is a shareholder could not assert an indirect claim for an injury to the enterprise in which it invested.

²⁴ Again, silence on an issue may not be interpreted as having tacitly been dealt with. See: *supra* ¶ 8 and footnote 10.

²⁵ A claim is direct if it concerns treatment of and loss by the shareholder that is separate and distinct from the treatment of the enterprise itself. On the other hand, a claim is derivative if the shareholder was affected simply as a consequence of the treatment of the corporation. In the latter case, a shareholder does not have any independent right of action under international law with respect to reflective losses it may have suffered as a result of the treatment of the corporation.

²⁶ In addition, NAFTA Article 1121 requires an investor to comply with a number of conditions precedent to submitting a claim to arbitration. In particular, under Article 1121(1), a disputing investor may submit a claim under Article 1116 to arbitration only if *the investor* consents to arbitration in accordance with the procedures set out in the NAFTA “and, where the claim is for loss or damage *to an interest in an enterprise* of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise,” waive their right to initiate or continue other proceedings with respect to the impugned measure (*emphasis added*). In contrast, under Article 1121(2), a disputing investor may submit a claim under Article 1117 to arbitration only if *both the investor and the enterprise* provide the requisite consent and waiver.

18. As is clear from the text, the NAFTA creates a strict separation between Articles 1116 and 1117 based on which entity incurred loss or damage – the investor or the enterprise, respectively. Ignoring this distinction would render Article 1117 redundant.²⁷ A corollary of the “general rule of interpretation” in the VCLT is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that reduces whole treaty clauses to inutility.²⁸

19. The elimination of this distinction would also have serious negative real world consequences. The distinction between Articles 1116 and 1117 is critical to ensuring that creditors’ rights are respected by ensuring that damages suffered by a corporation due to a NAFTA breach are paid to the corporation, not to its shareholders.²⁹ Allowing investor claims for reflective loss can strip assets from the company to the detriment of creditors and non-claimant shareholders.³⁰ The *Mondev* tribunal further noted that paying an award to the investor for losses of the enterprise “could also make a difference in terms of the tax treatment of those damages.”³¹

20. In addition, numerous complications arise if shareholders are permitted to raise reflective loss claims under Article 1116. As the *GAMI* tribunal noted, resolution of multiple and overlapping claims for the same loss is practically certain to be uncoordinated.³² It cautioned that awarding damages for reflective loss would produce insurmountable difficulties with respect to quantification of any loss to a particular

²⁷ See: *Bilcon – Damages Award*, ¶¶ 372-374.

²⁸ See: *United States – Standards for Reformulated and Conventional Gasoline (WT/DS2/AB/R)*, 29 April 1996, p. 23; *Mondev International Ltd. v. United States of America (ICSID Case No. ARB(AF)/99/2)* Award, 11 October 2002 (“*Mondev – Award*”), ¶ 79; *Bilcon – Damages Award*, ¶¶ 372-374.

²⁹ In corporate law, company creditors have a priority claim over shareholders for corporate assets. See: D. Gaukrodger, Chapter 8, “The Impact of Investment Treaties on Companies, Shareholders and Creditors”, OECD Business and Finance Outlook 2016 (“*Gaukrodger, 2016*”), p. 235.

³⁰ See: *Gaukrodger, 2016*, p. 239; D. Gaukrodger, Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law, OECD Working Papers on International Investment, No. 2014/2, OECD Publishing (“*Gaukrodger, 2014*”), p. 18; *Mondev – Award*, ¶¶ 84 and 86.

³¹ *Mondev – Award*, ¶ 84.

³² *GAMI – Final Award*, ¶ 119.

investor.³³ Moreover, the risks of double recovery and inconsistent decisions arise,³⁴ and concerns for judicial economy grow, as the number of cases brought to address the same harm increases.³⁵

21. Maintaining the clear distinction between Articles 1116 and 1117 is also the only way to respect the object and purpose of the NAFTA. The NAFTA's preamble reflects the Parties' desire to "[e]nsure a predictable commercial framework for business planning and investment".³⁶ Allowing shareholders to recover reflective losses under Article 1116 will weaken the corporation's separate legal personality, create unpredictability for investors, creditors, banks, and others who participate in the foreign direct investment market, create unfair conditions of competition among these different sorts of investors, and thus decrease the opportunities for investment in the NAFTA Parties.

22. All three NAFTA Parties have agreed on the distinction between direct claims that can be brought under Article 1116 and the indirect claims that can be brought under Article 1117.³⁷ The consistent position of the NAFTA Parties on the proper interpretation of

³³ *GAMI – Final Award*, ¶¶ 116-121.

³⁴ *GAMI – Final Award*, ¶¶ 120-121.

³⁵ *Gaukrodger, 2013*, p. 9.

³⁶ Further, in Article 102(1)(b) and (c), the NAFTA Parties made clear that their objectives included "promot[ing] conditions of fair competition in the free trade area" and "increas[ing] substantially investment opportunities in the territories of the Parties."

³⁷ The United States took this position in, e.g., *Mondev International Ltd. v. The United States of America* (ICSID Case No. ARB(AF)/99/2) Counter-Memorial on Competence and Liability of Respondent United States of America, 1 June 2001, p. 76 and Rejoinder on Competence and Liability of Respondent United States of America, 1 October 2001, p. 60; *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Submission of the United States of America, 18 September 2001, ¶¶ 6-10; *Pope & Talbot v. Government of Canada* (UNCITRAL) Seventh Submission of the United States of America, 6 November 2001, ¶¶ 2-10; *GAMI Investments, Inc. v. The United Mexican States* (UNCITRAL) Submission of the United States of America, 30 June 2003, ¶¶ 2-18; *Bilcon of Delaware et al. v. Government of Canada* (PCA Case No. 2009-04) Submission of the United States of America, 29 December 2017, ¶¶ 2-22. Mexico took the same position in, e.g., *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Submission of the United Mexican States (Damages Phase), 12 September 2001, ¶¶ 41-45; and *GAMI Investments, Inc. v. The United Mexican States* (UNCITRAL) Statement of Defense, 24 November 2003, ¶ 167(e) and (h). Canada took the same position in *Pope & Talbot, Inc. v. Government of Canada* (UNCITRAL) Canada's Counter-Memorial, 29 March 2000, ¶¶ 329-332; *United Parcel Service of America, Inc. v. Government of Canada* (UNCITRAL) Canada's Counter-Memorial (Merits Phase), 22 June 2005, ¶¶ 12, 523-525; *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Canada's Counter-Memorial (Damages Phase), 7 June 2001, ¶¶ 106-109; *Bilcon of Delaware*

Articles 1116 and 1117 constitute an authentic interpretation which, pursuant to Article 31(3) of the VCLT, “shall be taken into account” in interpreting these provisions.³⁸

III. ARTICLE 1105 (MINIMUM STANDARD OF TREATMENT)

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

23. Article 1105(1) requires the Parties to accord to investments of investors of another Party the customary international law minimum standard of treatment. The NAFTA Free Trade Commission’s July 31, 2001 *Note of Interpretation* (“FTC Note”) confirmed that:

1. 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.

2. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. 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 Article 1105(1).³⁹

24. As NAFTA Article 1131(2) indicates, and subsequent NAFTA tribunals have confirmed, the FTC Note represents the definitive interpretation of Article 1105(1) and is binding on tribunals constituted under NAFTA Chapter Eleven.⁴⁰

et al v. Government of Canada ((PCA Case No. 2009-04)) Counter-Memorial on Damages, 9 June 2017 ¶¶ 3, 11-28 and 31-34.

³⁸ *Bilcon – Damages Award*, ¶¶ 376-379.

³⁹ NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, 31 July 2001, §B (3).

⁴⁰ NAFTA Article 1131(2) (Governing Law) provides that “an interpretation by the [Free Trade] Commission of a provision of [the NAFTA] shall be binding on a Tribunal established under this Section”. NAFTA tribunals have consistently recognized that the FTC Note is binding on them. See: *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Award, 8 June 2009 (“*Glamis – Award*”), ¶ 599; *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) Award, 26 January 2006

25. The reference to customary international law in the FTC Note confirms that Article 1105 refers to an objective standard of treatment for investors, the minimum standard of treatment at customary international law,⁴¹ which is a “floor below which treatment of foreign investors must not fall.”⁴²

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

26. It is well established that a disputing party alleging a rule of customary international law bears the burden of proving its existence.⁴³ To establish that a rule is part of the minimum standard of treatment at customary international law, a claimant must provide

(“*Thunderbird – Award*”), ¶ 192; *Methanex – Final Award*, Part IV, Chapter C, ¶ 20; *Mondev – Award*, ¶ 100; *Loewen – Final Award*, ¶ 126; *Waste Management Inc. v. United Mexican States* (ICSID No. ARB(AF)00/3) Award, 30 April 2004, ¶ 90; *Cargill, Incorporated v. United Mexican States*, (ICSID Case No. ARB(AF)05/2) Award, 18 September 2009 (“*Cargill – Final Award*”), ¶¶ 135, 267-268; *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1) Award, 9 January 2003 (“*ADF – Award*”), ¶ 176; *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Award, 6 March 2018, (“*Mercer – Award*”), ¶ 7.50.

⁴¹ *Mondev – Award*, ¶ 120 (“The Tribunal has no difficulty in accepting that an arbitral tribunal may not apply its own idiosyncratic standard in lieu of the standard laid down in Article 1105(1)”); *Cargill – Final Award*, ¶¶ 268 and ¶ 276; *Crompton (Chemtura) Corp. v. Government of Canada* (UNCITRAL) Award, 2 August 2010 (“*Chemtura – Award*”), ¶ 121; *Mobil Investments Canada Inc. and Murphy Oil Company v. Canada* (ICSID Case No. ARB(AF)/07/04) Decision on Liability and Principles of Quantum, 22 May 2012 (“*Mobil – Decision on Liability and on Principles of Quantum*”), ¶ 153: (“It is not the function of an arbitral tribunal established under NAFTA to legislate a new standard which is not reflected in the existing rules of customary international law”); *Windstream Energy LLC v. Government of Canada* (UNCITRAL) Award, 27 September 2016, (“*Windstream – Award*”), ¶ 356.

⁴² *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000 (“*S.D. Myers – Partial Award*”), ¶ 259.

⁴³ *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States)*, [1952] I.C.J Reports 176, Judgment, p. 200, citing *Colombian-Peruvian Asylum Case*, [1950] I.C.J Reports, 266, Judgment, p. 276; Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford University Press, 2008) (“*Brownlie*”), p. 12 (“In practice the proponent of a custom has a burden of proof the nature of which will vary according to the subject-matter and the form of the pleadings”); *Cargill – Final Award*, ¶ 273: (“The burden of establishing any new elements of this custom is on Claimant. [...] If Claimant does not provide the Tribunal with the proof of such evolution, it is not the place of the Tribunal to assume this task. Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.”).

evidence of consistent and widespread State practice accompanied by an understanding that such practice is required by a rule of law (*opinio juris sive necessitates*).⁴⁴

27. In the 1969 *North Sea Continental Shelf* case, the International Court of Justice stated that “[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”⁴⁵ The ICJ more recently elaborated that such evidence may include, for example, the judgments of national courts, domestic legislation, or statements made by States.⁴⁶ The weight to be accorded to this evidence will depend on the particular circumstances of the case, including the overall context and the nature of the alleged rule.⁴⁷ Although investment arbitration awards may contain valuable analysis of State practice and *opinio juris* in relation to a particular rule of custom, they do not themselves constitute evidence of State practice and *opinio juris*.⁴⁸

⁴⁴ *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002, ¶ 84; *ADF – Award*, ¶¶ 271-273; *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, [1969] I.C.J. Reports 4, Judgment, 20 February 1969 (“*North Sea Continental Shelf – Judgment*”), ¶ 74; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Reports 14, Judgment, 26 November 1984, ¶ 207: (“[F]or a new customary rule to be formed, not only must the acts concerned ‘amount to a settled practice’, but they must be accompanied by the *opinio juris sive necessitates*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’”).

⁴⁵ *North Sea Continental Shelf – Judgment*, ¶ 77.

⁴⁶ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, [2012] I.C.J. Reports 99, Judgment, 3 February 2012, ¶ 55. See also: United Nations, *Draft Conclusions on Identification of Customary International Law with Commentaries*, 13 January 2018, p. 125.

⁴⁷ *Brownlie*, p.128.

⁴⁸ *Glamis – Award*, ¶ 605 (“Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law. They can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation.”); *Cargill – Final Award*, ¶ 277: (“[T]he awards of international tribunals do not create customary international law but rather, at most, reflect customary international law. Moreover, in both the case of scholarly writings and arbitral decisions, the evidentiary weight to be afforded such sources is greater if the conclusions therein are supported by evidence and analysis of custom”).

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

28. A determination that there has been a breach of the minimum standard of treatment under Article 1105 must begin by considering the rules regarding treatment of investments of investors that have crystallized into customary international law. Currently only a few rules have crystallized to become part of the minimum standard of treatment. These include, for example, the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings and the obligation to provide full protection and security to investments of investors.

29. Further, any such determination must be made in light of the “high measure of deference that international law generally extends to the right of domestic authorities to regulate within their own borders.”⁴⁹ Article 1105 is not an invitation to NAFTA tribunals to second-guess government policy and decision-making.⁵⁰

⁴⁹ *S.D. Myers – Partial Award*, ¶ 263. See also: *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016 (“*Mesa – Award*”), ¶ 553: (“In reviewing this alleged breach, the Tribunal must bear in mind the deference which NAFTA Chapter 11 tribunals owe a state when it comes to assessing how to regulate and manage its affairs”). The submissions of NAFTA Parties also reflect their agreement that the threshold for demonstrating a violation of Article 1105 is high. See: *Bilcon et al v. Government of Canada* (PCA Case No. 2009-04), Counter Memorial of Canada, 9 December 2011, ¶ 321 (“[T]he threshold for proving a violation of that standard is extremely high”); *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL), 1128 Second Submission of Mexico Pursuant to NAFTA Article 1128, 12 June 2015, ¶ 8 (“Mexico concurs in Canada’s submissions that the *Bilcon* tribunal [...] correctly held that the threshold for establishing a breach of the minimum standard of treatment at customary international law is high”); *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL), 1128 Second Submission of the United States of America, 12 June 2015, ¶ 20: (“[...] there is a high threshold for Article 1105 to apply”).

⁵⁰ See, e.g., *S.D. Myers – Partial Award*, ¶¶ 261-263 (explaining that “a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making”); *Glamis – Award*, ¶ 762 (holding that “it is not for an international tribunal to delve into the details of and justifications for domestic law”); *Chemtura – Award*, ¶¶ 123, 134 (holding that the Article 1105 analysis must take into account “the fact that certain agencies manage highly specialized domains involving scientific and public policy determinations”); *Windstream – Award*, ¶¶ 344 and 376; *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Award, 31 March 2010 (“*Merrill & Ring – Award*”), ¶ 236.

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

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

31. NAFTA tribunals have rejected the proposition that the minimum standard of treatment protects against any action that is inconsistent with an investor’s legitimate expectations.⁵¹ Moreover, tribunals have recognized that the fair and equitable treatment standard at customary international law “is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made.”⁵²

32. Therefore, the mere fact that a State regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor’s expectations, including its expectations of profits, does not, without more, fall below the customary international law minimum standard of treatment. While a State’s decisions or actions may at times be perceived as unfair or inequitable by an investor, Article 1105(1)

⁵¹ There is no evidence of an obligation at customary international law not to frustrate the investor’s expectations. At most, some tribunals have considered that under Article 1105, an investor’s expectations could be a relevant (though non-determinative) factor where a NAFTA Party’s conduct “creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.” *Thunderbird – Award*, ¶ 147. See also: *Mobil – Decision on Liability and on Principles of Quantum*, ¶ 152; *Glamis – Award*, ¶ 621; *Grand River Enterprises Six Nations, Ltd. et al v. United States of America* (UNCITRAL) Award, 12 January 2011, (“*Grand River – Award*”), ¶ 140; *Merrill & Ring – Award*, ¶ 233.

⁵² *Mobil – Decision on Liability and on Principles of Quantum*, ¶ 153.

is “not intended to provide foreign investors with blanket protection from this kind of disappointment.”⁵³

E. Denial of Justice is the Only Basis upon which Judgments of a Domestic Court May Be Found in Violation of the Minimum Standard of Treatment at Customary International Law

33. As noted above, the customary international law minimum standard of treatment reflected in Article 1105 includes the protection of foreign investors against denial of justice by the domestic courts of a respondent State.⁵⁴ It is well settled that absent a denial of justice, judgments of national courts interpreting domestic law cannot be challenged as a violation of international law.⁵⁵

34. A denial of justice, in a broad sense, is “[a]n injury involving the responsibility of the state committed by a court of justice.”⁵⁶ Specifically, for an act or omission by a court to constitute a denial of justice, it must be “extremely gross,”⁵⁷ “egregious”⁵⁸ or amount to

⁵³ *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* (ICSID Case No. ARB (AF)/97/2) Award, 1 November 1999 (“*Azinian – Award*”), ¶ 83.

⁵⁴ *Thunderbird – Award*, ¶ 194; *Glamis – Award*, ¶ 241.

⁵⁵ See, e.g., *Azinian – Award*, ¶¶ 99-103; *Mondev – Award*, ¶ 127; *Grand River – Award*, ¶ 234; *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16) Award, 31 March 2011, ¶¶ 306-324; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan* (ICSID Case No. ARB/07/14) Excerpts of Award, 22 June 2010 (“*Liman – Award*”), ¶¶ 268 and 274-279; *Infinito Gold Ltd. v. Republic of Costa Rica* (ICSID Case No. ARB/14/5), Award, 03 June 2021 (“*Infinito Gold – Award*”), ¶ 532 (“Costa Rica and Canada essentially argue that, absent a denial of justice, judicial decisions interpreting domestic law cannot breach international law, and that ‘claims of arbitrariness or unfairness in the context of judicial decisions must be viewed through the lens of denial of justice.’ The Tribunal agrees that this is the case under customary international law.”); Zachary Douglas, “International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed”, *International and Comparative Law Quarterly* (2014) (“*Douglas (2014)*”), p. 29 (“[A]cts or omissions attributable to the State within the context of a domestic adjudicative procedure can only supply the predicate conduct for a denial of justice and not for any other form of delictual responsibility towards nationals.”) and 34 (“Denial of justice is the sole form of international delictual responsibility towards foreign nationals for acts or omissions within an adjudicative procedure for which the State is responsible.”).

⁵⁶ J.L. Brierly, *The Law of Nations* (Oxford: 1963), p. 286 (“*Brierly*”).

⁵⁷ *Brierly*, pp. 286-287.

⁵⁸ Jan Paulsson, *Denial of Justice in International Investment Law* (Oxford: Oxford University Press, 2005) (“*Paulsson*”), p. 60.

an “outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man.”⁵⁹ A denial of justice may occur in instances where, for example, there has been a refusal to entertain a suit or serious failure to adequately administer justice or if there has been a “clear and malicious misapplication of the law”⁶⁰ or if the judgment in question is so patently egregious that “it is impossible for a third party to recognize how an impartial judge could have reached the result in question.”⁶¹

35. Even if a court decision is perceived as “incorrect”, States do not incur liability in international law for a merely erroneous decision or misapplication of national law by their domestic courts.⁶² This rule stems from the recognition of the independence of the judiciary

⁵⁹ *B.E. Chattin (US) v. United Mexican States*, 4 R.I.A.A. 23 July 1927, pp. 282, 286-87: (“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).

⁶⁰ *Azinian – Award*, ¶¶ 102-103.

⁶¹ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd ed. 2012), pp. 165-166. See also: *Paulsson*, p. 98 (“Denial of justice is always procedural. There may be extreme cases where the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it. Such cases would sanction the state’s failure to provide a decent system of justice. They do not constitute an international appellate review of national law.”); *Loewen Group and Another v. United States of America* (ICSID Case No. ARB(AF)/98/3) Opinion of Christopher Greenwood Q.C. (on the denial of justice under international law), 26 March 2001 (“*Loewen – Opinion of Christopher Greenwood, Q.C.*”), ¶ 64; *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia* (ICSID Case No. ARB/16/38), Award, 28 February 2020 (“*Staur Eiendom – Award*”), ¶ 473 (“In the case of a claim for denial of judicial due process, it is uncontroversial, as stated by Judge Greenwood in the *Loewen v. USA* case, that an international tribunal is not to act as a court of appeal or to review the findings of a national court, but rather must find that the administration of justice was ‘scandalously irregular’ or, as has been stated by others, involves ‘a particularly serious shortcoming’ and ‘egregious conduct’ that ‘shocks, or [...] at least surprises, a sense of judicial propriety.’”). *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama* (ICSID Case No. ARB/16/34), Award, 14 August 2020, ¶¶ 222-223, 409.

⁶² *Loewen Group and Another v. United States of America* (ICSID Case No. ARB(AF)/98/3), Second Opinion of Christopher Greenwood Q.C., 16 August 2001, ¶ 94; *Ida Robinson Smith Putnam (U.S.A.) v. United Mexican States* (United States-Mexico Cl. Commission 1927), R.I.A.A. Vol. IV, 15 April 1927, p.153, ¶ 5: (“A question which has been passed on in courts of a different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined. Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international Tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of law and fact”); *Barcelona Traction*, Separate Opinion of Judge Tanaka, p. 158; *Agility Public Warehousing Company K.S.C. v. Republic of Iraq* (ICSID Case No. ARB/17/7), Award, 22 February 2021 (“*Agility – Award*”), ¶ 212; G.G. Fitzmaurice, “The Meaning of the Term ‘Denial of Justice’”, 13 Brit. Y.B Int’l L. 93 (1932), p. 110 (“[T]he merely erroneous or unjust decision of a court, even though it may involve what amounts to a miscarriage of justice, is not a denial of justice, and, moreover, does not involve the

and the deference afforded to domestic courts acting in their *bona fide* role of adjudication and interpretation of a State's domestic law.⁶³

36. A prerequisite to making an international law claim of denial of justice against a domestic court decision is that the claimant must have exhausted local remedies against that judgment.⁶⁴ This follows the rationale that a State cannot be held liable for the failing of its system of justice if the system has not been given the full opportunity to correct the

responsibility of the state.”); *Paulsson*, p. 5: (“To the extent that national courts disregard or misapply national law, their errors do not generate international responsibility unless they have misconducted themselves in some egregious manner which scholars have often referred to as technical or procedural denial of justice.”); Christopher Greenwood, “State Responsibility for the Decisions of National Courts,” in *Issues of State Responsibility before International Judicial Institutions*, Fitzmaurice and Sarooshi (eds.) (Oxford: 2004), p. 61 (“it 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”).

⁶³ *Brierly*, p. 287: (“It will be observed that even on the wider interpretation of the term ‘denial of justice’ which is here adopted, the misconduct must be extremely gross. The justification of this strictness is that the independence of courts is an accepted canon of decent government, and the law therefore does not lightly hold a state responsible for their faults. It follows that an allegation of a denial of justice is a serious step...”); *Douglas (2014)*, p. 11 (“International law is deferential to the particular virtues of adjudication by respecting the integrity of the process and the outcomes it produces. This deference is manifest in the finality rule and the idea that denial of justice focuses upon the procedural aspects of the adjudication rather than the substantive reasons for the decision.”); *Mondev – Award*, ¶¶ 126-127; *Eli Lilly & Company v. Government of Canada* (UNCITRAL), Final Award, 16 March 2017, ¶ 224 (“[T]he Tribunal emphasizes that a NAFTA Chapter Eleven tribunal is not an appellate tier in respect of the decisions of the national judiciary. It is not the task of a NAFTA Chapter Eleven tribunal to review the findings of national courts and considerable deference is to be accorded to the conduct and decisions of such courts. It will accordingly only be in very exceptional circumstances, in which there is clear evidence of egregious and shocking conduct, that it will be appropriate for a NAFTA Chapter Eleven tribunal to assess such conduct against the obligations of the respondent State under NAFTA Article 1105(1).”); *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania* (ICSID Case No. ARB/11/24), Award, 30 March 2015, ¶¶ 764-770; *Mr. Frank Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23), Award, 8 April 2013 (“*Arif – Award*”), ¶ 441; *Azinian – Award*, ¶ 99; *Grand River – Award* ¶ 234; *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador II* (PCA Case No. 2009-23) Second Partial Award on Track II, 30 August 2018 (“*Chevron – Second Partial Award on Track II*”), ¶¶ 7.117 and 8.40; *Agility – Award*, ¶ 215.

⁶⁴ See e.g., *Chevron – Second Partial Award on Track II*, ¶ 7.117; *Apotex Inc. v. United States* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013 (“*Apotex – Award on Jurisdiction and Admissibility*”), ¶¶ 267-268, 276; *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan* (ICSID Case No. ARB/08/2) Award, 18 May 2010, ¶ 107; *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) Award, 8 July 2016, (“*Philip Morris – Award*”), ¶ 503; *Krederi Ltd. v. Ukraine* (ICSID Case No. ARB/14/17) Excerpts of Award, 2 July 2018, ¶¶ 473-475 and 600; *Manchester Securities Corporation v. Republic of Poland* (PCA Case No. 2015-18) Award, 07 December 2018, ¶ 483; *Staur Eiendom – Award*, ¶ 473; *Infinito Gold – Award*, ¶¶ 260 and 445.

alleged defects.⁶⁵ In other words, for a court decision to amount to a denial of justice at the international level, that decision must be final and issued by a court of last resort of the State's judiciary. International law thus requires a complainant to exhaust any remedy which is adequate and effective and reasonably available, so long as the remedy is not "obviously futile", in order to make a denial of justice claim.⁶⁶ Whether recourse to further appeals of a domestic court judgment is futile is a fact-specific inquiry taking into consideration the availability, adequacy and effectiveness of the remedy.⁶⁷

F. NAFTA Article 1105 Does Not Extend Beyond the Physical Protection and Security of Investments

37. Interpreting the phrase "protection and security" in accordance with Article 31(1) of the VCLT requires consideration of the ordinary meaning of the terms in their context and in light of the object and purpose of the treaty. In this regard, the dictionary definitions of the words "protection" and "security" point to a general meaning of safety from physical harm, injury or impairment.⁶⁸

⁶⁵ *Apotex – Award on Jurisdiction and Admissibility*, ¶ 282; *Loewen – Final Award*, ¶ 156; *Infinito Gold – Award*, ¶ 260; *Paulsson*, p. 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."); *Douglas (2014)*, p. 28 ("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").

⁶⁶ See: *The Finnish Ships Arbitration Award*, 9 May 1934, 3 R.I.A.A. 1480, pp. 1495 and 1503-1505; *Loewen – Final Award*, ¶¶ 165 and 168-169; *Pantechniki S.A. Contractors & Engineers v. Republic of Albania* (ICSID Case No. ARB/07/21) Award, 30 July 2009 ("*Pantechniki – Award*"), ¶ 96; *Apotex – Award on Jurisdiction and Admissibility*, ¶ 268; *Philip Morris – Award*, ¶ 503 ("It is for the Claimants to show that this condition has been met or that no remedy was available giving 'an effective and sufficient means or redress' or that, if available, it was 'obviously futile.'") (*Emphasis* in original).

⁶⁷ See: *Loewen – Final Award*, ¶ 169 ("Availability is not a standard to be determined or applied in the abstract. It means reasonably available to the complainant in the light of its situation, including its financial and economic circumstances as a foreign investor, as they are affected by any conditions relating to the exercise of any local remedy."); *Pantechniki – Award*, ¶ 96.

⁶⁸ As defined in the Oxford dictionary, the word "protection" means "[t]he action of protecting, or the state of being protected", and to "protect" means "[k]eep safe from harm or injury". "Harm" defined as "[p]hysical injury, especially that which is deliberately inflicted" and "injure" as "[d]o physical harm or damage to (someone)" or "[h]arm or impair (something)". "Security" is in turn defined as "[t]he state of being free from danger or threat", with "danger" defined as "[t]he possibility of suffering harm or injury" and "threat" defined as "[a] statement of an intention to inflict pain, injury, damage, or other hostile action on someone in

38. The full protection and security (“FPS”) standard was historically “developed in the context of physical protection and security of the company’s officials, employees or facilities”,⁶⁹ and “notions of ‘protection and constant security’ or ‘full protection and security’ in international law have traditionally been associated with situations where the physical security of the investor or its investment is compromised.”⁷⁰ Numerous investment tribunals have recognized that the FPS standard is intended to provide physical protection and security for investments.⁷¹

39. The NAFTA Parties’ treaty practice also confirms the shared understanding that the FPS obligation does not extend beyond the obligation to provide the level of police

retribution for something done or not done” or “[a] person or thing likely to cause damage or danger”. See: Lexico, a collaboration between Dictionary.com and Oxford University Press, available at: <https://www.lexico.com/>.

⁶⁹ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Award, 22 May 2007, ¶¶ 284-287; *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16) Award, 28 September 2007, ¶¶ 321-324. See also: *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Award, 19 January 2007, ¶¶ 258-259.

⁷⁰ *BG Group Plc. v. The Republic of Argentina* (UNCITRAL), Final Award, 24 December 2007 (“*BG Group – Final Award*”), ¶ 324.

⁷¹ *Saluka Investments B.V. (The Netherlands) v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006, ¶¶ 483-484; *BG Group – Final Award*, ¶¶ 323-328; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16) Award, 29 July 2008, ¶ 668; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal, S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/19) and *AWG Group v. The Argentine Republic* (UNCITRAL) Decision on Liability, 30 July 2010, ¶ 179; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1) Award, 22 September 2014, ¶¶ 622-623; *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award, 4 April 2016 (“*Crystallex – Award*”), ¶¶ 632-633; *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia* (PCA Case No. 2015-40) Award, 29 March 2019, ¶ 267 (“[T]he standard of full protection and security requires the host state to exercise due diligence in the provision of physical protection to foreign investments. Unless the relevant treaty clause explicitly provides otherwise, the standard of full protection and security does not extend beyond physical security nor does it extend to the provision of legal security.”); *Infinito Gold – Award*, ¶ 623 (“The Tribunal’s view is that, absent treaty language indicating that legal security is covered, the FPS standard is intended to ensure physical protection and integrity of the investor and its property within the territory of the host State.”).

protection required under customary international law, i.e. physical protection and security of foreign investors and their investments.⁷²

IV. ARTICLE 1110 (EXPROPRIATION AND COMPENSATION)

A. Article 1110(1) Reflects Customary International Law

40. NAFTA Article 1110(1) reflects the customary international law standard with respect to expropriation.⁷³ It provides that no Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment, except for a public purpose; on a non-discriminatory basis; in accordance with due process of law and Article 1105(1); and on payment of compensation in accordance with paragraphs 2 through 6 of Article 1110.

41. The first step in analysing whether there has been a breach of Article 1110 is to identify the specific investment alleged to have been expropriated.⁷⁴ Any expropriation analysis must begin with determining whether there is a valid property right capable of being expropriated.⁷⁵

⁷² See: *Canada-United States-Mexico Agreement*, S.C. 2020, c.1, entered into force 1 July 2020 (“CUSMA”), Article 14.6(2)(b) (“The obligations in paragraph 1 to provide ... ‘full protection and security’ requires each Party to provide the level of police protection required under customary international law.”).

⁷³ *Glamis – Award*, ¶ 354 (“The inclusion in Article 1110 of the term ‘expropriation’ incorporates by reference the customary international law regarding that subject.”); *Archer Daniels – Award*, ¶ 237.

⁷⁴ *Generation Ukraine v Ukraine* (ICSID Case No. ARB/00/9) Award, 16 September 2003, ¶ 6.2 (“Since expropriation concerns interference in rights in property, it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when allegedly expropriatory acts occurred.”); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Award, 27 August 2009, ¶ 442.

⁷⁵ *Chemtura – Award*, ¶ 242; *Crystallex – Award* ¶ 659; *Infinito Gold – Award*, ¶¶ 705-706. See also: Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 R.C.A.D.I. 259, 272 (1982) (“[O]nly property deprivation will give rise to compensation.”) (*emphasis in original*); Rudolf Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID Review, Foreign Investment Law Journal 41, 41 (1986) (“Once it is established in an expropriation case that the object in question amounts to ‘property,’ the second logical step concerns the identification of ‘expropriation.’”).

42. A determination of whether there is a property right capable of being expropriated requires a *renvoi* to the domestic law of the Party in question.⁷⁶ In this respect, international tribunals have generally recognized that domestic courts interpreting legal rights under domestic law should be accorded deference.⁷⁷ Only legal rights that have vested under the applicable domestic law are capable of being expropriated. A potential property right or one that is conditional, in that it may or may not materialize, is not vested and is not capable of being expropriated.⁷⁸

⁷⁶ *McLachlan, Shore & Weiniger* ¶ 8.64 (“The property rights that are the subject of protection under the international law of expropriation are created by the host State law.”); *Douglas (2009)*, p. 52, ¶ 102 (“whenever there is a dispute about the scope of the property rights comprising the investment, or to whom such rights belong, there must be a reference to a municipal law of property.”); *EnCana Corporation v. Republic of Ecuador* (UNCITRAL) Award, 3 February 2006, ¶ 184 (“Unlike many BITs there is no express reference to the law of the host State. However, for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador.”); *Emmis International Holding, B.V. Emmis Radio Operating, B.V. Mem Magyar Electronic Media Kereskedelmi Es Szolgáltató KFT v. Hungary* (ICSID Case No. ARB/12/2) Award, 16 April 2014 (“*Emmis – Award*”), ¶¶ 161-162 (“In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law. Public international law does not create property rights.”); *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt v. Hungary* (ICSID Case No. ARB/12/3) Award, 17 April 2015, ¶ 75; *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5) Award, 13 March 2015, ¶ 116 (“Expropriation under international law undoubtedly contemplates property rights existing under national law that have been taken by the State.”); *Vestey Group Ltd v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/06/4) Award, 15 April 2016, ¶ 257; *Lion Mexico Consolidated L.P. v. United Mexican States* (ICSID Case No. ARB(AF)/15/2) Decision on Jurisdiction, 30 July 2018, ¶ 231 (“NAFTA does not offer a definition of the term ‘intangible real estate’ used in its Art. 1139(g). Absent such definition, to determine whether an investor holds ‘intangible real estate’, it is necessary to refer to the law of the host state.”); *América Móvil S.A.B. de C.V. v. Republic of Colombia* (ICSID Case No. ARB(AF)/16/5) Award, 07 May 2021, ¶ 319; *Infinito Gold – Award*, ¶¶ 705 (“If no valid rights exist under domestic law, there can be no expropriation.”) and 711.

⁷⁷ *Eli Lilly and Company v. Government of Canada* (ICSID Case No. UNCT/14/2) Final Award, 16 March 2017, ¶¶ 221, 224 (“[A] NAFTA Chapter Eleven tribunal is not an appellate tier in respect of the decisions of the national judiciary. It is not the task of a NAFTA Chapter Eleven tribunal to review the findings of national courts and considerable deference is to be accorded to the conduct and decisions of such courts.”); *Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6) Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, ¶ 583; *Arif – Award* ¶ 417.

⁷⁸ *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002, ¶¶ 118 and 152; *Eureko B.V. v. Republic of Poland* (UNCITRAL) Partial Award, 19 August 2005, ¶ 151; *Thunderbird – Award*, ¶ 208; *Merrill & Ring – Award*, ¶ 142; *Emmis – Award* ¶ 168; *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50) Award, 4 September 2020, ¶ 470 (“[A] finding of expropriation must be premised on a showing that ‘Claimants must have held a property right of which they have been deprived.’ The property right or asset in question ‘must have vested (directly

43. For there to be an expropriation, a property right must have been taken.⁷⁹ In other words, there must be a taking of fundamental ownership rights, either directly or indirectly, that causes a substantial deprivation of economic value of the investment.⁸⁰ Mere interference with an investor's use or enjoyment of the benefits associated with property is insufficient to constitute an expropriation at international law as reflected in Article 1110(1).⁸¹

44. In considering allegations that the State has "taken" or "expropriated" the investor's property through its regulatory powers, consideration must be given to State's police power, which is a well recognized concept at customary international law: a host State is not required to compensate an investor for any loss caused by the imposition of a non-discriminatory, regulatory measure designed and applied to protect legitimate public welfare objectives, as such measures do not constitute an expropriation.⁸² This principle

or indirectly) in the claimant for him to seek redress.") and 472 ("[A]bsent any *established right* that was abrogated by Government interference, the fact that Government conduct may have impacted a company business plan does not itself amount to expropriation, even if the end result ultimately is that the company was unable to survive financially.") (*emphasis in original*).

⁷⁹ *McLachlan, Shore & Weiniger* ¶ 8.68 ("In fact, the central element is that property must be 'taken' by State authorities or the investor must be deprived of it by State authorities."); *Glamis – Award*, ¶ 356 ("There is for all expropriations, however, the foundational threshold inquiry of whether the property or property right was in fact taken."); *S.D. Myers – Partial Award*, ¶ 280 ("In general, the term 'expropriation' carries with it the connotation of a 'taking' by a governmental-type authority of a person's 'property' with a view to transferring ownership of that property to another person, usually the authority that exercised its *de jure* or *de facto* power to do the 'taking'").

⁸⁰ *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Interim Award, 26 June 2000 ("*Pope & Talbot – Interim Award*"), ¶ 102 ("The test is whether that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner."); *Glamis – Award*, ¶ 357; *Grand River – Award* ¶ 148; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB (AF)/00/2) Award, 29 May 2003, ¶ 115.

⁸¹ *Glamis – Award*, ¶¶ 356-357 ("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."); *Pope & Talbot – Interim Award*, ¶¶ 101-102; *S.D. Myers – Partial Award* ¶¶ 281-282.

⁸² See, e.g., *Methanex Corporation v. United States of America* (UNCITRAL) Fourth Submission of The Government of Canada, 30 January 2004, ¶ 14; *Methanex – Final Award*, Part IV, Chapter D, ¶ 7; *S.D. Myers – Partial Award*, ¶¶ 263 and 281-282; *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18) Decision on Jurisdiction and Liability, 14 January 2010, ¶¶ 273, 505; *Suez, Sociedad General de Aguas de Barcelona SA, and InterAgua Servicios Integrales del Agua SA v. The Argentine Republic* (ICSID Case No.

allows governments the necessary flexibility to regulate without having to pay compensation for every effect of regulation.⁸³

B. Judicial Determination Regarding the Invalidity of a Property Right Under Domestic Law Does Not Constitute an Expropriation Under Customary International Law, as Reflected in NAFTA Article 1110(1), in the Absence of a Denial of Justice

45. A domestic court's *bona fide* adjudication as to whether a property right exists under domestic law cannot be recast as an expropriation of that property. A neutral and independent judicial determination that a property right is invalid under domestic law, unless it can be impugned as a denial of justice, does not give rise to separate claim of expropriation under customary international law.⁸⁴

ARB/03/17) Decision on Liability, 30 July 2010, ¶ 128 (“As numerous cases have pointed out, in evaluating a claim of expropriation it is important to recognize a State’s legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation.”); *Philip Morris – Award* ¶ 305; *Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/19) Award, 30 October 2017, ¶¶ 7.17-7.22.

⁸³ See, e.g., *Chemtura – Award*, ¶ 266 (holding that Canada’s regulation of the pesticide lindane was a non-discriminatory measure motivated by health and environmental concerns and that a measure “adopted under such circumstances is a valid exercise of the State’s police powers and, as a result, does not constitute an expropriation”).

⁸⁴ See: Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, 2013), p. 208 (“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.”); Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009), ¶ 7.19 (“Where the investment in question is a contract governed by host state law and the contract is invalid or otherwise nullified based on the host state law, in principle there can be no expropriation because there has been a judicial determination that there is no contract to expropriate. The investor will either have to show that the judicial determination of the contract rights amounted to a denial of justice or that the law in question cancelling or nullifying the contract was itself expropriatory.”); *Loewen – Opinion of Christopher Greenwood, Q.C.*, ¶ 10; *Douglas (2014)*, pp. 29 and 34. See also: *Azinian – Award*, ¶¶ 99-100; *Loewen – Final Award*, ¶ 141 (“Claimant’s reliance on Article 1110 adds nothing to the claim based on Article 1105. In the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if Loewen established a denial of justice under 1105.”); *Liman – Award* ¶¶ 431-432; *Arif – Award*, ¶¶ 415-416; *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/13/38) Award, 14 December 2017, ¶ 350.

V. ARTICLE 1503 (STATE ENTERPRISES)

46. Article 1503 establishes the NAFTA Parties' obligations with regard to state enterprises. Article 1503(2) provides that:

Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) *wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges (emphasis added).*

47. NAFTA Chapter Fifteen provides for a *lex specialis* regime in relation to the attribution of acts of monopolies and state enterprises, to the content of the obligations, and to the method of implementation.⁸⁵ The obligations in Chapter Eleven apply to a state enterprise only where it acts in the exercise of delegated "governmental authority".⁸⁶ If a state enterprise is not exercising such authority, then the obligations in Chapter Eleven do not apply to that act.

48. A NAFTA Party is not responsible for the acts or omissions of a state enterprise merely because the state enterprise has the authority to enter into contracts or may receive directions from the State government.⁸⁷ Responsibility attaches only *in the particular*

⁸⁵ United Parcel Service of America Inc. v. Government of Canada (UNCITRAL) Award, 24 May 2007 ("*UPS – Award*"), ¶¶ 57, 59 and 62-63; *Mesa – Award*, ¶¶ 362 and 364. See also: *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33) Award, 3 November 2015, ¶ 321.

⁸⁶ *UPS – Award*, ¶ 72; *Mesa – Award* ¶¶ 360-361; *Windstream – Award*, ¶ 233 ("Article 1503(2) of NAFTA makes it clear that the State parties to NAFTA are responsible for the conduct of State enterprises, but *only to the extent that such enterprises are empowered to exercise governmental authority*. ... In other words, the conduct of persons or entities such as State enterprises which are not formal organs of the State can only be attributable to the State if the person or entity in question *is exercising governmental authority in the particular instance.*"); *Mercer – Award*, ¶ 6.53.

⁸⁷ *Mesa – Award*, ¶¶ 371 and 374; *Windstream – Award*, ¶ 234 ("Consequently, *to the extent that OPA acted on the basis of such directions*, its conduct could be considered attributable to Canada, depending on *whether the direction in question involved a delegation of exercise of governmental authority to the OPA*. Thus, the determination of whether *any of the specific acts or omissions of the OPA* at issue in this case are indeed

instance where the state enterprise engages in the exercise of any delegated regulatory, administrative or other governmental authority.⁸⁸ For example, the *UPS* tribunal held that although Canada Post, a creature of statute, “may be seen as part of the Canadian government system, broadly conceived” and “has an essential role in the economic, social and cultural life of Canada”⁸⁹, not all of its acts in the exercise of its statutory mandate were done in the exercise of “governmental authority”.⁹⁰ The tribunal contrasted the exercise of “governmental authority” with the use by a state enterprise of “those rights and powers which it shares with other businesses competing in the relevant market and undertaking commercial activities”, including “the rights to enter into contracts for purchase or sale and to arrange and manage their own commercial activities.”⁹¹ The tribunal concluded that the decisions of Canada Post relating to the use of its infrastructure were not made in the exercise of “governmental authority”.⁹²

49. The term “governmental authority” is not defined in the NAFTA. The decisions of other tribunals as to the meaning of the term “governmental authority” in Article 5 of the International Law Commission’s *Draft Articles on Responsibility of States for Internationally Wrongful Acts* can, however, be informative.⁹³ In particular, in *Jan de Nul*,

attributable to Canada requires an assessment of the relevant directions and therefore cannot be made *in abstracto*, but only *in concreto*, in the context of *an assessment of the relevant direction.*”) (*emphasis added*).

⁸⁸ See: *Mesa – Award*, ¶¶ 364 (“The acts of the OPA, Hydro One and IESO will accordingly be attributable to Canada if these enterprises were exercising regulatory, administrative or other governmental authority as specified in Article 1503(2) *when they carried out the acts in question.*”) and 367 (“[T]o decide whether OPA, Hydro One and IESO *exercised governmental authority when performing the acts challenged* by Mesa, the Tribunal must assess whether these entities exercised sovereign power, examples of which are provided in Article 1503(2) itself (the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.)”) (*emphasis added*); *Windstream – Award*, ¶ 233.

⁸⁹ *UPS – Award*, ¶ 57.

⁹⁰ *UPS – Award*, ¶ 77.

⁹¹ *UPS – Award*, ¶ 74.

⁹² *UPS – Award*, ¶ 78.

⁹³ See: *Mesa – Award*, ¶ 367; *Al Tamimi – Award*, ¶ 324 (“Given the specific test laid out by the State parties under Article 10.1.2, the criteria of Article 5 of the ILC Articles are not directly applicable to the present case. Indeed, there may be points of divergence between the test under Article 5 and the test under Article 10.1.2 of the US–Oman FTA: Article 10.1.2 refers to the exercise of ‘regulatory’ and ‘administrative’

the tribunal considered a claim against Egypt based on the conduct of the Suez Canal Authority (“SCA”), an entity that the Egyptian government had created by statute to manage maintain and develop the Suez canal.⁹⁴ The claim in question involved the SCA’s exercise of that statutory mandate related to a contract to widen and deepen the southern regions of the Canal.⁹⁵ The tribunal explained that it was irrelevant that the “subject matter” of the disputed conduct “related to the core functions of the SCA”, which was acting for the government’s and public’s benefit in managing the Canal.⁹⁶ In particular, it held that “[w]hat matters is not the ‘*service public*’ element, but the use of ‘*prérogatives de puissance publique*’ or governmental authority.”⁹⁷

Dated this 24th day of August, 2021.

Respectfully submitted
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authority in addition to ‘governmental’ authority. But Article 5 nevertheless provides a useful guide as to the dividing line between sovereign and commercial acts.”).

⁹⁴ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13) Award, 6 November 2008 (“*Jan de Nul – Award*”), ¶ 45.

⁹⁵ *Jan de Nul – Award*, ¶ 46.

⁹⁶ *Jan de Nul – Award*, ¶ 169.

⁹⁷ *Jan de Nul – Award*, ¶ 170. See also: *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24) Award, 18 June 2010, ¶¶ 193 (“[I]t is well established that for an act of a separate entity exercising elements of governmental authority to be attributed to the State, it must be shown that the precise act in question was an exercise of such governmental authority and not merely an act that could be performed by a commercial entity.”) and 202; *Ulysseas, Inc., v. The Republic of Ecuador* (UNCITRAL) Final Award, 12 June 2012, ¶¶ 124 and 137-139; *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt* (ICSID Case No. ARB/09/15) Award, 6 May 2014, ¶ 387; *Mesa – Award*, ¶ 367 (“The term ‘governmental authority’ is not defined in the NAFTA. In the context of ILC Article 5, the tribunal in *Jan de Nul* held that ‘governmental authority’ meant the use of ‘*prérogatives de puissance publique*.’ As the reference to governmental authority appears in Article 1503(2) as well as in Article 5, it seems appropriate to rely on the meaning so circumscribed.”); *Ortiz Construcciones y Proyectos S.A. v. People’s Democratic Republic of Algeria* (ICSID Case No. ARB/17/1) Award, 29 April 2020, ¶¶ 194-204.

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