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

WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS CLAYTON, DANIEL CLAYTON, AND BILCON OF DELAWARE INC.

Claimants/Investors,

-and-

GOVERNMENT OF CANADA,

Respondent/Party.

SUBMISSION OF THE UNITED STATES OF AMERICA

1. The United States of America hereby makes this submission pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA"), which authorizes non-disputing Parties to make submissions to a Tribunal on a question of interpretation of the NAFTA. 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 1105 (Minimum Standard of Treatment)

2. On July 31, 2001, the Free Trade Commission ("Commission"), comprising the NAFTA Parties' cabinet-level representatives, issued an interpretation confirming 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."[1] The Commission clarified that "[t]he 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."[2] The Commission

[1] Notes of Interpretation of Certain Chapter Eleven Provisions, Free Trade Commission ¶ B.1 (July 31, 2001).

[2] *Id.* ¶ B.2.

also stated 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)."[3]

3. NAFTA Article 1131, entitled "Governing Law," states in part that "[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."[4] The power to issue an authentic interpretation of a treaty remains with the States Parties themselves.[5]

4. The Commission's interpretation confirms the NAFTA Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in NAFTA Article 1105. As the United States has observed in previous submissions in NAFTA Chapter Eleven cases, 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.[6] Article 1105 thus reflects a standard that develops from State practice and *opinio juris*, rather than an autonomous, treaty-based standard. Although 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, that practice is not relevant to ascertaining the content of the customary international law minimum standard of treatment.[7] Arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, do not constitute evidence of the content of the customary international law standard required by Article 1105. While there may be overlap in the substantive protections both types of treaty provisions ensure, a claimant submitting a claim under an agreement such as NAFTA, in which fair and equitable treatment is expressly a part of the customary international minimum standard of treatment, still must demonstrate that the rights claimed are in fact a part of customary international law.

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[3] *Id.* ¶ B.3.

[4] NAFTA, art. 1131(2).

[5] *See* IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 136 (2d ed. 1984) ("It follows naturally from the proposition that the parties to a treaty are legally entitled to modify the treaty or indeed to terminate it that they are empowered to interpret it."); NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 256 (7th ed. 2002) ("L'interprétation réellement authentique est celle qui est fournie par un accord intervenu entre *tous les États parties au traité*.") (The truly authentic interpretation is that provided by agreement among *all States Parties to the treaty*.) (translation by counsel; emphasis in original).

[6] *See, e.g., Methanex v. United States*, Memorial on Jurisdiction and Admissibility of Respondent United States of America, NAFTA/UNCITRAL (Nov. 13, 2000); *ADF Group Inc. v. United States*, Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot*, NAFTA/ICSID Case No. ARB(AF)/00/1 (June 27, 2002); *Glamis Gold Ltd. v. United States*, Counter-Memorial of Respondent United States of America, NAFTA/UNCITRAL (Sept. 19, 2006); *Grand River Enters. v. United* States, Counter-Memorial of Respondent United States of America, NAFTA/UNCITRAL (Dec. 22, 2008).

[7] *See, e.g., Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Award ¶¶ 607-08 (June 8, 2009) (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"); *see also Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* 2012 I.C.J. ¶ 55 (Judgment of Feb. 3) ("While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court.").

5. The burden is on a 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*.[8] "The party which relies on a custom," therefore, "must prove that this custom is established in such a manner that it has become binding on the other Party."[9] Once a rule of customary international law has been established, the claimant must show that the State has engaged in conduct that violated that rule.[10] 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."[11]

6. Finally, the principle of "good faith" is not a separate element of the minimum standard of treatment embodied in the Agreement. It is well established in international law that good faith is "one of the basic principles governing the creation and performance of legal obligations," but "it is not in itself a source of obligation where none would otherwise exist."[12]

Article 1102 (National Treatment)

7. NAFTA's national treatment provision, Article 1102, is designed to prohibit discrimination on the basis of nationality.[13] Article 1102 paragraphs (1) and (2) are not intended to prohibit all differential treatment among investors or investments. Rather, they are intended only to ensure that Parties do not treat entities that are "in like circumstances" differently based

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[8] *See Rights of Nationals of the United States of America in Morocco (France v. United States)*, 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).

[9] *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Judgment of Nov. 20); *see also North Sea Continental Shelf (Federal Rep. of Germany v. Netherlands/Denmark)*, 1969 I.C.J. ¶ 74 (Judgment of Feb. 20) ("[A]n indispensable requirement [of showing a new rule of customary international law] would be that within the period in question, short though it might be, 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."); CLIVE PARRY ET AL., ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 81-82 (1986) (noting that a customary international legal rule emerges from "a concordant practice of a number of States acquiesced in by others; and a conception that the practice is required by or consistent with the prevailing law").

[10] *See Feldman v. Mexico*, 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 law, and in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.").

[11] *S.D. Myers v. Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 263 (Nov. 13, 2000).

[12] *Border and Transborder Armed Actions* (*Nicaragua v. Honduras*), 1988 I.C.J. 69, ¶ 94 (Judgment of Dec. 20) (citation and internal quotation marks omitted).

[13] NORTH AMERICAN FREE TRADE AGREEMENT, IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-159, Vol. 1, 103d Cong., 1st Sess., at 583 (1993) ("Articles 1102 and 1103 set out the basic non-discrimination rules of 'national treatment' and 'most-favored-nation treatment.'") All three NAFTA Parties agree that the national treatment obligation under Article 1102 is intended to protect against nationality-based discrimination against an investor or investment. *See Pope & Talbot, Inc. v. Canada*, Submission of the United States of America, NAFTA/UNCITRAL ¶ 3 (Apr. 7, 2000); *Pope & Talbot, Inc. v. Canada*, Second Submission of the United States of America, NAFTA/UNCITRAL ¶ 3 (May 25, 2000); *Pope & Talbot, Inc. v. Canada*, Supplemental Submission of the United Mexican States § A.1, at 2-3 (May 25, 2000); *Methanex v. United States*, Fourth Submission of the Government of Canada Pursuant to NAFTA Article 1128, NAFTA/UNCITRAL ¶ 5 (Jan. 30, 2004).

on their domestic nationality. If the challenged measure, whether in law or in fact, does not treat foreign investors or investments less favorably than domestic investors or investments on the basis of nationality, then there can be no violation of Article 1102.

8. The phrase "in like circumstances" ensures that comparisons are made with respect to investors or investments on the basis of characteristics that are relevant for purposes of the comparison. Thus, identifying appropriate domestic comparators for purposes of the "in like circumstances" analysis under Article 1102 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.[14]

9. Nothing in Article 1102 paragraphs (1) and (2) 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 domestic investor or investment. The relevant comparison is between the treatment that a Party accords to an investment of an investor of another Party and the best treatment that it accords to the investments of its nationals (or between the treatment that it accords to an investor of another Party and the best treatment that it accords to investors that are its nationals) *only if* the foreign investment or investor and a domestic investment or investor are *in like circumstances*. This distinction is important and was intended by the Parties. Thus, a NAFTA Party may adopt measures that draw legitimate distinctions among entities without necessarily violating Article 1102.

10. The national treatment obligation does not, as a general matter, prohibit a Party from adopting or maintaining measures that apply to or affect only a part of its national territory. The NAFTA Parties did not intend Article 1102 to foreclose the use of location-based regulatory measures. The United States, for example, limits business activities in certain environmentally sensitive areas and imposes additional limitations on emissions from manufacturing operations in areas where air pollution is more serious.

11. For the foregoing reasons, an investor or investment that operates within the territory covered by a location-specific measure may not be in circumstances "like" those of an investor or investment that does not operate *within that territory*. Therefore, an investor cannot rest its claim under Article 1102 on the fact that a domestic enterprise operating in another part of the country receives a different or greater benefit or is subject to a different or lesser burden unless it is "in like circumstances" with that enterprise.

Article 1116(2) (Limitations Period)

12. All claims under NAFTA Chapter Eleven must be brought within the three-year limitations period set out in Articles 1116(2) and Article 1117(2).[15] Although a legally distinct

[14] *See, e.g., Pope & Talbot v. 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.").

[15] Article 1116(2) states: "An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." Article 1117(2) likewise imposes a three-year limitations period on

injury can give rise to a separate limitations period under NAFTA Chapter Eleven, a continuing course of conduct does not extend the limitations period under Article 1116(2) or Article 1117(2).[16]

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claims that are brought by investors on behalf of an enterprise. Under Article 1117(2), investors are barred from bringing a claim on behalf of an enterprise "if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage."

[16] The United States' views on the interpretation of NAFTA Articles 1116(2) and 1117(2) are reflected in the attached non-disputing Party submission of July 14, 2008 in the NAFTA Chapter Eleven case *Merrill & Ring Forestry, L.P. v. Canada*.

ATTACHMENT

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

MERRILL & RING FORESTRY, L.P.,

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 makes this submission on a question of interpretation of the NAFTA. No inference should be drawn from the absence of comment on any issue not addressed below. The United States takes no position on how the interpretive positions it offers below apply to the facts of this case.

2. All claims under NAFTA Chapter Eleven must be brought within the three-year limitations period set out in Article 1116(2) and Article 1117(2). Although a legally distinct injury can give rise to a separate limitations period under NAFTA Chapter Eleven, a continuing course of conduct does not renew the limitations period under Article 1116(2) or Article 1117(2).

3. Article 1116(2) reads as follows:

> "An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."[1]

[1] Article 1117(2) likewise imposes a three-year limitations period on claims that are brought by investors on behalf of an enterprise. Under Article 1117(2), investors are barred from bringing a

4. Accordingly, Article 1116(2) requires an investor to submit a claim to arbitration within three years of the date on which the investor *first* acquired knowledge (either actual or constructive) of: (i) the alleged breach, and (ii) loss or damage incurred by the investor. Knowledge of loss or damage incurred by the investor under Article 1116(2) does not require knowledge of the extent of loss or damage.[2]

5. An investor *first* acquires knowledge of an alleged breach and loss at a particular moment in time: under Article 1116(2), that knowledge is acquired on a particular "date." Such knowledge cannot *first* be acquired on multiple dates, nor can such knowledge *first* be acquired on a recurring basis.

6. Both the *Grand River* and *Feldman* tribunals observed that Article 1116(2) introduces a "clear and rigid" limitation defense, which is not subject to any "suspension," "prolongation," or "other qualification."[3]

7. Notably, the *Grand River* tribunal rejected an argument put forward by the claimants that the limitations period under Article 1116(2) or Article 1117(2) applied separately to "each contested measure"[4] in that dispute:

> "[T]his analysis seems to render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries."[5]

8. Without addressing the *Grand River* decision, however, the *UPS* tribunal adopted a different view, finding that "continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitations period accordingly" under Article 1116(2) or Article 1117(2).[6] The *UPS* tribunal found that renewal of the limitations period under Article 1116(2) or Article 1117(2) is not contrary to the "first acquired" language in those provisions, because such a reading of that language "logically would mean

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claim on behalf of an enterprise "if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage."

[2] *See Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 87 (Oct. 11, 2002); *Grand River* Decision on Jurisdiction ¶ 78.

[3] *Grand River Enterprises Six Nations Ltd. v. United States of America* (UNCITRAL), Decision on Objections to Jurisdiction ¶ 29 (July 20, 2006); *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002).

[4] *Grand River* Decision on Jurisdiction ¶ 81 (emphasis omitted).

[5] *Id.*

[6] *United Parcel Service v. Canada* (UNCITRAL), Award ¶ 28 (May 24, 2007).

that knowledge of the allegedly offending conduct plus knowledge of loss triggers the time limitation period, even if the investor later acquires further information confirming the conduct or allowing more precise computation of loss."[7]

9. But as the *Mondev* and *Grand River* tribunals confirmed, knowledge of loss under Article 1116(2) or Article 1117(2) does not require knowledge of the precise amount of loss.[8] Nor does the *UPS* tribunal provide any reason for renewing a limitations period when an investor acquires "further information confirming" an alleged breach.

10. Under the *UPS* tribunal's reading of Article 1116(2), for any continuing course of conduct the term "first acquired" would in effect mean "last acquired," given that the limitations period would fail to renew only after an investor acquired knowledge of the state's *final* transgression in a series of similar and related actions. Accordingly, the specific use of the term "first acquired" under Article 1116(2) is contrary to the *UPS* tribunal's finding that a continuing course of conduct renews the NAFTA Chapter Eleven limitations period.

11. Notably, the only support cited by the *UPS* tribunal as "buttress[ing]" its conclusion,[9] the Interim Decision on Preliminary Jurisdictional Issues in the *Feldman* case, in fact does not support the conclusion that a continuing course of conduct renews the limitations period under Article 1116(2). Rather, the *Feldman* tribunal's ruling on Article 1117(2) in its Interim Decision was limited to the meaning of "make a claim" under that provision; the tribunal found that an investor "make[s] a claim" under Article 1117(2) upon delivery of its notice of arbitration, and not upon delivery of its notice of intent.[10]

12. The *Feldman* tribunal separately observed that the NAFTA has no retroactive effect, and thus could not apply to acts or omissions that occurred before January 1, 1994, the date on which the NAFTA entered into force.[11] The tribunal added that if there had been a "permanent course of action" which began prior to the NAFTA's entry into force, the tribunal would have retained jurisdiction over the "post-January 1, 1994 part" of the alleged activity.[12] But the tribunal's hypothetical "permanent course of action" addressed a narrow jurisdictional issue: whether the lack of jurisdiction over actions occurring

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[7] *Id.*

[8] *See supra* note 2.

[9] *UPS* Award ¶ 28.

[10] *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶ 44 (Dec. 6, 2000).

[11] *See id.* ¶ 62.

[12] *Id.*

before the NAFTA's entry into force ruled out the possibility of jurisdiction over the portion of a permanent course of action that might occur after the NAFTA's entry into force. Such a jurisdictional question did not concern the relevance, for time-bar purposes, of an alleged course of action that begins, and continues, after entry into force.

13. Nor does the Award on the merits in the *Feldman* case support the renewal of the limitations period under Article 1116(2) based on a continuing course of conduct.[13] The time-bar issues considered by the *Feldman* tribunal did not address the "first acquired" language under Article 1116(2) and Article 1117(2) in connection with a continuing course of conduct. Rather, the tribunal considered whether state action short of "formal and authorized recognition" of a claim could "either bring about interruption of the running of limitation or estop the Respondent State from presenting a regular limitation defense."[14] The tribunal found that no such interruption or estoppel applied.[15]

14. Finally, the *UPS* tribunal characterized as "true generally in the law" its finding that limitations periods are renewed by continuing courses of conduct.[16] Whatever the merits of this characterization, such a general rule would not override the specific requirements of Article 1116(2), which operates as a *lex specialis* and governs (together with Article 1117(2)) the operation of the limitations period for claims brought under NAFTA Chapter Eleven.[17]

15. In the *Grand River* case, the tribunal did not dismiss the claimants' challenge to certain later-in-time measures—specifically, "legislative actions occurring within" the three-year limitations period—because the NAFTA time-bar provisions did not "preclude Claimants from seeking to show that they suffered legally distinct injury on account of" those legislative acts.[18]

16. At the same time, however, the *Grand River* tribunal made clear that when a "series of similar and related actions by a respondent state" is at issue, an investor cannot evade the limitations period under Article 1116(2) by basing

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[13] *See Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002).

[14] *Id.* ¶ 63.

[15] *Id.*

[16] *UPS* Award ¶ 28.

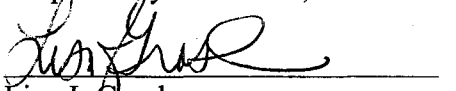
[17] States routinely establish specific rules in international agreements that define governing rights and duties in lieu of general principles of international law, reflecting the maxim *lex specialis derogate legi generali*. The *lex specialis* provision of the International Law Commission's Articles on State Responsibility confirms this point. Under that provision, the Articles "do not apply where and to the extent that" issues of state responsibility "are governed by special rules of international law." *Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, art. 55, International Law Commission, 53rd Sess. (2001).

[18] *Grand River* Decision on Jurisdiction ¶ 101.

its claim on "the most recent transgression" in that series.[19] To allow an investor to do so would "seem[] to render the limitations provisions ineffective[.]"[20] An ineffective Article 1116(2), in turn, would fail to promote the goals served by time-limit restrictions generally, which include ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential defendants and third parties.[21]

17. Accordingly, once an investor first acquires knowledge of breach and loss, subsequent transgressions by the state arising from a continuing course of conduct do not renew the limitations period under Article 1116(2).

Respectfully submitted,



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[19] *Id.* ¶ 81.

[20] *Id.*

[21] *See, e.g.*, GRAEME MEW, THE LAW OF LIMITATIONS 13 (LexisNexis, 2d ed. 2004) ("'[T]he state has an interest in promoting legal certainty. Not only potential defendants, but third parties need to have confidence that rights are not going to be disturbed by a long-forgotten claim.'") (quoting 1998 consultation paper by the English Law Commission); BIN CHENG, GENERAL PRINCIPLES OF LAW 380 (1987) ("It is considered that long lapse of time inevitably destroys or obscures the evidence of the facts and, consequently delay in presenting the claim places the other party in a disadvantageous position. For, if it had not previously been warned of the existence of the claim, it would probably not have accumulated and preserved the evidence necessary for its defence").