IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE
UNITED STATES-KOREA FREE TRADE AGREEMENT
AND THE 2013 UNCITRAL ARBITRATION RULES

ELLIOTT ASSOCIATES, L.P.,

Claimant,

-and-

REPUBLIC OF KOREA,

Respondent.

PCA CASE NO. 2018-51

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. The United States of America hereby makes this submission pursuant to Article 11.20.4 of the United States-Korea Free Trade Agreement ("KORUS" or "Agreement"), which authorizes a non-disputing Party to make oral and written submissions to a Tribunal regarding the interpretation of the Agreement. The United States does not take a position on how the interpretations apply to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

Article 11.1.3 (Attribution)

2. KORUS Article 11.1.3 provides that:

> measures adopted or maintained by a Party means measures adopted or maintained by:
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> (a) central, regional, or local governments and authorities; and
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> (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.[1]

3. Article 11.1.3(a) confirms that measures adopted or maintained by any government or authority of a Party are attributable to that Party. The term "governments and authorities" means the organs of a Party, consistent with the principles of attribution under customary international

[1] United States-Korea Free Trade Agreement ("KORUS") art. 11.1.3, Jun. 30, 2007 (entered into force Mar. 15, 2012).

law.[2] As the text of Article 11.1.3(a) makes clear, this rule of attribution applies to any State organ at the central, regional, or local level of government. The text of Article 11.1.3(a) does not draw distinctions based on the type of conduct at issue.[3]

4. Pursuant to Article 11.1.3(b), attribution of conduct of a non-governmental body to a Party requires that both (i) the conduct is governmental in nature and (ii) the measures adopted or maintained by the non-governmental body are undertaken "in the exercise of powers *delegated* by" the government or an authority of a Party.[4] (Emphasis added.) Article 16.9 of the Korus defines "delegation," for purposes of the chapter on competition-related matters, as including, *inter alia*, "a legislative grant, and a government order, directive, or other act, transferring to the . . . state enterprise, or authorizing the exercise by the . . . state enterprise of, governmental authority." If the conduct of a non-governmental body falls outside the scope of the relevant delegation of authority, such conduct is not a "measure[] adopted or maintained by a Party" under Article 11.1.

5. A non-governmental body such as a state enterprise may exercise 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. These examples illustrate circumstances in which a non-governmental body such as a state enterprise is exercising governmental authority delegated by a Party in its sovereign capacity.

Article 11.28 (Definition of "Investment")

6. The KORUS Article 11.28 defines an investment to include:

> every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include . . . shares, stock, and other forms of equity participation in an enterprise.[5]

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[2] *See, e.g.,* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, art. 4 (2001) ("ILC Draft Articles") ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.").

[3] *See* ILC Draft Articles, art. 4, cmt. 6 ("It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as *acta iure gestionis*. Of course, the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant….").

[4] *See* ILC Draft Articles, art. 5 ("The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.").

[5] KORUS art. 11.28(b).

7. This definition encompasses "every asset" that an investor owns or controls, directly or indirectly, that has the characteristics on an investment. The "[f]orms that an investment may take include" the categories listed, which are illustrative and non-exhaustive. The enumeration of a type of an asset in Article 11.28, however, is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.[6]

Article 11.16 (Causation)

8. KORUS Article 11.16(a)(ii) provides that a party may submit a claim to arbitration where the claimant has incurred loss or damage "by reason of, or arising out of, that breach."

9. The ordinary meaning of these terms requires an investor to establish the causal nexus between the alleged breach and the claimed loss or damage.[7] In this connection, it is well established that "causality in fact is a necessary but not a sufficient condition for reparation."[8] The standard for factual causation is known as the "but-for" or "*sine qua non*" test whereby an act causes an outcome if the outcome would not have occurred in the absence of the act. This test is not met if the same result would have occurred had the breaching State acted in compliance with its obligations.[9]

10. Furthermore, as the United States has previously explained with respect to substantively identical language in NAFTA Articles 1116(1) and 1117(1), the ordinary meaning of "by reason of, or arising out of" requires an investor to demonstrate proximate causation.[10] In this

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[6] Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 755, 767-68 (Chester Brown ed., 2013).

[7] H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 422 (2d ed. 1985) (noting that it is generally the claimant's burden to "persuade the tribunal of fact of the existence of causal connection between wrongful act and harm"); *see also Islamic Republic of Iran v. United States of America*, AWD 601-A3/A8/A9/A14/B/61-FT ¶ 153 (July 17, 2009), 38 IRAN-U.S. CL. TRIB. REP. 197, 223 (2009) ("Iran, as the Claimant, is required to prove that it has suffered losses . . . and that such losses were *caused by* the United States.") (emphasis added).

[8] ILC Draft Articles, art. 31, cmt. 10 (2001). The Iran-U.S. Claims Tribunal reaffirmed this principle in the remedies phase of Case A/15(IV) when it held that it must determine whether the "United States breach caused 'factually' the harm . . . and that that loss was also a 'proximate' consequence of the United States' breach." *Islamic Republic of Iran v. United States of America*, AWD 602-A15(IV)/A24-FT ¶ 52 (July 2, 2014), IRAN-U.S. CL. TRIB. ("A/15(IV) Award").

[9] A/15(IV) Award ¶ 52 ("[I]f one were to reach the conclusion that both tortious (or obligation-breaching) and non-tortious (obligation-compliant) conduct of the same person would have led to the same result, one might question that the tortious (or obligation-breaching) conduct was *condicio sine qua non* of the loss the claimant seeks to recover."). *See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 I.C.J. 40, ¶ 462 (Judgment of Feb. 26).

[10] *William Ralph Clayton et al. v. Government of Canada*, NAFTA/PCA Case No. 2009-04, Submission of the United States of America ¶¶ 23-27 (Dec. 29, 2017); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, *U.S. Amended Statement of Defense* ¶ 213 (Dec. 5, 2003); *Grand River Enterprises Six Nations LTD, et al*. v. United States of America, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America, at 174-75 (Dec. 22, 2008) ("Claimants must show that the compensation they seek 'is proved to have a sufficient causal link with the specific NAFTA provision that has been breached' and 'not from other causes.' '[T]he harm must not be too remote' and 'the breach of the specific NAFTA provision must be the *proximate* cause

connection, NAFTA tribunals have consistently imposed a requirement of proximate causation under NAFTA Articles 1116(1) and 1117(1). For example, the *S.D. Myers* tribunal held that damages may only be awarded to the extent that there is a "sufficient causal link" between the breach of a specific NAFTA provision and the loss sustained by the investor,[11] and then subsequently clarified that "[o]ther ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the proximate cause of the harm."[12]

11. Indeed, proximate causation is an "applicable rule[] of international law" that under the KORUS article 11.22.1 must be taken into account in fixing the appropriate amount, if any, of monetary damages.[13] Article 11.16.1 contains no indication that the Agreement Parties intended to vary from this established rule.[14] Accordingly, any loss or damage cannot be based on an assessment of acts, events, or circumstances not attributable to the alleged breach.[15] Injuries that

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of the harm.'") (quoting from the first and second partial awards in *S.D. Myers v. Government of Canada*) (footnotes omitted); *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Seventh Submission of the United States of America ¶¶ 2, 13 (Nov. 6, 2001) (only damages proximately caused by a breach may be recovered); *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America ¶ 12 (Sept. 18, 2001) (a tribunal's task is limited to assessing whether there has been a breach and whether the investor or investment suffered loss or damages proximately caused by such a breach).

[11] *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 316 (Nov. 13, 2000).

[12] *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Second Partial Award ¶ 140 (Oct. 21, 2002). *See also Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award in Respect of Damages ¶ 80 (May 31, 2002) (holding that under NAFTA Article 1116 the claimant bears the burden to "prove that loss or damages was caused to its interest, and that it was causally connected to the breach complained of[]"; *Archer Daniels Midland Co. v. United Mexican States,* NAFTA/ICSID Case No. ARB(AF)/04/05, Award ¶ 282 (Nov. 21, 2007) (requiring a "sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such an injury.").

[13] *See* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, art. 31, comment 10 (2001) ("ILC Draft Articles"). *See also Administrative Decision No. II (U.S. v. Germany)*, 7 R.I.A.A. 23, 29 (1923) (proximate cause is "a rule of general application both in private and public law – which clearly the parties to the Treaty had no intention of abrogating"); *United States Steel Products (U.S. v. Germany)*, 7 R.I.A.A. 44, 54-55, 58-59, 62-63 (1923) (rejecting on proximate cause grounds a group of claims seeking reimbursement for war-risk insurance premiums); *Dix Case (U.S. v. Venezuela)*, 9 R.I.A.A. 119, 121 (undated) ("International as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure."); *H. G. Venable (U.S. v. Mexico)*, 4 R.I.A.A. 219, 225 (1927) (construing the phrase "originating from" as requiring that "only those damages can be considered as losses or damages caused by [the official] which are immediate and direct results of his [action]"). *See also* BIN CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 244-45 (1953) ("it is 'a rule of general application both in private and public law,' equally applicable in the international legal order, that the relation of cause and effect operative in the field of reparation is that of proximate causality in legal contemplation").

[14] *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)* 1989 I.C.J. 15, ¶ 50 (Judgment of July 1989) ("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 [by an international agreement], in the absence of any words making clear an intention to do so."); *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶¶ 160, 162 (June 26, 2003) ("*Loewen* Award") ("It would be strange indeed if sub silentio the international rule were to be swept away.").

[15] *See* ILC Draft Articles, art. 31, comment 9 (noting that the language of Article 31(2) providing that injury includes damage "caused by the internationally wrongful act of a State," "is used to make clear that the subject

are not sufficiently "direct," "foreseeable," or "proximate" may not, consistent with applicable rules of international law, be considered when calculating a damage award.[16]

Article 11.5 (Minimum Standard of Treatment)

12. Article 11.5 provides that "[e]ach party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."[17] This provision "prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments."[18] Specifically, "'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."[19] And, "'full protection and security' requires each Party to provide the level of police protection required under customary international law."[20]

13. The above provisions demonstrate the Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in Article 11.5. 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. The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[21]

14. Annex 11-A to the KORUS addresses the methodology for determining whether a customary international law rule covered by Article 11.5 has crystalized. The Annex expresses the Parties' "shared understanding that 'customary international law' generally and as specifically referenced in Article 11.5 . . . results from a general and consistent practice of States that they follow from a sense of legal obligation." Thus, in Annex 11-A the Parties confirmed their understanding and application of this two-element approach—State practice and *opinio juris*—which is "widely endorsed in the literature" and "generally adopted in the practice of

matter of reparation is, globally, the injury *resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act*.") (emphasis added).

[16] ILC Draft Articles, art. 31, comment 10 (explaining that causality in fact is a necessary but not sufficient condition for reparation: "There is a further element, associated with the exclusion of injury that is too 'remote' or 'consequential' to be the subject of reparation. In some cases, the criterion of 'directness' may be used, in others 'foreseeability' or 'proximity'. . . . The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act[.]") (footnotes omitted).

[17] KORUS art. 11.5.1.

[18] KORUS art. 11.5.2.

[19] KORUS art. 11.5.2(a).

[20] KORUS art. 11.5.2(b).

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

States and the decisions of international courts and tribunals, including the International Court of Justice."[22]

15. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate, under this two-step approach, that a rule of customary international law exists, in its decision on *Jurisdictional Immunities of the State (Germany v. Italy)*.[23] In that case, the Court emphasized that "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States," and noted as examples of State practice relevant national court decisions or domestic legislation dealing with the particular issue alleged to be the norm of customary international law, as well as official declarations by relevant State actors on the subject.[24]

16. The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*.[25] "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."[26] Tribunals applying the minimum standard of treatment obligation in Article 1105 of NAFTA Chapter Eleven, which likewise affixes the standard to customary international law,[27] have confirmed that the party seeking to rely on a rule of customary international law must establish its existence. The tribunal in *Cargill, Inc. v. Mexico,* for example, acknowledged that

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[22] *See Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, 122 (Feb. 3) ("In particular . . . the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*.") (citing *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, 1969 I.C.J. 44, ¶ 77 (Feb. 20)); *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, ¶ 29-30 (June 3) ("It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States[.]"); Special Rapporteur on International Law Commission, *Second Report on Identification of Customary International Law* ¶ 21, Int'l Law Comm'n, U.N. Doc. A/CN.4/672 (May 22, 2014) (by Michael Wood) ("ILC Second report on the identification of customary international law"). *See also id.*, Annex, Proposed Draft Conclusion 3, at 14 (stating that in order to determine the "existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law"); Special Rapporteur on International Law Commission, *Fourth Report on Identification of Customary International Law*, ¶ 31, U.N. Doc. A/CN.4/695 (Mar. 8, 2016) (Michael Wood); id., Annex at 21 (proposing minor modifications to Draft Conclusion 3).

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

[24] *Id.* at 122-23 (discussing relevant materials that can serve as evidence of State practice and *opinio juris* in the context of jurisdictional immunity in foreign courts).

[25] *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20); *see also North Sea Continental Shelf* at 43; *Glamis* Award ¶¶ 601-602 (noting that the claimant bears the burden of establishing a change in customary international law, by showing "(1) a concordant practice of a number of States acquiesced in by others, and (2) a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)") (citations and internal quotation marks omitted).

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

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

> the proof of change in a custom is not an easy matter to establish. However, *the burden of doing so falls clearly on Claimant*. If the Claimant does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task. Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.[28]

17. Once a rule of customary international law has been established, a claimant must then show that the respondent State has engaged in conduct that violates that rule.[29] 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."[30] A failure to satisfy requirements of domestic law does not necessarily violate international law.[31] Rather, "something more than simple illegality or lack of authority under the domestic law of a state is necessary to render an act or measure inconsistent with the customary international law requirements. . . ."[32] Accordingly, a departure from domestic law does not in-and-of-itself sustain a violation of Article 11.5.

18. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, expressly addressed in Article 11.5.2(a),

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

[29] *Feldman* Award ¶ 177 ("[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.") (citation omitted).

[30] *S.D. Myers* First Partial Award ¶ 263; *see also Mesa* Award ¶ 505 ("when defining the content of [the minimum standard of treatment] one should . . . take into consideration that international law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs."); *Thunderbird* Award ¶ 127 (noting that states have a "wide regulatory 'space' for regulation," can change their "regulatory polic[ies]" and have "wide discretion" with respect to how to carry out such policies by regulation and administrative conduct).

[31] *ADF* Award ¶ 190 ("[T]he Tribunal has no authority to review the legal validity and standing of U.S. measures here in question under U.S. internal administrative law. We do not sit as a court with appellate jurisdiction with respect to the U.S. measures. (citation omitted) Our jurisdiction is confined by NAFTA Article 1131(1) to assaying the consistency of the U.S. measures with relevant provisions of NAFTA Chapter 11 and applicable rules of international law.") (emphasis in original); *see also GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 97 (Nov. 15, 2004) ("The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law."); *Thunderbird* Award ¶ 160 ("[I]t is not up to the Tribunal to determine how [the state regulatory authority] should have interpreted or responded to the [proposed business operation], as by doing so, the Tribunal would interfere with issues of purely domestic law and the manner in which governments should resolve administrative matters (which may vary from country to country).").

[32] *ADF* Award ¶ 190.

concerns the obligation to provide "fair and equitable treatment," which includes "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."

19. The customary international law minimum standard of treatment set forth in Article 11.5.1 does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination.[33] As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.[34] To the extent that the customary international law minimum standard of treatment incorporated in Article 11.5 prohibits discrimination, it does so only in the context of other established customary international law rules, such as prohibitions against discriminatory takings,[35] access to judicial remedies or treatment by the courts,[36] or the obligation of States to provide full

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

[34] See *Methanex* Final Award, Part IV, Ch. C ¶¶ 25-26 (explaining that customary international law has established exceptions to the broad rule that "a State may differentiate in its treatment of nationals and aliens," but noting that those exceptions must be proven rules of custom, binding on the Party against whom they are invoked); *see also* ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW: PEACE 932 (9th ed. 1992) ("[A] degree of discrimination in the treatment of aliens as compared with nationals is, generally, permissible as a matter of customary international law."); Borchard, *Minimum Standard of Treatment*, *supra* note 22, at 56 ("The doctrine of absolute equality – more theoretical than actual – is therefore incompatible with the supremacy of international law. The fact is that no state grants absolute equality or is bound to grant it. It may even discriminate between aliens, nationals of different states, e.g., as the United States does through treaty in the matter of the ownership of real property in this country."); ANDREAS ROTH, MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 83 (1949) ("[T]he principle of equality has not yet become a rule of positive international law, *i.e.*, there is no obligation for a State to treat the aliens like the nationals. A discrimination of treatment between aliens and nationals alone does not yet constitute a violation of international law.").

[35] *See, e.g.*, *BP Exploration Co. (Libya) Ltd. v. Libya*, 53 I.L.R. 297, 329 (Lagergren 1974) ("[T]he taking…clearly violates public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character."); *Libyan American Oil Co. (LIAMCO) v. Libya*, 62 I.L.R. 140, 194 (1977) ("It is clear and undisputed that non-discrimination is a requisite for the validity of a lawful nationalization. This is a rule well established in international legal theory and practice."); *Kuwait v. American Independent Oil Co. (AMINOIL)*, 66 I.L.R. 518, 585 (1982) (considering the question "whether the nationalization of Aminoil was not thereby tainted with discrimination," but finding that there were legitimate reasons for nationalizing one company and not the other); *see also* RESTATEMENT OF FOREIGN RELATIONS LAW § 712 (1987) ("A state is responsible under international law for injury resulting from . . . a taking by the state of the property of a national of another state that . . . is discriminatory . . . ."); *id.* § 712 cmt. f ("Formulations of the rules on expropriation generally include a prohibition of discrimination . . . .").

[36] *See, e.g.*, C.F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 243 (1967) ("Especially in a suit between State and alien it is imperative that there should be no discrimination between nationals and aliens in the imposition of procedural requirements. The alien cannot be expected to undertake special burdens to obtain justice in the courts of the State against which he has a complaint."); EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 334 (1919) (A national's "own government is justified in intervening in his behalf only if the laws themselves, the methods provided for administering them, and the penalties prescribed are in derogation of the principles of civilized justice as universally recognized or if, in a specific case, they have been wrongfully subverted by the courts so as to discriminate against him as an alien or perpetrate a technical denial of justice."); *Report of the Guerraro Sub-Committee of the Committee of the League of*

protection and security and to compensate aliens and nationals on an equal basis in times of violence, insurrection, conflict or strife.[37] Moreover, general investor-State claims of nationality-based discrimination are governed exclusively by the provisions of Chapter Eleven that specifically address that subject, and not Article 11.5.1.[38]

20. Decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary international law are not themselves instances of "State practice" for purposes of evidencing customary international law, although such decisions may be relevant for determining State practice when they include an examination of such practice.[39] A formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and *opinio juris* fails to establish a rule of customary international law as incorporated by Article 11.5.1.

Article 11.3 (National Treatment)

21. Article 11.3 provides in relevant part that each party shall accord to investors of the other Party and to covered investments "treatment no less favorable than that it accords, in like

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Nations on Progressive Codification 1, League of Nations Doc. C.196M.70, at 100 (1927) ("Denial of justice is therefore a refusal to grant foreigners free access to the courts instituted in a State for the discharge of its judicial functions, or the failure to grant free access, in a particular case, to a foreigner who seeks to defend his rights, *although in the circumstances nationals of the State would be entitled to such access*.") (emphasis added); *Ambatielos (Greece v. United Kingdom)*, 12 R.I.A.A. 83, 111 (Mar. 6, 1956) ("The modern concept of 'free access to the Courts' represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a practice which existed in former times and in certain countries, and which constituted an unjust discrimination against foreigners. Hence, the essence of 'free access' is adherence to and effectiveness of the principle of non-discrimination against foreigners who are in need of seeking justice before the courts of the land for the protection and defence of their rights.").

[37] *See, e.g.*, *The Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers* (United States, Reparation Commission), 2 R.I.A.A. 777, 794-95 (1926); League of Nations, *Bases of Discussion: Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners*, League of Nations Doc. C.75.M.69.1929.V, at 107 (1929), *reprinted in* SHABTAI ROSENNE, LEAGUE OF NATIONS CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW [1930], 526- 42 (1975) (Basis of Discussion No. 21 includes the provision that a State must "[a]ccord to foreigners to whom damage has been caused by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance the same indemnities as it accords to its own nationals in similar circumstances." Basis of Discussion No. 22(b) states that "[a] State must accord to foreigners to whom damage has been caused by persons taking part in an insurrection or riot or by mob violence the same indemnities as it accords to its own nationals in similar circumstances.").

[38] *See Mercer Int'l Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award ¶ 7.58 (Mar. 4, 2018) ("*Mercer* Award") ("So far as concerns the Claimant's claims of 'discriminatory treatment' contrary to NAFTA Article 1105(1), the Tribunal's [*sic*] agrees with the non-disputing NAFTA Parties' submissions that such protections are addressed in NAFTA Articles 1102 and 1103, rather than NAFTA Article 1105(1)."); *Methanex* Final Award, Part IV, Ch. C ¶¶ 14-17, 24 (analyzing the text of NAFTA Article 1105, and explaining that the impact of the "FTC interpretation of [NAFTA] Article 1105" was not to "exclude non-discrimination from NAFTA Chapter 11" but "to confine claims based on alleged discrimination to Article 1102, which offers full play for a principle of non-discrimination").

[39] *See, e.g.*, *Glamis* Award ¶ 605 ("Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law. They can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation.") (footnote omitted); *see also* M. H. Mendelson, *The Formation of Customary International Law*, 272 Recueil des Cours 155, 202 (1998) (noting that while such decisions may contribute to the formation of customary international law, they are not appropriately considered as evidence of "State practice").

circumstances, to its own investors [and to investments in its territory of its own investors] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[40]

22. To establish a breach of national treatment under Article 11.3, a claimant has the burden of proving that it or its investments: (1) were accorded "treatment"; (2) were in "like circumstances" with domestic investors or investments; and (3) received treatment "less favorable" than that accorded to domestic investors or investments.[41]

23. Article 11.3 is intended to prevent discrimination on the basis of nationality between domestic investors (or investments) and investors (or investments) of the other Party, that are in "like circumstances." It is not intended to prohibit all differential treatment among investors or investments. Rather, it is designed only to ensure that the Parties do not treat entities that are "in like circumstances" differently based on nationality.[42] Nationality-based discrimination under Article 11.3 may be *de jure* or *de facto*. *De jure* discrimination occurs when a measure on its face discriminates between investors or investments in like circumstances based on nationality. De facto discrimination occurs when a facially neutral measure with respect to nationality is applied in a discriminatory fashion based on nationality. A claimant is not required to establish discriminatory intent.

24. As indicated above, the appropriate comparison is between the treatment accorded to a claimant or its investment, on one hand, and the treatment accorded to a domestic investor or investment in like circumstances, on the other. It is therefore incumbent upon the claimant to identify domestic investors or investments as comparators. If the claimant does not identify any domestic investor or investment as allegedly being in like circumstances, no violation of Article 11.3 can be established.

25. Determining whether a domestic investor or investment identified by a claimant is in "like circumstances" to the claimant or its investment is a fact-specific inquiry. As one tribunal observed in the context of a similar national treatment provision in the NAFTA, "[i]t goes without saying that the meaning of the term 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."[43] The United States understands the term "circumstances" to denote conditions or facts that accompany treatment as opposed to the treatment itself. Thus,

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[40] KORUS art. 11.3.

[41] As the United States has elsewhere explained with respect to the otherwise identical national treatment obligation in NAFTA article 1102, this provision is "intended to prevent discrimination on the basis of nationality" and to "ensure that nationality is not the basis for differential treatment." *Mercer Int'l Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of the United States, ¶ 10 (May 8, 2015); *see also* U.S. Counter-Memorial in *Apotex Holdings Inc. v. United States of America*, Case No. ARB(AF)/12/1, ¶ 324 (Dec. 14, 2012); *cf. Gramercy Funds Management LLC v. Peru*, Submission of the United States, ¶ 49 n.91 (June 21, 2019) (interpreting the United States-Peru Trade Promotion Agreement).

[42] *Loewen* Award ¶ 139 (accepting in the NAFTA context that "Article 1102 [National Treatment] is direct[ed] *only* to nationality-based discrimination") (emphasis added); *Mercer* Award ¶ 7.7 (accepting the positions of the United States and Mexico that the National Treatment and Most-Favored Nations obligations are intended to prevent discrimination on the basis of nationality).

[43] *See, e.g.*, *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Award on the Merits of Phase 2, ¶ 75 (Apr. 10, 2001).

identifying appropriate comparators for purposes of the "like circumstances" analysis requires consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other relevant characteristics.

26. When determining whether a claimant is in like circumstances with comparators, it or its investment should be compared to a domestic investor or investment that is alike in all relevant respects but for nationality of ownership. Moreover, whether treatment is accorded in "like circumstances" under Article 11.3 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare objectives.

27. Nothing in Article 11.3 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 appropriate comparison is between the treatment accorded a foreign and a domestic investment or investor in like circumstances. This is an important distinction intended by the Parties. Thus, the Parties may adopt measures that draw distinctions among entities without necessarily violating Article 11.3.

Respectfully submitted,

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