IN THE ARBITRATION UNDER CHAPTER TEN OF THE
DOMINICAN REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT (CAFTA-DR) AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES BETWEEN

SARGEANT PETROLEUM, LLC,

Claimant

-and-

THE DOMINICAN REPUBLIC,

Respondent.

ICSID CASE NO. ARB(AF)/22/1

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to Article 10.20.2 of the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR" or "Treaty"), the United States of America makes this submission on questions of interpretation of the Treaty. The United States does not take a position, in this submission, on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.[1]

Article 10.12.2 (Denial of Benefits)

2. Article 10.12.2 provides: "Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other

[1] In footnotes to this submission, the symbol ¶ denotes the relevant paragraph(s) of the referenced document and the symbol § denotes the relevant section(s) of the referenced document.

than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise."

3. This treaty right is consistent with a long-standing U.S. policy to include a denial of benefits provision in investment agreements to safeguard against the potential problem of "free rider" investors, *i.e.*, third-party entities that may only as a matter of formality be entitled to the benefits of a particular agreement.[2] While it has been U.S. practice to omit a precise definition of the term "substantial business activities," in order that the existence of such activities may be evaluated on a case-by-case basis,[3] the United States has indicated in, for instance, its Statement of Administrative Action on the North American Free Trade Agreement (NAFTA) that "shell companies could be denied benefits but not, for example, firms that maintain their central administration or principal place of business in the territory of, or have a real and continuous link with, the country where they are established."[4] Similarly, in testimony before the U.S. House of Representatives, Ambassador Peter Allgeier, one of the U.S. negotiators of CAFTA-DR, explained that the denial of benefits provision of CAFTA-DR was intended to "protect against . . . establish[ment of] an affiliate that is merely a 'shell.'"[5]

Article 10.28 (Definition of Investment)

4. Article 10.28 states, in pertinent part, that "investment" means "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment,

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[2] *See, e.g.*, Herman Walker, Jr., *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 388 (1956) (noting that "recent treaties signed by the United States . . . indicate that this possibility of a 'free ride' by third-country interests is one to be guarded against . . . .").

[3] *See Hearing Before the Committee on Foreign Relations of the United States Senate on the Bilateral Investment Treaties with Argentina, Armenia, Bulgaria, Ecuador, Kazakhstan, Kyrgyzstan, Moldova, and Romania*, S. Hrg. 103-292, 103rd Cong., 1st Sess. (Sept. 10, 1993), Responses of the U.S. Department of State to Questions Asked by Senator Pell, at 27.

[4] North American Free Trade Agreement, Texts of the Agreement, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements, H. Doc. 103-159, 103rd Cong., 1st Sess. at 145-146 (Nov. 4, 1993*)*; *see Message from the President: Investment Treaty with Azerbaijan*, 106th Cong., 2d Sess., Sen. Treaty Doc. 106-47 (Sept. 12, 2000), at 12 (stating that the denial of benefits provision "would not generally permit [the host State] to deny benefits to a company of [the other Party] that maintains its central administration or principal place of business in the territory of, or has a real and continuous link with" the other Party; the same language appears in the transmittal messages accompanying U.S. investment treaties with Trinidad and Tobago, Georgia, Albania, Jordan, Bolivia, Honduras, El Salvador, Croatia, Mozambique, and Nicaragua).

[5] *See Implementation of the Dominican Republic – Central America Free Trade Agreement (DR-CAFTA): Hearing Before the Committee on Ways and Means, U.S. House of Representatives*, 109th Cong. 193 (April 21, 2005) (questions submitted from the Honorable Lloyd Doggett to Ambassador Peter F. Allgeier, and his responses).

including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." As the chapeau makes clear, this definition encompasses "every asset" that an investor owns or controls, directly or indirectly, that has the characteristics of an investment.

5. Article 10.28 further states that the "[f]orms that an investment may take include" the assets listed in the subparagraphs. For example, subparagraph (e) of the definition lists "turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts." Ordinary commercial contracts for the sale of goods or services typically do not fall within the list in subparagraph (e).[6] Subparagraph (g) lists "licenses, authorizations, permits, and similar rights conferred pursuant to domestic law"[7]; and subparagraph (h) lists "other tangible or intangible, movable or immovable property, and related property rights."

6. The enumeration of a type of an asset in Article 10.28 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.[8] Article 10.28's use of the word "including" in relation to "characteristics of an investment" indicates that the list of identified characteristics, *i.e.*, "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk," is not an exhaustive list; additional characteristics may be relevant.

7. The determination as to whether a particular instrument has the characteristics of an investment is a case-by-case inquiry, involving an examination of the nature and extent of any rights conferred under the State's domestic law.

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[6] CAFTA-DR Article 10.28, footnote 9 also states that "claims to payment that are immediately due and result from the sale of goods or services are not investments."

[7] *Id.*, footnote 10 states that "[w]hether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license authorization, permit, or similar instrument has the characteristics of an investment."

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

8. While Article 10.28 does not expressly provide that each type of investment must be made in compliance with the laws of the host state, it is implicit that the protections in Chapter Ten only apply to investments made in compliance with the host state's domestic law at the time that the investment is established or acquired.[9] As a general matter, however, trivial violations of the applicable law will not put an investment outside the scope of Article 10.28.[10]

Article 10.8.1 (Limitations Period)

9. Article 10.18.1 of the CAFTA-DR provides:

> No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for

[9] This requirement is necessarily implied, for example, in the definition of "enterprise," which is defined at Article 2.1 as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association[.]" *See also* CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES ¶ 6.110 (2nd ed. 2017) ("[A]n investment that is made in breach of the laws of the host State will not qualify as an investment under an investment treaty. *This will be the case even where the applicable treaty does not contain an express requirement of compliance with the laws of the host State*." (emphasis added)); *Ampal-American Israel Corp. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction ¶ 301 (Feb. 1, 2016) (concluding, in applying a treaty that lacked an express legality requirement (the United States-Egypt bilateral investment treaty), that "[i]t is a well-established principle of international law that a tribunal constituted on the basis of an investment treaty has no jurisdiction over a claimant's investment which was made illegally in violation of the laws and regulations of the Contracting State."); *Mamidoil Jetoil Greek Petroleum Products S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award ¶¶ 359-60 (Mar. 30, 2015) ("[T]he Tribunal shares the widely-held opinion that investments are protected by international law only when they are made in accordance with the legislation of the host State. States accept arbitration and accept to waive part of their immunity from jurisdiction to encourage and protect investments in international conventions. In doing so, they cannot be expected to have agreed to extend that mechanism to investments that violate their laws; likewise, it cannot be expected that States would want illegal investments by their nationals to be protected under those international conventions. This principle . . . applies to the substance of the protection when the relevant international instrument, such as the ECT in this case, does not specifically refer to a requirement of legality."); *Blusun S.A. v. Italian Republic*, ICSID Case No. ARB/14/3, Award ¶ 264 (Dec. 27, 2016) ("[I]t is true that the ECT does not lay down an explicit requirement of legality, but the Tribunal concludes that it does not cover investments which are actually unlawful under the law of the host state at the time they were made because protection of such investments would be contrary to the international public order.").

[10] *See, e.g.*, *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction ¶¶ 85-86 (Apr. 29, 2004) (noting, in a dispute under a treaty that included an express legality requirement, that "to exclude an investment on the basis of . . . minor errors would be inconsistent with the object and purpose of the Treaty"); *Metal-Tech Ltd v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award ¶ 165 (Oct. 4, 2013) (stating with respect to the underlying treaty's legality requirement that "the subject-matter scope of the legality requirement" covers issues including "non-trivial violations of the host State's legal order").

claims brought under Article 10.16.1(b)) has incurred loss or damage.

10. Article 10.18.1 imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute.[11] As is made explicit by Article 10.18.1, the Parties did not consent to arbitrate an investment dispute if "more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach" and "knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage." Accordingly, a tribunal must find that a claim satisfies the requirements of, *inter alia*, Article 10.18.1, in order to establish a Party's consent to (and therefore the tribunal's jurisdiction over) an arbitration claim. Because a claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction under Chapter Ten,[12] including with respect to

[11] Investment tribunals interpreting the CAFTA-DR have routinely reached this conclusion. *See, e.g.*, *Corona Materials LLC v. Dominican Republic*, CAFTA/ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA ¶ 280 (May 31, 2016) (finding that the tribunal lacks jurisdiction due to application of the time bar); *Spence Int'l Invests., Berkowitz et al. v. Costa Rica*, CAFTA/ICSID Case No. UNCT/13/2, Interim Award (Corrected) ¶¶ 235-236 (May 30, 2017) ("*Berkowitz* Interim Award") (addressing the time-bar defense as a jurisdictional issue); *see also Resolute Forest Products, Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility ¶¶ 82-83 (Jan. 30, 2018) ("*Resolute* Decision on Jurisdiction and Admissibility") (holding that compliance with the time bar specified in NAFTA Articles 1116 and 1117 "goes to jurisdiction"); *Apotex Inc. v. United States of America*, NAFTA/UNCT, Award on Jurisdiction and Admissibility ¶¶ 314, 335 (June 14, 2013) ("*Apotex* Award") (parties treated the United States' time-bar objection as a jurisdictional issue, and the tribunal expressly found that NAFTA Article 1116(2) deprived it of "jurisdiction *ratione temporis*" with respect to one of the claimant's alleged breaches); *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Procedural Order No. 2 (Revised) ¶ 18 (May 31, 2005) (finding that that "an objection based on a limitation period for the raising of a claim is a plea as to jurisdiction for purposes of Article 21(4)" of the UNCITRAL Arbitration Rules (1976)).

[12] *Pac Rim Cayman LLC v. Republic of El Salvador*, CAFTA/ICSID Case No. ARB/09/12, Decision on Jurisdiction ¶ 2.8 (June 1, 2012) (finding "that it is impermissible for the Tribunal to found its jurisdiction on any of the Claimant's CAFTA claims on the basis of an assumed fact (*i.e.*, alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent). The application of that '*prima facie*' or other like standard is limited to testing the merits of a claimant's case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal's jurisdiction directly depends, such as the Abuse of Process, Ratione Temporis and Denial of Benefits issues in this case."). *See also Apotex* Award ¶ 150; *Vito G. Gallo v. Government of Canada*, NAFTA/UNCITRAL, Award ¶ 277 (Sept. 15, 2011) ("[A] claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional stage . . . ."); *Mesa Power Group, LLC v. Government of Canada*, NAFTA/PCA Case No. 2012-17, Award ¶ 236 (Mar. 24, 2016) ("*Mesa* Award") ("It is for the Claimant to establish the factual elements necessary to sustain the Tribunal's jurisdiction over the challenged measures."); *Phoenix Action, Ltd. v. Czech Republic,* ICSID Case No. ARB/06/5, Award ¶¶ 58-64 (Apr. 15, 2009) (summarizing relevant investment treaty arbitral awards and concluding that "if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established *prima facie*] at the jurisdictional phase"); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction ¶¶ 190-192 (Nov. 14, 2005) (finding that claimant "has the burden of demonstrating that its claims fall within the Tribunal's jurisdiction");

Article 10.18.1, a claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.[13]

11. The limitations period is a "clear and rigid" requirement that is not subject to any "suspension," "prolongation," or "other qualification."[14] An investor *first* acquires knowledge of an alleged breach and loss under Article 10.18.1 as of a particular "date." Such knowledge cannot *first* be acquired at multiple points in time or on a recurring basis. As the *Grand River* tribunal recognized in interpreting the analogous limitations provisions under Articles 1116(2) and 1117(2) of the NAFTA,[15] subsequent transgressions by a Party arising from a continuing course of conduct do not renew the limitations period once an investor knows, or should have known, of the alleged breach and loss or damage incurred thereby.[16]

12. Thus, where a "series of similar and related actions by a respondent state" is at issue, a claimant cannot evade the limitations period by basing its claim on "the most recent transgression" in that series.[17] To allow a claimant to do so would "render the limitations provisions ineffective[.]"[18] An ineffective limitations period would undermine and be contrary to the State party's consent because, as noted above, the Parties did not consent to arbitrate an investment dispute if more than three years have elapsed from the date on which the claimant

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Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction ¶ 79 (Apr. 22, 2005) (acknowledging claimant had to satisfy the burden of proof "required at the jurisdictional phase").

[13] *See also Berkowitz* Interim Award ¶¶ 163, 239, 245-246.

[14] The substantively identical NAFTA Chapter Eleven limitations period has been described as "clear and rigid" and not subject to any "suspension, prolongation, or other qualification." *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction ¶ 29 (July 20, 2006) ("*Grand River* Decision on Objections to Jurisdiction"); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002) ("*Feldman* Award"); *Apotex* Award ¶ 327 (quoting *Grand River* Decision on Objections to Jurisdiction).

[15] *See Grand River* Decision on Objections to Jurisdiction ¶ 81.

[16] *See Resolute* Decision on Jurisdiction and Admissibility ¶ 158 ("[W]hether a breach definitively occurring and known to the claimant prior to the critical date continued in force thereafter is irrelevant.").

[17] *Grand River* Decision on Objections to Jurisdiction ¶ 81.

[18] *Id.* Thus, although a legally distinct injury can give rise to a separate limitations period, a continuing course of conduct does not extend the limitations period under Article 10.18.1. Moreover, while measures taken outside of the three-year limitations period may be taken into account as background or contextual facts, such measures cannot serve as a basis for a finding of a breach under Article 10 of the CAFTA-DR. *See Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 348 (June 8, 2009) ("*Glamis* Award").

first acquired, or should have first acquired, knowledge of the breach and knowledge that the claimant has incurred loss or damage.

13. With regard to knowledge of "incurred loss or damage" under Article 10.18.1, a claimant may have knowledge of loss or damage even if the amount or extent of that loss or damage cannot be precisely quantified until some future date.[19] Moreover, the term "incurred" broadly means "to become liable or subject to."[20] Therefore, an investor may have "incurred" loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate.[21]

14. As noted, Article 10.18.1 requires a claimant to submit a claim to arbitration within three years of the "date on which the claimant first acquired, or should have first acquired, knowledge" of the alleged breach, and loss or damage incurred by the claimant. For purposes of assessing what a claimant should have known, the United States agrees with the reasoning of the *Grand River* Tribunal: "a fact is imputed to [sic] person if by exercise of reasonable care or diligence, the person would have known of that fact."[22] As that Tribunal further explained, it is appropriate to "consider in this connection what a reasonably prudent investor should have done in connection with extensive investments and efforts such as those described to the Tribunal."[23] Similarly, as the *Berkowitz* tribunal found, endorsing the reasoning in *Grand River* with respect to the analogous limitations provision in the CAFTA-DR, "the 'should have first acquired

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[19] *See Mondev International Ltd. v. United States of America,* NAFTA/ICSID Case No. ARB(AF)/99/2, Award ¶ 87 (Oct. 11, 2002) ("*Mondev* Award") ("A claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.").

[20] "Incur," MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/incur (last visited Nov. 9, 2023); *see also United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999) (finding that to "incur" means to "become liable or subject to" and that "a person may become 'subject to' an expense before she actually disburses any funds").

[21] *Grand River* Decision on Objections to Jurisdiction ¶ 77; *see also Berkowitz* Interim Award ¶ 213 (finding "the date on which the claimant first acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred").

[22] *Grand River* Decision on Objections to Jurisdiction ¶ 59.

[23] *Id*. ¶ 66 ("In the Tribunal's view, parties intending to participate in a field of economic activity in a foreign jurisdiction, and to invest substantial funds and efforts to do so, ought to have made reasonable inquiries about significant legal requirements potentially impacting on their activities . . . . This is particularly the case in a field that the prospective investors know from years of past personal experience to be highly regulated and taxed by state authorities.").

knowledge' test . . . is an objective standard; what a prudent claimant should have known or must reasonably be deemed to have known."[24]

Article 10.13 (Non-Conforming Measures)

15. Article 10.13.2 of the CAFTA-DR states "Articles 10.3, 10.4, 10.9, and 10.10 do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II." In Annex II, with respect to most-favored-nation treatments (Articles 10.4 and 11.3), the United States and the Dominican Republic "reserve[] the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of the Agreement" for "all sectors." This reservation is discussed below in conjunction with Article 10.4.

16. Article 10.13.5 further provides that "Articles 10.3, 10.4, and 10.10 do not apply to: (a) procurement; or (b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance." Article 10.13.5 thus exempts "procurement" from Chapter 10's obligations with respect to national treatment, most-favored-nation treatment, and appointments to senior management and boards of directors.

17. Article 2.1 defines "procurement" as the "process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale or use in the production or supply of goods or services for commercial sale or resale[.]"[25] A tribunal should determine the applicability of such a carve-out or reservation in advance of considering an alleged breach of Articles 10.3, 10.4, or 10.10.[26]

[24] *Berkowitz* Interim Award ¶ 209.

[25] Article 1.5 of the United States-Mexico-Canada Agreement contains the same definition.

[26] *Resolute Forest Products Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-13, Final Award (July 25, 2022) ¶ 371 (in the context of NAFTA, the tribunal found that "[i]n the case of Article 1108(7), […] if the Tribunal were to find that some of the Assistance Measures are 'procurement', 'subsides' or 'grants', the obligations provided under NAFTA Article 1102 would 'not apply' to them. As such, the Tribunal deems it appropriate to start with the analysis of Article 1108(7), before turning to the analysis under Article 1102(3) as applicable."); *see also Mercer International Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Award ¶ 6.50 (Mar. 6, 2018) ("*Mercer* Award"); *Mesa* Award ¶ 465.

Article 10.3 and 10.4 (National Treatment and Most-Favored-Nation Treatment)

18. Article 10.3 ("National Treatment") provides that each Party shall accord to investors and covered investments of the other Party "treatment no less favorable than that it accords, in like circumstances," to its own investors and their investments "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory." Article 10.4 ("Most-Favored-Nation Treatment") provides that each Party shall accord to investors and covered investments of the other Party "treatment no less favorable than that it accords, in like circumstances," to investors and investments of a non-Party (*i.e.*, a third State) in its territory "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments" in its territory. These obligations thus prohibit nationality-based discrimination between domestic and foreign investors (or investments of foreign and domestic investors) that are "in like circumstances."[27]

19. To establish a breach of Article 10.3, 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."[28] As the *UPS v. Canada* tribunal noted (with respect to the functionally identical provisions of the NAFTA), "[t]his is a legal burden that rests squarely with the Claimant. That burden never shifts . . . ."[29] Establishing a violation of Article 10.4 is the

[27] *The Loewen Group v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 139 (June 26, 2003) (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).

[28] 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." *See, e.g.*, *Mercer Int'l Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of the United States of America ¶ 10 (May 8, 2015).

[29] *United Parcel Service of America Inc. v. Government of Canada*, NAFTA/UNCITRAL, ICSID Case No. UNCT/02/1, Award on the Merits ¶ 84 (May 24, 2007); *see Mercer International Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of the United States of America ¶ 13 (May 8, 2015) ("Nothing in the text of Articles 1102 or 1103 [of the NAFTA] suggests a shifting burden of proof. Rather, the burden to prove a violation of these articles, and each element of its claim, rests and remains squarely with the claimant.").

same as establishing a violation of Article 10.3, except that the applicable comparator is an investor or investments of a third State.

20. Determining whether an investor or investment identified by a claimant is in like circumstances with the claimant or its investment is a fact-specific inquiry. As one tribunal observed, "[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."[30] The United States understands the term "circumstances" to denote conditions or facts that accompany treatment as opposed to the treatment itself. Thus, identifying appropriate comparators for purposes of the "like circumstances" analysis requires consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other possible relevant characteristics. When determining whether a claimant was in like circumstances with comparators, it or its investment should be compared to a domestic investor or investment, or for Article 10.4, an investor or investment of a third State, that is alike in all relevant respects *but for* the nationality of ownership. Whether treatment is accorded in like circumstances under Articles 10.3 or 10.4 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare objectives.[31]

21. Moreover, if the claimant does not identify treatment that is actually being accorded with respect to an investor or investment of a non-Party or another Party in like circumstances, no violation of Article 10.3 or 10.4 can be established.[32] In other words, a claimant must identify a measure adopted or maintained by a Party through which that Party accorded more favorable treatment, as opposed to speculation as to how a hypothetical measure might have applied to

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

[31] *See, e.g.*, *S.D. Myers, Inc. v. Government of Canada,* NAFTA/UNCITRAL, First Partial Award ¶ 250 (Nov. 13, 2000) ("*S.D. Myers* First Partial Award") (in the context of NAFTA, determining that an "assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest").

[32] UN Conference on Trade & Dev. [UNCTAD], UNCTAD Series on Issues in International Investment Agreements II, *Most-Favoured-Nation Treatment*, 23-24 (2010) (noting that a comparison between two foreign investors in like circumstances is required to assess an alleged breach of an MFN treatment clause).

investors of a non-Party or another Party. Additionally, a Party does not accord treatment through the mere existence of provisions in its other international agreements such as conditions to consent, procedural provisions, umbrella clauses, or clauses that impose autonomous fair and equitable treatment standards. Treatment accorded by a Party could include, however, measures adopted or maintained by a Party in connection with carrying out its obligations under such provisions.

Annex II of the CAFTA-DR

22. Where a claimant alleges that it has received less favorable treatment in like circumstances than investors of another Party or a non-Party, with respect to measures adopted or maintained that accord treatment to investors of countries pursuant to a bilateral or multilateral international agreement, the claimant must also establish that the alleged non-conforming measures that constituted "less favorable" treatment are not subject to the reservations contained in Annex II of the CAFTA-DR. Both the United States and the Dominican Republic reserved "the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement."

Article 10.5 (Minimum Standard of Treatment)

23. Article 10.5.1 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."

24. Article 10.5.2 specifies that:

> For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. 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 that standard, and do not create additional substantive rights.

25. Article 10.5.2 then goes on to state:

> The obligation in paragraph 1 to provide:
>
> (a) "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; and
>
> (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

26. The above provisions demonstrate the Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in Article 10.5. 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."[33]

Methodology for determining the content of customary international law

27. Annex 10-B to the Treaty addresses the methodology for determining whether a customary international law rule covered by Article 10.5.1 has crystalized. The Annex expresses the Parties' "shared understanding that 'customary international law' generally and as specifically referenced in Article 10.5 . . . results from a general and consistent practice of States that they follow from a sense of legal obligation." Thus, in Annex 10-B the Parties confirmed their understanding and application of this two-element approach—State practice and *opinio juris*—which is the standard approach of States and international courts, including the International Court of Justice.[34]

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

[34] *See Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, 122 (Feb. 3) ("*Jurisdictional Immunities of the State*, 2012 I.C.J.") ("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. 3, 44, ¶ 77 (Feb. 20)) ("*North Sea Continental Shelf*, 1969 I.C.J."); *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, ¶ 29-30 (June 3).

28. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate, under this two-element approach, that a rule of customary international law exists. In its decision on *Jurisdictional Immunities of the State (Germany v. Italy)*,[35] 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.[36]

29. 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*.[37] "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."[38] Tribunals applying the minimum standard of treatment obligation in Article 1105 of NAFTA Chapter Eleven, which likewise affixes the standard to customary international law,[39] 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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[35] *Jurisdictional Immunities of the State*, 2012 I.C.J. at 99.

[36] *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); *see also* International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries (2018), Conclusion 6 ("Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts.").

[37] *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20); *see also North Sea Continental Shelf*, 1969 I.C.J. at 43; *Glamis* Award ¶¶ 601-602 (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).

[38] *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).

[39] 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.[40]

30. 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.[41] 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."[42] A failure to satisfy requirements of domestic law does not necessarily violate international law.[43] Rather, "something more than simple illegality or lack of

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[40] *Cargill Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/05/2, Award ¶ 273 (Sept. 18, 2009) ("*Cargill* Award") (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 Corp. v. United States of America,* NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Part IV, Chapter C ¶ 26 (Aug. 3, 2005) ("*Methanex* Final Award") (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).

[41] *See 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).

[42] *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"); *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 127 (Jan. 26, 2006) ("*Thunderbird* Award") (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).

[43] *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."); *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).").

authority under the domestic law of a state is necessary to render an act or measure inconsistent with the customary international law requirements. . . ."[44] Accordingly, a departure from domestic law does not in-and-of-itself sustain a violation of Article 10.5.

Obligations that have crystallized into the minimum standard of treatment

31. 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 10.5, 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."

32. Other areas included within the minimum standard of treatment concern the obligation not to expropriate covered investments except under the conditions specified in Article 10.7 and the obligation to provide "full protection and security," which, as expressly stated in Article 10.5.2(b), "requires each Party to provide the level of police protection required under customary international law."[45]

Obligations that have not crystallized into the minimum standard of treatment

Legitimate Expectations

33. The concept of "legitimate expectations" is not a component element of "fair and equitable treatment" under customary international law that gives rise to an independent host State obligation. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations; instead, something more is required.[46] An investor may develop its own

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[44] *ADF* Award ¶ 190.

[45] *See also The Loewen Group, et al. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Counter-Memorial of the United States, at 176 (Mar. 30, 2001) ("[C]ases in which the customary international law obligation of full protection and security was found to have been breached are limited to those in which a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien."); *Methanex v. United States of America*, NAFTA/UNCITRAL, Rejoinder Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment (June 27, 2001), at 39 (same).

[46] *See, e.g.*, *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America at 96 (Dec. 22, 2008) ("*Grand River* U.S. Counter-Memorial")

expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment.

Non-Discrimination

34. Similarly, the customary international law minimum standard of treatment set forth in Article 10.5 does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination.[47] As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.[48] To the extent that the customary international law minimum standard of treatment incorporated in Article 10.5 prohibits discrimination, it does so only in the context of other established

("As a matter of international law, although an investor may develop its own expectations about the legal regime that governs its investment, those expectations do not impose a legal obligation on the State."); PATRICK DUMBERRY, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105, 159-160 (2013) ("In the present author's view, there is little support for the assertion that there exists under customary international law any obligation for host States to protect investors' legitimate expectations."). Indeed, NAFTA tribunals have declined to find breaches of Article 1105 even where the claimant's purported expectations arose from a contract. *See also Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States*, NAFTA/ICSID Case No. ARB/(AF)/97/2, Award ¶ 87 (Nov. 1, 1999) ("NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes."); *Waste Management, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/00/3, Award ¶ 115 (Apr. 30, 2004) (explaining that "even the persistent non-payment of debts by a municipality is not equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and . . . some remedy is open to the creditor to address the problem").

[47] *See Grand River* Award ¶¶ 208-209 (In the context of NAFTA, arguing that "[t]he 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.").

[48] *See Methanex* Final Award, Part IV, Chapter 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 (1939) 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.").

customary international law rules, such as prohibitions against discriminatory takings,[49] access to judicial remedies or treatment by the courts,[50] or the obligation of States to provide full protection and security and to compensate aliens and nationals on an equal basis in times of violence, insurrection, conflict or strife.[51] Moreover, investor-State claims of nationality-based

[49] *See, e.g.*, *BP Exploration Co. (Libya) Ltd. V. Libya*, 53 I.L.R. 297, 329 (Ad Hoc Arb. 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 (Ad Hoc Arb. 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 (Ad Hoc Arb. 1982) (considering the question "whether the nationalization of Aminoil was not thereby tainted with discrimination," but finding that there were legitimate reasons for nationalizing one company and not the other); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712(1)(b) (AM. LAW INST. 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.* at § 712 cmt. f ("Formulations of the rules on expropriation generally include a prohibition of discrimination . . . .").

[50] *See, e.g.*, C.F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 243 (1967) ("Amerasinghe") ("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) ("BORCHARD (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 Guerrero Sub-Committee of the Committee of the League of 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 (Com. Arb. 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.").

[51] *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, 116 (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.").

discrimination are governed exclusively by the provisions of Chapter Ten that specifically address that subject (Articles 10.3 and 10.4), and not Article 10.5.[52]

Good Faith

35. The principle that "every treaty in force is binding on the parties to it and must be performed by them in good faith" (*i.e.*, *pacta sunt servanda*) is established in customary international law,[53] but is not part of the minimum standard of treatment or otherwise addressed by CAFTA-DR Chapter Ten. Thus, claims alleging breach of the good faith principle in a Party's performance of its Treaty obligations do not fall within the limited jurisdictional grant for investor-State disputes afforded in the Treaty.[54] Similarly, the good faith principle applies as between the States parties to the Treaty, and does not extend to third parties outside of the Treaty relationship; it is not an obligation owed to investors. As such, the good faith principle does not impose any obligation on the State to engage directly in negotiations with the investor.

36. Moreover, 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."[55] As such, customary international law does not impose a free standing, substantive obligation of "good faith" that, if breached, can

[52] *See Mercer* Award ¶ 7.58 ("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 (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").

[53] *See* Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 (reflecting the customary international law principle).

[54] *See, e.g.*, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 14, 135-36 ¶¶ 270-271 (June 27) (holding, with respect to a claim based on customary international law duties alleged to be "implicit in the rule *pacta sunt servanda*," that "the Court does not consider that a compromissory clause of the kind included in Article XXIV, paragraph 2, of the 1956 FCN Treaty, providing for jurisdiction over disputes as to its interpretation or application, would enable the Court to entertain a claim alleging conduct depriving the treaty of its object and purpose").

[55] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment, 1988 I.C.J. 69, 105-106, ¶ 94 (Dec. 20).

result in State liability.[56] Similarly, a claimant "may not justifiably rely upon the principle of good faith" to support a claim, absent a specific treaty obligation.[57]

* * *

37. States may decide expressly by treaty as a matter of policy to extend investment protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law.[58] The practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 10.5, in which "fair and equitable treatment" and "full protection and security" are expressly tied to the customary international law minimum standard of treatment.[59] Thus, arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other

[56] This consistent and longstanding position has been articulated in repeated submissions by the United States to NAFTA tribunals. *See, e.g.*, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL PCA Case No. 2012-17, Submission of the United States of America ¶ 7 (July 25, 2014) ("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.'"); *William Ralph Clayton et al. v. Government of Canada*, NAFTA/UNCITRAL PCA Case No. 2009-04, Submission of the United States of America ¶ 6 (Apr. 19, 2013) (same); *Grand River* U.S. Counter-Memorial at 94 ("[C]ustomary international law does not impose a free-standing, substantive obligation of 'good faith' that, if breached, can result in State liability. Absent a specific treaty obligation, a Claimant 'may not justifiably rely upon the principle of good faith' to support a claim."); *Canfor Corp. v. United States of America*, NAFTA/UNCITRAL, Reply on Jurisdiction of the United States of America, at 29 n.93 (Aug. 6, 2004) ("[Claimant] appears to argue that customary international law imposes a general obligation of 'good faith' independent of any specific NAFTA provision. The International Court of Justice, however, has squarely rejected that notion, holding that 'the principle of good faith . . . is not in itself a source of obligation where none would otherwise exist.'").

[57] *See Land and Maritime Boundary (Cameroon v. Nigeria)*, 1998 I.C.J. 275, 297, ¶ 39 (June 11).

[58] *See Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, 2007 I.C.J. 582, 615, ¶ 90 (May 24) ("The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.").

[59] Article 10.5.2 ("For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments."). *See also Grand River* Award ¶ 176 (noting that an obligation under Article 1105 of the NAFTA "must be determined by reference to customary international law, not to standards contained in other treaties or other NAFTA provisions, or in other sources, unless those sources reflect relevant customary international law"). While there may be overlap in the substantive protections ensured by this Treaty and other treaties, a claimant submitting a claim under this Treaty, in which fair and equitable treatment is defined by the customary international law minimum standard of treatment, still must demonstrate that the obligations invoked are in fact a part of customary international law.

treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 10.5.[60]

38. Moreover, decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary international law are not themselves instances of "State practice" for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice.[61] 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 10.5.1.

Article 10.7 (Expropriation)

39. Article 10.7 of the Agreement provides that no Party may expropriate or nationalize a covered investment (directly or indirectly) except for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate, and effective compensation; and in accordance with due process of law.[62] Compensation must be "prompt," in that it must be "paid without delay"[63];

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

[61] *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").

[62] Article 10.7 also clarifies that a Party may not expropriate a covered investment except in accordance with Article 10.5. The United States' views on the interpretation of Article 10.5 are provided *supra*.

[63] *See Mondev* Award ¶¶ 71-72 (Oct. 11, 2002) ("It is true that the obligation to compensate as a condition for a lawful expropriation (NAFTA Article 1110(1)(d)) does not require that the award of compensation should occur at exactly the same time as the taking. But for a taking to be lawful under Article 1110, at least the obligation to compensate must be recognised by the taking State at the time of the taking, or a procedure must exist at that time which the claimant may effectively and promptly invoke in order to ensure compensation. . . . The word[s] ['on payment'] should be interpreted to require that the payment be clearly offered, or be available as compensation for taking through a readily available procedure, at the time of the taking."). The requirement to provide "prompt, adequate, and effective compensation" for a lawful expropriation has been a feature of U.S. treaties for well over a half century. In that context, "prompt" has been understood to require a government to "diligently carry out orderly and nondilatory procedures . . . to ensure correct compensation and make payment as soon as possible." Charles Sullivan, *Treaty of Friendship, Commerce and Navigation: Standard Draft – Evolution Through January 1, 1962*, 112, 116 (U.S. Department of State, 1971).

"adequate," in that it must be made at the fair market value as of "the date of expropriation" and "not reflect any change in value occurring because the intended expropriation had become known earlier"; and "effective," in that it must be "fully realizable and freely transferable."

40. Annex 10-C of the Treaty establishes that Article 10.7.1 "reflect[s] customary international law concerning the obligation of States with respect to expropriation." Annex 10-C further states that a Party's actions cannot constitute an expropriation "unless it interferes with a tangible or intangible property right or property interest in an investment." As such, and because Article 10.7.1 protects "covered investments" from expropriation except in accordance with its conditions, the first step in any expropriation analysis must begin with an examination of whether there is an investment capable of being expropriated.[64] It is appropriate to look to the law of the host State[65] for a determination of the definition and scope of the property right or property interest at issue, including any applicable limitations.[66]

41. If an expropriation does not conform to each of the specific conditions set forth in Article 10.7.1, paragraphs (a) through (d), it constitutes a breach of Article 10.7. Any such breach requires compensation in accordance with Article 10.7.2.[67]

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[64] *Glamis* Award ¶ 356 ("There is for all expropriations, however, the foundational threshold inquiry of whether the property or property right was in fact taken."). *See also* Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law,* 176 RECUEIL DES COURS 259, 272 (1982) ("[O]nly *property* deprivation will give rise to compensation.") (emphasis in original); Rudolf Dolzer, *Indirect Expropriation of Alien Property,* 1 ICSID REV. FOR. INV. L.J. 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.'").

[65] *See, e.g.*, Higgins, *supra* note 72, at 270 (for a definition of "property . . . [w]e necessarily draw on municipal law sources").

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

[67] As the tribunal in *British Caribbean Bank v. Belize* confirmed with respect to very similar treaty language: "at no point does the Treaty, being a *lex specialis*, distinguish between lawful and unlawful expropriation. . . . Once the violation of the Treaty provisions regarding expropriation is established, the State has breached the Treaty." The tribunal, noting that the language "specifically negotiated" by the treaty parties required that "'compensation *shall* amount to the . . . fair market value of the investment expropriated before the expropriation,'" found no room for interpreting this language to allow for another standard of compensation in the event of a breach. *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18, Award ¶¶ 260-62 (Dec. 19, 2014) (emphasis added).

42. Under international law, where an action is a bona fide, non-discriminatory regulation, or application of such a regulation, it will not ordinarily be deemed expropriatory.[68] This principle in public international law, referred to as the police powers doctrine, is not an exception that applies after an expropriation has been found but, rather, is a recognition that certain actions, by their nature, do not engage State responsibility.[69]

43. The standard for compensation in the event of an expropriation is the same regardless of whether the expropriation was in compliance with the conditions set out in Article 10.7.1, or was in breach of those conditions. Where, at the time of the expropriation, a host State does not compensate or make provision for the prompt determination of compensation, the breach occurs at the time of the taking.[70] In contrast, "when a State provides a process for fixing adequate

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[68] *See, e.g.*, *Glamis*, Award ¶ 354 (quoting the RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712, cmt. (g) (1986) ("A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory. . . .")); *Chemtura Corp. v. Government of Canada*, NAFTA/UNCITRAL, Award ¶ 266 (Aug. 2, 2010) (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"); *Methanex* Final Award, Part IV, Ch. D ¶ 7 (holding that as a matter of general international law, a "a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process" will not ordinarily be deemed expropriatory or compensable).

[69] *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 539 (5th ed. 1998) ("Cases in which expropriation is allowed to be lawful in the absence of compensation are within the narrow concept of public utility prevalent in laissez-faire economic systems, *i.e*. exercise of police power, health measures, and the like."); G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT'L L., 307, 338 (1962) ("If, however, such prohibition can be justified as being reasonably necessary to the performance by a State of its recognized obligations to protect the public health, safety, morals or welfare, then it would normally seem that there has been no 'taking' of property.").

[70] *See Mondev* Award ¶ 72 ("Article 1110 requires that the nationalization or expropriation be 'on payment of compensation in accordance with paragraphs 2 through 6'. The word 'on' should be interpreted to require that the payment be clearly offered, or be available as compensation for taking through a readily available procedure, at the time of the taking. That was not the case here, and accordingly, if there was an expropriation, it occurred at or shortly after the rights in question were lost."). A breach of CAFTA-DR Article 10.7 will occur unless a host State observes its obligation to refrain from an uncompensated taking at the time of the expropriation by, for example, fixing, guaranteeing, or offering compensation. *See Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Rejoinder on Competence and Liability of Respondent United States of America, at 45 (Oct. 1, 2001) (citing authorities); *see also SEDCO, Inc. v. National Iranian Oil Co.*, Award No. 59-129-3,10 IRAN U.S. CL. TRIB. REP. 189, 204 n.39 (separate opinion Brower, J.) (Mar. 27, 1986) (describing a "taking itself" as wrongful "[i]f . . . no provision for compensation is made contemporaneously with the taking, or one is made which clearly cannot produce the required compensation, or unreasonably insufficient compensation is paid at the time of taking"); *Liberian Eastern Timber Corp. (LETCO) v. Government of the Republic of Liberia*, Award (Mar. 31, 1986), *in* 26 I.L.M. 647, 655 (1987) (finding Liberian Government deprived LETCO of its concession unjustifiably for failure to be "accompanied by payment (or at least the offer of payment) of appropriate compensation").

compensation, but then ultimately fails to promptly determine and pay such compensation," a breach of the compensation obligation may occur later, subsequent to the time of the taking.[71]

Claims for Indirect Expropriation

44. An indirect expropriation occurs "where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."[72] Annex 10-C, paragraph 4, of the CAFTA-DR provides specific guidance as to whether an action, including a regulatory action, constitutes an indirect expropriation. As explained in paragraph 4(a) of Annex 10-C, determining whether an indirect expropriation has occurred "requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action."

45. With respect to the first factor, an adverse economic impact "standing alone, does not establish that an indirect expropriation has occurred."[73] Moreover, it is a fundamental principle

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[71] *See IO European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award ¶¶ 422, 425 (Mar. 10, 2015), *translated in* Reply Memorandum of Law, *Bolivarian Republic of Venezuela,* No. Civ. 15-2178 (S.D.N.Y. May 7, 2015), E.C.F. No. 16 ("The Tribunal has already established that the LECUPS is a modern law, compliance with which in principle meets the requirements of Article 6(c) of the BIT. However, … the Tribunal concludes that the Bolivarian Republic has failed to offer a plausible explanation to justify the delay of more than four years in setting and paying the fair value due in compliance with the LECUPS, which in turn implies that the requirement under Article 6(c) of the BIT that the compensation be paid 'without undue delay' has not been met") ("El Tribunal ya ha establecido que la LECUPS es una legislación moderna, cuyo cumplimiento en principio cumpliría con los requisitos del Art. 6(c) del APRI. Sin embargo, … el Tribunal concluye que la República Bolivariana no ha ofrecido una explicación plausible que justifique el retraso de más de cuatro años en la fijación y en el pago al menos del justiprecio debido en cumplimiento de la LECUPS, lo que a su vez implica que no pueda considerarse cumplido el requisito del Art. 6(c) del APRI de que la compensación sea satisfecha "sin demora indebida."); *Goldenberg Case (Germany v. Romania)*, 2 R.I.A.A. 901, 909 (Sept. 27, 1928) ("[T]he requisition carried out by the German military authorities did not *initially* constitute an 'act contrary to the law of nations'. In order for this situation to continue, it was necessary, however, that within a reasonable delay, the claimants obtain equitable compensation. But such was not the case, the compensation, allocated several years after the requisition, amounting to barely a sixth of the value of the expropriated goods.") (translation by counsel; emphasis in original) ("[L]a réquisition opérée par l'autorité militaire allemande ne constituait pas *initialement* un 'acte contraire au droit des gens'. Pour qu'il continuât à en être ainsi, il fallait, cependant, que dans un délai raisonnable, les demandeurs obtinissent une indemnité équitable. Or tel n'a pas été le cas, l'indemnité, allouée plusieurs années après la réquisition, atteignant à peine le sixième de la valeur des biens expropriés.").

[72] CAFTA, Annex 10-C, ¶ 4; *see also* 2012 U.S. Model Bilateral Investment Treaty, ann. B (*Expropriation*) ¶ 4; *Lone Pine Resources Inc. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/15/2, Final Award ¶ 495 (Nov. 21, 2022) ("The concept of expropriation is well settled under customary international law as requiring either a direct taking or an outright transfer or seizure of the investor's property (direct expropriation) or a substantial deprivation, i.e., total or near-total deprivation, of the investor's property, without a formal transfer of title or outright seizure (indirect expropriation).").

[73] CAFTA-DR, Annex 10-C, para. 4(a)(i).

of international law that, for an expropriation claim to succeed the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as "to support a conclusion that the property has been 'taken' from the owner."[74]

46. The second factor requires an objective inquiry of the reasonableness of the claimant's investment-backed expectations. Whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation[75] or the potential for government regulation in the relevant sector.

47. The third factor considers the nature and character of the government action, including whether such action involves physical invasion by the government or whether it is more

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[74] *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Interim Award ¶ 102 (June 26, 2000); *see also Glamis* Award ¶ 357 ("[A] panel's analysis should begin with determining whether the economic impact of the complained of measures is sufficient to potentially constitute a taking at all: '[I]t must first be determined if the Claimant was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto . . . had ceased to exist.' The Tribunal agrees with these statements and thus begins its analysis of whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures 'substantially impair[ed] the investor's economic rights, *i.e.* ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings.'") (citations omitted); *Grand River* Award ¶¶ 149-50 (citing the *Glamis* Award); *Cargill* Award ¶ 360 (holding that a government measure only rises to the level of an expropriation if it affects "a radical deprivation of a claimant's economic use and enjoyment of its investment" and that a "taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property . . . (*i.e.*, it approaches total impairment)").

[75] *See, e.g.*, *Methanex* Final Award, Part IV, Ch. D ¶ 9 (noting that no specific commitments to refrain from regulation had been given to Methanex, which "entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons. Indeed, the very market for MTBE in the United States was the result of precisely this regulatory process"); *Grand River* Award ¶¶ 144-45 ("The Tribunal also notes that trade in tobacco products has historically been the subject of close and extensive regulation by U.S. states, a circumstance that should have been known to the Claimant from his extensive past experience in the tobacco business. An investor entering an area traditionally subject to extensive regulation must do so with awareness of the regulatory situation. Given the circumstances—including the unresolved questions involving the Jay Treaty and U.S. domestic law, and the practice of heavy state regulation of sales of tobacco products—the Tribunal holds that Arthur Montour could not reasonably have developed and relied on an expectation, the non-fulfillment of which would infringe NAFTA, that he could carry on a large-scale tobacco distribution business, involving the transportation of large quantities of cigarettes across state lines and into many states of the United States, without encountering state regulation."); *Glamis* U.S. Rejoinder 91 ("Consideration of whether an industry is highly regulated is a standard part of the legitimate expectations analysis, and . . . where an industry is already highly regulated, reasonable extensions of those regulations are foreseeable.").

regulatory in nature (*i.e.*, whether "it arises from some public program adjusting the benefits and burdens of economic life to promote the common good").[76]

48. Further, paragraph 4(b) provides that "[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations." This paragraph is not an exception, but rather is intended to provide tribunals with additional guidance in determining whether an indirect expropriation has occurred.

Chapter 10 and Contract Breaches

49. Mere breaches of a contract are not *per se* violations of international law, or specifically of the State's obligations under Chapter Ten.[77] Rather, a State may be responsible for a breach of contract in some circumstances, such as when a "repudiation of the contract is discriminatory or motivated by non-commercial considerations."[78] Moreover, to breach the minimum standard of treatment, for example, "something more is required, such as a complete repudiation of the contract or a denial of justice in the execution of the contract."[79]

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

[77] *See* Amerasinghe at 119.

[78] *See Mondev International Ltd. v. United States of America,* NAFTA/ICSID Case No. ARB(AF)/99/2, Counter-Memorial on Competence and Liability of the Respondent United States of America 35 (June 1, 2001); *see also* Stephen M. Schwebel, *On Whether the Breach by a State of a Contract with an Alien Is a Breach of International Law*, *in* JUSTICE IN INTERNATIONAL LAW: SELECTED WRITINGS OF STEPHEN M. SCHWEBEL 425, 429 (1994) (noting that if a State repudiates or violates its obligations under a contract with a foreign national, it is responsible for such a violation 'only if it' – the breach – 'is discriminatory . . . or if it is akin to an expropriation in that the contract is repudiated or breached for governmental rather than commercial reasons.'").

[79] *Grand River* U.S. Counter-Memorial at 97 (citing ILC Draft Articles, art. 4, cmt. 6 ("Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party.")).

Respectfully submitted,

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