

IN THE ARBITRATION UNDER CHAPTER TEN OF THE
UNITED STATES-PANAMA TRADE PROMOTION AGREEMENT, THE TREATY BETWEEN THE UNITED
STATES OF AMERICAN AND THE REPUBLIC OF PANAMA CONCERNING THE TREATMENT AND
PROTECTION OF INVESTMENTS, WITH AGREED MINUTES, AS AMENDED, AND THE ICSID
CONVENTION

OMEGA ENGINEERING LLC AND MR. OSCAR RIVERA,

Claimants,

-and-

THE REPUBLIC OF PANAMA,

Respondent.

ICSID CASE NO. ARB/16/42

SUBMISSION OF THE UNITED STATES OF AMERICA

1. The United States of America hereby makes this submission pursuant to Article 10.20.2 of the United States-Panama Trade Promotion Agreement (“U.S.-Panama TPA”) and the Treaty between the United States of America and the Republic of Panama concerning the Treatment and Protection of Investment, with Agreed Minutes, as amended (“U.S.-Panama BIT”) (or jointly, “the Agreements”) regarding the interpretation of the Agreements. 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.

Most-Favored-Nation-Treatment (Article 10.4 of the U.S.-Panama TPA)

2. Article 10.4 of the U.S.-Panama TPA provides:

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. (Emphases added.)

3. To establish a breach of most-favored-nation treatment (“MFN”) under Article 10.4, a claimant has the burden of proving that it or its investments: (1) were accorded “treatment”; (2) were in “like circumstances” with investors or investments (“comparators”) of a third State (*i.e.*, of a State which is not a Party to the U.S.-Panama TPA); and (3) received treatment “less favorable” than that accorded to such investors or investments.¹ As the *UPS v. Canada* tribunal noted with respect to the national treatment obligation of NAFTA Article 1102,² “[t]his is a legal burden that rests squarely with the Claimant. That burden never shifts. . . .”³

4. Article 10.4 is intended to prevent discrimination on the basis of nationality by the Party that is hosting the investment between investors (or investments) of the other Party and investors (or investments) of a third State. 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.⁴ A claimant is not required to establish discriminatory intent.

5. 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 third-State investor or investment in like circumstances, on the other. It is therefore incumbent upon the claimant to identify third-State investors or investments as comparators. If the claimant does not identify any third-State investor or investment as allegedly being in like circumstances, no violation of Article 10.4 can be established.

6. 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, “[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.”⁵ 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 relevant characteristics.

¹ 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).

² The requirements for establishing a breach of MFN treatment are the same as for establishing a breach of national treatment, except for the nationality of the comparators. For alleged breaches of MFN treatment, the nationality of the comparators must be of a third State, whereas for alleged breaches of national treatment the nationality of the comparators must be from the host State.

³ *United Parcel Service of America Inc. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/02/1, Award on the Merits ¶ 84 (May 24, 2007).

⁴ *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, 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); *See Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award ¶ 7.7 (Mar. 4, 2018) (“*Mercer Award*”) (accepting the positions of the United States and Mexico that the National Treatment and Most-Favored Nation obligations are intended to prevent discrimination on the basis of nationality).

⁵ *See, e.g., Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Award on the Merits of Phase 2, ¶ 75 (Apr. 10, 2001) (discussing the term “like circumstances” in the context of a national treatment claims).

When determining whether a claimant was in like circumstances with comparators, it or its investment should be compared to a national 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 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.

7. Nothing in Article 10.4 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 third-State investor or any investment of a national. The appropriate comparison is between the treatment accorded a foreign 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 10.4.

8. With respect to the third component of an MFN claim noted in paragraph 3, a claimant must also establish that the alleged non-conforming measure(s) that constituted “less favorable” treatment are not subject to the reservations contained in Annex II of the U.S.-Panama TPA, as set forth in Article 10.13.2. In particular, both Parties reserved “the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement(s) in force or signed prior to the date of entry into force of this Agreement.”⁶

9. A claimant must meet the basic requirement of Article 10.4 to identify a comparator “in like circumstances.” The MFN clause of the U.S.-Panama TPA expressly requires a claimant to demonstrate that investors of another Party or a non-Party “in like circumstances” were afforded more favorable treatment. Ignoring the “in like circumstances” requirement would serve impermissibly to excise key words from the Agreement.

10. Nor can Article 10.4 be used to alter the substantive content of the fair and equitable treatment or full protection and security obligations under Article 10.5. As noted in the submissions on Article 10.5 below, Article 10.5.2 clarifies that the concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. Article 10.5.3 further clarifies that a “breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.”

Minimum Standard of Treatment (Article 10.5 of the U.S.-Panama TPA and Article II(2) of the U.S.-Panama BIT)

11. Article 10.5 of the U.S.-Panama TPA includes both the “fair and equitable treatment” and “full protection and security” obligations, and provides:

Article 10.5: Minimum Standard of Treatment¹

⁶ U.S.-Panama TPA, Annex II, Schedule of the United States, at II-US-10; Annex II, Schedule of Panama, at II-PA-7.

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
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. 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. 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.
3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

12. Footnote 1 to Article 10.5 provides: “Article 10.5 shall be interpreted in accordance with Annex 10-A.” Annex 10-A is the Customary International Law Annex.

13. Article II(2) of the U.S-Panama BIT also includes both the fair and equitable treatment and full protection and security obligations, and provides in relevant part:

Investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws and international law.

14. Article 10.5 demonstrates the Parties’ express intent to establish the customary international minimum standard of treatment as the applicable law. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law. The standard establishes a minimum “floor below which treatment of foreign investors must not fall.”⁷

15. As explicitly noted in Article 10.5, two of these rules are the “fair and equitable treatment” and “full protection and security” obligations. As used in the U.S-Panama BIT, these two terms reflect obligations in the minimum standard of treatment under customary international law.

⁷ *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 259 (Nov. 13, 2000) (“*S.D. Myers* First Partial Award”); see also *Glamis Gold Ltd. v. United States*, NAFTA/UNCITRAL, Award ¶ 615 (June 8, 2009) (“*Glamis* Award”) (“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*”).

16. Annex 10-A to the U.S.-Panama TPA addresses the methodology for interpreting customary international law rules covered by the minimum standard of treatment. 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-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 States and the decisions of international courts and tribunals, including the International Court of Justice.”⁸

17. 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: Greece Intervening)*.⁹ 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.¹⁰ 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.¹¹ 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.

18. 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

⁸ 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).

⁹ *Jurisdictional Immunities of the State*, 2012 I.C.J. at 99.

¹⁰ *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).

¹¹ 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”).

opinio juris.¹² “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.”¹³ Tribunals applying the minimum standard of treatment obligation in Article 1105 of NAFTA Chapter Eleven, which likewise affixes the standard to customary international law,¹⁴ have confirmed that the party seeking to rely on a rule of customary international law must establish its existence. The tribunal in *Cargill, Inc. v. Mexico*, for example, acknowledged that

the proof of change in a custom is not an easy matter to establish. However, *the burden of doing so falls clearly on Claimant*. If the Claimant does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task. Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.¹⁵

19. 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.¹⁶ 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.”¹⁷ A failure to satisfy requirements of domestic law does not

¹² *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).

¹³ *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).

¹⁴ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions ¶ B.1 (July 31, 2001).

¹⁵ *Cargill, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB/(AF)/05/2, Award ¶ 273 (emphasis added) (“*Cargill Award*”). 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 of the Tribunal on Jurisdiction and Merits, Part IV, Ch. 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).

¹⁶ *Marvin Feldman v. Mexico*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) (“*Feldman Award*”) (“[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).

¹⁷ *S.D. Myers First Partial Award* ¶ 263; *see also Mesa Power Group LLC v. Government of Canada, PCA Case No. 2012-17, Award, ¶ 246 (Mar. 24, 2016)* (“*Mesa Award*”) (“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

necessarily violate international law.¹⁸ 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. . . .”¹⁹ Accordingly, a departure from domestic law does not in-and-of-itself sustain a violation of Article 10.5.

Rules Included within the Minimum Standard of Treatment

20. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas, including those discussed below.

Fair and Equitable Treatment

21. One such area, expressly addressed in Article 10.5.2(a), 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.”

Full Protection and Security

22. Another rule included as part of the minimum standard of treatment is the obligation to provide full protection and security. The United States has long maintained that the customary international law obligation to accord “full protection and security” requires that each Party provide the level of police protection required under customary international law.²⁰ Although as discussed above, arbitral decisions are not in and of themselves evidence of State practice, the vast majority of cases in which the customary international law obligation of full protection and security was found to have been breached are those in which a State failed to provide reasonable

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).

¹⁸ *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).”).

¹⁹ *ADF Award* ¶ 190.

²⁰ *See, e.g.*, U.S. 2004 and 2012 Model Bilateral Investment Treaties, Art. 5 (Minimum Standard of Treatment), paragraph 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. 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. The obligation in paragraph 1 to provide: . . . (b) “full protection and security” requires[s] each Party to provide the level of police protection required under customary international law.”

police protection against acts of a criminal nature that physically invaded the person or property of an alien.²¹

23. The United States has consistently maintained, moreover, that the obligation to provide “full protection and security” does not, for example, require States to prevent economic injury inflicted by third parties;²² provide for legal protection; or require States to guarantee that aliens or their investments are not harmed under any circumstances. Such interpretations would impermissibly extend the duty to provide “full protection and security” beyond the minimum standard under customary international law.

Concepts that Have Not Crystallized into the Minimum Standard

Legitimate Expectations

24. 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.²³ The United States is aware of no general and consistent State practice and

²¹ See, e.g., *American Mfg. & Trading, Inc. v. Zaire*, 36 I.L.M. 1531 (1997) (failure to prevent destruction and looting of property constituted violation of protection and security obligation); *Asian Agric. Products Ltd. v. Sri Lanka*, 30 I.L.M. 577 (1991) (destruction of claimant's property violated full protection and security obligation); *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, 1980 I.C.J. 3 (May 24) (failure to protect foreign nationals from being taken hostage violated most constant protection and security obligation); *Chapman v. United Mexican States (United States v. Mexico)*, 4 R.I.A.A. (Mex.-U.S. Gen. Cl. Comm'n 1930) (lack of protection found where claimant was shot and seriously wounded); *H.G. Venable (U.S. v. Mex.)*, 4 R.I.A.A. 219 (Mex.-U.S. Gen. Cl. Comm'n 1927) (bankruptcy court indirectly responsible for physical damage to attached property); *Biens Britanniques au Maroc Espagnol (Reclamation 53 de Melilla - Ziat, Ben Kiran) (Spain v. Great Britain)*, 2 R.I.A.A. 729 (1925) (reasonable police protection would not have prevented mob from destroying claimant's store). Other cases are in accord. See, e.g., *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award ¶ 632 (Apr. 4, 2016) (holding that the “full protection and security” treaty standard “only extends to the duty of the host state to grant physical protection and security”); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability ¶ 173 (June 30, 2010) (holding that “the full protection and security standard primarily seeks to protect investment from physical harm”); *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, ¶ 484 (Mar. 17, 2006) (“[T]he ‘full security and protection’ clause is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force.”). See also, e.g., Article 7(1) of the *Responsibility of the State for injuries caused in its territory to the person or property of aliens: Revised draft, reprinted in F.V. GARCIA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 129, 130 (1974) (“The State is responsible for the injuries caused to an alien by illegal acts of individuals, whether isolated or committed in the course of internal disturbances (riots, mob violence or civil war), if the authorities were manifestly negligent in taking the measures which, in view of the circumstances, are normally taken to prevent the commission of such acts.”).

²² See, e.g., *Methanex Corp. v. United States of America*, Reply Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment, at 38-39 (Apr. 12, 2001) (“Indeed, if the full protection and security requirement were to extend to an obligation to ‘protect foreign investments from economic harm inflicted by third parties,’ . . . Article 1105(1) would constitute a very substantial enlargement of that requirement as it has been recognized under customary international law.”); *Methanex Corp. v. United States of America*, Rejoinder of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment, at 39 (July 27, 2001) (accord); *Loewen Group, Inc. v. United States of America*, NAFTA/ICSID Case No. ARB (AF)/98/3, Counter-Memorial of the United States of America, at 179-80 (Mar. 30, 2001) (accord).

²³ See PATRICK DUMBERRY, *THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105*, at 158-59 (2013) (“DUMBERRY”) (“In the present author’s view, there is little support for the

opinio juris establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. The mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.²⁴

Non-Discrimination

25. In addition, the customary international law minimum standard of treatment set forth in Article 10.5.1 does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination.²⁵ As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.²⁶ 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 customary international law rules, such as prohibitions against discriminatory takings,²⁷ access to

assertion that there exists under customary international law any obligation for host States to protect investors' legitimate expectations.”).

²⁴ Indeed, the United States, Mexico and Canada recently addressed this point, agreeing as follows: “For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article [addressing the Minimum Standard of Treatment], even if there is loss or damage to the covered investment as a result.” United States Mexico Canada Agreement (“USCMCA”) Article 14.6.4. As a general practice the United States uses the words “*for greater certainty*” in its international trade and investment agreements to introduce confirmation regarding the meaning of the agreement. In the U.S. practice, the phrase “*for greater certainty*” signals that the sentence it introduces reflects the understanding of the United States and the other agreement party or parties of what the provisions of the agreement would mean even if that sentence were absent. As a consequence, “*for greater certainty*” sentences also serve to spell out more explicitly the proper interpretation of similar provisions in other agreements. The USMCA is not yet in force.

²⁵ See *Grand River Enterprises Six Nations, Ltd. v. United States of America, NAFTA/UNCITRAL, Award*, ¶¶ 208-209 (Jan. 12, 2011) (“*Grand River Award*”) (“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.”).

²⁶ 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* 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.”).

²⁷ 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

judicial remedies or treatment by the courts,²⁸ 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.²⁹ Moreover, general investor-State claims of nationality-based discrimination are governed exclusively by the provisions of Chapter Ten that specifically address that subject, and not Article 10.5.1.³⁰

Transparency

26. The concept of “transparency” also has not crystallized as a component of “fair and equitable treatment” under customary international law giving rise to an independent host-State

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”).

²⁸ *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) (“BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD”) (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 (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.”).

²⁹ *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.”).

³⁰ *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 (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”).

obligation.³¹ The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation of host-State transparency under the minimum standard of treatment.

Good Faith

27. With respect to the concept of “good faith,” in creating an investor-State dispute settlement mechanism in the Agreements, the United States and Panama specified the treaty obligations, the breach of which may be submitted to arbitration. U.S.-Panama TPA Article 10.16(1)(a) and (1)(b) provide that the only treaty obligations that may be arbitrated are those found in Section A of Chapter Ten. These provisions do not provide consent to arbitrate disputes based on alleged breaches of obligations found in other articles or chapters of the NAFTA or alleged breaches of other treaties or other international obligations.³²

28. Likewise, Article VII(1)(c) of the U.S.-Panama BIT provides that the only treaty obligations subject to investor-State arbitration are those that are conferred or created by the BIT itself.

29. The principle that “every treaty in force is binding on the parties to it and must be performed by them in ‘good faith’” is established in customary international law, not in Section A of the U.S.-Panama TPA nor in Article VII(1)(c) of the U.S.-Panama BIT. As such, claims alleging breach of the good faith principle do not fall within the limited jurisdictional grant of either of the Agreements.³³

³¹ See *United Mexican States v. Metalclad Corp.*, 2001 BCSC 664, ¶¶ 68, 72 (British Columbia Supreme Court, May 2, 2001) (holding that “[n]o authority was cited or evidence introduced [in the *Metalclad* arbitration] to establish that transparency has become part of customary international law,” and that “there are no transparency obligations contained in [NAFTA] Chapter 11”); *Feldman Award* ¶ 133 (finding that “it is doubtful that lack of transparency alone rises to the level of violation of NAFTA and international law,” and holding the British Columbia Supreme Court’s decision in *Metalclad* to be “instructive”); *Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/07/1, Award ¶¶ 208, 231 (Mar. 31, 2010) (stating that “a requirement for transparency may not at present be proven to be part of the customary law standard, as the judicial review of *Metalclad* rightly concluded,” though speculating that it might be “approaching that stage”).

³² See, e.g., *Mesa Award*, ¶ 246 (“[U]nder Article 1116, this Tribunal’s jurisdiction is limited to claims of an ‘investor’ of one NAFTA Party ... that another NAFTA Party has breached Section A (i.e. Articles 1101-1114) of Chapter 11 of the NAFTA... .”); *Grand River Award*, ¶ 71 (“The Tribunal understands the obligation to ‘take into account’ other rules of international law to require it to respect the Vienna Convention’s rules governing treaty interpretation. However, the Tribunal does not understand this obligation to provide a license to import into NAFTA legal elements from other treaties, or to allow alteration of an interpretation established through the normal interpretive processes of the Vienna Convention. This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA.”); *United Parcel Service of America Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction, ¶ 60 (Nov. 22, 2002) (“Article 1116 concerning investor-State disputes, like the similar article 1117, states the extent of what the Parties have agreed to in respect of claims being submitted to arbitration against each of them by an investor of another Party. Other provisions may shed light on this article, but substantive terms of other provisions will not necessarily state obligations subject to dispute resolution unless they fall within the purview of article 1116.”); *Methanex Final Award*, Part II, ch. B, ¶ 5 (Aug. 3, 2005) (“As interpreted by the Tribunal, its jurisdiction is here limited by Articles 1116-1117 NAFTA to deciding claims that the USA has breached an obligation under Section A of Chapter 11.”).

³³ See, e.g., *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, 1986 I.C.J. 14, 135-136, ¶¶ 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

30. Furthermore, 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.”³⁴ As such, customary international law does not impose a free-standing, substantive obligation of “good faith” that, if breached, can result in State liability.³⁵

Expropriation (Article 10.7 of the U.S.-Panama TPA and Article IV of the U.S.-Panama BIT)

31. Article 10.7 of the U.S.-Panama TPA provides that no Party may expropriate or nationalize property (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.³⁶ Compensation must be “prompt,” in that it must be “paid without delay”;³⁷ “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.³⁸

32. Article IV(1) of the U.S.-Panama BIT provides:

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”).

³⁴ *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 1988 I.C.J. 69, 105-106, ¶ 94 (Dec. 20).

³⁵ 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*, 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 & Bilcon of Delaware Inc. et al. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America, ¶ 6 (Apr. 19, 2013) (same); *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America, at 94 (Dec. 22, 2008) (“[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 Respondent 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.’”).

³⁶ 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 above.

³⁷ See *Mondev Int’l Ltd. v. United States*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award ¶ 71 (“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 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).

³⁸ U.S.-Panama TPA, art. 10.7.2(a)-(d).

Investment of a national or a company of either Party shall not be expropriated, nationalized, or subjected to any other direct or indirect measure having an effect equivalent to expropriation of nationalization ("expropriation") in the territory of the other Party, except for a public or social purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process and the general principles of treatment laid down in Article II(2). Such compensation shall amount to the full value of the expropriated investment immediately before the expropriatory action became known; include interest at a commercially reasonable rate; be paid without delay; be effectively realizable; and be freely transferable.

33. Both these provisions set forth the obligation of States with respect to expropriation ("expropriation obligation") as it exists under customary international law.

34. The U.S.-Panama TPA makes that clear in footnote 2, which requires that the expropriation provision in Article 10.7 be interpreted in Accordance with Annexes 10-A (Customary International Law) and 10-B (Expropriation). Annex 10-B, paragraph 1 explicitly states that Article 10.7 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

35. The expropriation provision of the U.S.-Panama-BIT also reflects customary international law concerning the obligation of States with respect to expropriation, which is made clear by the Letter of Transmittal that President Ronald Reagan sent to the Senate of the United States along with the BIT. As President Reagan explained, "[u]nder this treaty, the parties also agree to international law standards for expropriation and compensation; free financial transfers; and procedures, including international arbitration, for the settlement of investment disputes."³⁹

36. The expropriation obligation under customary international law may arise in two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.⁴⁰ The second is indirect expropriation.

37. Moreover, under international law, where an action is a *bona fide*, non-discriminatory measure, it will not ordinarily be deemed expropriatory.⁴¹ This principle is not an exception that

³⁹ Letter of Transmittal from President Ronald Reagan to Senate of the United States (Mar. 25, 1986) included in Senate Treaty Doc. 99-14 (99th Congress 2d Session) (emphasis added); *see also* Letter of Transmittal from Secretary George Shultz to President Ronald Reagan (Feb. 20, 1986) included in Senate Treaty Doc. 99-14 (99th Congress 2d Session) ("International law standards shall apply to the expropriation of investments and to the payment of compensation for expropriation.").

⁴⁰ U.S.-Panama TPA, Annex 10-B ¶ 3.

⁴¹ *See, e.g., Glamis Award* ¶ 354 (quoting the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712, cmt. (g) (1987) ("RESTATEMENT OF FOREIGN RELATIONS LAW") ("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 non-discriminatory regulation for a public purpose,

applies after an expropriation has been found, but rather is a recognition that certain actions, by their nature, do not engage State responsibility under the expropriation obligation.⁴²

38. Annex 10-B, paragraph 4 of the U.S.-Panama TPA provides specific guidance as to whether an action constitutes an indirect expropriation. As explained in paragraph 4(a) of Annex 10-B, determining whether an indirect expropriation has occurred “requires a case-by-case, fact-based inquiry” that considers, among other factors: (i) the economic impact of the government action; (ii) the extent to which that action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.

39. With respect to the first factor, an adverse economic impact “standing alone, does not establish that an indirect expropriation has occurred[.]”⁴³ It is a fundamental principle of international law that, for an expropriation claim to succeed a 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.”⁴⁴ Moreover, to constitute an expropriation, a deprivation must be more than merely “ephemeral.”⁴⁵

which is enacted in accordance with due process” will not ordinarily be deemed expropriatory or compensable); Caplan & Sharpe at 791-792 (discussing observation included in Annex B, paragraph 4(b) of U.S. 2012 Model BIT that “[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation.”). This observation was first included in the 2004 U.S. Model BIT and has been echoed in subsequent U.S. investment agreements.

⁴² See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 539 (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.”).

⁴³ U.S.-Panama TPA, Annex 10-B ¶ 4(a)(i).

⁴⁴ *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* ¶¶ 149-150 (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)”).

⁴⁵ *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA*, Award No. 141-7-2 (June 22, 1984), 6 IRAN-U.S. CL. TRIB. REP. 219, 225 (1984) (“While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.”); see *S.D. Myers First Partial Award* ¶¶ 284, 287-88 (Nov. 13, 2000).

40. In determining the economic impact of a government action on an investment under paragraph 4(a)(i) of Annex 10-B, the first point of comparison is the economic value of the investment immediately before the expropriation took place, based on the facts and circumstances known to exist at that time. Where a series of measures is alleged to have resulted in the expropriation, the first point of comparison is the economic value of the investment immediately before the first in the alleged series of measures. The second point of comparison is the economic value immediately after the alleged expropriatory measure(s) have been implemented, but must exclude any adverse economic impact caused by acts, events or circumstances not attributable to the alleged breach.⁴⁶ With respect to both points of comparison, the economic value of an investment must be reasonably ascertainable, and not speculative, indeterminate, or contingent on unforeseen or uncertain future events.⁴⁷

41. The second factor – the extent to which that action interferes with distinct, reasonable investment-backed expectations – requires an objective inquiry of the reasonableness of the claimant’s expectations, which may depend on the regulatory climate existing at the time the property was acquired in the particular sector in which the investment was made.⁴⁸ For example, where a sector is already highly regulated, reasonable extensions of those regulations are foreseeable.

42. The third factor considers the nature and character of the government action, including whether such action involves physical invasion by the government or whether it is more regulatory in nature (*i.e.*, whether “it arises from some public program adjusting the benefits and burdens of economic life to promote the common good”).⁴⁹

43. Where a State proclaims that it is enacting a non-discriminatory measure for a *bona fide* public purpose, courts and tribunals rarely question that characterization.⁵⁰ The Restatement

⁴⁶ See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, art. 31, cmt. 9 (2001) (“ILC Draft Articles”) (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 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).

⁴⁷ The same principles apply in determining damages. See *Metalclad Corp. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/97/1, Award ¶ 121 (Aug. 30, 2000) (rejecting use of discounted cash flow analysis as future profits “would be wholly speculative”); *Amoco Int’l Finance Corp. v. Islamic Republic of Iran*, Award No. 310-56-3 (July 14, 1987), 15 IRAN-U.S. CL. TRIB. REP. 189, 262 (1987) (“One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded.”); *Southern Pacific Properties Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award ¶ 189 (May 20, 1992) (rejecting application of the discounted cash flow method where its application would result in awarding “possible but contingent and undeterminate damages”) (quoting *Chorzów Factory*, 1928 P.C.I.J. (ser. A) No. 17, at 51 (Sep. 13)).

⁴⁸ *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”).

⁴⁹ *Glamis Gold, Ltd v. United States of America*, NAFTA/UNCITRAL, Rejoinder of Respondent United States of America, at 109 (Mar. 15, 2007) (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

⁵⁰ See Louis B. Sohn and R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55

(Third) of Foreign Relations, for instance, notes that the public purpose requirement “has not figured prominently in international claims practice, perhaps because the concept of public purpose is broad and not subject to effective reexamination by other states.”⁵¹

Burden of Proof and Governing Law (Article 10.22)

44. Article 10.22 of the U.S.-Panama TPA states in relevant part that “the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”

45. General principles of international law applicable to international arbitration are that a claimant has the burden of proving its claims, and if a respondent raises any affirmative defenses, the respondent must prove such defenses. The standard of proof is generally a preponderance of the evidence. However, when allegations of corruption are raised, either as part of a claim or as part of a defense, the party asserting that corruption occurred must establish the corruption through clear and convincing evidence.⁵²

Requirement to Accord Treatment to Investments and/or Investors

46. Some obligations in the Agreements require a Party to accord treatment to both investors and investments, whereas other obligations in the Agreements only require a Party to accord treatment to an investment. For example, the Agreements require the Parties to accord “fair and equitable treatment” only to investments, not to investors.⁵³ In contrast, the Agreements require the Parties to accord “national treatment” to both investors and investments.⁵⁴ In accordance with this distinction, for the Agreements’ obligations which only extend to investments, a claimant (*i.e.*, an investor) must establish that a Party’s treatment was accorded to an investment and violated the relevant obligation.

AM. J. INT’L L. 545, 555-56 (1961) (“It is not without significance that what constitutes a ‘public purpose’ has rarely been discussed by international tribunals and that in no case has property been ordered restored to its former owner because the taking was considered to be for other than a public purpose. This unwillingness to impose an international standard of public purpose must be taken as reflecting great hesitancy upon the part of tribunals and of States adjusting claims through diplomatic settlement to embark upon a survey of what the public needs of a nation are and how these may best be satisfied.”); Burns H. Weston, *Constructive Takings Under International Law: A Modest Foray Into the Problem of “Creeping Expropriation,”* 16 VA J. INT’L L. 103, 121 (1975) (explaining that, under international law, there is a “necessary presumption that States are ‘regulating’ when they say they are ‘regulating,’ and they are especially to be honored when they are explicit in this regard”); *see also* G.C. Christie, *What Constitutes a Taking of Property Under International Law,* 38 BRIT. Y.B. INT’L L. 307, 332 (1962) (“But it certainly would seem that if the facts are such that the reasons actually given are plausible, search for unexpressed ‘real’ reasons is chimerical. No such search is permitted in municipal law, and the extreme deference paid to the honour of States by international tribunals excludes the possibility of supposing that the rule is different in international law.”).

⁵¹ RESTATEMENT OF FOREIGN RELATIONS LAW § 712, cmt. e.

⁵² *E.g.*, *EDF (Services) Ltd. v. Romania* (ICSID Case No. ARB/05/13), Award ¶ 221 (Oct. 8, 2009); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/13/1), Award ¶ 492 (Aug. 22, 2017).

⁵³ U.S.-Panama TPA Article 10.5(1); U.S.-Panama BIT Article II(2).

⁵⁴ U.S.-Panama TPA Article 10.3; U.S.-Panama BIT Article II(1).

Damages

47. Both of the Agreements authorize claimants to seek damages for alleged breaches of specified obligations in the Agreements.⁵⁵ However, in accordance with the discussion above in paragraph 46, for TPA or BIT obligations that only extend to investments, a tribunal may only award damages for violations where the investment incurred damages. A tribunal has no authority to award damages that a claimant allegedly incurred in their capacity as an investor for violations of obligations that only extend to investments.

Respectfully submitted,



Lisa J. Grosh
Assistant Legal Adviser
John D. Daley
Deputy Assistant Legal Adviser
Nicole C. Thornton
Chief of Investment Arbitration
John I. Blanck
Attorney-Adviser
Office of International Claims and
Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

February 3, 2020

⁵⁵ U.S.-Panama TPA Article 10.26; U.S.-Panama BIT Article VII(4).