IN THE ARBITRATION UNDER CHAPTER TEN OF
THE UNITED STATES-PERU TRADE PROMOTION AGREEMENT AND
THE UNCITRAL ARBITRATION RULES

RENCO GROUP, INC.

Claimant

-and-

THE REPUBLIC OF PERU,

Respondent.

PCA CASE NO. 2019-46

SUBMISSION OF THE UNITED STATES OF AMERICA

1. The United States of America makes this submission pursuant to Article 10.20.2 of the United States-Peru Trade Promotion Agreement ("U.S.-Peru TPA" or "Agreement"), which authorizes a non-disputing Party to make oral and written submissions to a tribunal regarding the interpretation of the Agreement. The United States does not take a position on how the interpretation applies to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.[*]

Article 10.1.3 (Non-Retroactivity)

2. Article 10.1.3 states: "[f]or greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement."[2] Whereas a host State's conduct prior to the entry into force

[*] 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.

[2] The phrase "for greater certainty" signals that the sentence it introduces reflects what the agreement would mean even if that sentence were absent. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 115 U.N.T.S. 331, Article 28 ("Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist

of an obligation may be relevant to determining whether the State subsequently breached that obligation, under the rule against retroactivity, there must exist "conduct of the State after that date which is itself a breach."[3] To that effect, the *Carrizosa v. Colombia* tribunal recently observed with respect to the identical provision of the U.S.-Colombia TPA, "unless the post-treaty conduct . . . is itself capable of constituting a breach of the [treaty], independently from the question of (un)lawfulness of the pre-treaty conduct, claims arising out of such post-treaty conduct would also fall outside the Tribunal's jurisdiction."[4] This echoes the *Berkowitz v. Costa Rica* tribunal's earlier holding that "pre-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right. Pre-entry into force acts and facts cannot . . . constitute a cause of action."[5]

Article 10.22.1 (Burden of Proof)

3. Article 10.22.1 provides in relevant part that when a claim is submitted under Article 10.16.1(a)(i)(A), "the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."[6]

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before the date of the entry into force of the treaty with respect to that party."). While the United States is not a party to the VCLT, it has recognized since at least 1971 that the Convention is the "authoritative guide" to treaty law and practice. *See* Letter from Secretary of State Rogers to President Nixon transmitting the Vienna Convention on the Law of Treaties, October 18, 1971, *reprinted in* 65 DEP'T ST. BULL. 684, 685 (1971). *See also Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶ 62 (Dec. 6, 2000) ("*Feldman* Interim Decision") ("Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal's jurisdiction does not extend, before that date. NAFTA itself did not purport to have any retroactive effect. Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994.").

[3] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award ¶ 70 (Oct. 11, 2002) ("*Mondev* Award"). As the *Mondev* tribunal also observed, "there is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage." *Id.* ¶ 58; *see also Northern Cameroons (Cameroon v. U.K.)*, 1963 I.C.J. 15, 129 (Dec. 2) (Separate Opinion of Judge Fitzmaurice) ("An act which did not, in relation to the party complaining of it, constitute a wrong at the time it took place, obviously cannot *ex post facto* become one.").

[4] *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award ¶ 153 (Apr. 19, 2021) (finding "no jurisdiction to assess the lawfulness of the [respondent's] pre-treaty conduct, be it under the [treaty] or under any other source, such as customary international law").

[5] *Spence Int'l Invests., LLC, Berkowitz et al. v. Republic of Costa Rica*, CAFTA/ICSID Case No. UNCT/13/2, Interim Award (Corrected) ¶ 217 (May 30, 2017) ("*Berkowitz* Interim Award").

[6] U.S.-Peru TPA, art. 10.22.1. Pursuant to Article 10.22.2, the tribunal shall apply applicable rules of international law, along with the law of the respondent, to claims brought under Article 10.16.1(a)(i)(C) if the rules of law are not specified in the investment agreement or otherwise agreed to.

4. General principles of international law concerning the burden of proof in international arbitration provide that a claimant has the burden of proving its claims, and if a respondent raises any affirmative defenses, the respondent must prove such defenses.[7]

5. In the context of an objection to jurisdiction, the burden is on the claimant to prove the necessary and relevant facts to establish that a tribunal has jurisdiction to hear its claim. Further, it is well-established that where "jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage."[8] As the tribunal in *Bridgestone v. Panama* stated when assessing Panama's jurisdictional objections regarding a claimant's purported investments under the U.S.-Panama Trade Promotion Agreement, "[b]ecause the Tribunal is making a final finding on this issue, the burden of proof lies fairly and squarely on [the claimant] to demonstrate that it owns or controls a qualifying investment."[9]

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[7] BIN CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS 334 (2006) ("[T]he general principle [is] that the burden of proof falls upon the claimant . . . ."); *Marvin Roy Feldman Karpa v. United Mexican States*, 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.") (quoting Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, at 14, WT/DS33/AB/R (May 23, 1997)).

[8] *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award ¶ 61 (Apr. 15, 2009); *Vito G. Gallo v. Canada*, NAFTA/UNCITRAL PCA Case No. 55798, Award ¶ 277 (Sept. 15, 2011) ("Both parties submit, and the Tribunal concurs, that the maxim 'who asserts must prove,' or *actori incumbit probatio*, applies also in the jurisdictional phase of this investment arbitration: 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 phase . . . ."); *Pac Rim Cayman LLC v. Republic of El Salvador*, 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 Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections ¶ 118 (Dec. 13, 2017) ("*Bridgestone* Decision on Expedited Objections") (stating that "[w]here an objection as to competence raises issues of fact that will not fall for determination at the hearing of the merits, the Tribunal must definitively determine those issues on the evidence and give a final decision on jurisdiction"); *see also Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award ¶ 250 (Oct. 22, 2018) (finding that "[t]he Claimants bear the onus of establishing jurisdiction under the BIT and under the ICSID Convention. The onus includes proof of the facts on which jurisdiction depends").

[9] *Bridgestone* Decision on Expedited Objections ¶ 153.

Article 10.11 (Investment and Environment)

6. Article 10.11 provides:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

7. Article 10.11 informs the interpretation of other provisions of Chapter 10, including Articles 10.5 and 10.7, and provides a forceful protection of the right of either State Party to adopt, maintain or enforce any measure to ensure that investment is undertaken in a manner sensitive to environmental concerns.[10] Chapter 10 was not intended to undermine the ability of governments to take measures based upon environmental concerns, even when those measures may affect the value of an investment, if otherwise consistent with the Chapter.

Article 10.5 (Minimum Standard of Treatment)

8. 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."[11] "[F]or greater certainty," this provision "prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments."[12] Specifically, "'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."[13]

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[10] *See, e.g.*, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, U.S.-Oman FTA/ICSID Case No. ARB/11/33, Award ¶ 387 (Nov. 3, 2015) (observing that the analogous provision of the U.S.-Oman Free Trade Agreement "provides a forceful protection of the right of either State Party to adopt, maintain or enforce any measure to ensure that investment is undertaken in a manner sensitive to environmental concerns, provided it is not otherwise inconsistent with the express provisions") (internal quotation marks omitted); *see also David R. Aven and others v. The Republic of Costa Rica*, CAFTA/ICSID Case No. UNCT/15/3, Final Award ¶ 412 (Sept. 18, 2018).

[11] U.S.-Peru TPA, art. 10.5.1.

[12] *Id.*, art. 10.5.2.

[13] *Id.*, art. 10.5.2(a).

9. 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."[14]

Methodology for determining the content of customary international law

10. Annex 10-A to the Agreement 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-A the Parties confirmed their understanding and application of this two-element approach—State practice and *opinio juris*—which is the standard practice of States and international courts, including the International Court of Justice.[15]

11. 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)*,[16] the ICJ 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

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[14] *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 of America*, 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).

[15] *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. 3, 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 . . . .").

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

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.[17]

12. States may decide expressly by treaty to make policy decisions to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law.[18] 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.[19] Thus, arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other 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.[20]

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[17] *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.").

[18] *See Ahmadou Sadia 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 régimes 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.").

[19] U.S.-Peru TPA, art. 10.5.1, 10.5.2 ("[P]aragraph 1 prescribes the customary international law minimum standard of treatment . . . ."); *see also Grand River Enterprises Six Nations Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 176 (Jan. 12, 2011) ("*Grand River* Award") (noting that an obligation under Article 1105 of the NAFTA (which also prescribes the customary international law minimum standard of treatment) "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 the U.S.-Peru TPA and other treaties, a claimant submitting a claim under the U.S.-Peru TPA, 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.

[20] *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, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB/(AF)/05/2, Award ¶ 278 (Sept. 18, 2009) ("*Cargill* Award") (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").

13. 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.[21] 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.

14. 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*.[22] "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."[23] Tribunals applying the minimum standard of treatment obligation in Article 1105 of NAFTA Chapter 11, which likewise affixes the standard to customary international law,[24] 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

[21] *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); *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* Judgment, 2018 I.C.J. 507, 559, ¶ 162 (Oct. 1) ("The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia's argument based on legitimate expectations thus cannot be sustained.").

[22] *Asylum (Colombia v. Peru),* 1950 I.C.J. 266, 276 (Nov. 20); *see also North Sea Continental Shelf*, 1969 I.CJ. 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).

[23] *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, ¶ 66-67 (Sept. 7) (holding that the claimant had failed to "conclusively prove" the existence of a rule of customary international law).

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

> Claimant does not provide the Tribunal with the proof of such evolution, it is not the place of the Tribunal to assume this task. Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.[25]

15. 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.[26]

Obligations that have crystallized into the minimum standard of treatment

16. 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 10.5.2(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." This obligation is discussed in more detail below.

17. 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, which is also discussed below, 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."[27]

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[25] *Cargill* Award ¶ 273. 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*, Final Award, Part IV, Ch. C, ¶ 26 (Aug. 3, 2005) (citing *Asylum* 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 its burden).

[26] *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).

[27] *See The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, U.S. Counter-Memorial, at 176-77 (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

Claims for judicial measures

18. As noted in paragraph 8 above, the obligation to provide "fair and equitable treatment" under Article 10.5.1 includes, for example, the customary international law obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. Denial of justice in its historical and "customary sense" denotes "misconduct or inaction of the judicial branch of the government" and involves "some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process."[28] Aliens have no cause for complaint at international law about a domestic system of law provided that it conforms to "a reasonable standard of civilized justice" and is fairly administered.[29] "Civilized justice" has been described as requiring "[f]air courts, readily open to aliens, administering justice honestly, impartially, [and] without bias or political control."[30]

19. A denial of justice may occur in instances such as when the final act of a State's judiciary constitutes a "notoriously unjust"[31] or "egregious"[32] administration of justice "which offends a sense of judicial propriety."[33] More specifically, a denial of justice exists where there is, for

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reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien."); *Methanex v. United States*, NAFTA/UNCITRAL, Respondent Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment (June 27, 2001), at 39 (same).

[28] EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 330 (1919); J.L. BRIERLY, THE LAW OF NATION 286-87 (1963) (defining a denial of justice as "an injury involving the responsibility of the state committed by a court of justice").

[29] BORCHARD at 198 ("Provided the system of law conforms with a reasonable standard of civilized justice and provided that it is fairly administered, aliens have no cause for complaint in the absence of an actual denial of justice.") (footnote omitted).

[30] Borchard at 63.

[31] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 44 (2005) (citing J. Irizarry y Puente, *The Concept of "Denial of Justice" in Latin America*, 43 MICH. L. REV. 383, 406 (1944)); *id*. at 4 ("[A] state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner.") (emphasis omitted); Chattin Case (United States v. Mexico), 4 R. INT'L ARB. AWARDS 282, 286-87 (1927), *reprinted in* 22 AM. J. INT'L L. 667, 672 (1928) ("Acts of the judiciary . . . are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man.") (emphasis omitted).

[32] PAULSSON at 60 ("The modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice.").

[33] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 132 (June 26, 2003) ("*Loewen* Award") (a denial of justice may arise where there has occurred a "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of

example, an "obstruction of access to courts," "failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment."[34] Instances of denial of justice also have included corruption in judicial proceedings, discrimination or ill-will against aliens, and executive or legislative interference with the freedom of impartiality of the judicial process.[35] At the same time, erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law.[36] Similarly, neither the evolution nor development of "new" judge-made law that departs from previous jurisprudence within the confines of common law adjudication implicates a denial of justice.[37]

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judicial propriety"); *Mondev* Award ¶ 127 (finding that the test for a denial of justice was "not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome"); *see also Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain),* 1970 I.C.J. 3 (Feb. 5) Separate Opinion of Judge Tanaka, at 144 ("Separate Opinion of Judge Tanaka") (explaining that "denial of justice occurs in the case of such acts as- 'corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it, . . . But no merely erroneous or even unjust judgment of a court will constitute a denial of justice'") (citations omitted).

[34] Harvard Research Draft, The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, art. 9, 23 AM. J. INT'L L. SP. SUPP. 131, 134 (1929). The commentary notes that a "manifestly unjust judgment" is one that is a "travesty upon justice or grotesquely unjust." *Id.* at 178.

[35] *Id.* at 175.

[36] *Id*. at 134 ("An error of a national court which does not produce manifest injustice is not a denial of justice."); PAULSSON at 81 ("The erroneous application of national law cannot, in itself, be an international denial of justice."); PATRICK DUMBERRY, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105 228 (2013) (noting that a simple error, misinterpretation or misapplication of domestic law is not per se a denial of justice) (internal quotation marks omitted); BORCHARD at 196 (explaining that a government is not responsible for the mistakes or errors of its courts and that: "[A]s a general rule the state is not liable for the acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort."); Christopher Greenwood, *State Responsibility for the Decisions of National Courts*, *in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 61 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004) ("[I]t is well established that a mistake on the part of the court or an irregularity in procedure is not in itself sufficient to amount to a violation of international law; there must be a denial of justice.").

[37] *See Mondev* Award ¶¶ 131, 133 (finding, in response to the claimant's allegation that a decision of the Massachusetts Supreme Court involved a "significant and serious departure" from its previous jurisprudence, it doubtful that the court "made new law . . . [b]ut even if it had done so its decision would have fallen within the limits of common law adjudication. There is nothing here to shock or surprise even a delicate judicial sensibility.").

20. The international responsibility of States may not be invoked with respect to non-final judicial acts,[38] unless recourse to further domestic remedies is obviously futile or manifestly ineffective. The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence,[39] the particular nature of judicial action,[40] and the unique status of the judiciary in both international and municipal legal systems. As a result, the actions of domestic courts are accorded a greater presumption of regularity under international law than are legislative or administrative acts.[41] Indeed, as a matter of customary international law, international tribunals

[38] *See Apotex Inc. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 282 (June 14, 2013), ("*Apotex I & II* Award") ("[A] claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself."); *Loewen* Award ¶ 156 ("The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision."); PAULSSON at 108 ("For a foreigner's international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself."); Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63(3) INT'L & COMP. L.Q. 28 (2014) (explaining that "international responsibility towards foreign nationals for acts and omissions associated with an adjudicative procedure can only arise at the point at which the adjudication has produced its final result; it is only at that point that a constituent element of that responsibility has been satisfied, which is the existence of damage to the foreign national.").

[39] *See*, *e.g.*, Separate Opinion of Judge Tanaka at 154 ("One of the most important political and legal characteristics of a modern State is the principle of judicial independence."). Judge Tanaka went on to explain that what distinguishes the judiciary from other organs of government is the "social significance of the judiciary for the settlement of conflicts of vital interest as an impartial third party and, on the other hand, from the extremely scientific and technical nature of judicial questions, the solution of which requires the most highly conscientious activities of specially educated and trained experts. Independence of the judiciary, therefore, despite the existence of differences in degree between various legal systems, may be considered as a universally recognized principle in most of the municipal and international legal systems of the world. It may be admitted to be a 'general principle of law recognized by civilized nations' (Article 38, paragraph 1(c), of the Statute)." *Id.* at 154.

[40] *See*, *e.g.*, Douglas at 10-11 (explaining that the "rationality inherent in decision-making through adjudication, coupled with the opportunity afforded to affected parties to present reasoned arguments during the course of that decision-making process, . . . sets adjudication apart from other institutions of social ordering within the State," and that an authoritative decision by a domestic adjudicative body "cannot be disturbed by an international court or tribunal simply on the basis that a more rational set of reasons was available to that . . . body. . . . International law is deferential to the particular virtues of adjudication by respecting the integrity of the process and the outcomes it produces.") (footnotes omitted).

[41] *Loewen Group, Inc. and Raymond Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Response of the United States of America to the Submissions of Claimants Concerning Matters of Jurisdiction and Competence, at 8 (July 7, 2000) ("[U]nlike actions of the executive or the legislature, judicial acts can violate customary international law obligations in only the most extreme and unusual of circumstances . . . .") (citing T. BATY, THE CANONS OF INTERNATIONAL LAW 127 (1930) ("It is true that courts are organs of the nation; but they are not its organs in the sense in which the executive and the legislature are.")); BORCHARD at 195-96 (because "[i]n

will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice.[42]

21. In this connection, it is well-established that international tribunals, such as U.S.-Peru TPA Chapter 10 tribunals, are not empowered to be supranational courts of appeal on a court's application of domestic law.[43] Thus, an investor's claim challenging judicial measures under

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well- regulated states, the courts are more independent of executive control than any other authorities . . . [,] the state is not liable for the acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort."); ALWYN V. FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 33 (1938) ("[T]he question of proof of illegal action will be more difficult [with respect to judicial action] than is the case with other organs of the State."). *See also Loewen*, Response of the United States of America to the Submissions of Claimants Concerning Matters of Jurisdiction and Competence, at 9 (July 7, 2000) ("Given the unique status of the judiciary in both international and municipal legal systems, the actions of domestic courts are accorded a far greater presumption of regularity under international law than are legislative or administrative acts."). The United States distinguishes between judicial action and other forms of government action as a matter of domestic law. For example, the U.S. Supreme Court has long recognized liability for legislative and regulatory actions that violate the economic protections of the U.S. Constitution, but has never recognized liability for judicial action under those same provisions. *See*, *e.g.*, Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1075 n.121 (1997); Barton H. Thompson, Jr., Judicial Takings, 76 VA. L. REV. 1449, 1453 (1990) (observing with disapproval that "[t]he few scholars to have seriously addressed the issue have generally argued that it would be catastrophic to subject the courts to the same constitutional constraints as the legislative and executive branches . . . ."). The status of U.S. law has not changed. *See Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection et al.*, 560 U.S. 702 (2010); *Shinnecock Indian Nation v. United States*, 112 Fed. Cl. 369, 385 (2013) ("a theory of judicial takings . . . has not been adopted in the federal courts.").

[42] *See Robert Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award ¶ 99 (Nov. 1, 1999) ("*Azinian* Award") ("The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. What must be shown is that the court decision itself constitutes a violation of the treaty. Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end."); *Mohammad Ammar Al Bahloul v. Republic of Tajikistan*, SCC Case No. V(064/2008), Partial Award on Jurisdiction and Liability ¶ 237 (Sept. 2, 2009) ("[I]t is not the role of this Tribunal to sit as an appellate court on questions of Tajik law. Suffice it to say, we do not find the Tajik court's application of Tajik law on this issue to be malicious or clearly wrong, and therefore find no basis for Claimant's claim of denial of justice."). *See also* PAULSSON at 82.

[43] *Apotex I & II* Award ¶ 278 ("[I]t is not the proper role of an international tribunal established under NAFTA Chapter Eleven to substitute itself for the U.S. Supreme Court, or to act as a supranational appellate court."); *Azinian* Award ¶ 99 ("The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction."); *Waste Management Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/00/3, Final Award ¶ 129 (Apr. 30, 2004) ("*Waste Management II* Award") ("[T]he Tribunal would observe that it is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of amparo in respect of the decisions of the federal courts of NAFTA parties."); Separate Opinion of Judge Tanaka at 158 (explaining that erroneous decisions of municipal law cannot constitute a denial of justice because the interpretation of municipal law "does not belong to the realm of international law. If an international tribunal were to take up these issues and examine the regularity of the decisions of municipal courts, the international tribunal would turn out to be a '*cour de*

Article 10.5.1 is limited to a claim for denial of justice under the customary international law minimum standard of treatment. *A fortiori*, domestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law.

22. For the foregoing reasons, judicial measures may form the basis of a claim under the customary international law minimum standard of treatment under Article 10.5.1 only if they are final[44] and if it is proved that a denial of justice has occurred. Were it otherwise, it would be impossible to prevent Chapter 10 tribunals from becoming supranational appellate courts on matters of the application of substantive domestic law, which customary international law does not permit.[45]

Obligations that have not crystallized into the minimum standard of treatment

23. As noted, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. In contrast, the concepts of legitimate expectations, consistency, good faith, non-discrimination, transparency, and proportionality are not component elements of "fair and equitable treatment" under customary international law and do not give rise to independent host State obligations.

Legitimate Expectations

24. 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'

cassation', the highest court in the municipal law system. An international tribunal, on the contrary, belongs to quite a different order; it is called upon to deal with international affairs, not municipal affairs.").

[44] *See* Greenwood at 64 (explaining that it is "inherently implausible that States would intend" for interlocutory or non-final decisions of domestic courts to be subject to challenge on the international plane," which would have the effect of "set[ting] aside the entire system of checks and balances within the national judicial system").

[45] *See* Douglas at 33 (explaining that an exercise of adjudicative power can give rise to State responsibility through the medium of a denial of justice and that "[a]ny other approach would serve to vest international tribunals with appellate jurisdiction over the substantive outcomes in domestic adjudicative procedures").

expectations; instead, something more is required.[46] 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.

Consistency

25. The customary international law minimum standard of treatment incorporated in Article 10.5 does not impose an independent obligation on host States to act "consistently." To the contrary, a State retains the general latitude "to adapt to changing economic, political and legal circumstances" through regulatory actions,[47] and under the customary international law minimum standard of treatment, a State's right to regulate is not constrained by an investor's expectations, including a general expectation that governing regulations will remain static.[48]

26. Moreover, inconsistent State action cannot, in and of itself, sustain a violation of Article 10.5. State conduct that exhibits "simple illegality or lack of authority under the domestic law,"[49] for example, will be "inconsistent" with conduct that complies with domestic law. Yet, as set out in paragraphs 18-22, a State's failure to satisfy requirements of domestic law does not

[46] *See, e.g., Grand River Enterprises Six Nations, Ltd. et al. v. United States*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America, at 96 (Dec. 22, 2008) ("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."). Indeed, NAFTA tribunals have declined to find breaches of Article 1105 even where the claimant's purported expectations arose from a contract. *See Azinian* Award ¶ 87 ("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 II* Award ¶ 115 (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] *BG Group Plc. v. Argentine Republic*, Argentina-U.K. BIT/UNCITRAL, Award ¶ 298 (Dec. 24, 2007); *see also Thunderbird* Award, ¶ 127 (noting that states have a "wide regulatory 'space' for regulation," can change their "regulatory polic[ies]," and have "wide discretion" with respect to how to carry out such policies by regulation and administrative conduct).

[48] *Ioan Micula, Viorel Micula and others v. Romania*, Romania-Sweden BIT/ICSID Case No. ARB/05/20, Final Award, ¶ 666 (Dec. 11, 2013) ("[T]he fair and equitable treatment standard does not give a right to regulatory stability *per se*. The state has a right to regulate, and investors must expect that the legislation will change, absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability.").

[49] *ADF* Award ¶ 190.

necessarily violate international law.[50] 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."[51] Furthermore, any such determination "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 own borders."[52] *A fortiori*, State action that is merely "inconsistent" with other State action without also being illegal or without authority under domestic law cannot violate Article 10.5.

Good Faith

27. 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."[53] As such, customary international law does not impose a free-standing, substantive obligation of "good faith" that, if breached, can result in

[50] *Id.* ("[T]he Tribunal has no authority to review the legal validity and standing of the 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. 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, citations omitted); *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).").

[51] *ADF* Award ¶ 190.

[52] *S.D. Myers* First Partial Award, ¶ 263; *see also Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2012-17, Award ¶ 505 (Mar. 24, 2016) ("[W]hen 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.").

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

State liability.[54] Similarly, a claimant "may not justifiably rely upon the principle of good faith" to support a claim, absent a specific treaty obligation.[55]

Non-Discrimination

28. 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.[56] As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.[57] 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

[54] 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*, Counter-Memorial of the United States of America, 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.'").

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

[56] *See Grand River* Award ¶¶ 208-209 ("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.").

[57] *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 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,[58] access to judicial remedies or treatment by the courts,[59] 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.[60] Accordingly, general investor-State claims of

[58] *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.* § 712 cmt. f ("Formulations of the rules on expropriation generally include a prohibition of discrimination . . . .").

[59] *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."); BORCHARD at 334 (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.").

[60] *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.").

nationality-based discrimination are governed exclusively by the provisions of Chapter 10 that specifically address that subject, and not Article 10.5.1.[61]

Transparency

29. 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 obligation.[62] 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.

Proportionality

30. The United States has long observed that State practice and *opinio juris* do not establish that the minimum standard of treatment of aliens imposes a general obligation of proportionality on States.[63] To the contrary, the minimum standard of treatment affords every State "wide

[61] *See Mercer Int'l Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award ¶ 7.58 (Mar. 6, 2018) ("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").

[62] *See United Mexican States v. Metalclad Corp.*, [2001] 89 B.C.L.R. 3d 359, 2001 B.C.S.C. 664 ¶¶ 68, 72 (Can. B.C. S.C.) (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. 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").

[63] *Mason Capital, L.P., Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, KORUS/UNCITRAL, Submission of the United States ¶ 23 (Feb. 1, 2020); *see also Adel A Hamadi Al Tamimi v. Sultanate of Oman*, U.S.-Oman FTA/ICSID Case No. ARB/11/33, Submission of the United States ¶ 9 (Sept. 22, 2014); *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Rejoinder of the United States ¶¶ 188-93 (Mar. 15, 2007) (explaining that "even if [claimant] were able to demonstrate that the . . . measures were '[un]necessary, [un]suitable,' or '[dis]proportionate,' that would not support a finding of a violation of the international minimum standard [of treatment]."); *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Transcript of Hearing, at 19 (Aug. 17, 2007) (arguing that claimant had not supported its position on the minimum standard of treatment with evidence of State practice or *opinio juris*, nor could it have

discretion with respect to how it carries out [its] policies by regulation and administrative conduct"[64] and tribunals do "not have an open-ended mandate to second-guess government decision-making."[65]

Article 10.7 (Expropriation)

31. 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.[66] Compensation must be "prompt," in that it must be "paid without delay";[67] "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."[68]

32. 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.[69]

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done so because "[i]t cannot seriously be argued that the practice of States has been to subject their legislative and administrative rulemaking to standards such as these.").

[64] *Thunderbird* Award ¶ 127.

[65] *S.D. Myers* First Partial Award ¶ 261.

[66] 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 herein.

[67] *See Mondev Int'l Ltd. v. United States of America*, NAFTA/ICSID, 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 non-dilatory 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).

[68] U.S.-Peru TPA, art. 10.7.2(a)-(d).

[69] 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

Claims for Indirect Expropriation

33. Under international law, where an action is a bona fide, non-discriminatory regulation, it will not ordinarily be deemed expropriatory.[70] Annex 10-B, paragraph 3, of the Agreement provides specific guidance as to whether an action, including a regulatory action, constitutes an indirect expropriation. As explained in paragraph 3(a), 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."

34. With respect to the first factor, an adverse economic impact "standing alone, does not establish that an indirect expropriation has occurred."[71] It is a fundamental principle 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

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).

[70] *See, e.g.*, *Glamis*, Award ¶ 354 (quoting the RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712, cmt. (g) (1987) ("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).

[71] U.S.-Peru TPA, Annex 10-B, ¶ 3(a)(i).

conclusion that the property has been 'taken' from the owner."[72] Further, to constitute an expropriation, a deprivation must be more than merely "ephemeral."[73]

35. The second factor 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.[74] For example, where a sector is "already highly regulated, reasonable extensions of those regulations are foreseeable."[75]

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

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[72] *Pope & Talbot Inc. 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 ¶ 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)").

[73] *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*, 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 also S.D. Myers*, First Partial Award ¶¶ 284, 287-88.

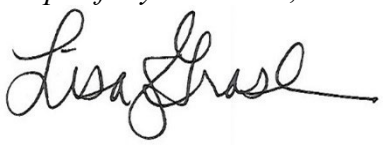
[74] *Methanex,* Final Award, Part IV, Ch. D, ¶ 7-9 (noting that no specific commitments to refrain from regulation had been given to Methanex, which "entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the 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.").

[75] *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, U.S. Rejoinder, at 91 (Mar. 15, 2007) ("The inquiry into an investor's expectations is an objective one. . . . 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.").

[76] *Id.* at 109 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)) (internal quotation marks omitted).

37. Further, Paragraph 3(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.

Respectfully submitted,



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

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