IN THE MATTER OF AN ARBITRATION UNDER CHAPTER TEN OF THE DOMINICAN REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT (CAFTA-DR) AND THE UNCITRAL ARBITRATION RULES

BETWEEN

MICHAEL BALLANTINE AND LISA BALLANTINE,

Claimants,

- and -

THE DOMINICAN REPUBLIC,

Respondent.

PCA Case No. 2016-17

SUBMISSION OF THE UNITED STATES OF AMERICA

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

Dominant and Effective Nationality Requirement for Claims Under Chapter Ten

2. CAFTA-DR Article 10.28 ("Definitions") provides:

> **claimant** means an investor of a Party that is a party to an investment dispute with another Party; . . . .
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> **investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality[.]

3. In order to submit a claim to arbitration under Chapter Ten, the investor must be "an investor of a Party" other than the respondent Party at the time of submission to arbitration. Pursuant to Article 10.16(1), only a "claimant" may submit a claim to arbitration, whether on its own behalf or on behalf of an enterprise that it owns or controls. In accordance with Article

10.16(4), in a proceeding under the UNCITRAL Arbitration Rules, a claim is "deemed submitted to arbitration" when the claimant's notice of arbitration and statement of claim are received by the respondent. Article 10.28, quoted above, defines a "claimant" as "an investor of a Party that **is** a party to an investment dispute with another Party." (Emphasis added.) Accordingly, if the investor is a natural person, and that person had the dominant and effective nationality[1] of the respondent Party at the time of submission of the claim, then the investor would not be, *at that time,* a party to a dispute with *another Party* (*i.e.*, with a Party other than the investor's own).

4. Further, the claimant also must be "an investor of a Party" other than the respondent Party at the time of the purported breach. Article 10.1(1) ("Scope and Coverage") states in relevant part that Chapter Ten "applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) covered investments[.]" The substantive provisions of Chapter Ten, Section A thus create obligations with respect to treatment accorded to "investors of another Party" and/or to "covered investments." Article 2.1 ("Definitions of General Application") in turn defines "covered investment" as "with respect to a Party, an investment, as defined in Article 10.28 (Definitions), in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter." (Emphasis added.) Thus, in order for the dispute to come within the scope of Chapter Ten, the investor must be "an investor of another Party", *i.e.*, a Party other than the respondent Party, at the time of the purported breach. If the requisite difference in nationality does not exist (meaning, in a case of a natural person with dual nationality, dominant and effective nationality of a Party other than the respondent Party), there can be no breach, as there was no obligation under Chapter Ten, Section A at the time of the purported breach. And pursuant to Article 10.16.1, what may be submitted to arbitration under Chapter Ten, Section B, are claims "that the respondent has breached an obligation under Section A." (Emphasis added.)

5. Where the requisite nationality does not exist at the operative times set out above, the respondent Party has not consented to the submission of a claim to arbitration at the outset, and the tribunal therefore lacks jurisdiction *ab initio* under Article 10.17: "Each Party consents to the submission of a claim to arbitration under this Section [B] in accordance with this Agreement." (Emphasis added.)

6. The conclusions above are consistent with the well-established principle of international law[2] that an individual or entity cannot maintain an international claim against its own State. As the United States has long maintained[3] with respect to the rule of "continuous nationality" and as

[1] The United States does not address here the relevant factors for determination of dominant and effective nationality under customary international law. For clarity, it should be noted that where U.S. embassies or consulates provide facilitative assistance to U.S. nationals abroad in connection with disputes between those nationals and other countries, such officials typically do not make a legal determination with respect to a dual national's dominant and effective nationality in order to provide such assistance.

[2] Article 10.22.1 requires CAFTA-DR Chapter Ten tribunals to decide the issues in dispute in accordance with the CAFTA and applicable rules of international law.

[3] *See* Comments and Observations Received by Governments, U.N. Doc. A/CN.4/561, at 41-43 (Jan. 27 and Apr. 3 and 12, 2006) (comments of the United States of America on Draft Article 5 of the ILC Draft Articles on Diplomatic

the tribunal in *Loewen v. United States of America* explained: "In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*."[4] In the absence of continuous nationality of the claimant as set forth above, a tribunal lacks jurisdiction over the relevant claim.[5]

Article 10.18: Conditions and Limitations on Consent of Each Party (Limitations Period)

7. Article 10.18.1 of the CAFTA-DR provides:

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

8. As is made explicit by Article 10.18, the CAFTA-DR Parties did not consent to arbitrate an investment dispute if "more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach" and "knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage." Thus, a tribunal must find that a claim satisfies the requirements, *inter alia*, of Article 10.18.1 in order to establish a Party's consent to (and therefore the tribunal's jurisdiction over) the claim. The Article thus imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of the dispute.[6] And because the claimant bears the burden of proof with respect to the factual

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Protection) (urging that the ILC Draft Articles state that nationality must be continuously maintained from the date of injury to the date of the resolution of the claim); *accord The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Memorial of the United States of America on Matters of Jurisdiction and Competence Arising from the Restructuring of The Loewen Group, Inc., at 10-20 (Mar. 1, 2002).

[4] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 225 (June 26, 2003) ("*Loewen* Award"); *see* JENNINGS & WATTS, OPPENHEIM'S INTERNATIONAL LAW 512-13 (9th ed. 1992) ("[F]rom the time of the occurrence of the injury until the making of the award, the claim must continuously and without interruption have belonged to a person or series of persons (a) having the nationality of the state by whom it is put forward, and (b) not having the nationality of the state against whom it is put forward.") (footnote omitted).

[5] *Loewen* Award, at 69 (June 26, 2003) (deciding, in the *dispositif*, that the tribunal had no jurisdiction due to a lack of continuous nationality).

[6] *See, e.g.*, *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA ¶ 280 (May 31, 2016) (finding that the tribunal lacks jurisdiction due to application of the time-bar); *Spence International Investments, LLC, Berkowitz et al. v. Republic of Costa Rica*, CAFTA/UNCITRAL, ICSID Case No. UNCT/13/2, Interim Award ¶¶ 235-236 (Oct. 25, 2016) ("*Spence* Interim Award") (addressing the time-bar defense as a jurisdictional issue); *see also Resolute Forest Products, Inc. v. Government of Canada*, NAFTA/UNCITRAL, PCA

elements necessary to establish jurisdiction under Chapter Ten, including with respect to Article 10.18.1,[7] a claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.[8]

9. This limitations period is a "clear and rigid" requirement that is not subject to any "suspension," "prolongation," or "other qualification."[9] An investor or enterprise first acquires knowledge of an alleged breach and loss at a particular moment in time; that is, under Article 10.18.1, knowledge is acquired as of a particular "date."

10. With regard to knowledge of the "breach" under Article 10.18.1, a "breach" of an international obligation exists "when an act of th[e] State is not in conformity with what is required of it by that obligation."[10] Thus, with respect to a claim under a given article in Chapter Ten, a claimant has actual or constructive knowledge of the alleged "breach" once it has (or should have had) knowledge of all elements required to make a claim under the article in question. In other words, the operative date is the date on which the claimant first acquired actual or constructive notice of facts sufficient to make a claim under the article.

Case No. 2016-13, Decision on Jurisdiction and Admissibility ¶¶ 82-83 (Jan. 30, 2018) (holding that compliance with the time bar specified in NAFTA Articles 1116 and 1117 "goes to jurisdiction"); *Apotex Inc. v. United States of America*, NAFTA/UNCITRAL, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility ¶¶ 314, 335 (June 14, 2013) ("*Apotex I & II* Award") (parties treated the United States' time-bar objection as a jurisdictional issue, and the tribunal expressly found that NAFTA Article 1116(2) deprived it of "jurisdiction *ratione temporis*" with respect to one of the claimant's alleged breaches); *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Procedural Order No. 2 (Revised) ¶ 18 (May 31, 2005) (finding that that "an objection based on a limitation period for the raising of a claim is a plea as to jurisdiction for purposes of Article 21(4)" of the UNCITRAL Arbitration Rules (1976)).

[7] *Apotex I & II* Award ¶ 150. *See also Vito G. Gallo v. Government of Canada*, NAFTA/UNCITRAL, Award ¶ 277 (Sept. 15, 2011) ("[A] claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional stage . . . ."); *Mesa Power Group, LLC v. Government of Canada*, NAFTA/PCA Case No. 2012-17, Award ¶ 236 (Mar. 24, 2016) ("It is for the Claimant to establish the factual elements necessary to sustain the Tribunal's jurisdiction over the challenged measures."); *see also Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award ¶¶ 58-64 (Apr. 15, 2009) (summarizing relevant investment treaty arbitral awards and concluding that "if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established *prima facie]* at the jurisdictional phase"); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction ¶¶ 190-192 (Nov. 14, 2005) (finding that claimant "has the burden of demonstrating that its claims fall within the Tribunal's jurisdiction."); *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction ¶ 79 (Apr. 22, 2005) (acknowledging claimant had to satisfy the burden of proof "required at the jurisdictional phase").

[8] *Spence* Interim Award ¶¶ 163, 239, 245-246.

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

[10] Articles on Responsibility of States for Internationally Wrongful Acts, art. 12, U.N. Doc. A/RES/56/83 (2001).

11. With regard to knowledge of "incurred loss or damage" under Articles 10.18.1, the term "incur" broadly means to "to become liable or subject to."[11] Therefore, an investor may "incur" loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate. As the *Grand River* tribunal correctly held, "damage or injury may be incurred even though the amount or extent may not become known until some future time."[12]

Article 10.3 (National Treatment)

12. Article 10.3 ("National Treatment") provides that each Party shall accord to investors or covered investments of the other Party "treatment no less favorable than that it accords, in like circumstances," to its own investors and their investments "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory." This obligation thus prohibits nationality-based discrimination between domestic and foreign investors (or investments of foreign and domestic investors) that are "in like circumstances."

13. To establish a breach of Article 10.3, a claimant has the burden of proving that it or its investments: (1) were accorded "treatment"; (2) were in "like circumstances" with domestic investors or investments; and (3) received treatment "less favorable" than that accorded to domestic investors or investments.[13] As the *UPS v. Canada* tribunal noted (with respect to the functionally identical provisions of the NAFTA), "[t]his is a legal burden that rests squarely with the Claimant. That burden never shifts . . . ."[14]

14. As indicated above, the appropriate comparison is between the treatment accorded to the Party's investment or investor and a national investment or investor *in like circumstances.* As one tribunal has observed, "[i]t goes without saying that the meaning of the term ['in like circumstances'] will vary according to the facts of a given case. By their very nature,

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[11] "Incur," Merriam-Webster Online Dictionary, *available at* https://www.merriam-webster.com/dictionary/incur; *see also United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999) (finding that to "incur" means to "become liable or subject to" and that "a person may become 'subject to' an expense before she actually disburses any funds").

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

[13] 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." *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).

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

'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations."[15] 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 "in like circumstances" analysis requires consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other possible relevant characteristics. Simply being in the same sector, or selling the same product, is not alone sufficient to demonstrate like circumstances. When determining whether the claimant was in like circumstances with alleged comparators, the Party's investor or 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 10.3 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

15. Nothing in Article 10.3 requires that investors or investments of investors of a Party, regardless of the circumstances, be accorded the best, or most favorable, treatment given to any national investor or any investment of a national. The appropriate comparison is between the treatment accorded a foreign investment or investor and a national investment or investor *in like circumstances*. This is an important distinction intended by the Parties. Thus, a CAFTA-DR Party may adopt measures that draw distinctions among entities without necessarily violating Article 10.3.

Article 10.5 (Minimum Standard of Treatment)

16. Article 10.5.1 of the Treaty requires that each Party "accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." Article 10.5.2 specifies that:

> For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.

Article 10.5.2 then goes on to state that

> The obligation in paragraph 1 to provide:
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> (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory

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

> proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
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> (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

Rules that have crystallized into the minimum standard

17. 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.[16] The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[17]

18. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, expressly addressed in Article 10.5.2, 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." Other areas included within the minimum standard of treatment concern the obligation not to expropriate covered investments except under the conditions specified in Article 10.7, and the obligation to provide "full protection and security," which, as stated in Article 10.5.2(b), "requires each Party to provide the level of police protection required under customary international law."[18]

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[16] A fuller description of the U.S. position is set out in *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America (Nov. 13, 2000); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Post-Hearing Submission of Respondent United States of America on Article 1105(1) and Pope & Talbot (June 27, 2002); *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Sept. 19, 2006); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Dec. 22, 2008) ("U.S. Counter- Memorial in *Grand River*"). Submissions of the United States in investor-State arbitrations may be found on the U.S. Department of State website, available at http://www.state.gov/s/l/c3433.htm.

[17] *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 259 (Nov. 13, 2000) ("*S.D. Myers* First Partial Award"); *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."); *see also* Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 AM. SOC'Y OF INT'L L PROC. 51, 58 (1939).

[18] *See The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Counter-Memorial of the United States of America, at 176-177 (Mar. 30, 2001) ("[C]ases in which the customary international law obligation of full protection and security was found to have been breached are limited to those in which a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien."); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Respondent's Rejoinder on Jurisdiction, Admissibility and the Proposed Amendment, at 39 (June 27, 2001) (same).

Methodology for determining the content of customary international law

19. Annex 10-B to the CAFTA-DR addresses the methodology for interpreting customary international law rules covered by the agreement. The annex expresses the CAFTA-DR 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." This two-element approach – State practice and *opinio juris* – 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."[19]

20. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate that a rule of customary international law exists, most recently in its decision on *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*.[20] In that case, 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 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.[21]

Obligations that have not crystallized into the minimum standard

21. The concept of "transparency" has not crystallized as a component of "fair and equitable treatment" under customary international law giving rise to an independent host-State obligation.[22] The United States is aware of no general and consistent State practice and *opinio*

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[19] *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[.]"); Michael Wood (Special Rapporteur), *Second Report on Identification of Customary International Law* ¶ 21, A/CN.4/672, International Law Commission (May 22, 2014) ("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"); Michael Wood (Special Rapporteur), Fourth Report on Identification of Customary International Law, Doc. A/CN.4/695, ¶ 31 & Annex at 21 (Mar. 8, 2016) (proposing minor modifications to Draft Conclusion 3).

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

[21] *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).

[22] *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*

juris establishing an obligation of host-State transparency under the minimum standard of treatment.

22. Moreover, as Article 10.5.3 makes clear: "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." In this connection, a Chapter Ten tribunal does not have jurisdiction to address matters that arise under Chapter Eighteen ("Transparency"). Rather, the jurisdiction of a Chapter Ten tribunal is limited, according to Article 10.16(1), to claims that a respondent Party breached an obligation of Chapter Ten (Section A), an investment authorization, or an investment agreement.[23] An investor bringing an Article 10.5 claim may not invoke an alleged host State violation of an international obligation owed to another State or to the investor's home State, including, for example, an obligation contained in another treaty or another Chapter of CAFTA-DR such as Chapter Eighteen. A violation of Chapter Eighteen, which is subject to the State-to-State dispute resolution provisions of Chapter Twenty, may be the basis of a claim by one CAFTA-DR Party against another, but that violation does not provide a separate cause of action for an investor, who may only bring claims against a host Party for alleged breaches of Chapter Ten, Section A.

23. The concept of "legitimate expectations" is also not a component element of "fair and equitable treatment" under customary international law that gives rise to an independent host

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of Canada, 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"); *see also Glamis Gold, Ltd. v. United States of America*, Rejoinder of Respondent United States of America, at 155-163 (Mar. 15, 2007) (section titled "No Transparency Rule Is Required by the International Minimum Standard of Treatment Reflected in Article 1105(1)"); *ADF Group v. United States of America*, NAFTA/ICSID, ICSID Case No. ARB(AF)/00/1, Final Post-Hearing Submission of the United States of America on Article 1105.1 and *Pope & Talbot*, at 10 (Aug. 1, 2002) ("To the extent that the *Metalclad* [*v. Mexico*] award can be read to suggest that the phrase 'fair and equitable' in Article 1105(1) articulates a standard other than the international minimum standard – such as that of transparency – it is wrongly reasoned and should not be followed here."); *RDC Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Submission of the Republic of El Salvador as a Non-Disputing Party under CAFTA Article 10.20.2 ¶ 7 (Jan. 2012) ("El Salvador considers that the requirement to provide 'Fair and Equitable Treatment' under CAFTA Article 10.5 does not include obligations of transparency, reasonableness, refraining from mere arbitrariness, or not frustrating investors' legitimate expectations.").

[23] Chapter Ten tribunals in this respect are tribunals of limited jurisdiction. *See, e.g.*, *Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Interim Decision on Jurisdiction ¶ 61 (Dec. 6, 2000) (noting that the tribunal's jurisdiction was "limited to claims arising out of an alleged breach of an obligation under Section A of Chapter Eleven of the NAFTA. Thus, the Tribunal does not have, in principle, jurisdiction to decide upon claims arising because of an alleged violation of general international law or domestic . . . law"); *Grand River Enterprises Six Nations Ltd. v United States of America*, NAFTA/UNCITRAL, Award ¶ 71 (Jan. 12, 2011) ("*Grand River* Award") ("This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA. As the *Methanex* Tribunal warned, 'interpreting Article 1131(1) to create a jurisdiction extending beyond Section A of Chapter 11 would indeed be to transform it . . . into an unqualified and comprehensive jurisdictional regime, in which there would be no limit ratione materiae to the jurisdiction of a tribunal established under Chapter 11 NAFTA.'") (footnote and internal quotations omitted).

State obligation.[24] 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 United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations; instead, something more is required, such as a complete repudiation of a contract.[25]

24. 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.[26] As a general proposition, a State may treat foreigners

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[24] For the views of other CAFTA-DR non-disputing Parties, *see, e.g.*, *Spence International Investments v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Non-Disputing Party Submission of the Republic of El Salvador, ¶¶ 8-12 (Apr. 17, 2015) ("The minimum standard of treatment does not include the protection of investors' expectations, legitimate or otherwise"); *RDC Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Submission of the Republic of El Salvador as a Non-Disputing under CAFTA Article 10.20.2, ¶ 7 (Jan. 2012) ("El Salvador considers that the requirement to provide 'Fair and Equitable Treatment' under CAFTA Article 10.5 does not include obligations of transparency, reasonableness, refraining from mere arbitrariness, or not frustrating investors' legitimate expectations."); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-Disputing Party Submission of the Republic of El Salvador ¶ 16 (Oct. 5, 2012) (noting that the concept of "fair and equitable treatment" does not include the protection of an investor's legitimate expectations[.]"); *RDC Corp. v. Guatemala*, Submission of the Republic of Honduras as a Non-Disputing Party ¶ 10 (Jan. 2012) (translation by counsel) ("However, because the focus should be on the conduct of the State, the Republic of Honduras does not consider it valid or necessary to refer to investors' expectations in order to decide whether there has been a violation of the minimum standard of treatment.") ("Sin embargo, debido a que el enfoque debe ser en la conducta del Estado, la República de Honduras no considera válido ni necesario hacer referencia a las expectativas de los inversionistas para decidir si se ha violado el nivel minimo de trato."); *TECO v. Guatemala*, Submission of the Republic of Honduras as a Non-Disputing Party ¶ 10 (Nov. 2012) (same); *TECO v. Guatemala*, Non- Disputing Party Submission of the government of the Dominican Republic ¶ 10 (Oct. 5, 2012) ("Given that the focus should be on the practice and conduct of the State, the Dominican Republic also notes that it is wrong to include investors' expectations of the treatment they expect to receive based on what has been offered, in deciding whether the State has complied with the minimum standard of treatment."); *see also* PATRICK DUMBERRY, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105, at 158-59 (2013) ("In the present author's view, there is little support for the assertion that there exists under customary international law any obligation for host States to protect investors' legitimate expectations.").

[25] *See, e.g.*, U.S. Counter-Memorial in *Grand River* ("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."). NAFTA tribunals have recognized this point. *See Robert Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award ¶ 87 (Nov. 1, 1999) ("NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes."); *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award ¶ 115 (Apr. 30, 2004) (explaining that "even the persistent non-payment of debts by a municipality is not equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and . . . some remedy is open to the creditor to address the problem.").

[26] *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

and nationals differently, and it may also treat foreigners from different States differently.[27] 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[28] or access to judicial remedies or treatment by the courts,[29] as well as the obligation of States to provide full

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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.").

[27] See *Methanex v. United States of America*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, Part IV, Chapter C ¶¶ 25-26 (Aug. 3, 2005) ("*Methanex* Final Award") (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, 33 AM. SOC'Y OF INT'L L. PROC. 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.").

[28] *See, e.g.*, *BP Exploration Co. (Libya) Ltd. v. Libya*, 53 I.L.R. 297, 329 (Lagergren 1974) ("the 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*, Award, 62 I.L.R. 140, 194 (1977) ("It is clear and undisputed that non-discrimination is a requisite for the validity of a lawful nationalization. This is a rule well established in international legal theory and practice."); *Kuwait v. American Independent Oil Co. (AMINOIL)*, 66 I.L.R. 518, 585, ¶ 87 (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 THE LAW OF FOREIGN RELATIONS § 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 . . . .").

[29] *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, DIPLOMATIC PROTECTION OF CITIZENS ABROAD, at 334 (1927) (a national's "own government is justified in intervening in his behalf only if the laws themselves, the methods provided for administering them, and the penalties prescribed are in derogation of the principles of civilized justice as universally recognized or if, in a specific case, they have been wrongfully subverted by the courts so as to discriminate against him as an alien or perpetrate a technical denial of justice."); Report of the Guerraro Sub-Committee of the Committee of the League of Nations on Progressive Codification 1, Publications of the League C.196, M. 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

protection and security and to compensate aliens and nationals on an equal basis for damages incurred during times of violence, insurrection, conflict or strife.[30] Moreover, general investor-State claims of nationality-based discrimination are governed exclusively by the provisions of Chapter Ten that specifically address that subject, not Article 10.5.1.[31]

25. 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 what is required by customary international law.[32] 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.[33] Thus, arbitral decisions interpreting "autonomous" fair

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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.").

[30] *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.").

[31] *See Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award ¶ 7.58 (Mar. 4, 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, Chapter 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"); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, U.S. Amended Statement of Defense ¶¶ 356-365 (Dec. 5, 2003) (explaining that unlike NAFTA Articles 1102 and 1103, which provide a relative standard of protection, Article 1105(1) signals an absolute, minimum standard of treatment and that, had the Parties intended to incorporate a general obligation of non-discrimination in Article 1105(1), they would have included exceptions in Article 1108 to exempt from Article 1105(1)'s ambit the discriminatory activities they considered permissible. Otherwise, permissible measures could be rendered violations under Article 1105(1), rendering ineffective the exceptions set forth in Article 1108)).

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

[33] CAFTA-DR, art. 10.5.2 ("For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments."). *See also Grand River* Award ¶ 176 (noting that an obligation under Article 1105 of the NAFTA "must be determined by reference to customary international law, not to standards contained in other treaties or other NAFTA provisions, or in other sources, unless those sources reflect relevant customary international law"). While there may be overlap in

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.[34] Likewise, 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.[35] 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.

Conclusions on the application of Article 10.5

26. The Treaty Parties thus expressly intended Article 10.5 to afford the minimum standard of treatment to covered investments, as that standard has crystallized into customary international law through general and consistent State practice and *opinio juris*. For alleged standards that are not specified in the treaty, a claimant must demonstrate that such a standard has crystallized into an obligation under customary international law.

27. To do so, 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*.[36] "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."[37]

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the substantive protections ensured by this Agreement and other treaties, a claimant submitting a claim under this Agreement, 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.

[34] *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*, 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.").

[35] *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").

[36] *Asylum (Colombia v. Peru)*, 1950 I.C.J. Rep. 266, 276 (Nov. 20); *see also North Sea Continental Shelf*, Judgment, 1969 I.C.J. Rep. at 43; *Glamis* Award ¶¶ 601-02 (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 international quotation marks omitted).

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

Tribunals applying the minimum standard of treatment obligation in Article 1105 of NAFTA Chapter Eleven, which, like Article 10.5 in the CAFTA-DR, affixes the standard to customary international law,[38] 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.[39]

28. Once a rule of customary international law has been established, the claimant must then show that the State has engaged in conduct that violates that rule.[40] 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."[41]

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such a manner that it has become binding on the other Party.") (citation and internal quotation marks omitted); The *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).

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

[39] *Cargill* Award ¶ 273 (emphasis added). The *ADF*, *Glamis*, and *Methanex* tribunals likewise placed on the claimant the burden of establishing the content of customary international law. *See ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award ¶ 185 (Jan. 9, 2003) ("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 ("As a threshold issue, the Tribunal notes that it is Claimant's burden to sufficiently" show the content of the customary international law minimum standard of treatment); *Methanex* Final Award, Part IV, Chapter C ¶ 26 (citing *Asylum (Colombia v. Peru)* for placing burden on claimant to establish the content of customary international law, and finding that claimant, which "cited only one case," had not discharged burden).

[40] *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).

[41] *S.D. Myers* First Partial Award ¶ 263; *International Thunderbird Gaming Corporation v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 127 (Jan. 26, 2006) (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).

Article 10.7 (Expropriation and Compensation)

29. As the Parties confirm in CAFTA-DR Annex 10-C, Article 10.7.1 "is intended to reflect customary international law concerning the obligation of States with respect to expropriation,"[42] and addresses two situations: "The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure. The second situation . . . is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure." [43]

30. Article 10.7.1 provides that no Party may expropriate or nationalize a covered investment,[44] whether directly or indirectly,[45] 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 and Article 10.5.[46] 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. Compensation must be "prompt," in that it must be "paid without delay";[47] "adequate," in that it must be made at the fair market value immediately before the expropriation took place, undiminished by any change in value that occurred because the expropriatory action became known earlier; and "effective," in that it must be fully realizable and freely transferable.[48]

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[42] CAFTA-DR, Annex 10-C ¶ 1.

[43] CAFTA-DR, Annex 10-C ¶ 3.

[44] As explained in Annex 10-C, "[a]n action or series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment." CAFTA-DR, Annex 10-C ¶ 2.

[45] CAFTA-DR, Annex 10-C ¶¶ 3-4.

[46] 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.

[47] *See Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award ¶¶ 71-72 (Oct. 11, 2002) ("*Mondev* Award") ("It is true that the obligation to compensate as a condition for a lawful expropriation (NAFTA Article 1110(1)(d)) does not require that the award of compensation should occur at exactly the same time as the taking. But for a taking to be lawful under Article 1110, at least the obligation to compensate must be recognised by the taking State at the time of the taking, or a procedure must exist at that time which the claimant may effectively and promptly invoke in order to ensure compensation. . . . The word[s] ['on payment'] should be interpreted to require that the payment be clearly offered, or be available as compensation for taking through a readily available procedure, at the time of the taking."). The requirement to provide "prompt, adequate, and effective compensation" for a lawful expropriation has been a feature of U.S. treaties for well over a half century. In that context, "prompt" has been understood to require a government to "diligently carry out orderly and nondilatory procedures . . . to ensure correct compensation and make payment as soon as possible." Charles Sullivan, *Treaty of Friendship, Commerce and Navigation: Standard Draft – Evolution through January 1, 1962*, 112, 116 (U.S. Department of State, 1971).

[48] CAFTA-DR, art. 10.7.2(a)-(d).

31. Under international law, where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory.[49] CAFTA-DR Annex 10-C, paragraph 4, provides specific guidance as to whether an action, including a regulatory action, constitutes an indirect expropriation.

32. As explained in paragraph 4(a) of Annex 10-C, an indirect expropriation occurs "where an action or series of actions by a Party *has an effect equivalent to direct expropriation* without formal transfer of title or outright seizure."[50] 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.

33. With respect to the first factor, an adverse economic impact "standing alone, does not establish that an indirect expropriation has occurred."[51] 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 conclusion that the property has been 'taken' from the owner."[52]

34. 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

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[49] *See, e.g.*, *Glamis* Award ¶ 354 (quoting the RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712, cmt. (g) (1986) ("A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory. . . .")); *Chemtura Corp. v. Government of Canada*, NAFTA/UNCITRAL, Award ¶ 266 (Aug. 2, 2010) (holding that Canada's regulation of the pesticide lindane was a non-discriminatory measure motivated by health and environmental concerns and that a measure "adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation"); *Methanex* Final Award, Part IV, Ch. D ¶ 7 (holding that as a matter of general international law, a "a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process" will not ordinarily be deemed expropriatory or compensable).

[50] CAFTA-DR, Annex 10-C ¶ 4 (emphasis added).

[51] CAFTA-DR, Annex 10-C ¶ 4.

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

acquired in the particular sector in which the investment was made.[53] For example, where a sector is "already highly regulated, reasonable extensions of those regulations are foreseeable."[54]

35. 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").[55]

36. Annex 10-C, paragraph 4(b), further provides that "[e]xcept in rare circumstances, nondiscriminatory 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,

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[53] *Methanex* Final Award, Part IV, Ch. D ¶ 9 (noting that no specific commitments to refrain from regulation had been given to Methanex, which "entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons. Indeed, the very market for MTBE in the United States was the result of precisely this regulatory process").

[54] *Glamis Gold, Ltd. v. United States of America*, 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.").

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