

IN THE ARBITRATION UNDER CHAPTER 10 OF THE  
DOMINICAN REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT  
AND THE UNCITRAL ARBITRATION RULES BETWEEN

SPENCE INTERNATIONAL INVESTMENTS, LLC, BERKOWITZ ET AL.,

*Claimant/Investor*

*-and-*

THE REPUBLIC OF COSTA RICA,

*Respondent/Party.*

ICSID Case No. UNCT/13/2

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**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 Agreement. 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.

Article 10.1.3 (Scope and Coverage)

2. Article 10.1.3 the CAFTA-DR states:

For 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.

This provision clarifies that the investment chapter of the CAFTA-DR does not apply retroactively.<sup>1</sup> The introductory phrase “[f]or greater certainty” confirms that Article 10.1.3 is

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<sup>1</sup> 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) (“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.”) (“*Feldman* Interim Decision”).

not strictly necessary because the CAFTA-DR would not apply retroactively even in the absence of such clarification.<sup>2</sup>

3. A host State's conduct prior to the entry into force of an obligation may be relevant in determining whether the State subsequently breached that obligation. Given the rule against retroactivity, however, there must exist "conduct of the State after that date which is itself a breach."<sup>3</sup> As the *Mondev* tribunal confirmed, "[t]he mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct."<sup>4</sup>

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

4. Article 10.18.1 requires a claimant to submit a claim to arbitration within three years of the "date on which the claimant first acquired, or should have first acquired, knowledge" of (i) the alleged breach, and (ii) loss or damage incurred by the claimant or enterprise.<sup>5</sup>

5. Article 10.18.1 refers to knowledge of the alleged breach and loss first acquired as of a particular "date." Such knowledge cannot be acquired at multiple points in time or on a recurring basis. Accordingly, a continuing course of conduct cannot renew the limitations period under Article 10.18.1. A legally distinct injury, by contrast, can give rise to a separate limitations period under CAFTA-DR Chapter Ten.

6. A tribunal constituted under CAFTA-DR Chapter Ten is bound by the terms of the agreement. Article 10.18.1 expressly requires a claimant to submit a claim to arbitration within three years of the date on which the claimant "first acquired" (or should have first acquired) knowledge of breach and loss.

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<sup>2</sup> 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 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 OF ST. BULL. 684, 685 (1971).

<sup>3</sup> *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.").

<sup>4</sup> *Mondev* Award ¶ 70 ("Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility.").

<sup>5</sup> 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").

7. Where a “series of similar and related actions by a respondent state” is at issue, an investor cannot evade the limitations period by basing its claim on “the most recent transgression in that series.”<sup>6</sup> To allow an investor to do so would, as the tribunal in *Grand River* recognized, “render the limitations provisions ineffective[.]”<sup>7</sup> An ineffective limitations period would fail to promote the goals of ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential respondents and third parties. Accordingly, once a claimant *first* acquires (or should have acquired) knowledge of breach and loss, subsequent transgressions by the State Party arising from a continuing course of conduct, as opposed to a legally distinct injury, do not renew the limitations period under Article 10.18.1.

8. Any reliance on *UPS v. Canada* with respect to this point is misplaced. That tribunal found that continuing courses of conduct constituting continuing breaches may renew claims limitation periods under international law.<sup>8</sup> But as the tribunal in *Clayton v. Canada* correctly noted in this context with respect to the same claims limitation period, the specific terms of the treaty “enjoy priority” over general rules of international law on time-limits “as *leges speciales*.”<sup>9</sup>

9. Moreover, contrary to the *UPS* tribunal’s decision, acquiring more detailed information about the breach or the loss does not reset the limitations period. As other NAFTA tribunals have held, knowledge of loss or damage incurred does not require knowledge of the full or precise extent of loss or damage.<sup>10</sup>

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<sup>6</sup> *Grand River* Decision on Jurisdiction ¶ 81 (interpreting the claims limitation language in NAFTA Chapter Eleven, which is identical to CAFTA-DR Article 10.18.1 for all relevant purposes).

<sup>7</sup> *Id.*

<sup>8</sup> *United Parcel Service, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award ¶ 28 (May 24, 2007) (finding that this result was “true generally in the law”) (“*UPS Award*”).

<sup>9</sup> *William Ralph Clayton et al. v. Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction and Liability ¶ 258 (Mar. 17, 2015) (“*Clayton Award*”). The *UPS* tribunal’s reliance on the *Feldman* Interim Decision was misplaced. That decision did not hold that a permanent course of conduct by the respondent would extend the time limitations period. The tribunal merely acknowledged that because the NAFTA came into effect on January 1, 1994, no obligations adopted under the NAFTA existed before that date and the tribunal’s jurisdiction could not extend before that date. See *Feldman* Interim Decision ¶ 62. With respect to the claims limitation provisions of Chapter Eleven, the tribunal only had occasion to decide whether the language “make a claim” referred to the notice of intent or the notice of arbitration – an issue not relevant in the context of CAFTA-DR where a claim is expressly deemed submitted to arbitration with the notice of arbitration. See CAFTA-DR, Article 10.16.4.

<sup>10</sup> See *Clayton Award* ¶ 275 (“The plain language of Article 1116(2) does not require full or precise knowledge of loss or damage. It might be that some qualification can be read into the plain language, such as a requirement that the loss be material. To require a reasonably specific knowledge of the amount of loss would, however, involve reading into Article 1116(2) a requirement that might prolong greatly the inception of the three-year period and add a whole new dimension of uncertainty to the time-limit issue[.]”); *Grand River* Decision on Jurisdiction ¶ 78 (“[T]he Tribunal’s views parallel those of the NAFTA Tribunal in *Mondev*. The claimant there also faced difficulties arising from the time limitations of Articles 1116(2) and 1117(2). The claimant sought to surmount these with the argument that it could have certain knowledge that it had incurred injury from events prior to the limitations period only after it knew the outcome of subsequent litigation that stood to quantify the extent of loss. The Tribunal did not agree, finding that ‘a Claimant may know that it has suffered loss or damage even if the extent of quantification of the loss or damage is still unclear.’”).

10. Finally, because the claimant bears the burden to establish jurisdiction under Chapter Ten, including with respect to Article 10.18.1,<sup>11</sup> the claimant must prove the necessary and relevant facts (*i.e.*, the date when such knowledge of breach and loss was first acquired) to establish that its claims fall within the three-year claims limitation period.

#### Article 10.5 (Minimum Standard of Treatment)

11. CAFTA-DR Article 10.5.1 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.” CAFTA-DR 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.

12. These provisions demonstrate the States Parties’ express intent to establish the customary international law minimum standard of treatment as the applicable standard in CAFTA-DR 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.<sup>12</sup> The standard establishes a minimum “floor below which treatment of foreign investors must not fall.”<sup>13</sup>

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<sup>11</sup> See *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections ¶¶ 2.8, 2.9, 2.11, 2.15 (June 1, 2012) (noting in the context of jurisdictional objections, including with respect to *ratione temporis* and Article 10.18.1 of the CAFTA-DR, that “all relevant facts supporting [ ] jurisdiction must be established by the Claimant at [the] jurisdictional stage,” that “the Claimant has to prove that the Tribunal has jurisdiction,” and that “the Claimant has the burden to prove facts necessary to establish jurisdiction (as it positively asserts)”; *Apotex Inc. v. United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction and Admissibility ¶ 150 (June 14, 2013) (“Apotex (as Claimant) bears the burden of proof with respect to the factual elements necessary to establish the Tribunal’s jurisdiction[.]”) (citing *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award ¶¶ 58-64 (Apr. 15, 2009) (summarizing previous decisions, 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”)).

<sup>12</sup> A fuller description of the U.S. position is set out in *Methanex 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) (“U.S. Counter-Memorial, *Glamis*”); *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, *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>.

<sup>13</sup> *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 259 (Nov. 13, 2000); *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 615 (June 8, 2009) (“The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community.”) (“*Glamis Award*”); see

13. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, which is expressly addressed in Article 10.5, concerns the obligation to provide “fair and equitable treatment,” which includes, for example, the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.<sup>14</sup> A denial of justice arises, for example, when a State’s judiciary administers justice to aliens in a “notoriously unjust”<sup>15</sup> or “egregious”<sup>16</sup> manner “which offends a sense of judicial propriety.”<sup>17</sup>

14. Other such areas concern, as addressed in Article 10.5, the obligation to provide “full protection and security,” which obligation is not at issue in this case, and the obligation not to expropriate covered investments, except under the conditions specified in Article 10.7.

15. CAFTA-DR Annex 10-B addresses the methodology for interpreting customary international law rules covered by the agreement. The annex expresses the treaty 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.”<sup>18</sup>

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also Edwin Borchard, *The “Minimum Standard” of the Treatment of Aliens*, 33 AM. SOC’Y OF INT’L L. PROC. 51, 58 (1939).

<sup>14</sup> CAFTA-DR, Article 10.5.2(a).

<sup>15</sup> 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)) (“PAULSSON”); *id.* at 4 (“[A] state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner.”) (emphasis omitted); *B. E. Chattin (U.S.A.) v. United Mexican States*, 4 R. INT’L ARB. AWARDS 282, 286-87 (July 23, 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).

<sup>15</sup> 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)) (“PAULSSON”); *id.* at 4 (“[A] state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner.”) (emphasis omitted); *B. E. Chattin (U.S.A.) v. United Mexican States*, 4 R. INT’L ARB. AWARDS 282, 286-87 (July 23, 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).

<sup>16</sup> 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.”).

<sup>17</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award ¶ 132 (June 26, 2003) (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 judicial propriety”).

<sup>18</sup> See 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 (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”); *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*.”); *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

Relevant State practice must be widespread and consistent<sup>19</sup> and be accepted as law, meaning that the practice must also be accompanied by a sense of legal obligation.<sup>20</sup> Moreover, the twin requirements of State practice and *opinio juris* “must both be identified ... to support a finding that a relevant rule of customary international law has emerged.”<sup>21</sup> The annex provides important guidance for assessing whether an alleged norm has been sufficiently demonstrated to be an element of customary international law.

16. 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)*.<sup>22</sup> 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.<sup>23</sup>

17. Neither the concepts of “good faith” nor “legitimate expectations” are component elements of “fair and equitable treatment” under customary international law that give rise to an independent host State obligation.<sup>24</sup> Indeed, while good faith is “one of the basic principles

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for primarily in the actual practice and *opinio juris* of States[.]”); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 14, 97 (June 27) (“[T]he Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and *opinio juris* of States.”).

<sup>19</sup> See, e.g., *North Sea Continental Shelf*, 1969 I.C.J. 3, 43 (Feb. 20) (noting that in order for a new rule of customary international law to form, “State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved”) (“*North Sea Continental Shelf* Judgment”); ILC Second report on the identification of customary international law, Draft Conclusion 9 and commentaries (citing authorities).

<sup>20</sup> *North Sea Continental Shelf* Judgment at 44 (“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.”); ILC Second report on the identification of customary international law, Draft Conclusion 10 with commentaries (citing authorities).

<sup>21</sup> ILC Second report on the identification of customary international law ¶¶ 22-23 (also noting that these requirements are “indispensable for any rule of customary international law properly so called”).

<sup>22</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99 (Feb. 3).

<sup>23</sup> *Id.* at 122-23 (discussing relevant materials that can serve as evidence of State practice and *opinio juris* in the context of jurisdiction immunity in foreign courts).

<sup>24</sup> For the views of other CAFTA-DR non-disputing Parties, see, e.g., *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*

governing the creation and performance of legal obligations,” it is well established that “it is not in itself a source of obligation where none would otherwise exist.”<sup>25</sup> As such, customary international law does not impose a free-standing, substantive obligation of “good faith” that can support a claim or, if breached, result in State liability.<sup>26</sup>

18. Similarly, 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 than the mere interference with those expectations.<sup>27</sup>

19. In fact, tribunals discussing State practice confirm that expectations about a particular legal regime do not preclude a State from taking future regulatory action. States may modify or

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*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 mínimo de trato.”); *TECO v. Guatemala*, Submission of the Republic of Honduras as a Non-Disputing Party ¶ 10 (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* 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.”).

<sup>25</sup> *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 1988 I.C.J. 69, 105 (Dec. 20) (internal quotation marks omitted).

<sup>26</sup> *Land and Maritime Boundary (Cameroon v. Nigeria)*, 1998 I.C.J. 275, 297 (June 11) (holding that in the absence of an independent obligation, Nigeria could “not justifiably rely upon the principle of good faith” in support of its claims). Nor can any obligation of “legitimate expectations” be derived from a general principle of “good faith.” A general principle of international law that does not impose any substantive obligations on a State toward foreign investors cannot itself create *additional* State obligations toward such investors.

<sup>27</sup> See, e.g., U.S. Counter-Memorial, *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.” Even when such expectations arise out of a legal commitment, “[t]o breach the minimum standard of treatment, something more is required, such as a complete repudiation of the contract or a denial of justice in the execution of the contract.”). 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) (“Azinian Award”) (“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.”).

amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's "expectations" about the state of regulation in a particular sector. Further, as the *Mobil v. Canada* tribunal recently explained, in the context of the minimum standard of treatment under NAFTA Article 1105:

[The fair and equitable treatment] standard does not require a State to maintain a stable legal and business environment for investments[.]... [T]here is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor. Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made.... What the foreign investor is entitled to under Article 1105 is that any changes are consistent with the requirements of customary international law on fair and equitable treatment.<sup>28</sup>

For all these reasons, regulatory action may only violate "fair and equitable treatment" under the minimum standard of treatment as that term is understood in customary international law.<sup>29</sup>

20. States may decide expressly by treaty to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law. Extending such protections through "autonomous" standards in any particular treaty represents a policy decision by a State, rather than an action taken out of a sense of legal obligation. That practice is not relevant to ascertaining the content of Article 10.5, which expressly ties "fair and equitable treatment" and "full protection and security" to the customary international law minimum standard of treatment.<sup>30</sup> Thus, arbitral decisions interpreting

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<sup>28</sup> *Mobil Investments Canada Inc. & Murphy Oil Corp. v. Canada*, NAFTA/ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum ¶ 153 (May 22, 2012) (noting also that "[i]t is not the function of an arbitral tribunal established under NAFTA to legislate a new standard which is not reflected in the existing rules of customary international law. The Tribunal has not been provided with any material to support the conclusion that the rules of customary international law require a legal and business environment to be maintained or set in concrete."); see also *Azinian Award* ¶ 83 ("It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints. . . . NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.").

<sup>29</sup> See, e.g., *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 194 (Jan. 26, 2006) ("*Thunderbird Award*"); see also U.S. Counter-Memorial, *Glamis*, at 218-262 (discussing the customary international law minimum standard of treatment in the context of regulatory action); *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Rejoinder of Respondent United States of America, at 139-243 (Mar. 15, 2007) (same) ("U.S. Rejoinder, *Glamis*").

<sup>30</sup> Article 10.5.2 ("For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments."). See also *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 176 (Jan. 12, 2011) (noting that 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



“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.<sup>31</sup> 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.<sup>32</sup>

21. Thus, the CAFTA-DR Parties 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.

22. 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*.<sup>33</sup> “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.”<sup>34</sup> Tribunals applying Article 1105 of NAFTA Chapter Eleven 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

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those sources reflect relevant customary international law”) (“*Grand River Award*”). While there may be overlap in the substantive protections ensured by CAFTA-DR and other treaties, a claimant submitting a claim under the CAFTA-DR, 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.

<sup>31</sup> 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”).

<sup>32</sup> See *id.* ¶ 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”).

<sup>33</sup> *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20); see also *North Sea Continental Shelf Judgment* 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).

<sup>34</sup> *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 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).

this task. Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.<sup>35</sup>

23. 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.<sup>36</sup> 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.”<sup>37</sup>

24. Finally, Article 10.5.3 makes clear a “determination that there has been a breach of another provision of” the CAFTA-DR “does not establish that there has been a breach of” the minimum standard of treatment. Each obligation must be determined under its own relevant standard. For example, a violation of Article 10.7 does not *per se* constitute a separate violation of Article 10.5.

#### Article 10.7 (Expropriation and Compensation)

25. Article 10.7.1 provides that no State Party to the CAFTA-DR may expropriate or nationalize property (directly or indirectly) except for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate and effective compensation; and in accordance with due process of law.<sup>38</sup> Compensation must be “prompt,” in that it must be “paid without delay”;<sup>39</sup>

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<sup>35</sup> *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award ¶ 273 (Sept. 18, 2009) (emphasis added) (“*Cargill Award*”). The *ADF*, *Glamis Gold*, 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 Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, Part IV, Chapter C ¶ 26 (Aug. 3, 2005) (citing *Asylum Case (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) (“*Methanex Final Award*”).

<sup>36</sup> *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).

<sup>37</sup> *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 263 (Nov. 13, 2000); *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).

<sup>38</sup> Article 10.7.1 also clarifies that no Party may 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.

<sup>39</sup> See *Mondev Award* ¶¶ 71-72 (“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

“adequate,” in that it must be made at the fair market value as of the date of expropriation, 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.<sup>40</sup>

26. 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. A breach of any such condition requires compensation in accordance with Article 10.7.2.<sup>41</sup> Where, at the time of the expropriation, a host State does not compensate or make provision for the prompt determination of compensation, the breach occurs at the time of the taking.<sup>42</sup> In contrast, “when a State provides a process for fixing adequate compensation, but then ultimately fails to promptly determine and pay such compensation,” a breach of the compensation obligation may occur later, subsequent to the time of the taking.<sup>43</sup>

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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).

<sup>40</sup> CAFTA-DR, Article 10.7.2(a)-(d).

<sup>41</sup> As the tribunal in *British Caribbean Bank v. Belize* recently confirmed with respect to very similar treaty language: “at no point does the Treaty, being a *lex specialis*, distinguish between lawful and unlawful expropriation. . . . Once the violation of the Treaty provisions regarding expropriation is established, the State has breached the Treaty.” The tribunal, noting that the language “specifically negotiated” by the treaty parties required that compensation “shall amount to the . . . fair market value of the investment expropriated before the expropriation,” found no room for interpreting this language to allow for another standard of compensation in the event of a breach. *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18, Award ¶¶ 260-62 (Dec. 19, 2014) (emphasis added).

<sup>42</sup> See *Mondev* Award ¶ 72 (“Article 1110 requires that the nationalization or expropriation be ‘on payment of compensation in accordance with paragraphs 2 through 6’. The word ‘on’ should be interpreted to require that the payment be clearly offered, or be available as compensation for taking through a readily available procedure, at the time of the taking. That was not the case here, and accordingly, if there was an expropriation, it occurred at or shortly after the rights in question were lost.”). A breach of CAFTA-DR Article 10.7 will occur unless a host State observes its obligation to refrain from an uncompensated taking at the time of the expropriation by, for example, fixing, guaranteeing, or offering compensation. See *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Rejoinder on Competence and Liability of Respondent United States of America, at 43 (Oct. 1, 2001) (citing authorities); see also *SEDCO, Inc. v. National Iranian Oil Co.*, Award No. 59-129-3, 10 IRAN-U.S. CL. TRIB. REP. 180, 204 n.34 (Mar. 27, 1986) (describing a “taking itself” as wrongful “[i]f . . . no provision for compensation is made contemporaneously with the taking, or one is made which clearly cannot produce the required compensation, or unreasonably insufficient compensation is paid at the time of taking”) (Sep. Op. of Judge Brower); *Liberian Eastern Timber Corp. (LETCO) v. Government of the Republic of Liberia*, Award (Mar. 31, 1986), in 2 ICSID REP. 343, 366 (1994) (finding Liberian Government deprived LETCO of its concession unjustifiably for failure to be “accompanied by payment (or at least the offer of payment) of appropriate compensation”).

<sup>43</sup> See Comments of the United Kingdom on the Draft Articles on State Responsibility ¶ 59 (“the breach does not arise until local procedures have definitively failed to deliver *proper compensation*,” e.g., “have so failed within the time limits implied by the requirement of promptness”) (emphasis added); *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award ¶¶ 422, 425 (Mar. 10, 2015) (“The Tribunal has already established that the LECUPS is a modern statute, the compliance with which in principle complies with the requirements of Art. 6(c) of the [treaty]. Nevertheless, . . . the Tribunal concludes that the Bolivarian Republic has not offered a plausible explanation justifying the delay of more than four years in fixing paying at least the fair value owed in compliance with the LECUPS, which implies that it cannot be considered to satisfy the requirement of Art.

27. Under international law, where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory.<sup>44</sup> CAFTA-DR Annex 10-C, paragraph 4, provides specific guidance as to whether an action, including a regulatory action, constitutes an indirect expropriation.

28. As explained in paragraph 4(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 that action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action. With respect to the first factor, an adverse economic impact “standing alone, does not establish that an indirect expropriation has occurred.” 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.”<sup>45</sup>

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6(c) of the [treaty] that compensation be paid “without undue delay.”) (translation by counsel) (“El Tribunal ya ha establecido que la LECUPS es una legislación moderna, cuyo cumplimiento en principio cumpliría con los requisitos del Art. 6(c) del APRI. Sin embargo, ... el Tribunal concluye que la República Bolivariana no ha ofrecido una explicación plausible que justifique el retraso de más de cuatro años en la fijación y en el pago al menos del justiprecio debido en cumplimiento de la LECUPS, lo que a su vez implica que no pueda considerarse cumplido el requisito del Art. 6(c) del APRI de que la compensación sea satisfecha “sin demora indebida.”); *Goldenberg Case (Germany v. Romania)*, 2 R.I.A.A. 901, 909 (Sept. 27, 1928) (“[T]he requisition carried out by the German military authorities did not *initially* constitute an ‘act contrary to the law of nations’. In order for this situation to continue, it was necessary, however, that within a reasonable delay, the claimants obtain equitable compensation. But such was not the case, the compensation, allocated several years after the requisition, amounting to barely a sixth of the value of the expropriated goods.”) (translation by counsel; emphasis in original) (“[L]a réquisition opérée par l’autorité militaire allemande ne constituait pas *initialement* un ‘acte contraire au droit des gens’. Pour qu’il continuât à en être ainsi, il fallait, cependant, que dans un délai raisonnable, les demandeurs obtinissent une indemnité équitable. Or tel n’a pas été le cas, l’indemnité, allouée plusieurs années après la réquisition, atteignant à peine le sixième de la valeur des biens expropriés.”).

<sup>44</sup> 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 (Aug. 2, 2010) ¶ 266 (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).

<sup>45</sup> *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

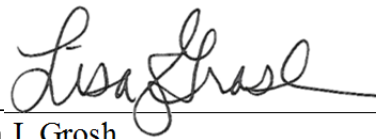
29. The second factor requires an objective inquiry of the reasonableness of the claimant's expectations, which may depend on the regulatory climate existing at the time the property was acquired in the particular sector in which the investment was made.<sup>46</sup> For example, where a sector is "already highly regulated, reasonable extensions of those regulations are foreseeable."<sup>47</sup>

30. 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").<sup>48</sup>

31. 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.

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*Respectfully submitted,*



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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)").

<sup>46</sup> *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").

<sup>47</sup> U.S. Rejoinder, *Glamis*, at 91 ("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.").

<sup>48</sup> U.S. Rejoinder, *Glamis*, at 109 (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)).