

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

GRAMERCY FUNDS MANAGEMENT LLC, AND
GRAMERCY PERU HOLDINGS LLC,

Claimants

-and-

THE REPUBLIC OF PERU,

Respondent.

ICSID CASE No. UNCT/18/2

SUBMISSION OF THE UNITED STATES OF AMERICA

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

Article 10.17.1 (Consent to Arbitration)

2. A State’s consent to arbitration is paramount.¹ Indeed, given that consent is the “cornerstone” of jurisdiction in investor-State arbitration,² it is axiomatic that a tribunal lacks jurisdiction in the absence of a disputing party’s consent to arbitrate.³

¹ See, e.g., ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 74 (1st ed. 2009) (“Arbitral tribunals constituted to hear international or transnational disputes are creatures of consent. Their source of authority must ultimately be traced to the consent of the parties to the arbitration itself.”); *William Ralph Clayton et al. v. Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction and Liability ¶ 229 (Mar. 17, 2015) (“General international law also provides that a state is not automatically subject to the jurisdiction of international adjudicatory bodies to decide in a legally binding way on complaints concerning its treatment of a foreign investor, but must give its consent to that means of dispute resolution. The heightened protection given to investors from other NAFTA Parties under Chapter Eleven of the Agreement must be interpreted and applied in a manner that respects the limits that the NAFTA Parties put in place as integral aspects of their consent, in Chapter Eleven, to an overall enhancement of their exposure to remedial actions by investors.”).

² As explained by the Executive Directors of the International Bank for Reconstruction and Development (World Bank) when submitting the then-draft ICSID Convention to the World Bank’s Member Governments, “[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre.” Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ¶ 23 (Mar. 18, 1965).

³ *Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction ¶ 71 (July 15, 2016) (“*Renco* Partial Award”) (“It is axiomatic that the Tribunal’s jurisdiction must be founded upon the existence

3. Article 10.17.1 of the U.S.-Peru TPA provides that: “Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.” Thus, the Parties to this Agreement have only consented to arbitrate investor-State disputes where an investor submits a claim in accordance with this Agreement, including the requirements relevant to the arbitration of claims under Section B, such as those set out in Articles 10.16 and 10.18.⁴ An agreement to arbitrate is then formed upon the investor’s corresponding consent to arbitrate “in accordance with the procedures set out in this Agreement” under Article 10.18.2(a).

Article 10.18.1 (Limitations Period)

4. Article 10.18.1 of the U.S.-Peru TPA provides:

1. 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.

5. Article 10.18.1 imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute.⁵ As is made explicit by Article 10.18.1, the Parties did not consent to arbitrate an investment dispute if “more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the

of a valid arbitration agreement between Renco and Peru.”). *See also* Christoph Schreuer, *Consent to Arbitration*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 831 (Peter Muchlinski et al., eds. 2008) (“Like any form of arbitration, investment arbitration is always based on agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal’s jurisdiction.”); CHRISTOPHER F. DUGAN ET AL., INVESTOR STATE ARBITRATION 219 (2008) (“The consent of the parties is the basis of the jurisdiction of all international arbitration tribunals.”).

⁴ *Cf. Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, First Partial Award ¶ 120 (Aug. 7, 2002) (concluding, when interpreting a similar consent provision under NAFTA Article 1122, that the NAFTA Parties’ consent to arbitrate requires a disputing investor to satisfy not only Articles 1101 (Scope and Coverage), 1116 (Claim by an Investor) and 1117 (Claim by an Investor on Behalf of an Enterprise), but also all pre-conditions and formalities required under Articles 1118 (Settlement of a Claim), 1119 (Notice of Intent), 1120 (Submission of a Claim) and 1121 (Conditions Precedent to Submission of a Claim)).

⁵ *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/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/PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility ¶¶ 82-83 (Jan. 30, 2018) (“*Resolute* Decision on Jurisdiction and Admissibility”) (holding that compliance with the time bar specified in NAFTA Articles 1116 and 1117 “goes to jurisdiction”); *Apotex Inc. v. United States of America*, NAFTA/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)).

breach” and “knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage.” Accordingly, a tribunal must find that a claim satisfies the requirements of, *inter alia*, Article 10.18.1 in order to establish a Party’s consent to (and therefore the tribunal’s jurisdiction over) a claim. Because the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction under Chapter Ten, including with respect to Article 10.18.1,⁶ the claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.⁷

6. This limitations period is a “clear and rigid” requirement that is not subject to any “suspension,” “prolongation,” or “other qualification.”⁸ An investor or enterprise first acquires knowledge of an alleged breach and loss under Article 10.18.1 as of a particular “date.” Such knowledge cannot *first* be acquired on multiple dates or on a recurring basis. As the *Grand River* tribunal recognized in interpreting the nearly identical limitations provisions under Articles 1116(2) and 1117(2) of the NAFTA,⁹ subsequent transgressions by a Party arising from a continuing course of conduct do not renew the limitations period once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby.¹⁰ To allow otherwise would permit an investor to evade the limitations period by basing its claim on the most recent transgression in that series, rendering the limitations provisions ineffective.¹¹

7. 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.”¹² With respect to a claim under a given article in Chapter Ten, a claimant has actual or constructive knowledge of the alleged

⁶ *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) (“*Mesa Award*”) (“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”).

⁷ *Spence Interim Award* ¶¶ 163, 239, 245-246.

⁸ The nearly identical NAFTA Chapter Eleven limitations period has been described as “clear and rigid” and not subject to any “suspension, prolongation, or other qualification.” *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction ¶ 29 (July 20, 2006) (“*Grand River Decision on Jurisdiction*”); *Resolute Decision on Jurisdiction and Admissibility* ¶ 153; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002) (“*Feldman Award*”).

⁹ See *Grand River Decision on Jurisdiction* ¶ 81.

¹⁰ See *Resolute Decision on Jurisdiction and Admissibility* ¶ 158 (“[W]hether a breach definitively occurring and known to the claimant prior to the critical date continued in force thereafter is irrelevant.”).

¹¹ *Id.* ¶ 81. Thus, although a legally distinct injury can give rise to a separate limitations period, a continuing course of conduct does not extend the limitations period under Article 10.18.1. Moreover, while measures taken outside of the three-year limitations period may be taken into account as background or contextual facts, such measures cannot serve as a basis for a finding of a breach under Article 10 of the U.S.-Peru TPA. See *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 348 (June 8, 2009) (“*Glamis Award*”).

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

“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 state a claim under the article.¹³

8. With regard to knowledge of “incurred loss or damage” under Article 10.18.1, a claimant may have knowledge of loss or damage even if the amount or extent of that loss or damage cannot be precisely quantified until some future date.¹⁴ Moreover, the term “incur” broadly means to “to become liable or subject to.”¹⁵ 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.¹⁶

Article 10.18.2(b) (Waiver Requirement)

9. Article 10.18.2 of the U.S.-Peru TPA states in relevant part:

2. No claim may be submitted to arbitration under this Section unless:

...

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant’s written waiver, and

(ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant’s and the enterprise’s written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

10. The waiver requirements under Article 10.18.2(b) are among the requirements upon which the Parties have conditioned their consent. An effective waiver is therefore a precondition

¹³ See *Resolute* Decision on Jurisdiction and Admissibility ¶ 158 (“[T]he breach . . . occurs when the State act is first perfected and can be definitively characterized as a breach of the relevant obligation.”).

¹⁴ See *Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award ¶ 87 (Oct. 11, 2002) (“*Mondev* Award”) (“A claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.”).

¹⁵ “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”).

¹⁶ *Grand River* Decision on Jurisdiction ¶ 77; 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”) (emphasis added).

to the Parties' consent to arbitrate claims, and accordingly a tribunal's jurisdiction, under Chapter Ten of the U.S.-Peru TPA.¹⁷

11. Similar to provisions found in many of the United States' international investment agreements,¹⁸ Article 10.18.2(b) is a "no U-turn" waiver provision, which permits claimants to elect to pursue any proceeding (including in domestic court) without relinquishing their right to assert a subsequent claim through arbitration under the Agreement, subject to compliance with the three-year limitations period for claims under Article 10.18.1. However, Article 10.18.2(b) makes clear that as a condition precedent to the submission of a claim to arbitration under the Agreement, a claimant must submit an effective waiver together with its Notice of Arbitration. The date of the submission of an effective waiver is the date on which the claim has been submitted to arbitration for purposes of Article 10.18.1, assuming all other relevant procedural requirements have been satisfied.

12. Compliance with Article 10.18.2(b) entails both formal and material requirements.¹⁹ As to the formal requirements, the waiver must be in writing and "clear, explicit and categorical."²⁰ The waiver must relinquish any right to initiate or continue any action with respect to measures challenged in the arbitration, excluding an action that seeks "interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration."²¹ As the written waiver is to "accompany" the Notice of Arbitration, it must be submitted at the same time as the Notice of Arbitration.²²

13. As to the material requirements, a claimant must act consistently and concurrently with the written waiver by abstaining from initiating or continuing proceedings with respect to the measures alleged to constitute a Chapter Ten breach in another forum as of the date of the waiver and thereafter. In relation to a similar waiver provision in NAFTA Chapter Eleven, the *Waste Management I* tribunal held,

the act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued. . . . [I]t is clear

¹⁷ *Renco* Partial Award ¶ 73 ("[C]ompliance with Article 10.18(2) is a condition and limitation upon Peru's consent to arbitrate. Article 10.18(2) contains the terms upon which Peru's non-negotiable offer to arbitrate is capable of being accepted by an investor. Compliance with Article 10.18(2) is therefore an essential prerequisite to the existence of an arbitration agreement and hence the Tribunal's jurisdiction."); see also *Waste Management, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/98/2, Award §§ 16, 31 (June 2, 2000) ("*Waste Management I* Award"); *Detroit Bridge International Co. v. Government of Canada*, NAFTA/PCA Case No. 2012-25, Award on Jurisdiction ¶¶ 291, 336-337 (Apr. 2, 2015) ("*Detroit Bridge* Award"); *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, CAFTA-DR/ICSID Case No. ARB/09/17, Award ¶¶ 79-80 (Mar. 14, 2011) ("*Commerce Group* Award"); *Railroad Development Corp. v. Republic of Guatemala*, CAFTA-DR/ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction under CAFTA Article 10.20.5, ¶ 56 (Nov. 17, 2008) ("*Railroad Development* Decision on Jurisdiction").

¹⁸ For example, waiver provisions similar to Article 10.18.2 of the U.S.-Peru TPA can be found in Article 1121 of NAFTA, Article 10.18.2 of the Dominican Republic-Central American Free Trade Agreement ("CAFTA-DR"), and Article 26 of the 2012 U.S. Model Bilateral Investment Treaty.

¹⁹ *Renco* Partial Award ¶ 73; see also *Waste Management I* Award § 20; *Commerce Group* Award ¶¶ 79-80.

²⁰ *Renco* Partial Award ¶ 74; *Waste Management I* Award § 18.

²¹ U.S.-Peru TPA, art. 10.18.3.

²² U.S.-Peru TPA, art. 10.18.2(b).

that the waiver required under NAFTA Article 1121 calls for a show of intent by the issuing party vis-à-vis its waiver of the right to initiate or continue any proceedings whatsoever before other courts or tribunals with respect to the measure allegedly in breach of the NAFTA provisions. Moreover, such an abdication of rights ought to have been made effective as from the date of submission of the waiver[.]²³

14. As the tribunal in *Commerce Group* explained in relation to an identical waiver provision contained in CAFTA-DR Chapter Ten, “[a] waiver must be more than just words; it must accomplish its intended effect.”²⁴ Thus, if a claimant initiates or continues proceedings with respect to the measure in another forum despite meeting the formal requirements of filing a waiver, the claimant has not complied with the waiver requirement, and the tribunal lacks jurisdiction over the dispute.²⁵

15. Article 10.18.2(b) requires a claimant’s waiver to encompass “any proceedings with respect to any measure alleged to constitute a breach referred to in Article 10.16.” The phrase “with respect to” should be interpreted broadly. This construction of the phrase is consistent with the purpose of this waiver provision: to avoid the need for a respondent State to litigate concurrent and overlapping proceedings in multiple forums, and to minimize not only the risk of double recovery, but also the risk of “conflicting outcomes (and thus legal uncertainty).”²⁶ As the tribunal in *Commerce Group* observed, the waiver provision permits other concurrent or parallel domestic proceedings where claims relating to different measures at issue in such proceedings are “separate and distinct” and the measures can be “teased apart.”²⁷

16. For a waiver to be and remain effective, any juridical persons that a claimant directly or indirectly owns or controls, or that directly or indirectly controls the claimant, must likewise abstain from initiating or continuing proceedings in another forum as of the date of filing the waiver (and thereafter) with respect to the measures alleged to constitute a Chapter Ten breach. To allow otherwise would permit a claimant to circumvent the formal and material requirements under Article 10.18.2(b) through its subsidiaries or parent, thereby rendering the waiver provision ineffective. This in turn would frustrate the purpose of this waiver provision mentioned in the preceding paragraph of this submission.

²³ *Waste Management I* Award § 24 (emphasis added).

²⁴ *Commerce Group* Award ¶ 80.

²⁵ *Id.* ¶ 115 (noting that the waiver was invalid and lacked “effectiveness” because claimants failed to discontinue domestic proceedings in El Salvador, so there was no consent of the respondent and the tribunal lacked jurisdiction); see also *Detroit Bridge* Award ¶ 336.

²⁶ *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 118 (Jan. 26, 2006) (“*Thunderbird* Award”) (In construing the waiver provision under the NAFTA, the tribunal held, “[o]ne must also take into account the rationale and purpose of that article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.”).

²⁷ *Commerce Group* Award ¶ 111-112 (holding that the waiver barred the claimant from pursuing a claim in a domestic proceeding that was “part and parcel” of its claim in a pending CAFTA-DR arbitration, because the measures subject to the claims in the respective proceedings could not be “teased apart”). Article 10.18.2 does not require a waiver of domestic proceedings where the measure at issue in the U.S.-Peru TPA arbitration is, for example, only tangentially or incidentally related to the measure at issue in the domestic proceedings.

17. If all formal and material requirements under Article 10.18.2(b) are not met, the waiver is ineffective and will not engage the respondent State's consent to arbitration or the tribunal's jurisdiction *ab initio* under the Agreement. A tribunal is required to determine whether a disputing investor has provided a waiver that complies with the formal and material requirements of Article 10.18.2(b). However, the tribunal itself cannot remedy an ineffective waiver. The discretion whether to permit a claimant to either proceed under or remedy an ineffective waiver lies with the respondent State as a function of its general discretion to consent to arbitration.²⁸ Where an effective waiver is filed subsequent to the Notice of Arbitration but before constitution of the tribunal, the claim will be considered submitted to arbitration on the date on which the effective waiver was filed, assuming all other requirements have been satisfied, and not the date of the Notice of Arbitration. However, where a claimant files an effective waiver subsequent to the constitution of the tribunal, the only available relief (unless the respondent State agrees otherwise) is the dismissal of the arbitration, as the tribunal would have been constituted before the proper submission of the claim to arbitration, and thus without the consent of the respondent State as contemplated in Article 10.17.1 the tribunal would lack jurisdiction *ab initio*.

Article 10.28 (Definition of "Investment")

18. Article 10.28 of the U.S.-Peru TPA, in pertinent part, defines "investment" for purposes of Chapter 10 as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." As the chapeau makes clear, this definition encompasses "every asset" that an investor owns or controls, directly or indirectly, that has the characteristics on an investment. Article 10.28 further states that the "[f]orms that an investment may take include" the assets listed in the subparagraphs. Subparagraph (c) of the definition lists, among forms that an investment may take, "bonds, debentures, other debt instruments, and loans." The enumeration of a type of an asset in Article 10.28, however, is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.²⁹

19. Annex 10-F of the U.S.-Peru TPA addresses, *inter alia*, certain limitations on claims for breaches of obligations under Section A with respect to the default, non-payment or restructuring of a public debt. This Annex does not limit or expand the definition of "investment" under Article 10.28. So long as the public debt that is owned or controlled by an investor has the characteristics of an investment, it is an "investment" for purposes of the Agreement.

Article 10.7 (Expropriation)

20. Article 10.7 of the U.S.-Peru TPA provides that no Party may expropriate or nationalize property (directly or indirectly) except for a public purpose; in a non-discriminatory manner; on

²⁸ *Renco Partial Award* ¶ 173; *see also Railroad Development Decision on Jurisdiction* ¶ 61 (finding that "the Tribunal has no jurisdiction without agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver" and that "[i]t is for the Respondent and not the Tribunal to waive a deficiency under [CAFTA-DR] Article 10.18 or to allow a defective waiver to be remedied"); *Waste Management I Award* § 31 (holding that the waiver deposited with the first notice of arbitration did not satisfy NAFTA Article 1121 and that this defect could not be made good by subsequent action on the part of the claimant).

²⁹ Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 755, 767-768 (Chester Brown ed., 2013) ("Caplan & Sharpe").

payment of prompt, adequate and effective compensation; and in accordance with due process of law.³⁰ Compensation must be “prompt,” in that it must be “paid without delay”;³¹ “adequate,” in that it must be made at the fair market value as of the date of expropriation and not reflect any change in value occurring because the intended expropriation had become known earlier; and “effective,” in that it must be fully realizable and freely transferable.³²

21. 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. 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.³³ 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 subsequent to the time of the taking.³⁴

³⁰ 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 below.

³¹ See *Mondev Award* ¶ 71 (“It is true that the obligation to compensate as a condition for a lawful expropriation (NAFTA Article 1110(1)(d)) does not require that the award of compensation should occur at exactly the same time as the taking. But for a taking to be lawful under Article 1110, at least the obligation to compensate must be recognised by the taking State at the time of the taking, or a procedure must exist at that time which the claimant may effectively and promptly invoke in order to ensure compensation.”). The requirement to provide “prompt, adequate, and effective compensation” for a lawful expropriation has been a feature of U.S. treaties for well over a half century. In that context, “prompt” has been understood to require a government to “diligently carry out orderly and nondilatory procedures . . . to ensure correct compensation and make payment as soon as possible.” Charles Sullivan, *Treaty of Friendship, Commerce and Navigation: Standard Draft – Evolution through January 1, 1962*, 112, 116 (U.S. Department of State, 1971).

³² U.S.-Peru TPA, art. 10.7.2(a)-(d).

³³ See *Mondev Award* ¶ 72 (“[NAFTA] 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 Article 10.7 of the present Agreement 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 *SEDCO, Inc. v. National Iranian Oil Co.*, Award No. 59-129-3 (Mar. 27, 1986), 10 IRAN-U.S. CL. TRIB. REP. 180, 204 n.34 (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”).

³⁴ See Draft Articles on State Responsibility, Comments and Observations Received from Governments, International Law Commission, 50th Sess., U.N. Doc. A/CN.4/488 (1998) at 125 (comments of the United Kingdom on Draft Article 22) (“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 law, compliance with which in principle meets the requirements of Article 6(c) of the BIT. However, . . . the Tribunal concludes that the Bolivarian Republic has failed to offer a plausible explanation to justify the delay of more than four years in setting and paying the fair value due in compliance with the LECUPS, which in turn implies that the requirement under Article 6(c) of the BIT that compensation be paid ‘without undue delay’ has not been met.”); *Goldenberg Case (Germany v. Romania)*, 2 R.I.A.A. 901, 909 (Sept. 27, 1928) (finding that the requisition carried out by the German

22. Under international law, where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory.³⁵ This principle is not an exception that applies after an expropriation has been found, but rather is a recognition that certain actions, by their nature, do not engage State responsibility.³⁶

23. U.S.-Peru TPA Annex 10-B, paragraph 3, provides specific guidance as to whether an action constitutes an indirect expropriation. As explained in paragraph 3(a) of Annex 10-B, determining whether an indirect expropriation has occurred “requires a case-by-case, fact-based inquiry” that considers, among other factors: (i) the economic impact of the government action; (ii) the extent to which that action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.

24. With respect to the first factor, an adverse economic impact “standing alone, does not establish that an indirect expropriation has occurred.”³⁷ It is a fundamental principle of international law that, for an expropriation claim to succeed a claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as “to support a

military authorities did not initially constitute a violation of the law of nations, but for this situation to continue it was necessary that within a reasonable delay, the claimants obtain equitable compensation).

³⁵ See, e.g., *Glamis Award* ¶ 354 (quoting the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712, cmt. (g) (1987) (“RESTATEMENT OF FOREIGN RELATIONS LAW”) (“A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory. . . .”); *Chemtura Corp. v. Government of Canada*, NAFTA/UNCITRAL, Award ¶ 266 (Aug. 2, 2010) (holding that Canada’s regulation of the pesticide lindane was a non-discriminatory measure motivated by health and environmental concerns and that a measure “adopted under such circumstances is a valid exercise of the State’s police powers and, as a result, does not constitute an expropriation”); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, Part IV, Ch. D ¶ 7 (Aug. 3, 2005) (“*Methanex* Final Award”) (holding that as a matter of general international law, “a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process” will not ordinarily be deemed expropriatory or compensable); Caplan & Sharpe at 791-792 (discussing observation included in Annex B, paragraph 4(b) of U.S. 2012 Model BIT that “[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation.”). This observation was first included in the 2004 U.S. Model BIT and has been echoed in subsequent U.S. investment agreements.

³⁶ See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 539 (1998) (“Cases in which expropriation is allowed to be lawful in the absence of compensation are within the narrow concept of public utility prevalent in laissez-faire economic systems, *i.e.* exercise of police power, health measures, and the like.”); G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT’L L., 307, 338 (1962) (“If, however, such prohibition can be justified as being reasonably necessary to the performance by a State of its recognized obligations to protect the public health, safety, morals or welfare, then it would normally seem that there has been no ‘taking’ of property.”).

³⁷ U.S.-Peru TPA, Annex 10-B ¶ 3(a)(i).

conclusion that the property has been ‘taken’ from the owner.”³⁸ Moreover, to constitute an expropriation, a deprivation must be more than merely “ephemeral.”³⁹

25. In determining the economic impact of a government action on an investment under paragraph 3(a)(i) of Annex 10-B, the first point of comparison is the economic value of the investment immediately before the expropriation took place, based on the facts and circumstances known to exist at that time. Where a series of measures is alleged to have resulted in the expropriation, the first point of comparison is the economic value of the investment immediately before the first in the alleged series of measures. The second point of comparison is the economic value immediately after the alleged expropriatory measure(s) have been implemented, but must exclude any adverse economic impact caused by acts, events or circumstances not attributable to the alleged breach.⁴⁰ With respect to both points of comparison, the economic value of an investment must be reasonably ascertainable, and not speculative, indeterminate, or contingent on unforeseen or uncertain future events.⁴¹

26. The second factor – the extent to which that action interferes with distinct, reasonable investment-backed expectations – requires an objective inquiry of the reasonableness of the claimant’s expectations, which may depend on the regulatory climate existing at the time the

³⁸ *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Interim Award ¶ 102 (June 26, 2000); *see also Glamis Award* ¶ 357 (“[A] panel’s analysis should begin with determining whether the economic impact of the complained of measures is sufficient to potentially constitute a taking at all: ‘[I]t must first be determined if the Claimant was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto . . . had ceased to exist.’ The Tribunal agrees with these statements and thus begins its analysis of whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures ‘substantially impair[ed] the investor’s economic rights, *i.e.* ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings.’”) (citations omitted); *Grand River Award* ¶¶ 149-150 (citing the *Glamis Award*); *Cargill Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award ¶ 360 (Sep. 18, 2009) (“*Cargill Award*”) (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)”).

³⁹ *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA*, Award No. 141-7-2 (June 22, 1984), 6 IRAN-U.S. CL. TRIB. REP. 219, 225 (1984) (“While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.”); *see S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶¶ 284, 287-88 (Nov. 13, 2000) (“*S.D. Myers First Partial Award*”).

⁴⁰ *See* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, art. 31, cmt. 9 (2001) (“ILC Draft Articles”) (noting that the language of Article 31(2) providing that injury includes damage “caused by the internationally wrongful act of a State,” “is used to make clear that the subject matter of reparation is, globally, the injury *resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.*”) (emphasis added).

⁴¹ The same principles apply in determining damages. *See Metalclad Corp. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/97/1, Award ¶ 121 (Aug. 30, 2000) (rejecting use of discounted cash flow analysis as future profits “would be wholly speculative”); *Amoco Int’l Finance Corp. v. Islamic Republic of Iran*, Award No. 310-56-3 (July 14, 1987), 15 IRAN-U.S. CL. TRIB. REP. 189, 262 (1987) (“One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded.”); *Southern Pacific Properties Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award ¶ 189 (May 20, 1992) (rejecting application of the discounted cash flow method where its application would result in awarding “possible but contingent and underterminate damages”) (quoting *Chorzów Factory*, 1928 P.C.I.J. (ser. A) No. 17, at 51 (Sep. 13)).

property was acquired in the particular sector in which the investment was made.⁴² For example, where a sector is already highly regulated, reasonable extensions of those regulations are foreseeable.

27. 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”).⁴³ Where a State proclaims that it is enacting a non-discriminatory statute or regulation for a *bona fide* public purpose, courts and tribunals rarely question that characterization.⁴⁴ The Restatement (Third) of Foreign Relations, for instance, notes that the public purpose requirement “has not figured prominently in international claims practice, perhaps because the concept of public purpose is broad and not subject to effective reexamination by other states.”⁴⁵

28. Judicial measures applying domestic law may give rise to a claim for denial of justice under Article 10.5 of the Agreement, as described in the next Section of this submission. Decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants do not, however, give rise to a claim for expropriation under Article 10.7.⁴⁶

⁴²*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”).

⁴³ *Glamis Gold, Ltd v. United States of America*, NAFTA/UNCITRAL, Rejoinder of Respondent United States of America, at 109 (Mar. 15, 2007) (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

⁴⁴ See Louis B. Sohn and R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT’L L. 545, 555-56 (1961) (“It is not without significance that what constitutes a ‘public purpose’ has rarely been discussed by international tribunals and that in no case has property been ordered restored to its former owner because the taking was considered to be for other than a public purpose. This unwillingness to impose an international standard of public purpose must be taken as reflecting great hesitancy upon the part of tribunals and of States adjusting claims through diplomatic settlement to embark upon a survey of what the public needs of a nation are and how these may best be satisfied.”); Burns H. Weston, *Constructive Takings Under International Law: A Modest Foray Into the Problem of “Creeping Expropriation,”* 16 VA J. INT’L L. 103, 121 (1975) (explaining that, under international law, there is a “necessary presumption that States are ‘regulating’ when they say they are ‘regulating,’ and they are especially to be honored when they are explicit in this regard”); see also G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT’L L. 307, 332 (1962) (“But it certainly would seem that if the facts are such that the reasons actually given are plausible, search for unexpressed ‘real’ reasons is chimerical. No such search is permitted in municipal law, and the extreme deference paid to the honour of States by international tribunals excludes the possibility of supposing that the rule is different in international law.”).

⁴⁵ RESTATEMENT OF FOREIGN RELATIONS LAW § 712, cmt. e.

⁴⁶ See, e.g., MARTINS PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT 208 (2013) (expressing the view that “while taking of property through the judicial process could be said to constitute expropriation, the rules and criteria to be applied for establishing the breach should come from denial of justice”); *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 141 (June 26, 2003) (“*Loewen* Award”) (noting that claimants’ expropriation claim based on judicial acts “adds nothing to the claim based on Article 1105” and that “[i]n the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if Loewen establishes a denial of justice under Article 1105”).

Moreover, the United States has not recognized the concept of “judicial takings” as a matter of domestic law.⁴⁷

29. Where a judiciary is not separate from other organs of the State and those organs (executive or legislative) direct or otherwise interfere with a domestic court decision so as to cause an effective expropriation, these executive or legislative acts may form the basis of a separate claim under Article 10.7, depending on the circumstances. Were it otherwise, States might seek to evade international responsibility for wrongful acts by using the courts as the conduit of executive or legislative action.

Article 10.5 (Minimum Standard of Treatment, including Denial of Justice)

30. Article 10.5 (Minimum Standard of Treatment) of the U.S.-Peru TPA provides in relevant part:

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
 - (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world;
 - (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

31. 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,

⁴⁷ It was the position of the United States Government in *Stop the Beach Renourishment* that the concept of a judicial taking should not be adopted under the Just Compensation Clause, and that continues to be the position of the United States. In *Stop the Beach*, only four Supreme Court Justices would have recognized that judicial actions taken by states may be subject to a Just Compensation (or Takings) Clause analysis under the United States Constitution. Plurality opinions do not form binding precedent. *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Envtl. Protection*, 560 U.S. 702 (2010); see also *Shinnecock Indian Nation v. United States*, 112 Fed. Cl. 369, 385 (2013) (“a theory of judicial takings . . . has not been adopted in the federal courts”).

has crystallized into customary international law. The standard establishes a minimum “floor below which treatment of foreign investors must not fall.”⁴⁸

32. Annex 10-A to the U.S.-Peru TPA addresses the methodology for interpreting customary international law rules covered by Article 10.5. The Annex expresses the Parties’ “shared understanding that ‘customary international law’ generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation.” Thus, in Annex 10-A the Parties confirmed their understanding and application of this two-element approach – State practice and *opinio juris* – which is “widely endorsed in the literature” and “generally adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice.”⁴⁹

33. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate, under this two-step approach, that a rule of customary international law exists, most recently in its decision on *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*.⁵⁰ In that case, the Court emphasized that “[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States,” and noted as examples of State practice relevant national court decisions or domestic legislation dealing with the particular issue alleged to be the norm of customary international law, as well as official declarations by relevant State actors on the subject.⁵¹

34. 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*.⁵² “The party which relies on a custom,” therefore, “must prove that this custom is

⁴⁸ *S.D. Myers* First Partial Award ¶ 259; see also *Glamis* Award ¶ 615 (“The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community.”); Edwin Borchard, *The “Minimum Standard” of the Treatment of Aliens*, 33 AM. SOC’Y OF INT’L L PROC. 51, 58 (1939) (“Borchard, *Minimum Standard of Treatment*”).

⁴⁹ See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, 122 (Feb. 3) (“In particular . . . the existence of a rule of customary international law requires that there be ‘a settled practice’ together with *opinio juris*.”) (citing *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, 1969 I.C.J. 44, ¶ 77 (Feb. 20)); *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, ¶ 29-30 (June 3) (“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States[.]”); Special Rapporteur on International Law Commission, *Second Report on Identification of Customary International Law* ¶ 21, Int’l Law Comm’n, U.N. Doc. A/CN.4/672 (May 22, 2014) (by Michael Wood) (“ILC Second report on the identification of customary international law”). See also *id.*, Annex, Proposed Draft Conclusion 3, at 14 (stating that in order to determine the “existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law”); Special Rapporteur on International Law Commission, *Fourth Report on Identification of Customary International Law*, ¶ 31, U.N. Doc. A/CN.4/695 (Mar. 8, 2016) (Michael Wood); *id.*, Annex at 21 (proposing minor modifications to Draft Conclusion 3).

⁵⁰ *Jurisdictional Immunities of the State*, 2012 I.C.J. at 99.

⁵¹ *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).

⁵² *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20); see also *North Sea Continental Shelf* at 43; *Glamis* Award ¶¶ 601-602 (noting that the claimant bears the burden of establishing a change in customary international law, by showing “(1) a concordant practice of a number of States acquiesced in by others, and (2) a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)”) (citations and internal quotation marks omitted).

established in such a manner that it has become binding on the other Party.”⁵³ Tribunals applying the minimum standard of treatment obligation in Article 1105 of NAFTA Chapter Eleven, which likewise affixes the standard to customary international law,⁵⁴ 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.⁵⁵

35. Once a rule of customary international law has been established, a claimant must then show that the respondent State has engaged in conduct that violates that rule.⁵⁶ 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.”⁵⁷ A failure to satisfy requirements of domestic law does not necessarily violate international law.⁵⁸ Rather, “something more than simple illegality or lack of

⁵³ *Rights of Nationals of the United States of America in Morocco (France v. United States)*, 1952 I.C.J. 176, 200 (Aug. 27) (“The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.”) (citation and internal quotation marks omitted); *Case of the S.S. “Lotus” (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, at 25-26 (Sept. 27) (holding that the claimant had failed to “conclusively prove” the existence of a rule of customary international law).

⁵⁴ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions ¶ B.1 (July 31, 2001).

⁵⁵ *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*, NAFTA/ICSID Case No. ARB(AF)/00/1, Award ¶ 185 (Jan. 9, 2003) (“*ADF Award*”) (“The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts.”); *Glamis Award* ¶ 601 (noting “[a]s a threshold issue . . . that it is Claimant’s burden to sufficiently” show the content of the customary international law minimum standard of treatment); *Methanex Final Award*, Part IV, Ch. 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).

⁵⁶ *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).

⁵⁷ *S.D. Myers First Partial Award* ¶ 263; see also *Mesa Award* ¶ 505 (“when defining the content of [the minimum standard of treatment] one should . . . take into consideration that international law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs.”); *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).

⁵⁸ *ADF Award* ¶ 190 (“[T]he Tribunal has no authority to review the legal validity and standing of U.S. measures here in question under U.S. internal administrative law. We do not sit as a court with appellate jurisdiction with respect to the U.S. measures. (citation omitted) Our jurisdiction is confined by NAFTA Article 1131(1) to assaying the consistency of the U.S. measures with relevant provisions of NAFTA Chapter 11 and applicable rules of international law.”) (emphasis in original); see also *GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 97 (Nov. 15, 2004) (“The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law.”); *Thunderbird Award* ¶ 160 (“[I]t is not up

authority under the domestic law of a state is necessary to render an act or measure inconsistent with the customary international law requirements. . . .”⁵⁹ Accordingly, a departure from domestic law does not in-and-of-itself sustain a violation of Article 10.5.

Concepts that have and have not crystallized into the minimum standard

36. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, expressly addressed in Article 10.5.2(a), concerns the obligation to provide “fair and equitable treatment,” which includes “the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.” This obligation, which is addressed in further detail below, encompasses the same guarantees as the “effective means of asserting claims and enforcing rights” provisions found in earlier U.S. treaty practice.⁶⁰ The United States removed the “effective means” provision from its investment treaties because it deemed that the customary international law principle prohibiting denial of justice rendered a separate treaty obligation unnecessary.⁶¹

37. 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.”

38. The concept of “legitimate expectations” is not a component element of “fair and equitable treatment” under customary international law that gives rise to an independent host State obligation.⁶² 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. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. The mere fact that a Party takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

39. 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

to the Tribunal to determine how [the state regulatory authority] should have interpreted or responded to the [proposed business operation], as by doing so, the Tribunal would interfere with issues of purely domestic law and the manner in which governments should resolve administrative matters (which may vary from country to country).”).

⁵⁹ *ADF Award* ¶ 190.

⁶⁰ See *Duke Energy Electroquil Partners and Electroquil, S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award ¶¶ 390-391 (Aug. 18, 2008) (holding that the “effective means” clause “seeks to implement and form part of the more general guarantee against denial of justice”); *Apotex Holdings, Inc. and Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/12/1, Award ¶ 9.70 (Aug. 25, 2014) (“The Tribunal determines that the plain meaning of [the effective means provision] does not apply to non-adjudicatory proceedings. . . .”).

⁶¹ KENNETH VANDEVELDE, *U.S. INTERNATIONAL INVESTMENT AGREEMENTS* 415 (2009).

⁶² See PATRICK DUMBERRY, *THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105*, at 158-59 (2013) (“DUMBERRY”) (“In the present author’s view, there is little support for the assertion that there exists under customary international law any obligation for host States to protect investors’ legitimate expectations.”).

general obligation of non-discrimination.⁶³ As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.⁶⁴ 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,⁶⁵ access to judicial remedies or treatment by the courts,⁶⁶ or the obligation of States to provide full protection and security and to compensate aliens and nationals on an equal basis in times of

⁶³ See *Grand River Award* ¶¶ 208-209 (“The language of Article 1105 does not state or suggest a blanket prohibition on discrimination against alien investors’ investments, and one cannot assert such a rule under customary international law. States discriminate against foreign investments, often and in many ways, without being called to account for violating the customary minimum standard of protection . . . [N]either Article 1105 nor the customary international law standard of protection generally prohibits discrimination against foreign investments.”).

⁶⁴ See *Methanex Final Award*, Part IV, Ch. C ¶¶ 25-26 (explaining that customary international law has established exceptions to the broad rule that “a State may differentiate in its treatment of nationals and aliens,” but noting that those exceptions must be proven rules of custom, binding on the Party against whom they are invoked); see also ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM’S INTERNATIONAL LAW: PEACE* 932 (9th ed. 1992) (“[A] degree of discrimination in the treatment of aliens as compared with nationals is, generally, permissible as a matter of customary international law.”); Borchard, *Minimum Standard of Treatment* at 56 (“The doctrine of absolute equality – more theoretical than actual – is therefore incompatible with the supremacy of international law. The fact is that no state grants absolute equality or is bound to grant it. It may even discriminate between aliens, nationals of different states, e.g., as the United States does through treaty in the matter of the ownership of real property in this country.”); ANDREAS ROTH, *MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS* 83 (1949) (“[T]he principle of equality has not yet become a rule of positive international law, *i.e.*, there is no obligation for a State to treat the aliens like the nationals. A discrimination of treatment between aliens and nationals alone does not yet constitute a violation of international law.”).

⁶⁵ See, e.g., *BP Exploration Co. (Libya) Ltd. v. Libya*, 53 I.L.R. 297, 329 (Lagergren 1974) (“[T]he taking...clearly violates public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character.”); *Libyan American Oil Co. (LIAMCO) v. Libya*, 62 I.L.R. 140, 194 (1977) (“It is clear and undisputed that non-discrimination is a requisite for the validity of a lawful nationalization. This is a rule well established in international legal theory and practice.”); *Kuwait v. American Independent Oil Co. (AMINOIL)*, 66 I.L.R. 518, 585 (1982) (considering the question “whether the nationalization of Aminoil was not thereby tainted with discrimination,” but finding that there were legitimate reasons for nationalizing one company and not the other); see also RESTATEMENT OF FOREIGN RELATIONS LAW § 712 (1987) (“A state is responsible under international law for injury resulting from . . . a taking by the state of the property of a national of another state that . . . is discriminatory”); *id.* § 712 cmt. f (“Formulations of the rules on expropriation generally include a prohibition of discrimination”).

⁶⁶ See, e.g., C.F. AMERASINGHE, *STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 243 (1967) (“Especially in a suit between State and alien it is imperative that there should be no discrimination between nationals and aliens in the imposition of procedural requirements. The alien cannot be expected to undertake special burdens to obtain justice in the courts of the State against which he has a complaint.”); EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS* 334 (1919) (“BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD*”) (A national’s “own government is justified in intervening in his behalf only if the laws themselves, the methods provided for administering them, and the penalties prescribed are in derogation of the principles of civilized justice as universally recognized or if, in a specific case, they have been wrongfully subverted by the courts so as to discriminate against him as an alien or perpetrate a technical denial of justice.”); *Report of the Guerrero Sub-Committee of the Committee of the League of Nations on Progressive Codification 1*, League of Nations Doc. C.196M.70, at 100 (1927) (“Denial of justice is therefore a refusal to grant foreigners free access to the courts instituted in a State for the discharge of its judicial functions, or the failure to grant free access, in a particular case, to a foreigner who seeks to defend his rights, *although in the circumstances nationals of the State would be entitled to such access.*”) (emphasis added); *Ambatielos (Greece v. United Kingdom)*, 12 R.I.A.A. 83, 111 (Mar. 6, 1956) (“The modern concept of ‘free access to the Courts’ represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a practice which existed in former times and in certain countries, and which constituted an unjust discrimination against foreigners. Hence, the essence of ‘free access’ is adherence to and effectiveness of the principle of non-discrimination against foreigners who are in need of seeking justice before the courts of the land for the protection and defence of their rights.”).

violence, insurrection, conflict or strife.⁶⁷ Moreover, general investor-State claims of nationality-based discrimination are governed exclusively by the provisions of Chapter Ten that specifically address that subject, and not Article 10.5.1.⁶⁸

40. The concept of “transparency” also has not crystallized as a component of “fair and equitable treatment” under customary international law giving rise to an independent host-State obligation.⁶⁹ The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation of host-State transparency under the minimum standard of treatment.

41. Decisions of international courts and arbitral tribunals interpreting “fair and equitable treatment” as a concept of customary international law are not themselves instances of “State practice” for purposes of evidencing customary international law, although such decisions may be relevant for determining State practice when they include an examination of such practice.⁷⁰ 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.

⁶⁷ 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.”).

⁶⁸ See *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award ¶ 7.58 (Mar. 4, 2018) (“*Mercer Award*”) (“So far as concerns the Claimant’s claims of ‘discriminatory treatment’ contrary to NAFTA Article 1105(1), the Tribunal’s [*sic*] agrees with the non-disputing NAFTA Parties’ submissions that such protections are addressed in NAFTA Articles 1102 and 1103, rather than NAFTA Article 1105(1).”); *Methanex Final Award*, Part IV, Ch. C ¶¶ 14-17, 24 (analyzing the text of NAFTA Article 1105, and explaining that the impact of the “FTC interpretation of [NAFTA] Article 1105” was not to “exclude non-discrimination from NAFTA Chapter 11” but “to confine claims based on alleged discrimination to Article 1102, which offers full play for a principle of non-discrimination”).

⁶⁹ See *United Mexican States v. Metalclad Corp.*, 2001 BCSC 664, ¶¶ 68, 72 (British Columbia Supreme Court, May 2, 2001) (holding that “[n]o authority was cited or evidence introduced [in the *Metalclad* arbitration] to establish that transparency has become part of customary international law,” and that “there are no transparency obligations contained in [NAFTA] Chapter 11”); *Feldman Award* ¶ 133 (finding that “it is doubtful that lack of transparency alone rises to the level of violation of NAFTA and international law,” and holding the British Columbia Supreme Court’s decision in *Metalclad* to be “instructive”); *Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/07/1, Award ¶¶ 208, 231 (Mar. 31, 2010) (stating that “a requirement for transparency may not at present be proven to be part of the customary law standard, as the judicial review of *Metalclad* rightly concluded,” though speculating that it might be “approaching that stage”).

⁷⁰ 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”).

Claims Based on Judicial Measures

42. Article 10.5.1 differs from other substantive obligations (*e.g.*, Articles 10.3, 10.4 and 10.6) in that it obligates a Party to accord treatment only to a “covered investment”.⁷¹ The minimum standard of treatment under Article 10.5.1 includes the obligation to provide “fair and equitable treatment,” which, as explained in Article 10.5.2(a), includes the customary international law obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. Therefore, in the context of a claim for denial of justice under Article 10.5.1, a claimant must establish that the treatment accorded to its covered investment rose to the level of a denial of justice under customary international law.

43. In addition, in the context of a claim for denial of justice under Article 10.5.1, a claimant (as an investor of a Party)⁷² must establish that it or its covered investment (in the case of an enterprise of the respondent State that the claimant owns or controls directly or indirectly)⁷³ was, or sought to be but was prohibited from becoming, a party to adjudicatory proceedings in order for the treatment accorded to result in a denial of justice by virtue of those proceedings.

44. Denial of justice in its historical and “customary sense” denotes “misconduct or inaction of the judicial branch of the government” and involves “some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process.”⁷⁴ A denial of justice may occur in instances such as when the final act of a State’s judiciary constitutes a “notoriously unjust”⁷⁵ or “egregious”⁷⁶ administration of justice “which offends a sense of judicial propriety.”⁷⁷

⁷¹ Commentators with respect to the similarly worded text under NAFTA Article 1105(1) agree that the obligation to accord the minimum standard of treatment applies only to investments. *See e.g.*, Meg N. Kinnear et al., *Article 1105 – Minimum Standard of Treatment, in INVESTMENT DISPUTES UNDER NAFTA, AN ANNOTATED GUIDE TO CHAPTER 11*, at 1105-17 (2008 Supp.) (“Several aspects of this are notable. First, the subject of this protection is investments rather than investors. The first paragraph of Article 1105 is limited to treatment of investments, unlike the second paragraph of Article 1105, and indeed other provisions such as Article 1102 and 1103, which refer to treatment accorded to both investments and investors. This limitation was present even in the earliest drafts of what became Article 1105(1).”).

⁷² U.S.-Peru TPA, art. 10.28 (defining “claimant” as “an investor of a Party that is a party to an investment dispute with another Party”).

⁷³ *See* U.S.-Peru TPA, art. 10.16.1(b).

⁷⁴ BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* at 330; J.L. BRIERLY, *THE LAW OF NATIONS* 286-87 (Sir Humphrey Waldock ed., 6th ed. 1963) (defining a denial of justice as “an injury involving the responsibility of the state committed by a court of justice”).

⁷⁵ JAN PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 44 (2005) (“PAULSSON”) (citing J. Irizarry y Puente, *The Concept of “Denial of Justice” in Latin America*, 43 MICH. L. REV. 383, 406 (1944)); *id.* at 4 (“[A] state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner.”) (emphasis omitted); *B.E. Chattin (United States v. Mexico)*, 4 R.I.A.A. 282, 286-87 (1927), *reprinted in* 22 AM. J. INT’L L. 667, 672 (1928) (“Acts of the judiciary . . . are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man.”) (emphasis omitted).

⁷⁶ 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.”).

⁷⁷ *Loewen Award* ¶ 132 (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”); *Mondev Award* ¶ 127 (finding that the test for a denial of justice was “not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome[.]”); *see also generally Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, 1970 I.C.J.

45. More specifically, a denial of justice exists where there is, for example, an “obstruction of access to courts,” “failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment.”⁷⁸ A manifestly unjust judgment is one that amounts to a travesty of justice or is grotesquely unjust.⁷⁹ To be manifestly unjust a court decision must “amount[] to an outrage, bad faith, willful neglect of duty, or an insufficiency of governmental action recognizable by every unbiased [person].”⁸⁰ Instances of denial of justice also have included corruption in judicial proceedings, discrimination or ill-will against aliens, and executive or legislative interference with the freedom or impartiality of the judicial process.⁸¹ However, erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law.⁸²

46. The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence,⁸³ the particular nature of judicial action,⁸⁴ and the unique status of the judiciary in both international

3, 144 (Feb. 5) (separate opinion by Tanaka, J.) (“*Barcelona Traction*”) (“[D]enial of justice occurs in the case of such acts as – ‘corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it, . . . But no merely erroneous or even unjust judgment of a court will constitute a denial of justice.’”) (citations omitted).

⁷⁸ Harvard Research Draft, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, art. 9, 23 AM. J. INT’L L. SP. SUPP. 133, 134 (1929) (“Harvard Draft”).

⁷⁹ Harvard Draft at 178 (noting that a “manifestly unjust judgment” is one that is a “travesty upon justice or grotesquely unjust”).

⁸⁰ *B.E. Chattin*, 4 R.I.A.A. at 286-87.

⁸¹ Harvard Draft at 175.

⁸² *Id.* at 134 (“An error of a national court which does not produce manifest injustice is not a denial of justice.”); PAULSSON at 81 (“The erroneous application of national law cannot, in itself, be an international denial of justice.”); DUMBERRY at 228 (noting that a simple error, misinterpretation or misapplication of domestic law is not per se a denial of justice); BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* at 196 (“[A]s a general rule the state is not liable for the acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort.”); Christopher Greenwood, *State Responsibility for the Decisions of National Courts*, in *ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS* 61 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004) (“[I]t is well established that a mistake on the part of the court or an irregularity in procedure is not in itself sufficient to amount to a violation of international law; there must be a denial of justice.”).

⁸³ *See e.g.*, Separate Opinion by Tanaka, J. at 154 (“One of the most important political and legal characteristics of a modern State is the principle of judicial independence.”). Judge Tanaka went on to explain that what distinguishes the judiciary from other organs of government is the “social significance of the judiciary for the settlement of conflicts of vital interest as an impartial third party and, on the other hand, from the extremely scientific and technical nature of judicial questions, the solution of which requires the most highly conscientious activities of specially educated and trained experts. The independence of the judiciary, therefore, despite the existence of differences in degree between various legal systems, may be considered as a universally recognized principle in most of the municipal and international legal systems of the world. It may be admitted to be a ‘general principle of law recognized by civilized nations’ (Article 38, paragraph 1(c), of the Statute).” *Id.* at 154.

⁸⁴ *See, e.g.*, Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63(4) INT’L. & COMP. L.Q. 28 at 10-11 (2014) (“Douglas”) (“[The] rationality inherent in decision-making through adjudication, coupled with the opportunity afforded to affected parties to present reasoned arguments during the course of that decision-making process, . . . sets adjudication apart from other institutions of social ordering within the State,” and that an authoritative decision by a domestic adjudicative body “cannot be disturbed by an international court or tribunal simply on the basis that a more rational set of reasons was available to that . . . body. . . . International law is deferential to the particular virtues of adjudication by respecting the integrity of the process and the outcomes it produces.”) (footnotes omitted).

and municipal legal systems. As a result, the actions of domestic courts are accorded a greater presumption of regularity under international law than are legislative or administrative acts.⁸⁵ Indeed, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice. In this connection, it is well established that international tribunals, such as U.S.-Peru TPA Chapter Ten tribunals, are not empowered to be supranational courts of appeal on a court's application of domestic law.⁸⁶

47. It is equally well established that the international responsibility of States may not be invoked with respect to non-final judicial acts,⁸⁷ unless recourse to further domestic remedies is obviously futile or manifestly ineffective. As the *Apotex* tribunal held, “[A] claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an

⁸⁵ See T. BATY, *THE CANONS OF INTERNATIONAL LAW* 127 (1930) (“It is true that courts are organs of the nation; but they are not its organs in the sense in which the executive and the legislature are.”); BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* at 195-96 (Because “[i]n well-regulated states, the courts are more independent of executive control than any other authorities . . . [,] the state is not liable for the acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort.”); ALWYN V. FREEMAN, *INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* 33 (1938) (“[T]he question of proof of illegal action will be more difficult [with respect to judicial action] than is the case with other organs of the State.”). The United States distinguishes between judicial action and other forms of government action as a matter of domestic law. For example, the U.S. Supreme Court has long recognized liability for legislative and regulatory actions that violate the economic protections of the U.S. Constitution, but has never recognized liability for judicial action under those same provisions. See, e.g., Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1075 n.121 (1997); Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1453 (1990).

⁸⁶ *Apotex I & II Award* ¶ 278 (“[I]t is not the proper role of an international tribunal established under NAFTA Chapter Eleven to substitute itself for the U.S. Supreme Court, or to act as a supranational appellate court.”); *Robert Azinian et. al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award ¶ 99 (Nov. 1, 1999) (“The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. What must be shown is that the court decision itself constitutes a violation of the treaty. Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end.”); *Waste Management Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/00/3, Award ¶ 129 (Apr. 30, 2004) (“[T]he Tribunal would observe that it is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of amparo in respect of the decisions of the federal courts of NAFTA parties.”); *Barcelona Traction* at 158 (explaining that erroneous decisions of municipal law cannot constitute a denial of justice because the interpretation of municipal law “does not belong to the realm of international law. If an international tribunal were to take up these issues and examine the regularity of the decisions of municipal courts, the international tribunal would turn out to be a ‘*cour de cassation*,’ the highest court in the municipal law system. An international tribunal, on the contrary, belongs to quite a different order; it is called upon to deal with international affairs, not municipal affairs.”); *Mohammad Ammar Al Bahloul v. Republic of Tajikistan*, SCC Case No. V(064/2008), Partial Award on Jurisdiction and Liability ¶ 237 (Sept. 2, 2009) (“[I]t is not the role of this Tribunal to sit as an appellate court on questions of Tajik law. Suffice it to say, we do not find the Tajik court’s application of Tajik law on this issue to be malicious or clearly wrong, and therefore find no basis for Claimant’s claim of denial of justice.”); PAULSSON at 82.

⁸⁷ See PAULSSON at 108 (“For a foreigner’s international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself.”); Douglas at 28 (“[I]nternational responsibility towards foreign nationals for acts and omissions associated with an adjudicative procedure can only arise at the point at which the adjudication has produced its final result; it is only at that point that a constituent element of that responsibility has been satisfied, which is the existence of damage to the foreign national.”).

opportunity to correct itself.”⁸⁸ While acts of State organs, including acts of State judiciaries, are attributable to the State,⁸⁹ there will be a breach of Article 10.5.1 based on judicial acts (*e.g.*, denial of justice) only if the justice system of the State *as a whole* (*i.e.*, until there has been a decision of the court of last resort available) produces a denial of justice.⁹⁰

Article 10.3 (National Treatment)

48. Article 10.3 of the U.S.-Peru TPA provides in relevant part (emphases added):

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

49. To establish a breach of national treatment under 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.⁹¹ As the *UPS v. Canada* tribunal noted with respect to the functionally identical provisions of NAFTA Article 1102, “[t]his is a legal burden that rests squarely with the Claimant. That burden never shifts. . . .”⁹²

50. Article 10.3 is intended to prevent discrimination on the basis of nationality between domestic investors (or investments) and investors (or investments) of the other Party, that are in “like circumstances.” It is not intended to prohibit all differential treatment among investors or investments. Rather, it is designed only to ensure that the Parties do not treat entities that are “in like circumstances” differently based on nationality.⁹³ Nationality-based discrimination under

⁸⁸ *Apotex I & II Award* ¶ 282.

⁸⁹ Articles on Responsibility of States for Internationally Wrongful Acts, art. 4(1) (“The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”).

⁹⁰ ILC Draft Articles, Ch. II, cmt. 4 (noting that the fact that conduct can be attributed to the State “says nothing . . . about the *legality* or otherwise of the conduct”) (emphasis added); Special Rapporteur on State Responsibility, *Second Report on State Responsibility*, ¶ 75, Int’l Law Comm’n, U.N. Doc. A/CN.4/498 (July 19, 1999) (by James Crawford) (“There are . . . cases where the obligation is to have a *system* of a certain kind, *e.g.* the obligation to provide a fair and efficient system of justice. There, systematic considerations enter into the question of breach, and an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act.”) (emphasis in original).

⁹¹ As the United States has elsewhere explained with respect to the otherwise identical national treatment obligation in NAFTA (Article 1102), this provision is “intended to prevent discrimination on the basis of nationality” and to “ensure that nationality is not the basis for differential treatment.” *See, e.g., Mercer Int’l Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of the United States of America ¶ 10 (May 8, 2015).

⁹² *United Parcel Service of America Inc. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/02/1, Award on the Merits ¶ 84 (May 24, 2007).

⁹³ *Loewen Award* ¶ 139 (accepting in the NAFTA context that “Article 1102 [National Treatment] is direct[ed] *only* to nationality-based discrimination”) (emphasis added); *Mercer Award* ¶ 7.7 (accepting the positions of the United

Article 10.3 may be *de jure* or *de facto*. *De jure* discrimination occurs when a measure on its face discriminates between investors or investments in like circumstances based on nationality. *De facto* discrimination occurs when a facially neutral measure with respect to nationality is applied in a discriminatory fashion based on nationality. A claimant is not required to establish discriminatory intent.

51. As indicated above, the appropriate comparison is between the treatment accorded to a claimant or its investment, on one hand, and the treatment accorded to a domestic investor or investment in like circumstances, on the other. It is therefore incumbent upon the claimant to identify domestic investors or investments as comparators. If the claimant does not identify any domestic investor or investment as allegedly being in like circumstances, no violation of Article 10.3 can be established.

52. Determining whether a domestic investor or investment identified by a claimant is in “like circumstances” to the claimant or its investment is a fact-specific inquiry. As one tribunal observed in the context of a similar national treatment provision in the NAFTA, “It goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, ‘circumstances’ are context dependent and have no unalterable meaning across the spectrum of fact situations.”⁹⁴ The United States understands the term “circumstances” to denote conditions or facts that accompany treatment as opposed to the treatment itself. Thus, identifying appropriate comparators for purposes of the “like circumstances” analysis requires consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other relevant characteristics. When determining whether a claimant was in like circumstances with comparators, it or its investment should be compared to a national investor or investment that is alike in all relevant respects but for nationality of ownership. Moreover, whether treatment is accorded in “like circumstances” under Article 10.3 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare objectives.

53. 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 in like circumstances. This is an important distinction intended by the Parties. Thus, the Parties may adopt measures that draw distinctions among entities without necessarily violating Article 10.3.

Article 10.4 (Most-Favored-Nation Treatment)

54. Article 10.4 of the U.S.-Peru TPA provides (emphases added):

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

States and Mexico that the National Treatment and Most-Favored Nations obligations are intended to prevent discrimination on the basis of nationality).

⁹⁴ See, e.g., *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Award on the Merits of Phase 2, ¶ 75 (Apr. 10, 2001).

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

55. The requirements for establishing a breach of Most-Favored-Nation Treatment (“MFN”) under Article 10.4 are the same as for establishing a National Treatment breach under Article 10.3, except that the applicable comparators are investors or investments of non-Parties.⁹⁵ Thus, as is the case under Article 10.3, if a claimant does not identify such non-Party investors or investments as allegedly being in like circumstances with the claimant or its investment, no violation of Article 10.4 can be established. Once it has identified comparators, the claimant then has the burden of proving that it or its investments: (1) were accorded “treatment”; (2) were in “like circumstances” with the identified non-Party investors or investments; and (3) received treatment “less favorable” than that accorded to the identified non-Party investors or investments.

56. With respect to the third component of an MFN claim noted in the preceding paragraph, a claimant must also establish that the alleged non-conforming measures that constituted “less favorable” treatment are not subject to the reservations contained in Annex II of the U.S.-Peru TPA. In particular, both Parties reserved “the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement.”⁹⁶ Moreover, both Parties reserved “the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed after the date of entry into force of this Agreement involving (a) aviation; (b) fisheries; or (c) maritime matters, including salvage.”⁹⁷

57. A claimant must meet the basic requirement of Article 10.4 to identify a comparator “in like circumstances.” Unlike many investment treaties, the MFN clause of the U.S.-Peru TPA expressly requires a claimant to demonstrate that investors of another Party or a non-Party “in like circumstances” were afforded more favorable treatment. Ignoring the “in like circumstances” requirement would serve impermissibly to excise key words from the Agreement. Nor can Article 10.4 be used to alter the substantive content of the fair and equitable treatment obligation under Article 10.5, including the obligation not to deny justice. As noted in the submissions on Article 10.5 above, Article 10.5.2 clarifies that the concept of “fair and equitable treatment” does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. Article 10.5.3 further clarifies that a “breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.”

⁹⁵ *Mercer Award* ¶ 7.10.

⁹⁶ U.S.-Peru TPA, Annex II, Schedule of the United States, at II-US-8; Annex II, Schedule of Peru, at II-Peru-1.

⁹⁷ *Id.*

Article 10.16.1 (Causation)

58. Articles 10.16.1(a)(ii) and 10.16.1(b)(ii) allow a claimant to recover loss or damage incurred “by reason of, or arising out of” a breach of an obligation under Chapter Ten, Section A of the U.S.-Peru TPA.

59. The ordinary meaning of these terms requires an investor to establish the causal nexus between the alleged breach and the claimed loss or damage.⁹⁸ In this connection, it is well established that “causality in fact is a necessary but not a sufficient condition for reparation.”⁹⁹ The standard for factual causation is known as the “but-for” or “*sine qua non*” test whereby an act causes an outcome if the outcome would not have occurred in the absence of the act. This test is not met if the same result would have occurred had the breaching State acted in compliance with its obligations.¹⁰⁰

60. The ordinary meaning of the term “by reason of, or arising out of” also requires an investor to demonstrate proximate causation. Indeed, proximate causation is an “applicable rule[] of international law” that under Article 10.22.1 must be taken into account in fixing the appropriate amount of monetary damages.¹⁰¹

61. Accordingly, any loss or damage cannot be based on an assessment of acts, events or circumstances not attributable to the alleged breach.¹⁰² Events that develop subsequent to the

⁹⁸ H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 422 (2d ed. 1985) (noting that it is generally the claimant’s burden to “persuade the tribunal of fact of the existence of causal connection between wrongful act and harm”); see also *Islamic Republic of Iran v. United States of America*, AWD 601-A3/A8/A9/A14/B/61-FT ¶ 153 (July 17, 2009), 38 IRAN-U.S. CL. TRIB. REP. 197, 223 (2009) (“Iran, as the Claimant, is required to prove that it has suffered losses . . . and that such losses were *caused by* the United States.”) (emphasis added).

⁹⁹ ILC Draft Articles, art. 31, cmt. 10 (2001). The Iran-U.S. Claims Tribunal reaffirmed this principle in the remedies phase of Case A/15(IV) when it held that it must determine whether the “United States breach caused ‘factually’ the harm . . . and that that loss was also a ‘proximate’ consequence of the United States’ breach.” *Islamic Republic of Iran v. United States of America*, AWD 602-A15(IV)/A24-FT ¶ 52 (July 2, 2014), IRAN-U.S. CL. TRIB. (“A/15(IV) Award”).

¹⁰⁰ A/15(IV) Award ¶ 52 (“[I]f one were to reach the conclusion that both tortious (or obligation-breaching) and non-tortious (obligation-compliant) conduct of the same person would have led to the same result, one might question that the tortious (or obligation-breaching) conduct was *condicio sine qua non* of the loss the claimant seeks to recover.”). See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 I.C.J. 40, ¶ 462 (Judgment of Feb. 26).

¹⁰¹ See ILC Draft Articles, art. 31, cmt. 10. See also *Administrative Decision No. II (United States v. Germany)*, 7 R.I.A.A. 23, 29 (1923) (proximate cause is “a rule of general application both in private and public law – which clearly the parties to the Treaty had no intention of abrogating”); *United States Steel Products (United States v. Germany)*, 7 R.I.A.A. 44, 54-55, 58-59, 62-63 (1923) (rejecting on proximate cause grounds a group of claims seeking reimbursement for war-risk insurance premiums); *Dix (United States v. Venezuela)*, 9 R.I.A.A. 119, 121 (undated) (“International as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure.”); *H. G. Venable (United States v. Mexico)*, 4 R.I.A.A. 219, 225 (1927) (construing the phrase “originating from” as requiring that “only those damages can be considered as losses or damages caused by [the official] which are immediate and direct results of his [action]”). See also BIN CHENG, GENERAL PRINCIPLES OF LAW 244-45 (1953) (explaining that “it is ‘a rule of general application both in private and public law,’ equally applicable in the international legal order, that the relation of cause and effect operative in the field of reparation is that of proximate causality in legal contemplation.”).

¹⁰² See ILC Draft Articles, art. 31, cmt. 9 (noting that the language of Article 31(2) providing that injury includes damage “caused by the internationally wrongful act of a State,” “is used to make clear that the subject matter of reparation is, globally, the injury *resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.*”) (emphasis added).

alleged breach may increase or decrease the amount of damages suffered by a claimant. At the same time, injuries that are not sufficiently “direct”, “foreseeable”, or “proximate” may not, consistent with applicable rules of international law, be considered when calculating a damage award.¹⁰³ Valuing damages as of the date of an award, rather than as of the time of breach, could fail to appropriately exclude injuries resulting from events subsequent to the date of breach that lack sufficient causal connection to the breach.¹⁰⁴ Tribunals should exercise caution also because compensation for such injuries may, depending on the circumstances, also be construed as intending to deter or punish the conduct of the disputing State, contrary to Article 10.26.3.¹⁰⁵

Respectfully submitted,



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¹⁰³ As the commentary to the ILC Draft Articles explains, causality in fact is a necessary but not sufficient condition for reparation: “There is a further element, associated with the exclusion of injury that is too “remote” or “consequential” to be the subject of reparation. In some cases, the criterion of “directness” may be used, in others “foreseeability” or “proximity”. . . . The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act[.]” ILC Draft Articles, art. 31, cmt. 10 (footnotes omitted).

¹⁰⁴ See, e.g., *Murphy Exploration & Production Co. v. Republic of Ecuador*, UNCITRAL, Partial Final Award ¶¶ 482-485 (May 6, 2016); *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award ¶¶ 83-84 (Feb. 17, 2000).

¹⁰⁵ Article 10.26.3 expressly provides that “[a] Tribunal may not award punitive damages.” See also ILC Draft Articles, art. 36, cmt. 4 (“[A]rticle 36 is purely compensatory, as its title indicates. . . . It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character.”) (citing the *Velásquez Rodríguez*, Compensatory Damages case, where “the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages (Series C, No. 7 (1989))”).