IN THE ARBITRATION UNDER CHAPTER TEN OF THE
UNITED STATES-COLOMBIA TRADE PROMOTION AGREEMENT AND THE ICSID CONVENTION

NEUSTAR, INC.

Claimant

-and-

THE REPUBLIC OF COLOMBIA,

Respondent.

ICSID CASE NO. ARB/20/7

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. The United States of America makes this submission pursuant to Article 10.20.2 of the United States-Colombia Trade Promotion Agreement ("U.S.-Colombia 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.[1]

Article 10.18.2(b) (Waiver Requirement)

2. Article 10.18.2 of the U.S.-Colombia TPA states in relevant part:

> 2. No claim may be submitted to arbitration under this Section unless:
>
> [. . .]
>
> (b) the notice of arbitration is accompanied,

[1] In footnotes to this submission, the symbol ¶ denotes the relevant paragraph(s) of the referenced document and the symbol § denotes the relevant section(s) of the referenced document.

(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.

3. The waiver requirements under Article 10.18.2(b) are among the requirements upon which the Parties have conditioned their consent in Article 10.17. An effective waiver is therefore a precondition to the Parties' consent to arbitrate claims, and accordingly, a tribunal's jurisdiction under Chapter Ten of the U.S.-Colombia TPA.[2]

4. Similar to provisions found in many of the United States' other international investment agreements,[3] Article 10.18.2(b) is a "no U-turn" waiver provision. As such, it 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.

[2] *The Renco Group Inc. v. Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, ¶ 73 (July 15, 2016) ("*Renco* Partial Award on Jurisdiction") ("[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, §§ 16-17 (June 2, 2000) ("*Waste Management I* Award"); *Detroit International Bridge Co. v. 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. El Salvador*, CAFTA-DR/ICSID Case No. ARB/09/17, Award, ¶¶ 79-80 (Mar. 14, 2011) ("*Commerce Group* Award"); *Railroad Development Corp. v. 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").

[3] For example, waiver provisions similar to Article 10.18.2 of the U.S.-Colombia TPA can be found in Article 10.18.2 of the U.S.-Peru Trade Promotion Agreement, 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.

The date of the submission of an effective waiver is the date on which the claim has been submitted to arbitration, assuming all other relevant procedural requirements have been satisfied.

5. Compliance with Article 10.18.2(b) entails both formal and material requirements.[4] As to the formal requirements, the waiver must be in writing, "clear, explicit and categorical."[5] As the *Renco* tribunal stated, interpreting a waiver provision in the U.S.-Peru Trade Promotion Agreement identical to Article 10.18.2(b), because Article 10.18.2(b) is a "no U-turn" provision, it requires an investor to "definitively and irrevocably" waive all rights to pursue claims in another forum once claims are submitted to arbitration with respect to a measure alleged to have breached the Agreement.[6] This conclusion, as the *Renco* tribunal rightly observed, results from the language requiring the investor to provide a written waiver of "'*any* right to initiate or continue before *any* [forum] *any* proceeding with respect to *any* measure alleged to constitute a breach . . . '"[7] The waiver required by Article 10.18.2(b) is thus "intended to operate as a 'once and for all' renunciation of all rights to initiate claims in a domestic forum, whatever the outcome of the arbitration (whether the claim is dismissed on jurisdictional or admissibility grounds or on the merits)."[8] That is, the waiver requirement seeks to give the respondent certainty, from the very start of arbitration under the Agreement, that the claimant is not pursuing and will not pursue proceedings in another forum with respect to the measures challenged in the arbitration.[9] Accordingly, a waiver containing any conditions, qualifications or reservations will not meet the formal requirements and will be ineffective.

6. As to the material requirements, a claimant must act consistently and concurrently with the written waiver by abstaining from initiating or continuing proceedings in another forum with respect to the measures alleged to constitute a breach of the obligations of Chapter Ten as of the

[4] *Renco* Partial Award on Jurisdiction, ¶ 73; *see also Waste Management I* Award, § 20 at 230; *Commerce Group* Award, ¶¶ 79-80.

[5] *Renco* Partial Award on Jurisdiction, ¶ 74; *Waste Management I* Award, § 18 at 229.

[6] *Renco* Partial Award on Jurisdiction, ¶¶ 95-96.

[7] *Id.*, ¶ 95 (Emphasis in original).

[8] *Id.*, ¶ 99.

[9] *See* U.S.-Colombia TPA Article 10.18.2(b).

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 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[.][10]

7. As the tribunal in *Commerce Group* explained in relation to an identical waiver provision contained in the CAFTA-DR Chapter Ten, "[a] waiver must be more than just words; it must accomplish its intended effect."[11] 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.[12]

8. Article 10.18.2(b) requires a claimant's waiver to encompass "any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16," except as provided in Article 10.18.3. 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)."[13] As the tribunal in *Commerce Group* observed, the

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[10] *Waste Management I* Award, § 24 (Emphasis added).

[11] *Commerce Group* Award, ¶ 80.

[12] *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.

[13] *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

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."[14]

9. For a waiver to be and remain effective, any juridical person or 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 affiliated corporate entities, thereby rendering the waiver provision ineffective. This in turn would frustrate the purpose of the waiver provision in Article 10.18.2 of the Agreement.

10. 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, a tribunal itself has no authority to 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 alone, as a function of the State's general discretion to consent to arbitration.[15] 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

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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.").

[14] *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.-Colombia TPA arbitration is, for example, only tangentially or incidentally related to the measure at issue in the domestic proceedings.

[15] *Renco* Partial Award on Jurisdiction, ¶ 173; *see also Railroad Development* Decision on Jurisdiction, ¶ 61 (finding that "the Tribunal has no jurisdiction without the 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 at 238-239 (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).

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.[16] Under such circumstances, the tribunal would lack jurisdiction *ab initio*.

11. Notwithstanding Article 10.18.2(b), the claimant (or the claimant and the enterprise) may initiate or continue domestic or other dispute settlement proceedings only in very narrow circumstances, where the action:

> 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.

Article 10.18.3 (Emphasis added) (footnote omitted).

12. This narrow carve-out from the broad waiver requirement in Article 10.18.2 is intended solely to preserve the *status quo ante* until the investment dispute before a Chapter 10 tribunal can be fully adjudicated. For example, a claimant may wish to seek preliminary injunctive relief before a domestic court to prevent an asset from being sold, destroyed, or impaired while the alleged breach of the TPA is being adjudicated by a Chapter 10 tribunal. Such relief is preventive in character and often viewed as an extraordinary remedy.[17] Moreover, as the carve-

[16] *See, e.g.*, *Renco* Partial Award on Jurisdiction, ¶¶ 138, 152, 160 (observing, with respect to the analogous waiver provision of the U.S.-Peru TPA, that the claimant's defective waiver "could only be cured (a) if Renco took the positive step of withdrawing the reservation of rights, or submitting a new waiver without the reservation of rights, and Peru consented to this by way of a variation of Article 10.18(2)(b) of the Treaty, or (b) if Renco commenced a new arbitration together with a waiver without any reservation of rights" and that as a result of the defective waiver, no agreement to arbitrate came into existence and the tribunal lacked jurisdiction); *see also Foster Wheeler USA Corp. v. Colombia*, ICSID Case No. ARB/19/34, Submission of the United States, ¶ 20 (April 4, 2022); *Gramercy Funds Management LLC v. Peru*, ICSID Case No. UNCT/18/2, Submission of the United States, ¶ 17 (June 21, 2019).

[17] The nature of the available relief and the standard for granting such relief is determined by the domestic law of the respondent. For example, in the United States, preliminary injunctive relief is viewed as an "extraordinary remedy." *See Winter v. Natural Resources Defense Council*, 555 U.S. 7, 24 (2008) (observing that "[a] preliminary injunction is an ***extraordinary*** remedy never awarded as of right.") (Emphasis added). As a general matter, in the United

out indicates, the interim injunctive relief sought must not involve the payment of monetary damages or go beyond that which is necessary to preserve the *status quo ante* during the pendency of the arbitral proceedings.

Article 10.3 (National Treatment)

13. Article 10.3 provides in relevant part that each party shall accord to investors of the other Party and to covered investments "treatment no less favorable than that it accords, in like circumstances, to its own investors [and 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."[18]

14. 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.[19] Nothing in the text of Articles 10.3 suggests a shifting burden of proof. Rather, the burden to prove a violation of this article, and each element of its claim, rests and remains squarely with the claimant.[20]

15. 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

States a requesting party may be awarded preliminary injunctive relief if it demonstrates: (1) a likelihood of success on the merits, (2) a likelihood that it will suffer irreparable harm absent such relief, (3) that the balance of equities tips in favor of the requesting party, and (4) that an injunction is in the public interest. *See id.*, at 20.

[18] U.S.-Colombia TPA art. 10.3.

[19] 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." *Mercer Int'l Inc. v. Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of the United States, ¶ 10 (May 8, 2015); *see also Apotex Holdings Inc. v. United States*, NAFTA/ICSID Case No. ARB(AF)/12/1, Counter-Memorial on Merits and Objections to Jurisdiction of Respondent United States, ¶ 324 (Dec. 14, 2012); *cf. Gramercy Funds Management LLC v. Peru*, ICSID Case No. UNCT/18/2, Submission of the United States, ¶ 49 n.91 (June 21, 2019) (interpreting the United States-Peru Trade Promotion Agreement).

[20] *See United Parcel Service of America, Inc. v. Canada*, NAFTA/UNCITRAL, Award on the Merits, ¶ 84 (May 24, 2007) (holding that the failure of a claimant to establish the requisite elements of a claim of breach of NAFTA Article 1102, the analogous national treatment provision of the NAFTA, "will be fatal to its case," that this legal burden "rests squarely with the Claimant," and that this "burden never shifts to the [NAFTA] Party[.]") ("*UPS* Award").

"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.[21] Nationality-based discrimination under 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.

16. 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.

17. 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, "[i]t goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations."[22] 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 possible relevant characteristics.

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[21] *Loewen Group, Inc. and Raymond L. Loewen v. United States*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award, ¶ 139 (June 26, 2003) ("*Loewen* Award") (accepting in the NAFTA context that "Article 1102 [National Treatment] is direct[ed] *only* to nationality-based discrimination") (emphasis added); *Mercer Int'l Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award, ¶ 7.7 (Mar. 6, 2018) ("*Mercer* Award") (accepting the positions of the United States and Mexico that the National Treatment and Most-Favored Nations obligations are intended to prevent discrimination on the basis of nationality).

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

18. When determining whether a claimant or its investment is in like circumstances with comparators, the claimant or its investment should be compared to a domestic 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.

19. 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 domestic investor or investment. The appropriate comparison is between the treatment accorded a foreign and a domestic 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)

20. 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.[23] 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. Similarly, Article 10.4 does not provide for shifting the burden of proof. Rather, the burden to prove a violation of this article, and each element of its claim, rests and remains squarely with the claimant.[24]

21. The MFN clause of the U.S.-Colombia TPA expressly requires a claimant to demonstrate that investors of a non-Party "in like circumstances" were afforded more favorable treatment.

[23] *Mercer* Award, ¶ 7.10.

[24] *See United Parcel Service of America, Inc. v. Canada*, NAFTA/UNCITRAL, Award on the Merits, ¶ 84 (May 24, 2007) (holding that the failure of a claimant to establish the requisite elements of a claim of breach of NAFTA Article 1102, the national treatment provision of the NAFTA, "will be fatal to its case," that this legal burden "rests squarely with the Claimant," and that this "burden never shifts to the [NAFTA] Party[.]") ("*UPS* Award").

Ignoring the "in like circumstances" requirement would serve impermissibly to excise key words from the Agreement.[25]

22. A claimant must also establish that the alleged non-conforming measures that constituted "less favorable" treatment are not subject to the non-conforming measure exceptions contained in Annex II.[26] In particular, each Party 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."[27]

23. If the claimant does not identify treatment that is actually being accorded with respect to an investor or investment of a non-Party or another Party in like circumstances, no violation of Article 10.4 can be established. In other words, the claimant must identify a measure adopted or maintained by a Party through which that Party accorded more favorable treatment, as opposed to speculation as to how a hypothetical measure might have applied to investors of a non-Party or another Party. Moreover, a Party does not accord treatment through the mere existence of provisions in its other international agreements such as umbrella clauses or clauses that impose autonomous fair and equitable treatment standards. Treatment accorded by a Party could include, however, measures adopted or maintained by a Party in connection with carrying out its obligations under such provisions.

Article 10.5 (Minimum Standard of Treatment)

24. Article 10.5 provides that "[e]ach party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."[28] This provision "prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered

[25] Further, 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. Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of the United States, ¶ 10 (May 8, 2015).

[26] Annex II is incorporated into Chapter Ten pursuant to Article 10.13.2.

[27] U.S.-Colombia TPA, Annex II, Schedule of the United States, at II-US-8; Annex II, Schedule of Colombia, at II-COL-4.

[28] U.S.-Colombia TPA art. 10.5.1.

investments."[29] Specifically, "'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world[.]"[30] And, "'full protection and security' requires each Party to provide the level of police protection required under customary international law."[31]

25. This text demonstrates the Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in Article 10.5. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts. The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[32]

26. Annex 10-A to the U.S.-Colombia TPA addresses the methodology for determining whether a customary international law rule covered by Article 10.5 has crystallized. The Annex expresses the Parties' "shared understanding that 'customary international law' generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation." Thus, in Annex 10-A the Parties confirmed their understanding and application of this two-element approach—State practice and *opinio juris*—which is the standard practice of States and international courts, including the International Court of Justice.[33]

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[29] U.S.-Colombia TPA art. 10.5.2.

[30] U.S.-Colombia TPA art. 10.5.2(a).

[31] U.S.-Colombia TPA art. 10.5.2(b).

[32] *S.D. Myers, Inc. v. Canada*, *NAFTA/UNCITRAL*, First Partial Award, ¶ 259 (Nov. 13, 2000) ("S.D. Myers, First Partial Award"); *see also Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Award, ¶ 615 (June 8, 2009) ("*Glamis* Award") ("The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community."); Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 AM. SOC'Y OF INT'L L. PROC. 51, 58 (1939).

[33] *See Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, 122 (Feb. 3) ("*Jurisdictional Immunities of the State*") ("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) ("*North Sea Continental Shelf*")); *see also Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, ¶ 27 (June 3) ("*Continental Shelf*") ("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[.]").

27. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate, under this two-step approach, that a rule of customary international law exists. In its decision on *Jurisdictional Immunities of the State (Germany v. Italy)*,[34] the ICJ emphasized that "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States," and noted as examples of State practice relevant national court decisions or domestic legislation dealing with the particular issue alleged to be the norm of customary international law, as well as official declarations by relevant State actors on the subject.[35]

28. The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*.[36] "The party which relies on a custom" therefore "must prove that this custom is established in such a manner that it has become binding on the other Party."[37] Tribunals applying the minimum standard of treatment obligation in Article 1105 of NAFTA Chapter Eleven, which likewise affixes the standard to customary international law,[38] have confirmed that

[34] *Jurisdictional Immunities of the State* at 99.

[35] *Id.* at 122-23 (quoting *Continental Shelf*, ¶ 27) (discussing relevant materials that can serve as evidence of State practice and *opinio juris* in the context of jurisdictional immunity in foreign courts); *see also* International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, U.N. Doc. A/73/10, Conclusion 6 (2018) ("Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts."); Comments from the United States on the International Law Commission's Draft Conclusions on the Identification of Customary International Law as Adopted by the Commission in 2016 on First Reading at 18 (under cover of diplomatic note dated Jan. 5, 2018) (noting that national court decisions are not themselves sources of international law (except where they may constitute State practice), but rather are sources that may help elucidate rules of law where they accurately compile and soundly analyze evidence of State practice and *opinio juris*.).

[36] *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20) ("*Asylum*"); *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).

[37] *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).

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

the party seeking to rely on a rule of customary international law must establish its existence. The tribunal in *Cargill, Inc. v. Mexico*, for example, acknowledged that:

> the proof of change in a custom is not an easy matter to establish. However, *the burden of doing so falls clearly on Claimant*. If the Claimant does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task. Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.[39]

29. 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.[40] Determining a breach of the minimum standard of treatment "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[41] A failure to satisfy requirements of domestic law does not necessarily violate international law.[42] Rather, "something more than simple illegality or lack of

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[39] *Cargill, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/2, Award, ¶ 273 ("*Cargill* Award") (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*, NAFTA/ICSID Case No. ARB(AF)/00/1, Award, ¶ 185 (Jan. 9, 2003) ("*ADF* Award") ("The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts."); *Glamis* Award, ¶ 601 (noting "[a]s a threshold issue . . . that it is Claimant's burden to sufficiently" show the content of the customary international law minimum standard of treatment); *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Part IV, Ch. C, ¶ 26 (Aug. 3, 2005) ("*Methanex* Final Award") (citing *Asylum* for placing burden on claimant to establish the content of customary international law, and finding that claimant, which "cited only one case," had not discharged burden).

[40] *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award, ¶ 177 (Dec. 16, 2002) ("*Feldman* Award") ("[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.") (citation omitted).

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

[42] *ADF* Award, ¶ 190 ("[T]he Tribunal has no authority to review the legal validity and standing of the U.S. measures here in question under *U.S. internal administrative law*. We do not sit as a court with appellate jurisdiction with respect to the U.S. measures. Our jurisdiction is confined by NAFTA Article 1131(1) to assaying the consistency of the U.S. measures with relevant provisions of NAFTA Chapter 11 and applicable rules of international law.") (emphasis in original, citations omitted); *see also GAMI Investments, Inc. v. United Mexican*

authority under the domestic law of a state is necessary to render an act or measure inconsistent with the customary international law requirements. . . ."[43] Accordingly, a departure from domestic law does not in-and-of-itself sustain a violation of Article 10.5.

30. States may decide expressly by treaty to make policy decisions to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law.[44] The practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 10.5 in which "fair and equitable treatment" and "full protection and security" are expressly tied to the customary international law minimum standard of treatment.[45] Thus, arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 10.5.[46] Likewise, decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary

States, NAFTA/UNCITRAL, Award, ¶ 97 (Nov. 15, 2004) ("The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law."); *Thunderbird* Award, ¶ 160 ("[I]t is not up to the Tribunal to determine how [the state regulatory authority] should have interpreted or responded to the [proposed business operation], as by doing so, the Tribunal would interfere with issues of purely domestic law and the manner in which governments should resolve administrative matters (which may vary from country to country).").

[43] *ADF* Award, ¶ 190.

[44] *See Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 2007 I.C.J. 582, ¶ 90 (May 24) ("The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.").

[45] U.S.-Colombia Annex 10-A (Customary International Law) ("Article 105.2 prescribes the customary international law minimum standard of treatment . . . ."); *see also Grand River Enterprises Six Nations, Ltd. v. United States*, NAFTA/UNCITRAL, Award, ¶ 176 (Jan. 12, 2011) ("*Grand River* Award") (noting that an obligation under Article 1105 of the NAFTA (which also prescribes the customary international law minimum standard of treatment) "must be determined by reference to customary international law, not to standards contained in other treaties or other NAFTA provisions, or in other sources, unless those sources reflect relevant customary international law"). While there may be overlap in the substantive protections ensured by the U.S.-Colombia TPA and other treaties, a claimant submitting a claim under the U.S-Colombia TPA, in which fair and equitable treatment is defined by the customary international law minimum standard of treatment, still must demonstrate that the obligations invoked are in fact a part of customary international law.

[46] *See, e.g., Glamis* Award, ¶ 608 (concluding that "arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom"); *Cargill* Award, ¶ 278 (noting that arbitral "decisions are relevant to the issue presented in Article 1105(1) only if the fair and equitable treatment clause of the BIT in question was viewed by the Tribunal as involving, like Article 1105, an incorporation of the customary international law standard rather than autonomous treaty language.").

international law are not themselves instances of "State practice" for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice.[47] 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.

Fair and Equitable Treatment

31. 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."

32. As discussed below, the concepts of legitimate expectations, transparency, good faith, and non-discrimination are not component elements of "fair and equitable treatment" under customary international law that give rise to independent host State obligations.

Legitimate Expectations

33. 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. 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

[47] *See, e.g., Glamis* Award, ¶ 605 ("Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law. They can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation.") (footnote omitted); *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, 2018 I.C.J. 507, ¶ 162 (Oct. 1) ("The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia's argument based on legitimate expectations thus cannot be sustained.").

investors' expectations; instead, something more is required.[48] 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.

Transparency

34. 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.[49] The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation of host State transparency under the minimum standard of treatment.

Good Faith

35. It is well-established in international law that good faith is "one of the basic principles governing the creation and performance of legal obligations," but "it is not in itself a source of obligation where none would otherwise exist."[50] As such, customary international law does not

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[48] *See, e.g., Grand River Enterprises Six Nations, Ltd. v. United States*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States, at 96 (Dec. 22, 2008) ("As a matter of international law, although an investor may develop its own expectations about the legal regime that governs its investment, those expectations do not impose a legal obligation on the State."). Indeed, NAFTA tribunals have declined to find breaches of Article 1105 even where the claimant's purported expectations arose from a contract. *See Azinian v. Mexico*, NAFTA/ICSID Case No. ARB/(AF)/97/2, Award, ¶ 87 (Nov. 1, 1999) ("NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes."); *Waste Management Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/00/3, Award, ¶ 115 (Apr. 30, 2004) (explaining that "even the persistent non-payment of debts by a municipality is not equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and . . . some remedy is open to the creditor to address the problem.").

[49] *See United Mexican States v. Metalclad Corp.*, [2001] 89 B.C.L.R. 3d 359, 2001 B.C.S.C. 664, ¶¶ 68, 72 (Can. B.C. S.C.) (holding that "[n]o authority was cited or evidence introduced [in the *Metalclad* arbitration] to establish that transparency has become part of customary international law," and that "there are no transparency obligations contained in [NAFTA] Chapter 11"); *Feldman* Award, ¶ 133 (finding that "it is doubtful that lack of transparency alone rises to the level of violation of NAFTA and international law," and holding the British Columbia Supreme Court's decision in *Metalclad* to be "instructive"); *Merrill & Ring Forestry L.P. v. Canada*, NAFTA/ICSID Case No. UNCT/07/1, Award, ¶¶ 208, 231 (Mar. 31, 2010) (stating that "a requirement for transparency may not at present be proven to be part of the customary law standard, as the judicial review of *Metalclad* rightly concluded," though speculating that it might be "approaching that stage").

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

impose a free-standing, substantive obligation of "good faith" that, if breached, can result in State liability.[51] Similarly, a claimant "may not justifiably rely upon the principle of good faith" to support a claim, absent a specific treaty obligation.[52]

Non-Discrimination

36. Similarly, the customary international law minimum standard of treatment set forth in Article 10.5 does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination.[53] As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.[54] To

[51] This consistent and longstanding position has been articulated in repeated submissions by the United States to NAFTA tribunals. *See, e.g., Mesa Power Group, LLC v. Canada*, UNCITRAL PCA Case No. 2012-17, Submission of the United States, ¶ 7 (July 25, 2014) ("It is well established in international law that good faith is 'one of the basic principles governing the creation and performance of legal obligations,' but 'it is not in itself a source of obligation where none would otherwise exist.'"); *William Ralph Clayton et al. v. Canada,* NAFTA/UNCITRAL PCA Case No. 2009-04, Submission of the United States, ¶ 6 (Apr. 19, 2013) (same); *Grand River*, Counter-Memorial of the United States, at 94 ("[C]ustomary international law does not impose a free-standing, substantive obligation of 'good faith' that, if breached, can result in State liability. Absent a specific treaty obligation, a Claimant 'may not justifiably rely upon the principle of good faith' to support a claim."); *Canfor Corp. v. United States*, NAFTA/UNCITRAL, Reply on Jurisdiction of the United States, at 29 n.93 (Aug. 6, 2004) ("[Claimant] appears to argue that customary international law imposes a general obligation of 'good faith' independent of any specific NAFTA provision. The International Court of Justice, however, has squarely rejected that notion, holding that 'the principle of good faith . . . is not in itself a source of obligation where none would otherwise exist.'").

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

[53] *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.").

[54] *See Methanex* Final Award, Part IV, Chapter C, ¶¶ 25-26 (explaining that customary international law has established exceptions to the broad rule that "a State may differentiate in its treatment of nationals and aliens," but noting that those exceptions must be proven rules of custom, binding on the Party against whom they are invoked); *see also* ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW: PEACE 932 (9th ed. 1992) ("[A] degree of discrimination in the treatment of aliens as compared with nationals is, generally, permissible as a matter of customary international law."); Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 AM. SOC'Y OF INT'L L. PROC. 51, 56 (1939) ("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

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,[55] access to judicial remedies or treatment by the courts,[56] or the obligation of States to provide full protection and security and to compensate aliens and nationals on an equal basis in times of violence, insurrection, conflict or strife.[57] Accordingly, general investor-State claims of

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discrimination of treatment between aliens and nationals alone does not yet constitute a violation of international law.").

[55] *See, e.g., BP Exploration Co. (Libya) Ltd. v. Libya*, 53 I.L.R. 297, 329 (Ad Hoc Arb. 1974) ("[T]he taking . . . clearly violates public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character."); *Libyan American Oil Co. (LIAMCO) v. Libya*, 62 I.L.R. 140, 194 (Ad Hoc Arb. 1977) ("It is clear and undisputed that non-discrimination is a requisite for the validity of a lawful nationalization. This is a rule well established in international legal theory and practice."); *Kuwait v. American Independent Oil Co. (AMINOIL)*, 66 I.L.R. 518, 585 (Ad Hoc Arb. 1982) (considering the question "whether the nationalization of Aminoil was not thereby tainted with discrimination," but finding that there were legitimate reasons for nationalizing one company and not the other); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712(1)(b) (AM. LAW INST. 1987) ("A state is responsible under international law for injury resulting from . . . a taking by the state of the property of a national of another state that . . . is discriminatory . . . ."); *id.*, § 712 cmt. f ("Formulations of the rules on expropriation generally include a prohibition of discrimination . . . .").

[56] *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) (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*, League of Nations Doc. C.196M.70, at 100 (1927) ("Denial of justice is therefore a refusal to grant foreigners free access to the courts instituted in a State for the discharge of its judicial functions, or the failure to grant free access, in a particular case, to a foreigner who seeks to defend his rights, *although in the circumstances nationals of the State would be entitled to such access*.") (emphasis added); *Ambatielos (Greece v. United Kingdom)*, 12 R.I.A.A. 83, 111 (Com. Arb. 1956) ("The modern concept of 'free access to the Courts' represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a practice which existed in former times and in certain countries, and which constituted an unjust discrimination against foreigners. Hence, the essence of 'free access' is adherence to and effectiveness of the principle of non-discrimination against foreigners who are in need of seeking justice before the courts of the land for the protection and defence of their rights.").

[57] *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

nationality-based discrimination are governed exclusively by the provisions of Chapter Ten that specifically address that subject, and not Article 10.5.1.[58]

Respectfully submitted,

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May 13, 2022

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.").

[58] *See Mercer* Award, ¶ 7.58 ("So far as concerns the Claimant's claims of 'discriminatory treatment' contrary to NAFTA Article 1105(1), the Tribunal's [*sic*] agrees with the non-disputing NAFTA Parties' submissions that such protections are addressed in NAFTA Articles 1102 and 1103, rather than NAFTA Article 1105(1)."); *Methanex* Final Award, Part IV, Ch. C, ¶¶ 14-17, 24 (analyzing the text of NAFTA Article 1105, and explaining that the impact of the "FTC interpretation of [NAFTA] Article 1105" was not to "exclude non-discrimination from NAFTA Chapter 11" but "to confine claims based on alleged discrimination to Article 1102, which offers full play for a principle of non-discrimination").