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

RIVERSIDE COFFEE, LLC,

Claimant

-and-

REPUBLIC OF NICARAGUA,

Respondent.

ICSID CASE NO. ARB/21/16

SUBMISSION OF THE UNITED STATES OF AMERICA

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

Articles 10.3 and 10.4 (National Treatment and Most-Favored-Nation Treatment)

2. Article 10.3 ("National Treatment") provides that each Party shall accord to investors and covered investments of the other Party "treatment no less favorable than that it accords, in like circumstances," to its own investors and their investments "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of

[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.

investments" in its territory. Article 10.4 ("Most-Favored-Nation Treatment") provides that each Party shall accord to investors and covered investments of the other Party "treatment no less favorable than that it accords, in like circumstances," to investors and investments of any other Party or of any non-Party (*i.e.*, a third State) "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments" in its territory. These obligations thus prohibit nationality-based discrimination between investors and investments "in like circumstances."[2]

3. To establish a breach of Article 10.3, a claimant has the burden of proving that it or its investments: (1) were accorded "treatment"; (2) were in "like circumstances" with domestic investors or investments; and (3) received treatment "less favorable" than that accorded to domestic investors or investments.[3] As the *UPS v. Canada* tribunal noted (with respect to the functionally identical provisions of the NAFTA), "[t]his is a legal burden that rests squarely with the Claimant. That burden never shifts . . . ."[4] Establishing a violation of Article 10.4 is the same as establishing a violation of Article 10.3, except that the applicable comparator is an investor or investment of a third State.

4. Determining whether an investor or investment identified by a claimant is in like circumstances with the claimant or its investment is a fact-specific inquiry. As one tribunal observed, "[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

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[2] *See, e.g., Loewen Group v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 139 (June 26, 2003) (accepting in the NAFTA context that "Article 1102 [National Treatment] is direct[ed] *only* to nationality-based discrimination") (emphasis added); *Mercer International Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Award ¶ 7.7 (Mar. 6, 2018) (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).

[3] 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 International Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of the United States of America ¶ 10 (May 8, 2015).

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

unalterable meaning across the spectrum of fact situations."[5] 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. When determining whether a claimant was in like circumstances with comparators, it or its investment should be compared, for Article 10.3, to a domestic investor or investment, or for Article 10.4, an investor or investment of a third State, that is alike in all relevant respects *but for* the nationality of ownership. Whether treatment is accorded in like circumstances under Articles 10.3 or 10.4 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare objectives.[6]

5. Moreover, if the claimant does not identify treatment that is actually being accorded with respect to a domestic investor or investment or an investor or investment of a non-Party or another Party in like circumstances, no violation of Article 10.3 or 10.4, respectively, can be established.[7] In other words, a 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 domestic investors or investors of a non-Party or another Party. Additionally, a Party does not accord treatment through the mere existence of provisions in its other international agreements such as conditions to consent, procedural provisions, 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.

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

[6] *See, e.g.*, *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 250 (Nov. 13, 2000) ("*S.D. Myers* First Partial Award") (in the context of NAFTA, determining that an "assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest").

[7] UN Conference on Trade & Dev. [UNCTAD], UNCTAD Series on Issues in International Investment Agreements II, *Most-Favoured-Nation Treatment*, 23-24 (2010) (noting that a comparison between two foreign investors in like circumstances is required to assess an alleged breach of an MFN treatment clause).

Annex II of the CAFTA-DR

6. Where a claimant alleges that it has received less favorable treatment in like circumstances than investors of another Party or a non-Party, with respect to measures adopted or maintained that accord treatment to investors of countries pursuant to a bilateral or multilateral international agreement, the 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 CAFTA-DR. Both the United States and Nicaragua 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."[8] The specific reservation in Annex II to the application of Articles 10.3 and 10.4 cannot be negated by a purported "double renvoi,"[9] attempting to make other treaties' national treatment or most-favored-nation treatment clauses applicable by virtue of Article 10.4.[10]

Article 10.5 (Minimum Standard of Treatment)

7. Article 10.5.1 provides that "[e]ach party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."

8. Article 10.5.2 specifies that:

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

[8] CAFTA-DR, Annex II, at II-NI-4 (Schedule of Nicaragua); *id.*, at II-US-9 (Schedule of the United States).

[9] *See, e.g.*, Claimant's Reply Memorial and Counter-Memorial on Jurisdiction ¶¶ 217, 1188, and 1252 (Nov. 3, 2023).

[10] *See supra* paragraph 5. *See also* CAFTA-DR art. 10.13.2 ("Articles 10.3, 10.4, 10.9, and 10.10 *do not apply* to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II.") (emphasis added)

9. Article 10.5.2 then goes on to state:

> 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; and
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> (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

10. 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.

Methodology for determining the content of customary international law

11. 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."[11] Annex 10-B to the Treaty addresses the methodology for determining whether a customary international law rule covered by Article 10.5.1 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-B the Parties confirmed their understanding and application of this two-element approach – State practice and *opinio juris* – which is the standard approach of States and international courts, including the International Court of Justice.[12]

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

[12] *See Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, 122 (Feb. 3) ("*Jurisdictional Immunities of the State*, 2012 I.C.J.") ("In particular . . . the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*.") (citing *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, 1969 I.C.J. 3, 44, ¶ 77

12. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate, under this two-element approach, that a rule of customary international law exists. In its decision on *Jurisdictional Immunities of the State (Germany v. Italy)*,[13] 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.[14]

13. 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*.[15] "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."[16] Tribunals applying the minimum standard of treatment obligation in Article 1105 of NAFTA Chapter Eleven, which likewise affixes the standard to customary international law,[17] have confirmed that

(Feb. 20)) ("*North Sea Continental Shelf*, 1969 I.C.J."); *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, ¶ 29-30 (June 3).

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

[14] *Id.* at 122-23 (discussing relevant materials that can serve as evidence of State practice and *opinio juris* in the context of jurisdictional immunity in foreign courts); *see also* International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 6, U.N. Doc. A/73 /10 (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.").

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

[16] *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).

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

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.[18]

14. 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.[19] 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."[20] A failure to satisfy requirements of domestic law does not necessarily violate international law.[21] Rather, "something more than simple illegality or lack of

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[18] *Cargill Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/2, Award ¶ 273 (Sept. 18, 2009) ("*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 of America*, NAFTA/ICSID Case No. ARB(AF)/00/1, Award ¶ 185 (Jan. 9, 2003) ("*ADF* Award") ("The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts."); *Glamis* Award ¶ 601 (noting "[a]s a threshold issue . . . that it is Claimant's burden to sufficiently" show the content of the customary international law minimum standard of treatment); *Methanex Corp. v. United States of America,* NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Part IV, Chapter C ¶ 26 (Aug. 3, 2005) ("*Methanex* Final Award") (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).

[19] *See Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) ("[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).

[20] *S.D. Myers* First Partial Award ¶ 263; *see also Mesa Power Group, LLC v. Government of Canada*, NAFTA/UNCITRAL PCA Case No. 2012-17, Award ¶ 505 (Mar. 24, 2016) ("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"); *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 127 (Jan. 26, 2006) ("*Thunderbird* Award") (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).

[21] *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

authority under the domestic law of a state is necessary to render an act or measure inconsistent with the customary international law requirements. . . ."[22] Accordingly, a departure from domestic law does not in-and-of-itself sustain a violation of Article 10.5.

Obligations that have crystallized into the minimum standard of treatment

15. 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, 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."[23]

16. 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 expressly stated in Article 10.5.2(b), "requires each Party to provide the level of police protection required under customary international law."[24]

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the consistency of the U.S. measures with relevant provisions of NAFTA Chapter 11 and applicable rules of international law."); *see also GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 97 (Nov. 15, 2004) ("The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law."); *Thunderbird* Award ¶ 160 ("[I]t is not up to the Tribunal to determine how [the state regulatory authority] should have interpreted or responded to the [proposed business operation], as by doing so, the Tribunal would interfere with issues of purely domestic law and the manner in which governments should resolve administrative matters (which may vary from country to country).").

[22] *ADF* Award ¶ 190.

[23] CAFTA-DR art. 10.5.2(a).

[24] *See also Loewen Group, et al. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Counter-Memorial of the United States, at 176 (Mar. 30, 2001) ("[C]ases in which the customary international law obligation of full protection and security was found to have been breached are limited to those in which a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien."); *Methanex v. United States of America*, NAFTA/UNCITRAL, Rejoinder Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment (June 27, 2001), at 39 (same); *Certain Iranian Assets (Islamic Republic of Iran v. United States*, 2023 I.C.J., ¶ 190 (Mar. 30) ("The Court considers that the core of the obligation to afford the most constant protection and security under the Treaty of Amity concerns the protection of property from physical harm. Each Contracting Party has an obligation to exercise due diligence in providing protection from physical harm to the property of nationals and companies of the other Contracting Party within its own territory. . . . The Court observes that the most constant protection and security standard is of particular practical significance and relevance in the form of protection of property from physical harm by third parties.").

Obligations that have not crystallized into the minimum standard of treatment

Legitimate expectations

17. 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 investors' expectations; instead, something more is required.[25] 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.

Good faith

18. The principle that "every treaty in force is binding on the parties to it and must be performed by them in good faith" (*i.e.*, *pacta sunt servanda*) is established in customary international law,[26] but is not part of the minimum standard of treatment or otherwise addressed by CAFTA-DR Chapter Ten. Thus, claims alleging breach of the good faith principle in a Party's performance of its Treaty obligations do not fall within the limited jurisdictional grant for investor-State disputes afforded in the Treaty.[27] Similarly, the good faith principle applies as

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[25] *See, e.g.*, *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America at 96 (Dec. 22, 2008) ("*Grand River* U.S. Counter-Memorial") ("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."); PATRICK DUMBERRY, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105, 159-160 (2013) ("In the present author's view, there is little support for the assertion that there exists under customary international law any obligation for host States to protect investors' legitimate expectations."). Indeed, NAFTA tribunals have declined to find breaches of Article 1105 even where the claimant's purported expectations arose from a contract. *See also Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States*, 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").

[26] *See* Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 (reflecting the customary international law principle).

[27] *See, e.g.*, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 14, 135-36 ¶¶ 270-271 (June 27) (holding, with respect to a claim based on customary international law duties alleged to be "implicit in the rule *pacta sunt servanda*," that "the Court does not consider that a

between the States Parties to the Treaty, and does not extend to third parties outside of the Treaty relationship; it is not an obligation owed to investors.

19. Moreover, 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."[28] As such, customary international law does not impose a free standing, substantive obligation of "good faith" that, if breached, can result in State liability.[29] Similarly, a claimant "may not justifiably rely upon the principle of good faith" to support a claim, absent a specific treaty obligation.[30]

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20. States may decide expressly by treaty as a matter of policy to extend investment protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law.[31] The practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 10.5, in which "fair

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compromissory clause of the kind included in Article XXIV, paragraph 2, of the 1956 FCN Treaty, providing for jurisdiction over disputes as to its interpretation or application, would enable the Court to entertain a claim alleging conduct depriving the treaty of its object and purpose").

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

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

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

[31] *See Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, 2007 I.C.J. 582, 615, ¶ 90 (May 24) ("The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal 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.").

and equitable treatment" and "full protection and security" are expressly tied to the customary international law minimum standard of treatment.[32] 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.[33]

21. Moreover, decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary international law are not themselves instances of "State practice" for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice.[34] While the CAFTA-DR Parties consented to allow investor-State tribunals to decide issues in dispute in accordance with the CAFTA-DR and applicable rules of international law, they did not consent to delegate to arbitral tribunals the authority to develop the content of customary international law, which must be determined solely through a thorough examination of State practice and *opinio juris*. Thus, the decisions of arbitral tribunals do not establish rules of customary international law, and decisions regarding the content of customary international law are only persuasive to the extent that they include an examination of State practice and

[32] CAFTA-DR art. 10.5.2 ("For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments."). *See also Grand River Enterprises Six Nations, Ltd. v. United States*, NAFTA/UNCITRAL, Award ¶ 176 (Jan. 12, 2011) (noting that an obligation under Article 1105 of the NAFTA "must be determined by reference to customary international law, not to standards contained in other treaties or other NAFTA provisions, or in other sources, unless those sources reflect relevant customary international law"). While there may be overlap in the substantive protections ensured by this Treaty and other treaties, a claimant submitting a claim under this Treaty, 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.

[33] *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.").

[34] *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").

opinio juris that itself can be relied upon to identify a rule of customary international law as incorporated in Article 10.5.

Article 10.7 (Expropriation)

22. Article 10.7 provides that no Party may expropriate or nationalize a covered investment (directly or indirectly) except for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate, and effective compensation; and in accordance with due process of law.[35] Compensation must be "prompt," in that it must be "paid without delay"[36]; "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."[37]

23. Annex 10-C of the Treaty establishes that Article 10.7.1 "reflect[s] customary international law concerning the obligation of States with respect to expropriation." Annex 10-C further states that a Party's actions cannot constitute an expropriation "unless it interferes with a tangible or intangible property right or property interest in an investment." As such, and because Article 10.7.1 protects "covered investments" from expropriation except in accordance with its conditions, the first step in any expropriation analysis must begin with an examination of whether there is an investment capable of being expropriated.[38] It is appropriate to look to the

[35] Article 10.7 also clarifies that a Party may not expropriate a covered investment except in accordance with Article 10.5.

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

[37] CAFTA-DR art. 10.7.2.

[38] *Glamis* Award ¶ 356 ("There is for all expropriations, however, the foundational threshold inquiry of whether the property or property right was in fact taken."). *See also* Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 RECUEIL DES COURS 259, 272 (1982) ("[O]nly *property* deprivation

law of the host State[39] for a determination of the definition and scope of the property right or property interest at issue, including any applicable limitations.[40]

24. If an expropriation does not conform to each of the specific conditions set forth in Article 10.7.1, paragraphs (a) through (d), it constitutes a breach of Article 10.7. Any such breach requires compensation in accordance with Article 10.7.2.

25. The standard for compensation in the event of an expropriation is the same regardless of whether the expropriation was in compliance with the conditions set out in Article 10.7.1, or was in breach of those conditions.[41] 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.[42] In contrast, "when a State provides a process for fixing adequate

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will give rise to compensation.") (emphasis in original); Rudolf Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID REV. FOR. INV. L.J. 41, 41 (1986) ("Once it is established in an expropriation case that the object in question amounts to 'property,' the second logical step concerns the identification of 'expropriation.'").

[39] *See, e.g.*, Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 RECUEIL DES COURS 259, 270 (1982) (for a definition of "property . . . [w]e necessarily draw on municipal law sources").

[40] *See Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Rejoinder of Respondent United States of America, at 11 (Mar. 15, 2007) ("*Glamis* U.S. Rejoinder") (agreeing with expert report of Professor Wälde that in an instance where property rights are subject to legal limitations existing at the time the property rights are acquired, any subsequent burdening of property rights by such limitations does not constitute an impairment of the original property interest).

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

[42] *See Mondev* Award ¶ 72 ("Article 1110 requires that the nationalization or expropriation be 'on payment of compensation in accordance with paragraphs 2 through 6'. The word 'on' should be interpreted to require that the payment be clearly offered, or be available as compensation for taking through a readily available procedure, at the time of the taking. That was not the case here, and accordingly, if there was an expropriation, it occurred at or shortly after the rights in question were lost."). A breach of CAFTA-DR Article 10.7 will occur unless a host State observes its obligation to refrain from an uncompensated taking at the time of the expropriation by, for example, fixing, guaranteeing, or offering compensation. *See Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Rejoinder on Competence and Liability of Respondent United States of America, at 45 (Oct. 1, 2001) (citing authorities); *see also SEDCO, Inc. v. National Iranian Oil Co.*, Award No. 59-129-3,10 IRAN U.S. CL. TRIB. REP. 189, 204 n.39 (separate opinion Brower, J.) (Mar. 27, 1986) (describing a "taking itself" as wrongful "[i]f . . . no provision for compensation is made contemporaneously with the taking, or one is made which clearly cannot produce the required compensation, or unreasonably insufficient compensation is paid at the time of taking"); *Liberian Eastern Timber Corp. (LETCO) v. Government of the Republic of Liberia*, Award (Mar. 31, 1986), *in* 26 I.L.M. 647, 655 (1987) (finding Liberian Government deprived LETCO of its concession

compensation, but then ultimately fails to promptly determine and pay such compensation," a breach of the compensation obligation may occur later, subsequent to the time of the taking.[43]

Claims for indirect expropriation

26. An indirect expropriation occurs "where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."[44] Annex 10-C, paragraph 4, of the CAFTA-DR provides specific guidance as to whether an action, including a regulatory action, constitutes an indirect expropriation. As explained in paragraph 4(a) of Annex 10-C, determining whether an indirect expropriation has occurred "requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action . . . ; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action."

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unjustifiably for failure to be "accompanied by payment (or at least the offer of payment) of appropriate compensation").

[43] *See IO European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award ¶¶ 422, 425 (Mar. 10, 2015), *translated in* Reply Memorandum of Law, *Bolivarian Republic of Venezuela*, No. Civ. 15-2178 (S.D.N.Y. May 7, 2015), E.C.F. No. 16 ("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 the compensation be paid 'without undue delay' has not been met") ("El Tribunal ya ha establecido que la LECUPS es una legislación moderna, cuyo cumplimiento en principio cumpliría con los requisitos del Art. 6(c) del APRI. Sin embargo, … el Tribunal concluye que la República Bolivariana no ha ofrecido una explicación plausible que justifique el retraso de más de cuatro años en la fijación y en el pago al menos del justiprecio debido en cumplimiento de la LECUPS, lo que a su vez implica que no pueda considerarse cumplido el requisito del Art. 6(c) del APRI de que la compensación sea satisfecha "sin demora indebida."); *Goldenberg Case (Germany v. Romania)*, 2 R.I.A.A. 901, 909 (Sept. 27, 1928) ("[T]he requisition carried out by the German military authorities did not *initially* constitute an 'act contrary to the law of nations'. In order for this situation to continue, it was necessary, however, that within a reasonable delay, the claimants obtain equitable compensation. But such was not the case, the compensation, allocated several years after the requisition, amounting to barely a sixth of the value of the expropriated goods.") (translation by counsel; emphasis in original) ("[L]a réquisition opérée par l'autorité militaire allemande ne constituait pas *initialement* un 'acte contraire au droit des gens'. Pour qu'il continuât à en être ainsi, il fallait, cependant, que dans un délai raisonnable, les demandeurs obtinissent une indemnité équitable. Or tel n'a pas été le cas, l'indemnité, allouée plusieurs années après la réquisition, atteignant à peine le sixième de la valeur des biens expropriés.").

[44] CAFTA-DR, Annex 10-C, ¶ 4; *see also* 2012 U.S. Model Bilateral Investment Treaty, ann. B (*Expropriation*) ¶ 4; *Lone Pine Resources Inc. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/15/2, Final Award ¶ 495 (Nov. 21, 2022) ("The concept of expropriation is well settled under customary international law as requiring either a direct taking or an outright transfer or seizure of the investor's property (direct expropriation) or a substantial deprivation, i.e., total or near-total deprivation, of the investor's property, without a formal transfer of title or outright seizure (indirect expropriation).").

27. With respect to the first factor, an adverse economic impact "standing alone, does not establish that an indirect expropriation has occurred."[45] Moreover, it is a fundamental principle of international law that, for an expropriation claim to succeed the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as "to support a conclusion that the property has been 'taken' from the owner."[46]

28. The second factor requires an objective inquiry of the reasonableness of the claimant's investment-backed expectations. Whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation[47] or the potential for government regulation in the relevant sector.

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[45] CAFTA-DR, Annex 10-C, ¶ 4(a)(i).

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

[47] *See, e.g.*, *Methanex* Final Award, Part IV, Ch. D ¶ 9 (noting that no specific commitments to refrain from regulation had been given to Methanex, which "entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons. Indeed, the very market for MTBE in the United States was the result of precisely this regulatory process"); *Grand River* Award ¶¶ 144-45 ("The Tribunal also notes that trade in tobacco products has historically been the subject of close and extensive regulation by U.S. states, a circumstance that should have been known to the Claimant from his extensive past experience in the tobacco business. An investor entering an area traditionally subject to extensive regulation must do so with awareness of the regulatory situation. Given the circumstances—including the unresolved questions involving the Jay Treaty and U.S. domestic law, and the practice of heavy state regulation of sales of tobacco products—the Tribunal holds that Arthur Montour could not reasonably have developed and relied on an expectation, the non-fulfillment of which would infringe NAFTA, that he could carry on a large-scale tobacco distribution business, involving the transportation of large quantities of cigarettes across state lines and into many states of the United States, without encountering state regulation."); *Glamis* U.S. Rejoinder 91 ("Consideration of whether an industry is highly regulated is a standard part of the legitimate expectations analysis, and . . . where an industry is already highly regulated, reasonable extensions of those regulations are foreseeable.").

29. 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").[48]

30. Further, paragraph 4(b) provides that "[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations." This paragraph is not an exception, but rather is intended to provide tribunals with additional guidance in determining whether an indirect expropriation has occurred.

Claims for judicial measures

31. Judicial measures may give rise to a claim for denial of justice under the circumstances described above with respect to Article 10.5.1. A denial of justice may exist where there is, for example, an obstruction of access to courts or failure to provide those guarantees which are generally considered indispensable to the proper administration of justice. Additional instances of denial of justice have included corruption in judicial proceedings and executive or legislative interference with the freedom of impartiality of the judicial process.

32. Decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants, however, do not give rise to a claim for expropriation under Article 10.7.1. It is therefore not surprising that commentators have acknowledged the particular "dearth" of international precedents on whether judicial acts may be expropriatory.[49] Moreover,

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

[49] Parvan P. Parvanov & Mark Kantor, *Comparing U.S. Law and Recent U.S. Investment Agreements: Much more similar than you might expect, in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010-2011 801 (Sauvant, ed. 2012) ("Judicial improprieties may in theory form the basis for a claim under international law for expropriation. However, it is far more common for an investor to pursue that claim under the customary international law principle of 'denial of justice,' which is often considered part of the international minimum standard of treatment . . . . Given the dearth of precedents, our analysis of judicial expropriations under international law could end right here."); *see also* 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").

the United States has not recognized the concept of "judicial takings" as a matter of domestic law.[50]

33. Of course, 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 10.7.1, 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 10.16.1 (Submission of a Claim to Arbitration and Limitations on Loss or Damages)

Causation

34. CAFTA-DR Article 10.16.1(a) provides that a claimant may submit a claim to arbitration that the respondent has breached an obligation under Section A of Chapter 10 (or an investment authorization or agreement) and that the claimant "has incurred loss or damage by reason of, or arising out of, that breach." In this connection, an investor may recover such damages only to the extent that they are established on the basis of satisfactory evidence that is not inherently speculative.[51]

[50] 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. But because the Supreme Court ultimately declined to find a judicial taking in that case, the plurality's view on whether a judicial action could ever effect a taking under the U.S. Constitution is not controlling. *See Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Protection*, 560 U.S. 702 (2010).

[51] As the International Law Commission has recognized, a State responsible for an internationally wrongful act shall compensate for the resulting damage caused "insofar as [that damage] is established." International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, art. 36(2) (2001). Specifically, as the ILC observes, "[t]ribunals have been reluctant to provide compensation for claims with inherently speculative elements." *Id.*, at cmt. 27 (citing cases); *see also S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Second Partial Award, ¶ 173 (Oct. 21, 2002) ("*S.D. Myers* Second Partial Award") ("[T]o be awarded, the sums in question must be neither speculative nor too remote."); *Mobil Investments Canada Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, ¶¶ 437-39 (May 22, 2012) (accord).

35. The ordinary meaning of these terms requires an investor to establish the causal nexus between the alleged breach and the claimed loss or damage.[52] In this connection, it is well established that "causality in fact is a necessary but not a sufficient condition for reparation."[53] The standard for factual causation is known as the "but-for" or "*sine qua non*" test, whereby an act causes an outcome that 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.[54]

36. Furthermore, as the United States has previously explained with respect to substantively identical language in NAFTA Articles 1116(1) and 1117(1), the ordinary meaning of "by reason of, or arising out of" requires an investor to demonstrate proximate causation.[55] In this connection, NAFTA tribunals have consistently imposed a requirement of proximate causation under NAFTA Articles 1116(1) and 1117(1). For example, the *S.D. Myers* tribunal held that damages may only be awarded to the extent that there is a "sufficient causal link" between the

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[52] 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).

[53] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, art. 31, cmt. 10, U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001) ("ILC Draft Articles"). 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. REP. ("A/15(IV) Award").

[54] 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)*, Judgment, 2007 I.C.J. 43, 233-34, ¶ 462 (Feb. 26).

[55] *William Ralph Clayton et al. v. Government of Canada*, NAFTA/PCA Case No. 2009-04, Submission of the United States of America, ¶¶ 23-27 (Dec. 29, 2017); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Amended Statement of Defense of the United States of America, ¶ 213 (Dec. 5, 2003); *Grand River* U.S. Counter-Memorial at 175 ("Claimants must show that the compensation they seek 'is proved to have a sufficient causal link with the specific NAFTA provision that has been breached' and 'not from other causes.' '[T]he harm must not be too remote' and 'the breach of the specific NAFTA provision must be the proximate cause of the harm.'") (quoting from the first and second partial awards in *S.D. Myers*) (footnotes omitted); *Pope & Talbot Inc. v. The Government of Canada*, NAFTA/UNCITRAL, Seventh Submission of the United States of America, ¶¶ 2, 13 (Nov. 6, 2001) (only damages proximately caused by a breach may be recovered); *S.D. Myers v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America, ¶ 12 (Sept. 18, 2001) ("[A tribunal's] task is limited to assessing whether there has been a breach . . . and whether the investor or investment has suffered loss or damage proximately caused by such a breach.").

breach of a specific NAFTA provision and the loss sustained by the investor,[56] and then subsequently clarified that "[o]ther ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the proximate cause of the harm."[57] In *Pope & Talbot,* the tribunal held that under Article 1116 the claimant bears the burden to "prove that loss or damage was caused to its interest, and that it was causally connected to the breach complained of."[58] The *ADM* tribunal required "a sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such an injury."[59]

37. Indeed, proximate causation is an "applicable rule[] of international law" that under CAFTA-DR Article 10.22.1 must be taken into account in fixing the appropriate amount, if any, of monetary damages.[60] Article 10.16.1 contains no indication that the States Parties intended to vary from this established rule. 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.[61]

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[56] *S.D. Myers* First Partial Award ¶ 316.

[57] *S.D. Myers* Second Partial Award ¶ 140.

[58] *Pope & Talbot Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award in Respect of Damages ¶ 80 (May 31, 2002).

[59] *Archer Daniels Midland Co. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/04/05, Award ¶ 282 (Nov. 21, 2007).

[60] *See* ILC Draft Articles, art. 31, cmt. 10. *See also Administrative Decision No. II (U.S. 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 (U.S. 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 Case (U.S. 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 (U.S. 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 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 244-45 (1953) ("[I]t 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.").

[61] ILC Draft Articles, art. 31, cmt. 10 (explaining that 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[.]").

38. Accordingly, any loss or damage cannot be based on an assessment of acts, events or circumstances not attributable to the alleged breach.[62] Events that develop subsequent to the alleged breach may increase or decrease the amount of damages suffered by a claimant.

Loss or damage incurred directly

39. The CAFTA-DR provides two separate jurisdictional bases for investors to bring claims against a Treaty Party: Articles 10.16.l(a) and 10.16.l(b). Articles 10.16.l(a) and 10.16.1(b) serve to address discrete and non-overlapping types of injury.[63] Where the investor seeks to recover loss or damage that it incurred directly, it may bring a claim under Article 10.16.l(a). However, where the alleged loss or damage is to "an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly," the investor's injury is only indirect. Such derivative claims must be brought, if at all, under Article 10.16.1(b).[64]

40. This distinction between Articles 10.16.l(a) and 10.16.l(b) was drafted purposefully in light of two existing principles of customary international law addressing the status of corporations. The first of these principles is that no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares. This is so because, as reaffirmed by the International Court of Justice in *Diallo*, "international law has repeatedly acknowledged the principle of domestic law that a company

[62] *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).

[63] As explained in the context of corollary provisions of the NAFTA, "Articles 1116 and 1117 set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of direct injury to an investor, and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by the investor." North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. I, 103d Cong., 1st Sess., at 145 (1993).

[64] *See, e.g.*, Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 824-25 (Chester Brown ed., 2013) ("Caplan & Sharpe") (noting that Article 24(l)(a) of the U.S. Model BIT, which is nearly identically worded to CAFTA-DR Article 10.16.l(a), "entitles a claimant to submit claims for loss or damage suffered directly by it in its capacity as an investor," while Article 24(l)(b) of the U.S. Model BIT, nearly identically worded to CAFTA-DR Article 10.16.l(b), "creates a derivative right of action, allowing an investor to claim for losses or damages suffered not directly by it, but by a locally organized company that the investor owns or controls.").

has a legal personality distinct from that of its shareholders."[65] As the *Diallo* Court further reaffirmed, quoting *Barcelona Traction*, "a wrong done to the company frequently causes prejudice to its shareholders." Nonetheless, "whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed."[66] Thus, only direct loss or damage suffered by shareholders is cognizable under customary international law.[67]

41. How a claim for loss or damage is characterized is therefore not determinative of whether the injury is direct or indirect. Rather, as *Diallo* and *Barcelona Traction* have found, what is determinative is whether the right that has been infringed belongs to the shareholder or the corporation.

42. Examples of claims that would allow a shareholding investor to seek direct loss or damage include where the investor alleges that it was denied its right to a declared dividend, to vote its shares, or to share in the residual assets of the enterprise upon dissolution.[68] Another example of a direct loss or damage suffered by shareholders is where the disputing State wrongfully expropriates the shareholders' ownership interests – whether directly through an expropriation of the shares or indirectly by expropriating the enterprise as a whole.[69]

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[65] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 2010 I.C.J. 639, ¶ 155 (Nov. 30) (noting also that "[t]his remains true even in the case of [a corporation] which may have become unipersonal").

[66] *Id.*, ¶ 156 (quoting *Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, Judgment, 1970 I.C.J. 3, 35, ¶ 44 (Feb. 5) ("*Barcelona Traction*")). *See also Barcelona Traction* ¶ 46 ("[A]n act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected.").

[67] *See Barcelona Traction* ¶ 47 ("Whenever one of his direct rights is infringed, the shareholder has an independent right of action."). The United States notes that some authors have asserted or proposed exceptions to this rule.

[68] *Id.* In such cases, the Court in *Barcelona Traction* held that the shareholder (or the shareholder's State that has espoused the claim) may bring a claim under customary international law.

[69] Under Article 10.7 of CAFTA-DR, an expropriation may be either direct or indirect, and acts constituting an expropriation may occur under a variety of circumstances. Determining whether an expropriation has occurred therefore requires a case-specific and fact-based inquiry.

43. The second principle of customary international law against which Articles 10.16.1(a) and 10.16.1(b) were drafted is that no international claim may be asserted against a State on behalf of the State's own nationals.[70]

44. Article 10.16.l(a) adheres to the principle of customary international law that shareholders may assert claims only for direct injuries to their rights.[71] Article 10.16.1(b), by contrast, provides a right to present a claim for *indirect* injury not otherwise found in customary international law, where a claimant alleges injury to an "enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly." Were shareholders to be permitted to claim under Article 10.16.l(a) for indirect injury, Article 10.16.1(b)'s limited carveout from customary international law would be superfluous. Moreover, it is well-recognized that an international agreement should not be held to have tacitly dispensed with an important principle of international law "in the absence of words making clear an intention to do so."[72] Nothing in the text of Article 10.16.l(a) suggests that the States Parties intended to derogate from customary international law restrictions on the assertion of shareholder claims, except as expressly contemplated in Article 10.16.1(b).

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[70] ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW: PEACE 512-513 (9th ed. 1992) ("[F]rom the time of the occurrence of the injury until the making of the award, the claim must continuously and without interruption have belonged to a person or to a series of persons (a) having the nationality of the state by whom it is put forward, and (b) not having the nationality of the state against whom it is put forward.") (footnotes omitted).

[71] Article 10.16.l(a) derogates from customary international law only to the extent that it permits individual investors to assert claims that could otherwise be asserted only by States. *See, e.g., Nottebohm Case (Liechtenstein v. Guatemala)*, Judgment, 1955 I.C.J. 4, 24 (Apr. 6) ("[B]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law[.]") (internal quotation omitted); F.V. Garcia-Amador et al., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 86 (1974) ("[I]nternational responsibility had been viewed as a strictly 'interstate' legal relationship. Whatever may be the nature of the imputed act or omission or of its consequences, the injured interest is in reality always vested in the State alone."); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 585 (5th ed. 1998) ("[T]he assumption of the classical law that only states have procedural capacity is still dominant and affects the content of most treaties providing for the settlement of disputes which raise questions of state responsibility, in spite of the fact that frequently the claims presented are in respect of losses suffered by individuals and private corporations.").

[72] *Elettronica Sicula S.p.A. (ELSI) (United States. v. Italy)*, Judgment, 1989 I.C.J. 15, 42, ¶ 50 (July 20) ("Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with [by an international agreement], in the absence of any words making clear an intention to do so."); *Loewen Group, Inc. v. United States*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award, ¶ 160 (June 26, 2003); *see also id.*, ¶ 162 ("It would be strange indeed if sub silentio the international rule were to be swept away.").

45. The above conclusions on the distinction between Articles 10.16.1(a) and 10.16.1(b) are reinforced in complementary CAFTA-DR provisions, which serve to recognize relevant principles of domestic law[73] aimed at preserving the separate legal identity of a corporation,[74] promoting judicial economy,[75] and protecting the rights of creditors and other shareholders.[76] In particular, Article 10.26.2(a) and (b) require that where a claim is made under Article 10.16.1(b) any resulting award must provide that restitution be made, or monetary damages be paid, to the enterprise, rather than the investor. This requirement – which follows the practice of many domestic legal systems with respect to shareholder derivative actions[77] – is aimed at preventing the investor from effectively stripping away a corporate asset (the claim) to the detriment of others with a legitimate interest in that asset, such as the enterprise's creditors.[78] Instead, any

[73] *See, e.g., Barcelona Traction* ¶ 50 ("If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has . . . not only to take cognizance of municipal law but also to refer to it.").

[74] *See, e.g., Bolivar v. Pocklington*, 975 F.2d 28, 33 (1st Cir. 1992) ("a sole shareholder cannot commandeer corporation assets by discarding the corporate veil at his convenience"). *See generally* David Gaukrodger, "Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law," OECD Working Papers on International Investment, 2014/02, at 13-25 (2014) ("Gaukrodger") (discussing the impact that shareholder claims for indirect loss may have on corporate identity).

[75] *See, e.g., Johnson v. Gore Wood & Co.* [2002] 2 AC 1, 62 (House of Lords) ("If the shareholder is allowed to recover in respect of [indirect] loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. . . . Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder."); *Gaubert v. United States*, 885 F.2d 1284, 1291 (5th Cir. 1989) ("One rationale behind this prohibition [on indirect loss] rests on principles of judicial economy."), *reversed on other grounds*, 499 U.S. 315 (1991).

[76] *See, e.g., Gaubert*, 885 F.2d at 1291 ("Another rationale for the prohibition [on shareholder claims for indirect loss] is fairness to creditors of the corporation. Common shareholders are usually at or near the bottom of the corporate financial pecking order. First come the secured then unsecured creditors, then the bondholders in order of preference, then the preferred shareholders, and lastly the common shareholders. Any recovery for injuries to the corporation is paid into the corporation, and the various creditors, bondholders, and equity-holders are 'paid' in that order. Were common shareholders allowed to sue directly and individually for damages to the value of their shares, we would be allowing them to bypass the corporate structure and effectively preference themselves at the expense of the other persons with a superior financial interest in the corporation."); Caplan & Sharpe, at 826 (noting that Article 24(1)(b) of the U.S. Model BIT, substantively identical to CAFTA-DR Article 10.16.1(b), maintains the "distinction between the rights of shareholders and the corporation [and] prevents investors from effectively stripping away a corporate asset . . . to the detriment of others with a legitimate interest in that asset, such as the enterprise's creditors") (internal citation omitted).

[77] *See* Gaukrodger at 19-20.

[78] Indeed, international tribunals have rejected shareholder claims in part because of the difficulty in determining what relief can fairly be granted in light of potential claims by creditors and other interested parties. *See, e.g.*, Eduardo Jiménez de Aréchaga, *Diplomatic Protection of Shareholders in International Law*, 4 PHIL. INT'L L.J. 71, 77, 78 (1965).

award for a claim under Article 10.16.1(b) will make the enterprise whole and the value of the shares and assets will be restored. This goal is reflected in Article 10.26.2(c), which provides that where a claim is made under Article 10.16.1(b), the award must provide that "it is made without prejudice to any right that any person may have in the relief under applicable domestic law."

46. Allowing an investor to claim for indirect loss under Article 10.16.1(a) would render the above framework ineffective.[79] For example, if an investor had the right to bring its own claim for loss or damage suffered by an enterprise, that investor might choose to make a claim under Article 10.16.1(a) rather than Article 10.16.1(b) in order to protect the award from creditors or other shareholders of the enterprise.[80] Under such circumstances, the provisions of Article 10.26.2 – designed to ensure any award based on injury to an enterprise is paid to the enterprise in order to protect the interests of creditors and other shareholders – would be rendered meaningless.[81]

Contributory Fault

47. It is well established that a claimant may not be awarded reparation for losses to the extent of its contribution to such losses, and nothing in the CAFTA-DR indicates otherwise. This is reflected in Article 39 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, which provides in its entirety: "In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is

[79] It is well-established under customary international law that provisions of a treaty must be interpreted in such a manner that renders their terms effective. *See Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6, ¶ 51 (Feb. 3) (rejecting construction that was "contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness") (collecting authorities); *accord Corfu Channel (United Kingdom v. Albania)*, 1949 I.C.J. 4, 24 (Apr. 9) ("It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.").

[80] *See* ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 452 (1st ed. 2009) ("It is difficult to imagine why a shareholder would elect to bring a claim for the account of its company if it had the option of bypassing the company altogether. The company might be liable to pay creditors, local taxes and discharge other obligations before distributing the residual amount of any damages recovered to the shareholders.").

[81] *See, e.g., Marvin Feldman v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Correction and Interpretation of the Award ¶¶ 12-13 (June 13, 2003) (revising the award to comply with the equivalent requirement under the NAFTA (established in Article 1135(2)) that awards made in connection with claims for indirect loss be paid to the enterprise).

sought."[82] Article 39, contrary to the claimant's suggestion in its Reply Memorial,[83] does not contain a second paragraph related to human rights obligations.

Respectfully submitted,

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[82] ILC Draft Articles, art. 39. *See also id.*, Commentary ¶ 1 ("Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with articles 1 and 28, but *where the injured State, or the individual victim of the breach, has materially contributed to the damage by some wilful or negligent act or omission*. Its focus is on situations which in national law systems are referred to as 'contributory negligence', 'comparative fault', 'faute de la victime', etc.") (emphasis added).

[83] Claimant's Reply Memorial and Counter-Memorial on Jurisdiction ¶ 1768 (Nov. 3, 2023).