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CHAPTER 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

1. Air Transport Agreements

Information on recent U.S. air transport agreements, by country, is available at <https://www.state.gov/e/eb/rls/othr/ata/>. The United States signed new air transport agreements in 2017 with St. Vincent and the Grenadines and with the Kingdom of the Netherlands, in respect of Sint Maarten. The United States and Sri Lanka amended their 2002 air transport agreement in 2017. The United States and Jamaica also amended their 2008 air transport agreement in 2017. The United States and Namibia amended their 2000 agreement. And the United States and Tanzania amended their 2000 agreement.

On April 7, 2017, the government of the United States and the government of St. Vincent and the Grenadines signed a new air transport agreement, which entered into force at signing. The April 7, 2017 State Department media note announcing the new agreement, available at <https://www.state.gov/r/pa/prs/ps/2017/04/269567.htm>, includes the following:

The new Open Skies agreement strengthens the partnership between the two countries and deepens commercial and economic ties between the United States and St. Vincent and the Grenadines. It will provide opportunities for airlines, travelers, businesses, airports and localities by allowing increased market access for passenger and cargo to fly between our two countries and beyond. In doing so, the new agreement will facilitate future travel and commerce between the United States and St. Vincent and the Grenadines.

On July 14, 2017, the United States and the Kingdom of the Netherlands, in respect of Sint Maarten signed a new agreement. As described in the July 14, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/07/272610.htm>, the agreement

modernizes the U.S.-Sint Maarten relationship by reducing the administrative burden on carriers and governments, clarifying route rights and reaffirming mutual adherence to international safety and security standards. The Agreement will enter into force after the two countries exchange diplomatic notes to confirm they have completed all necessary domestic procedures to adopt it.

The United States concluded four amended agreements during the Tenth International Civil Aviation Organization Air Services Negotiation Event (“ICAN 2017”) in Colombo, Sri Lanka, December 4-8, 2017. The December 8, 2017 State Department media note on developments in U.S. open skies partnerships at ICAN 2017 is available at <https://www.state.gov/r/pa/prs/ps/2017/12/276374.htm>, and includes the following:

On December 4, U.S. Ambassador to Sri Lanka Atul Keshap and the Democratic Socialist Republic of Sri Lanka’s Secretary of Civil Aviation G. S. Withanage signed an agreement to amend the U.S.-Sri Lanka Open Skies Agreement of 2002 to include seventh-freedom rights for all-cargo operations, effective the date of signing. Seventh freedom rights involve flights between a second and third country without touching the airline’s home country. These rights facilitate more efficient and cost-effective movement of goods, strengthen global express delivery cargo networks, enhance connectivity and competitiveness, and facilitate economic growth and job creation.

Also on December 4, the U.S. delegation and a Jamaican delegation led by Dr. Kathy-Ann Brown, Deputy Solicitor General, agreed, *ad referendum*, on the text of an amendment to the 2008 U.S.-Jamaica Air Transport Agreement that expands coverage to include seventh-freedom route rights for all-cargo operations. The delegations intend to recommend that their aviation authorities permit operations in accordance with the terms of the agreement, pending its signing and entry into force expected in early 2018.

On December 7, the U.S. delegation and a Namibian delegation led by Cedrik Limbo, Director, Transportation Policy and Regulation, Ministry of Works and Transport, agreed, *ad referendum*, on the text of an amendment to the 2000 U.S.-Namibia bilateral Open Skies Air Transport Agreement that expands coverage to include seventh-freedom route rights for all-cargo operations and removes an obsolete provision.

Also on December 7, the U.S. delegation and a Tanzanian delegation led by Hamza Johari, Director General, Civil Aviation Authority, agreed, *ad referendum*, on the text of an amendment to the 2000 U.S.-Tanzania Open Skies Agreement to remove an obsolete provision.

2. Foreign Air Carrier Permit for Norwegian Air International and Norwegian UK

As discussed in *Digest 2016* at 479-83, the State Department provided opinions to the Department of Transportation on applying the Air Transport Agreement between the United States of America and the European Community to pending applications for

foreign air carrier permits, submitted by Norwegian Air International (“NAI”) and Norwegian UK (“NUK”). On January 12, 2017, a group, including U.S. airline pilots and flight attendants associations and unions, filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit of the Department of Transportation’s decision to grant a foreign air carrier permit to NAI. *Air Line Pilots Ass’n, et al. v. Chao*, No. 17-1012 (D.C. Cir.). On July 7, 2017, the United States filed its brief as respondent in the D.C. Circuit, arguing, first, that the petition for review should be dismissed for lack of jurisdiction due to petitioners’ failure to establish standing; and second, that granting the permit was not arbitrary, capricious, or otherwise unlawful. The oral argument was set for February 23, 2018. The U.S. brief is excerpted below.

* * * *

I. PETITIONERS HAVE FAILED TO ESTABLISH ARTICLE III STANDING.

* * * *

Petitioners’ unsupported claims of injury, causation, and redressability are too speculative and attenuated to establish Article III standing. Petitioners assert that the Department’s grant of a foreign air carrier permit to Norwegian Air will permit Norwegian Air to provide service between the United States and foreign locations, using pilots, flight attendants, and other air crew members who are paid less and provided with working conditions inferior to those of the flight crews of other carriers providing service between the United States and foreign locations. Although petitioners do not explain their theory of causation, it appears to be premised on an assumption that existing carriers that provide service between the United States and foreign locations will pay less and provide less desirable conditions of employment to their own pilots and flight crews as a result of increased competition, or conversely, that existing carriers will lose market share on existing flight routes, thus forcing pilots and other air crew members to work for Norwegian Air instead of a higher-paying competitor. Each step of this attenuated causal link is speculative, and at odds with information in the administrative record.

* * * *

II. THE DEPARTMENT OF TRANSPORTATION’S GRANT OF A FOREIGN AIR CARRIER PERMIT TO NORWEGIAN AIR WAS NOT ARBITRARY, CAPRICIOUS, OR OTHERWISE UNLAWFUL.

Petitioners’ claims also fail on the merits. The Department of Transportation’s determination that Norwegian Air satisfied the requirements for a foreign air carrier permit under 49 U.S.C. § 41302 was reasonable and based on a correct interpretation of the statute. The issuance of a foreign air carrier permit was also consistent with the provisions of the 2007 Air Transport Agreement, as amended, including Article 17 bis.

- A. The Department of Transportation Reasonably Concluded That Norwegian Air Satisfied the Requirements of 49 U.S.C. § 41302.

As noted above, 49 U.S.C. § 41302 establishes two requirements for the issuance of a foreign air carrier permit: (1) that the carrier is fit, willing, and able to provide the foreign air transportation authorized by the permit; and (2) either that the carrier has been designated by the government of its country to provide the foreign air transportation under an agreement with the United States government, or that issuing the permit is otherwise in the public interest. The Department of Transportation's conclusion that Norwegian Air satisfied the requirements for a foreign air carrier permit under 49 U.S.C. § 41302 was not arbitrary or capricious.

The Department of Transportation concluded, and petitioners do not contest, that Norwegian Air is fit, willing, and able to provide the foreign air transportation described in its permit and to comply with Title 49, Part A, of the U.S. Code, and regulations of the Secretary of Transportation. JA 422, 573. The requirements of 49 U.S.C. § 41302(1) were thus satisfied.

In addition, the Department of Transportation found, and petitioners do not contest, that Norwegian Air is qualified, and has been designated by Ireland, the country of its incorporation, to provide foreign air transportation under an agreement with the United States. JA 420-22, 573. Thus, 49 U.S.C. § 41302(2) was satisfied. Norwegian Air established that it is a "Community airline," as that term is used in the 2007 Air Transport Agreement, as amended; that substantial ownership and effective control are vested in nationals of a European Union Member State (which per the 2011 Air Transport Agreement is extended to include Norway and Iceland); and that it is licensed as a Community airline by Ireland and has its principal place of business in Ireland, thereby satisfying the requirements of Article 4(b) of the 2007 Air Transport Agreement, as amended. The United States was thus obligated under Article 4 to "grant appropriate authorizations and permissions with minimum procedural delay," provided it determined that the requirements of "Article 8 (Safety) and Article 9 (Security) are being maintained and administered." 2007 Air Transport Agreement, art. 4(d), Add. 17.

Furthermore, under Article 6 bis of the 2007 Air Transport Agreement, as amended, "upon receipt of an application for operating authorization pursuant to Article 4," the United States was obligated to "recognise any fitness and/or citizenship determination made by the aeronautical authorities of [Ireland] with respect to [Norwegian Air] as if such a determination had been made by its own aeronautical authorities and not enquire further into such matters," unless it had "specific reason for concern" about Norwegian Air's qualifications to operate. Add. 87-88. The Department of Transportation acted in accordance with those international obligations in recognizing, and giving reciprocal effect to, Ireland's determinations of fitness and citizenship, in the course of granting a foreign air carrier permit to Norwegian Air. See 49 U.S.C. § 40105(b)(1)(A) (requiring Secretary to "act consistently with obligations of the United States Government under an international agreement").

Petitioners argue that the Department of Transportation did not properly apply 49 U.S.C. § 41302 because it did not make a determination pursuant to § 41302(2)(B) that the grant of a permit to Norwegian Air would be "in the public interest." Pet. Br. 25-28. By its plain terms, however, that statutory requirement did not apply. The statute requires either that (A) an air carrier "is qualified, and has been designated by the government of its country, to provide the foreign air transportation under an agreement with the United States Government, or (B) the foreign air transportation to be provided under the permit will be in the public interest." 49 U.S.C. § 41302(2) (emphasis added). Having found that (A) was satisfied, the Department was not required to determine that (B) was also satisfied. JA 421, 464.

Petitioners nevertheless contend that the “or” in 49 U.S.C. § 41302(2) should be read to mean “and,” suggesting that that construction is supported by legislative history. Pet. Br. 25-27. That legislative history, however, confirms that the Department’s interpretation of the plain language of the statute is correct. Indeed, the basic purpose of the section of the bill adding the provision codified at § 41302(2) was to provide the Department an alternative to the “public interest” standard.

In the 1979 Senate committee hearings, the Civil Aeronautics Board submitted a section-by-section analysis of the proposed bill that explained that the provision that was ultimately enacted without material changes as 49 U.S.C. § 41302 would

authorize the issuance of a foreign air carrier permit to a fit applicant *either* [1] upon a finding that the applicant is qualified, and has been designated by its government, to perform such foreign air transportation under the terms of an agreement with the United States, *or* (2) upon a finding that such transportation will be in the public interest. Currently the latter is the only criterion.

International Air Transportation Competition Act of 1979: Hearings on S. 1300 Before the Subcomm. on Aviation of the S. Comm. on Commerce, Sci. & Transp., 29 96th Cong. 67 (1979) (“1979 Hearings”) (emphasis added). The Board explained that “[t]he negotiation of a bilateral agreement itself represents a determination by the Government of the United States that the grant of route authority provided for under the bilateral is in the ‘public interest,’” and that the new provision “would avoid an unnecessary relitigation of the public interest question.” *Id.*

Although the Civil Aeronautics Board noted that the statute permitted but did not require issuance of a permit, and that the Board “would still retain the power to withhold a permit where issuance would not be in the public interest,” the example it provided was where “the foreign government was not complying with its obligations under an international agreement.” 1979 Hearings 67. Nothing in that statement suggests that the Board must make a separate determination that issuance of the permit is in the public interest in cases in which § 41301(2)(A) is satisfied. To the contrary, the Civil Aeronautics Board explicitly disagreed with a proposal by the Air Transport Association of America to amend the statute “to include a public interest criteria for grant of permits where the carrier is designated under a bilateral agreement.” *Id.* at 80.

The State Department’s section-by-section analysis of the bill also explained that the change would allow the Civil Aeronautics Board to “act consistently with our international agreements” and “enable the United States to provide firm assurances to foreign governments,” by “eliminating a dilemma previously faced on occasion where a service by a foreign carrier was authorized by a bilateral agreement but nevertheless attacked before the [Board] as not being in the ‘public interest.’” 1979 Hearings 101. The State Department explained that the provision, “in effect, creates a conclusive presumption that a service authorized by a bilateral agreement is in the public interest.” *Id.* Thus, although noncompliance with a bilateral agreement might provide a basis for the government to decline to issue a foreign air carrier permit, there is no statutory requirement that the Department of Transportation make a determination that issuance of a permit authorized under a bilateral agreement is in the public interest.

Petitioners also claim that the Department of Transportation “has consistently and historically interpreted the ‘or’ between [§ 41302](2)(A) and (2)(B) to be an ‘and.’” Pet. Br. 25; see also Pet. Br. 28-30. That assertion is incorrect. Petitioners cite to the Department of

Transportation's Foreign Air Carrier Information Packet, but that guidance notes that, in deciding foreign air carrier applications, the Department considers "whether the authority is covered by a bilateral agreement, and whether the applicant has been designated by its homeland." U.S. Dep't of Transp., Foreign Air Carrier Information Packet 5 (Sept. 2000), available at <https://cms.dot.gov/office-policy/aviation-policy/foreign-air-carrier-information-packet>. Furthermore, the Department's guidance on "Application Procedures for Foreign Air Carriers of the European Union" explains that the Department "uses determinations made by aeronautical authorities of Member States on the fitness and citizenship of their air carriers, rather than basing these findings on detailed evidentiary submissions" filed under 14 C.F.R. Part 211, as would presumably be the case if the Department needed to make a public interest assessment. U.S. Dep't of Transp., Appl. Procedures for Foreign Air Carriers of the European Union, Appl. Procedures for EU Carriers (Feb. 19, 2009), available at <https://cms.dot.gov/policy/aviation-policy/application-procedures-foreign-air-carriers-european-union>. And although the Department of Transportation has previously stated, in tentatively concluding that it would grant a foreign air carrier permit under 49 U.S.C. § 41301 and an exemption from the permit requirement under 49 U.S.C. § 40109(c), that the public interest supported its decision (a finding that is required under § 40109(c)), nothing in those decisions suggests that the Department believed it was required to make that determination as a condition of issuing a foreign air carrier permit under 49 U.S.C. § 41302(1) and (2)(A).

Finally, petitioners argue that the Department of Transportation's interpretation of 49 U.S.C. § 41302(2) will bar the agency from taking action under other statutory provisions setting forth a "public interest" standard. Pet. Br. 30-31. That is erroneous. The Department remains authorized to take steps as necessary to protect the public interest in connection with the statutes cited by petitioners, where applicable. Under the circumstances of this case, the Department decided to issue Norwegian Air a foreign air carrier permit because the carrier had satisfied the conditions of § 41302(1) and (2)(A). The Department's construction simply means that it need not conduct a separate analysis of the public interest under § 41302(2)(B) before issuing a foreign air carrier permit. Should the public interest warrant taking action under the other statutes petitioners cite, the Department has ample authority to do so.

Petitioners also contend that, even if the Department of Transportation did not deny Norwegian Air's application outright, it was arbitrary and capricious in not imposing conditions on the foreign air carrier permit under 49 U.S.C. § 41305(b), which provides that the Secretary of Transportation "may" (but is not required to) "impose terms for providing foreign air transportation under the permit that the Secretary finds may be required in the public interest." Pet. Br. 11, 13. Although the Department of Transportation did not expressly address petitioners' request to place conditions on Norwegian Air's foreign air carrier permit, the Department's reasoning that "[t]he existence of an air service agreement demonstrates that granting operating authority to a foreign carrier is per se in the public interest" is dispositive of that assertion. JA 421; accord JA 572. It would make little sense to find that grant of a permit is per se in the public interest and yet to impose permit conditions based on the theory that in their absence a grant would not be in the public interest.

- B. The Department of Transportation's Grant of a Foreign Air Carrier Permit to Norwegian Air Did Not Contravene Article 17 bis of the 2007 Air Transport Agreement, as Amended.

Petitioners also erroneously contend that the Department of Transportation's grant of a foreign air carrier permit to Norwegian Air was inconsistent with Article 17 bis of the 2007 Air Transport Agreement, as amended. Pet. Br. 16-19, 31-32.

1. In interpreting the meaning of the 2007 Air Transport Agreement, as amended, including Article 17 bis, this Court "begin[s] with the text of the treaty and the context in which the written words are used." *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1508-09 (2017).

As noted above, Article 4 of the 2007 Air Transport Agreement, as amended, obligated the United States to grant Norwegian Air "appropriate authorizations and permissions with minimum procedural delay," provided it determined that the ownership requirements of Article 4(b) were met, the fitness provision of Article 4(c) was satisfied, and requirements of Article 8 (Safety) and Article 9 (Security) were being maintained and administered, Art. 4(d). Add. 16. Furthermore, under Article 6 bis, upon receipt of an application for operating authorization pursuant to Article 4, the United States was obligated to "recognise any fitness and/or citizenship determination made by the aeronautical authorities of [Ireland] with respect to [Norwegian Air] as if such a determination had been made by its own aeronautical authorities and not enquire further into such matters," unless it had "specific reason for concern" about Norwegian Air's qualifications to operate. Add. 87-88. Under the plain language of the 2007 Air Transport Agreement, as amended, those are the exclusive criterion required for a grant of operating authority.

Against this backdrop, Article 17 bis, entitled "Social Dimension," provides in paragraph 1 that [t]he Parties recognise the importance of the social dimension of the Agreement and the benefits that arise when open markets are accompanied by high labour standards. The opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties' respective laws. Add. 92. That subsection imposes no obligations, and does not require the parties to take any particular action. It is a statement of principle, rather than a binding obligation.

Petitioner contends that the Department of Transportation failed to comply with paragraph 2 of Article 17 bis, which provides that

The principles in paragraph 1 shall guide the Parties as they implement the Agreement, including regular consideration by the Joint Committee, pursuant to Article 18, of the social effects of the Agreement and the development of appropriate responses to concerns found to be legitimate.

Add. 93. But that paragraph also fails to impose any binding obligation that the Department of Transportation violated in issuing a foreign air carrier permit to Norwegian Air. The requirement that the principles in paragraph 1 "shall guide the Parties as they implement the Agreement" does not compel or prohibit any specific conduct by a party to the Agreement. Nor does it set out any specific standards to govern implementation of the Agreement.

Paragraph 2 of Article 17 bis does provide for consideration by the Joint Committee of the social effects of the Agreement, pursuant to Article 18, and Paragraph 4(b) of Article 18 directs the Joint Committee to "consider[] the social effects of the Agreement as it is implemented and develop[] appropriate responses to concerns found to be legitimate." Add. 93. But neither Article 17 bis nor Paragraph 4(b) of Article 18 provide for a party to deny reciprocal recognition of fitness under Article 6 bis or operating authorization under Article 4.

In contrast, Article 4 sets out a mandatory requirement for a party to grant authorization and permission to an air carrier from another party provided that the stated conditions are satisfied. Add. 16-17. Although Article 4 conditions the grant of authority on a finding that the safety and security provisions in Articles 8 and 9 “are maintained and administered,” Add. 17, it has no similar requirement for the “social dimension” principles set forth in Article 17 bis. The plain language of Article 4 supports the interpretation that Article 17 bis does not provide an independent basis to refuse to comply with Article 4’s mandatory terms, nor justify withholding the authorization, as would a failure to meet the requirements of Article 8 (safety) or Article 9 (security).

Similarly, Article 6 bis, which was added at the same time as Article 17 bis in the 2010 Protocol, provides that in connection with applications by airlines under Article 4, a party shall “recognize any fitness and/or citizenship determination made by the aeronautical authorities” of the other party “as if such a determination had been made by its own aeronautical authorities and not enquire further into such matters,” unless the party has a specific reason for concern that the applicant does not satisfy “the conditions prescribed in Article 4.” Add. 87-88. Like Article 4 itself, Article 6 bis does not condition recognition on satisfaction of Article 17 bis. Rather, Paragraph 1(a) of Article 6 bis refers exclusively to “the conditions prescribed in Article 4 of this Agreement for the grant of appropriate authorisations or permissions, Add. 87, thus confirming that the drafters did not intend for the “Social Dimension” principles in Article 17 bis to be an independent ground on which to deny recognition.

Petitioners nevertheless argue that Article 17 bis’s paragraph 2 imposes a relevant mandatory obligation through its use of the phrase “[t]he principles in paragraph 1 shall guide the Parties as they implement the Agreement.” Pet. Br. 17- 18. But the assertion that the “principles” in paragraph 1 dictate a particular outcome in an individual case is not supported by the plain language of Article 17 bis. In Paragraph 1 of Article 17 bis, the parties “recognise the importance of the social dimension of the Agreement and the benefits that arise when open markets are accompanied by high labour standards,” and note that the “opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties’ respective laws.” Add. 92. That language can hardly be characterized as directive or imposing an affirmative obligation on the parties to the Agreement. It merely advises that the opportunities created by the Agreement are not intended to undermine certain labor standards or labor-related rights and principles. Had the parties intended for labor standards or labor-related rights to be a basis for denial of operating authorization under Article 4, they would have said so directly. See *Water Splash*, 137 S. Ct. at 1510. Petitioner’s argument is inconsistent with the plain text of the agreement.

Article 17 bis should also be interpreted in light of the object and purpose of the 2007 Air Transport Agreement, as amended. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006) (“An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.”) (quoting Restatement (Third) of Foreign Relations Law § 325(1) (1987)). The central purpose of the 2007 Air Transport Agreement, as amended, was to increase opportunities to provide air services between the parties; in particular, the preamble expresses the desire to allow airlines to offer “competitive prices and services in open markets.” 2007 Air Transport Agreement, preamble, Add. 7. That purpose would be defeated by allowing States to point to generalized labor concerns to deny authorization to foreign carriers that meet the specific requirements set forth in Article 4 and Article 6 bis.

Furthermore, it is well established that the views of the Executive Branch regarding the meaning of an international agreement are entitled to “great weight,” *Abbott v. Abbott*, 560 U.S. 1, 15 (2010), particularly where, as is the case here, the Department of State led negotiations of the agreement. See *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982). Here, the Department of State, the Department of Transportation, and the Department of Justice all concur that Article 17 bis does not provide an independent basis to deny authorization to an air carrier that is otherwise qualified to receive it under Article 4. ...

Finally, it is notable that aviation officials from the European Commission, which led the negotiation of the 2007, 2010, and 2011 agreements for the European Union and its Member States, share the Executive Branch’s view about the meaning of Article 17 bis. The administrative proceeding before the Department of Transportation reflects the following views from the European Commission’s Directorate General for Mobility and Transport, as expressed by the Director of Aviation and International Transport Affairs: “Article 17 bis does not provide a legal basis for unilaterally denying an application under Article 4 because (1) Article 4 makes no reference to Article 17 bis and (2) Article 17 bis itself does not formulate a legal rule that can be applied unilaterally by one party.” JA 338. As the Director explained, “[P]aragraph 1 of Article 17 bis sets out the parties’ views on the ‘importance of the social dimension’ of the Agreement and the ‘intentions’ underlying the opportunities it creates. It does not provide for legal consequences to be drawn from these views.” JA 338. Furthermore, the implementation of the Agreement referred to in Article 17 bis paragraph 2 “is referred to as a matter to be dealt with by ‘the parties,’ not any one single party.” JA 338. “[A]ny unilateral decision to deny an application using Article 17 bis runs against the letter and spirit of the Agreement.” JA 339.

In sum, the Department of Transportation’s issuance of a foreign air carrier permit to Norwegian Air was fully consistent with Article 17 bis.

2. Furthermore, even if petitioners were correct that Article 17 bis required the Department of Transportation to consider the social effects of granting a foreign air carrier permit to Norwegian Air—and the Department has explained why this interpretation of Article 17 bis is erroneous—the Department satisfied any such requirement.

As the Department explained in its final order, in deciding to grant Norwegian Air’s application for a foreign air carrier permit, the Department considered “significant concerns” raised by the parties opposing the application regarding Norwegian Air’s “potential hiring and employment practices affecting its operations in U.S. markets.” JA 572. In response, the Chief Executive Officer of Norwegian Air voluntarily committed to take steps “designed to address these concerns.” JA 572. The Department of Transportation’s final order expressly notes that, in deciding to grant the application, the Department took “into account the totality of the record regarding [Norwegian Air’s] application, including those changes to its hiring and employment practices that it has offered as a direct result of the difficult issues that have been raised during the course of this proceeding.” JA 573. Thus, even if Article 17 bis required the Department to consider the “Social Dimension” of granting a foreign carrier authorization to fly, the Department did so.

* * * *

3. Investigation of the Downing of Malaysia Airlines Flight MH17 in Ukraine

On July 6, 2017, the State Department issued a press statement on the Joint Investigative Team (“JIT”) report on the downing of Malaysian Airlines flight MH17 in Ukraine. The press statement, available at <https://www.state.gov/r/pa/prs/ps/2017/07/272398.htm>, welcomes the decision of the JIT to support prosecution of those responsible in Dutch courts. The press statement further states:

The United States will continue to work with the Joint Investigation Team in its investigation. We call on other states that are in a position to assist to cooperate fully so those responsible are held accountable. We again urge all states to take steps to ensure full compliance with UN Security Council Resolution 2166, which called for a “full, thorough and independent international investigation into the incident.”

4. International Civil Aviation Organization: Dispute with Brazil under Article 84 of the Chicago Convention

On December 2, 2016, the Brazilian Government filed an Application against the United States at the International Civil Aviation Organization (“ICAO”), under Article 84, Settlement of Disputes, of the Convention on International Civil Aviation (“Chicago Convention”). Brazil’s Application alleged that the United States violated Article 12, Rules of the Air, of the Chicago Convention in relation to a midair collision that occurred over Brazil on September 29, 2006.

On March 27, 2017, the U.S. Government filed a Preliminary Objection. In a closed session on June 21, 2017, the ICAO Council considered the U.S. Preliminary Objection. While the ICAO Council did not accept the U.S. Preliminary Objection and dismiss the case, it agreed that the arguments put forward by the United States could be joined to the merits of the case going forward. The Council also set the time limit for the United States to submit its Counter-Memorial, which was timely filed on August 31, 2017. In addition, the Council encouraged the parties to seek a settlement through negotiations. Both the United States and Brazil have expressed their intent to do so.

B. INVESTMENT DISPUTE RESOLUTION UNDER FREE TRADE AGREEMENTS

1. Non-Disputing Party Submissions under Chapter 11 of the North American Free Trade Agreement

Article 1128 of NAFTA allows NAFTA Parties who are not parties to a particular dispute to make submissions to a Tribunal hearing that dispute on questions of interpretation of NAFTA. The United States made Article 1128 submissions in several cases in 2017. U.S. submissions under Article 1128 are available at <https://www.state.gov/s/l/c3439.htm>.

a. Resolute v. Canada

On June 13, 2017, the United States made an Article 1128 submission in *Resolute Forest Products, Inc. v. Canada*. The claim in this case relates to measures allegedly adopted by Nova Scotia and Canada in support of a paper mill located in Nova Scotia. The Claimant alleges Canada violated Article 1102 (“National Treatment”), Article 1105 (“Minimum Standard of Treatment”), and Article 1110 (“Expropriation and Compensation”). Excerpts follow (with footnotes omitted) from the U.S. submission.

* * * *

1. Pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA), the United States of America makes this submission on questions of interpretation of the NAFTA. 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.

Articles 1116(2) and 1117(2) (Limitations Period)

2. Without a NAFTA Party’s consent to an investor-State arbitration brought pursuant to Chapter Eleven, a tribunal lacks jurisdiction over that investment dispute. Under Article 1122, the scope of a NAFTA Party’s consent to arbitrate an investment dispute is limited by the procedural conditions set out in Chapter Eleven. Those procedures include, *inter alia*, the requirements of Articles 1116 and 1117. Thus, a tribunal must find that a claim satisfies the requirements of Articles 1116 and/or 1117 in order to establish a Party’s consent to (and therefore the tribunal’s jurisdiction over) the claim.

3. Articles 1116(2) and 1117(2) prohibit an investor from making, and the Tribunal from hearing, “a claim if more than three years have elapsed from the date on which the investor first acquired or should have first acquired knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.” These Articles thus impose a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of the dispute.

4. The NAFTA Parties consistently raise, and tribunals generally address, the time bar defense as a jurisdictional objection. For example, in *Glamis Gold*, the tribunal found that “an objection based on a limitation period for the raising of a claim is a plea as to jurisdiction for purposes of Article 21(4)” of the UNCITRAL Arbitration Rules (1976). In *Apotex I & II*, the parties treated the United States’ time-bar objection as a jurisdictional issue, and the tribunal expressly found that Article 1116(2) deprived it of “jurisdiction *ratione temporis*” with respect to one of the claimant’s alleged breaches. Interpreting an identical limitations period provision under the Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA”), the *Spence* tribunal likewise addressed the time-bar defense as a jurisdictional issue.

5. Because the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction under Chapter Eleven, a claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.

6. The limitations period set out in Articles 1116(2) and 1117(2) requires a claimant to submit a claim to arbitration within three years of the “date on which the” investor or enterprise “first acquired, or should have first acquired, knowledge” of (i) the alleged breach, and (ii) loss

or damage incurred by the investor or enterprise. This limitations period is a “clear and rigid” requirement that is not subject to any “suspension,” “prolongation,” or “other qualification.”

7. An investor or enterprise *first* acquires knowledge of an alleged breach and loss at a particular moment in time; that is, under Articles 1116(2) and 1117(2), knowledge is acquired as of a particular “date.” Such knowledge cannot *first* be acquired at multiple points in time or on a recurring basis. As the *Grand River* tribunal recognized, a continuing course of conduct by the host State does not renew the limitations period under Articles 1116(2) and 1117(2), once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby. Accordingly, once a claimant *first* acquires (or should have first acquired) knowledge of breach and loss, subsequent transgressions by the NAFTA Party arising from a continuing course of conduct do not renew the limitations period under Articles 1116(2) or Article 1117(2).

8. With regard to knowledge of “incurred loss or damage” under Articles 1116(2) and 1117(2), the term “incur” broadly means to “to become liable or subject to.” Therefore, an investor may “incur” loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate. As the *Grand River* tribunal correctly reasoned:

In many sources, the verb [“incur”] is regularly taken to mean “become liable to.” Judicial dicta likewise suggest that one incurs a loss when liability accrues; a person may “incur” expenses before he or she actually dispenses any funds. In the Tribunal’s view, this interpretation corresponds most closely to the ordinary meaning of the term. The verb “to incur” in ordinary usage is often used to describe situations where there is no immediate outlay of funds by the affected party. A party is said to incur losses, debts, expenses or obligations, all of which may significantly damage the party’s interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct. Moreover, damage or injury may be incurred even though the amount or extent may not become known until some future time.

9. In *Pope & Talbot*, the tribunal interpreted Articles 1116(2) and 1117(2) as requiring that “the loss has occurred” rather than “could or would occur.” This interpretation is not incompatible with the holding in *Grand River*, as a loss occurs when it is incurred, rather than when the financial impact of the loss is realized. Moreover, an unduly restrictive reading of the *Pope & Talbot* tribunal’s interpretation is unwarranted by its findings. The tribunal did not find that the claimant in that case must have actually purchased, or paid the higher prices for, the wood chips before it had incurred loss or damage. Rather, the tribunal’s findings indicated that the date on which the “necessity to purchase” the more expensive wood chips arose determined when the loss or damage was incurred.

10. With regard to knowledge of the “alleged breach” under Articles 1116(2) and 1117(2), a “breach” of an international obligation exists “when an act of th[e] State is not in conformity with what is required of it by that obligation.” In the context of Article 1110, a breach is manifest where a NAFTA Party (1) takes a measure (or measures) that effects a direct or indirect expropriation and (2) fails to do so in conformity with at least one of the four criteria set forth in subparagraphs (a) through (d) of Article 1110(1). In order to establish the first point, the claimant must demonstrate that the government measure(s) 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.”

11. Thus, with respect to an expropriation claim, a claimant has actual or constructive knowledge of the “alleged breach” once it has (or should have had) knowledge of all elements required to make a claim under Article 1110—including that the destruction of, or interference with, the economic value of the investment is sufficient to constitute a taking. That date, however, need not coincide with the last of the government measures that are alleged to have harmed the claimant’s investment. For example, a claimant may have actual or constructive knowledge that previous measures in the series already expropriated its investment. Similarly, a claimant may have actual or constructive knowledge that the interference with the economic value of its investment is sufficient to constitute a taking before that investment has lost all of its value. Rather, as noted above and in paragraph 7, the operative date is the date on which the claimant first acquired actual or constructive notice of facts sufficient to make a claim under Article 1110.

Article 1101(1) (“Relating to” Requirement)

12. Article 1101(1) requires that the challenged measures adopted or maintained by a NAFTA Party “relate to” an investor of another NAFTA party, or to that investor’s investments. The “relating to” requirement cannot be satisfied by the mere, or incidental, effect that a challenged measure had on a claimant. Rather, there must have been a legally significant connection between the measure and the investor or its investment. Otherwise, untold numbers of domestic measures that simply have an economic impact on a foreign investor or its investment would pass through the Article 1101(1) threshold. As the *Methanex* tribunal aptly observed, “[a] threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all.”

13. Whether a challenged measure bears a “legally significant connection” to a foreign investor or investment depends on the facts of a given case. Negative impact of a challenged measure on a claimant, without more, does not satisfy the standard. Rather, a “legally significant connection” requires a more direct connection between the challenged measure and the foreign investor or investment.

14. Thus, for example, the *S.D. Myers* tribunal found that “the requirement that the import ban be ‘in relation’ to SDMI and its investment in Canada is easily satisfied,” given that the measure “was raised to address specifically the operations of SDMI and its investment.” In *Bilcon*, the tribunal found a legally significant connection where the challenged measure was the rejection by Nova Scotia and the Canadian federal government of a quarry project that was to be developed and operated pursuant to an agreement between the claimants and their Canadian joint-venture partner. The *Cargill* tribunal found that the import permit requirement at issue “directly affected” and “constituted a legal impediment to carrying on the business of Cargill de Mexico in sourcing HFCS in the United States and re-selling it in Mexico.” And while the *Methanex* tribunal held that the facts in that case did not meet the “legally significant connection” standard, it found that the claimant’s allegation that the Governor of California *intended* to penalize foreign producers of methanol (such as the claimant) through measures directed at MTBE producers could, if proven, satisfy the legally significant connection standard.

Article 1102(3) (National Treatment by States/Provinces)

15. As a general matter, the national treatment obligation under Article 1102 does not prohibit a NAFTA Party from adopting or maintaining measures that apply to or affect only a part of its national territory. Rather, the obligation prohibits nationality-based discrimination

between domestic and foreign investors (or investments of foreign and domestic investors) that are “in like circumstances.” Any suggestion to the contrary misconstrues the obligation as one to provide nationally uniform treatment. The Parties, all of whom are geographically, politically and economically diverse nations, did not intend such a result.

16. Article 1102(3) pertains to state and provincial measures only, and thus serves to determine what “treatment” by a state or province is the relevant reference point. The provision recognizes that states and provinces may have different standards for in-state (or in-province) and domestic out-of-state (or out-of-province) investors or their investments. Where a state or province accords different treatment to in-state (or in-province) investors or their investments and domestic out-of-state (or out-of-province) investors or their investments, investors from another NAFTA Party in like circumstances, or their investments, are entitled to receive the better of the treatment accorded by the state or province.

17. However, Article 1102(3) should not be construed as preventing a state or province from adopting or maintaining measures that apply only to investors or their investments operating (or seeking to operate) in that state or province. An investor cannot rest its claim under Article 1102(3) on the fact that a domestic enterprise operating in another state or province receives a different or greater benefit or is subject to a different or lesser burden unless it is “in like circumstances” with that enterprise. Whether such measures constitute less favorable “treatment” accorded to the foreign investor (or its investment) in “like circumstances” on the basis of nationality is a fact-specific inquiry at the merits phase.

Article 2103 (Taxation Measures)

18. NAFTA Article 2103(1) generally excludes taxation measures from the NAFTA’s provisions: “Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.” Article 2103 includes, however, several exceptions to this general exclusion. For example, Article 2103(4)(b) specifically subjects certain taxation measures to the national treatment and most-favored-nation treatment requirements of Articles 1102 and 1103, and Article 2103(6) specifically subjects, in certain circumstances, taxation measures to the provisions of Article 1110 relating to expropriation. By implication, taxation measures are not subject to any Chapter Eleven obligations, including those embodied in Article 1105, that are not expressly identified as exceptions to the Article 2103(1) general exclusion of taxation measures from the NAFTA.

19. Article 2103 applies to all “taxation measures.” NAFTA Article 201 defines a “measure” as “any law, regulation, procedure, requirement or practice.” A “practice” in this context includes the application of, or failure to apply (or the enforcement of or failure to enforce) a tax. Accordingly, with respect to a claim under Article 1110 alleging that an expropriation has occurred, Article 2103 does not create a distinction between a taxation measure imposed on a foreign investor or investment as a means of allegedly expropriating its investment, and a taxation measure that advantages a domestic investor or investment as a means of allegedly expropriating the foreign investor’s investment.

20. Article 2103(6) states that Article 1110 “shall apply to taxation measures except no investor may invoke that Article as a basis for a claim” to arbitration where the appropriate competent taxation authorities have determined that the challenged taxation measure “is not an expropriation.” In order to ensure that the appropriate taxation authorities can make this determination, the provision imposes a jurisdictional requirement that, before submitting a claim for expropriation challenging a taxation measure, a claimant must “refer the issue of whether the taxation measure is not an expropriation for determination to the competent authorities.”

Moreover, a claimant may only submit an Article 1110 claim involving this issue to arbitration under Article 1120 if, within the period of six months, “the competent authorities do not agree to consider the issue, or having considered it, fail to agree that the measure is not an expropriation.”

* * * *

b. Lone Pine, Inc. v. Canada

The United States submitted a non-disputing Party submission in *Lone Pine, Inc. v. Canada*, on August 16, 2017, providing U.S. interpretive views on Article 1139 (the definition of “investment”), Article 1101 (the scope of the Investment chapter), Article 1105 (the minimum standard of treatment) and Article 1110 (expropriation). Lone Pine brought the claim in connection with Quebec’s revocation of permits to mine for gas and oil resources under the St. Lawrence River. The tribunal held a hearing on the claim in October in Toronto. Excerpts follow (with footnotes omitted) from the U.S. submission.

* * * *

Article 1139 (Definition of “Investment”)

2. Article 1139 provides an exhaustive, not illustrative, list of what constitutes an investment for purposes of NAFTA Chapter Eleven. As the *Grand River* tribunal recognized, “on jurisdictional aspects, NAFTA awards are more relevant and appropriate than decisions in non-NAFTA investment cases.”

Article 1139(g)

3. Article 1139(g) defines “investment” as “real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes[.]” In this connection, Chapter Eleven tribunals have consistently declined to recognize as “property” mere contingent “interests.” Moreover, it is appropriate to look to the law of the host State for a determination of the definition and scope of the “property right” at issue.

Article 1139(h)

4. Article 1139(h) defines “investment” as “interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor’s property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise[.]”

5. To qualify as investment under Article 1139(h), more than the mere commitment of funds is required. An investor must also have a cognizable “interest” that arises from the commitment of those resources. Specifically, Article 1139(h)(i) states that such interests might arise from, for example, turnkey or construction contracts or concessions. Similar interests might arise, according to Article 1139(h)(ii), from “contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.” Not every economic interest that comes into existence as a result of a contract, however, constitutes an “interest” as used in Article 1139(h). For example, Article 1139(h) does not recognize as “investments” claims to money that

arise solely from commercial contracts for the sale of goods or services. Article 1139(i) specifically excludes from the definition of “investment” such interests.

* * * *

Article 1110 (Expropriation and Compensation)

8. Article 1110(1) provides that “[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment” unless specified conditions are satisfied.

9. As a threshold matter, the *Glamis* tribunal recognized that the term “expropriation” in Article 1110(1) “incorporates by reference the customary international law regarding that subject.” In this connection, it is a principle of customary international law that in order for there to have been an expropriation, a property right or property interest must have been taken. International courts have rejected claims that a customer base, or goodwill, by themselves, are property that can be the subject of an expropriation. For instance, in the *Oscar Chinn* case before the Permanent Court of International Justice, the Court denied an expropriation claim for failure to identify a property right. In that case, a British river carrier operator claimed that the Belgian Congo had expropriated its property when it increased government funding for a state-owned competitor which resulted in that competitor being granted a *de facto* monopoly. In denying the claim, the Court held that it was “unable to see in [claimant’s] original position—which was characterized by the possession of customers... anything in the nature of a genuine vested right.” The Court reasoned that “[f]avourable business conditions and goodwill are transient circumstances, subject to inevitable changes.”

10. As such, and given that Article 1110(1) protects “investments” from expropriation, the first step in any expropriation analysis must begin with an examination of whether there is an investment capable of being expropriated. Again, it is appropriate to look to the law of the host State for a determination of the definition and scope of the property right or property interest at issue, including any applicable limitations.

11. Article 1110 provides for protections from two types of expropriations, direct and indirect. A direct expropriation occurs “where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.”

12. 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.” 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 governmental action; (ii) the extent to which that action interferes with distinct, reasonable-investment-backed expectations; and (iii) the character of the government action.

13. With respect to the first factor, 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.”

14. The second factor requires an objective inquiry of the reasonableness of the claimant’s expectations, which “depend in part on the nature and extent of governmental regulation in the relevant sector.”

15. 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”).

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

17. Where a State proclaims that it is enacting a non-discriminatory statute or regulation for a *bona fide* public purpose, courts and tribunals rarely question that characterization. The Restatement (Third) of Foreign Relations, for instance, notes that the public purpose requirement “has not figured prominently in international claims practice, perhaps because the concept of public purpose is broad and not subject to effective reexamination by other states.” In sum, the concept of a “public purpose” is a broad one, and it is not appropriate to search for a State’s alleged ulterior motives when a State has articulated plausible reasons for enacting the measures in question.

* * * *

c. Mobil v. Canada

On October 24, 2017, the United States filed an Article 1128 submission in the arbitration under NAFTA Chapter 11 between Mobil Investments Canada, Inc., a U.S. corporation, and the Government of Canada regarding two oil fields located off the coast of Newfoundland and Labrador. Claimants allege that the damages sought arise from the same regulatory measures that were found by an earlier tribunal (*Mobil Investments Inc. & Murphy Oil Corp. v. Government of Canada*) to violate Article 1106 of the NAFTA. Excerpts follow (with footnotes omitted) from the submission.

* * * *

1. Pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA), the United States of America makes this submission on questions of interpretation of the NAFTA. 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. Consistent with the Tribunal’s communication of October 2, 2017, the United States addresses in this submission the following question: “Is a breach of the obligation to perform in good faith a breach of an obligation under the NAFTA?”

2. In creating Chapter Eleven’s investor-State dispute settlement mechanism, the NAFTA Parties have specified the treaty obligations the breach of which may be submitted to arbitration. NAFTA Articles 1116(1) and 1117(1) provide a Party’s consent to arbitrate only claims based on a breach of either Section A of Chapter Eleven, Article 1503(2) or, under certain circumstances, Article 1502(3)(a). Articles 1116(1) and 1117(1) do not provide consent to arbitrate disputes

based on alleged breaches of obligations found in other articles or chapters of the NAFTA or alleged breaches of other treaties or other international obligations.

3. The principle that “every treaty in force is binding on the parties to it and must be performed by them in good faith” is established in customary international law, not in Section A of NAFTA Chapter Eleven. As such, claims alleging breach of the good faith principle do not fall within the limited jurisdictional grant afforded in Section B.

4. Furthermore, 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.” As such, customary international law does not impose a free-standing, substantive obligation of “good faith” that, if breached, can result in State liability.

5. Accordingly, a claimant “may not justifiably rely upon the principle of good faith” to support a claim, absent a specific treaty obligation. There is no specific treaty obligation under the NAFTA to repeal or cease enforcement of a measure in response to an adverse arbitral award or decision. Article 1135(1), which governs the types of remedies a tribunal may award, provides that a tribunal may award “only” monetary damages and interest (or restitution of property with an option to pay monetary damages instead). Article 1134, which governs a tribunal’s authority to issue interim measures of protection, provides that “[a] tribunal may not ... enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117.” In either case, NAFTA tribunals have no authority to change domestic law or to require a NAFTA Party or any state or local government to change its laws or decisions.

* * * *

d. Clayton/Bilcon v. Canada

On December 29, 2017, the United States made an Article 1128 submission in the damages phase in a case brought by U.S. investors—members of the Clayton family and the Bilcon corporation they control—against the Government of Canada. Claimants prevailed in the merits phase on their claims that the environmental assessment undertaken with respect to the White Point Quarry and/or Marine Terminal Project, violated NAFTA Article 1102 (national treatment) and Article 1105 (minimum standard of treatment). Excerpts follow (with most footnotes omitted) from the U.S. submission made in the damages phase of the proceedings. See *Digest 2013* at 316-18 for a discussion of the previous U.S. Article 1128 submission in the case.

* * * *

Limitations on Claims for Loss or Damage under Articles 1116(1) and 1117(1)

2. Each claim by an investor must fall within either NAFTA Article 1116 or NAFTA Article 1117 and is limited to the type of loss or damage available under the Article invoked. Article 1116(1) permits an investor to present a claim for loss or damage incurred by the investor itself:

An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation . . . and that the *investor* has incurred loss or damage by reason of, or arising out of, that breach. (emphasis added).

3. Article 1117(1), in contrast, permits an investor to present a claim on behalf of an enterprise that it owns or controls for loss or damage incurred by that enterprise:

An investor of a Party, *on behalf of an enterprise* of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that another Party has breached an obligation . . . and that the *enterprise* has incurred loss or damage by reason of, or arising out of, that breach. (emphasis added).

4. Where the investor seeks to recover loss or damage that it incurred directly, it may bring a claim under Article 1116. However, where the alleged loss or damage is only to an enterprise that the investor owns or controls, the investor's injury is only *indirect*,³ and therefore, the investor must bring a derivative claim under Article 1117.

5. The United States' position on the interpretation and functions of Articles 1116(1) and 1117(1) is long-standing and consistent. The United States therefore agrees with Canada and Mexico that investors must allege direct damage to recover under Article 1116 and that indirect damage to an investor, based on injury to an enterprise the investor owns or controls, may only be claimed through Article 1117. Pursuant to Article 31(3)(a)-(b) of the Vienna Convention on the Law of Treaties, this subsequent agreement or subsequent practice of the NAFTA Parties "shall be taken into account" in interpreting Articles 1116 and 1117.

6. This distinction between Articles 1116 and 1117 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 recently reaffirmed by the International Court of Justice in *Diallo*, "international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders." 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." Thus, only direct loss or damage suffered by shareholders is cognizable under international law.

7. 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.

³ The disputing parties use the term "reflective loss" to describe the damages the claimants are seeking in this case. For the purposes of this submission, the United States treats "indirect" loss or damage as synonymous with "reflective" loss or damage.

8. 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. 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.

9. The second principle of customary international law against which Articles 1116 and 1117 were drafted is that no international claim may be asserted against a State on behalf of the State's own nationals.

10. Under these background principles, a common situation is left without a remedy under customary international law. Investors often choose to make an investment through a separate enterprise, such as a corporation, incorporated in the host State. If the host State were to injure that enterprise in a manner that does not directly injure the investor/shareholders, no remedy would ordinarily be available under customary international law. In such a case, the loss or damage is only directly suffered by the enterprise. As the investor has not suffered a direct loss or damage, it cannot bring an international claim. Nor may the enterprise maintain an international claim against the State of which it is a national under the principle of non-responsibility.

11. Article 1117(1) addresses this issue by creating a right to present a claim not found in customary international law. Where the investment is an enterprise of another Party, an investor of a Party that owns or controls the enterprise may submit a claim on behalf of the enterprise for loss or damage incurred by the enterprise. However, minority shareholders who do not own or control the enterprise may not bring a claim for loss or damage under Article 1117, thereby reducing the risk of multiple actions with respect to the same disputed measures.

12. Article 1116, in contrast, adheres to the principle of customary international law that shareholders may assert claims only for *direct* injuries to their rights. Were shareholders to be permitted to claim under Article 1116 for indirect injury, Article 1117's limited carve out 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." Nothing in the text of Article 1116 suggests that the NAFTA Parties intended to derogate from customary international law restrictions on the assertion of shareholder claims.

13. Similarly, Article 1121(1)(b)'s reference to an investor's "interest in an enterprise" cannot be read to allow an investor to claim for indirect loss or damage for injuries suffered by the enterprise. In defining an "investment", Article 1139 uses the term "interest in an enterprise" to refer to legal entitlements or rights belonging to the investor (not the enterprise). For example, Article 1139(e) includes within the definition of "investment" "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise," while Article 1139(f) includes within this definition "an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution." Thus, such "interest in an enterprise" under Article 1121(1)(b) contemplates the kinds of *direct* loss or damage sustained by a shareholder mentioned above.

14. The approach taken by other tribunals allowing shareholders to claim indirect loss is inapposite in the context of the NAFTA, as those cases typically involved investment treaties that do not address the limitations of shareholder claims under customary international law and reference "shares" only in the context of the definition of an investment. NAFTA, in contrast, creates an explicit regime, which must be treated as *lex specialis*.

15. The above conclusions on the distinction between Articles 1116(1) and 1117(1) are reinforced in several complementary NAFTA provisions, all of which serve to recognize relevant principles of domestic law aimed at preserving the separate legal identity of a corporation, promoting judicial economy, and protecting the rights of creditors and other shareholders.

16. For example, Article 1117(3) provides that claims brought on behalf of an investor under Article 1116(1) and an enterprise under Article 1117(1) that arise from the same events should be heard together by the same arbitral tribunal. This provision promotes judicial economy by providing for the consolidation of claims, thereby reducing the risk of double recovery and inconsistent awards when the claims are based on the same events. Article 1117(3) also makes clear that nothing prevents an investor that owns or controls an enterprise, in an appropriate case, from submitting claims under both Articles 1116 and 1117. This allowance would be unnecessary if the controlling investor could claim for indirect loss under Article 1116(1).

17. Article 1117(4) is aimed at further reducing the possibility of multiple actions by preventing the investment, which includes an enterprise under NAFTA Article 1139, from bringing a claim on its own behalf.

18. Articles 1121(1)(b) and 1121(2)(b) also reinforce the distinction between Articles 1116 and 1117, respectively, in order to reduce the likelihood of multiple actions and double recovery. Regardless of whether an investor submits a claim for injury to its own interest under Article 1116, or to the interest of an enterprise that the investor owns or controls under Article 1117, the enterprise must waive its right to seek available remedies under domestic law for the same injury. Otherwise, a NAFTA Party could be forced to defend against such claims in concurrent or consecutive proceedings, risking duplicative and potentially inconsistent decisions for the same loss or damage arising from the same breach.

19. Finally, under Article 1135(2)(a) and (b), where a claim is made under Article 1117(1), the award must provide that any restitution be made, or monetary damages be paid, to the enterprise. This requirement—which follows the practice of many domestic legal systems with respect to shareholder derivative actions—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. Instead, any award in the claimant’s favor will make the enterprise whole and the value of the shares and assets will be restored. This goal is reflected in Article 1135(2)(c), which provides that where a claim is made under Article 1117(1), the award must provide that it is made without prejudice to any person’s right (under applicable domestic law) in the relief.

20. Allowing an investor to claim for any indirect loss under Article 1116(1) would render the above framework ineffective. 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 1116(1) rather than Article 1117(1) in order to protect the award from creditors or other shareholders. Under such circumstances, the provisions of Article 1135—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.

21. Against this backdrop, no NAFTA tribunal that has considered the distinction between Article 1116 and 1117 has ever awarded damages for indirect loss under Article 1116. Rather, two NAFTA tribunals that have considered the implications of allowing for indirect loss under Article 1116 instead recognized the importance of the distinction between Article 1116 and 1117 and the policies that this distinction is intended to promote. In *Mondev*, the tribunal found that “[h]aving regard to the distinctions drawn between claims brought under Articles

1116 and 1117, a NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor.” It further cautioned future claimants to “consider carefully whether to bring proceedings under Articles 1116 and 1117, either concurrently or in the alternative, and that they fully comply with the procedural requirements under Articles 1117 and 1121 if they are suing on behalf of an enterprise.” In *GAMI*, the tribunal, in addressing the claimant’s expropriation claim under Article 1116, considered at length “difficulties attributable to the derivative nature” of the claim, including the dangers of inconsistent judgments and double recovery.

22. A tribunal cannot simply overlook an investor’s error in claiming indirect losses under Article 1116(1). Under Article 1122, the scope of a NAFTA Party’s consent to arbitrate an investment dispute is conditioned on compliance with the procedural requirements of Chapter Eleven. Those procedures include, inter alia, the requirements of Articles 1116. The disputing Party’s consent is limited to a claim for loss or damage available under the specific article(s) pled—NAFTA Article 1116(1) or Article 1117(1) or both—and an investor’s recovery of loss or damage must accordingly be limited to that available under the specific article(s). In addition, how an investor pleads a claim for loss or damage (i.e., under which article) can have implications on a disputing Party’s litigation strategy. For example, whether a claim for loss or damage has been brought pursuant to Article 1116 or 1117 can impact a disputing Party’s ability to assess the potential scope of claimed damages both with respect to any settlement negotiations regarding the dispute and with respect to its defense against such claims. Indeed, the difference in the scope of damages available to an investor under Article 1116 and to the investor’s enterprise under Article 1117 can be quite substantial.

Causation under Articles 1116 and 1117

23. Articles 1116 and 1117 allow an investor to recover loss or damage incurred “by reason of, or arising out of” a breach of an obligation under NAFTA Chapter Eleven, Section A.

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

The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent’s breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. However, the Court clearly cannot do so.

25. The ordinary meaning of the term “by reason of, or arising out of” also requires an investor to demonstrate proximate causation. All three NAFTA Parties agree. Indeed, proximate causation is an “applicable rule[] of international law” that under Article 1131(1) must be taken

into account in fixing the appropriate amount of monetary damages. Articles 1116 and 1117 contain no indication that the NAFTA Parties intended to vary from this established rule.

26. NAFTA tribunals have consistently imposed a requirement of proximate causation under Articles 1116 and 1117. The *S.D. Myers* tribunal held that damages may only be awarded to the extent that there is a “sufficient causal link” between the breach of a specific NAFTA provision and the loss sustained by the investor, 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.”] 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.” 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.”

27. Accordingly, any loss or damage cannot be based on an assessment of acts, events or circumstances not attributable to the alleged breach. Events that develop subsequent to the alleged breach may increase or decrease the amount of damages suffered by a claimant. At the same time, injuries that are not sufficiently “direct”, “foreseeable”, or “proximate” may not, consistent with applicable rules of international law, be considered when calculating a damage award.⁵⁵ Valuing damages as of the date of an award, rather than as of the time of breach, could fail to appropriately exclude injuries resulting from events subsequent to the date of breach that lack sufficient causal connection to the breach. Tribunals should exercise caution also because compensation for such injuries may, depending on the circumstances, also be construed as intending to deter or punish the conduct of the disputing State, contrary to Article 1135(3).⁵⁷

Restrictions on Parallel Proceedings under Article 1121

28. The relevance or applicability of domestic judicial review of a challenged measure should be considered both in the context of the claim made and NAFTA Article 1121.

29. Article 1121(1)(b) allows an investor to choose to take its claim to arbitration rather than to the courts of the NAFTA Party that allegedly breached its NAFTA obligations. Once an investor has chosen this option, Article 1121(1)(b) requires a waiver of a claimant’s “right to initiate or continue . . . any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116[.]” As the United States has previously explained, the phrase “with respect to” in Article 1121(1)(b) 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 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

⁵⁵ As the commentary to the ILC Draft Articles explains, causality in fact is a necessary but not sufficient condition for reparation: “There is a further element, associated with the exclusion of injury that is too “remote” or “consequential” to be the subject of reparation. In some cases, the criterion of “directness” may be used, in others “foreseeability” or “proximity”. . . . The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act[.]” ILC Draft Articles, art. 31, comment 10 (footnotes omitted).

⁵⁷ Article 1135(3) expressly provides that “[a] Tribunal may not order a Party to pay punitive damages.” See also ILC Draft Articles, art. 36, comment 4 (“[A]rticle 36 is purely compensatory, as its title indicates. . . . It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character.”) (citing the *Velásquez Rodríguez*, *Compensatory Damages* case, where “the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages (Series C, No. 7 (1989))”).

thus legal uncertainty).” As the tribunal in *Commerce Group* observed, the waiver provision permits other concurrent or parallel domestic proceedings where claims relating to different measures at issue in such proceedings are “separate and distinct” and the measures can be “teased apart.”

30. Article 1121(1)(b) includes an exception to the waiver requirement for “proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.” The purpose of this exception is to allow a claimant to initiate or continue certain proceedings to preserve its rights during the pendency of the arbitration, in a manner consistent with the broader purposes of the waiver requirement, as set forth in the preceding paragraph.

* * * *

2. Non-Disputing Party Submissions under other Trade Agreements

a. Bridgestone v. Panama

Chapter Ten of the United States-Panama Trade Promotion Agreement (“U.S.-Panama TPA”) contains provisions designed to protect foreign investors and their investments and to facilitate the settlement of investment disputes. Article 10.20.2 of the U.S.-Panama TPA, like Article 1128 of NAFTA, allows for non-disputing Party submissions. The United States filed two such submissions in 2017 in an arbitration initiated by Bridgestone Licensing Services, Inc., and Bridgestone Americas, Inc. (“Bridgestone”). Bridgestone claimed that a decision by the Supreme Court of Panama related to trademark proceedings violated the following provisions of the TPA: Article 10.3 (National Treatment), Article 10.5 (Minimum Standard of Treatment) and Article 10.7 (Expropriation and Compensation). The first submission, submitted on August 28, 2017, is excerpted below (with footnotes omitted). The first and second submissions, in their entirety, are available at <https://www.state.gov/s/l/c77391.htm>.

* * * *

Expedited Review Mechanisms in U.S. International Investment Agreements

2. In August 2002, an arbitral tribunal constituted under NAFTA Chapter Eleven concluded that it lacked authority to rule on the United States’ preliminary objection that, even accepting all of the claimant’s allegations of fact, the claims should be dismissed for “lack of legal merit.” The tribunal ultimately dismissed all of claimant’s claims for lack of jurisdiction, but only after three more years of pleading on jurisdiction and merits and millions of dollars of additional expense.

3. In all of its subsequent investment agreements concluded to date, the United States has negotiated expedited review mechanisms that permit a respondent State to assert preliminary objections in an efficient manner.

Articles 10.20.4 and 10.20.5 of the U.S.-Panama TPA

4. The U.S.-Panama TPA contains such expedited review mechanisms in Articles 10.20.4 and 10.20.5, which provide, in relevant part:

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

...

(c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

....

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

5. Paragraphs 4 and 5 establish complementary mechanisms for a respondent State to seek to efficiently and cost-effectively dispose of claims that cannot prevail as a matter of law, potentially together with any preliminary objections to the tribunal's competence. Additionally, the provisions leave in place any mechanism that may be provided by the relevant arbitral rules to address other objections as a preliminary question. As such, the Agreement, like other agreements incorporating this language, "draws a clear distinction between three different categories of procedures for dealing with preliminary objections."

6. Paragraph 4 authorizes a respondent to make "any objection" that, "as a matter of law," a claim submitted is not one for which the tribunal may issue an award in favor of the claimant under Article 10.26. Paragraph 4 clarifies that its provisions operate "[w]ithout prejudice to a tribunal's authority to address other objections as a preliminary question." Paragraph 4 thus provides a further ground for dismissal, in addition to "other objections," including those with respect to a tribunal's competence.

7. Subparagraph (a) requires that a respondent submit any such objection "as soon as possible after the tribunal is constituted," and generally no later than the date for the submission of the counter-memorial. This contrasts with the expedited procedures contained in paragraph 5, which authorize a respondent, "within 45 days after the tribunal is constituted," to make an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence.

8. Subparagraph (c) states that, for any objection under paragraph 4, a tribunal “shall assume to be true” the factual allegations supporting a claimant’s claims. The tribunal “may also consider any relevant facts not in dispute.” This evidentiary standard facilitates an efficient and expeditious process for eliminating claims that lack legal merit. Subparagraph (c) does not address, and does not govern, other objections, such as an objection to competence, which the tribunal may already have authority to consider.

9. Paragraph 5 provides an expedited procedure for deciding preliminary objections, whether permitted by paragraph 4 or the applicable arbitral rules. If the respondent makes a request within 45 days of the date of the tribunal’s constitution, “the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal’s competence.” Paragraph 5 thus modifies the applicable arbitration rules by *requiring* a tribunal to decide on an expedited basis any paragraph 4 objection as well as any objection to competence, provided that the respondent makes the request within 45 days of the date of the tribunal’s constitution.

10. As noted, paragraph 5 of Article 10.20 of the Agreement provides that the tribunal shall decide on an expedited basis “an objection under paragraph 4 *and any objection that the dispute is not within the tribunal’s competence*” (emphasis supplied), emphasizing that objections asserted under paragraph 4 are distinct from objections to the tribunal’s competence. As correctly noted by the tribunal in *The Renco Group*, when discussing this language in paragraph 5 of the Trade Promotion Agreement between the United States and Peru, “this sentence provides additional and cogent confirmation that the Treaty drafters intended to draw a clear demarcation between Article 10.20.4 objections and objections to competence, and that the latter do not fall within the scope of the Article 10.20.4 objections.” That tribunal further stated that “the underlying scheme established by the provisions and the plain language found in the text make it clear that competence objections were not intended to come within the scope of the Article 10.20.4 objections”

11. The distinction drawn in paragraph 5 between an “objection under paragraph 4” and an objection as to the tribunal’s competence demonstrates that the requirements in paragraph 4 are not incorporated into the paragraph 5 mechanism when it is being used to address the latter. As such, when a respondent invokes paragraph 5 to address objections to competence, there is no requirement that a tribunal “assume to be true claimant’s factual allegations.” To the contrary, there is nothing in paragraph 5 that removes a tribunal’s authority to hear evidence and resolve disputed facts. Moreover, paragraph 5 provides that a tribunal “*shall* . . . issue a decision or award” on the preliminary objections. Paragraph 5 provides for extensions of time as may be necessary to accommodate this result.

12. In this connection, nothing in the text of paragraph 5 alters the normal rules of burden of proof. In the context of an objection to competence, the burden is on a claimant to prove the necessary and relevant facts to establish that a tribunal is competent to hear a claim. It is well-established that where “jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage.” A tribunal may not assume facts in order to establish its jurisdiction when those facts are in dispute.

Articles 10.29 (Definition of “Investment”)

13. Article 10.29 states, in pertinent part, that “investment”

means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

14. As the chapeau makes clear, the definition of “investment” encompasses “every asset” that an investor owns or controls, directly or indirectly, that has the characteristics of an investment. The “[f]orms that an investment may take include” the categories listed in the subparagraphs, which are illustrative and non-exhaustive. In determining whether an asset falls within the definition, the analysis should be guided by whether it has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

15. Subparagraph (e) of the definition lists, among forms that an investment may take, “turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts.” Ordinary commercial contracts for the sale of goods or services typically do not fall within the list in subparagraph (e).

16. The definition of “investment” explicitly excludes claims to payment that arise from commercial contracts for the sale of goods or services and that are not immediately due.

Article 10.12.2 (Denial of Benefits)

17. Chapter Ten of the Agreement provides that a Party shall provide protection for “investors” of the other Party, which are defined to include a broad class of “enterprise[s],” including those that are “constituted or organized under the law of a Party.” At the same time, however, Article 10.12.2 of the Agreement provides that a Party “may deny the benefits” of Chapter Ten to an enterprise of the other Party that has “no substantial business activities in the territory” of the other Party and is owned or controlled by a person from the denying Party or from a non-Party:

Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.

Thus Parties to the Agreement may deny Chapter Ten benefits under these specified circumstances.

18. Article 10.12.2 imposes two substantive requirements that must be met before the provision can be invoked by a Party to the Agreement; specifically, an enterprise must (1) have no substantial business activities in the territory of the non-denying Party, and (2) be owned or controlled by persons of a non-Party or of the denying Party. Article 10.12.2 does not impose any requirement, however, with respect to when a respondent may invoke the denial of benefits provision. Neither this Article nor any other provision of the Agreement precludes a Party from invoking the denial of benefits provision at an appropriate time, including as part of a jurisdictional objection (expedited or otherwise) after a claim has been submitted to arbitration, to deny a claimant enterprise benefits under the Agreement.

19. Requiring the respondent to invoke the denial of benefits provision before a claim is filed would place an untenable burden on that Party. It would require the respondent, in effect, to monitor the ever-changing business activities of all enterprises in the territory of the other Party that attempt to make, are making, or have made investments in the territory of the respondent. This would include conducting, on a continuing basis, factual research, for all such enterprises, on their respective corporate structures and the extent of their business activities in the other Party. To be effective, such monitoring would in many cases require foreign investors to provide business confidential and other types of non-public information for review. Requiring the Parties to conduct this kind of continuous oversight in order to be able to invoke the denial of benefits provision under Article 10.12.2 before a claim is submitted to arbitration would undermine the purpose of the provision.

20. Similarly, there is no basis in the plain language of the Agreement to suggest that a respondent is required to invoke Article 10.12.2 between the submission of a claimant's notice of intent and notice of arbitration. Article 10.16.2, for example, requires that a notice of intent include a claimant's "name and address," but Article 10.16.2 does not require a claimant to disclose the extent of the claimant's business activities in the territory of the other Party to the Agreement or the names of any persons or entities that own or control the claimant enterprise.

21. In sum, for the above reasons, Article 10.12.2 does not impose any requirement with respect to when a respondent may invoke the denial of benefits provision.

Article 20.4 (Consultations)

22. Article 20.4.1 provides:

Either Party may request in writing consultations with the other Party with respect to any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement.

23. Where a Party seeks to deny the benefits of Chapter Ten of the Agreement to an investor of the other Party, either Party *may*—but is not required to—request consultations. A request for consultations pursuant to Article 20.4.1 is wholly discretionary, and there is no basis in the Agreement to draw any inference from a Party's decision not to request consultations. Moreover, the right to request consultations belongs to the Parties to the Agreement.

* * * *

b. Italba v. Uruguay

Italba Corporation ("Italba") alleges Uruguay violated provisions of the U.S.-Uruguay Bilateral Investment Treaty ("BIT") in its telecommunications regulation of Italba's local subsidiary. On September 11, 2017, the United States filed a submission pursuant to Article 28.2 of the U.S.-Uruguay BIT, which is excerpted below and available in full at <https://www.state.gov/s/l/c77386.htm>.

* * * *

Article 1 (Definition of “Investment”)*Licenses and Authorizations as “Investments”*

2. Article 1 of the Treaty defines “investment” to mean “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.” It adds that the “[f]orms that an investment may take include: ... (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law” Footnote 3 is appended to subparagraph (g), and states:

Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

3. The footnote refers to licenses, authorizations, permits, and similar instruments that “do not create any rights protected under domestic law” as being “among” those that “do not have the characteristics of an investment.” A license revocable at will by the State—which generally does not confer any protected rights—would exemplify the kind of license that is unlikely to constitute an investment. The determination as to whether a particular instrument has the characteristics of an investment is a case-by-case inquiry, involving examination of the nature and extent of any rights conferred under the State’s domestic law.

Meaning of “Control”

4. The Article 1 “investment” definition refers to “every asset that an investor owns *or controls*, directly or indirectly, that has the characteristics of an investment.” The term “control” is not defined in the Treaty. The omission of a definition for “control” accords with long-standing U.S. practice, reflecting the fact that determinations as to whether an investor controls an enterprise will involve factual situations that must be evaluated on a case-by-case basis.

Article 17 (Denial of Benefits)

5. The Treaty provides that a Party shall provide protections for “investors” of another Party, which are defined in Article 1 to include a broad class of “enterprise[s],” namely those that are “constituted or organized under the law of a Party.” At the same time, however, Article 17(2) provides:

A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control⁶ the enterprise.

6. This treaty right is consistent with a long-standing U.S. policy to include a denial of benefits provision in investment agreements to safeguard against the potential problem of “free rider” investors, *i.e.*, third-party entities that may only as a matter of formality be entitled to the benefits of a particular agreement. While it has long been U.S. practice to omit a precise

definition of the term “substantial business activities,” in order that the existence of such activities may be evaluated on a case-by-case basis, the United States has indicated in, for example, its Statement of Administrative Action on the NAFTA that “shell companies could be denied benefits but not, for example, firms that maintain their central administration or principal place of business in the territory of, or have a real and continuous link with, the country where they are established.”

Article 26 (Limitations Period)

7. Article 26(1) of the Treaty provides:

No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 24(1) and knowledge that the claimant (for claims brought under Article 24(1)(a)) or the enterprise (for claims brought under Article 24(1)(b)) has incurred loss or damage.

8. Pursuant to Article 24(4), a claim is “deemed submitted to arbitration under this Section when the claimant’s notice of or request for arbitration” is (for cases under the auspices of the ICSID Convention) “received by the Secretary-General [of ICSID].” Hence, the critical date for purposes of the limitations period is, in an ICSID case, the date falling three years prior to the Secretary-General’s receipt of the claimant’s request for arbitration.

9. Article 26(1) thus prohibits an investor from making, and the Tribunal from hearing, claims where the claimant “first acquired, or should have first acquired, knowledge of the breach” as well as “knowledge that the claimant ... or the enterprise ... has incurred loss or damage” more than three years prior to the date of submission to arbitration. The Article imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of the dispute. And because the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction, a claimant must prove the necessary and relevant facts to establish that each of its claims fall within the three-year limitations period.

10. The limitations period is a “clear and rigid” requirement that is not subject to any “suspension,” “prolongation,” or “other qualification.” An investor or enterprise *first* acquires knowledge of an alleged breach and loss at a particular moment in time; that is, under Article 26, knowledge is acquired as of a particular “date.” Such knowledge cannot *first* be acquired at multiple points in time or on a recurring basis. As the *Grand River* tribunal recognized, a continuing course of conduct by the host State does not renew the limitations period (there under Articles 1116(2) and 1117(2) of the NAFTA, functionally identical to the time-bar limitation set out in Article 26(1) of this Treaty), once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby. Thus, where a “series of similar and related actions by a respondent state” is at issue, an investor cannot evade the limitations period by basing its claim on “the most recent transgression in that series.” To allow an investor to do so would “render the limitations provisions ineffective[.]” An ineffective limitations period would fail to promote the goals of ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential respondents and third parties.

11. A legally distinct injury, by contrast, can give rise to a separate limitations period under the Treaty. In the case of a challenge to a measure adopted or maintained by a Party, the exhaustion of local remedies will not give rise to a legally distinct injury, unless the institutions to whom appeal has been made commit some new breach of the applicable standard.

12. With regard to knowledge of the “breach” under Article 26, a “breach” of an international obligation exists “when an act of th[e] State is not in conformity with what is required of it by that obligation.” Thus, with respect to a claim under a given Treaty article, a claimant has actual or constructive knowledge of the alleged “breach” once it has (or should have had) knowledge of all elements required to make a claim under the article in question. In other words, the operative date is the date on which the claimant first acquired actual or constructive notice of facts sufficient to make a claim under the article.

Articles 3 and 4 (National Treatment and Most-Favored-Nation Treatment)

13. Article 3 (“National Treatment”) provides that each Party shall accord to investors or covered investments of the other Party “treatment no less favorable than that it accords, in like circumstances,” to its own investors and their investments “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.” Article 4 (“Most-Favored-Nation Treatment”) provides that each Party shall accord to investors or covered investments of the other Party “treatment no less favorable than that it accords, in like circumstances,” to investors and investments of a non-Party (i.e., a third State) in its territory “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 domestic and foreign investors (or investments of foreign and domestic investors) that are “in like circumstances.”

14. To establish a breach of Article 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.” 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” In this vein, Paragraph 2 of the Protocol to the present Treaty explicitly confirms the Parties’ shared understanding consistent with general principles of law applicable to international arbitration that “when a claimant submits a claim to arbitration under Section B, it has the burden of proving all elements of its claim.”

15. Establishing a violation of Article 4 is the same as establishing a violation of Article 3, except that the applicable comparator in step two above is an investor or investments of a third State.

16. As indicated above, the appropriate comparison is between the treatment accorded to the Party’s investment or investor and a national or third-State investment or investor *in like circumstances*. As one tribunal has observed, “[i]t goes without saying that the meaning of the term [‘in like circumstances’] will vary according to the facts of a given case. By their very nature, ‘circumstances’ are context dependent and have no unalterable meaning across the spectrum of fact situations.” The United States understands the term “circumstances” to denote conditions or facts that *accompany* treatment as opposed to the treatment itself. Thus, identifying appropriate comparators for purposes of the “in like circumstances” analysis requires consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other possible relevant characteristics. Simply being in the same sector, or selling the same product, is not alone sufficient to demonstrate like circumstances. When determining whether the claimant was in like circumstances with alleged comparators, the Party’s investor or investment should be compared to a national or third-State investor or investment that is alike in all relevant respects but for nationality of ownership. Moreover, whether treatment is accorded in “like circumstances” under Articles 3 or 4 depends

on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

Article 5 (Minimum Standard of Treatment)

17. Article 5(1) of the Treaty requires that each Party “accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.” Article 5(2) specifies that:

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

Article 5(2) then goes on to state that

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

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

Rules that have crystallized into the minimum standard

18. The above provisions demonstrate the Parties’ express intent to establish the customary international law minimum standard of treatment as the applicable standard in Article 5. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law. The standard establishes a minimum “floor below which treatment of foreign investors must not fall.”

19. 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 5(2), concerns the obligation to provide “fair and equitable treatment,” which includes “the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.” A denial of justice arises, for example, when a State’s judiciary administers justice to aliens in a “notoriously unjust” or “egregious” manner “which offends a sense of judicial propriety.” Denial of justice is linked by the terms of Article 5(1) to its meaning under customary international law, and in its historical and “customary sense” denotes “misconduct or inaction of the judicial branch of the government” and involves “some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process.” In certain instances, a denial of justice under customary international law may be effected, in the context of “adjudicatory proceedings,” where the State authorities responsible for the enforcement phase of such proceedings refuse to execute a final judgment rendered by the judiciary.

20. Finally, there can be no denial of justice based on a judicial act without a final decision of a State’s highest judicial authority, unless recourse to further domestic remedies would be obviously futile or manifestly ineffective. This rule applies to claims of denial of justice brought under treaties, such as this one, that permit claimants to pursue domestic

remedies prior to arbitration but require claimants to waive their rights to pursue such claims before other fora in order to submit a claim to arbitration.

21. Other areas included within the minimum standard of treatment concern the obligation not to expropriate covered investments except under the conditions specified in Article 6, and the obligation to provide “full protection and security,” which, as expressly stated in Article 5(2)(b), “requires each Party to provide the level of police protection required under customary international law.”

Methodology for determining the content of customary international law

22. Annex A to the Treaty addresses the methodology for interpreting customary international law rules covered by the agreement. The annex expresses the treaty Parties’ “shared understanding that ‘customary international law’ generally and as specifically referenced in Article 5 ... results from a general and consistent practice of States that they follow from a sense of legal obligation.” This two-element approach—State practice and *opinio juris*—is “widely endorsed in the literature” and “generally adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice.”

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

Obligations that have not crystallized into the minimum standard

24. Neither the concepts of “good faith” nor “legitimate expectations” are component elements of “fair and equitable treatment” under customary international law that give rise to an independent host State obligation. Indeed, while good faith is “one of the basic principles governing the creation and performance of legal obligations,” it is well established that “it is not in itself a source of obligation where none would otherwise exist.” As such, customary international law does not impose a free-standing, substantive obligation of “good faith” that can support a claim or, if breached, result in State liability.

25. Similarly, an investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors’ expectations; instead, something more is required, such as a complete repudiation of a contract.

26. 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. The practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 5, in which “fair and equitable treatment” and “full protection and security” are expressly tied to the customary international law minimum standard of treatment. 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 5.43 Likewise, decisions of international courts

and arbitral tribunals interpreting “fair and equitable treatment” as a concept of customary international law are not themselves instances of “State practice” for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice. 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 5(1).

Conclusions on the application of Article 5

27. Thus, the Treaty Parties expressly intended Article 5 to afford the minimum standard of treatment to covered investments, as that standard has crystallized into customary international law through general and consistent State practice and *opinio juris*. For alleged standards that are not specified in the treaty, a claimant must demonstrate that such a standard has crystallized into an obligation under customary international law.

28. To do so, the burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*. “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.” Tribunals applying Article 1105 of NAFTA Chapter Eleven have confirmed that the party seeking to rely on a rule of customary international law must establish its existence. The tribunal in *Cargill, Inc. v. Mexico*, for example, acknowledged that

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

29. Once a rule of customary international law has been established, the claimant must then show that the State has engaged in conduct that violates that rule. 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.”

30. Finally, Article 5(3) makes clear a “determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of” the minimum standard of treatment. Each obligation must be determined under its own relevant standard. For example, a violation of Article 6 does not *per se* constitute a separate violation of Article 5.

Article 6 (Expropriation)

31. Article 6 of the Treaty provides that no Party may expropriate or nationalize property (directly or indirectly) except for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate and effective compensation; and in accordance with due process of law. Compensation must be “prompt,” in that it must be “paid without delay”; “adequate,” in that it must be made at the fair market value as of the date of expropriation, undiminished by any change in value that occurred because the expropriatory action became known earlier; and “effective,” in that it must be fully realizable and freely transferable.

32. If an expropriation does not conform to each of the specific conditions set forth in Article 6(1), paragraphs (a) through (d), it constitutes a breach of Article 6. 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. In contrast, “when a State provides a process for fixing adequate compensation, but then ultimately fails to promptly determine and pay such compensation,” a breach of the compensation obligation may occur later, subsequent to the time of the taking.

33. As explained in paragraph 4(a) of Annex B to the Treaty, determining whether an indirect expropriation has occurred “requires a case-by-case, fact-based inquiry” that considers, among other factors: (i) the economic impact of the government action; (ii) the extent to which that action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action. With respect to the first factor, an adverse economic impact “standing alone, does not establish that an indirect expropriation has occurred.” It is a fundamental principle of international law that, for an expropriation claim to succeed the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as “to support a conclusion that the property has been ‘taken’ from the owner.” Moreover, to constitute an expropriation, a deprivation must be more than merely “ephemeral.”

34. The second factor requires an objective inquiry of the reasonableness of the claimant’s expectations, which may depend on the regulatory climate existing at the time the property was acquired in the particular sector in which the investment was made. For example, where a sector is “already highly regulated, reasonable extensions of those regulations are foreseeable.”

35. The third factor considers the nature and character of the government action, including whether such action involves physical invasion by the government or whether it is more regulatory in nature (*i.e.*, whether “it arises from some public program adjusting the benefits and burdens of economic life to promote the common good”).

Article 34 (Awards)

36. Article 34(1) provides that an arbitral tribunal constituted under Section B of the Treaty “may award, separately or in combination, only” (a) monetary damages, with any applicable interest, and (b) “restitution of property,” but that if the latter is ordered then the award must provide the respondent Party the option of paying monetary damages in place of restitution. The tribunal is therefore disallowed from ordering the respondent Party to restore the property in question without providing damages as an alternative, ensuring that the Party always has the option of remedying a breach by payment of damages alone.

* * * *

C. WORLD TRADE ORGANIZATION

1. Dispute Settlement

The following discussion of developments in select WTO dispute settlement proceedings involving the United States in 2017 is drawn largely from Chapter V “The World Trade Organization” of the 2017 Annual Report of the President of the United States on the Trade Agreements Program (“2017 Annual Report”), available at <https://ustr.gov/about->

[us/policy-offices/press-office/reports-and-publications/2018/2018-trade-policy-agenda-and-2017](https://www.wto.org/english/press-office/reports-and-publications/2018/2018-trade-policy-agenda-and-2017). WTO legal texts referred to below are available at https://www.wto.org/english/docs_e/legal_e/legal_e.htm.

a. *Disputes brought by the United States*

(1) *China — Subsidies to Producers of Primary Aluminum*

As discussed in the 2017 Annual Report at 144, on January 12, 2017, the United States requested consultations with China concerning bank loans and low-priced inputs (coal, electricity, and alumina) that China provides to producers of primary aluminum in China. The United States is concerned that these subsidies prejudice the United States and are inconsistent with China's obligations under Articles 5(c), 6.3(a), 6.3(b), 6.3(c) and 6.3(d) of the *Subsidies and Countervailing Measures* (SCM Agreement) and Article XVI:1 of the *General Agreement on Tariffs and Trade 1994* (GATT 1994).

(2) *Indonesia – Import Restrictions on Horticultural Products, Animals, and Animal Products (DS455, DS465 and DS478)*

See *Digest 2016* at 495 regarding the panel decision that Indonesia's measures to restrict imports of horticultural and animal products are inconsistent with the GATT and not justified under any general exceptions. As discussed in the 2017 Annual Report at 152-53, Indonesia appealed the panel's report on February 17, 2017. An appellate report was issued on November 9, 2017. The appellate report affirmed the finding of the panel that all of Indonesia's measures are inconsistent with Article XI:1 of the GATT 1994 and, as Indonesia did not establish an affirmative defense with respect to any measure, with Indonesia's WTO obligations. The DSB adopted the appellate report and the panel report, as modified by the appellate report, on November 22, 2017. On December 18, 2017, Indonesia circulated a letter pursuant to Article 21.3(c) of the DSU stating that it would need a reasonable period of time to implement the DSB's recommendations and rulings in this dispute.

(3) *Canada — Measures Governing the Sale of Wine in Grocery Stores (Second Complaint) (DS531)*

As discussed in the 2017 Annual Report at 154-55, the United States requested and held two separate consultations with Canada in 2017 regarding measures maintained by the Canadian province of British Columbia ("BC") governing the sale of wine in grocery stores. As explained in the Annual Report:

The BC wine measures ... provide advantages to BC wine through the granting of exclusive access to a retail channel of selling wine on grocery store shelves...while imported wine may be sold in grocery stores only through a so-called “store within a store.” These measures are inconsistent with Canada’s obligations pursuant to Article III:4 of the GATT 1994, because they are laws, regulations, or requirements affecting the internal sale, offering for sale, purchase, or distribution of wine and fail to accord products imported into Canada treatment no less favorable than that accorded to like products of Canadian origin.

b. Disputes brought against the United States

(1) Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products (Mexico) (DS381)

As discussed in *Digest 2011* at 375-76, *Digest 2012* at 378-79, *Digest 2013* at 320, *Digest 2015* at 478-79, and *Digest 2016* at 496, Mexico challenged U.S. dolphin-safe labeling requirements for tuna and tuna products. The 2017 Annual Report summarizes developments in 2017 at page 165:

The Panels met with the parties on January 24-25, 2017. The Panels issued their reports on October 26, 2017. The Panels agreed with the United States that, while the dolphin safe labeling measure, as amended ..., results in a detrimental impact on Mexican tuna product, it does not unjustifiably discriminate against Mexican tuna product because its labeling requirements are calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the oceans. Consequently, the Panels found that the measure is consistent with Article 2.1 of the TBT Agreement and, although inconsistent with Articles I:1 and III:4 of the GATT 1994, is justified under Article XX because it is preliminarily justified under subparagraph (g) and applied consistently with the chapeau. Thus, the Panels found that the U.S. measure was consistent with the relevant U.S. WTO obligations.

Mexico appealed aspects of the compliance Panels’ reports on December 1, 2017. The United States filed an appellee submission on December 19, 2017. The Appellate Body is expected to issue a report in 2018.

(2) Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China (DS471)

See *Digest 2016* at 497-98 regarding the 2016 panel report in this case, which was appealed by China. Developments in 2017 are summarized in the 2017 Annual Report at 176:

...The Appellate Body held a hearing in Geneva on February 27-28, 2017, and issued a report on May 11, 2017. The Appellate Body rejected virtually all of China's claims on appeal and did not make any additional findings of inconsistency against the United States.

On May 22, 2017, the DSB adopted the panel and Appellate Body reports. On June 19, 2017, the United States stated that it intends to implement the recommendations of the DSB in this dispute in a manner that respects U.S. WTO obligations, and that it will need a reasonable period of time ("RPT") in which to do so. On October 17, 2017, China requested that an Article 21.3(c) arbitrator determine the RPT for implementation. The award of the arbitrator is expected in early 2018.

(3) *Conditional Tax Incentives for Large Civil Aircraft (DS487)*

See *Digest 2016* at 498 regarding the 2016 panel report on the EU's claim regarding tax incentives offered by the State of Washington to aircraft companies, which was appealed by both the United States and the EU. As discussed in the 2017 Annual Report at 177, the Appellate Body held a hearing on June 6, 2017 and circulated its report on September 4, 2017. The Appellate Body found that the challenged programs were not prohibited import-substitution subsidies and the United States had no compliance obligations.

(4) *Anti-Dumping Measures on Oil Country Tubular Goods from Korea (DS488)*

As discussed in the 2017 Annual Report at 177-78, Korea requested the establishment of a panel to consider antidumping duties imposed on oil country tubular goods from Korea. The panel established by the DSB in 2015 met with the parties in 2016 and circulated its report on November 14, 2017. As summarized in the Annual Report:

The panel found that the United States had acted inconsistently with the chapeau of Article 2.2.2 of the Antidumping Agreement because Commerce did not determine profit for constructed value based on actual data pertaining to sales of the like product in the home market. The panel also found that the United States had acted inconsistently with Articles 2.2.2(i) and (iii) because Commerce relied on a narrow definition of the "same general category of products" in concluding it could not determine profit under Article 2.2.2(i) and in concluding it could not calculate a profit cap under Article 2.2.2(iii). The panel further found that the United States had acted inconsistently with Article 2.2.2(iii) because Commerce failed to calculate and apply a profit cap. The panel exercised judicial economy with respect to Korea's claims that the United States acted inconsistently with the chapeau of Article 2.2.2 because Commerce did not determine profit for constructed value based on actual data pertaining to sales of the like product in third-country markets and with respect to Articles 1 and 9.3

as a consequence of substantive violations of Articles 2.2.2, 2.2.2(i), and 2.2.2(iii). Finally, the panel found two of Korea's claims with respect to profit for constructed value to be outside its terms of reference, specifically its claim that the United States had violated Article 2.2.2(iii) because Commerce had determined the profit rate based on a certain company's financial statements and its claim that the United States had violated Article X.3(a) of the GATT 1994, because Commerce had purportedly acted contrary to its agency practice of determining profit.

The panel otherwise rejected the remaining claims asserted by Korea with respect to the investigation at issue, including claims regarding the use of constructed export price and the selection of costs for calculation of constructed normal value; found such claims to be outside its terms of reference; or exercised judicial discretion. For example, the panel specifically found that Korea failed to demonstrate that the United States acted inconsistently with Articles 6.10 and 6.10.2 of the Antidumping Agreement in its selection of mandatory respondents. The panel also specifically rejected Korea's claims that Commerce's methodology for disregarding a respondent's exports to third-country markets was inconsistent "as such" and "as applied" in the investigation with Article 2.2 of the Antidumping Agreement. Finally, the panel exercised judicial economy with respect to Korea's claim that the United States had acted inconsistently with Article 2.4.

(5) *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia (DS491)*

As discussed in the 2017 Annual Report at 178-79, Indonesia requested consultations in connection with antidumping and countervailing duty measures on certain coated paper suitable for high-quality print graphics using sheet-fed presses in March of 2015 and a panel was established later that year to consider Indonesia's challenge. The panel met with the parties on December 6-7, 2016, and again on March 28-29, 2017. The panel rejected all of Indonesia's claims. The panel circulated its report on December 6, 2017. Indonesia did not appeal, and the DSB adopted the panel report.

2. Outcomes of the WTO 2017 Ministerial Conference

At the WTO's Eleventh Ministerial Conference in Buenos Aires in December 2017, Members agreed to a decision on fisheries subsidies; a work program on electronic commerce; and the creation of a working party on accession for South Sudan. See 2017 Annual Report at 85.

D. TRADE AGREEMENTS**1. Trans-Pacific Partnership**

As discussed in *Digest 2015* at 481-83, negotiations of the Trans-Pacific Partnership (“TPP”) agreement concluded in 2015. By Presidential Memorandum of January 23, 2017 to the United States Trade Representative (“USTR”), the United States announced its withdrawal from the TPP. 82 Fed. Reg. 8497 (Jan. 25, 2017). The Memorandum directs USTR to pursue bilateral trade negotiations wherever possible, “to promote American industry, protect American workers, and raise American wages.”

2. NAFTA

In May 2017, U.S. Trade Representative Robert Lighthizer notified Congress that the President intends to renegotiate the North American Free Trade Agreement (“NAFTA”). USTR press release, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces>. The letters to Congress from Ambassador Lighthizer are available at <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTA%20Notification.pdf>.

On July 17, 2017, USTR released a public statement of the objectives of the renegotiation of NAFTA, available at <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf>. In the ensuing months, administration officials held numerous consultations with Congress the private sector, labor representatives, ranchers, farmers, and leaders of the NGO community. In November 2017, USTR released updated negotiation objectives. The updated summary of objectives for the renegotiation of NAFTA is available at <https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf>.

E. OTHER ISSUES**1. FATCA**

As discussed in *Digest 2015* at 487-88 and *Digest 2016* at 503-04, the district court dismissed claims challenging the Foreign Account Tax Compliance Act (“FATCA”) and the international agreements implementing FATCA (“IGAs”) in 2016. *Crawford et al. v. U.S. Dep’t. of the Treasury et al.*, No. 3:15-cv-250 (S.D. Ohio). On August 18, 2017, the U.S. Court of Appeals for the Sixth Circuit affirmed the lower court’s decision that the plaintiffs lacked standing. *Crawford*, 868 F.3d 438 (6th Cir. 2017). Rehearing en banc was denied on September 26, 2017. Plaintiffs filed a petition for certiorari in the U.S. Supreme Court on December 21, 2017.*

* Editor’s note: On April 2, 2018, the U.S. Supreme Court denied the petition for certiorari in the case. No. 17-911.

2. Loan Guarantees

On January 5, 2017, Iraq signed a \$1 billion loan guarantee agreement with the United States. See January 5, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/01/266544.htm>. Provisions in the agreement encourage economic and institutional reforms. On January 18, 2017, the Government of Iraq issued a \$1 billion sovereign bond guaranteed by the United States. See media note available at <https://www.state.gov/r/pa/prs/ps/2017/01/267111.htm>.

3. Transatlantic Commercial Data Transfers

The EU-U.S. and Swiss-U.S. Privacy Shield Frameworks were designed by the U.S. Department of Commerce, and the European Commission and Swiss Administration, respectively, to provide companies on both sides of the Atlantic with a mechanism to comply with data protection requirements when transferring personal data from the European Union and Switzerland to the United States in support of transatlantic commerce. On July 12, 2016, the European Commission deemed the EU-U.S. Privacy Shield Framework adequate to enable data transfers under EU law. On January 12, 2017, the Swiss Government announced the approval of the Swiss-U.S. Privacy Shield Framework as a valid legal mechanism to comply with Swiss requirements when transferring personal data from Switzerland to the United States.

The Under Secretary of State for Economic Growth, Energy, and the Environment serves as the Privacy Shield Ombudsperson, a position dedicated to facilitating the processing of requests from EU and Swiss individuals relating to national security access to data transmitted from the European Union or Switzerland to the United States. Applicable data transfers include those conducted pursuant to the Privacy Shield Frameworks, standard contractual clauses (“SCCs”), binding corporate rules (“BCRs”), and “Derogations” or “Possible Future Derogations.” This role builds on the Under Secretary’s position under Presidential Policy Directive 28 as the Senior Coordinator for International Information Technology Diplomacy, which includes serving as a point of contact for foreign governments to raise concerns regarding signals intelligence activities conducted by the United States.

The Under Secretary reports directly to the Secretary of State and is independent from the Intelligence Community. To carry out the Ombudsperson duties, the Under Secretary works closely with other United States government officials, including independent oversight bodies such as inspectors general and the Privacy and Civil Liberties Oversight Board, as appropriate, to ensure that completed requests are processed and resolved in accordance with applicable laws and policies.

4. Intellectual Property: Special 301 Report

The “Special 301” Report is an annual review of the global state of intellectual property rights (“IPR”) protection and enforcement. USTR provides information about the Special

301 Report on its website at <https://ustr.gov/issue-areas/intellectual-property/Special-301>.

USTR issued the 2017 Special 301 Report in April 2017. The Report is available at <https://ustr.gov/sites/default/files/301/2017%20Special%20301%20Report%20FINAL.PDF>. The 2017 Report lists the following countries on the Priority Watch List: Algeria; Argentina; Chile; China; India; Indonesia; Kuwait; Russia; Thailand; Ukraine; and Venezuela. It lists the following on the Watch List: Barbados; Bolivia; Brazil; Bulgaria; Canada; Colombia; Costa Rica; Dominican Republic; Ecuador; Egypt; Greece; Guatemala; Jamaica; Lebanon; Mexico; Pakistan; Peru; Romania; Switzerland; Turkey; Turkmenistan; Uzbekistan; and Vietnam. See *Digest 2007* at 605–7 for additional background on the watch lists.

5. Presidential Permits

a. Keystone XL pipeline

As discussed in *Digest 2015* at 502, the Secretary of State denied the application for a permit for the proposed Keystone XL pipeline in November 2015.

On January 24, 2017, a Presidential Memorandum invited resubmission of the application to the State Department for a permit for the construction of the Keystone XL Pipeline and directed the Secretary of State to make a national interest determination and reach a final permitting decision with respect to the application within 60 days of its submission. On January 26, 2017, TransCanada resubmitted its permit application. On March 23, 2017, Under Secretary of State for Political Affairs Thomas A. Shannon, Jr., acting under delegated Presidential authority, issued a permit to TransCanada for the Keystone XL pipeline. As explained in the State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/03/269074.htm>:

The Department of State reviewed TransCanada’s application in accordance with Executive Order 13337 (April 30, 2004) and the January 24, 2017 Presidential Memorandum Regarding Construction of the Keystone XL Pipeline. In making his determination that issuance of this permit would serve the national interest, the Under Secretary considered a range of factors, including but not limited to foreign policy; energy security; environmental, cultural, and economic impacts; and compliance with applicable law and policy.

The Federal Register Notice of the issuance of the permit includes the permit’s full text. 82 Fed. Reg. 15,467 (Apr. 4, 2017). Additional information concerning the Keystone XL pipeline facilities and documents related to the Department of State’s review of the application for a Presidential permit can be found at <https://keystonepipeline-xl.state.gov/>.

Several environmental and indigenous groups have filed a legal challenge to the Presidential permit in federal court for the District of Montana under the Administrative Procedure Act, the National Environmental Policy Act, and related statutes. Litigation

relating to the prior denial of the application for a permit was dismissed in 2017. See *Digest 2016* at 509-11 regarding litigation in federal court and an arbitration claim under the NAFTA.

b. *NuStar Logistics pipelines*

On June 29, 2017, the State Department announced that Acting Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs Judith G. Garber, acting under delegated Presidential authority, had issued Presidential permits for three NuStar Logistics, L.P. pipelines. As detailed in a June 29, 2017 media note, available at <https://www.state.gov/r/pa/prs/ps/2017/06/272288.htm>:

The permit for the New Burgos Pipeline authorizes construction, connection, operation, and maintenance of a new pipeline that has the capacity to deliver up to 108,000 barrels per day of certain refined petroleum products. It will cross the U.S.-Mexico border near Peñitas, Texas. New permits for the existing Dos Laredos and existing Burgos pipelines, which cross the border in Texas near Laredo and Peñitas, respectively, reflect a change in the name of the permit holder and authorize transport of a broader range of petroleum products than under the previous Presidential permits.

The Department of State reviewed NuStar Logistics, L.P.'s applications in accordance with Executive Order 13337 (April 30, 2004). As a matter of policy, the Department's reviews were conducted in a manner consistent with the National Environmental Policy Act and the Department determined with respect to each application that implementation of the proposed project would have no significant direct, indirect, or cumulative effects on the quality of the natural or human environment.

In making her determination with respect to each application that issuance of the respective permit would serve the national interest, the Acting Assistant Secretary considered a range of factors, including but not limited to foreign policy; energy security; environmental, cultural, and economic impacts; and compliance with applicable law and policy. Among other considerations, the Acting Assistant Secretary found that issuance of each of the three Presidential permits would strengthen the bilateral relationship with Mexico and advance the economic and foreign policy interests of the United States.

The text of the permits is available in the Federal Register. 82 Fed. Reg. 32,039 & 32,041 (July 11, 2017).

c. *Enbridge Energy pipeline*

On August 11, 2017, the State Department published the Final Supplemental Environmental Impact Statement (“Final Supplemental EIS”) for the proposed expansion of Enbridge Energy’s line 67 pipeline. The State Department media note of August 11, 2017, available at <https://www.state.gov/r/pa/prs/ps/2017/08/273378.htm>, explains that the Final Supplemental EIS is part of the Department review of the Presidential permit application submitted by Enbridge, providing a technical assessment of potential environmental impacts without reaching a decision to approve or deny the permit. The media note further explains:

The Secretary of State (or his delegate), based on Presidentially-delegated authorities under Executive Order 13337, will now conduct a careful review to determine whether issuance of a new permit to Enbridge would be in the national interest. To make this determination, the Secretary of State (or his delegate) considers many factors, including but not limited to, foreign policy; energy security; environmental, cultural and economic impacts; and compliance with applicable law and policy. The Department will also consult with the heads of certain other agencies pursuant to Executive Order 13337.

On October 13, 2017, the Acting Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, acting under delegated Presidential authority, issued a Presidential permit to Enbridge, authorizing Enbridge to operate and maintain pipeline facilities at the U.S.–Canada border in Pembina County, North Dakota for the transportation of crude oil and other hydrocarbons. 82 Fed. Reg. 53,553 (Nov. 16, 2017). In accordance with E.O. 13337, the Acting Assistant Secretary determined that issuance of this permit would serve the national interest. The decision took into account the environmental effects of the proposed action consistent with the National Environmental Policy Act of 1969 (83 Stat. 852; 42 U.S.C. 4321 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1536), and other statutes relating to environmental concerns; the National Historic Preservation Act of 1966 (80 Stat. 917, 16 U.S.C. 470f *et seq.*); and the views of members of the public, various federal and state agencies, and various Indian tribes. *Id.*

d. *New Procedures for Transfer of Ownership or Control, or Name Change of Permit Holder*

On September 7, 2017, the State Department published Public Notice 10111, Procedures With Respect to Presidential Permits Where There Has Been a Transfer of Ownership or Control of a Cross-Border Facility, Bridge, or Border Crossing for Land Transportation, as Well as for Name Change of a Permit Holder. 82 Fed. Reg. 42,410 (Sept. 7, 2017). As the notice explains:

The Department is issuing this notice to describe the procedures it intends to follow with respect to transfers of ownership or control over cross-border facilities subject to Executive Order 11423, as amended, and Executive Order 13337, as well as changes of name of an entity holding a Presidential permit. This notice supersedes a previous notice, Public Notice 5092 (Procedures for Issuance of a Presidential Permit Where There Has Been a Transfer of the Underlying Facility, Bridge or Border Crossing for Land Transportation, 70 FR 30990, May 31, 2005), in its entirety.

...

In order to expedite the processing of transfers of infrastructure projects authorized under existing Presidential permits, including those that are a high priority for the Nation, as well as to provide Presidential permit holders and potential transferees with increased transparency regarding the procedures that the Department intends to follow with respect to such requests, the Department is issuing this public notice This notice also clarifies that a request by an existing permit holder limited to changing the name of the entity holding the permit can be processed by the Department in a more expedited manner. The Department reserves the right to deviate from these procedures in particular cases.

6. Corporate Responsibility Regimes

a. Kimberley Process

The Kimberley Process (“KP”) is an international, multi-stakeholder initiative created to increase transparency and oversight in the diamond industry in order to eliminate trade in conflict diamonds, or rough diamonds sold by rebel groups or their allies to fund conflict against legitimate governments. See State Department Conflict Diamonds webpage, <https://www.state.gov/e/eb/tfs/tfc/diamonds/index.htm>. For background on U.S. participation in the KP, see *Digest 2016* at 511-12; *Digest 2014* at 506-07; *Digest 2013* at 183; *Digest 2004* at 653-54; *Digest 2003* at 704-709; and *Digest 2002* at 728-29.

Effective April 26, 2017, the Department of State updated the list of Participants eligible for trade in rough diamonds under the Clean Diamond Trade Act of 2003, Public Law 108–19 (the “Act”). 82 Fed. Reg. 19,309 (Apr. 26, 2017). The update to the list reflects the reinstatement as Participants of the Central African Republic and Venezuela.

b. Extractive Industry Transparency Initiative (“EITI”)

The United States announced in 2017 that it would no longer be domestically implementing the EITI. See *Digest 2014* at 505-06 regarding acceptance of the United States as an EITI Candidate Country; *Digest 2013* at 357-58 regarding the U.S. application for candidacy; and *Digest 2012* at 412 regarding previous U.S. commitment to the EITI.

7. Fiscal Transparency Report

The Department of State issued its 2017 Fiscal Transparency Report pursuant to section 7031(b)(3) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016 (Div. K, P.L.114-113) (“the Act”). The report, available at <https://www.state.gov/e/eb/ifa/oma/fiscaltransparency/273700.htm>, reviews governments that receive U.S. government assistance for their compliance with defined minimum requirements of fiscal transparency and their progress toward meeting the requirements during the period of January 1 – December 31, 2016. Of the 68 governments identified as not meeting the minimum requirements of fiscal transparency, 11 were found to have made significant progress in 2017 toward meeting those requirements. The report provides government-by-government assessments of all governments that were reviewed (140 pursuant to the Act, plus Equatorial Guinea).

8. Committee on Foreign Investments in the United States

On September 13, 2017, President Trump signed an order “Regarding the Proposed Acquisition of Lattice Semiconductor Corporation by China Venture Capital Fund Corporation Limited.” 82 Fed. Reg. 42,665 (Sep. 18, 2017). A September 13, 2018 White House press statement, available at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-president-donald-j-trumps-decision-regarding-lattice-semiconductor-corporation/>, summarizes the basis for the order prohibiting the proposed acquisition:

President Donald J. Trump issued an order prohibiting the acquisition of Lattice Semiconductor Corporation (Lattice) by, among others, China Venture Capital Fund Corporation Limited (CVCF). CVCF is a Chinese corporation owned by Chinese state-owned entities that manages industrial investments and venture capital.

The President made the decision to issue this order under section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007. [50 U.S.C. § 4565] Under the Defense Production Act, the President is authorized to suspend or prohibit certain acquisitions that result in foreign control of a United States business if he concludes, among other things, that there is credible evidence that the foreign interest exercising control might take action that threatens to impair the national security of the United States. The President reached this decision upon consideration of the appropriate factors set forth in section 721 of the Defense Production Act and a review of a recommendation from the Committee on Foreign Investment in the United States. The national-security risk posed by the transaction relates to, among other things, the potential transfer of intellectual property to the foreign acquirer, the Chinese government’s role in supporting this transaction, the

importance of semiconductor supply chain integrity to the United States Government, and the use of Lattice products by the United States Government.

A statement issued the same date by Secretary of the Treasury Stephen T. Mnuchin, as chair of the Committee on Foreign Investment in the United States (“CFIUS”), is available at <https://www.treasury.gov/press-center/press-releases/Pages/sm0157.aspx>, and excerpted below.

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CVCF is a Chinese corporation owned by Chinese state-owned entities that manages industrial investments and venture capital. Lattice is a publicly traded company headquartered in Oregon that manufactures semiconductors for the consumer, communications, and industrial markets. Lattice’s primary semiconductor product lines are programmable logic devices, which are general purpose semiconductors that customers can program to provide functionality similar to chips that are designed and produced for specific applications.

The President took this action pursuant to section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007 (Section 721). Section 721 authorizes the President to suspend or prohibit certain acquisitions of U.S. businesses by foreign persons where he finds that there is credible evidence that the foreign interest exercising control might take action that threatens to impair national security, and where provisions of law other than Section 721 and the International Emergency Economic Powers Act do not provide adequate and appropriate authority to protect national security in the matter under review.

The President’s decision took into consideration the factors described in Section 721’s subsection (f), as appropriate, and the recommendation by CFIUS that he issue an order prohibiting this transaction. CFIUS and the President assess that the transaction poses a risk to the national security of the United States that cannot be resolved through mitigation. The national security risk posed by the transaction relates to, among other things, the potential transfer of intellectual property to the foreign acquirer, the Chinese government’s role in supporting this transaction, the importance of semiconductor supply chain integrity to the U.S. government, and the use of Lattice products by the U.S. government.

CFIUS is an interagency committee whose purpose is to review transactions that could result in the control of a U.S. business by a foreign person, in order to determine the effect of such transactions on the national security of the United States. CFIUS’s detailed analysis of the proposed transaction took into account all relevant national security factors, as enumerated in Section 721. CFIUS also received a thorough analysis of the threat posed by this transaction from the Office of the Director of National Intelligence, as required by Section 721.

Consistent with the longstanding, bi-partisan U.S. commitment to open investment, the CFIUS process focuses exclusively on identifying and addressing national security concerns. This focused mandate reinforces our commitment to welcoming foreign investment, while at the same time reinforcing our commitment to protecting national security.

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Cross References

Detroit International Bridge, **Ch. 5.A.3.**

Business and Human Rights, **Ch. 6.G.**

Aviation v. United States (*takings claim*), **Ch. 8.D.2.a.**

Alimanestianu (*takings claim*), **Ch. 8.D.2.b.**

Application of the FSIA in Enforcement of ICSID Arbitration Awards, **Ch. 10.A.1.**

Expropriation Exception to Immunity, **Ch. 10.A.3.**

DA Terra Siderurgica LTDA v. American Metals Int'l. (*enforcement of arbitral award*), **Ch. 15.C.2.**