

IN THE MATTER OF AN ARBITRATION UNDER THE TREATY BETWEEN
THE UNITED STATES OF AMERICA AND THE ORIENTAL REPUBLIC OF URUGUAY
CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT
AND THE ICSID CONVENTION
BETWEEN

ITALBA CORPORATION,

Claimant,

- and -

THE ORIENTAL REPUBLIC OF URUGUAY,

Respondent.

ICSID Case No. ARB/16/9

SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 28.2 of the Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (“Treaty” or “BIT”), the United States of America makes this submission on questions of interpretation of the Treaty. The United States does not take a position in this submission on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

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.¹ 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.²

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.”³ 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.⁴

¹ See KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 124 (2009) (“VANDEVELDE”) (emphasis added).

² For example, under U.S. law, it is well established that revocable government-granted licenses or permits do not confer property interests that give rise to claims for compensation. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981) (holding that attachments subject to “revocable” and “contingent” licenses, which the President could nullify, did not provide the plaintiff with any “property” interest that would support a constitutional claim for compensation); *Mike’s Contracting, LLC v. United States*, 92 Fed. Cl. 302, 310 (Ct. Fed. Cl. 2010) (holding that helicopter airworthiness certificates, subject to U.S. Federal Aviation Administration revocation or suspension, were not property interests that could give rise to a takings claim); see also *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, U.S. Counter-Memorial on Merits and Objections to Jurisdiction (Dec. 14, 2012), ¶ 227 (stating that “property ‘must be capable of exclusive possession or control,’” and that, where the purported investor has “no power . . . to prevent the government from exercising its statutory authority to withhold or revoke [the instrument in question],” the investor cannot “exclude” the government from those instruments, and they thus “lack the requisite exclusivity that would confer a cognizable ‘property interest’ under U.S. law”).

³ Emphasis added.

⁴ See *Hearing Before the Committee on Foreign Relations of the United States Senate on the Bilateral Investment Treaties with Argentina, Armenia, Bulgaria, Ecuador, Kazakhstan, Kyrgyzstan, Moldova, and Romania*, S. Hrg. 103-292, 103rd Cong., 1st Sess. (Sept. 10, 1993), Responses of the U.S. Department of State to Questions Asked by Senator Pell, at 27 (the term “control” is left undefined in U.S. Model BITs “because these [determinations] involve factual situations that must be evaluated on a case-by-case basis”); see also VANDEVELDE, at 116 (“a determination

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.”⁵ 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.⁷ 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,⁸ 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.”⁹

of whether an investor controls a company requires factual determinations that must be made on a case by case basis”).

⁵ A “claimant” under the dispute resolution provisions of the Treaty is defined in Article 1 as “an investor of a Party that is a party to an investment dispute with the other Party.” Article 1 then defines the term “investor of a Party” to include an “enterprise of a Party,” and in turn defines “enterprise of a Party” as “an enterprise constituted or organized under the law of a Party”

⁶ See above with respect to the term “control.”

⁷ See, e.g., Herman Walker, Jr., *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT’L L. 373, 388 (1956) (noting that “recent treaties signed by the United States, . . . , indicate that this possibility of a ‘free ride’ by third-country interests is one to be guarded against . . .”).

⁸ See *Hearing Before the Committee on Foreign Relations of the United States Senate on the Bilateral Investment Treaties with Argentina, Armenia, Bulgaria, Ecuador, Kazakhstan, Kyrgyzstan, Moldova, and Romania*, S. Hrg. 103-292, 103rd Cong., 1st Sess. (Sept. 10, 1993), Responses of the U.S. Department of State to Questions Asked by Senator Pell, at 27.

⁹ North American Free Trade Agreement, Texts of the Agreement, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements, H. Doc. 103-159, 103d Cong., 1st Sess., at 145 (Nov. 4, 1993); see *Message from the President: Investment Treaty with Azerbaijan*, 106th Cong., 2d Sess., Sen. Treaty Doc. 106-47 (Sept 12, 2000), at 12 (stating that the denial of benefits provision “would not generally permit [the host State] to deny benefits to a company of [the other Party] that maintains its central administration or principal place of

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.¹⁰

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.¹¹ And because the claimant bears the burden of proof with respect to the

business in the territory of, or has a real and continuous link with” the other Party; the same language appears in the transmittal messages accompanying U.S. investment treaties with Trinidad and Tobago, Georgia, Albania, Jordan, Bolivia, Honduras, El Salvador, Croatia, Mozambique, and Nicaragua).

¹⁰ See *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA ¶ 199 (May 31, 2016) (“*Corona Materials Award*”) (“[I]t is uncontroversial that the Claimant submitted its claims to arbitration when it initiated the present proceedings, *i.e.*, by way of its Request for Arbitration which was dated June 10, 2014. The application of Article 10.18.1 [identical to Article 26(1) of this Treaty] leads to the conclusion that the critical date is three years earlier, *i.e.* June 10, 2011.”).

¹¹ See, *e.g.*, *Spence International Investments, LLC, Berkowitz et al. v. Republic of Costa Rica*, CAFTA/UNCITRAL, ICSID Case No. UNCT/13/2, Interim Award ¶¶ 235-236 (Oct. 25, 2016) (“*Spence Interim Award*”) (addressing the time-bar defense as a jurisdictional issue); *Apotex Inc. v. United States of America*, NAFTA/UNCITRAL, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility ¶¶ 314, 335 (June 14, 2013) (“*Apotex I & II Award*”) (parties treated the United States’ time-bar objection as a jurisdictional issue, and the tribunal expressly found that Article 1116(2) deprived it of “jurisdiction *ratione temporis*” with respect to one of the claimant’s alleged breaches); *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Procedural Order No. 2 (Revised) ¶ 18 (May 31, 2005) (finding that that “an objection based on a limitation period for the raising of a claim is a plea as to jurisdiction for purposes of Article 21(4)” of the UNCITRAL Arbitration Rules (1976)).

factual elements necessary to establish jurisdiction,¹² a claimant must prove the necessary and relevant facts to establish that each of its claims fall within the three-year limitations period.¹³

10. The limitations period is a “clear and rigid” requirement that is not subject to any “suspension,” “prolongation,” or “other qualification.”¹⁴ 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,¹⁵ 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.”¹⁶ To allow an investor to do so would “render the limitations provisions ineffective[.]”¹⁷ 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

¹² *Apotex I & II* Award ¶ 150. See also *Vito G. Gallo v. Government of Canada*, NAFTA/UNCITRAL, Award ¶ 277 (Sept. 15, 2011) (“[A] claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional stage”); *Mesa Power Group, LLC v. Government of Canada*, NAFTA/PCA Case No. 2012-17, Award ¶ 236 (Mar. 24, 2016) (“It is for the Claimant to establish the factual elements necessary to sustain the Tribunal’s jurisdiction over the challenged measures.”); see also *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award ¶¶ 58-64 (Apr. 15, 2009) (summarizing relevant investment treaty arbitral awards and concluding that “if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established *prima facie*] at the jurisdictional phase”); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction ¶¶ 190-192 (Nov. 14, 2005) (finding that claimant “has the burden of demonstrating that its claims fall within the Tribunal’s jurisdiction.”); *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction ¶ 79 (Apr. 22, 2005) (acknowledging claimant had to satisfy the burden of proof “required at the jurisdictional phase”).

¹³ *Spence* Interim Award ¶¶ 163, 239, 245-246.

¹⁴ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction ¶ 29 (July 20, 2006) (“*Grand River* Decision on Jurisdiction”); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002) (“*Feldman* Award”); *Apotex I & II* Award ¶ 327 (quoting *Grand River* Decision); *Corona Materials* Award ¶ 199.

¹⁵ See *Grand River* Decision on Jurisdiction ¶ 81.

¹⁶ *Id.* (interpreting the claims limitation language in NAFTA Chapter Eleven, which is identical to Article 26(1) of this Treaty for all relevant purposes).

¹⁷ *Id.*

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.¹⁸

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.”¹⁹ 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”²⁰ 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.”

¹⁸ James Crawford, Special Rapporteur, Second Report on State Responsibility, International Law Commission, 51st Sess., U.N. Doc. A/CN.4/498 (1999) ¶ 140.

¹⁹ Articles on Responsibility of States for Internationally Wrongful Acts, art. 12, U.N. Doc. A/RES/56/83 (2001).

²⁰ *United Parcel Service of America Inc. v. Government of Canada*, NAFTA/UNCITRAL, ICSID Case No. UNCT/02/1, Award on the Merits ¶ 84 (May 24, 2007); see *Mercer International Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of the United States of America, ¶ 13 (May 8, 2015) (“Nothing in the text of Articles 1102 or 1103 [of the NAFTA] suggests a shifting burden of proof. Rather, the burden to prove a violation of these articles, and each element of its claim, rests and remains squarely with the claimant.”).

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.”²¹ 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:

²¹ See, e.g., *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Award on the Merits of Phase 2, ¶ 75 (Apr. 10, 2001).

(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.²² The standard establishes a minimum “floor below which treatment of foreign investors must not fall.”²³

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.”²⁴ A denial of justice arises, for example, when a State’s judiciary administers justice to aliens in a “notoriously unjust” or “egregious”²⁵ manner “which offends a sense of judicial propriety.”²⁶ Denial of

²² A fuller description of the U.S. position is set out in *Methanex v. United States of America*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America (Nov. 13, 2000); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Post-Hearing Submission of Respondent United States of America on Article 1105(1) and Pope & Talbot (June 27, 2002); *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Sept. 19, 2006); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Dec. 22, 2008) (“U.S. Counter-Memorial in *Grand River*”). Submissions of the United States in investor-State arbitrations may be found on the U.S. Department of State website, available at <http://www.state.gov/s/l/c3433.htm>.

²³ *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 259 (Nov. 13, 2000) (“*S.D. Myers* First Partial Award”); *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 615 (June 8, 2009) (“*Glamis* Award”) (“The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community.”); see also Edwin Borchard, *The “Minimum Standard” of the Treatment of Aliens*, 33 AM. SOC’Y OF INT’L L PROC. 51, 58 (1939).

²⁴ Treaty, art. 5(2)(a).

²⁵ JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 4 (2005) (citing J. Irizarry y Puente, *The Concept of “Denial of Justice” in Latin America*, 43 MICH. L. REV. 383, 406 (1944)) (“PAULSSON”); *id.* at 4 (“[A] state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner.”) (emphasis omitted); *Chattin Case (United States of America v. Mexico)*, 4 R. INT’L ARB. AWARDS 282, 286-87 (1927), reprinted in 22 AM. J. INT’L L. 667, 672 (1928) (“Acts of the judiciary . . . are not considered insufficient unless the wrong committed

justice is linked by the terms of Article 5(1) to its meaning under customary international law,²⁷ 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.”²⁸ 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.²⁹

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,³⁰ unless recourse to further domestic remedies would be

amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man.”) (emphasis omitted).

²⁶ *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award ¶ 132 (June 26, 2003) (“*Loewen Award*”) (a denial of justice may arise where there has occurred a “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety”).

²⁷ *Corona Materials Award* ¶ 248 (examining, in the context of a claim under the CAFTA-DR’s “minimum standard of treatment” article (identical to that in the present Treaty), what may constitute a “denial of justice under customary international law”).

²⁸ EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS* 330 (1925) (“BORCHARD”); J.L. BRIERLY, *THE LAW OF NATIONS* 286-87 (1963) (defining a denial of justice as “an injury involving the responsibility of the state committed by a court of justice”).

²⁹ *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT’L L. 131, 175 Supplement: Codification of International Law (1929) (“Harvard Draft”) (commentary accompanying Article 9 of the Draft, stating that various actions, including “failure to execute the judgment,” “have all been deemed, under particular circumstances, instances of ‘denial of justice.’”). Article 9 of the Harvard Draft states that a “[d]enial of justice exists where there is a denial, unwarranted delay or obstruction of access to the courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment.” *Id.* at 134 (emphasis added). According to its reporters, the 1929 Harvard Draft Convention was “framed with a desire to depart as little as possible from the existing rules of international law,” with indications “included in the comment [to each article] wherever the proposed statement departs from the existing law or practice.” *Id.* at 140. See also *The Interoceanic Railway of Mexico (Acapulo to Veracruz) (Limited)*, and *The Mexican Eastern Railway Company (Limited)*, and *The Mexican Southern Railway (Limited)*, 28 AM. J. INT’L L. 167, 176 (1934) (where an alien, after having won a lawsuit, “addresses himself to those non-judicial authorities upon whom, in most countries, execution of the judgments of civil courts is incumbent, and they either refuse to assist him, or postpone their action indefinitely, the alien in question is certainly entitled to complain of denial or undue delay of justice, although the responsibility cannot be laid at the door of the tribunal that sustained his action.”); *Montano (Peru) v. United States*, 2 MOORE’S ARB. 1630, 1634-38 (U.S.-Peru Claims Commission, Jan. 12, 1863) (“*The Eliza*”) (concluding that the U.S. government had denied the claimant justice, because the “sentence of the court was not made effective through the fault of the public officer who was under obligation to execute it”).

³⁰ See, e.g., *Apotex I & II Award* ¶ 282; (noting that denial of justice claims “depend upon the demonstration of a systemic failure in the judicial system. Hence, a claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself.”); *Loewen Award* ¶ 156 (“The purpose of the requirement that a

obviously futile or manifestly ineffective.³¹ 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.³²

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.”³³

decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision.”); PAULSSON, at 108 (“For a foreigner’s international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself.”); C. F. AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW* 198 (2004) (“the alien must proceed to the highest court in the whole system, which may include more than one line of tribunals or courts where the legal system of the respondent or host state has a multiple hierarchy of fora which can provide redress”) (“AMERASINGHE”); GREEN HACKWORTH, *5 DIGEST OF INTERNATIONAL LAW* 526 (1943) (“generally speaking, exhaustion of available judicial remedies is a prerequisite to a valid complaint that the alien has been denied justice.”); ALWYN FREEMAN, *INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* 311-12 (1938) (“responsibility [of a State] is engaged as the result of a definitive judicial decision by a court of last resort which violates an international obligation of the State”); *Christo G. Pirocaco* (U.S. v. Turkey), NIELSEN’S OPINIONS AND REPORT 587, 592-93 (1937) (“As a general rule, a denial of justice resulting from improper action of judicial authorities can be predicated only on a decision of a court of last resort.”); Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63(3) INT’L & COMP. L.Q. 28 (2014) (“Douglas”) (explaining that “international responsibility towards foreign nationals for acts and omissions associated with an adjudicative procedure can only arise at the point at which the adjudication has produced its final result; it is only at that point that a constituent element of that responsibility has been satisfied, which is the existence of damage to the foreign national.”).

³¹ AMERASINGHE, at 206.

³² *Loewen Award* ¶¶ 158-64; Carlo Focarelli, *Denial of Justice*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 29 (2013), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e775?rskey=3JY63I&result=1&prd=EPIL> (noting that in such scenarios “arbitration may be immediately resorted to for any complaint other than denial of justice, while this latter does not occur and cannot therefore be invoked before the exhaustion of local effective remedies.”); PAULSSON, at 108 (speaking with reference to waiver language similar to that in Article 26(2)(b) of this Treaty: “[i]n the particular case of denial of justice, however, claims will not succeed unless the victim has indeed exhausted municipal remedies, or unless there is an explicit waiver of a type yet to be invented.”).

³³ See *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, U.S. Counter-Memorial (Mar. 30, 2001), at 176-77 (“[C]ases in which the customary international law obligation of full protection and security was found to have been breached are limited to those in which a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien.”); *Methanex v. United States*, NAFTA/UNCITRAL, Respondent’s Rejoinder on Jurisdiction, Admissibility and the Proposed Amendment (June 27, 2001), at 39 (same).

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."³⁴

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)*.³⁵ 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.³⁶

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.³⁷ Indeed, while good faith is "one of the basic principles

³⁴ See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, 122 (Feb. 3) ("In particular . . . the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*." (citing *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, 1969 I.C.J. 44, ¶ 77 (Feb. 20)); *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, 29-30 (June 3) ("It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States[.]"); Michael Wood (Special Rapporteur), *Second Report on Identification of Customary International Law* ¶ 21, A/CN.4/672, International Law Commission (May 22, 2014) ("ILC Second report on the identification of customary international law"). See also *id.*, Annex, Proposed Draft Conclusion 3 (stating that in order to determine the "existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law"); Michael Wood (Special Rapporteur), Fourth Report on Identification of Customary International Law ¶ 31 & Annex at 21, A/CN.4/695 (Mar. 8, 2016) (proposing minor modifications to Draft Conclusion 3).

³⁵ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99 (Feb. 3).

³⁶ *Id.* at 122-23 (discussing relevant materials that can serve as evidence of State practice and *opinio juris* in the context of jurisdiction immunity in foreign courts).

³⁷ For the views of non-disputing Parties (other than the United States) in cases arising under the CAFTA-DR, Article 10.5 of which is identical to Article 5 of this Treaty, see, e.g., *Spence International Investments v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Non-Disputing Party Submission of the Republic of El Salvador (Apr. 17, 2015), ¶¶ 8-12 ("The minimum standard of treatment does not include the protection of investors' expectations, legitimate or otherwise"); *RDC Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Submission of the Republic of El Salvador as a Non-Disputing under CAFTA Article 10.20.2 ¶ 7 (Jan. 2012) ("El

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.”³⁸ 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.³⁹

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.⁴⁰

Salvador considers that the requirement to provide ‘Fair and Equitable Treatment’ under CAFTA Article 10.5 does not include obligations of transparency, reasonableness, refraining from mere arbitrariness, or not frustrating investors’ legitimate expectations.”); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-Disputing Party Submission of the Republic of El Salvador ¶ 16 (Oct. 5, 2012) (noting that the concept of “fair and equitable treatment” does not include the protection of an investor’s legitimate expectations[.]”); *RDC Corp. v. Guatemala*, Submission of the Republic of Honduras as a Non-Disputing Party ¶ 10 (Jan. 2012) (translation by counsel) (“However, because the focus should be on the conduct of the State, the Republic of Honduras does not consider it valid or necessary to refer to investors’ expectations in order to decide whether there has been a violation of the minimum standard of treatment.”) (“Sin embargo, debido a que el enfoque debe ser en la conducta del Estado, la República de Honduras no considera válido ni necesario hacer referencia a las expectativas de los inversionistas para decidir si se ha violado el nivel mínimo de trato.”); *TECO v. Guatemala*, Submission of the Republic of Honduras as a Non-Disputing Party ¶ 10 (same); *TECO v. Guatemala*, Non-Disputing Party Submission of the government of the Dominican Republic ¶ 10 (Oct. 5, 2012) (“Given that the focus should be on the practice and conduct of the State, the Dominican Republic also notes that it is wrong to include investors’ expectations of the treatment they expect to receive based on what has been offered, in deciding whether the State has complied with the minimum standard of treatment.”); see also PATRICK DUMBERRY, *THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105*, at 158-59 (2013) (“In the present author’s view, there is little support for the assertion that there exists under customary international law any obligation for host States to protect investors’ legitimate expectations.”).

³⁸ *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 1988 I.C.J. 69, 105 (Dec. 20) (internal quotation marks omitted).

³⁹ *Land and Maritime Boundary (Cameroon v. Nigeria)*, 1998 I.C.J. 275, 297 (June 11) (holding that in the absence of an independent obligation, Nigeria could “not justifiably rely upon the principle of good faith” in support of its claims). Nor can any obligation of “legitimate expectations” be derived from a general principle of “good faith.” A general principle of international law that does not impose any substantive obligations on a State toward foreign investors cannot itself create additional State obligations toward such investors.

⁴⁰ See, e.g., U.S. Counter-Memorial in *Grand River* (“As a matter of international law, although an investor may develop its own expectations about the legal regime that governs its investment, those expectations do not impose a legal obligation on the State.”). NAFTA tribunals have recognized this point. See *Robert Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award ¶ 87 (Nov. 1, 1999) (“NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes.”); *Waste Management, Inc. v. United Mexican States (“Number 2”)*, ICSID Case No. ARB(AF)/00/3, Award ¶ 115 (Apr. 30, 2004) (explaining that “even the persistent non-payment of debts by a

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.⁴¹ 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.⁴² 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.⁴⁴ A formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State

municipality is not equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and . . . some remedy is open to the creditor to address the problem.”).

⁴¹ See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 582, at p. 615, para. 90 (“The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.”).

⁴² Article 5(2) (“For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.”). See also *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 176 (Jan. 12, 2011) (noting that an obligation under Article 1105 of the NAFTA “must be determined by reference to customary international law, not to standards contained in other treaties or other NAFTA provisions, or in other sources, unless those sources reflect relevant customary international law”) (“*Grand River Award*”). While there may be overlap in the substantive protections ensured by this Treaty and other treaties, a claimant submitting a claim under this Treaty, in which fair and equitable treatment is defined by the customary international law minimum standard of treatment, still must demonstrate that the obligations invoked are in fact a part of customary international law.

⁴³ See, e.g., *Glamis Award* ¶ 608 (concluding that “arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom”); *Cargill Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award ¶ 278 (Sept. 18, 2009) (“*Cargill Award*”) (noting that arbitral “decisions are relevant to the issue presented in Article 1105(1) only if the fair and equitable treatment clause of the BIT in question was viewed by the Tribunal as involving, like Article 1105, an incorporation of the customary international law standard rather than autonomous treaty language.”).

⁴⁴ See, e.g., *Glamis Award* ¶ 605 (“Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law. They can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation.”) (footnote omitted); see also M. H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 202 (1998) (noting that while such decisions may contribute to the formation of customary international law, they are not appropriately considered as evidence of “State practice”).

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*.⁴⁵ “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.”⁴⁶ 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.⁴⁷

⁴⁵ *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20); *see also North Sea Continental Shelf Judgment*, at 43; *Glamis Award* ¶¶ 601-02 (noting that the claimant bears the burden of establishing a change in customary international law, by showing “(1) a concordant practice of a number of States acquiesced in by others, and (2) a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)”) (citations and international quotation marks omitted).

⁴⁶ *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, 1952 I.C.J. 176, 200 (Aug. 27) (“The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.”) (citation and internal quotation marks omitted); *The Case of the S.S. “Lotus” (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, at 25-26 (Sept. 27) (holding that the claimant had failed to “conclusively prove” the “existence of . . . a rule” of customary international law); *see Treaty, Protocol* ¶ 2 (“The Parties confirm their shared understanding that, consistent with general principles of law applicable to international arbitration, when a claimant submits a claim to arbitration under Section B, it has the burden of proving all elements of its claim . . .”).

⁴⁷ *Cargill Award* ¶ 273 (emphasis added). The *ADF*, *Glamis Gold*, and *Methanex* tribunals likewise placed on the claimant the burden of establishing the content of customary international law. *See ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award ¶ 185 (Jan. 9, 2003) (“The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts.”);

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.⁴⁸ 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.”⁴⁹

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.⁵⁰ Compensation must be “prompt,” in that it must be “paid without delay”;⁵¹ “adequate,” in that it

Glamis Award ¶ 601 (“As a threshold issue, the Tribunal notes that it is Claimant’s burden to sufficiently” show the content of the customary international law minimum standard of treatment); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, Part IV, Chapter C ¶ 26 (Aug. 3, 2005) (“*Methanex* Final Award”) (citing *Asylum Case (Colombia v. Peru)* for placing burden on claimant to establish the content of customary international law, and finding that claimant, which “cited only one case,” had not discharged burden).

⁴⁸ *Feldman Award* ¶ 177 (“[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.”) (citation omitted).

⁴⁹ *S.D. Myers First Partial Award* ¶ 263; *International Thunderbird Gaming Corporation v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 127 (Jan. 26, 2006) (noting that states have a “wide regulatory ‘space’ for regulation,” can change their “regulatory polic[ies]” and have “wide discretion” with respect to how to carry out such policies by regulation and administrative conduct).

⁵⁰ Article 6 also clarifies that a Party may not expropriate a covered investment except in accordance with Article 5. The United States’ views on the interpretation of Article 5 are provided herein.

⁵¹ See *Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award ¶¶ 71-72 (Oct. 11, 2002) (“*Mondev* Award”) (“It is true that the obligation to compensate as a condition for a lawful expropriation (NAFTA Article 1110(1)(d)) does not require that the award of compensation should occur at exactly the same time as the taking. But for a taking to be lawful under Article 1110, at least the obligation to compensate must be recognised by the taking State at the time of the taking, or a procedure must exist at that time which the claimant may effectively and promptly invoke in order to ensure compensation. . . . The word[s] [‘on payment’] should be interpreted to require that the payment be clearly offered, or be available as compensation for taking through a readily available procedure, at the time of the taking.”). The requirement to provide “prompt, adequate, and effective compensation” for a lawful expropriation has been a feature of U.S. treaties for well over a half century. In that context, “prompt” has been understood to require a government to “diligently carry out orderly and nondilatory procedures . . . to ensure correct compensation and make payment as soon as possible.” Charles

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.⁵²

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.⁵³ 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.⁵⁴

Sullivan, *Treaty of Friendship, Commerce and Navigation: Standard Draft – Evolution through January 1, 1962*, 112, 116 (U.S. Department of State, 1971).

⁵² Treaty, art. 6(2)(a)-(d).

⁵³ See *Mondev Award* ¶ 72 (“Article 1110 requires that the nationalization or expropriation be ‘on payment of compensation in accordance with paragraphs 2 through 6’. The word ‘on’ should be interpreted to require that the payment be clearly offered, or be available as compensation for taking through a readily available procedure, at the time of the taking. That was not the case here, and accordingly, if there was an expropriation, it occurred at or shortly after the rights in question were lost.”). A breach of Article 6 of the present Treaty will occur unless a host State observes its obligation to refrain from an uncompensated taking at the time of the expropriation by, for example, fixing, guaranteeing, or offering compensation. See *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Rejoinder on Competence and Liability of Respondent United States of America, at 43 (Oct. 1, 2001) (citing authorities); see also *SEDCO, Inc. v. National Iranian Oil Co.*, Award No. 59-129-3, 10 IRAN U.S. CL. TRIB. REP. 180, 204 n. 34 (Mar. 27, 1986) (describing a “taking itself” as wrongful “[i]f . . . no provision for compensation is made contemporaneously with the taking, or one is made which clearly cannot produce the required compensation, or unreasonably insufficient compensation is paid at the time of taking”) (Sep. Op. of Judge Brower); *Liberian Eastern Timber Corp. (LETCO) v. Government of the Republic of Liberia*, Award (Mar. 31, 1986), in 2 ICSID REP. 343, 366 (1994) (finding Liberian Government deprived LETCO of its concession unjustifiably for failure to be “accompanied by payment (or at least the offer of payment) of appropriate compensation”).

⁵⁴ See Comments of the United Kingdom on the Draft Articles on State Responsibility ¶ 59 (“the breach does not arise until local procedures have definitively failed to deliver *proper compensation*,” e.g., “have so failed within the time limits implied by the requirement of promptness”) (emphasis added); *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award ¶¶ 422, 425 (Mar. 10, 2015) (“The Tribunal has already established that the LECUPS is a modern statute, the compliance with which in principle complies with the requirements of Art. 6(c) of the [treaty]. Nevertheless, . . . the Tribunal concludes that the Bolivarian Republic has not offered a plausible explanation justifying the delay of more than four years in fixing paying at least the fair value owed in compliance with the LECUPS, which implies that it cannot be considered to satisfy the requirement of Art. 6(c) of the [treaty] that compensation be paid “without undue delay.”) (translation by counsel) (“El Tribunal ya ha establecido que la LECUPS es una legislación moderna, cuyo cumplimiento en principio cumpliría con los requisitos del Art. 6(c) del APRI. Sin embargo, . . . el Tribunal concluye que la República Bolivariana no ha ofrecido una explicación plausible que justifique el retraso de más de cuatro años en la fijación y en el pago al menos del justiprecio debido en cumplimiento de la LECUPS, lo que a su vez implica que no pueda considerarse cumplido el requisito del Art. 6(c) del APRI de que la compensación sea satisfecha ‘sin demora indebida.’”); *Goldenberg Case (Germany v. Romania)*, 2 R.I.A.A. 901, 909 (Sept. 27, 1928) (“[T]he requisition carried out by the German military authorities did not *initially* constitute an ‘act contrary to the law of nations’. In order for this

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.”⁵⁵ Moreover, to constitute an expropriation, a deprivation must be more than merely “ephemeral.”⁵⁶

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.⁵⁷ For example, where a sector is “already highly regulated, reasonable extensions of those regulations are foreseeable.”⁵⁸

situation to continue, it was necessary, however, that within a reasonable delay, the claimants obtain equitable compensation. But such was not the case, the compensation, allocated several years after the requisition, amounting to barely a sixth of the value of the expropriated goods.”) (translation by counsel; emphasis in original) (“[L]a réquisition opérée par l’autorité militaire allemande ne constituait pas initialement un ‘acte contraire au droit des gens’. Pour qu’il continuât à en être ainsi, il fallait, cependant, que dans un délai raisonnable, les demandeurs obtinissent une indemnité équitable. Or tel n’a pas été le cas, l’indemnité, allouée plusieurs années après la réquisition, atteignant à peine le sixième de la valeur des biens expropriés.”).

⁵⁵ *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Interim Award ¶ 102 (June 26, 2000); see also *Glamis Award* ¶ 357 (“[A] panel’s analysis should begin with determining whether the economic impact of the complained of measures is sufficient to potentially constitute a taking at all: ‘[I]t must first be determined if the Claimant was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto . . . had ceased to exist.’ The Tribunal agrees with these statements and thus begins its analysis of whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures ‘substantially impair[ed] the investor’s economic rights, i.e. ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings.’”) (citations omitted); *Grand River Award* ¶¶ 149-50 (citing the *Glamis Award*); *Cargill Award* ¶ 360 (holding that a government measure only rises to the level of an expropriation if it affects “a radical deprivation of a claimant’s economic use and enjoyment of its investment” and that a “taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property . . . (i.e., it approaches total impairment)”).

⁵⁶ *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA*, Award No. 141-7-2, 6 IRAN U.S. CL. TRIB. REP. 219, 225 (June 22, 1984) (“While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.”); see *S.D. Myers First Partial Award* ¶¶ 284, 287-88.

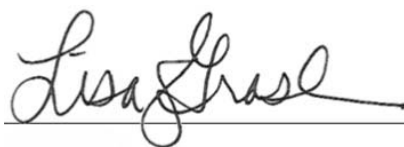
⁵⁷ *Methanex Final Award*, Part IV, Ch. D ¶ 9 (noting that no specific commitments to refrain from regulation had been given to Methanex, which “entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active

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”).⁵⁹

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.

Respectfully submitted,



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electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons. Indeed, the very market for MTBE in the United States was the result of precisely this regulatory process”).

⁵⁸ *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, U.S. Rejoinder, at 91 (Mar. 15, 2007) (“The inquiry into an investor’s expectations is an objective one. . . . Consideration of whether an industry is highly regulated is a standard part of the legitimate expectations analysis, and . . . where an industry is already highly regulated, reasonable extensions of those regulations are foreseeable.”).

⁵⁹ *Id.*, at 109 (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)).