

## Contents

<b>CHAPTER 11</b> .....	<b><a href="#">388</a></b>
<b>Trade, Commercial Relations, Investment, and Transportation</b> .....	<b><a href="#">388</a></b>
<b>A. TRANSPORTATION BY AIR</b> .....	<b><a href="#">388</a></b>
1. Air Transport Agreements .....	<a href="#">388</a>
2. The Downing of Malaysia Airlines Flight MH17 in Ukraine .....	<a href="#">390</a>
3. Restrictions on Air Service to Cuba .....	<a href="#">391</a>
<b>B. INVESTMENT DISPUTE RESOLUTION UNDER FREE TRADE AGREEMENTS</b> .....	<b><a href="#">391</a></b>
1. Non-Disputing Party Submissions under Chapter 11 of the North American Free Trade Agreement: .....	<a href="#">391</a>
a. Tennant Energy LLC v. Canada .....	<a href="#">391</a>
b. Vento Motorcycles, Inc. v. Mexico .....	<a href="#">393</a>
c. Lion Mexico Consolidated LP v. Mexico .....	<a href="#">397</a>
2. Non-Disputing Party Submissions under other Trade Agreements .....	<a href="#">400</a>
a. <i>U.S.-Korea FTA: Seo v. Republic of Korea</i> .....	<a href="#">400</a>
b. <i>U.S.-Panama TPA: Bridgestone v. Panama</i> .....	<a href="#">401</a>
c. <i>U.S.-Peru TPA: Gramercy v. Peru</i> .....	<a href="#">403</a>
<b>C. WORLD TRADE ORGANIZATION</b> .....	<b><a href="#">407</a></b>
1. Disputes brought by the United States .....	<a href="#">408</a>
a. <i>China – Domestic Supports for Agricultural Producers (DS511)</i> .....	<a href="#">408</a>
b. <i>China – Administration of Tariff-Rate Quotas for Certain Agricultural Products (DS517)</i> .....	<a href="#">408</a>
c. <i>European Union – Measures Concerning Meat and Meat Products (Hormones) (DS26, 48)</i> ...	<a href="#">408</a>
d. <i>European Union – Measures Affecting Trade in Large Civil Aircraft (DS316)</i> .....	<a href="#">408</a>
e. <i>India – Export Related Measures (DS541)</i> .....	<a href="#">409</a>
2. Disputes brought against the United States .....	<a href="#">409</a>
a. <i>Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (DS436)</i> .....	<a href="#">409</a>

b.	<i>Countervailing Duty Measures on Certain Products from China (DS437)</i>	<a href="#">410</a>
c.	<i>Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea (DS464)</i>	<a href="#">411</a>
d.	<i>Certain Measures Relating to the Renewable Energy Sector (India) (DS510)</i>	<a href="#">411</a>
3.	Dispute Settlement Understanding	<a href="#">411</a>
<b>D.</b>	<b>INVESTMENT TREATIES, TRADE AGREEMENTS AND TRADE-RELATED ISSUES</b>	<a href="#">412</a>
1.	Africa Growth and Opportunity Act	<a href="#">412</a>
2.	Generalized System of Preferences	<a href="#">413</a>
3.	NAFTA/U.S.-Mexico-Canada Agreement (“USMCA”)	<a href="#">413</a>
<b>E.</b>	<b>IMPORT ADJUSTMENTS BASED ON U.S. NATIONAL SECURITY</b>	<a href="#">414</a>
1.	Aluminum	<a href="#">414</a>
2.	Steel	<a href="#">415</a>
3.	Automobiles	<a href="#">416</a>
<b>F.</b>	<b>OTHER ISSUES</b>	<a href="#">418</a>
1.	Foreign Account Tax Compliance Act	<a href="#">418</a>
2.	Tax Treaties	<a href="#">419</a>
3.	U.S. Opposition to Nord Stream 2	<a href="#">419</a>
4.	Telecommunications	<a href="#">419</a>
5.	Intellectual Property	<a href="#">420</a>
a.	<i>Special 301 Report</i>	<a href="#">420</a>
b.	<i>Investigation of China’s Policies on Technology Transfer, IP and Innovation</i>	<a href="#">421</a>
c.	<i>Investigation of France’s Digital Services Tax</i>	<a href="#">421</a>
d.	<i>Marrakesh Treaty</i>	<a href="#">421</a>
e.	<i>Texas Advanced case regarding extraterritoriality of U.S. IP law</i>	<a href="#">421</a>
6.	Application of U.S. Securities Law to Purchases of Interests in Foreign Companies	<a href="#">422</a>
7.	Presidential Permits	<a href="#">426</a>

<i>a.</i>	<i>New Executive Order on Presidential Permits</i> .....	<a href="#">426</a>
<i>b.</i>	<i>Keystone XL pipeline</i> .....	<a href="#">428</a>
8.	Corporate Responsibility Regimes.....	<a href="#">429</a>
<i>a.</i>	<i>Kimberley Process</i> .....	<a href="#">429</a>
<i>b.</i>	<i>Business and Human Rights</i> .....	<a href="#">430</a>
9.	Committee on Foreign Investment in the United States .....	<a href="#">430</a>
	<b>Cross References</b> .....	<a href="#">431</a>

## CHAPTER 11

### Trade, Commercial Relations, Investment, and Transportation

#### A. TRANSPORTATION BY AIR

##### 1. Air Transport Agreements

Information on U.S. air transport agreements is available at <https://www.state.gov/subjects/air-transport-agreements/>. In 2019, U.S. air transport agreements with Cameroon and Namibia entered into force. In 2019, the United States negotiated new air transport agreements with The Bahamas and Belarus; and negotiated and signed or initialed amendments to the agreements with Suriname, Argentina, Japan, and Kenya. The United States also concluded an agreement addressing time restrictions on leasing of aircraft with crew with the EU, Norway, and Iceland.

On January 15, 2019, the U.S.-Cameroon air transport agreement, signed at Yaoundé February 6, 2006, entered into force. The agreement with Cameroon is available at <https://www.state.gov/19-115>.

On March 8, 2019, the Joint Committee established under the U.S.-EU Air Transport Agreement of 2007, as amended, met in Washington, D.C. See March 13, 2019 State Department media note, available at <https://www.state.gov/u-s-eu-joint-committee-meeting-strengthens-transatlantic-civil-aviation-ties/>. On the margins of this meeting, representatives of the United States, the EU, and the governments of Norway and Iceland initialed an agreement addressing EU time constraints on U.S. air carrier leases of aircraft with crew. See *id.* The agreement removing time constraints on leases was signed on August 27, 2019 by the United States, EU, Iceland, and Norway. See August 27, 2019 State Department media note, available at <https://www.state.gov/the-united-states-the-european-union-iceland-and-norway-sign-agreement-to-remove-time-constraints-on-air-carrier-leases-of-aircraft-with-crew/>. The agreement is available at <https://www.state.gov/agreement-to-remove-time-constraints-on-air-carrier-leases-of-aircraft-with-crew-between-the-u-s-eu-iceland-and-norway/>. As described in the media note:

This agreement ends a longstanding imbalance in our civil aviation relationship and allows U.S. carriers to lease aircraft and crew to their European partners

with no time constraints, in a manner consistent with the 2007 Air Transport Agreement between the United States and the European Community and its Member States, as amended. The agreement will be provisionally applied as of today's signature. Conclusion of the agreement demonstrates the close and cooperative relationship between the United States and our European partners. Transatlantic flights linking the United States and Europe power growth and job creation, and underpin valuable economic and commercial ties.

On March 25, 2019, the United States signed an agreement amending the 2013 air transport agreement with Suriname. The agreement entered into force upon signing and is available at <https://www.state.gov/suriname-19-325>.

On June 18, 2019, the U.S.-Namibia air transport agreement, signed at Windhoek March 16, 2000, and the amendment to that agreement signed December 12, 2018, both entered into force. The full text of the Namibia air transport agreement, with amendment and annexes, is available at <https://www.state.gov/namibia-19-618>.

On June 26, 2019, the governments of the United States and Argentina signed a protocol of amendment to the 1985 air transport agreement between the two countries. See June 26, 2019 media note, available at <https://www.state.gov/united-states-and-argentina-sign-protocol-to-modernize-their-1985-air-transport-services-agreement/>. The media note states that the conclusion of the amendment follows a year of negotiations by the U.S. Departments of State, Transportation, and Commerce with their counterparts from Argentina. The protocol of amendment entered into force upon signature. The full text of the June 26, 2019 protocol is available at <https://www.state.gov/argentina-19-626>.

On August 21, 2019, the U.S. and Japanese government delegations signed a record of discussions ("ROD") recommending that their respective governments adopt an amendment to the U.S.-Japan Air Transport Agreement of 1952, as amended. See August 21, 2019 State Department media note, available at <https://www.state.gov/united-states-and-japan-to-expand-daytime-service-at-haneda-airport/>. As explained in the media note:

The proposed amendment would expand daytime passenger service between Tokyo's Haneda Airport and U.S. destinations. It would provide for 12 additional slot pairs (12 arrivals and 12 departures daily) during daytime hours for U.S. air carriers and the same for Japanese carriers.

The ROD is available at <https://www.state.gov/u-s-japan-record-of-discussions-of-august-21-2019/>.

In a December 9, 2019 media note, the State Department announced that U.S. delegates had negotiated new air transport agreements with The Bahamas, Belarus, and Kenya during the twelfth ICAO Air Services Negotiation Event ("ICAN 2019"). The media note, available at <https://www.state.gov/strengthening-u-s-open-skies-civil-aviation-partnerships/>, is excerpted below.

\* \* \* \*

ICAN 2019, which took place in Aqaba, Jordan, on December 2-6, was the year's largest gathering of civil aviation negotiators. The event, organized by the International Civil Aviation Organization (ICAO), drew attendees from more than 60 nations. ...

The agreements with the Commonwealth of The Bahamas and the Republic of Belarus, initialed on December 3, are the first bilateral air transport agreements negotiated with these countries. Both agreements are now being applied on the basis of comity and reciprocity, creating new opportunities for travelers and businesses.

The agreement with Kenya, initialed on December 4, adds seventh-freedom traffic rights for all-cargo operations. Such rights facilitate the movement of goods throughout the world by giving carriers greater flexibility to meet their cargo and express delivery customers' needs more efficiently.

The U.S. delegation also met with counterparts from host country Jordan and 20 other nations to ensure fair competition for U.S. carriers, to explore possibilities for new Open Skies agreements, and to further modernize existing agreements with civil aviation partners. ...

\* \* \* \*

## 2. The Downing of Malaysia Airlines Flight MH17 in Ukraine

As discussed in *Digest 2018* at 439-40, and *Digest 2017* at 485, the State Department expressed support for, and confidence in, the Joint Investigative Team ("JIT") investigating the downing of Malaysian Airlines flight MH17 in Ukraine. On June 19, 2019, the Department issued a statement by Secretary of State Michael R. Pompeo welcoming the indictments of four individuals for their role in the downing of flight MH17. The statement is available at <https://www.state.gov/prosecution-of-four-suspects-in-mh17-case/> and includes the following:

This is an important milestone in the search for the truth, and we remain confident in the professionalism and ability of the Dutch criminal justice system to prosecute those responsible in a manner that is fair and just. We fully support the work of the Dutch authorities and the Joint Investigation Team (JIT), an independent criminal investigation led by the Netherlands, Australia, Belgium, Malaysia, and Ukraine.

...

We recall the UN Security Council's demand that "those responsible ... be held to account and that all States cooperate fully with efforts to establish accountability." All of those indicted today were members of Russia-led forces in eastern Ukraine. We call upon Russia to respect and adhere to UN Security Council Resolution 2166 (2014) and ensure that any indicted individuals currently in Russia face justice.

### 3. Restrictions on Air Service to Cuba

On October 25, 2019, the State Department announced in a media note, available at <https://www.state.gov/united-states-restricts-scheduled-air-service-to-cuban-airports/>, that the U.S. Department of Transportation had suspended scheduled commercial air service between the United States and Cuban international airports, other than Havana's Jose Marti International Airport. The restriction aims to curb Cuban regime profits from U.S. air travel. The media note further states:

U.S. air carriers will have 45 days to discontinue all scheduled air service between the United States and all airports in Cuba, except for Jose Marti International Airport.

In line with the President's foreign policy toward Cuba, this action prevents revenue from reaching the Cuban regime that has been used to finance its ongoing repression of the Cuban people and its support for Nicolas Maduro in Venezuela. In suspending flights to a total of nine airports, the United States impedes the Cuban regime from gaining access to hard currency from U.S. travelers staying in its state-controlled resorts, visiting state-owned attractions, and otherwise contributing to the Cuban regime's coffers near these airports.

## 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.

#### a. Tennant Energy LLC v. Canada

On November 27, 2019, the United States filed an 1128 submission in the dispute between Tennant Energy LLC, a California corporation, and the Government of Canada arising out of certain renewable energy initiatives undertaken by Ontario. Tennant Energy claims that Canada has violated Article 1105 (Minimum Standard of Treatment). The U.S. submission is excerpted below and available at <https://www.state.gov/tennant-energy-llc-v-government-of-canada/>.

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\* \* \* \*

### 2. NAFTA Article 1134 provides as follows:

A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.

3. The Article's first sentence permits the Tribunal to order, *inter alia*, measures "to preserve the rights of a disputing party." One example of such a measure, as noted later in the same sentence, is "an order to preserve evidence in the possession or control of a disputing party." This type of order preserves the other party's potential future right to have that evidence disclosed. The right to disclosure of evidence is contingent: it depends on the tribunal's authority under the applicable arbitration rules to order the disclosure and the tribunal's determination that it is appropriate under the circumstances to exercise such authority.

4. A measure requiring one party to post security for the other party's costs may also preserve rights, namely a disputing party's potential future right to recover its costs. Again, this right would be contingent but, as with orders to preserve evidence, it would be within the scope of Article 1134's first sentence.

5. Article 1134 makes no distinction between interim measures that protect contingent rights and measures that protect existing rights. Indeed, the phrase "rights of a disputing party" is not qualified in any way. The only types of interim measures that the Article expressly bars a tribunal from ordering are the two types specified in the Article's second sentence: "[a] Tribunal may not order attachment," nor may it "enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117." An order directing a party to post security for costs does not fall into either proscribed category.

6. The United States is not aware of any tribunals that have ruled on requests for security for costs under NAFTA Article 1134, but a number of tribunals have done so under Article 47 of the ICSID Convention, which, similar to Article 1134, permits a tribunal to grant provisional measures that "preserve the respective rights of either party." The United States agrees with the tribunals that have concluded that this language allows for provisional measures that preserve contingent rights, including orders granting a party security for its costs. For example, in *RSM Production Corp. v. Government of Grenada*, the tribunal explained:

As to what rights of a party may be preserved [under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules], it seems obvious that, in the context of a dispute, the parties' contested substantive rights have yet to be determined. For example, a party seeking damages for contractual or a treaty breach has no "established" or "determined" right to damages. Similarly, a party who seeks an ultimate award for costs has only a potential right to costs. . . .

To construe the rights that are to be protected or preserved under Article 47 and Rule 39 as being limited to "established" rights makes no sense whatever in the context of a provisional measure for their protection. Any such measure must, by definition, precede a determination of their substantive validity.<sup>1</sup>

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<sup>1</sup> *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Decision on Respondent's Application for Security for Cost ¶¶ 5.6, 5.8 (Oct. 14, 2010). See also *BSG Resources Ltd. v. Republic of Guinea*, ICSID Case No.

7. In sum, an order directing one party to post security for another party's costs may constitute "an interim measure of protection to preserve the rights of a disputing party." Moreover, such an order is not barred by the second sentence of Article 1134. Accordingly, a tribunal may issue such an order in appropriate circumstances and if so authorized by the applicable arbitration rules.

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**b. Vento Motorcycles, Inc. v. Mexico**

On August 23, 2019, the United States filed an 1128 submission in the dispute between Vento Motorcycles, Inc., a Texas company, and Mexico, in which Vento claims that Mexico wrongly applied certain tariffs to its products. The claimant alleges violations of Article 1102 (National Treatment), Article 1103 (Most-Favored-Nation Treatment), Article 1104 (Standard of Treatment), and Article 1105 (Minimum Standard of Treatment). The U.S. submission is excerpted below (with footnotes omitted) and available in full at <https://www.state.gov/vento-motorcycles-inc-v-united-mexican-states/>.

\* \* \* \*

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

Legitimate Expectations

17. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. The mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

Good Faith

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

19. 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

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ARB/14/22, Procedural Order No. 3, ¶ 75 (Nov. 25, 2015) ...; *RSM Production Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs ¶ 72 (Aug. 13, 2014) ...

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. Accordingly, a claimant “may not justifiably rely upon the principle of good faith” to support a claim, absent a specific treaty obligation, and the NAFTA contains no such obligation.

#### Non-Discrimination

20. Similarly, the customary international law minimum standard of treatment set forth in Article 1105 does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination. As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently. To the extent that the customary international law minimum standard of treatment incorporated in Article 1105 prohibits discrimination, it does so only in the context of other established customary international law rules, such as prohibitions against discriminatory takings, access to judicial remedies or treatment by the courts, or the obligation of States to provide full protection and security and to compensate aliens and nationals on an equal basis in times of violence, insurrection, conflict or strife.

#### Transparency

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

\* \* \*

22. 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 1105 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 1105(1). 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 1105(1).

23. Thus, the NAFTA Parties expressly intended Article 1105(1) 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*. A claimant must demonstrate that alleged standards that are not specified in the treaty have crystallized into an obligation under customary international law.

24. As all three NAFTA Parties agree, the burden is on the claimant and the claimant alone 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 . . . must prove that this custom is established in such a manner that it has become binding on the other Party.” Tribunals applying the minimum standard of treatment obligation in Article 1105 have confirmed that the party seeking to rely on a rule of customary international law must establish its existence. . . .

25. 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. An alleged breach of the minimum standard of treatment must be assessed “in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.” Chapter Eleven tribunals do not have an open-ended mandate to “second-guess government decision-making.”

**Article 1116(1) (Continuous Nationality)**

26. Article 1116(1) provides, in pertinent part, that “[a]n *investor of a Party* may submit to arbitration under this Section a claim that *another Party* has breached an obligation under” Chapter Eleven, Section A.

27. An investor must be a national of a Party other than the respondent NAFTA Party continuously at three critical dates and at all times between them: the time of the purported breach, the submission of a claim to arbitration, and the resolution of the claim.

\* \* \* \*

33. The conclusions above are consistent with the well-established principle of international law that an individual or entity cannot maintain an international claim against its own State. As the United States has long maintained with respect to the rule of “continuous nationality,” and as the tribunal in *Loewen v. United States of America* explained: “In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*.” In the absence of continuous nationality of the claimant as set forth above, a tribunal lacks jurisdiction over the relevant claim.

**Article 1116(2) (Limitations Period)**

34. All claims under Article 1116(1) must be submitted to arbitration within the three-year limitations period set out in Article 1116(2). The claims limitation period is “clear and rigid” and not subject to any “suspension,” “prolongation,” or “other qualification.” Specifically, Article 1116(2) requires a claimant to submit a claim to arbitration within three years of the “date on which the” investor “first acquired, or *should have first acquired*, knowledge” of (i) the alleged breach, and (ii) loss or damage incurred by the investor.

35. For purposes of assessing what a claimant should have known, the United States agrees with the reasoning of the *Grand River* Tribunal: “a fact is imputed to [*sic*] person if by exercise of reasonable care or diligence, the person would have known of that fact.” As that Tribunal further explained, it is appropriate to “consider in this connection what a reasonably prudent investor should have done in connection with extensive investments and efforts such as those described to the Tribunal.” Similarly, as the *Berkowitz* Tribunal held, endorsing the reasoning in *Grand River* with respect to the identically worded limitations provision in the CAFTA-DR, “the ‘should have first acquired knowledge’ test . . . is an objective standard; what a prudent claimant should have known or must reasonably be deemed to have known.”

**Article 1139 (Definition of “Investment”)**

36. Article 1139 provides an exhaustive, not illustrative, list of what constitutes an investment for purposes of NAFTA Chapter Eleven.

37. Article 1139(h) includes within the definition of “investment” “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[.]”

38. 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.”

39. Not every economic interest that comes into existence as a result of a contract, however, constitutes an “interest” as defined in Article 1139(h). Article 1139(i) specifically excludes from the definition of “investment” “claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d).” Article 1139(j) likewise excludes “any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h) [of the definition of ‘investment’ in Article 1139].”

#### **Limitations on Loss or Damage**

40. Article 1116(1) allows an investor to recover “loss or damage by reason of, or arising out of” a breach of Chapter Eleven, Section A. In this connection, an investor may recover such damages only to the extent that damages are established on the basis of satisfactory evidence that is not inherently speculative.

41. Moreover, an investor may only recover for loss or damage that the investor incurred in its capacity as an *investor of a Party*. “Investor of a Party” is defined in Article 1139 ...

42. Thus, reading Articles 1101, 1116 and 1139 together, it is clear that an investor may only recover for damages it incurred in its capacity as an investor seeking to make, making, or having made, an investment *in the territory of the other Party*.

43. Finally, the definition of “investment” in Article 1139 also limits the scope of damages available to a NAFTA Chapter Eleven claimant. ...

44. Moreover, Article 1139(h)(ii), ... does not treat “revenues or profits” as “investments” in themselves. Instead, “revenues or profits” are elements of the type of contract that may (as an example) give rise to “interests that arise from the commitment of capital or other resources in the territory” of the respondent State—with the “interests,” not the “revenues or profits,” constituting the “investment” under NAFTA Article 1139. Indeed, without these limitations, any income arising from a claimant’s exports to entities located in the respondent State might improperly be characterized as an “investment” under Article 1139, and under such characterization, all exporters would be free to bring “investment” claims under Chapter Eleven regardless of whether they are making, have made, or seek to make an investment in the territory of the respondent Party. Such claims are not, for the reasons herein provided, covered under Chapter Eleven.

\* \* \* \*

**c. Lion Mexico Consolidated LP v. Mexico**

On June 21, 2019, the United States filed an 1128 submission in the dispute between Lion Mexico Consolidated LP (“LMC”), a Canadian enterprise, and Mexico, in which LMC alleges that the cancellation by Mexican courts of mortgages that guaranteed LMC’s loan-based investment in Mexico violated NAFTA Chapter Eleven Articles 1110 (Expropriation and Compensation) and 1105 (Minimum Standard of Treatment). Excerpts follow from the U.S. submission (with footnotes omitted), which is available in full at <https://www.state.gov/lion-mexico-consolidated-lp-v-united-mexican-states/>.

\* \* \* \*

Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, which is expressly addressed in Article 1105(1), concerns the obligation to provide “fair and equitable treatment.” The “fair and equitable treatment” obligation includes, for example, the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. Other such areas concern the obligation to provide “full protection and security,” which is also expressly addressed in Article 1105(1), and the obligation not to expropriate covered investments, except under the conditions specified in Article 1110. The customary international law obligations not to deny justice and to provide full protection and security are further elaborated immediately below, whereas the obligation concerning expropriation is discussed under the Article 1110 heading.

Claims for Judicial Measures

6. Denial of justice in its historical and “customary sense” denotes “misconduct or inaction of the judicial branch of the government” and involves “some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process.” Aliens have no cause for complaint at international law about a domestic system of law provided that it conforms to “a reasonable standard of civilized justice” and is fairly administered. “Civilized justice” has been described as requiring “[f]air courts, readily open to aliens, administering justice honestly, impartially, [and] without bias or political control[.]”

7. A denial of justice may occur in instances such as when the final act of a State’s judiciary constitutes a “notoriously unjust” or “egregious” administration of justice “which offends a sense of judicial propriety.” ...

8. The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence, the particular nature of judicial action, and the unique status of the judiciary in both international and municipal legal systems. As a result, the actions of domestic courts are accorded a greater presumption of regularity under international law than are legislative or administrative acts. Indeed, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice.

9. In this connection, it is well-established that international tribunals such as NAFTA Chapter Eleven tribunals are not empowered to be supranational courts of appeal on a court's application of domestic law. Thus, an investor's claim challenging judicial measures under Article 1105(1) is limited to a claim for denial of justice under the customary international law minimum standard of treatment. *A fortiori*, domestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law.

*Treatment Must Be Accorded to the Investment*

10. As noted above, Article 1105(1) requires each Party to "accord to investments of investors of another Party *treatment* in accordance with international law, including fair and equitable treatment and full protection and security." (Emphasis added). Article 1105(1) differs from other substantive obligations, such as those in Articles 1102, 1103 and the second paragraph of Article 1105, in that it obligates a Party to accord treatment only to an "*investment*." In the context of a claim for denial of justice under Article 1105(1), a claimant (*i.e.*, an investor) must therefore establish that the treatment accorded to its investment rose to the level of a denial of justice under customary international law.

*Requirement of Judicial Finality*

11. It is well-established that the international responsibility of States may not be invoked with respect to non-final judicial acts, unless recourse to further domestic remedies is obviously futile or manifestly ineffective.

12. In this connection, while it is not controversial that acts of State organs, including acts of State judiciaries, are attributable to the State, there will be a breach of Article 1105(1) based on judicial acts (*e.g.*, a denial of justice) only if the justice system *as a whole* (*i.e.*, until there has been a decision of the court of last resort available) produces a denial of justice. ...

13. As such, non-final judicial acts cannot be the basis for claims under Chapter Eleven of the NAFTA, unless recourse to further domestic remedies is obviously futile or manifestly ineffective. Rather, an act of a domestic court that remains subject to appeal has not ripened into the type of final act that is sufficiently definite to implicate state responsibility, unless such recourse is obviously futile or manifestly ineffective.

14. International tribunals have found that further remedies were obviously futile where there "was no justice to exhaust." It is not enough for a claimant to allege the "absence of a reasonable prospect of success or the improbability of success, which are both less strict tests."

...

Full Protection and Security

\* \* \* \*

17. The United States has consistently maintained, moreover, that the Article 1105(1) obligation to provide "full protection and security" does not, for example, require States to prevent economic injury inflicted by third parties, nor does it require States to guarantee that aliens or their investments are not harmed under any circumstances. Such interpretations would impermissibly extend the duty to provide "full protection and security" beyond the minimum standard under customary international law.

**Article 1110 (Expropriation and Compensation)**

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19. Judicial measures may give rise to a claim for denial of justice under the circumstances described above with respect to Article 1105(1). As previously explained, a denial of justice may exist where there is, for example, an obstruction of access to courts, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. Additional instances of denial of justice have included corruption in judicial proceedings and executive or legislative interference with the freedom of impartiality of the judicial process.

20. Decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants, however, do not give rise to a claim for expropriation under Article 1110(1). Moreover, the United States has not recognized the concept of “judicial takings” as a matter of domestic law.

21. Of course, where a judiciary is not separate from other organs of the State and those organs (executive or legislative) direct or otherwise interfere with a domestic court decision so as to cause an effective expropriation, these executive or legislative acts may form the basis of a separate claim under Article 1110, depending on the circumstances. Were it otherwise, States might seek to evade international responsibility for wrongful acts by using the courts as the conduit of executive or legislative action.

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

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24. In the context of a claim of denial of justice, ... the three-year limitations period set out in Articles 1116(2) and 1117(2) will not begin to run until the date on which the investor or enterprise first acquired, or should have acquired, knowledge that either the breach has occurred – *i.e.*, when all available domestic remedies have been exhausted, unless obviously futile or manifestly ineffective – or the claimant or enterprise has incurred loss or damage, whichever is later.

#### **Article 1121(1)(b) and (2)(b) (Waiver)**

25. Article 1121(1)(b) and (2)(b) requires a waiver of an investor’s (or an investor’s and enterprise’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” Articles 1116 or 1117. The purpose of the waiver provision is to avoid the need for a respondent Party to litigate concurrent and overlapping proceedings in multiple forums, and to minimize not only the risk of double recovery, but also the risk of “conflicting outcomes (and thus legal uncertainty).”

26. Article 1121(1)(b) and (2)(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.

27. It is well-established that the responsibility of a State may not be invoked if “the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.” As discussed above, denial of justice is a claim to which a rule requiring judicial finality, unless obviously futile or manifestly ineffective, does apply, as a substantive element of the claim. Nothing in Article 1121 departs from this rule.

\* \* \* \*

## 2. Non-Disputing Party Submissions under other Trade Agreements

### a. *U.S.-Korea FTA: Seo v. Republic of Korea*

Chapter Eleven of the United States-Korea Free Trade Agreement (“KORUS”) contains provisions designed to protect foreign investors and their investments and to facilitate the settlement of investment disputes. Article 11.20.4 of the KORUS, like Article 1128 of NAFTA, allows for non-disputing Party submissions. On June 19, 2019, the United States made an Article 11.20.4 submission in the dispute brought by Mrs. Seo, a U.S. citizen, alleging that conduct by the Republic of Korea breached Korea’s obligations to accord fair and equitable treatment under KORUS Article 11.5 and expropriated her property in violation of KORUS Article 11.6. Excerpts follow from the U.S. submission, which is available in full at <https://www.state.gov/u-s-korea-fta-investor-state-arbitrations/>.

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### **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.

4. The KORUS contains such expedited review mechanisms in Article 11.20, at subparagraphs 6 and 7...

5. Paragraphs 6 and 7 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 6 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 11.26. Paragraph 6 clarifies that its provisions operate “[w]ithout prejudice to a tribunal’s authority to address other objections as a preliminary question.” Paragraph 6 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 7,

which authorize a respondent, “within 45 days after the tribunal is constituted,” to make an objection under paragraph 6 and any objection that the dispute is not within the tribunal’s competence.

8. Subparagraph (c) states that, for any objection under paragraph 6, 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 7 provides an expedited procedure for deciding preliminary objections, whether permitted by paragraph 6 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 6 and any objection that the dispute is not within the tribunal’s competence.” Paragraph 7 thus modifies the applicable arbitration rules by requiring a tribunal to decide on an expedited basis any paragraph 6 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.

\* \* \* \*

12. As such, when a respondent invokes paragraph 7 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 7 that removes a tribunal’s authority to hear evidence and resolve disputed facts. ...

13. Finally, nothing in the text of paragraph 7 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.

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**b. U.S.-Panama TPA: 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.

As discussed in *Digest 2018* at 453-56, and *Digest 2017* at 500-04, the United States has made three non-disputing Party submissions in *Bridgestone v. Panama*. On July 29 2019, the United States made a fourth submission orally at the hearing in the dispute. Excerpts follow from the fourth (oral) non-disputing Party submission of the United States. A transcript of the U.S. oral submission and the previous written submissions are available at <https://www.state.gov/bridgestone-licensing-services-inc-and-bridgestone-americas-inc-v-the-republic-of-panama/>.

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[T]he United States offers interpretations on three issues: The fair-and-equitable-treatment obligation, including the obligation not to deny Justice; the burden of proof for such a claim; and damages. ...

The first issue I will address is the minimum-standard-of-treatment obligation, which includes fair and equitable treatment, as provided in Paragraph 1 of Article 10.5. That obligation is circumscribed by the customary international law minimum standard of treatment of aliens and does not require treatment in addition to or beyond that standard.

Two provisions of the TPA address this explicitly:

First, Paragraph 2 of Article 10.5 explicitly prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. That paragraph additionally provides that the concept of “fair and equitable treatment” does not require treatment in addition to or beyond that which is required by that standard, and does not create additional substantive rights.

Additionally, Annex 10-A of the TPA, entitled “customary international law,” explains that the Parties view the customary international law obligations referenced in Article 10.5 as resulting from the general and consistent practice of States that they follow from a sense of legal obligation. Thus, the fair-and-equitable-treatment obligation in the TPA is the customary international law obligation.

Turning to denial of justice, as noted by Paragraph 2(a) of the Article 10.5, the obligation not to deny justice is included as part of the concept of fair and equitable treatment. Because the obligation not to deny justice is subsumed within fair and equitable treatment, it is also therefore a customary international law obligation. And this is made clear by Annex 10-A, which, as I just noted, refers to the customary international law obligations in Article 10.5.

The obligations in Paragraph 1 of Article 10.5 apply to covered investments rather than to investors. That is in contrast with other obligations of Section A of Chapter 10, the Investment chapter of the TPA. For example, the obligation to accord national treatment found in Article 10.3 applies to both investors and covered investments, as explicitly provided in Paragraphs 1 and 2 of that Article. Similarly, the obligation to accord most-favored-nation treatment found in Article 10.4 also applies to both investors and covered investments, and likewise the obligation in Article 10.6 Paragraph 1 regarding treatment in case of strife explicitly applies to both investors and covered investments.

So, the Parties to the TPA made deliberate decisions to require that some obligations apply to both investors and covered investments. However, for Article 10.5, the TPA Parties made the decision to extend the obligation only to covered investments. The obligations contained in Paragraph 1 of Article 10.5 including the obligation not to deny justice only apply to treatment accorded to covered investments.

... This means that a denial of justice claim, just like any claim alleging a violation of Paragraph 1 of Article 10.5, may not be arbitrated pursuant to Chapter 10 of the TPA if the Claim is for treatment accorded to an investor rather than a covered investment. ...

...In addition, a Claimant must establish that this treatment failed to meet the standards for denial of justice, which the United States discussed in more detail in its Third Submission in this matter, dated December 7th, 2018, in Paragraphs 2 to 4.

The question then, is how a covered investment is accorded treatment in an adjudicatory proceeding for the purposes of a denial of justice claim. For a claim submitted under Article 10.16, Paragraph 1(a), a Claimant, investor, alleging that the treatment accorded to its covered investment amounted to a denial of justice must establish that the Claimant was, or sought to be but was prohibited from becoming, a party to an adjudicatory proceeding in order for that treatment to result in a denial of justice by virtue of that proceeding.

Alternatively, for a claim submitted under Article 10.16 Paragraph 1(b) on behalf of its covered investment that is an enterprise of the Respondent State that the Investor owns or controls directly or indirectly, a Claimant must establish that the enterprise was, or sought to be but was prohibited from becoming, a party to an adjudicatory proceeding in order for the treatment accorded to result in a denial of justice by virtue of those proceedings.

The United States has also explained this in its recent non-disputing party submission under the U.S.-Peru TPA in *Gramercy Funds Management versus Republic of Peru*, ...

The second issue I will address briefly is the burden of proof for a claim of denial of justice under Article 10.5 of the TPA and applicable rules of international law. ...

General principles of international law concerning the burden of proof in international arbitration provide that a Claimant has the burden of proving its claims, and if a Respondent raises any affirmative defenses, the Respondent must prove such defenses. And the standard of proof is generally a preponderance of the evidence. However, when allegations of corruption are raised, either as part of a claim or part of a defense, the general principles of international law applicable to international arbitration require that the Party asserting that corruption occurred must establish the corruption through “clear and convincing” evidence.

An example of a tribunal that has ruled that the clear and convincing evidence standard is required for findings of corruption is *EDF Services Limited versus Romania* at Paragraph 221 of its Award dated October 8, 2009. And that case is ICSID Case Number ARB/05/13.

The third and last issue I will address is the issue of monetary damages, as that term is used in Paragraph 1(a) of Article 10.26. An investor may recover damages only to the extent that damages are established on the basis of satisfactory evidence that is not inherently speculative. Further, an investor may only recover for loss or damage that the Investor incurred in its capacity as an investor of a party. That means that the Investor may only recover for damages it incurred in its capacity as an investor-seeking to make, making or having made an “investment” in the territory of the other Party. In Article 2.1 of the TPA further defines “covered investment” as an investment within the territory of the other Party. The United States has made a comparable submission on this issue in the context of the NAFTA as an intervenor in Mexico’s action to partially set aside a NAFTA Award in the Court of Appeals for Ontario. That was the case of *Cargill versus Mexico*.

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**c. U.S.-Peru TPA: Gramercy v. Peru**

Chapter Ten of the U.S.-Peru Trade Promotion Agreement (“TPA”) contains provisions similar to those in other trade agreements, to protect investors and facilitate dispute settlement. Article 10.20.2 of the U.S.-Peru TPA, like Article 1128 of NAFTA, allows for non-disputing Party submissions. On June 21, 2019, the United States filed an Article 10.20.2 submission in the dispute *Gramercy v. Peru*. Claimants Gramercy Funds

Management LLC and Gramercy Peru Holdings LLC, incorporated in Delaware, filed a claim against the Government of Peru relating to measures allegedly taken by the government and its courts to diminish the value of agrarian reform bonds that the claimants purchased from Peruvian bondholders between 2006 and 2009. The claimants allege that Peru has violated Articles 10.3 (National Treatment), 10.4 (Minimum Standard of Treatment) and 10.7 (Expropriation) of the United States-Peru Trade Promotion Agreement. The submission is excerpted below (with footnotes omitted) and available in full at <https://www.state.gov/gramercy-v-peru/>.

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### **Article 10.7 (Expropriation)**

20. Article 10.7 of the U.S.-Peru TPA provides that no Party may expropriate or nationalize property (directly or indirectly) except for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate and effective compensation; and in accordance with due process of law. ...

21. If an expropriation does not conform to each of the specific conditions set forth in Article 10.7.1, paragraphs (a) through (d), it constitutes a breach of Article 10.7. ...

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

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

24. With respect to the first factor, an adverse economic impact “standing alone, does not establish that an indirect expropriation has occurred.” It is a fundamental principle of international law that, for an expropriation claim to succeed a claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as “to support a conclusion that the property has been ‘taken’ from the owner.” Moreover, to constitute an expropriation, a deprivation must be more than merely “ephemeral.”

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

the economic value of an investment must be reasonably ascertainable, and not speculative, indeterminate, or contingent on unforeseen or uncertain future events.

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

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

28. Judicial measures applying domestic law may give rise to a claim for denial of justice under Article 10.5 of the Agreement, as described in the next Section of this submission. Decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants do not, however, give rise to a claim for expropriation under Article 10.7.

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

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

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

33. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate, under this two-step approach, that a rule of customary international law exists, most recently in its decision on *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*....

34. The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*. ...

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

*Concepts that have and have not crystallized into the minimum standard*

36. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, expressly addressed in Article 10.5.2(a), concerns the obligation to provide “fair and equitable treatment,” which includes “the

obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.” This obligation, which is addressed in further detail below, encompasses the same guarantees as the “effective means of asserting claims and enforcing rights” provisions found in earlier U.S. treaty practice. The United States removed the “effective means” provision from its investment treaties because it deemed that the customary international law principle prohibiting denial of justice rendered a separate treaty obligation unnecessary.

37. Other areas included within the minimum standard of treatment concern the obligation not to expropriate covered investments except under the conditions specified in Article 10.7, and the obligation to provide “full protection and security,” which, as stated in Article 10.5.2(b), “requires each Party to provide the level of police protection required under customary international law.”

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

39. In addition, the customary international law minimum standard of treatment set forth in Article 10.5.1 does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination. ...

40. The concept of “transparency” also has not crystallized as a component of “fair and equitable treatment” under customary international law giving rise to an independent host-State obligation....

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

#### *Claims Based on Judicial Measures*

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

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

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

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

46. The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence, the particular nature of judicial action, and the unique status of the judiciary in both international and municipal legal systems. As a result, the actions of domestic courts are accorded a greater presumption of regularity under international law than are legislative or administrative acts. Indeed, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice. In this connection, it is well established that international tribunals, such as U.S.-Peru TPA Chapter Ten tribunals, are not empowered to be supranational courts of appeal on a court’s application of domestic law.

47. It is equally well established that the international responsibility of States may not be invoked with respect to non-final judicial acts, unless recourse to further domestic remedies is obviously futile or manifestly ineffective. ...

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### **C. WORLD TRADE ORGANIZATION**

The following discussion of developments in 2019 in select WTO dispute settlement proceedings involving the United States is drawn from Chapter II.D “WTO Dispute Settlement” of the Annual Report of the President of the United States on the Trade Agreements Program (“Annual Report”), released in February 2020 and available at [https://ustr.gov/sites/default/files/2020\\_Trade\\_Policy\\_Agenda\\_and\\_2019\\_Annual\\_Report.pdf](https://ustr.gov/sites/default/files/2020_Trade_Policy_Agenda_and_2019_Annual_Report.pdf). WTO legal texts referred to below are available at [https://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](https://www.wto.org/english/docs_e/legal_e/legal_e.htm).

**1. Disputes brought by the United States****a. *China – Domestic Supports for Agricultural Producers (DS511)***

A panel of the WTO concluded in its February 28, 2019 report that China breached Articles 3.2 and 6.3 of the Agriculture Agreement by exceeding, in each year from 2012 to 2015, its *de minimis* level of support for wheat, Indica rice, and Japonica rice. On April 26, 2019, the Dispute Settlement Body (“DSB”) adopted the panel’s report. The United States and China agreed on March 31, 2020 as the end of a “reasonable period of time” for China to come into compliance with WTO rules. The Annual Report provides background on the dispute at pages 59-60.

**b. *China – Administration of Tariff-Rate Quotas for Certain Agricultural Products (DS517)***

The Annual Report summarizes the background of this dispute at pages 60-61. On April 18, 2019, the panel constituted to hear the dispute circulated its report, finding that China’s administration of tariff-rate quotas (“TRQs”) for wheat, corn, and rice is inconsistent with its obligations. The DSB adopted the panel report on May 28, 2019. The United States and China agreed that the reasonable period of time for China to come into compliance with WTO rules ends February 29, 2020.

**c. *European Union – Measures Concerning Meat and Meat Products (Hormones) (DS26, 48)***

See *Digest 2008* at 562-67 and *II Cumulative Digest 1991-1999* at 1418-20 for background on this long-running dispute. As explained at pages 62-63 of the Annual Report, the United States and EU successfully negotiated a resolution, the August 2, 2019 “*Agreement on the Allocation to the United States of a Share in the Tariff Rate Quota for High Quality Beef Referred to in the Revised MOU Regarding the Importation of Beef from Animals Not Treated with Certain Growth-promoting Hormones and Increased Duties Applied by the United States to Certain Products of the European Union.*” Accordingly, the United States will not reinstate action in connection with the EU’s measures concerning meat and meat products. 84 Fed. Reg. 68,286 (Dec. 13, 2019).

**d. *European Union – Measures Affecting Trade in Large Civil Aircraft (DS316)***

As discussed in *Digest 2018* at 457, *Digest 2016* at 494-95, and *Digest 2011* at 373-74, both the panel and the Appellate Body agreed with U.S. claims that subsidies provided by the EU, France, Germany, Spain, and the United Kingdom to Airbus were inconsistent with WTO obligations. A compliance panel and the Appellate Body subsequently issued decisions in the dispute. Arbitration proceedings regarding the level of countermeasures

resumed in 2018, and on October 2, 2019, determined a commensurate level of countermeasures up to \$7.50 billion annually. A second compliance panel established in 2018 issued its report on December 2, 2019, finding that the EU continued to be in breach of Articles 5(c) and 6.3(a), (b), and (c) of the Agreement on Subsidies and Countervailing Measures (“SCM agreement”), and that the EU and certain Member States had accordingly failed to comply with the DSB recommendations under Article 7.8 of the SCM agreement to “take appropriate steps to remove the adverse effects or ... withdraw the subsidy.” See Annual Report at 66-67. The EU has notified the DSB of its appeal of the second compliance panel’s findings.

**e. *India – Export Related Measures (DS541)***

On October 31, 2019, the panel constituted to hear the dispute brought regarding India’s export subsidy program issued its report. The report finds all of the challenged export subsidy programs to be inconsistent with Articles 3.1 (a) and 3.2 of the SCM agreement. India has notified the DSB of its decision to appeal the panel report. See Annual Report at 69-70.

**2. Disputes brought against the United States**

**a. *Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (DS436)***

As discussed in *Digest 2014* at 474-75, India and the United States both appealed some of the panel’s findings in this dispute regarding U.S. countervailing measures on certain hot-rolled carbon steel flat products from India. The Appellate Body upheld the panel’s findings in part, also reversing in part. In 2018, India requested the establishment of a compliance panel. The Annual Report summarizes further developments in the dispute in 2019 at pages 82-83:

...The compliance Panel circulated its panel report on November 15, 2019. The compliance Panel rejected the majority of India’s claims that the United States failed to bring its countervailing duty determination and injury determination into compliance. The United States prevailed on eight sets of claims, including with respect to [the U.S. Department of Commerce’s or] USDOC’s determination that the National Mineral Development Corporation is a public body, rejection of in-country benchmarks, use of out-of-country benchmarks, the calculation of benefit under the Steel Development Fund program, the inclusion of new subsidies in a review proceeding, disclosure of essential facts, the “appropriateness” of exceeding a terminated domestic settlement rate in a Section 129 proceeding, and all but one aspect of the injury determination. The compliance Panel found in favor of India on one specificity claim and on one injury issue. The compliance Panel also found that the United States’ failure to

amend one portion of the cumulation statute (19 USC § 1677(7)(G)(i)(III)) was inconsistent with the DSB recommendation made in the original proceedings of the dispute.

On December 18, 2019, the United States notified the DSB of its decision to appeal issues of law covered in the report of the compliance Panel and legal interpretations developed by the compliance Panel. Because no division of the Appellate Body can be established to hear this appeal, the United States is conferring with India to seek a positive solution to this dispute.

**b. *Countervailing Duty Measures on Certain Products from China (DS437)***

As discussed in *Digest 2018* at 458 and *Digest 2014* at 475, China challenged certain U.S. countervailing duty determinations in which the U.S. Department of Commerce considered Chinese state-owned enterprises to be public bodies under the SCM agreement. After the Appellate Body partially reversed the first panel's report, and the United States implemented DSB recommendations, the compliance panel requested by China issued its report in 2018. Both the United States and China appealed some of the findings in the compliance panel's report. The Annual Report summarizes developments in 2019 at page 85:

An appellate report was circulated on July 16, 2019. The appellate majority upheld the findings of the compliance Panel. The appellate report includes a lengthy dissent that calls into question the reasoning and interpretative analysis of the appellate majority and prior Appellate Body reports.

The DSB considered the appellate report and the compliance Panel report, as modified by the appellate report, at its meeting on August 15, 2019. The United States noted in its DSB statement that, through the interpretations applied in this proceeding, based primarily on erroneous approaches by the Appellate Body in past reports, the WTO dispute settlement system is weakening the ability of WTO Members to use WTO tools to discipline injurious subsidies. The Subsidies Agreement is not meant to provide cover for, and render untouchable, one Member's policy of providing massive subsidies to its industries through a complex web of laws, regulations, policies, and industrial plans. Finding that the kinds of subsidies at issue in this dispute cannot be addressed using existing WTO remedies, such as countervailing duties, calls into question the usefulness of the WTO to help WTO Members address the most urgent economic problems in today's world economy. The United States noted specific aspects of the findings of the appellate report that are erroneous and undermine the interests of all WTO Members in a fair trading system, including erroneous interpretations of "public body" and out-of-country benchmark, diminishing U.S. rights and adding to U.S. obligations, engaging in fact-finding, and treating prior reports as "precedent."

On October 17, 2019, China requested authorization to suspend concessions and other obligations pursuant to Article 22.2 of the DSU. On

October 25, 2019, the United States objected to China's request, referring the matter to arbitration pursuant to Article 22.6 of the DSU. On November 15, 2019, the WTO notified the parties that the arbitration would be carried out by the panelists who served during the compliance proceeding: Mr. Hugo Perezcano Diaz, Chair; and Mr. Luis Catibayan and Mr. Thinus Jacobsz, Members.

**c. *Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea (DS464)***

As discussed in *Digest 2016* at 496-97, the United States agreed to implement the recommendation of the DSB after it adopted the Appellate Body and panel reports in this dispute. In 2018, the parties went to arbitration before the original panel after Korea requested authorization to suspend concessions. The Annual Report summarizes developments in 2019 at page 87:

The arbitrator circulated its decision on February 8, 2019. The arbitrator determined that the level of nullification or impairment to Korea from U.S. noncompliance with respect to the antidumping and countervailing duty measures on washers totaled no more than \$84.81 million per year, and the arbitrator further specified a formula for calculating the nullification or impairment for products other than washers.

On May 6, 2019, Commerce published a notice in the U.S. *Federal Register* announcing the revocation of the antidumping and countervailing duty orders on washers (84 Fed. Reg. 19,763 (May 6, 2019)). With this action, the United States has completed implementation of the DSB recommendations concerning those antidumping and countervailing duty orders.

**d. *Certain Measures Relating to the Renewable Energy Sector (India) (DS510)***

India brought this dispute concerning domestic content requirements and subsidy measures in the renewable energy programs of certain U.S. state governments. See Annual Report at 90-91. The June 27, 2019 panel report found that some state measures were not within its terms of reference and that other measures were inconsistent with Article III:4 of the GATT 1994. Both the United States and India have notified the DSB of their decisions to appeal.

**3. *Dispute Settlement Understanding***

In 2019, the United States made a series of statements at DSB meetings explaining that, for more than 16 years and across multiple U.S. Administrations, the United States has been raising serious concerns with the Appellate Body's disregard for the rules set by WTO Members and adding to or diminishing rights or obligations under the WTO Agreement. Many WTO Members share these concerns, whether on the mandatory 90-

day deadline for appeals, review of panel fact finding, issuing advisory opinions on issues not necessary to resolve a dispute, the treatment of Appellate Body reports as precedent, or persons serving on appeals after their term has ended. The United States has also explained that when the Appellate Body abused the authority it had been given within the dispute settlement system, it undermined the legitimacy of the system and damaged the interests of all WTO Members who cared about having the agreements respected as they had been negotiated and agreed. If WTO Members support a rules-based trading system, then the Appellate Body must follow the rules to which WTO Members agreed in 1995.

For many years, the United States and other WTO Members have raised repeated concerns about appellate reports going far beyond the text setting out WTO rules in areas as varied as subsidies, antidumping and countervailing duties, standards under the TBT Agreement, and safeguards. Such overreach restricts the ability of the United States to regulate in the public interest or protect U.S. workers and businesses against unfair trading practices.

As a result, the United States was not prepared to agree to launch the process to fill vacancies on the WTO Appellate Body without WTO Members engaging with and addressing these critical issues.

## **D. INVESTMENT TREATIES, TRADE AGREEMENTS AND TRADE-RELATED ISSUES**

### **1. Africa Growth and Opportunity Act**

As previewed in a November 2, 2018 announcement (see *Digest 2018* at 460), the President determined that the Islamic Republic of Mauritania is not making continual progress in meeting the requirements described in section 506A(a)(1) of the Trade Act and terminated the designation of Mauritania as a beneficiary sub-Saharan African country for purposes of section 506A of the Trade Act, effective January 1, 2019. 84 Fed. Reg. 35 (Jan. 7, 2019).

On October 31, 2019, the President provided notice of intent to terminate Cameroon's designation as a beneficiary sub-Saharan African Country under AGOA, effective January 2020. The President took the action in accordance with section 506A(a)(3)(B) of the Trade Act based on his determination "that the Government of Cameroon currently engages in gross violations of internationally recognized human rights, contravening the eligibility requirements of section 104 of the AGOA." See White House message, available at <https://agoa.info/news/article/15683-agoa-eligibility-of-cameroon-message-to-congress-by-the-white-house.html>. The White House message states further:

Cameroon has failed to address concerns regarding persistent human rights violations being committed by Cameroonian security forces. These violations include extrajudicial killings, arbitrary and unlawful detention, and torture.

In a December 26, 2019 proclamation<sup>\*</sup>, the President also determined:

that the Republic of Niger (Niger), the Central African Republic, and the Republic of The Gambia (The Gambia) have not established effective visa systems and related customs procedures meeting the requirements of section 113 of the AGOA (19 U.S.C. 3722), which are required in order for a beneficiary sub-Saharan African country to receive the preferential treatment provided for under section 112(a) of the AGOA (19 U.S.C. 3721(a)). Therefore, Niger, the Central African Republic, and The Gambia are not eligible for the treatment provided for under section 112(a).

Section 112(c) of the AGOA, as amended in section 6002 of the Africa Investment Incentive Act of 2006 (division D, title VI, Public Law 109-432, 120 Stat. 2922, 3190-93 (19 U.S.C. 3721(c))), provides special rules for certain apparel articles imported from “lesser developed beneficiary sub-Saharan African countries.”

## **2. Generalized System of Preferences**

In Proclamation 9902 of May 31, 2019, President Trump modified the list of beneficiary developing countries for purposes of the Generalized System of Preferences (“GSP”), removing India from the list. 84 Fed. Reg. 26,323 (June 5, 2019). The President made the determination to terminate India’s designation pursuant to section 502(d)(1) of the Trade Act of 1974, as amended (the “1974 Act”) (19 U.S.C. 2462(d)(1)), finding that India has not assured the United States that it will provide “equitable and reasonable access” to its markets. India’s designation as a beneficiary developing country terminated effective June 5, 2019, after proper notification to Congress.

In Proclamation 9887 of May 16, 2019, President Trump terminated the designation of Turkey as a beneficiary developing country for purposes of the GSP based on its level of economic development. 84 Fed. Reg. 23,425 (May 21, 2019).

## **3. NAFTA/U.S.-Mexico-Canada Agreement (“USMCA”)**

As discussed in *Digest 2018* at 460-61 and *Digest 2017* at 516, the Trump Administration renegotiated the North American Free Trade Agreement (“NAFTA”) and the United States, Canada, and Mexico signed the Protocol Replacing NAFTA with the Agreement Between the United States of America, the United Mexican States, and Canada (“USMCA”). On December 10, 2019 the three parties reached a compromise agreement that, Secretary Pompeo said, “will bring the United States, Mexico, and Canada closer to passage of the [USMCA].” See December 11, 2019 State Department press statement, available at <https://www.state.gov/on-the-united-states-mexico-canada-agreement/>. On December 19, 2019, the U.S. House of Representatives passed the USMCA. See press

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<sup>\*</sup> Editor’s note: The December 26, 2019 proclamation is Presidential Proclamation No. 9974, 84 Fed. Reg. 72,187 (Dec. 30, 2019).

statement from Secretary Pompeo, available at <https://www.state.gov/milestone-marked-by-u-s-house-of-representatives-passage-of-the-united-states-mexico-canada-agreement/>.\*\*

## E. IMPORT ADJUSTMENTS BASED ON U.S. NATIONAL SECURITY

Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862), as amended, authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security. The President acted pursuant to Section 232 in 2018 with respect to imports of aluminum, steel, and automobiles. Further adjustments were made in 2019.

### 1. Aluminum

As discussed in *Digest 2018* at 462-64, the United States took measures in 2018 to address aluminum imports. On May 19, 2019, in Proclamation 9893, the President excluded Canada and Mexico from the tariffs on aluminum imposed in 2018. 84 Fed. Reg. 23,983 (May 23, 2019). Excerpts follow from Proclamation 9893.

\* \* \* \*

4. The United States has successfully concluded discussions with Canada and Mexico on satisfactory alternative means to address the threatened impairment of the national security posed by aluminum imports from Canada and Mexico. The United States has agreed on a range of measures with Canada and Mexico to prevent the importation of aluminum that is unfairly subsidized or sold at dumped prices, to prevent the transshipment of aluminum, and to monitor for and avoid import surges. These measures are expected to allow imports of aluminum from Canada and Mexico to remain stable at historical levels without meaningful increases, thus permitting the domestic capacity utilization to remain reasonably commensurate with the target level recommended in the Secretary's report. In my judgment, these measures will provide effective, long-term alternative means to address the contribution of these countries' imports to the threatened impairment of the national security.

5. In light of these agreements, I have determined that, under the framework in the agreements, imports of aluminum from Canada and Mexico will no longer threaten to impair the national security, and thus I have decided to exclude Canada and Mexico from the tariff proclaimed in Proclamation 9704, as amended. The United States will monitor the implementation and effectiveness of these measures in addressing our national security needs, and I may revisit this determination as appropriate.

6. In light of my determination to exclude, on a long-term basis, these countries from the tariff proclaimed in Proclamation 9704, as amended, I have considered whether it is necessary

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\*\* Editor's note: The U.S. Senate approved the USMCA on January 16, 2020.

and appropriate in light of our national security interests to make any corresponding adjustments to such tariff as it applies to other countries. I have determined that, in light of the agreed-upon measures with Canada and Mexico, it is necessary and appropriate, at this time, to maintain the current tariff level as it applies to other countries.

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## 2. Steel

As discussed in *Digest 2018* at 464-67, the United States took actions to adjust imports of steel into the United States after an investigation into the effects of such imports on U.S. national security. On May 16, 2019, the President issued Proclamation 9886, reducing the tariff imposed on steel from Turkey from 50 percent to 25 percent. 84 Fed. Reg. 23,421 (May 21, 2019). Excerpts follow from Proclamation 9886.

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6. The Secretary [of Commerce] has now advised me that, since the implementation of the higher tariff under Proclamation 9772, imports of steel articles have declined by 12 percent in 2018 compared to 2017 and imports of steel articles from Turkey have declined by 48 percent in 2018, with the result that the domestic industry's capacity utilization has improved at this point to approximately the target level recommended in the Secretary's report. This target level, if maintained for an appropriate period, will improve the financial viability of the domestic steel industry over the long term.

7. Given these improvements, I have determined that it is necessary and appropriate to remove the higher tariff on steel imports from Turkey imposed by Proclamation 9772, and to instead impose a 25 percent ad valorem tariff on steel imports from Turkey, commensurate with the tariff imposed on such articles imported from most countries. Maintaining the existing 25 percent ad valorem tariff on most countries is necessary and appropriate at this time to address the threatened impairment of the national security that the Secretary found in the January 2018 report.

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On May 19, 2019, the President issued Proclamation 9894, excluding Canada and Mexico from the steel tariffs. 84 Fed. Reg. 23,987 (May 23, 2019). Excerpts follow from Proclamation 9894.

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4. In Proclamation 9705, I further stated that any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country, and noted

that, should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on steel articles imports from that country and, if necessary, adjust the tariff as it applies to other countries, as the national security interests of the United States require.

5. The United States has successfully concluded discussions with Canada and Mexico on satisfactory alternative means to address the threatened impairment of the national security posed by steel articles imports from Canada and Mexico. The United States has agreed on a range of measures with Canada and Mexico to prevent the importation of steel articles that are unfairly subsidized or sold at dumped prices, to prevent the transshipment of steel articles, and to monitor for and avoid import surges. These measures are expected to allow imports of steel articles from Canada and Mexico to remain stable at historical levels without meaningful increases, thus permitting the domestic industry's capacity utilization to continue at approximately the target level recommended in the Secretary's report. In my judgment, these measures will provide effective, long-term alternative means to address the contribution of these countries' imports to the threatened impairment of the national security.

6. In light of these agreements, I have determined that, under the framework in the agreements, imports of steel articles from Canada and Mexico will no longer threaten to impair the national security, and thus I have decided to exclude Canada and Mexico from the tariff proclaimed in Proclamation 9705, as amended. The United States will monitor the implementation and effectiveness of these measures in addressing our national security needs, and I may revisit this determination as appropriate.

7. In light of my determination to exclude, on a long-term basis, Canada and Mexico from the tariff proclaimed in Proclamation 9705, as amended, I have considered whether it is necessary and appropriate in light of our national security interests to make any corresponding adjustments to such tariff as it applies to other countries. I have determined that, in light of the agreed-upon measures with Canada and Mexico, it is necessary and appropriate, at this time, to maintain the current tariff level as it applies to other countries.

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### 3. Automobiles

As discussed in *Digest 2018* at 468, USTR initiated a Section 232 investigation in 2018 into the imports of motor vehicles and automotive parts to determine if those imports threaten to impair U.S. national security. On May 17, 2019, the President issued Proclamation 9888, "Adjusting Imports of Automobiles and Automobile Parts into the United States." 84 Fed. Reg. 23,433 (May 21, 2019). Excerpts follow from Proclamation 9888.

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2. The report found that automotive research and development (R&D) is critical to national security. The rapid application of commercial breakthroughs in automobile technology is necessary for the United States to retain competitive military advantage and meet new defense

requirements. Important innovations are occurring in the areas of engine and powertrain technology, electrification, lightweighting, advanced connectivity, and autonomous driving. The United States defense industrial base depends on the American-owned automotive sector for the development of technologies that are essential to maintaining our military superiority.

3. Thus, the Secretary found that American-owned automotive R&D and manufacturing are vital to national security. Yet, increases in imports of automobiles and automobile parts, combined with other circumstances, have over the past three decades given foreign-owned producers a competitive advantage over American-owned producers.

4. American-owned producers' share of the domestic automobile market has contracted sharply, declining from 67 percent (10.5 million units produced and sold in the United States) in 1985 to 22 percent (3.7 million units produced and sold in the United States) in 2017. During the same time period, the volume of imports nearly doubled, from 4.6 million units to 8.3 million units. In 2017, the United States imported over 191 billion dollars' worth of automobiles.

5. Furthermore, one circumstance exacerbating the effects of such imports is that protected foreign markets, like those in the European Union and Japan, impose significant barriers to automotive imports from the United States, severely disadvantaging American-owned producers and preventing them from developing alternative sources of revenue for R&D in the face of declining domestic sales. American-owned producers' share of the global automobile market fell from 36 percent in 1995 to just 12 percent in 2017, reducing American-owned producers' ability to fund necessary R&D.

6. Because "[d]efense purchases alone are not sufficient to support ... R&D in key automotive technologies," the Secretary found that "American-owned automobile and automobile parts manufacturers must have a robust presence in the U.S. commercial market" and that American innovation capacity "is now at serious risk as imports continue to displace American-owned production." Sales revenue enables R&D expenditures that are necessary for long-term automotive technological superiority, and automotive technological superiority is essential for the national defense. The lag in R&D expenditures by American-owned producers is weakening innovation and, accordingly, threatening to impair our national security.

7. In light of all of these factors, domestic conditions of competition must be improved by reducing imports. American-owned producers must be able to increase R&D expenditures to ensure technological leadership that can meet national defense requirements.

8. The Secretary found and advised me of his opinion that automobiles and certain automobile parts are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States. ...

9. The Secretary therefore concluded that the present quantities and circumstances of automobile and certain automobile parts imports threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962, as amended.

10. In reaching this conclusion, the Secretary considered the extent to which import penetration has displaced American-owned production, the close relationship between economic welfare and national security, *see* 19 U.S.C. 1862(d), the expected effect of the recently negotiated United States-Mexico-Canada Agreement (USMCA), and what would happen should the United States experience another economic downturn comparable to the 2009 recession.

11. In light of the report's findings, the Secretary recommended actions to adjust automotive imports so that they will not threaten to impair the national security. One recommendation was to pursue negotiations to obtain agreements that address the threatened impairment of national security. In the Secretary's judgment, successful negotiations could allow

American-owned automobile producers to achieve long-term economic viability and increase R&D spending to develop cutting-edge technologies that are critical to the defense industry.

12. I concur in the Secretary's finding that automobiles and certain automobile parts are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States, and I have considered his recommendations.

13. I have also considered the renegotiated United States-Korea Agreement and the recently signed USMCA, which, when implemented, could help to address the threatened impairment of national security found by the Secretary.

14. Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to take action to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security. If that action is the negotiation of an agreement contemplated in 19 U.S.C. 1862(c)(3)(A)(i), and such an agreement is not entered into within 180 days of the proclamation or is not being carried out or is ineffective, then the statute authorizes the President to take other actions he deems necessary to adjust imports and eliminate the threat that the imported article poses to national security. *See* 19 U.S.C. 1862(c)(3)(A).

15. I have decided to direct the United States Trade Representative (Trade Representative) to pursue negotiation of agreements contemplated in 19 U.S.C. 1862(c)(3)(A)(i) to address the threatened impairment of the national security with respect to imported automobiles and certain automobile parts from the European Union, Japan, and any other country the Trade Representative deems appropriate, and to update me on the progress of such negotiations within 180 days. ...

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## **F. OTHER ISSUES**

### **1. Foreign Account Tax Compliance Act**

On July 8, 2019, the U.S.-Costa Rica Agreement to Improve International Tax Compliance and to Implement the Foreign Account Tax Compliance Act ("FATCA"), with Supplemental Agreement, entered into force. The Costa Rica FATCA agreement was signed at San Jose March 20, 2019 and is available at <https://www.state.gov/costa-rica-19-708-agreement-to-improve-international-tax-compliance-and-to-implement-fatca-with-supplemental-agreement/>.

On July 17, 2019, the U.S.-Armenia Agreement for Cooperation to Facilitate the Implementation of FATCA entered into force. The Armenia FATCA agreement was signed at Yerevan on February 12, 2018. The full text of the agreement is available at <https://www.state.gov/armenia-19-717-agreement-for-cooperation-to-facilitate-the-implementation-of-the-foreign-account-tax-compliance-act/>.

On July 17, 2019, the U.S.-Dominican Republic Agreement for Cooperation to Facilitate the Implementation of FATCA entered into force. The Dominican Republic FATCA agreement was signed at Santo Domingo on September 15, 2016. The full text of

the agreement is available at <https://home.treasury.gov/system/files/131/FATCA-Agreement-DominicanRepublic-9-15-2016.pdf>.

On August 12, 2019, the Dominica FATCA agreement entered into force. The agreement was signed at Bridgetown and Roseau June 7 and 15, 2018. The text is available at <https://www.state.gov/dominica-19-812>.

On September 9, 2019, the U.S.-Tunisia Agreement for Cooperation to Facilitate the Implementation of FATCA entered into force. The Tunisia FATCA agreement was signed at Tunis on May 13, 2019. The full text of the agreement is available at <https://home.treasury.gov/system/files/131/FATCA-Agreement-Tunisia-5-13-2019.pdf>.

On November 18, 2019, the U.S.-Ukraine Agreement for Cooperation to Facilitate the Implementation of FATCA entered into force. The Ukraine FATCA agreement was signed at Kyiv on February 7, 2017. The full text of the agreement is available at <https://home.treasury.gov/system/files/131/FATCA-Agreement-Ukraine-2-07-2017.pdf>.

## **2. Tax Treaties**

The Protocol Amending the November 6, 2003 Convention on Double Taxation with Japan, signed at Washington January 24, 2013, entered into force August 30, 2019. The protocol was transmitted by the President of the United States of America to the Senate on April 13, 2015 (Treaty Doc. 114-1, 114th Congress, 1st Session). See *Digest 2015* at 486-87. It was reported favorably by the Senate Committee on Foreign Relations July 10, 2019 (Senate Executive Report No. 116-3, 116th Congress, 1st Session). Senate advice and consent to ratification was provided on July 17, 2019. The protocol was ratified by the President of the United States on August 5, 2019 and by Japan on August 27, 2019. The exchange of instruments of ratification occurred at Tokyo on August 30, 2019. The full text is available at <https://www.state.gov/japan-19-830>.

See Chapter 4 regarding other tax treaties that received Senate advice and consent to ratification in 2019 (with Spain, Switzerland, and Luxembourg).

## **3. U.S. Opposition to Nord Stream 2**

See discussion in Chapter 16 of the Protecting Europe's Energy Security Act of 2019 ("PEESA"), authorizing sanctions on persons with respect to providing vessels for the construction of the Nord Stream 2 pipeline, pursued by Russia in order to bypass Ukraine for gas transit to Europe, and opposed by the United States and a plurality of European countries.

## **4. Telecommunications**

On November 27, 2019, the State Department issued a media note regarding U.S. participation in the World Radiocommunication Conference held in Egypt from October 28 to November 22, 2019 ("WRC-19"). The media note is available at

<https://www.state.gov/conclusion-of-the-world-radiocommunication-conference-2019/> and excerpted below.

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Agreements reached at WRC-19 will help pave the way for the global harmonization of 5G, and the development of an ecosystem of applications and services that will fuel the growth of the digital economy for years to come. WRC-19 successfully identified over 15 GHz of globally harmonized millimeter wave spectrum for 5G, plus additional spectrum for 5G on a regional or country basis.

These decisions reinforce U.S. leadership in 5G, with successful outcomes in the 26 GHz, 40 GHz, and 47 GHz bands all aligning with actions already taken by the United States in its own aggressive 5G spectrum rollout. With this groundwork set, the world can now benefit from global roaming and economies of scale while permitting flexibility in 5G deployment.

WRC-19 also advanced a forward-looking framework for 5G and satellite services, including critical passive weather systems, to coexist without limiting the opportunities and benefits of 5G and incumbent services. The Conference reached consensus on additional agenda items covering a range of new technologies and services, from enabling our commercial space sector through growth of next generation non-geosynchronous orbit satellite constellations to innovative infrastructure platforms that keep us connected in the air and at sea.

Given how critical spectrum-enabled technologies and services are to our economy, we welcome the consensus reached in discussions on spectrum allocation and emerging technologies. At WRC-19, the United States reinforced American leadership in 5G and innovation in spectrum-based technologies.

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## 5. Intellectual Property

### a. *Special 301 Report*

The “Special 301” Report is an annual congressional report that in effect reviews 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 2019 Special 301 Report in April 2019. The Report is available at [https://ustr.gov/sites/default/files/2019\\_Special\\_301\\_Report.pdf](https://ustr.gov/sites/default/files/2019_Special_301_Report.pdf). The 2019 Report lists the following countries on the Priority Watch List: Algeria, Argentina, Chile, China, India, Indonesia, Kuwait, Russia, Saudi Arabia, Ukraine, and Venezuela. It lists the following on the Watch List: Barbados, Bolivia, Brazil, Canada, Columbia, Costa Rica, Dominican Republic, Ecuador, Egypt, Greece, Guatemala, Jamaica, Lebanon, Mexico, Pakistan, Paraguay, Peru, Romania, Switzerland, Thailand, Turkey, Turkmenistan, the United Arab Emirates, Uzbekistan, and Vietnam. See *Digest 2007* at 605–7 and the *2019 Special 301 Report* at 5-11 and Annex 1 for additional background on the watch lists.

**b. *Investigation of China’s Policies on Technology Transfer, IP and Innovation***

As discussed in *Digest 2018* at 475-77, USTR determined that China’s laws, policies, practices, and actions related to technology transfer, IP, and innovation are actionable under section 301 of the Trade Act of 1974, as amended, (the “Act”) (19 U.S.C. 2411) and the United States imposed tariffs on certain goods imported from China. The tariff rate for certain categories of goods was modified in a notice published on May 9, 2019 from 10 percent to 25 percent. 84 Fed. Reg. 20,459 (May 9, 2019). Additional goods were included in the 301 action on August 20, 2019. 84 Fed. Reg. 43,304 (Aug. 20, 2019). The rate for the goods identified on August 20, 2019 was modified (from ten percent to 15 percent) on August 30, 2019. 84 Fed. Reg. 45,821 (Aug. 30, 2019). USTR employed a product exclusion process under which several exclusions were granted. See, e.g., 84 Fed. Reg. 21,389 (May 14, 2019); 84 Fed. Reg. 25,895 (June 4, 2019); 84 Fed. Reg. 29,576 (June 24, 2019); 84 Fed. Reg. 32,821 (July 9, 2019); 84 Fed. Reg. 37,381 (July 31, 2019).

**c. *Investigation of France’s Digital Services Tax***

On July 10, 2019, USTR initiated an investigation on the Digital Services Tax (“DST”) under consideration by the Government of France. 84 Fed. Reg. 34,042 (July 16, 2019). The Section 301 Committee held public hearings and received public comments as part of this investigation. According to the Federal Register notice, there was evidence that France’s proposed DST would target large, U.S.-based tech companies. *Id.* USTR’s investigation initially focused on concerns that the DST would discriminate against U.S. companies; the retroactivity of the tax to January 1, 2019; and the extraterritoriality and other apparent unreasonableness of the tax within the international tax system. *Id.* at 34,043.

**d. *Marrakesh Treaty***

See Chapter 4 regarding U.S. ratification of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

**e. *Texas Advanced case regarding extraterritoriality of U.S. IP law***

On May 21, 2019, the United States filed a brief in the U.S. Supreme Court opposing the petition for certiorari in *Texas Advanced Optoelectronic Solutions, Inc. v. Renesas Electronics America, Inc.*, No. 18-600. On June 24, 2019, the petition was denied. Excerpts follow from the U.S. brief.

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Any person who “without authority \* \* \* offers to sell \* \* \* any patented invention[ ] within the United States” is liable for infringement under 35 U.S.C. 271(a). The geographic scope of this clause is subject to three possible interpretations. Section 271(a) might be read to establish infringement liability for (1) an offer made anywhere to sell a patented invention within the United States; (2) an offer made within the United States to sell an invention anywhere; or (3) an offer made within the United States to sell an invention within the U.S. market.

The Federal Circuit has adopted the first of those interpretations. See *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Contractors USA, Inc.*, 617 F.3d 1296 (2010); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 769 F.3d 1371 (2014), vacated and remanded on other grounds, 136 S. Ct. 1923 (2016); pp. 3-4, *supra*. Petitioner advocates the second interpretation. See Pet. 16-19. In the view of the United States, however, the third interpretation, which requires a domestic offer for a domestic sale, is the best construction of the “offers to sell” clause. The Federal Circuit therefore was correct in this case when it held that respondent is not liable for infringement on its offer to make the 98.8% of sales that occurred outside the U.S. market.

Interpreting Section 271(a) to require both a domestic offer and a contemplated sale within the United States is the most reasonable construction of that provision’s text in light of the surrounding statutory context, applicable canons of construction, and this Court’s presumption against extraterritorial application of U.S. law. “The presumption that United States law governs domestically but does not rule the world applies with particular force in patent law.” *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454-455 (2007). The Patent Act grants exclusive rights “only over the United States market” for the patented invention; U.S. law does not regulate sales in foreign markets. *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 523 (1972); *id.* at 531. Petitioner’s understanding of Section 271(a)’s “offers to sell” clause is especially problematic because that interpretation would make it unlawful to offer to perform an act—the sale of a U.S.-patented invention in a foreign market—that does not violate U.S. law and may not violate the foreign country’s law.

Although the government does not agree with the Federal Circuit’s interpretation of Section 271(a) in all respects, the court’s rule produces the correct result in a case like this one, where a defendant offers in the United States to make sales in a foreign market. And this case does not present an opportunity for the Court to address the converse scenario that was at issue in *Transocean*, where a defendant makes an offer abroad to undertake sales within the United States. The petition for a writ of certiorari therefore should be denied.

\* \* \* \*

## 6. Application of U.S. Securities Law to Purchases of Interests in Foreign Companies

On May 20, 2019, the United States filed an amicus brief in the U.S. Supreme Court in *Toshiba Corp. v. Automotive Indus. Pension Trust Fund*, No. 18-486. The issue in the case is whether Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), applies to domestic purchases of American Depositary Receipts (“ADRs”) for shares in Toshiba, a foreign corporation. Toshiba admitted certain fraudulent accounting practices, prompting a class action lawsuit alleging violations of Section 10(b) and Rule 10b-5 of the Securities and Exchange Commission (“SEC” or “Commission”), 17 C.F.R. 240.10b-5.

In 2010, the Supreme Court held that § 10(b) does not apply extraterritorially and, therefore, does not provide a cause of action for foreign plaintiffs to sue foreign and American companies in U.S. courts for misconduct in connection with securities traded on foreign exchanges. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010). See *Digest 2010* at 504-09. The U.S. brief, excerpted below (with record citations and most footnotes omitted), recommends that the Supreme Court deny certiorari to allow the district court to consider an amended complaint on remand, as directed by the court of appeals. The U.S. brief explains that the court of appeals correctly applied the decision in *Morrison* to find that the claims in the *Toshiba* case could constitute a permissible domestic application of Section 10(b).

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The court of appeals correctly held that respondents' claims involve a permissible domestic application of Section 10(b), and the court correctly remanded for amendment of the complaint and further analysis of whether respondents can adequately allege fraud by petitioner "in connection with" respondents' unsponsored-ADR purchases. Petitioner's contrary arguments are inconsistent with *Morrison*, the text of Section 10(b), and subsequent developments in this Court and Congress.

***1. The court of appeals correctly applied Morrison***

a. Federal statutes "apply only within the territorial jurisdiction of the United States" unless "a contrary intent appears." *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949). Until this Court decided *Morrison*, lower courts generally had agreed that the "text of Section 10(b) sheds little light on when a transnational securities fraud falls within the statute's substantive prohibition." U.S. Amicus Br. at 13, *Morrison*, *supra* (No. 08-1191) (U.S. *Morrison* Br.). Rather than applying the presumption against extraterritoriality, courts "sought to ascertain Section 10(b)'s transnational reach by considering" perceived congressional intent. *Id.* at 15; see, e.g., *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1337 (2d Cir. 1972) (Friendly, J.). The courts "uniformly agreed that Section 10(b) can apply to a transnational securities fraud either when fraudulent conduct has effects in the United States or when sufficient conduct relevant to the fraud occurs in the United States." U.S. *Morrison* Br. at 15. That approach was called the "conduct-and-effects test." *Morrison*, 561 U.S. at 275 (Stevens, J., concurring in the judgment).

In *Morrison*, the Court considered whether Section 10(b) applied to an alleged fraud involving misstatements, made by the Florida subsidiary of an Australian bank, that were reflected in the bank's financial statements and relied on by Australian investors who purchased the bank's shares on the Australian Stock Exchange. 561 U.S. at 251-253. In deciding that question, the Court thoroughly repudiated the conduct-and-effects test. *Id.* at 255-261. The Court explained that the test "disregard[ed] \* \* \* the presumption against extraterritoriality," was "not easy to administer," and had produced "unpredictable and inconsistent" results. *Id.* at 255, 258, 260. The Court instead relied exclusively on the text of the statute, found "no affirmative indication \* \* \* that § 10(b) applies extraterritorially," and "therefore conclude[d] that it does not." *Id.* at 265.

The Court then considered the argument that the claims involving alleged misstatements by the Florida subsidiary of the Australian bank "seek no more than domestic application" of

Section 10(b). *Morrison*, 561 U.S. at 266. In rejecting that contention, the Court stated that “the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States.” *Ibid.* The Court explained that “Section 10(b) does not punish deceptive conduct, but only deceptive conduct ‘in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.’” *Ibid.* (quoting 15 U.S.C. 78j(b)). Accordingly, the Court concluded, “it is \* \* \* only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies.” *Id.* at 267.<sup>5</sup>

In subsequent decisions, the Court has confirmed *Morrison*’s approach to identifying the permissible “domestic application[s] of [a] statute” that does not apply extraterritorially. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016). Courts “do this by looking to the statute’s ‘focus.’” *Ibid.* “If the conduct relevant to the statute’s focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad.” *Ibid.* By contrast, “if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.” *Ibid.*; see *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018) (“[If] the conduct relevant to [the statute’s] focus occurred in United States territory \* \* \*, then the case involves a permissible domestic application of the statute.”) (citation omitted).

b. The court of appeals correctly applied *Morrison* to respondents’ claims. The *Morrison* Court concluded that, because the text of Section 10(b) “exclusively focuses on ‘domestic purchases and sales,’” the provision applies only to “domestic transactions” in securities. The court of appeals construed that holding to require it “to examine the location of the transaction”—respondents’ purchase of the unsponsored Toshiba ADRs. Given the absence of any dispute that those ADRs “were purchased in the United States,” the court correctly held that respondents’ claims did not seek an impermissible extraterritorial application of Section 10(b).

Petitioner’s core contention below was that “the existence of a domestic transaction is necessary but not sufficient under *Morrison*.” In petitioner’s view, a permissible domestic application of Section 10(b) also requires a “connection between” the defendant and domestic “transactions.” *Ibid.* As the court of appeals correctly explained, that assertion conflates the question whether Section 10(b) *applies* with the question whether it has been *violated*. *Id.* at 32a. Respondents can ultimately obtain relief only if they show that petitioner engaged in fraud “in connection with the purchase or sale of” a security. 15 U.S.C. 78j(b). But the fact “that [petitioner] may ultimately be found not liable for causing the loss in value to the ADRs does not mean that [Section 10(b)] is inapplicable to the transactions.”

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<sup>5</sup> The *Morrison* litigation initially involved claims by “an American investor in [the bank’s] ADRs.” 561 U.S. at 252 n.1. Those claims were not before this Court. *Ibid.* The bank, however, conceded that “the securities law extends to protect domestic investors who purchase securities in domestic markets,” including investors “who purchased the [bank’s] ADRs.” *In re National Austl. Bank Sec. Litig.*, No. 03-cv-6537, 2006 WL 3844465, at \*2 n.6 (S.D.N.Y. Oct. 25, 2006); see Resps. Br. at 9, 51, *Morrison, supra* (No. 08-1191). And in holding that applying Section 10(b) to the Australian transactions would be impermissibly extraterritorial, the Court was careful to distinguish the domestic ADR purchases. See 561 U.S. at 273 (“This case involves no securities listed on a domestic exchange, and all aspects of the purchases complained of by those petitioners who still have live claims occurred outside the United States.”).

In arguing that a defendant's connection (or lack thereof) to the relevant securities transaction bears on the extraterritoriality analysis, *Morrison*, 561 U.S. at 266-267, petitioner seeks to revisit *Morrison*'s holding as to the "focus" of Section 10(b). The *Morrison* Court explained that "the focus of the Exchange Act"—the "object[] of the statute's solicitude"—was not on the "deceptive conduct" of the defendant, but on "purchases and sales of securities in the United States." *Id.* at 266; see *RJR Nabisco*, 136 S. Ct. at 2100 ("[*Morrison*] concluded that the statute's focus is on domestic securities transactions."). That was not the only conceivable reading of the statute; the government argued that Section 10(b) should apply when the case involves "significant conduct in the United States that is material to" a fraudulent transaction abroad. *Morrison*, 561 U.S. at 270 (quoting U.S. *Morrison* Br. at 16). But the Court rejected that interpretation, holding instead that Section 10(b)'s "exclusive focus [is] on domestic purchases and sales." *Id.* at 268. Petitioner's argument here is irreconcilable with that square holding. Because the "conduct in this case that is relevant to [Section 10(b)]'s focus clearly occurred in the United States," the claims involve a "domestic application" of the statute. *Western-Geco*, 138 S. Ct. at 2138.

c. Relying on passages in *Parkcentral*, several of petitioner's amici contend that, even when a particular suit involves domestic securities transactions, application of Section 10(b) will still be impermissibly extraterritorial unless the defendant has engaged in some degree of domestic conduct with respect to the transaction. . . . The *Parkcentral* court relied on amorphous and atextual presumptions about Congress's intent, and it acknowledged that its approach would not "reliably determine when a particular invocation of § 10(b) will be deemed appropriately domestic or impermissibly extraterritorial," 763 F.3d at 216-217, thus replicating several principal defects that this Court identified in earlier Second Circuit law, see *Morrison*, 561 U.S. at 258-259. . . . The Ninth Circuit in this case rightly declined the invitation to adopt a repackaged version of the conduct-and-effects test that the *Morrison* Court had rejected, and that raises the same practical concerns as the lower courts' pre-*Morrison* approach.

Efforts to reintroduce the conduct-and-effects test also contradict Congress's judgment. Shortly after the decision in *Morrison*, Congress amended the Exchange Act to codify the conduct-and-effects test in actions brought by the SEC or the Justice Department. . . . *SEC v. Scoville*, 913 F.3d 1204, 1215 (10th Cir. 2019). Applying a conduct-and-effects test to private securities-fraud actions would negate Congress's decision to limit that amendment to government enforcement suits. Cf., e.g., *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted; brackets in original).

***2. The court of appeals correctly remanded this case to allow the district court to determine whether respondents can adequately allege a Section 10(b) violation***

After correctly holding that respondents' claims involve a permissible domestic application of Section 10(b), the court of appeals correctly remanded to the district court to address whether respondents can adequately allege a violation of Section 10(b). In particular, the court noted that Section 10(b) requires an allegation that a defendant's fraud was "in connection with" the securities transaction that underlies the claim. *Id.* at 34a (quoting 15 U.S.C. 78j(b)).

Here, Section 10(b) requires respondents to allege and ultimately prove that petitioner "use[d]" or "employ[ed]" its fraudulent accounting practices "in connection with" respondent's purchase of the unsponsored ADRs in the United States. 15 U.S.C. 78j(b); see, e.g., *SEC v. Zandford*, 535 U.S. 813, 819-820 (2002). The court of appeals held that respondents have not yet

made adequate allegations on this point. And many of the strongest arguments advanced by petitioner and its amici against allowing this suit to go forward, although currently framed as grounds for concluding that application of Section 10(b) to these facts would be impermissibly extraterritorial, may be more persuasive in challenging respondents' efforts to satisfy the "in connection with" requirement. ... In particular, the distinction between sponsored and unsponsored ADRs, while irrelevant to the determination whether respondents' ADR purchases were "domestic" for purposes of *Morrison*, 561 U.S. at 267, may be relevant to whether petitioner "use[d]" or "employe[d]" fraudulent accounting practices "in connection with" respondents' purchases of the unsponsored ADRs, 15 U.S.C. 78j(b). For example, if petitioner can show that it "ch[ose] to list and transact [its] securities only in foreign markets precisely to avoid U.S. securities regulation and litigation," it would be more difficult for respondents to prove that petitioner's accounting fraud was "in connection with" domestic ADR purchases.

To succeed on their claims, moreover, private securities-fraud plaintiffs like respondents also must establish materiality, scienter, reliance, and loss causation. See *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-342 (2005). Petitioner's contention that it had no involvement in the unsponsored ADRs at issue here may be relevant to those elements of respondents' cause of action. For example, the loss-causation inquiry is based on common-law proximate-causation principles, *id.* at 344-345, which require consideration of the directness of the link between the defendant's conduct and the plaintiff's injury, see *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992), as well as the foreseeability of the harm, see *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 532-533 (1983). Respondents therefore must demonstrate that the injuries they suffered were not impermissibly indirect and were foreseeable results of petitioner's conduct. Although the United States takes no position on whether respondents can satisfy those requirements, the need for those additional inquiries further belies petitioner's predictions that the decision below will have extreme practical effects.

\* \* \* \*

## **7. Presidential Permits**

### **a. New Executive Order on Presidential Permits**

On April 10, 2019, the President issued Executive Order 13867, "Issuance of Permits with Respect to Facilities and Land Transportation Crossings at the International Boundaries of the United States." 84 Fed. Reg. 15,491 (Apr. 15, 2019). E.O. 13867 revokes the prior executive orders (E.O. 11423 and E.O. 13337) that governed the delegation of authority to the Secretary to issue or deny permits on the basis of a national interest determination. Under the new E.O., the Secretary still is designated to receive permit applications and prepares a foreign policy recommendation for the President, who has the sole authority to issue or deny a permit. Excerpts follow from E.O. 13867.

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\* \* \* \*

**Section 1. Purpose.** Presidents have long exercised authority to permit or deny the construction, connection, operation, or maintenance of infrastructure projects at an international border of the United States (cross-border infrastructure). Over the course of several decades, executive actions, Federal regulations, and policies of executive departments and agencies (agencies) related to the process of reviewing applications for Presidential permits, and issuing or denying such permits, have unnecessarily complicated the Presidential permitting process, thereby hindering the economic development of the United States and undermining the efforts of the United States to foster goodwill and mutually productive economic exchanges with its neighboring countries. To promote cross-border infrastructure and facilitate the expeditious delivery of advice to the President regarding Presidential permitting decisions, this order revises the process for the development and issuance of Presidential permits covering the construction, connection, operation, and maintenance of certain facilities and land transportation crossings at the international boundaries of the United States.

**Sec. 2. Cross-Border Infrastructure Presidential Permit Application Procedures.** (a) The Secretary of State shall adopt procedures to ensure that all actions set forth in subsections (b) through (h) of this section can be completed within 60 days of the receipt of an application for a Presidential permit for the types of cross-border infrastructure identified in subsection (b) of this section.

(b) Except with respect to facilities covered by Executive Order 10485 of September 3, 1953 (Providing for the Performance of Certain Functions Heretofore Performed by the President With Respect to Electric Power and Natural Gas Facilities Located on the Borders of the United States), as amended, and section 5(a) of Executive Order 10530 of May 10, 1954 (Providing for the Performance of Certain Functions Vested in or Subject to the Approval of the President), the Secretary of State is hereby designated to receive all applications for the issuance or amendment of Presidential permits for the construction, connection, operation, or maintenance, at the international boundaries of the United States, of:

- (i) pipelines, conveyor belts, and similar facilities for exportation or importation of all products to or from a foreign country;
- (ii) facilities for the exportation or importation of water or sewage to or from a foreign country;
- (iii) facilities for the transportation of persons or things, or both, to or from a foreign country;
- (iv) bridges, to the extent that congressional authorization is not required;
- (v) similar facilities above or below ground; and
- (vi) border crossings for land transportation, including motor and rail vehicles, to or from a foreign country, whether or not in conjunction with the facilities identified in subsection (b)(iii) of this section.

(c) Upon receipt of an application pursuant to subsection (b) of this section, the Secretary of State may:

- (i) request additional information from the applicant that the President may deem necessary; and
- (ii) refer the application and pertinent information to heads of agencies specified by the President.

(d) The Secretary of State shall, as soon as practicable after receiving an application pursuant to subsection (b) of this section, advise the President as to whether the President should request the opinion, in writing, of any heads of agencies concerning the application and any

related matter. Any agency heads whose opinion the President requests shall provide views and render such assistance as may be requested, consistent with their legal authority, in a timely manner, not to exceed 30 days from the date of a request, unless the President otherwise specifies.

(e) With respect to each application, the Secretary of State may solicit such advice from State, tribal, and local government officials, and foreign governments, as the President may deem necessary. The Secretary shall seek responses within no more than 30 days from the date of a request.

(f) Upon receiving the views and assistance described in subsections (c), (d), and (e) of this section, the Secretary of State shall consider whether additional information may be necessary in order for the President to evaluate the application, and the Secretary shall advise the President accordingly. At the direction of the President, the Secretary shall request any such additional information.

(g) If, at the conclusion of the actions set forth in subsections (b) through (f) of this section, the Secretary of State is of the opinion that the issuance of a Presidential permit to the applicant, or the amendment of an existing Presidential permit, would not serve the foreign policy interests of the United States, the Secretary shall so advise the President, and provide the President with the reasons supporting that opinion, in writing.

(h) If, at the conclusion of the actions set forth in subsections (b) through (f) of this section, the Secretary of State is of the opinion that the issuance of a Presidential permit to the applicant, or the amendment of an existing Presidential permit, would serve the foreign policy interests of the United States, the Secretary shall so advise the President, and provide the President with the reasons supporting that opinion, in writing.

(i) Any decision to issue, deny, or amend a permit under this section shall be made solely by the President.

(j) The Secretary of State shall, consistent with applicable law, review the Department of State's regulations and make any appropriate changes to them to ensure consistency with this order by no later than May 29, 2020.

(k) Executive Order 13337 of April 30, 2004 (Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States), and Executive Order 11423 of August 16, 1968 (Providing for the Performance of Certain Functions Heretofore Performed by the President With Respect to Certain Facilities Constructed and Maintained on the Borders of the United States), as amended, are hereby revoked.

**Sec. 3. Existing Permits.** All permits heretofore issued pursuant to the orders enumerated in section 2(k) of this order, and in force at the date of this order, shall remain in full effect in accordance with their terms unless and until modified, amended, suspended, or revoked by the appropriate authority.

\* \* \* \*

**b. *Keystone XL pipeline***

For background on the State Department's consideration of the application for a permit for the proposed Keystone XL pipeline (which dates back to the original application in 2008), see *Digest 2018* at 478-85, *Digest 2017* at 518-19, *Digest 2016* at 509-11, and *Digest 2015* at 502. On March 29, 2019, the President issued a permit authorizing

TransCanada Keystone Pipeline, L.P., to construct, connect, operate, and maintain pipeline facilities at the international boundary between the United States and Canada. 84 Fed. Reg. 13,101 (Apr. 3, 2019). The 2019 permit supersedes and revokes a permit authorizing similar activities that the State Department had issued in 2017. In December 2019, the Department, consistent with the National Environmental Policy Act (“NEPA”) of 1969, published a Final Supplemental Environmental Impact Statement (“EIS”) addressing the Keystone XL pipeline. The Notice of Availability for the Final Supplemental EIS for the Keystone XL Pipeline was published in the Federal Register by the Environmental Protection Agency (“EPA”) on December 20, 2019. 84 Fed. Reg. 70,187 (Dec. 20, 2019).

## **8. 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, i.e. rough diamonds sold by rebel groups or their allies to fund conflict against legitimate governments. 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.

Consistent with prior practice, the United States sent a delegation to the 2019 Kimberley Process Plenary in New Delhi, India, November 18-22, 2019. See November 25, 2019 State Department media note on the conclusion of the plenary, available at <https://www.state.gov/conclusion-of-the-2019-kimberley-process-plenary/>. The outcome of the plenary is summarized in the media note as follows:

The KP reform process did not reach consensus on a new, expanded definition of conflict diamonds that would include violence by a broader set of actors, including state security forces. The United States is committed to a strong and sustainable diamond industry and has expressed concern that the current definition’s limited focus on rebel groups does not sufficiently protect the legitimacy of the rough diamond supply chain.

The United States worked closely with the Central African Republic (CAR) Government and other KP members to make limited provisional modifications to the current KP oversight mechanism focused on the CAR. Under these modifications, the CAR Government can now export rough diamonds from the eight KP-compliant zones in the western CAR at will. The exports will be subject to quarterly reviews by the KP CAR Monitoring Team. In addition, importers must notify the Monitoring Team when they receive rough diamonds from CAR. Due to lack of government control and widespread rebel activity in the east, KP-compliant exports from eastern CAR are not possible.

International endorsement for due diligence and responsible sourcing with respect to natural resources such as diamonds has been expressed in the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, the Lusaka Declaration pertaining to responsible treatment of natural resources in Africa, and the UN Guiding Principles on Business and Human Rights. The United States continues to encourage our partners to express positions in the KP that reflect these endorsements.

**b. *Business and Human Rights***

See Chapter 6.

**9. *Committee on Foreign Investment in the United States***

As discussed in *Digest 2018* at 486-87, the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”) updated and strengthened the authorities of the Committee on Foreign Investment in the United States (“CFIUS”). Section 1727 of FIRRMA established that CFIUS should have implementing regulations in place no later than 18 months after its August 13, 2018 date of enactment. On September 17, 2019, the Department of the Treasury, as chair of CFIUS, published proposed regulations to implement FIRRMA. The proposed regulations were published in two parts: a revised version of 31 C.F.R. Part 800, applicable to “covered investments,” and a new regulation at 31 C.F.R. Part 802, addressing real estate transactions. 84 Fed. Reg. 50,174 (Sep. 24, 2019) (correction at 84 Fed. Reg. 52,411 (Oct. 2, 2019)) and 84 Fed. Reg. 50,214 (Sep. 24, 2019).

**Cross References**

*International crime issues relating to cyberspace*, **Ch. 3.B.6**

*Senate advice and consent to ratification of tax treaties*, **Ch.4.A.1.**

*Universal Postal Union*, **Ch. 4.B.2.**

*Marrakesh Treaty*, **Ch. 4.B.3.**

*Alimanestianu v. United States (takings case)*, **Ch. 8.F.**

*Expropriation Exception to Immunity: de Csepel v. Hungary*, **Ch. 10.A.2.**

*U.S.-Mexico-Canada agreement on environmental cooperation*, **Ch. 13.A.4.**

*Cuba sanctions*, **Ch. 16.A.4.**

*Cyber activity sanctions*, **Ch. 16.A.10**

*Applicability of international law to conflicts in cyberspace*, **Ch. 18.A.5.c.**