

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

BETWEEN

BAY VIEW GROUP, LLC AND THE SPALENA COMPANY, LLC,  
CLAIMANTS,

- AND -

REPUBLIC OF RWANDA,  
RESPONDENT.

ICSID Case No. ARB/18/21

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**SUBMISSION OF THE UNITED STATES OF AMERICA**

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

**ARTICLE 1 (DEFINITION OF “INVESTMENT”)**

*Licenses as “investments”*

2. Article 1 defines “investment” as “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.” This definition encompasses “every asset” that an investor owns or controls, directly or indirectly, that has the characteristics of an investment. The “[f]orms that an investment may take include” the categories listed in the subparagraphs, which are illustrative and non-exhaustive. The enumeration of a type of an asset in Article 1, however,

is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.<sup>1</sup>

3. Article 1 adds that the “[f]orms that an investment may take include: . . . (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law . . . .” Footnote 3 is appended to subparagraph (g), and states:

Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment *depends on such factors as the nature and extent of the rights that the holder has under the law of the Party*. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are *those that do not create any rights protected under domestic law*. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.<sup>2</sup>

4. The footnote refers to licenses, authorizations, permits, and similar instruments that “do not create any rights protected under domestic law” as being “among” those that “do not have the characteristics of an investment.” A license revocable at will by the State – which generally does not confer any protected rights – would exemplify the kind of license that is unlikely to constitute an investment.<sup>3</sup> The determination as to whether a particular instrument has the characteristics of an investment is a case-by-case inquiry, involving examination of the nature and extent of any rights conferred under the State’s domestic law.<sup>4</sup>

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<sup>1</sup> Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 755, 767-768 (Chester Brown ed., 2013).

<sup>2</sup> Emphasis added.

<sup>3</sup> See KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 124 (2009) (“VANDEVELDE”).

<sup>4</sup> For example, under U.S. law, it is well established that revocable government-granted licenses or permits do not confer property interests that give rise to claims for compensation. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981) (holding that attachments subject to “revocable” and “contingent” licenses, which the President could nullify, did not provide the plaintiff with any “property” interest that would support a constitutional claim for compensation); *Mike’s Contracting, LLC v. United States*, 92 Fed. Cl. 302, 310 (Fed. Cl. 2010) (holding that helicopter airworthiness certificates, subject to U.S. Federal Aviation Administration revocation or suspension, were not property interests that could give rise to a takings claim); see also *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Counter-Memorial on Merits and Objections to Jurisdiction of Respondent United States of America ¶ 227 (Dec. 14, 2012) (stating that “property ‘must be capable

## ARTICLE 2.3 (NON-RETROACTIVITY)

5. Article 2.3 states: “[f]or greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Treaty.” The phrase “for greater certainty” signals that the sentence it introduces reflects what the agreement would mean even if that sentence were absent.<sup>5</sup>
6. A host State’s conduct prior to the entry into force of an obligation may be relevant in determining whether the State subsequently breached that obligation. Given the rule against retroactivity, however, there must exist “conduct of the State after that date which is itself a breach.”<sup>6</sup> As the *Berkowitz* tribunal observed, “pre-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right. Pre-entry into force acts and facts cannot . . . constitute a cause of action.”<sup>7</sup> Further, “[t]he mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct.”<sup>8</sup>

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of exclusive possession or control,” and that, where the purported investor has “no power . . . to prevent the government from exercising its statutory authority to withhold or revoke [the instrument in question],” the investor cannot “exclude” the government from those instruments, and they thus “lack the requisite exclusivity that would confer a cognizable ‘property interest’ under U.S. law”).

<sup>5</sup> Article 2.3 is consistent with Article 28 of the Vienna Convention on the Law of Treaties. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1115 U.N.T.S. 331, Article 28 (“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”). While the United States is not a party to the VCLT, it has recognized since at least 1971 that the Convention is the “authoritative guide” to treaty law and practice. *See* Letter from Secretary of State Rogers to President Nixon transmitting the Vienna Convention on the Law of Treaties, October 18, 1971, *reprinted in* 65 DEP’T ST. BULL. 684, 685 (1971). *See also* *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶ 62 (Dec. 6, 2000) (“Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal’s jurisdiction does not extend, before that date. NAFTA itself did not purport to have any retroactive effect. Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994.”) (“*Feldman* Interim Decision”).

<sup>6</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award ¶ 70 (Oct. 11, 2002) (“*Mondev* Award”). As the *Mondev* tribunal also observed, “there is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage.” *Id.* ¶ 58. *See also* *Northern Cameroons (Cameroon v. U.K.)*, 1963 I.C.J. 15, 129 (Dec. 2) (Separate Opinion of Judge Fitzmaurice) (“An act which did not, in relation to the party complaining of it, constitute a wrong at the time it took place, obviously cannot *ex post facto* become one.”).

<sup>7</sup> *Berkowitz et al. v. Republic of Costa Rica*, CAFTA/ICSID Case No. UNCT/13/2, Interim Award (Corrected) ¶ 217 (May 30, 2017) (“*Berkowitz* Interim Award”) (noting in a footnote that it “took the same view with respect to pre-entry into force omissions”).

<sup>8</sup> *Id.* ¶ 222 (quoting *Mondev* Award ¶ 70 (reasoning “[a]ny other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility”).

## ARTICLE 23 (CONSULTATION AND NEGOTIATION)

7. Article 23 provides:

In the event of an investment dispute, the claimant and the respondent *should* initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures.<sup>9</sup>

8. The use of the word “should” in Article 23 indicates that “consultation and negotiation” are not legally required to submit a claim to arbitration. The United States has interpreted the word “should” in this manner in similarly worded consultation provisions in other

9. A State’s consent to arbitration is paramount.<sup>10</sup> Indeed, given that consent is the “cornerstone” of jurisdiction in investor-State arbitration,<sup>11</sup> it is axiomatic that a tribunal lacks jurisdiction in the absence of a disputing party’s consent to arbitrate.<sup>12</sup> The Parties to the U.S.-Rwanda BIT consented to arbitration pursuant to Article 25, which provides in relevant part that “[e]ach Party consents to the submission of a claim to arbitration under this Section *in accordance with this Treaty*.”<sup>13</sup>

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<sup>9</sup> Emphasis added.

<sup>10</sup> See, e.g., ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 74 (1st ed. 2009) (“Arbitral tribunals constituted to hear international or transnational disputes are creatures of consent. Their source of authority must ultimately be traced to the consent of the parties to the arbitration itself.”); *William Ralph Clayton et al. v. Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction and Liability ¶ 229 (Mar. 17, 2015) (“General international law also provides that a state is not automatically subject to the jurisdiction of international adjudicatory bodies to decide in a legally binding way on complaints concerning its treatment of a foreign investor, but must give its consent to that means of dispute resolution. The heightened protection given to investors from other NAFTA Parties under Chapter Eleven of the Agreement must be interpreted and applied in a manner that respects the limits that the NAFTA Parties put in place as integral aspects of their consent, in Chapter Eleven, to an overall enhancement of their exposure to remedial actions by investors.”).

<sup>11</sup> As explained by the Executive Directors of the International Bank for Reconstruction and Development (World Bank) when submitting the then-draft ICSID Convention to the World Bank’s Member Governments, “[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre.” Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ¶ 23 (Mar. 18, 1965).

<sup>12</sup> *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction ¶ 71 (July 15, 2016) (“It is axiomatic that the Tribunal’s jurisdiction must be founded upon the existence of a valid arbitration agreement between Renco and Peru.”). See also CHRISTOPH SCHREUER, *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 831 “Consent to Arbitration” (2008) (Peter Muchlinski et al., eds.) (explaining that “[l]ike any form of arbitration, investment arbitration is always based on agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal’s jurisdiction.”); CHRISTOPHER F. DUGAN ET AL., *INVESTOR STATE ARBITRATION* 219 (2008) (explaining also that “[t]he consent of the parties is the basis of the jurisdiction of all international arbitration tribunals”).

<sup>13</sup> An agreement to arbitrate is formed only upon the investor’s corresponding consent to arbitrate in accordance with this Treaty.

10. Pursuant to Article 25, the Parties to the Treaty did not provide unconditional consent to arbitration under any and all circumstances. Rather, the States Parties have only consented to arbitrate investor-State disputes under Section B where an investor submits a “claim to arbitration under this Section in accordance with this Treaty.”<sup>14</sup>
11. Article 24 authorizes a claimant to submit a claim to arbitration either on its own behalf or on behalf of an enterprise.<sup>15</sup> Article 24.2 requires, however, that “[a]t least 90 days before submitting any claim to arbitration under this Section, a claimant *shall* deliver to the respondent a written notice of its intention to submit the claim to arbitration (‘notice of intent’).”<sup>16</sup>
12. A disputing investor who does not deliver a Notice of Intent ninety (90) days before it submits a Notice of Arbitration or Request for Arbitration fails to satisfy the procedural requirement under Article 24.2 and so fails to engage the respondent’s consent to arbitrate. Under such circumstances, a tribunal will lack jurisdiction *ab initio*. A respondent’s consent cannot be created retroactively; consent must exist at the time a claim is submitted to arbitration.<sup>17</sup>
13. The procedural requirements in Article 24 are explicit and mandatory, as reflected in the way the requirements are phrased (*i.e.*, “shall deliver”; “shall specify”). These requirements serve important functions, including to provide a Party time to identify and assess potential disputes, to coordinate among relevant national and subnational officials, and to consider, if they so choose, amicable settlement or other courses of action prior to arbitration. Such courses of action may include preservation of evidence or the preparation of a defense. As recognized by the tribunal in *Merrill & Ring v. Canada*, rejecting a belated attempt to add a claimant in that case, the safeguards found in Article 1119 of the NAFTA (the NAFTA’s counterpart to Article 24’s Notice of Intent requirement) “cannot be regarded as merely procedural niceties. They perform a substantial function which, if not complied with, would deprive the Respondent of the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim[.]”<sup>18</sup>
14. For all of the foregoing reasons, a tribunal cannot simply overlook an investor’s failure to comply with the requirements of Article 24. Rather, satisfaction of the requirements of

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<sup>14</sup> U.S.-Rwanda BIT, art. 25.1.

<sup>15</sup> U.S.-Rwanda BIT, art. 24.1.

<sup>16</sup> U.S.-Rwanda BIT, art. 24.2 (emphasis added).

<sup>17</sup> Article 24.4 defines when a claim is considered “submitted to arbitration” as being when the “request for arbitration” or “notice of arbitration” is received, depending on which set of arbitral rules has been selected.

<sup>18</sup> *Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/07/1, Decision on a Motion to Add a New Party ¶ 29 (Jan. 31, 2008).

Article 24.2 through submission of a valid Notice of Intent must precede submission of a Notice of Arbitration by 90 days to engage the respondent's consent to arbitrate.<sup>19</sup>

### ARTICLE 24.1 (SUBMISSION OF A CLAIM TO ARBITRATION)

15. The U.S.-Rwanda BIT provides two jurisdictional bases for investors to bring claims against a Treaty Party: Articles 24.1(a) and 24.1(b). Articles 24.1(a) and 24.1(b) serve to address discrete and non-overlapping types of injury.<sup>20</sup> Where the investor seeks to recover loss or damage that it incurred *directly*, it may bring a claim under Article 24.1(a). However, where the alleged loss or damage is to “an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly,” the investor's injury is only *indirect*. Such derivative claims must be brought, if at all, under Article 24.1(b)<sup>21</sup>; and must comply with all jurisdictional requirements for bringing such a claim, including but not limited to, pursuant to Article 26.2(b)(ii), submission with the Notice of Arbitration of the enterprise's written waiver of its right to initiate any other proceeding with respect to the measures alleged to constitute a breach.<sup>22</sup>
16. This distinction between Articles 24.1(a) and 24.1(b) was drafted purposefully in light of two existing principles of customary international law addressing the status of corporations. The first of these principles is that no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares.

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<sup>19</sup> See *Waste Management Inc. v. United Mexican States* (“*Number 1*”), NAFTA/ICSID Case No. ARB(AF)/98/2, Award ¶¶ 4-5 (June 2, 2000) (noting ICSID's refusal to accept a request for arbitration under the corollary provisions of the NAFTA because of claimant's failure to satisfy “one of the procedural requirements to be met by the Claimant, namely, mandatory notice of intent to submit the claim to arbitration under NAFTA Article 1119,” and noting that the claimant's request was not accepted until “the formal defect . . . had been remedied by notice of intent to submit a claim to arbitration being forwarded to the body designated by the Government of Mexico” and the elapse of more than 90 days).

<sup>20</sup> As explained in the context of corollary provisions of the NAFTA, “Articles 1116 and 1117 set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of direct injury to an investor, and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by the investor.” North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. I, 103d Cong., 1st Sess., at 145 (1993).

<sup>21</sup> See, e.g., Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 755, 824-25 (Chester Brown ed., 2013) (“Caplan & Sharpe”) (noting that Article 24(1)(a) “entitles a claimant to submit claims for loss or damage suffered directly by it in its capacity as an investor,” while Article 24(1)(b) “creates a derivative right of action, allowing an investor to claim for losses or damages suffered not directly by it, but by a locally organized company that the investor owns or controls”).

<sup>22</sup> An enterprise's written waiver must accompany and take place in conjunction with the notice of arbitration. Where a valid waiver is filed subsequent to the notice of arbitration, the claim will be considered submitted to arbitration on the date on which the valid waiver was filed, assuming all other requirements have been satisfied, and not the date of the notice of arbitration. A tribunal may determine whether a disputing investor has submitted a waiver in accordance with the requirements of Article 26.2. However, a tribunal itself has no authority to remedy an invalid waiver.

This is so because, as reaffirmed by the International Court of Justice in *Diallo*, “international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders.”<sup>23</sup> As the *Diallo* Court further reaffirmed, quoting *Barcelona Traction*: “a wrong done to the company frequently causes prejudice to its shareholders.” Nonetheless, “whenever a shareholder’s interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.”<sup>24</sup> Thus, only *direct* loss or damage suffered by shareholders is cognizable under customary international law.<sup>25</sup>

17. How a claim for loss or damage is characterized is therefore not determinative of whether the injury is direct or indirect. Rather, as *Diallo* and *Barcelona Traction* have found, what is determinative is whether the right that has been infringed belongs to the shareholder or the corporation. Examples of claims that would allow a shareholding investor to seek direct loss or damage include where the investor alleges that it was denied its right to a declared dividend, to vote its shares, or to share in the residual assets of the enterprise upon dissolution.<sup>26</sup> Another example of a direct loss or damage suffered by shareholders is where the disputing State wrongfully expropriates the shareholders’ ownership interests – whether directly through an expropriation of the shares or indirectly by expropriating the enterprise as a whole.<sup>27</sup>
18. The second principle of customary international law against which Articles 24.1(a) and 24.1(b) were drafted is that no international claim may be asserted against a State on behalf

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<sup>23</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 2010 I.C.J. 639, ¶¶ 155-156 (Judgment of Nov. 30, 2010) (noting also that “[t]his remains true even in the case of [a corporation] which may have become unipersonal”).

<sup>24</sup> *Id.* ¶ 156 (quoting *Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, 1970 I.C.J. 3, ¶ 44 (Second Phase, Judgment of Feb. 5) (“*Barcelona Traction*”). See also *Barcelona Traction* ¶ 46 (“[A]n act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected.”).

<sup>25</sup> See *Barcelona Traction* ¶ 47 (“Whenever one of his direct rights is infringed, the shareholder has an independent right of action.”). The United States notes that some authors have asserted or proposed exceptions to this rule.

<sup>26</sup> *Id.* In such cases, the Court in *Barcelona Traction* held that the shareholder (or the shareholder’s State that has espoused the claim) may bring a claim under customary international law.

<sup>27</sup> Under Article 6 of the U.S.-Rwanda BIT, an expropriation may either be direct or indirect, and acts constituting an expropriation may occur under a variety of circumstances. Determining whether an expropriation has occurred therefore requires a case-specific and fact-based inquiry.

of the State's own nationals.<sup>28</sup> Article 24.1(b) therefore provides a right to present a claim not otherwise found in customary international law,<sup>29</sup> where a claimant alleges injury to “an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly.” Article 24.1(b) allows an investor of a Party that owns or controls that enterprise to submit a claim on behalf of the enterprise for loss or damage incurred by that enterprise.

19. In sum, Article 24.1(a) adheres to the principle of customary international law that shareholders may assert claims only for *direct* injuries to their rights.<sup>30</sup> Where an investor suffers loss to its investment and that investment is not an enterprise or held by an enterprise, the *Barcelona Traction* rule does not apply and Article 24.1(a) of the U.S.-Rwanda BIT provides a remedy. By contrast, where the injury is to an enterprise or an asset held by that enterprise, the harm to the investor is generally derivative of that to the enterprise and *Barcelona Traction* precludes a claim for direct injuries to a shareholder's rights. Article 24.1(b), but not Article 24.1(a), is available to remedy any violation of the Treaty in such a case. Were shareholders to be permitted to claim under Article 24.1(a) for indirect injury, Article 24.1(b)'s narrow and limited derogation from customary international law would be superfluous.

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<sup>28</sup> ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM'S INTERNATIONAL LAW: PEACE* 512-513 (9<sup>th</sup> ed. 1992) (“[F]rom the time of the occurrence of the injury until the making of the award, the claim must continuously and without interruption have belonged to a person or to a series of persons (a) having the nationality of the state by whom it is put forward, and (b) not having the nationality of the state against whom it is put forward.”) (footnote omitted).

<sup>29</sup> See Daniel M. Price & P. Bryan Christy, III, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, in *THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS* 165, 177 (Judith H. Bello et al. eds., 1994) (explaining in the context of the corollary provision in the NAFTA that “Article 1117 is intended to resolve the *Barcelona Traction* problem by permitting the investor to assert a claim for injury to its investment even where the investor itself does not suffer loss or damage independent from that of the injury to its investment.”).

<sup>30</sup> Article 24.1(a) derogates from customary international law only to the extent that it permits individual investors to assert claims that could otherwise be asserted only by States. See, e.g., *Nottebohm (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4, 24 (Second Phase, Judgment of Apr. 6) (“[B]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law[.]”) (internal quotation omitted); F.V. GARCÍA-AMADOR ET AL., *RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 86 (1974) (“[I]nternational responsibility had been viewed as a strictly ‘interstate’ legal relationship. Whatever may be the nature of the imputed act or omission or of its consequences, the injured interest is in reality always vested in the State alone.”); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 585 (5<sup>th</sup> ed. 1998) (“[T]he assumption of the classical law that only states have procedural capacity is still dominant and affects the content of most treaties providing for the settlement of disputes which raise questions of state responsibility, in spite of the fact that frequently the claims presented are in respect of losses suffered by individuals and private corporations.”).



20. Article 24.1(a) cannot be construed to reflect an intent to derogate from the rule that shareholders may assert claims only for injuries to their interests and not for injuries to the corporation. It is well-recognized that an international agreement should not be held to have tacitly dispensed with an important principle of international law “in the absence of words making clear an intention to do so.”<sup>31</sup> Nothing in the text of Article 24.1(a) suggests an intent to derogate from customary international law restrictions on the assertion of claims on behalf of shareholders.
21. In addition, the distinct functions of Articles 24.1(a) and 24.1(b) ensure that there will be no double recovery. When an investor that owns or controls an enterprise submits a claim under Article 24.1(b) for loss or damage suffered by that enterprise, any award in the claimant investor’s favor will make the enterprise whole and the value of the shares will be restored. A very different scenario arises if an investor that does not own or control an enterprise is permitted to bring a claim for loss or damage suffered by that enterprise under Article 24.1(a). In such a case, for example, nothing would prevent the enterprise from also seeking available remedies under domestic law for the same injury.<sup>32</sup> A Treaty Party could then be forced to defend against such claims in separate, consecutive proceedings, risking duplicative awards for the same loss or damage arising from the same breach.

### ***Meaning of “control”***

22. Article 24.1(b) of the BIT authorizes an investor of a Party to bring a claim on behalf of an enterprise that the investor “owns or controls directly or indirectly.” The BIT does not define “control.” The omission of a definition for “control” accords with long-standing U.S. practice, reflecting the fact that determinations as to whether an investor controls an enterprise will involve factual situations that must be evaluated on a case-by-case basis.<sup>33</sup>

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<sup>31</sup> *Elettronica Sicula S.p.A. (ELSI) (United States. v. Italy)* 1989 I.C.J. 15, ¶ 50 (Judgment of July 20) (“Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with [by an international agreement], in the absence of any words making clear an intention to do so.”); *Loewen Group, Inc. v. United States*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 160 (June 26, 2003) (“Loewen Award”); see also *id.* ¶ 162 (“It would be strange indeed if sub silentio the international rule were to be swept away.”).

<sup>32</sup> Under Article 26, a shareholder that owns or controls an enterprise and the enterprise itself must waive their rights to pursue damages in other forums. A minority non-controlling shareholder does not have the ability to compel an enterprise to submit such a waiver.

<sup>33</sup> See *Hearing Before the Committee on Foreign Relations of the United States Senate on the Bilateral Investment Treaties with Argentina, Armenia, Bulgaria, Ecuador, Kazakhstan, Kyrgyzstan, Moldova, and Romania*, S. Hrg. 103-292, 103rd Cong., 1st Sess. (Sept. 10, 1993), Responses of the U.S. Department of State to Questions Asked by Senator Pell, at 27 (the term “control” is left undefined in U.S. Model BITs “because these [determinations] involve factual situations that must be evaluated on a case-by-case basis”); see also VANDELDE, at 116 (“a determination

## ARTICLE 26.1 (LIMITATIONS PERIOD)

23. Article 26.1 of the Treaty provides:

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

24. Article 26.1 imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute.<sup>34</sup> As is made explicit by Article 26.1, the Parties did not consent to arbitrate an investment dispute if “more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach” and “knowledge that the claimant ... or the enterprise ... has incurred loss or damage.” Accordingly, a tribunal must find that a claim satisfies the requirements of, *inter alia*, Article 26.1 in order to establish a Party’s consent to (and therefore the tribunal’s jurisdiction over) an arbitration claim. Because the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction,<sup>35</sup> the claimant must prove

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

<sup>34</sup> See, e.g., *Corona Materials, LLC v. Dominican Republic*, CAFTA/ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA ¶ 280 (May 31, 2016) (finding that the tribunal lacks jurisdiction due to application of the time-bar); *Spence Int’l Invests., LLC; Berkowitz Interim Award* ¶¶ 235-236 (addressing the time-bar defense as a jurisdictional issue); see also *Resolute Forest Products, Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility ¶¶ 82-83 (Jan. 30, 2018) (“*Resolute* Decision on Jurisdiction and Admissibility”) (holding that compliance with the time bar specified in NAFTA Articles 1116 and 1117 “goes to jurisdiction”); *Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility ¶¶ 314, 335 (June 14, 2013) (“*Apotex I & II Award*”) (parties treated the United States’ time-bar objection as a jurisdictional issue, and the tribunal expressly found that NAFTA Article 1116(2) deprived it of “jurisdiction *ratione temporis*” with respect to one of the claimant’s alleged breaches); *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Procedural Order No. 2 (Revised) ¶18 (May 31, 2005) (finding that “an objection based on a limitation period for the raising of a claim is a plea as to jurisdiction for purposes of Article 21(4)” of the UNCITRAL Arbitration Rules (1976)).

<sup>35</sup> *Apotex I & II Award* ¶ 150. See also *Vito G. Gallo v. Government of Canada*, NAFTA/UNCITRAL, Award ¶ 277 (Sept. 15, 2011) (“[A] claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional stage . . . .”); *Mesa Power Group, LLC v. Government of Canada*, NAFTA/PCA Case No. 2012-17, Award ¶ 236 (Mar. 24, 2016) (“It is for the Claimant to establish the factual elements necessary to sustain the Tribunal’s jurisdiction over the challenged measures.”); see also *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award ¶¶ 58-64 (Apr. 15, 2009) (summarizing relevant investment treaty arbitral awards and concluding that “if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established *prima facie*] at the jurisdictional phase”); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction ¶¶ 190-192 (Nov. 14, 2005) (finding

the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.<sup>36</sup>

25. The limitations period is a “clear and rigid” requirement that is not subject to any “suspension,” “prolongation,” or “other qualification.”<sup>37</sup> An investor or enterprise first acquires knowledge of an alleged breach and loss under Article 26.1 as of a particular “date.” Such knowledge cannot *first* be acquired at multiple points in time or on a recurring basis. As the *Grand River* tribunal recognized in interpreting the nearly identical limitations provisions under Articles 1116(2) and 1117(2) of the NAFTA,<sup>38</sup> subsequent transgressions by a Party arising from a continuing course of conduct do not renew the limitations period once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby.<sup>39</sup>
26. Thus, where a “series of similar and related actions by a respondent state” is at issue, an investor cannot evade the limitations period by basing its claim on “the most recent transgression” in that series.<sup>40</sup> To allow an investor to do so would “render the limitations provisions ineffective[.]”<sup>41</sup> An ineffective limitations period would fail to promote the goals of ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential respondents and third parties. An ineffective limitations period would also undermine and in effect change the State party’s consent because, as noted at paragraph 24, the Parties did not consent to arbitrate an investment dispute if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach and knowledge that the claimant or the enterprise has incurred loss or damage.

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that claimant “has the burden of demonstrating that its claims fall within the Tribunal’s jurisdiction.”); *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction ¶ 79 (Apr. 22, 2005) (acknowledging claimant had to satisfy the burden of proof “required at the jurisdictional phase”).

<sup>36</sup> *Berkowitz* Interim Award ¶¶ 163, 239, 245-246.

<sup>37</sup> The nearly identical NAFTA Chapter Eleven limitations period has been described as “clear and rigid” and not subject to any “suspension, prolongation, or other qualification.” *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction ¶ 29 (July 20, 2006) (“*Grand River* Decision on Jurisdiction”); *Resolute* Decision on Jurisdiction and Admissibility ¶ 153; *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002) (“*Feldman* Award”).

<sup>38</sup> See *Grand River* Decision on Jurisdiction ¶ 81.

<sup>39</sup> See *Resolute* Decision on Jurisdiction and Admissibility ¶ 158 (“[W]hether a breach definitively occurring and known to the claimant prior to the critical date continued in force thereafter is irrelevant.”).

<sup>40</sup> *Grand River* Decision on Jurisdiction ¶ 81 (interpreting the claims limitation language in NAFTA Chapter Eleven, which is identical to Article 26.1 of this Treaty for all relevant purposes).

<sup>41</sup> *Id.*

27. With regard to knowledge of “incurred loss or damage” under Article 26.1, a claimant may have knowledge of loss or damage even if the amount or extent of that loss or damage cannot be precisely quantified until some future date.<sup>42</sup> Moreover, the term “incur” broadly means “to become liable or subject to.”<sup>43</sup> Therefore, an investor may “incur” loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate.<sup>44</sup>
28. With regard to knowledge of the “alleged breach” for claims under Article 6, a breach is manifest where a Party (1) takes a measure (or measures) that effects a direct or indirect expropriation and (2) fails to do so in conformity with at least one of the four criteria set forth in subparagraphs (a) through (d) of Article 6.1. In order to establish the first point, the claimant must demonstrate that the government measure(s) at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as “to support a conclusion that the property has been ‘taken’ from the owner.”<sup>45</sup>
29. Thus, with respect to an expropriation claim, a claimant has actual or constructive knowledge of the “alleged breach” once it has (or should have had) knowledge of all elements required to make a claim under Article 6 – including that the destruction of, or interference with, the

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<sup>42</sup> See *Mondev Award* ¶ 87 (“A claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.”).

<sup>43</sup> “Incur,” MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/incur> (last visited Feb. 15, 2021); see also *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999) (finding that to “incur” means to “become liable or subject to” and that “a person may become ‘subject to’ an expense before she actually disburses any funds”).

<sup>44</sup> *Grand River Decision on Jurisdiction* ¶77; see also *Berkowitz Interim Award* ¶213 (finding “the date on which the claimant first acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred”).

<sup>45</sup> *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Interim Award ¶¶ 100-102 (June 26, 2000) (“*Pope & Talbot Interim Award*”). See also *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 357 (June 8, 2009) (“*Glamis Award*”) (“[A] panel’s analysis should begin with determining whether the economic impact of the complained of measures is sufficient to potentially constitute a taking at all: ‘[I]t must first be determined if the Claimant was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto . . . had ceased to exist.’ The Tribunal agrees with these statements and thus begins its analysis of whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures ‘substantially impair[ed] the investor’s economic rights, i.e. ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings.’”) (citations omitted); *Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶¶ 149-154 (Jan. 12, 2011); *Feldman Award* ¶ 152; *Cargill, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/2, Award ¶ 360 (Sept. 18, 2009) (“*Cargill Award*”) (holding that expropriation under customary international law requires “a radical deprivation of a claimant’s economic use and enjoyment of its investment”).

economic value of the investment is sufficient to constitute a taking.<sup>46</sup> That date, however, need not coincide with the last of the government measures that are alleged to have harmed the claimant's investment. For example, a claimant may have actual or constructive knowledge that previous measures in the series already expropriated its investment. Similarly, a claimant may have actual or constructive knowledge that the interference with the economic value of its investment is sufficient to constitute a taking before that investment has lost all of its value.<sup>47</sup> Rather, as noted in paragraphs 25 and 26 above, the operative date is the date on which the claimant first acquired actual or constructive notice of facts sufficient to make a claim under Article 6.

### **ARTICLES 3 AND 4 (NATIONAL TREATMENT AND MOST-FAVORED-NATION TREATMENT)**

30. Article 3 (“National Treatment”) provides that each Party shall accord to investors and covered investments of the other Party “treatment no less favorable than that it accords, in like circumstances,” to its own investors and their investments “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.” Article 4 (“Most-Favored-Nation Treatment”) provides that each Party shall accord to investors and covered investments of the other Party “treatment no less favorable than that it accords, in like circumstances,” to investors and investments of a non-Party (i.e., a third State) in its territory “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments” in its territory. These obligations thus prohibit nationality-based discrimination between domestic and foreign investors (or investments of foreign and domestic investors) that are “in like circumstances.”<sup>48</sup>

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<sup>46</sup> With the exception of Article 6.1(d), the other elements of an Article 6 expropriation accrue, if at all, at the time of the taking. Even with respect to Article 6.1(d), where, at the time of the taking, a State does not compensate or make provision for the prompt determination of compensation, the breach occurs at the time of the taking. See *Mondev Award* ¶¶ 71-72. Thus, only when a State provides a process for fixing adequate compensation but ultimately fails to promptly determine and pay such compensation does a breach of the compensation obligation occur subsequent to the taking.

<sup>47</sup> See *Berkowitz Interim Award* ¶¶ 264-265 (finding that claimants had at least constructive knowledge of the expropriation no later than the dates of the government's decrees of expropriation, and arguably on the dates of the government's declarations of public interest, in respect to each property, notwithstanding that claimants remained in possession of the properties); *id.* ¶ 298 (finding that “the relevant question is not whether the MINAET was the last line of measures affecting the Claimants' property rights but rather when did the Claimants first acquire knowledge of the breach”). See also *International Technical Products Corp. v. Islamic Republic of Iran*, Case No. 302, Award No. 196-302-3 (Oct. 28, 1985), 9 IRAN-U.S. CL. TRIB. REP. 206, 241 (1985) (“What is decisive is the time by which Claimants had irreversibly lost possession and control of the property.”).

<sup>48</sup> *Loewen Award* ¶ 139 (accepting in the NAFTA context that “Article 1102 [National Treatment] is direct[ed] only to nationality-based discrimination”) (emphasis added); *Mercer Int'l Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award ¶ 7.7 (Mar. 4, 2018) (accepting the positions of the United States and Mexico that the

31. To establish a breach of Article 3, a claimant has the burden of proving that it or its investments: (1) were accorded “treatment”; (2) were in “like circumstances” with domestic investors or investments; and (3) received treatment “less favorable” than that accorded to domestic investors or investments.”<sup>49</sup> As the *UPS v. Canada* tribunal noted (with respect to the functionally identical provisions of the NAFTA), “[t]his is a legal burden that rests squarely with the Claimant. That burden never shifts . . . .”<sup>50</sup>
32. Establishing a violation of Article 4 is the same as establishing a violation of Article 3, except that the applicable comparator in step two above is an investor or investments of a third State.
33. Determining whether an investor or investment identified by a claimant is in like circumstances with the claimant or its investment is a fact-specific inquiry. As one tribunal observed, “[i]t goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, ‘circumstances’ are context dependent and have no unalterable meaning across the spectrum of fact situations.”<sup>51</sup> The United States understands the term “circumstances” to denote conditions or facts that accompany treatment as opposed to the treatment itself. Thus, identifying appropriate comparators for purposes of the “like circumstances” analysis requires consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other possible relevant characteristics. When determining whether a claimant was in like circumstances with comparators, it or its investment should be compared to a domestic investor or investment, or for Article 4, an investor or investment of a third State, that is alike in all relevant respects *but for* the nationality of ownership. Moreover, whether treatment is accorded in like circumstances under Articles 3 or 4 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare objectives.

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National Treatment and Most-Favored Nations obligations are intended to prevent discrimination on the basis of nationality).

<sup>49</sup> As the United States has elsewhere explained with respect to the otherwise identical national treatment obligation in NAFTA (Article 1102), this provision is “intended to prevent discrimination on the basis of nationality” and to “ensure that nationality is not the basis for differential treatment.” See, e.g., *Mercer Int’l Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of the United States of America ¶ 10 (May 8, 2015).

<sup>50</sup> *United Parcel Service of America Inc. v. Government of Canada*, NAFTA/UNCITRAL, ICSID Case No. UNCT/02/1, Award on the Merits ¶ 84 (May 24, 2007); see *Mercer International Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of the United States of America, ¶ 13 (May 8, 2015) (“Nothing in the text of Articles 1102 or 1103 [of the NAFTA] suggests a shifting burden of proof. Rather, the burden to prove a violation of these articles, and each element of its claim, rests and remains squarely with the claimant.”).

<sup>51</sup> See, e.g., *Pope & Talbot Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award on the Merits of Phase 2, ¶ 75 (Apr. 10, 2001).

34. With respect to the third component of an MFN claim noted in paragraph 31, a claimant must also establish that the alleged non-conforming measures that constituted “less favorable” treatment are not subject to the reservations contained in Annex II of the U.S.-Rwanda BIT. In particular, both Parties reserved “the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement.”<sup>52</sup>
35. In addition, Article 4 cannot be used to alter the substantive content of the fair and equitable treatment obligation under Article 5. As noted in the submissions on Article 5 below, Article 5.2 clarifies that the concept of “fair and equitable treatment” does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. Article 5.3 further clarifies that a “breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.”

### **ARTICLE 5 (MINIMUM STANDARD OF TREATMENT)**

36. Article 5.1 of the Treaty requires that each Party “accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.” Article 5.2 specifies that:

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

Article 5.2 then goes on to state:

The obligation in paragraph 1 to provide:

- (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

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<sup>52</sup> U.S.-Rwanda BIT, Annex II, Schedule of the United States, at II-US-8; Annex II, Schedule of Rwanda, at II-Rwanda-2.

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

37. The above provisions demonstrate the Parties’ express intent to establish the customary international law minimum standard of treatment as the applicable standard in Article 5. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts. The standard establishes a minimum “floor below which treatment of foreign investors must not fall.”<sup>53</sup>

### **Rules that have crystallized into the minimum standard**

38. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, expressly addressed in Article 5.2, concerns the obligation to provide “fair and equitable treatment,” which includes “the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.”<sup>54</sup>

39. Other areas included within the minimum standard of treatment concern the obligation not to expropriate covered investments except under the conditions specified in Article 6, and the obligation to provide “full protection and security,” which, as expressly stated in Article 5.2(b), “requires each Party to provide the level of police protection required under customary international law.”<sup>55</sup>

### **Methodology for determining the content of customary international law**

40. Annex A to the Treaty addresses the methodology for determining whether a customary international law rule covered by Article 5.1 has crystallized. The Annex expresses the Parties’ “shared understanding that ‘customary international law’ generally and as specifically referenced in Article 5 . . . results from a general and consistent practice of States that they follow from a sense of legal obligation.” Thus, in Annex A the Parties confirmed

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<sup>53</sup> *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 259 (Nov. 13, 2000) (“*S.D. Myers* First Partial Award”); see also *Glamis Award* ¶ 615 (“The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community.”); Edwin Borchard, *The “Minimum Standard” of the Treatment of Aliens*, 33 AM. SOC’Y OF INT’L L PROC. 51, 58 (1939).

<sup>54</sup> U.S.-Rwanda BIT, art. 5.2(a).

<sup>55</sup> See *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, U.S. Counter-Memorial (Mar. 30, 2001), at 176-77 (“[C]ases in which the customary international law obligation of full protection and security was found to have been breached are limited to those in which a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien.”); *Methanex v. United States*, NAFTA/UNCITRAL, Rejoinder Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment (June 27, 2001), at 39 (same).



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.”<sup>56</sup>

41. The International Court of Justice articulated in its decision on *Jurisdictional Immunities of the State (Germany v. Italy)* examples of the types of evidence that can be used to demonstrate, under this two-element approach, that a rule of customary international law exists.<sup>57</sup> Specifically, the Court noted as examples of State practice relevant national court decisions or domestic legislation dealing with the particular issue alleged to be the norm of customary international law, as well as official declarations by relevant State actors on the subject.<sup>58</sup>
42. 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*.<sup>59</sup> “The party which relies on a custom . . .” therefore “must prove that this custom is established in such a manner that it has become binding on the other Party.”<sup>60</sup> Tribunals applying the minimum standard of treatment obligation in Article 1105 of NAFTA Chapter Eleven, which likewise affixes the standard to customary international law,<sup>61</sup> have confirmed that the party seeking to rely on a rule of customary international law must

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<sup>56</sup> See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, 122 (Feb. 3) (“In particular . . . the existence of a rule of customary international law requires that there be ‘a settled practice’ together with *opinio juris*.”) (citing *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, 1969 I.C.J. 3, 44, ¶ 77 (Feb. 20)); *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, 29-30 (June 3) (“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States[.]”).

<sup>57</sup> *Jurisdictional Immunities of the State*, 2012 I.C.J. at 99.

<sup>58</sup> *Id.* at 122-23 (discussing relevant materials that can serve as evidence of State practice and *opinio juris* in the context of jurisdictional immunity in foreign courts).

<sup>59</sup> *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20); see also *North Sea Continental Shelf*, 1969 I.C.J. at 43; *Glamis Award* ¶¶ 601-602 (noting that the claimant bears the burden of establishing a change in customary international law, by showing “(1) a concordant practice of a number of States acquiesced in by others, and (2) a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)”) (citations and internal quotation marks omitted).

<sup>60</sup> *Rights of Nationals of the United States of America in Morocco (France v. United States)*, 1952 I.C.J. 176, 200 (Aug. 27) (“The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.”) (citation and internal quotation marks omitted); *Case of the S.S. “Lotus” (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, at 25-26 (Sept. 27) (holding that the claimant had failed to “conclusively prove” the existence of a rule of customary international law).

<sup>61</sup> NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions ¶ B.1 (July 31, 2001).

establish its existence. The tribunal in *Cargill, Inc. v. Mexico*, for example, acknowledged that

the proof of change in a custom is not an easy matter to establish. However, *the burden of doing so falls clearly on Claimant*. If the Claimant does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task. Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.<sup>62</sup>

43. 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.<sup>63</sup> Determining a breach of the minimum standard of treatment “must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders.”<sup>64</sup> A failure to satisfy requirements of domestic law does not necessarily violate international law.<sup>65</sup> Rather, “something more than simple

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<sup>62</sup> *Cargill Award* ¶ 273 (emphasis added). The *ADF, Glamis, and Methanex* tribunals likewise placed on the claimant the burden of establishing the content of customary international law. See *ADF Group, Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/00/1, Award ¶ 185 (Jan. 9, 2003) (“*ADF Award*”) (“The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts.”); *Glamis Award* ¶ 601 (noting “[a]s a threshold issue . . . that it is Claimant’s burden to sufficiently” show the content of the customary international law minimum standard of treatment); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Part IV, Ch. C ¶ 26 (Aug. 3, 2005) (“*Methanex*” Final Award) (citing *Asylum (Colombia v. Peru)* for placing burden on claimant to establish the content of customary international law, and finding that claimant, which “cited only one case,” had not discharged burden).

<sup>63</sup> *Feldman Award* ¶ 177 (“[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.”) (citation omitted).

<sup>64</sup> *S.D. Myers First Partial Award* ¶ 263; see also *Mesa Award* ¶ 505 (“when defining the content of [the minimum standard of treatment] one should . . . take into consideration that international law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs.”); *Thunderbird Gaming Corporation v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 127 (Jan. 26, 2006) (“*Thunderbird*” Award) (noting that states have a “wide regulatory ‘space’ for regulation,” can change their “regulatory polic[ies]” and have “wide discretion” with respect to how to carry out such policies by regulation and administrative conduct).

<sup>65</sup> *ADF Award* ¶ 190 (“[T]he Tribunal has no authority to review the legal validity and standing of U.S. measures here in question under U.S. internal administrative law. We do not sit as a court with appellate jurisdiction with respect to the U.S. measures. (citation omitted) Our jurisdiction is confined by NAFTA Article 1131(1) to assaying the consistency of the U.S. measures with relevant provisions of NAFTA Chapter 11 and applicable rules of international law.”) (emphasis in original); see also *GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 97 (Nov. 15, 2004) (“The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law.”); *Thunderbird Award* ¶ 160 (“[I]t is not up to the Tribunal to determine how [the state regulatory authority] should have interpreted or responded to the [proposed business operation], as by doing so, the Tribunal would interfere with issues of purely domestic law and

illegality or lack of authority under the domestic law of a state is necessary to render an act or measure inconsistent with the customary international law requirements. . . .”<sup>66</sup> Accordingly, a departure from domestic law does not in-and-of-itself sustain a violation of Article 5.

44. States may decide expressly by treaty as a matter of policy to extend investment protections under the rubric of “fair and equitable treatment” and “full protection and security” beyond that required by customary international law.<sup>67</sup> The practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 5, in which “fair and equitable treatment” and “full protection and security” are expressly tied to the customary international law minimum standard of treatment.<sup>68</sup> Thus, arbitral decisions interpreting “autonomous” fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 5.<sup>69</sup>
45. Moreover, decisions of international courts and arbitral tribunals interpreting “fair and equitable treatment” as a concept of customary international law are not themselves instances of “State practice” for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of

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the manner in which governments should resolve administrative matters (which may vary from country to country).”).

<sup>66</sup> *ADF Award* ¶ 190.

<sup>67</sup> See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 582, at p. 615, para. 90 (“The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.”).

<sup>68</sup> Article 5.2 (“For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.”). See also *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 176 (Jan. 12, 2011) (noting that an obligation under Article 1105 of the NAFTA “must be determined by reference to customary international law, not to standards contained in other treaties or other NAFTA provisions, or in other sources, unless those sources reflect relevant customary international law”) (“*Grand River Award*”). While there may be overlap in the substantive protections ensured by this Treaty and other treaties, a claimant submitting a claim under this Treaty, in which fair and equitable treatment is defined by the customary international law minimum standard of treatment, still must demonstrate that the obligations invoked are in fact a part of customary international law.

<sup>69</sup> See, e.g., *Glamis Award* ¶ 608 (concluding that “arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom”); *Cargill Award* ¶ 278 (noting that arbitral “decisions are relevant to the issue presented in Article 1105(1) only if the fair and equitable treatment clause of the BIT in question was viewed by the Tribunal as involving, like Article 1105, an incorporation of the customary international law standard rather than autonomous treaty language.”).

such practice.<sup>70</sup> A formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and *opinio juris*, fails to establish a rule of customary international law as incorporated by Article 5.1.

### Obligations that have not crystallized into the minimum standard

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

### GOOD FAITH

47. 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,<sup>71</sup> not in Articles 3 through 10 of the U.S.-Rwanda BIT. As such, claims alleging breach of the good faith principle in a party’s performance of its Treaty obligations do not fall within the limited jurisdictional grant afforded in this Treaty.<sup>72</sup>

48. Furthermore, it is well established in international law that good faith is “one of the basic principles governing the creation and performance of legal obligations,” but “it is not in itself a source of obligation where none would otherwise exist.”<sup>73</sup> As such, customary international law does not impose a free-standing, substantive obligation of “good faith” that, if breached, can result in State liability.<sup>74</sup> Accordingly, a claimant “may not justifiably rely

<sup>70</sup> See, e.g., *Glamis Award* ¶ 605 (“Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law. They can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation.”) (footnote omitted); see also M. H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 202 (1998) (noting that while such decisions may contribute to the formation of customary international law, they are not appropriately considered as evidence of “State practice”).

<sup>71</sup> See Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 (reflecting the customary international law principle).

<sup>72</sup> See, e.g., *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, 1986 I.C.J. 14, 135-136, ¶¶ 270-271 (June 27) (holding, with respect to a claim based on customary international law duties alleged to be “implicit in the rule *pacta sunt servanda*,” that “the Court does not consider that a compromissory clause of the kind included in Article XXIV, paragraph 2, of the 1956 FCN Treaty, providing for jurisdiction over disputes as to its interpretation or application, would enable the Court to entertain a claim alleging conduct depriving the treaty of its object and purpose”).

<sup>73</sup> *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 1988 I.C.J. 69, 105 (Dec. 20) (internal quotation marks omitted).

<sup>74</sup> This consistent and longstanding position has been articulated in repeated submissions by the United States to NAFTA tribunals. See, e.g., *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2012-17, Submission of the United States of America ¶ 7 (July 25, 2014) (“It is well established in international

upon the principle of good faith” to support a claim, absent a specific treaty obligation; and the U.S.-Rwanda BIT contains no such obligation.<sup>75</sup>

## TRANSPARENCY

49. The concept of “transparency” has not crystallized as a component of “fair and equitable treatment” under customary international law giving rise to an independent host-State obligation.<sup>76</sup> 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.

### *Legitimate Expectations*

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law that good faith is ‘one of the basic principles governing the creation and performance of legal obligations,’ but ‘it is not in itself a source of obligation where none would otherwise exist.’”); *Clayton v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2009-04, Submission of the United States of America ¶ 6 (Apr. 19, 2013) (same); *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America 94 (Dec. 22, 2008) (“[C]ustomary international law does not impose a free-standing, substantive obligation of ‘good faith’ that, if breached, can result in State liability. Absent a specific treaty obligation, a Claimant ‘may not justifiably rely upon the principle of good faith’ to support a claim.”); *Canfor Corp. v. United States of America*, NAFTA/UNCITRAL, Reply on Jurisdiction of Respondent United States of America, at 29 n.93 (Aug. 6, 2004) (“[Claimant] appears to argue that customary international law imposes a general obligation of ‘good faith’ independent of any specific NAFTA provision. The International Court of Justice, however, has squarely rejected that notion, holding that ‘the principle of good faith . . . is not in itself a source of obligation where none would otherwise exist.’”).

<sup>75</sup> *Land and Maritime Boundary (Cameroon v. Nigeria)*, 1998 I.C.J. 275, 297, ¶ 39 (June 11).

<sup>76</sup> See *United Mexican States v. Metalclad Corp.*, 2001 BCSC 664, ¶¶ 68, 72 (British Columbia Supreme Court, May 2, 2001) (holding that “[n]o authority was cited or evidence introduced [in the *Metalclad* arbitration] to establish that transparency has become part of customary international law,” and that “there are no transparency obligations contained in [NAFTA] Chapter 11”); *Feldman Award* ¶ 133 (finding that “it is doubtful that lack of transparency alone rises to the level of violation of NAFTA and international law,” and holding the British Columbia Supreme Court’s decision in *Metalclad* to be “instructive”); *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award ¶¶ 208, 231 (Mar. 31, 2010) (stating that “a requirement for transparency may not at present be proven to be part of the customary law standard, as the judicial review of *Metalclad* rightly concluded,” though speculating that it might be “approaching that stage”); see also *Glamis Gold, Ltd. v. United States of America*, Rejoinder of Respondent United States of America, at 155-163 (Mar. 15, 2007) (“*Glamis*,” U.S. Rejoinder”) (section titled “No Transparency Rule Is Required by the International Minimum Standard of Treatment Reflected in Article 1105(1)”); *ADF Group v. United States of America*, NAFTA/ICSID, ICSID Case No. ARB(AF)/00/1, Final Post-Hearing Submission of the United States of America on Article 1105.1 and *Pope & Talbot*, at 10 (Aug. 1, 2002) (“To the extent that the *Metalclad* [v. *Mexico*] award can be read to suggest that the phrase ‘fair and equitable’ in Article 1105(1) articulates a standard other than the international minimum standard – such as that of transparency – it is wrongly reasoned and should not be followed here.”); *RDC Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Submission of the Republic of El Salvador as a Non-Disputing Party under CAFTA Article 10.20.2 ¶ 7 (Jan. 2012) (“El Salvador considers that the requirement to provide ‘Fair and Equitable Treatment’ under CAFTA Article 10.5 does not include obligations of transparency, reasonableness, refraining from mere arbitrariness, or not frustrating investors’ legitimate expectations.”).

50. The concept of “legitimate expectations” is not a component element of “fair and equitable treatment” under customary international law that gives rise to an independent host State obligation. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors’ expectations; instead, something more is required.<sup>77</sup> An investor may develop its own expectations about the legal regime governing its investment, those expectations impose no obligations on the State under the minimum standard of treatment.

### ***Non-Discrimination***

51. The customary international law minimum standard of treatment set forth in Article 5 does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination.<sup>78</sup> As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.<sup>79</sup> To the extent that the customary international law minimum standard of treatment incorporated in Article 5 prohibits discrimination, it does so only in the context of other established

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<sup>77</sup> See, e.g., U.S. Counter-Memorial in *Grand River* (“As a matter of international law, although an investor may develop its own expectations about the legal regime that governs its investment, those expectations do not impose a legal obligation on the State.”). NAFTA tribunals have recognized this point. See *Robert Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award ¶ 87 (Nov. 1, 1999) (“NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes.”); *Waste Management, Inc. v. United Mexican States (“Number 2”)*, ICSID Case No. ARB(AF)/00/3, Award ¶ 115 (Apr. 30, 2004) (explaining that “even the persistent non-payment of debts by a municipality is not equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and . . . some remedy is open to the creditor to address the problem.”).

<sup>78</sup> See *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶¶ 208-209 (Jan. 12, 2011) (“*Grand River Award*”) (“The language of Article 1105 does not state or suggest a blanket prohibition on discrimination against alien investors’ investments, and one cannot assert such a rule under customary international law. States discriminate against foreign investments, often and in many ways, without being called to account for violating the customary minimum standard of protection . . . [N]either Article 1105 nor the customary international law standard of protection generally prohibits discrimination against foreign investments.”).

<sup>79</sup> See *Methanex Final Award*, Part IV, Chapter C ¶¶ 25-26 (Aug. 3, 2005) (“*Methanex Final Award*”) (explaining that customary international law has established exceptions to the broad rule that “a State may differentiate in its treatment of nationals and aliens,” but noting that those exceptions must be proven rules of custom, binding on the Party against whom they are invoked); see also ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM’S INTERNATIONAL LAW: PEACE* 932 (9th ed. 1992) (“[A] degree of discrimination in the treatment of aliens as compared with nationals is, generally, permissible as a matter of customary international law.”); Borchard, *Minimum Standard of Treatment* at 56 (“The doctrine of absolute equality – more theoretical than actual – is therefore incompatible with the supremacy of international law. The fact is that no state grants absolute equality or is bound to grant it. It may even discriminate between aliens, nationals of different states, e.g., as the United States does through treaty in the matter of the ownership of real property in this country.”); ANDREAS ROTH, *MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS* 83 (1949) (“[T]he principle of equality has not yet become a rule of positive international law, i.e., there is no obligation for a State to treat the aliens like the nationals. A discrimination of treatment between aliens and nationals alone does not yet constitute a violation of international law.”).

customary international law rules, such as prohibitions against discriminatory takings,<sup>80</sup> access to judicial remedies or treatment by the courts,<sup>81</sup> 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.<sup>82</sup>

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<sup>80</sup> See, e.g., *BP Exploration Co. (Libya) Ltd. v. Libya*, 53 I.L.R. 297, 329 (Ad Hoc Arb. 1974) (“[T]he taking . . . clearly violates public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character.”); *Libyan American Oil Co. (LIAMCO) v. Libya*, 62 I.L.R. 140, 194 (Ad Hoc Arb. 1977) (“It is clear and undisputed that non-discrimination is a requisite for the validity of a lawful nationalization. This is a rule well established in international legal theory and practice.”); *Kuwait v. American Independent Oil Co. (AMINOIL)*, 66 I.L.R. 518, 585 (Ad Hoc Arb. 1982) (considering the question “whether the nationalization of Aminoil was not thereby tainted with discrimination,” but finding that there were legitimate reasons for nationalizing one company and not the other); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712(1)(b) (AM. LAW INST. 1987) (“A state is responsible under international law for injury resulting from . . . a taking by the state of the property of a national of another state that . . . is discriminatory . . . .”); *id.* § 712 cmt. f (“Formulations of the rules on expropriation generally include a prohibition of discrimination . . . .”).

<sup>81</sup> See, e.g., C.F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 243 (1967) (“Especially in a suit between State and alien it is imperative that there should be no discrimination between nationals and aliens in the imposition of procedural requirements. The alien cannot be expected to undertake special burdens to obtain justice in the courts of the State against which he has a complaint.”); EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 334 (1919) (A national’s “own government is justified in intervening in his behalf only if the laws themselves, the methods provided for administering them, and the penalties prescribed are in derogation of the principles of civilized justice as universally recognized or if, in a specific case, they have been wrongfully subverted by the courts so as to discriminate against him as an alien or perpetrate a technical denial of justice.”); *Report of the Guerrero Sub-Committee of the Committee of the League of Nations on Progressive Codification I*, League of Nations Doc. C.196M.70, at 100 (1927) (“Denial of justice is therefore a refusal to grant foreigners free access to the courts instituted in a State for the discharge of its judicial functions, or the failure to grant free access, in a particular case, to a foreigner who seeks to defend his rights, although in the circumstances nationals of the State would be entitled to such access.”) (emphasis added); *Ambatielos (Greece v. United Kingdom)*, 12 R.I.A.A. 83, 111 (Mar. 6, 1956) (“The modern concept of ‘free access to the Courts’ represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a practice which existed in former times and in certain countries, and which constituted an unjust discrimination against foreigners. Hence, the essence of ‘free access’ is adherence to and effectiveness of the principle of non-discrimination against foreigners who are in need of seeking justice before the courts of the land for the protection and defence of their rights.”).

<sup>82</sup> See, e.g., *The Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers* (United States, Reparation Commission), 2 R.I.A.A. 777, 794-95 (1926); League of Nations, *Bases of Discussion: Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners*, League of Nations Doc. C.75.M.69.1929.V, at 107 (1929), reprinted in SHABTAI ROSENNE, LEAGUE OF NATIONS CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW [1930], 526-42 (1975) (Basis of Discussion No. 21 includes the provision that a State must “[a]ccord to foreigners to whom damage has been caused by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance the same indemnities as it accords to its own nationals in similar circumstances.” Basis of Discussion No. 22(b) states that “[a] State must accord to foreigners to whom damage has been caused by persons taking part in an insurrection or riot or by mob violence the same indemnities as it accords to its own nationals in similar circumstances.”).

## Full Protection and Security

As noted above, Article 5.2(b) explains that “full protection and security” requires each Party to provide the level of police protection required under customary international law.<sup>83</sup> This obligation does not, for example, require States to prevent economic injury inflicted by third parties,<sup>84</sup> 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 of treatment under customary international law.

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<sup>83</sup> In this connection, while arbitral decisions are not in and of themselves evidence of State practice, the vast majority of cases in which the customary international law obligation of full protection and security was found to have been breached are those in which a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien. *See, e.g., American Mfg. & Trading, Inc. v. Zaire*, ICSID Case No. ARB/93/1 (1997), *reprinted in* 36 I.L.M. 1531 (1997) (failure to prevent destruction and looting of property constituted violation of protection and security obligation); *Asian Agric. Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3 (1990), *reprinted in* 30 I.L.M. 577 (1991) (destruction of claimant's property violated full protection and security obligation); *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, 1980 I.C.J. 3 (May 24) (failure to protect foreign nationals from being taken hostage violated most constant protection and security obligation); *Chapman v. United Mexican States (United States v. Mexico)*, 4 R.I.A.A. 632 (Mex.-U.S. Gen. Cl. Comm'n 1930) (lack of protection found where claimant was shot and seriously wounded); *H.G. Venable (United States v. Mexico)*, 4 R.I.A.A. 219 (Mex.-U.S. Gen. Cl. Comm'n 1927) (bankruptcy court indirectly responsible for physical damage to attached property); *Biens Britanniques au Maroc Espagnol (Reclamation 53 de Melilla - Ziat, Ben Kiran) (Spain v. Great Britain)*, 2 R.I.A.A. 729 (1925) (reasonable police protection would not have prevented mob from destroying claimant's store). Other cases are in accord. *See, e.g., Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award ¶ 632 (Apr. 4, 2016) (holding that the “full protection and security” treaty standard “only extends to the duty of the host state to grant physical protection and security”); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability ¶ 173 (July 30, 2010) (holding that “the full protection and security standard primarily seeks to protect investment from physical harm”); *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, ¶ 484 (Mar. 17, 2006) (“[T]he ‘full security and protection’ clause is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force.”). *See also, e.g.,* Article 7(1) of the *Responsibility of the State for injuries caused in its territory to the person or property of aliens: Revised draft*, *reprinted in* F.V. GARCIA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 129, 130 (1974) (“The State is responsible for the injuries caused to an alien by illegal acts of individuals, whether isolated or committed in the course of internal disturbances (riots, mob violence or civil war), if the authorities were manifestly negligent in taking the measures which, in view of the circumstances, are normally taken to prevent the commission of such acts.”).

<sup>84</sup> *See, e.g., Methanex Corp. v. United States of America*, Reply Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment, at 38-39 (Apr. 12, 2001) (“Indeed, if the full protection and security requirement were to extend to an obligation to ‘protect foreign investments from economic harm inflicted by third parties,’ . . . Article 1105(1) would constitute a very substantial enlargement of that requirement as it has been recognized under customary international law.”); *Methanex Corp. v. United States of America*, Rejoinder Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment, at 39 (June 27, 2001) (accord); *Loewen Group, Inc. v. United States of America*, NAFTA/ICSID Case No. ARB (AF)/98/3, Counter-Memorial of the United States of America, at 179-80 (Mar. 3, 2001) (accord).



## ARTICLE 6 (EXPROPRIATION)

52. Article 6 of the Treaty provides that no Party may expropriate or nationalize property (directly or indirectly) except for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate and effective compensation; and in accordance with due process of law.<sup>85</sup> Compensation must be “prompt,” in that it must be “paid without delay”;<sup>86</sup> “adequate,” in that it must be made at the fair market value as of the date of expropriation, undiminished by any change in value that occurred because the expropriatory action became known earlier; and “effective,” in that it must be fully realizable and freely transferable.<sup>87</sup> If an expropriation does not conform to each of the specific conditions set forth in Article 6.1, paragraphs (a) through (d), it constitutes a breach of Article 6.
53. Annex B of the Treaty establishes that Article 6 “reflect[s] customary international law concerning the obligation of States with respect to expropriation.” Annex B further states that a Party’s actions cannot constitute an expropriation “unless it interferes with a tangible or intangible property right or property interest in an investment.” As such, and because Article 6.1 protects “covered investments” from expropriation except in accordance with its conditions, the first step in any expropriation analysis must begin with an examination of whether there is an investment capable of being expropriated.<sup>88</sup> It is appropriate to look to

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<sup>85</sup> Article 6 also clarifies that a Party may not expropriate a covered investment except in accordance with Article 5. The United States’ views on the interpretation of Article 5 are provided herein.

<sup>86</sup> See *Mondev Award* ¶¶ 71-72 (“It is true that the obligation to compensate as a condition for a lawful expropriation (NAFTA Article 1110(1)(d)) does not require that the award of compensation should occur at exactly the same time as the taking. But for a taking to be lawful under Article 1110, at least the obligation to compensate must be recognized by the taking State at the time of the taking, or a procedure must exist at that time which the claimant may effectively and promptly invoke in order to ensure compensation. . . . The word[s] [‘on payment’] should be interpreted to require that the payment be clearly offered or be available as compensation for taking through a readily available procedure, at the time of the taking.”). The requirement to provide “prompt, adequate, and effective compensation” for a lawful expropriation has been a feature of U.S. treaties for well over a half century. In that context, “prompt” has been understood to require a government to “diligently carry out orderly and nondilatory procedures . . . to ensure correct compensation and make payment as soon as possible.” Charles Sullivan, *Treaty of Friendship, Commerce and Navigation: Standard Draft – Evolution through January 1, 1962*, 112, 116 (U.S. Department of State, 1971).

<sup>87</sup> U.S.-Rwanda BIT, art. 6.2(a)-(d).

<sup>88</sup> *Glamis*, Award ¶ 356 (“There is for all expropriations, however, the foundational threshold inquiry of whether the property or property right was in fact taken.”). See, also e.g., Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 RECUEIL DES COURS 259, 272 (1982) (“[O]nly property deprivation will give rise to compensation.”) (emphasis in original); Rudolf Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID REVIEW, FOR. INVESTMENT L.J. 41, 41 (1986) (“Once it is established in an expropriation case that the object in question amounts to ‘property,’ the second logical step concerns the identification of ‘expropriation.’”).

the law of the host State<sup>89</sup> for a determination of the definition and scope of the property right or property interest at issue, including any applicable limitations.<sup>90</sup>

54. Moreover, under international law, where an action is a bona fide, non-discriminatory regulation, it will not ordinarily be deemed expropriatory.<sup>91</sup> Annex B, Paragraph 4, of the Treaty provides specific guidance as to whether an action, including a regulatory action, constitutes an indirect expropriation. As explained in paragraph 4(a) of Annex 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.
55. With respect to the first factor, an adverse economic impact “standing alone, does not establish that an indirect expropriation has occurred.”<sup>92</sup> It is a fundamental principle of international law that, for an expropriation claim to succeed the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as “to support

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<sup>89</sup> See, e.g., Higgins, *supra* note 88, at 270 (for a definition of “property . . . [w]e necessarily draw on municipal law sources”).

<sup>90</sup> See *Glamis*, U.S. Rejoinder at 11 (agreeing with expert report of Professor Wälde that in an instance where property rights are subject to legal limitations existing at the time the property rights are acquired, any subsequent burdening of property rights by such limitations does not constitute an impairment of the original property interest).

See, e.g., *Glamis Award* ¶ 354 (quoting the RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712, cmt. (g) (1986) (“A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory. . . .”)); *Chemtura Corp. v. Government of Canada*, NAFTA/UNCITRAL, Award ¶ 266 (Aug. 2, 2010) (holding that Canada’s regulation of the pesticide lindane was a non-discriminatory measure motivated by health and environmental concerns and that a measure “adopted under such circumstances is a valid exercise of the State’s police powers and, as a result, does not constitute an expropriation”); *Methanex Final Award*, Part IV, Ch. D ¶ 7 (holding that as a matter of general international law, a “a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process” will not ordinarily be deemed expropriatory or compensable).

<sup>92</sup> U.S.-Rwanda BIT, Annex B, para. 4(a)(i).

a conclusion that the property has been ‘taken’ from the owner.”<sup>93</sup> Moreover, to constitute an expropriation, a deprivation must be more than merely “ephemeral.”<sup>94</sup>

56. The second factor requires an objective inquiry of the reasonableness of the claimant’s expectations, which may depend on the regulatory climate existing at the time the property was acquired in the particular sector in which the investment was made.<sup>95</sup> For example, where a sector is “already highly regulated, reasonable extensions of those regulations are foreseeable.”<sup>96</sup>

57. 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”).<sup>97</sup>

58. Paragraph 4(b), further provides that “[e]xcept in rare circumstances, nondiscriminatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect

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<sup>93</sup> *Pope & Talbot Interim Award* ¶ 102; *see also Glamis Award* ¶ 357 (“[A] panel’s analysis should begin with determining whether the economic impact of the complained of measures is sufficient to potentially constitute a taking at all: ‘[I]t must first be determined if the Claimant was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto . . . had ceased to exist.’ The Tribunal agrees with these statements and thus begins its analysis of whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures ‘substantially impair[ed] the investor’s economic rights, *i.e.* ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings.’”) (citations omitted); *Grand River Award* ¶¶ 149-50 (citing the *Glamis Award*); *Cargill Award* ¶ 360 (holding that a government measure only rises to the level of an expropriation if it affects “a radical deprivation of a claimant’s economic use and enjoyment of its investment” and that a “taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property . . . (*i.e.*, it approaches total impairment)”).

<sup>94</sup> *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA*, Award No. 141-7-2 (June 22, 1984), 6 IRAN U.S. CL. TRIB. REP. 219, 225 (June 22, 1984) (“While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.”); *see S.D. Myers First Partial Award* ¶¶ 284, 287-88.

<sup>95</sup> *Methanex Final Award*, Part IV, Ch. D ¶ 9 (noting that no specific commitments to refrain from regulation had been given to Methanex, which “entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons. Indeed, the very market for MTBE in the United States was the result of precisely this regulatory process”).

<sup>96</sup> *Glamis*, U.S. Rejoinder, at 91 (“The inquiry into an investor’s expectations is an objective one. . . . Consideration of whether an industry is highly regulated is a standard part of the legitimate expectations analysis, and . . . where an industry is already highly regulated, reasonable extensions of those regulations are foreseeable.”).

<sup>97</sup> *Id.*, at 109 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

expropriations.” This paragraph is not an exception, but rather is intended to provide tribunals with additional guidance in determining whether an indirect expropriation has occurred.

*Respectfully submitted,*

A handwritten signature in black ink, appearing to read "Lisa Grosh". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

**Lisa J. Grosh**

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