

IN THE ARBITRATION UNDER CHAPTER TEN OF THE
UNITED STATES-PERU TRADE PROMOTION AGREEMENT
AND THE ICSID ARBITRATION RULES

LATAM HYDRO LLC, CH MAMACOCHA S.R.L.,

Claimants

-and-

REPUBLIC OF PERU,

Respondent.

ICSID CASE NO. ARB/19/28

SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 10.20.2 of the United States-Peru Trade Promotion Agreement (“U.S.-Peru TPA” or “Agreement”), the United States of America makes this submission on questions of interpretation of the Agreement. The United States does not take a position in this submission on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

Article 10.22.1 (Burden of Proof)

2. Article 10.22.1 provides in relevant part that when a claim is submitted under Article 10.16.1(a)(i)(A), “the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”¹

3. General principles of international law concerning the burden of proof in international arbitration provide that a claimant has the burden of proving its claims, and if a respondent raises any affirmative defenses, the respondent must prove such defenses.²

¹ U.S.-Peru TPA, art. 10.22.1. Pursuant to Article 10.22.2, the tribunal shall apply applicable rules of international law, along with the law of the respondent, to claims brought under Article 10.16.1(a)(i)(C) if the rules of law are not specified in the investment agreement or otherwise agreed to.

² BIN CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS 334 (2006) (“[T]he general principle [is] that the burden of proof falls upon the claimant[.]”); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award, ¶ 177 (Dec. 16, 2002) (“*Feldman*”) (“[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden

4. In the context of an objection to jurisdiction, the burden is on the claimant to prove the necessary and relevant facts to establish that a tribunal has jurisdiction to hear its claim. Further, it is well-established that where “jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage.”³ As the tribunal in *Bridgestone v. Panama* stated when assessing Panama’s jurisdictional objections regarding a claimant’s purported investments under the U.S.-Panama Trade Promotion Agreement, “[b]ecause the Tribunal is making a final finding on this issue, the burden of proof lies fairly and squarely on [the claimant] to demonstrate that it owns or controls a qualifying investment.”⁴

Article 10.18.2(b) (Waiver Requirement)

5. Article 10.18.2(b) requires that claimants waive “any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.”⁵

6. The purpose of the waiver provision is to avoid the need for a respondent to litigate concurrent and overlapping proceedings in multiple forums with respect to the same measure, and to minimize not only the risk of double recovery, but also the risk of “conflicting outcomes (and thus legal uncertainty).”⁶

of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.” (quoting Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, at 14, WT/DS33/AB/R (May 23, 1997)).

³ *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 61 (Apr. 15, 2009); *Vito G. Gallo v. Canada*, NAFTA/UNCITRAL PCA Case No. 55798, Award, ¶ 277 (Sept. 15, 2011) (citation omitted) (“Both parties submit, and the Tribunal concurs, that the maxim ‘who asserts must prove,’ or *actori incumbit probatio*, applies also in the jurisdictional phase of this investment arbitration: 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 phase[.]”); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction, ¶ 2.8 (June 1, 2012) (finding “that it is impermissible for the Tribunal to found its jurisdiction on any of the Claimant’s CAFTA claims on the basis of an assumed fact (i.e., alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent). The application of that ‘prima facie’ or other like standard is limited to testing the merits of a claimant’s case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal’s jurisdiction directly depends, such as the Abuse of Process, Ratione Temporis and Denial of Benefits issues in this case.”); see also *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, ¶ 118 (Dec. 13, 2017) (“*Bridgestone Licensing Services*”) (stating that “[w]here an objection as to competence raises issues of fact that will not fall for determination at the hearing of the merits, the Tribunal must definitively determine those issues on the evidence and give a final decision on jurisdiction.”); see also *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award, ¶ 250 (Oct. 22, 2018) (finding that “[t]he Claimants bear the onus of establishing jurisdiction under the BIT and under the ICSID Convention. The onus includes proof of the facts on which jurisdiction depends.”).

⁴ *Bridgestone Licensing Services*, ¶ 153.

⁵ U.S.-Peru TPA, art. 10.18.2(b).

⁶ *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award, ¶ 118 (Jan. 26, 2006) (“*Thunderbird*”) (stating, in relation to a waiver provision similar to Article 10.18 of the U.S.-Peru TPA, that

7. As the tribunal stated in the Partial Award in *Renco v. Peru*, the waiver provision in the TPA requires an investor to “definitively and irrevocably” waive all rights to pursue claims in another forum once claims are submitted to arbitration with respect to a measure alleged to have breached the Agreement.⁷ The waiver provision is thus “intended to operate as a ‘once and for all’ renunciation of all rights to initiate claims in a domestic forum, whatever the outcome of the arbitration (whether the claim is dismissed on jurisdictional or admissibility grounds or on the merits).”⁸ That is, the waiver requirement seeks to give the respondent certainty, from the very start of arbitration under the treaty, that the claimant is not pursuing and will not pursue proceedings in another forum with respect to the measures challenged in the arbitration.

8. By the ordinary meaning of the terms,⁹ Article 10.18.2(b) is concerned with parallel proceedings before administrative tribunals or courts under the law of any Party (*i.e.*, any administrative tribunal or court constituted under the laws of either Peru or the United States), or under any *other* binding dispute settlement procedure, and is not implicated when multiple Article 10.16.1 claims are submitted in a single Chapter Ten proceeding.

9. Textual context further supports this interpretation. Article 10.25 (Consolidation) provides for a process to consolidate two or more claims brought under Article 10.16.1 separately where they have a question of law or fact in common and arise out of the same events or circumstances. Additionally, Article 10.18.4(a)(ii) provides that no claim may be submitted to arbitration “for a breach of an investment agreement under Article 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C)” if the claimant or enterprise has “*previously* submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any *other* binding dispute settlement procedure.”¹⁰ (Emphasis added.) These provisions do not suggest that a claimant is

“[t]he consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.”); *see also Waste Management Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/98/2, Award, § 27 (June 2, 2000) (“*Waste Management I*”) (finding that, under Article 1121, which is similar to Article 10.18 of the U.S.-Peru TPA, “when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the *double benefit* in its claim for damages”) (emphasis added).

⁷ *See The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, ¶¶ 95-96 (July 15, 2016) (“*Renco*”); *see also Waste Management I* Award, § 19 (“It was from [the date of the notice of request for arbitration] that the Claimant was thus obliged, in accordance with the waiver tendered, to abstain from initiating or continuing any proceedings before other courts or tribunals with respect to those measures pleaded as constituting a breach of the provisions of the NAFTA.”).

⁸ *See Renco* Partial Award, ¶ 99.

⁹ Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

¹⁰ Article 10.18.4(b) further provides that if a claimant does elect to bring such a claim to “an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, that election shall be definitive, and the claimant may not thereafter submit the claim to arbitration under Section B.” These provisions further underscore the Parties’ intent to avoid issues of potentially inconsistent decisions and double recovery.

barred from bringing multiple, related claims under Article 10.16.1 in one proceeding before a Chapter Ten tribunal.

10. The waiver provision thus does not preclude the concurrent submission of treaty and contract claims under Article 10.16.1 before one tribunal, provided that issues such as potential double-recovery and inconsistent findings are otherwise addressed.

Article 10.16.2 (Notice and Cooling Off Requirement)

11. A State's consent to arbitration is paramount.¹¹ Indeed, given that consent is the "cornerstone" of jurisdiction in investor-State arbitration,¹² it is axiomatic that a tribunal lacks jurisdiction in the absence of a disputing party's consent to arbitrate.¹³ The Parties to the U.S.-Peru TPA consented to arbitration pursuant to Article 10.17, 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 Agreement*."¹⁴ (Emphasis added.)

12. Pursuant to Article 10.17, the Parties to the Agreement 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 Agreement."¹⁵

13. Article 10.16 authorizes a claimant to submit a claim to arbitration either on its own behalf or on behalf of an enterprise.¹⁶ Article 10.16.2 requires, however, that "[a]t least 90 days

¹¹ 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 PCA Case No. 2009-04, 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.").

¹² 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).

¹³ *Renco*, Partial Award on Jurisdiction, ¶ 71 ("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" (Peter Muchlinski et al., eds., 2008) (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").

¹⁴ An agreement to arbitrate is formed only upon the investor's corresponding consent to arbitrate in accordance with this Agreement.

¹⁵ U.S.-Peru TPA, art. 10.17.1.

¹⁶ *Id.*, art. 10.16.1.

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”).” Article 10.16.2 further provides that this notice “*shall specify*”:

- (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
- (b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;
- (c) the legal and factual basis for each claim; and
- (d) the relief sought and the approximate amount of damages claimed.

(Emphasis added.)

14. A disputing investor that does not deliver a valid 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 10.16.2, 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.¹⁷

15. The procedural requirements in Article 10.16.2 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*, which rejected 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 10.16’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[.]”¹⁸

16. For all of the foregoing reasons, a tribunal cannot simply overlook an investor’s failure to comply with the requirements of Article 10.16.2. Rather, satisfaction of the requirements of Article 10.16.2 through submission of a valid Notice of Intent must precede submission of a

¹⁷ Article 10.16.4 defines when a claim is considered “submitted to arbitration” as being when the “notice of or request for arbitration” is received, depending on which set of arbitral rules has been selected.

¹⁸ *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).

Notice of Arbitration by at least 90 days in order to engage the respondent's consent to arbitrate.¹⁹

Article 10.5 (Minimum Standard of Treatment)

17. Article 10.5 provides that “[e]ach party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”²⁰ This provision “prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.”²¹ Specifically, “‘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[.]”²² And “‘full protection and security’ requires each Party to provide the level of police protection required under customary international law.”²³

18. This text demonstrates the Parties’ express intent to establish the customary international law minimum standard of treatment as the applicable standard in Article 10.5. 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.”²⁴

19. Annex 10-A to the Agreement addresses the methodology for determining whether a customary international law rule covered by Article 10.5 has crystallized. The Annex expresses the Parties’ “shared understanding that ‘customary international law’ generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation.” Thus, in Annex 10-A the Parties confirmed their understanding and application of this two-element approach – State practice and *opinio juris* –

¹⁹ See *Waste Management I*, Award, ¶¶ 4-5 (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).

²⁰ U.S.-Peru TPA, art. 10.5.1.

²¹ *Id.*, art. 10.5.2.

²² *Id.*, art. 10.5.2(a).

²³ *Id.*, art. 10.5.2(b).

²⁴ *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award, ¶ 259 (Nov. 13, 2000) (“*S.D. Myers*”); see also *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award, ¶ 615 (June 8, 2009) (“*Glamis*”) (“The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community.”); see also Edwin Borchard, *The “Minimum Standard” of the Treatment of Aliens*, 33 AM. SOC’Y OF INT’L L. PROC. 51, 58 (1939).

which is the standard practice of States and international courts, including the International Court of Justice.²⁵

20. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate, under this two-step approach, that a rule of customary international law exists. In its decision on *Jurisdictional Immunities of the State (Germany v. Italy)*, the ICJ emphasized that “[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States,”²⁶ and noted as examples of State practice relevant national court decisions or domestic legislation dealing with the particular issue alleged to be the norm of customary international law, as well as official declarations by relevant State actors on the subject.²⁷

21. States may decide expressly by treaty to make policy decisions to extend protections under the rubric of “fair and equitable treatment” and “full protection and security” beyond that required by customary international law.²⁸ The practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 10.5 in which “fair and equitable treatment” and “full protection and security” are expressly tied to the customary international law minimum standard of treatment.²⁹ Thus, arbitral decisions interpreting “autonomous” fair and equitable

²⁵ See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, 122, ¶ 55 (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)).

²⁶ *Id.* at 122-23, ¶ 55 (quoting *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, 29-30, ¶ 27 (June 3)).

²⁷ *Id.* at 123, ¶ 55 (discussing relevant materials that can serve as evidence of State practice and *opinio juris* in the context of jurisdictional immunity in foreign courts); see also International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, U.N. Doc. A/73/10, Conclusion 6 (2018) (“Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct ‘on the ground’; legislative and administrative acts; and decisions of national courts.”); Comments from the United States on the International Law Commission’s Draft Conclusions on the Identification of Customary International Law as Adopted by the Commission in 2016 on First Reading, at 18 (under cover of diplomatic note dated Jan. 5, 2018) (noting that national court decisions are not themselves sources of international law (except where they may constitute State practice), but rather “are sources that may help elucidate rules of law where they accurately compile and soundly analyze evidence of State practice and *opinio juris*.”).

²⁸ See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, 2007 I.C.J. 582, 615, ¶ 90 (May 24) (“The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes 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.”).

²⁹ U.S.-Peru TPA, art. 10.5.1, 10.5.2 (“paragraph 1 prescribes the customary international law minimum standard of treatment”); see also *Grand River Enterprises Six Nations Ltd. v. United States of America*, NAFTA/UNCITRAL, Award, ¶ 176 (Jan. 12, 2011) (“*Grand River*”) (noting that an obligation under Article 1105 of the NAFTA (which also prescribes the customary international law minimum standard of treatment) “must be determined by reference to customary international law, not to standards contained in other treaties or other NAFTA provisions, or in other sources, unless those sources reflect relevant customary international law.”). While there

treatment and full protection and security provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 10.5.³⁰

22. Moreover, decisions of international courts and arbitral tribunals interpreting “fair and equitable treatment” as a concept of customary international law are not themselves instances of “State practice” for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice.³¹ 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 10.5.

23. 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*.³² “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.”³³ Tribunals applying the minimum standard of treatment obligation in Article 1105 of NAFTA Chapter

may be overlap in the substantive protections ensured by the U.S.-Peru TPA and other treaties, a claimant submitting a claim under the U.S.-Peru TPA, 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.

³⁰ See, e.g., *Glamis Award*, ¶ 608 (concluding that “arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom”); *Cargill, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB/(AF)/05/2, Award, ¶ 278 (Sept. 18, 2009) (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.”).

³¹ 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); *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, 2018 I.C.J. 507, 559, ¶ 162 (Oct. 1) (“The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia’s argument based on legitimate expectations thus cannot be sustained.”).

³² *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).

³³ *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, ¶ 66-67 (Sept. 7) (holding that the claimant had failed to “conclusively prove” the existence of a rule of customary international law).

Eleven, which likewise affixes the standard to customary international law,³⁴ have confirmed that the party seeking to rely on a rule of customary international law must establish its existence. The tribunal in *Cargill, Inc. v. Mexico*, for example, acknowledged that:

the proof of change in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on Claimant. If Claimant does not provide the Tribunal with the 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.³⁵

24. 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.³⁶ 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 own borders.”³⁷ A failure to satisfy requirements of domestic law does not necessarily violate international law.³⁸ Rather, “something more than simple illegality or lack of

³⁴ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions, ¶ B.1 (July 31, 2001).

³⁵ *Cargill* Award, ¶ 273. 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*”) (“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*, Final Award, Part IV, Ch. C, ¶ 26 (Aug. 3, 2005) (citing *Asylum* 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 its burden).

³⁶ *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).

³⁷ *S.D. Myers* First Partial Award, ¶ 263; see also *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2012-17, Award, ¶ 505 (Mar. 24, 2016) (“*Mesa*”) (“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*, Award, ¶ 127 (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).

³⁸ *ADF* Award, ¶ 190 (“[T]he Tribunal has no authority to review the legal validity and standing of the 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. 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, citations omitted); 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

authority under the domestic law of a state is necessary to render an act or measure inconsistent with the customary international law requirements. . . .”³⁹ Accordingly, a departure from domestic law does not, *ipso facto*, sustain a violation of Article 10.5.

Fair and Equitable Treatment

25. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, expressly addressed in Article 10.5.2(a), concerns the obligation to provide “fair and equitable treatment,” which includes “the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world[.]”

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

Legitimate Expectations

27. 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.⁴⁰ An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment.

Transparency

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

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

³⁹ *ADF Award*, ¶ 190.

⁴⁰ See, e.g., *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America, at 96 (Dec. 22, 2008) (“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.”). Indeed, NAFTA tribunals have declined to find breaches of Article 1105 even where the claimant’s purported expectations arose from a contract. See *Azinian v. Mexico*, NAFTA/ICSID Case No. ARB/(AF)/97/2, Award, ¶ 87 (March 24, 1997) (“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*, 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.”).

obligation.⁴¹ 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.

Good Faith

29. 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.”⁴² As such, customary international law does not impose a free-standing, substantive obligation of “good faith” that, if breached, can result in State liability.⁴³ Similarly, a claimant “may not justifiably rely upon the principle of good faith” to support a claim, absent a specific treaty obligation.⁴⁴

Non-Discrimination

30. Similarly, the customary international law minimum standard of treatment set forth in Article 10.5 does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination.⁴⁵ As a general proposition, a State may treat foreigners

⁴¹ See *United Mexican States v. Metalclad Corp.*, [2001] 89 B.C.L.R. 3d 359, 2001 B.C.S.C. 664, ¶¶ 68, 72 (Can. B.C. S.C.) (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*, NAFTA/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”).

⁴² *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment, 1988 I.C.J. 69, 105-106, ¶ 94 (Dec. 20).

⁴³ 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*, UNCITRAL PCA Case No. 2012-17, Submission of the United States of America, ¶ 7 (July 25, 2014) (“It is well established in international law that good faith is ‘one of the basic principles governing the creation and performance of legal obligations,’ but ‘it is not in itself a source of obligation where none would otherwise exist.’”); *William Ralph Clayton et al. v. Government of Canada*, NAFTA/UNCITRAL PCA Case No. 2009-04, Submission of the United States of America, ¶ 6 (Apr. 19, 2013) (same); *Grand River*, Counter-Memorial of the United States of America, at 94 (“[C]ustomary international law does not impose a free-standing, substantive obligation of ‘good faith’ that, if breached, can result in State liability. Absent a specific treaty obligation, a Claimant ‘may not justifiably rely upon the principle of good faith’ to support a claim.”); *Canfor Corp. v. United States of America*, NAFTA/UNCITRAL, Reply on Jurisdiction of the United States of America, at 29 n.93 (Aug. 6, 2004) (“[Claimant] appears to argue that customary international law imposes a general obligation of ‘good faith’ independent of any specific NAFTA provision. The International Court of Justice, however, has squarely rejected that notion, holding that ‘the principle of good faith . . . is not in itself a source of obligation where none would otherwise exist.’”).

⁴⁴ See *Land and Maritime Boundary (Cameroon v. Nigeria)*, 1998 I.C.J. 275, 297, ¶ 39 (June 11).

⁴⁵ See *Grand River*, Award, ¶¶ 208-209 (“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.”).

and nationals differently, and it may also treat foreigners from different States differently.⁴⁶ To the extent that the customary international law minimum standard of treatment incorporated in Article 10.5 prohibits discrimination, it does so only in the context of other established customary international law rules, such as prohibitions against discriminatory takings,⁴⁷ access to judicial remedies or treatment by the courts,⁴⁸ or the obligation of States to provide full protection and security and to compensate aliens and nationals on an equal basis in times of

⁴⁶ See *Methanex Final Award*, Part IV, Chapter C ¶¶ 25-26 (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.”); Edwin Borchard, *The “Minimum Standard” of the Treatment of Aliens*, 33 AM. SOC’Y OF INT’L L. PROC. 51, 56 (1939) (“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.”).

⁴⁷ 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”).

⁴⁸ 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* 1, 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 (Com. Arb. 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.”).

violence, insurrection, conflict or strife.⁴⁹ Accordingly, general investor-State claims of nationality-based discrimination are governed exclusively by the provisions of Chapter Ten that specifically address that subject, and not Article 10.5.1.⁵⁰

Article 10.7 (Expropriation)

31. Article 10.7 of the Agreement provides that no Party may expropriate or nationalize a covered investment (directly or indirectly) except for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate, and effective compensation; and in accordance with due process of law.⁵¹ Compensation must be “prompt,” in that it must be “paid without delay”;⁵² “adequate,” in that it must be made at the fair market value as of “the date of expropriation” and “not reflect any change in value occurring because the intended expropriation had become known earlier”; and “effective,” in that it must be “fully realizable and freely transferable.”⁵³

⁴⁹ 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.”).

⁵⁰ See *Mercer Int’l Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, ¶ 7.58 (Mar. 6, 2018) (“So far as concerns the Claimant’s claims of ‘discriminatory treatment’ contrary to NAFTA Article 1105(1), the Tribunal’s [*sic*] agrees with the non-disputing NAFTA Parties’ submissions that such protections are addressed in NAFTA Articles 1102 and 1103, rather than NAFTA Article 1105(1).”); *Methanex* Final Award, Part IV, Ch. C, ¶¶ 14-17, 24 (analyzing the text of NAFTA Article 1105, and explaining that the impact of the “FTC interpretation of [NAFTA] Article 1105” was not to “exclude non-discrimination from NAFTA Chapter 11” but “to confine claims based on alleged discrimination to Article 1102, which offers full play for a principle of non-discrimination”).

⁵¹ Article 10.7 also clarifies that a Party may not expropriate a covered investment except in accordance with Article 10.5. The United States’ views on the interpretation of Article 10.5 are provided herein.

⁵² See *Mondev Int’l Ltd. v. United States of America*, NAFTA/ICSID, Award, ¶¶ 71-72 (Oct. 11, 2002) (“It is true that the obligation to compensate as a condition for a lawful expropriation (NAFTA Article 1110(1)(d)) does not require that the award of compensation should occur at exactly the same time as the taking. But for a taking to be lawful under Article 1110, at least the obligation to compensate must be recognised by the taking State at the time of the taking, or a procedure must exist at that time which the claimant may effectively and promptly invoke in order to ensure compensation. . . . The word[s] [‘on payment’] should be interpreted to require that the payment be clearly offered, or be available as compensation for taking through a readily available procedure, at the time of the taking.”). The requirement to provide “prompt, adequate, and effective compensation” for a lawful expropriation has been a feature of U.S. treaties for well over a half century. In that context, “prompt” has been understood to require a government to “diligently carry out orderly and non-dilatory 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).

⁵³ U.S.-Peru TPA, art. 10.7.2(a)-(d).

32. If an expropriation does not conform to each of the specific conditions set forth in Article 10.7.1, paragraphs (a) through (d), it constitutes a breach of Article 10.7. Any such breach requires compensation in accordance with Article 10.7.2.⁵⁴

Claims for Indirect Expropriation

33. Under international law, where an action is a bona fide, non-discriminatory regulation, it will not ordinarily be deemed expropriatory.⁵⁵ Annex 10-B, paragraph 3, of the Agreement provides specific guidance as to whether an action, including a regulatory action, constitutes an indirect expropriation. As explained in paragraph 3(a), determining whether an indirect expropriation has occurred “requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action . . . ; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.”

34. With respect to the first factor, an adverse economic impact “standing alone, does not establish that an indirect expropriation has occurred.”⁵⁶ It is a fundamental principle of international law that, for an expropriation claim to succeed, the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as “to support a

⁵⁴ As the tribunal in *British Caribbean Bank v. Belize* confirmed with respect to very similar treaty language: “at no point does the Treaty, being a *lex specialis*, distinguish between lawful and unlawful expropriation. . . . Once the violation of the Treaty provisions regarding expropriation is established, the State has breached the Treaty.” The tribunal, noting that the language “specifically negotiated” by the treaty parties required that “compensation *shall* amount to the . . . fair market value of the investment expropriated before the expropriation,” found no room for interpreting this language to allow for another standard of compensation in the event of a breach. *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18, Award, ¶¶ 260-62 (Dec. 19, 2014) (emphasis added).

⁵⁵ See, e.g., *Glamis*, Award, ¶ 354 (quoting the RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712, cmt. (g) (1987) (“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).

⁵⁶ U.S.-Peru TPA, Annex 10-B, ¶ 3(a)(i).

conclusion that the property has been ‘taken’ from the owner.”⁵⁷ Further, to constitute an expropriation, a deprivation must be more than merely “ephemeral.”⁵⁸

35. 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.⁵⁹ For example, where a sector is “already highly regulated, reasonable extensions of those regulations are foreseeable.”⁶⁰

36. 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 (e.g., whether “it arises from some public program adjusting the benefits and burdens of economic life to promote the common good”).⁶¹

37. Further, Paragraph 3(b) provides that “[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect

⁵⁷ *Pope & Talbot Inc. v. Government of Canada*, NAFTA/UNCITRAL, Interim Award, ¶ 102 (June 26, 2000); see also *Glamis Award*, ¶ 357 (“[A] panel’s analysis should begin with determining whether the economic impact of the complained of measures is sufficient to potentially constitute a taking at all: ‘[I]t must first be determined if the Claimant was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto . . . had ceased to exist.’ The Tribunal agrees with these statements and thus begins its analysis of whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures ‘substantially impair[ed] the investor’s economic rights, i.e., ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings.’”) (citations omitted); *Grand River*, Award, ¶ 150 (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)”).

⁵⁸ *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA*, 6 IRAN-U.S. CL. TRIB. REP. 219, 225 (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 also *S.D. Myers*, First Partial Award, ¶¶ 284, 287-88.

⁵⁹ *Methanex*, Final Award, Part IV, Ch. D, ¶ 7-9 (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.”).

⁶⁰ *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, U.S. Rejoinder, at 91 (Mar. 15, 2007) (“The inquiry into an investor’s expectations is an objective one. . . . Consideration of whether an industry is highly regulated is a standard part of the legitimate expectations analysis, and . . . where an industry is already highly regulated, reasonable extensions of those regulations are foreseeable.”).

⁶¹ *Id.*, at 109 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)) (internal quotes omitted).

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.

Article 10.4 (Most Favored Nation Treatment)

38. Article 10.4 requires each Party to accord to investors of another Party and their investments “treatment no less favorable than that it accords, in like circumstances, to” investors, or investments of investors, “of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”⁶²

39. To establish a breach of the obligation to provide most-favored-nation (“MFN”) treatment under Article 10.4, a claimant has the burden of proving that it or its investments: (1) were accorded “treatment”; (2) were in “like circumstances” with identified investors or investments of a non-Party or another Party; and (3) received treatment “less favorable” than that accorded to those identified investors or investments.

40. Thus, if a claimant does not identify investors or investments of a non-Party or another Party as allegedly being “in like circumstances” with the claimant or its investment, no violation of Article 10.4 can be established. The MFN clause of the U.S.-Peru TPA expressly requires a claimant to demonstrate that investors or investments of another Party or a non-Party “in like circumstances” were afforded more favorable treatment. Ignoring the “in like circumstances” requirement would serve impermissibly to excise key words from the Agreement.

41. With respect to the third component of an MFN claim, a claimant must also establish that the alleged non-conforming measures that constituted “less favorable” treatment are not subject to the exceptions contained in Annex II of the U.S.-Peru TPA. In particular, both Parties reserve 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.”

42. If the claimant does not identify treatment that is actually being accorded with respect to an investor or investment of a non-Party or another Party in like circumstances, no violation of Article 10.4 can be established. In other words, the claimant must identify a measure adopted or maintained by a Party through which that Party accorded more favorable treatment, as opposed to speculation as to how a hypothetical measure might have applied to investors of a non-Party or another Party. Moreover, a Party does not accord treatment through the mere existence of provisions in its other international agreements such as umbrella clauses or clauses that impose autonomous fair and equitable treatment standards. Treatment accorded by a Party could include, however, measures adopted or maintained by a Party in connection with carrying out its obligations under such provisions.

⁶² U.S.-Peru TPA, art. 10.4.

Article 10.16 (Causation)

43. The U.S.-Peru TPA Articles 10.16.1(a)(ii) and 10.16.1(b)(ii) provide that a party may submit a claim to arbitration where the claimant has incurred loss or damage “by reason of, or arising out of, that breach.”⁶³ In this connection, an investor may recover such damages only to the extent that they are established on the basis of satisfactory evidence that is not inherently speculative.⁶⁴

44. The ordinary meaning of these terms requires an investor to establish the causal nexus between the alleged breach and the claimed loss or damage.⁶⁵ In this connection, it is well established that “causality in fact is a necessary but not a sufficient condition for reparation.”⁶⁶ The standard for factual causation is known as the “but-for” or “*sine qua non*” test, whereby an act causes an outcome that would not have occurred in the absence of the act. This test is not met if the same result would have occurred had the breaching State acted in compliance with its obligations.⁶⁷

45. Furthermore, as the United States has previously explained with respect to substantively identical language in NAFTA Articles 1116(1) and 1117(1), the ordinary meaning of “by reason of, or arising out of” requires an investor to demonstrate proximate causation.⁶⁸ In this

⁶³ U.S.-Peru TPA, arts. 10.16.1(a)(ii), 10.16.1(b)(ii).

⁶⁴ As the International Law Commission has recognized, a State responsible for an internationally wrongful act shall compensate for the resulting damage caused “insofar as [that damage] is established.” International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), art. 36(2) [hereinafter ILC Draft Articles]. Specifically, as the ILC observes, “[t]ribunals have been reluctant to provide compensation for claims with inherently speculative elements.” *Id.*, at cmt. 27 (citing cases); see also *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Second Partial Award, ¶ 173 (Oct. 21, 2002) (“[T]o be awarded, the sums in question must be neither speculative nor too remote.”); *Mobil Investments Canada Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, ¶¶ 437-39 (May 22, 2012) (accord).

⁶⁵ H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 422 (2d ed. 1985) (noting that it is generally the claimant’s burden to “persuade the tribunal of fact of the existence of causal connection between wrongful act and harm”); see also *Islamic Republic of Iran v. United States of America*, AWD 601-A3/A8/A9/A14/B/61-FT, ¶ 153 (July 17, 2009), 38 IRAN-U.S. CL. TRIB. REP. 197, 223 (2009) (“Iran, as the Claimant, is required to prove that it has suffered losses . . . and that such losses were caused by the United States . . .”) (emphasis added).

⁶⁶ ILC Draft Articles, art. 31, cmt. 10. The Iran-U.S. Claims Tribunal reaffirmed this principle in the remedies phase of Case A/15(IV) when it held that it must determine whether “the United States breach caused ‘factually’ the harm . . . and that that loss was also a ‘proximate’ consequence of the United States’ breach.” *Islamic Republic of Iran v. United States of America*, AWD 602-A15(IV)/A24-FT, ¶ 52 (July 2, 2014), IRAN-U.S. CL. TRIB. REP. (“A/15(IV) Award”).

⁶⁷ A/15(IV) Award, ¶ 52 (“[I]f one were to reach the conclusion that both tortious (or obligation-breaching) and non-tortious (obligation-compliant) conduct of the same person would have led to the same result, one might question that the tortious (or obligation-breaching) conduct was *condicio sine qua non* of the loss the claimant seeks to recover.”). See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 2007 I.C.J. 43, 233-34, ¶ 462 (Feb. 26).

⁶⁸ *William Ralph Clayton et al. v. Government of Canada*, NAFTA/PCA Case No. 2009-04, Submission of the United States of America, ¶¶ 23-27 (Dec. 29, 2017); *Methanex Corp. v. United States*, NAFTA/UNICTRAL Amended Statement of Defense of the United States of America, ¶ 213 (Dec. 5, 2003); *Grand River*, Counter-Memorial of the United States, at 175 (“Claimants must show that the compensation they seek ‘is proved to have a

connection, NAFTA tribunals have consistently imposed a requirement of proximate causation under NAFTA Articles 1116(1) and 1117(1). For example, the *S.D. Myers* tribunal held that damages may only be awarded to the extent that there is a “sufficient causal link” between the breach of a specific NAFTA provision and the loss sustained by the investor,⁶⁹ and then subsequently clarified that “[o]ther ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the proximate cause of the harm.”⁷⁰ In *Pope & Talbot*, the tribunal held that under Article 1116, the claimant bears the burden to “prove that loss or damage was caused to its interest, and that it was causally connected to the breach complained of.”⁷¹ The *ADM* tribunal required “a sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such an injury.”⁷²

46. Indeed, proximate causation is an “applicable rule[] of international law” that under Article 10.22.1 must be taken into account in fixing the appropriate amount, if any, of monetary damages.⁷³ Article 10.16.1 contains no indication that the States Parties intended to vary from this established rule. Injuries that are not sufficiently “direct,” “foreseeable,” or “proximate”

sufficient causal link with the specific NAFTA provision that has been breached’ and ‘not from other causes.’ [T]he harm must not be too remote’ and ‘the breach of the specific NAFTA provision must be the proximate cause of the harm.’”) (quoting from the first and second partial awards in *S.D. Myers*) (footnotes omitted); *Pope & Talbot Inc. v. Government of Canada*, NAFTA/UNCITRAL, Seventh Submission of the United States of America, ¶¶ 2, 13 (Nov. 6, 2001) (only damages proximately caused by a breach may be recovered); *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America, ¶ 12 (Sept. 18, 2001) (“[A tribunal’s] task is limited to assessing whether there has been a breach . . . and whether the investor or investment has suffered loss or damage proximately caused by such a breach.”).

⁶⁹ *S.D. Myers* First Partial Award, ¶ 316.

⁷⁰ *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Second Partial Award, ¶ 140 (Oct. 21, 2002).

⁷¹ *Pope & Talbot Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award in Respect of Damages, ¶ 80 (May 31, 2002).

⁷² *Archer Daniels Midland Co. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/04/05, Award, ¶ 282 (Nov. 21, 2007).

⁷³ See ILC Draft Articles, art. 31, cmt. 10; see also *Administrative Decision No. II (U.S. v. Germany)*, 7 R.I.A.A. 23, 29 (1923) (proximate cause is “a rule of general application both in private and public law – which clearly the parties to the Treaty had no intention of abrogating”); *United States Steel Products (U.S. v. Germany)*, 7 R.I.A.A. 44, 54-55, 58-59, 62-63 (1923) (rejecting on proximate cause grounds a group of claims seeking reimbursement for war-risk insurance premiums); *Dix Case (U.S. v. Venezuela)*, 9 R.I.A.A. 119, 121 (undated) (“International as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure.”); *H. G. Venable (U.S. v. Mexico)*, 4 R.I.A.A. 219, 225 (1927) (construing the phrase “originating from” as requiring that “only those damages can be considered as losses or damages caused by [the official] which are immediate and direct results of his [action]”). See also BIN CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 244-45 (1953) (“[I]t is ‘a rule of general application both in private and public law,’ equally applicable in the international legal order, that the relation of cause and effect operative in the field of reparation is that of proximate causality in legal contemplation.”). Cf. *supra* note 1, noting that under Article 10.22.2, the tribunal shall apply applicable rules of international law, along with the law of the respondent, to claims brought under 10.16.1(a)(i)(C) if the rules of law are not specified in the investment agreement or otherwise agreed to.

may not, consistent with applicable rules of international law, be considered when calculating a damage award.⁷⁴

47. Accordingly, any loss or damage cannot be based on an assessment of acts, events or circumstances not attributable to the alleged breach.⁷⁵ Events that develop subsequent to the alleged breach may increase or decrease the amount of damages suffered by a claimant. At the same time, injuries that are not sufficiently “direct,” “foreseeable,” or “proximate” may not, consistent with applicable rules of international law, be considered when calculating a damage award.⁷⁶

Respectfully submitted,



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⁷⁴ ILC Draft Articles, art. 31, cmt. 10 (explaining that causality in fact is a necessary but not sufficient condition for reparation: “There is a further element, associated with the exclusion of injury that is too ‘remote’ or ‘consequential’ to be the subject of reparation. In some cases, the criterion of ‘directness’ may be used, in others ‘foreseeability’ or ‘proximity.’ . . . The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act[.]”).

⁷⁵ See ILC Draft Articles, art. 31, cmt. 9 (noting that the language of Article 31(2) providing that injury includes damage “caused by the internationally wrongful act of a State,” “is used to make clear that the subject matter of reparation is, globally, the injury *resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act*”) (emphasis added).

⁷⁶ ILC Draft Articles, art. 31, cmt. 10.