

IN THE ARBITRATION UNDER CHAPTER TEN OF  
THE DOMINICAN REPUBLIC-CENTRAL AMERICA FREE TRADE AGREEMENT AND  
THE ICSID ARBITRATION RULES

THE LOPEZ-GOYNE FAMILY TRUST ET AL. (USA),  
*Claimant*  
-and-  
THE REPUBLIC OF NICARAGUA,  
*Respondent*

ICSID CASE NO. ARB/17/44

**SUBMISSION OF THE UNITED STATES OF AMERICA**

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1. The United States of America hereby makes this submission pursuant to Article 10.20.2 of the Dominican Republic-Central America Free Trade Agreement (“CAFTA-DR” or “Agreement”), which authorizes a non-disputing Party to make oral and written submissions to a Tribunal regarding the interpretation of the Agreement. The United States does not, through this submission, take a position on how the following interpretations apply to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

**Article 10.28 (Definition of Investment)**

2. Article 10.28 states, in pertinent part, that “investment” means “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.” As the chapeau makes clear, this definition encompasses “every asset” that an investor owns or controls, directly or indirectly, that has the characteristics of an investment.

3. Article 10.28 further states that the “[f]orms that an investment may take include” the assets listed in the subparagraphs. Subparagraph (b) of the definition lists “shares, stock, and other forms of equity participation in an enterprise”, and subparagraph (g) lists “licenses, authorizations, permits, and similar rights conferred pursuant to domestic law[.]” The enumeration of a type of an asset in Article 10.28, 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>

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<sup>1</sup> See Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 767-68 (Chester Brown ed., 2013) (“Caplan & Sharpe”).

4. Article 10.28's use of the word "including" in relation to "characteristics of an investment" indicates that the list of identified characteristics, i.e., "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk" is not an exhaustive list; additional characteristics may be relevant.

5. In addition, footnote 10 to subparagraph (g) provides:

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.

6. 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>2</sup> The determination as to whether a particular instrument has the characteristics of an investment is a case-by-case inquiry, involving an examination of the nature and extent of any rights conferred under the State's domestic law.

### **Article 10.7 (Expropriation and Compensation)**

7. 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.<sup>3</sup> Compensation must be "prompt," in that it must be "paid without delay";<sup>4</sup> "adequate," in that it must be made at the fair market value as of "the date of expropriation" and

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<sup>2</sup> See Kenneth J. Vandeveld, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 124 (2009).

<sup>3</sup> 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.

<sup>4</sup> 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).

“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.”<sup>5</sup>

8. 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.<sup>6</sup>

#### Claims for Indirect Expropriation

9. Under international law, where an action is a bona fide, non-discriminatory regulation, it will not ordinarily be deemed expropriatory.<sup>7</sup> Annex 10-C, paragraph 4, of the Agreement provides specific guidance as to whether an action, including a regulatory action, constitutes an indirect expropriation. As explained in paragraph 4(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 that action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.

10. With respect to the first factor, an adverse economic impact “standing alone, does not establish that an indirect expropriation has occurred.”<sup>8</sup> Moreover, 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

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<sup>5</sup> CAFTA-DR Art. 10.7.2(a)-(d).

<sup>6</sup> 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).

<sup>7</sup> See, e.g., *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award, ¶ 354 (June 8, 2009) (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 Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award, Part IV, Ch. D, ¶ 7 (Aug. 3, 2005) (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>8</sup> CAFTA-DR, Annex 10-C, ¶ 4(a)(i).

conclusion that the property has been ‘taken’ from the owner.”<sup>9</sup> Further, to constitute an expropriation, a deprivation must be more than merely “ephemeral.”<sup>10</sup>

11. 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>11</sup> For example, where a sector is “already highly regulated, reasonable extensions of those regulations are foreseeable.”<sup>12</sup>

12. 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”).<sup>13</sup>

13. Further, Paragraph 4(b) provides that “[e]xcept in rare circumstances, nondiscriminatory 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

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<sup>9</sup> *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 Enterprises Six Nations Ltd. v. United States of America*, NAFTA/UNCITRAL, Award, ¶ 150 (Jan. 12, 2011) (citing the *Glamis Award*); *Cargill, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB/(AF)/05/2, Award, ¶ 360 (Sept. 18, 2009) (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>10</sup> *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA*, Award No. 141-7-2, 6 IRAN-U.S. CL. TRIB. REP. 219, 225 (June 22, 1984) (“While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.”); see also *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award, ¶¶ 284, 287-88 (Nov. 13, 2000).

<sup>11</sup> *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.”).

<sup>12</sup> *Glamis*, 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.”).

<sup>13</sup> *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 10.5 (Minimum Standard of Treatment)**

14. 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.”<sup>14</sup> 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.”<sup>15</sup> 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[.]”<sup>16</sup> And “‘full protection and security’ requires each Party to provide the level of police protection required under customary international law.”<sup>17</sup>

15. 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.”<sup>18</sup>

16. Annex 10-B 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 Articles 10.5, 10.6, and Annex 10-C results from a general and consistent practice of States that they follow from a sense of legal obligation.” Thus, in Annex 10-B the Parties confirmed their understanding and application of this two-element approach – State practice and *opinio juris* – which is the standard practice of States and international courts, including the International Court of Justice.<sup>19</sup>

17. 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

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<sup>14</sup> CAFTA-DR Art. 10.5.1.

<sup>15</sup> *Id.*, Art. 10.5.2.

<sup>16</sup> *Id.*, Art. 10.5.2(a).

<sup>17</sup> *Id.*, Art. 10.5.2(b).

<sup>18</sup> *S.D. Myers First Partial Award*, ¶ 259; *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.”); *see also* Edwin Borchard, *The “Minimum Standard” of the Treatment of Aliens*, 33 AM. SOC’Y OF INT’L. L. PROC. 51, 58 (1939).

<sup>19</sup> *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)).

be looked for primarily in the actual practice and *opinio juris* of States,”<sup>20</sup> 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.<sup>21</sup>

18. 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.<sup>22</sup> 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.<sup>23</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 10.5.<sup>24</sup>

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<sup>20</sup> *Jurisdictional Immunities of the State* at 122-23, ¶ 55 (quoting *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, 29-30, ¶ 27 (June 3)).

<sup>21</sup> *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*.”).

<sup>22</sup> 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.”).

<sup>23</sup> CAFTA-DR Art. 10.5.1 and Art. 10.5.2 (“paragraph 1 prescribes the customary international law minimum standard of treatment . . . .”); see also *Grand River Award*, ¶ 176 (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 may be overlap in the substantive protections ensured by the CAFTA-DR and other treaties, a claimant submitting a claim under the CAFTA-DR, 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>24</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.”).

19. 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.<sup>25</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 10.5.

20. 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>26</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>27</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>28</sup> 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.<sup>29</sup>

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<sup>25</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); *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.”).

<sup>26</sup> *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20); see also *North Sea Continental Shelf* 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>27</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, ¶ 66-67 (Sept. 7) (holding that the claimant had failed to “conclusively prove” the existence of a rule of customary international law).

<sup>28</sup> NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions, ¶ B.1 (July 31, 2001).

<sup>29</sup> *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) (“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

21. 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>30</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 own borders.”<sup>31</sup> A failure to satisfy requirements of domestic law does not necessarily violate international law.<sup>32</sup> Rather, “something more than simple 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>33</sup> Accordingly, a departure from domestic law does not, *ipso facto*, sustain a violation of Article 10.5.

### Fair and Equitable Treatment

22. 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[.]”

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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 Final Award*, Part IV, Ch. C, ¶ 26 (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).

<sup>30</sup> *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award, ¶ 177 (Dec. 16, 2002) (“[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>31</sup> *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) (“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.”); *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award, ¶ 127 (Jan. 26, 2006) (noting that states have a “wide regulatory ‘space’ for regulation,” can change their “regulatory polic[ies],” and have “wide discretion” with respect to how to carry out such policies by regulation and administrative conduct).

<sup>32</sup> *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.”); *International 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 the manner in which governments should resolve administrative matters (which may vary from country to country).”).

<sup>33</sup> *ADF Award*, ¶ 190.



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

#### *Legitimate Expectations*

24. 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>34</sup> 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*

25. The concept of “transparency” also has not crystallized as a component of “fair and equitable treatment” under customary international law giving rise to an independent host-State obligation.<sup>35</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.

#### *Good Faith*

26. With respect to the concept of “good faith,” in creating an investor-State dispute settlement mechanism in the Agreement, the Parties specified the treaty obligations, the breach of which may be submitted to arbitration. CAFTA-DR Article 10.16(1)(a) and (1)(b) provide that the only treaty obligations that may be arbitrated are those found in Section A of Chapter Ten. These provisions do not provide consent to arbitrate disputes based on alleged breaches of

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<sup>34</sup> See, e.g., *Grand River*, 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 II* Award, ¶ 115 (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>35</sup> 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”).

obligations found in other articles or chapters of the CAFTA-DR or alleged breaches of other treaties or other international obligations.<sup>36</sup>

27. The principle that “every treaty in force is binding on the parties to it and must be performed by them in ‘good faith’” is established in customary international law, not in Section A of the CAFTA-DR. As such, claims alleging breach of the good faith principle do not fall within the limited jurisdictional grant of the Agreement.<sup>37</sup>

28. 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>38</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>39</sup>

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<sup>36</sup> See, e.g., *Mesa Award*, ¶ 246 (“[U]nder Article 1116, this Tribunal’s jurisdiction is limited to claims of an ‘investor’ of one NAFTA Party . . . that another NAFTA Party has breached Section A (i.e. Articles 1101-1114) of Chapter 11 of the NAFTA. . . .”); *Grand River Award*, ¶ 71 (“The Tribunal understands the obligation to ‘take into account’ other rules of international law to require it to respect the Vienna Convention’s rules governing treaty interpretation. However, the Tribunal does not understand this obligation to provide a license to import into NAFTA legal elements from other treaties, or to allow alteration of an interpretation established through the normal interpretive processes of the Vienna Convention. This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA.”); *United Parcel Service of America Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction, ¶ 60 (Nov. 22, 2002) (“Article 1116 concerning investor-State disputes, like the similar article 1117, states the extent of what the Parties have agreed to in respect of claims being submitted to arbitration against each of them by an investor of another Party. Other provisions may shed light on this article, but substantive terms of other provisions will not necessarily state obligations subject to dispute resolution unless they fall within the purview of article 1116.”); *Methanex Final Award*, Part II, ch. B, ¶ 5 (Aug. 3, 2005) (“As interpreted by the Tribunal, its jurisdiction is here limited by Articles 1116-1117 NAFTA to deciding claims that the USA has breached an obligation under Section A of Chapter 11 . . .”).

<sup>37</sup> See, e.g., *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgment, 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>38</sup> *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment, 1988 I.C.J. 69, 105-106, ¶ 94 (Dec. 20).

<sup>39</sup> This consistent and longstanding position has been articulated in repeated submissions by the United States to NAFTA tribunals. See, e.g., *Mesa*, 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, 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.’”).

### **Article 10.16.1 (Submission of a Claim to Arbitration and Limitations on Loss or Damages)**

29. The CAFTA-DR provides two separate jurisdictional bases for investors to bring claims against a Treaty Party: Articles 10.16.1(a) and 10.16.1(b). Articles 10.16.1(a) and 10.16.1(b) serve to address discrete and non-overlapping types of injury.<sup>40</sup> Where the investor seeks to recover loss or damage that it incurred directly, it may bring a claim under Article 10.16.1(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 10.16.1(b).<sup>41</sup>

30. This distinction between Articles 10.16.1(a) and 10.16.1(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. 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>42</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>43</sup> Thus, only direct loss or damage suffered by shareholders is cognizable under customary international law.<sup>44</sup>

31. 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.

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<sup>40</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>41</sup> See, e.g., Caplan & Sharpe, at 824-25 (noting that Article 24(l)(a), which is nearly identically worded to CAFTA-DR Article 10.16.1(a), “entitles a claimant to submit claims for loss or damage suffered directly by it in its capacity as an investor,” while Article 24(l)(b), nearly identically worded to CAFTA-DR Article 10.16.1(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>42</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 2010 I.C.J. 639, ¶ 155 (Nov. 30) (noting also that “[t]his remains true even in the case of [a corporation] which may have become unipersonal”).

<sup>43</sup> *Id.*, ¶ 156 (quoting *Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, Judgment, 1970 I.C.J. 3, 35, ¶ 44 (Feb. 5). 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>44</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.

32. 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>45</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>46</sup>

33. The second principle of customary international law against which Articles 10.16.1(a) and 10.16.1(b) were drafted is that no international claim may be asserted against a State on behalf of the State's own nationals.<sup>47</sup> Article 10.16.1(b) therefore provides a right to present a claim not otherwise found in customary international law,<sup>48</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 10.16.1(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.

34. In sum, Article 10.16.1(a) adheres to the principle of customary international law that shareholders may assert claims only for direct injuries to their rights.<sup>49</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 10.16.1(a) of CAFTA-DR provides a

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<sup>45</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>46</sup> Under Article 10.7 of CAFTA-DR, an expropriation may be either 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.

<sup>47</sup> ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM'S INTERNATIONAL LAW: PEACE* 512-513 (9th 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.”) (footnotes omitted).

<sup>48</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>49</sup> Article 10.16.1(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 Case (Liechtenstein v. Guatemala)*, Judgment, 1955 I.C.J. 4, 24 (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. Garcia-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 (5th 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.”).

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 10.16.1(b), but not Article 10.16.1(a), is available to remedy any violation of Chapter Ten in such a case. Article 10.16.1(b) may be applicable only where the breach causes loss to an "enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly." Were shareholders to be permitted to claim under Article 10.16.1(a) for indirect injury, Article 10.16.1(b)'s narrow and limited derogation from customary international law would be superfluous.

35. Moreover, it is well-recognized that an international agreement should not be held to have tacitly dispensed with an important principle of international law "in the absence of words making clear an intention to do so."<sup>50</sup> Nothing in the text of Article 10.16.1(a) suggests that the Treaty Parties intended to derogate from customary international law restrictions on the assertion of shareholder claims.

### Causation

36. CAFTA-DR Article 10.16.1(a)(ii) provides 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." 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.<sup>51</sup>

37. The ordinary meaning of these terms requires an investor to establish the causal nexus between the alleged breach and the claimed loss or damage.<sup>52</sup> In this connection, it is well established that "causality in fact is a necessary but not a sufficient condition for reparation."<sup>53</sup>

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<sup>50</sup> *Elettronica Sicula S.p.A. (ELSI) (United States. v. Italy)*, Judgment, 1989 I.C.J. 15, 42, ¶ 50 (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); see also *id.*, ¶ 162 ("It would be strange indeed if sub silentio the international rule were to be swept away.").

<sup>51</sup> 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). 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).

<sup>52</sup> 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).

<sup>53</sup> 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.*

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.<sup>54</sup>

38. 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.<sup>55</sup> In this 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,<sup>56</sup> 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.”<sup>57</sup> 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.”<sup>58</sup> 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.”<sup>59</sup>

39. Indeed, proximate causation is an “applicable rule[] of international law” that under CAFTA-DR Article 10.22.1 must be taken into account in fixing the appropriate amount, if any,

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*United States of America*, AWD 602-A15(IV)/A24-FT, ¶ 52 (July 2, 2014), IRAN-U.S. CL. TRIB. REP. (“A/15(IV) Award”).

<sup>54</sup> 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).

<sup>55</sup> *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*, 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 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*, 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*, 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.”).

<sup>56</sup> *S.D. Myers* First Partial Award, ¶ 316.

<sup>57</sup> *S.D. Myers* Second Partial Award ¶ 140.

<sup>58</sup> *Pope & Talbot Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award in Respect of Damages, ¶ 80 (May 31, 2002).

<sup>59</sup> *Archer Daniels Midland Co. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/04/05, Award, ¶ 282 (Nov. 21, 2007).

of monetary damages.<sup>60</sup> 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” may not, consistent with applicable rules of international law, be considered when calculating a damage award.<sup>61</sup>

40. Accordingly, any loss or damage cannot be based on an assessment of acts, events or circumstances not attributable to the alleged breach.<sup>62</sup> 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.<sup>63</sup>

## **Chapter Ten and Contract Breaches**

41. Mere breaches of a contract are not *per se* violations of international law, or specifically of the State’s obligations under Chapter Ten.<sup>64</sup> Rather, as the United States has previously explained, a State may be responsible for a breach of contract in some circumstances, such as when a “repudiation of the contract is discriminatory or motivated by non-commercial considerations.”<sup>65</sup> Moreover, to breach the minimum standard of treatment, for example,

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<sup>60</sup> 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.”).

<sup>61</sup> 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[.]”).

<sup>62</sup> 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).

<sup>63</sup> ILC Draft Articles, art. 31, cmt. 10.

<sup>64</sup> See C.F. Amerasinghe, *STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 119 (1967).

<sup>65</sup> See *Mondev*, Counter-Memorial of the United States, p. 35 (June 1, 2001); see also Stephen M. Schwebel, *On Whether the Breach by a State of a Contract with an Alien Is a Breach of International Law*, in *INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION: ESSAYS IN HONOUR OF ROBERT AGO* 401, 406 (1987) (noting that if a State repudiates or violates its obligations under a contract with a foreign national, it is responsible for such a violation ‘only if it’ – the breach – ‘is discriminatory . . . or if it is akin to an expropriation in that the contract is repudiated or breached for governmental rather than commercial reasons.’”).

“something more is required, such as a complete repudiation of the contract or a denial of justice in the execution of the contract.”<sup>66</sup>

*Respectfully submitted,*

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<sup>66</sup> *Grand River*, Counter-Memorial of the United States, at 97 (citing ILC Draft Articles, art. 4, cmt. 6 (“Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party.”)).