The formatting of the appended submission has been modified in order to comply with Section 508. The version of the submission that was originally filed by the United States is available on the Department of State's website.

In footnotes to this submission, the symbol ¶ denotes the relevant paragraph(s) of the referenced document and the symbol § denotes the relevant section(s) of the referenced document.

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

WORTH CAPITAL HOLDINGS 27 LLC,

Claimant

-and-

REPUBLIC OF PERU,

Respondent.

ICSID CASE NO. ARB/20/51

SUBMISSION OF THE UNITED STATES OF AMERICA

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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.[1]

Article 10.1.2 (Attribution)

2. Article 10.1.2 provides that:

> A Party's obligations under this Section shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party, such as the authority to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.

[1] In footnotes to this submission, the symbol ¶ denotes the relevant paragraph(s) of the referenced document and the symbol § denotes the relevant section(s) of the referenced document.

3. Pursuant to Article 10.1.2, attribution of conduct of a state enterprise to a Party requires that both (i) the conduct is governmental in nature[2] and (ii) the measures adopted or maintained by the state enterprise are undertaken "when it exercises . . . [the] authority *delegated* to it by" that Party.[3] (Emphasis added.) If the conduct of a state enterprise falls outside the scope of the relevant delegation of authority, such conduct is not the subject of a Party's obligations under Article 10.1.2.

4. A state enterprise may exercise regulatory, administrative, or other governmental authority that the Party has delegated to it, "such as the authority to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges." These examples illustrate circumstances in which a state enterprise is exercising governmental authority delegated by a Party in its sovereign capacity.

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[2] If conduct is to be regarded as an act of the State for purposes of international responsibility, "the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage." International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 5, commt. 5 (2001) ("ILC Draft Articles"). Moreover, "[b]eyond a certain limit, what is regarded as 'governmental' depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances." *Id*., art. 5, commt. 6.

[3] This is consistent with customary international law, as reflected in the ILC Draft Articles. *Id*., art. 5 ("The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."). Chapter Ten of the U.S.-Peru TPA does not define what it means for authority to be "delegated." Article 13.11 (Definitions) defines "delegation" for purposes of Chapter 13 (Competition) to include "a legislative grant, and a government order, directive, or other act, transferring to the monopoly or state enterprise, or authorizing the exercise by the monopoly or state enterprise of, governmental authority."

Article 10.16 (Submission of a Claim to Arbitration)

5. Article 10.16 provides in relevant part (emphases added):

> 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
>
>   a. the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached [a relevant obligation] and (ii) that the claimant **has incurred loss or damage by reason of, or arising out of, that breach**; and
>
>   b. the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim (i) that the respondent has breached [a relevant obligation] and (ii) that the enterprise **has incurred loss or damage by reason of, or arising out of, that breach**[.]

6. As the United States has previously explained with respect to substantively identical language in NAFTA Article 1116(1), to submit a claim to arbitration, an investor must establish that (i) a relevant obligation has been breached, and (ii) that the claimant or its enterprise (a) has incurred loss or damage (b) by reason of, or arising out of, that breach.[4] As the text of Article 10.16.1 makes clear, an investor may submit a claim only once the respondent Party "*has* breached" a relevant obligation, and also once "*the claimant* has incurred loss or damage by reason of, or arising out of" (*i.e.*, caused by) that breach. (Emphasis added.)

7. Article 10.16 does not authorize a claimant to bring a claim on behalf of a different investor who suffered the loss or damage as a result of the alleged breach.[5] Thus, a claimant must be the same investor who sought to make, was making, or made the investment at the time of the alleged breach, and who incurred loss or damage thereby.[6] There is no provision in Chapter Ten which authorizes a claimant to bring a claim for an alleged breach relating to a different investor.

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[4] *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Statement of Defense of Respondent United States of America, ¶ 39 (April 8, 2005) ("*Glamis* Statement of Defense"); *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America, at 109 (Sept. 19, 2006).

[5] Where the "investor of a Party" that suffered the loss or damage as a result of the alleged breach is an enterprise, whether that investor remains the same investor following a corporate reorganization requires a case-specific and fact-based inquiry.

[6] *See, e.g., Tennant v. Canada*, PCA Case No. 2018-54, Second Submission of the United States of America ¶ 11 (June 25, 2021); *see also, e.g.*, *Westmoreland Mining Holdings LLC v. Canada*, ICSID Case No. UNCT/20/3, Award ¶ 125 (Jan. 31, 2022) ("*Westmoreland* Award") ("It is established case law that where an investment is sold or transferred after the date of an alleged breach, no subsequent owner will acquire a right to advance a treaty claim.").

8. Other provisions in Chapter Ten serve as context[7] for the interpretation of Article 10.16 and further confirm that the claimant must be the same investor that incurred loss or damage by reason of the alleged breach.

9. Article 10.18.2 requires that a claimant submitting a claim to arbitration under Article 10.16 waive its "right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to any measure alleged to constitute a breach referred to in Article 10.16." This waiver provision ensures that a respondent need not litigate concurrent and overlapping proceedings in multiple forums (domestic or international), and minimizes not only the risk of double recovery, but also the risk of "conflicting outcomes (and thus legal uncertainty)."[8]

[7] 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."). Although the United States is not a party to the Vienna Convention on the Law of Treaties, it has recognized since at least 1971 that the Convention is the "authoritative guide to treaty law and practice." *See* Letter from Secretary of State Rodgers to President Nixon transmitting the Vienna Convention on the Law of Treaties, 92d Cong., 1st Sess. at 1 (Oct. 18, 1971).

[8] *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 118 (Jan. 26, 2006) (In construing the similarly worded Article 1121 of the NAFTA, noting that "one must also take into account the rationale and purpose of that article. The 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.").

10. This provision could be rendered meaningless if the claimant could be a different investor from the investor who had made the investment at the time of the alleged breach (the "original investor"), because only the claimant, and not the original investor, would be required by Article 10.18.2(b) to sign a waiver of other remedies.[9] This would allow the original investor to bring, for example, an action for damages in a domestic court with respect to the same measure, potentially subjecting the respondent to two proceedings for the same alleged breach and defeating the purpose of Article 10.18.2(b).

Article 10.18.1 (Limitations Period)

11. Article 10.18.1 of the U.S.-Peru TPA provides:

> No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.

[9] *See, e.g., Westmoreland* Award ¶¶ 125-127 (finding the same in the context of the NAFTA's waiver provision in Article 1121(1)).

12. Article 10.18.1 imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute.[10] As is made explicit by Article 10.18.1, the Parties did not consent to arbitrate an investment dispute if "more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach" and "knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage." Accordingly, a tribunal must find that a claim satisfies the requirements of, *inter alia*, Article 10.18.1 in order to establish a Party's consent to (and therefore the tribunal's jurisdiction over) an arbitration claim. Because the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction under Chapter Ten, including with respect to Article 10.18.1,[11] the claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.[12]

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[10] Investment tribunals interpreting similarly-worded treaty provisions have routinely reached this conclusion. *See, e.g., Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA ¶ 280 (May 31, 2016) (finding that the tribunal lacks jurisdiction due to application of the time-bar); *Spence Int'l Invests., LLC, Berkowitz et al. v. Republic of Costa Rica*, CAFTA/ICSID Case No. UNCT/13/2, Interim Award (Corrected) ¶¶ 235-236 (May 30, 2017) ("*Berkowitz* Interim Award") (addressing the time-bar defense as a jurisdictional issue); *see also Resolute Forest Products, Inc. v. Canada*, NAFTA/PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility ¶¶ 82-83 (Jan. 30, 2018) ("Resolute Decision on Jurisdiction and Admissibility") (holding that compliance with the time bar specified in NAFTA Articles 1116 and 1117 "goes to jurisdiction"); *Apotex Inc. v. United States*, NAFTA/ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility ¶¶ 314, 335 (June 14, 2013) ("*Apotex I & II* Award") (parties treated the United States' time-bar objection as a jurisdictional issue, and the tribunal expressly found that NAFTA Article 1116(2) deprived it of "jurisdiction *ratione temporis*" with respect to one of the claimant's alleged breaches); *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Procedural Order No. 2 (Revised) ¶ 18 (May 31, 2005) (finding that that "an objection based on a limitation period for the raising of a claim is a plea as to jurisdiction for purposes of Article 21(4)" of the UNCITRAL Arbitration Rules (1976)).

[11] *See Apotex I & II* Award ¶ 150. *See also Vito G. Gallo v. Canada*, NAFTA/UNCITRAL, Award ¶ 277 (Sept. 15, 2011) ("[A] claimant bears the burden of proving that he has standing and the tribunal has

13. The limitations period is a "clear and rigid" requirement that is not subject to any "suspension," "prolongation," or "other qualification."[13] An investor *first* acquires knowledge of an alleged breach and loss under Article 10.18.1 as of a particular "date." Such knowledge cannot *first* be acquired at multiple points in time or on a recurring basis. As the *Grand River* tribunal recognized in interpreting the analogous limitations provisions under Articles 1116(2) and 1117(2) of the NAFTA,[14] subsequent transgressions by a Party arising from a continuing course of conduct do not renew the limitations period once an investor knows, or should have known, of the alleged breach and loss or damage incurred thereby.[15]

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

[12] *See Berkowitz* Interim Award ¶¶ 163, 239, 245-246.

[13] The substantively identical NAFTA Chapter Eleven limitations period has been described as "clear and rigid" and not subject to any "suspension, prolongation, or other qualification." *Grand River Enterprises Six Nations, Ltd. v. United States*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction ¶ 29 (July 20, 2006) ("*Grand River* Decision on Objections to Jurisdiction"); *Marvin Feldman v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002) ("*Feldman* Award"); *Apotex I & II* Award ¶ 327 (quoting *Grand River* Decision on Objections to Jurisdiction).

[14] *See Grand River* Decision on Objections to Jurisdiction ¶ 81.

[15] *See Resolute* Decision on Jurisdiction and Admissibility ¶ 158 ("[W]hether a breach definitively occurring and known to the claimant prior to the critical date continued in force thereafter is irrelevant.").

14. Thus, where a "series of similar and related actions by a respondent state" is at issue, a claimant cannot evade the limitations period by basing its claim on "the most recent transgression" in that series.[16] To allow a claimant to do so would "render the limitations provisions ineffective[.]"[17] An ineffective limitations period would fail to promote the goals of ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential respondents and third parties. An ineffective limitations period would also undermine and in effect change the State party's consent because, as noted above, the Parties did not consent to arbitrate an investment dispute if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach and knowledge that the claimant has incurred loss or damage.

[16] *Grand River* Decision on Objections to Jurisdiction ¶ 81.

[17] *Id.* Thus, although a legally distinct injury can give rise to a separate limitations period, a continuing course of conduct does not extend the limitations period under Article 10.18.1. Moreover, while measures taken outside of the three-year limitations period may be taken into account as background or contextual facts, such measures cannot serve as a basis for a finding of a breach under Article 10 of the U.S.-Peru TPA. *See Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Award ¶ 348 (June 8, 2009) ("*Glamis* Award").

15. With regard to knowledge of "incurred loss or damage" under Article 10.18.1, a claimant may have knowledge of loss or damage even if the amount or extent of that loss or damage cannot be precisely quantified until some future date.[18] Moreover, the term "incur" broadly means "to become liable or subject to."[19] Therefore, an investor may "incur" loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate.[20]

[18] *See Mondev Int'l Ltd. v. United States*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award ¶ 87 (Oct. 11, 2002) ("A claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.").

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

[20] *Grand River* Decision on Objections to Jurisdiction ¶ 77; *see also Berkowitz* Interim Award ¶ 213 (finding "the date on which the claimant first acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred").

16. As noted, Article 10.18.1 requires a claimant to submit a claim to arbitration within three years of the "date on which the claimant first acquired, *or should have first acquired*, knowledge" of (i) the alleged breach, and (ii) loss or damage incurred by the claimant. (Emphasis added.) For purposes of assessing what a claimant should have known, the United States agrees with the reasoning of the *Grand River* Tribunal: "a fact is imputed to [*sic*] person if by exercise of reasonable care or diligence, the person would have known of that fact."[21] As that Tribunal further explained, it is appropriate to "consider in this connection what a reasonably prudent investor should have done in connection with extensive investments and efforts such as those described to the Tribunal."[22] Similarly, as the *Berkowitz* Tribunal held, endorsing the reasoning in *Grand River* with respect to the analogous limitations provision in the CAFTA-DR, "the 'should have first acquired knowledge' test . . . is an objective standard; what a prudent claimant should have known or must reasonably be deemed to have known."[23]

Article 10.28 (Definition of Investment)

17. 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."

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[21] *Grand River* Decision on Objections to Jurisdiction ¶ 59.

[22] *Grand River* Decision on Objections to Jurisdiction ¶ 66 ("In the Tribunal's view, parties intending to participate in a field of economic activity in a foreign jurisdiction, and to invest substantial funds and efforts to do so, ought to have made reasonable inquiries about significant legal requirements potentially impacting on their activities . . . . This is particularly the case in a field that the prospective investors know from years of past personal experience to be highly regulated and taxed by state authorities.").

[23] *Berkowitz* Interim Award ¶ 209.

18. Article 10.28 further states that the "[f]orms that an investment may take include" the assets listed in the subparagraphs. Subparagraph (e) of the definition lists "turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts." Ordinary commercial contracts for the sale of goods or services typically do not fall within the list in subparagraph (e).[24] Subparagraph (g) lists "licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;"[25] and subparagraph (h) lists "other tangible or intangible, movable or immovable property, and related property rights[.]"

19. The enumeration of a type of an asset in Article 10.28 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.[26] 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.

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[24] U.S.-Colombia TPA Article 10.28, footnote 12 indicates also that "claims to payment that are immediately due and result from the sale of goods or services, are less likely to have [the] characteristics" of an investment.

[25] Id., footnote 14 states that "[w]hether 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." Id., footnote 15 notes that "[t]he term 'investment' does not include an order or judgment entered in a judicial or administrative action."

[26] 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).

20. 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 10.5 (Minimum Standard of Treatment)

21. Article 10.5.1 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."[27] "[F]or greater certainty," 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."[28] 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."[29]

22. The above provisions demonstrate 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."[30]

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[27] U.S.-Peru TPA, art. 10.5.1.

[28] Id., art. 10.5.2.

[29] Id., art. 10.5.2(a).

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

Methodology for determining the content of customary international law

23. Annex 10-A to the Agreement addresses the methodology for determining whether a customary international law rule covered by Article 10.5.1 has crystalized. The Annex expresses the Parties' "shared understanding that 'customary international law' generally and as specifically referenced in Article 10.5 . . . results from a general and consistent practice of States that they follow from a sense of legal obligation." Thus, in Annex 10-A the Parties confirmed their understanding and application of this two-element approach—State practice and *opinio juris*—which is the standard practice of States and international courts, including the International Court of Justice.[31]

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

24. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate, under this two-element approach, that a rule of customary international law exists. In its decision on *Jurisdictional Immunities of the State (Germany v. Italy)*,[32] the ICJ emphasized that "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States," and noted as examples of State practice relevant national court decisions or domestic legislation dealing with the particular issue alleged to be the norm of customary international law, as well as official declarations by relevant State actors on the subject.[33]

[32] Jurisdictional Immunities of the State, 2012 I.C.J. at 99.

[33] *Id.* at 122-23 (discussing relevant materials that can serve as evidence of State practice and *opinio juris* in the context of jurisdictional immunity in foreign courts); *see also* International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries (2018), Conclusion 6 ("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.").

25. 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.[34] 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.[35] 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.[36]

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[34] *See Ahmadou Sadia 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.").

[35] U.S.-Peru TPA, art. 10.5.1, 10.5.2 ("[P]aragraph 1 prescribes the customary international law minimum standard of treatment . . . ."); *see also Grand River Enterprises Six Nations Ltd. v. United States*, NAFTA/UNCITRAL, Award ¶ 176 (Jan. 12, 2011) ("*Grand River* Award") (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 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.

[36] *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) ("*Cargill* Award") (noting that arbitral "decisions are relevant to the issue presented in

26. 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.[37] 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.

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").

[37] *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.").

27. 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*.[38] "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."[39] Tribunals applying the minimum standard of treatment obligation in Article 1105 of NAFTA Chapter 11, which likewise affixes the standard to customary international law,[40] 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**

[38] *Asylum (Colombia v. Peru),* 1950 I.C.J. 266, 276 (Nov. 20); *see also North Sea Continental Shelf*, 1969 I.CJ. 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).

[39] *Rights of Nationals of the United States 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); *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).

[40] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, ¶ B.1 (July 31, 2001).

such an instance, should hold that Claimant fails to establish the particular standard asserted.[41]

28. 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.[42]

29. 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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[41] *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*, NAFTA/ICSID Case No. ARB(AF)/00/1, Award ¶ 185 (Jan. 9, 2003) ("*ADF* Award") ("The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts."); *Glamis* Award ¶ 601 (noting "[a]s a threshold issue . . . that it is Claimant's burden to sufficiently" show the content of the customary international law minimum standard of treatment); *Methanex Corp. v. United States*, Final Award on Jurisdiction and Merits, 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).

[42] *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).

30. Other areas included within the minimum standard of treatment concern the obligation not to expropriate covered investments except under the conditions specified in Article 10.7, which is discussed below, and the obligation to provide "full protection and security," which, as expressly stated in Article 10.5.2(b), "requires each Party to provide the level of police protection required under customary international law."[43]

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

31. In contrast, other concepts such as good faith are not component elements of "fair and equitable treatment" under customary international law and do not give rise to independent host State obligations. 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."[44] As such, customary international law does not impose a free-standing, substantive obligation of "good faith" that, if breached, can result in State liability.[45] Similarly, a claimant "may not justifiably rely upon the principle of good faith" to support a claim, absent a specific treaty obligation.[46]

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

[45] 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.'").

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

Article 10.7 (Expropriation)

32. 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.[47] Compensation must be "prompt," in that it must be "paid without delay";[48] "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."[49]

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[47] 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.

[48] *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).

[49] U.S.-Peru TPA, art. 10.7.2(a)-(d).

33. 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.[50]

Claims for Indirect Expropriation

34. Under international law, where an action is a bona fide, non-discriminatory regulation, it will not ordinarily be deemed expropriatory.[51] This principle in public international law, referred to as the police powers doctrine, is not an exception that applies after an expropriation has been found but, rather, is a recognition that certain actions, by their nature, do not engage State responsibility.[52]

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[50] 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).

[51] *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. 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).

[52] *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 539 (5th ed. 1998) ("Cases in which expropriation is allowed to be lawful in the absence of compensation are within the narrow concept of public utility prevalent in laissez-faire economic systems, *i.e*. exercise of police power, health measures, and the like."); G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT.

35. 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."

36. With respect to the first factor, for an expropriation claim to succeed, the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as "to support a conclusion that the property has been 'taken' from the owner."[53]

Y.B. INT'L L., 307, 338 (1962) ("If, however, such prohibition can be justified as being reasonably necessary to the performance by a State of its recognized obligations to protect the public health, safety, morals or welfare, then it would normally seem that there has been no 'taking' of property.").

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

37. The second factor requires an objective inquiry of the reasonableness of the claimant's investment-backed expectations. Whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation[54] or the potential for government regulation in the relevant sector.

[54] *See Methanex* Final Award, Part IV, Ch. D ¶ 9 (noting that no specific commitments to refrain from regulation had been given to Methanex, which "entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons. Indeed, the very market for MTBE in the United States was the result of precisely this regulatory process"); *Grand River* Award ¶¶ 144-45 ("The Tribunal also notes that trade in tobacco products has historically been the subject of close and extensive regulation by U.S. states, a circumstance that should have been known to the Claimant from his extensive past experience in the tobacco business. An investor entering an area traditionally subject to extensive regulation must do so with awareness of the regulatory situation. Given the circumstances—including the unresolved questions involving the Jay Treaty and U.S. domestic law, and the practice of heavy state regulation of sales of tobacco products—the Tribunal holds that Arthur Montour could not reasonably have developed and relied on an expectation, the non-fulfillment of which would infringe NAFTA, that he could carry on a large-scale tobacco distribution business, involving the transportation of large quantities of cigarettes across state lines and into many states of the United States, without encountering state regulation."); *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Rejoinder of Respondent United States of America 91 (Mar. 15, 2007) ("*Glamis, U.S.* Rejoinder") ("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.").

38. The third factor considers the nature and character of the government action, including whether such action involves physical invasion by the government or whether it is more regulatory in nature (*i.e.*, whether "it arises from some public program adjusting the benefits and burdens of economic life to promote the common good"). [55]

39. 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 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.

[55] Glamis Rejoinder at 109 (quoting Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978)).

Respectfully submitted,

Lisa J. Grosh

Assistant Legal Adviser

John D. Daley

Deputy Assistant Legal Adviser

Nicole C. Thornton

Chief of Investment Arbitration

Alvaro J. Peralta

Attorney Adviser

Office of International Claims and

Investment Disputes

UNITED STATES DEPARTMENT OF STATE

Washington, D.C. 20520

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