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

ANGEL SAMUEL SEDA AND OTHERS,

Claimants,

-and-

THE REPUBLIC OF COLOMBIA,

Respondent.

ICSID CASE NO. ARB/19/6

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. The United States of America makes this submission pursuant to Article 10.20.2 of the United States-Colombia Trade Promotion Agreement ("U.S.-Colombia TPA" 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 take a position on how the interpretation applies to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

Scope and Coverage--"Relating to" Requirement (Article 10.1)

2. Article 10.1.1 provides (emphasis added):

> This Chapter applies to measures adopted or maintained by a Party relating to:
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> (a) Investors of another Party;
> (b) covered investments; and
> (c) with respect to Articles 10.9 and 10.11, all investments in the territory of the Party.

3. Article 10.1 sets forth the scope and coverage of Chapter Ten, and is determinative of which measures fall within the chapter and which do not. Article 10.1 requires that the challenged measures adopted or maintained by a U.S.-Colombia TPA Party "relate to" an investor of "another Party," or to a covered investment. The "relating to" requirement cannot be satisfied by the mere, or incidental, effect that a challenged measure had on a claimant. Rather, there must have been a "legally significant connection" between the measure and the investor or its investment.[1] Otherwise, untold numbers of domestic measures that simply have

[1] *See Methanex Corp. v. United States of America*, NAFTA/UNCITRAL First Partial Award, ¶ 147 (Aug. 7, 2002) (finding that "the phrase 'relating to'. . . signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them") ("*Methanex* First Partial

an economic impact on a foreign investor or its investment would pass through the Article 10.1 threshold.[2] As the *Methanex* tribunal aptly observed when interpreting the corollary scope provision of the NAFTA, "[a] threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all."[3]

4. Whether a challenged measure bears a legally significant connection to a foreign investor or investment depends on the facts of a given case. Negative impact of a challenged measure on a claimant, without more, does not satisfy the standard. Rather, a "legally significant connection" requires a more direct connection between the challenged measure and the foreign investor or investment.

Requirement to Accord Treatment to Covered Investments and/or Investors

5. Some obligations in the U.S.-Colombia TPA require a Party to accord treatment to both investors and covered investments, whereas other obligations in the Agreement only require a Party to accord treatment to a covered investment. For example, the Article 10.5 requires the Parties to accord "fair and equitable treatment" and "full protection and security" only to covered investments, not to investors.[4] In contrast, Article 10.3 requires the Parties to accord "national treatment" to both investors and covered investments.[5] In accordance with this distinction, for the Agreements' obligations which only extend to covered investments, a claimant (*i.e.*, an investor) must establish that a Party's treatment was accorded to the covered *investment* and violated the relevant obligation.

Waiver Requirement (Article 10.18)

6. Article 10.18.2 of the U.S.-Colombia TPA states in relevant part:

> 2. No claim may be submitted to arbitration under this Section unless:
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> . . .
>
> (b) the notice of arbitration is accompanied,
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> (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and

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Award"). *See also Bayview Irrigation District v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/1, Award ¶ 101 (June 19, 2007); *William Ralph Clayton v. Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction and Liability ¶ 240 (Mar. 17, 2005).

[2] NAFTA Chapter Eleven tribunals have consistently found that the mere effect of a challenged measure on a claimant, without more, does not satisfy the "relating to" requirement of Article 1101(1). *See, e.g.*, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/12/1, Award ¶ 6.13 (Aug. 25, 2014) ("*Apotex I and II* Award") (finding "something more than a mere 'effect' from the measure is required to overcome the jurisdictional threshold in NAFTA Article 1101(1)" and that the *Cargill Inc. v. Mexico* tribunal was not seeking to apply a different legal interpretation of NAFTA Article 1101(1) from the tribunals in *Methanex* and *Bayview*).

[3] *Methanex* First Partial Award ¶ 137.

[4] U.S-Colombia TPA Article 10.5(1).

[5] U.S-Colombia TPA Article 10.3.

(ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

7. The waiver requirements under Article 10.18.2(b) are among the requirements upon which the Parties have conditioned their consent in Article 10.17. An effective waiver is therefore a precondition to the Parties' consent to arbitrate claims, and accordingly, a tribunal's jurisdiction under Chapter Ten of the U.S.-Colombia TPA.[6]

8. Similar to provisions found in many of the United States' international investment agreements,[7] Article 10.18.2(b) is a "no U-turn" waiver provision, which permits claimants to elect to pursue any proceeding (including in domestic court) without relinquishing their right to assert a subsequent claim through arbitration under the Agreement, subject to compliance with the three-year limitations period for claims under Article 10.18.1. However, Article 10.18.2(b) makes clear that as a condition precedent to the submission of a claim to arbitration under the Agreement, a claimant must submit an effective waiver together with its Notice of Arbitration. The date on which the claim has been submitted to arbitration for purposes of Article 10.18.1 is therefore the date of the submission of an effective waiver, assuming all other relevant procedural requirements have been satisfied.

9. Compliance with Article 10.18.2(b) entails both formal and material requirements.[8] As to the formal requirements, the waiver must be in writing and "clear, explicit and categorical."[9] The waiver must relinquish any right to initiate or continue any action with respect to measures challenged in the arbitration, excluding an action that seeks "interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration."[10] As the written

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[6] *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award ¶ 73 (July 15, 2016) ("*Renco* Partial Award") ("[C]ompliance with Article 10.18(2) is a condition and limitation upon Peru's consent to arbitrate. Article 10.18(2) contains the terms upon which Peru's non-negotiable offer to arbitrate is capable of being accepted by an investor. Compliance with Article 10.18(2) is therefore an essential prerequisite to the existence of an arbitration agreement and hence the Tribunal's jurisdiction."); *see also Waste Management I v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/98/2, Award §§ 16-17 at 228-29 (June 2, 2000) ("*Waste Management I* Award"); *Detroit International Bridge Co. v. Canada*, NAFTA/PCA Case No. 2012-25, Award on Jurisdiction ¶¶ 291, 336-337 (Apr. 2, 2015) ("*Detroit Bridge* Award"); *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, CAFTA-DR/ICSID Case No. ARB/09/17, Award ¶¶ 79-80 (Mar. 14, 2011) ("*Commerce Group* Award"); *Railroad Development Corp. v. Republic of Guatemala*, CAFTA-DR/ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction under CAFTA Article 10.20.5 ¶ 56 (Nov. 17, 2008) ("*Railroad Development* Decision on Jurisdiction").

[7] For example, waiver provisions similar to Article 10.18.2 of the U.S.-Colombia TPA can be found in Article 10.18.2 of the U.S.-Peru Trade Promotion Agreement, Article 1121 of NAFTA, Article 10.18.2 of the Dominican Republic-Central American Free Trade Agreement ("CAFTA-DR"), and Article 26 of the 2012 U.S. Model Bilateral Investment Treaty.

[8] *Renco* Partial Award ¶ 73; *see also Waste Management I* Award § 20 at 230; *Commerce Group* Award ¶¶ 79-80.

[9] *Renco* Partial Award ¶ 74; *Waste Management I* Award § 18 at 229.

[10] U.S.-Colombia TPA, art. 10.18.3.

waiver is to "accompany" the Notice of Arbitration, it must be submitted at the same time as the Notice of Arbitration.

10. As to the material requirements, a claimant must act consistently and concurrently with the written waiver by abstaining from initiating or continuing proceedings in another forum with respect to the measures alleged to constitute a breach of the obligations of Chapter Ten as of the date of the waiver and thereafter. In relation to a similar waiver provision in NAFTA Chapter Eleven, the *Waste Management I* tribunal held:

> the act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued. . . . [I]t is clear that the waiver required under NAFTA Article 1121 calls for a show of intent by the issuing party vis-à-vis its waiver of the right to initiate or continue any proceedings whatsoever before other courts or tribunals with respect to the measure allegedly in breach of the NAFTA provisions. Moreover, such an abdication of rights ought to have been made effective as from the date of submission of the waiver[.][11]

11. As the tribunal in *Commerce Group* explained in relation to an identical waiver provision contained in the CAFTA-DR Chapter Ten, "[a] waiver must be more than just words; it must accomplish its intended effect."[12] Thus, if a claimant initiates or continues proceedings with respect to the measure in another forum despite meeting the formal requirements of filing a waiver, the claimant has not complied with the waiver requirement, and the tribunal lacks jurisdiction over the dispute.[13]

12. Article 10.18.2(b) requires a claimant's waiver to encompass "any proceedings with respect to any measure alleged to constitute a breach referred to in Article 10.16." The phrase "with respect to" should be interpreted broadly. This construction of the phrase is consistent with the purpose of this waiver provision: to avoid the need for a respondent State to litigate concurrent and overlapping proceedings in multiple forums, and to minimize not only the risk of double recovery, but also the risk of "conflicting outcomes (and thus legal uncertainty)."[14]

13. If all formal and material requirements under Article 10.18.2(b) are not met, the waiver is ineffective and will not engage the respondent State's consent to arbitration or the Tribunal's jurisdiction *ab initio* under the Agreement. A tribunal is required to determine whether a disputing investor has provided a waiver that complies with the formal and material requirements of Article 10.18.2(b). However, a tribunal itself has no authority to remedy an ineffective waiver. The discretion whether to permit a claimant to either proceed under or remedy an ineffective waiver lies with the respondent State alone, as a function of the State's general discretion to consent to arbitration.[15]

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[11] *Waste Management I* Award § 24 at 231-232 (emphasis added).

[12] *See Commerce Group* Award ¶ 80.

[13] *Id.* ¶ 115 (noting that the waiver was invalid and lacked "effectiveness" because claimants failed to discontinue domestic proceedings in El Salvador, so there was no consent of the respondent and the tribunal lacked jurisdiction); *see also Detroit Bridge* Award ¶ 336.

[14] *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 118 (Jan. 26, 2006) ("*Thunderbird* Award").

[15] *Renco* Partial Award ¶ 173; *see also Railroad Development* Decision on Jurisdiction ¶ 61 (finding that "the Tribunal has no jurisdiction without agreement of the parties to grant the Claimant an opportunity to remedy its

Continuous Nationality—Submission of a Claim by an Investor on behalf of an Enterprise (Article 10.16.1(b))

14. Article 10.16(1)(b) provides, in pertinent part, that "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 an (A) obligation under Section A [or other specified types of obligations] …." (Emphases added.) Article 10.28 defines "claimant" to "mean[] an investor of a Party that is a party to an investment dispute with another Party." (Emphases added.)

15. These provisions clarify that an investor seeking to be a claimant must not have the same nationality as the respondent State.[16] Further, for purposes of Article 10.16.1(b), an investor of a Party other than the respondent Party seeking to bring a claim on behalf of an enterprise must own or control directly or indirectly that enterprise continuously between three critical dates: (i) the time of the purported breach, (ii) the submission of a claim to arbitration, and (iii) the resolution of the claim.[17]

Time of the Purported Breach

16. As provided in Article 10.16.1(b), in pertinent part, a claimant may submit to arbitration a claim that "another Party… has breached" an obligation under Section A. (Emphasis added.) Further, as noted above, Article 10.1 (Scope and Coverage) clarifies that Chapter Ten applies to measures adopted or maintained by a Party relating to, *inter alia*,[18] "investors of another Party" and "covered investments[.]" "[A]n enterprise" is an 'investment'" as defined in Article 10.28, but it can only be a "covered investment" if it is an investment "of an investor of another Party" as provided under Article 1.3. Thus, because the substantive obligations of Section A apply to "investors of another Party," or investments "of an investor of another Party" in the territory of the first Party, an "investor of another Party," (*i.e.*, the Party that is not the respondent Party), must own or control directly or indirectly the investment [*i.e.*, the enterprise] at the time of the purported breach. If the requisite difference in nationality does not exist, there can be no breach, as there was no obligation under Chapter Ten, Section A at the time of the purported breach.

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defective waiver" and that "[i]t is for the Respondent and not the Tribunal to waive a deficiency under [CAFTA-DR] Article 10.18 or to allow a defective waiver to be remedied"); *Waste Management I* Award § 31 at 238-239 (holding that the waiver deposited with the first notice of arbitration did not satisfy NAFTA Article 1121 and that this defect could not be made good by subsequent action on the part of the claimant).

[16] This conclusion is consistent with the customary international law principle of "non-responsibility," according to which an individual or entity cannot maintain an international claim against its own State. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXTS, AND COMMENTARIES 264–265 (2002)).

[17] An investor of a Party who is seeking to bring a claim against the other Party on its (the investor's) own behalf under Article 10.16.1(a) must also maintain that nationality continuously between the same three points in time that an investor seeking to bring a claim on behalf of an enterprise under Article 10.16.1(b) must.

[18] Article 10.1(c) clarifies that Chapter Ten also applies to measures adopted or maintained by a Party relating to: "with respect to Articles 10.9 and 10.11, all investments in the territory of the Party."

And, pursuant to Article 10.16.1(b), what may be submitted to arbitration under Chapter Ten, Section B, are claims that the respondent State "has breached" an obligation under Section A.[19]

Submission of the Claim to Arbitration

17. A claimant (*i.e.*, an investor of a Party other than the respondent Party) must also own or control the enterprise directly or indirectly at the time of submission of the claim to arbitration. Article 10.16.1(b) provides that "the claimant, on behalf of an enterprise of the respondent that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim (i) that the other Party has breached (A) an obligation under [Chapter Ten] Section A …."

18. As the use of the present tense of "owns or controls" indicates, a claimant (*i.e.*, an investor of a Party other than the respondent Party), must own or control the enterprise directly or indirectly at the time of submission of the claim to arbitration.[20] Indeed, the tribunal in *Loewen v. United States of America* held that it lacked jurisdiction over Raymond Loewen's NAFTA Article 1117[21] claim (premised on indirect ownership or control of a U.S. enterprise through the Loewen Group, Inc., or "TLGI") because he could not show the requisite ownership or control at the time the claim was submitted to arbitration.[22]

Date of the Resolution of the Claim

19. A claimant (*i.e.*, an investor of a Party other than the respondent Party) must also own or control the relevant enterprise directly or indirectly through the resolution of the claim. Article 10.16.1(b)'s reference to "this Section" is a reference to Section B, which encompasses relevant dispute settlement procedures leading up to, during, and through the resolution of a claim. In this connection, multiple articles concerned with aspects of the dispute settlement process subsequent to the submission of a claim refer to the "disputing party" or the "disputing parties."[23] These terms are defined in Article 10.28 to mean "either the claimant or respondent" or both "the claimant and respondent," respectively. As noted above, "claimant" is further defined to "mean[] an investor of a Party that is party to an investment dispute with another Party."

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[19] This conclusion is supported also by the reasoning in *Waste Management II*, where the respondent argued, *inter alia*, that it was not aware of the nationality of the enterprise at the time of breach. The Tribunal noted that for purposes of Article 1117 (authorizing claims to be submitted on behalf of an enterprise substantively the same as in Article 10.16.1(b) of the U.S.-Colombia TPA), it was the nationality of the investor that directly or indirectly owns or controls the enterprise that matters, and that the relevant enterprise was owned or controlled indirectly by the U.S. claimant "at the time the actions said to amount to a breach of NAFTA occurred." *Waste Management, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/00/3, Award ¶¶ 80-85 (Apr. 30, 2004) (*Waste Management II* Award").

[20] Article 10.16.4 clarifies the time when a claim is considered submitted to arbitration; namely, when the request for arbitration or notice of arbitration is received – either by the ICSID Secretary-General or the disputing Party, depending on the instrument and rules under which the claim is submitted.

[21] NAFTA Article is substantively the same as Article 10.16.1(b) of the Agreement.

[22] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award, at 69-70 (June 26, 2003) ("*Loewen* Award").

[23] For example, Article 10.16 (Submission of a Claim to Arbitration), Article 10.19 (Selection of Arbitrators), Article 10.20 (Conduct of the Arbitration), Article 10.21 (Transparency of Arbitral Proceedings), Article 10.22 (Governing Law), and Article 10.26 (Awards), among other provisions, all refer to the "disputing party" or the "disputing parties."

20. Further, Article 10.26(8) provides that a "[i]f the respondent fails to abide by or comply with a final award, on delivery of a request by the Party of the claimant, a panel shall be established under Article 21.6 (Request for an Arbitral Panel)." The procedure established by this provision contemplates a continuing connection between an investor of a Party other than the respondent Party and such non-disputing Party through the time of the award and allows the non-disputing Party to pursue a State-to-State arbitration to seek compliance with that award.

21. The conclusions above are consistent with the well-established principle of international law that an individual or entity cannot maintain an international claim against its own State.[24] As the United States has long maintained[25] with respect to the rule of "continuous nationality," and as the tribunal in *Loewen v. United States of America* explained: "In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*."[26]

Expropriation (Article 10.7)

22. 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.[27] Compensation must be "prompt," in that it must be "paid without delay";[28]

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[24] *See* n.16, *supra*; U.S.-Colombia TPA art. 10.22.1 ("Governing Law") provides that a Chapter Ten tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.".

[25] *See* U.N. Int'l Law Commission, *Comments and Observations Received by Governments*, at 41-43, U.N. Doc. A/CN.4/561 (Jan. 27, Apr. 3 and 12, 2006) (comments of the United States of America on Draft Article 5 of the ILC Draft Articles on Diplomatic Protection) (urging that the ILC Draft Articles state that nationality must be continuously maintained from the date of injury to the date of the resolution of the claim); *accord Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Memorial of the United States of America on Matters of Jurisdiction and Competence Arising from the Restructuring of The Loewen Group, Inc., at 10-20 (Mar. 1, 2002).

[26] *Loewen* Award ¶ 225; *see* ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW: PEACE 512-13 (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.") (footnote omitted). In this connection, the *Loewen* tribunal in dismissing Raymond Loewen's Article 1117 claim for lack of jurisdiction also noted that he had failed to show the requisite ownership or control at the time of TLGI's restructuring (i.e., through to the resolution of the claim). *Loewen* Award at 69-70. *See also* Andrea K. Bjorklund, *Commentary on NAFTA Chapter 11: Article 1117, in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 503, n.193 (Chester Brown ed. 2013).

[27] 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.

[28] *See Mondev Int'l Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award ¶¶ 71-72 (Oct. 11, 2002) ("*Mondev* Award") ("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

"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.[29]

23. 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.[30]

Claims for Indirect Expropriation

24. Under international law, where an action is a bona fide, non-discriminatory regulation, it will not ordinarily be deemed expropriatory.[31] 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) of Annex 10-B, determining whether an indirect expropriation has occurred "requires a case-by-case, fact-based inquiry" that considers, among other factors: (i) the economic impact of the government action; (ii) the extent to which that action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.

25. With respect to the first factor, an adverse economic impact "standing alone, does not establish that an indirect expropriation has occurred."[32] 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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nondilatory procedures . . . to ensure correct compensation and make payment as soon as possible." Charles Sullivan, *Treaty of Friendship, Commerce and Navigation: Standard Draft – Evolution through January 1, 1962*, 112, 116 (U.S. Department of State, 1971).

[29] U.S.-Colombia TPA 10.7.2(a)-(d).

[30] 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).

[31] *See, e.g.*, *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 354 (June 8, 2009) ("*Glamis* Award") (quoting the RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712, cmt. (g) (1986) ("A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory. . . .")); *Chemtura Corp. v. Government of Canada*, NAFTA/UNCITRAL, Award ¶ 266 (Aug. 2, 2010) (holding that Canada's regulation of the pesticide lindane was a non-discriminatory measure motivated by health and environmental concerns and that a measure "adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation"); *Methanex* Final Award, Part IV, Ch. D ¶ 7 (holding that as a matter of general international law, a "a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process" will not ordinarily be deemed expropriatory or compensable).

[32] U.S.-Colombia TPA, Annex 10-B, para. 3(a)(i).

conclusion that the property has been 'taken' from the owner."[33] Further, to constitute an expropriation, a deprivation must be more than merely "ephemeral."[34]

26. 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.[35] For example, where a sector is "already highly regulated, reasonable extensions of those regulations are foreseeable."[36]

27. The third factor considers the nature and character of the government action, including whether such action involves physical invasion by the government or whether it is more regulatory in nature (*i.e.*, whether "it arises from some public program adjusting the benefits and burdens of economic life to promote the common good").[37]

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

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[33] *Pope & Talbot 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 ¶¶ 149-50 (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) ("*Cargill* Award") (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)").

[34] *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*, Award No. 141-7-2 (June 22, 1984), 6 IRAN U.S. CL. TRIB. REP. 219, 225 (June 22, 1984) ("While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral."); *see S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶¶ 284, 287-88 (Nov. 13, 2000) ("*S.D. Myers* First Partial Award").

[35] *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").

[36] *Glamis* Award, U.S. Rejoinder, at 91 ("The inquiry into an investor's expectations is an objective one. . . . Consideration of whether an industry is highly regulated is a standard part of the legitimate expectations analysis, and . . . where an industry is already highly regulated, reasonable extensions of those regulations are foreseeable.").

[37] *Id.*, at 109 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

Claims Based on Judicial Measures

29. Judicial measures may give rise to a claim for denial of justice under Article 10.5.1 of the Agreement, as noted in the next section of this submission. Decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants, however, do not give rise to a claim for expropriation under Article 10.7.1.[38] Moreover, the United States has not recognized the concept of "judicial takings" as a matter of domestic law.[39]

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

Minimum Standard of Treatment (Article 10.5)

31. 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."[40] 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."[41] 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[.]"[42] And, "'full

[38] *See, e.g.*, MARTINS PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT 208 (2013) (expressing the view that "while taking of property through the judicial process could be said to constitute expropriation, the rules and criteria to be applied for establishing the breach should come from denial of justice"); *Loewen* Award ¶ 141 (noting that claimants' expropriation claim based on judicial acts "adds nothing to the claim based on Article 1105. In the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if Loewen establishes a denial of justice under Article 1105.").

[39] It was the position of the United States Government in *Stop the Beach Renourishment* that the concept of a judicial taking should not be adopted under the Just Compensation Clause, and that continues to be the position of the United States. In *Stop the Beach*, only four Supreme Court Justices would have recognized that judicial actions taken by states may be subject to a Just Compensation (or Takings) Clause analysis under the United States Constitution. But because the Supreme Court ultimately declined to find a judicial taking in that case, the plurality's view on whether a judicial action could ever affect a taking under the U.S. Constitution is not controlling. *See Stop the Beach Renourishment*, 560 U.S. 702, 733-734 (2010); *see* generally *Marks* v. *United States*, 430 U.S. 188 (1977). Nor did the United States recognize the concept of "judicial takings" in decisions of the Foreign Claims Settlement Commission, such as *Elizabeth Leka and Diana Repishti v. Government of Albania*, Claim Nos. ALB-093/185. In those cases, the relevant claims settlement agreement covered not only expropriation, but any "intervention, or other taking, *or measures affecting*" property of U.S. nationals. (Emphasis added) The FCSC found that the Albanian government's "auction of the claimants' property without notice to claimants, *coupled with* the actions of the court in denying them subsequent legal rights to the property" constituted an "uncompensated 'intervention, or other taking of, or measures affecting' the claimants' property." (Emphasis added) In other words, the FCSC determined that certain executive action, coupled with court action denying any legal recourse, entitled claimants to an award of compensation under the circumstances.

[40] U.S.-Colombia TPA art. 10.5.1.

[41] U.S.-Colombia TPA art. 10.5.2.

[42] U.S.-Colombia TPA art. 10.5.2(a).

protection and security' requires each Party to provide the level of police protection required under customary international law."[43]

32. 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."[44]

33. Annex 10-A to the U.S.-Colombia TPA addresses the methodology for determining whether a customary international law rule covered by Article 10.5 has crystallized. The Annex expresses the Parties' "shared understanding that 'customary international law' generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation." Thus, in Annex 10-A the Parties confirmed their understanding and application of this two-element approach—State practice and *opinio juris*—which is the standard practice of States and international courts, including the International Court of Justice.[45]

34. 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)*,[46] 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.[47]

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[43] U.S.-Colombia TPA art. 10.5.2(b).

[44] *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."); Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 AM. SOC'Y OF INT'L L. PROC. 51, 58 (1939).

[45] *See Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, 122 (Feb. 3) ("*Jurisdictional Immunities of the State*") ("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. 44, ¶ 77 (Feb. 20) ("*North Sea Continental Shelf*")); *see also Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, ¶ 27 (June 3) ("*Continental Shelf*") ("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[.]").

[46] *Jurisdictional Immunities of the State* at 99.

[47] *Id.* at 122-23 (quoting *Continental Shelf* ¶ 27) (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

35. 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*.[48] "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."[49] Tribunals applying the minimum standard of treatment obligation in Article 1105 of NAFTA Chapter Eleven, which likewise affixes the standard to customary international law,[50] 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 the Claimant does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task. Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.[51]

36. 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.[52] 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."[53] A failure to satisfy requirements of domestic law does not

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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*.).

[48] *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20) ("*Asylum*"); *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).

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

[50] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions ¶ B.1 (July 31, 2001) ("FTC interpretation").

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

[52] *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) ("*Feldman* Award") ("[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).

[53] *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

necessarily violate international law.[54] 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. . . ."[55] Accordingly, a departure from domestic law does not in-and-of-itself sustain a violation of Article 10.5.

37. 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.[56] 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.[57] 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.[58] Likewise, decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary

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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* Award, ¶ 127 (noting that states have a "wide regulatory 'space' for regulation," can change their "regulatory polic[ies]," and have "wide discretion" with respect to how to carry out such policies by regulation and administrative conduct).

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

[55] *ADF* Award, ¶ 190.

[56] *See Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 2007 I.C.J. 582, ¶ 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 regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.").

[57] U.S.-Colombia Annex 10-A (Customary International Law) ("Article 105.2 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 U.S.-Colombia TPA and other treaties, a claimant submitting a claim under the U.S-Colombia 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.

[58] *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.").

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.[59] 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.

Fair and Equitable Treatment

38. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, expressly addressed in Article 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[.]"

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

Legitimate Expectations

40. 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.[60] 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.

[59] *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, ¶ 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.").

[60] *See, e.g., Grand River*, U.S. Counter-Memorial ("As a matter of international law, although an investor may develop its own expectations about the legal regime that governs its investment, those expectations do not impose a legal obligation on the State."). NAFTA tribunals have recognized this point. *See 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.").

Non-Discrimination

41. Similarly, the customary international law minimum standard of treatment set forth in Article 10.5 does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination.[61] As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.[62] To the extent that the customary international law minimum standard of treatment incorporated in Article 10.5 prohibits discrimination, it does so only in the context of other established customary international law rules, such as prohibitions against discriminatory takings,[63] access to judicial remedies or treatment by the courts,[64] or the obligation of States to provide full

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[61] *See Grand River* Award, ¶¶ 208-209 ("The language of Article 1105 does not state or suggest a blanket prohibition on discrimination against alien investors' investments, and one cannot assert such a rule under customary international law. States discriminate against foreign investments, often and in many ways, without being called to account for violating the customary minimum standard of protection . . . [N]either Article 1105 nor the customary international law standard of protection generally prohibits discrimination against foreign investments.").

[62] *See Methanex* Final Award, Part IV, Chapter C ¶¶ 25-26 (explaining that customary international law has established exceptions to the broad rule that "a State may differentiate in its treatment of nationals and aliens," but noting that those exceptions must be proven rules of custom, binding on the Party against whom they are invoked); *see also* ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW: PEACE 932 (9th ed. 1992) ("[A] degree of discrimination in the treatment of aliens as compared with nationals is, generally, permissible as a matter of customary international law."); Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 AM. SOC'Y OF INT'L L. PROC. 51, 56 (1939) ("The doctrine of absolute equality – more theoretical than actual – is therefore incompatible with the supremacy of international law. The fact is that no state grants absolute equality or is bound to grant it. It may even discriminate between aliens, nationals of different states, *e.g.*, as the United States does through treaty in the matter of the ownership of real property in this country."); ANDREAS ROTH, MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 83 (1949) ("[T]he principle of equality has not yet become a rule of positive international law, i.e., there is no obligation for a State to treat the aliens like the nationals. A discrimination of treatment between aliens and nationals alone does not yet constitute a violation of international law.").

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

[64] *See, e.g.*, C.F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 243 (1967) ("Especially in a suit between State and alien it is imperative that there should be no discrimination between nationals and aliens in the imposition of procedural requirements. The alien cannot be expected to undertake special burdens to obtain justice in the courts of the State against which he has a complaint."); EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 334 (1919) (A national's "own government is justified in intervening in his behalf only if the laws themselves, the methods provided for administering them, and the penalties prescribed are in derogation of the principles of civilized justice as universally recognized or if, in a specific case, they have been wrongfully subverted by the courts so as to discriminate against him as an alien or perpetrate a technical denial of justice."); *Report of the Guerrero Sub-Committee of the Committee of the League of Nations on Progressive Codification 1*, League of Nations Doc. C.196M.70, at 100 (1927) ("Denial of justice is therefore a refusal to grant foreigners free access to the courts instituted in a State for the discharge of its judicial functions, or the failure to grant free access, in a particular case, to a foreigner who seeks to defend his rights, *although in the circumstances nationals of the State would be entitled to such access*.") (emphasis added);

protection and security and to compensate aliens and nationals on an equal basis in times of violence, insurrection, conflict or strife.[65] Moreover, investor-State claims of nationality-based discrimination are governed exclusively by the provisions of Chapter Ten that specifically address that subject (Articles 10.3 and 10.4), and not Article 10.5.1.[66]

Transparency

42. 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.[67] 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.

Full Protection and Security

43. In addition to the fair and equitable treatment rule, another rule included as part of the minimum standard of treatment is the obligation to provide full protection and security. The United States has long maintained that the customary international law obligation to accord "full protection and security" requires that each Party provide the level of police protection required

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Ambatielos (Greece v. United Kingdom), 12 R.I.A.A. 83, 111 (Com. Arb. 1956) ("The modern concept of 'free access to the Courts' represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a practice which existed in former times and in certain countries, and which constituted an unjust discrimination against foreigners. Hence, the essence of 'free access' is adherence to and effectiveness of the principle of non-discrimination against foreigners who are in need of seeking justice before the courts of the land for the protection and defence of their rights.").

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

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

[67] *See United Mexican States v. Metalclad Corp.*, [2001] 89 B.C.L.R. 3d 359, 2001 BCSC 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").

under customary international law.[68] Although as discussed above, arbitral decisions are not evidence of State practice, the vast majority of cases in which the customary international law obligation of full protection and security was found to have been breached are those in which a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien.[69]

44. The obligation to provide "full protection and security" does not, for example, require States to: (i) prevent economic injury inflicted by third parties;[70] (ii) provide for legal security;[71] (iii) provide for stability of a State's legal environment; or (iv) guarantee that aliens or their investments are not harmed under any circumstances. Such interpretations would impermissibly

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[68] *See, e.g.*, U.S. 2004 and 2012 Model Bilateral Investment Treaties, Art. 5 (Minimum Standard of Treatment), paragraph 2: "For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: . . . (b) "full protection and security" requires[s] each Party to provide the level of police protection required under customary international law."

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

[70] *See, e.g.*, *Methanex Corp. v. United States of America*, Reply Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment, at 38-39 (Apr. 12, 2001) ("Indeed, if the full protection and security requirement were to extend to an obligation to 'protect foreign investments from economic harm inflicted by third parties,' . . . Article 1105(1) would constitute a very substantial enlargement of that requirement as it has been recognized under customary international law."); *Methanex Corp. v. United States of America*, Rejoinder Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment, at 39 (June 27, 2001) (accord); *Loewen Group, Inc. v. United States of America*, NAFTA/ICSID Case No. ARB (AF)/98/3, Counter-Memorial of the United States of America, at 179-80 (Mar. 30, 2001) (accord).

[71] Omega Eng'g LLC and Mr. Oscar Rivera v. Republic of Panama, ICSID Case No. ARB/16/42, Submission of the United States of America ¶ 23 (Feb. 3, 2020).

extend the duty to provide "full protection and security" beyond the minimum standard under customary international law, as the United States has consistently maintained.

Claims Based on Judicial Measures

45. The obligation to provide "fair and equitable treatment" under Article 10.5.1 includes, for example, the customary international law obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. Denial of justice in its historical and "customary sense" denotes "misconduct or inaction of the judicial branch of the government" and involves "some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process."[72] Aliens have no cause for complaint at international law about a domestic system of law provided that it conforms to "a reasonable standard of civilized justice" and is fairly administered.[73] "Civilized justice" has been described as requiring "[f]air courts, readily open to aliens, administering justice honestly, impartially, [and] without bias or political control."[74]

46. A denial of justice may occur in instances such as when the final act of a State's judiciary constitutes a "notoriously unjust"[75] or "egregious"[76] administration of justice "which offends a sense of judicial propriety."[77] In this connection, it is well-established that international tribunals, such as U.S.-Colombia TPA Chapter Ten tribunals, are not empowered to be supranational courts of appeal on a court's application of domestic law.[78] Thus, an investor's

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[72] EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAI 286 MS 330 (1925) ("BORCHARD"); BRIERLY at -87 (defining a denial of justice as "an injury involving the responsibility of the state committed by a court of justice").

[73] BORCHARD at 198 ("Provided the system of law conforms with a reasonable standard of civilized justice and provided that it is fairly administered, aliens have no cause for complaint in the absence of an actual denial of justice.") (footnote omitted).

[74] Borchard, 33 AM. SOC'Y OF INT'L L. PROC. at 63.

[75] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 44 (2005) ("PAULSSON") (citing J. Irizarry y Puente, The Concept of "Denial of Justice" in Latin America, 43 MICH. L. REV. 383, 406 (1944)); id. at 4 ("[A] state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner.") (emphasis omitted); Chattin Case (United States v. Mexico), 4 R. INT'L ARB. AWARDS 282, 286-87 (1927), reprinted in 22 AM. J. INT'L L. 667, 672 (1928) ("Acts of the judiciary . . . are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man.") (emphasis omitted).

[76] PAULSSON at 60 ("The modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice.").

[77] *Loewen* Award ¶ 132 (a denial of justice may arise where there has occurred a "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety"); *Mondev* Award ¶ 127 (finding that the test for a denial of justice was "not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome[.]"); *see also Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain),* 1970 I.C.J. 3 (Feb. 5) Separate Opinion of Judge Tanaka, at 144 ("Separate Opinion of Judge Tanaka") (explaining that "denial of justice occurs in the case of such acts as- 'corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it, . . . But no merely erroneous or even unjust judgment of a court will constitute a denial of justice'") (citations omitted).

[78] *Apotex I & II* Award ¶ 278 ("[I]t is not the proper role of an international tribunal established under NAFTA Chapter Eleven to substitute itself for the U.S. Supreme Court, or to act as a supranational appellate court."); *Azinian* Award ¶ 99 ("The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised

claim challenging judicial measures under Article 10.5.1 is limited to a claim for denial of justice under the customary international law minimum standard of treatment. *A fortiori*, domestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law.

47. For the foregoing reasons, judicial measures may form the basis of a claim under the customary international law minimum standard of treatment under Article 10.5.1 only if they are final[79] and if it is proved that a denial of justice has occurred. Were it otherwise, it would be impossible to prevent Chapter Ten tribunals from becoming supranational appellate courts on matters of the application of substantive domestic law, which customary international law does not permit.[80]

National Treatment (Article 10.3)

48. Article 10.3 provides in relevant part that each party shall accord to investors of the other Party and to covered investments "treatment no less favorable than that it accords, in like circumstances, to its own investors [and to investments in its territory of its own investors] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[81]

49. To establish a breach of national treatment under Article 10.3, a claimant has the burden of proving that it or its investments: (1) were accorded "treatment"; (2) were in "like circumstances" with domestic investors or investments; and (3) received treatment "less favorable" than that accorded to domestic investors or investments.[82]

50. Article 10.3 is intended to prevent discrimination on the basis of nationality between domestic investors (or investments) and investors (or investments) of the other Party, that are in

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has plenary appellate jurisdiction."); *Waste Management II* ¶ 129 ("[T]he Tribunal would observe that it is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of amparo in respect of the decisions of the federal courts of NAFTA parties."); Separate Opinion of Judge Tanaka at 158 (explaining that erroneous decisions of municipal law cannot constitute a denial of justice because the interpretation of municipal law "does not belong to the realm of international law. If an international tribunal were to take up these issues and examine the regularity of the decisions of municipal courts, the international tribunal would turn out to be a '*cour de cassation'*, the highest court in the municipal law system. An international tribunal, on the contrary, belongs to quite a different order; it is called upon to deal with international affairs, not municipal affairs.").

[79] *See* Greenwood at 64 (explaining that it is "inherently implausible that States would intend" for interlocutory or non-final decisions of domestic courts to be subject to challenge on the international plane," which would have the effect of "set[ting] aside the entire system of checks and balances within the national judicial system.").

[80] *See* Douglas at 33 (explaining that an exercise of adjudicative power can give rise to State responsibility through the medium of a denial of justice and that "[a]ny other approach would serve to vest international tribunals with appellate jurisdiction over the substantive outcomes in domestic adjudicative procedures.").

[81] U.S.-Colombia TPA art. 10.3.

[82] As the United States has elsewhere explained with respect to the otherwise identical national treatment obligation in NAFTA article 1102, this provision is "intended to prevent discrimination on the basis of nationality" and to "ensure that nationality is not the basis for differential treatment." *Mercer Int'l Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of the United States, ¶ 10 (May 8, 2015); *see also Apotex Holdings Inc. v. United States of America*, Case No. ARB(AF)/12/1, Counter-Memorial on Merits and Objections to Jurisdiction of Respondent United States, ¶ 324 (Dec. 14, 2012); *cf. Gramercy Funds Management LLC v. Peru*, ICSID Case No. UNCT/18/2, Submission of the United States, ¶ 49 n.91 (June 21, 2019) (interpreting the United States-Peru Trade Promotion Agreement).

"like circumstances." It is not intended to prohibit all differential treatment among investors or investments. Rather, it is designed only to ensure that the Parties do not treat entities that are "in like circumstances" differently based on nationality.[83] Nationality-based discrimination under Article 10.3 may be *de jure* or *de facto*. *De jure* discrimination occurs when a measure on its face discriminates between investors or investments in like circumstances based on nationality. *De facto* discrimination occurs when a facially neutral measure with respect to nationality is applied in a discriminatory fashion based on nationality. A claimant is not required to establish discriminatory intent.

51. As indicated above, the appropriate comparison is between the treatment accorded to a claimant or its investment, on one hand, and the treatment accorded to a domestic investor or investment in like circumstances, on the other. It is therefore incumbent upon the claimant to identify domestic investors or investments as comparators. If the claimant does not identify any domestic investor or investment as allegedly being in like circumstances, no violation of Article 10.3 can be established.

52. Determining whether a domestic investor or investment identified by a claimant is in "like circumstances" to the claimant or its investment is a fact-specific inquiry. As one tribunal observed in the context of a similar national treatment provision in the NAFTA, "[i]t goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations."[84] The United States understands the term "circumstances" to denote conditions or facts that accompany treatment as opposed to the treatment itself. Thus, identifying appropriate comparators for purposes of the "like circumstances" analysis requires consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other possible relevant characteristics.

53. When determining whether a claimant is in like circumstances with comparators, it or its investment should be compared to a domestic investor or investment that is alike in all relevant respects but for nationality of ownership. Moreover, whether treatment is accorded in "like circumstances" under Article 10.3 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare objectives.

54. Nothing in Article 10.3 requires that investors or investments of investors of a Party, regardless of the circumstances, be accorded the best, or most favorable, treatment given to any domestic investor or investment. The appropriate comparison is between the treatment accorded a foreign and a domestic investment or investor in like circumstances. This is an important distinction intended by the Parties. Thus, the Parties may adopt measures that draw distinctions among entities without necessarily violating Article 10.3.

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[83] *Loewen* Award ¶ 139 (accepting in the NAFTA context that "Article 1102 [National Treatment] is direct[ed] *only* to nationality-based discrimination") (emphasis added); *Mercer* Award, ¶ 7.7 (accepting the positions of the United States and Mexico that the National Treatment and Most-Favored Nations obligations are intended to prevent discrimination on the basis of nationality).

[84] *See, e.g.*, *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Award on the Merits of Phase 2 ¶ 75 (Apr. 10, 2001).

Most-Favored-Nation Treatment (Article 10.4)

55. The requirements for establishing a breach of Most-Favored-Nation Treatment ("MFN") under Article 10.4 are the same as for establishing a National Treatment breach under Article 10.3, except that the applicable comparators are investors or investments of non-Parties.[85] Thus, as is the case under Article 10.3, if a claimant does not identify such non-Party investors or investments as allegedly being in like circumstances with the claimant or its investment, no violation of Article 10.4 can be established. The MFN clause of the U.S.-Colombia TPA expressly requires a claimant to demonstrate that investors of a non-Party "in like circumstances" were afforded more favorable treatment. Ignoring the "in like circumstances" requirement would serve impermissibly to excise key words from the Agreement.[86] A claimant must also establish that the alleged non-conforming measures that constituted "less favorable" treatment are not subject to the non-conforming measure exceptions contained in Annex II.[87] In particular, each Party reserved "the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement."[88]

56. Nor can Article 10.4 be used to alter the substantive content of the fair and equitable treatment or the full protection and security obligations under Article 10.5. As noted in the submissions on Article 10.5 above, Article 10.5.2 clarifies that the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. Article 10.5.3 further clarifies that a "breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article."

Proximate Cause (Article 10.16.1)

57. Article 10.16.1 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

[85] *Mercer* Award ¶ 7.10.

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

[87] Annex II is incorporated into Chapter Ten pursuant to Article 10.13.2.

[88] U.S.-Colombia TPA, Annex II, Schedule of the United States, at II-US-8; Annex II, Schedule of Colombia, at II-COL-4.

(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.

58. 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 or arising out of" requires an investor to demonstrate proximate causation.[89] In this connection, NAFTA tribunals have consistently applied 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,[90] 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."[91]

59. Indeed, proximate causation is an "applicable rule[] of international law" that under the U.S.-Colombia TPA Article 10.22.1 must be taken into account in fixing the appropriate amount, if any, of monetary damages.[92] Article 10.16.1 contains no indication that the Parties intended to

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[89] *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, U.S. Amended Statement of Defense* ¶ 213; *Grand River Enterprises Six Nations LTD, et al*. v. United States of America, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America, at 174-75 (Dec. 22, 2008) ("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 v. Government of Canada*) (footnotes omitted); *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Seventh Submission of the United States of America ¶¶ 2, 13 (Nov. 6, 2001) (only damages proximately caused by a breach may be recovered); *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America ¶ 12 (Sept. 18, 2001) (a tribunal's task is limited to assessing whether there has been a breach and whether the investor or investment suffered loss or damages proximately caused by such a breach).

[90] *S.D. Myers* First Partial Award ¶ 316.

[91] *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Second Partial Award ¶ 140 (Oct. 21, 2002). *See also Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award in Respect of Damages ¶ 80 (May 31, 2002) (holding that under NAFTA Article 1116 the claimant bears the burden to "prove that loss or damages was caused to its interest, and that it was causally connected to the breach complained of[]"; *Archer Daniels Midland Co. v. United Mexican States,* NAFTA/ICSID Case No. ARB(AF)/04/05, Award ¶ 282 (Nov. 21, 2007) (requiring 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.").

[92] *See* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 31, comment 10 (2001) ("ILC Draft Articles"). *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 244-45 (1953) ("it 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").

vary from this established rule.[93] Accordingly, any loss or damage cannot be based on an assessment of acts, events, or circumstances not attributable to the alleged breach.[94] 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.[95]

Burden of Proof and Governing Law (Article 10.22)

60. Article 10.22.1 of the U.S.-Colombia TPA states in relevant part that "the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

61. General principles of international law applicable to international arbitration are that a claimant has the burden of proving its claims, and that burden does not shift to the respondent. If a respondent raises any affirmative defenses, the respondent must prove such defenses. The standard of proof is generally a preponderance of the evidence. However, when allegations of corruption are raised, either as part of a claim or as part of a defense, the party asserting that corruption occurred must establish the corruption through clear and convincing evidence.[96]

Damages (Article 10.26)

62. The U.S.-Colombia TPA authorizes claimants to seek damages for alleged breaches of specified obligations in the Agreement.[97] However, in accordance with the discussion above in paragraph 5, for TPA obligations that only extend to covered investments, a tribunal may only award damages for violations where the covered investment incurred damages. A tribunal has no authority to award damages that a claimant allegedly incurred in their capacity as an investor for violations of obligations that only extend to covered investments.

[93] *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)* 1989 I.C.J. 15, ¶ 50 (Judgment of July 1989) ("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* Award ¶¶ 160, 162 ("It would be strange indeed if sub silentio the international rule were to be swept away.").

[94] *See* ILC Draft Articles, art. 31, comment 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).

[95] ILC Draft Articles, art. 31, comment 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[.]") (footnotes omitted).

[96] *E.g., EDF (Services) Ltd. v. Romania* (ICSID Case No. ARB/05/13), Award ¶ 221 (Oct. 8, 2009); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/13/1), Award ¶ 492 (Aug. 22, 2017).

[97] U.S-Colombia TPA Article 10.26.

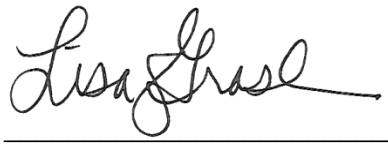
Disclosure of Information (Article 22.4)

63. Article 22.4 provides:

> Nothing in this Agreement shall be construed to require a party to furnish or allow access to confidential information the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

64. The ordinary meaning of "[n]othing in this Agreement" includes the investor-State arbitration provisions included in Section B of Chapter Ten of the Agreement, and thus this must be construed as preventing arbitral Tribunals established under this Section from ordering discovery of the information referenced in the provision.

Respectfully submitted,



Lisa J. Grosh
Assistant Legal Adviser
John D. Daley
Deputy Assistant Legal Adviser
Nicole C. Thornton
Chief of Investment Arbitration
John I. Blanck
Attorney-Adviser
Office of International Claims and Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

February 26, 2021