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

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

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER TEN OF THE DOMINICAN REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT (CAFTA-DR) AND THE
ICSID CONVENTION
BETWEEN

DANIEL W. KAPPES AND KAPPES, CASSIDAY & ASSOCIATES,

Claimants,

- and -

REPUBLIC OF GUATEMALA,

Respondent.

ICSID Case No. ARB/18/43

SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 10.20.2 of the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR" or "Treaty"), the United States of America makes this submission on questions of interpretation of the CAFTA-DR. The United States does not take a position in this submission on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

Article 10.18.1 (Limitations Period)

2. Article 10.18.1 of the Treaty provides:

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

3. Article 10.18.1 imposes a ratione temporis jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute.[1] As is made explicit by Article 10.18.1, the Parties did not consent to arbitrate an investment dispute if "more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach" and "knowledge that the claimant ... or the enterprise ... has incurred loss or damage." Accordingly, a tribunal must find that a claim satisfies the requirements of, inter alia, Article 10.18.1 in order to establish a Party's consent to (and therefore the tribunal's jurisdiction over) an arbitration claim. Because the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction,[2] the claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.[3]

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

[2] *Apotex I & II* Award ¶ 150. *See also Vito G. Gallo v. Government of Canada*, NAFTA/UNCITRAL, Award ¶ 277 (Sept. 15, 2011) ("[A] claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional stage . . . ."); *Mesa Power Group, LLC v. Government of Canada*, NAFTA/PCA Case No. 2012-17, Award ¶ 236 (Mar. 24, 2016) ("It is for the Claimant to establish the factual elements necessary to sustain the Tribunal's jurisdiction over the challenged measures."); *see also Phoenix Action, Ltd. v. Czech Republic,* ICSID Case No. ARB/06/5, Award ¶¶ 58-64 (Apr. 15, 2009) (summarizing relevant investment treaty arbitral awards and concluding that "if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established *prima facie]* at the jurisdictional phase"); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction ¶¶ 190-192 (Nov. 14, 2005) (finding that claimant "has the burden of demonstrating that its claims fall within the Tribunal's jurisdiction."); *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction ¶ 79 (Apr. 22, 2005) (acknowledging claimant had to satisfy the burden of proof "required at the jurisdictional phase").

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

4. The limitations period is a "clear and rigid" requirement that is not subject to any "suspension," "prolongation," or "other qualification."[4] An investor or enterprise first acquires knowledge of an alleged breach and loss under Article 10.18.1 as of a particular "date." Such knowledge cannot first be acquired at multiple points in time or on a recurring basis. As the Grand River tribunal recognized in interpreting the nearly identical limitations provisions under Articles 1116(2) and 1117(2) of the NAFTA,[5] subsequent transgressions by a Party arising from a continuing course of conduct do not renew the limitations period once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby.[6]

5. Thus, where a "series of similar and related actions by a respondent state" is at issue, an investor cannot evade the limitations period by basing its claim on "the most recent transgression in that series."[7] To allow an investor to do so would "render the limitations provisions ineffective[.]"[8] An ineffective limitations period would fail to promote the goals of ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential respondents and third parties. An ineffective limitations period would also undermine and in effect change the State party's consent because, as noted at paragraph 3, the Parties did not consent to arbitrate an investment dispute if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach and knowledge that the claimant or the enterprise has incurred loss or damage.

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

[5] *See Grand River* Decision on Jurisdiction ¶ 81.

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

[7] *Grand River* Decision on Jurisdiction ¶ 81 (interpreting the claims limitation language in NAFTA Chapter Eleven, which is identical to Article 10.18.1 of this Treaty for all relevant purposes).

[8] *Id.*

6. With regard to knowledge of "incurred loss or damage" under Article 10.18.1, a claimant may have knowledge of loss or damage even if the amount or extent of that loss or damage cannot be precisely quantified until some future date.[9] Moreover, the term "incur" broadly means "to become liable or subject to."[10] Therefore, an investor may "incur" loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate.[11]

Articles 10.28(g) and 10.14.1 (Relevance of Domestic Law)

7. Article 10.28 sets out a list of forms that "investment" may take, including, at subparagraph (g) of the definition, "licenses, authorizations, permits, and similar rights conferred pursuant to domestic law." Subparagraph (g), together with its footnote 10, reference domestic law to provide guidance as to when such an instrument may have the requisite characteristics of an investment. Specifically, whether such an instrument may constitute an investment will depend on such factors as the nature and extent of the rights that the holder has under the law of the host State Party. As the United States has previously explained with respect to the meaning of footnote 10, the determination as to whether a particular instrument has the characteristics of an investment is a case-by-case inquiry, involving examination of the nature and extent of any rights conferred under the State's domestic law.[12]

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

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

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

[12] For example, under U.S. law, it is well established that revocable government-granted licenses or permits do not confer property interests that give rise to claims for compensation. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981) (holding that attachments subject to "revocable" and "contingent" licenses, which the President could nullify, did not provide the plaintiff with any "property" interest that would support a constitutional claim for compensation); *Mike's Contracting, LLC v. United States*, 92 Fed. Cl. 302, 310 (Ct. Fed. Cl. 2010) (holding that helicopter airworthiness certificates, subject to U.S. Federal Aviation Administration revocation or suspension, were

8. Article 10.14.1 provides that nothing in Article 10.3 (National Treatment) precludes a Party from adopting special formalities such as a requirement that "covered investments be legally constituted under the laws or regulations of the Party," so long as such formalities "do not materially impair the protections afforded by a Party to investors of another Party and to covered investments pursuant to this Chapter." This paragraph provides that it is not a violation of a Party's National Treatment obligation to require that a covered investment be legally constituted under the Party's domestic law, so long as such requirements do not materially impair the protections of Chapter 10.

Article 10.5 (Minimum Standard of Treatment, including Denial of Justice)

9. Article 10.5.1 of the Treaty requires that each Party "accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." Article 10.5.2 specifies that:

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

10. Article 10.5.2 then goes on to state:

> The obligation in paragraph 1 to provide:

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not property interests that could give rise to a takings claim); *see also Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, U.S. Counter-Memorial on Merits and Objections to Jurisdiction (Dec. 14, 2012), ¶ 227 (stating that "property 'must be capable of exclusive possession or control,'" and that, where the purported investor has "no power . . . to prevent the government from exercising its statutory authority to withhold or revoke [the instrument in question]," the investor cannot "exclude" the government from those instruments, and they thus "lack the requisite exclusivity that would confer a cognizable 'property interest' under U.S. law").

> (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
>
> (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

11. The above provisions demonstrate the Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in Article 10.5. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts. The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[13]

Rules that have crystallized into the minimum standard

12. 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, 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."[14] This obligation is discussed in more detail below.

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[13] *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 259 (Nov. 13, 2000) ("*S.D. Myers* First Partial Award"); *see also Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 615 (June 8, 2009) ("*Glamis* Award") ("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).

[14] CAFTA-DR, art. 10.5.2(a).

13. Other areas included within the minimum standard of treatment concern the obligation not to expropriate covered investments except under the conditions specified in Article 10.7, and the obligation to provide "full protection and security," which, as expressly stated in Article 10.5.2(b) and further discussed below, "requires each Party to provide the level of police protection required under customary international law."[15]

Methodology for determining the content of customary international law

14. Annex 10-B to the Treaty addresses the methodology for determining whether a customary international law rule covered by Article 10.5.1 has crystalized. The Annex expresses the Parties' "shared understanding that 'customary international law' generally and as specifically referenced in Article 10.5 . . . results from a general and consistent practice of States that they follow from a sense of legal obligation." Thus, in Annex 10-B the Parties confirmed their understanding and application of this two-element approach—State practice and opinio juris—which is the standard practice of States and international courts, including the International Court of Justice.[16]

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

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

15. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate, under this two-element approach, that a rule of customary international law exists. In its decision on Jurisdictional Immunities of the State (Germany v. Italy),[17] 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.[18]

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

[18] *Id.* at 122-23 (discussing relevant materials that can serve as evidence of State practice and *opinio juris* in the context of jurisdictional immunity in foreign courts); *see also* International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries (2018), Conclusion 6 ("Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts.").

16. 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.[19] "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."[20] Tribunals applying the minimum standard of treatment obligation in Article 1105 of NAFTA Chapter Eleven, which likewise affixes the standard to customary international law,[21] 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.[22]

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

[20] *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).

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

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

17. 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.[23] Determining a breach of the minimum standard of treatment "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders."[24] A failure to satisfy requirements of domestic law does not necessarily violate international law.[25] 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. . . ."[26] Accordingly, a departure from domestic law does not in-and-of-itself sustain a violation of Article 10.5.

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

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

[25] *ADF* Award ¶ 190 ("[T]he Tribunal has no authority to review the legal validity and standing of U.S. measures here in question under U.S. internal administrative law. We do not sit as a court with appellate jurisdiction with respect to the U.S. measures. (citation omitted) Our jurisdiction is confined by NAFTA Article 1131(1) to assaying the consistency of the U.S. measures with relevant provisions of NAFTA Chapter 11 and applicable rules of international law.") ; *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).").

[26] *ADF* Award ¶ 190.

Claims for judicial measures

18. As noted in paragraph 12 above, 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."[27] 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.[28] "Civilized justice" has been described as requiring "[f]air courts, readily open to aliens, administering justice honestly, impartially, [and] without bias or political control."[29]

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

[28] 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).

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

19. A denial of justice may occur in instances such as when the final act of a State's judiciary constitutes a "notoriously unjust"[30] or "egregious"[31] administration of justice "which offends a sense of judicial propriety."[32] More specifically, a denial of justice exists where there is, for example, an "obstruction of access to courts," "failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment."[33] Instances of denial of justice also have included corruption in judicial proceedings, discrimination or ill-will against aliens, and executive or legislative interference with the freedom of impartiality of the judicial process.[34] At the same time, erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law.[35] Similarly, neither the evolution nor development of "new" judge-made law that departs from previous jurisprudence within the confines of common law adjudication implicates a denial of justice.[36]

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[30] 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).

[31] 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.").

[32] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 132 (June 26, 2003) ("*Loewen* Award") (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).

[33] Harvard Research Draft, The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, art. 9, 23 AM. J. INT'L L. SP. SUPP. 131, 134 (1929). The commentary notes that a "manifestly unjust judgment" is one that is a "travesty upon justice or grotesquely unjust." *Id.* at 178.

[34] *Id.* At 175.

[35] *Id*. at 134 ("An error of a national court which does not produce manifest injustice is not a denial of justice."); PAULSSON at 81 ("The erroneous application of national law cannot, in itself, be an international denial of justice.");

PATRICK DUMBERRY, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105 at 228 (2013) (noting that a simple error, misinterpretation or misapplication of domestic law is not per se a denial of justice) (internal quotes omitted); BORCHARD at 196 (explaining that a government is not responsible for the mistakes or errors of its courts and that: "[A]s a general rule the state is not liable for the acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort."); Christopher Greenwood, *State Responsibility for the Decisions of National Courts*, *in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 61 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004) ("[I]t is well established that a mistake on the part of the court or an irregularity in procedure is not in itself sufficient to amount to a violation of international law; there must be a denial of justice.").

[36] *See Mondev* Award ¶¶ 131, 133 (finding, in response to the claimant's allegation that a decision of the Massachusetts Supreme Court involved a "significant and serious departure" from its previous jurisprudence, it doubtful that the court "made new law . . . [b]ut even if it had done so its decision would have fallen within the limits of common law adjudication. There is nothing here to shock or surprise even a delicate judicial sensibility.").

20. The international responsibility of States may not be invoked with respect to non-final judicial acts,[37] unless recourse to further domestic remedies is obviously futile or manifestly ineffective. The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence,[38] the particular nature of judicial action,[39] and the unique status of the judiciary in both international and municipal legal systems. As a result, the actions of domestic courts are accorded a greater presumption of regularity under international law than are legislative or administrative acts.[40] Indeed, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice.[41]

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[37] *See Apotex I & II* Award ¶ 282 ("[A] claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself."); *Loewen* Award ¶ 156 ("The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision."); PAULSSON at 108 ("For a foreigner's international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself."); Zachary Douglas, International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed, 63(3) INT'L. & COMP. L.Q. 28 (2014) ("Douglas") (explaining that "international responsibility towards foreign nationals for acts and omissions associated with an adjudicative procedure can only arise at the point at which the adjudication has produced its final result; it is only at that point that a constituent element of that responsibility has been satisfied, which is the existence of damage to the foreign national.").

[38] *See*, *e.g.*, Separate Opinion of Judge Tanaka at 154 ("One of the most important political and legal characteristics of a modern State is the principle of judicial independence."). Judge Tanaka went on to explain that what distinguishes the judiciary from other organs of government is the "social significance of the judiciary for the settlement of conflicts of vital interest as an impartial third party and, on the other hand, from the extremely scientific and technical nature of judicial questions, the solution of which requires the most highly conscientious activities of specially educated and trained experts. Independence of the judiciary, therefore, despite the existence of differences in degree between various legal systems, may be considered as a universally recognized principle in most of the municipal and international legal systems of the world. It may be admitted to be a 'general principle of law recognized by civilized nations' (Article 38, paragraph 1(c), of the Statute)." *Id.* at 154.

[39] *See*, *e.g.*, Douglas at 10-11 (explaining that the "rationality inherent in decision-making through adjudication, coupled with the opportunity afforded to affected parties to present reasoned arguments during the course of that decision-making process, . . . sets adjudication apart from other institutions of social ordering within the State," and that an authoritative decision by a domestic adjudicative body "cannot be disturbed by an international court or tribunal simply on the basis that a more rational set of reasons was available to that . . . body. . . . International law is deferential to the particular virtues of adjudication by respecting the integrity of the process and the outcomes it produces.") (footnotes omitted).

[40] *Loewen Group, Inc. and Raymond Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Response of the United States of America to the Submissions of Claimants Concerning Matters of Jurisdiction and Competence, at 8 (July 7, 2000) ("[U]nlike actions of the executive or the legislature, judicial acts can violate

21. In this connection, it is well-established that international tribunals, such as CAFTA-DR Chapter 10 tribunals, are not empowered to be supranational courts of appeal on a court's application of domestic law.[42] Thus, an investor's 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.

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customary international law obligations in only the most extreme and unusual of circumstances[,]" citing T. BATY, THE CANONS OF INTERNATIONAL LAW 127 (1930) ("It is true that courts are organs of the nation; but they are not its organs in the sense in which the executive and the legislature are."); BORCHARD at 195-96 (because "[i]n well-regulated states, the courts are more independent of executive control than any other authorities . . . [,] the state is not liable for the acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort."); ALWYN V. FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 33 (1938) ("[T]he question of proof of illegal action will be more difficult [with respect to judicial action] than is the case with other organs of the State."). *See also Loewen*, Response of the United States of America to the Submissions of Claimants Concerning Matters of Jurisdiction and Competence, at 9 (July 7, 2000) ("Given the unique status of the judiciary in both international and municipal legal systems, the actions of domestic courts are accorded a far greater presumption of regularity under international law than are legislative or administrative acts."). The United States distinguishes between judicial action and other forms of government action as a matter of domestic law. For example, the U.S. Supreme Court has long recognized liability for legislative and regulatory actions that violate the economic protections of the U.S. Constitution, but has never recognized liability for judicial action under those same provisions. *See*, *e.g.*, Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1075 n.121 (1997); Barton H. Thompson, Jr., Judicial Takings, 76 VA. L. REV. 1449, 1453 (1990) (observing with disapproval that "[t]he few scholars to have seriously addressed the issue have generally argued that it would be catastrophic to subject the courts to the same constitutional constraints as the legislative and executive branches . . . ."). The status of U.S. law has not changed. *See* Stop the Beach *Renourishment, Inc. v. Florida Department of Environmental Protection et al.*, 560 U.S. 702 (2010); *Shinnecock Indian Nation v. United States*, 112 Fed. Cl. 369, 385 (2013) ("a theory of judicial takings . . . has not been adopted in the federal courts.").

[41] *See Robert Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award ¶ 99 (Nov. 1, 1999) ("*Azinian*, Award") ("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 has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. What must be shown is that the court decision itself constitutes a violation of the treaty. Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end."); *Mohammad Ammar Al Bahloul v. Republic of Tajikistan*, SCC Case No. V(064/2008), Partial Award on Jurisdiction and Liability ¶ 237 (Sept. 2, 2009) ("[I]t is not the role of this Tribunal to sit as an appellate court on questions of Tajik law. Suffice it to say, we do not find the Tajik court's application of Tajik law on this issue to be malicious or clearly wrong, and therefore find no basis for Claimant's claim of denial of justice."). *See also* PAULSSON at 82.

[42] *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*

22. 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[43] and if it is proved that a denial of justice has occurred. Were it otherwise, it would be impossible to prevent Chapter 10 tribunals from becoming supranational appellate courts on matters of the application of substantive domestic law, which customary international law does not permit.[44]

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 has plenary appellate jurisdiction."); *Waste Management Inc. v. United Mexican States ("Number 2")*, NAFTA/ICSID Case No. ARB(AF)/00/3, Final Award ¶ 129 (Apr. 30, 2004) ("*Waste Management II* Award") ("[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.").

[43] *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.").

[44] *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.").

Full Protection and Security

23. As noted in paragraph 10 above, Article 10.5.2(b) explains that "full protection and security" requires each Party to provide the level of police protection required under customary international law.[45] This obligation does not, for example, require States to prevent economic injury inflicted by third parties,[46] nor does it require States to guarantee that aliens or their investments are not harmed under any circumstances. Moreover, as discussed above, 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 and if it is proved that a denial of justice has occurred.

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

[46] *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

Obligations that have not crystallized into the minimum standard

Good Faith

24. The principle that "every treaty in force is binding on the parties to it and must be performed by them in good faith" is established in customary international law,[47] not in Chapter 10 of the CAFTA-DR. As such, claims alleging breach of the good faith principle in a party's performance of its Treaty obligations do not fall within the limited jurisdictional grant afforded in this Treaty.[48]

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).

[47] *See* Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 (reflecting the customary international law principle).

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

25. Furthermore, it is well established in international law that good faith is "one of the basic principles governing the creation and performance of legal obligations," but "it is not in itself a source of obligation where none would otherwise exist."[49] As such, customary international law does not impose a free-standing, substantive obligation of "good faith" that, if breached, can result in State liability.[50] Accordingly, a claimant "may not justifiably rely upon the principle of good faith" to support a claim, absent a specific treaty obligation, and the CAFTA-DR contains no such obligation.[51]

Legitimate Expectations

26. 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.[52] 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.

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[49] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 1988 I.C.J. 69, 105 (Dec. 20) (internal quotation marks omitted).

[50] This consistent and longstanding position has been articulated in repeated submissions by the United States to NAFTA tribunals. *See, e.g.*, *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2012-17, Submission of the United States of America ¶ 7 (July 25, 2014) ("It is well established in international law that good faith is 'one of the basic principles governing the creation and performance of legal obligations,' but 'it is not in itself a source of obligation where none would otherwise exist.'"); *Clayton v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2009-04, Submission of the United States of America ¶ 6 (Apr. 19, 2013) (same); *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America 94 (Dec. 22, 2008) ("*Grand River*, U.S. Counter-Memorial") ("[C]ustomary international law does not impose a free-standing, substantive obligation of 'good faith' that, if breached, can result in State liability. Absent a specific treaty obligation, a Claimant 'may not justifiably rely upon the principle of good faith' to support a claim."); *Canfor Corp. v. United States of America*, NAFTA/UNCITRAL, Reply on Jurisdiction of Respondent United States of America, at 29 n.93 (Aug. 6, 2004) ("[Claimant] appears to argue that customary international law imposes a general obligation of 'good faith' independent of any specific NAFTA provision. The International Court of Justice, however, has squarely rejected that notion, holding that 'the principle of good faith . . . is not in itself a source of obligation where none would otherwise exist.'.").

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

[52] *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* Award ¶ 87 ("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

27. 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.[53] As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.[54] 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,[55] access to judicial remedies or treatment by the courts,[56] or the obligation of States to provide full protection and security and to compensate aliens and nationals on an equal basis in times of violence, insurrection, conflict, or strife.[57]

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

[54] *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."); Borchard, *Minimum Standard of Treatment* at 56 ("The doctrine of absolute equality – more theoretical than actual – is therefore incompatible with the supremacy of international law. The fact is that no state grants absolute equality or is bound to grant it. It may even discriminate between aliens, nationals of different states, e.g., as the United States does through treaty in the matter of the ownership of real property in this country."); ANDREAS ROTH, MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 83 (1949) ("[T]he principle of equality has not yet become a rule of positive international law, *i.e.*, there is no obligation for a State to treat the aliens like the nationals. A discrimination of treatment between aliens and nationals alone does not yet constitute a violation of international law.").

[55] *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

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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 . . . .").

[56] *See, e.g.*, C.F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 243 (1967) ("Especially in a suit between State and alien it is imperative that there should be no discrimination between nationals and aliens in the imposition of procedural requirements. The alien cannot be expected to undertake special burdens to obtain justice in the courts of the State against which he has a complaint."); EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 334 (1919) (A national's "own government is justified in intervening in his behalf only if the laws themselves, the methods provided for administering them, and the penalties prescribed are in derogation of the principles of civilized justice as universally recognized or if, in a specific case, they have been wrongfully subverted by the courts so as to discriminate against him as an alien or perpetrate a technical denial of justice."); *Report of the Guerrero Sub-Committee of the Committee of the League of Nations on Progressive Codification 1*, League of Nations Doc. C.196M.70, at 100 (1927) ("Denial of justice is therefore a refusal to grant foreigners free access to the courts instituted in a State for the discharge of its judicial functions, or the failure to grant free access, in a particular case, to a foreigner who seeks to defend his rights, *although in the circumstances nationals of the State would be entitled to such access*.") (emphasis added); *Ambatielos (Greece v. United Kingdom)*, 12 R.I.A.A. 83, 111 (Mar. 6, 1956) ("The modern concept of 'free access to the Courts' represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a practice which existed in former times and in certain countries, and which constituted an unjust discrimination against foreigners. Hence, the essence of 'free access' is adherence to and effectiveness of the principle of non-discrimination against foreigners who are in need of seeking justice before the courts of the land for the protection and defence of their rights.").

[57] *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.").

28. States may decide expressly by treaty as a matter of policy to extend investment protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law.[58] 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.[59] 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.[60]

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

[59] Article 10.5.2 ("For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments."). *See also Grand River* Award ¶ 176 (noting that an obligation under Article 1105 of the NAFTA "must be determined by reference to customary international law, not to standards contained in other treaties or other NAFTA provisions, or in other sources, unless those sources reflect relevant customary international law"). While there may be overlap in the substantive protections ensured by this Treaty and other treaties, a claimant submitting a claim under this Treaty, in which fair and equitable treatment is defined by the customary international law minimum standard of treatment, still must demonstrate that the obligations invoked are in fact a part of customary international law.

[60] *See, e.g.*, *Glamis Award* ¶ 608 (concluding that "arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom"); *Cargill Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award ¶ 278 (Sept. 18, 2009) ("*Cargill* Award") (noting that arbitral "decisions are relevant to the issue presented in 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.").

29. Moreover, decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary international law are not themselves instances of "State practice" for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice.[61] 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 10.5.1.

Articles 10.3 and 10.4 (National Treatment and Most-Favored-Nation Treatment)

30. Article 10.3 ("National Treatment") provides that each Party shall accord to investors and covered investments of the other Party "treatment no less favorable than that it accords, in like circumstances," to its own investors and their investments "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory." Article 10.4 ("Most-Favored-Nation Treatment") provides that each Party shall accord to investors and covered investments of the other Party "treatment no less favorable than that it accords, in like circumstances," to investors and investments of a non-Party (i.e., a third State) in its territory "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments" in its territory. These obligations thus prohibit nationality-based discrimination between domestic and foreign investors (or investments of foreign and domestic investors) that are "in like circumstances."[62]

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

[62] *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).

31. To establish a breach of 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."[63] As the UPS v. Canada tribunal noted (with respect to the functionally identical provisions of the NAFTA), "[t]his is a legal burden that rests squarely with the Claimant. That burden never shifts . . . ."[64]

32. Establishing a violation of Article 10.4 is the same as establishing a violation of Article 10.3, except that the applicable comparator in step two above is an investor or investments of a third State.

[63] 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).

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

33. Determining whether an investor or investment identified by a claimant is in like circumstances with the claimant or its investment is a fact-specific inquiry. As one tribunal observed, "[i]t goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations."[65] The United States understands the term "circumstances" to denote conditions or facts that accompany treatment as opposed to the treatment itself. Thus, identifying appropriate comparators for purposes of the "like circumstances" analysis requires consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other possible relevant characteristics. When determining whether a claimant was in like circumstances with comparators, it or its investment should be compared to a domestic investor or investment, or for Article 10.4, an investor or investment of a third State, that is alike in all relevant respects but for the nationality of ownership. Moreover, whether treatment is accorded in like circumstances under Articles 10.3 or 10.4 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare objectives.

Claims based on judicial measures

34. As described above, judicial measures may give rise to a claim for denial of justice under Article 10.5.1. However, absent a denial of justice involving discriminatory treatment by the courts or access to judicial remedies, judicial measures do not violate Articles 10.3 or 10.4 of the CAFTA-DR.

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

35. Where a claim under Articles 10.3 or 10.4 is based on judicial actions in the course of litigation, identifying a comparator in "like circumstances" may be particularly difficult. For example, many of the circumstances facing the litigants in a civil trial – the facts underlying the dispute, the parties' counsel, their strategic approaches and tactical choices, the demeanor of the witnesses, etc. – will vary at least to some extent (and, in many respects, to a great extent) from case to case. While unusual circumstances may exist in which a foreign and domestic civil litigant are sufficiently comparable to satisfy the "in like circumstances" requirement – for instance, where comparably situated co-defendants receive different judicial treatment in the same case [66] – one could reasonably question whether it is possible to do so outside of such narrow circumstances. Moreover, as discussed in paragraph 20 above, the international responsibility of States may not be invoked with respect to non-final judicial acts, unless recourse to further domestic remedies is obviously futile or manifestly ineffective.

Annex II of the CAFTA-DR

36. Where a claimant alleges that it has received less favorable treatment in like circumstances than investors of another Party or a non-Party, with respect to measures adopted or maintained that accord treatment to investors of countries pursuant to a bilateral or multilateral international agreement, the claimant must also establish that the alleged non-conforming measures that constituted "less favorable" treatment are not subject to the reservations contained in Annex II of the CAFTA-DR. In particular, both the United States and Guatemala 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."[67]

[66] *See*, *e.g.*, *Jennie M. Fuller (U.S. v. Cuba)*, 1971 U.S. Foreign Cl. Settlement Comm'n, Ann. Rep. to the Congress 53 (June 24) (where, in the context of criminal law, the tribunal examined, on different grounds, a Cuban court's treatment of American and Cuban co-defendants tried for the same crime but sentenced differently; the American to death and the Cuban to life-imprisonment).

[67] CAFTA-DR, Annex II, Schedule of the United States, at II-US-9; Annex II, Schedule of Guatemala, at II-GU-1.

37. This reservation relates only to differential treatment accorded to an investor of a third State pursuant to a provision of an existing international agreement. That is, a CAFTA-DR Party that has taken this reservation is not obligated to extend that same treatment accorded pursuant to that treaty to nationals of other CAFTA-DR Parties. However, this reservation does not apply with respect to differential treatment accorded to third State nationals other than "under" – that is, pursuant to – the provisions of such an existing treaty.

38. In any event, a claimant must meet the basic requirement of Article 10.4 to identify a comparator "in like circumstances." Unlike many investment treaties, the Most-Favored-Nation Treatment clause of the CAFTA-DR 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. Nor can Article 10.4 be used to alter the substantive content of the fair and equitable treatment obligation under Article 10.5, including the obligation not to deny justice. As noted in the submissions on Article 10.5 above, Article 10.5.2 clarifies that the concept of "fair and equitable treatment" does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. Article 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."

Article 10.7 (Expropriation and Compensation)

39. Article 10.7 of the Treaty provides that no Party may expropriate or nationalize property (directly or indirectly) except for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate and effective compensation; and in accordance with due process of law.[68] Compensation must be "prompt," in that it must be "paid without delay";[69] "adequate," in that it must be made at the fair market value as of the date of expropriation, undiminished by any change in value that occurred because the expropriatory action became known earlier; and "effective," in that it must be fully realizable and freely transferable.[70]

40. 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.[71]

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[68] 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.

[69] *See Mondev* Award ¶¶ 71-72 ("It is true that the obligation to compensate as a condition for a lawful expropriation (NAFTA Article 1110(1)(d)) does not require that the award of compensation should occur at exactly the same time as the taking. But for a taking to be lawful under Article 1110, at least the obligation to compensate must be 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 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).

[70] CAFTA-DR, art. 10.7.2(a)-(d).

[71] 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).

41. Annex 10-C of the Treaty establishes that Article 10.7.1 "reflect[s] customary international law concerning the obligation of States with respect to expropriation." Annex 10-C further states that a Party's actions cannot constitute an expropriation "unless it interferes with a tangible or intangible property right or property interest in an investment." As such, and because Article 10.7.1 protects "covered investments" from expropriation except in accordance with its conditions, the first step in any expropriation analysis must begin with an examination of whether there is an investment capable of being expropriated.[72] It is appropriate to look to the law of the host State[73] for a determination of the definition and scope of the property right or property interest at issue, including any applicable limitations.[74]

Claims for indirect expropriation

42. Under international law, where an action is a bona fide, non-discriminatory regulation, it will not ordinarily be deemed expropriatory.[75] Annex 10-C, paragraph 4, of the Treaty provides specific guidance as to whether an action, including a regulatory action, constitutes an indirect expropriation. As explained in paragraph 4(a) of Annex 10-C, 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.

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

[73] *See, e.g.*, Higgins, *supra* note 72, at 270 (for a definition of "property . . . [w]e necessarily draw on municipal law sources").

[74] *See Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Rejoinder of Respondent United States of America, at 11 (Mar. 15, 2007) ("*Glamis*, U.S. Rejoinder") (agreeing with expert report of Professor Wälde that in an instance where property rights are subject to legal limitations existing at the time the property rights are acquired, any subsequent burdening of property rights by such limitations does not constitute an impairment of the original property interest).

[75] *See, e.g.*, *Glamis* Award ¶ 354 (quoting the RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712, cmt. (g) (1986) ("A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general

43. With respect to the first factor, an adverse economic impact "standing alone, does not establish that an indirect expropriation has occurred."[76] 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 conclusion that the property has been 'taken' from the owner."[77] Moreover, to constitute an expropriation, a deprivation must be more than merely "ephemeral."[78]

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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).

[76] CAFTA-DR, Annex 10-C, para. 4(a)(i).

[77] *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* Award ¶¶ 149-50 (citing the *Glamis* Award); *Cargill* Award ¶ 360 (holding that a government measure only rises to the level of an expropriation if it affects "a radical deprivation of a claimant's economic use and enjoyment of its investment" and that a "taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property . . . (*i.e.*, it approaches total impairment)").

[78] *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* First Partial Award ¶¶ 284, 287-88.

44. 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.[79] For example, where a sector is "already highly regulated, reasonable extensions of those regulations are foreseeable."[80]

45. 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").[81]

46. Further, Paragraph 4(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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[79] *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").

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

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

Claims for judicial measures

47. Judicial measures may give rise to a claim for denial of justice under the circumstances described above with respect to Article 10.5.1. As previously explained, a denial of justice may exist where there is, for example, an obstruction of access to courts, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. Additional instances of denial of justice have included corruption in judicial proceedings and executive or legislative interference with the freedom of impartiality of the judicial process.

48. 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.[82] Moreover, the United States has not recognized the concept of "judicial takings" as a matter of domestic law.[83]

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[82] *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.").

[83] 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 effect 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.

49. 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.

Article 10.16.1 (Limitations on Loss or Damage and Causation)

50. The United States recognizes that a majority of the Tribunal has rendered a Decision on Respondent's Preliminary Objections interpreting Article 10.16.1(a) of the CAFTA-DR; however, the United States nonetheless feels compelled to provide its views on the proper interpretation of Article 10.16.1 and the relationship between claims made under subparagraph (a) and (b) of that Article.

51. In light of the Decision on Respondent's Preliminary Objections, in particular the Tribunal's recognition of the "causation and quantum implications of claims for indirect loss" and the distinction that must be drawn between damages "incurred directly by a local enterprise and those said to have been incurred indirectly by an upstream investor,"[84] the United States offers below its views concerning the requirement under Article 10.16.1(a)(ii) for a claimant to prove the causal nexus between the alleged breach and the claimed loss or damage.

[84] Decision on Respondent's Preliminary Objections, March 13, 2020, ¶ 159.

Limitations on loss or damage

52. Each claim by an investor must fall within either CAFTA-DR Article 10.16.1, either subparagraph (a) or (b), and is limited to the type of loss or damage available under the subparagraph invoked. Where the investor seeks to recover loss or damage that it incurred directly, it may bring a claim under Article 10.16.1(a). However, where the alleged loss or damage is to "an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly," the investor's injury is only indirect. Such derivative claims must be brought, if at all, under Article 10.16.1(b).[85]

[85] *See*, *e.g.*, Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 824-25 (Chester Brown ed., 2013) ("Caplan & Sharpe") (noting that Article 24(1)(a), nearly identically worded to U.S.-Morocco FTA Article 10.15.1(a), "entitles a claimant to submit claims for loss or damage suffered directly by it in its capacity as an investor," while Article 24(1)(b), nearly identically worded to U.S.-Morocco FTA Article 10.15.1(b) "creates a derivative right of action, allowing an investor to claim for losses or damages suffered not directly by it, but by a locally organized company that the investor owns or controls").

53. This distinction between Articles 10.16.1(a) and 10.16.1(b) was drafted purposefully in light of two existing principles of customary international law addressing the status of corporations. The first of these principles is that no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares. This is so because, as reaffirmed by the International Court of Justice in Diallo, "international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders."[86] As the Diallo Court further reaffirmed, quoting Barcelona Traction: "a wrong done to the company frequently causes prejudice to its shareholders." Nonetheless, "whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed."[87] Thus, only direct loss or damage suffered by shareholders is cognizable under customary international law.[88]

54. How a claim for loss or damage is characterized is therefore not determinative of whether the injury is direct or indirect. Rather, as Diallo and Barcelona Traction have found, what is determinative is whether the right that has been infringed belongs to the shareholder or the corporation.

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

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

[88] *See Barcelona Traction* ¶ 47 ("Whenever one of his direct rights is infringed, the shareholder has an independent right of action."). The United States notes that some authors have asserted or proposed exceptions to this rule.

55. Examples of claims that would allow a shareholding investor to seek direct loss or damage include where the investor alleges that it was denied its right to a declared dividend, to vote its shares, or to share in the residual assets of the enterprise upon dissolution.[89] Another example of a direct loss or damage suffered by shareholders is where the disputing State wrongfully expropriates the shareholders' ownership interests – whether directly through an expropriation of the shares or indirectly by expropriating the enterprise as a whole.[90]

56. The second principle of customary international law against which Articles 10.16.1(a) and 10.16.1(b) were drafted is that no international claim may be asserted against a State on behalf of the State's own nationals.[91] Article 10.16.1(b) therefore provides a right to present a claim not otherwise found in customary international law,[92] where a claimant alleges injury to "an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly." Article 10.16.1(b) allows an investor of a Party that owns or controls that enterprise to submit a claim on behalf of the enterprise for loss or damage incurred by that enterprise.

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[89] *Id.* In such cases, the Court in *Barcelona Traction* held that the shareholder (or the shareholder's State that has espoused the claim) may bring a claim under customary international law.

[90] Under Article 10.7 of the CAFTA-DR, an expropriation may either be direct or indirect, and acts constituting an expropriation may occur under a variety of circumstances. Determining whether an expropriation has occurred therefore requires a case-specific and fact-based inquiry.

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

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

57. In sum, Article 10.16.1(a) adheres to the principle of customary international law that shareholders may assert claims only for direct injuries to their rights.[93] Where an investor suffers loss to its investment and that investment is not an enterprise or held by an enterprise, the Barcelona Traction rule does not apply and Article 10.16.1(a) of the CAFTA-DR provides a remedy. By contrast, where the injury is to an enterprise or an asset held by that enterprise, the harm to the investor is generally derivative of that to the enterprise and Barcelona Traction precludes a claim for direct injuries to a shareholder's rights. Article 10.16.1(b), but not Article 10.16.1(a), is available to remedy any violation of Chapter 10 in such a case. Article 10.16.1(b) may be applicable only where the breach causes loss to an "enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly."

58. Moreover, it is well-recognized that an international agreement should not be held to have tacitly dispensed with an important principle of international law "in the absence of words making clear an intention to do so."[94] Nothing in the text of Article 10.16.1(a) suggests that the Treaty Parties intended to derogate from customary international law restrictions on the assertion of shareholder claims.

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[93] Article 10.16.1(a) derogates from customary international law only to the extent that it permits individual investors to assert claims that could otherwise be asserted only by States. *See*, *e.g.*, *Nottebohm (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4, 24 (Second Phase, Judgment of Apr. 6) ("[B]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law[.]") (internal quotation omitted); F.V. GARCÍA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 86 (1974) ("[I]nternational responsibility had been viewed as a strictly 'interstate' legal relationship. Whatever may be the nature of the imputed act or omission or of its consequences, the injured interest is in reality always vested in the State alone."); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 585 (5th ed. 1998) ("[T]he assumption of the classical law that only states have procedural capacity is still dominant and affects the content of most treaties providing for the settlement of disputes which raise questions of state responsibility, in spite of the fact that frequently the claims presented are in respect of losses suffered by individuals and private corporations.").

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

Causation

59. CAFTA-DR Article 10.16.1(a)(ii) provides that a party may submit a claim to arbitration where the claimant has incurred loss or damage "by reason of, or arising out of, that breach."

60. The ordinary meaning of these terms requires an investor to establish the causal nexus between the alleged breach and the claimed loss or damage.[95] In this connection, it is well established that "causality in fact is a necessary but not a sufficient condition for reparation."[96] The standard for factual causation is known as the "but-for" or "sine qua non" test whereby an act causes an outcome if the outcome would not have occurred in the absence of the act. This test is not met if the same result would have occurred had the breaching State acted in compliance with its obligations.[97]

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

[96] ILC Draft Articles, art. 31, cmt. 10 (2001). The Iran-U.S. Claims Tribunal reaffirmed this principle in the remedies phase of Case A/15(IV) when it held that it must determine whether the "United States breach caused 'factually' the harm . . . and that that loss was also a 'proximate' consequence of the United States' breach." *Islamic Republic of Iran v. United States of America*, AWD 602-A15(IV)/A24-FT ¶ 52 (July 2, 2014), IRAN-U.S. CL. TRIB. ("A/15(IV) Award").

[97] A/15(IV) Award ¶ 52 ("[I]f one were to reach the conclusion that both tortious (or obligation-breaching) and non-tortious (obligation-compliant) conduct of the same person would have led to the same result, one might question that the tortious (or obligation-breaching) conduct was *condicio sine qua non* of the loss the claimant seeks to recover."). *See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 I.C.J. 40, ¶ 462 (Judgment of Feb. 26).

61. Furthermore, as the United States has previously explained with respect to substantively identical language in NAFTA Articles 1116(1) and 1117(1), the ordinary meaning of "by reason of, or arising out of" requires an investor to demonstrate proximate causation.[98] In this connection, NAFTA tribunals have consistently imposed a requirement of proximate causation under NAFTA Articles 1116(1) and 1117(1). For example, the S.D. Myers tribunal held that damages may only be awarded to the extent that there is a "sufficient causal link" between the breach of a specific NAFTA provision and the loss sustained by the investor,[99] 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."[100]

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[98] *William Ralph Clayton et al. v. Government of Canada*, NAFTA/PCA Case No. 2009-04, Submission of the United States of America ¶¶ 23-27 (Dec. 29, 2017); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL*, U.S. Amended Statement of Defense* ¶ 213 (Dec. 5, 2003); *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).

[99] *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 316 (Nov. 13, 2000).

[100] *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.").

62. Indeed, proximate causation is an "applicable rule[] of international law" that under CAFTA-DR Article 10.22.1 must be taken into account in fixing the appropriate amount, if any, of monetary damages.[101] Article 10.16.1 contains no indication that the Agreement Parties intended to vary from this established rule.[102] Accordingly, any loss or damage cannot be based on an assessment of acts, events, or circumstances not attributable to the alleged breach.[103] Events that develop subsequent to the alleged breach may increase or decrease the amount of damages suffered by a claimant. At the same time, injuries that are not sufficiently "direct," "foreseeable," or "proximate" may not, consistent with applicable rules of international law, be considered when calculating a damage award.[104] Valuing damages as of the date of an award, rather than as of the time of breach, could fail to appropriately exclude injuries resulting from events subsequent to the date of breach that lack sufficient causal connection to the breach.[105] Tribunals should exercise caution also because compensation for such injuries may, depending on the circumstances, also be construed as intending to deter or punish the conduct of the disputing State, contrary to Article 10.26.3.[106]

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[101] *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 AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 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").

[102] *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 Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶¶ 160, 162 (June 26, 2003) ("*Loewen* Award") ("It would be strange indeed if sub silentio the international rule were to be swept away.").

[103] *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).

Respectfully submitted,

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[104] As the commentary to the ILC Draft Articles explains, 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[.]" ILC Draft Articles, art. 31, comment 10 (footnotes omitted).

[105] *See*, *e.g.*, *Murphy Exploration & Production Co. v. Republic of Ecuador*, UNCITRAL, Partial Final Award ¶¶ 482-485 (May 6, 2016); *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award ¶¶ 83-84 (Feb. 17, 2000).

[106] Article 10.26.3 expressly provides that "[a] Tribunal may not order a Party to pay punitive damages." *See also* ILC Draft Articles, art. 36, comment 4 ("[A]rticle 36 is purely compensatory, as its title indicates. . . . It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character.") (citing the *Velásquez Rodriguez*, Compensatory Damages case, where "the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages (Series C, No. 7 (1989))").