INTERNATIONAL COURT OF JUSTICE

CERTAIN IRANIAN ASSETS

(ISLAMIC REPUBLIC OF IRAN v. UNITED STATES OF AMERICA)

COUNTER-MEMORIAL
SUBMITTED BY
THE UNITED STATES OF AMERICA

October 14, 2019

ANNEXES
VOLUME VII

Annexes 141 through 160

ANNEX 141

103 S.Ct. 2591
Supreme Court of the United States

FIRST NATIONAL CITY BANK, Petitioner
v.
BANCO PARA EL COMERCIO EXTERIOR de CUBA.

No. 81–984.
|
Argued March 28, 1983.
|
Decided June 17, 1983.

Synopsis
State-owned Cuban bank brought suit against American bank to recover an unpaid letter of credit. The United States District Court for the Southern District of New York, Charles L. Brieant, J., 505 F.Supp. 412, dismissed complaint on the merits on basis that the amount claimed was exceeded by the amount of defendant's validly asserted counterclaim for losses to the Cuban expropriation of assets, and plaintiff appealed. The Court of Appeals, 658 F.2d 913,reversed and remanded, and certiorari was granted. The Supreme Court, Justice O'Connor held that the American bank could apply claimed setoff of value of its seized Cuban assets when Cuban bank with full juridical capacity filed suit seeking to collect on letter of credit issued by American bank.

Ordered accordingly.

Justice Stevens filed an opinion concurring in part and dissenting in part in which Justices Brennan and Blackmun joined.

***611 **2592** *Syllabus*[*]

In 1960, the Cuban Government established respondent to serve as an official autonomous credit institution for foreign trade with full juridical capacity of its own. Respondent sought to collect on a letter of credit issued by petitioner bank in respondent's favor in support of a contract for delivery of Cuban sugar to a buyer in the United States. Shortly thereafter, all of petitioner's assets in Cuba were seized and nationalized by the Cuban Government. When respondent brought suit on the letter of credit in Federal District Court, petitioner counterclaimed, asserting a right to set off the value of its seized Cuban assets. After the suit was brought but before petitioner filed its counterclaim, respondent was dissolved and its capital was split between Banco Nacional, Cuba's central bank, and certain foreign trade enterprises or houses of the Cuban Ministry of Foreign Trade. Rejecting respondent's contention that its separate juridical status shielded it from liability for the acts of the Cuban Government, the District Court held that since the value of petitioner's Cuban assets exceeded respondent's claim, the setoff could be granted in petitioner's favor, and therefore dismissed the complaint. The Court of Appeals reversed, holding that respondent was not an alter ego of the Cuban Government for the purpose of petitioner's counterclaim.

Held: Under principles of equity common to international law and federal common law, petitioner may apply the claimed setoff, notwithstanding the fact that respondent was established as a separate juridical entity. Pp. 2596–2603.

(a) The Foreign Sovereign Immunities Act of 1976 does not control the determination of whether petitioner may apply the setoff. That Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among such instrumentalities. Pp. 2596–2597.

(b) Duly created instrumentalities of a foreign state are to be accorded a presumption of independent status. This presumption may be overcome, however, where giving effect to the corporate form would permit a foreign state to be the sole beneficiary

of a claim pursued in United States courts while escaping liability to the opposing party imposed by international law. Pp. 2598–2602.

***612** (c) Thus, here, giving effect to respondent's juridical status, even though it has ****2593** long been dissolved, would permit the real beneficiary of such an action, the Cuban Government, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of petitioner's assets in violation of international law. The corporate form will not be blindly adhered to where doing so would cause such an injustice. Having dissolved respondent and transferred its assets to entities that may be held liable on petitioner's counterclaim, Cuba cannot escape liability for acts in violation of international law simply by retransferring assets to separate juridical entities. To hold otherwise would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises. Pp. 2602–2603.

658 F.2d 913 (2nd Cir.1981), reversed and remanded.

Attorneys and Law Firms

Henry Harfield argued the cause for petitioner. With him on the briefs were *John E. Hoffman, Jr.*, and *Charles B. Manuel, Jr.*

Richard G. Wilkins argued the cause *pro hac vice* for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Geller, Geoffrey S. Stewart, Davis R. Robinson, Fred L. Morrison,* and *Ronald W. Kleinman.*

Michael Krinsky argued the cause for respondent. With him on the brief were *Victor Rabinowitz, Judith Levin,* and *Jules Lobel.**

* *John J. McGrath, Jr.,* filed a brief for Kalamazoo Spice Extraction Co. as *amicus curiae* urging reversal.

Richard F. Bellman filed a brief for the International Center for Law in Development as *amicus curiae* urging affirmance.

Opinion

***613** Justice O'CONNOR delivered the opinion of the Court.

In 1960 the Government of the Republic of Cuba established respondent Banco Para El Comercio Exterior de Cuba (Bancec) to serve as "[a]n official autonomous credit institution for foreign trade ... with full juridical capacity ... of its own...." Law No. 793, Art. 1 (1960), App. to Pet. for Cert. 2d. In September 1960 Bancec sought to collect on a letter of credit issued by petitioner First National City Bank (now Citibank) in its favor in support of a contract for delivery of Cuban sugar to a buyer in the United States. Within days after Citibank received the request for collection, all of its assets in Cuba were seized and nationalized by the Cuban Government. When Bancec brought suit on the letter of credit in United States District Court, Citibank counterclaimed, asserting a right to set off the value of its seized Cuban assets. The question before us is whether Citibank may obtain such a setoff, notwithstanding the fact that Bancec was established as a separate juridical entity. Applying principles of equity common to international law and federal common law, we conclude that Citibank may apply a setoff.

I

Resolution of the question presented by this case requires us to describe in some detail the events giving rise to the current controversy.

Bancec was established by Law No. 793, of April 25, 1960, as the legal successor to the Banco Cubano del Comercio Exterior (Cuban Foreign Trade Bank), a trading bank established by the Cuban Government in 1954 and jointly owned by the Government and private banks. Law No. 793 contains detailed "By-laws" specifying Bancec's purpose, structure, and administration. Bancec's stated purpose was "to contribute to, and collaborate with, the international trade policy of the Government and the application of the measures concerning foreign trade adopted by the 'Banco Nacional de Cuba,' " Cuba's central bank (Banco Nacional). Art. 1, ***614** No. VIII, App. to Pet. for Cert. 4d. Bancec was empowered to act as the Cuban Government's exclusive agent in foreign trade. The Government supplied all of its capital and owned all of its stock. The General Treasury of the Republic received all of Bancec's profits, after deduction of amounts for capital reserves. A Governing Board consisting of delegates from Cuban governmental ministries governed and managed Bancec. Its president was Ernesto Che Guevara, who also was Minister of State and president of Banco Nacional. A General Manager appointed by the Governing Board was charged with directing Bancec's day-to-day operations in a manner consistent with its enabling statute.

****2594** In contracts signed on August 12, 1960, Bancec agreed to purchase a quantity of sugar from El Institutio Nacional de Reforma Agraria (INRA), an instrumentality of the Cuban Government which owned and operated Cuba's nationalized sugar industry, and to sell it to the Cuban Canadian Sugar Company. The latter sale agreement was supported by an irrevocable letter of credit in favor of Bancec issued by Citibank on August 18, 1960, which Bancec assigned to Banco Nacional for collection.

Meanwhile, in July 1960 the Cuban Government enacted Law No. 851, which provided for the nationalization of the Cuban properties of United States citizens. By Resolution No. 2 of September 17, 1960, the Government ordered that all of the Cuban property of three United States banks, including Citibank, be nationalized through forced expropriation. The "Bank Nationalization Law," Law No. 891, of October 13, 1960, declared that the banking function could be carried on only by instrumentalities created by the State, and ordered Banco Nacional to effect the nationalization.

On or about September 15, 1960, before the banks were nationalized, Bancec's draft was presented to Citibank for payment by Banco Nacional. The amount sought was $193,280.30 for sugar delivered at Pascagoula, Mississippi. On September 20, 1960, after its branches were nationalized, ***615** Citibank credited the requested amount to Banco Nacional's account and applied the balance in Banco Nacional's account as a setoff against the value of its Cuban branches.

On February 1, 1961, Bancec brought this diversity action to recover on the letter of credit in the United States District Court for the Southern District of New York.

On February 23, 1961, by Law No. 930, Bancec was dissolved and its capital was split between Banco Nacional and "the foreign trade enterprises or houses of the Ministry of Foreign Trade," which was established by Law No. 934 the same day.[1] App. to Pet. for Cert. 16d. All of Bancec's rights, claims, and assets "peculiar to the banking business" were vested in Banco Nacional, which also succeeded to its banking obligations. *Ibid.* All of Bancec's "trading functions" were to be assumed by "the foreign trade enterprises or houses of the Ministry of Foreign Trade." By Resolution No. 1, dated March 1, 1961, the Ministry of Foreign Trade created Empresa Cubana de Exportaciones (Cuban Enterprise for Exports) (Empresa), which was empowered to conduct all commercial export transactions formerly conducted by Bancec "remaining subrogated in the rights and obligations of said bank [Bancec] as regards the commercial export activities." App. to Pet. for Cert. 26d. Three hundred thousand of the two million pesos distributed to the Ministry of Foreign Trade when Bancec was dissolved were assigned to Empresa. *Id.*, at 27d. By Resolution No. 102, dated December 31, 1961, and Resolution No. 1, dated January 1, 1962, Empresa was dissolved and Bancec's rights relating to foreign commerce in sugar were assigned to Empresa Cubana ***616** Exportadora de Azucar y sus Derivados (Cuba Zucar), a state trading company, which is apparently still in existence.

On March 8, 1961, after Bancec had been dissolved, Citibank filed its answer, which sought a setoff for the value of its seized branches, not an affirmative recovery of damages.[2] On July 7, 1961, Bancec filed a stipulation signed by the parties stating that Bancec had been dissolved and that its ****2595** claim had been transferred to the Ministry of Foreign Trade, and agreeing that the Republic of Cuba may be substituted as plaintiff. The District Court approved the stipulation, but no amended complaint was filed.

Apparently the case lay dormant until May 1975, when respondent filed a motion seeking an order substituting Cuba Zucar as

plaintiff. The motion was supported by an affidavit by counsel stating that Bancec's claim had passed through the Ministry of Foreign Trade and Empresa to Cuba Zucar, all by operation of the laws and resolutions cited above. Counsel for petitioner opposed the motion, and the District Court denied it in August 1975, stating that "to permit such a substitution ... would only multiply complications in this already complicated litigation." App. 160.

A bench trial was held in 1977[3], after which the District ***617** Court[4] granted judgment in favor of Citibank. 505 F.Supp. 412 (1980). The court rejected Bancec's contention that its separate juridical status shielded it from liability for the acts of the Cuban Government.

> "Under all of the relevant circumstances shown in this record, ... it is clear that Bancec lacked an independent existence, and was a mere arm of the Cuban Government, performing a purely governmental function. The control of Bancec was exclusively in the hands of the Government, and Bancec was established solely to further Governmental purposes. Moreover, Bancec was totally dependent on the Government for financing and required to remit all of its profits to the Government.
>
> Bancec is not a mere private corporation, the stock of which is owned by the Cuban Government, but an agency of the Cuban Government in the conduct of the sort of matters which even in a country characterized by private capitalism, tend to be supervised and managed by Government. Where the equities are so strong in ***618** favor of the counter-claiming defendants, as they are in this case, the Court should recognize the practicalities of the transactions.... The Court concludes that Bancec is an *alter ego* of the Cuban Government." *Id.*, at 427–428.

Without determining the exact value of Citibank's assets seized by Cuba, the court held that "the value of the confiscated branches ... substantially exceeds the sums already recovered, and therefore the set-off pleaded here may be granted in full in favor of Citibank." *Id.*, at 467. It therefore ****2596** entered judgment dismissing the complaint.[5]

The United States Court of Appeals for the Second Circuit reversed. 658 F.2d 913 (2nd Cir.1981). While expressing agreement with the District Court's "descriptions of Bancec's functions and its status as a wholly-owned instrumentality of the Cuban government," the court concluded that "Bancec was ***619** not an alter ego of the Cuban government for the purpose of [Citibank's] counterclaims." *Id.*, at 917. It stated that, as a general matter, courts would respect the independent identity of a governmental instrumentality created as "a separate and distinct juridical entity under the laws of the state that owns it"—except "when the subject matter of the counterclaim assertible against the state is state conduct in which the instrumentality had a key role." *Id.*, at 918. As an example of such a situation the Court of Appeals cited *Banco Nacional de Cuba v. First National City Bank*, 478 F.2d 191 (CA2 1973), in which it had ruled that Banco Nacional could be held liable by way of setoff for the value of Citibank's seized Cuban assets because of the role *it* played in the expropriations. But the court declined to hold that "a trading corporation wholly owned by a foreign government, but created and operating as a separate juridical entity, is an alter ego of that government for the purpose of recovery for wrongs of the government totally unrelated to the operations, conduct or authority of the instrumentality." 658 F.2d, at 920.[6]

Citibank moved for rehearing, arguing, *inter alia*, that the panel had ignored the fact that Bancec had been dissolved in February 1961. The motion, and a suggestion of rehearing en banc, were denied. This Court granted certiorari. 459 U.S. 942, 103 S.Ct. 253, 74 L.Ed.2d 198 (1982). We reverse, and remand the case for further proceedings.

II

A

As an initial matter, Bancec contends that the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–1611 (1976 ed.) (FSIA), immunizes an instrumentality owned by a foreign government from suit on a counterclaim based on actions ***620** taken by that government. Bancec correctly concedes that, under 28 U.S.C. § 1607(c)[7], an ****2597** instrumentality of a foreign state bringing suit in a United States court is not entitled to immunity "with respect to any counterclaim—... to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the [instrumentality.]" It contends, however, that as a substantive matter the FSIA prohibits holding a foreign instrumentality owned and controlled by a foreign government responsible for actions taken by that government.

We disagree. The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state. Section 1606 of the FSIA provides in relevant part that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity ..., the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances...." The House Report on the FSIA states:

> "The bill is not intended to affect the substantive law of liability. Nor is it intended to affect ... the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is ***621** liable in whole or in part for the claimed wrong." H.R.Rep. No. 94–1487, p. 12 (1976), U.S.Code Cong. & Admin.News 1976, pp. 6604, 6610.[8]

Thus, we conclude that the Foreign Sovereign Immunities Act does not control the determination of whether Citibank may set off the value of its seized Cuban assets against Bancec's claim. Nevertheless, our resolution of that question is guided by the policies articulated by Congress in enacting the FSIA. See *infra*, at 2600–2601.

B

We must next decide which body of law determines the effect to be given to Bancec's separate juridical status. Bancec contends that internationally recognized conflict-of-law principles require the application of the law of the state that establishes a government instrumentality—here Cuba—to determine whether the instrumentality may be held liable for actions taken by the sovereign.

We cannot agree. As a general matter, the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation. Application of that body of law achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation. See Restatement (Second) of Conflict of Laws § 302, Comments *a* & *e*, (1971). Cf. *Cort v. Ash*, 422 U.S. 66, 84, 95 S.Ct. 2080, 2090, 45 L.Ed.2d 26 (1975). Different conflicts principles apply, however, where the rights of third parties *external* to the corporation are at issue. See Restatement (Second) of Conflict of Laws, *supra*, § 301.[9] To ***622** give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign ****2598** courts.[10] We decline to permit such a result.[11]

Bancec contends in the alternative that international law must determine the resolution of the question presented. Citibank, on the other hand, suggests that federal common law governs. The expropriation claim against which Bancec ***623** seeks to interpose its separate juridical status arises under international law, which, as we have frequently reiterated, "is part of our law ...." *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900). As we set forth below, see *infra*, at 2600–2601 and nn. 19–20, the principles governing this case are common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies.

III

A

Before examining the controlling principles, a preliminary observation is appropriate. The parties and *amici* have repeatedly referred to the phrases that have tended to dominate discussion about the independent status of separately constituted juridical entities, debating whether "to pierce the corporate veil," and whether Bancec is an "alter ego" or a "mere instrumentality" of the Cuban Government. In *Berkey v. Third Avenue Railway Co.*, 244 N.Y. 84, 155 N.E. 58 (1926), Justice (then Judge) Cardozo warned in circumstances similar to those presented here against permitting worn epithets to substitute for rigorous analysis.

> "The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Id.*, at 94, 155 N.E., at 58.

With this in mind, we examine briefly the nature of government instrumentalities.[12]

***624** Increasingly during this century, governments throughout the world have established separately constituted legal entities to perform a variety of tasks.[13] The organization ****2599** and control of these entities vary considerably, but many possess a number of common features. A typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply.[14]

These distinctive features permit government instrumentalities to manage their operations on an enterprise basis while granting them a greater degree of flexibility and independence from close political control than is generally enjoyed ***625** by government agencies.[15] These same features frequently prompt governments in developing countries to establish separate juridical entities as the vehicles through which to obtain the financial resources needed to make large-scale national investments.

> "[P]ublic enterprise, largely in the form of development corporations, has become an essential instrument of economic development in the economically backward countries which have insufficient private venture capital to develop the utilities and industries which are given priority in the national development plan. Not infrequently, these public development corporations ... directly or through subsidiaries, enter into partnerships with national or private foreign enterprises, or they offer shares to the public." Friedmann, "Government Enterprise: A Comparative Analysis" in Government Enterprise: A Comparative Study 333–334 (W. Friedmann & J.F. Garner eds. 1970).

Separate legal personality has been described as "an almost indispensable aspect of the public corporation." Friedmann, *supra*, at 314. Provisions in the corporate charter stating that the instrumentality may sue and be sued have been construed to waive the sovereign immunity accorded to many governmental activities, thereby enabling third parties to deal with the instrumentality knowing that they may seek relief in the courts.[16] Similarly, the instrumentality's assets and liabilities must be treated as distinct from those of its sovereign in ***626** order to facilitate credit transactions with third parties. *Id.*, at 315. Thus what the Court stated with respect to private corporations in *Anderson v. Abbott*, 321 U.S. 349, 64 S.Ct. 531, 88 L.Ed. 793 (1944), is true also for governmental corporations:

****2600** "Limited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Id.*, at 362, 64 S.Ct., at 537.

Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee.[17] As a result, the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration would surely be frustrated. Due respect for the actions taken by foreign sovereigns and for principles of comity between nations, see *Hilton v. Guyot*, 159 U.S. 113, 163–164, 16 S.Ct. 139, 143, 40 L.Ed. 95 (1895), leads us to conclude—as the courts of Great Britain have concluded in other circumstances[18]—that government ***627** instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.

We find support for this conclusion in the legislative history of the Foreign Sovereign Immunities Act. During its deliberations, Congress clearly expressed its intention that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status. In its discussion of FSIA § 1610(b), the provision dealing with the circumstances under which a judgment creditor may execute upon the assets of an instrumentality of a foreign government, the House Report states:

"Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a ***628** judgment against another, unrelated agency or instrumentality. There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to ****2601** disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another." H.R.Rep. No. 94–1487, pp. 29–30, U.S.Code Cong. & Admin.News 1976, pp. 6628–6629 (citation omitted).

Thus, the presumption that a foreign government's determination that its instrumentality is to be accorded separate legal status is buttressed by this congressional determination. We next examine whether this presumption may be overcome in certain circumstances.

B

In discussing the legal status of *private* corporations, courts in the United States[19] and abroad[20], have recognized ***629** that an incorporated entity—described by Chief Justice Marshall as "an artificial being, invisible, intangible, and existing only in contemplation of law"[21] —is not to be regarded as legally separate from its owners in all circumstances. Thus, where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of the other. See *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402–404, 80 S.Ct. 441, 443, 44 L.Ed.2d 400 (1960). In addition, our cases have long recognized "the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322, 59 S.Ct. 543, 550, 83 L.Ed. 669 (1939). See *Pepper v. Litton*, 308 U.S. 295, 310, 60 S.Ct. 238, 246, 84 L.Ed. 281 (1940). In ***630** particular, the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies. *E.g.*, *Anderson v. Abbott, supra*, 321 U.S., at 362–363, 64 S.Ct., at 537–38. And, in *Bangor Punta Operations, Inc. v. Bangor &* ****2602** *Aroostook Railroad Co.*, 417 U.S. 703, 94 S.Ct. 2578, 41 L.Ed.2d 418 (1974), we concluded:

"Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy.... [W]here equity would preclude the shareholders from maintaining the action in their own right, the corporation would also be precluded.... [T]he principal beneficiary of any recovery and itself estopped from complaining of petitioners' alleged wrongs, cannot avoid the command of equity through the guise of proceeding in the name of ... corporations which it owns and controls." *Id.*, at 713,

94 S.Ct., at 2584 (citations omitted).

C

We conclude today that similar equitable principles must be applied here. In *National City Bank v. Republic of China*, 348 U.S. 356, 75 S.Ct. 423, 99 L.Ed. 389 (1955), the Court ruled that when a foreign sovereign asserts a claim in a United States court, "the consideration of fair dealing" bars the state from asserting a defense of sovereign immunity to defeat a setoff or counterclaim. *Id.*, at 365, 75 S.Ct., at 429. See 28 U.S.C. § 1607(c). As a general matter, therefore, the Cuban Government could not bring suit in a United States court without also subjecting itself to its adversary's counterclaim. Here there is apparently no dispute that, as the District Court found, and the Court of Appeals apparently agreed, see 658 F.2d, at 916, n. 4, "the devolution of [Bancec's] claim, however viewed, brings it into the hands of the Ministry [of Foreign Trade], or Banco Nacional," each a party that may be held liable for the expropriation ***631** of Citibank's assets. 505 F.Supp., at 425.[22] See *Banco Nacional de Cuba v. First National City Bank, supra*, 478 F.2d, at 194. Bancec was dissolved even before Citibank filed its answer in this case, apparently in order to effect "the consolidation and operation of the economic and social conquests of the Revolution," particularly the nationalization of the banks ordered by Law No. 891.[23] Thus, the Cuban Government and Banco Nacional, not any third parties that may ***632** have relied on Bancec's separate juridical identity, would be the only beneficiaries of any recovery.[24]

****2603** In our view, this situation is similar to that in the *Republic of china* case.

> "We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice." *Id.*, at 361–362, 75 S.Ct., at 427 (footnote omitted).[25]

Giving effect to Bancec's separate juridical status in these circumstances, even though it has long been dissolved, would permit the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of Citibank's assets—a seizure previously held by the Court of Appeals to have violated international law.[26] We decline to adhere blindly to the corporate form where doing so would cause such an injustice. See *Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co., supra*, 417 U.S., at 713, 94 S.Ct., at 2584.

Respondent contends, however, that the transfer of Bancec's assets from the Ministry of Foreign Trade or Banco Nacional to Empresa and Cuba Zucar effectively insulates it ***633** from Citibank's counterclaim. We disagree. Having dissolved Bancec and transferred its assets to entities that may be held liable on Citibank's counterclaim, Cuba cannot escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entities. To hold otherwise would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises. Cf. *Federal Republic of Germany v. Elicofon*, 358 F.Supp. 747, 757 (EDNY 1972), aff'd, 478 F.2d 231 (CA2 1973), cert. denied, 415 U.S. 931, 94 S.Ct. 1443, 39 L.Ed.2d 489 (1974). See n. 25, *supra*. We therefore hold that Citibank may set off the value of its assets seized by the Cuban Government against the amount sought by Bancec.

IV

Our decision today announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded.[27] Instead, it is the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a ***634** foreign state to reap the benefits of our courts while avoiding the obligations of international law.[28]

****2604** The District Court determined that the value of Citibank's Cuban assets exceeded Bancec's claim. Bancec challenged

this determination on appeal, but the Court of Appeals did not reach the question. It therefore remains open on remand. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, with whom Justice BRENNAN and Justice BLACKMUN join, concurring in part and dissenting in part.

Today the Court correctly rejects the contention that American courts should readily "pierce the corporate veils" of separate juridical entities established by foreign governments to perform governmental functions. Accordingly, I join Parts I, II, III–A, and III–B of the Court's opinion. But I respectfully dissent from Part III–C, in which the Court endeavors to apply the general principles it has enunciated. Instead I would vacate the judgment and remand the case to the Court of Appeals for further proceedings.

As the Court acknowledges, the evidence presented to the District Court did not focus on the factual issue that the Court now determines to be dispositive. Only a single witness testified on matters relating to Bancec's legal status and operational autonomy. The record before the District Court also included English translations of various Cuban statutes and resolutions, but there was no expert testimony on the ***635** significance of those foreign legal documents. Finally, as the Court notes, the record includes a July 1961 stipulation of the parties and a May 1975 affidavit by counsel for respondent. *Ante*, at 2595, n. 3. It is clear to me that the materials of record that have been made available to this Court are not sufficient to enable us to determine the rights of the parties.

The Court relies heavily on the District Court's statement that "the devolution of [Bancec's] claim, however viewed, brings it into the hands of the Ministry [of Foreign Trade], or Banco Nacional." But that statement should not be given dispositive significance, for the District Court made no inquiry into the capacity in which either entity might have taken Bancec's claim. If the Ministry of Foreign Trade held the claim on its own account, arguably the Cuban government could be subject to Citibank's setoff. But it is clear that the Ministry held the claim for six days at most, during the interval between the promulgation of Laws No. 930 and No. 934 on February 23, 1961, and the issuance of Resolution No. 1 on March 1. It is thus possible that these legal documents reflected a single, integrated plan of corporate reorganization carried out over a six-day period, which resulted in the vesting of specified assets of Bancec in a new, juridically autonomous corporation, Empresa.[1] Respondents argue ***636** that the Ministry ****2605** played the role of a trustee, "entrusted and legally bound to transfer Bancec's assets to the new *empresa* [foreign trade enterprise].... The Republic having acted as a trustee, there could be no counterclaim based upon its acts in an individual capacity." Brief for Respondent 57.

Of course, the Court may have reached a correct assessment of the transactions at issue. But I continue to believe that the Court should not decide factual issues that can be resolved more accurately and effectively by other federal judges, particularly when the record presented to this Court is so sparse and uninformative.[2]

All Citations

462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Law No. 934 provides that "[a]ll the functions of a mercantile character heretofore assigned to [Bancec] are hereby transferred and vested in the foreign trade enterprises or houses set up hereunder, which are subrogated to the rights and obligations of said former Bank in pursuance of the assignment of those functions ordered by the Minister." App. to Pet. for Cert. 24d.

2 Citibank's answer alleged that the suit was "brought by and for the benefit of the Republic of Cuba by and through its agent and wholly-owned instrumentality, ... which is in fact and in law and in form and function an integral part of and indistinguishable

from the Republic of Cuba." App. 113.

3 The bulk of the evidence at trial was directed to the question whether the value of Citibank's confiscated branches exceeded the amount Citibank had already recovered from Cuba, including a setoff it had successfully asserted in *Banco Nacional de Cuba v. First National City Bank*, 478 F.2d 191 (CA2 1973) (*Banco I*), the decision on remand from this Court's decision in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972). Only one witness, Raul Lopez, testified on matters touching upon the question presented. (A second witness, Juan Sanchez, described the operations of Bancec's predecessor. App. 185–186.) Lopez, who was called by Bancec, served as a lawyer for Banco Nacional from 1953 to 1965, when he went to work for the Foreign Trade Ministry. He testified that "Bancec was an autonomous organization that was supervised by the Cuban government but not controlled by it." App. 197. According to Lopez, under Cuban law Bancec had independent legal status, and could sue and be sued. Lopez stated that Bancec's capital was supplied by the Cuban government and that its net profits, after reserves, were paid to Cuba's Treasury, but that Bancec did not pay taxes to the Government. *Id.*, at 196.
The District Court also took into evidence translations of the Cuban statutes and resolutions, as well as the July 1961 stipulation for leave to file a motion to file an amended complaint substituting the Republic of Cuba as plaintiff. The court stated that the stipulation would be taken "for what it is worth," and acknowledged respondent's representation that it was based on an "erroneous" interpretation of Cuba's law. *Id.*, at 207–209.

4 Judge vanPelt Bryan, before whom the case was tried, died before issuing a decision. With the parties' consent, Judge Brieant decided the case based on the record of the earlier proceedings. 505 F.Supp. 412, 418 (1980).

5 The District Court stated that the events surrounding Bancec's dissolution "naturally inject a question of 'real party in interest' into the discussion of Bancec's claim," but it attached "no significance or validity to arguments based on that concept." 505 F.Supp., at 425. It indicated that when Bancec dissolved, the claim on the letter of credit was "the sort of asset, right and claim peculiar to the banking business, and accordingly, probably should be regarded as vested in Banco Nacional...." *Id.*, at 424. Noting that the Court of Appeals, in *Banco I*, had affirmed a ruling that Banco Nacional could be held liable by way of setoff for the value of Citibank's seized Cuban assets, the court concluded:
"[T]he devolution of [Bancec's] claim, however viewed, brings it into the hands of the Ministry, or Banco Nacional, each an *alter ego* of the Cuban Government.... [W]e accept the present contention of plaintiff's counsel that the order of this Court of July 6th [1961] permitting, but apparently not requiring, the service of an amended complaint in which the Republic of Cuba itself would appear as a party plaintiff in lieu of Bancec was based on counsel's erroneous assumption, or an erroneous interpretation of the laws and resolutions providing for the devolution of the assets of Bancec. Assuming this to be true, it is of no moment. The Ministry of Foreign Trade is no different than the Government of which its minister is a member." *Id.*, at 425 (emphasis in original).

6 In a footnote, the Court of Appeals referred to Bancec's dissolution and listed its successors, but its opinion attached no significance to that event. 658 F.2d, at 916, n. 4.

7 In relevant part, 28 U.S.C. § 1607 provides:
"In any action brought by a foreign state ... in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state."
As used in 28 U.S.C. § 1607, a "foreign state" includes an "agency or instrumentality of a foreign state...." 28 U.S.C. § 1603(a).
Section 1607(c) codifies our decision in *National City Bank v. Republic of China*, 348 U.S. 356, 75 S.Ct. 423, 99 L.Ed. 389 (1955). See H.R.Rep. No. 94–1487, p. 23 (1976).

8 See also H.R.Rep. No. 94–1487, p. 28, U.S.Code Cong. & Admin.News 1976, p. 6627 (in deciding whether property in the United States of a foreign state is immune from attachment and execution under 28 U.S.C. § 1610(a)(2), "[t]he courts will have to determine whether property 'in the custody of' an agency or instrumentality is property 'of' the agency or instrumentality, whether property held by one agency should be deemed to be property of another, [and] whether property held by an agency is property of the foreign state.")

9 See also Hadari, The Choice of National Law Applicable to the Multinational Enterprise and the Nationality of Such Enterprises, 1974 Duke L.J. 1, 15–19.

10 Cf. *Anderson v. Abbott*, 321 U.S. 349, 365, 64 S.Ct. 531, 539, 88 L.Ed. 793 (1944) (declining to apply the law of the state of incorporation to determine whether a banking corporation complied with the requirements of federal banking laws because "no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy concerning national banks which Congress has announced").

[11] Pointing out that 28 U.S.C. § 1606, see *ante*, at 2596–2597, contains language identical to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674 (1976 ed.), Bancec also contends alternatively that the FSIA, like the FTCA, requires application of the law of the forum state—here New York—including its conflicts principles. We disagree. Section 1606 provides that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity ..., the foreign state shall be liable in the same manner and to the same extent as a private individual in like circumstances." Thus, where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances. The statute is silent, however, concerning the rule governing the attribution of liability *among* entities of a foreign state. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425, 84 S.Ct. 923, 938, 11 L.Ed.2d 804 (1964), this Court declined to apply the State of New York's act of state doctrine in a diversity action between a United States national and an instrumentality of a foreign state, concluding that matters bearing on the nation's foreign relations "should not be left to divergent and perhaps parochial state interpretations." When it enacted the FSIA, Congress expressly acknowledged "the importance of developing a uniform body of law" concerning the amenability of a foreign sovereign to suit in United States courts. H.R.Rep. No. 94–1487, p. 32. See *Verlinden B.V. v. Central Bank of Nigeria*, —— U.S. ——, ——, 103 S.Ct. 1962, 1969, 75 L.Ed.2d 81 (1983). In our view, these same considerations preclude the application of New York law here.

[12] Although this Court has never been required to consider the separate status of a foreign instrumentality, it has considered the legal status under federal law of United States government instrumentalities in a number of contexts, none of which are relevant here. See, *e.g.*, *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784 (1939) (determining that Congress did not intend to endow corporations chartered by the Reconstruction Finance Corporation with immunity from suit).

[13] Friedmann, "Government Enterprise: A Comparative Analysis" in Government Enterprise: A Comparative Study 306–307 (W. Friedmann & J.F. Garner eds. 1970). See D. Coombes, State Enterprise: Business or Politics? (1971) (United Kingdom); Dallmayr, Public and Semi-Public Corporations in France, 26 Law & Contemp. Prob. 755 (1961); J. Quigley, The Soviet Foreign Trade Monopoly 48–49, 119–120 (1974); Seidman, "Government-sponsored Enterprise in the United States," in The New Political Economy 85 (B. Smith ed. 1975); Supranowitz, The Law of State-Owned Enterprises in a Socialist State, 26 Law & Contemp.Prob. 794 (1961); United Nations Department of Economic and Social Affairs, Organization, Management and Supervision of Public Enterprises in Developing Countries 63–69 (1974) (hereinafter United Nations Study); A.H. Walsh, The Public's Business: The Politics and Practices of Government Corporations 313–321 (1978) (Europe).

[14] Friedmann, *supra*, at 334; United Nations Study, *supra*, at 63–65.

[15] President Franklin D. Roosevelt described the Tennessee Valley Authority, perhaps the best known of the American public corporations, as "a corporation clothed with the power of government but possessed of the flexibility and initiative of a private enterprise." 77 Cong.Rec. 1423 (1933). See also J. Thurston, Government Proprietary Corporations in the English-Speaking Countries 7 (1937).

[16] J. Thurston, *supra*, at 43–44. This principle has long been recognized in courts in common law nations. See *Bank of the United States v. Planters' Bank of Georgia*, (22 U.S.) 9 Wheat. 904, 6 L.Ed. 244 (1824); *Tamlin v. Hannaford*, [1950] 1 K.B. 18, 24 (C.A.).

[17] See Posner, The Rights of Creditors of Affiliated Corporations, 43 U.Chi.L.Rev. 499, 516–517 (1976) (discussing private corporations).

[18] The British courts, applying principles we have not embraced as universally acceptable, have shown marked reluctance to attribute the acts of a foreign government to an instrumentality owned by that government. In *I Congreso del Partido*, [1983] A.C. 244, a decision discussing the so-called "restrictive" doctrine of sovereign immunity and its application to three Cuban state-owned enterprises, including Cubazucar, Lord Wilberforce described the legal status of government instrumentalities:

"State-controlled enterprises, with legal personality, ability to trade and to enter into contracts of private law, though wholly subject to the control of their state, are a well-known feature of the modern commercial scene. The distinction between them, and their governing state, may appear artificial: but it is an accepted distinction in the law of English and other states. Quite different considerations apply to a state-controlled enterprise acting on government directions on the one hand, and a state, exercising sovereign functions, on the other." *Id.*, at 258 (citation omitted).

Later in his opinion, Lord Wilberforce rejected the contention that commercial transactions entered into by state-owned organizations could be attributed to the Cuban government. "The status of these organizations is familiar in our courts, and it has never been held that the relevant state is in law answerable for their actions." *Id.*, at 271. See also *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] Q.B. 529 in which the Court of Appeal ruled that the Central Bank of Nigeria was not an "alter ego or organ" of the Nigerian government for the purpose of determining whether it could assert sovereign immunity. *Id.*, at 559.

In *C. Czarnikow, Ltd. v. Rolimpex*, [1979] A.C. 351, the House of Lords affirmed a decision holding that Rolimpex, a Polish state trading enterprise that sold Polish sugar overseas, could successfully assert a defense of *force majeure* in an action for breach of a

contract to sell sugar. Rolimpex had defended on the ground that the Polish government had instituted a ban on the foreign sale of Polish sugar. Lord Wilberforce agreed with the conclusion of the court below that, in the absence of "clear evidence and definite findings" that the foreign government took the action "purely in order to extricate a state enterprise from contractual liability," the enterprise cannot be regarded as an organ of the state. Rolimpex, he concluded, "is not so closely connected with the government of Poland that it is precluded from relying on the ban [on foreign sales] as government intervention...." *Id.*, at 364.

19 See 1 W.M. Fletcher, Cyclopedia of the Law of Private Corporations § 41 (rev. perm. ed. 1974):
"[A] corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons." *Id.*, at 166 (footnotes omitted).
See generally, H. Henn, Handbook of the Law of Corporations § 146 (2d ed. 1970); I.M. Wormser, Disregard of the Corporate Fiction and Allied Corporate Problems 42–85 (1927).

20 In *Case Concerning The Barcelona Traction, Light & Power Co.*, 1970 I.C.J. 3, the International Court of Justice acknowledged that, as a matter of international law, the separate status of an incorporated entity may be disregarded in certain exceptional circumstances:
"Forms of incorporation and their legal personality have sometimes not been employed for the sole purposes they were intended to serve; sometimes the corporate entity has been unable to protect the rights of those who have entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of 'lifting the corporate veil' or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.

In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law...." *Id.*, at 38–39.
On the application of these principles by European courts, see Cohn and Simitis, "Lifting the Veil" in the Company Laws of the European Continent, 12 Int. & Comp.L.Q. 189 (1963); Hadari, The Structure of the Private Multinational Enterprise, 71 Mich.L.Rev. 729, 771, n. 260 (1973).

21 *Trustees of Dartmouth College v. Woodward*, (17 U.S.) 4 Wheat. 514, 636, 4 L.Ed. 629 (1819).

22 Pointing to the parties' failure to seek findings of fact in the District Court concerning Bancec's dissolution and its aftermath, Bancec contends that the District Court's order denying its motion to substitute Cuba Zucar as plaintiff precludes further consideration of the effect of the dissolution. While it is true that the District Court did not hear evidence concerning *which* agency or instrumentality of the Cuban Government, under Cuban law, succeeded to Bancec's claim against Citibank on the letter of credit, resolution of that question has no bearing on our inquiry. We rely only on the fact that Bancec was dissolved by the Cuban Government and its assets transferred to entities that may be held liable on Citibank's counterclaim—undisputed facts readily ascertainable from the statutes and orders offered in the District Court by Bancec in support of its motion to substitute Cuba Zucar.

23 Law No. 930, the law dissolving Bancec, contains the following recitations:
"WHEREAS, the measures adopted by the Revolutionary Government in pursuance of the Program of the Revolution have resulted, within a short time, in profound social changes and considerable institutional transformations of the national economy.
"WHEREAS, among these institutional transformations there is one which is specially significant due to its transcendence in the economic and financial fields, which is the nationalization of the banks ordered by Law No. 891, of October 13, 1960, by virtue of which the banking functions will hereafter be the exclusive province of the Cuban Government.
"WHEREAS, the consolidation and the operation of the economic and social conquests of the Revolution require the restructuration into a sole and centralized banking system, operated by the State, constituted by the [Banco Nacional], which will foster the development and stimulation of all productive activities of the Nation through the accumulation of the financial resources thereof, and their most economic and reasonable utilization...." App. to Pet. for Cert. 14d–15d.

24 The parties agree that, under the Cuban Assets Control Regulations, 31 CFR Part 515 (1982), any judgment entered in favor of an instrumentality of the Cuban Government would be frozen pending settlement of claims between the United States and Cuba.

25 See also *Banco Nacional de Cuba v. First National City Bank, supra*, 406 U.S., at 770–773, 92 S.Ct., at 1814–1816 (Douglas, J., concurring in the result); *Federal Republic of Germany v. Elicofon*, 358 F.Supp. 747 (EDNY 1972), aff'd,

1973), cert. denied, 415 U.S. 931, 94 S.Ct. 1443, 39 L.Ed.2d 489 (1974). In *Elicofon*, the District Court held that a separate juridical entity of a foreign state not recognized by the United States may not appear in a United States court. A contrary holding, the court reasoned, "would permit non-recognized governments to use our courts at will by creating 'juridical entities' whenever the need arises." 358 F.Supp., at 757.

26 See *Banco I, supra*, 478 F.2d, at 194.

27 The District Court adopted, and both Citibank and the Solicitor General urge upon the Court, a standard in which the determination whether or not to give effect to the separate juridical status of a government instrumentality turns in part on whether the instrumentality in question performed a "governmental function." We decline to adopt such a standard in this case, as our decision is based on other grounds. We do observe that the concept of a "usual" or a "proper" governmental function changes over time and varies from nation to nation. Cf. *New York v. United States*, 326 U.S. 572, 580, 66 S.Ct. 310, 313, 90 L.Ed. 326 (1945) (opinion of Frankfurter, J.) ("To rest the federal taxing power on what is 'normally' conducted by private enterprise in contradiction to the 'usual' governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion"); *id.*, at 586, 66 S.Ct., at 316 (Stone, C.J., concurring); *id.*, at 591, 66 S.Ct., at 318 (Douglas, J., dissenting). See also Friedmann, The Legal Status and Organization of the Public Corporation, 16 Law & Contemp.Prob. 576, 589–591 (1951).

28 Bancec does not suggest, and we do not believe, that the act of state doctrine, see *e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), precludes this Court from determining whether Citibank may set off the value of its seized Cuban assets against Bancec's claim. Bancec does contend that the doctrine prohibits this Court from inquiring into the motives of the Cuban Government for incorporating Bancec. Brief for Respondent 16–18. We need not reach this contention, however, because our conclusion does not rest on any such assessment.

1 Law No. 930 provided, in part, that Bancec's "trade functions will be assumed by the foreign trade enterprises or houses of the Ministry of Foreign Trade," App. to Pet. for Cert. 16d, App. 104. Law No. 934, correspondingly, stated, "All the functions of a mercantile character heretofore assigned to said Foreign Trade Bank of Cuba are hereby transferred and vested in the foreign trade enterprises or houses set up hereunder, which are subrogated to the rights and obligations of said former Bank in pursuance of the assignment of those functions ordered by the Minister." App. to Pet. for Cert. 24d. The preamble of Resolution No. 1 of 1961, issued on March 1, 1961, explained that Law No. 934 had provided "that all functions of a commercial nature that were assigned to the former Cuban Bank for Foreign Trade are attributed to the enterprises or foreign trade houses which are subrogated in the rights and obligations of said Bank." Nothing in the affidavit filed by respondent in May 1975 elucidates the precise nature of these transactions, or explains how Bancec's former trading functions were exercised during the six-day interval. App. 132–137.

2 Nor do I agree that a contrary result "would cause such an injustice." *Ante*, at 2603. Petitioner is only one of many American citizens whose property was nationalized by the Cuban Government. It seeks to minimize its losses by retaining $193,280.30 that a purchaser of Cuban sugar had deposited with it for the purpose of paying for the merchandise, which was delivered in due course. Having won this lawsuit, petitioner will simply retain that money. If petitioner's contentions in this case had been rejected, the money would be placed in a fund comprised of frozen Cuban assets, to be distributed equitably among all the American victims of Cuban nationalizations. *Ante*, at 2602, n. 24. Even though petitioner has suffered a serious injustice at the hands of the Cuban Government, no special equities militate in favor of giving this petitioner a preference over all other victims simply because of its participation in a discrete, completed, commercial transaction involving the sale of a load of Cuban sugar.

ANNEX 142

102 S.Ct. 2374
Supreme Court of the United States

SUMITOMO SHOJI AMERICA, INC., Petitioner
v.
Lisa M. AVAGLIANO et al.
Lisa M. AVAGLIANO, et al., Petitioners
v.
SUMITOMO SHOJI AMERICA, INC.

Nos. 80–2070, 81–24.
|
Argued April 26, 1982.
|
Decided June 15, 1982.

Synopsis
Past and present female secretarial employees of a New York corporation, which was a wholly owned subsidiary of a Japanese general trading company, brought a class action against their employer, claiming that its alleged practice of hiring only male Japanese citizens to fill executive, managerial, and sales positions violated Title VII of the Civil Rights Act. Defendant moved to dismiss the complaint on ground that its practices were protected under Article VIII(1) of the Friendship, Commerce and Navigation Treaty between the United States and Japan. The United States District Court for the Southern District of New York, 473 F.Supp. 506, held that because defendant was incorporated in the United States, it was not covered by Article VIII(1), but the Court then certified for interlocutory appeal the question whether the terms of the treaty exempted defendant from Title VII's provisions. The Court of Appeals, Second Circuit, 638 F.2d 552,reversed in part, and certiorari was granted. The Supreme Court, Chief Justice Burger, held that Article VIII(1), which provides that the "companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice," provided no defense to a Title VII employment discrimination suit against an American subsidiary of a Japanese company, since such an American subsidiary is not a company of Japan and thus is not covered by Article VIII(1) of the treaty.

Vacated and remanded.

****2375** *Syllabus*[*]
***176** Petitioner Sumitomo Shoji America, Inc., is a New York corporation and a wholly owned subsidiary of a Japanese general trading company. Past and present female secretarial employees of Sumitomo, who, with one exception, are United States citizens, brought a class action in Federal District Court against Sumitomo, claiming that its alleged practice of hiring only male Japanese citizens to fill executive, managerial, and sales positions violated Title VII of the Civil Rights Act of 1964. Sumitomo moved to dismiss the complaint on the ground that its practices were protected under Art. VIII(1) of the Friendship, Commerce and Navigation Treaty between the United States and Japan. Article VIII(1) provides that the "companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." Article XXII(3) of the Treaty defines "companies" as "[c]ompanies constituted under the applicable laws and regulations within the territories of either Party." The District Court refused to dismiss, holding that because Sumitomo was incorporated in the United States, it was not covered by Art. VIII(1), but the court then certified for interlocutory appeal to the Court of Appeals the question whether the terms of the Treaty exempted Sumitomo from Title VII's provisions. The Court of Appeals reversed in part, holding that Art. VIII(1) was intended to cover locally incorporated subsidiaries of foreign companies but that the Treaty language did not insulate Sumitomo's employment practices from Title VII scrutiny.

Held: Sumitomo is not a company of Japan and thus is not covered by Art. VIII(1) of the Treaty. Pp. 2377–2382.

(a) Under Art. XXII(3)'s literal language, Sumitomo is a company of the United States, since it was "constituted under the applicable laws and regulations" of New York. As a company of the United States, it cannot invoke the rights provided in Art. VIII(1), which are available only to companies of Japan operating in the United States and to companies ***177** of the United States operating in Japan. Where both parties to the Treaty agree with this meaning and such interpretation follows from the clear Treaty language, deference will be given to it, absent extraordinarily strong contrary evidence. Pp. 2377–2380.

(b) Adherence to the Treaty language does not overlook the Treaty's purpose, since the primary purpose of the corporation provisions was to give corporations of each signatory legal status in the territory ****2376** of the other party and to allow them to conduct business in the other country on a comparable basis with domestic firms. Pp. 2380–2382.

2d Cir., 638 F.2d 552, vacated and remanded.

Attorneys and Law Firms

Abram Chayes, Washington, D. C., for Sumitomo Shoji America, Inc.

Lewis M. Steel, New York City, for Avagliano, et al.

Lawrence G. Wallace, Washington, D. C., for the United States as amicus curiae by special leave of Court.

Opinion

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to decide whether Article VIII(1) of the Friendship, Commerce and Navigation Treaty between ***178** the United States and Japan provides a defense to a Title VII employment discrimination suit against an American subsidiary of a Japanese company.

I

Petitioner, Sumitomo Shoji America, Inc., is a New York corporation and a wholly owned subsidiary of Sumitomo Shoji Kabushiki Kaisha, a Japanese general trading company or *sogo shosha.*[1] Respondents are past and present female secretarial employees of Sumitomo.[2] All but one of the respondents are United States citizens; that one exception is a Japanese citizen living in the United States. Respondents brought this suit as a class action claiming that Sumitomo's alleged practice of hiring only male Japanese citizens to fill executive, managerial, and sales positions violated both 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* (1976 ed. and Supp.IV).[3] Respondents sought both injunctive relief and damages.

***179** Without admitting the alleged discriminatory practice, Sumitomo moved under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint. Sumitomo's motion was based on two grounds: (1) discrimination on the basis of Japanese citizenship does not violate Title VII or § 1981; and (2) Sumitomo's practices are protected under Article VIII(1) of the Friendship, Commerce and Navigation Treaty between the United States and Japan, Apr. 2, 1953, [1953] 4 U.S.T. 2063, T.I.A.S. No. 2863. The District Court dismissed the § 1981 claim, holding that neither sex discrimination nor national origin discrimination are cognizable under that section. 473 F.Supp. 506 (S.D.N.Y.1979). The court refused to dismiss the Title VII claims, however; it held that because Sumitomo is incorporated in the United States it is not covered by Article VIII(1) of the Treaty. The District Court then certified for interlocutory appeal to the Court of Appeals under 28 U.S.C. § 1292(b) the

question of whether the terms of the Treaty ****2377** exempted Sumitomo from the provisions of Title VII.
The Court of Appeals reversed in part. 638 F.2d 552 (C.A.2 1981). The court first examined the Treaty's language and its history and concluded that the Treaty parties intended Article VIII(1) to cover locally incorporated subsidiaries of foreign companies such as Sumitomo. The court then held that the Treaty language does not insulate Sumitomo's executive employment practices from Title VII scrutiny. The court concluded that under certain conditions, Japanese citizenship could be a bona fide occupational qualification for high-level employment with a Japanese-owned domestic corporation and that Sumitomo's practices might ***180** thus fit within a statutory exception to Title VII.[4] The court remanded for further proceedings.[5]

We granted certiorari, 454 U.S. 962, 102 S.Ct. 501, 70 L.Ed.2d 377 (1981), and we vacate and remand.

II

Interpretation of the Friendship, Commerce and Navigation Treaty between Japan and the United States must, of course, begin with the language of the Treaty itself. The clear import of treaty language controls unless "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." *Maximov v. United States*, 373 U.S. 49, 54, 83 S.Ct. 1054, 1057, 10 L.Ed.2d 184 (1963). See also *The Amiable Isabella*, 6 Wheat. (10 U.S.) 1, 72, 5 L.Ed. 191 (1821).

***181** Article VIII(1) of the Treaty provides in pertinent part:

> "*[C]ompanies of either Party* shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." (Emphasis added.)[6]

***182 **2378** Clearly Article VIII(1) only applies to companies of one of the Treaty countries operating in the other country. Sumitomo contends that it is a company of Japan, and that Article VIII(1) of the Treaty grants it very broad discretion to fill its executive, managerial, and sales positions exclusively with male Japanese citizens.[7]

Article VIII(1) does not define any of its terms; the definitional section of the Treaty is contained in Article XXII. Article XXII(3) provides:

> "As used in the present Treaty, the term 'companies' means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party *shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other Party." (Emphasis added.)

Sumitomo is "constituted under the applicable laws and regulations" of New York; based on Article XXII(3), it is a company of the United States, not a company of Japan.[8] As ***183** a company of the United States operating in the United States, under the literal language of Article XXII(3) of the Treaty, Sumitomo cannot invoke the rights provided in Article VIII(1), which are available only to companies of Japan operating in the United States and to companies of the United States operating in Japan.

The Governments of Japan and the United States support this interpretation of the Treaty. Both the Ministry of Foreign Affairs of Japan and the United States Department of State agree that a United States corporation, even when wholly owned by a Japanese company, is not a company of Japan under the Treaty and is therefore not covered by Article VIII(1). ****2379** The Ministry of Foreign Affairs stated its position to the American Embassy in Tokyo with reference to this case:

> "The Ministry of Foreign Affairs, as the Office of [the Government of Japan] responsible for the interpretation of the [Friendship, Commerce and Navigation] Treaty, reiterates its view concerning the application of Article 8, Paragraph 1 of the Treaty: For the purpose of the Treaty, companies constituted under the applicable laws ... of either Party shall be

deemed companies thereof and, therefore, a subsidiary of a Japanese company which is incorporated under the laws of New York is not ***184** covered by Article 8 Paragraph 1 when it operates in the United States."[9]

The United States Department of State also maintains that Article VIII(1) rights do not apply to locally incorporated subsidiaries.[10] Although not conclusive, the meaning attributed to treaty provisions by the Government agencies ***185** charged with their negotiation and enforcement is entitled to great weight. *Kolovrat v. Oregon*, 366 U.S. 187, 194, 81 S.Ct. 922, 926, 6 L.Ed.2d 218 (1961).[11]

Our role is limited to giving effect to the intent of the Treaty parties. When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation.[12]

III

Sumitomo maintains that although the literal language of the Treaty supports the contrary interpretation, the intent of Japan and the United States was to cover subsidiaries regardless of their place of incorporation. We disagree.

****2380** Contrary to the view of the Court of Appeals and the claims of Sumitomo, adherence to the language of the Treaty would not "overlook the purpose of the Treaty." 638 F.2d, at 556. The Friendship, Commerce and Navigation Treaty between Japan and the United States is but one of a series of similar commercial agreements negotiated after World War II.[13] The primary purpose of the corporation provisions of ***186** the Treaties was to give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms. Although the United States negotiated commercial treaties as early as 1778, and thereafter throughout the 19th century and early 20th century,[14] these early commercial treaties were primarily concerned with the trade and shipping rights of individuals. Until the 20th century, international commerce was much more an individual than a corporate affair.[15]

As corporate involvement in international trade expanded in this century, old commercial treaties became outmoded. Because "corporation[s] can have no legal existence out of the boundaries of the sovereignty by which [they are] created," *Bank of Augusta v. Earle*, 13 Pet. (38 U.S.) 519, 588, 10 L.Ed. 274 (1839), it became necessary to negotiate new treaties granting corporations legal status and the right to function abroad. A series of Treaties negotiated before World War II gave corporations legal status and access to foreign courts,[16] but it was not until the ***187** postwar Friendship, Commerce and Navigation Treaties that United States corporations gained the ****2381** right to conduct business in other countries.[17] The purpose of the Treaties was ***188** not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage.

The Treaties accomplished their purpose by granting foreign corporations "national treatment"[18] in most respects and by allowing foreign individuals and companies to form locally incorporated subsidiaries. These local subsidiaries are considered for purposes of the Treaty to be companies of the country in which they are incorporated; they are entitled to the rights, and subject to the responsibilities of other domestic corporations. By treating these subsidiaries as domestic companies, the purpose of the Treaty provisions—to assure that corporations of one Treaty party have the right to conduct business within the territory of the other party without suffering discrimination as an alien entity—is fully met.

***189** Nor can we agree with the Court of Appeals view that literal interpretation of the Treaty would create a "crazy-quilt pattern" in which the rights of branches of Japanese companies operating directly in the United States would be greatly superior to the right of locally incorporated subsidiaries of Japanese companies. 638 F.2d, at 556. The Court of Appeals maintained that if such subsidiaries were not considered companies of Japan under the Treaty, they, unlike branch offices of Japanese corporations, would be denied access to the legal system, would be left unprotected against unlawful entry and molestation, and would be unable to dispose of property, obtain patents, engage in importation and exportation, or make payments, remittances, and transfers of funds. *Ibid*. That this is not the case is obvious; the subsidiaries, as companies of the

United States, would enjoy all of those rights and more. The only significant advantage branches may have over subsidiaries is that conferred by Article VIII(1).

IV

We are persuaded, as both signatories agree, that under the literal language of **2382 Article XXII(3) of the Treaty, Sumitomo is a company of the United States; we discern no reason to depart from the plain meaning of the Treaty language. Accordingly, we hold that Sumitomo is not a company of Japan and is thus not covered by Article VIII(1) of the Treaty.[19] The judgment of the Court of Appeals is vacated, **190 and the case is remanded for further proceedings consistent with this opinion.

Vacated and remanded.

All Citations

457 U.S. 176, 102 S.Ct. 2374, 72 L.Ed.2d 765, 28 Fair Empl.Prac.Cas. (BNA) 1753, 29 Empl. Prac. Dec. P 32,782

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 General trading companies have been a unique fixture of the Japanese economy since the Meiji era. These companies each market large numbers of Japanese products, typically those of smaller concerns, and also have a large role in the importation of raw materials and manufactured products to Japan. In addition, the trading companies play a large part in financing Japan's international trade. The largest trading companies—including Sumitomo's parent company—in a typical year account for over 50% of Japanese exports and over 60% of imports to Japan. See Krause & Sekiguchi, Japan and the World Economy, in Asia's New Giant: How the Japanese Economy Works 383, 389–397 (H. Patrick & H. Rosovsky eds. 1976).

2 Respondents have also filed a cross-petition in this case. Thus, the past and present secretaries, generally referred to as respondents, are the respondents in No. 80–2070 and the cross-petitioners in No. 81–24. Sumitomo is the petitioner in No. 80–2070 and the cross-respondent in No. 81–24.

3 Prior to bringing this suit, respondents each filed timely complaints with the Equal Employment Opportunity Commission. The EEOC issued "right to sue" letters to the respondents on October 27, 1977. This suit was filed on November 21, 1977, well within the statutory 90-day period allowed for filing suits after receipt of an EEOC notice of right to sue. 42 U.S.C. § 2000e–5(f)(1).

4 Sumitomo argued in the District Court that discrimination on the basis of national citizenship, as opposed to national origin, was not prohibited by Title VII. The District Court disagreed, however. It relied on *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 92, 94 S.Ct. 334, 338, 38 L.Ed.2d 287 (1973), in which we noted that "Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin." Although discussed at length in the briefs, this issue is not properly before the Court and we do not reach it. It was not included in the question certified for interlocutory review by the Court of Appeals under 28 U.S.C. § 1292(b), was not decided by the Court of Appeals, and was not set forth or fairly included in the questions presented for review by this Court as required by Rule 21.1(a).

5 In a nearly identical case, a divided panel of the Court of Appeals for the Fifth Circuit came to somewhat contrary results. *Spiess v. C. Itoh & Co.*, 643 F.2d 353 (1981), cert. pending, No. 81–1496. The Fifth Circuit majority agreed with the Second Circuit decision that a locally incorporated subsidiary of a Japanese corporation is covered by Article VIII(1) of the Treaty, but disagreed with the latter court's decision on the effect of the Treaty on Title VII. The court held that the Treaty provision did protect the subsidiary's practices from Title VII liability.
In dissent, Judge Reavley disagreed with the majority's initial conclusion. He would have held that under the plain language of the Treaty, locally incorporated subsidiaries are to be considered domestic corporations and are thus not covered by Article VIII(1).

[6] Similar provisions are contained in the Friendship, Commerce and Navigation Treaties between the United States and other countries. See, *e.g.*, Article XII(4) of the Treaty with Greece, [1954] 5 U.S.T. 1829, 1857, T.I.A.S. No. 3057 (1951); Article VIII(1) of the Treaty with Israel, [1954] 5 U.S.T. 550, 557, T.I.A.S. No. 551 (1951); Article VIII(1) of the Treaty with the Federal Republic of Germany, [1956] 7 U.S.T. 1839, 1848, T.I.A.S. No. 3593 (1954).
These provisions were apparently included at the insistence of the United States; in fact, other countries, including Japan, unsuccessfully fought for their deletion. See, *e.g.*, State Department Airgram No. A–453, dated Jan. 7, 1952, pp. 1, 3, reprinted in App. 130a, 131a, 133a (discussing Japanese objections to Article VIII(1)); Foreign Service Despatch No. 2529, dated Mar. 18, 1954, reprinted in App. 181a, 182a (discussing German objections to Article VIII(1)).
According to Herman Walker, Jr., who at the time of the drafting of the Treaty served as Adviser on Commercial Treaties at the State Department, Article VIII(1) and the comparable provisions of other treaties were intended to avoid the effect of strict percentile limitations on the employment of Americans abroad and "to prevent the imposition of ultranationalistic policies with respect to essential executive and technical personnel." Walker, Provisions on Companies in United States Commercial Treaties, 50 Am.J.Int'l L. 373, 386 (1956); Walker, Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice, 5 Am.J.Comp.L. 229, 234 (1956). According to the State Department, Mr. Walker was responsible for formulation of the postwar form of the Friendship, Commerce and Navigation Treaty and negotiated several of the treaties for the United States. Department of State Airgram A–105, dated Jan. 9, 1976, reprinted in App. 157a.
See also Foreign Service Despatch No. 2529, *supra*, App. 182a (Purpose of Article VIII(1) of Treaty with Germany "is to preclude the imposition of 'percentile' legislation. It gives freedom of choice as among persons lawfully present in the country and occupationally qualified under the local law").

[7] The issues raised by this contention are clearly of widespread importance. As we noted in n. 6, *supra*, treaty provisions similar to that invoked by Sumitomo are in effect with many other countries. In fact, some treaties contain even more broad language. See, *e.g.*, Article XII(4), Treaty of Friendship, Commerce and Navigation with Greece, [1954] 5 U.S.T., at 1857–1859 ("Nationals and companies of either party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents *and other employees of their choice*...") (emphasis added). As of 1979, United States affiliates of foreign corporations employed over 1.6 million workers in this country. Howenstine, Selected Data on the Operations of U. S. Affiliates of Foreign Companies, 1978 and 1979, in Survey of Current Business 35, 36 (U.S. Dept. of Commerce, May 1981).

[8] The clear language of Article VII(1) and Article XXII(3) is consistent with other Treaty provisions. For example, Article XVI(2) accords national treatment to "[a]rticles produced by nationals and companies of either Party within the territories of the other Party, *or by companies of the latter Party controlled by such nationals and companies*...." (Emphasis added.) This provision obviously envisions that companies of one party may be controlled by companies of the other party. If the nationality of a company were determined by the nationality of its controlling entity as Sumitomo proposes, rather than by the place of its incorporation, this provision would make no sense.
Several other Treaty provisions would make little sense if American subsidiaries were considered companies of Japan. Articles VII(1), VII(4), and XVI(2) contain clauses dealing with companies or enterprises controlled by companies of either party. If those companies or enterprises were themselves companies of the country of their parents, this separate treatment would be unwarranted.

[9] State Department Cable, Tokyo 03300, dated Feb. 26, 1982 (cable from the United States Embassy in Tokyo to the Secretary of State relaying the position of the Ministry of Foreign Affairs of Japan). See also Diplomatic Communication from the Embassy of Japan in Washington to the United States Department of State, dated Apr. 21, 1982 ("The Government of Japan reconfirms its view that a subsidiary of a Japanese company which is incorporated under the laws of New York is not itself covered by article 8., paragraph 1 of the Treaty of Friendship, Commerce and Navigation between Japan and the United States (the FCN Treaty) when it operates in the United States").

[10] Brief for United States as *Amicus Curiae* 8–22; Letter of James R. Atwood, Deputy Legal Adviser, U.S. Department of State, to Lutz Alexander Prager, Assistant General Counsel, Equal Employment Opportunity Commission, dated Sept. 11, 1979, reprinted in App. 307a. ("On further reflection on the scope of application of the first sentence of Paragraph 1 of Article VIII of the U. S.–Japan FCN, we have established to our satisfaction that it was not the intent of the negotiators to cover locally-incorporated subsidiaries, and that therefore U. S. subsidiaries of Japanese corporations cannot avail themselves of this provision of the treaty").
The Court of Appeals and Sumitomo dismiss the Atwood letter as incorrect, and point to a letter written by a previous State Department Deputy Legal Adviser as taking the contrary view. Letter of Lee R. Marks, Deputy Legal Adviser, U.S. Department of State, to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission, dated Oct. 17, 1978, reprinted in App. 94a. However neither of these letters is indicative of the state of mind of the Treaty negotiators; they are merely evidence of the later interpretation of the State Department as the agency of the United States charged with interpreting and enforcing the Treaty. However ambiguous the State Department position may have been previously, it is certainly beyond dispute that the Department now interprets the Treaty in conformity with its plain language, and is of the opinion that Sumitomo is not a company of Japan and is not covered by Article VIII(1). That interpretation, and the identical position of the Government of Japan, is entitled to great weight. *Kolovrat v. Oregon*, 366 U.S. 187, 81 S.Ct. 922, 6 L.Ed.2d 218 (1961).

[11] Determining the nationality of a company by its place of incorporation is consistent with prior treaty practice. See Walker, 50 Am.J.Int'l L., *supra*, n. 6, at 382–383. The place-of-incorporation rule also has the advantage of making determination of nationality a simple matter. On the other hand, application of a control test could certainly make nationality a subject of dispute.

[12] We express no view, of course, as to the interpretation of other Friendship, Commerce and Navigation Treaties which, although similarly worded, may have different negotiating histories.

[13] See, *e.g.*, Treaties of Friendship, Commerce and Navigation with China, 63 Stat. 1299, T.I.A.S. No. 1871 (1946); Italy, 63 Stat. 2255, T.I.A.S. No. 1965 (1948); Israel, [1954] 5 U.S.T. 550, T.I.A.S. No. 551 (1951); Greece, [1954] 5 U.S.T. 1829, T.I.A.S. No. 3057 (1951); Japan, [1953] 4 U.S.T. 2063, T.I.A.S. No. 2863 (1953); Federal Republic of Germany, [1956] 7 U.S.T. 1839, T.I.A.S. No. 3593 (1954); The Netherlands, [1957] 8 U.S.T. 2043, T.I.A.S. No. 3942 (1956); and Pakistan, [1961] 12 U.S.T. 110, T.I.A.S. No. 4683 (1959). The provisions of several of the treaties are compared in tabular form in Commercial Treaties: Hearing on Treaties of Friendship, Commerce and Navigation with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany, and Japan, before the Subcommittee of the Senate Committee on Foreign Relations, 83d Cong., 1st Sess., 7–17 (1953).

[14] See, *e.g.*, Treaty of Amity and Commerce with France, 8 Stat. 12, T.S. No. 83 (1778); Treaty of Amity, Commerce and Navigation with Great Britain, 8 Stat. 116, T.S. No. 105 (1794); Treaty of Commerce and Friendship with Sweden and Norway, 8 Stat. 232, T.S. No. 347 (1816); Treaty of Commerce and Navigation with the Netherlands, 8 Stat. 524, T.S. No. 251 (1839); Treaty of Commerce and Navigation with Belgium, 8 Stat. 606, T.S. No. 19 (1845); Treaty of Commerce and Navigation with Italy, 17 Stat. 845, T.S. No. 177 (1871); Treaty of Commerce with Spain, 23 Stat. 750, T.S. No. 337 (1884); Treaty of Commerce with Germany, 31 Stat. 1935, T.S. No. 101 (1900); Treaty of Commerce with China, 33 Stat. 2208, T.S. No. 430 (1903).

[15] See Walker, 50 Am.J.Int'l L., *supra* n. 6, at 374–378.

[16] Treaty of Commerce and Consular Rights with Japan, 37 Stat. 1504, T.S. No. 558 (1911); Treaties of Friendship, Commerce and Navigation with Germany, 44 Stat. 2132, T.S. No. 725 (1923); Estonia, 44 Stat. 2379, T.S. No. 736 (1925); Hungary, 44 Stat. 2441, T.S. No. 748 (1925); El Salvador, 46 Stat. 2817, T.S. No. 827 (1926); Honduras, 45 Stat. 2618, T.S. No. 764 (1927); Latvia, 45 Stat. 2641, T.S. No. 765 (1928); Austria, 47 Stat. 1876, T.S. No. 838 (1928); Norway, 47 Stat. 2135, T.S. No. 852 (1928); Poland, 48 Stat. 1507, T.S. No. 862 (1931); Finland, 49 Stat. 2659, T.S. No. 868 (1934); Treaties of Friendship, Commerce and Navigation with Siam, 53 Stat. 1731, T.S. No. 940 (1937); Liberia, 54 Stat. 1739, T.S. No. 956 (1938).
These rights given to corporations by these Treaties were quite limited. For example, Article VII of the 1911 Treaty with Japan provided:
"Limited liability and other companies and associations ... already or hereafter to be organized in accordance with the laws of either High Contracting Party and domiciled in the territories of such Party, are authorized, in the territories of the other, to exercise their rights and appear in the courts either as plaintiffs or defendants, subject to the laws of such other Party.
"The foregoing stipulation has no bearing upon the question whether a company or association organized in one of the two countries will or will not be permitted to transact its business or industry in the other, this permission remaining always subject to the laws and regulations enacted or established in the respective countries or in any part thereof." 37 Stat. 1506.
A similarly limited provision was contained in the other Treaties.

[17] The significance of this advance was emphasized in the Senate hearings on an early set of postwar Friendship, Commerce and Navigation Treaties:
"Perhaps the most striking advance of the postwar treaties is the cognizance taken of the widespread use of the corporate form of business organization in present-day economic affairs. In the treaties antedating World War II American corporations were specifically assured only small protection against possible discriminatory treatment in foreign countries. In the postwar treaties, however, corporations are accorded essentially the same treaty rights as individuals in such vital matters as the right to do business, taxation on a nondiscriminatory basis, the acquisition and enjoyment of real and personal property, and the application of exchange controls. Furthermore, the citizens and corporations of one country are given substantial rights in connection with forming local subsidiaries under the corporation laws of the other country and controlling and managing the affairs of such local companies." Commercial Treaties: Hearing on Treaties of Friendship, Commerce and Navigation Between the United States and Colombia, Israel, Ethiopia, Italy, Denmark and Greece before a Subcommittee of the Senate Committee on Foreign Relations, 82d Cong., 2d Sess., 4–5 (1952) (opening statement of Harold Linder, Deputy Assistant Secretary of State for Economic Affairs).

[18] "National treatment" is defined in Article XXII(1) of the Treaty:

> "The term 'national treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party."

In short, national treatment of corporations means equal treatment with domestic corporations. It is ordinarily the highest level of protection afforded by commercial treaties. In certain areas treaty parties are unwilling to grant full national treatment; in those areas the parties frequently grant "most-favored-nation treatment," which means treatment no less favorable than that accorded to nationals or companies of any third country. See Article XXII(2) of the Treaty. "The most-favored-nation rule can now, therefore, imply or allow the status of alien disability rather than of favor. In applicable situations nowadays, the first-class treatment tends to be national treatment; that which the citizens of the country enjoy." Walker, Modern Treaties of Friendship, Commerce and Navigation, 42 Minn.L.Rev. 805, 811 (1958).

19 We express no view as to whether Japanese citizenship may be a bona fide occupational qualification for certain positions at Sumitomo or as to whether a business necessity defense may be available. There can be little doubt that some positions in a Japanese controlled company doing business in the United States call for great familiarity with not only the language of Japan, but also the culture, customs, and business practices of that country. However, the Court of Appeals found the evidentiary record insufficient to determine whether Japanese citizenship was a bona fide occupational qualification for any of Sumitomo's positions within the reach of Article VIII(1). Nor did it discuss the bona fide occupational qualification exception in relation to respondents' sex discrimination claim or the possibility of a business necessity defense. Whether Sumitomo can support its assertion of a bona fide occupational qualification or a business necessity defense is not before us. See n. 4, *supra*.
We also express no view as to whether Sumitomo may assert any Article VIII(1) rights of its parent.

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ANNEX 143

IN THE ARBITRATION UNDER CHAPTER 11
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

METHANEX CORPORATION,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

MEMORIAL ON JURISDICTION AND ADMISSIBILITY OF RESPONDENT UNITED STATES OF AMERICA

Mark A. Clodfelter
Assistant Legal Adviser for International Claims and Investment Disputes
Barton Legum
Chief, NAFTA Arbitration Division, Office of International Claims and Investment Disputes
Alan J. Birnbaum
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Attorney-Advisers, Office of International Claims and Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

November 13, 2000

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> where . . . the detrimental effect is merely an indirect consequence of a policy with which aims of general public interest are pursued . . . .

Case 59/83, *SA Biovilac NV v. European Economic Commt'y*, [1984] E.C.R. 4057, at IV(A)(3) (1984); *see also* GILLIAN WHITE, NATIONALISATION OF FOREIGN PROPERTY 49 (1961) ("A property right, in order to qualify for the protection of the international law rules must be an actual legal right, as distinct from a mere economic or other benefit, such as a situation created by the law of a State in favour of some person or persons who are therefore interested in its continuance."). Because Methanex claims no more than lost future profits without identifying any property right that has been expropriated, this Tribunal lacks jurisdiction over Methanex's Article 1110 claim.[48]

B. Methanex's Article 1105(1) Claim Is Inadmissible On Its Face

Methanex's Article 1105(1) claim similarly fails to identify any right on which that claim could be based: there is no international law standard incorporated into that Article that is implicated by the measures in question. In the discussion that follows, the United States first demonstrates that the standards of treatment contemplated by Article 1105(1) are those established by customary international law. Second, the United States shows that no standard of customary international law incorporated into Article 1105(1), whether substantive or procedural, is implicated by the acts alleged to be wrongful here. Finally, the United States demonstrates that Methanex's attempt to salvage its Article

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[48] Methanex's remaining allegations all fall into the category of future lost profits. Methanex alleges that its access to the U.S. market is a property right that is subject to protection under Article 1110 and has been expropriated. *See* Reply to the Statement of Defense at 13 ¶ 70. It cannot be disputed, however, that Methanex's right of access to the U.S. market, including its access to the California market, is not affected by the California actions. Methanex US has not been deprived of any right to sell its product, methanol, anywhere in the United States. Methanex's claim is, essentially, that certain of its customers will be inclined to buy less methanol. This claim implicates Methanex's expectations of future sales to those customers, not its access to those customers.

1105(1) claim by recharacterizing the Executive Order as an implementation of the Bill rather than a measure in its own right is without substance.

1. Article 1105(1)'s standards are those of customary international law

Article 1105(1) requires a NAFTA State Party to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." The obligation of Article 1105(1), by its plain terms, is to provide "treatment *in accordance with international law*." "[F]air and equitable treatment" and "full protection and security" are provided as examples of the customary international law standards incorporated into Article 1105(1). The plain language and structure of Article 1105(1) requires these concepts to be applied as and to the extent that they are recognized in customary international law, and *not* as obligations to be applied without reference to international custom.

Methanex's suggestion that Article 1105(1), and in particular its reference to "fair and equitable treatment," can be applied without reference to customary international law is rebutted not only by the plain language of the Article, but also by the historical context of the words "fair and equitable" in the Article. The most direct antecedent to the usage of "fair and equitable treatment" in international investment agreements is the OECD Draft Convention on the Protection of Foreign Property, which was first proposed in 1963 and revised in 1967.[49] The commentary to Article 1 of the OECD Draft Convention, which incorporated the standard of "fair and equitable treatment," noted that

the standard reflected the "well-established general principle of international law that a State is bound to respect and protect the property of nationals of other States":[50]

> The phrase "fair and equitable treatment" . . . indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. The standard requires that . . . protection afforded under the Convention shall be that generally accorded by the Party concerned to its own nationals, but, being set by international law, the standard may be more exacting where rules of national law or national administrative practices fall short of the requirements of international law. The standard required conforms in effect to the "minimum standard" which forms part of customary international law.[51]

In addition, in 1984, the OECD's Committee on International Investment and Multinational Enterprises surveyed the OECD member States on the meaning of the phrase "fair and equitable treatment." The committee confirmed that the OECD's members – the world's principal developed countries – continued to view the phrase as referring to principles of customary international law.[52] Thus, from its first use in investment agreements, "fair and equitable treatment" was no more than a shorthand reference to elements of the developed body of customary international law governing the responsibility of a State for its treatment of the nationals of another State. It is in this

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[49] *See* UNITED NATIONS CONFERENCE ON TRADE & DEVELOPMENT, BILATERAL INVESTMENT TREATIES IN THE MID-1990S 54 (1998) ("The use of the standard of fair and equitable treatment in BITs dates from the OECD 1967 Draft Convention on the Protection of Foreign Property.").

[50] OECD, 1967 Draft Convention on the Protection of Foreign Property, *reprinted in* 7 I.L.M. 117, 119 (1968).

[51] *Id.* at 120.

[52] OECD, Commitee on International Investment & Multinational Enterprises, Intergovernmental Agreements Relating to Investment in Developing Countries, ¶ 36 at 12, Doc. No. 84/14 (May 27, 1984) ("According to all Member countries which have commented on this point, fair and equitable treatment introduced a substantive legal standard referring to general principles of international law even if this is not explicitly stated . . . .").

sense, moreover, that the United States incorporated "fair and equitable treatment" into its various bilateral investment treaties ("BITs").[53]

In the ensuing years, as international investment treaties incorporating variants of the OECD Draft Convention's formulation of "fair and equitable treatment" became more common, an academic debate emerged concerning the meaning of the phrase as it appears in those agreements without express reference to customary international law.[54] The prevalent view was that, in such circumstances, the phrase should be viewed as having its traditional meaning as a reference to the international minimum standard of treatment.[55] A few scholars contended that the requirement of "fair and equitable" treatment announced a new, undefined conventional standard distinct from customary international standards –

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[53] *See, e.g.*, Dep't of State, Letter of Submittal for U.S.-Bahrain Treaty Concerning the Encouragement and Reciprocal Protection in Investment, *reprinted in* S. Treaty Doc. 106-25 at viii (Apr. 24, 2000) ("Paragraph 3 sets out a minimum standard of treatment based on standards found in customary international law.").

[54] RUDOLPH DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 59 (1995) ("Some debate has taken place over whether reference to fair and equitable treatment is tantamount to the minimum standard required by international law or whether the principle represents an independent, self-contained concept."); *see also* UNITED NATIONS CONFERENCE ON TRADE & DEVELOPMENT, BILATERAL INVESTMENT TREATIES IN THE MID-1990S 53-54 (1998) (noting debate); UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, KEY CONCEPTS IN INTERNATIONAL INVESTMENT ARRANGEMENTS & THEIR RELEVANCE TO NEGOTIATIONS ON INTERNATIONAL TRANSACTIONS IN SERVICES 12 (1990) (same); Mahmoud Salem, *Les développements de la protection conventionelle des investissements étrangers*, 113 J. DROIT INT'L 579, 607-08 (1986) (same).

[55] *See* Swiss Dep't of External Affairs, *Mémoire*, 36 ANN. SUISSE DE DROIT INT'L 174, 178 (1980) ("On se réfère ainsi au principe classique du droit des gens selon lequel les Etats doivent mettre les étrangers se trouvant sur leur territoire et leurs biens au bénéfice du 'standard minimum' international, c'est-à-dire leur accorder un minimum de droits personnels, procéduraux et économiques.") ("One thus references the classic principle of international law according to which States must provide foreigners in their territory the benefit of the international 'minimum standard,' that is, to accord them a minimum of personal, procedural and economic rights.") (translation by counsel); *see also* PAUL E. COMEAUX & N. STEPHAN KINSELLA, PROTECTING FOREIGN INVESTMENT UNDER INT'L LAW 106 (1996) (standard U.S. BIT provision on fair and equitable treatment "relies upon already-existing requirements of international law, which binds each state to 'international minimum standards' of treatment even when there is no BIT in place"); UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS & INT'L CHAMBER OF COMMERCE, BILATERAL INVESTMENT TREATIES 1959-1991 at 9 (1992) ("fair and equitable treatment . . . is a general standard of treatment that has been developed under customary international law").

a subjective standard that left it to arbitrators to determine in each case "whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable."[56]

Against this backdrop, the drafters of Chapter Eleven excluded any possible conclusion that the parties were diverging from the customary international law concept of fair and equitable treatment. Accordingly, they chose a formulation that expressly tied fair and equitable treatment to the customary international minimum standard rather than some subjective, undefined standard. Article 1105(1)'s provision for "treatment in accordance with international law, *including* fair and equitable treatment" (emphasis supplied) clearly states the primacy of customary international law.[57] If this were not enough, the heading of Article 1105(1) – "Minimum Standard of Treatment" – confirms the applicability of the customary international minimum standard. Finally, Canada's Statement on Implementation of the NAFTA clearly notes that Article 1105(1) "provides for a minimum absolute standard of treatment, *based on long-standing principles of customary international law.*"[58]

For these reasons, the United States disagrees with the discussion of "fair and equitable treatment" in the award by the Chapter Eleven arbitral tribunal in *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (Aug. 30, 2000). Although the award's sparse statement of reasons leaves some doubt, it appears to apply a

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[56] F.A. MANN, FURTHER STUDIES IN INTERNATIONAL LAW 238 (1990); *see also* UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, KEY CONCEPTS IN INTERNATIONAL INVESTMENT ARRANGEMENTS & THEIR RELEVANCE TO NEGOTIATIONS ON INTERNATIONAL TRANSACTIONS IN SERVICES 12-13 (1990).

[57] *See* RUDOLPH DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 60 (1995) (although the formulation of "fair and equitable treatment" in some BITs suggests "a self-contained standard," in the NAFTA, "the fair and equitable standard is explicitly subsumed under the minimum standard of customary international law").

"fair and equitable" standard without an evaluation of customary international law on the subject. To the extent that *Metalclad* can be read to suggest that "fair and equitable" in Article 1105(1) articulates a standard other than the international minimum standard, it is wrongly reasoned and should not be followed here.

2. No customary international law standard incorporated into Article 1105(1) applies to the acts at issue here

The "international minimum standard" is an umbrella concept incorporating a set of rules that have over the centuries crystallized into customary international law in specific contexts.[59] The American Law Institute's *Restatement* frames the standard in the following terms:

> The international standard of justice . . . is the standard required for the treatment of aliens by
>
> (a) the applicable principles of international law as established by international custom, judicial and arbitral decisions, and other recognized sources or, in the absence of such applicable principles,

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[58] Dep't of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation*, *in* CANADA GAZETTE 68, 149 (Jan. 1, 1994) (emphasis added).

[59] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 531 (5th ed. 1998) ("there is no single standard but different standards relating to different situations."); *see also id.* at 529 ("The basic point would seem to be that there is no single standard."); 5 CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC 46 (1970) ("La grande majorité de la doctrine estime qu'il existe à cet égard un standard international minimum suivant lequel les Etats sonts tenus d'accorder aux étrangers *certains droits*, . . . même dans le cas où ils refuseraient ce traitement à leurs nationaux.") ("The great majority of commentators hold that there exists in this respect an international minimum standard according to which States must accord to foreigners *certain rights* . . . , even where they refuse such treatment to their own nationals.") (emphasis supplied; translation by counsel); *cf.* JEAN COMBACAU & SERGE SUR, DROIT INTERNATIONAL PUBLIC 373 (4th ed. 1999) ("De la pratique relative au traitement minimum on ne saurait en effet attendre des énoncés catégoriques ; elle repose sur une casuistique fine, qui tient largement compte de la situation d'espèce . . . .") ("Of the practice concerning the minimum treatment one cannot make categorical pronouncements; the practice rests on a fine analysis, which largely takes into account the particular circumstances of the case . . . .") (translation by counsel).

(b) analogous principles of justice generally recognized by states that have reasonably developed legal systems.[60]

The relevant principles are generally grouped under the heading of State responsibility for injuries to aliens.[61] This body of law includes standards for denial of justice, expropriation and other acts subject to an absolute, rather than a relative, standard of international law.[62]

No international standard incorporated into Article 1105(1), however, is implicated by the measures at issue here. Methanex asserts essentially two complaints concerning the Bill and the Executive Order. First, it complains about the *process* by which the measures were adopted. It asserts that the Executive Order was "based on a

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[60] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 165(2) (1965); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 reporters' note 13 (1987) (noting that "[t]he previous Restatement dealt with economic injuries to aliens in [thirteen different sections]. The subject is treated here in fewer sections, . . . but without major change in substance.").

[61] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 531 (5th ed. 1998) (referring to "general principles of state responsibility . . . applicable to cases where aliens are injured . . . ."); *accord* JEAN COMBACAU & SERGE SUR, DROIT INTERNATIONAL PUBLIC 373 (4th ed. 1999) ("L'étalon international qui permet de répondre à ces questions [du traitement minimum international] . . . recoupe inévitablement celui dont on use plus généralement pour déterminer les obligations résultant pour l'État de son titre territorial . . . et comporte des obligations d'abstention et d'action.") ("The international standard that addresses these questions [of international minimum treatment] . . . inevitably overlaps with that which one uses more generally to determine a State's obligations resulting from its territorial authority . . . and contains obligations to act and to abstain from acting.") (translation by counsel).

[62] *See, e.g.*, Swiss Dep't of External Affairs, *Mémoire*, 36 ANN. SUISSE DE DROIT INT'L 174, 179 (1980) ("Pour ce qui est de ce standard, nous pouvons nous borner à en décrire le contenu en ce qui concerne les droits patrimoniaux des étrangers puisque l'article 2 de l'API touche au 'traitement juste et équitable' des seuls 'investissements'. Sur ce point, il convient de faire les constatations suivantes : . . . la propriété étrangère ne peut être nationalisée ou expropriée que moyennant le versement sans retard d'une indemnité effective et adéquate. L'étranger doit également pouvoir accéder aux voies judiciaires pour se défendre contres les atteintes portées à son patrimoine par des particuliers. De plus, il peut exiger que sa personne et ses biens soient protégés par la force publique en cas d'émeutes, lorsqu'il existe un état d'urgence, etc. . . . . L'expression 'traitement juste et équitable' se rapporte à l'ensemble de ces éléments.") ("So far as the content of this standard is concerned, we can limit ourselves to describing it as it relates to the property rights of foreigners since article 2 of the BIT addresses 'fair and equitable treatment' of only 'investments.' On this point, it is appropriate to note the following: foreign property can be nationalized or expropriated only upon prompt payment of an effective and adequate indemnity. The foreigner must also have access to the judiciary to defend himself against wrongful acts against his property by individuals. Moreover, the alien may require that his person and his goods be protected by the authorities in the event of riots, in a

process which lacked substantive fairness"; "was based solely on the UC Report" and that the report in turn lacked "a proper risk characterization"; relied on "an extraordinarily scant database . . . and broad assumptions"; "contained a badly flawed exposure assessment and cost/benefit analysis"; and failed adequately to "discuss alternative solutions and remediation." Statement of Claim ¶¶ 32-33. Second, Methanex complains about the *substance* of the measures, asserting that the measures were "arbitrary" and "go[] far beyond what is necessary to protect any legitimate public interest." *Id.* ¶ 33.

However, as confirmed in the accompanying Expert Report of Detlev F. Vagts, Bemis Professor of Law at Harvard Law School and reporter for the *Restatement (Third) of Foreign Relations Law of the United States*, customary international law imposes no constraints on the *processes* by which States adopt executive or legislative measures such as these. As Professor Vagts recognizes, there is "no rule of customary international law that imposes constraints on the process by which States exercise their jurisdiction to prescribe. The variety of legislative and administrative procedures for laying down rules is so great – involving federal States and centralized States, parliamentary States and presidential States, democratic States and authoritarian States – that no general international consensus on what is a fair process has emerged or even been proposed." Vagts Rep. ¶ 15.[63] Methanex's assertions directed to the process by which the challenged measures were issued are misplaced.

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state of emergency, etc. . . . . The expression 'fair and equitable treatment' encompasses the ensemble of these elements.") (footnotes omitted; translation by counsel).

[63] *See also* JEAN COMBACAU & SERGE SUR, DROIT INTERNATIONAL PUBLIC 376 (4th ed. 1999) ("L'Etat (ou ses démembrements) peut-il . . . par une norme objective (loi) . . . porter atteinte à une situation légale constituée sur la base de son droit par un étranger ? . . . . Le pouvoir de légiférer et de modifier la législation est un attribut étatique incontesté en droit international . . . .") ("Can a State (or one of its

Nor can Methanex identify any *substantive* obligation of "treatment in accordance with international law" implicated by the measures at issue here. The principal substantive standard applicable to legislative and rule-making acts in the investment context is the rule barring expropriation without compensation recognized in Article 1110.[64] For the reasons already expressed, however, Methanex can identify no "investment" on which an expropriation claim could be founded on these allegations. There is no other substantive international standard applicable to this case under Article 1105(1). Methanex has identified none.

At bottom, Methanex's claim is founded on a disagreement with the policy judgments that underlay the California Governor's decision to task state agencies with taking action toward a ban of MTBE in the state's gasoline. No standard of customary international law, however, guarantees a right to measures that an alien agrees with. Methanex's Article 1105(1) claim is inadmissible.

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instrumentalities) . . . by an objective norm (law) . . . violate a legal situation of a foreigner based on the State's law? . . . . The power to legislate and to modify legislation is an attribute of the State uncontested by international law . . . .") (translation by counsel).

[64] *See* Vagts Rep. ¶¶ 16-17; ANDREAS H. ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 168 (1949) ("With regard to the legislative power, no general customary rule limiting the legislative power of [a] State to legislation not interfering with vested rights, or making internationally illegal, legislation infringing vested rights and therefore rendering a State internationally liable for it, has ever been shown to exist . . . ."; noting only substantive obligation to pay compensation for expropriation); *see also* 5 CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC 44-66 (1970) (extensive analysis of State responsibility for legislative acts that identifies three categories of legislative acts that implicate State responsibility: expropriation, promulgation of a law contrary to international agreements and failure to promulgate a law required by international agreement or to abrogate a law inconsistent with an international agreement); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 178-196 & introductory note to ch. 2 (1965) (extensive review of substantive principles of State responsibility for injury to aliens, in which sections 178-183 "relate to applications of this [international minimum] standard to the procedure followed by a state in the administration of justice, as distinct from the provisions of its substantive law"; remaining sections address expropriation, breach of contract and prohibition on gainful activity by aliens).

3. Methanex's characterization of the Executive Order as "implementing" the Bill cannot salvage its Article 1105(1) claim

Methanex's assertion that "there is an international law principle requiring procedural, as well as substantive fairness, in the application and implementation of executive or legislative measures to the investments of foreign investors" misses the point. Claimant's Reply to the Statement of Defense ¶ 22. The United States agrees that the principles of State responsibility for injuries to aliens include requirements of a minimum standard of procedural and substantive fairness in criminal, civil and administrative adjudicatory proceedings to which an alien is a party (and in which legislative or executive measures are often applied).[65] Those principles, however, have no application to the measures at issue here. *See* Vagts Rep. ¶¶ 11-15.

The Executive Order – even if viewed, as Methanex would have it, as a ban of MTBE in California's gasoline (which, as detailed in Part IV below, it is not) – was not an application of existing law to any particular person in a specific instance. Instead, to use the NAFTA's terminology, it was at best an "administrative ruling of general application."[66] Because the Executive Order does not deal with any particular alien (or

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[65] *See, e.g.*, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 178-182 (1965) (stating rules for denial of procedural justice, arrest and detention, denial of fair trial or other proceeding, unfair trial or other proceeding and unjust determination); 5 CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC 38, 69-71 (1970) (collecting authorities recognizing State responsibility for acts by administrative officers against specific aliens, including murder, arbitrary expulsion, arbitrary arrest and arbitrary detention, and acts by judicial officers in cases to which aliens were a party, including refusal to adjudicate, inexcusable delay in administering justice and pronouncement of a manifestly unjust judgment). A number of rules traditionally grouped under the heading of State responsibility for injury to aliens address the relationship between States and natural persons of foreign nationality. Such rules are not relevant here.

[66] NAFTA art. 1806 ("administrative ruling of general application means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct but does not include: (a) a determination or ruling made in an administrative

US investment of a Mexican or Canadian investor), the principles referenced by Methanex have no application here. Administrative rulings of general application are, from the perspective of customary international law, closely related to legislative acts.[67] As discussed above, customary international law imposes no procedural constraints on the adoption of such measures and the substantive constraints, such as the rule barring expropriation without compensation, have no application here.

III. THE SUBJECT MEASURES DO NOT "RELATE TO" METHANEX OR ITS INVESTMENTS

The "Scope and Coverage" of Chapter 11 are limited to "measures adopted or maintained by a Party *relating to*: (a) investors of another Party; [or] (b) investments of investors of another Party in the territory of the Party." NAFTA art. 1101(1)(a)-(b) (emphasis added). This Tribunal lacks jurisdiction over Methanex's claims because the subject measures do not "relate to" Methanex or its investments within the meaning of Article 1101(1).

Measures of general applicability – especially ones such as those at issue here that are aimed at the protection of human health and the environment – are, by their nature, likely to affect a vast range of actors and economic interests. Given the potential of such

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or quasi-judicial proceeding that applies to a particular person, good or service of another Party in a specific case; or (b) a ruling that adjudicates with respect to a particular act or practice.").

[67] *See* Vagts Rep. ¶¶11-12; *see also, e.g.*, 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 230-31 (1987) (Although a State's jurisdiction to prescribe was traditionally viewed as "legislative jurisdiction" in international law, today "much regulation is effected through administrative rules and regulations, through executive acts and orders, and sometimes by court decree." Accordingly, the *Restatement* refers to all such regulation as falling under the heading of "*jurisdiction to prescribe, i.e.*, the authority of a state to make its law applicable to persons or activities.") (emphasis in original).

ANNEX 144

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES
BETWEEN

ADF GROUP INC.,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

Case No. ARB(AF)/00/1

POST-HEARING SUBMISSION OF RESPONDENT UNITED STATES OF AMERICA ON ARTICLE 1105(1) AND *POPE & TALBOT*

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June 27, 2002

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POST-HEARING SUBMISSION
OF RESPONDENT UNITED STATES OF AMERICA ON
ARTICLE 1105(1) AND *POPE & TALBOT*

In accordance with the Tribunal's order of June 17, 2002, the United States respectfully presents these further observations on Article 1105(1) and the May 31, 2002 Award in Respect of Damages rendered in the case of *Pope & Talbot Inc. v. Canada* (the "*Pope* Damages Award").[1]

In Part I below, the United States responds to the question posed by the Tribunal with respect to Article 1105(1): "what factors or kinds of factors a Chapter Eleven tribunal applying in a concrete case the 'fair and equitable treatment and full protection and security standard' referred to in Article 1105(1), NAFTA, may take into account"? In Part II of this submission, the United States presents its observations on the *Pope* Damages Award.

[1] The United States adopts in this submission the same abbreviations that it used in its Counter-Memorial and Rejoinder.

I. FURTHER OBSERVATIONS WITH RESPECT TO ARTICLE 1105(1)

For the reasons stated below, the United States respectfully submits that the "factors or kinds of factors a Chapter Eleven tribunal applying . . . the 'fair and equitable treatment and full protection and security' standard . . . may take into account"[2] depend upon the rule of the customary international law minimum standard of treatment implicated by the claims asserted. Here, however, no rule of customary international law incorporated into Article 1105(1) addresses the conduct that ADF has claimed to violate that article. Nor has ADF attempted to identify any such rule. Because the relevant factors depend upon the particular rule that is applicable in any given set of circumstances, the absence of such a rule here renders identification of such factors unnecessary. The United States therefore submits that, although Article 1105(1) is "applicable" here because ADF has asserted a claim under that article, no actionable claim of violation of Article 1105(1) has been stated.

The "international minimum standard" embraced by Article 1105(1) is an umbrella concept incorporating a set of rules that over the centuries have crystallized into customary international law in specific contexts.[3] The treaty term "fair and equitable treatment" refers to the customary

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[2] June 17, 2002 Letter-Order.

[3] *See* Transcript of Hearing, Apr. 17, 2002, at 758-60 (statement by Mr. Legum); *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 531 (5th ed. 1998) ("there is no single standard but different standards relating to different situations."); *see also id.* at 529 ("The basic point would seem to be that there is no single standard."); 5 CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC 46 (1970) ("The great majority of commentators hold that there exists in this respect an international minimum standard according to which States must accord to foreigners *certain rights* . . . , even where they refuse such treatment to their own nationals.") ("La grande majorité de la doctrine estime qu'il existe à cet égard un standard international minimum suivant lequel les Etats sonts tenus d'accorder aux étrangers *certains droits*, . . . même dans le cas où ils refuseraient ce traitement à leurs nationaux.") (emphasis supplied; translation by counsel).

international law minimum standard of treatment.[4] The rules grouped under the heading of the international minimum standard include those for denial of justice, expropriation and other acts subject to an absolute, minimum standard of treatment under customary international law.[5] The treaty term "full protection and security" refers to the minimum level of police protection against criminal conduct that is required as a matter of customary international law.[6]

The rules encompassed within the customary international law minimum standard of treatment are specific ones that address particular contexts. There is no single standard applicable to all contexts. The customary international law minimum standard is in this sense analogous to the

[4] *See* U.S. Rejoinder at 42 n.62 & accompanying text; *accord* Transcript, Apr. 17, 2002, at 761 (statement by Mr. Legum).

[5] *See, e.g.*, Swiss Dep't of External Affairs, *Mémoire*, 36 ANN. SUISSE DE DROIT INT'L 174, 179 (1980) ("So far as the content of this standard is concerned, we can limit ourselves to describing it as it relates to the property rights of foreigners since article 2 of the BIT addresses 'fair and equitable treatment' of only 'investments.' On this point, it is appropriate to note the following: foreign property can be nationalized or expropriated only upon prompt payment of an effective and adequate indemnity. The foreigner must also have access to the judiciary to defend himself against wrongful acts against his property by individuals. Moreover, the alien may require that his person and his goods be protected by the authorities in the event of riots, in a state of emergency, etc. . . . . The expression 'fair and equitable treatment' encompasses the ensemble of these elements.") ("Pour ce qui est de ce standard, nous pouvons nous borner à en décrire le contenu en ce qui concerne les droits patrimoniaux des étrangers puisque l'article 2 de l'API touche au 'traitement juste et équitable' des seuls 'investissements'. Sur ce point, il convient de faire les constatations suivantes : . . . la propriété étrangère ne peut être nationalisée ou expropriée que moyennant le versement sans retard d'une indemnité effective et adéquate. L'étranger doit également pouvoir accéder aux voies judiciaires pour se défendre contres les atteintes portées à son patrimoine par des particuliers. De plus, il peut exiger que sa personne et ses biens soient protégés par la force publique en cas d'émeutes, lorsqu'il existe un état d'urgence, etc. . . . . L'expression 'traitement juste et équitable' se rapporte à l'ensemble de ces éléments.") (footnotes omitted; translation by counsel).

[6] Tribunals have found the obligation of full protection and security to have been breached only in cases where the criminal conduct involved a physical invasion of the person or property of an alien. *See, e.g.*, *American Manufacturing & Trading, Inc. (U.S.) v. Zaire*, 36 I.L.M. 1531 (1997) (finding violation of protection and security obligation in case involving destruction and looting of property); *Asian Agricultural Products Ltd. (U.K.) v. Sri Lanka*, 30 I.L.M. 577 (1991) (similar finding in case involving destruction of claimant's property); *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24) (similar finding in case involving hostage-taking of foreign nationals); *Chapman v. United Mexican States (U.S. v. Mex.)*, 4 R.I.A.A. 632 (Mex.-U.S. Gen. Cl. Comm'n 1930) (similar finding in case where claimant was shot and seriously wounded); *H.G. Venable (U.S. v. Mex.)*, 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 (Réclamation 53 de Melilla - Ziat, Ben Kiran) (Spain v. Gr. Brit.)*, 2 R.I.A.A. 729 (1925) (no violation where police protection under the circumstances would not have prevented mob from destroying claimant's store).

common-law approach of distinguishing among a number of distinct torts potentially applicable to particular conduct, as contrasted with the civil-law approach of prescribing a single delict applicable to all conduct. As with common-law torts, the burden under Article 1105(1) is on the claimant to identify the applicable rule and to articulate and prove that the respondent engaged in conduct that violated that rule.

Thus, for example, in a case in which a claimant asserts that it has suffered injury as a result of an allegedly unjust court judgment, the factors a tribunal applying Article 1105(1) must take into account are those for an alleged substantive denial of justice: whether the judgment in question effects a "manifest injustice" or "gross unfairness,"[7] "flagrant and inexcusable violation,"[8] or "palpable deviation" in which "[b]ad faith – not judicial error seems to be the heart of the matter."[9] Where a claimant asserts that it suffered injury as a result of the destruction of its property by private citizens, the factors a tribunal applying Article 1105(1) must take into account are those for an alleged denial of full protection and security: whether, under all the circumstances, the police

[7] J.W. Garner, *International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to Denial of Justice*, 1929 BRIT.Y.B. INT'L L. 181, 183; *see also id.* at 188 ("manifestly or notoriously unjust" decisions).

[8] Eduardo Jim•nez de Ar•chaga, *International Law in the Past Third of a Century*, 159 R.C.A.D.I. 267, 281 (1978).

[9] 2 DANIEL P. O'CONNELL, INTERNATIONAL LAW 948 (2d ed. 1970); *see also, e.g.*, *Garrison's Case (U.S. v. Mex.)* (1871), 3 MOORE'S INT'L ARBITRATION 3129 (1868) (an "extreme" case where court "act[ing] with great irregularity" refused Garrison's appeal "by intrigues or unlawful transactions"); *Rihani*, Am.-Mex. Cl. Comm'n (1942), 1948 Am. Mex. Cl. Rep. 254, 257-58 (finding decision of the Supreme Court of Justice of Mexico "such a gross and wrongful error as to constitute a denial of justice"); *The Texas Company*, Am.-Mex. Cl. Comm'n (1942), 1948 Am. Mex. Cl. Rep. 142, 144 (rejecting claim for failure to show error by Supreme Court of Justice of Mexico "resulting in a manifest injustice"); *Chattin (U.S.) v. Mexico* (1927), 4 R.I.A.A. 282, 286-87 (requiring that injustice committed by judiciary rise to the level of "an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man")•

exerted the minimum level of protection against criminal conduct required as a matter of customary international law.[10]

Here, however, ADF asserts that it has suffered injury under Article 1105(1) because the FHWA, admittedly acting in accordance with the regulation's terms and the agency's longstanding administrative policy, applied to its investment a regulation of general application.[11] ADF does not contend that the substance of the regulation was contrary to customary international law.[12] It does not contend that the application of the regulation effected a denial of justice.[13]

Instead, ADF's complaint is that, pursuant to statutory authority, the FHWA promulgated a regulation that was more specific than the terms of the statute that the regulations implemented (*i.e.*, the 1982 Act).[14] It contends that, even though the regulation long preceded its contract bid, it was confused by the existence of a more general standard in the statute and a more specific standard in the implementing regulation.[15] It further asserts that the United States Congress should have acted to resolve the supposed inconsistency between the general standard in the statute and the more

[10] *See* authorities cited *supra* n.6

[11] *See* Transcript, Apr. 18, 2002, at 905-08 (statement of Mr. Kirby); *see also id.* at 904 ("The way the law was applied--once again, not challenging that that was the way it was done. That's what the regulations say.").

[12] *See id.* at 904 (statement of Mr. Kirby) ("Or because you can well say--they could still have passed it as a rule of origin--as a 100 percent content rule. Theoretically, Congress could have said all manufactured products as well, 100 percent content.").

[13] *See id.* at 911 (statement of Mr. Kirby) ("this isn't a denial of justice case").

[14] *See id.* at 900-04 (statement of Mr. Kirby).

[15] *See id.*; *see also id.* at 901 ("And when he looks at that entire chain, what he sees is a very, very difficult beast to conceptualize, and he is left with either believe what the lowest official tells me and that's it, or believe that that lower official must surely recognize that what he's doing is so different to what the statute requires that we challenge him or we do something else.").

specific one in the regulation.[16] It does not identify any rule of the customary international law minimum standard of treatment of aliens that is implicated by its assertions.

Under these circumstances, the United States submits that the Tribunal's analysis under Article 1105(1) must begin and end with an assessment of whether ADF has articulated a violation of any applicable rule of customary international law. The United States submits that ADF has articulated no such violation. As the United States noted in its Rejoinder (at 32-33), the system of administrative rule-making in the United States grants certain agencies, including the FHWA, the rule-making authority to promulgate specific regulations that implement more general statutory provisions. The United States, of course, has the sovereign right under international law to structure its rule-making organs in this manner. As the International Court of Justice has observed: "No rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today."[17] No breach of customary international law may be stated based on the allegation that the FHWA's regulation was more specific than the congressional statute it implemented.[18]

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[16] *See* Transcript, Apr. 18, 2002, at 889 (statement of Mr. Kirby) ("there is an ongoing duty on the part of Congress to rectify and not to leave that arbitrary application of the laws in the hands of the administrative officials at Federal Highway."); *id*. at 898 (referring to the supposed "duty of Congress to ensure that its laws are properly administered and applied.").

[17] *Western Sahara*, 1975 I.C.J. 12, 43-44 ¶ 94 (Oct. 16).

[18] On various occasions in these proceedings, ADF has argued that the FHWA's promulgation of implementing regulations in 1983 was *ultra vires*. ADF recognized at the hearing, however, that any claim with respect to the promulgation of the regulations could not be entertained under the NAFTA, which did not enter into force until 1994. *See* Transcript, Apr. 18, 2002, at 905-10. In any event, as the United States demonstrated in its pleadings and at the hearing, the regulations were amply within the FHWA's authority and ADF's assertion of *ultra vires* action under municipal law in any case could not, by itself, establish a violation of customary international law. *See* Counter-Mem. at 15-16; Rejoinder at 32-33.

Because ADF's assertions implicate no applicable rule of customary international law, the predicate necessary for determining what factors would be relevant to an analysis under Article 1105(1) is absent. In other words, because the relevant factors depend upon the applicable rule, the absence of such a rule here renders identification of such factors unnecessary. The absence of an applicable rule should end the Tribunal's analysis under Article 1105(1).

Finally, the United States notes that the foregoing response to the Tribunal's question is based on ADF's position as stated in its pleadings and at the hearing. It is, of course, far too late for ADF to attempt to change its position at this stage of the proceeding. Should ADF nonetheless attempt to do so in its responsive submission, the United States reserves its right to object and to request the opportunity to address any new articulation of ADF's Article 1105(1) claim.

II. OBSERVATIONS ON THE *POPE* DAMAGES AWARD

An award of a Chapter Eleven tribunal has "no binding force except between the disputing parties and in respect of the particular case." NAFTA art. 1136(1). The significance of such an award for another tribunal, therefore, depends among other things upon the persuasiveness of the reasoning expressed in the award.

Although the recent *Pope* award is an "Award in Respect of Damages," it addresses primarily the Free Trade Commission's July 31, 2001 interpretation of Article 1105(1), which was issued after the *Pope* tribunal's award on the merits but before the damages award. The United States, therefore, directs its observations on the *Pope* Damages Award to the tribunal's treatment of the FTC interpretation.

The United States submits that there is no persuasive force to the *Pope* tribunal's suggestion that it need not abide by a Free Trade Commission ("FTC") interpretation of a provision of the NAFTA. In addition to lacking support in the NAFTA or elsewhere, the bulk of the *Pope* Damages Award consists of opinions extraneous to the narrow grounds on which the decision was ultimately based – opinions of the type known in common-law jurisdictions as *obiter dicta* and which are given lesser weight than those on which the decision rests.[19] As the United States demonstrates below, the *Pope* Damages Award merits little consideration for several reasons.

A. The NAFTA Does Not Authorize Chapter Eleven Tribunals To Disregard The Actions Of The Free Trade Commission

The *Pope* tribunal was wrong to suggest in *dicta* that the NAFTA grants it the authority to sit in judgment of the NAFTA Parties' acts undertaken pursuant to NAFTA Chapter Twenty. [20] Although the NAFTA contemplates that both the Free Trade Commission and Chapter Eleven tribunals may have reason to interpret the meaning of a provision of the Agreement, the text of the NAFTA confirms the subsidiary role of Chapter Eleven tribunals *vis-à-vis* the FTC in that regard.

[19] Indeed, it is noteworthy that the 41-page "Award in Respect of Damages" addresses the subject of damages only in the last nine pages, and begins that brief discussion under a heading styled "Other Issues."

[20] *See Pope* Damages Award ¶¶ 23-24.

In Chapter Twenty, the three NAFTA Parties gave the FTC plenary authority over the implementation and interpretation of the NAFTA generally. Among other things, Chapter Twenty provides that "[t]he Commission *shall* . . . supervise the implementation of this Agreement," and it *shall* resolve, without qualification, "disputes that may arise regarding its interpretation or application[.]" NAFTA art. 2001(2)(a), (c) (emphasis added). The three Parties thus manifested their shared intent "to arrive at a mutually satisfactory resolution" – through the Free Trade Commission – "of *any matter* that might affect [the NAFTA's] operation." *Id.* art. 2003 (emphasis added).

Chapter Eleven, in contrast, authorizes *ad hoc* Chapter Eleven tribunals to settle only a limited range of investment disputes and, likewise, grants each tribunal limited authority over a particular investment dispute and the individual claimant and NAFTA Party involved. *See* NAFTA arts. 1116-1117; art. 1136(1) ("An award made by a Tribunal shall have no binding force except between disputing parties and in respect of the particular case.").[21] Thus, although a tribunal may be called upon to apply a provision of the NAFTA in settling an investment dispute (*see id.* art. 1131(1)), its own interpretation of such a provision does not bind other Chapter Eleven tribunals.

The same is not true, however, of an interpretation by the FTC, which binds all Chapter Eleven tribunals. Indeed, the NAFTA directly addresses the possibility that a Chapter Eleven tribunal may have to apply a provision of the NAFTA as to which the FTC has issued an interpretation. In such a case, the FTC's plenary power overrules a tribunal's authority to interpret particular NAFTA provisions in deciding issues in investment disputes: "An interpretation by the

Commission of a provision of this Agreement *shall be binding* on a Tribunal established under [Section B of Chapter Eleven]."[22] It follows that a Chapter Eleven tribunal may not disregard an interpretation of a provision of the NAFTA by the NAFTA Parties, acting through the FTC pursuant to Chapter Twenty, or interpret that provision in a manner inconsistent with an FTC interpretation.[23] The NAFTA Parties thus expressly limited the powers of Chapter Eleven tribunals with respect to the interpretation of the NAFTA, and made those powers subject to decisions taken by the Free Trade Commission.

Any other result would thwart the intent of the NAFTA Parties and render provisions of the NAFTA ineffective. If, as suggested by the *Pope* tribunal in *dicta*, a Chapter Eleven tribunal could disregard an FTC interpretation that differs from the tribunal's own reading of a NAFTA provision, the aims of Article 1131(2) and Chapter Twenty would be defeated. The FTC's authority under Article 2001 to issue interpretations binding, by virtue of Article 1131(2), on all Chapter Eleven tribunals ensures the consistent and uniform interpretation of the NAFTA. That purpose would not be served if individual Chapter Eleven tribunals could disregard an FTC interpretation based on an *ad hoc* judgment as to whether the FTC was correct in viewing its action as an interpretation.

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[21] *See also* NAFTA art. 1134 (Chapter Eleven tribunals may not even issue recommendations with respect to the measure alleged to constitute a breach).

[22] NAFTA art. 1131(2) (emphasis added). Even the *Pope* tribunal recognized that such an interpretation binds all constituted tribunals, regardless of the phase of the pending arbitration. *See Pope* Damages Award ¶ 51.

[23] Indeed, the NAFTA considers the views of the Parties regarding questions of interpretation to be of significant importance even when not expressed in the form of a binding interpretation under Article 1131(2). *See, e.g.*, NAFTA art. 1128 (allowing non-disputing Parties to make submissions to a tribunal regarding questions of interpretation); *id.* art. 2020 (calling on the NAFTA Parties to seek agreement on an interpretation of the NAFTA when the issue of interpretation arises in a domestic proceeding); *see also id.* art. 1132 (providing that, where a defense is asserted based on a reservation or exception set out in an Annex, an interpretation by the Commission "shall be binding" on a tribunal, and only if no interpretation is submitted shall the tribunal decide the issue).

Indeed, principles of international law do not endorse such a result, because it would effectively "deprive the [FTC] of an important power which has been entrusted to it by the [NAFTA],"[24] and thereby render provisions of the NAFTA ineffective.[25] In other words, if a Chapter Eleven tribunal were to disregard an FTC interpretation by characterizing it as an amendment, the result would be to override the FTC's interpretation. This would be precisely the reverse of the approach envisioned under the NAFTA, in which the FTC's interpretive authority ranks above that of tribunals, not the other way around.

Indeed, nothing in the text of the NAFTA supports the view that FTC interpretations would be subject to such review by an *ad hoc* tribunal constituted under Chapter Eleven. Where the Parties envisaged a review mechanism – for example, in Article 1136(3), which contemplates ICSID or municipal court proceedings to annul or review final Chapter Eleven awards – the Parties expressly stated their intent. By contrast, no provision of Chapter Twenty nor any provision elsewhere in the NAFTA calls for review of FTC action. Had the parties intended Chapter Eleven tribunals to review and selectively disregard FTC actions, as the *Pope* Damages Award suggests in

[24] *Competence of the General Assembly for the Admission of a State to the United Nations*, 1950 I.C.J. 4, 9 (Mar. 3) ("To hold that the General Assembly has power to admit a State to membership in the absence of a recommendation of the Security Council would be to deprive the Security Council of an important power which has been entrusted to it by the Charter. It would almost nullify the role of the Security Council in the exercise of one of the essential functions of the Organization.").

[25] *See Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6 • 51 (Feb. 3) (collecting authorities supporting "one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness"); *accord Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 24 (Apr. 9) ("It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.").

dicta, provisions enabling – or at least referencing – such review would have been included in the NAFTA.[26] The absence of such provisions refutes the *Pope* tribunal's *dicta.*

In sum, the NAFTA does not permit a Chapter Eleven tribunal to review an interpretation of the NAFTA Parties sitting as the members of the FTC and to disregard it on the ground that the tribunal considers it to be an "amendment." For a Chapter Eleven tribunal to disregard a Free Trade Commission interpretation is thus to exceed the scope of its authority under the NAFTA.

B. The *Pope* Tribunal Erred In Its *Dicta* Interpreting Article 1105(1)

As demonstrated below, the *Pope* tribunal's reasoning in *dicta* with respect to Article 1105(1) is not only contrary to an FTC interpretation binding on this Tribunal, but contrary to established principles of treaty interpretation. It also is based upon a lack of appreciation for how rules of customary international law are established and finds no support in the principal authority relied upon by the *Pope* tribunal.

1. The *Pope* Tribunal Ignored Well-Settled Principles of Treaty Interpretation

As the United States previously demonstrated and the FTC confirmed, the *Pope* tribunal erred in its interpretation of Article 1105(1) in its April 10, 2001 Award on the Merits ("*Pope* Merits Award").[27] This incorrect interpretation, which the *Pope* tribunal reiterated in its May 31,

[26] *Cf., e.g.*, Treaty Establishing the European Community, Mar. 25, 1957, art. 230 (*ex* art. 173), *available at* <http://www.europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf> ("The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission . . . and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.").

[27] *See* Counter-Mem. at 49-50; Rejoinder at 33.

2002 Damages Award (but ultimately did not apply), defies established principles of treaty interpretation in several respects.[28]

First, the *Pope* tribunal admitted that its interpretation of Article 1105(1) is inconsistent with the plain meaning of that Article's text.[29] Such an approach flatly disregards the cardinal rule, set forth in the Vienna Convention on the Law of Treaties ("Vienna Convention"), that "[a] treaty shall be interpreted . . . in accordance with the ordinary meaning to be given to the terms of the treaty[.]"[30]

Second, there is no basis in international law for the *Pope* tribunal's analysis of the phrase "international law" in Article 1105(1) based solely on the reference to that term in the Statute of the International Court of Justice, a treaty not related to the NAFTA.[31] To the contrary, customary international law requires that treaty terms be construed "*in their context* and in the light of [the treaty's] object and purpose."[32] That context includes the text of the treaty and certain related instruments, but does not include unrelated treaties.[33]

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[28] *See Pope* Damages Award ¶¶ 9, 44.

[29] *See id.* ¶ 9 ("[T]he Tribunal determined that, notwithstanding the language of Article 1105, *which admittedly suggests otherwise*, the requirement to accord NAFTA investors fair and equitable treatment was independent of, not subsumed by the requirement to accord them treatment required by international law.") (emphasis added).

[30] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Convention"), art. 31(1).

[31] *See Pope* Damages Award ¶ 46 & n.35 (relying exclusively on Article 38 of the Statute of the International Court of Justice). Contrary to the *Pope* tribunal's approach, Article 38 does not purport to define the term "international law" in any event.

[32] Vienna Convention art. 31(1) (emphasis added).

[33] *See id.* art. 31(2) ("The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text . . . : (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.").

The context of Article 1105(1), which the *Pope* Damages Award does not consider, unequivocally demonstrates that the NAFTA Parties did *not* intend to incorporate the entirety of international law in that provision. Notably, the NAFTA's provisions show that, although the Parties were well aware of the international legal obligations contained in the NAFTA and in other agreements in force between them,[34] they intended to subject to investor-State arbitration only a narrow range of obligations: Articles 1116(1) and 1117(1) provide for investor-State arbitration only of "a claim that another Party has breached an *obligation under . . . Section A or Article 1503(2)* . . . or . . . *Article 1502(3)(a)*[.]" (Emphasis added). Reading Article 1105(1) to encompass *all* international legal obligations would render meaningless the clearly stated limitation in Articles 1116 and 1117. If the NAFTA Parties intended to offer Chapter Eleven arbitration for breaches of any international legal obligation, including those contained in the NAFTA, they would not have drafted Articles 1116 and 1117 as they did.

For example, the NAFTA states various obligations of the NAFTA Parties with respect to sanitary and phytosanitary measures. *See, e.g.*, NAFTA Chapter Seven, Section B, arts. 709-723. The NAFTA, of course, is an international convention within the meaning of Article 38(1)(a) of the Statute of the International Court of Justice, and the obligations with respect to sanitary and phytosanitary measures are obligations in international law as among the NAFTA Parties. Articles 1116(1) and 1117(1) make perfectly clear, however, that the NAFTA Parties did not intend to subject claims of violations of those international law obligations to investor-State arbitration under

[34] *See* NAFTA art. 103 ("In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency . . . .").

Chapter Eleven of the NAFTA. Reading Article 1105(1) to encompass all international legal obligations, including these, cannot be reconciled with the context of the provision.

Similarly, under the *Pope* tribunal's interpretation of Article 1105(1), it would be unnecessary for a claimant under Chapter Eleven to specify that it was bringing a claim under any article of Section A of Chapter Eleven other than Article 1105(1). Rather, under the *Pope* tribunal's reading, a claim of a violation of, for example, Chapter Eleven's national treatment provision would be subsumed in an Article 1105(1) claim. Those incongruous results are not what the NAFTA Parties intended. Indeed, the binding FTC Interpretation has made it clear that "[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)." FTC Interpretation (July 31, 2001) ¶ B(3).

The context of Article 1105(1) further shows that the international legal obligations the NAFTA Parties had in mind in Article 1105(1) were those setting forth minimum standards of treatment of foreign persons and their property in the territory of the host State. NAFTA Article 1105(1) itself reflects the NAFTA Parties' commitment to provide "investments of investors of *another Party*" with the international minimum standard of treatment. The title of the article is "Minimum Standard of Treatment."[35] There is a body of international law that sets forth minimum standards of treatment for property of nationals of a State in the territory of another State. As the FTC observed in its clarification, that body of law is one established under customary international

[35] *See also* NAFTA art. 1101(1)(a)-(b) (limiting the scope of application of Chapter Eleven, in pertinent part, to "measures maintained or adopted by a Party relating to . . . investments of investors of another Party in the territory of the Party").

law, and it is known as the customary international law minimum standard of treatment of aliens.[36] Thus, the context of Article 1105(1) conclusively confirms the correctness of the FTC interpretation and rejects the ill-considered views of the *Pope* tribunal.

Third, the *Pope* tribunal similarly erred in its reliance on provisions of bilateral investment treaties ("BITs") to interpret NAFTA Article 1105(1).[37] Those treaties are not part of the context for interpreting Article 1105(1) as defined by Article 31(2) of the Vienna Convention. The Vienna Convention clearly defines the "context" of a treaty to include only those "agreement[s] . . . which [were] *made between all the parties*" of the treaty and "instrument[s] . . . made by one or more parties . . . and *accepted by the other parties* as an instrument related to the treaty."[38] Neither Mexico nor Canada has entered into a BIT with the United States. Nor has any NAFTA Party accepted, as contemplated by Article 31(2) of the Vienna Convention, the BITs as instruments related to the NAFTA. Therefore, the *Pope* tribunal erred in relying on the BITs as "context" to interpret the NAFTA.

Moreover, there is no foundation in any event for the *Pope* Award's suggestion of "stark inconsistencies" between the BITs' provisions on "fair and equitable treatment" and the text of

[36] *See* FTC Interpretation ¶ B(1)-(2). Contrary to the *Pope* tribunal's erroneous suggestion, the NAFTA Parties did not seek, by issuing the interpretation of Article 1105(1), to modify the phrase "international law." *See Pope* Damages Award at n.9 ("the clarification consisted of adding the word 'customary' as a modifier."); *id.* at n.37 (characterizing the United States' position as arguing "that the term 'international law' in Article 1105 means customary international law"). Rather, in paragraph B(1) of the July 31, 2001 Interpretation, the three NAFTA Parties interpreted the meaning of the obligation agreed to in Article 1105(1): "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party."

[37] *See Pope* Merits Award ¶¶ 110- 117; *Pope* Damages Award ¶¶ 9, 27, 44, 61-62.

[38] Vienna Convention art. 31(2) (emphasis added).

Article 1105(1).[39] The *Pope* tribunal's reading of those BIT provisions, based in particular on the views of academics regarding United States BITs, is flatly inconsistent with what the United States Department of State repeatedly has advised the United States Senate that provision means in submitting the treaties for constitutionally-required advice and consent: that the provision was intended to require a minimum standard of treatment based on *customary international law*.[40] The United States' understanding of the BITs it negotiated is the same as the understanding of NAFTA Article 1105(1) expressed in the Canadian Statement of Implementation, issued on January 1, 1994, the day the NAFTA entered into force: "Article 1105 . . . provides for a minimum absolute standard of treatment, *based on long-standing principles of customary international law*."[41] The *Pope* tribunal therefore erred in suggesting that there were inconsistencies between the "fair and equitable treatment" provisions of the BITs and Article 1105(1).[42]

Indeed, for all of the reasons stated above, the United States joined Canada and Mexico in late 2000 in a submission to the *Pope* tribunal, stating that the treatment to be accorded to "investments of investors of another Party" under Article 1105(1) is the minimum standard of

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[39] *See Pope* Damages Award ¶ 25.

[40] *See* U.S. Rejoinder at nn.59-61 & accompanying text (listing Department of State letters submitting U.S. BITs to Congress that clarify that "'fair and equitable' treatment in accordance with international law. . . . sets out a minimum standard of treatment based on customary international law").

[41] Canadian Statement of Implementation at 149 (Jan. 1, 1994) (emphasis added).

[42] The *Pope* tribunal mischaracterized the United States as having "asserted that the difference [between the text of the BITs and Article 1105(1) of the NAFTA] was the product of a conscious decision by the NAFTA Parties to change the approach in the BITs." *Pope* Damages Award ¶ 27. Rather, the United States explained to the *Pope* tribunal that the NAFTA Parties, in Article 1105(1), merely "chose a formulation that expressly tied fair and equitable treatment to the customary international minimum standard" to exclude any other conclusion in light of the academic debate concerning the meaning of the phrase "fair and equitable treatment" as it appears in the BITs without express reference to customary international law. Fourth Submission of the United States in *Pope & Talbot, Inc. v. Canada* (Nov. 1, 2000) ¶¶ 7-8. Notwithstanding the academic debate, however, neither the U.S. BITs nor NAFTA Article 1105(1) requires treatment beyond the minimum standard of treatment based on customary international law.

treatment of aliens under customary international law.[43] The *Pope* tribunal, however, rejected that interpretation and provided its own interpretation, stating, among other things, that "[n]either Mexico nor Canada has subscribed to the version of the intent of the drafters put forward by the United States."[44] Mexico then responded, noting that the *Pope* tribunal was incorrect, and that all three NAFTA Parties had subscribed to that same interpretation.[45] The *Pope* tribunal never addressed the point raised in Mexico's submission and did not acknowledge it in its Damages Award. Instead, even after the three NAFTA Parties issued their binding interpretation in July 2001, largely to address the *Pope* tribunal's failure to heed to the NAFTA Parties prior statements regarding the interpretation of Article 1105(1), the *Pope* tribunal in its Damages Award concluded in *dicta* that the Parties had attempted to amend the NAFTA.[46]

Finally, the *Pope* tribunal's analysis of the NAFTA's negotiating history is erroneous for two reasons. As an initial matter, the *Pope* tribunal erred in resorting to the negotiating history at all.[47] The premise for the tribunal's reference to *travaux préparatoires* was its suggestion that the text of Article 1105(1) "contained ambiguities that had to be resolved by those charged with interpreting the texts."[48] The *Pope* tribunal's suggestion, however, cannot be reconciled with its *dicta* suggesting that the meaning of Article 1105(1) was so clear that the FTC's interpretation of

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[43] *See* Fourth Submission of the United States in *Pope & Talbot* (Nov. 1, 2000) ¶¶ 7-8.

[44] *Pope* Merits Award ¶ 114 n.109.

[45] *See* Submission of Mexico in *Pope & Talbot* (Apr. 25, 2001) at 1-2 (stating "all three NAFTA Parties pleaded that Article 1105 incorporates only the international minimum standard" and requesting that the *Pope* tribunal issue a *corrigendum* to reflect accurately Mexico's views with regard to the parameters of Article 1105).

[46] *See Pope* Damages Award ¶ 47.

[47] The Vienna Convention permits resort to supplementary means of treaty interpretation only for specified purposes. *See* Vienna Convention art. 32.

[48] *See Pope* Damages Award ¶ 26 & n.10.

the provision was an "amendment." If, as the *Pope* tribunal suggested, the article was ambiguous, the FTC acted well within its authority in interpreting it. If it was not – and it certainly is not as interpreted by the FTC – then the *Pope* tribunal had no occasion to resort to secondary means of treaty interpretation such as the negotiating history.[49]

The *Pope* tribunal's conclusions based on that history are without support in any event. After reviewing more than forty drafts of NAFTA Chapter Eleven, the *Pope* tribunal found that the text of Article 1105(1) underwent relatively few changes and none showed, as the investor had contended, that the Parties had considered but rejected a version of the article expressly referencing "customary international law."[50] Nonetheless, the *Pope* tribunal inexplicably suggested that the negotiating history supported its view, expressed in *dicta*, that the FTC interpretation was an "amendment."[51] Basing such a result on such a history as this cannot be reconciled with accepted approaches to treaty interpretation.[52]

2. The *Pope* Tribunal Erred In Its Approach To The Development of Customary International Law Through Treaty-Making

The *Pope* tribunal observed in its award on damages that treaties such as bilateral investment treaties reflect State practice, but it erred by implying that such State practice – without

[49] Vienna Convention art. 32(a)-(b).

[50] *See Pope* Damages Award ¶¶ 38, 43, 46.

[51] *Id.* ¶ 47.

[52] *See* Vienna Convention art. 32; s*ee also Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* 1995 I.C.J. 5, 21-2 ¶ 41 (Feb. 15) (stating that *travaux* similar to those that do exist for the NAFTA "must be used with caution . . . on account of their fragmentary nature;" where the *final* text did not exclude Qatar's interpretation, the Court was "unable to see why the abandonment of a form of words corresponding to the interpretation given by Qatar to the[] [treaty] should imply that the [treaty] must be interpreted in accordance with Bahrain's thesis."). The *Pope* tribunal also questioned Canada's statement to the claimant that there were "no mutually agreed negotiating texts." *Pope* Damages Award ¶¶ 31, 40. In the United States' view, however, short of the final text of the signed NAFTA itself, there are no such "mutually agreed" texts.

more – is sufficient to establish a rule of customary international law. *See Pope* Damages Award • 59 ("International agreements constitute practice of states and contribute to the grounds of customary international law."); *id.* • 62 ("the practice of states is now represented by [in excess of 1800 bilateral investment] treaties").

As the United States has previously advised this Tribunal, customary international law, including the minimum standard of treatment of aliens, may evolve over time. *Cf. Pope* Damages Award • 58 (rejecting "static conception of customary international law"). In addition, treaties, including BITs, may constitute a form of State practice as between or among the parties to a given treaty. However, the United States disagrees with the *Pope* Damages Award in that it appears to ascribe legal significance to this form of State practice without further analysis.

It is elemental that a rule may be considered to form part of customary international law only where the rule is established by a general and consistent practice of States *followed by them from a sense of legal obligation*.[53] In other words, a customary international law rule is established by two elements: "a concordant practice of a number of States acquiesced in by others; and a conception that the practice is required by or consistent with the prevailing law (the *opinio juris*)."[54]

In addition, the International Court of Justice has observed that several factors must be considered in assessing whether a *treaty-based* rule reflects *opinio juris* supporting the existence of a customary, rather than simply a treaty-based, obligation. In *North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.)*, the Court held that, in order for a provision to become part of

[53] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES • 102(2) (1987).

[54] CLIVE PARRY, JOHN P. GRANT, ANTHONY PARRY & ARTHUR D. WATTS, ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 82 (1986).

customary international law, among other things, it must be "a norm-creating provision," one which "is now accepted as [a norm of the general corpus of international law] by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention."[55]

While a bilateral investment treaty may reflect State practice between the two parties to that BIT, the *Pope* tribunal erred in its analysis of the BITs. It made no attempt to analyze either the consistency of State practice in investment treaties or whether any such State practice evidenced the *opinio juris* necessary to establish customary international law.[56] The tribunal does not even mention *opinio juris*, let alone cite any evidence of it. Indeed, as mentioned above, the *Pope* tribunal found "stark inconsistencies between the provisions of BITs and corresponding commitments of Article 1105."[57] Thus, because it failed even to attempt the requisite analysis, the *Pope* tribunal's statement that BITs are State practice cannot support a view that any particular BIT obligation has crystallized into a rule of customary international law.

3. The *Pope* Tribunal Erred In Its Analysis Of Authority Purportedly Supporting Its Award

Finally, the United States notes that the decision of the Chamber of the International Court of Justice in *Elettronica Sicula S.P.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15 (July 20), does not

[55] 1969 I.C.J. 3, 41 • 71 (Feb. 20).

[56] *See Pope* Damages Award ¶¶ 59-62.

[57] *Id.* • 25.

support the *Pope* tribunal's conclusions with respect to the evolution and content of customary international law.[58]

In *ELSI*, the ICJ interpreted a treaty provision, not replicated in the text of the NAFTA, which prohibited certain "arbitrary" measures.[59] The ICJ was not applying customary international law to the claims of arbitrariness presented in *ELSI*. Thus, contrary to the *Pope* tribunal's suggestion, the decision in *ELSI* cannot reflect an evolution in customary international law. Of course, citation to a single authority applying a conventional standard does not demonstrate the requisite State practice or *opinio juris* necessary to establish the existence of a principle of customary international law.[60] In fact, *ELSI* did not even purport to address customary international law standards requiring treatment of an alien amounting to an "outrage" for a finding of a violation. In any event, ELSI clearly does not establish that any relevant standard under customary international requires mere "surprise."[61] The *Pope* tribunal's approach should be rejected.

CONCLUSION

For the foregoing reasons, the United States respectfully submits that there is no occasion for the Tribunal to identify factors or types of factors relevant to an analysis under Article 1105(1) because ADF's has failed to identify any rule of customary international implicated by its claims.

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[58] *See Pope* Damages Award ¶¶ 63-64.

[59] *See ELSI*, 1989 I.C.J. at 72 (quoting Article I of the Supplementary Agreement to the 1948 FCN Treaty between Italy and the United States as follows: "The nationals, corporations and associations of either High Contracting Party shall not be subjected to arbitrary or discriminatory measures . . . ."). Even assuming the *Pope* tribunal's broad view of the meaning of Article 1105(1) is correct (and it is not), because the FCN Treaty in *ELSI* is not in force as between Canada, Mexico and the United States, the *ELSI* cannot provide any rule of decision applicable here. *See* Statute of the International Court of Justice art. 38(1)(a) (stating that the ICJ shall apply "international conventions . . . establishing rules expressly recognized by the contesting states").

[60] *See supra* nn.53-54 and accompanying text.

The United States further submits that the Tribunal should not rely on the *Pope* Damages Award as it is poorly-reasoned and unpersuasive.

Respectfully submitted,

_____/S/_____

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June 27, 2002

[61] *See Pope* Damages Award ¶ 64.

ANNEX 145

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

GLAMIS GOLD, LTD.,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

COUNTER-MEMORIAL OF
RESPONDENT UNITED STATES OF AMERICA

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September 19, 2006

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fide legislation and regulations enacted in the public interest) or they are not (as Glamis asserts when arguing that the California measures are preempted by federal law and thus barred from application to its plan of operations). In any event, Glamis's own arguments to the BLM undermine any claim of futility.

Glamis has not been refused permission to develop the Imperial Project site, its reclamation plan has not been denied, and the California measures have not been applied to it. Accordingly, Glamis's expropriation claim is not ripe and should be denied.

B. The California Measures Did Not Interfere With Any Property Right Held By Glamis And, Thus, Are Not Expropriatory

If the Tribunal nevertheless considers Glamis's expropriation claim ripe for review, a threshold inquiry in the analysis of whether a regulation constitutes an expropriation is whether the claimant has established that it holds a compensable property interest.[563] Glamis's claim that the California measures expropriated its investment fails because Glamis has no property right to engage in mining activities free from the reclamation requirements imposed by those measures.

[563] *See, e.g., United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) (denying regulatory takings claim after finding that claimant had no property interest in navigable waters); *United States v. Willow River Power Co.*, 324 U.S. 499 (1945) (dismissing regulatory takings claim on the ground that claimant had no property interest in river runoff for tailwaters); *Karuk Tribe v. United States*, 209 F.3d 1366, 1374 (Fed. Cir. 2000) (insisting that a court must first determine whether plaintiff possessed a "stick in the bundle of property rights" before it can find a taking), *cert. denied*, 532 U.S. 941 (2001); *M & J Coal Co. v. United States*, 47 F.3d 1148, 1153-54 (Fed. Cir. 1995) (describing the need to "determine whether the use interest proscribed by the governmental action was part of the owner's title to begin with" as a threshold inquiry in any takings analysis), *cert. denied*, 516 U.S. 808. International law recognizes the expropriation only of property rights or property interests. *See, e.g.*, Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 R.C.A.D.I. 259, 272 (1982) ("Only *property* deprivation will give rise to compensation.") (emphasis in original); Rodolf Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID Review, For. Investment L.J. 41, 41 (1986) ("[O]nce it is established in an expropriation case that the object in question amounts to 'property,' the second logical step concerns the identification of expropriation."); *Tradex Hellas S.A. v. Republic of Albania*, Case No. ARB/94/2, Award ¶ 177 (Apr. 29, 1999) ("expropriation by definition is a 'compulsory' transfer of property rights") (internal quotations omitted). Although international law governs this arbitration, domestic law may nevertheless be relevant for determining the existence of such property rights or property interests. *See, e.g., Tradex* Award ¶ 130 (property right limited by privatization provisions under Albanian land law); *Marvin Roy Feldman Karpa v. United Mexican States*, Case No. ARB(AF)/99/1, Award ¶¶ 118-19 (Dec. 16, 2002) (property right limited by invoice requirement under Mexican excise tax law).

The property rights held by Glamis – unpatented mining claims located on federal lands – are possessory interests subject to wide-ranging federal, state, and local regulations. The unpatented mining claims include no right to have a particular plan of operations or reclamation plan approved by governmental authorities. Furthermore, the unpatented mining claims are subject to pre-existing principles of religious accommodation enshrined in the U.S. and California Constitutions, as well as pre-existing cultural, environmental, and health and safety limitations under California property law. Accordingly, any burden imposed on Glamis by the challenged California measures – which merely specify the implementation of those pre-existing principles in the particular context of surface mining – cannot be deemed expropriatory.

1. The Property Interest At Issue: Glamis's Unpatented Mining Claims

The Mining Law gives U.S. citizens the right "to explore, discover, and extract valuable minerals from the public domain and to obtain title to lands containing such discoveries."[564] Any U.S. citizen has the right to explore for minerals on federal public lands that have not already been claimed.[565] This right of exploration is a gratuity from the government that can be withdrawn at any time.[566] The rights in a mining claim on federal public lands are hierarchical: the locator of an "unpatented" mining claim merely

[564] *Freese v. United States*, 221 Cl. Ct. 963 (1979). The Mining Law restricts exploration for minerals on the federal public lands to U.S. citizens. 30 U.S.C. § 22 (2000). To meet the Mining Law's citizenship requirements, Glamis Gold, Inc., a subsidiary of Glamis Gold, Ltd., a Canadian company, is incorporated under the laws of the State of Nevada, and is also headquartered in Nevada. See NOA at 4. In the case of a corporation, such citizenship is established by showing proof of incorporation under the laws of the United States. 30 U.S.C. § 24 (2000).

[565] *See* 30 U.S.C. § 22 (2000).

[566] *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 47 (D.D.C. 2003).

holds a possessory interest in, while the owner of a "patented" mining claim holds title to, the land.

All of the mining claims that comprise the Imperial Project site are unpatented mining claims, located after 1980,[567] on approximately 1,600 acres of land owned by the U.S. federal government.[568] In 1987, Glamis began acquiring the rights to these claims,[569] over which it ultimately obtained sole ownership through a variety of business partnerships, joint ventures, and acquisitions.[570]

The locator of an unpatented mining claim holds only a right of "possession and enjoyment" of the surface of the land and any minerals located within the land.[571] The possessory interest and mineral rights arise when a mining claimant makes a valuable mineral discovery, posts notice at the site of the claim, records these facts with the appropriate land office, and pays the required annual fees.[572] With respect to every unpatented mining claim, the United States maintains the underlying fee title to the land.[573]

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[567] BLM, Mineral Report, Att. I-3 (Sept. 27, 2002) (10 FA tab 98). The Imperial Project is composed of 187 lode mining claims and 277 mill site locations. *Id*.

[568] BLM, Mineral Report, at 13 (Sept. 27, 2002) (6 FA tab 255).

[569] Mem. ¶ 29.

[570] Mem. ¶ 29, McArthur Statement ¶¶ 4-5; Letter from A.D. Rovig, Glamis Gold, Inc., to J.R. Billingsley, Vice President, Admin., Glamis Gold, Ltd. (Feb. 18, 1994) (GLA093196 to 235).

[571] 30 U.S.C. § 26 (2000); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963).

[572] *See* 30 U.S.C. §§ 26, 29, 30 (2000).

[573] 30 U.S.C. § 26 (2000). It is not until a mining claim is patented that fee simple title to the land is conveyed by the Government to the claimant. After a patent is issued, the Government no longer retains title to the land in question, and the patentee is freed from the limitations of the mining laws and may put the land to uses other than mining. 30 U.S.C. § 29 (2000). The patentee, however, must still comply with the same federal and state environmental, health, and safety regulations that apply to other private land owners. Since 1994, Congress has imposed a moratorium on spending appropriated funds for the acceptance or processing of mineral patent applications. *See* Interior and Related Agencies Appropriations Act for Fiscal Year 2005, Pub. L. No. 108-447, Div. E, tit. I, 118 Stat. 2809, at § 120 (2004).

Congress's authority over the public lands is plenary[574] and one acquires only what has been granted pursuant to that authority.[575] Such grants "are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it."[576]

Unpatented mining claims on federal lands are subject to compliance with federal, state and local environmental and other regulations.[577] Absent an actual conflict between state and federal law, unpatented mining claims are subject to reasonable state environmental regulations applicable to federal lands within a state's borders,[578] and there is no conflict between state and federal law where state mining laws or regulations require "a higher standard of protection for public lands" than federal law.[579] Federal law

[574] *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

[575] *Andrus v. Charlestone Stone Prods.*, 436 U.S. 604, 617 (1978); *United States v. Union Pac. R. Co.*, 353 U.S. 112, 116 (1957).

[576] *Id.*; *Andrus v. Charlestone Stone Prods.*, 436 U.S. at 617.

[577] 30 U.S.C. § 22 (2000) ("[A]ll valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase . . . under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."); 30 U.S.C. § 26 (2000) (according exclusive right of possession to locaters of mining claims on public lands "so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title"); *see also Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963) (mining claims are "valid against the United States if there has been a discovery of [a valuable] mineral within the limits of the claim, if the lands are still mineral, and if other statutory requirements have been met").

[578] *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987) (rejecting pre-emption challenge to state environmental regulation of unpatented mining claims in national forests where the applicable federal regulations "expressly contemplate[d] coincident compliance with state law as well as with federal law").

[579] 43 C.F.R. § 3809.3 (2002) ("Nothing in this subpart shall be construed to effect a preemption of State laws and regulations relating to the conduct of operations or reclamation on federal lands under the mining laws"); *see also* 43 C.F.R. 3809.3-1(a) (1980); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 587, 581 (1987) (distinguishing, for pre-emption purposes, land use regulations (which "in essence choose[] particular uses for the land") from environmental regulations (which "require[] only that, however the land is used, damage to the environment is kept within prescribed limits"), and observing that state law is pre-empted "to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress") (internal quotations and citations omitted)).

does not exempt mining claimants from following reasonable federal or state environmental laws or regulations, even where the law or regulation would render certain mining activities on the public lands uneconomic.[580]

Furthermore, Glamis's unpatented mining claims include no right to have a specific project approved by governmental authorities.[581] For example, the Interior Board of Land Appeals ("IBLA"), the administrative body that hears appeals by mining companies against the BLM, ruled in *Great Basin Mine Watch* that "the mere filing of a plan of operations by a holder of a mining claim invests no rights in the claimant to have any plan of operations approved."[582] The IBLA rejected the BLM's characterization of its own authority, finding that the BLM had in fact "understated" its authority to reject a plan of operations.[583] Specifically, the IBLA ruled that "under no circumstances" could regulatory compliance be waived merely because such compliance would render a given project unprofitable.[584]

The recent Montana Supreme Court decision in *Seven-Up Pete Venture v. Montana* further illustrates that a mining company's property interest does not include a right of approval for a particular project, especially where mining in the manner proposed

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[580] *See, e.g., Atlas Corp. v. United States*, 895 F.2d 745, 757-58 (Fed. Cir. 1990) (affirming dismissal of takings claim where reclamation requirements were imposed on mining project "[p]ursuant to Congress' power to protect the general health, safety, and welfare," even if the costs of such reclamation requirements rendered the mining project uneconomic). In addition, the NAFTA Parties were careful to recognize the need to maintain their ability to regulate for the protection of the environment. *See* NAFTA art. 1114 ("Nothing in . . . Chapter [Eleven] shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.").

[581] 43 C.F.R. § 3809.1-6(a)(2) (1980) (BLM will notify the operator "[o]f any changes in or additions to the plan necessary to meet the requirements of these regulations"); 43 C.F.R. § 3809.411(d) (2002) (describing circumstances under which BLM could either approve or disapprove a proposed plan of operations).

[582] *Great Basin Mine Watch*, 146 I.B.L.A. 248, 256, (Interior Bd. of Land Appeals Nov. 9, 1998).

[583] *Id.* at 256.

[584] *Id.*

would cause environmental damage.[585] In 1998, the State of Montana, through voter initiative 137 ("I-137"), banned all open-pit cyanide leaching at new gold and silver mines and mine expansions.[586] Certain mining companies in Montana that held mineral leases on state lands, as well as private mineral leases and fee interests on federal lands that pre-dated I-137 sued, claiming the initiative amounted to an unconstitutional taking of their property.[587]

The plaintiffs in *Seven-Up Pete* had invested more than $70 million in their mining projects.[588] They argued that I-137 destroyed the value of their mineral leases and fee interests, which were terminated as a result of I-137. They also argued that I-137 frustrated their expectations with respect to the manner in which they could mine, because the state knew that plaintiffs intended to use cyanide heap leaching to recover the minerals and there was no other economically viable way to mine the land at issue.[589] Further, the plaintiffs complained that I-137 "changed a century of Montana mining history."[590]

The State of Montana, on the other hand, noted that the leases in question provided that "[t]he lessee shall fully comply with all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental

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[585] *Seven Up Pete Venture v. Montana*, 114 P.3d 1009 (2005).

[586] Mont. Code Ann. § 82-4-390 ("Cyanide heap and vat leach open-pit gold and silver mining prohibited. (1) Open-pit mining for gold or silver using heap leaching or vat leaching with cyanide ore-processing reagents is prohibited except as described in subsection (2). (2) A mine described in this section operating on November 3, 1998, may continue operating under its existing operating permit or any amended permit that is necessary for the continued operation of the mine.").

[587] *See Seven Up Pete Venture*, 114 P.3d at 1015.

[588] *Id.* at 1021.

[589] *Id.* at 1016.

[590] *Seven Up Pete Venture v. Montana*, Appellants' Initial Brief (No. 03-154) (June 6, 2003), at 6.

protection, and reclamation."[591] It also argued that the plaintiffs had never been given a guarantee that their mining permits would be approved and, likewise, they did not have a right to mine using the cyanide heap leach process.[592] The state further argued that the heavily regulated nature of the mining industry should have put plaintiffs on notice of the likelihood of future regulations.[593] Finally, Montana noted that I-137 did not prohibit plaintiffs from developing their mineral estate in a manner other than through a cyanide heap leach process and did not deprive them of any right granted by the mineral leases.[594]

The Supreme Court of Montana found that plaintiffs did not have a property interest in the approval of their mining permit.[595] Citing federal law, the court set out the applicable standard for determining whether there is a cognizable property interest in obtaining a permit, which exists "only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured."[596] The court reasoned that the Montana Department of Environmental Quality possessed the statutory discretion to deny a mining permit, and the plaintiffs were required by their mineral leases to obtain a mining permit subject to environmental regulations before commencing mining.[597] Thus, the court concluded that the plaintiffs' opportunity to seek a mining permit did not constitute a property right.[598] Furthermore, the court continued,

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[591] *Seven Up Pete Venture v. Montana*, Brief of Respondent (No. 03-154) (July 7, 2003), at 4.

[592] *Seven Up Pete Venture*, 114 P.3d at 1016.

[593] *See id.* at 1016-17.

[594] *See id.* at 1017.

[595] *See id.* at 1019.

[596] *See id.* at 1018 (quoting *Kiely Const. LLC v. City of Red Lodge*, 57 P.3d 836, ¶ 28 (Mont. 2002) (quoting *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 68 (4th Cir. 1992)) (emphasis in *Seven Up Pete Venture* omitted).

[597] *Id.* at 1017-20.

[598] *Id.* at 1019.

"the [plaintiffs] had not secured an operating permit as required by [statute and the terms of the leases]. Thus, the passage of I-137 did not take away any existing permits or halt any on-going mine operations related to the Venture's projects."[599] Because the plaintiffs lacked a property right in obtaining the permits, the court found that the enactment of I-137 did not constitute an unconstitutional taking.[600]

Similarly, in *Kinross Copper Corp. v. Oregon*, the holder of unpatented mining claims argued that the state's denial of a water discharge permit that was necessary to commence mining constituted a taking of its mining claims under the U.S. and Oregon Constitutions.[601] The court rejected this argument, explaining, "the determinative inquiry is whether *what the government has prohibited* is itself a property right."[602] The court noted that the permit denial did not prohibit the plaintiff from mining.[603] It concluded that the only property that plaintiff held was its unpatented mining claims, and this property did not include water rights. Because the permit denial did not deprive plaintiff of its property interest in its unpatented mining claims, no taking had occurred.[604]

As discussed above, Glamis's unpatented mining claims confer a possessory interest that is subject to wide-ranging federal, state, and local regulations, including state regulations that may require a higher standard of protection for public lands than federal law, and include no right of approval for a specific proposed mining project or

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[599] *Id.* at 1019.

[600] When amending the 3809 Regulations, the DOI acknowledged Montana's ban on cyanide leach mining and noted that "no conflict exists if the State regulation requires a higher level of environmental protection." Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. 69,998, 70,008 (Nov. 21, 2000) (codified at 43 C.F.R. § 3809.3 (2001)).

[601] *Kinross Copper Corp. v. Oregon,* 160 Or. App. 513, 516 (1999).

[602] *Id.* at 519 (emphasis in original).

[603] *Id.* at 520.

[604] *Id.* at 524-526.

reclamation plan. Moreover, as discussed below, background principles of the U.S. and California Constitutions and California property law serve to further restrict the bundle of property rights Glamis holds in its unpatented mining claims. Given the broad, pre-existing limitations on Glamis's property rights, the specific, later-in-time implementation of those limitations by the challenged California measures cannot be deemed expropriatory.

2. Laws And Regulations That Merely Specify Pre-Existing Limitations On Property Rights Are Not Expropriatory

In reviewing regulatory action in takings claims, the U.S. Supreme Court has traditionally resorted to "existing rules or understandings that stem from an independent source such as state law," when determining if a claimant holds an interest that qualifies for protection under the Fifth and Fourteenth Amendments as "property."[605] As such, "[i]f the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with," the government need not compensate a property owner, no matter what the economic impact of the challenged regulations.[606] In such a case, the challenged law or decree "inheres in the title itself, in the restrictions that the background principles of the State's law of property and nuisance already place upon land ownership."[607]

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[605] *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

[606] *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (noting the Court's traditional resort to pre-existing rules or understandings of state property law when defining the range of interests protected by the Constitution); *see also id.* at 1030 (characterizing as "unexceptional" its "recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those 'existing rules or understandings.'"); *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 538 (2005) (citing *Lucas* for proposition that the government must pay compensation for "'total regulatory takings,' except to the extent that 'background principles of nuisance and property law' independently restrict the owner's intended use of the property").

[607] *Lucas*, 505 U.S. at 1029; *see also Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (Rehnquist, J., dissenting on other grounds) (recognizing that "short-term delays attendant to

Decisions of both domestic courts and international tribunals illustrate that the specific application of broad, pre-existing limitations on property rights is not expropriatory. In the recent case of *American Pelagic Fishing Co. v. United States*, for instance, the Court of Appeals for the Federal Circuit denied the claimant's takings claim on grounds that a pre-existing federal statute circumscribed the nature of the property right in question.[608] There, the claimant had invested nearly $40 million in a commercial fishing vessel and obtained special permits to fish for mackerel in the U.S. Exclusive Economic Zone ("EEZ") after a federally commissioned study concluded that larger vessels were needed to "improve the competitive position of the U.S. Atlantic mackerel industry with respect to European competitors."[609] After the claimant had made its investment, and in response to concerns regarding the size of the claimant's vessel and its potential environmental effect on the Atlantic mackerel and herring populations, Congress "effectively cancelled American Pelagic's existing permits and authorization letter, and at the same time prevented any further permits from being issued" to the vessel.[610] Congress, through a later appropriations bill, eventually made this permit revocation permanent.[611] It was undisputed that these measures prohibited "all profitable

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zoning and permit regimes are a long-standing feature of state property law and part of a landowner's reasonable investment-backed expectations").

[608] *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363 (Fed. Cir. 2004), *cert. denied*, 125 S.Ct. 2963 (2005).

[609] *Id.* at 1367-68.

[610] *Id.* at 1368-69.

[611] *Id.*

uses of the vessel."[612] Furthermore, the court below conclusively found that "[n]o other vessels were affected by the legislative revocation."[613]

The court dismissed American Pelagic's takings claim. In so doing, it relied on the fact that American Pelagic had made its investment against the backdrop of the 1976 Magnuson-Stevens Fishery Conservation and Management Act.[614] That Act abrogated any common law right to fish in the EEZ.[615] As such, the court found that the Act was a "background principle" of federal law that established the federal government's right to permit or restrict fishing in that zone and enabled the federal government subsequently to alter the bundle of rights American Pelagic could claim to hold pursuant to that statute, without causing an expropriation.[616] Consequently, despite the fact that (i) American Pelagic had made its investment in reliance on a federally funded study which recommended additional fishing in the EEZ and had obtained the requisite fishing permits; (ii) the Congressional measures challenged in the case were enacted after American Pelagic acquired title to its vessel; and (iii) the Congressional measures were directed exclusively at American Pelagic, the court held that the property right that American Pelagic had in its vessel did not include the right to fish in the EEZ and, therefore, denied the takings claim.

Similarly, in *Hunziker v. Iowa*, the Supreme Court of Iowa rejected an action by a group of land developers challenging a denial of a building permit on the basis of a

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[612] *American Pelagic Fishing Co. v. United States*, 49 Fed. Cl. 36, 50 (2001).

[613] *Id.* at 42.

[614] *American Pelagic*, 379 F.3d at 1367, n.1 (citing the Magnuson-Stevens Fishery Conservation and Management Act, Pub. L. No. 94-265, 90 Stat. 331 (codified as amended at 16 U.S.C. §§ 1801-1883 (2000)).

[615] *Id.* at 1380.

[616] *Id.* at 1382-83.

previously enacted statute.[617] In that case, the developers sold a plot of land for residential development, which, one year later, the Iowa state archaeologist discovered to contain a Native American burial mound. Pursuant to an Iowa state statute enacted more than a decade prior to the time the developers acquired title to the land, the Iowa state archaeologist prohibited the mound's disinterment and the city refused to issue a building permit to allow residential construction on the lot, which ultimately forced the developers to refund the proceeds from the sale of land and retake possession of the property.[618] The Supreme Court of Iowa found an Iowa statute prohibiting the disinterment of Native American graves to be a "background principle" of Iowa state property law that rendered the municipality's action non-compensable.[619]

Relying on U.S. Supreme Court precedent, the Iowa Supreme Court held that the actions of the Iowa state archaeologist and the subsequent municipal building permit denial did not exact a taking, because the "bundle of rights" the developers acquired with their fee simple title to the land never included the right to "disinter the human remains and build in the area where the remains were located."[620] Accordingly, because Iowa's statutory scheme to protect Native American burial remains was "in existence at least a decade before plaintiff acquired title," from the moment the developers acquired the plot in question the State of Iowa could have prevented the disinterment of these remains.

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[617] *Hunziker v. Iowa*, 519 N.W.2d 367 (Iowa 1994), *cert. denied*, 514 U.S. 1003 (1995).

[618] *See id.* at 368-69.

[619] *See id.* at 371.

[620] *Id.* The Iowa Supreme Court described Section 305A.9 as part of a complete statutory scheme by the Iowa legislature to prevent the disinterment of ancient Native American remains. The two other provisions of this scheme which it set forth in some detail were Section 305A.7, which provides in relevant part that the Iowa state archaeologist has primary responsibility for "investigating, preserving and reinterring" ancient human remains, and Section 716.5(2) which imposes criminal penalties on persons that intentionally disinter human remains of "state and national significance from an historical or scientific standpoint" without the permission of the state archaeologist. *See Hunziker*, 519 N.W.2d at 370 (quoting Iowa Acts ch. 1158 § 7 (1976) and ch. 1029 § 50 (1978)).

The Court thus found that the plaintiff never had a right to engage in activity that disturbed Native American burial remains, and dismissed the takings claim.[621]

These principles apply equally to mining rights. For example, in *M & J Coal Co. v. United States*,[622] the U.S. Court of Appeals for the Federal Circuit found that the claimant's property rights were limited by pre-existing environmental and health and safety standards, specifically under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), as enforced by the Department of the Interior's Office of Surface Mining ("OSM"). Just as the California SMARA requires the California SMGB to adopt regulations addressing environmental and health and safety concerns arising from mining activity, the federal SMCRA authorizes the OSM "to prohibit mining operations that endanger public health and safety or harm the environment."[623]

In *M & J Coal*, the OSM issued a cessation order requiring M & J to alter the subsidence mining technique it was using, so as to restore the strength of the subsided land above the mine and protect the public from surface cracks on adjacent properties.[624] M & J argued that the order constituted a taking requiring the payment of just compensation under the Fifth Amendment. The Federal Circuit rejected the claim, notwithstanding the fact that the original mining rights were acquired through various mineral severance deeds which included the express right to mine without liability for damage done to the overlying surface of the mine, reasoning:

> [A]t the time M & J acquired its mining rights, whatever they were, it knew or should have known that it could not mine in such

[621] *Id.* at 371.

[622] *M & J Coal Co. v. United States*, 47 F.3d 1148 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 808.

[623] *Id.* at 1150.

[624] *Id.* at 1151-52.

> a way as to endanger public health and safety and that any state authorization it may have received was subordinate to the national standards that were established by SMCRA and enforced by OSM.[625]

Because the "bundle of property rights" M & J acquired with its mining rights never included a cognizable property right to mine in the manner it proposed, the Federal Circuit held that the OSM's requirement that it modify its plan of operations to protect surface structures did not effect a taking.[626]

Similarly, as noted above, the Court of Appeals of Oregon in *Kinross Copper* determined that the Oregon Department of Environmental Quality's failure to grant Kinross Copper's National Pollutant Discharge Elimination System (NPDES) permit did not effect a taking, because Kinross Copper's unpatented mining claims did not confer upon it "the 'right' to discharge mining wastes into the waters of the state."[627] The court found that the pre-existing principles of federal mining law did not confer upon Kinross Copper any right to have its permit approved, because its property rights "came into existence in 1976, nearly 100 years after the enactment of the Desert Lands Act of 1877, which severed water rights from the grant of an unpatented mining claim."[628] Similarly, because the Oregon legislature had long regulated the nature of water rights within the state, establishing a comprehensive permitting system for appropriating water and expressly providing that no person could discharge waste without obtaining a NPDES permit, the Court of Appeals reasoned that Oregon law did not confer upon Kinross

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[625] *Id.* at 1154.

[626] *Id.* (quoting *Lucas*, 505 U.S. at 1027).

[627] *Kinross Copper v. Oregon*, 160 Or. App. 513, 525 (1999).

[628] *Id.* at 524.

Copper any such right to a water discharge permit.[629] Thus, the Court of Appeals concluded that Kinross Copper's takings claim was "predicated on the loss of a right that it never possessed" under pre-existing federal and state law and dismissed its takings claim.[630]

International tribunals also recognize that the scope of property rights is informed by the legislative and regulatory framework existing at the time such rights are acquired. For example, in the *Tradex* case, described above, the tribunal found that a pre-existing Albanian land law limited the property rights at issue in that case.[631] The tribunal found that certain references to an Albanian land law in the joint-venture agreement established that "the parties to the Agreement, including Tradex, accepted future application of the Land Law and that the investment was subject to future applications of the Land Law, in other words: subject to future privatizations."[632] Such a limitation on Tradex's investment "from the very beginning" would allow Albania to argue that "the actual application of the Land Law at a later stage did not infringe the investment and thus did not constitute an expropriation."[633]

The same principle was applied by the tribunal in *Marvin Roy Feldman Karpa v. United Mexican States* when denying claimant's expropriation claim.[634] The *Feldman* tribunal observed that the claimant had been "stymied by a longstanding requirement"

[629] *Id.* at 523-24.

[630] *Id.* at 525-26.

[631] *See Tradex Hellas S.A. v. Republic of Albania*, Case No. ARB/94/2, Award ¶ 54 (Apr. 29, 1999).

[632] *Id.* ¶ 130.

[633] *Id.* Because the tribunal ultimately found that Tradex had not demonstrated that any rights had been expropriated, it did not need to reach the issue of whether such rights, in light of the references to the Land Law in the joint venture agreement, were subject to possible privatization measures "from the very beginning of the investment." *Id.* ¶ 131.

[634] *Marvin Roy Feldman Karpa v. United Mexican States*, Case No. ARB(AF)/99/1, Award (Dec. 16, 2002).

under the applicable excise tax law, which required, for tax rebate purposes, the presentation of certain invoices.[635] Because claimant had not been in a position to obtain such invoices "at any relevant time," the tribunal found that the claimant never possessed a "'right'" to obtain tax rebates upon export of cigarettes.[636] Accordingly, the tribunal found, "this is not a situation in which the Claimant can reasonably argue that post investment changes in the law destroyed the Claimant's investment, since the [excise tax] law at all relevant times contained the invoice requirements."[637] Any later-in-time denial of tax rebates based on claimant's failure to meet the pre-existing invoice requirements therefore was not expropriatory.

Likewise, the tribunal in *International Thunderbird Gaming Corporation v. United Mexican States* specifically denied an expropriation claim under NAFTA Article 1110 on the ground that "compensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited."[638] The tribunal in that case found the claimant never had a right to operate gaming machines in Mexico because the operation of such machines was prohibited by Mexican law.[639] Given this pre-existing legal limitation, the *Thunderbird* tribunal held that Mexico could not have expropriated a property interest the claimant never held.

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[635] *Id.* ¶ 118.

[636] *Id.*

[637] *Feldman* Award ¶ 119.

[638] *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 208 (January 26, 2006).

[639] *Id.* ¶ 124.

Thus, the *Tradex, Feldman* and *Thunderbird* tribunals recognized the same proposition as was applied in the domestic U.S. cases discussed above: where property rights are, from their inception, subject to a broad restriction, the claimant's property right does not include the right to engage in the activity proscribed by (or the right to be relieved from the requirements imposed by) the subsequent application of that restriction. The subsequent application of that pre-existing limitation on property rights, therefore, is not expropriatory. Glamis's unpatented mining claims are subject to such pre-existing limitations, which were merely implemented by the challenged California measures. Accordingly, those measures interfered with no property right held by Glamis.

As discussed above, the unpatented mining claims that comprise the Imperial Project were located after 1980.[640] Long pre-dating those claims were principles of religious accommodation enshrined in the First Amendment of the United States Constitution[641] and Article I of the California Constitution,[642] as well as the California Legislature's enactment of the Sacred Sites Act in 1976 (prohibiting irreparable damage to Native American sites on public land absent a showing of necessity)[643] and SMARA in

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[640] *See supra* note 140.

[641] The First Amendment of the United States Constitution provides that the United States Congress "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The Fourteenth Amendment prohibits the state legislatures from making or enforcing any law "which shall abridge the privileges and immunities of the citizens of the United States." U.S. CONST. amend. XIV.

[642] Article I of the California Constitution guarantees the free exercise and enjoyment of religion without discrimination or preference to all California citizens and directs that the California legislature make no law respecting an establishment of religion. *See* CAL. CONST. of 1849, art. I, § 4. While the California courts are generally charged with interpreting the provisions of the California Constitution, because there are relatively few cases interpreting its prohibition against the establishment of religion, the California Supreme Court generally looks to federal cases to interpret this provision. *See, e.g., Bennett v. Livermore Unified Sch. Dis.*, 238 Cal. Rptr. 819, 821 (Cal. Ct. App. 1987).

[643] CAL. PUB. RES. CODE § 5097.9 (1976).

1975 (requiring mined lands to be reclaimed to a "usable condition which is readily adaptable for alternate land uses and create no danger to public health and safety").[644]

Glamis's unpatented mining claims, therefore, never included the right to limit California's authority to accommodate Native American religious practices, or to mine in a manner that that irreparably damage[d] Native American cultural and religious sites (in violation of the Sacred Sites Act) or to fail to reclaim mined lands to a usable condition (in violation of SMARA). Senate Bill 22 merely implements, in the specific context of surface mining operations, pre-existing principles of religious accommodation under the U.S. and California Constitutions and pre-existing protections for Native American cultural and religious sites under the Sacred Sites Act, and thus did not expropriate any property right that Glamis ever held. Similarly, the amendments to the SMGB regulations, which merely implement, in the specific context of open-pit metallic mining operations, the pre-existing reclamation standard under SMARA, interfered with no property right held by Glamis.

Accordingly, and as confirmed in the attached expert report of Professor Joseph L. Sax, a renowned expert in U.S. Constitutional takings law, Glamis's unpatented mining claims include no right to limit the authority of the state, pursuant to background principles of constitutional law, to accommodate Native American religious practices.[645] Nor do those claims include any right to mine in a manner that is inconsistent with pre-existing standards under the Sacred Sites Act or SMARA.[646] Accordingly, neither the

[644] CAL PUB. RES. CODE § 2733 (2001).

[645] Sax Rpt. ¶¶ 13-19.

[646] *Id.* ¶¶ 9(b), 23-24.

reclamation requirements imposed by Senate Bill 22 nor those imposed by the amendments to the SMGB's regulations can be deemed expropriatory.

a. SB 22 Is A Generally-Applicable Legislative Measure To Implement Pre-Existing Principles of Religious Accommodation Enshrined In The United States And California Constitutions, And Is Therefore Not Expropriatory

The U.S. Supreme Court has long interpreted the First Amendment as permitting government accommodation of the free exercise of religion.[647] In fact, the U.S. Supreme Court has explained that the "government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."[648] The California Senate introduced Senate Bill 22 on December 2, 2002, as an "urgency statute" necessary "[t]o prevent the imminent destruction of important Native American sacred sites" by requiring that surface mines be "backfilled and graded to achieve the approximate original contours of mined lands prior to mining."[649] By amending SMARA to prevent irreparable damage to such sites, the California Legislature implemented the pre-existing principle of religious accommodation enshrined in the First Amendment of the United States Constitution and Article I of the California Constitution.

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[647] *See Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla*., 480 U.S. 136, 144-45 (1987) ("This Court has long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause.")).

[648] *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987)). The line between mandatory and merely permissible government accommodation of religion lies somewhere between the Free Exercise and Establishment Clauses. *See Locke v. Davey*, 540 U.S. 712, 718 (2004) (reaffirming that "there is room for play in the joints between [the Free Exercise and Establishment Clauses]," allowing room for legislative action that is neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause); *see also generally* Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resouces on Public Lands*, 73 U. COLO. L. REV. 413, 475 (2002).

[649] California Senate, Senate Bill 22 (introduced Dec. 2, 2002) (ARC 01084-86) (Cal. 2003) (explaining that SB 22 was "an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution" and as such, it went into immediate effect).

Here, Glamis chose not to wait for a decision from the DOI on its plan of operations. Neither did it challenge DOI's or BLM's actions – or alleged inaction – in court. In this respect, Glamis resembles the hypothetical claimant described in *Generation Ukraine*, who "abandon[s] his investment without any effort at overturning the administrative fault; and thus claims an international delict on the theory that there had been an uncompensated virtual expropriation."[954]

Under well-established principles of international law, Glamis's claim that the federal government's actions expropriated its investment should be rejected.

IV. Glamis Has Failed To Demonstrate A Violation Of Article 1105(1)

Glamis's claim that the United States breached Article 1105(1) of the NAFTA should be dismissed. Glamis's claim is based on the mistaken premise that the measures at issue, taken separately or together, violate what Glamis contends are customary international law obligations on all States to manage their regulatory and legislative affairs in a transparent and predictable manner, to refrain from upsetting foreign investors' legitimate, investment-backed expectations, and to refrain from acting in an arbitrary or unjust manner.[955] Glamis, however, fails to demonstrate general and consistent State practice followed from a sense of legal obligation, as is necessary to prove a rule of customary international law. Even if Glamis had shown the existence of such rules – which it has not – none of the measures at issue, alone or in combination, lacked transparency, undermined Glamis's legitimate expectations, was arbitrary, or

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order prohibiting further rental payments by the National Iranian Oil Company (NOIC) to claimant for petroleum exploration and drilling equipment held by the NIOC).

[954] *Generation Ukraine Inc. v. Ukraine*, 44 I.L.M. 404, Award ¶ 20.30 (Sept. 16, 2003).

[955] Mem. ¶¶ 523-39.

constituted anything other than the normal exercise of regulatory and legislative decision-making in the face of complex and conflicting public interests.

Not only was the relevant government decision-making conducted in a regular and transparent manner, but also Glamis itself was one of the most active public participants in that process at every level of state and federal government. That Glamis's lobbying efforts evidently did not succeed, or that it may dislike the decisions ultimately reached by the State of California and the federal government, does not establish a breach of the NAFTA. As the *S.D. Myers* Chapter Eleven tribunal explained:

> When interpreting and applying the 'minimum standard' a Chapter Eleven tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potential controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.[956]

Glamis effectively requests that this Tribunal second-guess California's democratically established means of addressing the public interest in protecting the environment and irreplaceable, sacred Native American resources from the threat posed by open-pit cyanide heap leach mining, and the federal government's interpretation of its own regulations – a request this Tribunal lacks authority to grant. Glamis's Article 1105(1) claim should therefore be dismissed.

Below, we first demonstrate that NAFTA Article 1105(1) prescribes the minimum standard of treatment under customary international law. Second, we describe the content of that standard, and demonstrate that the measures at issue do not violate this

[956] *S.D. Myers, Inc. v. Canada*, 232 I.L.M. 408, First Partial Award ¶ 261 (Nov. 13, 2000).

standard. Finally, we demonstrate that the California and federal measures at issue fully comply even with the standards Glamis advances, but which it fails to show are part of customary international law.

A. An Article 1105(1) Claim Can Only Be Sustained When A Violation Of The Customary International Law Minimum Standard Of Treatment Has Been Demonstrated

The disputing parties agree that Article 1105(1) requires treatment in accordance with customary international law.[957] Article 1105 is captioned "Minimum Standard of Treatment." Paragraph One of that Article provides that "Each Party shall accord to investments of investors of another Party treatment in *accordance with international law*, including fair and equitable treatment and full protection and security."[958] In July 2001, the NAFTA Free Trade Commission, which is composed of the trade ministers of the three NAFTA Parties, issued the following Note of Interpretation:

> Minimum Standard of Treatment in Accordance with International Law
>
> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
>
> 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
>
> 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

[957] Mem. ¶¶ 517-18 ("[T]he international minimum standard of treatment," including the "'fair and equitable treatment' standard," "is comprised of customary international law."). Given the parties' agreement that Article 1105(1) prescribes the customary international law minimum standard of treatment, Glamis's argument that Article 1105(1) must be interpreted in good faith is irrelevant. *See id*. ¶ 517. Rather, the pertinent issue is the *content* of the customary international law minimum standard of treatment.

[958] NAFTA art. 1105(1) (emphasis added).

This interpretation is binding on all Chapter Eleven tribunals.[959]

Thus, the minimum standard of treatment required by Article 1105 is that set by rules of customary international law. As Glamis itself recognizes,[960] a rule only crystallizes into customary international law over time through a general and consistent practice of States that is adhered to from a sense of legal obligation.[961] Establishment of such a rule thus requires two elements: "a concordant practice of a number of States acquiesced in by others; and a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)."[962]

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[959] *See id*. art. 1131(2) ("An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this section."). Glamis's suggestion that the Parties' interpretation amounts to a "re-interpretation" is unfounded. Mem. ¶ 517. Numerous NAFTA Chapter Eleven tribunals, the Supreme Court of British Columbia, and secondary authorities relied on by Glamis all recognize the interpretation's validity. *See, e.g., International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award ¶¶ 192-93 (Jan 26, 2006); *Methanex Corp. v. United States of America*, UNCITRAL, Award, Pt. IV, Ch. C ¶¶ 20-24 (Aug. 3, 2005) (noting that even if the interpretation had altered the meaning of Article 1105(1) – which it did not – it would nonetheless be "entirely legal and binding on a tribunal seized with a Chapter Eleven case" under the terms of the Vienna Convention on the Law of Treaties); *Waste Mgmt., Inc. v United Mexican States*, ICSID Case No. ARB(AF)/00/3, 43 I.L.M. 967, Award ¶¶ 90-91 (Apr. 30, 2004); *Loewen Group, Inc. v. United States of America*, 7 ICSID REP. 442, Award ¶¶ 124-28 (June 26, 2003); *ADF Group, Inc. v. United States of America*, 6 ICSID REP. 470, Award ¶¶ 175-78 (Jan. 9, 2003); *United Parcel Serv. of Am., Inc. v. Canada*, 7 ICSID REP. 288, Award ¶ 97 (Nov. 22, 2002); *Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, 42 I.L.M. 85, Award ¶¶ 100-125 (Oct. 11, 2002); *United Mexican States v. Metalclad Corp.*, 5 ICSID REP. 236 ¶¶ 61-65 (Sup. Ct. B.C.) (May 2, 2001); Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, J. WORLD INVEST. & TRADE 357, 362-63 (noting, *inter alia*, that Article 1105(1)'s text "suggest[s] that . . . fair and equitable treatment is part of international law, specifically of its rules on the minimum standard of treatment").

[960] Mem. ¶ 518.

[961] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); *see also* United States-Chile Free Trade Agreement, ann. 10-A, June 6, 2003, State Dept. No. 04-35 ("The Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Articles 10.4 and 10.9 results from a general and consistent practice of States that they follow from a sense of legal obligation."); United States – Singapore Free Trade Agreement, Exchange of letters of May 6, 2003, State Dept. No. 04-36 (same); Dominican Republic – Central America – United States Free Trade Agreement, ann. 10-B, Aug. 5, 2004, State Dept. No. 06-63 (same).

[962] CLIVE PARRY, JOHN P. GRANT, ANTHONY PARRY & ARTHUR D. WATTS, ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 82 (1986); Statute of the International Court of Justice art. 38(1) (customary international law is "international custom, as evidence of a general practice accepted as law"); *Case of Nicaragua v. United States* (Merits), I.C.J. REP. 14 (1986) ("[F]or a new customary rule to be formed, not only must the acts concerned 'amount to settled practice,' but they must be accompanied by the *opinion juris sive necessitates*. Either the States taking such action or the other States in a position to react to it,

The customary international law minimum standard of treatment does not impose a duty on States to compensate any party who complains that a particular regulation or legislation is "unfair."[963] The exercise of regulatory or legislative powers in the context of shifting governmental policies and public interests will inevitably result in outcomes that may appear unfair to some. Rather, the minimum standard sets an absolute minimum *floor* of treatment, ensuring that States' treatment of aliens does not "fall[] below a civilized standard."[964]

Such a minimum standard of treatment is necessary where protections under treaty-based national treatment obligations do not adequately protect aliens because the host State treats it own nationals unjustly or egregiously, and accords aliens like treatment. As the *S.D. Myers* tribunal observed:

> The minimum standard of treatment provision of the NAFTA is similar to clauses contained in [bilateral investment treaties]. The inclusion of a 'minimum standard' provision is necessary to avoid what might otherwise be a gap. A government might treat an investor in a harsh, injurious and unjust manner, but do so in a way that is no different than the treatment inflicted on its own nationals. The 'minimum standard' is a *floor below which treatment of foreign investors must not fall*.[965]

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must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.'").

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

[964] Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 AM. SOC'Y OF INT'L L. PROC. 51, 58 (1939). Likewise, Glamis's contention that the minimum standard of treatment is a *relative* standard that varies according to the "levels of development of the host state" must be rejected. *See* Mem. ¶ 519. The OECD Working Paper, on which Glamis itself relies, explicitly provides that the international minimum standard under customary international law "is an 'absolute,' 'noncontingent' standard of treatment, . . . as opposed to the 'relative' standards embodied in 'national treatment' …." OECD Working Paper on Fair and Equitable Treatment (2004) 2 & 8 n.32. It "provid[es] for a minimum set of principles which States, *regardless of their domestic legislation and practices*, must respect when dealing with foreign nationals and their property." *Id.* at n.32 (emphasis added).

[965] *S.D. Myers, Inc. v. Canada*, 232 I.L.M. 408, First Partial Award ¶ 259 (Nov. 13, 2000) (emphasis added); *see also* J.C. Thomas, *Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators*, 17 ICSID REVIEW – FOR. INVEST. L.J. 21, 22-23 (2002) (citing E. Root, *The Basis for Protection to Citizens Residing Abroad*, 4 AM. J. INT'L L. 517 (1910)).

Sufficiently broad State practice and *opinio juris* have thus far coincided to establish minimum standards of State conduct in only a few areas. Article 1105(1) embodies, for example, the requirement to provide a minimum level of internal security and law and order, referred to as the customary international law obligation of full protection and security.[966] Similarly, Article 1105 recognizes that a State may incur international responsibility for a "denial of justice" where its judiciary administers justice to aliens in a "notoriously unjust"[967] or "egregious"[968] manner "which offends a sense of judicial propriety."[969] In addition, the most widely-recognized substantive standard applicable to legislative and rule-making acts in the investment context is the rule barring expropriation without compensation, but that obligation is particularized in the NAFTA under Article 1110.[970] In the absence of a customary international law rule governing

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[966] *See, e.g., Asian Agric. Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award ¶¶ 67-77 (June 27, 1990); *Am. Mfg. & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award ¶ 6.06 (Feb. 21, 1997).

[967] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 44 (2005) (citing IRIZARRY Y PUENTE, DENIAL OF JUSTICE at 406); *id.* at 4 ("[A] state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner."); *Chattin* case (U.S. v. Mex.), 4 R.I.A.A. 282, 286-87 (1927) ("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); D.P. O'CONNELL, INTERNATIONAL LAW 948 (2d ed. 1970) ("Bad faith and not judicial error seems to be the heart of" a denial of justice claim.).

[968] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 60 (2005) ("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.").

[969] *Loewen Group, Inc. v. United States of America*, 7 ICSID REP. 442, Award ¶ 132 (June 26, 2003) (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"). Claims for denial of justice may also arise with respect to administrative proceedings that are quasi-judicial in nature, although international law restraints on administrative action are even less strict. *See International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award ¶ 200 (Jan 26, 2006) ("As acknowledged by Thunderbird, the SEGOB proceedings should be tested against the standards of due process and procedural fairness applicable to administrative officials. *The administrative due process requirement is lower than that of a judicial process*.") (emphasis added); *see also id*. (noting that in the administrative context, mere procedural errors that may lead to a seemingly arbitrary or unfair result "do[] not attain the minimum level of gravity required under Article 1105 of the NAFTA").

[970] *See* ANDREAS H. ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 168 (1949) ("With regard to the legislative power, no general customary rule limiting the legislative power of

State conduct in a particular area, however, a State remains free to conduct its affairs as it deems appropriate.[971]

The burden is on the *claimant* to establish the existence of a rule of customary international law.[972] "The party which relies on a custom . . . must prove that this custom is established in such a manner that it has become binding on the other party."[973] The claimant also bears the burden of demonstrating that the State has engaged in conduct that has violated that rule.[974]

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[a] State to legislation not interfering with vested rights, or making internationally illegal, legislation infringing vested rights and therefore rendering a State internationally liable for it, has ever been shown to exist . . . . "; noting only substantive obligation to pay compensation for expropriation); 5 CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC 44-66 (1970) (extensive analysis of State responsibility for legislative acts that identifies three categories of legislative acts that implicate State responsibility: expropriation, promulgation of a law contrary to international agreements, and failure to promulgate a law required by international agreement or to abrogate a law inconsistent with an international agreement); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 178-196, ch. 2 intro. n. (1965) (extensive review of substantive principles of State responsibility for injury to aliens, in which sections 178-183 "relate to applications of this [international minimum] standard to the procedure followed by a state in the administration of justice, as distinct from the provisions of its substantive law;" remaining sections address expropriation, repudiation of contract and prohibition on gainful activity by aliens).

[971] *S.S. Lotus* (Fr. v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 18 (rejecting any implied '[r]restrictions upon the independence of States," and noting that States "enjoy a wide measure of discretion which is only limited in certain cases by prohibitive rules."); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 52 (July 8) ("State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.").

[972] *Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 200 (Aug. 27) (Judgment) (quoting *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20) (Judgment)) ("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."); NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 330 § 214 (6th ed. 1999) (burden is placed on the party "who relies on a custom to establish its existence and exact content") (translation from French by counsel); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 12 (5th ed. 1998) ("In practice the proponent of a custom has a burden of proof of the nature of which will vary according to the subject-matter and the form of the pleadings.").

[973] *Asylum (Colom. v. Peru)*, 1950 I.C.J., at 276.

[974] *See, e.g., Tradex Hellas S.A. v. Albania*, 14 ICSID REV. – FOREIGN INV. L.J. 197, 219 (Final Award Apr. 29, 1999) ("[I]t is the claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim . . . . A Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.") (internal quotation omitted); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 334 (1987) ("[T]he general principle [is] that the burden of proof falls upon the claimant . . . ."); *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, 42 I.L.M. 625, Award ¶ 177 (Dec. 16, 2002) ("[I]t is a generally accepted

ANNEX 146

CONFIDENTIAL INFORMATION REDACTED

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

GRAND RIVER ENTERPRISES SIX NATIONS, LTD., JERRY MONTOUR, KENNETH HILL AND ARTHUR MONTOUR, JR.,

Claimants/Investors,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

COUNTER-MEMORIAL OF RESPONDENT UNITED STATES OF AMERICA

Jeffrey D. Kovar
Assistant Legal Adviser
Lisa J. Grosh
Deputy Assistant Legal Adviser
Mark E. Feldman
Chief, NAFTA Arbitration
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UNITED STATES DEPARTMENT OF STATE
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December 22, 2008

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Thus, the key to interpreting the provisions of the NAFTA must be the text itself, as informed by the treaty's context, object, and purpose, only to the extent those additional sources are relevant to, and consonant with, the substantive provision at issue. This approach is grounded in the well-accepted principle that general objectives can shed light on treaty provisions, but cannot impose independent obligations on treaty signatories.[308]

Claimants cannot rely on general NAFTA objectives under Article 102 to transform the nature of national treatment and most-favored-nation obligations under Article 1102 and Article 1103. Given Claimants' failure to meet required elements under Article 1102 and Article 1103, both claims should be dismissed.

B. Claimants Fail To Establish That Their Alleged Investments Were Not Accorded The Minimum Standard of Treatment Under Article 1105

Article 1105, the minimum standard of treatment provision of NAFTA Chapter Eleven, obligates Parties to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." Claimants put forward several obligations which, they contend, are included within the minimum standard of treatment obligation under Article 1105.

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[308] *See Oil Platforms Case* (Iran v. U.S.), 1996 I.C.J. 803, ¶¶ 24-31 (Dec. 12, 1996) (rejecting Iran's suggestion that Article I of the Treaty of Amity, Economic Relations and Consular Rights of August 15, 1955, which provided for a "firm and enduring peace and sincere friendship" between the parties, conferred any independent obligations on the Parties; finding, rather, that such general language only "throw[s] light on the interpretation of the other Treaty provisions"); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 178-79 (1993) (holding that the "broad remedial goals" of the United Nations Protocol Relating to the Status of Refugees could not be interpreted to impose extraterritorial obligations on its signatories); WORLD TRADE ORGANIZATION, REPORT OF THE APPELLATE BODY NO. AB-1997-4, EC MEASURES CONCERNING MEAT AND MEAT PRODUCTS (HORMONES) ¶¶ 211-13, WTO DOC. NO. WT/DS26/AB/R (Jan. 16, 1998) (finding that the general objective in Article 5.5 of the Agreement on the Application of Sanitary and Phytosanitary measures of achieving "consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection" was a prospective goal that did not establish a legal obligation of consistency on Parties to the agreement).

Claimants then assert that such obligations have been violated in this case. As discussed below, Claimants fail on both counts.

NWS and Tobaccoville distribute and sell billions of Grand River-manufactured cigarettes throughout the United States. As an NPM, Grand River is not subject to the payment obligations or advertising restrictions that apply to participating manufacturers under the MSA. The escrow statutes adopted by all Settling States were intended to level the playing field between PMs and NPMs by imposing deposit obligations on NPMs that were roughly comparable to the payment obligations imposed on PMs under the MSA. Escrow payments under the original escrow statutes were subject to the allocable share release provision, which was premised on the assumption that NPMs sold cigarettes nationally.[309]

Grand River, like many NPMs, was able to exploit that assumption by concentrating its sales in a few Settling States and thereby obtain refunds of large portions of its escrow payments. As stated by Professor Gruber, the allocable share release "unintentionally skewed the competitive playing field dramatically in favor" of NPMs that concentrated their sales in a few Settling States.[310] The allocable share amendments restored the level playing field between PMs and NPMs by amending the release provision to foreclose the ability of NPMs to obtain refunds by concentrating their sales in only a few states.

Claimants assert that the allocable share amendments violated the customary international law minimum standard of treatment of aliens. But the allocable share amendments apply to all NPMs equally, and were adopted through open, democratic

[309] *See* Facts Sec. IV.

[310] Gruber Report ¶ 31.

processes in which both PMs and NPMs participated. Claimants operate in the highly-regulated tobacco industry. Given the plainly unanticipated loophole in the allocable share release provision, the amendment of that provision was both reasonable and predictable.

Faced with these facts, Claimants rest their Article 1105 claim on unsupported, and unsupportable, assertions. *First*, Claimants allege that the Settling States made the following "unilateral offer" to tobacco manufacturers: if opting not to sign the MSA, a manufacturer, as an NPM, would be "entitled" to obtain refunds on escrow payments "reflecting their proportionate share of the national market."[311] But the "entitlement" alleged by Claimants was in fact an unanticipated loophole that undermined the very purpose of the escrow statutes: to ensure an adequate source of funds for Settling States to satisfy any potential future tobacco-related judgments against NPMs.

Second, Claimants assert that they took "state officials . . . at their word" that the escrow statutes would provide a level playing field between "regional" NPMs and grandfathered SPMs operating on a national basis. This assertion is not only unsupported, but directly contrary to the basic assumption underlying the escrow statutes, that NPMs would sell their products nationally.[312]

In addition, as discussed above in connection with Claimants' Article 1102 and Article 1103 claims, the "discrimination" alleged by Claimants ultimately concerns the failure to accord Grand River special treatment, different from that accorded to all other NPMs. Specifically, Grand River seeks an exemption from deposit obligations that is not

[311] Mem. ¶ 203.

[312] *See* Facts Sec. IV.

available to any other NPM. But such an exemption is not justified by their status as members of Canadian First Nations.

Furthermore, the deposit obligations under the amended escrow statutes apply to Grand River, a Canadian exporter of cigarettes, which has no investment in the United States. Article 1105 obligates each Party to accord *investments* of investors of another Party treatment in accordance with the law minimum standard of treatment. The deposit obligations do not apply to any U.S. investment of Claimants, and thus cannot support a claim under Article 1105. Nevertheless, even if the escrow deposit obligations did apply to an investment of the Claimants in the United States, the minimum standard of treatment has not been violated with respect to such an investment.

This section responds to Claimants' arguments under Article 1105 as follows. *First*, the section provides an overview of the content of the minimum standard of treatment, as well as the requirements for demonstrating a rule of customary international law. *Second*, the section addresses how Claimants have failed to take such requirements into account when putting forward an alleged obligation not to frustrate an investor's "basic" expectations. *Third*, assuming *arguendo* the existence of Claimants' alleged "expectations" obligation, the section addresses Claimants' failure to support their particular expectations arguments with respect to the Jay Treaty, federal Indian law, and the regulatory environment for the tobacco industry. *Fourth*, with respect to Claimants' allegations of discrimination under Article 1105, the section refers back to the earlier analysis of Claimants' Article 1102 and Article 1103 claims, which observed that the "discrimination" alleged by Claimants ultimately concerns the failure to accord Grand River special treatment, different from the treatment accorded to all other NPMs. *Fifth*,

and finally, the section addresses Claimants' denial of justice claim, which fails because the challenged measures do not limit Claimants' access to U.S. courts. For the reasons set forth below, Claimants' Article 1105 claim should be dismissed in its entirety.

1. A Claim Under Article 1105(1) Must Arise From The Failure To Accord The Minimum Standard Of Treatment To An Alien's Investment

Article 1105(1) requires that "[e]ach Party shall accord to *investments* of investors of another Party treatment *in accordance with international law*, including fair and equitable treatment and full protection and security."[313] As the NAFTA Free Trade Commission ("FTC") confirmed in its 2001 interpretation, the scope of Article 1105(1) extends only to those investment protections that are recognized under customary international law:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to *investments* of investors of another Party.

2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).[314]

Under Article 1131, the FTC's interpretation "of a provision of this Agreement shall be binding on a Tribunal established under this Section."[315] In addition, NAFTA Chapter Eleven tribunals, as well as the Supreme Court of British Columbia, have

[313] NAFTA art. 1105(1) (emphasis added).

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

[315] NAFTA art. 1131(2).

recognized the authority of the interpretation.[316] Furthermore, "'an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.'"[317] Claimants do not dispute the valid and binding nature of the FTC interpretation.[318]

a. The Scope of Article 1105(1) Includes Only Protections Recognized Under The Minimum Standard of Treatment

As confirmed by the FTC interpretation, Article 1105(1) protects only the property rights and interests of aliens, *i.e.*, the "investments of investors," that are recognized under the minimum standard of treatment, which "provid[es] for a minimum

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[316] *See, e.g.*, *Int'l Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶¶ 192-93 (Jan. 26, 2006) ("*Int'l Thunderbird Gaming v. Mexico*, Award"); *Methanex v. United States of America*, Final Award, pt. IV, ch. C, ¶¶ 20-24 (noting that even if the interpretation had altered the meaning of Article 1105(1)—which it did not—it would nonetheless be "entirely legal and binding on a tribunal seized with a Chapter 11 case" under the terms of the Vienna Convention on the Law of Treaties); *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award ¶¶ 90-91 (Apr. 30, 2004) ("*Waste Mgmt. v. Mexico*, Award"); *Loewen Group v. United States*, Award ¶¶ 124-28; *ADF Group v. United States*, Award ¶¶ 175-78; *United Parcel Serv. of Am.,Inc. v. Gov't of Canada*, 7 ICSID Rep. 288, Award on Jurisdiction ¶ 97 (Nov. 22, 2002) ("*UPS v. Canada*, Award on Jurisdiction"); *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, 42 I.L.M. 85, Award ¶¶ 100-25 (Oct. 11, 2002) ("*Mondev v. United States*, Award"); *United Mexican States v. Metalclad Corp.*, 5 ICSID Rep. 236 ¶¶ 61-65 (Sup. Ct. B.C.) (May 2, 2001); Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INVEST. & TRADE 357, 362-63 (noting, *inter alia*, that Article 1105(1)'s text "suggest[s] that . . . fair and equitable treatment is part of international law, specifically of its rules on the minimum standard of treatment").

[317] *Methanex Corp. v. United States*, Final Award, pt. II, ch. B, ¶ 19 (quoting International Law Commission Report, vol. 2, at 221, and noting the ICJ's approval of this passage in the *Kasikili/Sedudu Island Case* (Bots. v. Namib.), 1999 I.C.J. Rep. 1045 ¶ 49). *See also* ROBERT JENNINGS & ARTHUR WATTS, 1 OPPENHEIM'S INTERNATIONAL LAW § 630 (9th ed. 1992) ("The parties to a treaty often foresee many of the difficulties of interpretation likely to arise in its application, and in the treaty itself define certain of the terms used. Or they may in some other way and before, during, or after the conclusion of the treaty, agree upon the interpretation of a term, either informally (and executing the treaty accordingly) or by a more formal procedure, as by an interpretive declaration or protocol or a supplementary treaty. Such authentic interpretations given by the parties override general rules of interpretation.") (footnotes omitted) (quoted with approval in the *Methanex v. United States* Final Award at pt. II, ch. H, ¶ 23); ARTHUR WATTS, 2 THE INTERNATIONAL LAW COMMISSION 1949-1998, PART TWO 688-89 (1999) (Commentary to final draft article 27) (same); *see also* Campbell McLachlan, *The Principle of Systemic Integration & Art. 31(3)(C) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279, 287 (2005) ("For much of the time, interpretation of contracts and treaties alike will be a matter of ascertaining and giving effect to the intention of the parties by reference to the words they have used.").

[318] *See* Mem. ¶ 154 (citing the FTC interpretation with approval).

set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property."[319] As such, this standard establishes an absolute minimum "floor below which treatment of foreign investors must not fall."[320]

Currently, this "floor" defines certain categories of treatment that thereby constitute the protection accorded to investments under Article 1105(1). One such category is a State's obligation to prevent a "denial of justice," which arises, for example, when its judiciary administers justice to aliens in a "notoriously unjust"[321] or "egregious"[322] manner "which offends a sense of judicial propriety."[323] Another such standard is a State's responsibility to provide a minimum level of internal security and law and order, which is found in the customary international legal obligation to accord

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[319] OECD DIRECTORATE FOR FIN. AND ENTER. AFFAIRS, WORKING PAPERS ON INTERNATIONAL INVESTMENT NO. 2004/3, FAIR AND EQUITABLE TREATMENT STANDARD IN INTERNATIONAL INVESTMENT LAW 8 n. 32 (2004) ("OECD WORKING PAPER ON FAIR AND EQUITABLE TREATMENT").

[320] *S.D. Myers v. Canada*, First Partial Award ¶ 259; *see also* Edwin Borchard, *The 'Minimum Standard' of the Treatment of Aliens*, 33 AM. SOC'Y OF INT'L PROC. 51, 58 (1939). Likewise, the OECD Working Group on Fair and Equitable Treatment expressly recognized that the minimum standard of treatment of foreign direct investment under customary international law "is an 'absolute,' 'non-contingent' standard of treatment, . . . as opposed to the 'relative standards' embodied in 'national treatment' . . . ." OECD WORKING PAPER ON FAIR AND EQUITABLE TREATMENT 2, 8 n.32.

[321] Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 44 (2005) (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* (U.S. v. Mex.), 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); D.P. O'Connell, 2 INTERNATIONAL LAW 948 (2d ed. 1970) ("Bad faith and not judicial error seems to be the heart of" a denial of justice claim) (footnotes omitted).

[322] Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 60 (2005) ("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.").

[323] *Loewen Group v. United States*, Award ¶ 132 (a denial of justice may arise where there has occurred a "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety").

"full protection and security" to investments of investors.[324] The minimum standard of treatment also bars direct and indirect expropriation without prompt, adequate, and effective compensation.[325] NAFTA Chapter Eleven, however, sets out the expropriation obligation in its own provision, Article 1110.

The NAFTA Parties agreed that the minimum standard of treatment obligation under Article 1105(1) would extend only to the "investments of investors of another Party," *i.e.*, the foreign investor's economic stake in the host State. Thus the treatment accorded to matters other than a foreign investor's investment in the host State cannot support a claim under Article 1105(1). This limitation is consistent with the commentary to the OECD Draft Convention on the Protection of Foreign Property, which states that the minimum standard of treatment reflects the "well-established general principle of international law that a State is bound to respect and protect the *property* of nationals of other States."[326]

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[324] *See, e.g., Asian Agric. Prods., Ltd. v. Rep. of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award ¶¶ 85-86 (June 27, 1990) (finding that Sri Lanka violated the full protection and security obligation under the minimum standard when it failed to take measures which would have prevented harm to farm in the course of counter-insurgency); *Am. Mfg. & Trading, Inc. v. Zaire*, ICSID Case No. ARB/93/1, Award ¶ 6 (Feb. 21, 1997) (explaining that the obligation to provide full protection and security under international law makes it incumbent upon the State receiving an investment to "take all measures necessary" to ensure the physical security of an investment and finding that Zaire violated that obligation when it failed to prevent looting of American Manufacturing's property).

[325] *See, e.g.*, OECD DIRECTORATE FOR FIN. AND ENTER. AFFAIRS, WORKING PAPERS ON INTERNATIONAL INVESTMENT NO. 2004/4, "INDIRECT EXPROPRIATION" AND THE "RIGHT TO REGULATE" IN INTERNATIONAL INVESTMENT LAW at 2 (2004) ("It is a well recognized rule of international law that the property of aliens cannot be taken, whether for public purposes or not, without adequate compensation ."); G.C. Christie, *What constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT'L L. 307, 307 (1962) (examining "the question of what constitutes a taking of the kind that brings into operation the widely recognized rule of international law that the property of aliens cannot normally be taken, whether for public purpose or not, without adequate compensation"); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 535-36 (5TH ED. 1998) ("The rule supported by all leading 'Western' governments and many jurists in Europe and North America is as follows: the expropriation of alien property is lawful if prompt, adequate, and effective compesation is provided for.").

[326] OECD Draft Convention on the Protection of Foreign Property, Oct. 12, 1967, *reprinted in* 7 I.L.M. 117 (1968) (emphasis added). Likewise, the 2004 U.S. Model BIT recognizes that the customary international law minimum standard of treatment "refers to all customary international law principles that protect the

Furthermore, because the minimum standard of treatment sets an absolute minimum "floor below which treatment of foreign investors must not fall,"[327] that floor cannot provide special treatment for particular classes of investors or investments.

Finally, as provided in the FTC interpretation, a "determination that there has been a breach … of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."[328] The investor-State dispute resolution provisions of Chapter Eleven do not provide a forum for enforcing rights that a claimant may have under other international agreements.[329] Nor can Claimants import obligations indirectly from separate international legal instruments by characterizing those obligations as "relevant rules of international law" for purposes of interpreting Article 1105(1).[330] "[R]elevant rules of international law" under Article 31(3)(c) of the Vienna Convention cannot override a treaty provision, much less a treaty provision that has been expressly interpreted by the Parties.[331] Claimants' attempt to the contrary should be rejected.

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economic rights and interests of aliens." 2004 Model BIT, Annex A (emphasis added). Recent Bilateral Investment Treaties ("BITs") and Free Trade Agreements ("FTAs") signed by the United States have included the same language. *See*, *e.g.*, U.S.-Uru. Bilateral Investment Treaty, Nov. 4, 2008, Annex A; U.S.-Rwanda Bilateral Investment Treaty, Feb. 19, 2008, Annex A; U.S.-S. Korea Free Trade Agreement, June 30, 2007, Annex 11-A. *See also* Alireza Falstafi, *The International Minimum Standard of Treatment of Foreign Investors' Property: A Contingent Standard*, 30 SUFFOLK TRANSNAT'L L. REV. 317, 356-57 (2007) ("The minimum standard of treatment must operate within the framework of international rules regarding the treatment of foreign investment or property" or risk creating a standard that could "accommodate *any* claim of responsibility for injury." Such an approach "is vulnerable to the substitution of the subjective perception of the observer for the international law on the treatment of foreign investors' property.").

[327] *See S.D. Myers*, *supra* n. 320, ¶259.

[328] FTC Interpretation ¶ B(3).

[329] *See Mondev v. United States*, Award ¶ 121 ("If there had been an intention to incorporate by reference extraneous treaty standards in Article 1105 and to make Chapter 11 arbitration applicable to them, some clear indication of this would have been expected.").

[330] *See* Vienna Convention art. 31(3)(c) ("any relevant rules of international law applicable in the relations between the parties" shall be taken into account when interpreting a treaty provision, together with the treaty's context).

[331] *See, e.g.*, Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUR. J. INT'L L. 529, 537 (2003) ("Relevant

In sum, Article 1105(1) affords the investments of investors only the customary international law minimum standard of treatment of aliens—no more and no less.

b. The Obligations Alleged By Claimants, Which They Have Not Shown To Be Included Within The Minimum Standard Of Treatment, Were In Any Case Not Violated Here

Claimants attempt to derive two broad minimum standard of treatment obligations from the international legal principle of "good faith," which they hope to insert within the minimum standard of treatment: (i) a prohibition against frustrating an investor's "basic" expectations about the regulatory environment and other specific legal obligations that were in place when the investor chose to invest and (ii) a general prohibition on discrimination against foreign investors.[332] Claimants fail to demonstrate that such alleged obligations are part of the minimum standard of treatment. Specifically, Claimants fail to establish that their alleged obligations are supported by (i) consistent state practice; and (ii) *opinio juris*, or an understanding that such practice is required by law.[333] Even if Claimants were able to establish such obligations, however, such obligations have not been violated in this case.

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rules" under Article 31(3)(c) may not, generally speaking, override or limit the scope or effect of a provision for whose clarification they are referred."); *RosInvestCo UK Ltd. v. Russian Fed.* SCC Case No. V079/2005, Award on Jurisdiction ¶ 39 (Oct. 1, 2007) (observing that Article 31(3)(c) should not "amount to a general licence to override" terms of a treaty).

[332] *See* Mem. ¶¶ 161-68, 178.

[333] *See Continental Shelf Case* (Libya v. Malta), 1985 I.C.J. Rep. 13, 29 (June 3, 1985) ("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 . . . ."); *Military and Paramilitary Activities in and Against Nicaragua Case* (Nicar. v. U.S.), 1986 I.C.J. 14 , 108-09 (Nov. 26, 1986) ("[F]or a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice,' but they must be accompanied by the opinio juris sive necessitates. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.'"); *see also* CLIVE PARRY ET AL., ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 81-82 (1986) (customary international legal rule emerges from "a concordant

When arguing that the "principle of good faith" is part of the minimum standard of treatment, Claimants mischaracterize the role of "good faith" under customary international law.[334] "The principle of 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*."[335] As such, customary 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.[336] Claimants submit no evidence of State practice or *opinio juris* to contradict this well-

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practice of a number of States acquiesced in by others; and a conception that the practice is required by or consistent with the prevailing law (the *opinio juris*)").

The party relying on custom "must prove that this custom is established in such a manner that it has become binding on the other Party," *Asylum Case* (Colom. v. Peru), Judgment, 1950 I.C.J. Rep. 266, 276 (Nov. 20, 1950). The relevant state practice "should have been both extensive and virtually uniform in the sense of the provision invoked; -- and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved." *North Sea Continental Shelf Cases* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 43, ¶ 74 (Feb. 20, 1969). Once the claimant has demonstrated a particular custom, the claimant must then show that the State has engaged in conduct that violated the applicable rule. *See, e.g.*, *Tradex Hellas S.A. v. Albania*, ICSID Case No. ARB/94/2, Final Award ¶ 74 (Apr. 29, 1999) ("[I]t is the claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim. … A Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.") (internal quotation omitted); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 334 (1987) ("[T]he general principle [is] that the burden of proof falls upon the claimant …."); *Feldman v. Mexico*, 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."). *See also* NGUYEN QUOC DINH, PATRICK DALLIER & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 334-35 § 214 (7th ed. 2002) (burden is placed on the party "who relies on a custom to establish its existence and exact content") ("qui s'appuie sur une coutume d'en établir l'existence et la portée exacte") (translation from French by counsel); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 12 (6th ed. 2003) ("In practice the proponent of a custom has a burden of proof the nature of which will vary according to the subject-matter and the form of the pleadings.").

[334] *See* Mem. ¶¶ 161-63, 171-74.

[335] *Border and Transborder Armed Actions Case* (Nicar. v. Hond.), 1988 I.C.J. Rep. 69, 105, ¶ 94 (Dec. 20, 1988) (emphasis added).

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

settled rule.[337] Claimants' attempt to characterize the international law principle of good faith as a free-standing obligation should be rejected.[338]

Furthermore, Claimants' attempts to derive "expectations" and discrimination obligations from the principle of "good faith" are equally unsound. A general principle of international law that does not impose any substantive obligations on a State toward foreign investors cannot itself create *additional* State obligations toward such investors. Even if such additional obligations could be read into the minimum standard of treatment, however, Claimants have failed to show that the minimum standard of treatment protects a foreign investor's "basic" expectations, whether it be to a "transparent and predictable business and regulatory environment,"[339] certain treatment under the Jay Treaty;[340] or U.S. federal Indian law.[341] Likewise, Claimants have failed to demonstrate that the minimum standard of treatment provides a blanket prohibition against discrimination

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[337] The arbitral decisions on which Claimants rely do not find good faith to be a free-standing obligation under customary international law. *See, e.g.*, *Sempra Energy Int'l v. Argentine Rep.*, ICSID Case No. ARB/02/16, Award ¶ 298 (Sept. 28, 2007) (referring to the "good faith requirement" in the context of an existing treaty obligation of fair and equitable treatment); *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award ¶ 308 (Feb. 6, 2007) (finding that the "fair and equitable treatment" obligation includes a "principle of good faith"); *Tecmed v. Mexico*, Award ¶ 154 (analyzing existing treaty obligation of fair and equitable treatment "in light of the good faith principle established by international law").

[338] Claimants similarly fail to establish a free-standing obligation under the rule of *pacta sunt servanda* – that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention art. 26; *see also* Report of the International Law Commission Covering Its 16th Session, 727th Meeting, 20 May 1964, [1964] 1 Y.B. INT'L L. COMM'N 27-32, ¶ 70, U.N. Doc. A/CN.4/SER.A/1964 ("[A] treaty must be applied and observed not merely according to its letter, but in good faith" including "abstain[ing] from acts which would inevitably affect [the Parties'] ability to perform the treaty."). A rule of treaty interpretation, *pacta sunt servanda* cannot be transformed into an open-ended source for claimants to import other international obligations. In support of their argument, Claimants rely on the Separate Opinion of Judge Cancado Trindade in *Hilaire, Constantine, and Benjamin v. Trindidad and Tobago*, Series C No. 94 [2002] IACHR 4 (June 21, 2002). But that Separate Opinion addressed the rule of *pacta sunt servanda* in the context of Trinidad and Tobago's fulfillment of "the international obligations that it has assumed." *See id.* ¶ 43.

[339] *See* Mem. ¶¶ 164-68, 202-12.

[340] *See* Mem. ¶¶ 220-29.

[341] *See* Mem. ¶¶ 220-29.

against foreign investors.[342] Finally, even if such obligations were protected by the minimum standard of treatment, Claimants fail to demonstrate that their claims would prevail.

2. The Minimum Standard Of Treatment Does Not Obligate States To Protect An Investor's Expectations

Contrary to Claimants' assertions,[343] States are not obligated to protect a foreign investor's expectations—legitimate or otherwise—under the minimum standard of treatment.[344]

Notably, as a factual matter and contrary to their assertions, Claimants could not possibly have had any "legitimate expectation" that the allocable share release mechanism under the original escrow statutes would not be amended. Under the original escrow statutes, for NPM sales in 2003, NPMs obtained releases of approximately $137 million dollars (out of approximately $236 million in escrowed funds).[345] Such a shortfall of available funds for Settling States to satisfy potential future tobacco-related judgments against NPMs plainly was unsustainable. As discussed below, the allocable share amendments were both reasonable and predictable.

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.[346] Even if, unlike in this case, Claimants had

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[342] *See* Mem. ¶¶ 179-92.

[343] *See* Mem. ¶¶ 161-63.

[344] Claimants' arguments with respect to their alleged open-ended discrimination obligation under Article 1105 are addressed in Merits-Liability Sec. II.B.3 below.

[345] Hering Declaration ¶ 3.

[346] *CMS Gas Transmission v. Argentine Rep.*, ICISD No. ARB/01/8, Annulment Proceeding, ¶ 89 (Sept. 25, 2007) ("Although legitimate expectations might arise by reason of a course of dealing between the investor and the host State, these are not, as such, legal obligations.").

entered into a contractual relationship with the Settling States, a mere breach of contract cannot, by itself, amount to a breach of the minimum standard of treatment.[347] To breach the minimum standard of treatment, something more is required, such as a complete repudiation of the contract or a denial of justice in the execution of the contract.[348] NAFTA Chapter Eleven tribunals recognize this point.[349]

Similarly, Claimants' assertion that a foreign investor's "detrimental reliance" on the investment climate of a host State can violate the minimum standard of treatment

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[347] *See SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction ¶ 167 (Aug. 6, 2003) (noting "the widely accepted principle . . . that under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law"); *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction ¶ 122 (Jan. 29, 2004) (citing *SGS v. Pakistan* with approval); *Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, art. 4, cmt. ¶ 6, 53rd Sess. [2001] 2:2 Y.B. INT'L L. COMM'N 40, U.N. Doc. A/56/10 ("Of course the breach by a State of a contract does not as such entail a breach of international law."); F.V. García-Amador, Special Rapporteur, *International Responsibility: Fourth Report*, [1959] 2 Y.B. INT'L L. COMM'N 30, ¶ 123, U.N. Doc. A/CN.4/119 (Feb. 26, 1959) ("Diplomatic practice and international case-law have traditionally accepted almost as dogma the idea that the mere non-performance by a State of its obligations under a contract with an alien individual does not in itself necessarily give rise to international responsibility."); F. A. Mann, *State Contracts and State Responsibility*, 54 AM. J. INT'L L. 572, 578 (1960) (pointing out that no States other than Switzerland and France have adopted the view that mere contractual breaches give rise to a breach of international law and that the United States "has, for more than a century and a half, been clearly opposed to it").

[348] *See Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 4, cmt. ¶ 6, 53rd Sess. [2001] 2:2 Y.B. INT'L L. COMM'N 40, U.N. Doc. A/56/10 ("Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party."); *Compañía de Aguas del Aconquija S.A. v. Argentine Rep.*, ICSID Case No. ARB/97/3, Decision on Annulment ¶ 110 n.78 (July 3, 2002) ("*Vivendi II*") (explaining that the determination of whether particular conduct violates a treaty cannot be satisfied by an examination of that conduct in context of contractual rights and duties alone; also citing ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW 927 (9th ed. 1992): "It is doubtful whether a breach by a state of its contractual obligations with aliens constitutes per se a breach of an international obligation, unless there is some additional element as denial of justice, or expropriation, or breach of treaty, in which case it is that additional element which will constitute the basis for the state's international responsibility.").

[349] *See Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award ¶ 87 (Nov. 1, 1999) ("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 Mgmt. V. Mexico*, 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").

cannot withstand scrutiny.[350] Claimants provide no evidence of State practice establishing such an obligation. In fact, tribunals discussing state practice confirm the opposite; namely, that a State acting in its sovereign capacity does not incur liability for an investor's purported detrimental reliance on the state of the business or regulatory climate in which it invests. The *Methanex* panel, for example, rejected claimant's argument that it was entitled to the preservation of the preferences it had received for access in the MTBE market because "the very market for MTBE in the United States was the result of precisely this [the MTBE] regulatory process."[351]

The weakness of Claimants' "expectations" theory is further illustrated by the principal authority on which they rely for support. Claimants place particular weight on the *Tecmed v. Mexico* award,[352] but that decision has been criticized for exceeding the scope of international obligations that bind States. As the *ad hoc* tribunal in the *MTD Equity v. Chile* annulment observed, "the *TECMED* Tribunal's apparent reliance on the foreign investor's expectations as the host State's obligations … is questionable" because "[t]he obligations of the host State towards foreign investors derive from the terms of the

[350] *See* Mem. ¶¶ 161-63.

[351] *Methanex Corp. v. United States*, Final Award, pt. IV, ch. D ¶ 9. Similarly, the Permanent Court of International Justice concluded in the *Oscar Chinn* case that a State's business and regulatory regime does not create "vested rights," *i.e.*, actionable rights, that would prevent a State from changing its regulatory environment to meet new needs or address economic problems. *See Oscar Chinn Case*, 1934 P.C.I.J. (Ser. A/B) No. 63, at 88-89 (Dec. 12, 1934) (rejecting British claim of violation of "general principles of international law" of "vested rights" on behalf of national) ("Favourable business conditions and goodwill are transient circumstances, subject to inevitable changes . . . [when industries are] exposed to the danger of ruin or extinction if circumstances change . . . no vested rights are violated by the State."); s*ee also* G. Kaeckenbeeck, *The Protection of Vested Rights in International Law*, 17 BRIT. Y.B. INT'L L. 1, 2-3 (1936) (noting that the "liberty to embark upon industry or commercial activity" was not a "vested right"); *see also id.* at 3 ("By vested right, however, is not as a rule here meant every legal relation of a determinate person. Abstract faculties or qualities of all men or of whole classes of men, *as well as expectations founded on the law*, are not vested rights, and are normally destroyed by a new law.").

[352] *Tecmed v. Mexico*, Award, *supra* note 246.

applicable investment treaty and not from any set of expectations investors may have or claim to have."[353]

Claimants submit no evidence of State practice establishing a legal obligation not to frustrate an investor's expectations formed at the time the investor made its investment. State practice, in fact, tends to support the opposite view. As Claimants acknowledge,[354] under customary international law, States may regulate to achieve legitimate objectives to benefit the public welfare and will not incur liability solely because the change interferes with an investor's "expectations" about the state of the business environment.[355] The protection of public health falls squarely within that regulatory authority under international law.[356]

As the *S.D. Meyers* tribunal recognized, the determination of a breach of the obligation of 'fair and equitable treatment' by the host State "must be made in the light of the high measure of deference that international law generally extends to the right of

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[353] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment ¶ 67 (Mar. 21, 2007).

[354] *See* Mem. ¶ 154 (recognizing that the minimum standard of treatment obligation under Article 1105 "requires due respect for the right of a sovereign State to regulate in the best interests of its citizens").

[355] *Feldman v. Mexico*, Award ¶ 112 ("Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social consideration. Those changes may well make certain activities less profitable or even uneconomic to continue.").

[356] *See, e.g.*,LOUIS B. SOHN AND R.R. BAXTER, CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS, FINAL DRAFT WITH EXPLANATORY NOTES, ART. 10(5) (1961), REPRINTED IN F.V. GARCÍA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 204-05 (1974) ("An uncompensated taking of an alien property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health, and morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful."); *see also* OECD Draft Convention on the Protection of Foreign Property, Oct. 12, 1967, *reprinted in* 7 I.L.M. 117, accompanying note to Article 3 ("Article 3 acknowledges, by implication, the sovereign right of a State, under international law, to deprive owners, including aliens, of property which is within its territory in the pursuit of its political, social,or economic ends. To deny such a right would be [to] attempt to interfere with its powers to regulate – by virtue of its independence and autonomy, equally recognized by international law – its political and social existence.").

domestic authorities to regulate matters within their own borders."[357] As such, a host State is accorded "wide discretion with respect to how it carries out [its public welfare] policies by regulation" and is free to change such policies to address legitimate public needs.[358] Tribunals are consequently reluctant to second-guess decisions made by State officials because "[g]overnments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive."[359] None of Claimants' authorities contradicts these principles.

a. Claimants Fail To Demonstrate Any Obligation To Provide Investors With A "Transparent And Predictable Business And Regulatory Climate" Under The Minimum Standard Of Treatment

Claimants fail to demonstrate that the minimum standard of treatment obligates States to provide a "transparent" and "stable" or "predictable" regulatory environment.[360] The authorities cited by Claimants do not demonstrate that "transparency" is protected by the minimum standard of treatment.[361] Claimants' main support for a "transparent" regulatory environment, *Metalclad v. Mexico*,[362] has been set aside on this precise point by the Supreme Court of British Columbia. The Court found that Metalclad had failed to

[357] *S.D. Myers v. Canada*, First Partial Award ¶ 263.

[358] *Int'l Thunderbird Gaming v. Mexico*, Award ¶ 127.

[359] *S.D. Myers v. Canada*, First Partial Award ¶ 261

[360] Mem. ¶¶ 200(a), 202-12.

[361] Similarly, Claimants point to no case interpreting the minimum standard of treatment or identifying State practice that establishes an obligation to provide an investor with a "predictable" regulatory environment.

[362] *United Mexican States v. Metalclad Corp.*, 5 ICSID REP. 236 ¶ 70 (Sup. Ct. B.C.) (May 2, 2001).

introduce any evidence of any kind "to establish that transparency has become a part of customary international law" and held that the *Metalclad* tribunal had exceeded its authority because it had "misstated the applicable law to include transparency obligations and then made its decision on the basis of the concept of transparency."[363] By comparison, NAFTA tribunals that have rejected the notion of transparency as an element of customary international law have based their conclusion on State practice and are, as such, more persuasive authorities for interpreting the scope of Article 1105(1).[364]

Indeed, the NAFTA itself, in Chapter Eighteen, imposes specific transparency obligations that are limited to publication, notification and provision of information, administrative proceedings, and review and appeal.[365] Claims that a Party has violated one of these Chapter Eighteen obligations may not be brought by individuals but must be resolved on a State-by-State basis under Chapter Twenty.[366] Moreover, as confirmed by the binding FTC interpretation, a "breach of another provision of the NAFTA does not establish that there has been a breach of Article 1105(1)."[367]

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[363] *Id. See also* OECD DIRECTORATE FOR FIN. AND ENTER. AFFAIRS, WORKING PAPERS ON INTERNATIONAL INVESTMENT NO. 2004/3, FAIR AND EQUITABLE TREATMENT STANDARD IN INTERNATIONAL INVESTMENT LAW at 37 (2004) (concluding that "[i]n a few cases, Arbitral Tribunals have defined "fair and equitable treatment" drawing upon a relatively new concept *not generally considered a customary international law standard: transparency*") (emphasis added).

[364] *See, e.*g., *S.D. Myers, Inc. v. Canada*, First Partial Award (Sep. Op. by B. Schwartz (concurring in part)) ¶ 241 (Nov. 13, 2000) (noting the "absence of evidence" of acceptance "by states throughout the world" supporting the proposition that "transparency in the making of regulations is part of general international law"); *Feldman v.Mexico*, Award ¶ 133 ("[I]t is doubtful that lack of transparency alone rises to the level of violation of NAFTA and international law.").

[365] *See* NAFTA arts. 1802-1805.

[366] *See* NAFTA arts. 2004-2019.

[367] FTC interpretation, ¶B(3).

ANNEX 147

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

S.D. Myers, Inc.
(Claimant)

-and-

Government of Canada
(Respondent)

PARTIAL AWARD

CONTENTS

CHAPTER VIII

DID THE MEASURE RELATE TO AN INVESTMENT?

233. Article 1101 of the NAFTA states:

> *Scope and Coverage*
>
> *This Chapter applies to measures adopted or maintained by a Party relating to:*
>
> *(a) investors of another Party;*
>
> *(b) investments of investors of another Party in the territory of the Party; and*
>
> *(c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.*

234. In this case, the requirement that the import ban be "in relation" to SDMI and its investment in Canada is easily satisfied. It was the prospect that SDMI would carry through with its plans to expand its Canadian operations that was the specific inspiration for the export ban. It was raised to address specifically the operations of SDMI and its investment.

235. That is sufficient to dispose of the "relating to" requirement for the immediate purpose of determining liability in this case.

236. CANADA also took the position that the requirement was not met because the measure concerned trade in goods. This contention is dealt with separately in the context of the relationship between Chapter 11 and other chapters of the NAFTA.

CHAPTER IX

DID CANADA COMPLY WITH ITS NAFTA CHAPTER 11 OBLIGATIONS?

237. In this Chapter the Tribunal reviews the merits of SDMI's claims under four separate provisions of Chapter 11 of the NAFTA.

Article 1102 (National Treatment)

238. SDMI claims that CANADA denied it "national treatment", contrary to Article 1102. Article 1102(1) states:

> *Each Party shall accord to investors of another Party treatment no less favorable than it accords, in like circumstances, to its own investors, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

239. Article 1102(2) is identical, except that it refers to "investments", rather than "investors":

> *Each Party shall accord to investments of investors of another Party treatment no less favorable than it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

240. Article 1102(3) addresses the obligations of "sub-national" authorities - local states or provinces - and states that in that context the relevant comparison is between the treatment accorded to an investment or an investor and the best treatment accorded to investments or investors within the jurisdiction of the sub-national authority:

> *The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or a province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or*

province to investors, and to the investments of investors, or the Party of which it forms a part.[43]

241. CANADA argues that the Interim Order merely established a uniform regulatory regime under which all were treated equally. No one was permitted to export PCBs, so there was no discrimination. SDMI contends that Article 1102 was breached by a ban on the export of PCBs that was not justified by *bona fide* health or environmental concerns, but which had the aim and effect of protecting and promoting the market share of producers who were Canadians and who would perform the work in Canada.

242. CANADA's submission is one dimensional and does not take into account the basis on which the different interests in the industry were organized to undertake their business.

"Like Circumstances"

243. Articles 1102(1) and 1102(2) refer to treatment that is accorded to a Party's own nationals "in like circumstances". The phrase "like circumstances" is open to a wide variety of interpretations in the abstract and in the context of a particular dispute.

244. WTO dispute resolution panels, and its appellate body, frequently have been required to apply the concept of "like products". The case law has emphasized that the interpretation of "like" must depend on all the circumstances of each case. The case law also suggests that close attention must be paid to the legal context in which the word "like" appears; the same word "like" may have different meanings in different provisions of the GATT. In *Japan - Alcoholic Beverages*, WT/DS38/AB/R, the Appellate Body stated at paragraphs 8.5 and 8.6:

[the interpretation and application of "like"] is a discretionary decision that must be made in considering the various characteristics of products

[43] Article 1102(4) appears to be of little relevance to the current discussion. It confirms that a state cannot require that a minimum level of equity in an enterprise in its territory be held by its own nationals, and that an investor of another Party cannot be required to sell or otherwise dispose of its investment in the territory of the Party.

> *in individual cases. No one approach to exercising judgment will be appropriate for all cases. The criteria in [an earlier case], Border Tax Adjustments should be examined, but there can be no one precise and absolute definition of what is "like". The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which the provisions may apply.*

245. In considering the meaning of "like circumstances" under Article 1102 of the NAFTA, it is similarly necessary to keep in mind the overall legal context in which the phrase appears.

246. In the GATT context, a *prima facie* finding of discrimination in "like" cases often takes place within the overall GATT framework, which includes Article XX (General Exceptions). A finding of "likeness" does not dispose of the case. It may set the stage for an inquiry into whether the different treatment of situations found to be "like" is justified by legitimate public policy measures that are pursued in a reasonable manner.

247. The Tribunal considers that the legal context of Article 1102 includes the various provisions of the NAFTA, its companion agreement the NAAEC and principles that are affirmed by the NAAEC (including those of the Rio declaration). The principles that emerge from that context, to repeat, are as follows:

- states have the right to establish high levels of environmental protection. They are not obliged to compromise their standards merely to satisfy the political or economic interests of other states;
- states should avoid creating distortions to trade;
- environmental protection and economic development can and should be mutually supportive.

248. As SDMI noted in its Memorial, all three NAFTA partners belong to the OECD. OECD practice suggests that an evaluation of "like situations" in the investment context should

take into account policy objectives in determining whether enterprises are in like circumstances. The OECD Declaration on International and Multinational Enterprises, issued on June 21, 1976, states that investors and investments should receive treatment that is *…no less favorable than that accorded in like situations to domestic enterprises*. In 1993 the OECD reviewed the "like situation" test in the following terms:

> *As regards the expression 'in like situations', the comparison between foreign-controlled enterprises is only valid if it is made between firms operating in the same sector. More general considerations, such as the policy objectives of Member countries could be taken into account to define the circumstances in which comparison between foreign-controlled and domestic enterprises is permissible inasmuch as those objectives are not contrary to the principle of national treatment.*

249. The Supreme Court of Canada has explored the complexity of making comparisons as it has developed its line of decisions on discrimination against individuals. In the *Andrews* case, the Court stated that the question of whether or not discrimination exists cannot be determined by applying a purely mechanical test whether similarly situated individuals are treated in the same manner. Whether individuals are "similarly situated", and have been treated in a substantively equal manner, depends on an examination of the context in which a measure is established and applied and the specific circumstances of each case.[44]

250. The Tribunal considers that the interpretation of the phrase "like circumstances" in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of "like circumstances" must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest. The concept of "like circumstances" invites an examination of whether a non-national investor complaining of less favourable treatment is in the same "sector" as the national investor. The Tribunal

[44] [1989] 1 S.C.R. 143, at paragraphs 27 to 31. Decisions of U.S. courts are to a similar effect. Although domestic law is not controlling in Chapter 11 disputes, it is not inappropriate to consider how the domestic laws of the parties to the dispute address an issue.

takes the view that the word "sector" has a wide connotation that includes the concepts of "economic sector" and "business sector".

251. From the business perspective, it is clear that SDMI and Myers Canada were in "like circumstances" with Canadian operators such as Chem-Security and Cintec. They all were engaged in providing PCB waste remediation services. SDMI was in a position to attract customers that might otherwise have gone to the Canadian operators because it could offer more favourable prices and because it had extensive experience and credibility. It was precisely because SDMI was in a position to take business away from its Canadian competitors that Chem-Security and Cintec lobbied the Minister of the Environment to ban exports when the U.S. authorities opened the border.

National treatment and protectionist motive or intent.

252. The Tribunal takes the view that, in assessing whether a measure is contrary to a national treatment norm, the following factors should be taken into account:

- whether the practical effect of the measure is to create a disproportionate benefit for nationals over non nationals;
- whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty.

253. Each of these factors must be explored in the context of all the facts to determine whether there actually has been a denial of national treatment.

254. Intent is important, but protectionist intent is not necessarily decisive on its own. The existence of an intent to favour nationals over non-nationals would not give rise to a breach of Chapter 1102 of the NAFTA if the measure in question were to produced no adverse effect on the non-national complainant. The word "treatment" suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11.

255. CANADA was concerned to ensure the economic strength of the Canadian industry, in part, because it wanted to maintain the ability to process PCBs within Canada in the future. This was a legitimate goal, consistent with the policy objectives of the Basel Convention. There were a number of legitimate ways by which CANADA could have achieved it, but preventing SDMI from exporting PCBs for processing in the USA by the use of the Interim Order and the Final Order was not one of them. The indirect motive was understandable, but the method contravened CANADA's international commitments under the NAFTA. CANADA's right to source all government requirements and to grant subsidies to the Canadian industry are but two examples of legitimate alternative measures. The fact that the matter was addressed subsequently and the border re-opened also shows that CANADA was not constrained in its ability to deal effectively with the situation.

256. The Tribunal concludes that the issuance of the Interim Order and the Final Order was a breach of Article 1102 of the NAFTA.

257. The consequences of the Tribunal's determination in relation to Article 1102 of the NAFTA are considered later.

Article 1105

258. SDMI submits that CANADA treated it in a manner that was inconsistent with Article 1105(1) of the NAFTA. Entitled "Minimum Standard of Treatment", it reads as follows:

> *Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.*

259. The minimum standard of treatment provision of the NAFTA is similar to clauses contained in BITs. The inclusion of a "minimum standard" provision is necessary to avoid what might otherwise be a gap. A government might treat an investor in a harsh, injurious and unjust manner, but do so in a way that is no different than the treatment inflicted on its own

nationals. The "minimum standard" is a floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner.

260. The US-Mexican Claims Commission noted in the *Hopkins* case that:

> *It not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal laws...The citizens of a nation may enjoy many rights which are withheld from aliens, and conversely, under international law, aliens may enjoy rights and remedies which the nation does not accord to its own citizens.*[45]

261. When interpreting and applying the "minimum standard", a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.

262. Article 1105(1) expresses an overall concept. The words of the article must be read as a whole. The phrases …*fair and equitable treatment*… and …*full protection and security*… cannot be read in isolation. They must be read in conjunction with the introductory phrase …*treatment in accordance with international law.*

263. The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to

[45] *The USA on behalf of George W. Hopkins* v. *The United Mexican States* (Docket No. 39), 21 American Journal

the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case.

264. In some cases, the breach of a rule of international law by a host Party may not be decisive in determining that a foreign investor has been denied *"fair and equitable treatment"*, but the fact that a host Party has breached a rule of international law that is specifically designed to protect investors will tend to weigh heavily in favour of finding a breach of Article 1105.

265. The breadth of the *"minimum standard"*, including its ability to encompass more particular guarantees, was recognized by Dr. Mann in the following passage:

> *...it is submitted that the right to fair and equitable treatment goes much further than the right to most-favored-nation and to national treatment....so general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that provisions of the Agreements affording substantive protection are not more than examples of specific instances of this overriding duty.*[46]

266. Although modern commentators might consider Dr Mann's statement to be an over-generalisation, and the Tribunal does not rule out the possibility that there could be circumstances in which a denial of the national treatment provisions of the NAFTA would not necessarily offend the minimum standard provisions, a majority of the Tribunal determines that on the facts of this particular case the breach of Article 1102 essentially establishes a breach of Article 1105 as well.

267. Mr. Chiasson considers that a finding of a violation of Article 1105 must be based on a demonstrated failure to meet the fair and equitable requirements of international law. Breach of another provision of the NAFTA is not a foundation for such a conclusion. The language of the NAFTA does not support the notion espoused by Dr. Mann insofar as it is

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of International Law 160, at 166-167 (1926).

[46] F.A. Mann, *"British Treaties for the Promotion and Protection of Investments"*, (1981) 52 Brit. Y.B. Int'l L.

considered to support a breach of Article 1105 that is based on a violation of another provision of Chapter 11. On the facts of this case, CANADA's actions come close to the line, but on the evidence no breach of Article 1105 is established.

268. By a majority, the Tribunal determines that the issuance of the Interim and Final Orders was a breach of Article 1105 of the NAFTA. The Tribunal's decision in this respect makes it unnecessary to review SDMI's other submissions in relation to Article 1105.

269. The consequences of the Tribunal's determination in relation to Article 1105 of the NAFTA are considered in the next chapter.

Article 1106 – Performance Requirements

270. SDMI contends that CANADA's export ban breached Article 1106 of NAFTA because, in effect, SDMI was required, as a condition of operating in Canada, to carry out a major part of its proposed business, the physical disposal of PCB waste in Canada. In doing so, SDMI effectively would have been required to consume goods and services in Canada.

271. Article 1106 states:

> *No party may imposed or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or a non Party in its territory:*
>
> *(b) to achieve a given level or percentage of domestic content*
>
> *(c) to purchase, use or accord a preference to goods produced or services provided in its territory or to purchase goods or services from persons in its territory;*

272. Article 1106(5) states:

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241 at p. 243.

Paragraphs 1 and 3 do not apply to any requirement other then the requirements set out in those paragraphs

273. The export ban imposed by CANADA was not cast in the form of express conditions attached to a regulatory approval but, in applying Article 1106 the Tribunal must look at substance, not only form.

274. The 1947 GATT agreement contained no specific provisions on performance requirements. One dispute was brought before a GATT panel. The USA challenged CANADA's FIRA. Under that statute, non-Canadian investors in some circumstances had to obtain regulatory approval before operating or expanding in CANADA. The regulator could attach conditions to its approval. For example, a factory operator might be required to purchase 50% of its supplies from local suppliers, rather than from abroad. The GATT panel accepted some aspects of the U.S. complaint and rejected others, but the GATT panel looked at the substance of the measure notwithstanding the fact that the GATT did not contain any express provision equivalent to Article 1106 of the NAFTA.

275. Although the Tribunal must review the substance of the measure, it cannot take into consideration any limitations or restrictions that do not fall squarely within the "requirements" listed in Articles 1106(1) and (3).

276. The only part of the definition that might apply to the current situation is …*conduct or operation of an investment.*…. but in the opinion of the majority of the Tribunal, subparagraph (b) clearly does not apply and, neither does subparagraph (c).

277. Looking at the substance and effect of the Interim Order, as well as the literal wording of Article 1106, the majority of the Tribunal considers that no "requirements" as defined were imposed on SDMI that fell within Article 1106. Professor Schwartz considers that the effect of the Interim Order was to require SDMI to undertake all of its operations in Canada and that this amounted to a breach of subparagraph (b).

278. By a majority, the Tribunal concludes that this is not a "performance requirements" case.

Article 1110 – Expropriation

279. SDMI claims that the Interim Order and the Final Order were "tantamount" to an expropriation and violated Article 1110 of the NAFTA.

280. The term "expropriation" in Article 1110 must be interpreted in light of the whole body of state practice, treaties and judicial interpretations of that term in international law cases. In general, the term "expropriation" carries with it the connotation of a "taking" by a governmental-type authority of a person's "property" with a view to transferring ownership of that property to another person, usually the authority that exercised its *de jure* or *de facto* power to do the "taking".

281. The Tribunal accepts that, in legal theory, rights other than property rights may be "expropriated" and that international law makes it appropriate for tribunals to examine the purpose and effect of governmental measures. The Interim Order and the Final Order were regulatory acts that imposed restrictions on SDMI. The general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA, although the Tribunal does not rule out that possibility.

282. Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs.

283. An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary.

284. In this case the closure of the border was temporary.[47] SDMI's venture into the Canadian market was postponed for approximately eighteen months. Mr. Dana Myers testified that this delay had the effect of eliminating SDMI's competitive advantage. This may have significance in assessing the compensation to be awarded in relation to CANADA's violations of Articles 1102 and 1105[48], but it does not support the proposition on the facts of this case that the measure should be characterized as an expropriation within the terms of Article 1110.

285. SDMI relied on the use of the word "tantamount" in Article 1110(1) to extend the meaning of the expression "tantamount to expropriation" beyond the customary scope of the term "expropriation" under international law. The primary meaning of the word "tantamount" given by the Oxford English Dictionary is "equivalent". Both words require a tribunal to look at the substance of what has occurred and not only at form. A tribunal should not be deterred by technical or facial considerations from reaching a conclusion that an expropriation or conduct tantamount to an expropriation has occurred. It must look at the real interests involved and the purpose and effect of the government measure.

286. The Tribunal agrees with the conclusion in the Interim Award of the *Pope & Talbot* Arbitral Tribunal[49] that something that is "equivalent" to something else cannot logically encompass more. In common with the *Pope & Talbot* Tribunal, this Tribunal considers that the drafters of the NAFTA intended the word "tantamount" to embrace the concept of so-called

[47] The fact that the border was closed again on the U.S. side in July 1997 cannot be laid at CANADA's door.

[48] This is a matter for argument at a later stage of the proceedings.

[49] Award of June 26, 2000, para. 104.

"creeping expropriation", rather than to expand the internationally accepted scope of the term expropriation.

287. In this case, the Interim Order and the Final Order were designed to, and did, curb SDMI's initiative, but only for a time. CANADA realized no benefit from the measure. The evidence does not support a transfer of property or benefit directly to others. An opportunity was delayed.

288. The Tribunal concludes that this is not an "expropriation" case.

ANNEX 148

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
Washington, D.C.

In accordance with the
United Nations Commission on International Trade Law (UNCITRAL)
Arbitration Rules

Glamis Gold, Ltd.
(Claimant)

- AND -

United States of America
(Respondent)

AWARD

Before the Arbitral Tribunal constituted under Chapter 11
of the North American Free Trade Agreement, and comprised of:

Michael K. Young
Professor David D. Caron
Kenneth D. Hubbard

Secretary of the Tribunal
Ms. Eloïse Obadia

Legal Assistant to the Tribunal
Ms. Leah D. Harhay

Date of dispatch to the parties: June 8, 2009

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349. The basis of the claim is to be determined with reference to the submissions of Claimant. Claimant argues that the events listed by Respondent are not the basis of its claim but rather form "the factual predicate of the unlawful and now rescinded January 17, 2001 Secretarial Record of Decision denying the Imperial Project, and are thus the context for the substantial damage flowing from that decision and the failure of the federal and state government authorities to comply with the law and approve Glamis's Plan of Operation on a timely basis."[698]

350. The Tribunal has reviewed the submissions of Claimant and finds that Claimant does not in its Notice of Arbitration, nor its subsequent filings, bring a claim on the basis of the earlier events listed by Respondent. The Tribunal denies Respondent's objection.

D. FINAL DISPOSITION OF THE TRIBUNAL WITH RESPECT TO PRELIMINARY OBJECTIONS

351. The Tribunal holds that Claimant's claims are not time barred. Claimant does not in its Notice of Arbitration, nor its subsequent filings, bring a claim on the basis of the earlier events listed by Respondent.

352. The Tribunal additionally holds that Claimant's claim as articulated, that the California measures caused such significant harm to its investment as to effect an expropriation *on the date of their passage*, is ripe for adjudication.

V. CLAIMANT'S CLAIM FOR EXPROPRIATION UNDER ARTICLE 1110

353. NAFTA Article 1110(1), titled "Expropriation and Compensation," provides:

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1); and
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6.

[698] Claimant's Reply Memorial, ¶ 287.

354. The inclusion in Article 1110 of the term "expropriation" incorporates by reference the customary international law regarding that subject. Under custom, a State is responsible, and therefore must provide compensation, for an expropriation of property when it subjects the property of another State Party's investor to an action that is confiscatory or that "unreasonably interferes with, or unduly delays, effective enjoyment" of the property.[699] A State is not responsible, however, "for loss of property or for other economic disadvantage resulting from bona fide … regulation … if it is not discriminatory."[700]

355. A direct expropriation is readily apparent: there is an "open, deliberate and acknowledged taking[] of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State…."[701] In an indirect expropriation, the property is still "taken" by the host government in that the economic value of the property interest is radically diminished, but such an expropriation does not occur through a formal action such as nationalization. Instead, in an indirect expropriation, some entitlements inherent in the property right are taken by the government or the public so as to render almost without value the rights remaining with the investor. An action "tantamount to expropriation", like an indirect taking, does not involve the direct transfer of title from the investor to the host State. "Tantamount" means equivalent and thus the concept should not encompass *more* than direct expropriation; it merely differs from direct expropriation which effects a physical taking of property in that no actual transfer of ownership rights occurs.[702]

356. This proceeding involves the particularly thorny issue of what is commonly known as a regulatory taking. More specifically, the question presented in this

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[699] RUDOLF DOLZER, EXPROPRIATION AND NATIONALIZATION, 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 319 (Rudolf Bernhardt, ed. 1995).

[700] RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712, Comment (g) (1986).

[701] *Metalclad*, Award, ¶ 103 (Aug. 30, 2000).

[702] *See S.D. Myers*, Partial Award, ¶ 285 (Nov. 13, 2000). Actions that result in an indirect taking or are "tantamount to expropriation" include those acts that sometimes constitute what is known as "creeping expropriation". *See S.D. Myers*, *supra*, ¶ 286. Creeping expropriation occurs when the expropriating measures are implemented over a period of time. *See Feldman*, Award, ¶ 101 (Dec. 16, 2002). Most often, creeping expropriation is said to occur when a State seeks "to achieve the same result [as an outright taking] by taxation and regulatory measures designed to make continued operation of a project uneconomical so that it is abandoned." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712, Reporter's Note 7 (1986) [Ex. 44].

proceeding is whether the administrative and legislative actions taken individually, or in concert, by the federal government and the State of California constitute an expropriation under Article 1110. The Parties, citing to the *2004 Model Bilateral Investment Treaty*,[703] indicate that tribunals in such instances often assess whether measures of a State constitute a non-compensable regulation or a compensable expropriation by examining, *inter alia*, (1) the extent to which the measures interfered with reasonable and investment-backed expectations of a stable regulatory framework,[704] and (2) the purpose and character of the governmental actions taken.[705] There is for all expropriations, however, the foundational threshold inquiry of whether the property or property right was in fact taken. This threshold question is relatively straightforward in the case of a direct taking, for example, by nationalization. In the case of an indirect taking or an act tantamount to expropriation such as by a regulatory taking, however, the threshold examination is an inquiry as to the degree of the interference with the property right. This often dispositive inquiry involves two questions: the severity of the economic impact and the duration of that impact.

357. Several NAFTA tribunals agree on the extent of interference that must occur for the finding of an expropriation, phrasing the test in one instance as, "the *affected property* must be impaired to such an extent that it must be seen as 'taken'";[706] and in another instance as, "the test is whether that interference is sufficiently restrictive to support a

[703] Claimant's Memorial, ¶ 423; Respondent's Counter-Memorial, at 160. The Tribunal notes that both Parties, to support this assertion, refer to the *2004 U.S. Model Bilateral Investment Treaty*, ann. B ¶ 4, and Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). The Parties both cite to and rely on U.S. law of takings, not because it is applicable, but because it is argued by both as a well-developed body of law.

[704] Cane Tenn., Inc. v. United States, 63 Fed. Cl. 715 (2005), quoting Cienega Gardens v. United States, 331 F.3d 1319, 1345-46 (2003) (internal citations omitted) ("The purpose of consideration of plaintiffs' investment-backed expectations is to limit recoveries to property owners who can demonstrate that 'they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.'").

[705] OECD, "INDIRECT EXPROPRIATION" AND THE "RIGHT TO REGULATE" IN INTERNATIONAL INVESTMENT LAW, (OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT) 10 (2004/4) [Ex. 53]. *See also Saluka*, Award, ¶ 264 (Mar. 17, 2006) (emphasis in original) ("It thus inevitably falls to the *adjudicator* to determine whether particular conduct by a state 'crosses the line' that separates valid regulatory activity from expropriation. Faced with the question of *when, how and at what point otherwise valid regulation becomes, in fact and effect, an unlawful expropriation,* international tribunals must consider the circumstances in which the question arises. The context within which an impugned measure is adopted and applied is critical to the determination of its validity.").

[706] *GAMI Investments*, Final Award, ¶ 126 (Nov. 15, 2004).

conclusion that the property has been 'taken' from the owner."[707] Therefore, 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."[708] 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."[709]

358. To determine whether Claimant's investment in the Imperial Project has been so radically deprived of its economic value to Claimant as to potentially constitute an expropriation and violation of Article 1110 of the NAFTA, the Tribunal must assess the impact of the complained of measures on the value of the Project. Claimant has alleged that the federal and California measures acted both individually and together to effect a taking.[710] As to their collective effect, Claimant argues that Respondent, at the federal and state levels, committed a "continuum of acts" with the delay and denial of decisions and approvals by the federal government's having allowed the State of California the time to impose legislative and regulatory measures on the Imperial Project.[711] Although the federal measures were "partially lift[ed]," there was not, according to Claimant, ever a "correction" of that act; thus Claimant's investment was left exposed to the subsequent California measures.[712]

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[707] *Pope & Talbot*, Interim Award, ¶ 102 (June 26, 2000).

[708] *Tecmed*, Award, ¶ 115 (May 29, 2003).

[709] OECD, "INDIRECT EXPROPRIATION" AND THE "RIGHT TO REGULATE" IN INTERNATIONAL INVESTMENT LAW, (OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT) 11 (2004/4) [Ex. 53].

[710] Counsel for Claimant, Tr. 1591:10-1592:4.

[711] Counsel for Claimant, Tr. 1591:14-1592:1.

[712] Counsel for Claimant, Tr. 1591:14-1592:1. *See also* Claimant's Memorial, ¶¶ 512-514. Claimant argues that the denial of its Plan of Operations by Secretary Babbitt also severely affected the value of the Imperial Project, occasioning "unreasonable and improper delays" that are "the very reason that Glamis became subject to the California measures in December 2002." Claimant argues, however that, should the denial not appear sufficiently severe on its own, it breaches international obligations when viewed in totality with the California measures.

359. As this is an indirect expropriation claim and Claimant argues that there are several acts working together to effect the expropriation, several dates of expropriation are discussed. Claimant argues that the date of the California regulations—December 12, 2002—would be the last date upon which expropriation occurred (though it may have occurred previously), and it argues for this date as it is "so much more clear of [a] precise date of expropriation."[713] With respect to the federal measures, Claimant places the date of expropriation as January 17, 2001, the date of the ROD denying the Plan of Operations.[714] The Parties in fact discuss many possible dates because, as Claimant explains, "in cases such as these involving measures tantamount to expropriation, the Tribunal could look to other dates as well …."[715] Respondent argues, however, that this, or presumably any date, is an "artificial" date for valuation, as the California reclamation requirements have not yet been applied to Claimant.[716]

360. To the extent that Claimant argues that the delay and temporary denial occasioned by the federal government themselves effected an expropriation, the Tribunal finds Claimant's argument without merit. The Tribunal finds that the federal Record of Decision denying approval of the Imperial Project, even if it presented difficulties to Claimant, was quickly reversed and therefore of short duration. This does not constitute an expropriation under NAFTA Article 1110. The Tribunal therefore denies Claimant's claim that the delay and temporary denial occasioned by the federal government either individually or in combination with subsequent complained of measures of the State of California were violations of Article 1110.

361. To the extent that Claimant is arguing that the federal measures facilitated the expropriation by the California measures, the issue becomes the effect of the California measures. The Tribunal thus focuses upon the effect of the California measures, which

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[713] Counsel for Claimant, Tr. 1593:3-4; *see also* 1592:5-11. *See also supra* ¶¶ 181-84. These regulations took effect on December 18, 2002, and were set to expire as of April 17, 2003, but were re-filed on April 15, 2003, and were finally made final and permanent on April 18, 2003 and, on May 30, 2003, were approved by the Office of Administrative Law.

[714] Counsel for Claimant, Tr. 2001:21-2002:3.

[715] Claimant's Reply Memorial, ¶ 302; *See* Counsel for Claimant, Tr. 2002:4-13 (arguing that Respondent, is "responsible for all of the measures," and therefore, in a claim for an act tantamount to expropriation, there is no need to divide up each of the individual actions. There is a choice as to when, in the pattern of practice that begins with the federal measures on July 17, 2002, expropriation actually occurs.).

[716] Counsel for Respondent, Tr. 1903:2-6.

Claimant itself has done.[717] The Tribunal necessarily turns its attention to the impact of the California measures—Senate Bill 22 ("SB 22") and the State Mining and Geology Board Regulations ("SMGB Regulations") (collectively referred to as "the backfilling measures" or the "California measures"). Therefore, the Tribunal turns to the determination of whether there has been a radical diminution in value of the Imperial Project, which is ascertained by the analysis of the entitlements and value that remain with Claimant after the enactment of these measures.

362. The Tribunal begins with Claimant's assertion that the value of the Imperial Project before the adoption of the backfilling measures was $49.1 million and its further assertion that after the adoption of the backfilling measures the value of the Project was negative $8.9 million.[718] The Parties focus on five different elements which, Claimant argues, together lead to this asserted negative value. In making its own evaluation of whether the Imperial Project retained value following the backfilling measures, the Tribunal starts with the values and methodologies offered by Claimant for the several elements of its valuation, reviews them one-by-one with Respondent's objections to each, and makes adjustments that the Tribunal considers appropriate in light of the facts presented.

363. The first of the five contested elements concerns the cost of backfilling and involves weighing the two Parties' contentions as to the appropriate cost of backfilling, which in turn is based on four sub-factors: (a) the calculated cost per ton of backfilling, which includes an analysis of the regulatory requirements for and estimated expenses of pit engineering, (b) the cost of equipment refurbishment, (c) the appropriate swell factors for the two identified mineral groups—ore-containing materials and waste rock—a critical issue for determining how many tons of material would need to be backfilled and thus the ultimate cost of backfilling; and (d) the estimated total tonnage that would need to be backfilled to satisfy the California requirements, which includes evaluating the Parties' disparate views regarding the timing of such movement and the associated costs of performing the various stages of backfilling at different times. The second element examined is the appropriate weight to be given the third pit, the Singer Pit, and

[717] Counsel for Claimant, Tr. 1593:1-6.
[718] Behre Dolbear Response Report (Dec. 2006), at 4.

Claimant's assertion that its value is too speculative to include in the post-backfilling valuation and Respondent's argument that this assumption is incorrect. The third element that the Tribunal analyzes is the appropriate price of gold: although the Parties agree on the correct price of gold at the alleged date of expropriation, they dispute the relevance of the current price to the value of the Imperial Project. The fourth element the Tribunal analyzes is the Parties' dispute regarding the amount and type of financial assurances that the federal, state and county governments would require to be posted to ensure proper reclamation of the Imperial Project. The Tribunal assesses both the types of financial assurances available to Claimant, as well as the timing for posting these assurances as required by the various responsible governmental entities. In the fifth and final element, the Tribunal determines the appropriate discount rate to be employed in valuing the Imperial Project as of the asserted date of expropriation—December 12, 2002—which includes an assessment of the disparate discount rates offered by the Parties to use in calculating the present value of the Imperial Project. This rate is based on the risk-free rate plus a component that accounts for the specific risks of the particular project and is a critical component of valuing an asset with an uncertain or risky income stream.

364. The Tribunal in the following sections examines each of these elements and the contentions of the Parties regarding each. With respect to each element, the Tribunal decides upon the appropriate reduction in value, if any, for each of these five elements and modifies the Claimant's asserted post-backfilling measures valuation. This approach—namely, the Tribunal's acceptance of Claimant's assumptions as a starting point—is a best case scenario for Claimant. In essence, this approach asks: "Even if the Tribunal accepts Claimant's pre-backfilling measures valuation as correct and further accepts Claimant's characterization of the factors resulting in a reduced value, does a review of the claimed reduction and the resulting adjustments by the Tribunal result in a radical diminution in the value of the Imperial Project?"[719]

365. Thus, to be specific, the Tribunal's goal in this inquiry into Claimant's valuation model is not to determine if there *was* an expropriation, but to determine if there was *not*

[719] The Tribunal notes that this methodology would not apply at a damages phase, where the Tribunal would be required to reach a final definitive number; whereas in this situation, the Tribunal need only reach the conclusion that substantial value remained.

significant economic impact. These are very different inquiries: the first requires definitive cost calculations and a full revision of the discounted cash flow methodologies to determine exactly the value of the Imperial Project post-backfilling; while the second requires only sufficient calculation to determine if the Project's value is positive. In this latter endeavor, issues presenting specific complexity, in which the Tribunal is satisfied with neither of the calculations offered by either Party, can be resolved in Claimant's favor, as the question above is not what is the exact value of the Imperial Project following the complained of measures, but is the value of the post-backfilling Imperial Project positive *even* if such an issue is decided in Claimant's favor.

366. The Tribunal, after completing its analysis, concludes that the California backfilling measures did not result in a radical diminution in the value of the Imperial Project. Therefore, it denies Claimant's claim that the actions of the state and federal government resulted in an expropriation under Article 1110. The Tribunal observes that, although Arbitrator Hubbard dissents to the Tribunal's conclusion with respect to the fourth element, financial assurances, he agrees that the remaining value of the Imperial Project would be sufficiently positive to warrant dismissal of Claimant's claim for expropriation.[720]

A. THE FIRST DISPUTED ELEMENT OF CLAIMANT'S VALUATION: THE COST OF BACKFILLING

1. ISSUE PRESENTED

367. The California measures require complete backfilling of all pits to the extent possible, and spreading and recontouring of any remaining piles to a maximum height of 25 feet. The cost of this required backfilling is central to the determination of whether the value of the Glamis Imperial Project has been so dramatically decreased as to warrant a finding of expropriation under Article 1110. Claimant estimates total reclamation costs at the end of the Project being as much as $98.5 million; Respondent places the total cost of backfilling, spreading and recontouring at approximately $55.4 million, a difference of $43 million.

[720] *See infra* footnote 1044.

Claimant's investment. The Tribunal thus holds that Claimant's claim under Article 1110 fails.

VI. CLAIMANT'S CLAIM UNDER ARTICLE 1105

537. Claimant argues that the complained of measures of the United States federal and California state governments, viewed both individually and collectively, violated its rights to receive fair and equitable treatment as promised by Article 1105 of the NAFTA. In order to evaluate these claims, the Tribunal must first determine the scope and bounds of the customary international law minimum standard of treatment of aliens which, as discussed below, comprises the fair and equitable treatment standard of Article 1105. The Tribunal begins this task by identifying the sources which bear on determining this standard; it then assesses the record to determine what state obligations are required by the customary international law minimum standard of treatment. Finally, the Tribunal will hold the federal and California measures, both individually and as a collective whole, up against this standard and assess whether Claimant has proven a breach of Article 1105.

A. ARTICLE 1105(1) LEGAL STANDARD: WHAT IS REQUIRED OF A STATE PARTY BY THE OBLIGATION TO PROVIDE "FAIR AND EQUITABLE TREATMENT"

1. ISSUE PRESENTED

538. Article 1105(1) of the NAFTA provides that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." The scope and reach of what is required of a Party by this standard has been addressed in numerous arbitrations and debated by scholars; this case is no different.

539. The Parties to this Arbitration agree that fair and equitable treatment is a "recognized standard under customary international law,"[1085] and that it is "firmly within the minimum standard of treatment to be accorded under customary international

[1085] Counsel for Claimant, Tr. 2078:22-2079:6.

law."[1086] They disagree, however, on what that standard requires of a State Party and what authorities are permissibly referenced by the Tribunal to define the standard.

540. In its analysis of the fair and equitable treatment standard of Article 1105, the Tribunal therefore addresses first the proper scope of authoritative sources to which it may look for guidance in defining this elusive standard; and second, assesses Claimant's contentions to determine what obligations it has proven the customary international law minimum standard of treatment now requires of a State Party.

541. The Tribunal thus turns to its first task: determining the universe of sources available to instruct it on the bounds of "fair and equitable treatment." Although, by the close of proceedings, both Parties agreed that the NAFTA standard is the customary international law minimum standard of treatment of aliens, they, as well as numerous other scholars, jurists, States and corporations, disagree as to how to define this customary international law standard. A major difference between the Parties' positions turns on Claimant's assertion that the Tribunal may rely on decisions of tribunals that apply an autonomous analysis—driven by the language of the treaty, which may or may not reflect customary international law standards—in addition to those decisions that rest explicitly on customary international law.

542. Specifically, Claimant contends that the fair and equitable treatment standard includes interrelated and dynamic obligations providing for, among other duties, protection against arbitrariness and discrimination, protection of legitimate investment-backed expectations, and a requirement of a transparent and predictable legal and business framework.[1087] Claimant arrives at this interpretation from the guidance of

[1086] Counsel for Claimant, Tr. 36:15-18; Counsel for Respondent, Tr. 1390:11-14.

[1087] *See, e.g.,* Counsel for Claimant, Tr. 40:9-16. The Tribunal notes that, as exhibited under the NAFTA, there are two types of discrimination: nationality-based discrimination and discrimination that is founded on the targeting of a particular investor or investment. The former falls under the purview of Article 1102 and Claimant does not argue this. Inasmuch as Claimant argues that it was discriminated against, this argument appears primarily in the discussion of Article 1110, in which Claimant asserts that the discriminatory nature of the California measures provides additional proof that the measures were not a bona fide exercise of State police power and thus a non-compensable regulation. *See, e.g.,* Claimant's Memorial, ¶¶ 497-510; Claimant's Reply Memorial, ¶¶ 170-75. Claimant does not argue the discriminatory nature of the California measures in its Article 1105 claim, explaining that *Waste Management* was criticized in *obiter dictum* by the *Methanex* tribunal to the extent that *Waste Management* implies a duty of non-discrimination in Article 1105(1). Claimant's Memorial, at 291, footnote 1015, citing *Methanex*, Final Award, Part IV, Ch. C, ¶ 26 (Aug. 3, 2005). Claimant asserts that *Waste*

arbitral decisions based on bilateral investment treaties ("BITs"), as well as NAFTA arbitrations, scholarship, and state practice.

543. Respondent argues that Article 1105's duty to provide fair and equitable treatment is solely a reference to the minimum standard of treatment demanded by customary international law.[1088] As customary international law, this interpretation is derived from "general and consistent practice of states followed by them out of a sense of legal obligation or *opinio juris*."[1089] Respondent reiterates that "international tribunals do not create customary international law. Only nations create customary international law."[1090]

544. The Tribunal therefore begins its analysis by identifying those sources that illuminate the customary international law standard and then, based on the record before it, determines the content of that standard. Following this analysis, the Tribunal will hold up the disputed facts to this standard and determine whether Claimant has proved that Respondent has failed to fulfill the obligations required.

2. CONTENTIONS OF THE PARTIES

a. Sources Relevant to Determine the Article 1105 Standard

i. *Claimant's Contentions*

545. Claimant explains the task for this Tribunal, and all tribunals addressing Article 1105, as "determin[ing] whether the facts of a particular case violated those established and commonly accepted legal principles that comprise the fair and equitable treatment standard of treatment under customary international law."[1091] Claimant thus agrees that the fair and equitable treatment standard articulated in Article 1105 is the customary

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Management does so, however, only in circumstances where the claimant's allegations of discrimination were offered in regard to Article 1102 and only incidentally as regards a claim under Article 1105(1). Claimant continues to explain, however, that *Loewen Group v. United States* does state that discrimination can be unfair and inequitable in the context of Article 1105(1). Claimant's Memorial, at 291, footnote 1015, citing *Loewen*, Award, ¶ 135 (June 26, 2003). The Tribunal therefore interprets Claimant's arguments made in its Memorial, at paragraph 568, regarding "Respondent's arbitrary and discriminatory treatment" as an assertion that, as part of the duty prescribed by Article 1105 to not act arbitrarily, there is a duty to not unfairly target a particular investor, whether based upon nationality or some other characteristic.

[1088] Respondent's Counter-Memorial, at 218-19.

[1089] Counsel for Respondent, Tr. 105:10-13.

[1090] Counsel for Respondent, Tr. 105:17-19.

[1091] Counsel for Claimant, Tr. 36:7-13.

international law minimum standard of treatment, but argues that there is a universe of principles that are so "fundamental" that they are common throughout the world, "regardless of whether the standard is viewed through the lens of customary international law or the so-called autonomous Treaty standard."[1092] These principles, it asserts, include "the duty to act in good faith, due process, transparency and candor, and fairness and protection from arbitrariness."[1093]

546. Claimant argues that, to accept Respondent's framework, the Tribunal would have to accept three principles fundamentally at odds with international law:

> *[F]irst*, that the content of Article 1105 is *sui generis* and thus, divorced from the substantive protections recognized by arbitral tribunals as comprising the international standard of treatment for foreign investors under customary international law; *second*, that Article 1105 need not be interpreted in an evolutionary fashion; and *third*, that reference to the 'minimum standard' somehow means that the most arbitrary and capricious of state actors sets the bar for how any state may treat foreign investors.[1094]

Such a framework, contends Claimant, is both unsupported by international law, and contradictory "even to positions Respondent has advanced in the past."[1095]

547. Claimant argues that Respondent is attempting to freeze a historical interpretation of the requirements of Article 1105 from the 1920s rather than interpreting it, as it should, in an evolutionary fashion.[1096] Claimant asserts that freezing the protection provided by the fair and equitable treatment standard is criticized by modern tribunals, which have explicitly rejected any threshold limitation that conduct be "egregious," "outrageous," "shocking," or otherwise extraordinary (as was required by the seminal case of *Neer v. Mexico*).[1097]

[1092] Counsel for Claimant, Tr. 39:22-40:6.
[1093] Counsel for Claimant, Tr. 40:6-8.
[1094] Claimant's Reply Memorial, ¶ 206.
[1095] *Id.*
[1096] *Id.* ¶ 214.
[1097] *Id.* ¶ 215, citing Neer v. Mexico ("*Neer*"), 4 R. Int'l Arb. Awards, 60-62 (Oct. 15, 1926). Mr. Neer, a citizen of the United States employed as the superintendent of a mine near Guanaceví, Mexico, was riding home on horseback with his wife when they were stopped by a number of armed men who engaged Mr. Neer in conversation, and subsequently shot him dead. Mrs. Neer claimed that the Mexican authorities "showed an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprits ...." *Id.* ¶ 1. "Without attempting to announce a precise formula" for determining an international delinquency, the commission held:

548. Claimant argues instead that the duty to accord fair and equitable treatment and the minimum standard of treatment are dynamic standards, elucidated by review of current legal and treaty activity. Citing the OECD Working Papers on Fair and Equitable Treatment, Claimant argues that all three NAFTA Parties have accepted this characterization.[1098] This is also reflected, Claimant contends, in the fact that "FTC interpretations incorporate *current* international law, whose content is shaped by the conclusion of more than 2,000 bilateral investment treaties and many treaties of friendship and commerce."[1099] Claimant also points to the decision of the *Mondev* tribunal and its finding that BITs, "through their incorporation of the 'fair and equitable treatment' standard, reflected both the State practice, as well as the sense of obligation, legal obligation, *opinio juris* required under customary international law."[1100]

549. Claimant does not dispute that NAFTA Free Trade Commission's ("FTC") interpretation "prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party."[1101] Still, Claimant contends, the standard must be interpreted in "good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose," as required by Article 31(1) of the

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> (first) that the propriety of governmental acts should be put to the test of international standards and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.

Id. ¶ 4. *But see Mondev*, Award, ¶ 116 (Oct. 11, 2002) ("[B]oth the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to what those terms – had they been current at the time – might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.").

[1098] Claimant's Memorial, ¶ 518, citing OECD, *Fair and Equitable Treatment Standard in International Investment Law* (OECD Working Papers on International Investment, 2004/3) ("*OECD Working Papers*"), at 11-12 ("United States expressed the view that the customary international law referred to in NAFTA Article 1105(1) is not 'frozen in time' and that the minimum standard of treatment does evolve." "Canada agreed with the US on the view that the minimum standard of treatment does evolve." "Mexico also agrees that 'the standard is relative and that the conduct which may not have violated international law [in] the 1920s might very well be seen to offend internationally accepted principles today.'" (citations and emphasis omitted)) [Ex. 174].

[1099] Counsel for Claimant, Tr. 37:1-7, quoting *Mondev*, Award, ¶ 125 (Oct. 11, 2002) (emphasis added).

[1100] Counsel for Claimant, Tr. 37:8-13, citing *Mondev*, Award (Oct. 11, 2002).

[1101] Claimant's Memorial, ¶ 517.

Vienna Convention, which requires looking at the standard as it has *evolved* under customary international law.[1102]

550. Claimant does dispute Respondent's allegations that "there is any restriction that fair and equitable treatment be defined only by customary international law rather than international law in general, given that the plain language of Article 1105 requires treatment in accordance with international law."[1103] Claimant cites to the NAFTA awards in *Mondev*, *Pope & Talbot*, *Loewen* and *ADF* for the proposition that there is no rule that fair and equitable treatment be defined solely by customary international law, rather than the "normal sources of international law."[1104]

551. Claimant agrees that there is a difference between the autonomous and customary international law standards and that the standard articulated in NAFTA Article 1105 is the customary international law minimum standard of treatment of aliens, but it argues that the two sources of law, at this point, require the same conduct of states. Claimant thus asserts that this dispute between "customary international law" and "international law" is unnecessary, as "BIT jurisprudence has converged with customary international law in this area ...."[1105] That the standards are generally the same, Claimant argues, is demonstrated in the OECD Draft Convention and recognition by the United States, which incorporated the same standard as that in the Draft Convention in its various BITs.[1106] In addition, according to Claimant, some tribunals—including *Occidental* and *CMS*—have affirmatively stated that the treaty standard at issue does not differ from the customary international law standard.[1107]

552. Finally, Claimant reiterates that the customary standard referenced in the NAFTA has been influenced by the many BITs that require fair and equitable treatment.[1108] BIT jurisprudence demonstrates both elements of customary international law—State practice and *opinio juris*—and thus informs the international standard of

[1102] *Id.*
[1103] Counsel for Claimant, Tr. 1709:20-1710:3.
[1104] Counsel for Claimant, Tr. 1710:3-19; *see also* Claimant's Reply Memorial, ¶¶ 210-11.
[1105] Counsel for Claimant, Tr. 1710:20-22.
[1106] Counsel for Claimant, Tr. 1711:3-14.
[1107] Counsel for Claimant, Tr. 1713:5-9, citing *Occidental v. Ecuador*, Final Award (July 1, 2004) and *CMS v. Argentina*, Award (May 12, 2005).
[1108] Claimant's Reply Memorial, ¶ 207.

treatment owed to foreign investors under customary international law.[1109] Claimant quotes the *Mondev* award for its finding that "the vast number of bilateral and regional investment treaties (more than 2,000) almost uniformly provide for fair and equitable treatment of foreign investments, and largely provide for full security and protection of investments …. On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment."[1110]

ii. *Respondent's Contentions*

553. While Claimant states that it agrees with Respondent that Article 1105 is the "obligation to accord investments the customary international law minimum standard of treatment," Respondent argues that this is merely "lip service" as Claimant nowhere proves the existence of any rule of customary international law violated by Respondent.[1111] According to Respondent, establishment of a rule of customary international law requires: (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*)."[1112] Respondent asserts that the burden is on Claimant to prove the existence of a rule of customary international law and Respondent's violation of that rule, and that Claimant has done neither.[1113]

554. Customary international law cannot be proven, alleges Respondent, by decisions of international tribunals, as they do not constitute State practice.[1114] In support, Respondent cites to the U.S. Court of Appeals for the Second Circuit which distinguishes between primary and secondary sources of customary international law: "[A] primary source of authority" is one upon which, standing alone, courts may rely for propositions of customary international law; while secondary sources (such as "the writings of jurists") "at most provide evidence of the practice of States, and then only insofar as they

[1109] *Id.* ¶ 208, citing *Mondev*, Award, ¶¶ 110-125 (Oct. 11, 2002).
[1110] *Id.*, quoting *Mondev*, Award, ¶ 117 (Oct. 11, 2002) (internal citation omitted).
[1111] Counsel for Respondent, Tr. 1390:10-20.
[1112] Respondent's Counter-Memorial, at 219 (citation omitted).
[1113] *Id.* at 222.
[1114] Respondent's Rejoinder, at 151, citing MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 71 (1997).

rest on factual and accurate descriptions of the past practices of [S]tates, not on projections of future trends or the advocacy of the 'better rule.'"[1115]

555. Respondent argues that the NAFTA Free Trade Commission could not have been clearer in its note of interpretation of July 31, 2001 ("FTC Note"): the requirement under Article 1105(1) requires the customary international law minimum standard of treatment, nothing more and nothing less.[1116] According to Respondent's view of this interpretation, an investor is barred from claiming that the language regarding the fair and equitable treatment standard under Article 1105(1) differs from or is greater than that required by customary international law.[1117] This is supported, Respondent asserts, by arbitral awards subsequent to the issuance of the FTC Note. Respondent cites to the *ADF* award in which the tribunal held that the FTC Note "clarifies that so far as the three NAFTA Parties are concerned, the long-standing debate as to whether there exists such a thing as a minimum standard of treatment of non-nationals and their property prescribed in customary international law, is closed."[1118] In addition, the *Mondev* award states that the FTC Note "makes it clear that Article 1105(1) refers to a standard existing under customary international law, and not to standards established by other treaties of the three NAFTA Parties."[1119]

556. Therefore, Respondent asserts, any tribunal interpreting a BIT that finds the fair and equitable treatment provision in that BIT as being "something other than a shorthand reference to customary international law" (i.e., an autonomous standard) is not interpreting it "in accordance with the intent of the NAFTA parties, nor in a manner that the NAFTA parties have all through the Free Trade Commission instructed and bound NAFTA Tribunals to interpret that phrase."[1120]

[1115] *Id.* at 151-52, quoting U.S. v. Yousef, 327 F.3d 56, 93, 99 (2d Cir. 2003) (emphasis omitted).

[1116] Counsel for Respondent, Tr. 1931:19-1932:8.

[1117] Counsel for Respondent, Tr. 1932:8-15.

[1118] Respondent's Counter-Memorial, at 218-19, citing *ADF Group*, Award, ¶ 178 (Jan. 9, 2003) (citation omitted).

[1119] *Id.*, citing *Mondev*, Award, ¶ 121 (Oct. 11, 2002).

[1120] Counsel for Respondent, Tr. 1934:9-20. Specifically, in response to Tribunal questions, Respondent stated that it does not believe that the standard articulated in the cases based on the U.S.-Argentine BIT is "reflective or has been shown to be reflective of the minimum standard of treatment under customary international law." Counsel for Respondent, Tr. 2134:2-11.

557. The additional danger of looking to BIT jurisprudence, Respondent warns, is that "the majority of fair and equitable treatment clauses in international investment agreements do not include any reference to international law."[1121] There are, Respondent admits, some agreements in force with provisions similar to Article 1105, but that does not mean that all fair and equitable treatment provisions are the same.[1122] Respondent points to UNCTAD's study of fair and equitable treatment in which it concluded that "the presence of a provision assuring fair and equitable treatment in an investment instrument does not automatically incorporate the international minimum standard for foreign investors."[1123] UNCTAD reports, in fact, that there are at least four different approaches to fair and equitable treatment that it found in various BITs.[1124]

558. According to Respondent, the fact that treaty practice establishes the repeated inclusion of fair and equitable treatment provisions in BITs proves nothing in and of itself.[1125] There are, Respondent argues, significant textual differences among the various fair and equitable treatment provisions, which indicate that their meanings are not uniform across agreements.[1126] Quoting *Mondev*, Respondent contends that the central question in Chapter 11 cases still remains: "what is the *content* of customary international law providing for fair and equitable treatment …?"[1127]

b. Scope of the Standard

i. *Introductory Note*

559. The Tribunal notes that numerous NAFTA tribunals have wrestled with the question of the scope and bounds of "fair and equitable treatment" and the duties and obligations that this treatment requires of a State Party. Probably the most comprehensive review was done by the tribunal in *Waste Management*, in which it attempted a survey of the holdings to date in NAFTA jurisprudence:

[1121] Respondent's Rejoinder, at 147 (citation omitted).
[1122] *Id.*
[1123] *Id.* at 148, quoting UNCTAD, *Fair and Equitable Treatment*, Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/11 (Vol. III) (1999), at 40.
[1124] Respondent's Rejoinder, at 148, citing *id*. at 13.
[1125] *Id.* at 142.
[1126] *Id.*
[1127] *Id.*, quoting *Mondev*, Award, ¶ 113 (Oct. 11, 2002) (emphasis added).

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment… of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety–as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[1128]

The tribunal in *GAMI* primarily followed this line of reasoning, extracting four "implications" that it found particularly salient: (1) "The failure to fulfill the objectives of administrative regulations without more does not necessarily rise to a breach of international law;" (2) "A failure to satisfy requirements of national law does not necessarily violate international law;" (3) "Proof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal or regulatory requirements;" and (4) "The record as a whole—not isolated events—determines whether there has been a breach of international law."[1129]

560. The tribunal in *International Thunderbird Gaming* had a slightly different holding: "the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards."[1130] Although bad faith would meet the standards described, most tribunals agree that a breach of Article 1105 does not require bad faith.[1131]

561. In this case, Claimant argues that the international minimum standard of treatment is a dynamic, evolving standard and points to two particular duties that it argues are current requirements of a host State under its obligations to provide fair and

[1128] *Waste Management*, Award, ¶ 98 (Apr. 30, 2004). As noted above at footnote 1087, Claimant is not arguing a duty of non-discrimination as a duty separate from those included in the requirement of fair and equitable treatment under Article 1105.

[1129] *GAMI Investments*, Final Award, ¶ 97 (Nov. 15, 2004).

[1130] *International Thunderbird*, Award, ¶ 194 (Jan. 26, 2006).

[1131] *See Loewen*, Award, ¶ 132 (June 26, 2003); *Mondev*, Award, ¶ 115 (Oct. 11, 2002); *Waste Management*, Award, ¶ 93 (Apr. 30, 2004).

equitable treatment: (1) an obligation to protect legitimate expectations through establishment of a transparent and predictable business and legal framework;[1132] and (2) an obligation to provide protection from arbitrary measures.[1133] It is against these alleged duties that Claimant weighs the disputed facts and argues that Respondent has breached Article 1105. It is therefore incumbent upon the Tribunal to address the contention of the evolution of the standard and these two asserted aspects of the obligation to provide fair and equitable treatment.

562. The Tribunal notes that Claimant asserts that these two duties are both aspects of the same obligation, "interrelated" "strands" that are typically evaluated together;[1134] while Respondent asserts that there is "no greater showing of State practice and *opinio juris* with respect to the combined," as opposed to individual, duties.[1135] In order to best assess the scope of the standard as the Parties argue it, the Tribunal first examines the two individual duties asserted and then weaves them back into a comprehensive standard against which to weigh the facts.

ii. *The Asserted Evolution of the Customary International Law Minimum Standard of Treatment*

a. Claimant's Contentions

563. Claimant argues that, "[g]iven the international minimum standard of treatment is comprised of customary international law, the standard is an evolving one based on the general and consistent practice of states and *opinio juris* …."[1136] Claimant asserts that "[a]ll three parties to the NAFTA accept that the Article 1105(1) standard is a dynamic one."[1137] Claimant cites to statements by the United States in *Mondev* that "Article 1105(1) is intended to provide a real measure of protection of investments, and ... having regard to its general language and to the evolutionary character of international law, it has evolutionary potential."[1138] Claimant therefore argues that Respondent's treatment of it

[1132] Claimant's Reply Memorial, ¶¶ 224-34.
[1133] *Id.* ¶¶ 235-41.
[1134] Counsel for Claimant, Tr. 40:9-16.
[1135] Counsel for Respondent, Tr. 1402:8-12.
[1136] Claimant's Memorial, ¶ 518, citing *OECD Working Papers*, at 40 [Ex. 174].
[1137] *Id.*, citing *OECD Working Papers*, at 11-12.
[1138] *Id.*, quoting *Mondev*, Award, ¶ 119.

must be judged against the international law minimum standard of treatment, "which incorporates current standards of fair and equitable treatment."[1139]

564. Claimant contends that the resources and levels of development particular to a host State play an integral role in the application of the minimum standard of treatment to it.[1140] Claimant argues that this is especially important in determining an investor's legitimate expectations.[1141] Therefore, "[f]or a highly developed legal system with relatively extensive resources and institutional stability, such as the United States, the international minimum standard thus requires better conduct than what may be required for a less-developed country."[1142]

565. This is not because the fair and equitable treatment standard is a contingent standard, Claimant explains, that varies based on a host State's treatment of foreigners or its own nationals, but because the exact meaning of the standard is to be determined "by reference to specific circumstances of application."[1143] The specific circumstances of application, Claimant continues, "necessarily involve[] a consideration of the host state's level of development."[1144] Claimant quotes OECD Working Papers to explain this concept:

> It is an 'absolute', 'non-contingent' standard of treatment, i.e., a standard that states the treatment to be accorded in terms whose exact meaning has to be determined, *by reference to specific circumstances of application,* as opposed to the 'relative' standards embodied in 'national treatment' and 'most favoured nation' principles which define the required treatment by reference to the treatment accorded to other investment.[1145]

b. Respondent's Contentions

566. Respondent argues that the minimum standard of treatment is neither dynamic nor flexible based on the particular development of a country. Citing also to the OECD Working Papers, Respondent asserts that "the international minimum standard of treatment under customary international law 'is an "absolute," "noncontingent" standard

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[1139] *Id.*
[1140] *Id.* ¶ 519.
[1141] *Id.*, citing *Generation Ukraine*, Award, ¶ 20.37 (Sept. 16, 2003).
[1142] *Id.*
[1143] Claimant's Reply Memorial, ¶¶ 219-20, quoting *OECD Working Papers*, at 2.
[1144] *Id.* ¶ 220.
[1145] *Id.* ¶ 218, quoting *OECD Working Papers*, at 2 (emphasis added) [Ex. 174].

of treatment, … as opposed to the "relative" standards embodied in "national treatment"'…."'[1146] Claimant's standard, according to Respondent, would tie the minimum standard of treatment to the domestic legal system of the respondent in each case.[1147] Respondent asserts that this is incorrect as the standard, by definition, sets a minimum:

> The international minimum standard is a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, *regardless of their domestic legislation and practices*, must respect when dealing with foreign nationals and their property.[1148]

567. Respondent argues that, as Claimant "itself recognizes, a rule only crystallizes into customary international law over time through a general and consistent practice of States that is adhered to from a sense of legal obligation."[1149] Respondent therefore asserts that the establishment of such a rule requires two elements: "a concordant practice of a number of States acquiesced in by others; and a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)."[1150]

iii. *The Asserted Obligation to Protect Legitimate Expectations through Establishment of a Transparent and Predictable Legal and Business Framework*

a. Claimant's Contentions

568. Claimant asserts that the "NAFTA Treaty itself in its preamble, resolved, 'that it was to ensure a predictable commercial framework for business planning and investment.'"[1151] Inherent in business planning and investment based upon prediction of the commercial framework is the concept of an investor's "legitimate expectations." Claimant argues that, "[t]he principle of 'legitimate expectation,' though not explicitly mentioned in Article 1105 or in other similar investment treaties, is considered to be part

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[1146] Respondent's Counter-Memorial, at 220, footnote 964, quoting *OECD Working Papers*, at 2 and 8, footnote 32.

[1147] Respondent's Rejoinder, at 143.

[1148] *Id.* at 144, quoting *OECD Working Papers*, at 8, footnote 32 (emphasis added) (additional citations omitted).

[1149] Respondent's Counter-Memorial, at 219, citing Claimant's Memorial, ¶ 518 and RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

[1150] *Id.*, quoting CLIVE PARRY, JOHN P. GRANT, ANTHONY PARRY & ARTHUR D. WATTS, ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 82 (1986).

[1151] Counsel for Claimant, Tr. 44:2-5, 44:12-15.

of the fair and equitable treatment standard as an expression and part of the 'good faith' principle recognized in international law …."[1152] Claimant draws on the *Tecmed* award for support of this contention. In that award, the tribunal held that the fair and equitable treatment standard under the Spain-Mexico BIT in question required the "Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."[1153]

569. Similarly, Claimant cites to the *CMS* tribunal which, in analyzing the underlying United States-Argentina bilateral investment treaty, held that "[t]here can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment."[1154] Claimant quotes the *CMS* tribunal as explaining:

> In addition to the specific terms of the Treaty, the significant number of treaties, both bilateral and multilateral, that have dealt with this standard also unequivocally shows that fair and equitable treatment is inseparable from stability and predictability. Many arbitral decisions and scholarly writing point in the same direction.[1155]

570. Claimant also cites to *International Thunderbird*, in which, Claimant argues, a NAFTA tribunal accepts the notion that the protection of legitimate expectations is part of the fair and equitable treatment obligations under customary international law.[1156] The award states:

> Having considered recent investment case law and the good faith principle of international customary law, the concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA party to honour those expectations could cause the investor (or investment) to suffer damages.[1157]

Claimant additionally references numerous other arbitral decisions based on various BITs that, Claimant claims, "have found that stability of the legal and business framework is an

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[1152] Claimant's Memorial, ¶ 532, quoting *Tecmed*, Award, ¶ 153 (May 29, 2003).
[1153] *Id.* ¶ 533, quoting *Tecmed*, Award, ¶ 154 (May 29, 2003).
[1154] *Id.* ¶ 534, quoting *CMS v. Argentina*, Award, ¶ 274 (May 12, 2005).
[1155] Claimant's Reply Memorial, ¶ 226, quoting *CMS v. Argentina,* Award, ¶ 276 (May 12, 2005).
[1156] Counsel for Claimant, Tr. 45:8-20, citing *International Thunderbird*, Award, ¶ 147 (Jan. 26, 2006).
[1157] *International Thunderbird*, Award, ¶ 147 (Jan. 26, 2006) (internal citation omitted).

essential or dominant element of fair and equitable treatment ….”[1158]

571. Claimant stresses that a tribunal should not “second-guess” a State’s action, but that it still must evaluate whether the State complied with its international obligations. Claimant quotes *Saluka v. Czech Republic*: “The Czech Republic, once it had decided to bind itself by the Treaty to accord ‘fair and equitable treatment’ to investors of the other Contracting Party, was bound to implement its policies, including its privatization strategies, in a way that did not lead to unjustified differential treatment unlawful under the Treaty.”[1159] A determination of a breach of the fair and equitable treatment standard therefore, according to Claimant, requires weighing the legitimate and reasonable expectations of the investor against the legitimate regulatory interests of the State.[1160]

572. Claimant argues that “numerous tribunals—interpreting BITs and other instruments around the world—have concluded that measures which *lack transparency*, fail to provide predictability or are otherwise arbitrary violate the customary international law obligation to provide fair and equitable treatment.”[1161] It relies on *Waste Management*, among other awards,[1162] to support this contention.[1163] *Waste Management* held that the minimum standard of fair and equitable treatment can be “infringed by conduct attributable to the State and harmful to the claimant” if it “involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a *complete lack of transparency and candour* in an administrative process.”[1164]

573. Claimant also cites to the *Tecmed* award for the proposition that a foreign investor expects its host State to act consistently, free from ambiguity and “totally

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[1158] Counsel for Claimant, Tr. 47:16-22, citing *Saluka v. Czech Republic*; *Azurix v. Argentina*; *Occidental v. Ecuador*; *PSEG v. Turkey*; *CMS v. Argentina*; and *Enron v. Argentina*.

[1159] Counsel for Claimant, Tr. 1728:13-19, quoting *Saluka v. Czech Republic*, Partial Award, ¶ 337 (Mar. 17, 2006).

[1160] Counsel for Claimant, Tr. 1729:1-6.

[1161] Claimant’s Reply Memorial, ¶ 222 (emphasis added).

[1162] *See* Claimant’s Memorial, ¶ 534, citing *CMS v. Argentina*, Award, ¶ 274 (May 12, 2005); Claimant’s Memorial, ¶ 535, citing *Metalclad*, Award, ¶ 76 (Sept. 2, 2000); Claimant’s Memorial, ¶ 537, citing Mazzeffini v. Kingdom of Spain (“*Mazzeffini*”), ICSID Case No. ARB/97/7, Award, ¶ 83 (Jan. 25, 2000).

[1163] Claimant’s Memorial, ¶ 538.

[1164] *Id.*, quoting *Waste Management*, Award, ¶ 98 (Apr. 30, 2004) (emphasis added).

transparently" in its relations with the investor.[1165] This enables the investor to "know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices to be able to plan its investment and comply with such regulations."[1166] Claimant quotes *ADC v. Hungary* which provides: "It is one thing to say that an investor shall conduct its business in compliance with the host State's domestic laws and regulations. It is quite another to imply that the investor must also be ready to accept whatever the host State decides to do to it."[1167]

574. Finally, Claimant finds additional support for its contention that fair and equitable treatment includes a duty of transparency in the 1999 UNCTAD Report on fair and equitable treatment:

> The concept of transparency overlaps with fair and equitable treatment in at least two significant ways. First, transparency may be required, as a matter of course, by the concept of fair and equitable treatment. If laws, administrative decisions and other binding decisions are to be imposed upon a foreign investor by a host State, then fairness requires that the investor is informed about such decisions before they are imposed. This interpretation suggests that where an investment treaty does not expressly provide for transparency, but does for fair and equitable treatment, then transparency is implicitly included in the treaty. Secondly, where a foreign investor wishes to establish whether or not a particular State action is fair and equitable, as a practical matter, the investor will need to ascertain the pertinent rules concerning the State action; the degree of transparency in the regulatory environment will therefore affect the ability of the investor to assess whether or not fair and equitable treatment has been made available in any given case.[1168]

b. Respondent's Contentions

575. Respondent asserts that Claimant has failed to demonstrate the existence of any customary international law rule requiring "States to regulate in such a manner—or refrain from regulating—so as to avoid upsetting foreign investors' settled expectations

[1165] Counsel for Claimant, Tr. 1724:8-16, citing *Tecmed*, Award, ¶ 154 (May 29, 2003).

[1166] *Id.* Claimant argues that this decision is instructive, despite the fact that it is based on an autonomous fair and equitable treatment standard in the Spain-Mexico BIT, because the tribunal expressly interpreted the provision by giving effect to "the good faith principle and international law." Counsel for Claimant, Tr. 1724:5-8; *Tecmed*, Award, ¶ 155 (May 29, 2003).

[1167] Claimant's Reply Memorial, ¶ 231, quoting *ADC v. Hungary*, Award, ¶ 424 (Oct. 2, 2006).

[1168] *Id.* ¶ 229, quoting UNCTAD, FAIR AND EQUITABLE TREATMENT 51 (UNCTAD Series on International Investment Agreements, 1999) (internal citations omitted).

with respect to their investments."[1169] For support of this contention, Respondent points to the cases relied upon by Claimant for the proposition that the "duty to accord fair and equitable treatment" includes protection "against disappointment of an investor's expectations." None of these cases, Respondent contends, explains how such a principle became a part of the minimum standard of treatment under customary international law.[1170] *Generation Ukraine* is not relevant to Claimant's argument, Respondent contends, because the claimant in that case alleged only a breach of the prohibition against expropriation, not a breach of the minimum standard of treatment.[1171] Claimant's reliance on *Tecmed* was similarly misplaced, according to Respondent, as that tribunal interpreted the Spain-Mexico BIT and, in doing so, expressly interpreted the fair and equitable treatment standard in that BIT as an "autonomous" standard.[1172] Similarly, Respondent contends that the *Saluka* tribunal also was applying an autonomous standard.[1173] Finally, the *CMS* tribunal, according to Respondent, "summarily equated the international law minimum standard of treatment with 'the required stability and

[1169] Respondent's Counter-Memorial, at 230. As noted above, Claimant divided the asserted duties inherent in the fair and equitable treatment of Article 1105(1) into two obligations: (1) the duty to protect investor expectations through the maintenance of a predictable and transparent framework, and (2) the duty to protect investors from arbitrary acts. Claimant's Reply Memorial, ¶¶ 224-41. Respondent, in countering these asserted duties, divided them instead into three obligations: (1) to act transparently, (2) to act in a manner that does not frustrate investors' legitimate expectations, and (3) to refrain from arbitrary conduct. Counsel for Respondent, Tr. 1390:21-1391:8. As it is the burden of the Claimant to prove the content of the customary international law minimum standard of treatment that it asserts has been breached in this situation, it is its right to determine the methodology by which to argue its positions. The Tribunal therefore adopts Claimant's methodology of analysis and combines the first two obligations. In addition, as explained below in its holding, the Tribunal takes this approach because it finds that Claimant has not in fact alleged a separate stand-alone claim for breach of transparency in the usual sense of insufficient notice and comment, and instead argues for a "transparent and predictable framework" which the Tribunal interprets to mean a knowable and consistent regime in which significant changes should be forewarned and not surprising. To the extent that Respondent argued its positions based upon three inherent State obligations, the Tribunal has combined its first two asserted duties into one and consolidated Respondent's arguments with respect to these duties.

[1170] Respondent's Rejoinder, at 179.

[1171] Respondent's Counter-Memorial, at 230-31.

[1172] *Id.* at 231, quoting *Tecmed*, Award, ¶¶ 155-56 (May 29, 2003). For further explanation of the "autonomous" standard, as opposed to that of customary international law or international law, *see supra* ¶¶ 541-43.

[1173] Counsel for Respondent, Tr. 1980:12-19, citing *Saluka v. Czech Republic*, Award, ¶ 305 (Mar. 17, 2006). Respondent also notes that the *Saluka* tribunal nevertheless recognized that no investor may reasonably "expect that the circumstances prevailing at the time the investment is made remain totally unchanged." *Id.*

predictability of the business environment, founded on solemn legal and contractual commitments,' without purporting to rely on *any* evidence" of *opinio juris*.[1174]

576. Respondent argues that frustration of an investor's expectations cannot form the basis of a stand-alone claim under NAFTA Chapter 11.[1175] Respondent asserts that if States were prohibited from regulating in any manner that frustrated expectations—or had to compensate for any diminution in profit—they would lose the power to regulate.[1176] In contrast to such a stand-alone provision, Respondent points to tribunals interpreting BITs which have found breaches of the obligation to provide fair and equitable treatment when express assurances or contractual commitments made to induce foreign investment had been breached.[1177] For instance, Respondent argues that both the *CMS* and *Enron* tribunals found a breach of the fair and equitable treatment obligations when Argentina abandoned the energy privatization incentives it had agreed to in the Gas Law of 1992, in the form of inflation-adjusted tariffs that could be calculated in U.S. dollars and converted to pesos.[1178] Similarly, in *Azurix* and *Siemens*, the tribunals found that Argentina breached its fair and equitable treatment obligations when it forced renegotiation of rate adjustment provisions contained in their respective Concession Contracts.[1179] Finally, the *Tecmed* tribunal found such a breach based on a conclusion that Mexico had breached a quasi-contract between the investor and various governmental entities.[1180]

577. Respondent cites to the fact that a breach of contract does not rise to the level of a Chapter 11 claim without something beyond mere breach as the best example of why the duty to protect legitimate investor expectations is not a component of the customary

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[1174] Respondent's Counter-Memorial, at 232, citing *CMS v. Argentina*, Award, ¶ 284 (May 12, 2005).

[1175] Counsel for Respondent, Tr. 1396:12-15; Respondent's Counter-Memorial, at 233-34; Respondent's Rejoinder, at 178-79.

[1176] Respondent's Counter-Memorial, at 233, citing *Feldman*, Award, ¶ 103 (Dec. 16, 2002) (noting, in the context of an indirect expropriation claim, that "[r]easonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say the customary international law recognized this.").

[1177] Counsel for Respondent, Tr. 1981:18-1982:11.

[1178] Counsel for Respondent, Tr. 1982:12-16; *see also CMS,* Form 8-K at Ex. 99.1 (May 17, 2005).

[1179] Counsel for Respondent, Tr. 1983:1-6.

[1180] Counsel for Respondent, Tr. 1983:7-17.

international law minimum standard of treatment.[1181] Respondent asserts that a claimant must demonstrate something more than a contract breach, such as denial of justice or repudiation in a discriminatory way, or in a manner motivated by non-commercial considerations.[1182] According to Respondent, if "the expectations [that] manifest in a contract cannot provide a basis for a breach of the minimum standard of treatment, no lesser basis for such expectation can do so."[1183]

578. Respondent asserts that Claimant also has failed to show "any relevant State practice to support its contention that States are obligated under international law to provide a transparent and predictable framework for foreign investment."[1184] Respondent contends that "neither [Claimant] nor the sources it cites demonstrate that any such rule is part of customary international law … or how—if at all—such a binding customary international practice has evolved."[1185] Respondent explains that, although there may be transparency aspects within the customary international law minimum standard of treatment, there is not a stand-alone rule:

> [O]bviously in established sets of rules recognized as being part of the minimum standard of treatment, there are some transparency aspects. For example, in a judicial denial of justice, the accessibility of the foreign national to the courts and the availability of records, for example, is obviously a part of the protection. You might call that transparency, but no stand-alone rule of transparency [exists] for all State conduct.[1186]

Respondent argues that Claimant is instead suggesting a standard that amounts to an imposition of the same kind of procedural rigidity that has been administratively imposed by the Administrative Procedure Act in the United States,[1187] which, *inter alia*, provides detailed instructions on how the rulemaking of U.S. federal agencies is to be conducted and reviewed.

579. In addition, Respondent argues that Claimant has failed to identify "what exactly it believes States are required to do in order to conform to the so-called rule of customary

[1181] Counsel for Respondent, Tr. 1396:18-1398:1; Respondent's Rejoinder, at 179-80.
[1182] Respondent's Rejoinder, at 179-80, citing *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 4, cmt. ¶ 6 (additional citations omitted).
[1183] Counsel for Respondent, Tr. 1397:15-18; *see also* Respondent's Rejoinder, at 180.
[1184] Respondent's Counter-Memorial, at 226-27.
[1185] Respondent's Rejoinder, at 154.
[1186] Counsel for Respondent, Tr. 1444:10-18.
[1187] Respondent's Rejoinder, at 154; *see also* Counsel for Respondent, Tr. 1393:14-16.

international law."[1188] For instance, while Claimant cites to *Tecmed* and *Azurix*, both of these tribunals, Respondent asserts, spoke of transparency in terms of a State making public its laws and regulations that govern foreign investment.[1189] Claimant does not, however, allege that Respondent failed to properly publish its laws and regulations.[1190] Respondent contends that if, however, Claimant is alleging that the international minimum standard of treatment requires States to provide "ample opportunity" in advance of all laws and regulations for foreign investor comment, this is legally incorrect.[1191]

580. According to Respondent, all three State Parties to the NAFTA have agreed that there is no general transparency requirement in Article 1105 and have expressly rejected the notion that transparency forms part of customary international law.[1192] In addition, the United States and Canada consider that, "unless explicitly provided for elsewhere in the NAFTA, Chapter Eighteen comprise[s] the extent of the Parties' agreement on their transparency obligations. That is, *expressio unius est exclusio alterius.*"[1193] Chapter 18, Respondent points out, "sets out a number of requirements designed to foster openness, transparency and fairness in the adoption and application of the administrative measures covered by the Agreement."[1194] Respondent adds that the NAFTA Parties have not consented to arbitrate any alleged breaches of obligations arising under Chapter 18 through Chapter 11's investor State arbitration mechanism.[1195]

581. Respondent then challenges Claimant's cited arbitral awards for its contention that the customary international law minimum standard of treatment includes a requirement of transparency. Respondent points out that the portion of the *Metalclad*

[1188] Counsel for Respondent, Tr. 1392:19-22.
[1189] Counsel for Respondent, Tr. 1392:22-1393:5.
[1190] Counsel for Respondent, Tr. 1393:5-9.
[1191] Counsel for Respondent, Tr. 1393:10-19.
[1192] Respondent's Rejoinder, at 158, citing *Methanex*, Rejoinder Memorial of the United States on Jurisdiction, Admissibility and the Proposed Amendment, p. 33 (June 27, 2001); *Metalclad*, Amended Petition of Mexico to the Supreme Court of British Columbia (Sup. Ct. B.C.), ¶ 72 (Oct. 27, 2000); *Metalclad*¸ Outline of Argument of Intervenor Attorney General of Canada (Sup. Ct. B.C.), ¶¶ 31-33 (Feb. 16, 2001).
[1193] Respondent's Rejoinder, at 159, citing U.S. Statement of Administrative Action (hereinafter "*U.S. SAA*") at 193, and Canadian Statement of Implementation (hereinafter "*Canadian SOI*") at 196 (internal citation omitted).
[1194] *Id.*, quoting NAFTA, IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-159, 103d Cong., at 193 (1993).
[1195] *Id.* at 131, citing NAFTA, arts. 1116 & 1117.

award that addresses transparency was overturned by the Supreme Court of British Columbia, and this ruling was then quoted approvingly in the *Feldman v. United Mexican States* NAFTA Chapter 11 award.[1196] The *Feldman* award continued to state that "a denial of transparency alone thus does not constitute a violation of Chapter Eleven."[1197] Respondent also dismisses Claimant's reliance on *ADC v. Hungary* as it considered an autonomous BIT standard.[1198] Finally, the 2004 OECD Working Papers on fair and equitable treatment, Respondent asserts, specifically note that "[i]n a few recent cases, Arbitral Tribunals have defined 'fair and equitable treatment' drawing upon a relatively new concept not generally considered a customary international law standard: transparency."[1199]

582. Finally, Respondent argues that to the extent any of the arbitral decisions cited by Claimant applied an obligation of transparency, it was merely a general obligation to publish relevant laws and regulations.[1200] Respondent alleges that *Tecmed*, for instance, spoke of transparency in terms of an obligation to make known "beforehand any and all rules and regulations that will govern …."[1201]

iv. *The Asserted Obligation to Provide Protection from Arbitrary Actions*

a. Claimant's Contentions

583. Claimant contends that the duty to accord fair and equitable treatment includes protection from arbitrariness and finds support for this assertion in two NAFTA awards. First, Claimant cites to *S.D. Myers*, in which the tribunal held that "a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the

[1196] Counsel for Respondent, Tr. 1394:18-1395:22.
[1197] Counsel for Respondent, Tr. 1395:12-1396:1, quoting *Feldman*, Award, ¶ 133 (Dec. 16, 2002).
[1198] Respondent's Rejoinder, at 168, citing *ADC v. Hungary*, Award, ¶ 445 (Oct. 2, 2006).
[1199] *Id.* at 156; *see also* Counsel for Respondent, Tr. 1394:10-17, quoting *OECD Working Papers,* at 37.
[1200] *Id.* at 169.
[1201] *Id.* at 170, quoting *Tecmed*, Award, ¶ 154 (Award) (May 29, 2003).

international perspective."[1202] Similarly, *International Thunderbird* held that "manifest arbitrariness falling below international standards" is prohibited under Article 1105.[1203]

584. Citing BIT jurisprudence, Claimant points to the *Tecmed* tribunal, which found that the Spain-Mexico BIT at the heart of that dispute protected the investor from arbitrary actions and required the host State "to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor."[1204] Claimant also cites to *LG&E v. Argentina*, in which the tribunal held that a State must engage in a rational decision-making process to avoid arbitrariness.[1205]

585. Arbitrariness, Claimant asserts, lacks "procedural fairness."[1206] Claimant argues that "government actions are arbitrary, in violation of the fair and equitable treatment standard, when the conduct is 'grossly unfair,' 'unjust,' 'clearly improper and discreditable ….'"[1207] "Thus, when there is an insufficient nexus between the government measure and the apparent objective, the government has acted arbitrarily, since its actions are not founded on fair and adequate reasons and lack legal justification."[1208]

586. Claimant cites to the definition of arbitrariness provided by the *Restatement (Third) of Foreign Relations Law*: an arbitrary act is one that is "unfair and unreasonable, and inflicts serious injury to established rights of foreign nationals, though falling short of an act that would constitute an expropriation."[1209] Claimant expands on this definition with that provided in *Lauder v. Czech Republic*: an arbitrary act is "not founded on reason or fact nor on the law."[1210] In addition, the *Tecmed* award states:

> The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the

[1202] Claimant's Reply Memorial, ¶ 239, quoting *S.D. Myers*, Partial Award, ¶ 263 (Nov. 13, 2000).
[1203] *Id.*, quoting *International Thunderbird*, Award, ¶ 194 (Jan. 26, 2006).
[1204] Counsel for Claimant, Tr. 45:21-46:14, quoting *Tecmed*, Award, ¶ 154 (May 29, 2003).
[1205] Counsel for Claimant, Tr. 47:9-15, citing *LG&E v. Argentina*.
[1206] Counsel for Claimant, Tr. 1717:22-1718:5.
[1207] Claimant's Reply Memorial, ¶ 235.
[1208] Claimant's Memorial, ¶ 530.
[1209] *Id.* ¶ 523, quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 712, footnote 11.
[1210] *Id.*, citing *Lauder v. Czech Republic*, Final Award, ¶ 232 (Sept. 3, 2002).

> investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.[1211]

The *ELSI* tribunal, in turn, provides that:

> Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the *Asylum* case, when it spoke of 'arbitrary action' being 'substituted for the rule of law' … It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.[1212]

Claimant also points to the outer limits of this standard as defined in *Pope & Talbot*: "there is no threshold limitation that the conduct complained of be egregious, outrageous, or shocking, or otherwise extraordinary."[1213] Nor, according to Claimant, does a party need to show that the host State acted in bad faith.[1214]

587. To prove that Respondent acted arbitrarily, Claimant argues that it need not show that the particular measure at issue is a violation of customary international law, but that the legal framework from which the measure sprang violated the "established and accepted principles embodied in the fair and equitable treatment standard …."[1215] Claimant cites to *Occidental v. Ecuador*, in which the tribunal held that the claimant did not need to prove a violation of customary international law for the failure to refund value-added taxes, "but rather whether the legal and business framework [met] the requirements of stability and predictability under international law."[1216] Therefore, Claimant argues, there is no duty for it to demonstrate customary international law rules regarding mine reclamation; it need only prove that fair and equitable treatment obligations have been breached in terms of a failure to maintain a legal and business environment free from arbitrariness.[1217]

[1211] Counsel for Claimant, Tr. 1719:6-17, quoting *Tecmed*, Award, ¶ 154 (May 29, 2003).

[1212] Claimant's Memorial, ¶ 525, quoting *ELSI*, Judgment, ¶ 128 (July 28, 1989) (internal citation omitted).

[1213] Counsel for Claimant, Tr. 1719:1-5; *see also* Claimant's Memorial, ¶ 526, quoting *Pope & Talbot*, Award on the Merits of Phase 2, ¶ 118 (Apr. 10, 2001).

[1214] Claimant's Memorial, ¶ 522, quoting *Loewen*, Award, ¶ 132 (June 26, 2003); *Mondev*, Award, ¶ 116 (Oct. 11, 2002); *CMS v. Argentina*, Award, ¶ 280 (May 12, 2005).

[1215] Counsel for Claimant, Tr. 1714:13-1715:16.

[1216] Counsel for Claimant, Tr. 1714:13-1715:16, quoting *Occidental v. Ecuador*, Final Award, ¶ 191 (July 1, 2004).

[1217] Counsel for Claimant, Tr. 1715:10-16.

588. Finally, Claimant agrees that the task of the Tribunal is not to second-guess the activities of the United States government, but rather to take the national conduct as a fact and measure it against the international law standards of Chapter 11 to determine whether the conduct was in accordance with those standards.[1218] Claimant argues, however, that "[w]hile tribunals cannot substitute their policy judgments for the State[']s, they can and must probe the host State's rationale to see whether its measures matched its objectives."[1219]

b. Respondent's Contentions

589. Respondent asserts that Claimant has "failed to present any evidence of relevant State practice to support its contention that Article 1105(1) imposes a general obligation on States to refrain from 'arbitrary' conduct."[1220] According to Respondent, no Chapter 11 tribunal has found that decision-making that appears "arbitrary" to some parties is sufficient to constitute an Article 1105 violation; instead these tribunals have consistently accorded a high level of deference to administrative decision-making.[1221]

590. Respondent additionally argues that Claimant, in making this argument, is requesting the Tribunal to find a violation of Article 1105 "based on what it perceives to be unwise legislation and mistakes made in the … administrative processing of its plan of operations."[1222] According to Respondent, Claimant seeks to impose upon Respondent the burden of justifying the appropriateness of the regulatory and legislative measures and proving that they are without "relevant flaws"; that they conform with "international and U.S. best practice"; and that they are the "least restrictive measures available" and "necessary, suitable, and proportionate."[1223]

591. Imperfect legislation or regulation, however, does not give rise to State responsibility under customary international law, Respondent contends.[1224] Under international law, every State is free to "change its regulatory policy," and every State

[1218] Counsel for Claimant, Tr. 70:21-71:21, quoting *Saluka v. Czech Republic*, Partial Award, ¶ 308 (Mar. 17, 2006) and *International Thunderbird*, Award, ¶ 127 (Jan. 26, 2006).
[1219] Counsel for Claimant, Tr. 1722:4-7.
[1220] Respondent's Counter-Memorial, at 227.
[1221] *Id.*
[1222] Counsel for Respondent, Tr. 1399:3-7.
[1223] Counsel for Respondent, Tr. 1399:8-17.
[1224] Respondent's Rejoinder, at 188.

"has a wide discretion with respect to how it carries out such policies by regulation and administrative conduct."[1225] The issue is not the legislature's motivation, but only whether the measure is rationally related to a legitimate governmental purpose.[1226]

592. Respondent asserts that Claimant would have the Tribunal "engage in *de novo* review of factual determinations made by agencies and legal conclusions drawn by agencies on issues of first impression."[1227] Respondent quotes *S.D. Myers* for the proposition that tribunals are allowed limited, if any, appellate review of domestic decisions: "determination [that Article 1105 has been breached] must be made in … light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[1228] The tribunal explained the rationale for this holding:

> When interpreting and applying the 'minimum standard', a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.[1229]

593. Respondent asserts that this is reiterated by the tribunal in *International Thunderbird*:

> [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).[1230]

This deference is further reinforced by the tribunals in *ADF* and *Mondev*, both of which stress that international tribunals do not sit as courts of appellate jurisdiction with

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[1225] *Id.*, quoting *International Thunderbird*, Award, ¶ 127 (Jan. 26, 2006).
[1226] *Id.* at 189, citing Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 583, 487 (1955).
[1227] Counsel for Respondent, Tr. 104:15-18.
[1228] Respondent's Counter-Memorial, at 230, quoting *S.D. Myers*, Partial Award, ¶ 263 (Nov. 13, 2000).
[1229] Counsel for Respondent, Tr. 1400:9-1401:3, quoting *S.D. Myers*, Partial Award, ¶ 261 (Nov. 13, 2000).
[1230] Respondent's Rejoinder, at 207, quoting *International Thunderbird*, Award, ¶ 160 (Jan. 26, 2006).

authority to review the legal validity of domestic measures.[1231] Finally, it is also confirmed by the *Saluka* award, Respondent contends, which holds that "[i]n the absence of clear and compelling evidence that the [Czech banking regulator] erred or acted otherwise improperly in reaching its decision … the Tribunal must in the circumstances accept the justification given by the Czech banking regulator for its decision."[1232]

594. Respondent argues that the deference usually accorded to administrative agency and legislative decisions is not limited to separation of power, but also "arises out of a recognition that those courts are not best placed to make those determinations; that they lack the expertise that the legislature and/or the administrative agency has on these particular questions" and they do not possess the full administrative record.[1233] Respondent cites to Claimant's own expert to support this contention: "a high measure of deference to the facts and factual conclusions seems the only way to prevent investment tribunals from becoming science courts, and from frustrating democratically adopted preferences of risk in matters of fundamental importance such as public health."[1234]

595. Respondent observes that such deference is acknowledged by both U.S. and Canadian courts. U.S. courts, for instance, have adopted the "arbitrary and capricious" standard in which they will uphold a challenged agency action unless the petitioner can show the action to be "arbitrary and capricious;"[1235] the scope of review is narrow and a court is not to substitute its judgment for that of the agency.[1236] Canadian courts, Respondent argues, also "give considerable respect" to administrators' discretionary decision-making, restricting their review to "limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations …."[1237]

[1231] Counsel for Respondent, Tr. 2106:5-15, citing *ADF Group*, Second Article 1128 Submission of the United Mexican States, ¶ 190 (Jan. 9, 2003) (citing *Mondev*, Award, ¶ 136 (Oct. 11, 2002)).

[1232] Respondent's Rejoinder, at 207, quoting *Saluka v. Czech Republic*, Partial Award, ¶ 273 (Mar. 17, 2006).

[1233] Counsel for Respondent, Tr. 1457:11-20.

[1234] Counsel for Respondent, Tr. 1457:21-1458:11, quoting Expert Report of Professor Wälde, at IV-27, footnote 474; *see also* Respondent's Rejoinder, at 210.

[1235] Respondent's Rejoinder, at 208, quoting 5 U.S.C. § 706(2)(A) (1966).

[1236] *Id.* at 208-9, quoting Motor Vehicles Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (additional citations omitted).

[1237] *Id.* at 209, quoting Baker v. Minister of Citizenship and Immigration, [1999] S.C.R. 817, 853 (Can.).

596. If there is an obligation for a State to not act arbitrarily, as the *ELSI* court determined based on the BIT under consideration in that case, Respondent argues that a breach of such an international duty must go far beyond the measure's mere domestic illegality:

> A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness. … Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.[1238]

597. Respondent argues that NAFTA tribunals have held that there is a very high threshold beyond which an act must rise to be so arbitrary as to violate Article 1105. The *International Thunderbird* tribunal, for instance, held that mere "arbitrary" conduct by an administrative agency is insufficient to amount to an Article 1105 breach; to constitute a breach of international obligations, the regulatory action had to amount to a "gross denial of justice or manifest arbitrariness falling below international standards."[1239] The tribunal in *S.D. Myers* held similarly: a breach of Article 1105 occurs only when "an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective."[1240] The *S.D. Myers* tribunal continued on to note that this "determination must be made in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[1241] The *S.D. Myers* tribunal, Respondent notes, found no Article 1105 breach under an arbitrariness standard despite its conclusion that "there was no legitimate environmental reason for introducing the ban" at issue.[1242]

[1238] *Id.* at 206, quoting *ELSI*, Judgment, p. 74 (July 28, 1989).

[1239] Respondent's Counter-Memorial, at 227-28, quoting *International Thunderbird*, Award, ¶ 194 (Jan. 26, 2006).

[1240] *Id.* at 230, quoting *S.D. Myers*, Partial Award, ¶ 263 (Nov. 13, 2000).

[1241] *Id.*, quoting *S.D. Myers*, Partial Award, ¶ 263 (Nov. 13, 2000).

[1242] *Id.*, quoting *S.D. Myers*, Partial Award, ¶ 195 (Nov. 13, 2000).

3. DECISION OF THE TRIBUNAL WITH RESPECT TO THE ARTICLE 1105(1) LEGAL STANDARD

598. As noted above, Article 1105(1) of the NAFTA provides that "[e]ach party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

599. There is no disagreement among the State Parties to the NAFTA, nor the Parties to this arbitration, that the requirement of fair and equitable treatment in Article 1105 is to be understood by reference to the customary international law minimum standard of treatment of aliens.[1243] Indeed, the Free Trade Commission ("FTC") clearly states, in its binding Notes of Interpretation on July 31, 2001, that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party."[1244]

600. The question thus becomes: what does this customary international law minimum standard of treatment require of a State Party vis-à-vis investors of another State Party? Is it the same as that established in 1926 in *Neer v. Mexico*?[1245] Or has Claimant proven that the standard has "evolved"? If it has evolved, what evidence of custom has Claimant provided to the Tribunal to determine its current scope?

601. As a threshold issue, the Tribunal notes that it is Claimant's burden to sufficiently answer each of these questions. The State Parties to the NAFTA (at least Canada and Mexico) agree that "the test in *Neer* does continue to apply," though Mexico "also agrees that the standard is relative and that conduct which may not have violated international law [in] the 1920's might very well be seen to offend internationally accepted principles today."[1246] If, as Claimant argues, the customary international law

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[1243] Counsel for Claimant, Tr. 36:15-18; Counsel for Respondent, Tr. 1390:11-14; Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, § B(2) (July 31, 2001) ("FTC Notes").

[1244] *FTC Notes*, § B(1). For further discussion of the binding nature of the FTC Notes, *see* NAFTA Article 1131(2): "An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

[1245] Neer v. Mexico, 4 R. Int'l Arb. Awards, 60 (Oct. 15, 1926).

[1246] *ADF Group*, Second Article 1128 Submission of the United Mexican States, p. 15 (July 22, 2002), quoting *Pope & Talbot*, Post-Hearing Article 1128 Submission of the United Mexican States (Damages Phase), ¶ 8 (Dec. 3, 2001), quoting *Pope & Talbot*, Respondent Canada's Counter-Memorial (Phase 2), ¶ 309 (Aug. 18, 2001) (Mexico's Post-Hearing Article 1128 Submission in *Pope & Talbot* quotes with approval Canada's submission as respondent in *Pope & Talbot*, which states in paragraph 8:

minimum standard of treatment has indeed moved to require something less than the "egregious," "outrageous," or "shocking" standard as elucidated in *Neer*, then the burden of establishing what the standard now requires is upon Claimant.

602. The Tribunal acknowledges that it is difficult to establish a change in customary international law. As Respondent explains, establishment of a rule of customary international law requires: (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*)."[1247]

603. The evidence of such "concordant practice" undertaken out of a sense of legal obligation is exhibited in very few authoritative sources: treaty ratification language, statements of governments, treaty practice (e.g., Model BITs), and sometimes pleadings.[1248] Although one can readily identify the practice of States, it is usually very difficult to determine the intent behind those actions. Looking to a claimant to ascertain custom requires it to ascertain such intent, a complicated and particularly difficult task. In the context of arbitration, however, it is necessarily Claimant's place to establish a change in custom.

604. The Tribunal notes that, although an examination of custom is indeed necessary to determine the scope and bounds of current customary international law, this requirement—repeatedly argued by various State Parties—because of the difficulty in proving a change in custom, effectively freezes the protections provided for in this provision at the 1926 conception of egregiousness.

605. Claimant did provide numerous arbitral decisions in support of its conclusion that fair and equitable treatment encompasses a universe of "fundamental" principles common throughout the world that include "the duty to act in good faith, due process, transparency and candor, and fairness and protection from arbitrariness."[1249] Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove

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"The conduct of government toward the investment must amount to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, an outrage, bad faith or the willful neglect of duty.").

[1247] Respondent's Counter-Memorial, at 219 (citations omitted).

[1248] In the NAFTA context, there is the addition of Article 1128 submissions through which the State Parties can express directly their views on and interpretations of the provisions of the NAFTA.

[1249] Counsel for Claimant, Tr. 40:1-8.

customary international law.[1250] 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.

606. This brings the Tribunal to its first task: ascertaining which of the sources argued by Claimant are properly available to instruct the Tribunal on the bounds of "fair and equitable treatment." As briefly mentioned above, the Tribunal notes that it finds two categories of arbitral awards that examine a fair and equitable treatment standard: those that look to define customary international law and those that examine the autonomous language and nuances of the underlying treaty language. Fundamental to this divide is the treaty underlying the dispute: those treaties and free trade agreements, like the NAFTA, that are to be understood by reference to the customary international law minimum standard of treatment necessarily lead their tribunals to analyze custom; while those treaties with fair and equitable treatment clauses that expand upon, or move beyond, customary international law, lead their reviewing tribunals into an analysis of the treaty language and its meaning, as guided by Article 31(1) of the Vienna Convention.

607. Ascertaining custom is necessarily a factual inquiry, looking to the actions of States and the motives for and consistency of these actions. By applying an autonomous standard, on the other hand, a tribunal may focus solely on the language and nuances of the treaty language itself and, applying the rules of treaty interpretation, require no party proof of State action or *opinio juris.* This latter practice fails to assist in the ascertainment of custom.

608. As Article 1105's fair and equitable treatment standard is, as Respondent phrases it, simply "a shorthand reference to customary international law,"[1251] the Tribunal finds 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. The various BITs cited by Claimant may or may not illuminate customary international law; they will prove helpful to this Tribunal's analysis when they seek to provide the same base floor of

[1250] Respondent's Rejoinder, at 151, quoting Robert Cryer, *Of Custom, Treaties, Scholars, and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*, 11 J. CONFLICT & SECURITY L. 239, 252 (2006) (additional citation omitted).

[1251] Counsel for Respondent, Tr. 1934:9-20.

conduct as the minimum standard of treatment under customary international law; but they will not be of assistance if they include different protections than those provided for in customary international law.

609. Claimant has agreed with this distinction between customary international law and autonomous treaty standards but argues that, with respect to this particular standard, BIT jurisprudence has "converged with customary international law in this area."[1252] The Tribunal finds this to be an over-statement. Certainly, it is possible that some BITs converge with the requirements established by customary international law; there are, however, numerous BITs that have been interpreted as going beyond customary international law, and thereby requiring more than that to which the NAFTA State Parties have agreed. It is thus necessary to look to the underlying fair and equitable treatment clause of each treaty, and the reviewing tribunal's analysis of that treaty, to determine whether or not they are drafted with an intent to refer to customary international law.

610. Looking, for instance, to Claimant's reliance on *Tecmed v. Mexico* for various of its arguments, the Tribunal finds that Claimant has not proven that this award, based on a BIT between Spain and Mexico,[1253] defines anything other than an autonomous standard and thus an award from which this Tribunal will not find guidance. Article 4(1) of the Spain-Mexico BIT involved in the *Tecmed* proceeding provides that each contracting party guarantees just and equitable treatment conforming with "International Law" to the investments of investors of the other contracting party in its territory.[1254] Article 4(2) proceeds to explain that this treatment will not be less favorable than that granted in similar circumstances by each contracting party to the investments in its territory by an investor of a third State.[1255] Several interpretations of the requirement espoused in Article 4(2) are indeed possible, but the *Tecmed* tribunal itself states that it "understands that the scope of the undertaking of fair and equitable treatment under Article 4(1) of the Agreement described ... is that resulting from *an autonomous interpretation* ...."[1256]

[1252] Counsel for Claimant, Tr. 1710:20-22.

[1253] *See Tecmed*, Award, ¶ 4 (May 29, 2003), citing Agreement on the Reciprocal Promotion and Protection of Investments signed by the Kingdom of Spain and the United Mexican States, (Dec. 18, 1996).

[1254] Claimant's Memorial, ¶ 533, footnote 1033, quoting *Tecmed*, Award, ¶ 154 (May 29, 2003).

[1255] Agreement on the Reciprocal Promotion and Protection of Investments signed by the Kingdom of Spain and the United Mexican States, Article 4(2) (Dec. 18, 1996).

[1256] *Tecmed*, Award, ¶ 155 (May 29, 2003) (emphasis added).

Thus, this Tribunal finds that the language or analysis of the *Tecmed* award is not relevant to the Tribunal's consideration.

611. The Tribunal therefore holds that it may look solely to arbitral awards—including BIT awards—that seek to be understood by reference to the customary international law minimum standard of treatment, as opposed to any autonomous standard. The Tribunal thus turns to its second task: determining the scope of the current customary international law minimum standard of treatment, as proven by Claimant.

612. It appears to this Tribunal that the NAFTA State Parties agree that, at a minimum, the fair and equitable treatment standard is that as articulated in *Neer*:[1257] "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[1258] Whether this standard has evolved since 1926, however, has not been definitively agreed upon. The Tribunal considers two possible types of evolution: (1) that what the international community views as "outrageous" may change over time; and (2) that the minimum standard of treatment has moved beyond what it was in 1926.

613. The Tribunal finds apparent agreement that the fair and equitable treatment standard is subject to the first type of evolution: a change in the international view of what is shocking and outrageous. As the *Mondev* tribunal held:

> *Neer* and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be. In particular, both the substantive and procedural rights of the individual in international law have undergone considerable development. In light of these developments it is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to what those

[1257] *ADF Group*, Second Article 1128 Submission of the United Mexican States, p. 15 (July 22, 2002), quoting *Pope & Talbot*, Post-Hearing Article 1128 Submission of the United Mexican States (Damages Phase), ¶ 8 (Dec. 3, 2001), quoting *Pope & Talbot*, Respondent Canada's Counter-Memorial (Phase 2), ¶ 309 (Aug. 18, 2001).

[1258] *Neer v. Mexico*, 4 R. Int'l Arb. Awards, ¶ 4 (Oct. 15, 1926). The *Neer* tribunal continued to explain that its inquiry was limited to "whether there [was] convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in wilful neglect of their duties, or in a pronounced degree of improper action, or (2) that Mexican law rendered it impossible for them properly to fulfil their task." *Id.* ¶ 5.

> terms—had they been current at the time—might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.[1259]

Similarly, this Tribunal holds that the *Neer* standard, when applied with current sentiments and to modern situations, may find shocking and egregious events not considered to reach this level in the past.

614. As regards the second form of evolution—the proposition that customary international law has moved beyond the minimum standard of treatment of aliens as defined in *Neer*—the Tribunal finds that the evidence provided by Claimant does not establish such evolution. This is evident in the abundant and continued use of adjective modifiers throughout arbitral awards, evidencing a strict standard. *International Thunderbird* used the terms "*gross* denial of justice" and "*manifest* arbitrariness" to describe the acts that it viewed would breach the minimum standard of treatment.[1260] *S.D. Myers* would find a breach of Article 1105 when an investor was treated "in *such an unjust or arbitrary* manner."[1261] The *Mondev* tribunal held: "The test is 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 ...."[1262]

615. The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community. Although the circumstances of the case are of course relevant, the standard is not meant to vary from state to state or investor to investor. The protection afforded by Article 1105 must be distinguished from that provided for in Article 1102 on National Treatment. Article 1102(1) states: "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors ...." The treatment of investors under Article 1102 is compared to the treatment the State's own investors receive and thus can

[1259] *Mondev*, Award, ¶ 116 (Oct. 11, 2002).
[1260] *International Thunderbird*, Award, ¶ 194 (Jan. 26, 2006) (emphasis added).
[1261] *S.D. Myers*, Partial Award, ¶ 263 (Nov. 13, 2000) (emphasis added).
[1262] *Mondev,* Award, ¶ 127 (Oct. 11, 2002) (emphasis added).

vary greatly depending on each State and its practices. The fair and equitable treatment promised by Article 1105 is not dynamic; it cannot vary between nations as thus the protection afforded would have no minimum.

616. It therefore appears that, although situations may be more varied and complicated today than in the 1920s, the level of scrutiny is the same. The fundamentals of the *Neer* standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1). The Tribunal notes that one aspect of evolution from *Neer* that is generally agreed upon is that bad faith is not required to find a violation of the fair and equitable treatment standard, but its presence is conclusive evidence of such. Thus, an act that is egregious or shocking may also evidence bad faith, but such bad faith is not necessary for the finding of a violation. The standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under *Neer*; it is entirely possible, however that, as an international community, we may be shocked by State actions now that did not offend us previously.

617. Respondent argues below that, in reviewing State agency or departmental decisions and actions, international tribunals as well as domestic judiciaries favor deference to the agency so as not to second guess the primary decision-makers or become "science courts." The Tribunal disagrees that domestic deference in national court systems is necessarily applicable to international tribunals. In the present case, the Tribunal finds the standard of deference to already be present in the standard as stated, rather than being additive to that standard. The idea of deference is found in the modifiers "manifest" and "gross" that make this standard a stringent one; it is found in the idea that a breach requires something greater than mere arbitrariness, something that is surprising, shocking, or exhibits a manifest lack of reasoning.

618. With this thought in mind, the Tribunal turns to the duties that Claimant argues are part of the requirements of a host State per Article 1105: (1) an obligation to protect

legitimate expectations through establishment of a transparent and predictable business and legal framework, and (2) an obligation to provide protection from arbitrary measures. As the United States explained in its 1128 submission in *Pope & Talbot*, and as Mexico adopted in its 1128 submission to the *ADF* tribunal: "'fair and equitable treatment' and 'full protection and security' are provided as examples of the customary international law standards incorporated into Article 1105(1). … The international law minimum standard [of treatment] is an umbrella concept incorporating a set of rules that has crystallized over the centuries into customary international law in specific contexts."[1263] The Tribunal therefore finds it appropriate to address, in turn, each of the State obligations Claimant asserts are potential parts of the protection afforded by fair and equitable treatment.

a. Asserted Obligation to Protect Legitimate Expectations Through Establishment of a Transparent and Predictable Legal and Business Framework

619. As explained above, the minimum standard of treatment of aliens established by customary international law, and by reference to which the fair and equitable treatment standard of Article 1105(1) is to be understood, is an absolute minimum, a floor below which the international community will not condone conduct. To maintain fair and equitable treatment as an absolute floor, a breach must be based upon objective criteria that apply equally among States and between investors.

620. The Tribunal notes Respondent's argument that even those expectations that manifest in a contract are insufficient to provide a basis for a breach of the minimum standard of treatment.[1264] The Tribunal agrees that mere contract breach, without something further such as denial of justice or discrimination, normally will not suffice to establish a breach of Article 1105.[1265] Merely not living up to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA. Instead, Article 1105(1)

[1263] *ADF Group*, Second Article 1128 Submission of the United Mexican States, p. 8 (July 22, 2002), quoting *Pope & Talbot*, Fourth Article 1128 Submission of the United States, ¶¶ 3, 8 (Nov. 1, 2000).

[1264] Counsel for Respondent, Tr. 1397:15-18; Respondent's Rejoinder, at 180.

[1265] *See* Azinian v. United Mexican States ("*Azinian*"), NAFTA/ICSID Case No. ARB/(AF)/97/2, Award, ¶ 87 (Nov. 1, 1999) (holding, "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.").

requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce its expectations.[1266]

621. The Tribunal therefore agrees with *International Thunderbird* that legitimate expectations relate to an examination under Article 1105(1) in such situations "where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct …."[1267] In this way, a State may be tied to the objective expectations that it creates *in order to induce* investment.

622. As the Tribunal determines below that no specific assurances were made to induce Claimant's "reasonable and justifiable expectations," the Tribunal need not determine the level, or characteristics, of state action in contradiction of those expectations that would be necessary to constitute a violation of Article 1105.

b. Asserted Obligation to Provide Protection from Arbitrary Measures

623. With respect to the asserted duty to protect investors from arbitrariness, the Tribunal notes Claimant's citations to several NAFTA arbitrations that have found a violation of Article 1105 in arbitrary state action. Claimant cites to *S.D. Myers* for its holding that "a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust and arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective."[1268] Similarly, it quotes *International Thunderbird*'s holding that "manifest arbitrariness falling below acceptable international standards" is prohibited under Article 1105.[1269]

624. The Tribunal also notes, however, Respondent's argument that no Chapter 11 tribunal has found that decision-making that appears arbitrary to some parties is sufficient to constitute an Article 1105 violation.[1270] In *Mondev*, for instance, the tribunal held: "The test is 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

[1266] *Methanex*, Final Award, Part IV, Ch. D, ¶ 7 (Aug. 3, 2005).
[1267] *International Thunderbird*, Award, ¶ 147 (Jan. 26, 2006) (internal citation omitted).
[1268] Claimant's Reply Memorial, ¶ 239, quoting *S.D. Myers*, Partial Award, ¶ 263 (Nov. 13, 2000).
[1269] *Id.*, citing *International Thunderbird*, Award, ¶ 194 (Jan. 26, 2006).
[1270] Respondent's Counter-Memorial, at 227.

judicial propriety of the outcome ….”[1271] Respondent understands this to be the case because tribunals consistently afford administrative decision-making a high level of deference.[1272] Respondent quotes *S.D. Myers* to illustrate this deference: “determination [that Article 1105 has been breached] must be made in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.”[1273] This, Respondent argues, leads to the result that merely imperfect legislation or regulation does not give rise to State responsibility under customary international law.[1274]

625. The Tribunal finds that, in this situation, both Parties are correct. Previous tribunals have indeed found a certain level of arbitrariness to violate the obligations of a State under the fair and equitable treatment standard. Indeed, arbitrariness that contravenes *the* rule of law, rather than *a* rule of law, would occasion surprise not only from investors, but also from tribunals.[1275] This is not a mere appearance of arbitrariness, however—a tribunal’s determination that an agency acted in a way with which the tribunal disagrees or that a state passed legislation that the tribunal does not find curative of all of the ills presented; rather, this is a level of arbitrariness that, as *International Thunderbird* put it, amounts to a “gross denial of justice or manifest arbitrariness falling below acceptable international standards.”[1276]

626. The Tribunal therefore holds that there is an obligation of each of the NAFTA State Parties inherent in the fair and equitable treatment standard of Article 1105 that they do not treat investors of another State in a *manifestly* arbitrary manner. The Tribunal thus determines that Claimant has sufficiently substantiated its arguments that a duty to protect investors from arbitrary measures exists in the customary international law minimum standard of treatment of aliens; though Claimant has not sufficiently rebutted Respondent’s assertions that a finding of arbitrariness requires a determination of some act far beyond the measure’s mere illegality, an act so manifestly arbitrary, so unjust and surprising as to be unacceptable from the international perspective.

[1271] *Mondev*, Award, ¶ 127 (Oct. 11, 2002).
[1272] Respondent’s Counter-Memorial, at 227.
[1273] *Id.* at 230, quoting *S.D. Myers*, Partial Award, ¶ 263 (Nov. 13, 2000).
[1274] Respondent’s Rejoinder, at 188.
[1275] *ELSI*, Judgment, ¶ 128 (July 28, 1989).
[1276] *International Thunderbird*, Award, ¶ 194 (Jan. 26, 2006).

4. FINAL DISPOSITION OF THE TRIBUNAL WITH RESPECT TO THE SCOPE OF THE FAIR AND EQUITABLE LEGAL STANDARD

627. The Tribunal holds that Claimant has not met its burden of proving that something other than the fundamentals of the *Neer* standard apply today. The Tribunal therefore holds that a violation of the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105. Such a breach may be exhibited by a "gross denial of justice or manifest arbitrariness falling below acceptable international standards;"[1277] or the creation by the State of objective expectations *in order to induce* investment and the subsequent repudiation of those expectations.[1278] The Tribunal emphasizes that, although bad faith may often be present in such a determination and its presence certainly will be determinative of a violation, a finding of bad faith is not a requirement for a breach of Article 1105(1).

B. DETERMINATION OF WHETHER THE FACTS ALLEGED VIOLATE THE ARTICULATED LEGAL STANDARD OF ARTICLE 1105(1)

628. Claimant argues, as part of its claim under Article 1105 of the NAFTA, that in "determining whether the Respondent's conduct rises to the level of a breach of Article 1105, the Tribunal should consider the entirety of its conduct rather than focusing on individual aspects of that conduct."[1279] Quoting *GAMI*, Claimant asserts that "[t]he record as a whole—not isolated events—determines whether there has been a breach of international law."[1280] To support its claim that the entirety of the United States federal and California State actions worked together to violate Claimant's rights under Article 1105, however, Claimant discusses the individual federal and State actions—and their

[1277] *Id.*

[1278] The Tribunal takes no position on the type or nature of repudiation measures that would be necessary to violate international obligations. As the Tribunal held above, Claimant has not proved governmental actions that would have legitimately created such expectations; the Tribunal therefore need not and does not reach the latter half of the inquiry.

[1279] Claimant's Memorial, ¶ 556.

[1280] *Id.*, quoting *GAMI Investments,* Final Award, ¶ 97 (Nov. 15, 2004).

ANNEX 149

PROCEEDINGS

OF THE

American Society of International Law

AT ITS

THIRTY-THIRD ANNUAL MEETING

HELD AT

WASHINGTON, D. C.

APRIL 27–29, 1939

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gize for disarranging the program this morning. Committee meetings interfered. The committee arranged to so distribute the functions and labors of the various committees of the Society that such delays should not hereafter be necessary.

THE "MINIMUM STANDARD" OF THE TREATMENT OF ALIENS

By EDWIN BORCHARD

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In its note of August 3, 1938, the Mexican Government contested the right of the United States to demand compensation for the agricultural lands of American citizens expropriated by Mexico since 1927, by asserting that the countries of this Continent have vigorously maintained "the principle of equality between nationals and foreigners, considering that the foreigner who voluntarily moves to a country . . . in search of a personal benefit, accepts in advance, together with the advantages which he is going to enjoy, the risks to which he may find himself exposed. It would be unjust that he should aspire to a privileged position safe from any risk, but availing himself, on the other hand, of the effort of the nationals which must be to the benefit of the collectivity." The Mexican Minister of Foreign Affairs then invoked Article 9 of the Convention on the Rights and Duties of States signed at Montevideo, 1933, which provides for complete jurisdiction of States within their national territory over all inhabitants, to the effect that "the nationals and foreigners are under the same protection of the law and the national authorities, and foreigners may not claim rights other than or more extensive than those of nationals."

Secretary Hull in his reply of August 22 paid tribute to the doctrine of equality but contended that it "invariably referred to equality in lawful rights of the person and to protection in exercising such lawful rights." He then expressed surprise at Mexico's announcement of the "astonishing theory" that this beneficent principle of equality should be invoked not "to protect both human and property rights" but to deprive and strip "individuals of their conceded rights." He denied that this was permissible because Mexican nationals were also despoiled. As to exposure to the same risks and the claim that aliens enjoy a privileged position by seeking to escape confiscation, Secretary Hull maintained that the Mexican doctrine of risk "presupposes the maintenance of law and order consistent with principles of international law; that is to say, when aliens are admitted into a country the country is obligated to accord them that degree of protection of life and property consistent with the standards of justice recognized by the law of nations." [1] He denied that this was a claim of special

[1] Correspondence printed in AMERICAN JOURNAL OF INTERNATIONAL LAW, Supplement, Vol. 32 (1938), pp. 181–207.

privilege in contravention of the Montevideo treaty and maintained that confiscation could not be excused by the "inapplicable doctrine of equality."

During the meeting of the Committee of Experts for the Codification of International Law at Lima, Mr. Cruchaga Ossa of Chile contended that Article 9 of the Montevideo Convention on the Rights and Duties of States[2] made the equality of rights the maximum that could be claimed by any alien. He denied the existence of any "minimum standard" for the treatment of aliens; but remarked that even if there were one recognized in Europe, the countries on this continent had in the first, second, fifth and seventh Inter-American Conferences committed themselves to the exclusive doctrine of equality, which henceforth constituted the rule of law in the Americas. Although Chile had in 1930 conceded that a denial of justice gave a foreign government a privilege of intervening diplomatically on behalf of its nationals, Mr. Cruchaga in 1938 was driven by the logic of his own position to dispute the possibility of invoking diplomatic protection against denials of justice, because nationals could not enjoy it.[3] On September 10, 1938, President Cardenas of Mexico attacked the whole conception of diplomatic protection as an impairment of national sovereignty.

Source of the Rights of Aliens. These positions require us to reëxamine the whole structure of international law. If it is true that the doctrine of equality is the final test of international responsibility, then the source of international responsibility lies in municipal law. Only when a state denies equality, may international responsibility be asserted. Although this would seem to contradict the rule that a state's international obligations are determined by international law, anything in its municipal law to the contrary notwithstanding,[4] the growing spirit of nationalism, which Latin American countries have not escaped, and the memory of past impositions have persuaded some of their publicists and statesmen to advocate the suppression of diplomatic protection by Calvo clauses, by an assumed automatic nationalization if not naturalization of the alien, by restricted statutory

[2] The United States made a long reservation to this convention, reserving its rights under international law. U. S. Treaty Ser., No. 881. The reservation was not referred to by Mr. Hull in his reply of Aug. 22, 1938.

[3] AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 33 (1939), pp. 275–278. See the argument for equality in Yepes, J. M., *Le Panaméricanisme* (Paris, 1936), pp. 121–127.

[4] See Oppenheim, 5th ed. by Lauterpacht, 1937, I, Sec. 115d, p. 283: "It is a well-established principle that a State cannot invoke its municipal legislation as a reason for avoiding its international obligations. For essentially the same reason a State, when charged with a breach of its international obligations with regard to the treatment of aliens, cannot validly plead that according to its Municipal Law and practice the act complained of does not involve discrimination against aliens as compared with nationals. This applies in particular to the question of the treatment of the persons of aliens. It has been repeatedly laid down that there exists in this matter a minimum standard of civilization, and that a State which fails to measure up to that standard incurs international liability." (Footnotes omitted.)

or treaty definitions of the term "denial of justice" [5] and now finally by the contention that the doctrine of equality forecloses all diplomatic protection.

In its note of September 3, 1938, Mexico insisted that municipal law, not international law, was the source of the rights of individuals, including aliens, and cited Oppenheim in support.[6] It contended that expropriation without compensation was in line with the "standards of international law in accordance with the evolution which the traditional concepts of that law have necessarily undergone." Without now entering upon the specific question whether international law protects against uncompensated expropriation, it may be agreed that the so-called Rights of Man [7] are not a product of international law and that the primary source of the alien's rights is municipal law. But the argument overlooks the fact that treaty and custom have in the course of the 18th and 19th centuries placed limitations on the arbitrary power of a state to deprive aliens of elementary rights, and that international tribunals enforce these claims. This is a body of law which can be disregarded by a state only at the peril of international responsibility, and, while fashioned empirically, it operates as a check on arbitrariness. Like the common law, it has grown interstitially from case to case. Thus, while equality is the ultimate that the alien may ask of municipal law, which is by no means bound to grant equality, the body of international law developed by diplomatic practice and arbitral decision, vague and indefinite as it may be, represents the minimum which each state must accord the alien whom it admits. Whether called the fundamental, natural, or inherent rights of humanity or of man or of the alien, this minimum has acquired a permanent place in the protective ambit of international forums.

Growth and Function of International Law. But international law has not only been woven from the approved practice of states in their diplomatic intercourse and from the decisions of arbitral tribunals. It is also composed of the uniform practices of the civilized states of the western world who gave birth and nourishment to international law. Long before Article 38 of the Statute of the Permanent Court of International Justice made the "general principles of law recognized by civilized States" a source of common international law, foreign offices and arbitral tribunals had relied on such general

[5] See Guerrero, in Report of Subcommittee of Experts, League of Nations Document C.196.M.70.1927.V.100. The report is discussed in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1929, pp. 223, 228, *et seq.*

[6] Oppenheim, 5th ed. by Lauterpacht, 1937, I, 508–509. See also Monnot (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 171; Smith (U. S.) *v.* Mexico, April 11, 1839, Moore's Arbitrations, 3374; Lewis (Gt. Brit.) *v.* United States, May 8, 1871, *ibid.*, 3019; *Only Son* (U. S.) *v.* Great Britain, Feb. 8, 1853, *ibid.*, 3404. See also Steinbach, Peter A., *Untersuchungen zum internationalen Fremdenrecht* (Bonn, 1931), p. 90, note.

[7] See Declaration of the Rights of Man, adopted by the Institute of International Law at its Briarcliff meeting, 1929, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 24 (1930), p. 560. *Cf.* Kaufmann, in 54 *Recueil des Cours, Acad. de Droit Int.* (1935), IV, p. 427, where they are called the fundamental rights of aliens. Bibliography in Oppenheim, *op. cit.*, I, 510, note.

principles to work out a loose minimum which they applied constantly in interstate practice. For example, the doctrine *nulla poena sine lege* is accepted by common practice as a fundamental right of the alien, and the professed revolutionary departure from this principle by certain states would, if applied to aliens, meet with strong resistance. The disability of the alien to claim political rights and his immunity from military service and other political obligations have now a stronger source than the statutes or treaties in which these disabilities and privileges were originally recorded. They now rest on common law. In most states, the elementary private rights of life, liberty and property, within their well-recognized and increasing limitations, are not denied to aliens any more than they are to nationals.

When, then, in particular cases they are withheld by administrative action in spite of the constitution or law, the international claim would rest on the state's violation of its own law and not on the minimum standard. It is well known that aliens may be denied numerous privileges, such as the ownership of real property and engagement in certain occupations, and may be restricted in other respects by municipal law. Yet the alien must enjoy police and judicial protection for such rights as the local law grants, and its arbitrary refusal is a denial of justice. Bad faith, fraud, outrage resulting in injury, cannot be defended on the ground that it is a custom of the country to which nationals must also submit. The helpless position of the alien in the Roman law and through the Middle Ages has undergone a change with the growth of the national state and the migration of men. The unlimited power of spoliation has been subjected to the control of international law. Who can deny that this has been an advantage to the world?

Indeed, the limitations on arbitrariness have exerted a useful influence on municipal law, and these in civilized states have operated to the benefit of all men. Due process of law has been to some extent internationalized by the fact that international tribunals have drawn on the *mores* of the average and not of the crudest municipal practice. While at times diplomatic protection in the hands of dominant Powers has oppressed weak states, I venture to say that the shoe is now on the other foot. Indeed, the effect of international adjudication, the growth of nationalism, the movements for codification, the greater tolerance of social experimentation, have encouraged weak states to invoke their national sovereignty either to escape the restrictions of international law, or to maintain that international law has changed content so as to support what it once disapproved.[8]

[8] If there were no force in international law to insure respect for the rights of aliens, and if it had no substantive content, the Permanent Court of International Justice would have been wrong in asserting the existence of a common or generally accepted international law respecting the treatment of aliens, applicable to them despite municipal legislation (Judgment No. 7, pp. 22, 33). The Treaty of Lausanne of 1923 provides that citizens of the Allied Powers shall be treated in accordance with "modern" or "ordinary" international law. AMERICAN JOURNAL OF INTERNATIONAL LAW, Supp., Vol. 18 (1924), p. 68. The treaty between the United States and Germany, 1923, provides that nationals of each coun-

The Doctrine of Equality. The states of Latin America lay claim to a peculiar virtue in placing the alien on a footing of civil equality with the national. This provision was first introduced into modern civil codes by Andrés Bello, the famous Venezuelan who in 1855 drafted the Chilean Civil Code. In granting such equality, they go beyond the requirements of international law. But in so doing they cannot, as some profess, escape the obligations of international law. And the civil equality, even if it were in practice granted as written, is a very limited one and hardly different from that accorded by most western states. Most impositions and discriminations come from public law and administrative encroachments. If these could be perpetrated freely, and if the fact that nationals are also spoliated or prejudiced were an adequate defense, the state would escape the control of international law, and that in effect is the purpose of the argument. Mexico, in its note of September 3, 1938, frankly contended that the equality of treatment was not established "to protect the rights of foreigners against the State," but, on the contrary, to defend "weak states against the unjustified pretension of foreigners who, alleging supposed international laws, demanded a privileged position." But what of justified pretensions? The doctrine of equality as the final test of international obligations is thus in effect a repudiation of the many decisions of international tribunals which establish such obligations as a rule of international law.

And yet the campaign for equality as the final test is unrelenting. At the Hague Codification Conference, Dr. C. C. Wu of China made the plausible argument that when a foreigner comes to a country he must be prepared for all the local conditions, political and physical, as he is prepared for the weather. He must take what he finds and cannot complain of a defective or corrupt administration any more than nationals can. Seventeen countries, mainly the lesser states, supported this argument, although it was restricted to the remedies available to injured aliens. Twenty-one countries, including all the great Powers, opposed it as contrary to international law, and on that issue the projected draft of a convention fell to pieces. As in other cases, those who are opposed to prevailing rules of international law avail themselves of a codification conference to endeavor to break down rules of law that conflict with their interests. Sovereignty is more emotionally invoked by the less mature than by older states. These weaker countries often disregard the rule, axiomatic in fact, that a state claiming the privileges of international law must comply with its duties, or deny that there is any duty to establish any degree or standard of organization or perform any normal obligations with respect to aliens. All such requirements are deemed to impose upon them some external standard as a condition of statehood and this they resent. They thus claim that the test of their

try shall be treated by the other with "that degree of protection that is required by international law" (*ibid.*, Supp., Vol. 20 (1926), p. 5). See Freeman, Denial of Justice, p. 502 *et seq.*, an excellent summary of the evidence on the minimum standard.

responsibility for injuries is purely domestic, and that if nationals are despoiled, aliens will also have to submit. Otherwise they maintain the alien would be to them a source of danger. They wish to be the exclusive judges of their conduct toward all inhabitants, including aliens.

Up to a certain point, we might agree. For nearly all purposes, equality of treatment with nationals would satisfy international law requirements. Most states comply with that vague minimum which has been posited as indispensable to an admissible state. Equality, then, grants more than the alien or his government can ordinarily ask, for in the absence of treaty there is no rule prohibiting certain discriminations against aliens. But in spite of and beyond equality, there is a margin of fundamental privileges and immunities which cannot be transgressed without responsibility under international law. While it is inaccurate to assume that this collection of "fundamental" rights is claimable by all individuals against any state, they are claimable on the alien's behalf by his own state, as yet the only authorized vindicator of local rights improperly denied; for their observance a state is responsible even if nationals have no redress.

Reasons why Equality is Insufficient. The doctrine of equality has therefore little or no relation to the minimum which practice has established. If it delimited the international minimum, as it does the local maximum, municipal law would replace international law as the test of international responsibility. International tribunals seek their criteria of responsibility not merely in municipal law but in common experience rooted in the *mores* of the time. In the 19th and early 20th centuries these were found in constitutions which placed the individual on a high plane of protection in his relations with the state. It is possible that the retrogressions of the 20th century will create new *mores* which will disregard the rights of the individual, deny him all protection against the group, and possibly even subordinate international law to the sovereign state. That will require something of a revolution in thought and law. But only then will we have reached the stage where the doctrine of equality will have become the final test of state responsibility. Until that time, we are warranted in assuming that the common practice of western civilization still respects the elementary rights which we have come to associate with the modern world and enlightened civilization and that the decisions of international tribunals which reflect these *mores* are to be deemed law. No single state or even group of states can resign from that law.

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. While states naturally desire a free hand in dealing with all their inhabitants, and while it is probably embarrassing to be restrained

by treaty or international law in perpetrating excesses, this is one of the conditions of international intercourse. Contrary to the common view, the United States and other strong states probably pay more in damages for breach of international duty than do the smaller states, which are disposed to invoke their abstract sovereignty to escape international responsibility. For example, United States mob violence cases are unfortunately a frequent source of responsibility, and it would seem strange to an American to contend that aliens like nationals must suffer such excesses without redress. When the argument for equality is associated with a refusal to accept the requirement of some normal degree of state organization, it is apparent that it is a demand for escape from international obligations. Even an admission that treaties have placed some limitations upon this freedom of action would not concede that general international law has any say in the matter.

As a further explanation of why the alien is not bound to submit to exceptional excesses, even if nationals cannot escape, John Bassett Moore, in his brief in the Constancia Sugar case before the Spanish Treaty Claims Commission, remarked that nationals are presumed to have a political remedy, whereas the alien's inability to exercise political rights deprives him of one of the principal safeguards against oppression.

Yet another powerful reason is the fact that diplomacy, international practice and arbitral decision have established the rule that equality of treatment, while *prima facie* a fair defense, is not conclusive of international duty and responsibility. Acting Secretary Polk in 1918 was not the first to point this out.[9] In the Hopkins case before the United States-Mexico General Claims Commission of 1923 the tribunal concluded that by virtue of their diplomatic and arbitral appeal aliens may on occasion receive "broader and more liberal treatment" than nationals under municipal law.[10] But the court denied that this amounted to a discrimination against

[9] "The Government of the United States is firmly of the opinion that the great weight of international law and practice supports the view that every nation has certain minimum duties to perform with regard to the treatment of foreigners, irrespective of its duties to its own citizens, and that in default of such performance, it is the right of the foreign government concerned to enter protest. . . . While the Mexican Government may see fit to confiscate vested property rights of its own citizens, such action is in equity no justification for the confiscation of such rights of American citizens and does not estop the Government of the United States from protesting on behalf of its citizens against confiscation of their property." (Mr. Polk, Acting Secretary to Ambassador Henry P. Fletcher, Dec. 13, 1918, For. Rel. 1918, pp. 786–787.) See also Mr. Root, in Proceedings of the American Society of International Law, 1910, p. 21, also in Hyde, International Law, I, 466; note of Secretary Hull to Mexico, Aug. 22, 1938, AMERICAN JOURNAL OF INTERNATIONAL LAW, Supp., Vol. 32 (1938), p. 191.

[10] "If it be urged that under the provisions of the Treaty of 1923 as construed by this Commission the claimant Hopkins enjoys both rights and remedies against Mexico which it withholds from its own citizens under its municipal laws, the answer is that it not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treat-

a state's own citizens and in favor of aliens. In the Roberts case the tribunal remarked:

> Roberts was accorded the same treatment as that given to all other persons. . . . Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization.[11]

Disregard of the Doctrine of Equality in Most Cases of Denial of Justice. It is only in the matter of substantive law, when the claim is advanced that particular rights, such as the right of property, may not be withdrawn from aliens, that the issue of equality seriously arises to challenge the claim that the international standard has been violated. Mexico in its agricultural notes of last summer referred to its agricultural expropriations as "general and impersonal" in character, affecting "equally all the inhabitants of the country." There were various considerations, historical, legal, and conventional, which militated against the uncompensated expropriation of American-owned agricultural lands, but in principle it is always difficult, though not impossible, to contend that a change in substantive national policy violates common international law. Such questions cannot be answered in the abstract. Few countries would concede that their substantive law or administration falls below a civilized standard.

The bulk of the cases arise out of a denial of justice in the matter of procedure, some gross deficiency in the vindication and enforcement of alien rights. A corrupt administration of justice, judicial or administrative, which is now more common than in the 19th century, gives rise to responsibility, regardless of the question whether nationals must submit to the same corruption. A perversion of justice by judges carrying out a national

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ment than it accords to its own citizens under its municipal laws. The reports of decisions made by arbitral tribunals long prior to the Treaty of 1923 contain many such instances. There is no ground to object that this amounts to a discrimination by a nation against its own citizens in favor of aliens. It is not a question of discrimination, but a question of difference in their respective rights and remedies. The citizens of a nation may enjoy many rights which are withheld from aliens, and, conversely, under international law aliens may enjoy rights and remedies which the nation does not accord to its own citizens." (Opinions of Commissioners, pp. 50–51.)

See also Neer (U. S.) *v.* Mexico, *ibid.*, p. 71; Faulkner (U. S.) *v.* Mexico, *ibid.*, p. 86.

[11] *Ibid.*, p. 105. In its case against Belgium before the Permanent Court of International Justice, known as the Oscar Chinn case (Series C, No. 75, p. 41 *et seq.*), the British Government adduced the Sicilian sulphur monopoly case, the Uruguayan and Italian insurance monopolies of 1911, and the well-known collection of opinions solicited by Edouard Clunet on the propriety of the Italian monopoly, practically all of which support the principle that the mere equality of treatment of national and alien will not be sufficient to satisfy the international standard.

policy and not applying impartially the rules of law, is especially reprehensible and excuses the resort to or exhaustion of local remedies. Bad faith cannot be tested by national standards; it invites a more general criterion which international tribunals have not hesitated to invoke.[12] The more extreme denials of justice will be judged international delinquencies without reference to the question of equality.[13]

In order to limit the international responsibility of the state, several attempts have been made by Latin American countries to confine the term "denial of justice" by legislative definition to such matters as the refusal of access to the courts, the discriminatory refusal to exercise jurisdiction as in the case of nationals, and to overlook as immaterial local bias, the nature and integrity of the judicial machinery and its conformity with elementary principles of justice. This was the substance of the Guerrero Report to the Codification Conference of 1930.[14] International tribunals and foreign offices have not consented to such limitations of international responsibility.

[12] See Mr. Root, Proceedings of the American Society of International Law, 1910, p. 16 (quoted also in Hyde, I, 466): "In many countries, the courts are not independent; the judges are removable at will; they are not superior, as they ought to be, to local prejudices and passions, and their organization does not afford to the foreigner the same degree of impartiality which is accorded to citizens of the country, or which is required by the common standard of justice obtaining throughout the civilized world." Root, *ibid.*, 26.

Dunn, The Protection of Nationals (Balto., 1932), p. 119; Kuhn, in AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 31 (1937), p. 96; Brierly, Law of Nations (2d ed. 1936), p. 173. See also Chattin (U. S.) *v.* Mexico, 1923, Opinions of Commissioners, 441 (Nielsen's opinion); Roberts (U. S.) *v.* Mexico, *supra*, *ibid.*, p. 105.

[13] Neer (U. S.) *v.* Mexico, *ibid.*, 73, 77. "The propriety of governmental acts should be put to the test of international standards." The tribunal added: "The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency." See also Garcia (Mexico) *v.* United States, *ibid.*, 163, 169; Roberts (U. S.) *v.* Mexico, *ibid.*, 105; Fabiani (France) *v.* Venezuela, Feb. 24, 1891, Moore's Arb. 4878, 4893. See cases discussed in Freeman, *op. cit.*, p. 543 *et seq.*

Judge Max Huber in his *Rapports* on the British Reclamations in the Spanish Zone of Morocco, after denying liability for the acts of individuals, added that ". . . restriction thus attached to the right of States to intervene for the protection of their citizens assumes that the general security in the country of residence does not fall below a certain level and that at least their protection by the courts does not become purely illusory." *Rapports*, p. 54.

In several cases before the General Claims Commission, United States and Mexico, the facts disclosed a maladministration of justice "below the standard prescribed by international law." Galvan (Mexico) *v.* United States, Opinions of Commissioners, 410; Swinney (U. S.) *v.* Mexico, *ibid.*, p. 131. See numerous quotations in Freeman, *op. cit.*, pp. 560–562, from the decisions of other tribunals.

[14] AMERICAN JOURNAL OF INTERNATIONAL LAW, Spl. Supp., Vol. 23 (1929), pp. 175, 219; Annex to Questionnaire No. 4, Report of Subcommittee, League of Nations, Doc. C.196. M.70.1927.V, p. 100; Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 20 (1926), pp. 738–747.

The Standard of Civilized Justice. It is thus apparent that both in its substantive and procedural aspects international law, as evidenced by diplomatic practice and arbitral decision, has established the existence of an international minimum standard to which all civilized states are required to conform under penalty of responsibility.[15] Even Latin American authors sustain this view.[16]

[15] Beside the cases referred to, see the report of the international conference at Paris on the treatment of aliens, 25 *Rev. de droit int. privé* (1930), 218: "Without doubt it is recognized today in all civilized states that the treatment of aliens is subject to a certain standard of international law whose violation may give rise to diplomatic action of governments"; and the following publicists: Scelle, in LaPradelle's *Revue de Droit International*, 1927, p. 1116: "The Permanent Court of International Justice has held that aliens have the right to a treatment better than nationals whenever nationals are treated contrary to (international) common law"; Kaufmann, in *Zeitschrift für Ostrecht*, 1927, p. 1260, and in his brief before the Permanent Court, Ser. C. 11, p. 412: "Whenever internal law with respect to aliens is found below the requirements of the international standard, notably if there is a denial of justice, the alien has even a right to treatment superior to that which internal law accords nationals."

As Steinbach puts it, *Untersuchungen zum internationalen Fremdenrecht* (1931), p. 80, the state only then meets the requirements of international law in granting equality to nationals and aliens when the treatment of nationals corresponds to the measures which international law requires. In support of this view, he cites Barthelemy, in *Causes Célèbres*, II, 1929, p. 314, Anzilotti, Richter and Schmid. Other authors who sustain these views are: Hyde, International Law (Boston, 1922), I, secs. 266–267; Dunn, International Law and Private Property Rights, 28 Col. L. Rev. 166, 175 (1928); Accioly, *Tratado de direito internacional publico* (Rio de Janeiro, 1933), I, 335–336; Basdevant, "*Étrangers*," in LaPradelle's *Répertoire de Droit International*, Nos. 7–19 and 303 *et seq.*; Möller, International Law in Peace and War, translated from Danish by H. M. Pratt (London, 1931), I, 133, 148; Witenberg, J. C., "*La protection de la propriété immobilière des étrangers*," 55 Clunet (1928), 566; Hall, International Law, 8th ed. by Higgins (London, 1924), pp. 59–60; Leibholz, "*Das Verbot der Willkür*," 1 *Zeitschr. f. ausl. öffentl. Recht*, I, 77, 97–99 (1929). See also Hatschek, *Wörterbuch des Völkerrechts*, I, p. 221; Strupp, *Das Völkerrechtliche Delikt*, p. 118; Triepel, *Völkerrecht und Landesrecht*, 330; Cavaglieri, *Lezioni*, 267; Fauchille, I, 1, p. 928; Décencière-Ferrandière, *La responsabilité int. des États* (Paris, 1925), p. 57; Brierly, J. L., Law of Nations, 2d ed. (1936), p. 172.

[16] Alvarez, A., *Exposé de motifs et déclaration des grands principes du droit international moderne* (Paris, 1936): "In no case, may aliens claim more rights than nationals, unless the country in which they reside does not assure to its inhabitants, in permanent fashion, the minimum of rights to which Article 25(b) and Articles 28 and 29 refer (Article 30). Article 25(b) provides that states must 'maintain a political and legal organization which permits all persons residing on their territory to exercise their rights and enjoy advantages which the sentiment of international justice today imposes on all civilized people.' Article 28 provides that 'every state must assure to every individual on its territory the full and entire protection of the right to life, liberty, and property, without distinction of nationality, race, language, or religion.' Article 29 provides for the free exercise of all faiths, etc."

While these provisions may to some extent be deemed aspirations, they indicate that the author approves the minimum standard. See also the Projects of the American Institute of International Law, 1925, Nos. 15 and 16, which establish that each government is obliged to maintain "internal order and governmental stability indispensable to compliance with its international obligations," probably an excessive requirement, and that they only

But the existence of the standard and its service as a criterion of international responsibility in specific instances by no means give us a definition of its content. Frequent reference to it may easily give rise to the erroneous inference that it is definite and definable,[17] whereas the variability of time, place and circumstance makes it even less precise than the term "due process of law," which has also with the passage of time added substantive content to its procedural controls. The international standard is compounded of general principles recognized by the domestic law of practically every civilized country, and it is not to be supposed that any normal state would repudiate it or, if able, fail to observe it. Referring to its procedural aspects, Mr. Root in 1910 characterized it as "a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world."[18]

While the standard is mild, flexible and variable according to circumstances, some attempt has been made to collate out of experience a number of minimum rights which all states claiming membership in the family of nations may be required to accord. While not identical with the unofficial "rights of man" which the Institute of International Law hoped to exact from each state, the substantive content of the standard nevertheless is associated with certain elementary privileges of human existence which every state admitting aliens may be deemed to extend—mainly rights to life and the elementary liberties connected with the earning of a living. How far these privileges may be impaired or curtailed in the public interest must be

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are responsible when they have not "maintained order in the interior" or have been "negligent in the suppression of acts which disturb that order," or have omitted to take "reasonable precautions to avoid" injuries to aliens.

Diplomatic Protection (No. 16), the American Institute Project, established that aliens cannot claim more "obligations and responsibility" than are conceded to nationals in "the constitution, laws and treaties in force." But diplomatic protection is permitted when there has been a "denial of justice by those authorities, undue delay or violation of the principles of international law."

In 1933, the American Institute submitted to the Montevideo Conference the following article: "The jurisdiction of States, within limits of the national territory, extends to all the inhabitants. The inhabitants, nationals and aliens, enjoy a single protection as the national laws and authorities provide. Aliens cannot demand rights different or more extended than the rights of nationals. (This) equal protection must assure nationals and aliens the minimum (of rights) exacted by international law."

Ruiz Moreno, I., *Lecciones de Derecho Int. Publico* (Buenos Aires, 1934), I, pp. 238, 260; Accioly, H. *Tratado de direito int. publico* (Rio de Janeiro, 1933), I, p. 268; Maúrtua, Victor M., and Scott, J. B., Responsibility of States, etc. (Oxford, 1930), p. 45: "There is a minimum juridical standard imposed by human civilization, without which neither the existence of the State as a sovereign entity nor that of the international community could be conceived"; Ulloa, *Derecho Int..Publico* (2d ed., 1938, Lima), I, pp. 224, 243.

[17] *Cf.* Baty, Canons of International Law (London, 1930), p. 133.

[18] Proceedings of American Society of International Law, 1910, p. 21.

determined from case to case, and equality of sacrifice with nationals is naturally an important test. As a rule, unjustified discrimination will be found an ingredient in sustainable claims.[19]

In recent years the question whether the protection of private property against confiscation is included within the minimum standard has given rise to much debate.[20] Mexico openly asserted in its notes to the United States of August 3 and September 3, 1938, that there is no international obligation to make compensation for the expropriation of property, "general and impersonal" in character, provided a social purpose is served, and that its only duty in the premises arose under Mexican law. In the light of the recent invasions of the institution of private property in Russia in the agrarian reforms of eastern European countries, in Article 297 of the Treaty of Versailles, in the many extensions of the police power, a few publicists, notably Sir John Fischer Williams, seem to support the Mexican view.[21] The great majority, however, rely on modern constitutions and treaties which still respect private property, permitting direct expropriation only against compensation, and regard the instances cited as aberrations not impairing the general principle.[22] Perhaps it is dangerous to rely on any general principle for the decision of a concrete case, but it can hardly be maintained that private property has lost all legal protection and that the state can confiscate at its pleasure. But how far it may go will have to be

[19] In 1929 a conference was held in Paris under the auspices of the League of Nations to endeavor to work out a convention on the treatment of foreigners. Preparatory Documents C.I.T.E. 1.C.36.M.21.1929.II; Draft Convention, Geneva, 1928, C.174.M.53.1928.II. The Convention broke down largely because many states declined to commit themselves to concede equality to foreigners. Cutler, J. W., "The Treatment of Foreigners," AMERICAN JOURNAL of INTERNATIONAL LAW, Vol. 27 (1933), p. 225; Kuhn, A., in *ibid.*, Vol. 24 (1930), p. 570. Interestingly, the Hague Codification Conference of 1930 on responsibility of states broke down largely because the majority of states refused to admit that equality of treatment satisfied in all cases the international standard.

[20] See The Mexican Expropriations in International Law, Memorandum, Oct. 11, 1938, pp. 103–130.

[21] Williams, in British Yearbook of International Law, 1928, p. 1; Marburg, *Der rumänischungarische Optantenstreit*, also in *Wörterbuch des Völkerrechts*, III, 820. *Cf.* Oppenheim, 5th ed., I, 283–285 (partial compensation necessary).

[22] Chorzow case, Judgment No. 7, pp. 21–22, immunity from confiscation deemed a part of the "accepted principles of international law"; Peter Pazmany University (Hungary) *v.* Czechoslovakia, Dec. 15, 1933, Judgment No. 61, Ser. A/B. Judge Robert Fazy (Switzerland), in case between Germany and Rumania, Sept. 27, 1928, held that the "respect of private property and vested rights of aliens is uncontestably a part of the general principles admitted by the law of nations" (3 *Rev. de Dr. Int.*, April–June, 1929, p. 558). See British observations in Portuguese expropriations of religious properties, quoted in Fachiri, 1925 British Yearbook of International Law, pp. 159, 168; also 1929 British Yearbook, pp. 32, 38; Shufeldt (U. S.) *v.* Guatemala, 1931, Arbitration Ser. No. 3; Steinbach, *Untersuchungen, supra*, p. 90, note; 34th Report, Int. Law Assn., p. 248; Verdross, in *Recueil des Cours, Acad. de Droit Int.*, 1929, V, p. 442; 1931, III, pp. 327, 330, 359; Kaeckenbeeck, in 1936 British Yearbook of International Law, p. 16.

determined from case to case. The doctrine of vested rights depends on so many variables that prediction is hazardous.[23]

On the procedural side, we are perhaps in less doubt of the content of the standard, although we must still be satisfied with general principles. Fair courts, readily open to aliens, administering justice honestly, impartially, without bias or political control, seem essentials of international due process. While the details of procedure necessarily vary considerably from country to country, certain essential elements of a fair trial and objective justice are required of all systems. It is probably less difficult to apply than to define these principles, and we have in their application the aid of innumerable precedents from international practice. In spite of the legislative effort strictly to narrow the conception of denial of justice and the privilege of diplomatic interposition, few foreign countries have been willing to abandon their nationals to the arbitrariness of corrupt courts or administrative bodies.

Policy. It is well that this is so. Notwithstanding the determined effort of several countries to make equality the final test of international responsibility, it is doubtful whether even the Montevideo Convention will be given such an interpretation. For some Latin American countries this endeavor is part of the general campaign to get rid of diplomatic protection. It might be called an exemplification of the Calvo Clause. What it means is a repudiation of international law, a claim for the supremacy of local law over international law, a denial that local law and arbitrariness may be limited by international requirements. Its assertion does not raise the prestige of the countries who advance it, but on the contrary creates suspicion. As already observed, few if any countries are now the victims of unjustified diplomatic interposition on behalf of foreign claimants; indeed, much is now tolerated which even ten years ago would have elicited forceful action. Countries that seek to escape international responsibility by maintaining that they have no or few obligations with respect to aliens neither win respect for their sovereignty nor awaken that confidence which is reflected in foreign investment. Strong Powers, able to make demands for unlimited sovereignty, refrain from so doing and submit frequently to arbitration and the test of international law. With the current general disapproval of the use of force in the collection of claims, there is no reason why weaker states cannot entrust their complaints and defenses to the test of law. The international standard restricts their freedom but very slightly. A voluntary conformity to the standard and to the rules of international law and practice which it embodies would be more profitable in the long run than the ill-will and lack of confidence aroused by unsuccessful revolt against the standard and by a professed freedom from the restraints on arbitrariness hitherto associated with international law.

[23] See the excellent article of Frederick Dunn, "International Law and Private Property Rights," 28 Col. L. Rev. 116 (1928).

ANNEX 150

Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions:

A. Access to documents

1. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.

2. In the application of the foregoing:

   (a) In accordance with Article 1120(2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.

   (b) Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:

      (i) confidential business information;

      (ii) information which is privileged or otherwise protected from disclosure under the Party's domestic law; and

      (iii) information which the Party must withhold pursuant to the relevant arbitral rules, as applied.

   (c) The Parties reaffirm that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents.

   (d) The Parties further reaffirm that the Governments of Canada, the United Mexican States and the United States of America may share with officials of their respective federal, state or provincial governments all relevant documents in the course of dispute settlement under Chapter Eleven of NAFTA, including confidential information.

3. The Parties confirm that nothing in this interpretation shall be construed to require any Party to furnish or allow access to information that it may withhold in accordance with Articles 2102 or 2105.

B. Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

Closing Provision

The adoption by the Free Trade Commission of this or any future interpretation shall not be construed as indicating an absence of agreement among the NAFTA Parties about other matters of interpretation of the Agreement.

Done in triplicate at Washington, D.C., on the 31st day of July, 2001, in the English, French and Spanish languages, each text being equally authentic.

For the Government of the United States of America	For the Government of the United Mexican States	For the Government of Canada
Robert B. Zoellick United States Trade Representative	Luis Ernesto Derbez Bautista Secretary of Economy	Pierre S. Pettigrew Minister for International Trade

ANNEX 151

STATE RESPONSIBILITY FOR INJURIES TO ALIENS

by

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Annex 151

bunals, but also the use of procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection, as provided by municipal law, which must have been put to the test before a State, as the protector of its nationals, can prosecute the claim on the international plane.[1]

ANALYSIS OF PROCEDURAL ASPECTS

The procedural aspects of a proceeding before a municipal tribunal may be divided into two classes, viz., (1) those that are obligatory in themselves on a party to the proceeding according to the local law and (2) those that are not obligatory but are only permissive or discretionary as means to the conduct of his case according to the local law. It is important when considering the subject to bear in mind the policies behind the rule of local remedies in general,[2] since they will have relevance in the delimitation of the specific rules relating to procedural remedies.

1. *Procedural Remedies that are Obligatory under the Local Law*

In the case of obligatory procedural rules or methods, the answer to the question whether an alien must use them in order to exhaust the local procedural remedies depends on general principle. Since they are obligatory on a party to a proceeding, the alien is, like any other party to a proceeding, bound to observe them. If a decision is given against him because he failed to observe an obligatory rule, he must suffer the consequences of his failure. He has not done his best to obtain justice from the respondent State and he cannot be allowed to have his case taken up before and adjudicated upon by an international tribunal. These means were essential to the presentation of his case and he is presumed to have known that they were so. The object of the local remedies rule is not only to give the respondent State an opportunity of doing justice but it is also designed to give the injured alien a means of obtaining justice.[3] Hence it is not an unfair obligation to impose upon him that he should, at least, use all the means which according to the municipal law concerned he is under a duty to use. Thus, if he fails to institute his case within the required time after the commission of the alleged wrong, as he may be under an obligation to do, or if he fails to make the pleadings as the

[1] *Ambatielos Claim* p. 28.
[2] See Chapter V.
[3] See Chapter V pp. 172 ff.

municipal law requires and consequently has a decision given against him, he must bear the loss. He has not exhausted procedural remedies and his claim is not admissible before an international tribunal.

Two special problems may, however, arise in this connexion.

(a) *The problem of doubtful rules*

First, what is the position if the particular rule disregarded is a doubtful one and the decision against the alien, resulting from his violation of the rule, is made *primae impressionis*? Should he bear the consequences of not having interpreted the rule accurately, considering that the rule was in doubt until the decision in the case?

It is submitted that he must take the risk and bear the loss, if he fails to use a remedy required of him, however doubtful it may have been. This is in the very nature of the judicial process. Disputes on the law generally come to court because there are doubts about the law or its application, and the parties must assume the risk of the position they adopt in regard to the law. The alien must take the risk of a wrong interpretation of a rule.

An argument against this view is that the respondent State is at fault for having doubtful rules in its legal system and that the alien should not be penalised as a result of this. However, an answer to this is that the alien can be expected to take extra precautions in his own interest. It is not an unfair burden to lay on the alien that he should make allowance for such eventualities which are the incidents of any litigation.

(b) *The problem of harsh requirements*

Secondly, is it open to a claimant to argue that the obligations imposed on him in respect of the procedures within a local court for having his claim settled are too harsh, and that, if he loses his case because he fails to fulfil a harsh requirement, he cannot be held not to have exhausted local remedies? As an example of a harsh requirement may be taken a rule or directive that certain arguments or certain evidence should be submitted within a certain period which is exceptionally limited. By reference to certain general principles that operate in regard to the treatment of aliens, it is submitted that an alien may be said to have exhausted his procedural remedies in a situation of the kind envisaged, even though he has failed to keep an obligation required by the local procedural law, if he can prove that his case falls within one of two categories.

The first class of case is where the rule is applied to him in a discriminatory manner so as to increase his burdens;[1] i.e., where an obligation is imposed on him which is not imposed on the nationals of the State concerned in general. 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. Equally, a State cannot be permitted to impose procedural obligations of such a kind on aliens in order that it may exercise the privilege of doing justice in connexion with alleged breaches of its international obligations. It is submitted, therefore, that in such a case non-fulfilment of a procedural obligation which is discriminatory and is the cause of the alien's failure to win his case before the local courts cannot be regarded as a non-exhaustion of procedural remedies.

The second class of case is where the obligation imposed on the alien is contrary to the treaty obligations owed by the respondent State to the national State of the alien or falls below the international minimum standard.[2] The reasoning that supports this exception to the rule that an alien must fulfil all procedural obligations in order to exhaust local remedies is similar to that which applies to the previous exception. Where a treaty lays down some limitation, or international law lays down a minimum standard, an alien cannot be expected to bear heavier burdens in order to find justice in the courts of the respondent State. Conversely, a State ought not to be allowed to impose obligations on aliens contrary to its international obligations in order that it may exercise the privilege of doing justice in cases of alleged violations by it of its own international obligations. So, in this case too, an alien must be regarded as having exhausted all the necessary procedural remedies, if his case before the local courts failed because of his not fulfilling obligations of the above-mentioned kind.

It may be difficult to determine what the 'international minimum standard' is in a given case. But this is a difficulty which is experienced in that whole area of international law in which the concept

[1] This principle is well established in the law of alien treatment; see Oppenheim, i, pp. 350 and 688.

[2] See Oppenheim, ibid. p. 350, especially note 4, and p. 351, note 1, and works there cited.

is operative. Suffice it to say that there is such a standard and that its application in a given case will depend on numerous factors, such as the findings of comparative analyses of the attitudes of legal systems to the relevant problems. It is submitted that the standard that the particular alien is accustomed to in his national State would also be relevant. The object of the international minimum standard is to protect the alien but not beyond his legitimate expectations. He cannot legitimately expect a higher standard of treatment than he is entitled to in his national State. Hence, on this view of the international minimum standard, it is less a fixed and invariable standard than an estimate of legitimate expectations in a particular case. Where the standard of treatment in the alien's national State is higher than the general standard elsewhere, however, it cannot be taken into account in determining whether the procedural remedy imposed on him is below the international standard.

2. *Procedural Remedies that are not Obligatory but Discretionary according to the Local Law*

The second category of procedural rules concerns those that are permissive or discretionary. For example, the rule that witnesses may be called and examined is not an obligatory rule. The rule that counsel may plead in a court of law does not specify any obligations to use counsel nor does it indicate how good counsel must be or whether counsel must have had a certain minimum of experience in chambers. Similarly, no indication is given of what kind of evidence must be adduced in order that the plaintiff may be successful in his case. The action to be taken under rules of this kind is left to the discretion of the plaintiff. In the *Ambatielos Claim*, for instance, the procedural remedy in issue was that of calling a witness to give evidence as to the terms of the contract.[1]

(a) *Criteria for determining exhaustion*

It is evident that this category presents a different problem from that posed by the previous category. The question is how far must an alien party to a proceeding do what he is not under an obligation to do according to the local law in relation to the procedures of trial, in order that he may exhaust local remedies. All other things being

[1] *Ambatielos Claim* p. 31.

equal, the answer to this question in relation to any particular remedy must, it is submitted, take into consideration two factors:

(i) the effect of the remedy concerned in relation to the successful conclusion in adequate redress of the alien's case;
(ii) the consideration that the alien may be dealing with a complicated field of law in which he leaves much, if not all, in the hands of counsel and in which trial tactics are much involved.

(i) *The effect of the remedy.* As regards the first factor, it is necessary that the effect of the remedy in issue must bear some objective relation to the result of the case. The remedy must be of such a kind that, if used, it would have influenced the decision in the case in favour of the alien. What the exact influence or relation must be is not an easy question to answer. The alien has his case taken up before an international tribunal with a decision against him in a case in which the respondent State points to a particular remedy which he has failed to use. It is clear that in broad terms the remedy must be of such a kind that had it been used it would have resulted in a decision favourable to the alien, if it is to merit consideration in the exhaustion of procedural remedies by the alien.

But how is the effect on the decision to be judged? It is tempting to answer that only such remedies which would have *certainly* brought about a favourable decision need be considered, that those which would not with certainty have brought about such a result are not relevant and that the alien would have failed to exhaust his procedural remedies only in circumstances in which he has not resorted to the former kind of remedy. But it is difficult to judge the effect of a remedy *ex post facto* in terms of certainty. Moreover, this criterion would weigh the balance too much in favour of the alien as against the respondent State. Perhaps a more subtle criterion is a degree of probability. This would strike a fair compromise between the interest of the respondent State in doing justice through its own machinery and that of the alien in having justice done in the most efficient and cheapest way possible. It is submitted, therefore, that the test to be applied in determining the effect of a remedy is whether its use would *probably* have resulted in a victory for the claimant alien. If its use would not probably have done so, it is not a remedy which the alien need have resorted to in order to exhaust the local procedural remedies. To place the relationship between the remedy and its effect at less than this would pitch the balance too much

in favour of the respondent State. If the test were whether there was any *possibility* of success through the use of the relevant remedy, the burden on the alien would be too heavy; for possibilities are unlimited and a vast number of remedies left unused may be brought within the compass of the rule. The alien would have to be excessively meticulous, if he had to seek out all the possibilities of success in order to be able to say that he had exhausted procedural remedies in a particular court. The test of probability, therefore, is submitted to be the most suitable.

The *Ambatielos Claim* has some relevance to this question. The facts of the case were as follows: Ambatielos, a Greek, entered into a contract to purchase some ships from the United Kingdom Government. Some of these ships were delivered with certain delays while others were not delivered at all, as a result of which Ambatielos suffered loss. Being unable to pay the full purchase price, he mortgaged the last two vessels to the United Kingdom Shipping Controller. Then Ambatielos unsuccessfully sought to terminate the contract for the last two ships. As a result of these differences the dispute, which now took a complicated form, came before the English courts when the United Kingdom Government started proceedings to enforce the mortgages. There Ambatielos contended that the contract had been broken because there was a term in it which imposed a time limit for the delivery of the ships. The United Kingdom Government contended otherwise. Ambatielos's case depended, *inter alia*, on the evidence of Major Laing, an official of the United Kindgom Government who was not called. Also the United Kingdom Government had claimed privilege for certain minutes that were requested as being relevant. The court decided against Ambatielos. Then, Major Laing disclosed to Ambatielos certain correspondence between him and the Controller of Shipping of the contents of which Ambatielos was unaware up to that time. Ambatielos appealed and applied for leave to call Major Laing. The Court of Appeal rejected the application. The Greek Government took up Ambatielos's case and the matter came to arbitration after a considerable history before the International Court of Justice, before which certain preliminary points relating to arbitration were raised. In the arbitration the Greek claim consisted of a claim for breach of contract of sale; alternatively, of a claim for unjust enrichment; and, again alternatively, of a claim connected with the alleged failure of the United Kingdom Government to cancel at an early time the contract regarding two of the nine

vessels sold. The claim was based mainly on the breach of a Treaty of 1886 and included the point that the treaty had been violated by a denial of justice consisting of the withholding of documents. The United Kingdom Government raised two objections apart from denying the claim. One of these was that Ambatielos had not exhausted legal remedies before the English courts, because he had not availed himself of the opportunity of calling a key witness, Major Laing, and had, therefore, failed to resort to a remedy that should have been used. The Commission decided the point against the Greek government.

In the *Ambatielos Claim* the Commission recognized that there had to be some relation between the remedy and its effect on the case, if it was to be characterized as a remedy that had to be used. But it conceded that the rule should not be strained too far so as to prejudice the alien.[1] No adequate definition of the rule was, however, given. It was stated that only 'essential' remedies had to be used,[2] but 'essential' was not explained. Commissioner Spiropoulos was not much more helpful when he stated that 'essential' meant 'such as will affect the course of the proceedings'.[3] For the *Ambatielos Claim* a definition was unnecessary. Both the claimant[4] and the Commission[5] recognized that the remedy was effective or essential. It is to fill in the gap created by the absence of further explanation, therefore, that it has been submitted that the remedy should be regarded as effective only if it is *probable* that its use would have led to success.

The definition of the effect of the remedy for the purpose of exhaustion of procedural remedies differs considerably from the criterion used in determining whether an appeal must be taken from a lower to a higher court in order that the local remedies may be exhausted. The test in the latter case is whether the appeal is not 'obviously futile', as was stated in the *Finnish Ships Arbitration*.[6] That is to say, the remedy of appeal must be resorted to, unless it can be shown that the appeal would 'obviously' not have changed the decision. This is different from saying that an appeal must be

[1] *Ambatielos Claim* p. 28.
[2] Ibid. p. 28. [3] Ibid. p. 37.
[4] Sir Frank Soskice for the Greek Government: *Commission of Arbitration under the Anglo-Greek Treaties of Commerce and Navigation – Minutes* (1956), 2nd Sitting p. 9.
[5] *Ambatielos Claim* p. 29.
[6] See *supra* Chapter V pp. 192 ff. See also the *Ambatielos Claim* pp. 27 and 28.

taken only if it is probable that an appeal will succeed. The latter is the form of proposition that applies in the present circumstances. There are good reasons for the difference in standards. In the case of an appeal the proceedings are taken before a higher and more experienced tribunal. The purpose of an appeal is to have a decision reversed and it is the specific business of appeal courts to reverse decisions. It is not an unfair requirement, therefore, that an alien should do his best to have a decision reversed in his favour by such a court, unless it is absolutely clear that the court will not reverse it. Also the higher court must be given the opportunity of reversing the decision unless it is obvious that it will not do so. In the case of procedural remedies of a discretionary nature within the same court, the object of the remedy is to help the alien prove his case against the defendant. It is only those that are likely to help him in this task that are relevant to his case and not just any remedy which is not obviously useless. He must use only those remedies that will probably lead to success.

(ii) *The 'reasonable counsel'*. The second factor comes into play if it is established that the procedural remedy in issue is 'effective' or 'essential'. It is submitted that the investigation of the question whether a remedy must be used does not stop with the answer that it is an 'effective' or 'essential' one. Factors connected with the nature of litigation in the modern world with all its concomitant complications, tactics, and specialisation become relevant.

In approaching this question it would be proper to consider the attitudes of the Commissioners in the *Ambatielos Claim*. To begin with, Commissioner Alfaro and Commissioner Spiropoulos took different views on the problem.[1] The Commission thought that there was nothing further to be considered beyond the 'effectiveness' of the remedy.[2] Commissioner Alfaro, on the other hand, took the view that even if the particular remedy in issue was an effective or essential one, provided the alien has resorted to other remedies of the same general category, e.g., producing evidence, he could not be said to have failed to exhaust his procedural remedies only because he failed to use the particular remedy, however effective it may have been.[3] Commissioner Spiropoulos[4] expressed the opinion that there were two requirements for a finding that procedural remedies had not been

[1] Both these Commissioners dissented on the issue of exhaustion of procedural remedies.

[2] *Ambatielos Claim* pp. 29 ff. [3] Ibid. p. 33. [4] Ibid. p. 37.

exhausted in the same court: (a) the remedy must be 'essential', (b) there must be a determination against the alien, having regard to the particular circumstances of the case, of 'what counsel *would have done* in the interests of his client'.[1]

The view of the Commission errs on the side of caution, it is submitted, in laying too heavy a burden on the alien. No room is left for a certain expediency and even good judgment which may be quite proper in the presentation of a case, especially at the time of trial. An objective 'essentiality' or 'effectiveness' which can be easily determined by hindsight at the time of an international arbitration at a much later date may not be so apparent at the time of the trial. The question is whether, without setting too strict a standard for an alien in expecting of him the meticulousness and expense of using all means that are, in fact, effective, irrespective of how obvious their effectiveness may be, the interests of the respondent State in having the opportunity to do justice by its own methods and to be saved the expense and publicity of an international arbitration may be preserved.

In the view of Commissioner Alfaro there may be difficulty in determining the exact scope of the general categories. It also leaves room for the alien not seriously to seek to obtain justice from the respondent State, particularly if he prefers to have an adjudication by an international tribunal. All he need do is resort to one remedy in each category, however effective other remedies may be.

The view of Commissioner Spiropoulos offers a suitable solution. The second requirement in his view is the application of what may be called the objective standard of the 'reasonable counsel'. The question to be asked is whether a reasonable or average qualified counsel, as opposed to a layman, would have taken advantage of the remedy in the interests of his client. In answering the question numerous factors have to be taken into account, depending on the facts of each particular case, as is indicated in the above opinion. A rather compendious way of explaining it is by saying that the effectiveness of the remedy envisaged must be weighed against the risk of not using it. The test makes allowance for such factors as minor errors and the non-obviousness of the essential nature of the remedy, factors which are not lightly to be dismissed in legal practice. This test is not subjective in that it does not give counsel *carte blanche* in the choice of a particular remedy. The mere fact that counsel did

[1] Italics added.

not use a given remedy, even for bona fide reasons, would not be sufficient in itself to warrant the non-use of the remedy from the point of view of the exhaustion of procedural remedies. Nor does it give counsel a similar freedom of choice, provided some action is taken in each general category that may be established of procedural remedies, as Commissioner Alfaro's test would permit. On the other hand, it is not so strict as requiring the alien (as represented by counsel) to act according to the exact objective truth of every situation, as the Commission's view favours. Where the remedy is an obviously effective or essential one, the application of this test would not affect the obligation of the alien to use it. For it could not be argued that a reasonable counsel would, in the circumstances, refrain from using the remedy. It is where the effectiveness of the remedy is not so obvious that it will help the alien. If it can be shown that the remedy though in fact effective, was not so obviously effective and that reasonable counsel would not have thought it necessary to use it for his client's benefit, then the alien need not have used it.

It is submitted that the above view of the law originating from the opinion of Commissioner Spiropoulos is most satisfactory as giving adequate weight to the interests of both the alien and the respondent State. The alien is under an obligation to observe a certain standard in his search for justice which is beyond and outside himself or his counsel as individuals. The respondent State, on the other hand, may not expect perfection on the part of the alien in his appreciation of the true effect of the remedy. Thus, not only must the remedy be essential, but it must be such as a reasonable counsel would have used as being effective.

In the *Ambatielos Claim* the result that was reached by the Commission on the question whether Mr. Ambatielos should have called Major Laing would have been the same had they applied the more liberal view of the law proposed here. The decision on the facts of the case, therefore, does not conflict with this view, and so permits it.

Commissioner Spiropoulos's conclusion that Major Laing would not have been called by reasonable counsel[1] was, it is submitted, not warranted by the facts. The British government[2] and the Greek government[3] made different submissions on the point. But it is evi-

[1] *Ambatielos Claim* p. 37.
[2] C.A.M., 9th Sitting p. 46; ibid., 11th Sitting p. 45 and ibid., 12th Sitting p. 105.
[3] Especially ibid., 13th Sitting p. 90; also ibid., 2nd Sitting p. 33, ibid., 3rd Sitting p. 28 and ibid., 6th Sitting p. 22.

dent that reasonable counsel ought to have surmised (*a*) that Major Laing, if anybody, would have the necessary evidence, since he was the responsible officer of the Crown who took part in the actual transaction and (*b*) that the letter probably contained important evidence of which Major Laing had knowledge, and therefore reasonable counsel ought to have called him.[1]

Suppose, however, that Major Laing had indicated that he had no evidence and there was no reason for counsel to disbelieve him; then a situation would have arisen in which a reasonable counsel could not have been expected to call him in evidence, even though in fact Major Laing did have cogent evidence and the remedy of calling him would have been effective. Equally, it may be that a witness has shown that he is likely to be so hostile as not to reveal the truth, or a written document is of such a nature that it is ambiguous by itself, though unknown to counsel and his client and through no fault of theirs, there may be some other evidence which could resolve the ambiguity in the alien's favour. Then, it is submitted that a reasonable counsel would not resort to either of these remedies as being helpful to his client, effective though they may be in actual fact, and there would be no failure to exhaust procedural remedies.

(b) *Two related problems*

In connexion with these principles that apply to discretionary remedies there are two further problems that arise. The first concerns the verification of the effect of the remedy in question, and the second the time in respect of which the two principles outlined above must be applied.

(i) *Verification of the effectiveness of the remedy.* The question may be put thus, 'How does an international tribunal verify whether the remedy was an effective one and would have changed the decision in the case before the municipal court?' Broadly speaking, there are three possible alternatives. The tribunal may accept the word of the claimant State as to the effect of the remedy or it may accept the word of the respondent State or it may investigate the matter on the evidence presented to it and come to its own conclusion. Looking to reason and good sense, it would seem that this is a matter of law and fact which the tribunal must ordinarily investigate and decide

[1] The holding of the Court of Appeal of the U.K. on the question of this evidence would seem to support this view: *Board of Trade* v. *'Ambatielos' etc.* (1953) Lloyd's Rep. p. 387.

on the evidence before it. To determine the effect of the remedy an estimate of probabilities has to be made and there is no reason why a tribunal should not be competent to make such an estimate.

On the other hand, where the claimant State concedes that the remedy concerned is an effective or essential one, there is no reason for the tribunal to go behind this admission. A finding that the remedy is an effective one, as opposed to a finding that it is ineffective, would not be in the claimant State's favour but to its detriment. If it is willing to admit this result against itself, there is no reason for the tribunal to examine the issue in order to contradict the admission. Similarly, if the respondent State admits that the remedy is not an effective one then it is denying its contention and its admission must be accepted by the tribunal.

Difficulties arise, however, when the claimant State concedes the effectiveness of the remedy and the respondent State apparently denies its effectiveness. In short, the parties appear to maintain the converse of what they should in their own interests be maintaining. It is normally for the respondent State to maintain that the remedy which the alien has failed to use is an effective one, while it is for the claimant State to maintain that the remedy is an ineffective one so that it was not under an obligation to resort to it. It is this unusual situation that seems to have arisen in the *Ambatielos Claim*. Hence, whatever was said by the Commission and the other Commissioners on this issue must be read subject to this qualification. Their statements apply to the general problem being considered only in a limited way.

The Commission appears to have taken the view that in the case before them the assertion of the claimant State as to the effectiveness of the remedy was to be accepted.[1] Although the language of the Commission is open to the interpretation that it was laying down a general principle, it is submitted that it was dealing only with the situation before it, where the claimant State conceded that the remedy was an effective one, and did not intend to lay down a general principle that the assertion of the claimant State as to the effect of remedies is always to be accepted. As a general principle it would defeat the purpose of litigation; for the claimant State would only have to contend that the remedy was ineffective in order to win its point on the issue of procedural remedies. The Commission's reluctance to decide whether the remedy was an effective one must be attributed to

[1] *Ambatielos Claim* p. 29.

the fact that the claimant admitted that the remedy was effective in this case. It is not necessary to suppose that the Commission intended to lay down a general principle that an international tribunal does not have the power or ability to decide such a question.[1]

The situation that arose in the *Ambatielos Claim* was exceptional and is to be explained by reference to the nature of the litigation.[2] On a closer examination, it would appear that the respondent State really maintained that the remedy was effective for the purpose of this issue, while the claimant State not only conceded but strongly contended that the remedy was an effective one for other purposes in the case and did not change its position. Hence, the situation was one in which the claimant State conceded the contention of the respondent State that the remedy was effective. It is submitted, therefore, that the conclusion of the Commission that the remedy must be taken to be an effective one in the circumstances of the case was correct. There is no reason to suppose, however, that the general principles have been altered by the decision.

In the final analysis there are four possible situations that may arise and three principles that govern them, which may, it is submitted, be formulated as follows:

(*a*) Where the claimant State maintains that the remedy in question is ineffective and the respondent State maintains the contrary, the tribunal must decide the question of the effectiveness of the remedy on the evidence presented to it. This is the normal situation.

(*b*) Where the claimant State expressly concedes the respondent State's allegation that the remedy is effective or there is some implied

[1] Commissioner Alfaro was of the opinion that the Greek view of the effect of the remedy could not be accepted; *Ambatielos Claim* p. 34. The Commissioner's view is to be preferred, in the circumstances of the case.

[2] The confusion arose from the nature of the legal issues involved. The main basis of the Greek claim was the Treaty of 1886 and the substance of this claim was that there had been a denial of justice in the proceedings before the High Court of the United Kingdom in connexion with Mr. Ambatielos's breach of contract claim. For this purpose, the Greek Government argued that the Crown had failed to call Major Laing and, thus, denied justice. Hence, it maintained that the calling of this witness was an *effective* remedy: C.A.M., 5th Sitting pp. 1 ff.

The British Government denied this proposition in maintaining that there had been no denial of justice.

When it came to arguing the point that procedural remedies had not been exhausted because Major Laing had not been called by Mr. Ambatielos, the British Government conceded that even on the assumption that Major Laing's evidence would have been effective, local remedies had not been exhausted: C.A.M., 12th Sitting p. 112. The Greek Government did not deny that the remedy was effective but argued that reasonable counsel would not have used it; C.A.M., *passim*. Hence, the Greek Government always maintained that the calling of Major Laing was an effective remedy.

agreement between the parties that the remedy is effective, the issue is decided by the agreement of the parties and the tribunal merely accepts that position. It was this kind of situation that really arose in the *Ambatielos Claim* and the Commission applied the above principle in its decision.

(*c*) The converse case where the respondent State concedes the inefficacy of the remedy to the claimant State either expressly or impliedly is not likely to arise in reality, since that would be incompatible with the raising of the issue by the respondent State. But if it does arise, the same principle as is applicable to category (*b*) is applicable. The issue is decided by the agreement of the parties.

(*d*) An equally unlikely situation is where the claimant State concedes that the remedy is effective and the respondent State concedes that it is ineffective, such as *appeared* to be the situation in the *Ambatielos Claim*. As in the *Ambatielos Claim*, it will generally be the case that the true situation is more reasonable. If such a case arises, however, it is submitted that the concession by the respondent State should be accepted as a denial of its case. It is more appropriate to accept the admission of the respondent State than that of the claimant State, since it is the duty of the respondent State to raise the issue that local remedies have not been exhausted and, if it makes such an admission, it is really denying its case.

(ii) *The time in respect of which the two principles must be applied.* The second problem relates to the time in respect of which the principles of effectiveness and of the reasonable counsel are to be applied. Commissioner Alfaro in his separate opinion took the view that the above-mentioned principles should be applied to the facts of the situation as at the time at which the remedy could, in the ordinary course of affairs, have been resorted to.[1]

In regard to the principle of effectiveness, the application of the time rule creates no problems.[2] It is in relation to the application of the second necessary principle, that of the reasonable counsel, that the question of time becomes important. The issue whether counsel acted reasonably in all the circumstances of the case has to be decided with reference to the time at which he had to act in choosing to use or reject the available remedy.

In the *Ambatielos Claim*, as submitted above,[3] reasonable counsel

[1] *Ambatielos Claim* p. 34.
[2] Ibid. Commissioner Alfaro did not find this a problem either.
[3] See *supra* p. 251.

would have called Major Laing as a witness on the basis of the knowledge possessed at the time of the first action, even though certain knowledge came to light later.[1] The rule could, however, make a difference where facts coming to light after an action would, if they had been known before, have induced counsel, as a reasonable counsel to resort to a remedy which he has in his discretion, reasonably exercised, decided to avoid. Then, at the time of the action counsel could not reasonably have been expected to resort to the remedy.

(c) *Obstruction by the respondent State*

If the respondent State prevents an alien from using an effective or essential remedy in a manner that is lawful or unlawful according to the law of the respondent State, it is submitted that the alien is relieved of the obligation of resorting to it and will be regarded as having exhausted procedural remedies even without making use of it.[2] This proposition rests on the principle that local remedies need not be exhausted where there are none to exhaust.[3]

Suppose, however, that the respondent State has evidence in its possession which is useful for the claimant's case before the local courts, and the claimant State is prevented from reaching it for the proceedings. Does that fact relieve the claimant from making use of other effective remedies which can bring about a favourable result and which, taken alone, reasonable counsel can be expected to use? That is to say, is the alien to be exempted from exhausting local remedies at all where there are alternative effective remedies and the respondent State obstructs the alien in the use of one of them?

(i) *Violation of municipal law obligation.* The problem may arise where a respondent State has failed to fulfil a municipal law obligation to provide the claimant with a particular remedy to which he is entitled. In this situation the non-fulfilment of an obligation by the respondent State imposes an unfair burden on the claimant in the proof of his case. The object of the rule relating to the exhaustion of local remedies is to give the respondent State an opportunity of redressing an international wrong by means of its own machinery of justice. If the State is itself unwilling to perform the obligations

[1] Commissioner Alfaro, while admitting the principle, took a different view of the facts in this case: *Ambatielos Claim* p. 34.

[2] This is apart from any other wrong that the respondent State may commit by way of denying the alien justice, if the obstruction is contrary to municipal or international law.

[3] See *The Robert E. Brown Claim* (1923) (*U.S.A. v. G.B.*), (1923–24) *Annual Digest* No. 35.

imposed on it by its own law in the exercise of the privilege, especially when they touch upon the alien's right to make out his case, there is no justice done. The fact that the alien can use other means to prove his case makes little difference then; for the parties are not in a position of equality. It is submitted, therefore, that the non-fulfilment of an obligation by the respondent State, which deprives the alien of an effective means of redress, exempts the alien from resorting to other effective means, no matter how much more or less effective than the former means the other means may be. The fact that an effective means of redress has not been resorted to in these circumstances does not prevent the alien from successfully maintaining that the rule of exhaustion of local remedies has been satisfied.

Equally, where the alien is under an obligation according to the local law to perform some act of a procedural nature, his non-performance of this obligation would not amount to a non-exhaustion of local procedural remedies, if the respondent State is delinquent in performing a procedural obligation which deprives the claimant of an effective means of redress. The basic reason is the same. The object of justice is not to be achieved, if one of the parties defaults in the performance of his share of the obligations which contribute to the making of the other party's case. The privilege granted to the respondent State is not being exercised in a manner which befits the purpose for which it was granted.

In broad terms the rules governing the above situations may be traced to the international law principle of good faith or abuse of rights which has been regarded as applicable to rights deriving from customary international law.[1]

(ii) *Exceptional rights granted by municipal law.* Where, however, the respondent State deprives the alien of an effective procedural means of redress, while acting within the rights granted to it by its own law in excess of the rights granted to the ordinary citizen or litigant, and the alien has an alternative procedural means of an effective nature, the position is different. In the *Ambatielos Claim*, the Crown did not disclose certain letters which would have been effective evidence.[2] The Crown claimed privilege according to English law.[3] The Greek government conceded the municipal law validity of this

[1] See Cheng, pp. 129 ff.
[2] See the Greek argument: C.A.M., 2nd Sitting p. 28.
[3] Ibid., 9th Sitting p. 37. See also ibid., 11th Sitting p. 51; ibid., 12th Sitting p. 105; ibid., 14th Sitting p. 27.

action.[1] The Commission took the view that 'If a man can secure help by taking course A or course B and is prevented from taking course A, he fails to exhaust his remedies, if he refrains from taking course B.'[2] It consequently found that Mr. Ambatielos should, nevertheless, have called Major Laing in order to exhaust remedies.[3] Commissioner Spiropoulos merely stated that the existence of documents in the possession of the Crown was a factor to be considered in determining whether reasonable counsel would have called Major Laing.[4]

The Commission's view is somewhat limited as a statement of general principle. On the other hand, Commissioner Spiropoulos's view is not specific enough. It is submitted that the content of this particular rule must be determined by reference to the purposes which have been outlined above.[5] Most important is the consideration that the local proceedings are in the nature of a preliminary procedural requirement in the settlement of a dispute in international law. It is more than just a dispute between State and individual over a purely domestic problem. Thus, there is an interest of the international community at stake in having justice done. In the light of this factor the State party to the dispute should do its best to provide adequate means whereby justice may be done in such a dispute.[6] Moreover, the interest of the respondent State in settling an alleged international delinquency by its own means before being saddled with the expense, trouble and publicity of an international proceeding must be set off against that of the alien in having justice done in the best way possible with the greatest saving of such expense as would result from unsuccessful proceedings at the municipal level.

These are cogent considerations for taking an approach to this problem which is less categorical than that taken by the Commission, which seems to throw the whole burden of the risk on the alien. In any event, as has been submitted, different considerations from those expressed so broadly in that view apply to the case where the respondent State suppresses an alternative means of redress in violation of its municipal or international obligations. Similarly, it is submitted that, although the respondent State may be acting well within its rights at municipal law in depriving the alien of an alternative

[1] Ibid., 2nd Sitting pp. 66 ff. and p. 73. See also ibid., 5th Sitting p. 24 and ibid. 6th Sitting p. 25.
[2] *Ambatielos Claim* p. 30.
[3] Ibid.
[4] Ibid. p. 38.
[5] See *supra* Chapter V.
[6] See C.A.M., 3rd Sitting pp. 86–88 for a similar notion.

remedy, the policy considerations set out above may impose some limits on the exercise of these rights. This is a case of proceedings in a State, before the courts of that State, in which that State is a party; an international issue is at stake and that State has control of an alternative effective procedural means of redress, in a situation in which the alien is in a position of inequality. In arriving at a satisfactory rule two aspects of the situation require special consideration, it is submitted:

(i) the effectiveness of the means of redress as compared with that of the alternative remedy;
(ii) the possibility that a reasonable counsel can make a decision that the remedy in the control of the respondent State is more effective than the alternative remedy.

As to (i), it is submitted that a comparative estimate of the actual effectiveness of the two remedies should be made. This may be a difficult task but it is not beyond performance. It must be shown that there is a greater probability of success by the use of the remedy under the control of the respondent State than by the use of the alternative, if any exemption is to be granted to the alien from resorting to the alternative remedy.

The second consideration requires that in addition to (i), it must be shown that a reasonable counsel would have been able to estimate that effectiveness and, therefore, have had some reason for not using the alternative remedy. For, unless counsel has good reason for not using what he could have used and should have used, he cannot be excused. It is insufficient that the remedy being suppressed is in fact more effective than the one available, if counsel does not know this fact or cannot come to a reasonable conclusion on it.[1]

It will be observed that these submissions do not open the door too wide for aliens. They embody firm limitations on the alien's right to avoid using an alternative remedy which is available. They operate in favour of the interest of the State doing justice by its own means, while they give adequate weight to the interests of the alien and the international community in having justice done. Prima facie the alien must resort to the alternative remedy under the ordinary

[1] Commissioner Spiropoulos suggested further that, if the alien could not expect to be given the remedy being suppressed in similar proceedings in his national State, he should have no right to expect it as against a foreign State. But, it is submitted that this is hardly a consideration of relevance in the light of the policies behind the law of exhaustion of local remedies.

conditions in order to exhaust procedural remedies in the same court. To this extent the view of the Commission in the *Ambatielos Claim* is acceptable. In an exceptional case, however, the alien may be exempted from resorting to the alternative remedy available. These circumstances arise where it can be shown not only that the remedy of which he was deprived is more effective than the alternative remedy which was available but also that a reasonable counsel could have come to this conclusion. These conditions are not easily susceptible of proof and thus it will be seldom that an alien will gain exemption on these grounds.

In the *Ambatielos Claim* neither the Commission nor any of the other Commissioners examined this aspect of the rule of exhaustion of local remedies in this way. However, it is possible to explain that by reference to the fact that the situation before the Commission did not involve these exceptional circumstances. It was unnecessary for the Commission to enter into a detailed analysis of the principles applicable because these issues were never raised. Thus, it was clear that it could not be said that the crucial documents which were being suppressed would probably have been more efficacious than the evidence of Major Laing. Hence, no exemption from the prima facie rule could be granted to the alien, Mr. Ambatielos.[1]

(iii) *The powers of international tribunals in relation to this question.* That the position above outlined does substantial justice between the parties may be proved by a consideration of the situation that would arise before an international court in a case where, for instance, the Crown insists on exercising its privilege and withholding evidence.

[1] A further situation that may arise in proceedings before national courts is where the alien cannot produce evidence required by the court for the proof of his case because of the act of his national State. In such a case, the alien's failure to produce the necessary evidence if detrimental to his case, does not appear to amount to a failure on his part to exhaust his procedural remedies. He has done everything in his power to make out his case. It is his State that has caused the obstruction. In the international proceedings, however, the claim is brought on behalf of the alien by his national State. The claim is regarded as the claim of one State against another. If the alien is regarded as having exhausted local remedies, should not the claimant State be prevented from bringing an international claim on an equitable theory that it must come to an international court with clean hands? Having prevented the respondent State from doing justice in the cause of one of its nationals should it not be disallowed from claiming justice in the same cause against the respondent State? It will be noted that it is the alien who suffers by this. But there are three entities involved in this situation and at international law each has an interest in relation to the other. It is unfortunate that the solution should work to the detriment of the least responsible of the three. This problem is suggested by the facts of *Societé Internationale pour Participations Industrielles et Commerciales, S.A.* v. *Brownell, A. G., as Successor to the Alien Property Custodian et al.*, 225 F 2d. p. 532 (1955), certiorari denied, 243 F 2d. p. 254 (1957).

Where the alien has alternative means of proving his case, and he cannot show that the evidence which the Crown is withholding would both be more effective than the means he has and be so effective to the knowledge of reasonable counsel, he would have to resort to his alternative means and, if he succeeds, *cadit quaestio*. If he does not succeed he would have exhausted local remedies and could now have an action brought before an international court. If in the international proceeding his national State can make its case on the merits without reference to the evidence withheld by the Crown, it merely means that the municipal courts have given a wrong decision, the withheld evidence, nevertheless, not being really necessary. The important question is whether the alien's State can in any way get the benefit of the withheld evidence in order to make its case before the international tribunal, for this might be of advantage where that evidence is in fact more effective than the other evidence available. In a situation where the withheld evidence is more effective than the other effective means available to the alien and the alien can show that reasonable counsel could have come to this conclusion, he does not have to exhaust local remedies according to the principle here advocated and the case would come directly before an international tribunal. Here too the question would arise whether the alien's national State can get the benefit of the withheld evidence.

The question which arises in regard to the withheld evidence in both these instances may be answered by reference to principles already enunciated by international tribunals. Although the burden of proof in a given case rests with the plaintiff State,[1] international tribunals in general have taken the view that, while it is normally incumbent upon the party who alleges a fact to introduce evidence to establish it, the respondent State is under an obligation to produce all evidence within its possession to establish the truth, while in any case where evidence which would probably influence its decision is peculiarly within the knowledge of either party, the failure to produce it, unexplained, may be taken into account by the tribunal in reaching

[1] See *The Queen Case* (1872) (*Brazil* v. *Norway–Sweden*), La Pradelle-Politis, *Recueil des Arbitrages Internationaux* ii, 708; *Firme Ruinart Père et Fils Case* (1927) (*France* v. *Germany*), 7 T.A.M. 601; *Banque d'Orient Case* (1928) (*Greece* v. *Turkey*), 7 T.A.M. 973; the *Asylum Case*, 1950 I.C.J. Reports p. 276; the *U.S. Nationals in Morocco Case*, 1952 I.C.J. Reports p. 200; the *Nottebohm Case*, 1955 I.C.J. Reports p. 4; the *Corfu Channel Case*, 1949 I.C.J. Reports p. 4; the *Minquiers and Ecrehos Case*, 1953 I.C.J. Reports p. 67; Cheng, pp. 326 ff.; Rosenne, *The International Court of Justice* (1961) pp. 409 ff.; Witenberg, 56 Hague *Recueil* (1936) 97.

a decision.[1] Article 75 of the Hague Convention for the Pacific Settlement of Disputes of 1907 imposes an undertaking upon the parties to supply the tribunal, as fully as they consider possible, with all the information required for deciding the dispute.[2] Under these principles it would seem that there would be an obligation to submit the withheld evidence to the tribunal, though the tribunal cannot take any measure of compulsion. Failure to fulfil the obligation could be noted by the tribunal and used against the State withholding evidence, so that all that the plaintiff State might be required to do is to produce very meagre evidence to support its case for the tribunal to reach a decision in its favour. The position of the alien with regard to the withheld evidence would, at any rate, be somewhat better before an international tribunal than before the municipal court of the respondent State, if not fully secure.

In the case of the International Court of Justice the Statute and Rules of the Court have something specific to say on this matter, so that those provisions would govern cases before the Court. Article 49 of the Statute gives the Court power to call upon agents to produce documents or supply explanations. Article 54 of the Rules states that the Court may request the parties to call witnesses or experts, or to call for the production of any other evidence on points of fact in regard to which the parties are not in agreement. Under Article 44 of the Statute provision is made for the service of notices by direct application to the government upon whose territory the notice has to be served.[3] Where documents are called for under these provisions the resulting position would, it is submitted, be the same as under the customary law governing international tribunals so that the Court could make the appropriate inferences from a refusal to produce evidence. In the *Corfu Channel Case* these provisions were invoked against the United Kingdom in order to secure the production of certain documents but these were not produced. However, the Court found that it would not draw from the refusal to produce these documents any conclusions differing from those to which the actual events gave rise.[4] This was evidently a case in which the evidence from other sources pointed strongly in favour of a particular conclusion which supported the withholding State's contention so that

[1] The *Parker Claim* (1926) (*U.S.A.* v. *Mexico*), 4 *U.N.R.I.A.A.* 39.
[2] See also Article 15 of the Draft on Arbitral Procedure of the International Law Commission: G.A.O.R. (viii) Sup. No. 9 (A/2456), which is similar.
[3] See also Rosenne, *The International Court of Justice* (1961) pp. 402 ff.
[4] 1949 I.C.J. Reports p. 34.

the refusal' could not be interpreted against such a conclusion. This does not mean to say, however, that in appropriate circumstances the refusal to produce evidence cannot be interpreted against the refusing State. Thus, before the International Court of Justice too the position of the alien State is likely to be stronger than the position of the alien before the municipal court and the possibility of a favourable decision consequently greater.

It is evident that there is some advantage to be gained by the alien in being exempted from resort to remedies in circumstances in which there are more effective remedies being withheld by the respondent State and reasonable counsel can infer that they are more effective. The chances of his State's succeeding in an international proceeding are better than his chances before a municipal court and, therefore, there is every reason for allowing him not to resort to municipal remedies on that basis. On the other hand, the advantage that may be gained before an international tribunal does not accrue where the remedy being withheld is not more effective than that which the alien already has. Then it is reasonable that the alien should exhaust the available remedies before his case is taken up at an international level. Even where the withheld remedy is more effective than available remedies but reasonable counsel cannot come to such a conclusion, it is still in keeping with reason, in that it is a test of his good faith, that the alien should be under an obligation to resort to the available remedies.

It is also worthy of note here that even where the alien is expected to resort to an alternative remedy under these rules and fails in his suit before the municipal courts, his State will be in a stronger position before an international tribunal with regard to the withheld evidence than the alien was before the municipal courts so that there is a greater likelihood of success. However, the mere fact that the alien's national State enjoys a stronger position before an international tribunal than the alien before the municipal courts does not justify a rule that wherever the respondent State takes advantage of privilege the alien should be exempted from resort to local remedies, just as much as the converse position (that the alien must always resort to alternative means where such privilege is exercised) would also be too one-sided.

(iv) *General rights granted by municipal law.* Where the respondent State controls an alternative remedy under the law applying to citizens in general, it is submitted that it cannot be argued that preventing

the alien from access to an alternative remedy has any relevance to the question whether the alien may be exempted from using an existing remedy. The respondent State is merely exercising a right available to anyone, including the alien, equally. Hence no question of inequality and unfairness arises. The alien must take into account the right of the respondent State to exercise general powers.

(v) *Rights in violation of international law.* It may happen in either case (i.e., whether the power of suppressing an alternative remedy is granted by the general law or by a special law applicable to the respondent State only), that such power of suppression is contrary to the treaty obligations of the respondent State or falls below the international minimum standard. In such an event, it is submitted that according to the general principles of international law the alien need not resort to any available remedies, however effective or ineffective they may be, in order to exhaust local remedies. For the remedies provided by the respondent State do not conform to the requirements of international law.

(d) *The burden of proof*

The question of the burden of proof in cases involving the exhaustion of local procedural remedies in the same court has not been discussed as such either by writers or in any cases. The question must perforce be discussed in terms of principle. It is in connexion with discretionary remedies that the problem arises. The law as submitted above involves several issues. These relate to

(i) the effectiveness of the remedy;
(ii) the reasonable conduct of counsel in regard to the use of that remedy;
(iii) the comparative effectiveness of an alternative remedy which has been suppressed;
(iv) the reasonable conduct of counsel in regard to the alternative remedy.

The first two points are connected with the answer to the question whether a particular discretionary remedy should have been used by the claimant. The last two are relevant to the situation where the respondent State deprives the alien of an alternative means of proving his case, although the claimant may have a means already at his disposal.

(i) *The authorities in general.* In the *Norwegian Loans Case*, Judge Lauterpacht had occasion to advert to the problem of the burden of proof where the defence was raised that local remedies had not been exhausted. The case involved Norwegian legislation which was apparently contrary to international law and purported to deprive French bondholders of their rights. The learned judge had this to say:

> There is in general a degree of unhelpfulness in the argument concerning the burden of proof. However, some prima facie distribution of the burden of proof there must be. This being so, the following seems to be the accurate principle on the subject: (1) as a rule, it is for the plaintiff State to prove that there are no effective remedies to which recourse can be had; (2) no such proof is required, if there exists legislation which on the face of it deprives the private claimant of a remedy; (3) in that case it is for the defendant State to show that, notwithstanding the absence of a remedy, its existence can nevertheless reasonably be assumed; (4) the degree of burden of proof thus to be adduced ought not to be so stringent as to render the proof unduly exacting . . .[1]

Legislation as a factor in the issue is not of specific relevance here. But according to Judge Lauterpacht's view, it would seem that there are four important points of a general nature.

(1) It is implied presumably that the respondent State that raises the plea must show that there are some remedies available to the alien.
(2) The claimant State must then prove that those remedies were ineffective. This is the general rule.
(3) The degree of burden of proof thus to be adduced ought not to be so stringent as to render the proof unduly exacting.
(4) This is only a prima facie distribution of the burden of proof.

It is also apparent that in certain circumstances the learned judge was prepared to allow a shift in the burden of proof, viz., where there was legislation apparently depriving the alien of a remedy.

On the same lines Fawcett suggests that it is for the respondent State to prove that there are remedies available, while it is for the claimant State to prove that these were ineffective.[2]

Neither Judge Lauterpacht nor Fawcett was dealing with the exhaustion of procedural remedies in the same court in particular. However, these statements provide a good starting point for a discussion of the subject. Judge Lauterpacht is open to a more flexible

[1] 1957 I.C.J. Reports p. 39.

[2] In 31 *B.Y.I.L.* (1954) 458.

approach, since he described his distribution of the burden of proof as a prima facie one.

(ii) *The burden in the case of discretionary procedural remedies.* Burden of proof refers to the notion that a party must adduce evidence in order to prove the necessary facts. What has to be proved will depend on who has to prove it. For example, in the case of the question relating to the effectiveness of the procedural remedy, if the burden is on the respondent State to prove the facts, it must prove that the procedural remedy in issue was an effective one, i.e., would probably have resulted in a decision which would have satisfied the alien's plaint. The burden would be on the respondent State to adduce sufficient evidence to prove this effectiveness. If it failed to do so the remedy must be pronounced ineffective. If it adduces evidence which is equally consistent with the effectiveness as with the ineffectiveness of the remedy, it has failed to discharge the onus.

If the claimant State bore the burden of proof, it would have to show that the particular remedy was ineffective, i.e., would probably not have affected the decision given by the local court. The burden would be on the claimant State to adduce sufficient evidence to prove the ineffectiveness of the remedy. If it failed to do so, or if it merely adduced evidence which was consistent with either the effectiveness or ineffectiveness of the remedy, the remedy would be effective and the point would go against the claimant State.

In a situation where it is alleged by the respondent State that the claimant did not exhaust his procedural remedies, the issues of relevance are whether the remedy was an effective or ineffective one and whether reasonable counsel could have foreseen that it would be effective or not. According to Judge Lauterpacht's analysis, taken literally, it is for the respondent State, having raised the issue as a preliminary objection, merely to prove that the particular procedural remedy was available.[1] Then it is for the claimant State to adduce evidence and prove that the particular remedy was ineffective, i.e., would probably not have affected the local court decision.

Although this approach may be satisfactory with reference to other aspects of the rule of exhaustion of local remedies, such as the

[1] Procedural remedies in general cannot be meant in this case; since then there would be no issue presented that a particular remedy was not used. The respondent State must point to a particular remedy that was not used. It is reasonable, then, that it should at least show that such a means was available. If it were sufficient for the respondent State merely to show that procedural remedies in general were available, it would not have to prove much.

exhaustion of substantive remedies or appeals, it is doubtful whether it should be rigidly applied to the question of the exhaustion of procedural remedies in the same court. In the case of the exhaustion of local remedies in general the respondent State points to something which by its very nature raises a presumption that it is effective, viz., an appeal not resorted to, so that it is not entirely inconsistent to shift the burden of proving the ineffectiveness of the remedy on to the claimant State.[1]

In the case of the exhaustion of procedural remedies in the same court, however, it is submitted that the alien has already availed himself of proceedings before a judge in relation to a specific issue or specific issues of law and fact. There is no reason to presume, therefore, that, because the respondent State points to a procedural remedy in the same court which the alien has not used, the alien has failed to conduct his case in the best way possible. The principle *omnia rite esse praesumuntur*[2] would apply in favour of the alien. In that event the claimant State cannot be expected to prove that the remedy referred to was an ineffective one, since that would amount to a denial of that presumption. Hence the burden must lie on the respondent State to show that the remedy was not only available but was also effective.

It is submitted, therefore, that in the case of procedural remedies the prima facie distribution of the burden of proof outlined by Judge Lauterpacht should not apply to the issue whether the remedy is an effective one. The whole burden should rest on the respondent State. The exception is explicable by the fact that the exhaustion of procedural remedies in the same court is different from the exhaustion of other remedies.

In regard to the issue whether reasonable counsel could have foreseen that the remedy was an effective one, the same reasoning does not apply. Once it is proved that the remedy is effective it can justly be said to give rise to a presumption that a reasonable counsel would have used it, so that it is for the party denying this proposition to prove its case, namely, that reasonable counsel could not have surmised the effectiveness of the remedy. Thus, in respect of this

[1] There are some arguments of a general nature against the shift in the burden of proof even in these cases. (i) It is easier to prove a positive than a negative. Hence the burden should be on the respondent State to prove the effectiveness of the remedy. (ii) The respondent State raises the issue of non-exhaustion. But in the general case it is conceded that the contrary arguments may be stronger.

[2] For this principle in international law see Cheng, p. 305.

issue, it is submitted that there should be a shift in the burden of proof. The claimant State must prove that a reasonable counsel could not in all the circumstances of the case have foreseen the effectiveness of the remedy, effective though it in fact was.

As for the other two issues that may arise in a litigation concerning procedural remedies, they come from a situation where there are alternative remedies of which one is being suppressed by the respondent State, so that the alien is led not to use the other. Here the respondent State has shown that there is an effective procedural remedy which has not been used, while it is the claimant who alleges that there was an alternative which was more effective which, however, was not available through the act of the respondent State. It is submitted that it cannot reasonably be presumed that an alternative which is suppressed will always be more effective than the one available so as to lay the burden on the respondent State to show that the alternative was of such a kind that the other should have been used. The claimant raises the issue in replication to a defence of non-exhaustion and should be required to prove that both the factors necessary for the success of such a replication are present. Thus, it is the claimant State that must prove that the alternative remedy was of greater effectiveness and that reasonable counsel could have acted and did act on this basis.

Briefly, to sum up on the burden of proof, it is submitted that it is for the respondent State to prove that the procedural remedy alleged not to have been used was effective, while it is for the claimant State to show that counsel could not reasonably have known or surmised this fact and could not reasonably have used it. In a case where the reply is made by the claimant State that there was an alternative remedy of which the alien was deprived by the respondent State, it is submitted that it is for the claimant State to prove both that this alternative remedy was more effective than the other and that counsel could reasonably have, and did in fact, come to this conclusion.

CONCLUSION

This chapter has purported to examine the chief problems connected with a limited aspect of the rule of exhaustion of local remedies, namely, the exhaustion of procedural remedies in the same court. There is little material on it, whether in the way of case decisions, State practice or textual writings, so that much of what has been

said has of necessity to be submitted as argument from general principle. The *Ambatielos Claim* itself, in which the issue was raised for the first time, left much to be desired both in its treatment of the problem and in the answers it gave to the specific issues which it decided.

Procedural remedies, in the sense understood here, belong to one of two categories. They are either obligatory or discretionary. In regard to the former, the question whether a particular remedy must be resorted to or not for the purposes depends on whether the obligation is discriminatory, falls below the international minimum standard, or is contrary to the treaty obligations of the respondent State.

Discretionary remedies require a different treatment. Whether a particular discretionary remedy must be used or not is to be determined, firstly, by asking the question whether it is an effective remedy or not. The *Ambatielos Claim* provides authority for this. Though there may be difficulty as to the exact meaning of the term effective, it has been submitted that it should be taken to mean 'such as will probably effectuate a decision in the alien's favour'. Further, it is necessary that the fact that reasonable counsel would, in all the circumstances of the case, have been able to estimate the effectiveness of the remedy be also shown in order to impose on the alien an obligation to use the remedy. It is important that the determination of the effectiveness of the remedy concerned should rest on certain definite rules which have been outlined above. Generally it is for the court to make a determination in its own right on the basis of the evidence presented to it. But there may be situations in which the court should accept an admission by one of the parties. In the application of the principles relating to the nature of the remedy, the time to which these principles should be applied is an aspect which requires attention, since the scales can be tipped in the wrong direction by reference being made to the wrong point of time. The relevant time is that at which the remedy fell due to be chosen.

A special problem arises where there are alternative remedies available to the alien one of which the respondent State has deemed fit to suppress. Clearly, if the act of suppression is being resorted to in breach of its obligations imposed by the local law or international law, the alien is relieved of his duty to exhaust local procedural remedies, since the respondent State is not in good faith. However, if the act of suppression is within the law, the answer to the question

whether the alien must exhaust other available procedural remedies will depend on several considerations. If the suppression is in accordance with the general law applicable to all litigants, then the fact of suppression becomes irrelevant, unless that law is in violation of treaty or customary international law. If, however, it is the result of a special law applicable to the State as such, then the alien should not be under an obligation to resort to an alternative remedy in the exceptional circumstances that the remedy suppressed is comparatively more effective than the alternative remedy available, and if reasonable counsel could have come to that conclusion, but not otherwise. The fact that before an international court the national State of the alien will be in a stronger position in regard to the withheld evidence than the alien before the municipal courts helps to justify this rule.

Finally, some conclusions were reached regarding the burden of proof in cases involving the exhaustion of procedural remedies in the same court. Prima facie it may seem proper to place the burden of proving the ineffectiveness of the procedural remedy on the alien's State. But it has been suggested that a more equitable distribution of the burden would require the respondent State to prove that the remedy is effective, while the claimant State must show that counsel could not reasonably have determined its effectiveness. As for the greater effectiveness of an alternative remedy, which is being suppressed by the respondent State, and the ability of a reasonable counsel to surmise this greater effectiveness, it is for the claimant State to prove these issues which it raises.

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Second report on identification of customary international law

by Michael Wood, Special Rapporteur*

Contents

* The Special Rapporteur wishes to thank Omri Sender for his invaluable assistance with the preparation of the present report.

I. Introduction

1. In 2012 the Commission placed the topic "Formation and evidence of customary international law" on its current programme of work, and held an initial debate on the basis of a note by the Special Rapporteur.[1] Also in 2012, the General Assembly, following a debate in the Sixth Committee, noted with appreciation the Commission's decision to include the topic in its programme of work.[2]

2. At its sixty-fifth session, in 2013, the Commission held a general debate[3] on the basis of the Special Rapporteur's first report,[4] which was of an introductory nature, and a memorandum by the Secretariat on 'Elements in the previous work of the International Law Commission that could be particularly relevant to the topic'.[5] In light of the debate, and following informal consultations, the Commission decided to change the title of the topic to read 'Identification of customary international law'. This was done partly to avoid difficulties with the translation of the word 'evidence' into other United Nations official languages, and also to emphasise that the principal objective of the topic was to offer guidance to those called upon to identify the existence of a rule of customary international law. The change in title was made on the understanding that matters relating both to what one Commission member referred to as the 'formative elements', and to evidence or proof of customary international law, remained within the scope of this topic.[6]

3. In addition, the Special Rapporteur drew the following conclusions[7] from the debate and informal consultations:

(a) There was general support among members of the Commission for the 'two-element' approach, that is to say, that the identification of a rule of customary international law requires an assessment of both general practice and acceptance of that practice as law. Virtually all those who spoke expressly endorsed this approach, which was also supported by the wide array of materials covered in the first report, and none questioned it. At the same time, it was recognized that the two elements may sometimes be 'closely entangled', and that the relative weight to be given to each may vary according to the circumstances.

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[1] See A/CN.4/653, *Note on the formation and evidence of customary international law*.

[2] General Assembly resolution 67/92 of 14 December 2012, para. 4.

[3] See summary records A/CN.4/SR.3181, 3182, 3183, 3184, 3185, 3186 (17, 18, 19, 23, 24, 25 July 2013); A/68/10: *Report of the International Law Commission on its Sixty-fifth session (6 May–7 June and 8 July–9 August 2013)*, paras. 66-107.

[4] A/CN.4/663.

[5] A/CN.4/659 (hereinafter: '*Secretariat memorandum*').

[6] A/CN.4/SR.3186 (25 July 2013), at 5. It is worthwhile to recall in this context Jennings' observation that "in international law the questions of whether a rule of customary law exists, and how customary law is made, tend in practice to coalesce": R. Jennings, 'What is International Law and How Do We Tell It When We See It?', *Annuaire Suisse de Droit International*, 37 (1981), 59, 60. See also K. Wolfke, *Custom in Present International Law*, 2nd edition (Martinus Nijhoff Publishers, 1993), 116 ("The ascertainment and formation of customary international law are of necessity closely interrelated, since, on the one hand, the process of formation determines the means of identification of customary rules, and on the other, the action of ascertaining custom or its elements influences its further development. This interdependence is already evident from the content of Article 38.1(b) of the Statute of the [International] Court").

[7] A/CN.4/SR.3186, *ibid.*, at 3-6.

(b) There was widespread agreement that the primary materials for seeking guidance on the topic would be likely to be the approach of States, as well as that of international courts and tribunals, first among them the International Court of Justice.

(c) There was general agreement with the view that the outcome of the work on the topic should be of a practical nature, and should be a set of 'conclusions' with commentaries. Moreover, there was general agreement that in drafting conclusions the Commission should not be overly prescriptive.

(d) There was general agreement that the Commission would need to deal to some degree with the relationship between customary international law and other sources of international law, in particular treaties and general principles of law. In addition, there was interest in looking into 'special' or 'regional' customary international law.

(e) Most members of the Commission were of the view that *jus cogens* should not be dealt with as part of the present topic.

4. During the Sixth Committee debate in 2013, delegations welcomed the 'two-element' approach, while stressing the need to address the question of the relative weight to be accorded to State practice and *opinio juris*. There were differing views on whether to include a detailed study of *jus cogens* within the present topic. The Commission's intention to consider the relationship between customary international law and other sources of international law was generally welcomed, though it was noted that the question of the hierarchy of sources was for separate consideration. The importance of looking at 'special' or 'regional' customary international law, including 'bilateral custom', was stressed.[8]

5. Delegations reaffirmed the importance of having regard, when identifying customary international law, as far as possible, to the practice of States from all regions, while noting, however, that relatively few States systematically compile and publish their practice. Caution was expressed concerning the analysis of State practice, in particular with respect to decisions of domestic and regional courts. It was further suggested that the practice of international organizations should be considered.[9]

6. One or two delegations proposed that the form of the final outcome of the Commission's work on the topic should be considered at a later stage; nevertheless, the Commission's present intention that the outcome should take the form of 'conclusions' with commentaries was widely supported. The importance of not being overly prescriptive was emphasised, as was the notion that the flexibility of customary international law must be preserved.[10]

7. At its 2013 session, the Commission requested States "to provide information, by 31 January 2014, on their practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation, as set out in (a) official statements before legislatures, courts and

[8] A/CN.4/666: *Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session*, paras. 43-44.
[9] *Ibid*., at paras. 45-46.
[10] *Ibid*., at para. 47.

international organizations; and (b) decisions of national, regional and subregional courts."[11] As of the date of writing this report, written contributions had been received from nine States,[12] for which the Special Rapporteur is very grateful. Further contributions would be welcome at any time.

8. The Special Rapporteur also welcomes the contribution that can be made by academic bodies to thinking on the subject. Over the last year or two, various institutions have organised meetings on aspects of the topic, which were both encouraging and stimulating. Since the Commission's sixty-fifth session there have also been some new relevant writings, as well as judgments of international courts and tribunals, which this report has taken into account.

9. The first report sought to describe the basic materials to be consulted for the purposes of the present topic, and considered certain preliminary issues. This second report covers central questions concerning the approach to the identification of rules of 'general' customary international law, in particular the two constituent elements and how to determine whether they are present. Section II of the report covers the scope and outcome of the topic, explaining that the draft conclusions concern the method for identifying rules of customary international law, and do not enter upon the actual substance of such rules. Section III, concerning the use of terms, includes a definition of customary international law which is inspired by the wording of Article 38.1(b) of the Statute of the International Court of Justice, but does not refer directly to that provision. Section IV describes the basic 'two elements' approach in general terms, these elements being 'a general practice' and 'accepted as law' (commonly referred to as 'State practice' and '*opinio juris*', respectively). Sections V and VI then begin the more detailed inquiry into the two elements, which (as explained in Section VII on the future programme of work) will be continued in the third report.

10. It seems desirable to cover in the same report both practice and *opinio juris*, given the close relationship between the two. At the same time, doing so necessarily means that a large amount of ground had to be covered in this report without the benefit of detailed discussions within the Commission and Sixth Committee. Sections V and VI are thus necessarily of a rather preliminary nature; the Special Rapporteur may need to review and further refine both the text and the proposed conclusions in the next report.

11. The present report proposes 11 draft conclusions, which are reproduced together in the annex. As indicated there, it is proposed that the draft conclusions should be divided into four Parts (Introduction; Two constituent elements; A general practice; Accepted as law). This indicates the general structure envisaged by the Special Rapporteur. Further draft conclusions will be proposed in the next report, but – subject always to the views of members of the Commission – these are unlikely to affect the structure.

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[11] A/68/10, *supra* note 3, at para. 26.

[12] The Kingdom of Belgium; the Republic of Botswana; Cuba; the Czech Republic; the Republic of El Salvador; the Federal Republic of Germany; Ireland; the Russian Federation; and the United Kingdom of Great Britain and Northern Ireland.

II. Scope and outcome of the topic

12. The debates in the Commission and in the Sixth Committee in 2013 confirmed the utility of the present topic, which aims particularly to offer practical guidance to those, in whatever capacity, called upon to identify rules of customary international law, in particular those who are not necessarily specialists in the general field of public international law. It is important that there be a degree of clarity in the practical application of this central aspect of international law, while recognizing of course that the customary process is inherently flexible. As is widely recognized, "[t]he question of sources is … of critical importance; and the jurisprudential and philosophical debates that continue to rage have much more than an academic significance. It is right and proper to find them absorbing, and to participate in the intellectual exchanges. But we should not ignore that the need for them is a damaging acknowledgment of inadequacies in a legal system".[13]

13. It is not of course the object of the present topic to determine the substance of the rules of customary international law, or to address the important question of who is bound by particular rules (States, international organizations, other subjects of international law). The topic deals solely with the methodological question of the identification of customary international law.

14. The present topic is and its conclusions are intended to be without prejudice to ongoing work on other topics. It will also be important, as work on the topic proceeds, to avoid entering upon matters relating to other sources of international law, including general principles of law (Article 38.1(c) of the Statute of the International Court of Justice). The work will also be without prejudice to questions relating to *jus cogens*, which could be the subject of a separate topic.

15. In light of the above the following draft conclusion is proposed:

Draft Conclusion 1

Scope

1. The present draft conclusions concern the methodology for determining the existence and content of rules of customary international law.

2. The present draft conclusions are without prejudice to the methodology concerning other sources of international law and questions relating to peremptory norms of international law (*jus cogens*).

III. Use of terms

16. In the first report, the Special Rapporteur proposed a definition of 'customary international law' that consisted of a simple cross-reference to Article 38.1(b) of the Statute of the International Court of Justice (ICJ).[14] A number of members of the

[13] R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994), 17.
[14] A/CN.4/663, *supra* note 1, at para. 45.

Commission felt that a cross-reference was not entirely satisfactory, both because it was not self-contained and because it might be seen as relying too heavily on the Statute, which was in terms only applicable to the ICJ.[15]

17. The Special Rapporteur therefore proposes that the Commission adopt a definition of customary international law that draws upon the language of the ICJ Statute, without referring directly to it. This would have the advantage of maintaining the key concepts ('a general practice'; 'accepted as law'), which are the basis of the approach not only of the ICJ itself but also of other courts and tribunals and of States.[16] The language of Article 38.1(b), now almost a century old, continues to be widely relied upon and has lost none of its relevance. Indeed, compared with what are perhaps the terms in more common use today ('State practice' and '*opinio juris*') the wording of the Statute seems less problematic and indeed more modern. In any event, the division into two distinct elements mandated by the language of the Statute "constitutes an extremely useful tool for 'discovering' customary rules".[17]

18. Another term that it may perhaps be useful to define is 'international organization'. It would seem appropriate to adopt the definition used in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,[18] as well as in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,[19] that is, that "international organization" means an "intergovernmental organization". As is clear from the Commission's commentary, the more elaborate definition employed in the draft articles on the Responsibility of international organizations was devised for the particular circumstances of that topic.[20] In the present context, the more general and broader definition would seem preferable.

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[15] But see *ibid*., at para. 32 ("Article 38.1 has frequently been referred to or reproduced in later instruments. Although in terms it only applies to the International Court, the sources defined in Article 38.1 are generally regarded as valid for other international courts and tribunals as well, subject to any specific rules in their respective statutes" [citations omitted]). The chapeau of Art. 38.1, as adopted in 1945 ("The Court, whose function is to decide *in accordance with international law*, such disputes as are submitted to it, shall apply:" (emphasis added)), strongly suggests that this provision of the Statute is intended to state the sources of international law.

[16] See paras. 24-25 below.

[17] A. Pellet, 'Article 38', in A. Zimmermann et al., *The Statute of the International Court of Justice: A Commentary*, 2nd edition (Oxford University Press, 2012), 731, 813. See also G.M. Danilenko, 'The Theory of International Customary Law', *German Yearbook of International Law*, 31 (1988), 9, 10-11 ("… the definition of custom provided by Art. 38 of the statute is extremely important for the theory and practice of customary international law. In the first place, Art. 38 reaffirms the recognition by all States of international custom as one of the main sources of international law … Secondly, Art. 38 reflects the agreement of all members of the international community on basic constituent elements required for the formation and operation of customary rules of international law, namely, practice, on the one hand, and acceptance of this practice as law, on the other"); G. Arangio-Ruiz, 'Customary Law: A Few More Thoughts about the Theory of 'Spontaneous' International Custom', in N. Angelet (ed.), *Droit Du Pouvoir, Pouvoir Du Droit: Mélanges offerts à Jean Salmon* (Bruylant, 2007), 93, 105.

[18] Art. 1.1(1).

[19] Art. 2.1(*i*).

[20] Articles on the Responsibility of international organizations (2011), Art. 2(a) and commentary (1) to (15): *Report of the ILC 2011*, 73-78.

19. It will be for consideration, as the topic proceeds, whether further terms need to be defined. If there is eventually a 'use of terms' provision it may be desirable to include a saving clause along the lines of those contained in earlier texts based on the Commission's drafts, such as article 2.3 of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property.[21]

20. In light of the above, the following draft conclusion is proposed:

Draft Conclusion 2

Use of terms

For the purposes of the present draft conclusions:

(a) "Customary international law" means those rules of international law that derive from and reflect a general practice accepted as law;

(b) "International organization" means an intergovernmental organization;

(c) …

IV. Basic approach: two constituent elements

21. The present report proceeds on the basis that the identification of a rule of customary international law requires an assessment of both practice and the acceptance of that practice as law ('two-element' approach).[22] There was widespread support for this approach within the Commission in the course of its debate in 2013, as also in the Sixth Committee.[23] As explained below, the two-element approach is indeed generally adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice. It is widely endorsed in the literature.

22. Under this approach, a rule of customary international law may be said to exist where there is 'a general practice' that is 'accepted as law'. These two requirements, "the criteria which [the International Court of Justice] has repeatedly laid down for identifying a rule of customary international law",[24] must both be identified in any

[21] The Article reads: "The provisions of paragraphs 1 and 2 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State".

[22] See also para. 3.1 above.

[23] See also para. 24 below.

[24] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 122, para. 55; the Court went on, in the same paragraph, to specify that "In particular ... the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*". See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77 ("…two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it"); *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 29 ("It is of course axiomatic that the

given case to support a finding that a relevant rule of customary international has emerged. Thus, for a persuasive analysis of whether a rule of customary international law exists, "it would be necessary to be satisfied that such a rule meets the conditions required for the birth of an international custom".[25]

23. The two elements are indeed indispensable for any rule of customary international law properly so called. As one author has explained, "Without practice (*consuetudo*), customary international law would obviously be a misnomer, since practice constitutes precisely the main *differentia specifica* of that kind of international law. On the other hand, without the subjective element of acceptance of the practice as law the difference between international custom and simple regularity of conduct (*usus*) or other non-legal rules of conduct would disappear".[26]

24. The two-element approach is widely supported in State practice. To mention just a few recent examples, Rwanda, the United States and Uruguay have stated, in bilateral investment treaties, "their shared understanding" that customary international law "… results from a general and consistent practice of States that they follow from a sense of legal obligation".[27] The Netherlands and The United Kingdom have similarly stated that "… the two constituent elements of customary international law [are] the widespread and consistent practice of States (State practice) and the belief that compliance is obligatory under a rule of law (*opinio juris*)".[28] Such a position was adopted by Member States of the European Union as a whole in the *European Union Guidelines on promoting compliance with international humanitarian law*, which define customary international law as a source of international law that "is formed by the practice of States, which they accept as binding upon them".[29] The Supreme Court of Singapore has ruled that "extensive and virtually uniform practice by all States … together with *opinio juris*,

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material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States"); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 97 ("...the Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and *opinio juris* of States"); P. Tomka, 'Custom and the International Court of Justice', *The Law & Practice of International Courts and Tribunals*, 12 (2013), 195, 197 ("In fact, the Court has never abandoned its view, firmly rooted in the wording of the Statute, that customary international law is 'general practice accepted as law'").

[25] *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 47 (Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda).

[26] K. Wolfke, *supra* note 6, at 40-41.

[27] Annex A to the *Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment* (2008) and Annex A to the *Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment* (2005), in which the parties "confirm their shared understanding that 'customary international law' generally and as specifically referenced in Article 5 and Annex B results from a general and consistent practice of States that they follow from a sense of legal obligation".

[28] Brief by the Governments of the United Kingdom of Great Britain and Northern Ireland and The Kingdom of The Netherlands as Amici Curiae in support of the Respondents in the case of *Esther Kiobel et al v Royal Dutch Petroleum Co et al* (3 February 2012) before the United States Supreme Court, 8, 11.

[29] *Updated European Union Guidelines on promoting compliance with international humanitarian law* (2009/C 303/06), section 7.

is what is needed for the rule in question to become a rule of CIL",[30] and in Slovenia the Constitutional Court has likewise held that that norms "can become compulsory as customary international law when they are applied by a great number of States with the intention of respecting a rule in international law".[31] The Constitutional Court and Supreme Court of the Czech Republic have also recognized the two elements as essential,[32] as did the New Zealand Court of Appeals, which observed that "customary international law, the (unwritten) rules of international law binding on all States … arise when States follow certain practices generally and consistently out of a sense of legal obligation".[33] That both general practice and acceptance as law are required for the formation and identification of customary international law has been acknowledged, moreover, by, among others, Austria, India, Israel, Iran, Malaysia, the Nordic countries, Portugal, Russia, South Africa, and Vietnam, in their interventions in the Sixth Committee debates on the 2012 and 2013 reports of the International Law Commission.[34] In recent pleadings before the International Court of Justice, States continue to base their arguments upon the two-element approach.[35]

25. Other international courts and tribunals likewise accept that the identification of rules of customary international law requires an inquiry into the two elements. As noted in the first report, notwithstanding the specific contexts in which these other courts and tribunals work, overall there is substantial reliance on the approach and case law of the Permanent Court of International Justice and the International Court of Justice, including the constitutive role attributed to the two elements of State practice and *opinio juris*.[36]

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[30] *Yong Vui Kong v Public Prosecutor,* [2010] 3 S.L.R. 489 [2010] SGCA 20 (Supreme Court of Singapore — Court of Appeal, 14 May 2010), paras. 96-98.

[31] Decision No. U-I-146/07, dated 13 November 2008, para. 19; see also Case No. Up-13/99, decision of 8 March 2001, para. 14.

[32] File no. II. ÚS 214/98 (30 January 2001) and file no. 11 Tcu 167/2004 (16 December 2004), respectively.

[33] *Attorney General v. Zaouvi*, CA20/04, Judgment (30 September 2004), para. 34.

[34] The statements by the various States during these debates may be found on the United Nations' PaperSmart Portal, available online at http://www.un.org/en/ga/sixth/.

[35] For example, in *Jurisdictional Immunities of the State (Germany v. Italy)* Germany argued that "No general practice, supported by *opinio juris*, exists as to any enlargement of the derogation from the principle of state immunity in respect of violations of humanitarian law committed by military forces during an armed conflict", and Italy, who was not relying on customary international law, suggested in its Counter-Memorial that "The question at issue in the present case is not whether there is a widespread and consistent practice, supported by the *opinio juris*, pointing to the existence of an international customary rule permitting in general terms the denial of immunity in cases involving gross violations of international humanitarian law or human rights law" (Memorial of the Federal Republic of Germany (12 June 2009), para. 55; Counter-Memorial of Italy (22 December 2009), para. 4.108). For another recent example, see the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case, in particular *Questions put to the Parties by Members of the Court at the close of the public hearing held on 16 March 2012: compilation of the oral and written replies and the written comments on those replies*, pp. 20-48, especially at pp. 24-25 (Belgium) - "Question put to Belgium - Senegal being invited to comment - by Judge Greenwood at the end of the public sitting of 16 March 2012". In other instances as well, just as States have not argued for the existence of a rule of customary international law based on the presence of either practice or *opinio juris* alone, they have not attempted to question the existence of an alleged rule of customary international law arguing that the two-element approach is theoretically flawed.

[36] A/CN.4/663, *supra* note 1, at paras. 66-82.

26. Most authors also adopt the two-element approach. It is to be found in both textbooks and treatises on public international law[37] and in monographs on or dealing with custom, whether specifically on sources[38] or on some other topic of international law.[39] For example, *Oppenheim* states that "the terms of Article 38(1)(b) … make it clear that there are two essential elements of custom, namely practice and *opinio juris*".[40] And the recent edition of *Brierly* states that "[c]ustom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it as obligatory … in the words of Article 38(1)(b) of the Statute,

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[37] See, for example, R. Jennings, A. Watts (eds.) *Oppenheim's International Law*, vol. I, 9th edition (Longmans, 1991), 25-31; A. Cassese, *International Law*, 2nd edition (Oxford University Press, 2005), 153-169 ("the fundamental elements constituting custom: State practice (*usus* or *diuturnitas*) and the corresponding views of States (*opinio juris* or *opinio necessitatis*))"; P.-M. Dupuy, Y. Kerbrat, *Droit international public*, 10th edition (Dalloz, 2010), 364 ("La bivalence du phénomène coutumier trouve un écho direct dans la représentation qu'en donnent les différents courants de la doctrine, aussi bien objectiviste que volontariste. Pour les uns comme pour les autres, confortés par le texte précité de l'article 38. b du statut de la Cour de La Haye (CPJI puis CIJ), la réunion de deux éléments est nécessaire pour que naisse la coutume en tant que règle de droit"); M. Bos, *A Methodology of International Law* (North-Holland, 1984), 109 ("for a custom to exist one merely has to ascertain the existence of the alleged factual aspects of it, i.e. its material and psychological components, and to put these to the test of the definition of custom"); V. Lowe, *International Law* (Oxford University Press, 2007), 36-63; M.N. Shaw, *International Law*, 6th edition (Cambridge University Press, 2008), 72-93 ("it is possible to detect two basic elements in the make-up of a custom. These are the material facts, that is, the actual behaviour of states and the psychological or subjective belief that such behaviour is law"); L. Damrosch, L. Henkin, S. Murphy and H. Smit, *International Law: Cases and Materials*, 5th edition (West, 2009), 59 ("What is clear is that the definition of custom comprises two distinct elements …"); P. Dailler, M. Forteau and A. Pellet, *Droit international public*, 8th edition (L.G.D.J, 2009), 352-379 ("Il est certes admis par tous que le processus coutumier n'est parfait que par la réunion de deux elements"); S. Murphy, *Principles of International Law*, 2nd edition (West, 2012), 92-101 ("States through their practice, and international lawyers through writings and judicial decisions, have agreed that customary international law exists whenever two key requirements are met: (1) a relatively uniform and consistent state practice regarding a particular matter; and (2) a belief among states that such practice is legally required"); A. Clapham, *Brierly's Law of Nations: An Introduction to the Role of Law in International Relations*, 7th edition (Oxford University Press, 2012), 57-63; J. Crawford, *Brownlie's Principles of Public International Law*, 8th edition (Oxford University Press, 2012), 23-30 ("the existence of custom is … the conclusion of someone (a legal adviser, a court, a government, a commentator) as to two related questions: (a) is there a general practice; (b) is it accepted as international law?"); M. Diez de Velasco (C. Escobar Hernández, ed.), *Instituciones de derecho internacional public*, 18th edition (Tecnos, 2013), 136-141 ("una prática seguida por los sujetos internacionales e generalmente aceptada por éstos como derecho"); J. Klabbers, *International Law* (Cambridge University Press, 2013), 26-34 ("two main requirements: there must be a general practice, and this general practice must be accepted as law …."); C. Santulli, *Introduction au droit international* (Pedone, 2013), 45 ("la doctrine classique des deux éléments de la coutume: la pratique, qui constitue l'élément materiel, et l'acceptation ou *opinio juris*, qui constitue l'élément volontaire (ou "psychologique")").

[38] See, for example, L. Millán Moro, *La "Opinio Iuris" en el Derecho Internacional Contemporaneo* (Editorial Centro de Estudios Ramon Areces, 1990); H. Thirlway, *The Sources of International Law* (Oxford University Press, 2014), Chapter III ("The traditional criteria in international law for the recognition of a binding custom are that there should have been sufficient State practice … and that this should have been accompanied by, or be backed by, evidence of what is traditionally called *opinio juris* or *opinio juris sive necessitatis*").

[39] For example, O. Corten, *Le droit contre la guerre*, 2nd edition (Bruylant, 2014), Chapter 1; for an earlier edition in English, see O. Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart, 2010), Chapter 1.

[40] R. Jennings, A. Watts (eds.), *supra* note 37, at 27.

we must examine whether the alleged custom shows a 'general practice accepted as law'".[41]

27. As was noted in the first report, certain authors have sought to devise alternative approaches, often emphasising one constituent element over the other, be it practice or *opinio juris*, or even excluding one element altogether.[42] This was also the case, to a degree, with the work of the International Law Association that culminated in its *London Statement* of 2000,[43] which tended to downplay the role of the subjective element.[44] While such writings are always interesting and provocative, and have been (and should be) duly taken into account, it remains the case that they do not seem to have greatly influenced the approach of States or courts. The two-element approach remains dominant.[45]

28. The first report raised the question whether there might be different approaches to the identification of rules of customary international law in different fields.[46] For example, there have been suggestions in the literature,[47] occasionally echoed in practice,[48] that in such fields as international human rights law,

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[41] A. Clapham, *supra* note 37, at 57.

[42] See A/CN.4/663, *supra* note 1, at paras. 97-101.

[43] *London Statement of Principles Applicable to the Formation of General Customary International Law*, with commentary: Resolution 16/2000 (Formation of General Customary International Law), adopted at the sixty-ninth Conference of the International Law Association, in London, on 29 July 2000 (hereinafter: '*ILA London Statement of Principles*'); see also A/CN.4/663, *supra* note 1, at paras. 89-91.

[44] The final report referred to "the alleged necessity for the 'subjective' element" (*ILA London Statement of Principles*, Introduction, para. *10*, as well as Part III).

[45] See also O. *Sender*, M. Wood, 'The Emergence of Customary International Law: Between Theory and Practice', in Y. Radi, C. Brölmann (eds.), *Research Handbook on the Theory and Practice of International Law-Making* (Edward Elgar, *forthcoming*) ("the two-element approach has … enabled the formation and identification of rules of international law that have for the most part won wide acceptance, while allowing customary international law to retain its characteristic flexibility. It has proven to be both useful and stable, and it remains authoritative through the ICJ Statute, which is binding on 193 States. Other theories on how a rule of customary international law emerges are, essentially, policy approaches; as such they may be instructive, but they remain policy, not law.").

[46] A/CN.4/663, *supra* note 1, at para. 19.

[47] A/CN.4/663, *supra* note 1, at footnotes 32-34; see also R. Kolb, 'Selected Problems in the Theory of Customary International Law', *Netherlands International Law Review*, 50 (2003), 119,128 ("… the time has come to put *à plat* the theory of custom and to articulate different types (and thus elements) of it in relation to different subject matters and areas. There is not one international custom; there are many international customs whose common family-bond is still to be shown. Consequently, a new map of international customary law has to be drawn, reflecting the various contours of international life, instead of artificially pressing the growing diversity of that experience into the Procrustean bed of traditional practice and *opinio juris*"); A. Cassese, *supra* note 37, at 160-161 ("*Usus* and *opinio*, as elements of customary law, play a different role in a particular branch of international law, the humanitarian law of armed conflict … In consequence [of the wording of the Martens Clause] it is logically admissible to infer (and is borne out by practice) that the requirement of State *practice* may not need to apply to the formation of a principle or a rule based on the laws of humanity or the dictates of public conscience …").

[48] See, for example, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T (ICTY Trial Chamber), 14 January 2000, para. 527 ("principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallizing as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law."); see also Appeal Judgment of the Extraordinary Chambers in the Courts of Cambodia (Supreme Court Chamber), Case number 001/18-07-2007-ECCC/SC (3 February 2012), para. 93 ("With respect to customary international law, the Supreme

international humanitarian law and international criminal law, among others, one element may suffice in constituting customary international law, namely *opinio juris*.[49] However, the better view is that this is not the case.[50] There may, on the other hand, be a difference in application of the two-element approach in different fields (or, perhaps more precisely, with respect to different types of rules): for example, it may be that "for purposes of... [a specific] case the most pertinent State practice"[51] would be found in one particular form of practice that would be given "a major role".[52] But the underlying approach is the same: both elements are required.

Court Chamber considers that in evaluating the emergence of a principle or general rule concerning conduct that offends the laws of humanity or the dictates of public conscience in particular, the traditional requirement of 'extensive and virtually uniform' state practice may actually be less stringent than in other areas of international law, and the requirement of *opinio juris* may take pre-eminence over the *usus* element of custom").

[49] It has similarly been suggested that "a sliding scale" by which consistent State practice may establish a rule of customary international law even without any evidence of acceptance of the practice as law, and a clearly established acceptance as law may establish a rule of customary international law without any evidence of a settled practice, could be utilized "depend[ing] on the activity in question and on the reasonableness of the asserted customary rule": See F.L. Kirgis, Jr., 'Custom on a Sliding Scale', *American Journal of International Law*, 81 (1987), 146-151 (the model also refers to situations where not "much" of either element, respectively, exists).

[50] See also the Statements on behalf of China, Israel, Iran, Poland, the Russian Federation, Singapore and South Africa in the 2013 Sixth Committee debate on the work of the International Law Commission (available at http://www.un.org/en/ga/sixth), all calling for a *unified* approach to be applied; T. Treves, 'Customary International Law', in *Max Planck Encyclopedia of Public International Law* (2012), para. 3 ("The essential characteristic which customary international law rules have in common is the way they have come into existence and the way their existence may be determined"); J. Kammerhofer, 'Orthodox Generalists and Political Activists in International Legal Scholarship', in M. Happold (ed.), *International Law in a Multipolar World* (Routledge, 2012), 138-157.

[51] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99 at p. 132, para. 73.

[52] *Ibid.*, at p. 162 (Separate Opinion of Judge Keith), para. 4. See, for example, *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, at p. 614, para. 88 ("in contemporary *international* law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the treaties for the promotion and protection of foreign investments, and the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, which created an International Centre for Settlement of Investment Disputes (ICSID), and also by contracts between States and foreign investors. In that context, the role of diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative"); *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (ICTY Appeals Chamber), 2 October 1995, para. 99 ("Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting To ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions");

Any other approach risks artificially dividing international law into separate fields, which would run counter to the systemic nature of international law.[53] In any case, as will be illustrated below, it is often difficult to consider the two elements separately.[54]

29. All evidence must be considered in light of its context.[55] In assessing the existence or otherwise of the two constituent elements, be it by reviewing primary evidence or by looking to subsidiary means, great care is required. While "evidence can be taken [from a variety of sources]… the greatest caution is always necessary."[56] Much depends on the particular circumstances in determining what the relevant practice actually is, and to what extent it is indeed accepted as law,[57] and different weight may be given to different evidence. For example, "[p]articularly significant are manifestations of practice that go against the interest of the State from which they come, or that entail for them significant costs in political, military, economic, or other terms, as it is less likely that they reflect reasons of political

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Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment (ICTY Appeals Chamber), 15 July 1999, para. 194. See also B. Conforti, B. Labella, *An Introduction to International Law* (Martinus Nijhoff Publishers, 2012), 32 ("The weight given to the acts depends on the content of the international customary rule. For example, treaties have great importance in matters of extradition, while domestic court decisions have more weigh in questions of the jurisdictional immunities of foreign States and foreign State organs, etc."). Cf. *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 175 ,176 ,178 (Dissenting Opinion of Judge Tanaka) ("To decide whether these two factors in the formative process of a customary law exist or not, is a delicate and difficult matter … The appraisal of factors must be relative to the circumstances and therefore elastic; it requires the teleological approach ... In short, the process of generation of a customary law is relative in its manner according to the different fields of law, as I have indicated above. The time factor, namely the duration of custom, is relative; the same with factor of number, namely State practice. Not only must each factor generating a customary law be appraised according to the occasion and circumstances, but the formation as a whole must be considered as an organic and dynamic process. We must not scrutinize formalistically the conditions required for customary law and forget the social necessity, namely the importance of the aims and purposes to be realized by the customary law in question").

[53] As was stressed at the outset of the 2006 Fragmentation Study, "International law is a legal system": *ILC Report 2006*, para. 251, Conclusion (1). In addition, "[w]hen courts ignore the traditional requirements for customary international law or fail to subject them to any strict scrutiny they risk giving tacit weight to what has been called 'the rush to champion new rules of law' … [In such *cases*] [s]cant regard is given to the niceties of state consent or the likelihood of compliance with such easily pronounced norms" (citations omitted): A. Boyle, C. Chinkin, *The Making of International Law* (Oxford University Press, 2007), 285.

[54] See also H. Thirlway, *supra* note 38, at 62 ("Practice and *opinio juris* together supply the necessary information for it to be ascertained whether there exists a customary rule, but the role of each – practice and *opinio* – is not uniquely focused; they complement one *another*"); *ILA London Statement of Principles*, at 7 ("It is in fact often difficult or even impossible to disentangle the two elements").

[55] See also *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at p. 200 ("There are isolated expressions to be found in the diplomatic correspondence which, if considered *without* regard to their context, might be regarded as acknowledgements of United States claims to exercise consular jurisdiction and other capitulatory rights. On the other hand, the Court can not ignore the general tenor of the correspondence …").

[56] J.L. Kunz, 'The Nature of Customary International Law', *American Journal of International Law*, 47 (1953), 662, 667.

[57] See also T. Treves, *supra* note 50, at para. 28 ("[manifestations of practice] help in ascertaining what is customary international law in a given moment. In performing such a task, caution and balance are indispensable, not only in determining the right mix of what States say and do, want and believe, but also in being aware of the ambiguities with which many elements of practice are fraught").

opportunity, courtesy, etc."[58] In a similar manner, the care with which a statement is made is a relevant factor; less significance may be given to off-the-cuff remarks made in the heat of the moment.

30. Ascertaining whether a rule of customary international law exists is a search for "a practice, which… has gained so much acceptance among States that it may now be considered a requirement under general international law".[59] Such an exercise may be an "arduous and complex process",[60] not least because "any alleged rule of customary law must [of course] be proved to be a valid rule of international law, and not merely an unsupported proposition".[61] As elaborated below, for this task "caution and balance are indispensable, not only in determining the right mix of what States say and do, want and believe, but also in being aware of the ambiguities with which many elements of practice are fraught".[62]

31. In light of the above, the following draft conclusions are proposed:

Draft Conclusion 3

Basic approach

To determine the existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law.

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[58] T. Treves, *supra* note 50, at para. 30.

[59] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 83, para. 204.

[60] E. Petrič, '*Customary* International Law in the Case Law of the Constitutional Court of the Republic of Slovenia' (to be published by the Council of Europe). See also the Brief by the Governments of the United Kingdom of Great Britain and Northern Ireland and The Kingdom of The Netherlands as *Amici Curiae* in support of the Respondents in the case of *Esther Kiobel et al v Royal Dutch Petroleum Co et al*, *supra* note 28, at 13 ("The methodology of determining what constitutes a new rule of international law is there-fore… no straight-forward matter and requires painstaking analysis to establish whether the necessary elements of State practice and *opinio juris* are present."); *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 100 (Separate Opinion of Judge De Castro) ("It is not easy to prove the existence of a general practice accepted as law"); J.L. Kunz, *supra* note 56, at 667 ("The ascertainment whether the two conditions of the custom procedure have been fulfilled in a concrete case … is a difficult task").

[61] M.N. Shaw, *supra* note 37, at 144.

[62] T. Treves, *supra* note 50, at para. 28. See also A. Boyle, C. Chinkin, *supra* note 53, at 279 ("applying the criteria for establishing custom is not a scientific process, the accuracy of which can be measured. Rather it requires an evaluation of the facts and arguments"); P.W. Birnie, A.E. Boyle, *International Law and the Environment*, 2nd edition (Oxford University Press, 2002), 16 ("the identification of customary law has always been, and remains, particularly problematical, requiring the exercise of skill, judgment, and considerable research").

Draft Conclusion 4

Assessment of evidence

In assessing evidence for a general practice accepted as law, regard must be had to the context including the surrounding circumstances.

V. A general practice

32. Practice,[63] often referred to as the 'material' or 'objective' element, plays an "essential role" in the formation and identification of customary international law.[64] It may be seen as the 'raw material' of customary international law, as the latter emerges from practice, which "both defines and limits it".[65] Such practice consists of "material and detectable"[66] acts of subjects of international law, and it is these "instances of conduct"[67] that may form "a web of precedents"[68] in which a pattern of conduct may be observed.

33. *From 'a general practice' to 'State practice'*. States continue to be the primary subjects of international law.[69] State practice plays a number of important roles in international law, including subsequent practice as an element (or means) for the

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[63] Practice *has* also been referred to as, *inter alia* and at times interchangeably, 'usage', '*usus*', '*consuetude*', or '*diuturnitas*'.

[64] As the International Court observed in *Military and Paramilitary Activities in and against Nicaragua*, "Bound as it is by Article 38 of its Statute to apply, *inter alia*, international custom 'as evidence of a general practice accepted as law', the Court may not disregard the essential role played by general practice" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 97-98, para. 184).

[65] See Judge Sir Percy Spender's Dissenting Opinion in *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 99 ("The proper way of measuring the nature and extent of any such custom, if established, is to have regard to the practice which itself both defines and limits it. The first element in a custom is a constant and uniform practice which must be determined before a custom can be defined").

[66] Francois Gény, *Méthode d'interprétation et sources en droit privé positif* (1899), section 110) (referring to 'usage' as a *constitutive* element of customary international law, quoted in A.A. D'Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971), 49).

[67] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 108. See also Weisburd's definition: "various types of activity … practice means just that" (A.M. Weisburd, 'Customary international Law: The Problem of Treaties', *Vanderbilt Journal of Transnational* Law, 21 (1988), 1, 7).

[68] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 329 (Separate Opinion of *Judge* Ammoun). See also *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949*, p. 4, at pp. 83, 99 (Dissenting Opinion by Judge Azevedo) ("Custom is made up of recognized precedents … [Customary international law requires] significant or constant facts which could justify the assumption that States have agreed to recognize a customary [rule]"); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 175 (Dissenting Opinion of Judge Tanaka) (referring to "a usage or a continuous repetition of the same kind of acts … It represents a quantitative factor of customary law"); B. Stern, 'Custom at the Heart of International Law', *Duke Journal of Comparative and International Law*, 11 (2001), 89, 95 ("it is very generally admitted that the material element is constituted by the repetition of a certain number of facts for a certain length of time, these different variables being modulated according to different situations").

[69] See also C. Walter, 'Subjects of International Law', in *Max Planck Encyclopedia of Public International Law* (2012), para. 5.

interpretation of treaties under articles 31.3(b) and 32 of the Vienna Convention on the Law of Treaties.[70] It is the conduct of States which is of primary importance for the formation and identification of customary international law, and the material element of customary international law is thus commonly referred to as 'State practice', that is, conduct which is attributable to States.[71] "[T]he actual practice of States… is expressive, or creative, of customary rules".[72] As the International Court has consistently made clear, it is "State practice from which customary law is derived".[73]

34. *Attribution of practice to a State*. As in other cases, such as State responsibility and subsequent practice in relation to the interpretation of treaties, for practice to be relevant for the formation of customary international law it must be attributable to the State.[74] For this purpose, the actions of all branches of

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[70] Currently under consideration by the Commission in the topic 'Subsequent agreements and subsequent practice in relation to interpretation of treaties': see in particular draft conclusions 4(2) and 5: *ILC Report 2013*. See also A.M. Weisburd, 'The International Court of Justice and the Concept of State Practice', *University of Pennsylvania Journal of International Law*, 31 (2009), 295, 299 (observing that "The significance of State practice in international law is difficult to overstate"); W.J. Aceves, 'The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice', *University of Pennsylvania Journal of International Economic Law*, 17 (1996), 995-1068; C. Parry, 'The Practice of States', *Transactions of the Grotius Society*, 44 (1958) 145, 165 ("One looks to the practice of States, that is to say, for evidence of new rules on new topics of international law, or of changes in the earlier law").

[71] See also M. Wood, O. Sender, 'State Practice', in *Max Planck Encyclopedia of Public International Law* (2014 update); Y. Dinstein, 'The Interaction between Customary Law and Treaties', 322 *Recueil des Cours* (2006), 242, 266 ("The general practice constituting the *font et origo* of customary international law is, in essence, that of States"); M.H. Mendelson, 'The Formation of Customary International Law', 272 *Recueil des Cours* (1998), 155, 201 ("what is conveniently and traditionally called State practice … is, more precisely, the practice of subjects of international law"). On the historical development of the doctrine of State practice as the basis of customary international law, see A. Carty, 'Doctrine versus State Practice', in B. Fassbender, A. Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012), 972-996.

[72] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 46, para. 43.

[73] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 143, para. 101. When used, the term 'international practice' has thus referred to the practice of States: See, for example, *Interpretation of Peace Treaties (Second Phase), Advisory Opinion: I.C.J. Reports 1950*, p. 221, at p. 242 (Dissenting opinion of Judge Read); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 261 (Separate Opinion of Judge Padilla Nervo), and p. 344 (Dissenting Opinion of Judge Riphagen); *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 83 (Separate Opinion of Judge De Castro); *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 236 (Dissenting Opinion of Judge Skubiszewski); *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432, at p. 554 (Dissenting Opinion of Judge Ranjeva); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at pp. 75, 76 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 170 (Separate Opinion of Judge Keith); *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 457.

[74] See the Commission's *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001), Part One, Chapter II; and the Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, draft conclusion 5. See also I. Brownlie, 'Some Problems in the Evaluation of the Practice of States as an Element of Custom', in *Studi di diritto internazionale in onore di Gaetano Arangio Ruiz*, vol. I (2004), 313, 318 (referring to the 2001 Articles (4, 5, and 8) when suggesting that "[n]o doubt analogous principles should apply to the identification of organs and persons competent to

government (whether exercising executive, legislative, judicial or other functions) may be relevant.[75] The conduct of *de facto* organs of a State, that is, "those individuals or entities which are to be considered as organs of a State under international law, although they are not so characterized under municipal law",[76] may also count as State practice.[77] This may be so "whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".[78]

35. One significant difficulty is ascertaining the practice of States. The dissemination and location of practice remain an important practical issue in the circumstances of the modern world, notwithstanding the development of technology and information resources.[79] As indicated in section VII below, this issue – which the Commission considered several decades ago under the title 'Ways and means of

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produce statements or materials which qualify as State practice"). It is not necessarily the case that the rules on attribution will be identical in different contexts; see, for example, H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol. II (Oxford University Press, 2013), 1190 ("The practice supportive of the existence of a rule of customary law must be State practice, that is to say the practice of organs of the State, though the test is not the same as that for establishing the responsibility of a State").

[75] Article 4 of the Articles on the Responsibility of States for internationally wrongful acts states that "[t]he conduct of any state organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other function ...": J. Crawford, *State Responsibility. The General Part* (Cambridge University Press, 2013), Part II (Attribution to the state), especially pp. 113-126. See also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at p. 87 ("According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State"); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 168, at p. 242; *2 BvR 1506/03*, Order of the Second Senate of 5 November 2003 (German Federal Constitutional Court), para. 51 ("For this purpose [consulting the relevant state practice], the Court focuses on the conduct of the organs of state authority that are competent for legal relations under international law; as a general rule, this will be the government or the head of state. Apart from this, state practice can also result from the acts of other organs of state authority such as acts of the legislature or of the courts to the extent that their conduct is directly relevant under international law"); M. Bos, *supra* note 37, at 229 ("practice can be anything within the scope of a State's jurisdiction. All actions or, more generally, forms of behaviours so qualified are eligible to become the basis of a customary rule"); *ILA London Statement of Principles*, at 17. The older position, according to which only the actions of those designated to represent the State externally ('international organs of a State') may count as State practice (voiced, for example, by K. Strupp, 'Regles générales du droit de la paix', 47 *Recueil des Cours* (1934), 313-315) is no longer generally accepted.

[76] P. Palchetti, 'De Facto Organs of a State', in *Max Planck Encyclopedia of Public International Law* (2012), para. 2.

[77] See also K. Zemanek, 'What is 'State Practice' and who Makes It?', in U. Beyerlin et al (eds.), *Festschrift für Rudolf Bernhardt* (Springer-Verlag, 1995), 289, 305 ("the constitutional authority of the organs performing the acts is immaterial as long as the conduct appears to foreign States, assessing it with due diligence and good faith, as attributable to the State in question and expressing or implementing its attitude towards a rule of customary law").

[78] See Article 4 of the *Articles on State Responsibility*. The ILA Committee's suggestion that in States organized under a federal structure, "[t]he activities of territorial governmental entities within a State which do not enjoy separate international legal personality do not as such normally constitute State practice, unless carried out on behalf of the State or adopted ('ratified') by it" (*ILA London Statement of Principles*, at 16) does not seem accurate.

[79] S. Rosenne, *Practice and Methods of International Law* (Oceana Publications, 1984), 56 ("The evidence of customary law [remains] … scattered, elusive and on the whole unsystematic").

making the evidence of customary international law more readily available' – will be revisited in the Special Rapporteur's third report.

36. The following draft conclusions are proposed:

Draft Conclusion 5

Role of practice

The requirement, as an element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the creation, or expression, of rules of customary international law.

Draft Conclusion 6

Attribution of conduct

State practice consists of conduct that is attributable to a State, whether in the exercise of executive, legislative, judicial or any other function.

37. *Manifestations of practice*. It has occasionally been suggested that 'State practice' should only qualify as such for the purposes of customary international law when it relates to a type of situation falling within the domain of international relations,[80] or to some actual incident or episode of claim-making (as opposed to assertions *in abstracto*).[81] This approach is too narrow; it may indeed be said that "[i]n the international system … every act of state is potentially a legislative act".[82] Such acts may comprise both physical and verbal (written and oral) conduct: views to the contrary, according to which "claims themselves, although they may *articulate* a legal norm, cannot constitute the material component of custom",[83] are

[80] J.L. Kunz, *supra* note 56, at 666; *ILA London Statement of Principles*, at 9 (suggesting correctly, however, that "[w]hether a matter concerns a State's international legal relations, or is solely a matter of domestic jurisdiction, depends on the stage of development of international law and relations at the time"); S. Rosenne, *ibid.*, at 56.

[81] See, for example, H.W.A. Thirlway (writing in 1972), *International Customary Law and Codification* (Sijthoff, 1972), 58 ("State practice as the material element in the formation of custom is, it is worth emphasizing, *material*: it is composed of acts by States with regard to a particular person, ship, defined area of territory, each of which amounts to the assertion or repudiation of a claim relating to a particular apple of discord").

[82] A.M. Weisburd, *supra* note 67, at 31. See also I. Brownlie, *supra* note 74, at 313-314 (suggesting, *inter alia*, that "the materials not related to sudden crises are more likely to represent a mature and consistent view of the law"); V.D. Degan, *Sources of International Law* (Martinus Nijhoff, 1997), 149 (noting that while some older scholars had confined the evidence of custom to those able to bind the State internationally, "[n]evertheless, … customary rules can emerge from concordant legislative or other unilateral acts of a number of States, or that even some decisions of municipal courts can influence practice").

[83] A.A. D'Amato, *supra* note 66, at 88 (explaining that "a state has not done anything when it makes a claim; until it takes enforcement action, the claim has little value as a prediction of what the state will actually do"). See also *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at p. 191 (Dissenting Opinion of Judge Read) ("[Customary international law] cannot be established by citing cases

too restrictive.[84] Accepting such views could also be seen as encouraging confrontation and, in some cases, even the use of force.[85] In any event, it appears undeniable that "the method of communication between States has widened. The

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where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships … The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over the waters in question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiation and international arbitration"); A. D'Amato, 'Custom and Treaty: A Response to Professor Weisburd', *Vanderbilt Journal of Transnational Law*, 21 (1988), 459, 465 ("what governments *say* is at best *a theory about* international law, and not international law itself"); K. Wolfke, *supra* note 6, at 42 ("customs arise from acts of conduct and not from promises of such acts"); G.J.H. van Hoof, *Rethinking the Sources of International Law* (Kluwer Law and Taxation Publishers, 1983), 108. For a dated and extreme position see Conradie J in *S v Petane*, 1988 (3) SA 51 (C) at 59F-G, 61D-E (Cape Provincial Division, South Africa) ("customary international law is founded on practice, not on preaching … One must … look for state practice at what states have done on the ground in the harsh climate of a tempestuous world, and not at what their representatives profess in the ideologically overheated environment of the United Nations where indignation appears frequently to be a surrogate for action").

[84] See also M.E. Villiger, *Customary International Law and Treaties*, 2nd edition (Kluwer Law International, 1997), 19-20 ("there is much merit in qualifying verbal acts as State practice. First, and most important…States themselves as well as courts regard comments at conferences as constitutive of State practice"); C. Parry, *supra* note 70, at 168 ("very often there is very little difference between what a State does and what it says because its actions may consist only in pronouncements"); M. Akehurst, 'Custom as a Source of International Law', *British Yearbook of International Law*, 47 (1977), 1, 53 ("State practice means any act or statement by a State from which views about customary law can be inferred"); R. Müllerson, 'On the Nature and Scope of Customary International Law', *Austrian Review of International & European Law*, 2 (1997), 341, 342 ("even if one would be eager to make a clear-cut distinction between 'actual' practice and other forms of practice (non-actual?) it is not easy and sometimes it is simply impossible"); R. Bernhardt, 'Custom and Treaty in the Law of the Sea', 205 *Recueil des Cours* (1987), 247, 265, 267 ("It has also sometimes been said that only factual deeds and not words are relevant State practice … Words, declarations, communications, even signals must be included in the great variety of practices which can be constitutive for customary law … it is legally unacceptable to exclude communications, written and spoken words, from the world of State practice. There is no *numerus clausus* of State acts and State practice which are exclusively necessary or decisive for the creation and coming into force of customary law. On the other hand, it must be admitted that verbal declarations cannot create customary rules if the real practice is different"); K. Skubiszewski, 'Elements of Custom and the Hague Court', *ZaöRV*, 31 (1971), 810, 812 ("the practice of States is built of their actions and reactions. It is 'a process of reciprocal interaction'. This does not mean that the picture of State practice is composed exclusively of actions *sensu stricto*. Words and inaction are also evidence of the conduct of States" (citations omitted)); R.R. Baxter, 'Multilateral Treaties as Evidence of Customary International Law', *British Yearbook of International Law*, 41 (1965-66), 275, 300 ("The firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts"). It is also worthy to recall in this context the words of the *ILA London Statement of Principles*, which accepts that "[v]erbal acts, and not only physical acts, of States count as State practice", at 13-14: "When defining State practice … it is necessary to take account of the distinction between what conduct counts as State practice, and the weight to be given to it … Discussion of the objective element in custom has been bedeviled by a failure to make this distinction").

[85] See also R. Müllerson, 'The Interplay of Objective and Subjective Elements in Customary Law', in K. Wellens (ed.), *International Law: Theory and Practice – Essays in Honour of Eric Suy* (Martinus Nijhoff Publishers, 1998), 161, 162 ("… if only seizures, invasions, genocide and other similar acts were state practice then in some areas of international law (for example international humanitarian law) only so-called rogue states would contribute to the development of customary law … it would [also] increase even more the role of powerful states in the process of international law-making. Finally … in many [] areas of international law only a few states may have such ['actual'] practice or states may become involved in 'actual' practice only occasionally.").

beloved 'real' acts become less frequent because international law, and the Charter of the UN in particular, place more and more restraints on States in this respect".[86] Moreover, "the term 'practice' (as per Article 38 of the ICJ Statute) is general enough – thereby corresponding with the flexibility of customary law itself – to cover any act or behaviour of a State, and it is not made entirely clear in what respect verbal acts originating from a State would be lacking, so that they cannot be attributed to the behaviour of that State".[87] At the same time, as will be suggested below, caution is needed in assessing what States (and international organizations) say: words cannot always be taken at face value.

38. Once both physical and verbal acts are accepted as forms of practice for purposes of identification of customary international law, it appears that "distinctions between 'constitutive acts' and 'evidence of constitutive acts'… are artificial and arbitrary".[88] Such distinctions will be avoided in this report. As was stated in the Commission's debate in 2013, "The material [that needs to be consulted to identify customary international law] can be evidence of the existence of the customary rule and in other situations it can also be the source of practice … itself".[89] Accordingly, "the evidence [for ascertaining whether a rule of customary international law has emerged or otherwise] may take a variety of forms, *including* conduct – What is significant is that the source must be reliable and unequivocal, and should reflect the consistent position of the State concerned."[90]

39. Practice (and evidence thereof) takes a great variety of forms, as "in their interaction and communication ... States do not confine themselves to dogmatically determined types of acts. They use all forms which serve their purpose".[91] The

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[86] K. Zemanek, *supra* note 77, at 306.

[87] M.E. Villiger, *supra* note 84, at 21.

[88] K. Zemanek, *supra* note 77, at 292 (explaining that "one may disguise the other" and adding that "Furthermore, one might never know of a 'constitutive' act if it were not recorded"). See also A.A. D'Amato, *supra* note 66, at 268 ("… a rule of law is not something that exists in the abstract, nor is *opinio juris* something that we can lay our hands upon. Rules of law and states of mind appear *only* as manifestations of conduct; they are generalizations we make when we find recurring patterns of behavior or structured legal arguments. If the term 'evidence' must be used, we may say that rules of law are expressed *only* in 'evidence'; if the evidence is truly evidence of the rule of law, then it is an outward expression of the rule itself. Evidence is a necessary, and not a dispensable, component of the rule. But because of the confusions resulting from its use, the term 'evidence', along with the term 'sources', is best relegated to the domain of counterproductive terminology").

[89] The Commission's 3183rd meeting, 19 July 2013 (Hmoud).

[90] I. Brownlie, *supra* note 74, at 318 (emphasis added). See also A. Clapham, *supra* note 37, at 58 ("Such evidence [for an alleged custom] will obviously be voluminous and also diverse. There are multifarious occasions on which persons who act or speak in the name of a state, do acts, or make declarations, which either express or imply some view on a matter of international law. Any such act or declaration may, so far as it goes, be some evidence that a custom, and therefore that a rule of international law, does or does not exist. But, of course, its value as evidence will altogether be determined by the occasion and the circumstances").

[91] K. Zemanek, *supra* note 77, at 299. In addition, "no rule of international law describes what the facts are whose occurrence leads to the formation of a custom … there are no specific factual elements whose only occurrence prove the existence of a rule": L. Fumagalli, 'Evidence Before the International Court of Justice: Issues of Fact and Questions of Law in the Determination of International Custom', in N. Boschiero et al (eds.), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Asser Press, 2013), 137, 146.

Commission itself has relied upon various materials in assessing practice for the purpose of identifying rules of customary international law.[92]

40. Several authors have drawn up lists of the main forms that practice may take. For example, *Brownlie's Principles of Public International Law* contains the following non-exhaustive list:

> diplomatic correspondence, policy statements, press releases, the opinions of government legal advisers, official manuals on legal questions (e.g. manuals of military law), executive decisions and practices, orders to military forces (e.g. rules of engagement), comments by governments on ILC drafts and corresponding commentaries, legislation, international and national judicial decisions, recitals in treaties and other international instruments (especially when in 'all states' form), an extensive pattern of treaties in the same terms, the practice of international organs, and resolutions relating to legal questions in UN organs, notably the General Assembly.[93]

41. Given the inevitability and pace of change, political and technological, it is neither possible nor desirable to seek to provide an exhaustive list of these 'material sources' of customary international law: it remains impractical for the Commission, as it was in 1950, "to list all the numerous types of materials which reveal State practice on each of the many problems arising in international law".[94] At the same time, it may be helpful to indicate some of the main types of practice that have been relied upon by States, by courts and tribunals, and in writings. The following list is therefore non-exhaustive; moreover, some of the categories below overlap, so that a particular example or type of State practice may well fall under more than one.

(a) Physical actions of States, that is, the conduct of States 'on the ground'.[95] Examples of such practice may include passage of ships in international waterways;[96] passage over territory;[97] impounding of fishing boats; granting of

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[92] Secretariat *memorandum*, at 14 ("The Commission has relied upon a variety of materials in assessing State practice for the purpose of identifying a rule of customary international law").

[93] J. Crawford, *supra* note 37, at 24 (footnotes omitted); the author adds that "the value of these sources varies and will depend on the circumstances". Other lists may be found, for example, in L. Ferrari Bravo, 'Méthodes de recherche de la coutume international dans la pratique des États', 192 *Recueil des Cours* (1985), 233, 257-287; M.E. Villiger, *supra* note 84, at 17; A. Pellet, *supra* note 17, at 815-816. Ireland has similar list on its Ministry of Foreign Affairs website: "in the absence of a treaty governing relations between two or more states as to what the law should be, or, in other words, state practice combined with recognition that a certain practice is obligatory, if sufficiently widespread and consistent, such practice and consensus may constitute customary international law. Evidence of custom may be found among the following sources: diplomatic correspondence; opinions of official legal advisers, statements by governments; United Nations General Assembly resolutions; comments by governments on drafts produced by the International Law Commission; the decisions of national and international courts". See also *Federal Republic of Germany v. Margellos and Others* (Special Supreme Court of Greece), Judgment No. 6/2002, 17 September 2002, 129 ILR 525, 528, para. 9; K. Wolfke, 'Some Persistent Controversies Regarding customary International Law', *Netherlands Yearbook of International Law*, 24 (1993), 1, 15 ("As regards these ways and means of proving whether a custom already exists no full list of guidelines can be drawn up").

[94] Yearbook *of the International Law Commission, 1950*, vol. II, 368.

[95] Judge Read referred to "actual assertion of sovereignty" in his Dissenting Opinion in the *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at p. 191.

[96] Corfu *Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949*, p. 4, at p. 99 (Dissenting Opinion of Judge Azevedo).

diplomatic asylum;[98] battlefield or operational behaviour; or conducting atmospheric nuclear tests or deploying nuclear weapons.[99]

(b) Acts of the executive branch. These may include executive orders and decrees,[100] and other "administrative measures",[101] as well as official statements by government such as declarations,[102] proclamations,[103] government statements before parliament,[104] positions expressed by States before national or international courts and tribunals (including in *amicus curiae* briefs of States),[105] and statements on the international plane.[106]

(c) Diplomatic acts and correspondence.[107] This includes protests against the practice of other States and other subjects of international law. Diplomatic correspondence may take a variety of forms, including *notes verbales*, circular notes, third-party notes, and even 'non-papers'.

(d) Legislative acts. From constitutions to draft bills,[108] "[l]egislation is an important aspect of State practice".[109] As the Permanent Court of International

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[97] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at pp. 40-41.

[98] Colombian-*Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 277.

[99] Nuclear *Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 305 (Separate Opinion of Judge Petrén); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 312 (Dissenting Opinion of Judge Schwebel).

[100] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 104, 107 (Separate Opinion of Judge Ammoun).

[101] See, for example, *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports* 2009, p. 213, at p. 280 (Separate Opinion of Judge Sepúlveda-Amor).

[102] See, for example, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 295 (Separate Opinion of Judge Ranjeva); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 104 (Separate Opinion of Judge Ammoun); *Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 3, at p. 43 (Dissenting Opinion of Judge Padilla Nervo); *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 84 (Separate Opinion of Judge De Castro).

[103] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 104, 105, 107, 126 (Separate Opinion of Judge Ammoun); *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 84 (Separate Opinion of Judge De Castro).

[104] See, for example, *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 197 (Separate Opinion of Judge Jessup).

[105] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 123, para. 55. See also I. Brownlie, *supra* note 74, at 315 ("it seems obvious that statements made by Agents and Counsel before international tribunals constitute State practice").

[106] See, for example, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 312 (Dissenting Opinion of Judge Schwebel).

[107] See, for example, Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 3, at p. 197 (Separate Opinion of Judge Jessup), and pp. 298, 299 (Separate Opinion of Judge Ammoun).

[108] See, for example, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 24; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 123, para. 55; *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at p. 220 (Dissenting Opinion of Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 105, 107, 129 (Separate Opinion of Judge Ammoun, where he says, *inter alia*, "The bill [that was submitted to the Belgian Chamber of

Justice observed in 1926, "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures".[110] It is worthwhile to recall the view expressed by the Commission in this context in 1950, according to which "[t]he term legislation is here employed in a comprehensive sense; it embraces the constitutions of States, the enactments of their legislative organs, and the regulations and declarations promulgated by executive and administrative bodies. No form of regulatory disposition effected by a public authority is excluded".[111]

(e) Judgments of national courts. Judicial decisions and opinions of municipal courts may serve as State practice,[112] and "are of value as evidence of that

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Representatives] … expresses the official point of view of the Government. It constitutes one of those acts within the municipal legal order which can be counted among the precedents to be taken into consideration, where appropriate, for recognizing the existence of custom"), and p. 228 (Dissenting Opinion of Judge Lachs); *Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 3, at p. 44 (Dissenting Opinion of Judge Padilla Nervo), and p. 51 (Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda), and p. 84 (Separate Opinion of Judge De Castro); Special Tribunal for Lebanon, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Appeals Chamber), 16 February 2011, paras. 87, 91-98; *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion based on Lack of Jurisdiction (Special Court of Sierra Leone Appeals Chamber), 31 May 2004, p. 13, at para. 18; *Genny de Oliviera v. Embaixada da República Democratica Alema* (Brazilian Federal Supreme Court), Apelação Civel No. 9.696-3/SP, 31 May 1989, pp. 4-5; *Democratic Republic of the Congo v. FG Hemispheric Associates LLC*, in the Court of Final Appeal of the Hong Kong Special Administrative Region, Final Appeal Nos. 5, 6 & 7 of 2010 (Civil), 8 June 2011, para. 68 ("However that may be, a rule of domestic law in any given jurisdiction may happen to result from a rule of customary international law or it may happen to precede and contribute to the crystallisation of a custom into a rule of customary international law"). On constitutional provisions in particular as State practice (and as evidence of *opinio juris*) see R. Crootof, 'Constitutional convergence and Customary International Law', *Harvard International Law Journal Online*, 54 (2013), 195-203.

[109] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 310, para. 3 (Dissenting Opinion of Judge ad hoc Gaja). Judge Gaja went on to say that "It is significant also when the object of a rule of international law is the conduct of judicial authorities, as with regard to the exercise of jurisdiction by courts".

[110] *Certain German Interests in Polish Upper Silesia*, PCIJ, Series A, No 7, at 19.

[111] 'Ways and Means for Making the Evidence of Customary International Law More Readily Available', Report of the International Law Commission on its Second Session (A/CN.4/34), *Yearbook of the International Law Commission, 1950*, Vol. II, 370.

[112] See, for example, *The Case of the S.S. "Lotus" (France/Turkey)*, PCIJ, Series A, No. 10, pp. 28-29; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 24; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 123, para. 55; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 292 (Separate Opinion of Judge Guillaume); *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6, at p. 63 (Separate Opinion of Judge Wellington Koo); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 88 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal); *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (ICTY Appeals Chamber), 15 July 1999, paras. 255-270; Extraordinary Chambers in the Courts of Cambodia, Case No. 001/18-07-2007-ECCC/SC (Supreme Court Chamber), 3 February 2012, paras. 223, 224; *Prosecutor v. Šainović and Others*, Case No. IT-05-87-A, Judgment (ICTY Appeals Chamber), 23 January 2014, paras. 1627-1642; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgment (ICTY Appeals Chamber), 21 July 2000, Declaration of Judge Robinson, para. 281; Case No. Up-13/99 (Slovenian Constitutional Court), Decision of 8 March 2001, para. 14; *Dralle v Republic of Czechoslovakia* (Austrian

State's practice, even if they do not otherwise serve as evidence of customary international law" itself.[113] When assessing the decisions of domestic courts, however, the position of customary international law within the law to be applied by the various courts and tribunals, and special provisions and procedures that may exist at the various domestic levels for identifying rules of customary international law, must be borne in mind.[114] Moreover, "the value of these decisions varies considerably, and individual decisions may present a narrow, parochial outlook or rest on an inadequate use of sources".[115] Judgments of the highest courts naturally carry more weight. Cases that have been reversed on the particular point are no longer likely to be considered as practice.

(f) Official publications in fields of international law, such as military manuals or instructions to diplomats.[116]

(g) Internal memoranda by State officials. Such memoranda are, however, often not made public. It should be borne in mind, however, that as was said in a different but analogous context, these "do not necessarily represent the view or policy of any government, and may be no more than the personal view that one civil servant felt moved to express to another particular civil servant at that moment; it is not always easy to disentangle the personality elements from what were, after all, internal, private and confidential memoranda at the time they were made".[117]

(h) Practice in connection with treaties. Negotiating, concluding and entering into, ratifying and implementing bilateral or multilateral treaties (and putting forward objections and reservations to them) are another form of practice.[118] Such

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Supreme Court), Judgment of 10 May 1950, 17 ILR 155, 157-161. See also H. Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law', *British Yearbook of International Law*, 10 (1929), 65-95; P.M. Moremen, 'National Court Decisions as State Practice: A Transnational Judicial Dialogue?', *North Carolina Journal of International Law and Commercial Regulation*, 32 (2006), 259, 265-290; A. Roberts, 'Comparative International Law: The Role of National Courts in Creating and Enforcing International Law', *International & Comparative Law Quarterly*, 60 (2011), 57, 62; and the lecture by Judge Greenwood before the British Institute of International and Comparative Law entitled "The Contribution of National Courts to the Development of International Law" (4 February 2014), available online at http://www.biicl.org/news/view/-/id/201/.

[113] 'Ways and Means for Making the Evidence of Customary International Law More Readily Available', *supra* note 111. Speaking of, Crawford's *Brownlie's Principles of Public International Law*, *supra* note 37, states that some decisions of national courts "provide indirect evidence of the practice of the forum state on the question involved" (at 41).

[114] A/CN.4/663, *supra* note 1, at para. 84. See also P.M. Moremen, *supra* note 112, at 290-308.

[115] J. Crawford, *supra* note 37, at 41.

[116] See, for example, *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgment (ICTY Appeals Chamber), 30 November 2006, para. 89; *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment (ICTY Trial Chamber), 16 November 1998, para. 341.

[117] Red Sea Islands (*Eritrea/Yemen*) arbitration award, 9 October 1998, para. 94; see also I. Brownlie, *supra* note 74, at 316-317.

[118] See, for example, *Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955*, p. 4, at pp. 22-23; *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951*, p.15, at pp. 24-25; *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43; *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 104-105, 126, 128 (Separate Opinion of Judge Ammoun); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 347 (Dissenting Opinion of Judge Riphagen); *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 26; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 79; *Continental Shelf (Libyan Arab*

practice does not concern the law of treaties alone; it may also relate to the obligations assumed through the relevant international legal instrument.[119]

(i) Resolutions of organs of international organizations, such as the General Assembly of the United Nations, and international conferences.[120] This mainly concerns the practice of States in connection with the adoption of resolutions of organs of international organizations or at international conferences, namely, voting

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Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 13, at pp. 38, 48; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at pp. 138, 143, paras. 89, 100; *Interpretation of Peace Treaties (second phase), Advisory Opinion: I.C.J. Reports 1950*, p. 221, at pp. 241-242 (Dissenting opinion of Judge Read); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 292 (Separate Opinion of Judge Guillaume), and pp. 312, 314 (Dissenting Opinion of Judge Schwebel); *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at pp. 163-164 (Dissenting Opinion of Judge McNair); *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at p. 220 (Dissenting Opinion of Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau); *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at pp. 41-42, and also pp. 55-56 (Separate Opinion of Judge Wellington Koo), and p. 104 (Dissenting Opinion of Judge Sir Percy Spender); *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906, Judgment of 18 November 1960: I.C.J. Reports 1960*, p. 192, at p. 223 (Dissenting Opinion of Judge Urrutia Holguín); *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion based on Lack of Jurisdiction (Special Court of Sierra Leone Appeals Chamber), 31 May 2004, p. 13, paras. 18-21; Special Tribunal for Lebanon, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Appeals Chamber), 16 February 2011, paras. 87-89; *The Paquete Habana*, 175 U.S. 677 (United States Supreme Court, 1900), 686-700. See also A.M. Weisburd, *supra* note 67, at 1-46 ("treaties are simply one more form of state practice"); *Human Rights Council Report of the Working Group on Arbitrary Detention* (24 December 2012), A/HRC/22/44, para. 43.

[119] See also A. D'Amato, *supra* note 83, at 462 ("What makes the content of a treaty count as an element of custom is the fact that the parties to the treaty have entered into a binding commitment to act in accordance with its terms. Whether or not they subsequently act in conformity with the treaty, the fact remains that they have so committed to act. The commitment itself, then, is the 'state practice' component of custom"); J. Barboza, 'The Customary Rule: From Chrysalis to Butterfly', in C.A. Armas Barea et al. (eds.), *Liber Amicorum 'In Memoriam' of Judge José María Ruda* (Kluwer Law International, 2000), 1, 2-3 ("Texts express with more precision than actions the contents of a practice, particularly when those texts are carefully written by groups of technical and legal experts"). But see K. Wolfke, 'Treaties and Custom: Aspects of Interrelation', in J. Klabbers, R. Lefeber (eds.), *Essays on the Law of Treaties: A Collection of Essays In Honour of Bert Vierdag* (Martinus Nijhoff Publishers, 1998), 31, 33 ("A treaty *per se* is, therefore, not any element of practice [of course with the exception of the customary law of treaties]. It can, however, contribute to the element of acceptance as law by the parties").

[120] See, for example, *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 26; *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at pp. 302-303 (Separate Opinion of Judge Ammoun) ("I would observe, in addition, that the positions taken up by the delegates of States in international organizations and conferences, and in particular in the United Nations, naturally form part of State practice … it cannot be denied, with regard to the resolutions which emerge therefrom, or better, with regard to the votes expressed therein in the name of States, that these amount to precedents contributing to the formation of custom"); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 312 (Dissenting Opinion of Judge Schwebel, who lists "action of the United Nations Security Council under 'State Practice'); *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 188 (Dissenting Opinion of Judge Weeramantry) ("The various resolutions of the General Assembly relating to this right in general terms, which have helped shape public international law … are an important material source of customary international law in this regard"). Security Council resolution 2125 (2013) implicitly recognizes this potential role of resolutions as well by underscoring "that this resolution shall not be considered as establishing customary international law" (para. 13).

in favour or against them (or abstaining), and the explanations (if any) attached to such acts.[121] At the same time, it must be borne in mind that "the final text of a decision of an international organization will always be incapable of reflecting all propositions and alternatives formulated by each and every party to the negotiations …. One should, therefore, not overly rely on the shortcuts provided by the decision-making processes of international organizations in order to identify state practice".[122] (This matter will be addressed more fully in in the third report.)

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[121] See also R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford University Press, 1963), 2 ("The United Nations is a very appropriate body to look to for indications of developments in international law, for international custom is to be deduced from the practice of states, which includes their international dealings as manifested by their diplomatic actions and public pronouncements. With the development of international organizations, the votes and views of states have come to have legal significance as evidence of customary law. Moreover, the practice of states comprises their collective acts as well as the total of their individual acts ... The existence of the United Nations ... now provides a very clear, very concentrated, focal point for state practice"); B. Conforti, B. Labella, *supra* note 52, at 35, 42-43 ("The resolutions of international organizations are also relevant to the ascertainment of custom as *acts of States*, i.e., as aggregates of expressions of the volition of States which have voted in favour of the resolutions… [i]nternational organizations are endowed with some elements of international personality. However, with regard to customary law making the resolutions of organizations must be considered as the collective action of all the States that voted for their adoption rather than the action of the organizations themselves. This explains why such resolutions play a role on the development of custom only where they are adopted unanimously, by consensus, or at least by a wide majority"); I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff Publishers, 1998), 19-20 ("The process of synthesizing State practice is assisted by several mechanisms. First, the resolutions of the General Assembly of the United Nations, when they touch upon legal matters, constitute evidence of State practice. So also do resolutions of Conferences of Heads of State"); *ILA London Statement of Principles*, at 19 ("in the context of the formation of customary international law… [a resolution by an organ of an international organization, containing statements about customary international law] is probably best regarded as a series of verbal acts by the individual member States participating in that organ"). But see I. MacGibbon, 'General Assembly Resolutions: Custom, Practice and Mistaken Identity', in B. Cheng (ed.), *International Law: Teaching and Practice* (Stevens & Sons, 1982), 10, 19 ("while a General Assembly resolution (although difficult to envisage as being, in itself, State practice in any meaningful sense) embodies, or rather is the result of, various forms of State conduct in the General Assembly, and so reflects State practice of a kind, it is nevertheless a peripheral kind and – in the context of the development of international custom – of a somewhat artificial kind"); H. Meijers, 'On International Customary Law in The Netherlands', in I.F. Dekker, H.H.G. Post (eds.), *On the Foundations and Sources of International Law* (T.M.C. Asser Press, 2003), 77, 84 ("Does a state, when voting on the acceptance of a resolution, for instance in the General Assembly of the United Nations, act as a state, or as part of an organ of the United Nations, a separate subject of international law? The answer seems evident: as part of the UN organ… [only when] it states its reasons for voting in the way it did, or gives its point of view *vis-à-vis* that resolution, we may identify an act of state").

[122] J. Wouters, P. De Man, 'International Organizations as Law-Makers', in J. Klabbers, A. Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (Edward Elgar Publishing, 2011), 190, 208 (reference omitted). See also R. Higgins, *supra* note 13, at 23-24 ("Resolutions are but one manifestation of state practice. But in recent years there has been an obsessive interest with *resolution*s as an isolated phenomenon. Intellectually, this is hard to understand or justify. We can only suppose that it is easier – that is, that it requires less effort, less rigour, less by way of meticulous analysis – to comment on the legal effect of a resolution than to look at a collective practice on a certain issue in all its complex manifestations. The political bodies of international organizations engage in debate; in the public exchange of views and positions taken; in expressing reservations upon views being taken by others; in preparing drafts intended for treaties, or declarations, or binding resolutions, or codes; and in decision-making that

42. *Inaction as practice*. Abstention from acting, also referred to as a "negative practice of States",[123] may also count as practice.[124] Inaction by States may be central to the development and ascertainment of rules of customary international law, in particular when it qualifies (or is perceived) as acquiescence.[125] It is intended

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may or may not imply a legal view upon a particular issue. But the current fashion is often to examine the resolution to the exclusion of all else").

[123] See, for example, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at pp. 144, 145 (Dissenting Opinion of Judge ad hoc Van den Wyngaert); P. Tomka, *supra* note 24, at 210.

[124] See, for example, *The Case of the S.S. "Lotus" (France/Turkey)*, PCIJ, Series A, No. 10, p. 28; *Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955*, p. 4, at p. 22; *Military and Paramilitary Activities in and against Nicaragua (*Nicaragua *v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 99 (abstentions from the threat of use of force against the territorial integrity or political independence of any State as practice); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 253, para. 65 (the Court referring to proponents of a prohibition attempting to rely on "a consistent practice of non-utilization of nuclear weapons by States"); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 135, para. 77 ("The almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by States"); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 134 (Separate Opinion of Judge Petrén, referring to the practice of non-recognition when saying that the term "implies not positive action but abstention from acts signifying recognition"); *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at p. 221 (Dissenting Opinion of Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at pp. 198, 199 (Separate Opinion of Judge Jessup, referring to the United States Department of State declining to make representation on behalf of an American company, and to the United States not raising a certain argument as a basis for resisting a claim in an inter-State dispute). For support in scholarly writing see, for example, *ILA London Statement of Principles*, at 15; G.I. Tunkin, 'Remarks on the Juridical Nature of Customary Norms of International Law', *California Law Review*, 49 (1961), 419, 421 ("The practice of states may consist in their taking definitive action under certain circumstances or, on the contrary, abstaining from action"); S. Séfériadès, 'Aperçu sur la coutume juridique internationale et notamment sur son fondement', *RGDIP*, 43 (1936), 129, 143 ("… même des actes négatifs, - des omissions, - consécutivement répétés, sont de nature à finir par devenir des coutumes, entrainant l'obligation légale de ne pas faire. … Egalement, en droit des gens, on ne saurait, nous semble-t-il, ne pas reconnaître une origine coutumière à l'obligation des Etats de s'abstenir de faire contre les représentants des pays étrangers tout acte de nature à porter atteinte à leur liberté personnelle ou à la franchise de leur hôtel, ainsi qu'à l'obligation des armées d'occupation de respecter, sur terre, la propriété privée ennemie"); H. Meijers, 'How is International Law Made? – The Stages of Growth of International Law and the Use of Its Customary Rules', *Netherlands Yearbook of International Law*, 9 (1978), 3, 4-5 ("the inactive are carried along by the active … lack of protest – lack of open objection to the development of the new rule – is sufficient for the creation of a rule of customary law (and for the obligation to abide by it)"); J.L. Kunz, *supra* note 56, at 666; M. Mendelson, 'The Subjective Element in Customary International Law', *British Yearbook of International Law*, 66 (1995), 177, 199 ("omissions are perfectly capable, if they are sufficiently unambiguous, of constituting acts of State practice").

[125] See also R. Kolb, *supra* note 47, at 136 ("There is hardly any exaggeration in saying that custom is mainly silence and inaction, not action"); A.M. Weisburd, *supra* note 67, at 7 ("if generality in the sense of affirmative acts by most states is not necessary, it must at least be possible to infer acquiescence in a rule by the very large majority of states"). Danilenko differentiates between "active and passive customary practice", suggesting that the latter "increases the precedent value of active practice and thus becomes a major factor in the process of creating generally accepted customary norms": G.M. Danilenko, *supra* note 17, at 28.

to examine this matter further in the third report, in light of the debate in the Commission in 2014.

43. *The practice of international (inter-governmental) organizations*. This is an important field that will be covered in greater detail in the third report.[126] Bearing in mind that "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community",[127] the acts of international organizations on which States have conferred authority may also contribute or attest to the formation of a general practice in the fields in which those organizations operate.[128] In assessing the practice of such organizations one ought to distinguish between practice relating to the internal affairs of the organization on the one hand, and the practice of the organization in its relations with States, international organizations, etc., on the other.[129] It is the latter practice that is relevant for present purposes, and which mostly consists of "operational activities", defined by one author as "the programmatic work of international organizations carried out as part of their overall mission or in fulfilment of a specific mandate".[130] Another important distinction should be drawn in this context between the practice of organs or other bodies composed of the representatives of States and that of organs composed of individuals serving in their personal capacity, as the latter cannot be said to

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[126] A leading work in this field is G. Cahin, *La coutume internationale et les organisations internationales* (Pedone, 2001).

[127] *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at 178.

[128] See, for example, *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951*, p.15, at p. 25; *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 95 (Separate Opinion of Judge Weeramantry, who refers to "the practice of international financial institutions"). See also *Secretariat memorandum*, at 23 ("Under certain circumstances, the practice of international organizations has been relied upon by the Commission to identify the existence of a rule of customary international law. Such reliance has related to a variety of aspects of the practice of international organizations, such as their external relations, the exercise of their functions, as well as positions adopted by their organs with respect to specific situations or general matters of international relations"); R. Jennings, A. Watts (eds.), *supra* note 37, at 31 ("the concentration of state practice now developed and displayed in international organisations and the collective decisions and the activities of the organisations themselves may be valuable evidence of general practices accepted as law in the fields in which those organisations operate"); *ILA London Statement of Principles*, at 19 ("The practice of intergovernmental organizations in their own right is a form of 'State practice'"). But see M.E. Villiger, *supra* note 84, at 16-17. On this topic more generally see J. Klabbers, 'International Organizations in the Formation of Customary International Law', in E. Cannizzaro, P. Palchetti (eds.), *Customary International Law on the Use of Force* (Martinus Nijhoff Publishers, 2005), 179-195 (also raising the question whether *ultra vires* practice of such organizations may count as 'practice'); L. Hannikainen, 'The Collective Factor as a Promoter of Customary International Law', *Baltic Yearbook of International Law*, 6 (2006), 125-141. Of course, international organizations vary greatly from one another, and this needs to be borne in mind when assessing the significance of their practice (see also commentary (8) to Article 6 of the Commission's *Draft Articles on the Responsibility of International Organizations* (2011)).

[129] For example, administration of territory or peacekeeping operations. Indeed, such practice is no longer thought of as confined to "States' relations to the organizations" ('Ways and Means for Making the Evidence of Customary International Law More Readily Available', *supra* note 111, at 372).

[130] I. Johnstone, 'Law-Making Through the Operational Activities of International Organizations', *George Washington International Law Review*, 40 (2008), 87, 94 (discussing such activities, however, in a somewhat different context; and adding that these activities "are distinguished from the more explicitly normative functions of international organizations, such as treaty making or adopting resolutions, declarations, and regulations by intergovernmental bodies").

represent States.[131] A distinction should, moreover, be made between "products of the secretariats of international organizations and products of the intergovernmental organs of international organizations. While both can provide materials that can be consulted ... the greater weight ... [is] to be given to the products of the latter, whose authors are also the primary authors of state practice."[132] While it has been suggested that "IOs provide shortcuts to finding custom",[133] considerable caution is required in assessing their practice.[134] Considerations that apply to the practice of States may also be relevant to the practice of international organizations, and the present report should be read in that light.

44. The practice of those international organizations (such as the European Union) to which Member States sometimes have transferred exclusive competences, may be equated with that of States, since in particular fields such organizations act in place of the Member States.[135] This applies to the actions of such organizations, whatever forms they take, whether executive, legislative or judicial. If one were not to equate the practice of such international organizations with that of States, it would in fact mean that, not only would the organization's practice not count for State practice,

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[131] Accordingly, the work of the Commission as well, often employed as subsidiary means for determining the existence or otherwise of a rule of customary international law, "cannot be equated with State practice, or evidence an *opinio juris*" (H. Thirlway, 'Law and Procedure, Part Two', *British Yearbook of International Law*, 61 (1990), 1, 59-60).

[132] As suggested by Mr. Tladi in his intervention during last year's debate in the Commission (3182nd meeting, 18 July 2013).

[133] J.E. Alvarez, *International Organizations as Law-makers* (Oxford University Press, 2005), 592 (explaining that "The modern resort to IO-generated forms of evidence for custom might be seen … as a relatively more egalitarian approach to finding this source of law, even if it comes, as critics charge is the case with respect to GA resolutions for example, at the expense of sometimes elevating the rhetoric of states over their deeds").

[134] See also J. Wouters, P. De Man, *supra* note 122, at 208 ("One should thus be mindful not to equate the practice of international organizations with state practice. Whether actions of international organizations can be attributed to the state community as a whole is a complex question and the answer depends on … divergent factors").

[135] See also Statement on behalf of the European Union, A/C.6/68/SR.23 (4 November 2013), para. 37 ("The Union acted on the international plane on the basis of competences conferred upon it by its founding treaties. It was a contracting party to a significant number of international agreements, alongside States. Moreover, in several areas covered by international law it had exclusive competences. Those special characteristics gave it a particular role in the formation of customary international law, to which it could contribute directly through its actions and practices."); see also F. Hoffmeister 'The Contribution of EU Practice to International Law', in M. Cremona, *Developments in EU External Relations Law* (Oxford University Press, 2008), 37–128; M. Wood, O. Sender, 'State Practice', *supra* note 71, at paras. 20-21; E. Paasivirta, P.J. Kuijper, 'Does One Size Fit All? The European Community and the Responsibility of International Organizations', *Netherlands Yearbook of International Law*, 36 (2005), 169, 204-212. Ms. Jacobsson has likewise suggested that "[o]ne cannot disregard… [] the practice of an international organization if that organization has the competence to enact legislation in respect of a particular question. Such practice cannot be described solely as the view on customary international law by the organization. It may also be equalled to State practice" (the Commission's 3184th meeting, 23 July 2013). But see J. Vanhamme, 'Formation and Enforcement of Customary International Law: The European Union's Contribution', *Netherlands Yearbook of International Law*, 39 (2008), 127, 131 ("EC [European Community] acts constitute EU [European Union] practice. To depict them as State practice [that is, to attribute them to the Member States] would deny one of the main features of the European Community, i.e. its autonomous functioning on the basis of the legislative, executive and judicial powers delegated to it by the Member States. Moreover, the EC's international legal practice does faithfully represent the *opinio juris* of all 27 Member States [who gave a permanent commitment to accept its decisions as binding law]").

but its Member States would be deprived or reduced of their ability to contribute to State practice in cases where the Member States have conferred some of their public powers to the organization.

45. *The role of other non-State actors.* It has sometimes been suggested that the conduct of other 'non-State actors' such as non-governmental organizations and even individuals, ought to be acknowledged as contributing to the development of customary international law.[136] Some have recalled in this context that "according to Article 38 of the ICJ statute, custom … [is] not required to be followed or acknowledged 'by states' only, as it is actually required by the same norm when referring to conventions. So that, in principle, practices may emanate from state and non-state actors."[137] The better view, however, is that, while individuals and non-governmental organizations can indeed "play important roles in the promotion of international law and in its observance"[138] (for example, by encouraging State

[136] For such a dynamic view of 'participation' in international law-making or the call to make such processes 'inclusive', see, for example *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 155 (Dissenting Opinion of Judge ad hoc Van den Wyngaert) ("the opinion of *civil society* … cannot be completely discounted in the formation of customary international law today"); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at pp. 69-70, 74 (Dissenting Opinion of Judge Ammoun) ("the primary factor in the formation of the customary rule whereby the right of peoples to self-determination is recognized … [may be] the struggle of peoples [for such cause], before they [now members of the international community] were recognized as States ... If there is any 'general practice' which might be held, beyond dispute, to constitute law within the meaning of Article 38, paragraph 1 (b), of the Statute of the Court, it must surely be that which is made up of the conscious action of the peoples themselves, engaged in a determined struggle"); *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 100 (Separate Opinion of Judge Ammoun); L.-C. Chen, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective*, 2nd edition (Yale University Press, 2000), 344 ("the focus on 'states' is unrealistic ... the relevant patterns in behavior extend ... also to those of private individuals and representatives of non-governmental organizations"); D. Bodansky, 'Customary (and Not So Customary) International Environmental Law', *Indiana Journal of Global Legal Studies*, 3 (1995), 105, 108 (referring to the behaviour of States and of "international organizations, transnational corporations and other non-governmental groups"); I. Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights', *Virginia Journal of International Law*, 31 (1991), 211, 212-213 ("In particular, by questioning the comprehensiveness of traditional formulations of national sovereignty, this Article will explore the prospect of permitting transnational and non-governmental groups to have a legal voice in the creation of custom"); C. Steer, 'Non-State Actors in International Criminal Law', in J. D'Aspermont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2013), 295-310 (arguing that in international criminal law non-State actors such as NGOs, judges and lawyers are those who determine the normative content); J.J. Paust, 'Nonstate Actor Participation in International Law and the Pretense of Exclusion', *Virginia Journal of International Law*, 51 (2011), 977-1004; A. Roberts, S. Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law', *Yale Journal of International Law*, 37 (2012), 107-152; and W.M. Reisman, 'The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application', in R. Wolfrum, V. Röben (eds.), *Developments of International Law in Treaty Making* (Springer, 2005), 15-30.

[137] J.P. Bohoslavsky, Y. Li and M. Sudreau, 'Emerging Customary International Law in Sovereign Debt Governance?', *Capital Markets Law Journal*, 9 (2013), 55, 63. Baron Descamps' original proposal with regard to the rules to be applied by the Permanent Court of International Justice referred to custom as "being practice between nations accepted by them as law": see K. Wolfke, *supra* note 6, at 3.

[138] T. Buergenthal, S.D. Murphy, *Public International Law in a Nutshell*, 5th edition (West Publishing, 2013), 75.

practice through bringing international law claims in national courts or by being relevant when assessing such practice), their actions are not 'practice' for purposes of the formation or evidencing of customary international law.[139]

46. While the decisions of international courts and tribunals as to the existence of rules of customary international law and their formulation are not 'practice',[140] such decisions serve an important role as "subsidiary means for the determination of rules of law".[141] The pronouncements of the ICJ in particular may carry great weight.[142]

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[139] Cf. conclusion 5, paragraph 2, of the Commission's draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (*ILC Report 2013*, para. 38): "Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty". See also the Statements on behalf of Israel and Iran in the 2013 Sixth Committee debate on the work of the International Law Commission (available at http://www.un.org/en/ga/sixth); A.C. Arend, *Legal Rules and International Society* (Oxford University Press, 1999), 176 ("Even though nonstate actors exist, and, in some cases, these nonstate actors have entered into international agreements, these actors do not enter into the process of creating general international law in an unmediated fashion. In other words, the interactions of nonstate actors with each other and with states do not produce customary international law"); J. D'Aspermont, 'Inclusive law-making and law-enforcement processes for an exclusive international legal system', in J. D'Aspermont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2013), 425, 430; M.H. Mendelson, *supra* note 71, at 203 (suggesting that the contribution of non-State actors to the formation of CIL is "in a *broader* sense … [it is an] indirect contribution"); Y. Dinstein, *supra* note 71, at 267-269; *ILA London Statement of Principles*, at 16. With regard to the suggestion by some that the practice of individuals, such as fishermen, has been recognized as giving rise to customary international law (see, for example, K. Wolfke, *supra* note 93, at 4), it is probably more accurate to say that while "[i]t cannot be denied, of course, that actions of individuals may create certain facts which may subsequently become the subject matter of inter-state dialogue … in such circumstances the actions of individuals do not constitute a law-creating practice: they are just simple facts giving rise to international practice of states" (G.M. Danilenko, *Law-Making in the International Community* (Martinus Nijhoff Publishers, 1993), 84). See also K. Wolfke, *supra* note 6, at 58: "whose behaviour contributes to the practice is not important; what is important is to whom the practice may be attributed, and above all, who it is who has 'accepted it as law'"; C. Santulli, *supra* note 37, at 45-46 ("Pour être pertinent aux fins de l'élaboration des règles coutoumières, le précédent doit pouvoir être imputé à un Etat ou à une organisation internationale. Seuls les Etats et les organisations internationales, en effet, pariticipent au phénomène coutoumier. La conduit des sujets internes n'en est pas moins importante, mais elle n'est juridiquement pertinente pour apprécier la formation de la coutume internationale qu'au regard de la réaction qu'elle a sucitée, tolérance ou réprobation").

[140] See also M.H. Mendelson, *supra* note 71, at 202; but see *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 315 (Separate Opinion of Judge Ammoun): "international case-law … [is] considered an element of [custom]"; G.M. Danilenko, *ibid*., at 83 ("The decisions of tribunals, and especially the judgments of the I.C.J., are an important part of community practice"). Cf. L. Kopelmanas, 'Custom as a Means of the Creation of International Law', *British Yearbook of International Law*, 18 (1937), 127, 142 ("the creation of legal rules by custom by the action of the international judge is an incontestable positive fact"); R. Bernhardt, *supra* note 84, at 270 ("This formula [of Article 38 of the International Court's Statute, awarding judicial decision the status of subsidiary means for determining rules of law] underestimates the role of decisions of international courts in the norm-creating process. Convincingly elaborate judgments often have a most important influence on the norm-generating process, even if in theory courts apply existing law and do not create new law").

[141] Article 38.1(d) of the ICJ Statute. See also *Secretariat memorandum*, at 25-26 (observing that "The Commission has, on some occasions, relied upon decisions of international courts or tribunals as authoritatively expressing the status of a rule of customary international law" (Observation 15); that "Furthermore, the Commission has often relied upon judicial pronouncements as a consideration in support of the existence or non-existence of a rule of customary international law" (Observation 16); and that "At

47. *Confidential practice*. Much State practice, such as classified exchanges among Governments, is not publicly available, at least not for some time.[143] It is difficult to see how practice can contribute to the formation or identification of general customary international law unless and until it has been disclosed publicly.[144] At the same time, a practice known among only some or even two States may contribute to the development of a regional, special or local (rather than general) rule of customary international law, opposable to them alone.[145]

48. The following draft conclusion is proposed:

Draft Conclusion 7

Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal actions.

2. Manifestations of practice include, among others, the conduct of States 'on the ground', diplomatic acts and correspondence, legislative acts, judgments of national courts, official publications in the field of international law, statements on behalf of States concerning codification

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times, the Commission has also relied upon decisions of international courts or tribunals, including arbitral awards, as secondary sources for the purpose of identifying relevant State practice" (Observation 17)).

[142] I. Brownlie, *supra* note 121, at 19 ("the judgments of the International Court and other international tribunals have a role in the recognition and authentication of rules of customary international law"). For a recent example see the judgment of the European Court of Human Rights in *Jones and Others v. The United Kingdom* (Applications nos. 34356/06 and 40528/06), 14 January 2014, para. 198. Cf. K. Wolfke, *supra* note 6, at 145 ("… judgments and opinions of international courts, especially of the Hague Court, are of decisive importance as evidence of customary rules. The Court has invoked them almost as being positive law").

[143] Such confidential practice is to be distinguished from practice which is simply hard to access. Practice may go largely unnoticed, for a variety of reasons. This is, for example, the case where the practice of particular States is not published in some widely accessibly form. There is a special problem, to which members of the Commission and States have drawn attention, with practice that is primarily available in languages that are not widely read (which is in fact the case with most languages).

[144] See also Y. Dinstein, *supra* note 71, at 275 ("Another condition for State conduct – if it is to count in assessing the formation of custom – is that it must be transparent, so as to enable other States to respond to it positively or negatively"); *ILA London Statement of Principles*, at 15 ("Acts do not count as practice if they are not public"). On the "representational function of doctrine [coming] up against the *sécret de l'état*" more generally see A. Carty, *supra* note 71, at 979-982. Meijers stresses that "States concur in the creation of law by not protesting, that is to say, by not reacting. If that is so, the states concerned must get an opportunity to react. From this there flow two further requirements for the formation of law: it must be possible to indicate at least one express manifestation of the will to create a law, and this express manifestation of will must be cognoscible for all states which will be considered as wishing to concur in the creation of the new rule if they do not protest" (H. Meijers, *supra* note 124, at 19). But see M. Bos, 'The Identification of Custom in International Law', *German Yearbook of International Law*, 25 (1982), 9, 30 ("even if facilitated, the discovery of evidence [of State practice] at times may be a problem, for not every bit of practice will find its way to digests and collections. It is asking too much, therefore, to say that in additions to the qualifications … [of virtual uniformity, attribution to the State and generality] practice should also be sufficiently perceptible to other States on which the customary rule-to-be may be binding in future").

[145] The issue of regional/special/bilateral custom will be dealt with in the Special Rapporteur's third report.

efforts, practice in connection with treaties, and acts in connection with resolutions of organs of international organizations and conferences.

3. Inaction may also serve as practice.

4. The acts (including inaction) of international organizations may also serve as practice.

49. *No predetermined hierarchy*. No one manifestation of practice is *a priori* more important than the other; its weight depends on the circumstances as well as on the nature of the rule in question.[146] For example, while in common parlance 'actions speak louder than words', that will obviously not be the case when it is acknowledged that the action is unlawful.[147] At the same time, in many cases it is ultimately the executive that speaks for the State in international affairs.[148]

50. *A State's practice should be "taken as a whole"*.[149] This implies, first, that account has to be taken of all available practice of a particular State. Secondly, it may be the case that the various organs of the State do not speak with one voice. For example, a court, or the legislature, may adopt a position contrary to that of the executive branch, and even within the same branch different positions may be taken. This may be particularly likely with the practice of sub-State organs (for example, in a federal State); it may be necessary to look cautiously at that practice, in the same way one would approach lower court decisions. Where a State speaks in several voices, its practice is ambivalent, and such conflict may well weaken the weight to be given to the practice concerned.[150]

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[146] See also B. Conforti, B. Labella, *supra* note 52, at 32 ("These diverse actions are not governed by a set hierarchy: acts of domestic courts and executive organs, organs conducting foreign relations, and representatives at international organizations, are all on an equal footing. The weight given to the acts depends on the content of the international customary rule"); M. Akehurst, *supra* note 84, at 21 ("There is no compelling reason for attaching greater importance to one kind of practice than to another"); K. Wolfke, *supra* note 6, at 157 ("The absence of any appropriate indication in the Statute of the [international] Court, and the freedom enjoyed by the Court in the choice and evaluation of evidence of customary law, do not give any ground for admitting any formal hierarchy of the kinds of such evidence").

[147] See, for example, the International Court's consideration of the principle of non-intervention in its *Nicaragua* judgment: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 108-109, para. 207. See also R. Müllerson, *supra* note 84, at 344 ("Of course, different categories of state practice may have different weight in the process of custom formation. Usually it matters more what states do than what they say, but on the other hand, at least in official inter-state relations, saying is also doing. 'Actual' practice may be weightier in the process of custom formation but diplomatic practice usually conveys more clearly the international legal position of states. Often only a few states may be engaged in 'actual' practice, while other states' practice may be only diplomatic or even completely absent").

[148] See also A. Roberts, *supra* note 112, at 62 ("Where inconsistencies emerge, the conflicting practice must be weighed, considering factors such as which branch of government has authority over the matter"); but see I. Wuerth, 'International Law in Domestic Courts and the *Jurisdictional Immunities of the State* Case', *Melbourne Journal of International Law*, 13 (2012), 1, 9 ("Privileging the executive branch is unsatisfactory because a national court decision invokes the responsibility of the state as a matter of international law and it often provides clearer evidence of the *opinio juris* than executive branch practice").

[149] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 136, para. 83.

[150] See, for example, *Yong Vui Kong v Public Prosecutor*, [2010] 3 S.L.R. 489 [2010] SGCA 20 (Supreme Court of Singapore — Court of Appeal, 14 May 2010), para. 96. For a different argument, according to which only once differences between the practice followed by different organs of a State disappear can the

51. The following draft conclusion is proposed:

Draft Conclusion 8

Weighing evidence of practice

1. There is no predetermined hierarchy among the various forms of practice.

2. Account is to be taken of all available practice of a particular State. Where the organs of the State do not speak with one voice, less weight is to be given to their practice.

52. *Generality of practice*. "It is of course clear from the explicit terms of Article 38, paragraph 1 *(b)*, of the Statute of the Court, that the practice from which it is possible to deduce a general custom is that of the generality of States and not of all of them".[151] Indeed, for a rule of general customary international law to emerge or be identified the practice need not be unanimous (universal);[152] but, it must be "extensive"[153] or, in other words, sufficiently widespread.[154] This is not a purely

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practice of that State become "consistent and thus capable of contributing to the development of customary law" see M. Akehurst, *supra* note 84, at 22.

[151] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 330 (Separate Opinion of Judge Ammoun).

[152] See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 104 (Separate Opinion of Judge Ammoun) ("[Proving the existence of customary international law] is therefore a question of enquiring whether such a practice is observed, not indeed unanimously, but… by the generality of States with actual consciousness of submitting themselves to a legal obligation"), and p. 229 (Dissenting Opinion of Judge Lachs) ("to become binding, a rule or principle of international law need not pass the test of universal acceptance. This is reflected in several statements of the Court … Not all States have, as I indicated earlier in a different context, an opportunity or possibility of applying a given rule. The evidence should be sought in the behaviour of a great number of States, possibly the majority of States, in any case the great majority of the interested States"); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 435 (Dissenting Opinion of Judge Barwick) ("Customary law among the nations does not, in my opinion, depend on universal acceptance"); *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 95 (Separate Opinion of Judge Weeramantry) ("The general support of the international community does not of course mean that each and every member of the community of nations has given its express and specific support to the principle – nor is this a requirement for the establishment of a principle of customary international law"). For scholarly support see, for example, J. Dugard SC, *International Law: A South African Perspective*, 4th edition (Juta, 2012), 28 ("For a rule to qualify as custom, it must receive 'general' or 'widespread' acceptance. Universal acceptance is not necessary"); H. Thirlway, *supra* note 38, at 59 ("One thing that can be stated with certainty is that unanimity among all States is not a requirement, either in the sense that all States must have been shown to have participated in [the practice], or in the sense that there is evidence that the *opinio*, the view that it is a binding custom, is held by all States").

[153] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 74.

[154] See, for example, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 40, at p. 102, para. 205 (referring to "[a uniform and] widespread State practice"); *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at 299, para. 111 (referring to "a sufficiently extensive and convincing practice"); *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at pp. 45, 52 (Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda) (referring to "sufficiently widespread" and "sufficiently general and uniform" State practice), and p. 161 (Separate

quantitative test, as the participation in the practice must also be broadly representative,[155] and include those States whose interests are specially affected.

53. The exact number of States required for the "kind of 'head count' analysis of State practice"[156] leading to the recognition of a practice as 'general' cannot be identified in the abstract.[157] In essence, what is important is that "[t]he practice must have been applied by the overwhelming majority of states which hitherto had an opportunity of applying it"[158] (including, in appropriate cases, through inaction), and that "[t]he available practice … [will be] so widespread that any remaining

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Opinion of Judge Petrén) (referring to the need for a "sufficiently large" number of States); *Kaunda and Others v. The President of the Republic of South Africa and Others*, Judgment of the Constitutional Court of South Africa (4 August 2004), para. 29 ("…presently this is not the general practice of states… It must be accepted, therefore, that the applicants cannot base their claims on customary international law"); *2 BvR 1506/03*, Order of the Second Senate of 5 November 2003 (German Federal Constitutional Court), para. 59 ("Such practice, however, is not sufficiently widespread as to be regarded as consolidated practice that creates customary international law"). Generality has indeed been described as "the key concept to the essence of a universal customary rule": J. Barboza, *supra* note 119, at 7. See also the *Secretariat memorandum*, at 10 ("The generality of State practice has also been regarded by the Commission as a key consideration in the identification of a rule of customary international law").

[155] See *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 42, para. 73 ("a very widespread and representative participation…"), and p. 227 (Dissenting Opinion of Judge Lachs) ("This mathematical computation, important as it is in itself, should be supplemented by, so to speak, a spectral analysis of the representativity of the States … For in the world today an essential factor in the formation of a new rule of general international law is to be taken into account: namely that States with different political, economic and legal systems, States of all continents, participate in the process"); *Mondev International Ltd v. United States of America* (ICSID, Award, 11 October 2002), para. 117 ("Investment treaties run between North and South, and East and West, and between States in these spheres *inter se*. On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment. In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law"); *2 BvR 1506/03*, Order of the Second Senate of 5 November 2003 (German Federal Constitutional Court), para. 50 (referring to "conduct that is continuous in time and as uniform as possible, and which takes place with a broad and representative participation of states and other subjects of international law with law-making authority"); *ILA London Statement of Principles*, at 23 ("For a rule of general customary international law to come into existence, it is necessary for the State practice to be both extensive and representative"); G.M. Danilenko, *supra* note 139, at 94 ("The requirement of generality means that customary practice must acquire a broad and representative character").

[156] To borrow the words of Judge Dillard in his Separate Opinion in *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 56.

[157] See also A. Clapham, *supra* note 37, at 59-60 ("This test of general recognition [among States of a certain practice as obligatory] is necessarily a vague one; but it is of the nature of customary law, whether national or international, not to be susceptible to exact or final formulation"); J. Barboza, *supra* note 119, at 8 ('"Generality' seems to be a rather flexible notion").

[158] J.L. Kunz, *supra* note 56, at 666; and see para. 54 below on 'specially affected States'. See also R. Higgins, *supra* note 13, at 22 ("we must not lose sight of the fact that it is the practice of the vast majority of states that is critical, both in the formation of new norms and in their development and change and possible death"). The German Federal Constitutional Court has held that it suffices if a rule is recognized as binding by an overwhelming majority of States, which need not necessarily include Germany (see Order of the Second Senate of 8 May 2007, 2 BvM 1-5/03, 1, 2/06, para. 33: "A rule of international law is 'general' within the meaning of Article 25 of the Basic Law if it is recognised by the vast majority of states (see BVerfGE 15, 25 (34)). The general nature of the rule relates to its application, not to its content, recognition by all states not being necessary. It is equally not necessary for the Federal Republic of Germany in particular to have recognised the rule").

inconsistent practice will be marginal and without direct legal effect".[159] At times, even a "respectable" number of States adhering to the practice may not necessarily be sufficient;[160] yet it very well may be that only a relatively small number of States engage in a practice, and the inaction of others suffices to create a rule of customary international law.[161]

54. *Specially affected States*. Due regard should be given to the practice of "States whose interests [are] specially affected",[162] where such States may be identified. In other words, any assessment of international practice ought to take into account the practice of those States that are "affected or interested to a higher degree than other states"[163] with regard to the rule in question, and such practice should weigh heavily (to the extent that, in appropriate circumstances, it may prevent a rule from emerging).[164] Which States are "specially affected" will depend upon the rule under consideration, and indeed "not all areas … allow a clear identification of 'specially

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[159] M.E. Villiger, *supra* note 84, at 30.

[160] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 42, para. 73. See also *Nguyen Tuong Van v. Public Prosecutor* (Singapore Court of Appeal), [2005] 1 SLR 103; [2004] SGCA 47, para. 92.

[161] See, for example, M. Akehurst, *supra* note 84, at 18 ("A practice followed by a very small number of States can create a rule of customary law if there is no practice which conflicts with the rule").

[162] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 42, para. 73 ("…With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected"), p. 43, para. 74 ("State practice, including that of States whose interest are specially affected"), and pp. 175-176 (Dissenting Opinion of Judge Tanaka) ("It cannot be denied that the question of repetition is a matter of quantity … What I want to emphasize is that what is important … [is] the meaning which [a number or figure] would imply in the particular circumstances. We cannot evaluate the ratification of the Convention [on the Continental Shelf] by a large maritime country or the State practice represented by its concluding an agreement on the basis of the equidistance principle, as having exactly the same importance as similar acts by a land-locked country which possesses no particular interest in the delimitation of the continental shelf"). See also *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 90 (Separate Opinion of Judge De Castro) ("For a new rule of international law to be formed, the practice of States, including those whose interests are specially affected, must have been substantially or practically uniform"), and p. 161 (Separate Opinion of Judge Petrén) ("Hence another element which is necessary for the formation of a new rule of customary law is missing, namely its acceptance by those States whose interests it affects"); J.B. Bellinger, W.J. Haynes, 'A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*', *International Review of the Red Cross*, 89 (2007), 443, 445 (footnote 4); T. Treves, *supra* note 50, at para. 36 ("While, for instance, it would be difficult to determine the existence of a rule on the law of the sea in the absence of corresponding practice of the main maritime powers, or of the main costal States, or, as the case may be, of the main fishing States, the silence of less involved States would not be an obstacle to such determination. Similarly, rules on economic relations, such as those on foreign investment, require practice of the main investor States as well as that of the main States in which investment is made").

[163] W.T. Worster, 'The Transformation of Quantity into Quality: Critical Mass in the Formation of Customary International Law', *Boston University International Law Journal*, 31 (2013), 1, 63. Meijers refers to "The states which have a predominant share in a given activity" (H. Meijers, *supra* note 124, at 7); Danilenko refers to "a special interest in the relevant principles and rules" (G.M. Danilenko, *supra* note 139, at 95).

[164] See, for example, *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 47 (Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda) ("…those claims have generally given rise to protests or objections by a number of important maritime and distant-water fishing States, and in this respect they cannot be described as being 'generally accepted'").

affected' states".[165] In many cases, all States are affected equally. Admittedly, some States will often be "specially affected";[166] as mandated by the principle of sovereign equality, however, it is only in such capacity that their practice may be assessed and attributed particular weight.[167]

55. *Consistency of the practice*. For a rule of customary international law to become established, the relevant practice must be consistent.[168] While the specific

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[165] G.M. Danilenko, *supra* note 139, at 95. See also M. Mendelson, *supra* note 124, at 186 ("the notion of 'specially affected states' is not very precise"); M.J. Aznar, 'The Contiguous Zone as an Archeological Maritime Zone', *International Journal of Marine and Coastal Law*, 29 (2014), 1, 12. One example for such a challenge may be found in the International Court's *Legality of the Threat or Use of Nuclear Weapons* case, where Judge Shahabuddeen, in his Dissenting Opinion, suggested that "Where what is in issue is the lawfulness of the use of a weapon which could annihilate mankind and so destroy all States, the test of which States are specially affected turns not on the ownership of the weapon, but on the consequences of its use. From this point of view, all states are equally affected, for, like the people who inhabit them, they all have an equal right to exist" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 414. For the same point see also pp. 535-536 (Dissenting Opinion of Judge Weeramantry).

[166] De Visscher compares the growth of customary international law to the "formation of a road across vacant land": "Among the users are some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in the world, or because their interests bring them more frequently this way": C. De Visscher, *Theory and Reality in Public International Law* (Princeton University Press, 1968), 149.

[167] See also *ILA London Statement of Principles*, at 26: "There is no rule that major powers have to participate in a practice in order for it to become a rule of general customary law. Given the scope of their interests, both geographically and *ratione materiae*, they often will be 'specially affected' by a practice; and *to that extent and to that extent alone*, their participation is necessary". See also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 278 (Declaration of Judge Shi) ("any undue emphasis on the practice of this 'appreciable section' [of "important and powerful members of the international community [that] play an important role on the stage of international politics"] would not only be contrary to the very principle of sovereign equality of States, but would also make it more difficult to give an accurate and proper view of the existence of a customary rule"), and p. 533 (Dissenting Opinion of Judge Weeramantry) ("From the standpoint of the creation of international custom, the practice and policies of five States out of 185 seem to be an insufficient basis on which to assert the creation of custom, whatever be the global influence of those five"). But see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 312, 319 (Dissenting Opinion of Judge Schwebel) ("This nuclear practice is not a practice of a lone and secondary persistent objector. This is not a practice of a Pariah government crying out in the wilderness of otherwise adverse international opinion. This is the practice of five of the world's major Powers, of the permanent members of the Security Council, significantly supported for almost 50 years by their allies and other States sheltering under their nuclear umbrellas. That is to say, it is the practice of States – and practice supported by a large and weighty number of other States – that together represent the bulk of the world's military and economic and financial and technological power and a very large proportion of its population"); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 306 (Separate Opinion of Judge Petrén) ("It would be unrealistic to close one's eye to the attitude, in that respect, of the State with the largest population in the world"); T. Buergenthal and S.D. Murphy, *supra* note 138, at 28 ("That it [practice] does not have to be universal seems to be clear. Equally undisputed is the conclusion that, in general, the practice must be one that is accepted by the world's major powers and by states directly affected by it").

[168] See, for example, *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at pp. 276, 277 ("a constant and uniform usage"); *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 40 ("a constant and uniform practice"); *Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955*, p. 4, at p. 30 (Dissenting Opinion of Judge Klaestad); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 74 (the practice must be "virtually uniform"); *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 90 (Separate Opinion of Judge De

circumstances surrounding each act may naturally vary, "a core of meaning that does not change" common to them is required: it is then that a regularity of conduct may be observed.[169] Where, by contrast, the practice demonstrates "that each specific case is, in the final analysis, different from all the others ... [t]his precludes the possibility of those conditions arising which are necessary for the formation of principles and rules of customary law".[170] In other words, where the facts reveal that "there is so much uncertainty and contradiction, so much fluctuation and discrepancy … so much inconsistency … and the practice has been so much influence by considerations of political expediency in the various cases, [] it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule …".[171]

Castro) ("For a new rule of international law to be formed, the practice of States, including those whose interests are specially affected, must have been substantially or practically uniform") and p. 50 (Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda) ("Another essential requirement for the practice of States to acquire the status of customary law is that such State practice must be common, consistent and concordant. Thus contradiction in the practice of States or inconsistent conduct, particularly emanating from these very States which are said to be following or establishing the custom, would prevent the emergence of a rule of customary law"). See also the *Secretariat memorandum*, at 9 ("The uniformity of State practice has been regarded by the Commission as a key consideration in the identification of a rule of customary international law"). One scholar has written that in practice the two requirements of generality and uniformity "meld together in a unitary analytical process. International lawyers cannot, for example, analyze whether State practice is general without having identified a practice that is uniform" (D.P. Fidler, 'Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law', *German Yearbook of International Law*, 39 (1996), 198, 202).

[169] J. Barboza, *supra* note 119, at 7 ("The repetition of conduct is of the essence of custom. Of course, the facts are never the same: Heraclitus used to say that we never bathe twice in the same river. The facts may change, the subjects may be different, the circumstances may vary, but there is a core of meaning that does not change. Whenever there is a repetition, there are individual facts that belong to a common genus; to speak of repetition implies a previous abstraction and elimination of a number of data belonging to the individual facts, the facts that occurred in real life. At the same time, a core of *generic meaning* is kept, i.e. a meaning that can be applied to the other situations ... That *generic meaning* repeats itself in every precedent and establishes the content of the accepted by States concerned as law between them"). See also G.M. Danilenko, *supra* note 139, at 96 ("any customary rule is a normative generalization from individual precedents").

[170] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 290, para. 81.

[171] *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 277. See also *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949*, p. 4, at p. 74 (Dissenting Opinion by Judge Krylov) ("The practice of States in this matter is far from uniform, and it is impossible to say that an international custom exists in regard to it") and p. 128 (Dissenting Opinion by Judge ad hoc Ečer) ("The practice of States was so varied that no proof of the existence of such a rule [of customary international law] was to be found"); *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at p. 131 (finding that where "certain States" adopted or applied one rule and "other States" have adopted a different practice, "Consequently, the [] rule has not acquired the authority of a general rule of international law"); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at pp. 56-57 (Separate Opinion of President Bustamante y Rivero) (asserting that where [practice] is of a "sporadic nature [that] stands in the way of any systemization" the emergence of customary international law is "hardly likely in the circumstances"); *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, at p. 212 (Declaration of Judge Nagendra Singh) ("a widely divergent and, discordant State practice [would prevent a rule from crystallizing]"); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at pp. 117-118 (Separate Opinion of Judge Bula-Bula) ("many

56. In establishing the consistency of practice it is, of course, important to consider situations that are in fact comparable, where the same or similar issues have arisen.[172] And while frequent repetition of a consistent practice would naturally lend it greater weight, "the degree of frequency has to be weighed against the frequency with which the circumstances arise in which the action constituting practice has to be taken, or is appropriate".[173]

57. *Some inconsistency is not fatal*. Complete uniformity of practice is not required: "[t]oo much account should not be taken of superficial contradictions and inconsistencies".[174] In the words of the International Court, "It is not to be expected that in the practice of States the application of the rules in question should have been perfect ... The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule."[175]

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inconsistencies and equivocations fundamentally characterizing a practice both unilateral and solitary … [mean that] no customary norm has emerged").

[172] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 45, para. 79; *2 BvR 1506/03*, Order of the Second Senate of 5 November 2003 (German Federal Constitutional Court), para 42 ("it must be particularly taken into account that the relevant state practice and the doctrines that the Higher Regional Court has taken into consideration, in their overriding majority refer to situations that involve only two states. In the present case, however, legal relations exist between the Republic of Yemen, as the complainant's state of origin, the United States of America, as the requesting state of the forum, and the Federal Republic of Germany as the requested state of residence. Accordingly, the legal consequences of the alleged violation of international law do not directly refer to criminal proceedings in the state of the forum… but to extradition proceedings in the requested state of residence"); *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, Judgment (Special Court for Sierra Leone Appeals Chamber), 28 May 2008, para. 406.

[173] H. Thirlway, *supra* note 38, at 65.

[174] G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law', *British Yearbook of International Law*, 30 (1953), 1, 45. See also M. Villiger, *supra* note 84, at 44 ("… an overly strict test … would jeopardize the formation of customary international law. For example, it would mean neglecting the necessarily general character of customary law when examining the instances of practice in too much detail. Furthermore, what appears at first glance to be inconsistent practice may well contain as a common denominator a general rule, or there may at least be uniformity on partial or special rules. Once the rule has become established, it may well permit various options … Divergence from the rule may, in reality, point to an admissible exception …"); J. Crawford, *supra* note 37, at 24 ("Complete uniformity of practice is not required, but substantial uniformity is"); D. Bodansky, *supra* note 136, at 109 ("customary rules represent regularities, but not necessarily uniformities, of behaviour … mistakes and violations of rules are possible"); R. Müllerson, *supra* note 85, at 167 (making the general point that "Legal regulation is needed only where there are deviations from desired patterns of practice"). In Briggs' words, "Variations from the concordance, generality, or consistency of a practice are grist for judicial interpretations": H.W. Briggs, 'The Colombian-Peruvian Asylum Case and Proof of Customary International Law', *American Journal of international Law*, 45 (1951), 728, 729. According to the *Secretariat memorandum*, "Where there was a unifying thread or theme underlying international practice, a certain variability in practice has often not precluded the Commission from identifying a rule of customary international law" (at 12).

[175] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 98, para. 186. The Court added that "If a State acts in a

58. *Duration of the practice*. Although rules of customary international law have traditionally emerged as a result of a practice extending over a lengthy period of time, it is widely acknowledged that there is no specific requirement with regard to how long a practice must exist before it can ripen into a rule of customary international law.[176] As the International Court held in the *North Sea Continental Shelf* case, "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law … [yet] an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform … and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved".[177] While some rules may inevitably take

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way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule". See also *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 336 (Dissenting Opinion by Judge Azevedo); *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at pp. 40, and also in pp. 104, 107 (Dissenting Opinion of Judge Sir Percy Spender); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 229 (Dissenting Opinion of Judge Lachs). In the *Fisheries* case the Court said that it "considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice. They may easily be understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812, and are not such as to modify the conclusions reached by the Court" (*Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at p. 138).

[176] See, for example, J. Dugard SC, *supra* note 152, at 27 ("In most cases some passage of time is required for a practice to crystallize into a customary rule. In some cases, however, where little practice is needed to establish a rule, it may come into existence very rapidly"); O. Corten, *Métholodologie du droit international public* (Editions de l'Université de Bruxelles, 2009), 150-151 ("Si, auparavant, la doctrine semblait exiger une pratique très ancienne, les évolutions récentes de la jurisprudence ont rendu cette condition caduque. *Ratione temporis*, une coutume peut très bien resultée d'une pratique limitée dans le temps pouvu, ajoute-t-on généralement, qu'elle soit particulièrement intense et univoque"); J.L. Kunz, *supra* note 56, at 666 ("… international law contains no rules as to how many times or for how long a time this practice must be repeated"); K. Wolfke, *supra* note 93, at 3 ("this practice no longer needs to occur for any great length of time"); *ILA London Statement of Principles*, at 20 ("… no precise amount of time is required"). But see the Separate Opinion of Judge Sepúlveda-Amor in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 279: "Time is another important element in the process of creation of customary international law … To claim the existence of a customary right, created in such a short span of time, clearly contradicts the Court's previous jurisprudence on the matter" (citing to the *Right of Passage* case); R.Y. Jennings, 'The Identification of International Law', in B. Cheng (ed.), *International Law: Teaching and Practice* (Stevens & Sons, 1982), 3, 5 ("Certainly practice over a more or less long period is an essential ingredient of customary law").

[177] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 74; see also p. 124 (Separate Opinion of Judge Ammoun), p. 230 (Dissenting Opinion of Judge Lachs) ("With regard to the time factor, the formation of law by State practice has in the past frequently been associated with the passage of a long period of time. There is no doubt that in some cases this may be justified. However, the great acceleration of social and economic change, combined with that of science and technology, have confronted law with a serious challenge: one it must meet, lest it lag even farther behind events than it has been wont to do … the short period within which the law on the continental shelf has developed and matured does not constitute an obstacle to recognizing its principles and rules, including the equidistance rule, as part of general law"), and p. 244 (Dissenting Opinion of Judge Sørensen) ("The possibility has thus been reserved of recognizing the rapid emergence of a new rule of customary law based on the recent practice of States. This is particularly important in view of the extremely dynamic process of evolution in

longer to emerge,[178] provided that the practice shows sufficient generality and consistency, no particular duration is required.[179] It ought to be borne in mind in this context, however, that "all states which could become bound by their inaction must have the time necessary to avoid implicit acceptance by resisting the rule".[180]

59. The following draft conclusion is proposed:

Draft Conclusion 9

Practice must be general and consistent

1. To establish a rule of customary international law, the relevant practice must be general, meaning that it must be sufficiently widespread and representative. The practice need not be universal.

2. The practice must be generally consistent.

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which the international community is engaged at the present stage of history"). The Inter-American Court of Human Right has held with regard to 'customary practice' that "the important point is that the practice is observed without interruption and constantly, and that it is not essential that the conduct should be practiced over a specific period of time" (*Baena Ricardo et al.*, Judgment of November 28, 2003, Inter-Am. Ct. H.R., (Ser. C) No. 104 (2003), para. 104).

[178] See H. Thirlway, *supra* note 38, at 64 ("If the issue to be resolved arises frequently, and is regulated in essentially the same way on each occasion, the time required may be short; if the issue arises only sporadically, it may take a longer time for consistency of handling to be observable … It is in fact the consistency and repetition rather than the duration of the practice that carries the most weight."). See also H. Lauterpacht, 'Sovereignty over Submarine Areas', *British Yearbook of International Law*, 27 (1950), 376, 393 (suggesting that "[t]he 'evidence of a general practice as law' – in the words of Article 38 of the Statute – need not be spread over decades. Any tendency to exact a prolonged period for the crystallization of custom must be proportionate to the degree and the intensity, of the change that it purports, or is asserted, to effect"); H. Li, *Guoji Fa De Gainian Yu Yuanyuan (Concepts and Sources of International Law)* (Guizhou People's Press, 1994), 91 (cited in C. Cai, 'Intenrational Investment Treaties and the Formation, Application and Transformation of Customary International Law Rules', *Chinese Journal of International Law*, 7 (2008), 659, 661).

[179] See also I. Brownlie, *supra* note 121, at 19; E. Jiménez de Aréchaga, 'General Course in Public International Law', 159 *Recueil des Cours* (1978), 25 ("The Court's acceptance of a quickly maturing practice shows that the traditional requirement of duration is not an end in itself but only a means of demonstrating the generality and uniformity of a given State practice"); L.B. Sohn, 'Unratified Treaties as a Source of Customary International Law', in A. Bos, H. Siblesz (eds.), *Realism in Law-Making: Essays in International Law in Honour of Willem Riphagen* (Martinus Nijhoff Publishers, 1986), 231, 234 ("The length of time over which a practice has endured is not crucial for formation of custom. More important is the strength of other factors – frequency and repetition of the practice, number of States that have engaged in the practice, and the relative strength of opposing practice"); S. Rosenne, *supra* note 79, at 55 ("It is not necessary that this line of conduct should have been pursued over a long period of time, although assertions of 'quickie' or spontaneous production of customary rules must be treated with reserve. It is more important to establish that there is widespread acceptance of the view that such conduct is in conformity with the law and is required by the law, together with experience of actual conduct consonant therewith"). Cf. M.P. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge University Press, 2013).

[180] H. Meijers, *supra* note 124, at 23-24 (asserting that "[a]ll states that fall within the potential reach of the nascent rule must get an opportunity to protest against its emergence"). But see G. Arangio-Ruiz, *supra* note 17, at 100 ("Particularly nowadays any action or omission of a State is known all over the world with the immediateness of a ray of light").

3. Provided that the practice is sufficiently general and consistent, no particular duration is required.

4. In assessing practice, due regard is to be given to the practice of States whose interests are specially affected.

VI. Accepted as law

60. The second element necessary for the formation and identification of customary international law – acceptance of the 'general practice' as law – is commonly referred to as *opinio juris* (or "*opinio juris sive necessitatis*"). This "subjective element" of customary international law requires, in essence, that the practice in question be motivated by a "conception... that such action was enjoined by law".[181] States are to "believe[] themselves to be applying a mandatory rule of customary international law",[182] or, in other words, "[feel] legally compelled to … [perform the relevant act] by reason of a rule of customary law obliging them to do so".[183] It is this "internal point of view"[184] through which regularities of conduct may harden into a rule of law, and which enables a distinction to be made between law and non-law.[185] As Judge Chagla put it, "… custom under international law requires much more than [a piling up of a large number of instances]. It is not enough to have its external manifestation proved; it is equally important that its mental or psychological element must be established. It is this all-important element that distinguishes mere practice or usage from custom. In doing something or in forbearing from doing something, the parties must feel that they are doing or

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[181] M.O. Hudson, *The Permanent Court of International Justice, 1920-1942 – a Treatise* (Macmillan, 1943), 609.

[182] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 76.

[183] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 44-45, para. 78.

[184] D. Bodansky, *supra* note 136, at 109.

[185] A practice unaccompanied by such a sense of obligation does not contribute to customary international law. See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77 ("Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*"); *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 123, para. 55 ("While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite opinio juris and therefore sheds no light upon the issue currently under consideration by the Court"). See also H.W.A. Thirlway, *supra* note 81, at 48 ("while the requirement of *opinio juris* does undoubtedly give rise to many problems in practice … it is admittedly difficult to distinguish between usage which has become binding as customary law and usage which has not … without allowing the psychological element in the creation of custom to creep back into the discussion by a devious route and under another name"). On the important function of *opinio juris* in preventing generally unwanted general practice from becoming customary international law see C. Dahlman, 'The Function of *Opinio Juris* in Customary International Law', *Nordic Journal of International Law*, 81 (2012), 327-339. Villiger has remarked that "In addition, the *opinio* serves in particular to distinguish violations of the customary rule from subsequent modifications to the rule – a test not without its significance in view of the dynamic nature of customary international law. As long as the previous *opinio* has not been eroded, and the new *opinio* is not established, the diverging practice remains a form either of persistent or subsequent objection" (M.E. Villiger, *supra* note 84, at 48).

forbearing out of a sense of obligation. They must look upon it as something which has the same force as law ... there must be an overriding feeling of compulsion – not physical but legal".[186]

61. *Other motives for action*. 'Acceptance as law' is to be distinguished from other, extra-legal considerations that a State may have with regard to the practice in question. In ascertaining whether a rule of customary international law exists it ought to be established, therefore, that the relevant practice was not motivated (solely) by considerations such as "courtesy, good-neighbourliness and political expediency"[187] as well as "convenience or tradition".[188] States must have accorded deference to a rule "as a matter of legal obligation and not merely as a matter of

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[186] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 120 (Dissenting Opinion of Judge Chagla, referring to local custom but relies in this context on the general language of Article 38.1(b) of the Statute of the Court).

[187] *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at pp. 285, 286 (adding that "considerations of convenience or simple political expediency seem to have led the territorial State to recognize asylum without that decision being dictated by any feeling of legal obligation"). See also *Case concerning Right of Passage over Indian Territory (Preliminary Objections), Judgment of November 26th, 1957: I.C.J. Reports 1957*, p. 125, at p. 177 (Dissenting Opinion of Judge Chagla) ("[the State] must go further and establish that … [the practice was] enjoyed … as a matter of right and not as a matter of grace or concession"); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 305 (Separate Opinion of Judge Petrén) ("[refraining from a conduct must be] motivated not by political or economic considerations but by a conviction that … [that certain conduct is] prohibited by customary international law"); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 109 (where the Court contrasted "statements of international policy" from "an assertion of rules of existing international law"); *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at p. 221 (Dissenting Opinion of Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau) (referring to "asserting usage as at least one basis of its rights … [and thus] It was not, therefore, a case of mere 'gracious tolerance'"); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 423-424 (Dissenting Opinion of Judge Shahabuddeen) ("It is also important to have in mind that bare proof of acts or omissions allegedly constituting State practice does not remove the need to interpret such acts or omissions. The fact that States may feel that realities leave them no choice but to do what they do does not suffice to exclude what they do from being classified as part of State practice, provided, however, that what they do is done in the belief that they were acting out of a sense of legal obligation…"); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 145 (Dissenting Opinion of Judge ad hoc Van den Wyngaert) ("A 'negative practice of States', consisting in their abstaining from instituting criminal proceedings, cannot, in itself, be seen as evidence of an *opinio juris*. Abstinence may be explained by many other reasons, including courtesy, political considerations, practical concerns and lack of extraterritorial criminal jurisdiction. Only if this abstention was based on a conscious decision of the States in question can this practice generate customary international law"); C. De Visscher, *supra* note 166, at 149 ("Governments attach importance to distinguishing between custom, by which they hold themselves bound, and the mere practices often dictated by considerations of expediency and therefore devoid of definite legal reasoning. The fact that this is often a political interest is no reason for denying its significance").

[188] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77 ("There are many international acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty"). See also *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 69 (Separate Opinion of Vice-President Sette-Camara) ("In support of the distance principle political and diplomatic convenience can be invoked – but this is hardly *opinio juris sive necessitatis*").

reciprocal tolerance or comity".[189] 'Acceptance as law' is not to be confused with considerations of a social or economic nature either,[190] although these may very well be present especially at the outset of the development of a practice.

62. Nor may practice motivated (solely) by the need to comply with treaty (or some other extra-customary) obligations be taken as indicating 'acceptance as law':[191] when the parties to a treaty act in fulfilment of their conventional obligations, this does not generally demonstrate the existence of an *opinio juris*.[192]

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[189] *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 58 (Separate Opinion of Judge Dillard).

[190] See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 23 (where the Court said of the equidistance method of maritime delimitation: "In short, it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application. Yet these factors do not suffice of themselves to convert what is a method into a rule of law, making the acceptance of the results of using that method obligatory in all cases in which the parties do not agree otherwise … Juridically, if there is such a rule, it must draw its legal force from other factors than the existence of these advantages, important though they may be"); *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at p. 34 ("Humanitarian considerations may constitute an inspirational basis for rules of law … Such considerations do not, however, in themselves amount to rules of law. All States are interested – have an interest – in such matters. But the existence of an "interest" does not of itself entail that this interest is specifically juridical in nature").

[191] See also O. Schachter, 'Entangled Treaty and Custom', in Y. Dinstein, M. Tabory (eds.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers, 1989), 717, 729; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008), 81 ("Practice in compliance with some other extra-customary rule will not be independent evidence of customary *opinio juris*, as was established in the *North Sea* case"). Baxter pointed to a paradox in this context, according to which "As the express acceptance of the treaty increases, the number of States not parties whose practice is relevant diminishes" (R.R. Baxter, 'Treaties and Custom', 129 *Recueil des Cours* (1970), 27, 73; see also R. Cryer, 'Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study', *Journal of Conflict and Security Law*, 11 (2006), 239, 244 ("In some ways, it can be more difficult to appraise practice in relation to a norm that has a pre-existing treaty basis, as the practice of parties to the treaties *inter se* can be attributed to the existence of the treaty").

[192] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 76 ("over half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention, and were therefore presumably so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law …"); *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at pp. 199-200 ("throughout this whole period [of 150 years], the United States consular jurisdiction was in fact based, not on custom or usage, but on treaty rights … [there is] not enough to establish that the States exercising consular jurisdiction in pursuance of treaty rights enjoyed in addition an independent title thereto based on custom or usage"); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 531 (Dissenting Opinion of Judge Jennings) ("… there are obvious difficulties about extracting even a scintilla of relevant 'practice' on these matters from the behaviour of those few States which are not parties to the Charter; and the behaviour of all the rest, and the *opinio juris* which it might otherwise evidence, is surely explained by their being bound by the Charter itself"); *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 479 (Separate Opinion of Judge Abraham) ("such an approach does not demonstrate the existence of an *opinio juris*, that is to say, a belief that there exists an obligation … outside of any conventional obligation"); *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment (ICTY Trial Chamber), 16 November 1998, para. 302. The United States Supreme Court has likewise referred in *The Paquete Habana* case (1900) to a rule of international law existing "independently of any express treaty or other public act": 175 U.S. 677, 708. See also P. Tomka,

By contrast, where States act in conformity with a treaty by which they are not (yet) bound or towards States not parties to the treaty, the existence of 'acceptance as law' may indeed be established.[193] This may also be the case where non-parties to a treaty act in accordance with rules embodied therein, as for example with certain non-parties to the United Nations Convention on the Law of the Sea.[194]

63. Where States "freely have recourse [to a set of different methods] in order to reconcile their national interests", there is usually no indication of "any *opinio juris* based on the awareness of States of the obligatory nature of the practice employed".[195] In other words, "the practice of States does not justify the formulation of any general rule of law" where such States are in a position to select a practice appropriate to their individual circumstances (and have thus not recognized a specific practice as obligatory).[196]

64. Acceptance as law is generally to be sought with respect to the interested States, both those who carry out the practice in question and those in a position to respond to it: "either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'".[197] In the modern reality of multiple multilateral fora such inquiry into what some refer to as "individual *opinio juris*" may be complemented or assisted by a search for

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supra note 24, at 204 ("This will not often be a problem in regard to determining whether the convention codified a pre-existing rule of law, given the extensive preparatory work and opportunities for explicit comments throughout the process of adopting a codification convention, as well as the circumstances of the adoption, which will shed light on this issue").

[193] See, for example, the reference to Venezuelan practice in *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 370 (Dissenting Opinion by Judge ad hoc Caicedo Castilla).

[194] In *Peru v Chile* before the International Court of Justice, the Agent of Peru stated that "Peru accepts and applies the rules of the customary international law of the sea, as reflected in the [Law of the Sea] Convention": *Maritime Dispute (Peru* v. *Chile), CR 2012/34*, p. 43, para. 10 (Wagner).

[195] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 127 (Separate Opinion of Judge Ammoun). Unless, of course, the rule itself permits several courses of action.

[196] *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at p. 131.

[197] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 109 (citation omitted); see also *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 121 (Dissenting Opinion of Judge Chagla) ("There must be an equally clear realization on the other side of an obligation…"); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at pp. 315 (Separate Opinion of Judge Ammoun) ("a practice only contributes to the formation of a customary rule if … both the State which avails itself thereof or seeks to impose it and the State which submits to or undergoes it regard such practice as expressing a legal obligation which neither may evade"); H. Thirlway, *supra* note 38, at 70-71. By contrast, authors have sometimes suggested that it is mainly the *opinio juris* of either group of States which is most important: for the view that the *opinio juris* of the 'receiving' states is most important see, for example, K. Wolfke, *supra* note 6, at 44,47 ("For a typical custom it suffices that the acceptance of the practice as law should be presumed upon all circumstances of the case in question, above all on the attitude, hence conduct, of the accepting states to be bound by the customary rule … It should be added that the requirement of any 'feeling of duty' or 'conviction' on the part of the acting state is even somewhat illogical, since what is legally important is only the reaction of other states to the practice, in particular, whether they consider it as required by law or legally permitted"); I.C. MacGibbon, 'Customary International Law and Acquiescence', *British Yearbook of International Law*, 33 (1957), 115, 126 ("The *opinio juris* is, of course, relevant to the formation of customary rights, but only from the standpoint of the States affected by the exercise of the right in question …").

"coordinated or general *opinio juris*",[198] that is, acceptance of a certain practice as law (or otherwise) by a general consensus of States.[199] Much like the convenience afforded by examining practice undertaken jointly by States, this may make it easier to identify whether the members of the international community are indeed in agreement or are divided as to the binding nature of a certain practice.

65. While the idea that acceptance as law is necessary for the transformation of habitual practice into a legal rule dates back to the ancient world,[200] the Latin phrase *opinio juris sive necessitatis* is of far more recent origin. Literally meaning 'belief (or opinion) of law or of necessity',[201] this "technical name"[202] for the subjective element is usually shortened to "*opinio juris*", a fact that may well have "its own significance. What is generally regarded as required is the existence of an *opinio* as to the law, that the law is, or is becoming, such as to require or authorize a given action".[203]

66. Scholars attempting to expound on the meaning and function of the concept of *opinio juris* have wrestled not only with its linguistic indeterminacy and uncertain

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[198] See, for example, G.M. Danilenko, *supra* note 139, at 102-107.

[199] See also A. Pellet, *supra* note 17, at 819 (citing to several cases when suggesting that "in parallel with practice, [the International Court of Justice] will usually rely on a general opinion, not that of States individually"); E. Jiménez de Aréchaga, *supra* note 179, at 11 ("[The International Court] has searched for the general consensus of States instead of adopting a positivist insistence on strict proof of the consent of the defendant State"); P.B. Casella, 'Contemporary Trends on *Opinio Juris* and the Material Evidence of Customary International Law', 2013 Amado Lecture before the Commission (speaking notes available with the Special Rapporteur) ("*Opinio juris* is no longer to be viewed as individual opinion of one or of certain states, but presently as collective statements, issued by the international community, as a whole, or a substantial part of it); J. Charney, 'Remarks on the Contemporary Role of customary International Law', *ASIL/NVIR Proceedings* (1995), 21 ("Some maintain that individual States must choose to accept the norm as law. But clearly acceptance is required only by the international community and not by every individual State and other international legal persons"). Judge Meron, in his Partly Dissenting Opinion in *Nahimana et al. v. Prosecutor* (ICTR Appeals Chamber), suggests that where a "consensus among states has not crystallized, there is clearly no norm under customary international law" (Case No. ICTR-99-52-A, 28 November 2007, paras. 5-8); see also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 315 (Dissenting Opinion of Judge Schwebel) ("vehement protest and reservation of right, as successive resolutions of the General Assembly show … abort the birth or survival of *opinio juris* to the contrary").

[200] Crawford refers to Isidore of Seville's (c540-636CE) *Etymologiae, Liber V: De Legibus et Temporibus*, ch 3, §§3-4, where it is said that "Custom as law is established by moral habits, which is accepted as law when written law is lacking: it does not make a difference whether it exists in writing or reason, since reason too commits to law … Custom is so called also because it is in common usage" (J. Crawford, *supra* note 37, at 26). For an "intellectual genealogy" of the "extra ingredient" of customary international law see E. Kadens, E.A. Young, 'How Customary Is Customary International Law?', *William & Mary Law Review*, 54 (2013), 885-920.

[201] Thirlway has proposed the following translation "in light of its application in law": "the view (or conviction) that what is involved is (or, perhaps, should be) a requirement of the law, or of necessity" (H. Thirlway, *supra* note 38, at 57).

[202] S. Rosenne, *supra* note 79, at 55.

[203] H. Thirlway, *supra* note 38, at 78. See also L. Millán Moro, *supra* note 38; R. Huesa Vinaixa, *El Nuevo Alcance de la "Opinio Iuris" en el Derecho Internacional Contemporaneo* (tirant lo blanch, 1991). Some have suggested for *opinio juris* an additional role beyond the one commonly accorded to it with regard to customary international law: see, for example, the Dissenting Opinion of Judge Cançado Trindade in *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 283, para. 290 ("one should not pursue a very restrictive view of *opinio juris*, reducing it to the subjective component of custom and distancing it from the general principles of law").

provenance,[204] but also with long-standing theoretical problems associated with attempting to capture in exact terms the amorphous process by which a pattern of State conduct acquires legal force.[205] In particular, some have debated whether the subjective element does indeed stand for the belief (or opinion) of States, or rather, for their consent (or will).[206] Others have deliberated the *opinio juris* 'paradox', that "vicious cycle argument" which questions how a new rule of customary international law can ever emerge if the relevant practice must be accompanied by a conviction that such practice is already law.[207] Still others have questioned whether States may be capable at all of having a belief,[208] and whether such inner motivation can ever be proved.[209] Several writers have argued that *opinio juris* ought to be

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[204] See, for example, M. Mendelson, *supra* note 124, at 194, 207 ("it is submitted that the linguistic incoherence of the phrase *opinio juris sive necessitatis* reflects a certain incoherence of the thought behind it … for its part, [it] is a phrase of dubious provenance and uncertain meaning").

[205] See also E. Kadens, E.A. Young, *supra* note 200, at 907 ("The central problem of custom concerns the 'extra ingredient' necessary to transform a repetitive practice into a binding norm. And a central lesson of our historical discussion is that this has *always* been the central problem").

[206] As has been noted by scholars, the PCIJ and the ICJ have referred to both notions of will and belief (see, respectively, *The Case of the S.S. "Lotus" (France/Turkey)*, PCIJ, Series A, No. 10, p. 18; *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77). For attempts to reconcile the two approaches see, for example, the *ILA London Statement of Principles*, at 30 ("It is possible to achieve an elision or apparent reconciliation of these two approaches by using such terms as "accepted" or "recognized" as law"); O. Elias, 'The Nature of the Subjective Element in Customary International Law', *International and Comparative Law Quarterly*, 44 (1995), 501-520.

[207] See, for example, H. Kelsen, 'Théorie du droit international coutumier', *Revue internationale de la théorie du droit*, X (1939), 253, 262-5, reproduced in C. Leben, *Hans Kelsen, Ecrits français de droit international* (Presses Universitaires de France, 2001), 61; see also H. Taki, '*Opinio Juris* and the Formation of Customary International Law: A Theoretical Analysis', *German Yearbook of International Law*, 51 (2008), 447, 450. (On some of the proposed solutions to the 'paradox' see T. Maluwa, 'Custom, Authority and Law: Some Jurisprudential Perspectives on the Theory of Customary International Law', *African Journal of International and Comparative Law*, 6 (1994), 387-410; A. Verdross, 'Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts', *ZaöRV*, 29 (1969), 635-653; J. Tasioulas, '*Opinio Juris* and the Genesis of Custom: A Solution to the 'Paradox'', *Australian Yearbook of International Law*, 26 (2007), 199-205; D. Lefkowitz, '(Dis)solving the Chronological Paradox in Customary International Law: A Hartian Approach', *Canadian Journal of Law and Jurisprudence*, 21 (2008), 129-148; A.A. D'Amato, *supra* note 66, at 52-53; B.D. Lepard, *Customary International Law: A New Theory with Practical Implications* (Cambridge University Press, 2010), 112; O.A. Elias, C.L. Lim, *The Paradox of Consensualism in International Law* (Kluwer Law International, 1998), 3-21.

[208] See, for example, A. D'Amato, *supra* note 83, at 471 ("it is an anthropomorphic fallacy to think that the entities we call states can 'believe' anything; thus, there is no reason to call for any such subjective and wholly indeterminate test of belief when one is attempting to describe how international law works and how its content can be proved"); B. Cheng, 'Custom: The Future of General State Practice In a Divided World', in R.St.J. Macdonald, D.M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (Martinus Nijhoff Publishers, 1983), 513, 530 ("In the first place, there is the question whether states, being legal entities, can 'think', but this is a simple matter of imputability in international law. If states can 'act' and 'commit illegal acts' through their agents, why can they not 'think'? Are theirs all mindless acts? The next question is, can we really establish the thought of man, let alone that of a legal person? This is an old chestnut. In law, one has no difficulty in ascertaining the 'intention of the parties', the 'intention of the legislator,' *mens rea*, 'willfulness,' and a host of other psychological elements everyday. In law, these psychological elements need not correspond to reality. They are simply what, in lawyers' logic, are deductible from what has been said or done").

[209] M. Akehurst, *supra* note 84, at 36 ("The traditional view seeks evidence of what States believe; the present author prefers to look for statements of belief by States"); H. Taki, *supra* note 207, at 447 ("it is possible to solve the 'problem of proof' by means of inferring the inner consciousness of the acting individual from some external phenomena (for example observable conduct)"); J.L. Slama, '*Opinio Juris* in Customary

understood as embodying ethical principles and morality,[210] while others deny the relevance of such considerations in this context.[211] These academic debates and others, referred to by one author as "formidable",[212] often reflect deeper controversies on (international) law more broadly.[213] The subjective element of customary international law has, however, "created more difficulties in theory than in practice",[214] and the theoretical torment which may accompany it in the books has rarely impeded its application in practice.[215]

International Law', *Oklahoma City University Law Review*, 15 (1990), 603, 656 ("A state's actions, express statements, consent, acquiescence, protests, or lack of protests, are all objective factors capable of *manifesting opinio juris*").

[210] See, for example, R. Wolfrum, 'Sources of International Law', in *Max Planck Encyclopedia of Public International Law* (2012), para. 25 ("*Opinio iuris*, the belief that a certain conduct is required or permitted under international law, is in fact a conviction that such conduct is just, fair, or reasonable and for that reason is required under law").

[211] See, for example, K. Skubiszewski, *supra* note 84, at 838 ("The assertions of a right by one State or States, the toleration or admission by others that the former are entitled to that right, the submission to the obligation – these are phenomena that are evidence of the States' opinion that they have moved from the sphere of facts into the realm of law. For rights and duties here have a strictly and exclusively *legal* connotation, and not moral, ethical, or one dictated by courtesy or convenience"); M. Akehurst, *supra* note 84, at 37 ("A statement that something is morally obligatory may help to create rules of international morality; it cannot help to create rules of international law").

[212] I.C. MacGibbon, *supra* note 197, at 125.

[213] See also M. Mendelson, *supra* note 124, at 177 ("One reason why the controversies have continued for so long without resolution is that the holders of different theories are able to find in the phenomenon what they want to see, thereby strengthening their pre-conceptions"); K. Wolfke, *supra* note 6, at 44 ("the differences of opinion on this subjective element of custom are closely combined with endless disputes on what is international law in general and on the so-called 'basis of binding force' of that law"); J. Klabbers, *supra* note 128, ay 180 ("More importantly perhaps, the very idea of customary law provokes all sorts of debates not just because of the practical relevance combined with the inherent indeterminacy of the notion, but also because of its acute political relevance. It is through the sources of international law (and custom still ranks as one of the two main sources of that particular legal order) that political values are being distributed, which renders sources doctrine in general highly volatile … Small wonder then that sources doctrine continues to provoke debate, and small wonder then that most of the debate tends to be methodological in nature"); D.P. Fidler, *supra* note 168, at 199 ("the problems associated with CIL ultimately stem from competing perspectives on international relations"). Many of the difficulties and debates owe to a temporal analysis of the subjective element, that is, of its role in a rule's early formative stage as opposed to later emergence and identification: see also A. Orakhelashvili, *supra* note 191, at 80-84. Cheng's observation is most relevant here: "contrary to a rather prevalent view, *opinio juris* is not necessarily the recognition of the binding character of a pre-existing rule in which case the question arises as to the origin of the pre-existing rule itself. In a horizontal legal system like international law, where the subjects are also the law-makers, *opinio juris* is simply what the subject/law-maker at any given moment accepts as law, as general law…": B. Cheng, 'On the Nature and Sources of International Law', in B. Cheng (ed.), *International Law: Teaching and Practice* (Stevens & Sons, 1988), 203, 223.

[214] H.W. Briggs, *supra* note 174, at 730 (adding that "Theoretical difficulties involved in the determination of these elements [required for the establishment of a rule of customary international law] or of the methods and procedures by which customary rules of international law are created or evolve from non-obligatory practice often receive more attention than the fact that in a given case courts have relatively little difficulty in determining whether or not an applicable rule of customary international law exists" (at 729)). See also *ILA London Statement of Principles*, at 30 ("… in the real world of diplomacy the matter [of the subjective element in customary international law] may be less problematic than in the groves of Academe"); S. Yee, 'The News that *Opinio Juris* "Is Not a Necessary Element of Customary [International] Law" Is Greatly Exaggerated', *German Yearbook of International Law*, 43 (2000), 227, 230 ("The idea of *opinio juris* remains the chief culprit in creating confusion among scholars and practitioners of international law in general, but this is probably more so among legal theorists"); C. De Visscher, *supra* note 166, at 149

67. The International Court has used a range of different expressions to refer to the subjective element imported by the words "accepted as law" in its Statute. These include a "feeling of legal obligation";[216] "a belief that [the] practice is rendered obligatory by the existence of a rule of law requiring it … [a] sense of legal duty";[217] a "recognition of necessity";[218] a "conviction of necessity";[219] "a belief in the respect due to this long-established practice";[220] "a deliberate intention … a common awareness reflecting the conviction… as to [a] right";[221] "the general feeling… regarding the obligatory character of [the practice]";[222] an "actual consciousness of submitting [] to a legal obligation" or a "consciousness of the binding nature of the rule";[223] "a conviction that they [the parties] are applying the law";[224] and "a conviction, a conviction of law, in the minds of [States], to the effect that they have… accepted the practice as a rule of law, the application whereof they will not thereafter be able to evade".[225] Other courts and tribunals, as well as States, have likewise drawn upon a rich fund of vocabulary in referring to this 'psychological'/ 'qualitative'/ 'immaterial'/ 'attitudinal' requirement of customary international law.[226] In general, however, all such references appear to express a

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(footnote 29) ("… proving the existence of the psychological element of custom does not present the insurmountable difficulties sometimes alleged"); E. Jiménez de Aréchaga, *supra* note 179, at 24 (referring to the argument that obtaining evidence of the existence of *opinio juris* in concrete cases is difficult when saying that "This difficulty may be somewhat exaggerated"); H.W.A. Thirlway, *supra* note 81, at 47 ("The precise definition of the *opinio juris*, the psychological element in the formation of custom, the philosopher's stone which transmutes the inert mass of accumulated usage into the gold of binding legal rules, has probably caused more academic controversy than all the actual contested claims made by States of the basis of alleged custom, put together"); I. Brownlie, *supra* note 121, at 21 ("in practice the question of proof does not present as much difficulty as the writers have anticipated"); *Restatement (Third) of the Foreign Relations Law of the United States* (1987), §102, reporter's note 2 ("Most troublesome conceptually has been the circularity in the suggestion that law is built by practice based on a sense of legal obligation … Such conceptual difficulties, however, have not prevented acceptance of customary law essentially as here defined").

[215] For the argument that pure theorizing, for example about what requirements customary international law should or could have, does not change the law, see J. Kammerhofer, 'Law-making by Scholars', in Y. Radi, C. Brölmann (eds.), *Research Handbook on the Theory and Practice of International Law-Making* (Edward Elgar, forthcoming).

[216] *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 286.

[217] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77.

[218] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 60 (Separate Opinion of Judge Wellington Koo).

[219] *Ibid.*, at p. 121 (Dissenting Opinion of Judge Chagla).

[220] *Ibid.*, at p. 82 (Dissenting Opinion of Judge Armand-Ugon).

[221] *Ibid*.

[222] *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 370 (Dissenting Opinion by Judge ad hoc Caicedo Castilla).

[223] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 104, 130 (Separate Opinion of Judge Ammoun).

[224] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 90 (Dissenting Opinion of Judge Moreno Quitana).

[225] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 306 (Separate Opinion of Judge Ammoun).

[226] See, for example, *United Parcel Service of America Inc v. Government of Canada* (UNCITRAL, Award, 22 November 2002), para. 97 ("a sense of obligation"); Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia, Criminal Case No. 002/19-09-2007-EEEC/OICJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, para.

common meaning: acceptance by States that their conduct or the conduct of others is in accordance with customary international law. "Belief, acquiescence, tacit recognition, consent have one thing in common – they all express subjective attitude of states either to their own behaviour or to the behaviour of other states in the light of international law".[227]

68. The so-called "subjective element" constitutive of customary international law thus refers to the requirement that the practice in question has "occurred in such a way as to show a general recognition that a rule of [customary international] law or legal obligation is involved".[228] While the term *opinio juris* has undoubtedly become established in referring to this element,[229] it is suggested that 'accepted as law' may be the better term.[230] The International Court, reflecting the language of its Statute, has employed this language in the *Right of Passage* case, one of the first cases in which the Court elaborated on the methodology for ascertaining customary international law, when concluding that "in view of all the circumstances of the case, [it was] satisfied that that practice was accepted as law".[231] Use of this term

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53 ("…*opinio juris*, meaning that what States do and say represents the law"). See also *Secretariat memorandum*, at 17, 18 ("The Commission has often characterized the subjective element as a sense among States of the existence or non-existence of an obligatory rule … In certain instances, the Commission has referred to the subjective element by employing different terminology…" (citations omitted)).

[227] R. Müllerson, *supra* note 85, at 163. See also H. Waldock, 'General Course on Public International Law', 106 *Recueil des Cours* (1962), 49 ("… the ultimate test [in ascertaining a rule of customary international law] must always be: 'is the practice accepted as law?' This is especially true in the international community, where those who participate in the formation of a custom are sovereign States who are the decision-makers, the law-makers within the community. Their recognition of the practice as law is in a very direct way the essential basis of customary law").

[228] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 74. See also K. Wolfke, *supra* note 6, at 44 ("such practice must give sufficient foundation for at least the presumption that the states concerned have accepted it as legally binding").

[229] "[P]erhaps regrettably" so, writes Crawford: J. Crawford, *supra* note 37, at 25; Wolfke refers to the Latin term as "still widely applied, but misleading", explaining that "[m]isunderstandings arise because this term, having a definite meaning in the history of legal theory, is applied by contemporary authors and, as has been seen, even by the [International] Court, with different connotations or shades of meaning": K. Wolfke, *supra* note 6, at 45-46. But see R. Müllerson, *supra* note 85, at 164 ("Depending on a context we may speak of will, consent, consensus, belief, acquiescence, protest, estoppel, or maybe even something else. However, as the term *opinio juris* is so well entrenched in international legal practice and literature, it would hardly be wise to try to get rid of it").

[230] See also I.C. MacGibbon, *supra* note 197, at 129 ("[As compared with the term '*opinio juris*',] [t]he phrase 'accepted as law', however, may admit of interpretation in senses which more accurately reflect the actual processes of evolution from practice or usage to custom, whether viewed from the standpoint of the exercise of rights or that of the performance of obligations"); C. Santulli, *supra* note 37, at 50 ("Le statut de la Cour internationale de Justice considère en son article 38 que la coutume est une pratique "acceptée". Ainsi le statut rompt-il avec une tradition qui aimait présenter *l'opinio iuris sive necessitatis* comme la "conscience" d'obéir à une règle de droit"); A. Pellet, *supra* note 17, at 819 (referring to the *travaux préparatoires* of Article 38.1(b) and to the practice of the Court when suggesting that "'acceptation' is not necessarily restricted to the will of the States but to an 'acceptance', which can be interpreted less strictly"); K. Skubiszewski, *supra* note 84, at 839-840.

[231] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 40 ("This practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation").

from the Statute goes a large way towards overcoming the *opinio juris* 'paradox' referred to above.

69. The following draft conclusion is proposed:

Draft Conclusion 10

Role of acceptance as law

1. The requirement, as an element of customary international law, that the general practice be accepted as law means that the practice in question must be accompanied by a sense of legal obligation.

2. Acceptance as law is what distinguishes a rule of customary international law from mere habit or usage.

70. *Evidencing 'acceptance as law'*. The motivation behind a certain practice must be discernible in order to identify a rule of customary international law: "[o]nly by objectifying the concept of *opinio* can it have a practical impact on the difficult task of differentiating 'legal' custom from nonlegal 'usage'".[232] In practice, acceptance as law has indeed been indicated by or inferred from a variety of relevant conduct undertaken by States. Some practice may thus in itself be evidence of *opinio juris*, or, in other words, be relevant both in establishing the necessary practice and its 'acceptance as law'.[233] In that sense, "[w]hatever states do … is state practice which has two facets or aspects to it: a visible, observable behaviour of states (or other

[232] J.L. Slama, *supra* note 209, at 656. See also M.E. Villiger, *supra* note 84, at 48.

[233] See also *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at 299 ("[the] presence [of customary rules] in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas"); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 305 (Separate Opinion of Judge Petrén) ("The conduct of these States [that have conducted nuclear atmospheric tests] proves that their Governments have not been of the opinion that customary international law forbade atmospheric nuclear tests"); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 147 (Dissenting Opinion of Judge ad hoc Van den Wyngaert); E. Jiménez de Aréchaga, *supra* note 179, at 24 ("A large amount of what is described as the material element of State practice contains in itself an implicit subjective element, an indication of *opinio juris*"); M. Bos, *supra* note 144, at 30 ("In general, it may be said that anything within the bracket of State practice may serve as evidence of [] 'general practice *accepted as law*'"); J. Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge, 2010), 63 ("In one sense, all that states do or omit to do can be classified as 'state practice', because their behaviour is what they do. State behaviour in a wider sense, however, is also our only guide to what they want or believe to be the law"); M. Koskenniemi, 'Theory: Implications for the Practitioner', in *Theory and International Law: An Introduction* (The British Institute of International and Comparative Law, 1991), 3, 15 ("In legal practice, there exists no way to ascertain the presence or absence of the subjective element which would be separate from the ascertainment of the existence of consistent conforming behaviour"); B. Conforti, B. Labella, *supra* note 52, at 32 ("The subjective element … ties together all the many different types of State conduct"); K. Zemanek, *supra* note 77, at 292-293 ("separating material recording 'State practice' from material recording *opinio juris*, though theoretically perhaps desirable, is practically impossible because the first may, through its language, evidence the second"); H. Thirlway, *supra* note 38, at 58, 62, 70 ("Since the *opinio juris* is a state of mind, there is an evident difficulty in attributing it to an entity such as a State; and it is thus to be deduced from the State's pronouncements and actions, particularly the actions alleged to constitute the 'practice' element of the custom").

subjects of international law) and their subjective attitude to this behaviour which may be implicitly present in the very act or behaviour or which may be conveyed to other states through different acts of behaviour constituting, in turn, state practice of a different kind".[234] In any case, it is important that the court or tribunal should nevertheless in fact have separately identified the two elements.

71. How to determine the evidence of 'acceptance as law' may depend on the nature of the rule and the circumstances in which the rule falls to be applied. There may, for example be a distinction to be drawn between cases involving the assertion of a legal right and those acknowledging a legal obligation, and between cases where the practice concerned consists of conduct 'on the ground' as opposed to verbal practice.

72. Mere adherence to an alleged rule does not generally suffice as evidence of *opinio juris*: "such usage does not necessarily prove that actors see themselves as subject to a legal obligation".[235] In the words of the International Court, "acting, or agreeing to act in a certain way, does not itself demonstrate anything of a juridical nature".[236]

73. Similarly, although some have suggested that a large number of concordant acts,[237] or the fact that such cases have been occurring over a considerable period of

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[234] R. Müllerson, *supra* note 84, at 344. The International Court has also referred to, for example, "a practice illustrative of belief" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14 at p. 108, para. 206). But see M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005), 388 ("we cannot automatically infer anything about State wills or beliefs — the presence or absence of custom — by looking at the State's external behaviour. The normative sense of behaviour can be determined only once we first know the 'internal aspect' — that is, how the State itself understands its conduct … doctrine about customary law is indeterminate because circular. It assumes behaviour to be evidence of the *opinio juris* and the latter to be evidence of which behaviour is relevant as custom").

[235] A.M. Weisburd, *supra* note 67, at 9. See also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 423-424 (Dissenting Opinion of Judge Shahabuddeen) ("It is also important to have in mind that bare proof of acts or omissions allegedly constituting State practice does not remove the need to interpret such acts or omissions. The fact that States may feel that realities leave them no choice but to do what they do does not suffice to exclude what they do from being classified as part of State practice, provided, however, that what they do is done in the belief that they were acting out of a sense of legal obligation").

[236] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 76.

[237] See, for example, *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 336 (Dissenting Opinion by Judge Azevedo) ("concordant cases, by their number, would clearly reveal an *opinio juris*"); Portugal's contention in the *Right of Passage* that "it would be impossible to contend that unanimity and uniformity [of practice of States] do not bear witness to a conviction of the existence of a legal duty (*opinio juris sive necessisatis*)" (*Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 11); H. Lauterpacht, *The Development of International Law by the International Court* (Stevens, 1958), 380 ("Unless judicial activity is to result in reducing the legal significance of the most potent source of rules of international law, namely, the conduct of States, it would appear that the accurate principle on the subject consists in regarding all uniform conduct of Governments (or, in appropriate cases, abstention therefrom) as evidencing the *opinio necessitatis juris* except when it is shown that the conduct in question was not accompanied by any such intention"), quoted with concurrence in *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 246-247 (Dissenting Opinion of Judge Sørensen).

time,[238] may suffice to establish the existence of *opinio juris*, this is not so. While these facts may indeed *give rise to* the acceptance of the practice as law,[239] they do not embody such acceptance in and of themselves. As the International Court had observed, "even if these instances of action … were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris* … The frequency, or even habitual character of the acts is not in itself enough".[240]

74. 'Acceptance as law' should thus generally not be evidenced by the very practice alleged to be prescribed by customary international law. This provides, moreover, that the same conduct should not serve in a particular case as evidence of both practice and acceptance of that practice as law.[241] Applying this rule to 'non-actual' practice may also serve to guarantee that abstract statements could not, by themselves, create law.[242]

75. *Manifestations of 'acceptance as law'*. "[T]he task of ascertaining the *opinio*, although difficult, is feasible (and is considerably alleviated in the framework of the modern drafting process)".[243] An express statement by a State that a given rule is obligatory *qua* customary international law, for a start, provides "the clearest proof"

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[238] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 83 (Dissenting Opinion of Judge Armand-Ugon) ("A fact observed over a long period of years … acquires binding force and assumes the character of a rule of law").

[239] See, for example, *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 40 ("This practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the parties and has given rise to a right and a correlative obligation"); and p. 82 (Dissenting Opinion of Judge Armand-Ugon) ("The continual repetition of an act over a long period does not weaken this usage; on the contrary, it strengthens it; a relationship develops between the act and the will of the States which have authorized it. The recurrence of these acts over so long a period engenders, both in the State which performs them and in the State which suffers them, a belief in the respect due to this long-established practice (Article 38(I)(b) of the Statute of the Court)").

[240] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77. See also *The Case of the S.S. "Lotus" (France/Turkey)*, PCIJ, Series A, No. 10, p. 28; Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia, Criminal, Case No. 002/19-09-2007-EEEC/OICJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, para. 53 ("A wealth of State practice does not usually carry with it a presumption that *opinio juris* exists").

[241] See also M.H. Mendelson, *supra* note 71, at 206-207 ("What must, however, be avoided is counting the same act as an instance of both the subjective and the objective element. If one adheres to the 'mainstream' view that it is necessary for both elements to be present, and in particular for the subjective element to be accompanied by 'real' practice, this must necessarily preclude treating a statement as both an act and a manifestation of belief (or will)"); M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press, 1999) 136-141.

[242] See also M.E. Villiger, *supra* note 84, at 19 ("Since such fears [that one body, or conference, could 'make' law through abstract statements of State representatives] are justified, we may first attempt a synthesis of views, proceeding from Judge Read's argument that 'claims may be important as starting points'. Clearly, the conditions for the formation of customary law are such that one instance of practice, or a few instances in one occasion, cannot create law. Rather, a qualified series of instances is required, and statements at a conference would lose any value if they were not followed by uniform and consistent practice. Equally clearly however, these conditions serve as adequate safeguards, and the fear of instant customary law hardly warrants attaching further conditions to the single instances of practice" (citations omitted)).

[243] M.E. Villiger, *supra* note 84, at 50.

that it "believes itself bound by, or that from now on it will adhere to, [that] certain principle or rule".[244] Conversely, when a State says that something is not a rule of customary international law, that is evidence of the absence of an *opinio juris*. Such assertions by States of rights or obligations under (customary) international law (or lack thereof) could, *inter alia*, take the form of an official statement by a government or a minister of that government,[245] claims and legal briefs before court and tribunals, transmittal statements by which governments introduce draft legislation in parliament,[246] a joint declaration of States through an official document, or statements made in multilateral conferences such as codification conventions or debates in the United Nations.[247] Diplomatic protests, in particular, "may, and frequently do, indicate the view of the law on the matters in questions entertained by the protesting States: to this extent they may afford evidence of the acceptance of a practice as law".[248]

76. Evidence of 'acceptance as law' (or lack thereof) may also be found in a wide range of other practice,[249] depending on the particular case and considering that

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[244] L.B. Sohn, *supra* note 179, at 235; see also, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at pp. 122-123, para. 55; M.E. Villiger, *supra* note 84, at 50 ("the *express statement* of a State that a given rule is obligatory (or customary, or codificatory), furnishes the clearest evidence as to the State's legal conviction").

[245] See, for example, *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 367 (Dissenting Opinion by Judge ad hoc Caicedo Castilla); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at pp. 74-75 (Separate Opinion of Judge Ammoun); *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (ICTY Appeals Chamber), 2 October 1995, paras. 100, 105, 113-114, 120-122.

[246] See also *Mondev International Ltd v. United States of America* (ICSID, Award, 11 October 2002), para. 111 ("Whether or not explanations given by a signatory government to its own legislature in the course of ratification or implementation of a treaty can constitute part of the *travaux preparatoires* of the treaty for purposes of its interpretation, they can certainly shed light on the purposes and approaches taken to the treaty, and thus can evidence *opinio juris*").

[247] See, for example, *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951*, p.15, at p. 26; *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 48 (Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda) ("On a subject where practice is contradictory and lacks precision, is it possible and reasonable to discard entirely as irrelevant the evidence of what States are prepared to claim and to acquiesce in, as gathered from the positions taken by them in view of or in preparation for a conference for the codification and progressive development of the law on the subject? ... The least that can be said ... is that such declarations and statements and the written proposals submitted by representatives of States are of significance to determine the views of those States as to the law or fisheries jurisdiction and their *opinio iuris* on a subject regulated by customary international law"); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at p. 329 (Separate Opinion of Judge Tomka); E. Jiménez de Aréchaga, *supra* note 179, at 14, 24 ("the deliberations in a plenipotentiary conference itself, even before and independently of the adoption of a convention, may themselves result in the emergence of a consensus of States which, followed by their actual practice, crystallizes in a customary rule … The express or implicit indications of *opinio juris* are particularly significant and frequent when a State participates in the process of a codification and progressive development of international law under United Nations auspices").

[248] I.C. MacGibbon, *supra* note 197, at 124.

[249] See also *Secretariat memorandum*, at 21-22 ("The Commission has relied upon a variety of materials in assessing the subjective element for the purpose of identifying a rule of customary international law");

"[f]or a typical custom it suffices that the acceptance of the practice as law should be presumed upon all circumstances of the case in question, above all on the attitude, hence conduct, of the accepting states to be bound by the customary rule".[250] As was the case with practice (see paragraph 41 above), the following list is non-exhaustive: it is intended to suggest the kind of materials where the subjective element may be found:

(a) Intergovernmental (diplomatic) correspondence,[251] such as a memorandum from a diplomatic mission to the Minister of Foreign Affairs of the State to which it is accredited,[252] or notes exchanged between governments. Here the language used needs to be carefully analysed in context to determine whether the State is expressing an opinion as to the existence of a legal rule.

(b) The jurisprudence of national courts[253] clearly embodies a sense of legal obligation. Care must be taken, however, as it "may be difficult to tell … whether this sense of legal obligation derives from international law, from domestic law, or from domestic auto-interpretation of international law".[254] Only when such judgments apply the rule in question in a way which demonstrates, mostly by way of its reasoning, that it is accepted as required under customary international law, could they be relevant as evidence of 'acceptance as law'.

(c) The opinions of government legal advisers when they say that something is or is not in accordance with customary international law,[255] and such opinion has been adopted by the government as legally mandated.[256]

Restatement (Third) of the Foreign Relations Law of the United States (1987), §102, comment (c) ("Explicit evidence of a sense of legal obligation (*e.g.*, by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions").

[250] K. Wolfke, *supra* note 6, at 44.

[251] See, for example, *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at pp. 135-136; *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 42.

[252] See, for example, *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 371 (Dissenting Opinion by Judge ad hoc Caicedo Castilla).

[253] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 135, para. 77 (where the subjective element was "demonstrated by the positions taken by States and the jurisprudence of a number of national courts which have made clear that they considered that customary international law required immunity"); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 76 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal); Special Tribunal for Lebanon, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Appeals Chamber), 16 February 2011, para. 100.

[254] P.M. Moremen, *supra* note 112, at 274; see also *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at pp. 171-172 (Dissenting Opinion of Judge ad hoc Van den Wyngaert) ("And even where national law requires the presence of the offender, this is not necessarily the expression of an *opinio juris* to the effect that this is a requirement under international law. National decisions should be read with much caution"). Mr. Hmoud highlighted this point as well in his intervention last year, saying that "[n]ational judicial decisions are an important source of material but they have to be well scrutinized as *national* courts usually implement the internal legal processes of the state involved and are not necessarily experienced or well-resourced to identify the rules of customary international law" (3183rd meeting, 19 July 2013).

[255] See, for example, *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgment (ICTY Appeals Chamber), 30 November 2006, para. 89.

(d) Official publications in fields of international law, such as military manuals or instructions to diplomats.

(e) Internal memoranda by State officials, such as instructions of a Ministry of Foreign Affairs to its diplomats.[257]

(f) Treaties (and their *travaux préparatoires*) may potentially demonstrate the existence of 'acceptance as law' as well,[258] given that "[c]onventions continue to be a very important form for the expression of the juridical conscience of peoples".[259] For present purposes, such juridical consciousness (with regard to the convention as a whole or certain provisions therein) must exist *outside the treaty*, not just within: for a treaty to serve as evidence of *opinio juris*, States (and international organizations), whether parties or not, must be shown to regard the rule(s) enumerated in the treaty as binding on them as rules of law regardless of the treaty.[260] This may well be the case when a treaty purports to be *declaratory* of customary international law, explicitly or implicitly:[261] then "the treaty is clear

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[256] Indeed, it ought to be remembered that such opinions do not necessarily become those of the government, and that at times, as the Commission has previously considered, "the efforts of legal advisers are necessarily directed to the implementation of policy" (*Yearbook of the International Law Commission, 1950*, vol. II, p. 372, where it was added that "[n]or would a reproduction of such opinions be of much value unless it were accompanied by an adequate analysis of the history leading up to the occasion with reference to which they were given").

[257] See, for example, *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 372 (Dissenting Opinion by Judge ad hoc Caicedo Castilla)

[258] See also *Camuzzi International S.A. v. The Argentine Republic* (ICSID, Decision on Objections to Jurisdiction, 11 May 2005), para. 144 ("there is no obstacle in international law to the expression of the will of States through treaties being at the same time an expression of practice and of the *opinio juris* necessary for the birth of a customary rule if the conditions for it are met"); *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at pp. 369-370 (Dissenting Opinion by Judge ad hoc Caicedo Castilla) ("… this article in the Bolivarian Agreement has a special meaning as regards custom in matters of asylum, namely, that it demonstrates the existence in both Columbia and Peru of one of the elements which are necessary for the existence of a custom – the psychological element, the *opinio juris sive necessitatis*. The Bolivarian Agreement recognizes asylum, recognizes the value of the principles applied in America; hence it includes these principles as binding. Consequently, their acceptance by governments or by one individual government implies their acceptance by that government as 'being the law', that is to say, that they are the applicable law. This is a matter of the utmost importance, since the psychological element of custom, which is always so difficult to prove, is here entirely proved"); *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, Judgment (Special Court for Sierra Leone Appeals Chamber), 28 May 2008, para. 403; *Derecho, René Jesús s/incidente de prescripción de la acción penal* (Argentinian Supreme Court), causa N° 24.079C, 11 July 2007, para. III-A (of the State Attorney-General's brief); Appeal Judgment of the Extraordinary Chambers in the Courts of Cambodia (Supreme Court Chamber), Case number 001/18-07-2007-ECCC/SC, 3 February 2012, para. 94.

[259] *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at p. 148 (Individual Opinion of Judge Alvarez). See also A.T. Guzman, T.L. Meyer, 'Customary International Law in the 21st Century', in R.A. Miller, R.M. Bratpies, *Progress in International Law* (Martinus Nijhoff Publishers, 2008), 207 ("looking to treaties as evidence of CIL can remain a valuable practice… because treaties can send credible signals as to what rules states believe to be binding on non-parties").

[260] Bearing in mind that, as Weisburd asserts, "it does not follow that conclusion of a treaty necessarily implies *opinio juris*, that is, that the parties believe that the treaty's provisions would legally bind them outside the treaty" (A.M. Weisburd, *supra* note 67, at 24). Of course, treaties may serve as evidence of customary international law or contribute to the formation thereof not only with regard to rules enshrined in them, but also with regard to the customary law of treaties.

[261] As Baxter explains, "The declaratory treaty is most readily identified as such by an express statement to that effect, normally in the preamble of the instrument, but its character may also be ascertained from

evidence of the will of States [parties to the treaty], free of the ambiguities and inconsistencies characteristic of the patchwork of evidence of State practice that is normally employed in proving the state of international law".[262] In other words, when States accept (within the treaty or in the negotiations leading up to it or upon or after its adoption) that the treaty or certain provisions in it are declaratory of existing customary international law, this may serve as clear evidence of 'acceptance as law'.[263] Still, "the evidence of the practice of the parties consolidated in the treaty must be weighed in the balance with all other [consistent and inconsistent] evidence of customary international law according to the normal procedure employed in the proof of customary international law", in particular "past practice or declarations of the asserting State[s]".[264] Whether the States concerned have indeed signed and/or ratified the treaty, and the ability of parties to make reservations to articles of the treaty, may also be relevant in assessing the existence of *opinio juris*,[265] yet these considerations do not necessarily signal a lack of it given

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preparatory work for the treaty and its drafting history": R.R. Baxter, *supra* note 191, at 56. See also K. Wolfke, *supra* note 119, at 36 ("if a treaty contains an express, or even an indirect, recognition, of an already existing customary rule, such recognition constitutes additional evidence of the customary rule in question"). Weisburd correctly explains that "Even when this type of statement [that the treaty is declarative of custom] is an inaccurate description of the state of the law as of the date of the treaty's conclusion, it amounts to an explicit acknowledgment by the parties to the treaty that they would be legally bound to the treaty's rules even if the treaty did not exist": A.M. Weisburd, *supra* note 67, at 23. Importantly, however, "complex considerations … have to be taken into account in determining whether, and if so to what extent, a new rule embodied in a codification convention may be regarded as expressive of an existing or emerging norm of customary law. Any such rule has to be analyzed in its context and in the light of the circumstances surrounding its adoption. It also has to be viewed against the background of what may be a rapidly developing State practice in the sense of the new rule" (I. Sinclair, 'The Impact of the Unratified Codification Convention', in A. Bos, H. Siblesz (eds.), *Realism in Law-Making: Essays on International Law In Honour of Willem Riphagen* (Martinus Nijhoff Publishers, 1986), 211, 220).

[262] R.R. Baxter, *supra* note 191, at 36.

[263] See also A.M. Weisburd, *supra* note 67, at 25 ("a treaty is not evidence of *opinio juris* if the parties expressly deny in the treaty text and *opinio juris* as to the legal status of the treaty's rules outside the instrument [i.e. the treaties declare themselves as entered into by the parties purely as an act of grace]. The issue is one of the parties' beliefs. But if belief is the key issue, it would seem to follow that a treaty may deny *opinio juris* even without an express statement to that effect if the treaty contains other evidence demonstrating that the parties would not see the treaty's rules as binding but for the treaty. This is not to say that such treaties are not binding as treaties, or to say that such denials of *opinio juris* in the treaty would preclude the emergence of a customary rule on the subject outside the treaty. It is only to say that one cannot consider such a treaty itself to be evidence of the customary law status of the rules it establishes").

[264] R.R. Baxter, *supra* note 191, at 43, 44. See also G.M. Danilenko, *supra* note 139, at 154 ("it should be emphasized that codifying conventions, even those which expressly state that they embody existing customary law, can never be considered as conclusive evidence of customary law"). As the Court opined in a different context, "… in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice": *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 98, para 184.

[265] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 38-39, para. 63, and p. 42, para. 72; and see p. 130 (Separate Opinion of Judge Ammoun) ("the power to subject the implementation of … [a treaty provision] implies the absence, in the minds of the signatories to the Convention, of the *opinio juris sive necessitatis*. The latter requires consciousness of the binding nature of the rule, and it is self-evident that a rule cannot be felt to be binding when the right not to apply it is reserved"). See also *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 305

that custom and treaty may co-exist independently of one another.[266] In any case, "[w]hether a treaty rule is good evidence of *opinio juris* for purposes of customary law is essentially a question of fact. One has to look at the statements, claims, and State conduct …"[267] in order to determine it. Another issue is whether the repetition of a similar or identical provisions in a large number of bilateral treaties, may be of evidence of 'acceptance as law'. Here too, the provision (and the treaty in which it is incorporated) would need to be analyzed in their context and in the light of the circumstances surrounding their adoption. This is particularly so as "[t]he multiplicity of … treaties … is as it were a double-edged weapon":[268] "the concordance of even a considerable number of treaties *per se* constitutes neither sufficient evidence not even a sufficient presumption that the international community as a whole considers such treaties as evidence of general customary law. On the contrary, there are quite a few cases where such treaties appear to be evidence of exceptions from general regulations".[269]

(Separate Opinion of Judge Petrén) (observing that by a treaty which allows for denunciation the signatories "show[] that they [are] still of the opinion that customary international law [does] not prohibit [the obligation enumerated in the treaty]"); *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Judgment (ICTR Appeals Chamber), 28 November 2007 (Partly Dissenting Opinion of Judge Meron), para. 5 ("The number and extent of the reservations reveal that profound disagreement persists in the international community as to whether mere hate speech is or should be prohibited, indicating that Article 4 of the CERD and Article 20 of the ICCPR do not reflect a settled principle. Since a consensus among states has not crystallized, there is clearly no norm under customary international law criminalizing mere hate speech"); *Diplomatic Immunity of Domestic Servants Case* (Austrian Supreme Court), OGH 6 Ob 94/71, judgment of 28 April 1971, SZ 1971 No. 44/56, 204.

[266] With regard to reservations (and, similarly, denunciation) see also R.R. Baxter, *supra* note 191, at 47-53; *ILA London Statement of Principles*, at 44 ("[Conclusion] 22. The fact that a treaty permits reservations to all or certain of its provisions does not of itself create a presumption that those provisions are not declaratory of existing customary law"); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 197-198 (Dissenting Opinion of Judge Morelli). On ratifying (on not) codification conventions as evidence of acceptance as law see, for example, I. Sinclair, *supra* note 261, at 227 ("it is fair to say that even sparsely ratified codification conventions may well be looked upon, in general, as providing some evidence of *opinio juris* on the subject-matter involved. The *quality* of the evidence will depend on the provenance of the particular provision which may be in issue. If the *travaux préparatoires* of a specific codification convention demonstrate that a particular provision was adopted at the codification conference on a sharply divided vote, and that the controversy thus engendered may have led a number of States to refuse to participate in the convention, there is clearly a strong case for discounting the value of that provision in the context of later codification efforts").

[267] O. Schachter, *supra* note 191, at 735.

[268] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 306 (Separate Opinion of Judge Ammoun).

[269] K. Wolfke, *supra* note 119, at 35. See also *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 ("The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary."); J.L. Kunz, *supra* note 56, at 668 ("Treaties may, under different circumstances, be evidence for the fulfillment of both conditions, and, under other circumstances, evidence against it"); K. Wolfke, *supra* note 93, at 9-10; H. Thirlway, *supra* note 38, at 71; *ILA London Statement of Principles*, at 47-48 ("There is no presumption that a succession of similar treaty provisions gives rise to a new customary rule with the same content").

(g) Resolutions of deliberative organs of international organizations, such as the General Assembly and Security Council of the United Nations, and resolutions of international conferences. *Opinio juris* may be deduced from the attitudes of States vis-à-vis such non-binding texts that purport, explicitly or implicitly, to declare the existing law, as may be expressed by both voting (in favour, against or abstaining) on the resolution, by joining a consensus, or by statements made in connection with the resolution.[270] Such deduction is to be done, however, "with all due caution",[271] as States may, in fact, have various motives when consenting to (or disapproving of) the text of a resolution: indeed, "[s]upport for law-declaring resolutions … would have to be appraised in the light of the conditions surrounding

[270] See, for example, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 99-100, 101 ("This *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions … The effect of consent to the text of such resolutions … may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves ... the adoption by States of … [a resolution] affords an indication of their *opinio juris* as to customary international law on the question."); *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (ICTY Appeals Chamber), 2 October 1995, paras. 111, 112; *Libyan American Oil Company (LIAMCO)* v. *Government of the Libyan Arab Republic*, Arbitral Award (1977), 62 ILR, 140, 189 ("… the said Resolutions, if not a unanimous source of law, are evidence of the recent dominant trend of international opinion concerning the sovereign right of States over their natural resources …"); *Texaco Overseas Petroleum Company and California Asiatic Oil Company* v. *The Government of the Libyan Arab Republic*, Arbitral Award 1977), 53 ILR, 389, 491-495; P. Tomka, *supra* note 24, at 210-211; H.W.A. Thirlway, *supra* note 81, at 65 ("It is suggested … that in fact the discussions, and the statements made on behalf of member States in the discussions, will almost always be of greater relevance than the resolution"); A. Pellet, *supra* note 17, at 817, 825 ("In the case of ascertaining a customary rule of general international law … it is suggested that … [resolutions adopted by the organs of international organizations] belong more to the manifestation of the *opinio juris* than to the formation of a practice … in assessing their legal value, the important element is not what *they* say, but what *the States* have had to say about them"); J.E. Alvarez, *supra* note 133, at 260 ("GA resolutions can be an efficient mechanism for finding … *opinio juris*, especially as compared to the annoying tendency of states to omit any discussion of the concept in their bilateral diplomatic discourse"); *Human Rights Council Report of the Working Group on Arbitrary Detention* (24 December 2012), A/HRC/22/44, para. 43. See also the conclusions of the commission of the *Institut de Droit International* on 'The Elaboration of General Multilateral Conventions and of Non-contractual Instruments Having a Normative Function or Objective' with regard to Resolutions of the United Nations General Assembly (1987, available at http://www.idi-iil.org/idiE/resolutionsE/1987_caire_02_en.PDF): "A law-declaring Resolution purports to state an existing rule of law. In particular, it may be a means for the determination or interpretation of international law, it may constitute evidence of international custom, or it may set forth general principles of law" (Conclusion 4); "A Resolution may constitute evidence of customary law or of one of its ingredients (custom-creating practice, *opinio juris*), in particular when that has been the intention of States in adopting the Resolution or when the procedures applied have led to the elaboration of a statement of law" (Conclusion 20); "Evidence [of international custom] supplied by a Resolution is rebuttable" (Conclusion 21). Rosenne has observed that "[t]o establish whether a given State has in fact consented to that resolution, in whole or in part, close examination of all the proceedings in the body which adopted the resolution is needed": S. Rosenne, *supra* note 79, at 112.

[271] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 99, para. 188; and see at p. 182 (Separate Opinion of Judge Ago) ("There are, similarly, doubts which I feel bound to express regarding the idea … that the acceptance of certain resolutions or declarations drawn up in the framework of the United Nations or the Organization of American States, as well as in another context, can be seen as proof conclusive of the existence among the States concerned of a concordant *opinio juris* possessing all the force of a rule of customary international law"). See also Guidelines 3.1.5.3 and 4.4.2 of the Commission's *Guide to Practice on Reservations to Treaties* (2011).

such action. It is far from clear that voting for a law-declaring resolution is in itself conclusive evidence of a belief that the resolution expresses a legal rule".[272] As the International Court had observed with regard to UN General Assembly resolutions, "even if they are not binding, [such resolutions] may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to it normative character".[273] While an investigation into the language and specific circumstances of adopting a given resolution is indeed indispensable, it may be suggested that in general, where "substantial numbers of negative votes and abstentions" by States are to be found, a generally held *opinio juris* as to the normative character of the resolution is missing; in other words, such resolution would "fall short of establishing the existence of an *opinio juris*".[274] Similarly, a resolution adopted unanimously (or by an overwhelming and representative majority) may be evidence of a generally held legal conviction.[275] In addition, where a State not only refrains from voicing any objections to the adoption of a law-declaring resolution but also takes an active part in bringing that about, 'acceptance as law' of its normative content may very well be attributed to it.[276] Finally, "a series of resolutions [containing consistent statements] may show the gradual evolution of the *opinio juris* required for the establishment of a new rule";[277] this too, of course, depends on the particular circumstances.[278]

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[272] O. Schachter, *supra* note 191, at 730. See also S. Rosenne, *supra* note 79, at 112 ("As often as not a vote is an indication of a political desideratum and not a statement of belief that that the law actually requires such a vote or contains any element of *opinio juris sive necessitatis*… or that the resolution is a statement of law"); L. Hannikainen, *supra* note 128, at 138 ("The overwhelming majority of resolutions of international organizations are formally recommendations only. This is well known to States – they may have very different reasons to vote for a resolution. Those reasons may include political expediency and the desire not to be singled out as a dissenter. Even if a resolution employs legal terminology and speaks of all States' obligations, a State's affirmative vote cannot be taken as a definitive proof of *opinio juris*").

[273] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 254-255. See also the synthesized view of the Iran-United States Claims Tribunal in the *Sedco* case (1986): "United Nations General Assembly resolutions are not directly binding upon States and generally are not evidence of customary law. Nevertheless, it is generally accepted that such resolutions in certain specified circumstances may be regarded as evidence of customary international law or can contribute—among other factors—to the creation of such law" (25 ILM 629, 633-634).

[274] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 255, para. 71.

[275] See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 79 (Separate Opinion of Judge Ammoun); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at pp. 235, 236 (Separate Opinion of Judge Al-Khasawneh); J. Barboza, *supra* note 119, at 5 ("The probability of such type of [General Assembly normative resolutions] to serve as a declaration of customary law, or as the basis for the formation of a custom depends, precisely, on the majority behind it. If obtained by unanimity, or by consensus, they represent the international opinion better than multilateral treaties, having a relatively restricted membership").

[276] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 133, para 264.

[277] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 255, para. 70; see also at p. 532 (Dissenting Opinion of Judge Weeramantry) ("The declarations of the world community's principal representative body, the General Assembly, may not themselves make law,

77. *Inaction as evidence of the subjective element.* 'Acceptance as law' may also be established by inaction or abstention, when these represent concurrence or acquiescence in a practice.[279] In Fitzmaurice's words, "[c]learly, absence of

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but when repeated in a stream of resolutions … [they may] provide important reinforcement [to a view of what a rule of customary international law is]"); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 236 (Separate Opinion of Judge Al-Khasawneh) ("[a very large number of resolutions adopted by overwhelming majorities or by consensus repeatedly making the same point] while not binding, nevertheless produce legal effects and indicate a constant record of the international community's *opinio juris*"); *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at p. 292 (Dissenting Opinion of Judge Tanaka) ("Of course, we cannot admit that individual resolutions, declarations, judgments, decisions, etc., have binding force upon the members of the [international] organization. What is required for customary international law is the repetition of the same practice; accordingly, in this case resolutions, declarations, etc., on the same matter in the same, or diverse, organizations must take place repeatedly. Parallel with such repetition, each resolution, declaration, etc., being considered as the manifestation of the collective will of individual participant States, the will of the international community can certainly be formulated more quickly and more accurately as compared with the traditional method of the normative process. This collective, cumulative and organic process of custom-generation can be characterized as the middle way between legislation by convention and the traditional process of custom making, and can be seen to have an important role from the viewpoint of the development of international law. In short, the accumulation of authoritative pronouncements such as resolutions, declarations, decisions, etc., concerning the interpretation of the Charter by the competent organs of the international community can be characterized as evidence of the international custom referred to in Article 38, paragraph 1 (*b*)"); E. Suy, 'Innovation in International Law-Making Processes', in R. St. John Macdonald et al (eds.), *The International Law and Policy of Human Welfare* (Sitjhoff & Noordhoff, 1978), 187, 190 ("[*opinio juris*] may also arise … through the mere repetition of principles in subsequent resolutions to which states give their approval"). But see S. Rosenne, *supra* note 79, at 112 ("There is a tendency today for the agendas of international organs to be excessively repetitive, and the repeated voting is an inert reflex from a policy decision when the issue was first brought up for discussion"). Cf. *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 99 (Separate Opinion of Judge Ammoun) ("The General Assembly has affirmed the legitimacy of that struggle [for liberation from foreign domination] in at least four resolutions … which taken together already constitute a custom"), and p. 121 (Separate Opinion of Judge Dillard) ("even if a particular resolution of the General Assembly is not binding, the cumulative impact of many resolutions when similar in content, voted for by overwhelming majorities and frequently repeated over a period of time may give rise to a general *opinio juris* and thus constitute a norm of customary international law").

[278] See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 254-255, and also at pp. 319-320 (Dissenting Opinion of Judge Schwebel) ("[General Assembly resolutions] adopted by varying majorities, in the teeth of strong, sustained and qualitatively important opposition … consisting as it does of States that bring together much of the world's military and economic power and a significant percentage of its population, more than suffices to deprive the [General Assembly] resolutions in question of legal authority … the repetition of resolutions of the General Assembly in this vein … rather demonstrates what the law is not. When faced with continuing and significant opposition, the repetition of General Assembly resolutions is a mark of ineffectuality in law formation as it is in practical effect"); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at pp. 435-436 (Dissenting Opinion of Judge Barwick) ("[it may be that] resolutions of the United Nations and other expressions of international opinion, however frequent, numerous and emphatic, are insufficient to warrant the view that customary international law now embraces [a certain rule]"). See also S. Rosenne, *supra* note 79, at 112 ("Consensus is a particularly misleading notion, as frequently the formal element of no vote will conceal the many reservation buried away in the records, and it often only means agreement on the words to be used and on their place in the sentence, and absence of agreement, or even disagreement, on their meaning and on the intent of the document as a whole"); *ILA London Statement of Principles*, at 59.

[279] See, for example, *Interpretation of Peace Treaties (second phase), Advisory Opinion: I.C.J. Reports 1950*, p. 221, at p. 242 (Dissenting opinion of Judge Read) ("The fact that no State has adopted this position [that a State party to a dispute may prevent its arbitration by the expedient of refraining from appointing a representative on the Commission] is the strongest confirmation of the international usage or practice in

opposition is relevant only in so far as it implies consent, acquiescence or toleration on the part of the States concerned; but absence of opposition per se will not necessarily or always imply this. It depends on whether the circumstances are such that opposition is called for because the absence of it will cause consent or acquiescence to be presumed. The circumstances are not invariably of this character, particularly for instance where the practice or usage concerned has not been brought to the knowledge of other States, or at all events lacks the notoriety from which such knowledge might be presumed: or again, if the practice or usage concerned takes a form such that it is not reasonably possible for other States to infer what its true character is".[280]

78. Contradictory practice (that is, practice inconsistent with the alleged rule of customary international law) may evidence a lack of 'acceptance as law',[281] just as it may serve to prevent a certain practice from being regarded as settled. On the other hand, the practice that is not in accordance with a rule may be an occasion that reaffirms an *opinio juris*, if the action is justified in terms that support the customary rule.[282]

79. Evidence of 'acceptance as law' by a particular State (or international organization) may be inconsistent; for example, "Governments and national courts in the same State may hold different opinions on the same question, which makes it even more difficult to identify the *opinio juris* in that State".[283] As with practice, such ambivalence might undermine the significance of the *opinio juris* of that State (or intergovernmental organization) in attempting to identify the existence or not of a rule of customary international law.

80. The following draft conclusion is proposed:

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matters of arbitration which is set forth above"); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 232 (Dissenting Opinion of Judge Lachs); *Priebke, Erich s/ solicitud de extradición* (Argentinian Supreme Court), causa No 16.063/94, 2 November 1995, para. 90. See also K. Wolfke, *supra* note 6, at 48 ("toleration of a practice by other states, considering all relevant circumstances, justifies the presumption of its acceptance as law"); J.I. Charney, 'Universal International Law', *American Journal of International Law*, 87 (1993), 529, 536. Judge Hudson wrote of "the failure of other States to challenge that conception [of the State that acted, that practice was required by law] at the time" as one of the elements of customary international law: M.O. Hudson, *supra* note 181, at 609.

[280] G. Fitzmaurice, *supra* note 174, at 33. See also *The Case of the S.S. "Lotus" (France/Turkey)*, PCIJ, Series A, No. 10, p. 28 ("only if such abstentions were based on their [States] being conscious of having a duty to abstain would it be possible to speak of an international custom"); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 42, para. 73 ("That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied: the reasons are speculative, but the facts remain"). Danilenko highlights that "[u]nder existing international law, absence of protest implies acquiescence only if practice affects interests [(direct or indirect)] and rights of an inactive state": G.M. Danilenko, *supra* note 139, at 108.

[281] See, for example, *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 305 (Separate Opinion of Judge Petrén) ("The conduct of these States [that have conducted nuclear atmospheric tests] proves that their Governments have not been of the opinion that customary international law forbade atmospheric nuclear tests").

[282] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 106, 108-109 (paras. 202, 207).

[283] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 171 (Dissenting Opinion of Judge ad hoc Van den Wyngaert).

Draft Conclusion 11

Evidence of acceptance as law

1. Evidence of acceptance of a general practice as law may take a wide range of forms. These may vary according to the nature of the rule and the circumstances in which the rule falls to be applied.

2. The forms of evidence include, but are not limited to, statements by States which indicate what are or are not rules of customary international law, diplomatic correspondence, the jurisprudence of national courts, the opinions of government legal advisers, official publications in fields of international law, treaty practice, and action in connection with resolutions of organs of international organizations and of international conferences.

3. Inaction may also serve as evidence of acceptance as law.

4. The fact that an act (including inaction) by a State establishes practice for the purpose of identifying a rule of customary international law does not preclude the same act from being evidence that the practice in question is accepted as law.

VII. Future programme of work

81. As already announced,[284] the third report, in 2015, will continue the discussion of the two elements of customary international law (‘a general practice’; ‘accepted as law’), and the relationship between them in the light of progress with the topic in 2014. The next report will address in more detail certain particular aspects touched on in the present report, in particular the role of treaties, resolutions of international organizations and conferences, and international organizations generally. The third report will also cover the “persistent objector” rule, and “special” or “regional” customary international law, as well as “bilateral custom”.

82. As was recalled in the first report, at its first and second sessions in 1949 and 1950 the Commission, in accordance with the mandate in article 24 of its Statute, had on its agenda a topic entitled ‘Ways and means of making the evidence of customary international law more readily available’. This led to a series of recommendations, which were adopted by the General Assembly and which are still of importance today.[285]

83. As mentioned above, the dissemination and location of practice (and *opinio juris*) remains an important practical issue in the circumstances of the modern world.[286] It is therefore proposed that the draft conclusions should be supplemented by indications as to where and how to find practice and acceptance as law. This would describe the various places where practice and *opinio juris* may be found, for

[284] A/CN.4/663, *supra* note 1, at para. 102.
[285] See also *Secretariat memorandum*, at paras. 9-11; A/CN.4/663, *supra* note 1, at para. 9.
[286] See, for example, S. Rosenne, *supra* note 79, at 58-61; O. Corten, *supra* note 176, at 149-178.

example in digests and other publications of individual States, as well as publications of practice in specific areas of international law.

84. The Special Rapporteur still aims to submit a final report in 2016, with revised draft conclusions and commentaries in light of the debates and decisions of 2014 and 2015, but acknowledges, as some members of the Commission have said, that this is an ambitious work programme.

Annex

Proposed draft conclusions on the identification of customary international law

Part one
Introduction

Draft conclusion 1

Scope

1. The present draft conclusions concern the methodology for determining the existence and content of rules of customary international law.

2. The present draft conclusions are without prejudice to the methodology concerning other sources of international law and questions relating to peremptory norms of international law (*jus cogens*).

Draft conclusion 2

Use of terms

For the purposes of the present draft conclusions:

(a) "Customary international law" means those rules of international law that derive from and reflect a general practice accepted as law;

(b) "International organization" means an intergovernmental organization;

(c) …

Part two
Two constituent elements

Draft conclusion 3

Basic approach

To determine the existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law.

Draft Conclusion 4

Assessment of evidence

In assessing evidence for a general practice accepted as law, regard must be had to the context including the surrounding circumstances.

Part three
A general practice

Draft conclusion 5

Role of practice

The requirement, as an element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the creation, or expression, of rules of customary international law.

Draft conclusion 6

Attribution of conduct

State practice consists of conduct that is attributable to a State, whether in the exercise of executive, legislative, judicial or any other function.

Draft conclusion 7

Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal actions.

2. Manifestations of practice include, among others, the conduct of States 'on the ground', diplomatic acts and correspondence, legislative acts, judgments of national courts, official publications in the field of international law, statements on behalf of States concerning codification efforts, practice in connection with treaties, and acts in connection with resolutions of organs of international organizations and conferences.

3. Inaction may also serve as practice.

4. The acts (including inaction) of international organizations may also serve as practice.

Draft conclusion 8

Weighing evidence of practice

1. There is no predetermined hierarchy among the various forms of practice.

2. Account is to be taken of all available practice of a particular State. Where the organs of the State do not speak with one voice, less weight is to be given to their practice.

Draft conclusion 9

Practice must be general and consistent

1. To establish a rule of customary international law, the relevant practice must be general, meaning that it must be sufficiently widespread and representative. The practice need not be universal.

2. The practice must be generally consistent.

3. Provided that the practice is sufficiently general and consistent, no particular duration is required.

4. In assessing practice, due regard is to be given to the practice of States whose interests are specially affected.

Part Four
Accepted as Law

Draft conclusion 10

Role of acceptance as law

1. The requirement, as an element of customary international law, that the general practice be accepted as law means that the practice in question must be accompanied by a sense of legal obligation.

2. Acceptance as law is what distinguishes a rule of customary international law from mere habit or usage.

Draft conclusion 11

Evidence of acceptance as law

1. Evidence of acceptance of a general practice as law may take a wide range of forms. These may vary according to the nature of the rule and the circumstances in which the rule falls to be applied.

2. The forms of evidence include, but are not limited to, statements by States which indicate what are or are not rules of customary international law, diplomatic correspondence, the jurisprudence of national courts, the opinions of government legal advisers, official publications in fields of international law, treaty practice, and action in connection with resolutions of organs of international organizations and of international conferences.

3. Inaction may also serve as evidence of acceptance as law.

4. The fact that an act (including inaction) by a State establishes practice for the purpose of identifying a rule of customary international law does not

preclude the same act from being evidence that the practice in question is accepted as law.

Annex 152

ANNEX 153

The Fair and Equitable Treatment Standard

A Guide to NAFTA Case Law on Article 1105

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Wolters Kluwer
Law & Business

Annex 153

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CHAPTER 3

The Substantive Content of Article 1105

This chapter examines the content of the FET standard under Article 1105. Before specifically reviewing how NAFTA tribunals have defined the actual scope of the standard (at section §3.02), we will first make a few observations on the important role played by arbitral tribunals in that respect (section §3.01[A]). We will also briefly examine the manner in which different scholars have determined the various 'elements' that comprise the FET standard (section §3.01[B]).

§3.01 GENERAL REMARKS

[A] The Critical Role Played by Tribunals in Determining the Content of the Fair and Equitable Treatment Standard

As mentioned above,[1] the obligation for NAFTA Parties to provide foreign investors with an FET does not simply mean that they must be treated 'fairly' and 'equitably'. The concept of FET has a distinct meaning *of its own*. At the same time, the standard is flexible and depends on the circumstances of each case.[2] Its inherent flexibility results from the fact that it is a '*standard*'.[3] The concept of a 'standard' in international investment law has recently been examined by scholars.[4] As stated by the *Waste*

1. *See*, at Chapter 2 section §2.02[A].
2. Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6(3) J. World Invest. & Trade 364 (2005).
3. Alexandra Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment* 329 (Wolters Kluwer 2012); Ionna Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* 155 (Oxford U. Press 2008).
4. Tudor, *supra* n. 3, at 123, distinguishes between two distinct elements of a legal standard: the 'normative, element (the actual source of the standard, i.e., the text of the provision) and the 'descriptive' (or 'subjective') elements (the circumstances and the facts that are relevant for the application of the standard by a judge, or arbitrator, to a specific case). For Tudor, 'the subjective element is the flesh that covers the carcass of the standard, giving it life. It is only when the FET standard is applied to a specific case that it becomes alive' (at 117, *see also*, at

investment'.[187] Finally, the tribunal made this important statement: 'a claimant cannot have a legitimate expectation that the host country will not pass legislation that will affect it'.[188] The tribunal therefore rejected all of the claimant's allegations of legitimate expectations breaches.

In sum, the *Glamis* award is the most comprehensive analysis of the concept of legitimate expectations under Article 1105. For the first time, the award addressed the issue whether an investor's expectations arising from a *contract* can be the basis of a *legal* claim of breach of legitimate expectations under Article 1105. Also, while the award reiterated *Thunderbird's* finding that an investor's expectations must be 'reasonable and justifiable', it further clarified that such *objective* expectations must be based on *specific* 'definitive, unambiguous and repeated' *assurances* or *commitments* made by the host State to the investor 'purposely and specifically' to 'induce' its investment. The full implication of these important findings will be discussed in the next section.

[5] Conclusion

To date, no NAFTA tribunal has come to the conclusion that a host State stood in violation of an investor's legitimate expectations under Article 1105. Tribunals have nonetheless made a number of important findings on the scope of this concept. In the following paragraphs, nine observations will be made on NAFTA case law.

First, the reasoning of some of the earlier awards suggests that these tribunals did *not* view the concept of legitimate expectations as a *stand-alone* element of the FET standard. For instance, the *Waste Management* tribunal (which did not, however, deal with any specific allegations of breach of legitimate expectations) stated that 'the minimum standard of treatment of fair and equitable treatment' was infringed when State conduct was 'arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory ... or involves a lack of due process ...'.[189] The tribunal added that '*in applying this standard* it is *relevant* that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant'.[190] Thus, for the tribunal the concept of legitimate expectations is only relevant in the context of its assessment of whether or not State conduct is arbitrary, grossly unfair, etc. Meanwhile, the *Merrill & Ring* ruling is silent on the question,[191] and the *Grand River* tribunal does not seem to take a position.[192]

187. *Ibid.*, para. 812.
188. *Ibid.*, para. 813.
189. *Waste Management v. Mexico*, Award, (30 April 2004), para. 98.
190. *Ibid.* (emphasis added).
191. *Merrill & Ring Forestry L.P. v. Canada* [hereinafter *Merrill & Ring v. Canada*], UNCITRAL, Award, (31 March 2010), para. 233.
192. *Grand River Enterprises Six Nations, Ltd., et al. v. United States* [hereinafter *Grand River v. United States*], UNCITRAL, Award, (12 January 2011), para. 140 ('The Tribunal understands the concept of reasonable or legitimate expectations in the NAFTA context to correspond with those expectations upon which an investor is entitled to rely as a result of representations or conduct by a state party').

Some writers have argued that the *Thunderbird* award marked a milestone in that it was the first one to recognize the concept of legitimate expectations as part of the FET standard.[193] A statement made by Wälde in his separate opinion suggests that this is the case. He indicated that he concurred with his colleagues on 'the general view that the principle of legitimate expectation forms part, i.e., a subcategory, of the duty to afford fair and equitable treatment under Article 1105 of the NAFTA'.[194] In any event, Wälde's separate opinion explicitly endorsed this position:

> One can observe over the last years a significant growth in the role and scope of the legitimate expectation principle, from an earlier function as a subsidiary interpretative principle to reinforce a particular interpretative approach chosen, to its current role as a self standing subcategory and independent basis for a claim under the 'fair and equitable standard' as under Art. 1105 of the NAFTA.[195]

Yet, the issue is not entirely clear. The *Thunderbird* award only goes so far as to say that the concept of 'legitimate expectations' relates, *within the context of the NAFTA framework*, to a situation where ...'.[196] The tribunal simply does not go on to discuss whether the concept is one element of the FET standard under Article 1105.

The *Glamis* tribunal's reasoning *does* suggest that the concept of legitimate expectations is an element of the FET standard. However, it is open to criticism. On the question of the evolution of custom, the tribunal first came to the following conclusion:

> It therefore appears that, although situations may be more varied and complicated today than in the 1920s, the level of scrutiny is the same. The fundamentals of the *Neer* standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1) (...). The standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under *Neer* ... .[197]

It is noteworthy that, in this passage, the tribunal does not make any reference to legitimate expectations in its listing of acts susceptible of breaching the FET standard under Article 1105. Earlier in the award, the tribunal thoroughly explained the U.S. position that an investor's expectations cannot form the basis of a stand-alone claim under NAFTA Chapter 11 and that there exists no customary international law rule requiring a State to protect such expectations.[198] The tribunal never expressly responded to these arguments. In the award's section where the tribunal found it 'appropriate to address, in turn, each of the State obligations Claimant asserts are potential parts of the protection afforded by fair and equitable treatment',[199] the

193. Fietta, *supra* n. 107, at 425.
194. *Thunderbird v. Mexico*, Separate Opinion of Thomas Wälde, (1 December 2005), para. 1.
195. *Ibid.*, para. 37.
196. *Thunderbird v. Mexico*, Award, (26 January 2006), para. 147 (emphasis added).
197. *Glamis v. United States*, Award, (8 June 2009), para. 616.
198. *Ibid.*, paras. 575–576.
199. *Ibid.*, para. 618.

tribunal simply refrained from analyzing whether or not legitimate expectations constitute an element of the FET standard under Article 1105. One explanation for this omission may be the fact that the tribunal had already concluded at this stage that the United States had not breached Article 1105 on this ground. Thus, the tribunal explained that since 'no specific assurances were made to induce Claimant's "reasonable and justifiable expectations"' it 'need not determine the level, or characteristics, of state action in contradiction of those expectations that would be necessary to constitute a violation of Article 1105'.[200] The concept of legitimate expectations is in fact only introduced at the very end of the tribunal's reasoning on this issue. In the one-paragraph section of the award entitled 'Final Disposition of the Tribunal with respect to the Scope of the Fair and Equitable Legal Standard', the tribunal made this final theoretical remark regarding Article 1105:

> The Tribunal holds that Claimant has not met its burden of proving that something other than the fundamentals of the *Neer* standard apply today. The Tribunal therefore holds that a violation of the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105. *Such a breach may be exhibited by* a 'gross denial of justice or manifest arbitrariness falling below acceptable international standards;' *or the creation by the State of objective expectations in order to induce investment and the subsequent repudiation of those expectations.*[201]

The last sentence of this quote makes it clear that the tribunal considers legitimate expectations as an element of the FET standard. Thus, the concept is mentioned along with *other elements* of the FET standard under Article 1105.[202] Yet, this reference to the obligation to respect an investor's legitimate expectations seems contradictory to the first sentence of the quote stating that 'the fundamentals of the *Neer* standard apply today'. Clearly, the concept of legitimate expectations goes far beyond the traditional definition of the MST.[203] The tribunal, on the one hand, seems to restrict the scope of the FET standard by referring to the *Neer* fundamentals, while, on the other hand, extending it by including this new obligation. These different approaches are difficult

200. *Ibid.*, para. 622.
201. *Ibid.*, para. 627 (emphasis added).
202. This conclusion is also supported by this other passage (at para. 828): 'Thus addressing the record as a whole, the Tribunal holds that Claimant has not established that the acts complained of fall short of the customary international law minimum standard of treatment. The complained-of acts were not egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons. *There was no specific inducement of Claimant's expectations*' (emphasis added).
203. *See*, Kahn, *supra* n. 150, at 148, 153-154: 'the tribunal's expectations-based article 1105 standard is especially removed from Neer (...). It is disingenuous to equate this standard with "shocking" or "outrageous" behavior, whether the conduct is judged by 1926 or modern sensibilities. While Glamis commendably recognizes expectation protection as a feature of article 1105, its view that the combination of language from U.S. and NAFTA takings jurisprudence equates with Neer is preposterous'.

to reconcile. For all of these reasons, the *Glamis* award does not seem to be the most solid precedent in favor of recognizing the concept of legitimate expectations as an element of the FET standard.

In sum, the *Glamis* award is the only award that supports (to some extent) the view that legitimate expectations constitute a stand-alone element of the FET standard under Article 1105. This situation is in sharp contrast with the position adopted by the majority of *non-NAFTA* awards which have recognized that the FET standard encompass an obligation to protect an investor's legitimate expectation.[204] For instance, the *Saluka* tribunal stated that the FET standard was 'closely tied to the notion of legitimate expectations which is the dominant element of the standard'.[205] The vast majority of writers also believe that the concept of legitimate expectations is one of the elements of the FET standard.[206]

In the present author's view, the *Mobil* tribunal adopted a more convincing approach. It did not include legitimate expectations in its definition of the FET standard under Article 1105,[207] but added that the concept 'will be a relevant factor' in assessing whether or not any breach of the FET standard has occurred:

> On the basis of the NAFTA case-law and the parties' arguments, the Tribunal summarizes the applicable standard in relation to Article 1105 as follows:
> (1) the minimum standard of treatment guaranteed by Article 1105 is that which is reflected in customary international law on the treatment of aliens;
> (2) the fair and equitable treatment standard in customary international law will be infringed by conduct attributable to a NAFTA Party and harmful to a claimant that is arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.
> (3) in determining whether that standard has been violated it will be a relevant factor if the treatment is made against the background of
> (i) clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment, and

204. *See*, case law examined in: Vandevelde, *supra* n. 27, at 66 ff. A number of tribunals have, however, taken a different position (*see*, cases referred to at *infra* n. 212).
205. *Saluka v. Czech Republic*, Partial Award, (17 March 2006), para. 302.
206. Tudor, *supra* n. 3, at 155, 163-168, 154; Choudhury, *supra* n. 44, at 316-317; Kläger, *supra* n. 13, at 117-118, 154, 164; R. Kreindler, *Fair and Equitable Treatment – A Comparative International Law Approach*, 3(3) Transnational Disp. Mgmt. 9 (2006); Fietta, *supra* n. 107, at 432; Fietta, *supra* n. 72, at 397-398; Thomas J. Westcott, *Recent Practice on Fair and Equitable Treatment*, 8(3) J. World Invest. & Trade 425 (2007); Schreuer & Dolzer, *supra* n. 71, at 134-135; Andrew Newcombe & Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 279-280, 282-283 (Kluwer 2009); Yannaca-Small, *supra* n. 44, at 129; UNCTAD, *supra* n. 11, at 62, 63.
207. *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* [hereinafter *Mobil v. Canada*], ICSID No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, (22 May 2012), para. 152 ('the fair and equitable treatment standard in customary international law will be infringed by conduct attributable to a NAFTA Party and harmful to a claimant that is arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety').

(ii) were, by reference to an objective standard, reasonably relied on by the investor, and
(iii) were subsequently repudiated by the NAFTA host State.[208]

Thus, for the *Mobil* tribunal, while the host State's failure to respect an investor's legitimate expectations would *not in itself* constitute a breach of the FET standard, it remains that such a 'factor' may be taken into account when assessing whether or not *other* elements of the standard have been breached (i.e., whether State conduct was arbitrary, grossly unfair, involved a lack of due process, etc.). It should be added that another recent award (*Cargill*) also gave a general definition of what constitutes a violation of the FET standard under Article 1105 without specifically referring to the concept of legitimate expectations.[209] In fact, the *Cargill* tribunal concluded that 'no evidence' had been put forward by the claimant to sustain its argument that NAFTA Parties are bound to 'provide a stable and predictable environment in which reasonable expectations are upheld'.[210] It added that no such requirement exists 'in the NAFTA or in customary international law, at least where such expectations do not arise from a contract or quasi-contractual basis'.[211]

In the context outside of NAFTA, a limited number of tribunals have also concluded that there is *no* legal obligation for the host State to protect an investor's legitimate expectations. They have held that such expectations are only one relevant factor amongst others to determine a breach of the FET standard.[212] The reasons why this approach is sound are examined in the next paragraph (our second observation).

Second, NAFTA Parties have consistently objected to the view that the concept of legitimate expectations imposes any legal obligation, *solely on its own*, under Article

208. *Ibid.*, para. 152.
209. *Cargill Inc. v. Mexico*, ICSID Case no. ARB(AF)/05/2, Award, (18 September 2009), para. 296.
210. *Ibid.*, para. 289.
211. *Ibid.*, para. 290.
212. *See*, for instance, *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Decision on Annulment, (25 September 2007), para. 89 ('[a]lthough legitimate expectations might arise by reason of a course of dealing between the investor and the host State, these are not, as such, legal obligations, though they may be relevant to the application of the fair and equitable treatment clause contained in the BIT'); *MTD Equity Sdn Bhd and MTD Chile SA v. Chile*, ICSID No. ARB/01/7, Decision on Annulment, (16 February 2007), paras. 67–69 ('The Committee can appreciate some aspects of these criticisms. For example the TECMED Tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations (such as the obligation to compensate for expropriation) is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly'. But the tribunal added that 'legitimate expectations generated as a result of the investor's dealings with the competent authorities of the host State may be relevant to the application of the guarantees contained in an investment treaty'); *AWG Group v. Argentina*, UNCITRAL, Decision on Liability, (30 July 2010), Judge Nikken's Separate Opinion, para. 3 ('The assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor at the time of his/her investment does not correspond, in any language, to the ordinary meaning to be given to the terms "fair and equitable". Therefore, prima facie, such a conception of fair and equitable treatment is at odds with the rule of interpretation of international customary law expressed in Article 31.1 of the Vienna Convention on the Law of Treaties'). *See also*: Picherack, *supra* n. 66, at 277-278.

1105.[213] Thus, both the United States[214] and Canada[215] have insisted that the so-called 'obligation' to protect an investor's legitimate expectations is *not* part of the customary international law minimum standard of treatment of aliens. This is because claimants have not put forward any evidence of State practice and opinio juris to support such a claim. Thus, for Canada:

> [W]hile NAFTA tribunals have considered as a relevant element the repudiation of the legitimate expectations of foreign investors, assuming they reasonably existed at the time of the investment and are based on specific representations ... they have not found that the failure to fulfill legitimate expectations constituted in and of itself a breach of a rule of customary international law part of the minimum standard of treatment under Article 1105.[216]

NAFTA Parties are right on this point. No tribunal has gone through the exercise of determining the customary nature of the concept of legitimate expectations. No attempt has been made to comprehensively examine State practice and opinio juris. In the

213. It should be noted, however, that all NAFTA Parties agree that the issue is relevant to a claim of regulatory expropriation *under NAFTA Article 1110. See*, for instance, the position of the United States described in: *Grand River v. United States*, Award, (12 January 2011), para. 127.

214. *See*, for instance, *Grand River v. United States*, US Counter-Memorial, (22 December 2008), at 96, 97 ('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') and at 99 ('Claimants submit no evidence of State practice establishing a legal obligation not to frustrate an investor's expectations formed at the time the investor made its investment. State practice, in fact, tends to support the opposite view. As Claimants acknowledge, under customary international law, States may regulate to achieve legitimate objectives to benefit the public welfare and will not incur liability solely because the change interferes with an investor's "expectations" about the state of the business environment. The protection of public health falls squarely within that regulatory authority under international law').

215. For instance, *United Parcel Service of America Inc. v. Government of Canada* [hereinafter *UPS v. Canada*], UNCITRAL, Canada's Counter-Memorial, (22 June 2005), paras. 941–945; *ibid.*, Canada's Rejoinder, (6 October 2005), para. 296 ('The Claimant argues that fair and equitable treatment includes the obligation to protect legitimate expectations (...). The Claimant cites no *opinio juris* or state practice for the assertion that legitimate expectations, transparency or general fairness constitute customary rules of international law. In any event, the Claimant would be unable to prove that a customary obligation to protect legitimate expectations exists. The concept of legitimate expectations can only be relevant where a legal obligation exists'); *Merrill & Ring v. Canada*, Canada's Counter-Memorial, (13 May 2008), paras. 508, 509 ('The "obligation" to protect the legitimate expectations of an investor is not part of the customary international law minimum standard of treatment of aliens. There is no such "obligation" under Article 1105'); *Vito G. Gallo v. Canada*, UNCITRAL, Canada's Statement of Defence, (15 September 2008), para. 196; *ibid.*, Canada's Counter-Memorial, (29 June 2010), para. 272; *Mobil v. Canada*, Canada's Counter-Memorial (1 December 2009), paras. 242, 252–253, 268, 270; *ibid.*, Decision on Liability and on Principles of Quantum, (22 May 2012), paras. 123, 124 (describing Canada's position).

216. *Mobil v. Canada*, Decision on Liability and on Principles of Quantum, (22 May 2012), para. 124 (quoting from Canada's Counter-Memorial, (1 December 2009), para. 270). It should be noted that in its pleadings Canada offers an alternative position (*Ibid.*, para. 125) whereby there are four 'prerequisites necessary for the expectations of a foreign investor to be entitled to protection' i.e. 'First, the Claimants' legitimate expectations must be based on objective expectations; second, the investor must have relied on a specific assurance by the state to induce the investment; third, the legitimate expectations must be those which existed at the time the investment was made and; fourth, to assess the legitimacy of the expectations, all circumstances must be taken into account'.

present author's view, there is little support for the assertion that there exists under customary international law any obligation for host States to protect investors' legitimate expectations.[217]

Third, supporters of the inclusion of the concept of legitimate expectations as one of the elements of the FET standard have never carried out the exercise of establishing that the concept has been recognized as a rule of customary international law. They instead rely on the fact that the concept is said to be widely accepted *under municipal law*.[218] The separate opinion of Wälde in *Thunderbird* accurately illustrates such an argument:

> The 'fair and equitable standard' can not be derived from subjective personal or cultural sentiments; it must be anchored in objective rules and principles reflecting, in an authoritative and universal or at least widespread way, the contemporary attitude of modern national and international economic law. The wide acceptance of the 'legitimate expectations' principle therefore supports the concept that it is indeed part of 'fair and equitable treatment' as owed by governments to foreign investors under modern investment treaties and under Article 1105 of the NAFTA.[219]

A number of writers (and tribunals[220]) have thus argued that the concept of legitimate expectations is a general principle of law because it is a recognized rule in many domestic legal systems.[221] For this reason, they consider that arbitral tribunals should apply this principle of law in resolving disputes as a source of international law pursuant to Article 38(1)(c) of the ICJ Statute. One variation of this argument is to view the concept of legitimate expectations as based on the requirement of good faith, which is itself one of the general principles referred to at Article 38(1)(c) of the ICJ Statute.[222]

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217. Yannaca-Small, *supra* n. 44, at 130. *Contra*: Dolzer & Schreuer, *supra* n. 71, at 135 ('there is authority to the effect that transparency and the investor's legitimate expectations are protected even without a treaty guarantee of FET').
218. Diehl, *supra* n. 3, at 360, provides another reason: 'the normative justification for the legal protection of legitimate expectations is very strong. The protection of such expectations is to be derived from the fairness element of the FET standard. Fairness requires protection of legitimate expectations for one main reason: Expectations are central to autonomy and planning of one's life or in a business context of one's business development (rule of law/certainty theory'.
219. *Thunderbird v. Mexico*, Separate Opinion of Thomas Wälde, (1 December 2005), para. 30.
220. *Total S.A. v. Argentina*, ICSID Case No. ARB/04/01, Decision on Liability (27 December 2010), para. 128; *Thunderbird v. Mexico*, Separate Opinion of Thomas Wälde, (1 December 2005), paras. 27–28.
221. Snodgrass, *supra* n. 75, at 53; Diehl, *supra* n. 3, at 170-174, 551; Kingsbury & Schill, *supra* n. 56, at 11-12; Kläger, *supra* n. 13, at 278 ('All principles and sub-principales of fair et equitable treatment – sovereignty, the protection of legitimate expectations, pacta sunt servanda, non-discrimination, sustainable development, fair procedure, due process, denial of justice, transparency and proportionality – are accepted principal of international law deeply rooted within one or several of the sources of international law'). *Contra*: Paparinskis, *supra* n. 18, at 255-256 ('even among the unrepresentative sample of legal systems of the traditional claimant States considered, there are significant differences in the way in which legitimate expectations are addressed, in particular regarding the distinction between substantive expectations and expectations relating to due process'). *See*, more generally: S. Schønberg, *Legitimate Expectations in Administrative Law* (Oxford U. Press 2000).
222. *Total S.A. v. Argentina*, Decision on Liability (27 December 27, 2010), para. 128; *Thunderbird v. Mexico*, Separate Opinion of Thomas Wälde, (1 December 2005), para. 25.

In the present author's view, interpreting legitimate expectations as a general principle of law is of limited relevance in the specific context of Article 1105. As mentioned above,[223] the reasoning of some NAFTA tribunals (*ADF*[224] and *Merrill & Ring*[225]) seems to suggest that when interpreting Article 1105, they are allowed to look *beyond* customary international law at other sources of international law, including general principles of law. Yet, the position of the majority of NAFTA tribunals is that 'the content of the obligation imposed by Article 1105 must be determined by reference to customary international law, not to standards contained (...) [within] other sources, unless those sources reflect relevant customary international law'.[226] In other words, based on the clear guidance provided by the binding FTC Note, NAFTA tribunals should look *solely* to custom as a source of international law in their interpretation of Article 1105, not at general principles of law.

In any event, it is not at all clear to what extent relying on the concept of legitimate expectations as a general principle of law would be helpful to a NAFTA tribunal. It is generally recognized that the concept of general principles of law 'was inserted into Article 38 [of the ICJ Statute] as a source of law, to close the gap that might be uncovered in international law and solve this problem which is known legally as *non liquet*'.[227] In other words, such principles were 'intended to offer judges an additional source of law in the event of absence or unclearness in the relevant treaties and custom'.[228] It has been argued that the minimum standard of treatment is sufficiently developed with respect to the scope of protection that States must accord to foreign investors (and their investments) without the need for tribunals to resort to any general principle, including legitimate expectations.[229]

Fourth, all tribunals have defined the obligation to protect the legitimate expectations of an investor quite *narrowly*. Tribunals have thus repeatedly *qualified* the concept in several ways in order to significantly *reduce its scope*. The narrow approach that has been consistently adopted by NAFTA tribunals remains in sharp contrast with the stance taken by a number of non-NAFTA tribunals.

Some of these non-NAFTA awards have read into the FET standard an obligation for the host State to maintain a stable legal and business environment.[230] One

223. *See*, at Chapter 2 section §2.03[A][3].
224. *ADF v. United States*, Award, (9 January 2003), paras. 184, 185.
225. *Merrill & Ring v. Canada*, Award, (31 March 2010), para. 184.
226. *Grand River v. United States*, Award, (12 January 2011), paras. 176, 181, 219.
227. M.N. Shaw, *International Law* 98 (6th ed., Cambridge U. Press 2008).
228. Tudor, *supra* n. 3, at 94.
229. Paparinskis, *supra* n. 18, at 256 ('is not the case that, in the absence of a hypothetical rule on expectations, the international standard would be entirely lacking in criteria to apply to evaluating the international lawfulness of changes in the domestic legal system: (...) the considerations of non-arbitrariness, transparency, and due process, and most likely also non-discrimination, would still discipline the host State').
230. *CMS Gas Transmission Company v. Argentina*, Award, (12 May 2005), para. 274 ('there can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment'), para. 284 ('In fact, the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law'); *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, Award, (22 May 2007), para. 260 ('Thus, the

prominent illustration of that trend is the ruling by the *Tecmed* tribunal, which interpreted an FET clause as requiring the host State to 'provide to international investments treatment that does not affect the *basic expectations* that were taken into account by the foreign investor to make the investment'.[231] The tribunal then explained that a foreign investor should expect the host State to act:

> free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.[232]

A foreign investor should also expect the host State to act *consistently*, i.e., to act 'without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities'.[233] The extensive interpretation given by the *Tecmed* tribunal and others has been rightly criticized by many for being too demanding of host States and 'nearly impossible to achieve'.[234] Worse, this approach 'would potentially prevent the host State from introducing any legitimate regulatory change, let alone from undertaking a regulatory reform that may be called for'.[235] Some writers believe, on the contrary, that the so-called requirement of a stable legal and business framework is in fact *itself* one autonomous element contained within the FET standard.[236] This proposition has been contested by a number of other scholars.[237]

Tribunal concludes that a key element of fair and equitable treatment is the requirement of a 'stable framework for the investment', which has been prescribed by a number of decisions. Indeed, this interpretation has been considered 'an emerging standard of fair and equitable treatment in international law'); *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador*, ICSID No. ARB/04/19, Award, (18 August 2008), para. 339; *LG&E Energy Corp v. Argentina*, Decision on Liability, (3 October 2006), paras. 124, 125, 131; *PSEG Global et al. v. Turkey*, ICSID No. ARB/02/5, Award, (19 January 2007), paras. 246–256; *Occidental Exploration and Production Co v. Ecuador*, LCIA No. UN 3467, Award, (1 July 2004), paras. 183, 190, 196, 252, 253.

231. *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID No. ARB (AF)/00/2, Award, (29 May 2003), para. 154 (emphasis added).
232. *Ibid.*
233. *Ibid.*
234. UNCTAD, *supra* n. 11, at 65.
235. *Ibid.*, at 67.
236. Tudor, *supra* n. 3, at 169; T. Weiler & I. Laird, *Standards of Treatment*, in *The Oxford Handbook of International Investment Law*, 276-277 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., Oxford U. Press 2008); Westcott, *supra* n. 206, at 425; Christina Knahr, *Fair and Equitable Treatment and its Relationship with other Treatment Standards*, in *Austrian Arb. Yb 2009*, 504 (Christian Klausegger et al. eds., C.H. Beck, Stämpfli & Manz 2009).
237. Newcombe & Paradell, *supra* n. 206, at 286 ('While some awards to date might suggest that the requirement for a stable and predictable framework for investment is an independent element of fair and equitable treatment, caution should be exercised in referring to freestanding obligations of stability and predictability. The majority of cases where tribunals have invoked the element of stability and predictability have arisen in contexts where there was reliance on specific representations or undertakings and the investors in question had acquired investments with those legitimate expectations. In these cases, tribunals have found that the legal framework cannot "be dispensed with altogether when specific commitments to the contrary have been made". When the host state has made no specific assurances or guarantees linked

In contrast, not a single NAFTA tribunal (with the possible exception of *Merrill & Ring*, discussed in the next paragraph) has pinpointed an obligation to maintain a stable legal and business framework as a constitutive element of the concept of legitimate expectations. In fact, only Wälde's separate opinion in *Thunderbird* supports the view that 'greater transparency, clarity and predictability' must 'guide the process of both defining the conditions of the legitimate expectations principle under Article 1105 and of applying it to the particular facts of a specific situation'.[238]

As mentioned above, the one possible exception to this line of consistent case law is the *Merrill & Ring* award. The tribunal first acknowledged that in the case at hand, Canada had not made any representations to the investor.[239] Because of such a lack of representation, the tribunal stated that 'if it were necessary to reach a decision on the question, the Tribunal would be likely to conclude ... that Canada had not contravened the provisions of Article 1105(1)'.[240] In spite of this conclusion, the tribunal nevertheless made the following controversial statement obiter dictum:

> The Investor raises the violation of its legitimate expectations as another issue. While it is clear that no representations have been made by Canada to induce the Investor to make a particular decision or to engage in conduct that is later frustrated, any investor will have an expectation that its business may be conducted in a normal framework free of interference from government regulations which are not underpinned by appropriate public policy objectives. Emergency measures or regulations addressed to social well-being are evidently within the normal functions of a government and it is not legitimate for an investor to expect to be exempt from them. Yet, regulations which end-up creating benefits for a certain industry, to the detriment of an investor, might be incompatible with what that investor might reasonably expect from a government.[241]

This passage is very similar to other broad interpretations that have been given by non-NAFTA tribunals on the stability of the legal environment.[242] In any event, it is not at all clear what the tribunal means when it states that the 'investor will have an expectation' that the government will refrain from any interference whatsoever. Is this a reference to any general expectation that an investor may have when doing business

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to specific acquired rights, such as in a license or permit, tribunals are less likely to find there is a legitimate expectation that the legal framework will not change'). *See also*: Picherack, *supra* n. 66, at 271, 278-282.

238. *Thunderbird v. Mexico*, Separate Opinion of Thomas Wälde, (1 December 2005), para. 36.
239. *Merrill & Ring v. Canada*, Award, (31 March 2010), para. 233. Later in the award (at para. 242), the tribunal reiterated that there was a 'complete absence of evidence of any representation by Canada to the Investor which might be said to have induced or even encouraged its investment'.
240. *Ibid.*, para. 242. But the tribunal explained (at para. 243) that it was not 'necessary' to reach a decision on the matter since it decided to examine instead whether the investor had proven any damages for the alleged breaches. It ultimately concluded that no damage was proven (para. 266).
241. *Ibid.*, para. 233.
242. This is clear from other passages of the award (*Ibid.*, at para. 232) where the tribunal noted that 'the stability of the legal environment is also an issue to be considered in respect of fair and equitable treatment', adding that 'State practice and jurisprudence have consistently supported such a requirement in order to avoid sudden and arbitrary alterations of the legal framework governing the investment'.

abroad? The first sentence of the quoted passage suggests that this is in fact a reference to the *legal* concept of legitimate expectations. This would mean, in turn, that mere 'interference' by a government regulation that is 'not underpinned by appropriate public policy objectives' could breach an investor's expectation. The existence of such a broad obligation would require a tribunal to determine each time whether or not a regulation is in fact in line with the host State's 'public policy objectives' and, moreover, to verify the 'appropriateness' of such objectives. Earlier in the award, the tribunal stated that '[c]ustomary international law has for long recognized that the minimum standard of treatment may be curtailed for reasons of public policy, which necessarily has to pursue a genuine public policy'.[243] The tribunal does not provide any reasons for the adoption of such a broadly defined obligation. It is submitted that future tribunals should not follow this approach.

Fifth, all NAFTA tribunals that have examined the concept have endorsed the four-elements definition of legitimate expectations adopted by the *Thunderbird* tribunal. As mentioned above, the tribunal defined the concept as follows:

> Having considered recent investment case law and the good faith principle of international customary law, the concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA party to honour those expectations could cause the investor (or investment) to suffer damages.[244]

In fact, this definition reflects an earlier statement made by the *Metalclad* tribunal to the effect that legitimate expectations must be reasonable in the circumstances and be based on specific representations made by governmental officials.[245] As mentioned above, the *Waste Management* tribunal also referred to the same three basic points ('breach of representations made by the host State which were reasonably relied on by the claimant').[246] As subsequently pointed out by the *Mobil* tribunal,[247] these different statements suggest that a legitimate expectations claim requires the following *four elements*:

- Conduct or representations have been made by the host State.
- The claimant has relied on such conduct or representations to make its investment.
- Such reliance by the claimant on these representations was 'reasonable'.

243. *Ibid.*, para. 224.
244. *Thunderbird v. Mexico*, Award, (26 January 2006), para. 147.
245. *Metalclad v. Mexico*, Award, (30 August 2000), para. 89.
246. *Waste Management v. Mexico*, Award, (30 April 2004), para. 98.
247. *Mobil v. Canada*, Decision on Liability and on Principles of Quantum, (22 May 2012), para. 152 ('In determining whether that standard has been violated it will be a relevant factor if the treatment is made against the background of (i) clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment, and (ii) were, by reference to an objective standard, reasonably relied on by the investor, and (iii) were subsequently repudiated by the NAFTA host State'). *See also*, at para. 154.

- The host State subsequently repudiated these representations therefore causing damages to the investor.[248]

Sixth, subsequent NAFTA tribunals have all followed these four requirements. They have also continued to further *qualify* and *narrowly* define these requirements. The most significant development came three years later in 2009 when the *Glamis* tribunal rendered its award. This award is important for having greatly clarified the scope of an investor's legitimate expectations as protected under Article 1105. In its ruling, the tribunal reiterated *Thunderbird's* proposition that an investor's expectations must be 'reasonable and justifiable'. The requirement is also recognized by other non-NAFTA awards.[249] What is 'reasonable' of course will depend on the circumstances of the case.[250]

The *Glamis* award also clarified three fundamental aspects of the concept of legitimate expectations. First, the expectations must be *objective*. Other tribunals have come to the same conclusion.[251] As pointed out by one writer, the investor's expectations 'must be objective and reasonable, rather than subjective or held by one party alone'.[252] This means that an investor 'takes the law of the host State as it finds it and cannot subsequently complain about the application of that law to its investment'.[253] The reasonableness of an investor's expectations is therefore a function of its actual knowledge of the general regulatory framework and political and economical environment of the country in which it plans to invest.[254] The *Duke* tribunal speaks of a requirement to take into account 'all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic cultural and historical conditions prevailing in the host State'.[255] In other words, an investor must assess

248. *See*, Fietta, *supra* n. 107, at 430; Picherack, *supra* n. 66, at 276.
249. *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador*, Award, (18 August 2008), para. 340.
250. Newcombe & Paradell, *supra* n. 206, at 277: 'Whether reliance by a foreign investor upon host state conduct is "reasonable" is a highly contextual inquiry. Tribunals and commentators have identified a number of factors that are potentially relevant in assessing an investor's reasonable reliance. These include: (i) the timing and specificity of the representation; (ii) whether there were any disclaimers by the state; (iii) the position of the person making the representation within the government hierarchy; (iv) the relative skills and expertise of the parties; (v) the foresee-ability of reliance; (vii) changes in circumstances or conditions upon which the representations were based; (viii) the extent to which there were mistaken assumptions; (ix) the extent to which the investor sought to protect itself for a specific risk; (x) the conduct of the investor'.
251. *See*, for instance, *LG&E Energy Corp v. Argentina*, Decision on Liability, (3 October 2006), para. 131 (speaking of 'justified expectations of the foreign investor').
252. Kinnear, *supra* n. 35, at 26; Salacuse, *supra* n. 11, at 232.
253. Kinnear, *supra* n. 35, at 22; Dolzer, *supra* n. 28, at 103; *see*: *LG&E Energy Corp v. Argentina*, Decision on Liability, (3 October 2006), para. 130; Salacuse, *supra* n. 11, at 232; Dolzer & Schreuer, *supra* n. 71, at 134.
254. UNCTAD, *supra* n. 11, at 71 (referring to several cases); Tudor, *supra* n. 3, at 164-165.
255. *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador*, Award, (18 August 2008), para. 340.

and bear the risk associated to the business it intends to conduct.[256] Case law requires a high degree of due diligence from investors.[257]

The second clarification made by the *Glamis* award is that expectations must be based on *specific* 'definitive, unambiguous and repeated' *assurances* or *commitments* made by the host State to the investor. Non-NAFTA tribunals have also highlighted the requirement of specific representations.[258] As pointed out by Fietta, 'the more specific the assurances that are given, the more likely they are to give rise to some basis for a legitimate expectations-based claim'.[259] The additional qualification mentioned by the *Glamis* tribunal that representations be not only specific, but also 'definitive, unambiguous and repeated' suggests the adoption of an even narrower interpretation of the concept of legitimate expectations. A third qualification made by the *Glamis* award is the fact that any assurances given by the host State to the investor must have been made 'purposely and specifically' to have 'induced' its investment. This qualification has the effect of further narrowing down the scope of application of the concept of legitimate expectations under Article 1105.

Seventh, under Article 1105, legitimate expectations *cannot* be based simply on the host State's existing domestic legislation on foreign investments at the time when the investor makes its investment. This is clear from the *Glamis* award's emphasis on a *threshold* requirement of a *quasi-contractual* relationship between the investor and the host State. Other NAFTA tribunals have also adopted the same position.

Thus, the *Grand River* tribunal held that *general legislation* could not be the source of legitimate expectations, which requires *specific* assurances by the government.[260] The tribunal noted that the 'conduct' of the United States said to be giving rise to some expectations were in fact an international treaty (the Jay Treaty) and its own domestic legislation (U.S. federal Indian law).[261] The tribunal was reluctant to admit that these instruments could 'serve as sources of reasonable or legitimate expectations for the purposes of a NAFTA claim'.[262] Thus, it explained that '[o]rdinarily, reasonable

256. Peter Muchlinski, *Caveat Investor'? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard*, 55 ICLQ 527, 530 (2006); UNCTAD, *supra* n. 11, at 78 ('Investors have a due diligence obligation to determine the extent of the risk to which they are subjected, including country and regulatory risks, and to have expectations that are reasonable in all the circumstances. In particular, when planning their investments, investors should take account of the conditions in the particular host State, including the standards of governance and regulatory development prevailing in that State').
257. Diehl, *supra* n. 3, at 415, 429.
258. *See*, Vandevelde, *supra* n. 27, at 75 (referring and discussing a number of cases).
259. Fietta, *supra* n. 107, at 431; Yannaca-Small, *supra* n. 44, at 126; Diehl, *supra* n. 3, at 386 ('the cases decided so far suggest that the less formal public communications are, the less likely is the emergence of a legitimate expectation'). *See also*: Newcombe & Paradell, *supra* n. 206, at 279; UNCTAD, *supra* n. 11, at 68.
260. *Grand River v. United States*, Award, (12 January 2011), para. 127. The tribunal decided to examine this question in the award's section dealing with the expropriation claim, but added that its reasoning would also apply to the Article 1105 claim. In this case, the claimant argued that 'as a member of one of the First Nations in North America and the nature of his business activities, which he described as involving trade among sovereign indigenous peoples', he had a 'legitimate expectation not to be subjected to MSA-related regulatory actions by the states of the United States in respect of his tobacco-related activities' (para. 128).
261. *Ibid.*, para. 141.
262. *Ibid.*

or legitimate expectations of the kind protected by NAFTA are those that arise through *targeted representations or assurances* made explicitly or implicitly by a state party'.[263] The tribunal concluded that these instruments could not 'serve as sources of reasonable or legitimate expectations for the purposes of a NAFTA claim'.[264] This is because the investor could not have reasonably relied on the unsettled legal framework of the U.S. federal Indian law to create any expectations.[265] Similarly, the reasoning of the *ADF* tribunal suggests that an investor's legitimate expectations cannot be generated by its sole reliance on domestic *case law* when it decides to make its investment.[266] Thus, the tribunal emphasized upon the requirement of *misleading* representations made by *authorized officials* about such case law. In other words, 'mere silence or evasive statements do not suffice and will not generate legitimate expectations with regard to the status of the law'.[267]

The consistent position adopted by these NAFTA tribunals contrasts with that of other non-NAFTA tribunals that have held that legitimate expectations could even be protected *without any specific* representations made by the host State.[268] For these non-NAFTA tribunals, an investor's expectation could be based merely on the existing domestic legislation of the host State concerning foreign investments (which was later changed) if it can be shown that the investor actually *relied* upon such legislation when deciding to make its investment.[269] Amidst the literature on this issue, this remains a contentious approach.[270]

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263. *Ibid.*, (emphasis added).
264. *Ibid.*
265. *Ibid.*, para. 142 ('As to U.S. domestic law, given its unsettled nature in relevant respects, it is implausible to find that Mr. Montour could have reasonably expected, and reasonably relied on such an expectation as a prudent investor, that states would refrain from applying the MSA measures to him as they have done'). *See*, C. Lévesque, *Chronique de Droit international économique en 2010-2011 – Investissement*, 49 Can YIL 360 (2011).
266. Diehl, *supra* n. 3, at 400; Yannaca-Small, *supra* n. 44, at 125.
267. Diehl, *supra* n. 3, at 422. *See also*: Choudhury, *supra* n. 44, at 309.
268. *Parkerings-Compagniet AS v. Lithuania*, ICSID No. ARB/05/8, Award, (11 September 2007), para. 131 ('The expectation is legitimate if the investor received an explicit promise or guarantee from the host state, or if implicitly, the host state made assurances or representation that the investor took into account in making the investment. Finally, in the situation where the host state made no assurance or representation, the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectations of the investor are legitimate').
269. *See*, for instance, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, ICSID No. ARB/03/19, Decision on Liability, (30 July 2010), para. 226. *See also*: UNCTAD, *supra* n. 11, at 77.
270. Diehl, *supra* n. 3, at 402 ('Although protection of legitimate expectations based on governmental conduct that does not reach the level of a contract or formal promise may be desirable from a policy point of view, a requirement that an expectation be based on some individualized act of government seems an appropriate limitation. This is especially true in the context of the FET standard - a standard whose wide scope needs to be limited in order to achieve legal certainty and predictability. It is submitted that legitimate expectations should more readily be identified on the basis of individualized administrative conduct or communication than on the basis of general legislation or quasi-legislative administrative rule-making'), at 429 ('legitimate expectations can arise as a result of overt governmental conduct that, while it may take various forms, has to be specific, unambiguous and beneficial to the individual or company towards which it is directed. Legitimate expectations will generally not be based upon legislation or legislative-type regulations, but will derive from targeted and individualized governmental

Eighth, the *Mobil* tribunal has clearly held that an investor's expectations are *not* violated by the simple fact that the host State *changed* the regulation (even drastically) upon which the investor may have based its decision to make its investment. The tribunal added that Article 1105 only protects investors against changes of legislation that are 'arbitrary or grossly unfair or discriminatory':

> This [FET] applicable standard does not require a State to maintain a stable legal and business environment for investments, if this is intended to suggest that the rules governing an investment are not permitted to change, whether to a significant or modest extent. Article 1105 may protect an investor from changes that give rise to an unstable legal and business environment, but only if those changes may be characterized as arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard. In a complex international and domestic environment, there is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor. Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made. Governments change, policies changes and rules change. These are facts of life with which investors and all legal and natural persons have to live with. What the foreign investor is entitled to under Article 1105 is that any changes are consistent with the requirements of customary international law on fair and equitable treatment.[271]

It is generally recognized that the requirement for a State to respect an investor's expectations does not mean that it is consequently prevented from regulating.[272] Consequently, many tribunals have held that an investor certainly cannot expect 'that the circumstances prevailing at the time the investment is made remain totally unchanged'.[273] An investor's reasonable expectations must be balanced against the 'host State's legitimate right subsequently to regulate domestic matters in the public interest'.[274] This is the case even if such changes negatively affect a foreign investor.[275] Such conduct would not be considered as breaching the investor's legitimate expectations.[276] As pointed out by some tribunals, States have the right to change their laws:

> It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the

conduct'). The issue is discussed by these authors: Kinnear, *supra* n. 35, at 24; Vandevelde, *supra* n. 27, at 134; Fietta, *supra* n. 72, at 397.

271. *Mobil v. Canada*, Decision on Liability and on Principles of Quantum, (22 May 2012), para. 153.
272. Picherack, *supra* n. 66, at 277.
273. *Saluka v. Czech Republic*, Partial Award, (17 March 2006), para. 305. *See also*: *Parkerings-Compagniet AS v. Lithuania*, Award, (11 September 2007), para. 333.
274. *Saluka v. Czech Republic*, Partial Award, (17 March 2006), paras. 304–308.
275. UNCTAD, *supra* n. 11, at 74; Diehl, *supra* n. 3, at 429.
276. UNCTAD, *supra* n. 11, at 74.

> regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.[277]

While investors must therefore anticipate that laws will change over time, they can also expect that 'such changes will be implemented in good faith and in a non-abusive manner and that public-interest arguments will not be used as a disguise for arbitrary and discriminatory measures'.[278] This was the conclusion reached by the *Mobil* tribunal as well.

A ninth point is that representations can be made in the context of a State contract (via a stabilization clause). The existence of a contract *does not* mean however, that *any* violation of that contract by the host State necessarily amounts to a violation of the FET obligation. In other words, the investor may 'expect' that a contract will be executed, but a breach of the contract does not necessarily violate *its legitimate expectations* under the FET standard. This is, in fact, the position taken by several non-NAFTA tribunals.[279] The *Glamis* award confirmed that under Article 1105, an investor's expectation is not violated by the mere fact that the host State (party to a contract with the investor) has breached the contract.

In sum, under Article 1105, an investor's legitimate expectations is *not* a stand alone *element* of the FET standard, but rather a 'factor' that should be taken into account by a tribunal when assessing whether or not *other* elements of the standard have been breached. The different NAFTA cases examined above suggest that a tribunal should consider an investor's expectations when the following criteria are fulfilled:

(1) An investor's expectations must be 'reasonable' and 'justifiable' (*Waste Management*,[280] *Thunderbird*,[281] *Glamis*,[282] *Mobil*[283]).
(2) Such 'objective' expectations must be, at the very least, based on the conduct of the host State (*Thunderbird*,[284] *Grand River*[285]) or on 'representations'

277. *Parkerings-Compagniet AS v. Lithuania*, Award, (11 September 2007), para. 332. *See also*: *Continental Casualty v. Argentina*, ICSID No. ARB/03/9, Award, (5 September 2008), para. 258; *EDF (Services) Limited v. Romania*, ICSID No. ARB/05/13, Award, (8 October 2009), para. 217.
278. UNCTAD, *supra* n. 11, at 77.
279. *Parkerings-Compagniet AS v. Lithuania*, Award, (11 September 2007), para. 344; *Gustav FW Hamester GmbH & Co KG v. Ghana*, ICSID No. ARB/07/24, Award, (18 June 2010), para. 337; *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Final Award, (21 June 2011), para. 292. *See also*: UNCTAD, *supra* n. 11, at 70; Salacuse, *supra* n. 11, at 236; Paparinskis, *supra* n. 18, at 255.
280. *Waste Management v. Mexico*, Award, (30 April 2004), para. 98.
281. *Thunderbird v. Mexico*, Award, (26 January 2006), para. 147.
282. *Glamis v. United States*, Award, (8 June 2009), para. 621.
283. *Mobil v. Canada*, Decision on Liability and on Principles of Quantum, (22 May 2012), para. 152.
284. *Thunderbird v. Mexico*, Award, (26 January 2006), para. 147.
285. *Grand River v. United States*, Award, (12 January 2011), para. 140.

made by the host State (*Metlaclad*,[286] *Waste Management*,[287] *ADF*,[288] *Merrill*,[289] *Mobil*[290]).[291]

(3) Moreover, the *Glamis* tribunal has suggested that an investor's expectations must be based on 'definitive, unambiguous and repeated'[292] specific 'commitments'[293] (or 'assurances'[294]) made by the host State to have 'purposely and specifically induced the investment'[295] by the investor. These findings have been endorsed by subsequent tribunals (implicitly[296] or explicitly[297]) with occasional slight differences in the use of terminology.[298]

286. *Metalclad v. Mexico*, Award, (30 August 2000), para. 87.
287. *Waste Management v. Mexico*, Award, (30 April 2004), para. 98.
288. *ADF v. United States*, Award, (9 January 2003), para. 189.
289. *Merrill & Ring v. Canada*, Award, (31 March 2010), para. 150. In the award's section on *expropriation*, the tribunal reiterated the *Thunderbird* and *Glamis* tribunals' statements to the effect that for legitimate expectations 'to give rise to actionable rights requires there to have been some form of representation by the state and reliance by an investor on that representation in making a business decision'.
290. *Mobil v. Canada*, Decision on Liability and on Principles of Quantum, (22 May 2012), para. 156, where the tribunal refers to 'promises' 'made, either expressly or by any pattern of behavior over a ten year period, such as to give rise to a representation that there would not be changes to the regulatory regime'.
291. *Thunderbird v. Mexico*, Award, (26 January 2006), suggesting that representations by the host State would include the opinion of administrative agencies.
292. *Glamis v. United States*, Award, (8 June 2009), para. 802.
293. *Ibid.*, para. 767.
294. *Ibid.*, paras. 800–801.
295. *Ibid.*, para. 766. *See also*, *ibid.*, para. 767.
296. *Cargill Inc. v. Mexico*, Award, (18 September 2009), para. 290: 'No evidence, however, has been placed before the Tribunal that there is such a requirement in the NAFTA or in customary international law, at least where such expectations do not arise from a *contract or quasi-contractual basis*' (emphasis added).
297. *Mobil v. Canada*, Decision on Liability and on Principles of Quantum, (22 May 2012), para. 170 ('In the absence of evidence indicating that the Claimants were induced to make their investments by clear and explicit representations in relation to any future change to the regulatory framework, or the Benefits Plans, whether by or attributable to the Respondent, the Tribunal concludes that there can be no violation of Article 1105 of the NAFTA on the ground alleged by the Claimants').
298. *See*, for instance, *Grand River v. United States*, Award, (12 January 2011), para. 141, referring to 'targeted representations or assurances' made by the host State. *See also*: *Mobil v. Canada*, Decision on Liability and on Principles of Quantum, (22 May 2012), para. 152 (referring to 'clear and explicit representations' made by the host State), para. 156 ('For the reasons set out below, having carefully studied the record and all the evidence the Tribunal is unable to conclude that any such *'promises' were made, either expressly or by any pattern of behavior over a ten year period, such as to give rise to a representation* that there would not be changes to the regulatory regime. In order to be able to rely upon an expectation that is said to exist, evidence would need to be tendered to show *clear and explicit representations* together with an indication as to reliance being placed upon such representations. The record in this case shows no such evidence, including of any subjectively held expectation that might be claimed to have existed', emphasis added).

(4) An investor must have relied on those representations, commitments or assurances when it decided to make its investment (*Waste Management,*[299] *Thunderbird,*[300] *Grand River,*[301] *Merrill,*[302] *Mobil*[303]).

(5) The host State must have subsequently failed to respect the reasonable and justifiable expectations created by its conduct, which resulted in damages for the investor (*Thunderbird,*[304] *Mobil*[305]).

[C] Transparency

The question of whether or not there exists any obligation of transparency for host States under international investment law is currently amongst the most controversial issues. While a number of writers have concluded that the FET standard includes an obligation of transparency,[306] others have come to the opposite conclusion.[307] Similarly, a 2004 OECD working paper provided that transparency was 'a relatively new

299. *Waste Management v. Mexico*, Award, (30 April 2004), para. 98.
300. *Thunderbird v. Mexico*, Award, (26 January 2006), para. 147.
301. *Grand River v. United States*, Award, (12 January 2011), para. 141.
302. *Merrill & Ring v. Canada*, Award, (31 March 2010), para. 150 ('reliance by an investor on that representation in making a business decision').
303. *Mobil v. Canada*, Decision on Liability and on Principles of Quantum, (22 May 2012), para. 156.
304. *Thunderbird v. Mexico*, Award, (26 January 2006), para. 147.
305. *Mobil v. Canada*, Decision on Liability and on Principles of Quantum, (22 May 2012), para. 152.
306. Carl-Sebastian Zoellner, *Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law*, 27 Mich.J.Int'l L. 579, 616 (2006) ('It could argue that due to the transparency enhancing provisions found in countless BITs, other multilateral investment treaties: and NAFTA itself, as well as with to the due process component of transparency, the principle has indeed gained relevance in interpreting the customary international law minimum standard guaranteed by fair and equitable treatment or expropriation provisions'), at 627 ('tribunals have recognized transparency as the underlying rationale of international economic provisions and a vital component of the success and functioning of le WTO and NAFTA legal orders (...) Hence, it does not seem premature to refer to it as an interpretative principle of international economic law'); Diehl, *supra* n. 3, at 454 ('Serious violations of the requirement to act in a transparent manner will, however, lead to a violation of the FET standard irrespective of whether individual expectations based on identifiable State conduct have been formed - and should be protected'); Villanueva, *supra* n. 121, at 103, 186-7; Charles H. Brower II, *Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium*, 29 Pepp. L. Rev. 43, 83 (2002); John Hanna, Jr, *Is Transparency of Governmental Administration Customary International Law in Investor-Sovereign Arbitrations? Courts and Arbitrators May Differ*, 21(2) Arb. Int'l 187 (2005); Kinnear, *supra* n. 35, at 20; Kreindler, *supra* n. 206, at 9; A. Lemaire, *Traitement juste et équitable*, 124 Gaz.Pal., Cahiers de l'arbitrage 43 (2004); Salacuse, *supra* n. 11, at 237 ('even where an investment treaty does not specifically provide for transparency a fair and equitable treatment clause implicitly requires transparency by the host government'); Weiler, *supra* n. 96, at 738; Knahr, *supra* n. 236, at 500; Laird & Weiler, *supra* n. 236, at 277, 278 ('there is certainly support for the proposition that regulatory transparency is now a requirement of customary international law'); Kläger, *supra* n. 13, at 234-235 (who nevertheless points out to the lack of uniformity in tribunal's understanding of transparency which gives only relative weight to the concept as autonomous); UNCTAD, *Fair and Equitable Treatment*, 51 (UNCTAD Series on Issues in International Investment Agreements 1999) ('where an investment treaty does not expressly provide for transparency, but does for fair and equitable treatment, then transparency is implicitly included in the treaty').
307. Vandevelde, *supra* n. 27, at 83-84 ('The transparency principle may be the most conceptually troubled element of the fair and equitable treatment standard. Several tribunals have regarded

In truth, this theoretical question is of little practical importance due to the fact that the obligation not to deny justice exists under international law. All States therefore have an obligation to protect foreign investors from a denial of justice under custom. The obligation exists even in situations where no BIT governs the relationship between an investor and the State or where a BIT does not contain an FET clause. The limited practical relevance of this question is also clear in the specific context of Article 1105 where NAFTA tribunals have to apply the minimum standard of treatment under customary international law (which includes protection against denial of justice).

[2] Defining Denial of Justice

The present section does not intend to provide a comprehensive analysis of the concept of denial of justice.[759] The objective is to highlight the most salient features of the concept before examining its concrete application by NAFTA tribunals. Defining what constitutes a denial of justice under international law is no easy task.[760] Under

759. *See*: C. Focarelli, *Denial of Justice*, in *The Max Planck Encyclopedia of Public International Law* (R. Wolfrum ed., Oxford U. Press 2009); C. Eagleton, *Denial of Justice in International Law*, 22 AJIL 538 (1928); J.W. Garner, *International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to a Denial of Justice*, 10 British YIL 181 (1929); G.G. Fitzmaurice, *The Meaning of the Term "Denial of Justice"*, 13 British YIL 93 (1932); C. De Visscher, *Le deni de justice en droit international*, 52 Rec Cours 367 (1936); A.V. Freeman, *The International Responsibility of States for Denial of Justice* (Longman, Green & Co. 1938); H.W. Spiegel, *Origin and Development of Denial of Justice* 32 AJIL 63 (1938); E. Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 3 Mich LR 445 (1940); García-Amador et al., *supra* n. 751; Bjorklund, *supra* n. 751; Paulsson, *supra* n. 751; Roger P. Alford, *Ancillary Discovery to Prove Denial of Justice*, 53(1) Va.J.Int'l L 127 (2013); Rym Ben Khelifa, *Le déni de justice en droit de l'investissement international: l'affaire Loewen c. les États-Unis d'Amérique*, in: *Où va le droit international de l'investissement?: Désordre normatif et recherche d'équilibre: actes du colloque organisé à Tunis les 3 et 4 mars 2006* 239 (Pedone 2007); Louis-Christophe Delanoy & Tim Portwood, *La responsabilité de l'Etat pour déni de justice dans l'arbitrage d'investissement*, 3 Rev. arb. 603 (2005); Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, 20(3) EJIL 729 (2009); Jurgen Kurtz, *Access to Justice, Denial of Justice and International Investment Law: A Reply to Francesco Francioni*, 20(4) EJIL 1077 (2009); Susan L. Karamanian, *Denial of Justice and the Foreign Investor: Lessons from North America*, in: *International Law: Issues and Challenges, vol. 2* 16 (Hope India Publications 2009); Alexis Mourre & Alexandre Vagenheim, *Some Comments on Denial of Justice in Public and Private International Law after Loewen and Saipem*, in: *Liber amicorum Bernardo Cremades* 843 (La Ley 2010); Mavluda Sattorova, *Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors From Judicial Misconduct*, 61(1) ICLQ 223 (2012); D. Wallace, *Fair and Equitable Treatment and Denial of Justice: Loewen v. US and Chattin v. Mexico*, in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* 669 (T. Weiler ed., Cameron May 2005); Don Wallace, *State Responsibility for Denial of Substantive and Procedural Justice under NAFTA Chapter Eleven*, 23 Hastings Int'l & Comp.L.Rev. 393 (2000); A.O. Adede, *A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law*, 14 Can YIL 73 (1976); Thomas W. Wälde, *Denial of Justice: A Review Comment on Jan Paulsson, Denial of Justice in International Law*, 21(2) ICSID Rev. 449 (2006); Stephen M. Schwebel, *The United States 2004 Model Bilateral Investment Treaty and Denial of Justice in International Law*, in: *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* 519-521 (Oxford U. Press 2009); Carlos Andrés Hécker Padilla, *Denial of Justice to Foreign Investors*, 3(1) Cuadernos de derecho transnacional, 296-301 (2011).

760. On this question, *see* Paulsson, *supra* n. 751, at 59 ff, indicating (at 98) that 'no enumerative approach to defining denial of justice has succeeded in the past, and there is no prospects that one will emerge in the future'. *See also*: Wallace, *supra* n. 759, at 672 ff.

international law, a State is responsible for the actions of its courts.[761] A denial of justice occurs in the context of the maladministration of the host State's judicial system toward an investor. Thus, Paulsson describes the concept as arising when 'a state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner'.[762] Newcombe et al. speak of 'minimum standards of administration of justice' to which foreign investors are entitled.[763]

One important point to highlight is that only 'gross or manifest instances of injustice' will be considered a denial of justice.[764] Thus, 'a simple error, misinterpretation or misapplication of domestic law is not per se a denial of justice'.[765] There is indeed a threshold for denial of justice to occur.[766] Paulsson speaks of 'egregious' actions by the State and of 'fundamental violations' of international law.[767] This position has been endorsed by tribunals.[768] The existence of such a threshold of liability is significant as an international tribunal does not serve as a court of appeal reviewing decisions emanating from lower courts.

Before being given the option to claim any denial of justice on the international plane, it is paramount that the investor exhausts all available procedural remedies before local courts. This will allow higher courts to correct any maladministration committed earlier by lower courts. This preliminary requirement is essential since, as stated by one writer, 'denial of justice arises where a national legal *system* fails to provide justice – not where there is a single procedural irregularity or misapplication of the law at some level of the judicial system'.[769] In the words of Paulsson, 'international

761. Article 4(1), *Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, 26 July 2001, U.N. Doc. A/CN.4/L.602/Rev.1.ILC ('I.L.C. Articles on State Responsibility').
762. Paulsson, *supra* n. 751, at 4, *see also* at 62.
763. Newcombe & Paradell, *supra* n. 206, at 238. *See also*, at 240 ('customary international law requires states to maintain a judicial system that meets international minimum standards of due process in its treatment of foreigners'). *See also*: Paulsson, *supra* n. 751, at 7.
764. Newcombe & Paradell, *supra* n. 206, at 238; Diehl, *supra* n. 3, at 467.
765. UNCTAD, *supra* n. 11, at 80. *See also*: Newcombe & Paradell, *supra* n. 206, at 238; Kläger, *supra* n. 13, at 227; Paulsson, *supra* n. 751, at 73 ff, 87 ff; Diehl, *supra* n. 3, at 462, 503 (highlighting the fact that denial of justice has nothing to do with situations where domestic tribunals disregard or misapply international law). On this point, *see*: Paulsson, *supra* n. 751, at 84-87; Paparinskis, *supra* n. 18, at 186-187.
766. Diehl, *supra* n. 3, at 503, 456 ('under international law, the general notion of denial of justice leads to State liability whenever an uncorrected national judgment is vitiated by fundamental unfairness. In other words: There has to be discreditable legal outcome or one that offends judicial propriety and not merely an incorrect outcome').
767. Paulsson, *supra* n. 751, at 60.
768. *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on Merits, (30 March 2010), para. 244 ('The test for establishing a denial of justice sets, as the Respondent has argued, a high threshold. While the standard is objective and does not require an overt showing of bad faith, it nevertheless requires the demonstration of "a particularly serious shortcoming" and egregious conduct that "shocks, or at least surprises, a sense of judicial propriety"'); *Joseph Charles, Lemire v. Ukraine*, ICSID No. ARB/06/18, Decision on Jurisdiction and Liability, (14 January 2010), para. 249 (footnote 71) ('for claims based on denial of justice, aggravating circumstances like outrage, bad faith, willful neglect of duty or other egregious behavior are required').
769. Newcombe & Paradell, *supra* n. 206, at 240-241 (emphasis in the original). *See also*: Diehl, *supra* n. 2, at 503 ('If the courts of a State do not function in a proper manner and administer justice in a fundamentally unfair fashion, they commit a delict commonly referred to as "denial

law does not impose a duty on States to treat foreigners fairly at every step of the legal process'.[770] In fact, 'the duty is to create and maintain a system of justice which ensures that unfairness to foreigners either does not happen, *or is corrected*'.[771] In this context, it has been rightly suggested that the exhaustion of local remedies is 'an inherent material element of the delict'.[772] Thus, the requirement of the exhaustion of local remedies is considered as a 'substantive requirement of the cause of action of denial of justice'.[773] This requirement therefore applies despite any waiver contained within an international instrument.[774]

One earlier attempt to clarify the meaning of the principle of denial of justice was made in 1929 with the publication of *The Law of Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners* by Harvard University.[775] Recently, UNCTAD listed the following instances of denial of justice:

(a) Denial of access to justice and the refusal of courts to decide.
(b) Unreasonable delay in proceedings.
(c) Lack of a court's independence from the legislative and the executive branches of the State.
(d) Failure to execute final judgments or arbitral awards.
(e) Corruption of a judge.
(f) Discrimination against the foreign litigant.
(g) Breach of fundamental due process guarantees, such as a failure to give notice of the proceedings and failure to provide an opportunity to be heard.[776]

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of justice". While the focus of FET claims based on administrative conduct is not on a systemic failure but usually on individual and grave misconduct by administrative agencies or other executive actors whose actions are imputable to the State, denial of justice only occurs in the case of a fundamental breakdown in a judicial system, that is, if the system as such has been at fault').

770. Paulsson, *supra* n. 751, at 7.
771. *Ibid.*, at 7 (emphasis in the original), *see also*, at 100-130.
772. *Ibid.*, at 8, 102 ff.
773. Diehl, *supra* n. 3, at 503.
774. It should be noted that a number of authors have been critical of this position: McLachlan et al., *supra* n. 37, at 232-233; Bjorklund, *supra* n. 751, at 858.
775. *The Law of Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners*, 23 AJIL Spec Supp 174 (1929), Article 9 ('Denial of justice exists where there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice'). The commentary to the document also provided a series of examples considered as a denial of justice: 'the failure to apprehend a criminal, denial of free access to the courts, failure to render a decision or undue delay in rendering judgment, corruption in the judicial proceedings, discrimination or ill-will against the alien as such, or as a national of a particular state, the refusal in bad faith to apply the local law, executive interference with the freedom or impartiality of the judicial process, failure to execute judgment, denial of an appeal where local law ordinarily permits it, negligently permitting a prisoner to escape, refusal to prosecute the guilty, or premature pardon of a convicted person, have all been deemed, under particular circumstances, instances of "denial of justice"'.
776. UNCTAD, *supra* n. 11, at 80.

Paulsson provides the following list of instances where tribunals have found a denial of justice:

> Some denials of justice may be readily recognised: refusal of access to court to defend legal rights, refusal to decide, unconscionable delay, manifest discrimination, corruption, or subservience to executive pressure. (...) No definitive list of instances could be presented, for it would soon be invalidated by new fact patterns, untested forms of organisation of systems of justice, and the boundless capacities of human invention. Recurring instances are unreasonable delay, politically dictated judgments, corruption, intimidation, fundamental breaches of due process, and decisions so outrageous as to be inexplicable otherwise than as expressions of arbitrariness or gross incompetence. A further basic postulate is that some acts or omissions by governmental authorities are sufficiently closely related to the administration of justice that they must also be deemed capable of generating international delinquency under the heading of denial of justice: failures of enforcement, the implementation of sanctions against persons or property without trial, failure of investigation or indictment, lengthy imprisonment without trail, arbitrarily lenient or harsh punishment.[777]

[3] Distinguishing Denial of Justice and Due Process

The concept of 'denial of justice' is closely interconnected with that of 'due process'. The requirement of due process is considered by many as an element of the FET standard.[778] According to many writers, States are required under custom to provide investors with due process in their administration of justice.[779] Under domestic law, the concept of the 'rule of law' is generally considered to encompass a 'procedural' dimension which is governed by the principle of 'due process'.[780] Thus, due process 'requires that one to whom the coercive power of the state is to be applied receive notice of the intended application and an opportunity to contest that application before an impartial tribunal'.[781] A denial of justice occurs when a breach of due process in the administration of justice is not corrected by the judicial system.[782] Paulsson puts it

777. Paulsson, *supra* n. 751, at 204-205, *see* at 176-206. *See also*, the comprehensive analysis of case law by Paparinskis, *supra* n. 18, at 189 ff.
778. Diehl, *supra* n. 3, at 432, 437; Choudhury, *supra* n. 44, at 316.
779. Newcombe & Paradell, *supra* n. 206, at 238, 241, 243-244; Vandevelde, *supra* n. 27, at 50. *See also*: *AAPL v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, (June 27, 1990), dissenting opinion of Judge Asente ('the general obligation of the host state to exercise due diligence in protecting foreign investment in its territories, an obligation that derives from customary international law').
780. Vandevelde, *supra* n. 27, at 49.
781. *Ibid.*
782. *Ibid.*, at 50 ('Customary international law long has required that foreign investors be accorded due process before local courts or administrative agencies. Failure to do so constitutes a denial of justice. Denial of justice—that is, a failure of due process— constitutes a violation of the fair and equitable treatment standard. Thus, fair and equitable treatment requires conduct consistent with the procedural dimension of the rule of law'); Newcombe & Paradell, *supra* n. 206, at 243.

Annex 153

ANNEX 154

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES BETWEEN

LONE PINE RESOURCES INC.,

Claimant/Investor

-and-

GOVERNMENT OF CANADA,

Respondent/Party.

ICSID CASE NO. UNCT/15/2

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA), the United States of America makes this submission on questions of interpretation of the NAFTA. The United States does not take a position, in this submission, on how the interpretations offered below apply to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

Article 1139 (Definition of "Investment")

2. Article 1139 provides an exhaustive, not illustrative, list of what constitutes an investment for purposes of NAFTA Chapter Eleven.[1] As the *Grand River* tribunal recognized, "on jurisdictional aspects, NAFTA awards are more relevant and appropriate than decisions in non-NAFTA investment cases."[2]

[1] *See Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 82 (Jan. 12, 2011) ("*Grand River* Award") ("NAFTA's Article 1139 is neither broad nor open-textured. It prescribes an exclusive list of elements or activities that constitute an investment for purposes of NAFTA."). All three NAFTA Parties agree. *See e.g.*, *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America, at 32 (Nov. 13, 2000) ("Article 1139 of the NAFTA identifies an exhaustive list of property rights and interests that may constitute an 'investment' for purposes of Chapter Eleven. None of the property rights or property interests identified in the definition of 'investment' in Article 1139, however, encompass a mere hope that profits may result from prospective sales[.]"); *Methanex Corp.*, Second 1128 Submission of Canada ¶ 59 (Apr. 30, 2001) ("The definition of 'investment' in NAFTA Article 1139 . . . is exhaustive, not illustrative."); *Methanex Corp.*, Second 1128 Submission of Mexico ¶ 19 (May 15, 2001) ("[A]n investment as defined in Article 1139 . . . while inclusive of several categories, is also exhaustive.").

[2] *Grand River Enterprises* Award ¶ 61. As the *Grand River* tribunal further recognized, non-NAFTA cases interpreting different definitions of investment invoked to support a broad construction of "investment" have "little value in constructing NAFTA." *Grand River Enterprises* Award ¶ 70.

Article1139(g)

3. Article 1139(g) defines "investment" as "real estate or other property, tangible or intangible, acquitted in the expectation or used for the purpose of economic benefit or other business purposes[.]" In this connection, Chapter Eleven tribunals have consistently declined to recognize as "property" mere contingent "interests."[3] Moreover, it is appropriate to look to the law of the host State for a determination of the definition and scope of the "property right" at issue.[4]

Article 1139(h)

4. Article 1139(h) defines "investment" as "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise[.]"

5. To qualify as investment under Article 1139(h), more than the mere commitment of funds is required. An investor must also have a cognizable "interest" that arises from the commitment of those resources. Specifically, Article 1139(h)(i) states that such interests might arise from, for example, turnkey or construction contracts or concessions. Similar interests might arise, according to Article 1139(h)(ii), from "contracts where remuneration depends substantially on the production, revenues or profits of an enterprise." Not every economic interest that comes into existence as a result of a contract, however, constitutes an "interest" as used in Article

[3] *See Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA/UNCITRAL, Award ¶¶ 142, 257-58 (Mar. 31, 2010) (finding that "[e]xpropriation cannot affect potential interests[,]" and that the expectation of contracts executed in the future was an "uncertain expectation, like the goodwill considered in Oscar Chinn, [that] does not appear to provide a solid enough ground on which to construct a legitimately affected interest"); *Bayview* Award ¶ 118 (finding no property rights where, among other things, exploitation or use of the water requires the grant of a concession under Mexican law, which such concession does not guarantee the existence or permanence of the water); *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 208 (Jan. 26, 2006) ("[C]ompensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited."); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 118 (Dec. 16, 2002) (finding no "right" to tax rebates where the right was conditioned upon presentation of certain invoices); *see also Methanex Corp.*, Final Award on Jurisdiction and Merits, Part IV, Chapter D ¶ 17 (Aug. 3, 2005) (noting that "items such as goodwill and market share may . . . in a comprehensive taking . . . figure in valuation," "[b]ut it is difficult to see how they might stand alone" as an investment under Article 1139) ("*Methanex* Final Award").

[4] *See, e.g.*, Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 263, 270 (1982) (for a definition of "property . . . [w]e necessarily draw on municipal law sources"). It is well-established under U.S. law, for example, that that revocable government-granted licenses do not confer property interests that give rise to claims for compensation. *See 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 not property interests that could give rise to a takings claim). This is particularly true when a person voluntarily enters a heavily regulated field.

1139(h). For example, Article 1139(h) does not recognize as "investments" claims to money that arise solely from commercial contracts for the sale of goods or services. Article 1139(i) specifically excludes from the definition of "investment" such interests.

Article 1101 ("Relating to" Requirement)

6. Article 1101(1) requires that the challenged measures adopted or maintained by a NAFTA Party "relate to" an investor of another NAFTA Party, or to that investor's investments. The "relating to" requirement cannot be satisfied by the mere, or incidental, effect that a challenged measure had on a claimant. Rather, there must have been a legally significant connection between the measure and the investor or its investment.[5] Otherwise, untold numbers of domestic measures that simply have an economic impact on a foreign investor or its investment would pass through the Article 1101(1) threshold.[6] As the *Methanex* tribunal aptly observed, "[a] threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all."[7]

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

Article 1110 (Expropriation and Compensation)

8. Article 1110(1) provides that "[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment" unless specified conditions are satisfied.

[5] *See Methanex v. United States of America*, NAFTA/UNCITRAL First Partial Award, ¶ 147 (Aug. 7, 2002) (finding that "the phrase 'relating to'. . . signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them") ("*Methanex* First Partial Award"). *See also Bayview Irrigation District, et al. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/1, Award ¶ 101 (June 19, 2007); *William Ralph Clayton et al. v. Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction and Liability ¶ 240 (Mar. 17, 2005).

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

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

9. As a threshold matter, the *Glamis* tribunal recognized that the term "expropriation" in Article 1110(1) "incorporates by reference the customary international law regarding that subject."[8] In this connection, it is a principle of customary international law that in order for there to have been an expropriation, a property right or property interest must have been taken.[9] International courts have rejected claims that a customer base, or goodwill, by themselves, are property that can be the subject of an expropriation. For instance, in the *Oscar Chinn* case before the Permanent Court of International Justice, the Court denied an expropriation claim for failure to identify a property right.[10] In that case, a British river carrier operator claimed that the Belgian Congo had expropriated its property when it increased government funding for a state-owned competitor which resulted in that competitor being granted a *de facto* monopoly. In denying the claim, the Court held that it was "unable to see in [claimant's] original position – which was characterized by the possession of customers . . . anything in the nature of a genuine vested right."[11] The Court reasoned that "[f]avourable business conditions and goodwill are transient circumstances, subject to inevitable changes."[12]

10. As such, and given that Article 1110(1) protects "investments" from expropriation, the first step in any expropriation analysis must begin with an examination of whether there is an investment capable of being expropriated.[13] Again, it is appropriate to look to the law of the host

[8] *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 354 (June 8, 2009) ("*Glamis*, Award")

[9] *See, e.g.*, Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 R.C.A.D.I. 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.'"). This principle of customary international law is reflected in 2012 U.S. Model Bilateral Investment Treaty, ann. B (*Expropriation*) ¶ 2 ("2012 U.S. Model BIT").

[10] (U.K. v. Belg.), 1934 P.C.I.J. (ser. A/13) No. 63, at 88 (Dec. 12).

[11] (U.K. v. Belg.), 1934 P.C.I.J. (ser. A/13) No. 63, at 88 (Dec. 12).

[12] (U.K. v. Belg.), 1934 P.C.I.J. (ser. A/13) No. 63, at 88 (Dec. 12); *see also* Rudolf L. Bindschedler, *La protection de la propriete privee en droit international public*, 90 R.C.A.D.I. 179, 223-24 (1956) ("La clientèle, notion intimement liée à celle de la liberté du commerce et de l'industrie, n'est pas plus que cette derrière susceptible d'appropriation.") ("Clientele, a notion intimately linked to that of liberty of commerce and industry, is no more capable of expropriation than the latter.") (emphasis omitted; translation by counsel); *c.f.*, *Methanex* Final Award, Part IV, Ch. D ¶ 17 (Aug. 3, 2005) (noting that "items such as goodwill and market share may . . . in a comprehensive taking . . . figure in valuation," "[b]ut it is difficult to see how they might stand alone" as an investment under Article 1139).

[13] *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 R.C.A.D.I. 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.'").

State[14] for a determination of the definition and scope of the property right or property interest at issue, including any applicable limitations.[15]

11. Article 1110 provides for protections from two types of expropriations, direct and indirect.[16] A direct expropriation occurs "where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure."[17]

12. An indirect expropriation occurs "where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."[18] 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 governmental action; (ii) the extent to which that action interferes with distinct, reasonable-investment-backed expectations; and (iii) the character of the government action.[19]

13. With respect to the first factor, for an expropriation claim to succeed, the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as "to support a conclusion that the property has been 'taken' from the owner."[20]

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[14] *See, e.g.*, Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 263, 270 (1982) (for a definition of "property . . . [w]e necessarily draw on municipal law sources").

[15] *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).

[16] As the United States has previously explained, the phrase "take a measure tantamount to nationalization or expropriation" explains what the phrase "indirectly nationalize or expropriate" means; it does not assert or imply the existence of an additional type of action that may give rise to liability beyond those types encompassed in the customary international law categories of "direct" and "indirect" nationalization or expropriation. *Metalclad Corp. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/97/1), Submission of the United States of America ¶¶ 9-14 (Nov. 9, 1999). *See also Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL Interim Award ¶¶ 103-04 (June 26, 2000) (rejecting the claimant's argument that "tantamount to expropriation" provides protections beyond those provided by customary international law; *see also* id. ¶ 96); *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 286 (Nov. 13, 2000) ("In common with the *Pope & Talbot* Tribunal, this Tribunal considers that the drafters of the NAFTA intended the word 'tantamount' to embrace the concept of so-called 'creeping expropriation,' rather than to expand the internationally accepted scope of the term expropriation."); *Cargill Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/2 ¶ 372 ("Article 1110, in using the terms 'expropriation' and 'tantamount to expropriation', incorporates this customary law of expropriation."). *See also* Kenneth Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation*, 278 (2010) ("Some BITs refer to measures 'tantamount' or 'equivalent' to expropriation to describe indirect expropriation.") (footnotes omitted).

[17] 2012 U.S. Model Bilateral Investment Treaty, ann. B (*Expropriation*) ¶ 3 ("2012 U.S. Model BIT").

[18] 2012 U.S. Model BIT ann. B (*Expropriation*) ¶ 4.

[19] *See*, 2012 U.S. Model BIT ann. B (*Expropriation*) ¶ 4(a), which is intended to reflect customary international law.

[20] *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Interim Award ¶ 102 (June 26, 2000) ("*Pope & Talbot* Interim Award"); *see also Glamis*, Award ¶ 357 ("[A] panel's analysis should begin with determining

14. The second factor requires an objective inquiry of the reasonableness of the claimant's expectations, which "depend in part on the nature and extent of governmental regulation in the relevant sector."[21]

15. 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").[22]

16. Under international law, where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory.[23] This principle in public international law is not

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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, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award ¶ 360 (Sept. 18, 2009) ("*Cargill* Award") (holding that a government measure only rises to the level of an expropriation if it affects "a radical deprivation of a claimant's economic use and enjoyment of its investment" and that a "taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property . . . (i.e., it approaches total impairment)").

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

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

[23] *See, e.g.*, *Glamis* Award ¶ 354 (quoting the RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712, cmt. (g) (1987) ("A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory. . . .")); *Chemtura Corp. v. Government of Canada*, NAFTA/UNCITRAL, Award (Aug. 2, 2010) ¶ 266 (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

an exception that applies after an expropriation has been found but, rather, is a recognition that certain actions, by their nature, do not engage State responsibility.[24]

17. Where a State proclaims that it is enacting a non-discriminatory statute or regulation for a *bona fide* public purpose, courts and tribunals rarely question that characterization.[25] The Restatement (Third) of Foreign Relations, for instance, notes that the public purpose requirement "has not figured prominently in international claims practice, perhaps because the concept of public purpose is broad and not subject to effective reexamination by other states."[26] In sum, the concept of a "public purpose" is a broad one, and it is not appropriate to search for a State's alleged ulterior motives when a State has articulated plausible reasons for enacting the measures in question.

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non-discriminatory regulation for a public purpose, which is enacted in accordance with due process" will not ordinarily be deemed expropriatory or compensable); Lee M. Caplan and Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT: An Article-by-Article Analysis*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 791-792 (Chester Brown ed., 2013) (discussing observation included in Annex B, paragraph 4(b) of U.S. 2012 Model BIT that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation."). This observation was first included in the 2004 U.S. Model BIT and has been echoed in subsequent U.S. investment agreements.

[24] *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW at 539 (1998) ("Cases in which expropriation is allowed to be lawful in the absence of compensation are within the narrow concept of public utility prevalent in laissez-faire economic systems, i.e. exercise of police power, health measures, and the like.") (emphasis added); G.C. Christie, What Constitutes a Taking of Property Under International Law, 38 BRIT. Y.B. INT'L L., 307, 338 (1962) ("If, however, such prohibition can be justified as being reasonably necessary to the performance by a State of its recognized obligations to protect the public health, safety, morals or welfare, then it would normally seem that there has been no 'taking' of property.") (emphasis added).

[25] *See* Louis B. Sohn and R.R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens," 55 Am. J. Int'l L. 545, 555-56 (1961) ("It is not without significance that what constitutes a 'public purpose' has rarely been discussed by international tribunals and that in no case has property been ordered restored to its former owner because the taking was considered to be other than for a public purpose. This unwillingness to impose an international standard of public purpose must be taken as reflecting great hesitancy upon the part of tribunals and of States adjusting claims through diplomatic settlement to embark upon a survey of what the public needs of a nation are and how these may best be satisfied."); Burns H. Weston, *Constructive Takings Under International Law: A Modest Foray Into the Problem of "Creeping Expropriation," 16* VA J. INT'L L. 103, 121 (1975) (explaining that, under international law, there is a "necessary presumption that States are 'regulating' when they say they are 'regulating,' and they are especially to be honored when they are explicit in this regard"); *see also* G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT'L L. 307, 332 (1962) ("But it certainly would seem that if the facts are such that the reasons actually given are plausible, search for unexpressed 'real' reasons is chimerical. No such search is permitted in municipal law, and the extreme deference paid to the honour of States by international tribunals excludes the possibility of supposing that the rule is different in international law.").

[26] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 712, cmt. e (1987).

Article 1105 (Minimum Standard of Treatment)

18. Article 1105 is titled "Minimum Standard of Treatment." Article 1105(1) requires each Party to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

19. On July 31, 2001, the Free Trade Commission ("Commission"), comprising the NAFTA Parties' cabinet-level representatives, issued an interpretation reaffirming that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party."[27] The Commission clarified 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."[28] The Commission's interpretation "shall be binding" on tribunals established under Chapter Eleven.[29]

20. The Commission's interpretation thus confirms the NAFTA Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in NAFTA Article 1105. 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.[30] The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[31]

21. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, which is expressly addressed in Article 1105(1), concerns the obligation to provide "fair and equitable treatment." The "fair and equitable treatment" obligation includes, for example, the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.

22. Other such areas concern the obligation to provide "full protection and security," which is also addressed in Article 1105(1), but which is not at issue in this case. The minimum standard

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

[28] *Id.* ¶ B.2.

[29] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, art. 1131(2) (1993).

[30] A fuller description of the U.S. position is set out in *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America (Nov. 13, 2000); *ADF Group Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/00/1, Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot* (June 27, 2002); *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Sept. 19, 2006) ("*Glamis*, U.S. Counter-Memorial") ; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Dec. 22, 2008).

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

of treatment also includes the obligation not to expropriate covered investments, except under the conditions specified in Article 1110, which is addressed in greater detail above.

23. Customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation. This two-element approach – State practice and *opinio juris* – is "widely endorsed in the literature" and "generally adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice."[32]

24. Relevant State practice must be widespread and consistent[33] and be accepted as law, meaning that the practice must also be accompanied by a sense of legal obligation.[34] The twin requirements of State practice and *opinio juris* "must *both* be identified . . . to support a finding that a relevant rule of customary international [law] has emerged."[35] A perfunctory reference to these requirements is not sufficient.[36]

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[32] *See* Michael Wood (Special Rapporteur), *Second Report on Identification of Customary International Law* ¶ 21, A/CN.4/672, International Law Commission (May 22, 2014) ("ILC Second Report on the Identification of Customary International Law"); *see also id.*, Annex, Proposed Draft Conclusion 3 (stating that in order to determine the "existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law"); *see also* Michael Wood (Special Rapporteur), Fourth Report on Identification of Customary International Law ¶ 31 & Annex at 21, A/CN.4/695 (Mar. 8, 2016) (proposing minor modifications to Draft Conclusion 3); *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. 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[.]").

[33] *See, e.g.*, *North Sea Continental Shelf*, 1969 I.C.J. at 43 (noting that in order for a new rule of customary international law to form, "State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; -- and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved"); ILC Second Report on the Identification of Customary International Law, Draft Conclusion 9 and commentaries (citing authorities).

[34] *North Sea Continental Shelf*, 1969 I.C.J. at 44 ("Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."); ILC Second Report on the Identification of Customary International Law, Draft Conclusion 10 with commentaries (citing authorities).

[35] ILC Second Report on the Identification of Customary International Law ¶¶ 22-23 (citing these requirements as "indispensable for any rule of customary international law properly so called") (emphasis added).

[36] *See* PATRICK DUMBERRY, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105 at 115 (2013) ("DUMBERRY") (observing that the tribunal in *Merrill & Ring* failed "to cite a single example of State practice in support of" its "controversial findings"); UNCTAD, FAIR AND EQUITABLE TREATMENT – UNCTAD SERIES ON ISSUES IN INTERNATIONAL AGREEMENTS II at 57 (2012) ("The *Merrill & Ring* tribunal failed

25. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate that a rule of customary international law exists, most recently in its decision on *Jurisdictional Immunities of the State* (*Germany v. Italy*).[37] In that case, 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.[38]

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.[39] 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. 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 than the interference with those expectations.[40]

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to give cogent reasons for its conclusion that MST made such a leap in its evolution, and by doing so has deprived the 2001 NAFTA Interpretive Statement of any practical effect.").

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

[38] *Id.* at 122-23 (discussing relevant materials that can serve as evidence of State practice and *opinio juris* in the context of jurisdiction immunity in foreign courts).

[39] *See, e.g., Mesa Power Group, LLC v. Government of Canada*, NAFTA/UNICTRAL, Government of Canada Response to 1128 Submissions ¶ 12 (June 26, 2015) (concurring with the United States that there is no obligation not to frustrate investors' expectations under the minimum standard of treatment); DUMBERRY at 158-60 ("there is little support for the assertion that there exists under customary international law any obligation for host States to protect investors' legitimate expectations."). Similarly, the customary international law minimum standard of treatment set forth in Article 1105(1) does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination. *See Grand River Enterprises Six Nations Ltd. v United States of America*, NAFTA/UNCITRAL, Award ¶¶ 208-09 (Jan. 12, 2011) ("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."); 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.").

[40] *See, e.g., Grand River*, U.S. Counter-Memorial, at 96-97 ("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." Even when such expectations arise out of a legal commitment, "[t]o breach the minimum standard of treatment, something more is required, such as a complete repudiation of the contract or a denial of justice in the execution of the contract."). NAFTA tribunals have recognized this point. *See Robert Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award ¶ 87 (Nov. 1, 1999) ("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.").

27. In fact, tribunals discussing State practice confirm that expectations about a particular legal regime do not preclude a State from taking future regulatory action. States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's "expectations" about the state of regulation in a particular sector. Further, as the *Mobil v. Canada* tribunal explained:

> [The fair and equitable treatment] standard does not require a State to maintain a stable legal and business environment for investments[.]… [T]here is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor. Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made.… What the foreign investor is entitled to under Article 1105 is that any changes are consistent with the requirements of customary international law on fair and equitable treatment.[41]

For all these reasons, regulatory action may only violate "fair and equitable treatment" under the minimum standard of treatment as that term is understood in customary international law.[42]

28. States may decide expressly by treaty to make policy decisions to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law.[43] The practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 1105 in which "fair and equitable treatment" and "full protection and security" are expressly tied to the customary international law minimum

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[41] *Mobil Investments Canada Inc. & Murphy Oil Corp. v. Canada*, NAFTA/ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum ¶ 153 (May 22, 2012) (noting also that "[i]t is not the function of an arbitral tribunal established under NAFTA to legislate a new standard which is not reflected in the existing rules of customary international law. The Tribunal has not been provided with any material to support the conclusion that the rules of customary international law require a legal and business environment to be maintained or set in concrete."); *see also Azinian* Award ¶ 83 ("It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints. . . . NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.").

[42] *See, e.g.*, *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 193-94 (Jan. 26, 2006) ("*Thunderbird* Award"); *see also Glamis*, U.S. Counter-Memorial at 218-262 (discussing the customary international law minimum standard of treatment in the context of regulatory action); *Glamis*, U.S. Rejoinder at 139-243 (same).

[43] *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.").

standard of treatment.[44] 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 1105(1).[45] Likewise, 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.[46] 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 1105(1).

29. Thus, the NAFTA Parties expressly intended Article 1105(1) to afford the minimum standard of treatment to covered investments, as that standard has crystallized into customary international law through general and consistent State practice and *opinio juris*. A claimant must demonstrate that alleged standards that are not specified in the treaty have crystallized into an obligation under customary international law.

30. To do so, as all three NAFTA Parties agree,[47] the burden is on the claimant and claimant alone to establish the existence and applicability of a relevant obligation under customary

[44] FTC Interpretation ¶ B.1 ("Article 1105(1) prescribes the customary international law minimum standard of treatment . . . .); s*ee 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 NAFTA and other treaties, a claimant submitting a claim under the NAFTA, 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.

[45] *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) (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.").

[46] *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). All three NAFTA Parties further agree that decisions of arbitral tribunals are not evidence in themselves of customary international law. *See, e.g.*, *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Second Submission of Mexico Pursuant to NAFTA Article 1128 ¶ 10 (June 12, 2015) ("Mexico concurs with Canada's submission that decisions of arbitral tribunals are not themselves a source of customary international law.").

[47] *See, e.g., Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Government of Canada Rejoinder on the Merits (July 2, 2014) ¶ 147 ("[I]t is a well-established principle of international law that the party alleging the existence of a rule of customary international law bears the burden of proving it. Thus, the burden is on the Claimant to prove that customary international law has evolved to include the elements it claims are protected.") (footnote omitted); *id.*, Second Submission of Mexico Pursuant to NAFTA Article 1128 (June 12, 2015) ¶ 9 (concurring with the United States' position that the burden is on a claimant to establish a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*); *id.*, Second Submission

international law that meets the requirements of State practice and *opinio juris.*[48] "The party which relies on a custom," therefore, "must prove that this custom is established in such a manner that it has become binding on the other Party."[49] Tribunals applying Article 1105 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.[50]

31. Once a rule of customary international law has been established, the claimant must then show that the State has engaged in conduct that violates that rule.[51] Determining a breach of the minimum standard of treatment therefore "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

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of the United States of America ¶ 12 (June 13, 2015). *See also id*. ¶ 8 ("Specifically, as addressed below, the *Bilcon* tribunal failed to recognize that the burden is on a claimant to establish the existence and applicability of a rule of customary international law, and failed to determine whether the *Bilcon* Claimants had met that burden.").

[48] *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 ¶¶ 601-02 (noting that the claimant bears the burden of establishing a change in customary international law, by showing "(1) a concordant practice of a number of States acquiesced in by others, and (2) a conception that the practice is required by or consistent with the prevailing law (*opinio juris*).") (citations and internal quotation marks omitted).

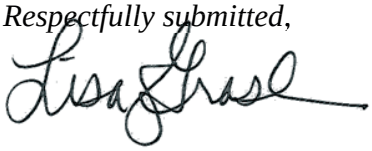
[49] *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, 1952 I.C.J. 176, 200 (Aug. 27) ("The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.") (citation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

[50] *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) ("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 ("As a threshold issue, the Tribunal notes that it is Claimant's burden to sufficiently" show the content of the customary international law minimum standard of treatment); *Methanex,* Final Award, Part IV, Chapter C ¶ 26 (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).

[51] *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).

matters within their own borders."[52] Chapter Eleven tribunals do not have an open-ended mandate to "second-guess government decision-making."[53]

Respectfully submitted,



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[52] *S.D. Myers*, First Partial Award ¶ 263.

[53] *S.D. Myers*, Partial Award ¶ 261 (Nov. 13, 2000) ("When interpreting and applying the 'minimum standard,' a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections."); *International Thunderbird Inc. v. Mexico*, NAFTA/UNCITRAL, Award ¶ 127 (Jan. 26, 2006) (reasoning that States have "wide discretion" with respect to how they carry out policies in the context of gambling operations).

ANNEX 155

IN THE MATTER OF AN ARBITRATION UNDER THE TREATY BETWEEN
THE UNITED STATES OF AMERICA AND THE ORIENTAL REPUBLIC OF URUGUAY
CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT
AND THE ICSID CONVENTION
BETWEEN

ITALBA CORPORATION,

Claimant,

- and -

THE ORIENTAL REPUBLIC OF URUGUAY,

Respondent.

ICSID Case No. ARB/16/9

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to Article 28.2 of the Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment ("Treaty" or "BIT"), the United States of America makes this submission on questions of interpretation of the Treaty. 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 1 (Definition of "Investment")

Licenses and Authorizations as "Investments"

2. Article 1 of the Treaty defines "investment" to mean "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." It adds that the "[f]orms that an investment may take include: . . . (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law . . . ." Footnote 3 is appended to subparagraph (g), and states:

> Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the

> licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

3. The footnote refers to licenses, authorizations, permits, and similar instruments that "do not create any rights protected under domestic law" as being "among" those that "do not have the characteristics of an investment." A license revocable at will by the State – which generally does not confer any protected rights – would exemplify the kind of license that is unlikely to constitute an investment.[1] 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.[2]

Meaning of "Control"

4. The Article 1 "investment" definition refers to "every asset that an investor owns *or controls*, directly or indirectly, that has the characteristics of an investment."[3] The term "control" is not defined in the Treaty. The omission of a definition for "control" accords with long-standing U.S. practice, reflecting the fact that determinations as to whether an investor controls an enterprise will involve factual situations that must be evaluated on a case-by-case basis.[4]

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[1] *See* KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 124 (2009) ("VANDEVELDE") (emphasis added).

[2] 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 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").

[3] Emphasis added.

[4] *See Hearing Before the Committee on Foreign Relations of the United States Senate on the Bilateral Investment Treaties with Argentina, Armenia, Bulgaria, Ecuador, Kazakhstan, Kyrgyzstan, Moldova, and Romania*, S. Hrg. 103-292, 103rd Cong., 1st Sess. (Sept. 10, 1993), Responses of the U.S. Department of State to Questions Asked by Senator Pell, at 27 (the term "control" is left undefined in U.S. Model BITs "because these [determinations] involve factual situations that must be evaluated on a case-by-case basis"); *see also* VANDEVELDE, at 116 ("a determination

Article 17 (Denial of Benefits)

5. The Treaty provides that a Party shall provide protections for "investors" of another Party, which are defined in Article 1 to include a broad class of "enterprise[s]," namely those that are "constituted or organized under the law of a Party."[5] At the same time, however, Article 17(2) provides:

> A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control[6] the enterprise.

6. This treaty right is consistent with a long-standing U.S. policy to include a denial of benefits provision in investment agreements to safeguard against the potential problem of "free rider" investors, *i.e.*, third-party entities that may only as a matter of formality be entitled to the benefits of a particular agreement.[7] While it has long been U.S. practice to omit a precise definition of the term "substantial business activities," in order that the existence of such activities may be evaluated on a case-by-case basis,[8] the United States has indicated in, for example, its Statement of Administrative Action on the NAFTA that "shell companies could be denied benefits but not, for example, firms that maintain their central administration or principal place of business in the territory of, or have a real and continuous link with, the country where they are established."[9]

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of whether an investor controls a company requires factual determinations that must be made on a case by case basis").

[5] A "claimant" under the dispute resolution provisions of the Treaty is defined in Article 1 as "an investor of a Party that is a party to an investment dispute with the other Party." Article 1 then defines the term "investor of a Party" to include an "enterprise of a Party," and in turn defines "enterprise of a Party" as "an enterprise constituted or organized under the law of a Party . . . ."

[6] See above with respect to the term "control."

[7] *See, e.g.*, Herman Walker, Jr., *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 388 (1956) (noting that "recent treaties signed by the United States, . . . , indicate that this possibility of a 'free ride' by third-country interests is one to be guarded against . . . .").

[8] *See Hearing Before the Committee on Foreign Relations of the United States Senate on the Bilateral Investment Treaties with Argentina, Armenia, Bulgaria, Ecuador, Kazakhstan, Kyrgyzstan, Moldova, and Romania*, S. Hrg. 103-292, 103rd Cong., 1st Sess. (Sept. 10, 1993), Responses of the U.S. Department of State to Questions Asked by Senator Pell, at 27.

[9] North American Free Trade Agreement, Texts of the Agreement, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements, H. Doc. 103-159, 103d Cong., 1st Sess., at 145 (Nov. 4, 1993); *see Message from the President: Investment Treaty with Azerbaijan*, 106th Cong., 2d Sess., Sen. Treaty Doc. 106-47 (Sept 12, 2000), at 12 (stating that the denial of benefits provision "would not generally permit [the host State] to deny benefits to a company of [the other Party] that maintains its central administration or principal place of

Article 26 (Limitations Period)

7. Article 26(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 24(1) and knowledge that the claimant (for claims brought under Article 24(1)(a)) or the enterprise (for claims brought under Article 24(1)(b)) has incurred loss or damage.

8. Pursuant to Article 24(4), a claim is "deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration" is (for cases under the auspices of the ICSID Convention) "received by the Secretary-General [of ICSID]." Hence, the critical date for purposes of the limitations period is, in an ICSID case, the date falling three years prior to the Secretary-General's receipt of the claimant's request for arbitration.[10]

9. Article 26(1) thus prohibits an investor from making, and the Tribunal from hearing, claims where the claimant "first acquired, or should have first acquired, knowledge of the breach" as well as "knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage" more than three years prior to the date of submission to arbitration. The Article imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of the dispute.[11] And because the claimant bears the burden of proof with respect to the

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business in the territory of, or has a real and continuous link with" the other Party; the same language appears in the transmittal messages accompanying U.S. investment treaties with Trinidad and Tobago, Georgia, Albania, Jordan, Bolivia, Honduras, El Salvador, Croatia, Mozambique, and Nicaragua).

[10] *See 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 ¶ 199 (May 31, 2016) ("*Corona Materials* Award") ("[I]t is uncontroversial that the Claimant submitted its claims to arbitration when it initiated the present proceedings, *i.e.*, by way of its Request for Arbitration which was dated June 10, 2014. The application of Article 10.18.1 [identical to Article 26(1) of this Treaty] leads to the conclusion that the critical date is three years earlier, *i.e.* June 10, 2011.").

[11] *See, e.g.*, *Spence International Investments, LLC, Berkowitz et al. v. Republic of Costa Rica*, CAFTA/UNCITRAL, ICSID Case No. UNCT/13/2, Interim Award ¶¶ 235-236 (Oct. 25, 2016) ("*Spence* Interim Award") (addressing the time-bar defense as a jurisdictional issue); *Apotex Inc. v. United States of America*, NAFTA/UNCITRAL, 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 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)).

factual elements necessary to establish jurisdiction,[12] a claimant must prove the necessary and relevant facts to establish that each of its claims fall within the three-year limitations period.[13]

10. The limitations period is a "clear and rigid" requirement that is not subject to any "suspension," "prolongation," or "other qualification."[14] An investor or enterprise *first* acquires knowledge of an alleged breach and loss at a particular moment in time; that is, under Article 26, knowledge is acquired 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,[15] a continuing course of conduct by the host State does not renew the limitations period (there under Articles 1116(2) and 1117(2) of the NAFTA, functionally identical to the time-bar limitation set out in Article 26(1) of this Treaty), once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby. 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."[16] To allow an investor to do so would "render the limitations provisions ineffective[.]"[17] An ineffective limitations period would fail to promote the goals of ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential respondents and third parties.

11. A legally distinct injury, by contrast, can give rise to a separate limitations period under the Treaty. In the case of a challenge to a measure adopted or maintained by a Party, the

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[12] *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").

[13] *Spence* Interim Award ¶¶ 163, 239, 245-246.

[14] *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"); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002) ("*Feldman* Award"); *Apotex I & II* Award ¶ 327 (quoting *Grand River* Decision); *Corona Materials* Award ¶ 199.

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

[16] *Id.* (interpreting the claims limitation language in NAFTA Chapter Eleven, which is identical to Article 26(1) of this Treaty for all relevant purposes).

[17] *Id.*

exhaustion of local remedies will not give rise to a legally distinct injury, unless the institutions to whom appeal has been made commit some new breach of the applicable standard.[18]

12. With regard to knowledge of the "breach" under Article 26, a "breach" of an international obligation exists "when an act of th[e] State is not in conformity with what is required of it by that obligation."[19] Thus, with respect to a claim under a given Treaty article, a claimant has actual or constructive knowledge of the alleged "breach" once it has (or should have had) knowledge of all elements required to make a claim under the article in question. In other words, the operative date is the date on which the claimant first acquired actual or constructive notice of facts sufficient to make a claim under the article.

Articles 3 and 4 (National Treatment and Most-Favored-Nation Treatment)

13. Article 3 ("National Treatment") provides that each Party shall accord to investors or 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 4 ("Most-Favored-Nation Treatment") provides that each Party shall accord to investors or 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."

14. To establish a breach of Article 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." 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 . . . ."[20] In this vein, Paragraph 2 of the Protocol to the present Treaty explicitly confirms the Parties' shared understanding consistent with general principles of law applicable to international arbitration that "when a claimant submits a claim to arbitration under Section B, it has the burden of proving all elements of its claim."

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[18] James Crawford, Special Rapporteur, Second Report on State Responsibility, International Law Commission, 51st Sess., U.N. Doc. A/CN.4/498 (1999) ¶ 140.

[19] Articles on Responsibility of States for Internationally Wrongful Acts, art. 12, U.N. Doc. A/RES/56/83 (2001).

[20] *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.").

15. Establishing a violation of Article 4 is the same as establishing a violation of Article 3, except that the applicable comparator in step two above is an investor or investments of a third State.

16. As indicated above, the appropriate comparison is between the treatment accorded to the Party's investment or investor and a national or third-State investment or investor *in like circumstances.* As one tribunal has observed, "[i]t goes without saying that the meaning of the term ['in like circumstances'] 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."[21] 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 "in 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. Simply being in the same sector, or selling the same product, is not alone sufficient to demonstrate like circumstances. When determining whether the claimant was in like circumstances with alleged comparators, the Party's investor or investment should be compared to a national or third-State investor or investment that is alike in all relevant respects but for nationality of ownership. Moreover, whether treatment is accorded in "like circumstances" under Articles 3 or 4 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

Article 5 (Minimum Standard of Treatment)

17. Article 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 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.

Article 5(2) then goes on to state that

> The obligation in paragraph 1 to provide:

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

> (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.

Rules that have crystallized into the minimum standard

18. The above provisions demonstrate the Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in Article 5. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law.[22] The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[23]

19. 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 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."[24] A denial of justice arises, for example, when a State's judiciary administers justice to aliens in a "notoriously unjust" or "egregious"[25] manner "which offends a sense of judicial propriety."[26] Denial of

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[22] A fuller description of the U.S. position is set out in *Methanex v. United States of America*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America (Nov. 13, 2000); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Post-Hearing Submission of Respondent United States of America on Article 1105(1) and Pope & Talbot (June 27, 2002); *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Sept. 19, 2006); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Dec. 22, 2008) ("U.S. Counter- Memorial in *Grand River*"). Submissions of the United States in investor-State arbitrations may be found on the U.S. Department of State website, available at http://www.state.gov/s/l/c3433.htm.

[23] *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 259 (Nov. 13, 2000) ("*S.D. Myers* First Partial Award"); *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."); *see also* Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 AM. SOC'Y OF INT'L L PROC. 51, 58 (1939).

[24] Treaty, art. 5(2)(a).

[25] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 4 (2005) (citing J. Irizarry y Puente, *The Concept of "Denial of Justice" in Latin America*, 43 MICH. L. REV. 383, 406 (1944)) ("PAULSSON"); *id.* at 4 ("[A] state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner.") (emphasis omitted); *Chattin Case (United States of America 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

justice is linked by the terms of Article 5(1) to its meaning under customary international law,[27] and 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."[28] In certain instances, a denial of justice under customary international law may be effected, in the context of "adjudicatory proceedings," where the State authorities responsible for the enforcement phase of such proceedings refuse to execute a final judgment rendered by the judiciary.[29]

20. Finally, there can be no denial of justice based on a judicial act without a final decision of a State's highest judicial authority,[30] unless recourse to further domestic remedies would be

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amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man.") (emphasis omitted).

[26] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, 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").

[27] *Corona Materials* Award ¶ 248 (examining, in the context of a claim under the CAFTA-DR's "minimum standard of treatment" article (identical to that in the present Treaty), what may constitute a "denial of justice under customary international law").

[28] EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 330 (1925) ("BORCHARD"); J.L. BRIERLY, THE LAW OF NATIONS 286-87 (1963) (defining a denial of justice as "an injury involving the responsibility of the state committed by a court of justice").

[29] *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT'L L. 131, 175 Supplement: Codification of International Law (1929) ("Harvard Draft") (commentary accompanying Article 9 of the Draft, stating that various actions, including "failure to execute the judgment," "have all been deemed, under particular circumstances, instances of 'denial of justice.'"). Article 9 of the Harvard Draft states that a "[d]enial of justice exists where there is a denial, unwarranted delay or obstruction of access to the courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment." *Id.* at 134 (emphasis added). According to its reporters, the 1929 Harvard Draft Convention was "framed with a desire to depart as little as possible from the existing rules of international law," with indications "included in the comment [to each article] wherever the proposed statement departs from the existing law or practice." *Id.* at 140. *See also The Interoceanic Railway of Mexico (Acapulo to Veracruz) (Limited), and The Mexican Eastern Railway Company (Limited), and The Mexican Southern Railway (Limited)*, 28 AM. J. INT'L L. 167, 176 (1934) (where an alien, after having won a lawsuit, "addresses himself to those non-judicial authorities upon whom, in most countries, execution of the judgments of civil courts is incumbent, and they either refuse to assist him, or postpone their action indefinitely, the alien in question is certainly entitled to complain of denial or undue delay of justice, although the responsibility cannot be laid at the door of the tribunal that sustained his action."); *Montano (Peru) v. United States*, 2 MOORE'S ARB. 1630, 1634-38 (U.S.-Peru Claims Commission, Jan. 12, 1863) ("*The Eliza*") (concluding that the U.S. government had denied the claimant justice, because the "sentence of the court was not made effective through the fault of the public officer who was under obligation to execute it").

[30] *See, e.g.*, *Apotex I & II* Award ¶ 282; (noting that denial of justice claims "depend upon the demonstration of a systemic failure in the judicial system. Hence, 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

obviously futile or manifestly ineffective.[31] This rule applies to claims of denial of justice brought under treaties, such as this one, that permit claimants to pursue domestic remedies prior to arbitration but require claimants to waive their rights to pursue such claims before other fora in order to submit a claim to arbitration.[32]

21. Other areas included within the minimum standard of treatment concern the obligation not to expropriate covered investments except under the conditions specified in Article 6, and the obligation to provide "full protection and security," which, as expressly stated in Article 5(2)(b), "requires each Party to provide the level of police protection required under customary international law."[33]

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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."); C. F. AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 198 (2004) ("the alien must proceed to the highest court in the whole system, which may include more than one line of tribunals or courts where the legal system of the respondent or host state has a multiple hierarchy of fora which can provide redress") ("AMERASINGHE"); GREEN HACKWORTH, 5 DIGEST OF INTERNATIONAL LAW 526 (1943) ("generally speaking, exhaustion of available judicial remedies is a prerequisite to a valid complaint that the alien has been denied justice."); ALWYN FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 311-12 (1938) ("responsibility [of a State] is engaged as the result of a definitive judicial decision by a court of last resort which violates an international obligation of the State"); *Christo G. Pirocaco* (U.S. v. Turkey), NIELSEN'S OPINIONS AND REPORT 587, 592-93 (1937) ("As a general rule, a denial of justice resulting from improper action of judicial authorities can be predicated only on a decision of a court of last resort."); 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.").

[31] AMERASINGHE, at 206.

[32] *Loewen* Award ¶¶ 158-64; Carlo Focarelli, *Denial of Justice*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 29 (2013), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e775?rskey=3JY63I&result=1&prd=EPIL (noting that in such scenarios "arbitration may be immediately resorted to for any complaint other than denial of justice, while this latter does not occur and cannot therefore be invoked before the exhaustion of local effective remedies."); PAULSSON, at 108 (speaking with reference to waiver language similar to that in Article 26(2)(b) of this Treaty: "[i]n the particular case of denial of justice, however, claims will not succeed unless the victim has indeed exhausted municipal remedies, or unless there is an explicit waiver of a type yet to be invented.").

[33] *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's Rejoinder on Jurisdiction, Admissibility and the Proposed Amendment (June 27, 2001), at 39 (same).

Methodology for determining the content of customary international law

22. Annex A to the Treaty addresses the methodology for interpreting customary international law rules covered by the agreement. The annex expresses the treaty Parties' "shared understanding that 'customary international law' generally and as specifically referenced in Article 5 . . . results from a general and consistent practice of States that they follow from a sense of legal obligation." This two-element approach – State practice and *opinio juris* – is "widely endorsed in the literature" and "generally adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice."[34]

23. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate that a rule of customary international law exists, most recently in its decision on *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*.[35] In that case, 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.[36]

Obligations that have not crystallized into the minimum standard

24. Neither the concepts of "good faith" nor "legitimate expectations" are component elements of "fair and equitable treatment" under customary international law that give rise to an independent host State obligation.[37] Indeed, while good faith is "one of the basic principles

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[34] *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. 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[.]"); Michael Wood (Special Rapporteur), *Second Report on Identification of Customary International Law* ¶ 21, A/CN.4/672, International Law Commission (May 22, 2014) ("ILC Second report on the identification of customary international law"). *See also id.*, Annex, Proposed Draft Conclusion 3 (stating that in order to determine the "existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law"); Michael Wood (Special Rapporteur), Fourth Report on Identification of Customary International Law ¶ 31 & Annex at 21, A/CN.4/695 (Mar. 8, 2016) (proposing minor modifications to Draft Conclusion 3).

[35] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99 (Feb. 3).

[36] *Id.* at 122-23 (discussing relevant materials that can serve as evidence of State practice and *opinio juris* in the context of jurisdiction immunity in foreign courts).

[37] For the views of non-disputing Parties (other than the United States) in cases arising under the CAFTA-DR, Article 10.5 of which is identical to Article 5 of this Treaty, *see, e.g.*, *Spence International Investments v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Non-Disputing Party Submission of the Republic of El Salvador (Apr. 17, 2015), ¶¶ 8-12 ("The minimum standard of treatment does not include the protection of investors' expectations, legitimate or otherwise"); *RDC Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Submission of the Republic of El Salvador as a Non-Disputing under CAFTA Article 10.20.2 ¶ 7 (Jan. 2012) ("El

governing the creation and performance of legal obligations," it is well established that "it is not in itself a source of obligation where none would otherwise exist."[38] As such, customary international law does not impose a free-standing, substantive obligation of "good faith" that can support a claim or, if breached, result in State liability.[39]

25. Similarly, 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. 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, such as a complete repudiation of a contract.[40]

Salvador considers that the requirement to provide 'Fair and Equitable Treatment' under CAFTA Article 10.5 does not include obligations of transparency, reasonableness, refraining from mere arbitrariness, or not frustrating investors' legitimate expectations."); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-Disputing Party Submission of the Republic of El Salvador ¶ 16 (Oct. 5, 2012) (noting that the concept of "fair and equitable treatment" does not include the protection of an investor's legitimate expectations[.]"); *RDC Corp. v. Guatemala*, Submission of the Republic of Honduras as a Non-Disputing Party ¶ 10 (Jan. 2012) (translation by counsel) ("However, because the focus should be on the conduct of the State, the Republic of Honduras does not consider it valid or necessary to refer to investors' expectations in order to decide whether there has been a violation of the minimum standard of treatment.") ("Sin embargo, debido a que el enfoque debe ser en la conducta del Estado, la República de Honduras no considera válido ni necesario hacer referencia a las expectativas de los inversionistas para decidir si se ha violado el nivel minimo de trato."); *TECO v. Guatemala*, Submission of the Republic of Honduras as a Non-Disputing Party ¶ 10 (same); *TECO v. Guatemala*, Non-Disputing Party Submission of the government of the Dominican Republic ¶ 10 (Oct. 5, 2012) ("Given that the focus should be on the practice and conduct of the State, the Dominican Republic also notes that it is wrong to include investors' expectations of the treatment they expect to receive based on what has been offered, in deciding whether the State has complied with the minimum standard of treatment."); *see also* PATRICK DUMBERRY, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105, at 158-59 (2013) ("In the present author's view, there is little support for the assertion that there exists under customary international law any obligation for host States to protect investors' legitimate expectations.").

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

[39] *Land and Maritime Boundary (Cameroon v. Nigeria)*, 1998 I.C.J. 275, 297 (June 11) (holding that in the absence of an independent obligation, Nigeria could "not justifiably rely upon the principle of good faith" in support of its claims). Nor can any obligation of "legitimate expectations" be derived from a general principle of "good faith." A general principle of international law that does not impose any substantive obligations on a State toward foreign investors cannot itself create additional State obligations toward such investors.

[40] *See, e.g.*, U.S. Counter-Memorial in *Grand River* ("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 Robert Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award ¶ 87 (Nov. 1, 1999) ("NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes."); *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award ¶ 115 (Apr. 30, 2004) (explaining that "even the persistent non-payment of debts by a

26. States may decide expressly by treaty to make policy decisions to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law.[41] The practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 5, in which "fair and equitable treatment" and "full protection and security" are expressly tied to the customary international law minimum standard of treatment.[42] 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 5.[43] Likewise, 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.[44] A formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State

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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.").

[41] *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.").

[42] Article 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 Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 176 (Jan. 12, 2011) (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") ("*Grand River* Award"). 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.

[43] *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.").

[44] *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").

practice and *opinio juris*, fails to establish a rule of customary international law as incorporated by Article 5(1).

Conclusions on the application of Article 5

27. Thus, the Treaty Parties expressly intended Article 5 to afford the minimum standard of treatment to covered investments, as that standard has crystallized into customary international law through general and consistent State practice and *opinio juris*. For alleged standards that are not specified in the treaty, a claimant must demonstrate that such a standard has crystallized into an obligation under customary international law.

28. To do so, 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*.[45] "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."[46] Tribunals applying Article 1105 of NAFTA Chapter Eleven 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.[47]

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[45] *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20); *see also North Sea Continental Shelf* Judgment, at 43; *Glamis* Award ¶¶ 601-02 (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 international quotation marks omitted).

[46] *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, 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); The *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); *see* Treaty, Protocol ¶ 2 ("The Parties confirm their shared understanding that, consistent with general principles of law applicable to international arbitration, when a claimant submits a claim to arbitration under Section B, it has the burden of proving all elements of its claim . . . .").

[47] *Cargill* Award ¶ 273 (emphasis added). The *ADF*, *Glamis Gold*, 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*, ICSID Case No. ARB(AF)/00/1, Award ¶ 185 (Jan. 9, 2003) ("The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts.");

29. Once a rule of customary international law has been established, the claimant must then show that the State has engaged in conduct that violates that rule.[48] 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."[49]

30. Finally, Article 5(3) makes clear a "determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of" the minimum standard of treatment. Each obligation must be determined under its own relevant standard. For example, a violation of Article 6 does not *per se* constitute a separate violation of Article 5.

Article 6 (Expropriation)

31. Article 6 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.[50] Compensation must be "prompt," in that it must be "paid without delay";[51] "adequate," in that it

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Glamis Award ¶ 601 ("As a threshold issue, the Tribunal notes 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 of the Tribunal on Jurisdiction and Merits, Part IV, Chapter C ¶ 26 (Aug. 3, 2005) ("*Methanex* Final Award") (citing *Asylum Case (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).

[48] *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).

[49] *S.D. Myers* First Partial Award ¶ 263; *International Thunderbird Gaming Corporation v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 127 (Jan. 26, 2006) (noting that states have a "wide regulatory 'space' for regulation," can change their "regulatory polic[ies]" and have "wide discretion" with respect to how to carry out such policies by regulation and administrative conduct).

[50] Article 6 also clarifies that a Party may not expropriate a covered investment except in accordance with Article 5. The United States' views on the interpretation of Article 5 are provided herein.

[51] *See Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award ¶¶ 71-72 (Oct. 11, 2002) ("*Mondev* Award") ("It is true that the obligation to compensate as a condition for a lawful expropriation (NAFTA Article 1110(1)(d)) does not require that the award of compensation should occur at exactly the same time as the taking. But for a taking to be lawful under Article 1110, at least the obligation to compensate must be recognised by the taking State at the time of the taking, or a procedure must exist at that time which the claimant may effectively and promptly invoke in order to ensure compensation. . . . The word[s] ['on payment'] should be interpreted to require that the payment be clearly offered, or be available as compensation for taking through a readily available procedure, at the time of the taking."). The requirement to provide "prompt, adequate, and effective compensation" for a lawful expropriation has been a feature of U.S. treaties for well over a half century. In that context, "prompt" has been understood to require a government to "diligently carry out orderly and nondilatory procedures . . . to ensure correct compensation and make payment as soon as possible." Charles

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.[52]

32. If an expropriation does not conform to each of the specific conditions set forth in Article 6(1), paragraphs (a) through (d), it constitutes a breach of Article 6. Where, at the time of the expropriation, a host State does not compensate or make provision for the prompt determination of compensation, the breach occurs at the time of the taking.[53] In contrast, "when a State provides a process for fixing adequate compensation, but then ultimately fails to promptly determine and pay such compensation," a breach of the compensation obligation may occur later, subsequent to the time of the taking.[54]

Sullivan, *Treaty of Friendship, Commerce and Navigation: Standard Draft – Evolution through January 1, 1962*, 112, 116 (U.S. Department of State, 1971).

[52] Treaty, art. 6(2)(a)-(d).

[53] *See Mondev* Award ¶ 72 ("Article 1110 requires that the nationalization or expropriation be 'on payment of compensation in accordance with paragraphs 2 through 6'. The word 'on' 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. That was not the case here, and accordingly, if there was an expropriation, it occurred at or shortly after the rights in question were lost."). A breach of Article 6 of the present Treaty will occur unless a host State observes its obligation to refrain from an uncompensated taking at the time of the expropriation by, for example, fixing, guaranteeing, or offering compensation. *See Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Rejoinder on Competence and Liability of Respondent United States of America, at 43 (Oct. 1, 2001) (citing authorities); *see also SEDCO, Inc. v. National Iranian Oil Co.*, Award No. 59-129-3, 10 IRAN U.S. CL. TRIB. REP. 180, 204 n. 34 (Mar. 27, 1986) (describing a "taking itself" as wrongful "[i]f . . . no provision for compensation is made contemporaneously with the taking, or one is made which clearly cannot produce the required compensation, or unreasonably insufficient compensation is paid at the time of taking") (Sep. Op. of Judge Brower); *Liberian Eastern Timber Corp. (LETCO) v. Government of the Republic of Liberia*, Award (Mar. 31, 1986), *in* 2 ICSID REP. 343, 366 (1994) (finding Liberian Government deprived LETCO of its concession unjustifiably for failure to be "accompanied by payment (or at least the offer of payment) of appropriate compensation").

[54] *See* Comments of the United Kingdom on the Draft Articles on State Responsibility ¶ 59 ("the breach does not arise until local procedures have definitively failed to deliver *proper compensation*," *e.g.*, "have so failed within the time limits implied by the requirement of promptness") (emphasis added); *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award ¶¶ 422, 425 (Mar. 10, 2015) ("The Tribunal has already established that the LECUPS is a modern statute, the compliance with which in principle complies with the requirements of Art. 6(c) of the [treaty]. Nevertheless, . . . the Tribunal concludes that the Bolivarian Republic has not offered a plausible explanation justifying the delay of more than four years in fixing paying at least the fair value owed in compliance with the LECUPS, which implies that it cannot be considered to satisfy the requirement of Art. 6(c) of the [treaty] that compensation be paid "without undue delay.") (translation by counsel) ("El Tribunal ya ha establecido que la LECUPS es una legislación moderna, cuyo cumplimiento en principio cumpliría con los requisitos del Art. 6(c) del APRI. Sin embargo, . . . el Tribunal concluye que la República Bolivariana no ha ofrecido una explicación plausible que justifique el retraso de más de cuatro años en la fijación y en el pago al menos del justiprecio debido en cumplimiento de la LECUPS, lo que a su vez implica que no pueda considerarse cumplido el requisito del Art. 6(c) del APRI de que la compensación sea satisfecha 'sin demora indebida.'"); *Goldenberg Case (Germany v. Romania)*, 2 R.I.A.A. 901, 909 (Sept. 27, 1928) ("[T]he requisition carried out by the German military authorities did not *initially* constitute an 'act contrary to the law of nations'. In order for this

33. As explained in paragraph 4(a) of Annex B to the Treaty, 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. With respect to the first factor, an adverse economic impact "standing alone, does not establish that an indirect expropriation has occurred." 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."[55] Moreover, to constitute an expropriation, a deprivation must be more than merely "ephemeral."[56]

34. 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.[57] For example, where a sector is "already highly regulated, reasonable extensions of those regulations are foreseeable."[58]

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situation to continue, it was necessary, however, that within a reasonable delay, the claimants obtain equitable compensation. But such was not the case, the compensation, allocated several years after the requisition, amounting to barely a sixth of the value of the expropriated goods.") (translation by counsel; emphasis in original) ("[L]a réquisition opérée par l'autorité militaire allemande ne constituait pas initialement un 'acte contraire au droit des gens'. Pour qu'il continuât à en être ainsi, il fallait, cependant, que dans un délai raisonnable, les demandeurs obtinissent une indemnité équitable. Or tel n'a pas été le cas, l'indemnité, allouée plusieurs années après la réquisition, atteignant à peine le sixième de la valeur des biens expropriés.").

[55] *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)").

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

[57] *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

35. 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").[59]

Article 34 (Awards)

36. Article 34(1) provides that an arbitral tribunal constituted under Section B of the Treaty "may award, separately or in combination, only" (a) monetary damages, with any applicable interest, and (b) "restitution of property," but that if the latter is ordered then the award must provide the respondent Party the option of paying monetary damages in place of restitution. The tribunal is therefore disallowed from ordering the respondent Party to restore the property in question without providing damages as an alternative, ensuring that the Party always has the option of remedying a breach by payment of damages alone.

Respectfully submitted,

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September 11, 2017

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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").

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

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

ANNEX 156

[Communicated to the Council, the Members of the League and other Governments.]

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[C.P.D.I. 95 (2).]

Geneva, April 20th, 1927.

LEAGUE OF NATIONS

COMMITTEE OF EXPERTS FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW

REPORT

TO THE COUNCIL OF THE LEAGUE OF NATIONS

ON THE

QUESTIONS WHICH APPEAR RIPE FOR INTERNATIONAL REGULATION

(QUESTIONNAIRES Nos 1 to 7.)

Adopted by the Committee at its Third Session, held in March-April 1927

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III.

Second Part of the First Question.

IN WHAT CASES A STATE MAY BE HELD RESPONSIBLE FOR DAMAGE DONE IN ITS TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS.

The foregoing considerations will be of great help to us in determining the limits of international responsibility in individual cases, without having recourse to obsolete ideas or conceptions based on analogies derived from domestic law.

It is particularly important, in the codification of international law, to steer resolutely clear of all conceptions which would tend to augment the responsibility of States by incorporating in international law principles drawn from dissimilar and even contrary sources.

Such tendencies have prejudiced the cause of international law and have increased rather than reduced the number of international disputes. We must be careful to avoid all exaggeration, as this might constitute a lasting and serious menace to friendly international relations. We must always consider the inter-State will, the only force that can create international law, and must refuse to admit responsibility whenever international opinion is divided or doubtful.

This will certainly be a prudent attitude to adopt, all the more so because States, as at present organised, possess in themselves the necessary means for rendering the protection of foreigners effective.

It is in the light of these observations that we shall now proceed to consider the various circumstances which may cause damage to foreigners and which may or may not involve international responsibility.

Political Crimes committed against Foreigners in the Territory of a State.

Political crime is the most serious case which can arise, since international law requires a higher form of protection for the foreigner who represents his State officially.

This crime, however, would not in itself constitute a violation of international law. Men, whether they are public officials or not, will always be exposed to the risk of injury and damage. It was obviously not the intention of the international community that the representative character of an individual should render him immune from ordinary misadventure.

Nevertheless, States have undertaken to exercise greater vigilance over these persons than they do over private individuals. They are also bound to take special steps to forestall any assault against the persons of foreign representatives and to display particular energy in pursuing the criminals and ensuring the proper course of justice.

Only if a State neglects these duties, or fails to act with all due diligence and sincerity, will its conduct involve an international responsibility.

This question has already been examined and skilfully settled by a special Committee of Jurists appointed by the Council of the League of Nations on September 28th, 1924.

The question was defined as follows:

> " In what circumstances and to what extent is the responsibility of a State involved by the commission of a political crime in its territory ? "

The reply of the Committee of Jurists was:

> " The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.
>
> "The recognised public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance on his behalf."

This method of defining the international duty of a State and determining the limits of its responsibility is entirely in keeping with the criterion which we suggested in Part I of this report. It has never been the intention of States themselves to guarantee the inviolability of individual rights or to assume responsibilities which belong to others. They have simply undertaken to make such domestic arrangements as will ensure that foreigners shall find in their territory the relative security afforded by good internal organisation and the existence of appropriate organs for the repression and judgment of crime.

This limitation of the obligation, and of the consequent responsibility, should impel the State which has suffered as a result of the crime to adopt an extremely prudent attitude towards the State in which the crime was committed or attempted. Responsibility cannot be established until a full enquiry has been conducted into the facts of the case. Therefore, as regards political crimes committed against strangers, we propose the adoption of the text which was given above.

Illegal Acts of Officials.

We have said that officials, to whatever branch of the national administration they may belong, are organs of the State and their acts are consequently to be regarded as acts of the State.

It is indeed through its officials that the State exercises protection. The obligation to provide officials has not been contracted in so definite a form as we have stated it, since international law has created the duty without laying down rules for its application. But, since the State is an abstract entity, it must, in order to find expression, provide itself with organs wherewith to exercise its powers.

Again, though it is perfectly true that the State is not bound to possess any specified organ, it is none the less under an obligation to set up all the organs which it requires to fulfil its international duties.

The first question which now arises is whether all acts of officials should be regarded as acts of the State. Our answer is in the negative, and we draw a distinction between acts accomplished by officials within the limits of their competence and acts which go beyond these limits.

The former are truly acts of the State and, if they are contrary to international law and adversely affect the rights of another State, they must certainly involve the responsibility of the State to which they can definitely and indisputably be ascribed. If, in these circumstances, a foreigner suffers damage, it is for the State to make compensation for such damage.

The reason for this is clear. When the official acts within the limits of his competence, he is obeying a command of the State. If such command infringes a rule of international law, the State must be responsible, since the infringement must arise from the command being wrongful, either as going beyond the rights of the State or as failing to satisfy a duty owed by the State.

In either case, the act of the official, though lawful from the point of view of domestic law, is an illegal act on the part of the State.

In order, however, for the responsibility of a State to be really involved because a foreigner had suffered damage through the fault of an official, and for the State of which the foreigner is a national to be entitled to consider itself wronged and to claim reparation, certain conditions must be fulfilled. These conditions are as follows : (1) the act accomplished by the official within the scope of his official powers must be contrary to an international duty; (2) the duty violated must be a legal and not merely a moral duty; (3) the right invoked by the injured State the violation of which has involved the damage must be a positive right created by treaty between the two States or by customary law duly recognised as emanating from the collective will of States; and (4) the damage must not be the result of an act accomplished by the official in defending the rights of the State.

When these basic conditions have been fulfilled, the international responsibility becomes clearly established and the State cannot plead the inadequacy of its laws. It has, indeed, incurred responsibility precisely because it has not foreseen the need of adequate legislation to enable it to fulfil its international duties. That is the main reason for the publication of treaties. By their publication treaties become laws which officials are bound to know and observe.

If the act of the official is accomplished outside the scope of his competence, that is to say, if he has exceeded his powers, we are then confronted with an act which, juridically speaking, is not an act of the State. It may be illegal, but, from the point of view of international law, the offence cannot be imputed to the State.

Those who seek to render States responsible for such acts are obliged to fall back on theories which are often ingenious but which have no place in international law. We may quote, for instance, the theory of *culpa in eligendo* or *in custodiendo*. This theory, like all the other faulty theories, is based on a *presumptio juris et de jure*, which cannot be applied in international law.

Moreover, is any State so perfectly organised that it can be certain of never making an error in choosing its officials or supervising their acts ? Can it even be stated that a man will always conscientiously fulfil his duties and be incapable of ever committing a wrongful act ?

Some persons assert that the existence of this responsibility is supported by the numerous precedents to be found in the past history of international claims. It would be extremely dangerous to attribute any value to these precedents. Positive international law cannot derive its strength from sources which are so exiguous and so conflicting.

A practice which is based on the use of force cannot be described as international practice in the sense admitted by international law. On the contrary, for the sake of the law's prestige, we should be careful to include in customary law only that which undeniably represents the definite will of all States composing the international community.

It would be inconceivable that States should, in their anxiety to protect foreigners, go so far as to guarantee these foreigners against all abuse of power on the part of the authorities and substitute international responsibility for individual responsibility.

Just as the act of the official, accomplished within the limit of his competence, is, from the point of view of international law, an act of the State, because it constitutes an application of the national law—no matter whether such law be perfect or faulty—so an irregularity on the part of an official is an individual act, which is not willed by the State and may even be the result of malice on the part of the official.

Although such cases should not be regarded as coming within the scope of international law, the State is nevertheless bound to proceed in such a way as to obviate their occurrence as far as possible, and to enable the foreigner who has been wronged to take action against the offender.

We shall therefore place these cases in a higher category than unlawful acts committed by individuals who are not officials. Acts of private persons and acts of officials who exceed their powers are alike private acts, but we consider that the vigilance exercised by the State should be more strict in the latter case.

Thus, with regard to acts of officials, international responsibility arises if a Government, being informed that an official is about to commit an unlawful act against a national of a foreign State, does not take timely steps to prevent it; or if, when the act has been committed, the Government does not hasten to visit the official in question with condign punishment under the national legislation; or, again, if it fails to give effect to the proceedings which the injured foreigner is entitled to bring in conformity with the State's legislation.

Apart from these circumstances, a State cannot be held responsible under international law.

Acts of Private Persons.

It is in this connection, more especially, that a mass of theory has been evolved with a view to proving that a State is internationally responsible for the acts of individuals subject to its jurisdiction. None of these theories will bear careful scrutiny.

In the first place, an attempt has been made to resuscitate a mediæval conception under which the body politic was held to be responsible for the acts of its members. This conception, which may have been of some service when all power was concentrated in the hands of sovereigns, would be utterly inapt in the present position of the relations between the State and the individuals under its jurisdiction.

Grotius took a step in the right direction by opposing to this theory the Roman conception of *culpa*, but his view was still far from meeting the requirements of international law and defining the true function of modern States in their international relations.

At the present time, the postulate that the State is not responsible for the acts of others has become a basic legal rule: indeed, if it were not so, the very foundations of the community would be shaken.

The sovereigns, who were formerly identified with the State, are no longer absolute masters of everything within their territory. The individual as well as the sovereign has a sphere of action proper to himself. He has full liberty of action and is responsible for his acts. The relation of one State to other States is the same as that of the individual to the State in which he resides. If one private person, be he national or foreigner, causes injury or wrong to another private person, be he national or foreigner, his act, being unlawful from the point of view of domestic law, entitles the injured party to take legal action in conformity with the law of the country.

We do not think it necessary to dwell at any length on this subject, as its importance, from the point of view of international law, is slight. Should any doubt arise concerning wrongs due to the acts of private persons, it will be sufficient to refer to our definition of the violation of international law and the nature and limits of the responsibility of States in their mutual relations.

Acts performed in the Exercise of Judicial Functions.

If there is one general principle concerning which there can be no discussion, it is respect for the majesty of the law. As between self-respecting States, there can be no greater insult than to question the good faith of municipal magistrates in their administration of justice.

There are certain other principles as unquestioned and as widely observed as the above. For instance, the principle that all interference or claim to interfere with the regular course of justice in another State is tantamount to an attack on that State's internal sovereignty.

Here we have certain legal standards, as categorical as they are precise, created by the will of all countries as rules of conduct to be observed in all circumstances of the life of the international community.

As regards the duty of affording judicial protection to foreigners, it is sufficient that they should be granted a legal status, which they can assert through appropriate laws and independent tribunals to which they are allowed access on the same footing as nationals. Neither more nor less.

The decisions of these tribunals must always be regarded as being in conformity with the law. None but a judge of the country is entitled to interpret that country's law. Even if he makes a mistake his judgment must be accepted; the dignity of justice and the character of modern States demand this.

The opinion that a State is not responsible for a judicial error committed by its tribunals is so firmly implanted in the minds of nations that legal publicists in all countries have criticised —and often very harshly criticised—the arbitral award under which De Martens declared the Netherlands to be responsible for the judicial error committed by its courts in the case of the Australian vessel *Costa Rica Packet*.

This is equivalent to stating that the community of nations admits no appeal against judicial errors other than that which the *lex loci* itself may afford to foreigners as well as nationals, and that, if no provision is made for appeal, both parties must acquiesce and cannot claim to invoke any responsibility at all on the part of the State in which the case was heard.

The same principle must apply to sentences which have been termed "*unjust*" or "*manifestly unjust*".

Nothing could be more dangerous than to admit the possibility of rehearing, elsewhere than in the courts of the country, a judicial decision alleged to be contrary to justice. An opening would thus be afforded for abuses of every kind, for the most serious violations of internal sovereignty and for countless international conflicts.

As States are at present organised, each being bound to respect the institutions of the others, any endeavour to create, at a given moment, a special court having power to overrule the national judicature would be unthinkable.

Unless we are ready to overset the one true basis of international law—the collective will of States—we will not entertain the supposition that States, when they entered the community,

ever contemplated an abridgment of the dignity and authority of their own courts of law. That, however, would be the final result of rehearing a case where no provision for appeal existed under the legislation of the State concerned; and yet the advocates of the theory of international responsibility, in connection with judicial decisions vitiated by *manifest or flagrant injustice*, would inevitably be led to provide for some such re-hearing.

Where would they find a *super-judge* competent to determine the existence of such injustice ? And, supposing that they could discover such a personality, what would become of the principle of the equality of States, a principle on which the international community is based, and which cannot be disregarded without shaking the whole edifice to its foundations ?

Moreover, to admit the possibility of international proceedings being brought in another country, in opposition to the original *lex loci*, would be contrary to the international rule under which nationals of a foreign State cannot claim more favourable treatment than nationals. This would, however, be the result if foreigners had an international appeal open to them in addition to the remedies offered by the national law.

We should not continue this reasoning any further had not a number of modern legal publicists unfortunately come forward in favour of this view of international responsibility. We must therefore persist in our argument, and we shall substantiate our contention—that no international recourse is admissible against municipal judgments—by quoting certain cases. These cases demonstrate the repugnance with which requests for intervention on these lines have almost invariably been received.

In 1885, when the Government of the United States of America received a request of this kind, the Secretary of State, Mr. Bayard, sent a letter to the American Minister in Mexico in which he said: "This Department is not a tribunal for the rehearing of decisions of foreign courts, and we have always laid down that errors of law and even of fact, committed by these tribunals, do not afford a motive for any intervention on our part".

Another American Secretary of State, Mr. Marcy, adopted a similar line in writing to the United States Minister in Chile, Mr. Starkéatter: "Irregularities committed in the case of an American citizen in Chile, unless they amount to a *refusal of justice*, afford no grounds for intervention by the United States."

When Great Britain and Portugal submitted to arbitration the question of the alleged *manifest injustice* of a decision given by the Corte de Relacão, the arbitration tribunal stated: "While we unhesitatingly admit that the decision was erroneous, we cannot agree that it was manifestly unjust. It would be manifestly unjust to hold the Portuguese Government to account for faults imputable to the courts of that country. According to the Portuguese constitution, these courts are absolutely independent of the Government and therefore the Government can exert no influence over their decisions. The British Government cannot disregard this fact without at the same time disregarding the whole existence of Portugal as a civilised State, and that is obviously not the intention of the British Government."

As these views were expressed in cases in which the party concerned happened to be a small State, we can well imagine the reception which a great Power would accord to a claim to hold it responsible for an unjust decision given by its magistrates.

In every State the independence of the judicature and respect for the law are recognised as such fundamental principles that even when the courts are called upon to apply the rules of private international law, which, as a result of an international treaty, fall within the scope of the State's own laws, they are not made subject in doing so to the supervision of their Government (resolution of the Institute of International Law at its session at The Hague in 1875).

Another theory which is quite as inadmissible is that international responsibility is incurred through abnormal delay in the administration of justice.

No State can claim to possess courts so efficient that they never exceed the time-limit laid down in the laws of procedure. The larger the State, the greater the number of cases brought before its judges, and consequently the greater the difficulty of avoiding delays, sometimes quite-considerable delays.

If we agree that the State is responsible neither for judicial errors nor for the manifest injustice of judicial decisions, nor for abnormal delay in the administration of justice, are we to infer from this that the State has no responsibilities in regard to the manner in which it dispenses justice? Certainly not. Its international responsibility may become seriously involved.

We have already shown that the State owes protection to the nationals of foreign States within its territory, and must accord such protection by granting foreigners the necessary means for defending their rights. But these means can only be such as are made available by the laws and courts of the country and by the authorities responsible for public order and security.

In the case in question the State would not be fulfilling its duty towards other States if it did not allow foreigners to have access to its courts on the same terms as its own nationals, or if these courts refused to proceed with an action brought by a foreigner in defence of the rights which are granted to him and through the means of recourse which are provided under the domestic laws.

Such responsibility would arise as the result of *a denial of justice*.

In saying "on the same terms as its own nationals", we desired to emphasise the necessity of equality as regards access to the means of recourse open to all persons under the same jurisdiction. Thus, if the nationals of a State are allowed to appeal from the decision of a court of first instance, the same privilege must be accorded to foreigners when their recognised rights are in dispute.

The decision of a judicial authority, in accordance with the *lex loci*, that a petition submitted by a foreigner cannot be entertained should not, however, be regarded as a *denial of justice*.

The State has fulfilled its duty by the very fact that the local tribunal has been able to give a decision regarding this request.

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.

In conclusion, therefore, we infer that a State, in so far as it is bound to afford judicial protection, incurs international responsibility only if it has been guilty of a *denial of justice*, as defined above.

Damage caused to Foreigners in Cases of Riot and Civil War.

This problem has long been a source of disputes of every kind, and discussions which have not yet led to the enunciation of any definite rule. This is not due to the absence of international juridical standards by which the problem might be solved, but rather to a habit, which certain exponents of international law have acquired, of straying into fields where no enquiry on the lines of international law can be usefully carried out, and then evolving a series of quite unwarrantable conclusions, by means of analogies which are incompatible with that law.

Some authorities, in their desire to attain these results, have not hesitated to delve into the remote past, and to explore both the individualist and collective conceptions of law.

When these theories have crumbled away in the light of careful research, other theories have been advanced to replace them—new indeed, but equally futile.

The latest of these were expounded during the discussion of the regulations drawn up at Neuchâtel by the Institute of International Law, namely, the theories of *expropriation* and *State risk (risque étatif)*.

We will examine these theories briefly, but will not of course approach the question from the same standpoint as their authors. Our sole concern is to discover rules of international law capable of being codified; we cannot therefore allow ourselves to wander deliberately further and further away from international law in the search for some basis of international responsibility.

Brusa has done so, and has openly avowed it. In his report to the Institute of International Law he states that foreign diplomatic intervention should be limited to cases in which justice is not accorded to a foreigner who has suffered damage in time of riot or revolution, or in which the Government has violated the law of nations, in particular (he observes) by violating a treaty under which foreign residents are exempted from forced loans and contributions.

" In this case, " adds Brusa, " in addition to the correlative duty of affording compensation for the services rendered and returning the property received, the State has, it would seem, at the same time actually incurred responsibility towards the foreign State under the law of nations, and has thus afforded ground for direct diplomatic intervention."

Unless we are mistaken, the logical outcome of Brusa's idea is that:

1. The obligation to compensate for damage arises from the fact that the State has received services,
2. The responsibility of the State only becomes of an international character when the State violates the law of nations by the *denial of justice* or the violation of a treaty.

This would prove that the " responsibility " arising out of Brusa's arguments is purely civil.

In correlation with his theory of compensation for benefits received by the State (and as if he purposely desired to break away from international law), he advances simultaneously his other theory of *expropriation* in civil matters.

What would become of international law if rules deriving from private law were thus transferred to its sphere on the sole ground of some sort of analogy ? And is there really any such analogy between the relations of States *inter se* and the relations between a State and individuals; between the international community and the national community ? In the first place, there can be no juridical analogy between two bodies of law which are different as to their source, their content and their validity. International law and private law have been created, and are moved, by two separate forces, which have absolutely no kinship with one another. For the first, although it is superior, the concourse of many wills is required; the latter is subject to no such limitative necessity.

According to this principle, therefore, international law must keep itself pure from any infiltration of domestic law.

Neither in the theories of Brusa, nor in the application of the idea of *risk (risque)* proposed by Fauchille on the same occasion, do we perceive any principles of private law which could be converted into principles of international law. It is therefore juridically impossible to draw any conclusions therefrom, even of a provisional nature.

In short, it is idle to assert that the elements required to establish international responsibility can be found in civil law or in the ideas applicable to civil law.

Apart from the fundamental difficulty which we have pointed out, these two theories are open to other criticisms. The theory of *expropriation*, for instance, ceases to be accurate when it places all loss that a foreigner may suffer in the case of revolution on the same footing as the loss of property for reasons of public utility. In the latter case we have a rendering of services which constitutes an undoubted title to compensation, however the question may have arisen; whereas, in other acts which may involve loss, we do not perceive a similar rendering of material services.

The theory of *State risk (risque étatif)* tends to introduce into international law economic conceptions which are out of place in international relations. The arguments by which it has been sought to bring these conceptions into the sphere of international law neither enhance their value nor justify their admission. " Foreigners ", said Fauchille, " who come to take up their residence in a country constitute, like nationals, a source of gain for the State in which they reside: their industry and their sojourn in the territory bring profit to the State. Is it not logical and just that, in return, the State should be bound to give compensation for loss which these persons—be they nationals or foreigners — may have suffered at the hands of other nationals or other foreigners ? "

Would it not be more logical to reverse the argument and say: Foreigners do not leave their homeland in order to be of profit to the State in which they take up their residence. On the contrary, they come to the country with the definite intention of availing themselves of its wealth, its hospitality and its institutions, hoping to carve out for themselves a better position than that which they have left behind them. Their change of residence being voluntary, they must accept all the risks of chance happenings and unforeseen events.

In this survey we should also reject all theories which base the responsibility of the State, in case of riot or revolution, on a *presumptio juris et de jure* or an *obligatio ex delicto.*

International law itself provides the basis for the solution of this question.

A *riot* is an act committed by private individuals, and not by the State. No loss occasioned to foreigners by a riot involves international responsibility unless the State has neglected to fulfil its duties of exercising vigilance, repressing disorder and providing judicial protection.

Damage caused by revolution may be the result of acts committed by either of the opposing parties. If the acts are committed by the lawful authorities, whose concern it is to restore order, the State is not responsible for the fact that, in exercising its supreme right and duty, it has caused damage to foreigners, since the interests of the community, of which foreigners as well as nationals form part, are higher than any private interests. The State, by taking steps to restore the well-being of the community, has simply acted as an entity which is bound, both from a national and an international standpoint, to maintain order and security. The former duty arises under the constitution, and the latter under the obligation which the State has contracted to ensure normal conditions of life for foreigners, and these conditions can only be secured if order and peace prevail. Although the claim of absolute irresponsibility may just conceivably be open to question when a State is exercising a right, it cannot possibly be questioned when the State is simultaneously exercising a right and discharging an international duty.

We do not share the opinion of those who deny that revolution is a case of *vis major.* In general, neither wars nor revolutions are desired by the State—the latter, indeed, even less so than the former. They almost invariably occur because some blind force, against which the public authorities are powerless, has been set in motion. No State is immune from the evil. Revolution bursts upon a country with all the brutal force of some convulsion of nature. Foreigners as well as nationals have to partake of the consequences and share in the good or evil fortune which these undesired and unforeseen events may bring.

If it could be sustained that the protective rôle of a State renders it indisputably liable to grant compensation for all losses suffered by foreigners, we could not overlook the question of compensation for losses caused to foreigners by strikes. In this case the responsibility of the State would be even more directly involved, since, in almost all countries, the State recognises the right to strike, or at any rate tolerates strikes. It should not be forgotten that in the intensive modern life of great cities a strike may cause greater loss to foreigners and nationals than that occasioned by minor revolutions, which have often formed a pretext for inordinate claims.

Loss occasioned by the acts of rebels or revolutionaries comes within the category of acts done by private individuals and therefore not imputable to the State. In this connection we should remember the rule that the duty of protection is confined to the territory over which the State exercises its sovereignty.

A State cannot be held responsible for occurrences in a territory no longer under its authority or control, when a case of *vis major* prevents it from fulfilling its duties as protector.

Let us now refer to customary law in order to ascertain whether there is any rule which may be regarded as an expression of inter-State will in the matter of losses suffered by foreigners in civil wars.

Customary law demonstrates with mathematical exactitude that States, wherever situated, have on all occasions absolutely rejected all international responsibility for such losses.

Powerful States have invariably asserted this rejection of responsibility in terms so clear and precise that no doubt can exist as to their very definite views on the subject. Weaker States, when they have not been able to resist external pressure, have indeed paid indemnities, but always subject to the reservation that they were not bound at law to pay them, and were simply doing so as an *act of grace.*

We will quote a few instances of States which, on various occasions, have pleaded the non-existence of international responsibility: Belgium, in 1830 and 1834; France, in 1830, 1848 and 1871; Russia, in 1850; Austria, in 1865; the United States of America during the War of Secession and in 1851, when a number of Spaniards were victims of the populace of New Orleans; and also all the States of Latin America.

Treaties concluded between certain European States, and between several of the American States, which contain provisions disclaiming responsibility in case of damage occasioned by revolt and civil war, have often been the subject of criticism. We think that these criticisms ought rather to be levelled against the nations which, in defiance of all international rules, have sought to impose on other States a responsibility which the latter could never really have incurred.

The States of Latin American have acted wisely in endeavouring to secure protection for their legitimate rights by means of treaty provisions.

It should be noted, moreover, that these treaties are careful not to exclude responsibility arising from *a denial of justice.*

In short, if international law is to be codified—as it certainly should be—in accordance with the will of States, as manifested either by treaties or by international practice, we must conclude that the State is not responsible for loss suffered by foreigners in cases of riot or revolution.

We do not, however, include in this category loss of property sustained by foreigners through the action of the State as a result of requisition, expropriation, confiscation, spoliation or on any other arbitrary proceedings. Whether in peace, in war or in time of revolution, the State should be foremost in respecting and protecting the property of foreigners.

We have said that property, with life and liberty, forms part of the fundamental rights of the individual and that these rights must be recognised and protected wherever the individual happens to be. A state of war or revolution would in no way justify the violation of any of these rights, and a State failing in the duty, which it has contracted with regard to the international community, to afford safety and protection would also incur international responsibility.

The State is therefore bound to grant compensation for the property of foreigners which it has appropriated in time of revolution.

As regards the property of foreigners seized by revolutionaries or rebels — an act which, as we have pointed out, falls within the category of acts committed by private individuals—the State must provide such foreigners with all facilities for prosecuting the offenders and recovering possession of their property. If, on the contrary, the State were to deprive these foreigners of all means of action, by passing a law of amnesty, its international responsibility would be involved and it would be answerable for any damage which the revolutionaries or rebels might have caused to the foreigners in question.

V.

Second Question.

WHETHER AND, IF SO, IN WHAT TERMS IT WILL BE POSSIBLE TO FRAME AN INTERNATIONAL CONVENTION WHEREBY FACTS WHICH MIGHT INVOLVE THE RESPONSIBILITY OF STATES COULD BE ESTABLISHED, AND PROHIBITING IN SUCH CASES RECOURSE TO MEASURES OF COERCION UNTIL ALL POSSIBLE MEANS OF PACIFIC SETTLEMENT HAVE BEEN EXHAUSTED.

We have shown that international responsibility does not arise by reason of any loss which foreigners may sustain but by reason of a failure to act, or the commission of an act, contrary to international law and imputable to the State. Although in some cases responsibility clearly results from the existence or non-existence of a fact, it is often — we might say almost always — necessary to conduct a careful enquiry into the facts in order to ascertain whether they really give rise to a question of international law and whether the State has incurred responsibility.

At present, the best international method for conducting such enquiries is that of international commissions of enquiry.

Let us summarise the advantages of these commissions:

1. The time which elapses between the committing of the acts and the constitution of the commissions undoubtedly helps to abate the excitement and passions aroused;

2. The nationality of the persons appointed to conduct the enquiry, their standing and the moral responsibility which rests upon them afford a guarantee of the impartiality of their investigations;

3. Since the conclusions of these commissions do not take the form of an arbitral award, the conflict may be eliminated by the mere acceptance of these conclusions, without any judgment, which might wound the susceptibilities of the responsible State, having been pronounced;

4. Should the conclusions produce no immediate result, the dispute may still be settled by other pacific methods.

In most cases the enquiry may be expected to end the dispute without creating any abiding bitterness between the two States concerned. Neither party has reason to regard itself as victor or vanquished; neither has had to bow to the peremptory dictates of a judicial sentence. The commission merely submits its report and the parties concerned are free to draw their conclusions therefrom and to order their actions accordingly.

We should not forget the immense service which was rendered to the cause of peace by this method of conciliation in the Dogger Bank affair between Russia and Great Britain. Never has a question of damage caused to foreigners brought two great Powers so near to the brink of war as in 1904, when the Russian fleet on its way to the Far East bombarded a British fishing fleet on the Dogger Bank.

War was only avoided by having recourse to one of the international commissions of enquiry provided for in the Hague Convention of 1899.

The first result of this procedure was to allay the justifiable indignation which had been aroused in England and which was gathering volume as the discussion between the Russian and British Governments continued.

The commission was composed of five members, one being chosen by the Government of each of the nations concerned, two others by the French and American Governments, and the fifth by these four members sitting together. Four months later it submitted a report, stating,

ANNEX 157

Black's Law Dictionary (11th ed. 2019), means

MEANS

Bryan A. Garner, Editor in Chief

Preface | Guide | Legal Maxims | Bibliography

means *n.* (14c) **1.** Available resources, esp. for the payment of debt; income. — Also termed *means of support*. **2.** Something that helps to attain an end; an instrument; a cause.

Black's Law Dictionary (11th ed. 2019), assistance of counsel

ASSISTANCE OF COUNSEL

Bryan A. Garner, Editor in Chief

Preface | Guide | Legal Maxims | Bibliography

assistance of counsel (17c) *Constitutional law.* Representation by a lawyer, esp. in a criminal case. • The phrase in its modern uses derives from the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defense." U.S. Const. amend. VI. See RIGHT TO COUNSEL.

- **effective assistance of counsel.** (1937) A conscientious, meaningful legal representation, whereby the defendant is advised of all rights and the lawyer performs all required tasks reasonably according to the prevailing professional standards in criminal cases. *See* Fed. R. Crim. P. 44; 18 USCA § 3006A.

> "The law is in flux on precisely what constitutes the 'effective' assistance of counsel. The Supreme Court has yet to set forth a definitive standard, and lower courts have adopted differing ones. Prior to the 1970s the most common standard was the 'mockery of justice' standard, under which counsel's assistance was 'ineffective' only when it was so inadequate that it reduced the trial 'to a farce' or rendered it a 'mockery of justice.' Since that time, most courts have abandoned this formulation in favor of more stringent requirements, stipulating, for example, that 'counsel must exercise [the] normal skill and knowledge which normally prevails at the time and place' (*Moore v. United States*, 432 F.2d 730 (3d Cir. 1970)), that counsel must render the 'reasonably competent assistance of an attorney acting as his diligent advocate' (*United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973)), or that counsel's representation must be 'within the range of competence demanded of attorneys in criminal cases' (*Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977)). All of these new standards beg the questions of what traditional level of practice is to be regarded as 'customary,' 'diligent,' or 'reasonable.' Thus, little has been definitively resolved by the new, higher standards." Arval A. Morris, "Right to Counsel," in 1 *Encyclopedia of Crime and Justice* 278, 283 (Sanford H. Kadish ed., 1983).

- **inadequate assistance of counsel.** See *ineffective assistance of counsel*.

- **ineffective assistance of counsel.** (1957) A representation in which the defendant is deprived of a fair trial because the lawyer handles the case unreasonably, usu. either by performing incompetently or by not devoting full effort to the defendant, esp. because of a conflict of interest. • In determining whether a criminal defendant received ineffective assistance of counsel, courts generally consider several factors: (1) whether the lawyer had previously handled criminal cases; (2) whether strategic trial tactics were involved in the allegedly incompetent action; (3) whether, and to what extent, the defendant was prejudiced as a result of the lawyer's alleged ineffectiveness; and (4) whether the ineffectiveness was due to matters beyond the lawyer's control. — Abbr. IAC. — Also termed *inadequate assistance of counsel*.

> "The Sixth Amendment right to assistance of counsel has been held to imply the 'right to the effective assistance of counsel.' The Court has often said that the converse — ineffective assistance of counsel — is a constitutional denial of the Sixth Amendment right, even if the lawyer has been retained by rather than appointed for the defendant. 'Ineffective' does not necessarily mean incompetent or unprepared; it means an inability to perform as an independent lawyer devoted to the defendant … However, counsel's assistance is not necessarily ineffective because the lawyer made mistakes. Only very serious errors, such as would likely have produced an entirely different outcome at trial, will suffice to require a new trial." Jethro K. Lieberman, *The Evolving Constitution* 263–64 (1992).

Black's Law Dictionary (11th ed. 2019), permit

PERMIT

Bryan A. Garner, Editor in Chief

Preface | Guide | Legal Maxims | Bibliography

permit (pər-**mit**) *vb.* (15c) **1.** To consent to formally; to allow (something) to happen, esp. by an official ruling, decision, or law <permit the inspection to be carried out>. **2.** To give opportunity for; to make (something) happen <lax security permitted the escape>. **3.** To allow or admit of <if the law so permits>.

ANNEX 158

§ 2-608. Revocation of Acceptance in Whole or in Part.

(1) The buyer may revoke his acceptance of a lot or commercial unitwhose non-conformity substantially impairs its value to him if he has accepted it

- (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
- (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the sellerof it.

(3) A buyer who so revokes has the same rights and duties with regard to the goodsinvolved as if he had rejected them.

‹ § 2-607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over. up § 2-609. Right to Adequate Assurance of Performance. ›

Annex 158

ANNEX 159

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Articles
J. Steven Jarreau[a1]

ANATOMY OF A BIT: THE UNITED STATES - HONDURAS BILATERAL INVESTMENT TREATY

Introduction

Foreign direct investment[1] influences the world economy by promoting the transfer of capital, technology and managerial skills, improving economic efficiency through greater competition and enhancing market access.[2] The United States and Honduras, appreciating the benefits of foreign direct investment (FDI) while mindful of the shortcomings of customary international law[3] and ***430** the absence of a multilateral accord on FDI,[4] entered into negotiations to promote and protect foreign investment in their respective countries. Subsequent to the conclusion of those negotiations, the Honduran Congress and the United States Senate ratified the Treaty Between the Government of the United States of America and the Government of the Republic of Honduras Concerning the Encouragement and Reciprocal Protection of Investment.[5]

The agreement achieved by Honduras[6] and the United States[7] is a bilateral investment treaty (BIT).[8] Bilateral investment treaties, the origins of which extend from a 1959 agreement between the Federal Republic of Germany and Pakistan,[9] are international covenants intended to foster foreign direct investment by extending protection from noncommercial, political risks.[10] The intense worldwide treaty activity of recent years attests to the importance of FDI from the perspective of both capital exporting, as well as capital importing countries.[11] It is also recognition by ***431** the United States that the American Treaties of Friendship, Commerce and Navigation (FCN),[12] the predecessors to bilateral investment treaties, inadequately protect the overseas investments of Americans.[13]

Treaties of Friendship, Commerce and Navigation originated[14] in an era where international commercial activity principally involved merchants trading goods.[15] Contemporary international commercial activity involves the physical establishment of operations beyond the borders of the investor's home state. The increasing flow of international direct investment, the increasing complexity of international economic relations between states and investors, and the expansion of BIT's to encompass dispute settlement between host states and investors[16] resulted in investment treaties being drafted with greater detail, the interpretation of BIT's from a more legalistic perspective and the resolution of investment disputes in a more judicial rather than diplomatic manner.

The treaty between Honduras and the United States, the fourth BIT between the United States and a Central or South American country,[17] represents a BIT crafted with greater emphasis on dispute resolution.[18] Expropriation, of foremost concern of past treaty negotiators,[19] is now relegated to a lesser role as investor-state ***432** dispute resolution rises appreciably in importance.[20] The significance placed on dispute resolution provisions in contemporary BIT's and the increasing recourse by investors to international arbitration[21] enables investors to direct and control investor-state disagreements. The resolution of investor-state investment differences will, however, continue to remain difficult. While recent BIT negotiations, including

those between the United States and Honduras, have committed greater resources to the dispute settlement features of investment treaties, numerous other aspects of the treaties remain vague and ambiguous.

The intended or unintended ambiguities in the United States - Honduras bilateral investment treaty are the focus of this article. The treaty will be analyzed from the perspective of an investor or a state either contemplating or engaged in dispute resolution. The purpose of highlighting ambiguities in the agreement is to provide investors and states engaged in dispute negotiations or formal dispute resolution with a thorough understanding of their positions. A secondary aim is to enable the negotiators of future investment agreements to draft treaties in more precise terms.

The Treaty

Overview

The United States - Honduras investment treaty closely parallels the 1994 United States prototype investment treaty.[22] It consists of a title, a preamble,[23] sixteen articles, an annex and a protocol. The title and the preamble provide an understanding of the goals and objectives of the treaty, but are not, by the express ***433** indication of the Parties, part of the treaty.[24] The substantive law of the agreement is found in the articles[25] and the Annex. The Protocol clarifies the intentions of the Parties with respect to specific aspects of the treaty.[26]

Article I provides definitions for technical words and phrases employed in the other articles,[27] including an extensive definition of "investment."[28] Articles II[29] and XI[30] set the standards of treatment to be accorded investors and investments from the earliest stage of establishing an investment through its ultimate disposition. Article II also provides for a treaty Annex through which Honduras and the United States may make exceptions to their Article II treatment obligations.[31]

Articles III and IV address expropriation[32] and the obligations of the host state for investment losses caused by war or other civil disturbances.[33] Article V concerns financial transfers relating to investments, including the repatriation of profits.[34] Article VI prohibits the Parties from mandating or enforcing specific conditions, such as export requirements, as prerequisites for undertaking or operating an investment.[35] The entitlement of investors or their representatives to enter and remain in the territories of Honduras and the United States is set forth in Article VII.[36]

The resolution of treaty differences between the United States and Honduras, as well as the methodology for resolving investment disputes between an investor and a host state, are provided for in Articles VIII through X.[37] These articles address the obligation of the states to engage in state-to-state consultation[38] and, if necessary, binding arbitration.[39]

Article XII reserves to Honduras and the United States the ***434** right to withhold the benefits of the treaty from certain investors when nationals of a third country own or control the investment.[40] In Article XIII, the treaty establishes that it does not apply to matters of taxation, with limited exceptions.[41] Article XIV entitles Honduras and the United States to take action necessary to comply with their international obligations concerning peace and security, as well as those actions essential to maintain their national security.[42] Additionally, this article permits the Parties to prescribe formalities in connection with covered investments, provided the formalities do not impair any right granted in the treaty.[43]

Article XV addresses the extension of treaty obligations to the political subdivisions of the Parties[44] and to state enterprises.[45] The duration of the agreement and its application to investments in existence at the time the treaty became effective and those subsequently established or acquired is set forth in Article XVI.[46]

The Annex and the Protocol are "integral" parts of the treaty, but are not found within the articles in the main body of the BIT.[47] The Annex sets forth those sectors of the economies and activities of the United States and Honduras that the Parties have agreed that they may exempt from the Article II obligation of extending national treatment, and national and most favored nation treatment.[48] The Protocol confirms the mutual understanding of the Parties regarding specific aspects of the treaty.[49]

Preamble

The Preamble to the United States - Honduras treaty follows ***435** the title and precedes the articles.[50] It consists of five statements that outline the object and purpose of the Parties.[51] The treaty does not expressly state the purpose of the Preamble. The concluding phrase of the Preamble that the Parties "Have agreed as follows:" immediately precedes the articles of the treaty, confirming that it is not part of the substantive body of legal principles that constitute the treaty.[52] This determination is supported by a reading of the Annex and the Protocol that are stated to "form...integral part[s]" of the treaty.[53] A statement in the treaty concerning the intent of the Parties for including the Preamble and the purposes of the statements in the Preamble would have eliminated uncertainty concerning its significance.

Although the Preamble is not part of the substantive aspect of the agreement, its inclusion and placement in the final document establishes that the Parties considered it relevant to achieving the goals sought in the BIT. The articles, Annex and Protocol should be understood and interpreted with reference to the prefactory statements in the Preamble.[54]

The Preamble commences with the statement that the United States and Honduras enter into the treaty "[d]esiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party."[55] It concludes by stating that the Parties, "[h]aving resolved to conclude a treaty concerning the encouragement and reciprocal protection of investment;...[h]ave agreed as follows:...."[56] Since the precise purpose of the Preamble is left to interpretation, an arbitral panel could conclude that the capital exporting state has an affirmative duty to "promote economic cooperation" by "encouraging" foreign investment.[57] A reasonable ***436** interpretation suggests that neither the United States nor Honduras should impede the flow of investment into or out of their respective countries.[58] During times of discord between the Parties arguments alleging a breach of the treaty will likely rely on the language of the Preamble.[59]

The second goal announced in the Preamble recognizes "that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties."[60] This goal reflects the view that private foreign investment is a component of economic development[61] and that intergovernmental agreements establishing standards of treatment and protection for foreign investment encourage the flow of direct investment.[62] Investment protections extended by international agreement provide more security to an investor than the Parties' domestic laws, which are subject to judicial interpretation and unilateral modification.[63]

The third aim recognized in the preamble is that "a stable framework for investment will maximize effective utilization of economic resources and improve living standards."[64] This pronouncement fosters the belief that the treaty will prove mutually beneficial to the economic development of both Honduras and the United States.[65] It presupposes that the private sector, as opposed to government-directed decision-making results in the more efficient use of limited resources.

The fourth objective announced in the Preamble is the recognition that "the development of economic and business ties can promote respect for internationally recognized worker rights."[66] The goal is not the direct promotion of American or Honduran labor rights, but rather the indication of a belief that economic development "can promote respect" for "internationally recognized ***437** worker rights."[67]

The final purpose of the Preamble expresses the conviction of the Parties that the preceding "objectives can be achieved without relaxing health, safety and environmental measures of general application."[68] This element of the Preamble differs from the recognition of worker rights in a significant regard. The focus on worker rights is from the international perspective. The attention directed to health, safety and environmental measures only concerns those of "general application," a phrase that is not defined.[69] The dual purposes of this objective is to dissuade the Parties from reducing health, safety and environmental standards to obtain investment, while at the same time recognizing the sovereignty of the United States and Honduras in matters of public health, safety and the environment.

Scope of Application

Scope of Application: Investment

The United States - Honduras investment agreement applies to "investment[s]" as defined in Article I (d) of the treaty.[70] One of the initial ambiguities in the treaty is that Article I (d) defines "investment" to mean "every kind of investment."[71] The

meaning of "investment" in the phrase "every kind of investment" is not, however, defined.[72] The objects, that is the "investment," to which the United States and Honduras afford specific rights and protections can only be determined by interpreting Article I (d).

An examination of Article I (d) results in the conclusion that ***438** the term "investment" should be broadly construed.[73] The definition states that "investment" includes "every kind of investment"[74] and that "every kind of investment...includes investment consisting or taking the form of" any or all of six categories of juridical entities, legal rights and assets.[75] The definition was drafted in terms that would encompass new, yet undeveloped forms of investment.[76]

The types of juridical entities, legal rights and assets that may constitute an investment are broad and illustrative.[77] The first is a "company."[78] A "company", comprehensively defined in Article I (a), includes "any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled."[79] The term "company" is not limited to incorporated juridical entities, but "includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or other organization."[80] "Shares, stock, and other forms of equity participation, and bonds, debentures, and other forms of debt interests in a company" form the second type of investments.[81]

Contractual rights, tangible and intangible property, and rights acquired pursuant to law comprise the third, fourth and sixth types of investments.[82] Contractual rights are expansively defined to include rights "such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions, or other similar contracts."[83] Tangible and intangible property includes "real property" and "rights, such as leases, mortgages, liens and pledges."[84] "Rights conferred pursuant to law," the sixth form of investment, embraces rights "such as licenses and permits."[85]

***439** The fifth and one of the most important forms of investment protected by the United States - Honduras BIT is "intellectual property."[86] The BIT lacks a specific definition of intellectual property, but provides a list of those rights that the Parties deemed to be intellectual property rights. Intellectual property includes "copyrights and related rights, patents, rights in plant varieties, industrial designs, rights in semiconductor layout designs, trade secrets, including know-how and confidential business information, trade and service marks, and trade names."[87]

Scope of Application: Parameters on Investment

Although "investment" is broadly defined in Article I (d), the treaty includes specific limitations on investments and restrictions on to whom those benefits may flow.[88] The principal restrictions focus on the nationality of natural-person investors, the place of organization of a juridical person investment, territoriality constraints and the preclusion of treaty benefits under specifically delineated, policy-based circumstances. The restrictions mandate that the investment be one of a "national or company" of either the United States or Honduras and that it be "owned or controlled directly or indirectly by that national or company."[89] The investment must be in the territory of the other Party[90] and the extension of treaty benefits may not inure to a third country with whom a Party does not maintain normal economic relations or to a juridical entity essentially conducting business in the territory of one of the Parties in name only.[91]

Nationals

A "national" of a Party is a "natural person" according to the "applicable law" of the respective Party.[92] The term "applicable law" is not defined nor is there customary international law that addresses this issue.[93] "Applicable law" should be understood to ***440** mean the respective domestic laws of Honduras and the United States.[94]

The treaty does not address two issues concerning who should be considered a "national." Those issues include the impact of a change of nationality by an individual subsequent to the establishment or acquisition of an investment[95] and by a natural person of one Party who is a long-term resident of the other Party in whose territory the investment exists.[96]

These issues may be resolved by resorting to the Preamble. The Preamble provides that one of the purposes of the treaty is the promotion of greater economic integration with respect to investment "by nationals...of one Party in the territory of the other Party."[97] Considering this purpose, permitting a natural person to change nationality with the intent of altering entitlement to treaty benefits would defeat the purpose of fostering economic cooperation through investment in the territory

of the other Party. Extending the privileges of the BIT to a person who is a long-term resident of the host state, but a national of the other Party, would also have this effect. The treaty does, however, state that the "applicable law" of the Parties resolves questions of nationality, indicating that the intent of natural-person investors in asserting a particular nationality is significant.[98]

Juridical Entities

A "company," as previously stated, includes a broad array of juridical entities constituted or organized "under applicable law."[99] The term includes "any entity...whether or not for profit, and whether privately or governmentally owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association, or other organization."[100] The treaty definition, by referencing "any entity" and concluding with the phrase "or other organization," encompasses a multitude of legal persons currently known or that may be developed in the future.

The United States - Honduras BIT employs a place of incorporation test and defines a "company of a Party" as a juridical ***441** entity "constituted or organized under the laws of that Party."[101] Ambiguity in the BIT exists because juridical entities in the United States are constituted or organized under the laws of sub-federal authorities, rather than federal law. However, sub-federal authorities are not "Parties" to the treaty.

The definition of "company of a Party"[102] should be interpreted to include those juridical entities constituted or organized under the laws of the sub-federal authorities of the United States or Honduras. A "company," in accordance with the definition in Article I (a), is any entity constituted or organized under "applicable law."[103] Applicable law in Honduras and the United States should mean the laws of the jurisdictions providing for the establishment and governance of juridical entities. A restrictive interpretation of Article I (b) would essentially render the agreement void.[104]

Territoriality Requirement

The territoriality requirement of an investment is set forth in Article I (e). Article I (e) defines an investment to which the benefits of the treaty may flow as a "covered investment."[105] A "covered investment" is further defined as "an investment of a national or company of a Party in the territory of the other Party."[106] The treaty does not, however, delineate the "territory" of either the United States or Honduras. The territories of both countries should be those areas over which the Parties exercised sovereign authority on July 1, 1995, the date of the signing of the treaty. Providing investments in subsequently acquired territory with the benefits of the treaty should not be assumed. Territorial additions by either Party could result in circumstances not contemplated during the negotiations.[107]

Denial of Treaty Benefits

Investments that meet the nationality, juridical entity and territoriality requirements may still be denied the benefits of the ***442** treaty under circumstances set forth in Article XII.[108] Article XII "reserves" to the United States and Honduras the right to deny "a company of the other Party the benefits of this treaty if nationals of a third country own or control the company" and one of two other circumstances exist.[109] The initial situation involves the denial of treaty benefits to an investment owned or controlled by nationals of a country that the United States or Honduras, whichever state is denying the benefits, "does not maintain normal economic relations."[110] Article XII (a) respects the rights of the Parties to choose those third states with which they will engage economically. The United States, in accordance with this provision, may not be compelled to extend treaty benefits to an entity that meets the definition of a "company of a Party," but is owned or controlled, for instance, by nationals of North Korea, Burma (Myanmar) or Cuba.[111] Honduras, likewise, retains the right, based on the policy considerations enunciated in Article XII (a), to limit those juridical entities that may enjoy the privileges of the treaty.

The second circumstance ensures the Parties the right to withhold treaty benefits from any entity that "has no substantial business activities in the territory of the Party under whose laws it is constituted or organized."[112] This reservation, set forth in Article XII (b), is drafted to preserve the flow of treaty benefits to the Parties. Whether the business activity in issue is "substantial" is a matter resolved on a case-by-case basis. Business activity should be considered "substantial" if it supports the economic development of the host Party[113] and promotes the underlying purpose of precluding name-only entities with

few ties to the state of organization from enjoying the benefits of the treaty. The recourse of an entity denied treaty benefits, because it lacks substantial business activity in the state under whose laws it is constituted, ***443** is to seek the benefits of a BIT negotiated with the state where it undertakes substantial business activity, if a BIT with that state exists.

Scope of Application: Time

The temporal application of the United States - Honduras BIT is addressed in Article XVI. Article XVI addresses when the agreement becomes effective, establishes a minimum duration, the method of its termination, and the effect of treaty terms and conditions subsequent to termination of the agreement.

Entry into Force and Duration

The treaty entered into force pursuant to Article XVI (1) on July 11, 2001, thirty days after the Parties exchanged instruments of ratification.[114] It remains in force for a minimum of ten years and could conceivably continue to be lex specialis between the two countries indefinitely.[115] The treaty may be terminated in accordance with Article XVI (2) only after its initial ten-year period and then only after the Party electing to end the agreement provides the other with written notice. If neither Party chooses to conclude the agreement at the end of the initial ten-year period, it may be terminated at any subsequent time provided the terminating Party gives the other Party "one year's written notice."[116]

An issue of concern for investors is the effect of premature termination of the agreement.[117] A subsequent government of a Party that does not share the same political ideology or economic policy of the ratifying government might assert that it is not bound by the treaty. The only possible assertion in this situation, which would likely prove unsuccessful in the context of the United States - Honduras BIT, would be an unforeseen, fundamental change of circumstances pursuant to Article 62 of the Vienna Convention on the Law of International Treaties (Vienna Convention).[118] Circumstances sufficient to justify termination of the agreement contrary to Article XVI would entail a "change that radically transforms the obligation under the treaty."[119] A change ***444** of government or economic policy, even if through revolution, does not constitute the fundamental change contemplated by the Vienna Convention.[120] This argument would be more persuasive if the governments of Honduras and the United States were not representative governments.[121]

Application of the Treaty to Existing and Subsequent Investments

Article XVI (1) provides that the treaty applies to "covered investments...existing at the time of entry into force," as well as, those that are established or acquired after the inception of the agreement.[122] This provision, representative of a practice in many Latin American BIT's,[123] extends the protections of the agreement to those investments that predate the treaty, as well as, those initiated or acquired after its effective date.[124] Absent the provision expressly providing coverage for prior investments, the only protection available for those investments would be the limited protections afforded under customary international law.

Effect of the Treaty After Termination

Although the BIT has specific provisions addressing its termination, some obligations survive termination. Article XVI (3) provides that all of the terms and conditions of the agreement, except those pertaining to the establishment or acquisition of an investment, continue in force for ten years after the conclusion of the treaty.[125]

Ambiguity in Article XVI (3) and (4) establishes a basis for maintaining a right to eleven years of treaty protection. Article XVI (3) provides that the treaty protections continue for ten years after its termination.[126] Article XVI (2) states that the agreement ***445** terminates at the end of the initial ten year period or anytime thereafter on giving one year's written notice.[127] If the treaty does not terminate until one of the Parties gives one year's written notice and the benefits continue for ten years subsequent to its termination, an investor may claim entitlement to eleven years of protection. Article XVI should be interpreted as terminating the treaty on the date of written notification, thereafter extending only ten years of protection. This interpretation is not in explicit accord with the language of the agreement but it is in concurrence with the presumed intent of the Parties.

Admission

Establishment and Acquisition

Customary international law, as reflected in the Guidelines on the Treatment of Foreign Direct Investment developed by the World Bank Group ("World Bank Guidelines")[128] and the United Nations Charter of Economic Rights and Duties of States,[129] is well-settled concerning the obligation of states to permit foreign investment in their territories.[130] The decision to admit foreign investment is a matter of governmental policy and the discretion to exercise that policy rests exclusively with the state concerned.[131] The execution of an investment treaty is an assertion of sovereign discretion whereby a state relinquishes its absolute right to control the entry of foreign investment.[132]

In many investment treaties, admission clauses provide that the entry of foreign investment "shall" be permitted.[133] The entitlement to enter the territory of the host state for the purpose of establishing or acquiring foreign direct investment is, however, ***446** generally qualified by language that only authorizes admission in accordance with the host state's domestic laws and regulations.[134] Treaty provisions that provide for the admission of foreign investment subject to the host state's laws and regulations, which are subject to domestic interpretation and amendment, in practice significantly restrict the ability of a foreign investor to establish or acquire investment.[135]

The practice of the United States, continued in the United States - Honduras investment treaty, is considerably different.[136] The United States - Honduras BIT does not have a separate article or clause addressing the admission of foreign investment.[137] The approach taken by the United States, designed to reduce the actions of foreign governments that impede or distort the flow of investment, is a system based on national treatment and most favored nation principles.[138] The aim of United States BIT practice is to enable investment decisions to respond to market forces.[139]

Article II (1) of the United States - Honduras treaty establishes a liberal policy favoring the admission of investments of nationals and juridical entities of the other Party. The United States and Honduras agree to accord the establishment and acquisition of covered investments national treatment, most favored nation treat or the more favorable of national treatment and most favorable nation treatment.[140] National treatment is the treatment of foreign investment "no less favorable than [the Party] accords, in like situations, to investments in its territory of its own nationals or companies."[141] Most favored nation treatment involves a comparison of the treatment accorded investments made by nationals and juridical entities of the other Party with the treatment accorded by the host Party to investments in its territory by nationals and juridical entities of third countries.[142] The unavoidable ambiguity in the definition of national treatment and ***447** most favored nation treatment is the comparison of "like situations."[143]

The dictates of Article II(2)(a) and the Annex curtail the liberal admission policy set forth in Article II(1). Article II (2)(a) provides that Honduras and the United States may "adopt or maintain" exceptions to their national treatment, most favored nation treatment or their national and most favored nation treatment obligations "in the sectors or with respect to the matters specified in the Annex."[144] Article II (2)(a) afforded both Parties, at the time the treaty was negotiated, the right to make specific reservations that they determined to be in their national security interest or that were consistent with their economic goals.[145]

The system utilized in the United States - Honduras agreement is that of a "negative list" intended to foster transparency.[146] The Parties were obligated to stipulate in the Annex those sectors or matters for which they may withhold the agreement's open admission policy.[147] Accepting the premise that the treaty's policy is one of open admission, exceptions should not be implied and those declared in the Annex should be narrowly construed, in accord with the intent and purpose of the exception privilege of Article II.[148]

Performance Requirements

Performance requirements are obligations imposed by host states on investors, frequently in conjunction with an incentive, that mandate the investing national or entity operate the investment in a particular manner.[149] These requirements may be a

prerequisite to establishing or acquiring an investment or an obligation imposed to continue its operation. Performance requirements can be used to discriminate against foreign investors if, for example, they compel a minimum amount of production be exported or that the investor purchase a minimum amount of ***448** locally produced goods or services.[150]

United States BIT practice, contrary to most investment treaty practice, expressly addresses performance requirements.[151] Article VI of the United States - Honduras treaty provides that neither country "shall mandate or enforce" performance requirements as a prerequisite for the "establishment, acquisition, expansion, management, conduct or operation of a covered investment."[152] Neither Party, pursuant to Article VI, may compel an investor to utilize host country products or services, limit imports, export a specific measure of products or services, limit sales within the host Party's territory, transfer technology, production processes or other propriety knowledge or engage in research and development.[153] The prohibition against performance requirements extends to "any commitment or undertaking in connection with the receipt of a governmental permission or authorization," however "conditions for the receipt or continued receipt of an advantage" are specifically authorized.[154] Arbitral tribunals relying on Article VI and the national treatment standard of Article II, should question conditions imposed subsequent to the entry of an investment.[155] The enactment of legislation that is facially neutral, but impacts domestic and foreign investment in different degrees is the concern of the foreign investor.

General Standards of Treatment

Treatment standards in bilateral investment treaties enable the Parties to eliminate or reduce the uncertainty that exists in customary international law concerning the rights and privileges accorded to foreign investment within the territories of their respective BIT partners.[156] Treatment standards may be categorized into absolute standards and relative standards.[157] Absolute standards include fair and equitable treatment, full protection and security, and treatment according to the minimum standards ***449** of international law.[158] The relative standards of treatment include national treatment and most favored nation treatment.[159]

The lack of an international consensus concerning the treatment that must be accorded foreign investment is reflected in the manner the treatment standards are set forth in BIT's.[160] Treatment standards are not uniform and the format of the standards in BIT's reflects the unique views of the contracting parties regarding the relationship between the different standards.[161]

The United States - Honduras BIT addresses the Parties' treatment obligations in a single article. Article II mandates that each Party accord covered investments national treatment, most favorable nation treatment, or national and most favored nation treatment "[w]ith respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments."[162] National treatment, as previously discussed, is the treatment of foreign investment no less favorable than a Party accords to investment in its territory by its own nationals or juridical entities.[163] Most favored nation treatment, also addressed earlier, is the treatment of covered foreign investments in a manner no less favorable than a Party accords to investments in its territory by nationals and entities of third countries.[164] National and most favored nation treatment extends to covered investments the more favorable of either national treatment or most favored nation treatment.[165]

Fair and equitable treatment, full protection and security, and treatment no less favorable than that required by international law are additional treatment standards set forth in the United States - Honduras agreement.[166] These principles, like national treatment, most favored nation treatment and the better of national and most favored nation treatment, while provided for ***450** in Article II, are set forth in a subsequent separate clause.[167] Unlike the obligations of national treatment, most favored nation treatment, and national and most favored nation treatment to which Honduras and the United States can adopt and maintain exceptions,[168] the Parties bound themselves "at all times" to accord fair and equitable treatment, full protection and security, and treatment no less favorable than customary international law mandates.[169] The relationship between the treatment standards in Article II (1) and those in paragraph (3) is not set forth in the language of the treaty. Using the interpretative rules set forth in the Vienna Convention suggests reading both paragraphs together and understanding the text in a manner that affords each meaning,[170] with the more favorable interpretation to the advantage of the investor.

The manner in which the United States - Honduras treaty was drafted indicates that the obligations of national treatment, most favored nation treatment, and national and most favored nation treatment apply to a specific, limited schedule of activities, namely "the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments."[171] The obligation to accord fair and equitable treatment, full protection and security, and treatment no

less favorable than mandated by international law are not limited by any treaty language and apply to all investment-related relationships between an investor and the host state.

Fair and Equitable Treatment

The United States - Honduras BIT provides that the Parties shall at all times accord "fair and equitable treatment" to covered investments, but does not define the meaning of "fair and equitable treatment."[172] The phrase is both vague and subject to interpretation.[173] Although there is no international consensus of "fair and equitable" treatment, the purpose of the clause is to "provide a basic and general standard" that is detached from the host ***451** state's domestic laws.[174] Assessing what parties with different perspectives consider to be "fair and equitable" will be difficult, but this standard affords the treaty the flexibility to apply in a multitude of circumstances.

"Fair and equitable" treatment, as set forth in the treaty, is an independent standard of treatment.[175] The phrase "fair and equitable treatment" is separated from the phrase "full protection and security" by a conjunctive,[176] as is the third phrase of Article II (3)(a) that concludes "and shall in no case accord treatment less favorable than that required by international law."[177] The drafting of Article II (3)(a) indicates three different standards: fair and equitable treatment, full protection and security, and treatment not below that mandated by customary international law. This position is persuasive considering that the Parties agreed that they "shall in no case accord treatment" below the standard required by international law.[178] If the minimum standard is set in accordance with international law, any additional investment protection must grant covered investments greater sanctuary from adverse host state measures.[179]

The language of Article II (3)(a) may, conversely, be understood as only affording that treatment accorded by international law. The phrase "fair and equitable treatment and full protection and security", under this interpretation is merely an articulation of the minimum standard of treatment pursuant to international law. Some Latin American treaties provide that "fair and equitable treatment" shall be "in accordance with or in conformity with the rules and principles of international law",[180] indicating a belief that international law mandates fair and equitable treatment for foreign investments.

Fair and equitable treatment, as well as full protection and security, in the North American Free Trade Agreement (NAFTA),[181] is explicitly subsumed under the minimum standard ***452** of customary international law.[182] Article 1105(1) of the NAFTA provides that "[e] party shall accord to investments of investors of another party treatment in accordance with international law, including fair and equitable treatment and full protection and security."[183] The language in Chapter 11 of the NAFTA is, however, significantly different from the phraseology employed in the United States - Honduras BIT. More host state obligations emerge from a plain reading of the United States - Honduras agreement than from the NAFTA.

Whether Article II (3)(a) of the treaty is merely an elaboration of the minimum standards of treatment required by international law or affords greater investment protections is significant because of the rigors encountered to confirm the existence of a customary international legal standard.[184] Validating the existence of an international legal precept is arduous.[185] This exercise is avoided if it is concluded that the Parties to the treaty intended that protections greater than those available under international were undertaken with the execution of the agreement.

Full Protection and Security

The United States and Honduras agreed in Article II to accord, at all times, "full protection and security."[186] This obligation, similar to the obligation of fair and equitable treatment, lacks definition and exactitude.[187] Whether the obligation to accord "full protection and security" is an independent duty of the host state or simply part of the minimum standard of treatment subsumed by customary international law also remains unsettled.[188]

The duty of providing "full protection and security" extends from the Treaties of Friendship, Commerce and Navigation, treaties for which the focus was not foreign direct investment.[189] The FCN obligation of "full protection and security" is a general duty on the part of the host state to exercise "due diligence" in the protection ***453** of foreigners.[190] The obligation does not establish a strict liability standard that would render host states responsible for any detrimental change in investment circumstances or destruction of an investment.[191] Early twentieth century scholars advocated state responsibility for injuries caused to the person of an alien, for the destruction of property by forces of the state or that resulted from the negligence of

the host state in protecting the alien or his property.[192] Support for this position was not, however, universal.[193]

The World Bank Guidelines offer an understanding of what the United States and Honduras may have intended by "full protection and security."[194] The Guidelines suggest that fulfillment of this commitment entails extending protection and security to the persons of investors, as well as to property rights, including the granting of permits, import and export licenses, employment authorizations, entry and stay visas, and other legal matters relevant to the treatment of foreign investors.[195] The Guidelines recognize that as foreign investment becomes more complex, so too must the protections afforded investment.

International Law

The United States and Honduras, pursuant to Article II (3)(a), "shall in no case accord [foreign investment] treatment less favorable than that required by international law."[196] This clause reiterates the principle of customary international law that once the privilege of engaging in the economic activity of a foreign country is extended by a state, investors are entitled to a certain minimum standard of treatment.[197] The minimum standard of ***454** treatment in the United States - Honduras agreement is customary international law, those international rules of state conduct the existence of which is confirmed by the "general and consistent practice of States."[198] Customary international law is followed out of a "sense of legal obligation," as opposed to economic or political compulsion.[199]

The minimum standard of treatment, while a "floor" below which the treatment of foreign investment should not fall,[200] is a nebulous standard. A "credible case" may be made for minimum standards protecting "life, liberty, and property" from state violence or state-sanctioned mob violence and the arbitrary dispossession by a dictator for private gain.[201] These are, however, old benchmarks. The issues, among others, that will challenge future arbitral panels is whether international law protects investors against "unjust" domestic court judgments,[202] the "arbitrary" failure of states to take affirmative actions,[203] and "unfair" international competition.[204]

National Treatment, Most Favored Nation Treatment and National and Most Favored Nation Treatment

The United States - Honduras BIT accords covered investments, "in like situations," national treatment, most favored nation treatment or the "most favorable" of national and most favored nation treatment.[205] The national treatment standard gives rise to international responsibility if the host state discriminates between its own investors and foreign investors.[206] The presence of the national treatment obligation, in addition to Article ***455** VI, impedes the host state from imposing burdens such as export quotas or local purchase requirements on the foreign investor after the investment agreement has been executed.[207] This is significant, subsequent to the commitment of resources by the investor, when the bargaining position of the host state will be dominant.[208]

The most favored nation standard of treatment extends to American or Honduran investors the most favorable treatment that the Parties accord to third country investors.[209] A Honduran investor in the United States, for example, is entitled to be treated either in accordance with the standards of the United States - Honduras BIT or in accordance with a more favorable measure if such treatment is extended by the United States to an investor from a third country with direct investment in the United States.[210] The treaty does not address whether the higher standard accorded a third country investor must be in accordance with an investment treaty, leading to the conclusion that the only issue of significance is the standard of treatment.

The United States - Honduras treaty, extending "national treatment and most favored nation treatment," further obligates the Parties to accord foreign investment the standard of treatment that is the more favorable of the two.[211] Although the foreign investor should be entitled to the better standard of treatment, even absent the express language of the treaty extending the "most favorable," Article II (1) of the treaty eliminates any doubt.[212]

The principle burden facing an investor asserting that a Party failed to accord national treatment, most favored nation treatment or the most favorable of either national and most favored nation treatment is the establishment of "like situations."[213] The ***456** investor must prove that the factual circumstances surrounding the investment are "like" the situation involving an investment of a national or juridical entity of the host state, in the case of national treatment, or the situation involving the investment of a third party investor, in the case of most favorable nation treatment.[214] Examining the totality of

the circumstances, the inquiry will scrutinize whether local investments or investments from a third country, "in like situations," have been granted any special privileges or benefits by the host state not available to the investment of an investor from the other Party.[215] The inquiry should seek to ascertain whether the foreign investment was placed at a competitive disadvantage in relation to the situation of the domestic or third country investments.[216]

Sector and Subject Specific Exceptions to National Treatment and Most Favored Nation Treatment Obligations

The United States and Honduras set forth exceptions to their Article II (1) national treatment and most favored nation treatment obligations in the treaty Annex.[217] These exceptions are in those sectors and matters in which the Parties domestic regimes do not confer the investments of nationals or juridical entities of the other Party national treatment or most favored nation treatment.[218] The United States and Honduras must, even as regards the excepted sectors and matters, afford covered investments all of the other rights conferred in the agreement.[219]

The Annex specifies in paragraphs (1) and (4) the sectors and matters for which the United States and Honduras may adopt or maintain exceptions to their national treatment obligations.[220] Although the Parties have exempted themselves from the obligation of according national treatment in the listed sectors and subjects, the agreement specifically mandates that they continue to extend most favored nation treatment.[221] The United States in ***457** paragraph (1) of the Annex exercised the right to adopt or maintain exceptions to its national treatment obligation in matters of:

> atomic energy; customhouse brokers; licenses for broadcast, common carriers, or aeronautical radio stations; COMCAST; subsidies or grants, including government-supported loans, guarantees and insurance; state and local measures exempt from Article 1102 of the North American Free Trade Agreement pursuant to Article 1108 thereof; and landing of submarine cables.[222]

Honduras in paragraph (4) exercised the right to adopt or maintain exceptions to its national treatment obligation in:

> properties on cays, reefs, rocks, shoals or sandbanks or on islands or on any property located within 40 km of the coastline or land borders of Honduras; small scale industry and commerce with total invested capital of no more than US $40,000 or its equivalent in national currency; ownership, operation and editorial control of broadcast radio and television; ownership, operation and editorial control of general interest periodicals and newspapers published in Honduras.[223]

Although Honduras exercised its right to make exceptions to its national treatment obligation, Protocol paragraph (2) confirms the understanding that Honduras will neither reject nor delay decisions on applications to possess or acquire real estate within "urban zones" or in the areas enumerated in Annex paragraph (4) "on grounds of nationality."[224] Protocol paragraph (2) appears in conflict with the language and intent of Annex paragraph (4).

The United States in paragraph (2) of the Annex reserved the right to adopt or maintain exceptions to its obligation to accord both national treatment and most favored nation treatment. The United States reserved rights in "fisheries; air and marine transport, and related activities."[225] Honduras, however, reserved no exceptions to its Article II (1) obligation to extend national treatment and most favored nation treatment.

The United States advised Honduras during the treaty negotiations that "if Honduras undertook acceptable commitments with respect to all or certain financial services, the United States would consider limiting its exceptions with respect to its national ***458** and MFN [most favored nation] treatment obligations in financial services."[226] Honduras responded by taking no exceptions relating to banking, insurance, securities or other financial services.[227] The United States, in Annex paragraph (3), further reserved in "banking, insurance, securities, and other financial services,"[228] the right to adopt or maintain exceptions to national treatment and most favored nation treatment, but agreed to extend to Honduran investments treatment no less favorable than that accorded to Canada and Mexico in the NAFTA.[229]

Article II (2)(a) states that exceptions to the obligations of Article II (1) may be "adopted or maintained" in the sectors or with respect to the matters "specified" in the Annex.[230] While the Parties may adopted or continue to maintain exceptions to

the treaty's Article II (1) obligations, neither the United States nor Honduras may enlarge the enumeration of sectors or matters excepted in the Annex. Those sectors and matters excepted from the commitments to extend national treatment or most favored nation treatment must have been set forth in the Annex at the time the treaty was signed.[231] Expansion of the Annex to encompass sectors or matters not provided for would be contrary to the language of the treaty and violative of its transparency. Changes to the Annex may only be by an amendment to the treaty ratified by both Parties.

Article II (2)(a) of the treaty prohibits the application of an exception that would require divestiture, in whole or in part, of a covered investment that existed at the time the exception became effective.[232] Protection of pre-establishment or pre-acquisition activities is not afforded to investors as Article II (2)(a) only addresses "covered investments existing at the time the exception becomes effective."[233]

Annex paragraph (5), unlike the preceding paragraphs, sets forth a positive duty. Honduras and the United States in Annex paragraph (5) agree to accord national treatment to covered investments in the "leasing of minerals or pipeline rights-of-way ***459** on government lands."[234] The United States sought the inclusion of paragraph (5) because the Mineral Lands Leasing Act[235] and federal law pertaining to Naval Petroleum and Oil Shale Reserves[236] dictate that foreign investors must be denied mineral leases, and oil and gas pipeline rights-of-way on government lands in the United States if American foreign direct investors are denied those right in a foreign country.[237]

Discriminatory Measures

The treatment obligations of Article II (3)(a), to accord fair and equitable treatment, full protection and security, and treatment not less than required by international law, are accompanied by an additional obligation in Article II (3)(b). Article II (3)(b) mandates that neither the United States nor Honduras "shall in any way impair by unreasonable and discriminatory measures the management, conduct, operation, and sale or disposition of covered investments."[238] The obligation of nondiscriminatory treatment applies to governmental "measures."[239] The treaty does not indicate whether the measures must involve direct governmental action or more broadly encompass action only tacitly sanctioned by a Party. The obligation of nondiscriminatory measures, by express exclusion, does not extend to the establishment, acquisition or expansion activities of an investor. This is a significant difference from the activities of an investor protected by the national treatment and most favored nation treatment standards of Article II (1). The Parties to the treaty impliedly retain the right to treat investors differently with regards to the establishment, acquisition and expansion of investment.

The prohibition in Article II (3)(b) focuses on the impairment of an investment by "unreasonable and discriminatory" measures.[240] Measures that "impair" should be broadly interpreted because the Parties modified impair with the phrase "in any way."[241] The reach of the duty imposed by subparagraph (3)(b) is, ***460** however, limited to only those measures that are both unreasonable and discriminatory.[242] Whether a measure is unreasonable and results in discriminatory impairment of the management, conduct, operation or disposition of an investment may only be determined on a case-by-case basis. Customary international law, which may be a source for guidance, prohibits discriminatory treatment in which governmental measures result in actual injury to an alien and the governmental measure is undertaken with the intent to harm the alien.[243]

Political Subdivisions and State Enterprises

The obligations accepted by the United States and Honduras when they entered into the treaty apply to the political subdivisions of the Parties,[244] as well as to state enterprises.[245] The federal governments, irrespective of whether they have the domestic right to control sub-federal authorities, are responsible for the actions of their political subdivisions.[246] Accordingly, it will not be a defense in the resolution of a dispute between an investor and a state that the measure at issue was the action of a political subdivision.[247]

The United States - Honduras treaty obligations assumed by the Parties also apply to state enterprises "in the exercise of any regulatory, administrative or other governmental authority delegated to it" by a Party.[248] The United States and Honduras specifically agreed that state enterprises, in the sale or other distribution of their goods and services, would accord covered investments "national and most favored nation treatment."[249]

Transfers

Government foreign exchange measures impact foreign investors' ability to efficiently administer their investment operations. ***461** [250] Article V of the BIT responds to these issues by establishing the types of transfers that may be made into and out of the host country, and the limitations that the Parties may impose on those transfers.[251] In Article VI, the United States and Honduras balanced the competing interests of the host state's "monetary sovereignty,"[252] and the right to regulate their currency, with the interest of the investor and the investor's home state in unrestricted transferability.[253]

Types of Transfers

Article V (1) provides that "[e]ach Party shall permit all transfers relating to a covered investment to be made freely and without delay."[254] Transfers that are considered "relating to" a covered investment are set forth in Article V (1)(a) through (e).[255] According to the treaty, "[s]uch transfers include:

(a) contributions to capital;

(b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;

(c) interest, royalty payments, management fees, and technical assistance and other fees;

(d) payments under a contract, including a loan agreement; and

(e) compensation pursuant to Articles III and IV, and payments arising out of an investment dispute."[256]

The language of Article V (1) indicates that the Parties intended the types of transfers encompassed within the agreement to be broadly interpreted.[257] The transfers include "all transfers" relating ***462** to covered investments with the agreement illustratively listing specific types.[258]

"Contributions to capital" is the first transfer that is specified in the United States - Honduras treaty.[259] Although some BIT's specifically guarantee investors the right to transfer additional capital into the host state,[260] the United States - Honduras BIT simply provides for "contributions to capital."[261] However, investors, relying on the broad language of Article V, should be entitled to make initial, as well as additional capital contributions provided that those contributions have a nexus with the covered investment.

Returns on the investment are provided for in Article V (1)(b), as are the proceeds from the sale or liquidation of an investment.[262] Article V (1)(b) addresses the transfer of "profits, dividends and capital gains," as well as the proceeds from the sale of all or part of the investment, or from the total or partial liquidation of the investment.[263] The transfer rights accorded in Article V (1)(b) complement the treatment obligations of Article II (1), as they relate to the "sale or other disposition" of an investment.[264]

Article V (1)(c) relates to the transfer of "interest, royalty payments, management fees, and technical assistance and other fees."[265] With regard to the transfers discussed in Article V (1)(c), the United States - Honduras treaty is neutral as to whether the investment has the status of a debtor or creditor.[266]

Transfers of payments that are made pursuant to contracts are provided for in Article V (1)(d). The United States - Honduras treaty does not restrict nor does it offer any indication of the types of contracts that may call for payments from an investment, except that they include payments made pursuant to loan agreements.[267] The transfer of funds to repay indebtedness is limited to transfers that are "related to" the covered investment.[268] This ***463** requirement, similar to that of other investment treaties, restricts the transfer of funds for loan repayment to those funds that were borrowed for the purpose of investing in the territory of either the United States or Honduras.[269]

The final category of transfers includes compensation received as the result of expropriation,[270] for losses suffered due to civil disturbance,[271] and for payments that arise out of an investment dispute.[272] Article V (1)(e) expressly provides for the transfer of "compensation" for expropriation or losses from civil disturbance, while Article IV, which addresses the Parties' obligations for losses owing to civil disturbance, provides for either restitution or compensation.[273] "Restitution" is not a treaty-defined term. A strict interpretation of Article V (1)(e) and a Party's assertion that it provided "restitution," not compensation, will set the stage for resolution of the meaning of "restitution," and whether the United States - Honduras treaty also mandates that the Parties permit the transfer of "restitution."

The reference to payments that arise from investment disputes is unique to United States BIT practice.[274] This is an acknowledgement of the increasingly significant role dispute resolution plays in foreign direct investment and the interest of the Parties in facilitating non-diplomatic, expeditious dispute resolution. The United States - Honduras treaty states that such payments must "arise out of" an investment dispute.[275] Transfers "arising out of" investment disputes include arbitral recoveries beyond simply the award of damages and may include costs, interest and other awards unique to a particular investor-host state undertaking.

The payment of remuneration by an investor in the host country to employees or independent contractors that are not nationals of the host country is a transfer of significant importance. American and Honduran negotiators either chose not address or could not agree whether foreign nationals who are paid in the host country should be permitted to transfer all or part of their salaries to ***464** their home country or a third country.[276] Relying on Article VII, which addresses the entry and sojourn of aliens, as well as on Article V (1)(d), which addresses transfers that relate to payments made under contract, a position may be advanced that remuneration transfers, if not specifically provided for in the treaty, are within the spirit of the agreement.[277] Precluding employees from transferring their salaries would create an impediment to the effective exercise by the investment of the rights extended under Article VII to employ foreign nationals.[278] Furthermore, investors are less likely to be able to employ the most capable individuals if those persons have concerns about the ability to repatriate their salaries. Since investors are authorized to transfer payments made under a contract, and compensation is paid pursuant to contracts of employment, whether directly to employees or indirectly to independent contractors, investors should consider making a percentage of their compensation payments in the host country and a percentage in their home or a third country.[279]

Limitations on Transfers

The obligation of the Parties to permit transfers relating to covered investments is not without qualification.[280] Honduras and the United States in Article V (4), agreed that they may prevent transfers through the "equitable, non-discriminatory and good faith application" of four areas of their domestic laws.[281] Those laws are as follows: "(a) bankruptcy, insolvency or the protection of rights of creditors; (b) issuing, trading or dealing in securities; (c) criminal or penal offenses; or (d) ensuring compliance with orders or judgments in adjudicatory proceedings."[282]

The laws listed in Article V (4)(a) through (d) present issues of interpretation. Bankruptcy laws and those designed for the protection of creditors require an initial determination of debtor and creditor status.[283] Although issuing and trading securities may be ***465** understood, "dealing" in securities is less specific.[284] Offenses set forth in a Party's criminal code should fall within Article V (4)(c), but administrative action is neither precisely civil nor criminal. The enforcement of orders or judgments in "adjudicatory proceedings" encompasses actions of the courts, yet it is unresolved whether orders or decisions of administrative bodies also fall within the parameters of Article V (4)(c).[285]

Disputes concerning the denial of transfers based on a Party's assertion of its rights under Article V (4) will also involve whether the law and proceedings are equitable, non-discriminatory and applied in good faith. Equitable application mandates that the proceedings conform to the imprecise standard of "principles of justice and right."[286]

Recourse to the treatment standards of Article II assists in providing substance to the Article V (4) obligation of non-discrimination.[287] One of the basic tenets of the treaty is that investors be treated no less favorable than an investor of a Party or an investor of a third-country.[288] The meaning underlying the non-discriminatory application of the host country's laws and regulations may also be found in Article III which mandates that expropriation be undertaken in a "non-discriminatory" manner.[289]

An international understanding of a Party's "good faith" application of its bankruptcy, securities, or criminal laws, and

proceedings to ensure compliance with adjudicatory orders or judgments may be obtained from an application of the Vienna Convention (the "Convention"). Article 26 of the Convention requires that the Parties of a treaty perform their obligations in "good faith."[290] A body of international jurisprudence applying this standard in different factual situations offers substance to the meaning of "good faith."

***466 Convertibility and Exchange Rates**

The United States - Honduras treaty provides that the Parties are to permit transfers in and out of their countries "freely and without delay."[291] The BIT, unlike other investment treaties, does not provide either Party with the right to institute currency or exchange controls during times of "exceptional economic or financial circumstances."[292] Although the BIT is void of any provision addressing periods of exchange shortfalls, times of financial stringency may give rise to the doctrine of rebus sic stantibus, making an absolute right of repatriation indefensible.[293]

Additionally, the United States - Honduras treaty mandates that transfers shall be made "without delay."[294] This provision is consistent with Article III on expropriation which also calls for the payment of compensation to be made "without delay."[295] In contrast, the BIT practices of other states, frequently only require that transfers be made "without undue delay," thus indicating that some delay is acceptable.[296]

Article V(2) provides investors with the entitlement to make transfers in "freely usable currency at the market rate of exchange prevailing on the date of transfer."[297] The phrase "freely usable currency" is also employed in Article III on expropriation, but in neither article is it defined. The International Monetary Fund,[298] ***467** the source of the phrase, employs it to currently reference the United States Dollar, the Japanese Yen, the German Mark, the French Franc and the British Pound Sterling.[299] While some BIT's stipulate the currency of transfer and others call for transfers in the currency of the original investment,[300] the United States - Honduras treaty affords the Parties latitude as to the currency of the transfer.

The United States - Honduras treaty imposes on the host country, the risk that an investor may make transfers of a freely usable currency into the territory of a Party which currency may subsequently experience a monetary crisis. Since the issue of free usability is relevant on the date of the transfer, it is possible that an investor may desire to transfer currency out of the country at a time when the currency that was transferred into the host country is no longer "freely usable."[301] The tenor of Article V is that the Parties should not manipulate the transfer of currency to the detriment of the investor. Utilizing the "market rate of exchange prevailing on the date of transfer,"[302] essentially the "spot rate,"[303] confirms this view. The question that remains is what "market" the Parties anticipate will be used, such as Tegucigalpa, New York, London or Paris, if the rates of exchange vary from market to market.

Entry and Sojourn

The opportunity for investors and their representatives to travel to and within the host country is essential to successful foreign direct investing. Article VII of the treaty addresses this necessity.[304] Subject to the laws of Honduras and the United States "relating to the entry and sojourn of aliens,"[305] that is the immigration laws of each country,[306] investors of one Party are entitled to travel to and within the territory of the other Party.[307] Honduran investors, pursuant to Article VII, are eligible to obtain "treaty-investor visas," with American investors being accorded ***468** similar treatment by the Honduran government.[308]

Article VII of the BIT sets forth the minimum obligations of the United States and Honduras with regard to the entry and sojourn of foreign investors. The Parties "shall permit...nationals of the other Party" to "enter and remain" in their respective territories to engage in specifically delineated investment-related activities.[309] Those activities include "establishing, developing, administering or advising on the operations of an investment."[310] Arising out of each investment are these factual issues: (1) "What is the activity of the investor or the investor's representative?" and (2) "What is the relationship between the activity and establishing, developing, administering or advising on the operation of the investment?" Although the United States - Honduras treaty does not establish a specific time limit for travel within a Party's territory, the presence of an investor or an investor's representative must bear a minimal relationship to the establishment or operation of the investment.[311]

The "nationals of the other Party" to whom the United States - Honduras treaty confers entry and sojourn privileges, are individual investors and employees of juridical entities.[312] The BIT uses the word "employs" in the phrase "a company of the other Party that employs them," but does not define employment status.[313] The question that arises is whether the representative of an investing company who travels to the host state must be a direct employee of the juridical entity or whether consultants and other independent contractors retained or "employed" by the investment will be accorded BIT entry and sojourn rights. Lawyers, accountants, geologists, economists and others with unique skills will frequently not be on the payroll of an investment, yet they are essential to its successful establishment and operation. Provided that the consultants are nationals of the state of the investor or investing entity, a broad interpretation of the term "employ" is in accord with the object and purpose of the United States - Honduras treaty.[314]

The investor, to obtain the entry and sojourn privileges of the agreement, must "have committed" or be in the "process of committing" ***469** a "substantial amount of capital or other resources."[315] The commitment and amount of capital or other resources raises issues that are not resolved by the United States - Honduras treaty. The act of "having committed"[316] capital or other resources for the purpose of creating or acquiring an investment indicates a degree of permanency in the decision to invest. The investor may not be precluded from rescinding the actions concerning the investment, but any decision to alter the investor's course would come at a cost. The state of being in the "process of committing"[317] assets to an investment is an earlier period of time. It is a time in the investment process that represents action on the part of the investor that is more than mere inquiry, but before the time in which the investor has actually dedicated funds or resources.

The amount of capital or resources that the Parties consider to be "substantial" is not defined in the United States - Honduras treaty.[318] The difficulty in determining an amount that will be considered "substantial" for any given investor, any particular investment, at any given time and under any unique economic circumstances, probably resulted in the decision to leave clarification of the term "substantial" to subsequent consultation or dispute resolution. Notwithstanding this, the definition of "company" in Article I may offer guidance in the interpretation of the term "substantial."[319] Considering that an investor may be a single individual or involve business entities ranging from sole proprietorships to large corporations, the amount of capital or resources that must be devoted to an investment before it will be considered "substantial" may bear relationship to the type of investor.[320]

The United States - Honduras treaty further provides that the United States and Honduras "shall permit covered investments to engage top managerial personnel of their choice, regardless of nationality."[321] This situation involves, for instance, a juridical entity organized under Honduran law that has invested ***470** or is contemplating operations in the United States and has in its employ a Nicaraguan national. Although the United States - Honduras treaty places no restrictions on the nationality of an investment's senior management, if those individuals are not Honduran or American they must "independently qualify for the appropriate visa."[322] Since the United States - Honduras treaty does not define "top managerial" positions, the discretion of immigration officers in resolving this factual issue will be significant.

Expropriation

Customary international law sanctions state action that expropriates or nationalizes the investments of foreigners within the territory of the state.[323] The United States - Honduras BIT, in response to customary international law and the state takings experienced in the 1950's through the 1970's,[324] includes a detailed article addressing expropriation and nationalization.[325] Reflecting the historical significance of expropriation and nationalization, state takings are preceded in the United States - Honduras treaty only by Article I, its definitions, and Article II, the standards of treatment. Article III is a comprehensive article that sets forth the basic premise on takings, the circumstances under which a taking is permissible and the compensation due to the foreign investor as a result of an expropriation or nationalization.[326]

Measures That Constitute Expropriation

Article III commences with the proposition that expropriation and nationalization are permitted, but immediately focuses on those measures that constitute a taking and the restrictions with which the host state must comply in order for the taking to be considered in compliance with the United States - Honduras treaty.[327] The United States - Honduras treaty addresses the expropriation and nationalization of covered investments that are undertaken "directly" by the host state, or "indirectly through ***471** measures tantamount to expropriation or nationalization."[328] The United States - Honduras BIT, similar to many

investment treaties, does not define "expropriation," "nationalization," or those measures deemed "tantamount to expropriation or nationalization."[329] The multitude of measures that a host state might undertake, although not constituting de jure takings, preclude precise definition.[330]

The characterization of state measures as either an expropriation, nationalization, direct or indirect takings is not, however, significant. Rather, it is the effect on the investor's rights and interests which serves as the focal point.[331] The examination of these effects assists in determining those indirect measures that are deemed to be "tantamount to expropriation or nationalization."[332] If the effect of the Party's action is similar to that which would have resulted from a direct taking,[333] the provisions of Article III should operate to protect the national or juridical entity involved.

Indirect taking or "creeping expropriation" is the incremental erosion of a foreign investor's ownership interest.[334] The Organization of Economic Co-operation and Development (OECD),[335] an organization of predominately developed countries, offered the following examples of indirect takings in its draft convention: (1) excessive or arbitrary taxation; (2) prohibition of dividend distribution coupled with compulsory loans; (3) imposition of administrators; (4) prohibition on employee termination; (5) refusal of access to raw materials; and (6) refusal to grant essential export or import authorization.[336] An international arbitral tribunal ***472** called on to address indirect taking in Starrett Housing Corp. v. The Government of the Islamic Republic of Iran, concluded that although Iran, the host state, did not issue any law or decree expressly taking the foreign investor's property, its measures interfered with the foreign investor's property interests to the extent that it "must be deemed to have been expropriated...even though the legal title to the property formally remains with the original owner."[337]

Early United States treaties provided lists of measures which the Parties to those treaties deemed to constitute indirect takings.[338] The measures included: (1) confiscatory taxes; (2) compulsory sale; (3) impairment of management or control; and (4) impairment of economic value.[339] The United States - Honduras BIT does not include such a list, presumably because of the restrictive effect it would have on the interpretation of measures the Parties intended to constitute expropriation.

Similarly, the United States - Honduras treaty does not address which Party bears the burden of proving that a taking has occurred. The host state should bear the burden of establishing that its taking meets the requirements of the treaty. Since takings, although permissible, are subject to intense inquiry and since the host state is likely to be in possession of the documentation and information necessary to confirm observance of the treaty terms, the host state should assume the initial burden of demonstrating respect for its treaty obligations. The investor should then have the opportunity to rebut the evidence proffered by the host state.

Conditions Precedent

The United States - Honduras BIT, while recognizing the authority of the Parties to expropriate or nationalize covered investments, sets forth five requirements for considering a taking as being in compliance with the treaty.[340] The requirements are as follows: (1) the taking must have a public purpose; (2) it must be done in a non-discriminatory manner; (3) the investor must receive prompt, adequate and effective compensation; (4) the procedures ***473** must accord due process of law; and (5) the taking must be in harmony with the treatment obligations of Article II (3), which are fair and equitable treatment, full protection and security, and treatment not less than the minimum dictated by customary international law.[341]

Public Purpose

The public purpose requirement of Article III reiterates the well-established principle of customary international law.[342] The United States - Honduras treaty, in accord with international law as to principle, is equally comparable in its lack of definition.[343] The absence of a treaty definition or an internationally accepted understanding of "public purpose" coupled with the likelihood that an arbitral tribunal will extend considerable weight to the host state's subjective view of the taking[344] warrants the establishment of parameters.

The intention of the public purpose requirement in investment treaties is to safeguard investors from executive and legislative abuse and to deter host states from enacting measures that have private, as opposed to public impetus.[345] The parameters of takings extend from those measures designed to promote a public good, to those with personal or foreign policy retaliatory motives.[346] Variations employed in other treaties with purposes similar to those of the United States - Honduras treaty include

expropriation or nationalization for the public benefit, a national purpose, the public use, the public interest, in the interest of national defense or security and takings with an internal public or social basis.[347]

Non-discriminatory

The obligation of Article III (1), that takings be carried out in a non-discriminatory manner, is a similarly well-established principle of customary international law.[348] While discriminatory takings ***474** may be contrary to the United States - Honduras treaty and international law, the treaty does not define or offer examples of takings done in a discriminatory manner. Discriminatory nationalization may be particularly difficult to substantiate when the state is in a position to maintain that economics was the motivating factor.[349]

The obligation that takings be non-discriminatory is strengthened by the obligations Honduras and the United States accepted pursuant to Article II (1). Article II (1) mandates with respect to specific activities, particularly the "sale or other disposition" of covered investments, that investors be accorded national treatment, most favored nation treatment and the better of national treatment and most favored nation treatment. (Emphasis added).[350] If expropriation and nationalization are included within the meaning of "other disposition," the host state must not only engage in a non-discriminatory taking, but must also extend the treatment standards of Article II to the taking of an investment.[351]

Compensation

Should the United States or Honduras expropriate or nationalize the investment of a national or juridical entity of the other Party, the taking state is obligated pursuant to Article III (1) to pay the investor "prompt, adequate and effective compensation."[352] The United States - Honduras treaty, in Article III (2), (3) and (4), elaborates on the meaning of "prompt, adequate and effective" compensation.[353] The compensation standard set forth in the United States - Honduras BIT is known as the "Hull Formula,"[354] named after former U.S. Secretary of State Cordell Hull who initially used the phrase.[355] It is the standard strenuously advocated by the United States,[356] as well as other capital exporting countries.[357] This standard is in contrast to that of the more flexible ***475** compensation standard of "appropriate compensation," generally supported by capital importing countries.[358] Bargaining positions and competition for foreign investment all factor into the decision of capital-importing countries whether or not to agree to the Hull Formula.[359]

Amount of Compensation

Adequate compensation, pursuant to Article III (2), is "equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken ("the date of the expropriation")."[360] The United States - Honduras treaty does not define "fair market value," but it does provide that it "shall not reflect any change in value occurring because the expropriatory action had become known before the date of expropriation."[361] The taking state may not benefit from the impact that public knowledge of an impending expropriation or nationalization may have on the value of an investment.[362] Establishing the date of the expropriatory action in an indirect taking will be contentious. Doubt as to the precise date should be resolved in favor of the investor, as the host state, once again, is more likely to be in possession of relevant documentation and information.

The lack of factors for determining "fair market value" was probably not an oversight, but rather a reflection that the Parties could not agree on a specific set of criteria applicable to each unique situation. A side letter to the 1982 investment treaty between the United States and Panama[363] provides that "both Parties understand that the estimate of full value of expropriated investment can be made using several methods of calculation depending on the circumstances thereof."[364] The United States - Haiti investment treaty, a treaty signed but not yet ratified due to political circumstances, stipulates that "compensation will be equivalent to the fair market value of the investment, as determined ***476** according to different methods of calculation as appropriate in each specific case."[365]

The absence of treaty standards for determining "fair market value," the imprecise nature of the measure and the particular interests of the taking Party result in a host of considerations being brought forward to determine the value of an investment.[366] The World Bank Guidelines (the "Guidelines"), include the value a willing buyer would pay a willing seller,

taking into consideration the nature of the investment, its future potential, the length of time the investment has been in operation, the percentage of tangible assets to intangible assets, and "other relevant factors pertinent to the special circumstances of each case."[367] The Guidelines, without suggesting a single, definitive measure of fairness by which compensation may be judged, consider profitability or the lack thereof as an important consideration.[368] Criteria in the NAFTA for determining the fair market value of an expropriated investment include "going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate."[369] A 1991 treaty between Israel and Romania provides for the inclusion of "equitable principles taking into account, inter alia, the capital invested, its appreciation or depreciation, current returns, replacement value and other relevant factors."[370]

Time and Manner of Payment

Investors whose investments have been expropriated or nationalized are entitled to compensation "paid without delay" and that is "fully realizable and freely transferable."[371] Although neither the term "prompt"[372] in Article III (1), nor the phrase "without delay"[373] in Article III (2) are defined, the United States - Honduras treaty should not be interpreted to mean that compensation ***477** must be paid immediately following the taking. The BIT permits the allowance of delay, but only as it relates to the formalities necessary to transfer funds. Balance of payment circumstances may impede a Party's ability to transfer a large sum of currency, particularly foreign currency, out of the host country.[374] Nevertheless, these circumstances are not a treaty-acceptable basis to delay the payment of compensation.[375] The United States - Honduras treaty, unlike British investment treaties, does not provide for the payment of compensation in installments.[376]

The Protocol of the United States - Egypt investment treaty[377] offers insight, from the American perspective, into what is considered a permissible delay.[378] The investment agreement that the United States negotiated with Egypt specifies that "the term 'prompt' does not necessarily mean instantaneous. 'The intent is that the Party diligently and expeditiously carry out necessary formalities.'"[379]

German investment treaty practice incorporates the identical phrase employed in the United States - Honduras BIT, "without delay," and declares that the taking state will be in compliance with its treaty obligation if payment is "effected within such period as is normally required for the completion of transfer formalities."[380] German investment treaties further provide that the applicable period "shall commence on the day on which the relevant request has been submitted and may on no account exceed two months."[381]

Compensation, in order to be "effective," must be "fully realizable and freely transferable."[382] Whether a particular currency on a particular date is "fully realizable and freely transferable," given that the United States - Honduras treaty offers no understanding ***478** of the phrase, can only be determined on a case-by-case basis taking into account all of the circumstances.

The United States - Honduras treaty in Article III (3) and (4) expressly addresses situations in which the fair market value of an expropriated investment is denominated in "freely usable currency" and "currency that is not freely usable."[383] The substance of Article III (3) and (4) is that investors are to be fully and completely compensated for the fair market value of their investment, with interest accruing from the date of the expropriatory action until the investor receives total payment.[384] If the fair market value of the investment is denominated in a freely usable currency, the investor is to receive, in addition to the value of the investment, "interest at a commercially reasonable rate for that currency" through the date of payment.[385] If the fair market value of the investment is not denominated in a currency that is freely usable, the compensation paid must initially be "converted into the currency of payment at the market rate of exchange prevailing on the date of the payment."[386] The taking state is then required to pay the fair market value of the investment on the date of expropriation "converted into a freely usable currency at the market rate of exchange prevailing on that date."[387] The taking state must additionally pay interest accruing from the date of the taking through the date of payment.[388] Interest accrues at "a commercially reasonable rate...."[389]

The Parties to the United States - El Salvador BIT set forth their understanding of the phrase "commercially reasonable rate" in the treaty Protocol.[390] A "commercially reasonable rate" for "a freely usable currency may include a commercially reasonable bank rate for that freely usable currency and a commercially reasonably bond rate for government bonds for that freely usable currency."[391] The United States - El Salvador BIT's use of the word ***479** "may" indicates that other commercially reasonable rates will fulfill the purpose of confirming that investors do not suffer loss while awaiting the

receipt of payment.

Due Process

The obligation that the United States and Honduras shall only expropriate or nationalize covered investments "in accordance with due process of law"[392] references the procedures utilized by the host state in taking an investment.[393] Due process of law, in the international context, is not entirely synonymous with due process in the domestic setting.[394] The United States - Honduras treaty, and investment treaties in general, do not reference domestic law addressing expropriation or nationalization, thereby confirming the principle that international standards are intended to judge the legitimacy of a taking.[395]

Due process of law on the international plane wants for substance, although certain basic features exist. In order to effectuate due process, the Parties should afford advance notification of a taking, a just hearing conducted by an unbiased official, and a decision on the legitimacy of the taking within a reasonable period of time.[396] The availability of review by the host state's courts has also been asserted as an international due process standard.[397] Many investment treaties expressly provide for domestic judicial review of state takings, which is in accordance with international legal standards.[398] The United States - Honduras BIT does not have such a provision.

Resorting to the domestic judicial system of the host country by a Honduran or American investor to redress expropriation or nationalization may result in the forfeiture of the right to compel ***480** arbitration.[399] The United States - Honduras BIT, while conferring investor access to the domestic courts and administrative tribunals to resolve investment disputes, expressly precludes recourse to investor-state arbitration once the domestic route has been exercised.[400]

Losses Due to Armed Conflict and Civil Disturbance

A feature commonly found in bilateral investment treaties is a provision relating to the treatment accorded foreign investment for losses suffered by an investor due to armed conflict or internal disorder.[401] The United States - Honduras investment treaty addresses this issue in Article IV.[402] The United States - Honduras BIT has two provisions in Article IV that address investment losses suffered in the territory of the host state "owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance, or similar events."[403] Article IV (1) provides that "[e]ach Party shall accord national treatment and most favored nation treatment to covered investments as regards any measure relating to losses that investments suffer in its territory" as the result of war or civil disturbance.[404] Article IV (2) sets forth the obligation of the host state to make restitution or pay compensation for the requisitioning or destruction of an investment by the host Party's military forces or other authorities.[405]

The investment loss rights that are provided by Article IV, relate to losses sustained by investments in the host state[406] that result from "war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance, or similar events."[407] The situations that trigger Article IV range from war ***481** against foreign countries to entirely internal civil disorder.[408] Considering that the description of events includes an array of situations of differing degrees of conflict that illustratively provide for "war or other armed conflict" at one extreme and "civil disturbance, or similar events" at the other, Article IV should be broadly interpreted to the advantage of the investor.[409]

The obligations of Honduras and the United States pursuant to Article IV, unlike the list of triggering events, have been narrowly drawn. Article IV (1) obligates the Parties to accord covered investments "national treatment and most favored nation treatment" as regards any measure relating to investment losses in their respective territories.[410] The Parties must treat the investment losses of an investor of the other Party in the same manner as they would treat the investment losses of one of their own nationals or juridical entities. The United States and Honduras must also afford such investment losses the same treatment that the host Party extends to losses suffered by an investor from a third state. If neither the Party nor any of its political subdivisions[411] affords the losses of investors of the host country or of any third country special treatment, investment losses incurred by nationals or juridical entities of the other Party owing to armed conflict or civil disturbance are not entitled to any special recovery privilege.

The total or partial loss of a covered investment that meets the criteria set forth in Article IV (2)(a) and (b) obligates the host

Party to make restitution or pay compensation.[412] Restitution or compensation is only due an investor if the loss incurred results from the "requisitioning of all or part of such investments by the Party's forces or authorities" or the "destruction of all or part of such investments by the Party's forces or authorities that was not required by the necessity of the situation."[413] The BIT does not offer guidance concerning the circumstances that must exist for the destruction of an investment to be considered as having been "required by the necessity of the situation."[414]

The "combat exception" to treaty liability, although involving ***482** action by a Party in preservation of its national security or internal civil order, should not be considered self-judging absent express language to this effect.[415] Deference from arbitral bodies should be accorded to decisions of the Parties regarding these matters, however a Party's actions should ultimately be assessed from an international perspective.[416] If the United States and Honduras had intended for this exception to financial liability to be self-judging, they could have utilized language that would have ensured that result. The American and Salvadorian negotiators in Article XIV of the United States - El Salvador investment agreement, for example, drafted the treaty so that each country, in the fulfillment of its international obligations to maintain peace or in the protection of its national security, could apply any measure "it considered necessary."[417] The standard in Article XIV of the United States - El Salvador BIT, unlike Article IV of the United States - Honduras BIT, is self-judging.[418]

The issue of the "necessity of the situation" was addressed in the British decision in the matter of Burmah Oil Co. v. Lord Advocate.[419] The property in question was destroyed during World War II to prevent it from falling into the hands of the advancing enemy army. The House of Lords, interpreting the British Crown Suits Act of 1857, concluded that because the property was destroyed in advance of possibly being obtained by the enemy, it was not destroyed in combat.[420] The United States - Honduras treaty, unlike the British Crown Suits Act, does not mandate that the property be destroyed in combat, only that the situation necessitated its destruction. The standard in the United States - Honduras treaty provides the Parties with greater latitude and limits those circumstances in which an investor may obtain recovery for the loss of an investment.

The "combat action" exception also arose in arbitral proceedings before the International Centre for the Settlement of Investment Disputes (ICSID) involving the interpretation of an investment agreement between Sri Lanka and the United Kingdom.[421] The property in Asian Agricultural Products Ltd. v. The Republic of Sri Lanka was a shrimp culture farm that was ***483** destroyed by the Sri Lankan military based on information that it was being used by separatist elements.[422] The arbitral panel, which consisted of an Egyptian, French and Ghanaian national, concluded that the actions of the Sri Lankan forces qualified as "combat action."[423] The tribunal also concluded, however, that the agreement at issue afforded protection pursuant to customary international law, and that this protection included an affirmative duty on the part of the host state to safeguard investments.[424] The failure of Sri Lanka to protect the shrimp farm, according to the arbitral panel, resulted in liability pursuant to customary international law that took precedent over the combat exception to liability.[425] The dissent in Asian Agricultural Products maintained that the treaty provisions excluding liability were special provisions that derogated from the general principles of customary international law and should have primacy.[426]

Access to Judicial and Administrative Process

The United States and Honduras in Article II of the investment treaty provide investors with the right to utilize the judicial and administrative systems of the respective countries to resolve conflicts that arise between private parties in business matters. Each Party, pursuant to Article II (4), is obligated to "provide effective means of asserting claims and enforcing rights with respect to covered investments."[427] Two primary issues arise in the interpretation of this aspect of Article II. The initial issue concerns what constitutes "asserting claims" or "enforcing rights."[428] The second issue involves the "means" by which the Parties are to make their judicial and administrative systems available.[429]

The only express limitation in Article II (4) involves the types of claims and rights that an investor may seek to secure through ***484** access to the judicial or administrative structures. The claims or rights that an investor may assert are limited to only those "with respect to covered investments."[430] A better understanding of Article II (4) may be obtained from a reading of the article as a whole, particularly Article II (1), which addresses the activities that are entitled to specific treatment by each Party.[431] Article II (1) focuses on the establishment, acquisition, expansion, management, conduct, operation and the sale or other disposition of a covered investment. Reading Article II paragraphs (1) and (4) together, an investor's right of access to a Party's judicial or administrative system is available to address all issues, from the initial establishment of an investment through its ultimate disposition.

Explicit from a reading of the entire agreement is that Article II (4) does not permit recourse to the domestic judicial or administrative system for the resolution of disputes between an investor and a host-Party. Article IX, which addresses investment disputes, provides for the resolution of these differences.[432] An "investment dispute" is defined in the treaty as a "dispute between a Party and a national or company of the other Party arising out of or relating to an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognized" by the treaty with respect to a covered investment.[433] Although Article II (4) is broadly written to encompass a multitude of actions, Article IX specifically addresses "investment disputes."[434] Access to the host state's judicial or administrative tribunals is not conferred by Article II (4) for the resolution of a matter considered to be an "investment dispute."[435]

Article II (4) states that the "means" of asserting a claim or enforcing a right must be "effective."[436] No definition is provided for determining when a Party should be deemed to have provided "effective means," mere access to the judicial and administrative process, without more, does not meet the standard. There must be a fair and impartial system through which a timely and reasoned determination may be rendered in order for the assertion of a claim to be effective. The means must also be available, once a ***485** claim or right has been successfully asserted, for the investor to utilize the system to enforce all judicially or administratively confirmed rights.

Article II (5) complements Article II (4) by providing that "[e]ach Party shall ensure that its laws, regulations, administrative practices and procedures of general application, and adjudicatory decisions that pertain to or affect covered investments are promptly published or otherwise made publicly available."[437] One of the goals of Article II (5) is the effective assertion of claims and enforcement of rights through transparent legal, judicial and administrative systems.

Consultation and Dispute Resolution

The resolution of disputes relating to the United States - Honduras treaty and direct investment is provided for in Articles IX, X and XI.[438] The United States - Honduras treaty includes the customary provisions addressing consultation and dispute resolution between the Parties involving state-to-state matters, but additionally provides the means for investors to pursue investment-related issues directly with the host country.[439] It is the presence of the investor-state arbitration provision, creating international obligations on the part of the United States and Honduras, which is most significant.[440] The direct means for foreign investors to protect their investments in a neutral forum "depoliticizes" the process and imparts investor confidence.[441] Investors no longer need to exclusively rely on their home states to espouse their positions through diplomatic channels, and can avoid the risks associated with litigating before possibly impartial local tribunals.[442]

Consultation

The representatives of Honduras and the United States in Article VIII of the treaty committed their countries to promptly engage in consultation in advance of instituting arbitration to ***486** resolve issues that arise between the Parties.[443] The obligation to consult is the initial method set forth in the treaty for resolving Party-to-Party disagreement.[444] Consultation offers the Parties the possibility of prompt resolution of a matter that is only available when parties with conflicting positions meet face-to-face.[445] Consultations may be sought to "resolve any disputes in connection with the [t]reaty," or to "discuss any matter relating to the interpretation or application...or the realization of the objectives of the treaty."[446] The Parties should resort to the Preamble for an understanding of the United States - Honduras treaty objectives.

Article VIII only mandates consultation for the resolution of state-to-state issues. When read in conjunction with Article IX, addressing investor-state investment disputes, and Article X providing for government-to-government arbitration, Article VIII precludes the Parties from compelling consultations on matters that directly involve investors. Nothing in the United States - Honduras treaty prevents the United States and Honduras from engaging in diplomatic discussions concerning matters that are principally investor-state issues, but compelling such discussions would re-inject politics into the process and is prohibited.

Although consultations are to be undertaken "promptly," the United States - Honduras treaty does not set a time period within which exchanges should be initiated or completed,[447] nor does it address the level of diplomatic personnel that must participate. The obligation to consult and to do so promptly should be carried out in good faith,[448] with the understanding that dilatory tactics should not frustrate a Party's entitlement to pursue Article XI arbitration. The requirement to consult should

be satisfied when the Ambassador of one Party addresses the issue at hand with the relevant ministry of the other, although consultations between other officials may suffice.[449]

***487 Dispute Resolution Between the Governments of Honduras and The United States**

Intergovernmental Arbitral Tribunal Jurisdiction

Differences between Honduras and the United States concerning the interpretation or application of the United States - Honduras treaty that the Parties cannot resolve through Article VIII consultations "or other diplomatic channels" may be submitted to arbitration for binding resolution.[450] Arbitration pursuant to Article X, although limited to matters concerning the "interpretation and application" of the United States - Honduras treaty, could bring purportedly internal, political matters within the jurisdiction of an arbitral tribunal if broadly construed.[451]

This situation arose in the interpretation of the United States - Nicaragua Treaty of Friendship, Commerce and Navigation.[452] Nicaragua, as a result of the action of the United States involving the "Contras," instituted proceedings before the International Court of Justice (ICJ), the judicial arm of the United Nations, alleging that the United States violated its sovereignty.[453] The United States attempted to preclude the ICJ from hearing the matter on the grounds that the issues were beyond the Court's jurisdiction. The United States maintained that the issues raised by Nicaragua involved its essential security interests.[454] The Court declined the position of the United States stating that the matter concerned a dispute relating to the "interpretation or application" of the FCN treaty and was properly before the ICJ.[455]

State-to-state arbitration clauses may also create an expansive basis for arbitral tribunal jurisdiction if a state's activity with regard to the promotion of conditions favorable to the inward or outward flow of investment is subject to review.[456] The United ***488** States - Honduras BIT precludes this inquiry.[457] Article VIII consultations only mandate that the Parties "discuss any matter relating...to the realization of the objectives of the [t]reaty."[458] Arbitration pursuant to Article X does not, however, impose an obligation to arbitrate issues that concern the realization of the treaty objectives.[459] The reluctance of the United States and Honduras to extend arbitral review to matters beyond the interpretation or application of the agreement reduces the Parties' concerns that their internal policies will be subject to international scrutiny, but it also limits the protection available to their respective foreign direct investors.[460]

Law Applicable to Disputes Between The Parties

Arbitral decisions resolving disputes between Honduras and the United States are to be made "in accordance with the applicable rules of international law."[461] Article X (1) reinforces the presumption that international agreements are not governed by domestic state law, but rather, by international law.[462] Since the treaty references "[t]he applicable rules of international law,"[463] without limitation, the international law applicable to the resolution of state-party disputes is customary international law.[464] Customary international law, as previously discussed, consists of those rules of international governance "where the existence of the rule is established by general and consistent practice of States followed by them from a sense of legal obligation."[465] Absent a "concordant practice of a number of States acquiesced in by others; and a conception that the practice is required by or consistent with the prevailing law (the opinio juris)" a rule should not be accepted and applied by an arbitral tribunal as international ***489** law.[466]

Constitution, Procedural Rules and Expenses of the Intergovernmental Arbitral Tribunal

The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules[467] are specified in the United States - Honduras treaty as governing the United States - Honduras state-to-state arbitral process.[468] The United States - Honduras treaty allows the Parties to employ other arbitral rules or to modify the UNCITRAL Arbitration Rules, provided that they both agree.[469] The arbitrators may also propose modifications to the UNCITRAL Arbitration Rules, but the objection of either Party compels strict adherence to the UNCITRAL rules.[470]

United States - Honduras intergovernmental arbitral tribunals will consist of three-member panels.[471] The Parties must each appoint an arbitrator of their choice within two months of receipt of a request for arbitration.[472] The Party-appointed

arbitrators then select the third, presumably neutral, arbitrator who will chair the panel.[473] The arbitral chair must be a national of a third state.[474] The UNCITRL Arbitration Rules relating to the appointment of three-member arbitral panels apply, "mutatis mutandis,"[475] to the appointment of Party-to-Party arbitral panels.[476] ***490** The only exception is that the Secretary General of ICSID, rather than the Secretary General of the United Nations, is delegated the authority to resolve appointments that are not administered by the Parties or the Party-appointed arbitrators.[477]

The United States - Honduras BIT is unique from other investment treaties in its reference to specific arbitral rules, rather than obligating the tribunal to determine its own procedure.[478] The agreement is also distinctive in its aim of conducting the arbitration and achieving an arbitral decision in a relatively short time period.[479] Unless the Parties agree to the contrary, all submissions must be made and all hearings completed within six months of the selection of the third arbitrator.[480] The arbitral panel must then complete its deliberations and render a decision no later than two months after receipt of the final submission or the close of the hearing, whichever is later.[481] Although arbitral tribunals generally have the authority to extend time constraints, only the Parties, not the tribunal, may lengthen the periods set in the United States - Honduras BIT.[482]

The expenses incurred by the Chair and the other arbitrators, as well as other costs of the proceedings are presumptively borne equally by the Parties.[483] The United States - Honduras treaty does extend discretion to the arbitral panel to "direct that a higher proportion of the costs be paid by one of the Parties."[484]

Dispute Resolution Between an Investor and a Party

Article IX of the United States - Honduras treaty is the article of foremost consequence for most foreign direct investors.[485] Article IX confers on the investor the right to initiate and control dispute resolution with the host state and expressly sets forth the rights investors may assert.[486] The investor's entitlement to ***491** engage the host state on the international plane flows solely and directly from the authority conferred in Article IX.[487] The United States - Honduras BIT not only empowers investors to participate in dispute resolution with the host state, particularly through international arbitration, but further authorizes the assertion of claims by investors to be based on substantive provisions of the United States - Honduras treaty.[488]

Investment disputes subject to the control of an investor are "dispute[s] between a Party and a national or company of the other Party arising out of or relating to an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognized" by the treaty with respect to covered investments.[489] The treaty does not, however, offer guidance regarding those disputes that should be regarded as "arising out of or relating to" investment authorizations, investment agreements or the rights conferred, created or recognized by the treaty,[490] but such disputes should be coterminous with the broad definition of "investment" in Article I (d).[491] The phraseology of Article IX (1), "arising out of or relating to," particularly the use of the coordinating conjunction "or" suggests an expansive interpretation.[492] The language of Article IX (1), when read with the expansive definition of "investment,"[493] supports the conclusion that the Parties intended the phrase "investment dispute" to be liberally construed.[494]

Balanced against an expansive interpretation of "investment dispute" is the issue of state sovereignty and the extent to which it may be accepted that the Parties intended to yield that sovereignty to an arbitral tribunal. Disputes that involve business issues are appropriate for settlement through investor-state dispute resolution. The more fundamentally political an issue, such as the characterization of a war[495] or the legality of the use of ***492** force,[496] the less likely it is that the Parties intended to extend to an investor the right to have that matter addressed in a domestic court or through the arbitral process.

Investor - State Dispute Resolution Methodology

The United States - Honduras BIT provides investors with three options to resolve investment disputes with the host state. Investors may proceed before the domestic courts or administrative bodies of the host state, conclude their differences in accordance with any previously agreed on settlement procedures applicable to the issues or compel the host state to submit to binding international arbitration.[497] The most important alternative, that of arbitration in an international forum, is an aspect of investment treaty practice on which American negotiators have consistently refused to compromise and is only available through the treaty.[498] Binding arbitration may be before the International Centre for the Settlement of Investment Disputes, if ICSID's jurisdictional requirements are satisfied, the Additional Facility of ICSID, if ICSID jurisdiction cannot be established, pursuant to the UNCITRAL Arbitration Rules or in accordance with any other arbitral institution or arbitration

rules, if agreed to by both the investor and the host state.[499]

Investors may only compel arbitration if they have not previously instituted action in the host state's domestic legal system or pursuant to a previously agreed upon method, and "three months" have passed since the dispute arose.[500] If the investor has "previously submitted the dispute for resolution"[501] under one of the initial two options of Article IX (2), that of the local courts or a previously agreed on dispute-settlement procedure, investor recourse to arbitration is precluded.[502] The "three month" delay in ***493** instituting arbitration commences to run on "the date on which the dispute arose."[503] The United States - Honduras treaty does not state how it should be decided when a dispute is considered to have arisen. The date should not be later than the date on which the investor's rights in the domestic system would commence to run. Although investors are prevented from commencing arbitration pursuant to Article IX (3)(a) prior to the elapse of the three-month period, they are entitled to seek interim injunctive relief during this period to preserve their rights and interests.[504]

Injunctive Relief

Investors, pursuant to Article IX (3)(b), may seek interim injunctive relief through the domestic judicial or administrative system of the host country.[505] Maintenance of the status quo between the investor and the host state must underlie the interim request for relief. Referencing the language of the United States - Honduras treaty, an investor's recourse to injunctive relief must be solely for the "preservation of its rights and interests."[506] Injunctive relief intended to preserve an investor's rights and interests is relief that does not involve the payment of damages.[507] The United States - Honduras treaty does not define the term "damages."

Article IX (3)(b) makes it clear that resort to strictly injunctive relief will not negatively impact an investor's option of engaging in binding arbitration. Sub-paragraph (3)(b) provides that a national or juridical entity may seek interim injunctive relief "notwithstanding that it may have submitted a dispute to binding arbitration."[508] The United States - Honduras treaty further states that such relief may be sought "prior to the institution of the arbitral process or during the proceedings."[509] Despite having the right to do so, investors required by their particular circumstances to seek injunctive relief against a Party should carefully limit the request. An expansive prayer for injunctive relief may be interpreted as seeking the payment of damages, rather than ***494** merely the preservation of rights and interests, and consequently be deemed an exercise of the investor's right to dispute resolution in the domestic legal system.[510]

Consent to Binding Investor - State Arbitration

ICSID Convention Article 25 (1)[511] and the Additional Facility Rules[512] only extend the jurisdiction of ICSID to "legal dispute[s] arising directly out of an investment" for which there has been "consent in writing" to submit the dispute to ICSID.[513] ICSID will not entertain arbitration against a sovereign state absent unconditional consent set forth in a written instrument.[514] The United States - Honduras BIT expressly provides the requisite written consent in Article IX (4).[515]

Article IX (4) of the agreement provides that "[e]ach Party hereby consents to the submission of any investment dispute for settlement by binding arbitration" in accordance with the election of the investor.[516] The Parties, through Article IX(4), confirm their intention that the consent agreed to in the United States - Honduras treaty satisfies the requirements of the ICSID Convention and the Additional Facility Rules.[517] The language drawn on by Honduras and the United States does not, as in some treaties, suggest a willingness to consider arbitration. Rather, it expressly recognizes the Parties' obligations to participate in binding arbitration before ICSID or pursuant to the Additional Facility Rules.[518] Since neither Article 25 (1) of the ICSID Convention nor the Additional ***495** Facility Rules require that a state's consent be in a particular instrument or even conferred in the same instrument, investors whose investment agreements with a host state do not expressly address consent remain entitled through Article IX (4) of the United States - Honduras BIT to submit their disputes for arbitration before ICSID or the Additional Facility.[519]

Finality and Enforcement of Investor - State Arbitral Awards

The United States and Honduras expressly sought through Article IX (6) to eliminate protracted litigation or arbitration and to facilitate satisfaction of arbitral awards. The Parties provided that any arbitral award rendered pursuant to Article IX would

be "final and binding on the parties to the dispute."[520] "The parties," as expressed in Article IX (6), refers to both investors and the host Party, not just the "Parties" to the United States - Honduras treaty.[521] The United States - Honduras treaty further provides that Honduras and the United States are to "carry out without delay" the provisions of any arbitral award and to provide in their territories for the enforcement of any arbitral award.[522] The failure of the Parties to enforce an award rendered pursuant to the conditions set forth in the United States - Honduras treaty could constitute a breach of the Treaty and possibly render the Party directly liable.[523]

Buttressing the obligation of the Parties to carry out the terms of any arbitral award are the requirements of Article IX (5). Article IX (5) mandates that arbitration be held in a country that is a Party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") ***496** [524] in order to ensure, to the extent possible against any sovereign, that the Parties comply with arbitral awards rendered against them.[525] The New York Convention enables investors in whose favor an arbitral award has been rendered, to seek recognition and enforcement of the award against the assets of the host Party in any state that is a Party to the New York Convention. The Parties affirm through Article IX (4) that the treaty constitutes an "agreement in writing"[526] as mandated by the New York Convention.[527] Recognition and enforcement of an award against Honduras may, however, be complicated by the fact that only the United States is a Party to the New York Convention.[528] Issues of jurisdiction and sovereign immunity may also hinder the ability of an investor to obtain ultimate satisfaction of an award.[529]

Exhaustion of Local Remedies

The local remedies rule, a fundamental principle of customary international law, calls for the exhaustion of all remedies provided for by the laws of the host state in advance of recourse to international arbitration.[530] The rule is recognition of state sovereignty over matters within its territory and is implied in investment treaties that are silent on the issue.[531] The Court of International Justice in Elettronica Sicula S.p.A. (ELSI) addressed the obligation to exhaust local remedies when asserting privileges based on a Treaty of Friendship, Commerce and Navigation.[532] The ICJ held that "it was unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so."[533]

***497** The United States - Honduras investment treaty, although not expressly obviating the local remedies rule, does provide investors with dispute resolution options that contradict incorporation of the rule in the treaty. Article IX (2) states that "a party to an investment dispute may submit the dispute for resolution" in accordance with the terms set forth in the United States - Honduras treaty.[534] The options available to an investor through the BIT include recourse to the domestic legal system of the host Party, dispute settlement procedures agreed on in advance and binding arbitration.[535] Since the obligation to exhaust local remedies is not expressly dispensed with in the United States - Honduras treaty, there is the presumption that it should be implied. Article IX (2) should, however, be interpreted as rebutting this presumption. Providing an investor with dispute resolution options directly conflicts with the proposition of the rule.[536] The intent of Honduras and the United States, as expressed in Article IX (2), was to eliminate the investor's obligation to exhaust local remedies prior to electing its course of dispute resolution with the host state.

Conclusion

The development of international commerce from trade between merchants to direct investment beyond the traditional borders of the investor's home country has brought with it a rapidly evolving legal landscape.[537] International dispute resolution, once the provenance of diplomats and state espousal of claims, is now the arena of the "transnational adjudicator."[538] Providing investors with the means of advancing their disputed claims with the host state and recognition of that privilege by investors has resulted in a proliferation of arbitral claims.[539]

Appreciating the nuances and ambiguities of bilateral investment treaties is essential to contemporary foreign direct investing. ***498** Treaty provisions drafted by skilled diplomats are being subjected to the scrutiny of talented arbitrators. The strengths and weaknesses of negotiating positions, and concurrent arbitral awards, rest on the interpretation of treaty terms that are more frequently being construed in a legalistic manner. As investor - state dispute resolution, the recourse of final resort, becomes more prevalent, knowledge of treaty ambiguities becomes more indispensable and the need for treaties crafted with greater certainty more evident.

Footnotes

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The opinions expressed in this article do not necessarily represent the views of U.S. Customs and Border Protection or the United States government.

1 See U.N. Ctr. On Transnational Corporations & Int'l Chamber Of Commerce, Bilateral Investment Treaties 1959-1991, 1992, at preface iii, U.N. Doc. ST/CTC/136, U.N. Sales No. E.92 II.A.16, I.C.C. Sales No. 508 [hereinafter Bilateral Investment Treaties 1959-1991].

2 See M. Sornarajah, The International Law On Foreign Investment 41 n.37 (1994).

3 See generally Clive Parry Et Al., Encyclopaedic Dictionary Of International Law 82 (1987); Restatement (Third) The Foreign Relations Law Of The United States § 102 (2) (1986) [hereinafter Restatement (Third) Foreign Relations Law] (providing that customary international law requires "a concordant practice of a number of States acquiesced in by others and a conception that the practice is required by or consistent with the prevailing law (the opinio juris)").

4 See The Sinking of the MAI, Economist, Mar. 14, 1998, at 81; UK Admits Failure After French Talks Withdrawal, Fin. Times (London), Nov. 18, 1998, at 14.

5 See Treaty Concerning The Encouragement And Reciprocal Protection Of Investments, July 1, 1995, U.S.-Hond., Treaty Doc. 106-27 [hereinafter United States - Honduras Investment Treaty]; See also Gary G. Yerkey, Senate Ratifies Bilateral Treaties on Investment With 10 Countries, 17 Int'l Trade Rep. (BNA) 1630 (Oct. 26, 2000) (discussing U.S. Trade Representative Charlene Barshefsky's statement on the senate ratification of ten investment treaties, including the treaty with Honduras).

6 See generally UNITED STATES TRADE REPRESENTATIVE, EXECUTIVE OFFICE OF THE PRESIDENT, 2003 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS at 157; U.S. COMMERCIAL SERVICE, U.S. DEP'T OF COMMERCE, 2002 COUNTRY COMMERCIAL GUIDE FOR HONDURAS, available at http://www.usatrade.gov/Website/CCG.nsf/ShowCCG?OpenForm&Country=HONDURAS (addressing investment conditions in Honduras). (This internet cite no longer exists in the listed location)

7 See generally Barbara Hagenbaugh, China Draws More Foreign Money Than USA, USA Today, Sept. 5, 2003, at 3B (stating that worldwide foreign direct investment in 2002 was U.S. $651.2 billion and that foreign direct investment in the United States fell to U.S. $30 billion in 2002 from a high of U.S. $314 billion in 2000); Michael Youssef, Direct Investment Positions in 2001, Int'l Econ. Rev.17 (U.S. Int'l Trade Comm'n ed. USCIT Publication 3612) (discussing the flow of direct investment into and out of the United States in 2001).

8 See Bureau of Econ. and Bus. Affairs, U.S. Dep't of State, U.S. Bilateral Investment Treaty Program, (July 1, 2003) [hereinafter U.S. BIT Program] (addressing the objectives of the United States in negotiating investment treaties).

9 See Jeswald W. Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in

Developing Countries 24 Int'l Law 665 (1990).

10 See Louis Henkin, Et Al., International Law: Cases And Materials, 764, 1446 (3rd ed. 1993); see also Brian M. McKell, Protecting the Balance Sheet Against Political Risk, 32 Int'l L. News 1 (Summer 2003) (discussing methods of protecting foreign investment against non-economic, political risks).

11 See Sornarajah, supra note 2, at 225; See also Teresa McGhie, Bilateral and Multilateral Investment Treaties, in Legal Aspects Of Foreign Direct Investment 107 (Daniel D. Bradlow & Alfred Escher eds., 1999); U.N. Economic Commission On Latin America And The Caribbean, Foreign Investment In Latin America And The Caribbean 1998 Report, U.N. Doc.LC/G.2042-P, U.N. Sales No. E.98.II.G.14 (1998).

12 See generally Fritz Munich, Treaties of Friendship, Commerce and Navigation, in 7 Encyclopedia Of Public International Law 484, (Rudolf Bernhardt ed., 1984) (discussing the Treaties of Friendship, Commerce and Navigation).

13 See Sornarajah, supra note 2, at 229.

14 See Paul E. Comeaux & N. Stephen Kinsella, Protecting Foreign Investment Under International Law: Legal Aspects Of Political Risk 104 (1997) (The first treaty of Friendship, Commerce and Navigation entered into by the United States with France was negotiated by Benjamin Franklin, Arthur Lee and Silas Deane shortly after the signing of the Declaration of Independence.); See also Kenneth J. Vandevelde, U.S. Bilateral Investment Treaties: The Second Wave, 14 Mich. J. Int'l L. 621, 624-25 (1993).

15 See Sornarajah, supra note 2, at 229.

16 See Bilateral Investment Treaties 1959-1991, supra note 1, at 11.

17 See President's Message to the Senate Transmitting the Honduras - United States Bilateral Investment Treaty With Documentation, 36 Weekly Comp. Pres. Doc. 1199 (May 23, 2000) [hereinafter President's Message to the Senate].

18 See United States - Honduras Investment Treaty, supra note 5, arts. IX-X; infra Consultation and Dispute Resolution.

19 See Bilateral Investment Treaties 1959-1991, supra note 1, at 11.

20 See International Centre for the Settlement of Investment Disputes Deputy Secretary-General Antonio Parra, Presentation to the International Dispute Resolution Committee, Section of International Law and Practice, American Bar Association (June 24, 2002) (stating that the Centre receives one to two new cases each month and that "not very long ago this was the annual rate").

21 See id.

22 See generally 1994 Prototype Treaty, Treaty Between the Government of the United States of America and the Government of the [Country] Concerning the Encouragement and Reciprocal Protection of Investment, revised Apr. 1998 (available from the Office of the U.S. Trade Representative, Office of Services, Investments and Intellectual Property Rights); Trade Unit, Organization of American States, Investment Agreements in the Western Hemisphere: A Compendium (Oct. 1999), available at http://www.sice.oas/bites/asp (providing a study prepared for the Free Trade Areas of the Americas, Working Group on Investments, undertaken by the Trade Unit of the Organization of American States).

23 See infra Preamble.

[24] See United States - Honduras Investment Treaty, supra note 5, Preamble.

[25] See infra Scope of Application.

[26] Madeline Albright, Dep't of State, Letter of Submittal, May 1, 2000, S. Treaty Doc. 106-27, at v (2000) [hereinafter Albright].

[27] See United States - Honduras Investment Treaty, supra note 5, art. I.

[28] See id. art. I(d).

[29] See id. art. II.

[30] See id. art. XI.

[31] See id. art. II(2)(a) and Annex.

[32] See id. art. III.

[33] See id. art. IV.

[34] See id. art. V.

[35] See id. art. VI.

[36] See id. art. VII.

[37] See id. arts. VIII - X.

[38] See id. art. VIII.

[39] See id. arts. IX and X.

[40] See id. art. XII.

[41] See id. art. XIII.

[42] See id. art. XIV(1) and Protocol paras. (3) and (4) (confirming the understanding of the Parties with respect to the meaning of Article XIV(1)).

[43] See id. art. XIV(2).

[44] See id. art. XV(1)(a) and (b).

45 See id. art. XV(2).

46 See id. art. XVI.

47 Id. art. XVI(4).

48 See id. Annex.

49 See id. Protocol; Jose Luis Siqueiros, Bilateral Treaties on the Reciprocal Protection of Foreign Investment, 24 Cal. W. Int'l L. J. 255, 258 (1994); See generally Vienna Convention on the Law of International Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331, art. 31 (4) [hereinafter Vienna Convention] (stating that special meaning shall be given to terms when the parties to treaties so intended); See also Edmund Jan Osmanczyk, The Encyclopedia Of The United Nations And International Relations 999 (2nd ed. 1990) (a more readily available version of the Convention).

50 See id. United States - Honduras Investment Treaty, supra note 5, Preamble; See generally U. N. Ctr. on Transnational Corporations, Bilateral Investment Treaties, U.N. Doc. ST/CTC/65, U.N. Sales No. E.88.II.A.1 at 14-15, (1988) [hereinafter U.N. Ctr. on Transnational Corporations, Bilateral Investment Treaties].

51 See generally Albright, supra note 26; Sornarajah, supra note 2, at 237; Bilateral Investment Treaties 1959-1991, supra note 1, at 8; Vienna Convention, supra note 49, art. 31.

52 See United States - Honduras Investment Treaty, supra note 5, Preamble.

53 Id. art. XVI(4).

54 See Sornarajah, supra note 2, at 237; Siqueiros, supra note 49, at 258-59; See generally Iimar Tammelo, Treaty Interpretation and Practical Reason--Towards a General Theory of Legal Interpretation 11, 12 (1967) (stating that treaty interpretation requires "consideration of the whole context of the treaty").

55 United States - Honduras Investment Treaty, supra note 5, Preamble.

56 Id.

57 Id.

58 See Sornarajah, supra note 2, at 239.

59 See id. at 238-39.

60 United States - Honduras Investment Treaty, supra note 5, Preamble.

61 See Remarks at the Welcoming Ceremony at the Central American Summit in San Jose, Costa Rica, 33 Wkly. Comp. Pres. Doc. 673, 684 (May 8, 1997); Alejandro A. Escobar, Introductory Note on Bilateral Investment Treaties Recently Concluded by Latin American States, 11 ICSID Review- Foreign Inv. L. J. 86, 87 (1996).

62 Cf. Sornarajah, supra note 2, at 236 (stating that developing countries believe that investor confidence in the legal structure will attract foreign direct investment, but the ability to attract FDI depends more on the political and economic climate).

63 See Bilateral Investment Treaties 1959-1991, supra note 1, preface iii.

64 United States - Honduras Investment Treaty, supra note 5, Preamble.

65 See Sornarajah, supra note 2, at 239.

66 United States - Honduras Investment Treaty, supra note 5, Preamble.

67 Id. See generally Kimberly Ann Elliott, International Labor Standards and Trade: What Should be Done?, in Launching New Global Trade Talks, an Action Agenda, at 165, 167 (Inst. Int'l Econ., Jeffery J. Schott ed. 1998) (The International Labor Organization core standards are: freedom of association; collective bargaining; freedom from forced labor; equal remuneration; nondiscrimination in employment; and a minumum age for work. These principles are also endorsed by Organization for Economic Co-operation and Development Trade Union Advisory Committee and the International Confederation of Free Trade Unions.).

68 United States - Honduras Investment Treaty, supra note 5, Preamble.

69 Id.

70 Id. art. I(d); See generally McGhie, supra note 11, at 110 (discussing treaty definitions of "investment" and "investor"); Maryse Robert, Organization Of American States, Multilateral And Regional Investment Rules: What Comes Next? 3-5 (2001) (analyzing the scope of investment agreements in the Western Hemisphere).

71 United States - Honduras Investment Treaty, supra note 5, art. I(d); see generally U.N. Ctr. On Transnational Corporations, Bilateral Investment Treaties, supra note 50, at 16-18.

72 See United States - Honduras Investment Treaty, supra note 5, art. I(d).

73 See Robert, supra note 70, at 4; Bilateral Investment Treaties 1959-1991, supra note 1, at 8; See also Comeaux, supra note 14, at 105 (stating that the United States prototype treaty language is broad).

74 United States - Honduras Investment Treaty, supra note 5, art. I(d).

75 Id.

76 See Sornarajah, supra note 2, at 241; Bilateral Investment Treaties 1959-1991, supra note 1, at 8.

77 See United States - Honduras Investment Treaty, supra note 5, art. I(d).

78 Id. art. I(d)(i).

79 Id. art. I(a).

80 Id.

81 Id. art. I(d)(ii).

82 See id. art. I(d)(iii), (iv) and (vi).

83 See id. art. I(d)(iii).

84 Id. art. I(d)(iv).

85 Id. art. I(d)(vi).

86 Id. art. I(d)(v).

87 Id.

88 See generally McGhie, supra note 11, at 111 (discussing limitations on the term “investment”).

89 United States - Honduras Investment Treaty, supra note 5, art. I(d).

90 See id. art. I(e).

91 See id. art. XII(a) and (b).

92 Id. art. I(c); see generally U. N. Ctr. On Transnational Corporations, Bilateral Investment Treaties, supra note 50, at 22-23.

93 See Rudolf Dolzer & Margrete Stevens, Int’l Ctr. for the Settlement of Inv. Disputes, Bilateral Investment Treaties 35 (1995)

94 See Escobar, supra note 61, at 88.

95 See Dolzer & Stevens, supra note 93, at 36.

96 See Escobar, supra note 61, at 88.

97 United States - Honduras Investment Treaty, supra note 5, Preamble.

98 Id. art. I(c).

99 Id. art. I(a).

100 Id.

101 Id. art. I(b); See Robert, supra note 70, at 4.

102 United States - Honduras Investment Treaty, supra note 5, art. I(b).

103 Id. art. I(a).

104 See generally Vienna Convention, supra note 49, art. 31(1) (treaties should be interpreted in good faith and in light of their object and purpose).

105 United States - Honduras Investment Treaty, supra note 5, art. I(e).

106 Id.; see U.N. Ctr. on Transnational Corporations, Bilateral Investment Treaties, supra note 50, at 26.

107 See generally Vienna Convention, supra note 49, art. 62 (addressing unforeseen, fundamental changes in circumstances).

108 See Dolzer & Stevens, supra note 93, at 42.

109 United States - Honduras Investment Treaty, supra note 5, art. XII; see U. N. Ctr. On Transnational Corporations, Bilateral Investment Treaties, supra note 50, at 25.

110 United States - Honduras Investment Treaty, supra note 5, art. XII(a); See Robert, supra note 70, at 5.

111 See generally Office of Foreign Assets Control, Dep't of the Treasury, Sanctions Program and Country Summaries, at www.treas.gov/offices/enforcement/ofac/sanctions/index.html.

112 United States - Honduras Investment Treaty, supra note 5, art. XII(b); See Robert, supra note 70, at 5.

113 See United States - Honduras Investment Treaty, supra note 5, Preamble para. 2.

114 See id. at art. XVI(1); See generally Dolzer & Stevens, supra note 93, at 44 (discussing the entry into force and duration of BIT's).

115 See United States - Honduras Investment Treaty, supra note 5, art. XVI(1); See generally Comeaux, supra note 14, at 109.

116 United States - Honduras Investment Treaty, supra note 5, art. XVI(2).

117 See Sornarajah, supra note 2, at 274.

118 See Vienna Convention, supra note 49, art. 62.

119 Id.

120 See Sornarajah, supra note 2, at 274-275.

121 See id.

122 United States - Honduras Investment Treaty, supra note 5, art. XVI (1); See generally Comeaux, supra note 14, at 109; Robert, supra note 70, at 5 (stating that most investment agreements in the Western Hemisphere afford protection for investments made before and after the entry into force of the particular treaty).

123 See Escobar, supra note 61, at 88.

124 See Robert, supra note 70, at 50; Siqueiros, supra note 49, at 267; see generally U. N. Ctr. On Transnational Corporations, Bilateral Investment Treaties, supra note 50, at 21-22.

125 See United States - Honduras Investment Treaty, supra note 5, art. XVI(3); see generally U. N. Ctr. On Transnational Corporations, Bilateral Investment Treaties, supra note 50, at 28.

126 See United States - Honduras Investment Treaty, supra note 5, art. XVI(3).

127 See id. at art. XVI(2).

128 See The World Bank Group, Guidelines on the Treatment of Foreign Direct Investment, 7 ICSID Rev. - Foreign Inv. L. J., 297, 299 (1992) [hereinafter World Bank Guidelines].

129 See Charter of Economic Rights and Duties of States G.A. Res. 3281, U.N. GAOR, 29th Sess., U.N. doc. A/RES/3281 (XXIX) (1975) [hereinafter U.N. Charter of Economic Rights].

130 See Ibrahim F.I. Shihata, Recent Trends Relating to Entry of Foreign Direct Investment, 9 ICSID Review- Foreign Inv. L. J. 47, 59 (1994); A.A.Fatouros, Towards an International Agreement on Foreign Direct Investment?, 10 ICSID Rev.-Foreign Inv. L.J. 181 (1995).

131 See Shihata, supra note 130, at 47; Adeoye Akinsanya, International Protection of Direct Foreign Investment in the Third World, Int'l & Comp L. Q. 58, 59 (1987); McGhie, supra note 11, at 112.

132 See Bilateral Investment Treaties 1959-1991, supra note 1, at 9.

133 See Shihata, supra note 130, at 55.

134 See id.; see also Bilateral Investment Treaties 1959-1991, supra note 1, at 8.

135 See Shihata, supra note 130, at 55; Bilateral Investment Treaties 1959-1991, supra note 1, at 8.

136 See Dolzer & Stevens, supra note 93, at 50.

137 See id. at 56; Fatouros, supra note 130, at 195.

138 See McGhie, supra note 11, at 113.

139 See Shihata, supra note 130, at 55; Statement by the President, International Investment Policy, 19 Wkly Comp. Pres. Doc. 1214 (Sept. 9, 1983) [hereinafter Presidential Investment Policy Statement].

140 See United States - Honduras Investment Treaty, supra note 5, art. II(1).

141 Id.

142 See id.

143 Id.

144 Id. art. II(2)(a); see infra Sector and Subject Specific Exceptions to National Treatment and Most Favored Nation Treatment Obligations.

145 See Shihata, supra note 130, at 68.

146 See id. at 58; Foreign Inv. Advisory Serv., Int'l Fin. Corp., Foreign Direct Investment, Lessons of Experience number 5, at 30 (1997) [hereinafter Foreign Investment Advisory Service].

147 See Bilateral Investment Treaties 1959-1991, supra note 1, at 8.

148 See Vienna Convention, supra note 49, art. 31(1).

149 See Bilateral Investment Treaties 1959-1991, supra note 1, at 10; see generally Robert, supra note 70, at 7-8 (addressing performance requirements in BIT's and trade agreements in countries of the Western Hemisphere).

150 See Bilateral Investment Treaties 1959-1991, supra note 1, at 10; see generally Robert, supra note 70, at 7-8.; Dolzer & Stevens, supra note 93, at 79.

151 See Presidential Investment Policy Statement, supra note 139, at 1216; Dolzer & Stevens, supra note 93, at 80.

152 United States - Honduras Investment Treaty, supra note 5, art. VI; see Patricia McKinstry Robin, The BIT Won't Bite: The American Bilateral Investment Treaty Program, 33 Am. U. L. Rev 931, 949 (1984).

153 See United States - Honduras Investment Treaty, supra note 5, art. VI(a) - (f).

154 Id. art. VI; See Shihata, supra note 130, at 59.

155 See Sornarajah, supra note 2, at 251.

156 See id. at 250.

157 See Comeaux, supra note 14, at 105-06.

158 See id.

159 See id.

160 See Escobar, supra note 61, at 89.

161 See id.

162 See United States - Honduras Investment Treaty, supra note 5, art. II(1).

163 See id.; See generally Robert, supra note 70, at 5 (discussing the concept of national treatment in countries of the Western Hemisphere).

164 See United States - Honduras Investment Treaty, supra note 5, art. II(1); See generally Robert, supra note 70, at 6-7 (discussing the concept of most favored nation treatment in countries of the Western Hemisphere).

165 See United States - Honduras Investment Treaty, supra note 5, art. II(1).

166 See id. art. II(3); See generally Robert, supra note 70, at (discussing treatment standards in countries of the Western Hemisphere).

167 See United States - Honduras Investment Treaty, supra note 5, art. II(3).

168 See id. art. II(2).

169 See id.

170 See Vienna Convention supra note 49, art. 31.

171 United States - Honduras Investment Treaty, supra note 5, art. II(1).

172 See generally Dolzer & Stevens, supra note 93, at 60; U. N. Ctr. On Transnational Corporations, Bilateral Investment Treaties, supra note 50, at 30.

173 See Sornarajah, supra note 2, at 250-251; Bilateral Investment Treaties 1959-1991, supra note 1, at 9.

174 Dolzer & Stevens, supra note 93, at 58; see Robert, supra note 70, at 4.

175 See generally Shihata, supra note 130, at 56; Cf. Robert, supra note 70, at 4-5.

176 United States - Honduras Investment Treaty, supra note 5, art. II(3)(a).

177 Id.

178 Id.

179 See generally Dolzer & Stevens, supra note 93, at 60; see also F.A. Mann, British Treaties for the Protection and Promotion of Investment, 1981 Brit. Y.B. Int'l L. 244 (stating that "fair and equitable treatment" goes beyond the minimum standard of international law and should be understood and applied autonomously).

180 See Escobar, supra note 61, at 89.

181 See North American Free Trade Agreement, Dec. 8, 1993, Can.-Mex.-U.S., 107 Stat. 2057, reprinted in 32 I.L.M. 289 [hereinafter NAFTA].

182 See Free Trade Commission Clarifications Related to NAFTA Chapter 11, July 31, 2001, at B.

183 NAFTA, supra note 181, art. 1105(1).

184 See generally Parry, supra note 3, at 81-82.

185 See id.

186 United States - Honduras Investment Treaty, supra note 5, at art. II(3)(a); see Robert, supra note 70, at 6.

187 See Dolzer & Stevens, supra note 93, at 60-61.

188 Cf. Barcelona Traction 1970 ICJ 32 (full protection and security held to be a "self-contained" standard of treatment).

189 See Dolzer & Stevens, supra note 93, at 60-61.

190 Id.at 61.

191 See id.

192 See Sornarajah, supra note 2, at 124-25.

193 See id.

194 See World Bank Guidelines, supra note 128, at 300; See generally Ibrahim F. I. Shihata, Introductory Remarks, Report to the Development Committee on the Legal Framework for the Treatment of Foreign Investment, World Bank Group, Legal Treatment of Foreign Investment: "The World Bank Guidelines," (1993) [hereinafter Shihata, Introductory Remarks World Bank Guidelines]. Mr. Shihata was Vice President and General Counsel of the World Bank and the Secretary-General of the International Centre for Settlement of Investment Disputes.

195 See World Bank Guidelines, supra note 128, at 300.

196 United States - Honduras Investment Treaty, supra note 5, art. II(3)(a); see The Paquete Habana, 175 U.S. 677, 700 (1900) (stating the "[i]nternational law is part of our [U.S.] law").

197 See Sornarajah, supra note 2, at 128-29 n.137 (quoting A. Roth, The Minimum Standard of International Law Applied to Aliens 185-86 (1949)).

198 Restatement (Third) Foreign Relations Law supra note 3, at § 102 (2).

199 Id.; see Malcolm N. Shaw, International Law 51 (1997).

200 In a NAFTA Arbitration Under the UNCITRAL Arbitration Rules, S.D. Myers, Inc. (Claimant) and Government of Canada (Respondent) Partial Award, para. 263 (Nov. 13, 2002).

201 Sornarajah, supra note 2, at 129.

202 See Mondev International Ltd. v. The United States of America, Notice of Arbitration, para. 135 et seq., ICSID Case No. ARB(AF)/ (Sept. 1, 1999).

203 See GAMI Investments, Inc. v. The Government of the United Mexican States, Demand for Arbitration, (April 9, 2002).

204 See Sean D. Murphy, Contemporary Practice of the United States Relating to International Law: Customary International Law Does Not Protect Anticompetitive Behavior 97 Am. J. Int'l L. 441 (2003).

205 United States - Honduras Investment Treaty, supra note 5, art. II(1); See generally McGhie, supra note 11, at 113-15 (discussing the national treatment and most favored nation treatment standards).

206 See Sornarajah, supra note 2, at 251; Robert, supra note 70, at 6; U. N. Ctr. On Transnational Corporations, Bilateral Investment Treaties, supra note 50, at 33.

207 See Sornarajah, supra note 2, at 251.

208 See id.

209 See id.; Robert, supra note 70, at 6; U. N. Ctr. On Transnational Corporations, Bilateral Investment Treaties, supra note 50, at 34-35.

210 See Dolzer & Stevens, supra note 93, at 65-66.

211 See Bilateral Investment Treaties 1959-1991 supra note 1, at 9; Sornarajah, supra note 2, at 251.

212 See United States - Honduras Investment Treaty, supra note 5, art. II(1).

213 Id. art. II(1); see generally Don Wallace, Jr. & David B. Bailey, The Inevitability of National Treatment of Foreign Direct

Investment With Increasingly Few Excepions, 31 Cornell Int'l L. J. 615, 620-21 (1998) (suggesting that the term "like circumstances" employed in the proposed Multilateral Agreement on Investments is a "modest norm" with its determination subject to different application).

214 See Wallace & Bailey, supra note 213, at 619-20.

215 See Bilateral Investment Treaties 1959-1991, supra note 1, at 9.

216 See Dolzer & Stevens, supra note 93, at 66.

217 See Albright, supra note 26, at XIV; Robert, supra note 70, at 7.

218 See Albright, supra note 26, at XIV; Kenneth J. Vandevelde, Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties, 36 Colum. J. Transnat'l L. 501, 518 (1998).

219 See United States - Honduras Investment Treaty, supra note 5, art. XVI.

220 See id. Annex paras. (1) and (4).

221 See id. art. II(3)(a).

222 Id. Annex, para. (1).

223 Id. Annex, para. (4).

224 Id. Protocol, para. (2).

225 Id. Annex para. (2).

226 Albright, supra note 26, at XV.

227 See id.

228 United States - Honduras Investment Treaty, supra note 5, para. (3).

229 See Albright, supra note 26, at XV.

230 United States - Honduras Investment Treaty, supra note 5, art. II(2)(a).

231 See Shihata, supra note 130, at 57.

232 See Albright, supra note 26, at XVI; McGhie, supra note 11, at 113.

233 See United States - Honduras Investment Treaty, supra note 5, art. II (2)(a).

234 Id. Annex para. (5).

235 See 30 U.S.C.§ 181 (2000).

236 See 10 U.S.C. §7435 (2000).

237 See Albright, supra note 26, at XV.

238 United States - Honduras Investment Treaty, supra note 5, art. II(3)(b); see generally U. N. Ctr. On Transnational Corporations, Bilateral Investment Treaties, supra note 50, at 30-31.

239 See United States - Honduras Investment Treaty, supra note 5, art. II(3)(b).

240 Id.

241 Id.; See Dolzer & Stevens, supra note 93, at 62.

242 See United States - Honduras Investment Treaty, supra note 5, art. III(3)(b).

243 See Dolzer & Stevens, supra note 93, at 62.

244 See United States-Honduras Investment Treaty supra note 5, art. XV (1)(a); McGhie, supra note 11, at 112; Vandevelde, supra note 14, at 649.

245 See United States--Honduras Investment Treaty, supra note 5, art. XV(2).

246 See Dana H. Freyer et al., Bilateral Investment Treaties and Arbitration, 52-May Disp. Res. J. 74, 76 (1998).

247 Cf. Vienna Convention, supra note 49, art. 27 (internal domestic law is not a justification for the failure to perform a treaty obligation).

248 See United States - Honduras Investment Treaty, supra note 5, art. XV(2).

249 Id. art. II(1).

250 See Foreign Investment Advisory Service, supra note 146, at 35; see generally Sornarajah, supra note 2, at 252 (addressing repatriation of profits).

251 See United States - Honduras Investment Treaty, supra note 5, art. V; See generally World Bank Guidelines, supra note 128, at 301-02; Robert, supra note 70, at 9.

252 Dolzer & Stevens, supra note 93, at 85 n. 234.

253 See id. at 85.

254 United States - Honduras Investment Treaty, supra note 5, art. V(1).

255 See id. art. V(1) (a)-(e); see generally Comeaux, supra note 14, at 107-08.

256 See United States - Honduras Investment Treaty, supra note 5, art. V(1); U. N. Ctr. on Transanational Corporations, Bilateral Investment Treaties, supra note 50, at 42.

257 See generally Dolzer & Stevens, supra note 93, at 90 (stating that such provisions are not necessarily exhaustive); Henkin, supra note 10, at 767 (defining "returns" broadly); Bilateral Investment Treaties 1959-1991, supra note 1, at 10 (stating that most treaties encompass the principle of free transferability of investment-related payments).

258 See United States - Honduras Investment Treaty, supra note 5, art. V(1).

259 Id. art. V(1)(a).

260 See Escobar, supra note 61, at 90.

261 See United States - Honduras Investment Treaty, supra note 5, art. V(1)(a).

262 See id. art. V(1)(b).

263 Id.

264 Dolzer & Stevens, supra note 93, at 93.

265 United States - Honduras Investment Treaty, supra note 5, art. V(1)(c).

266 See generally Sornarajah, supra note 2, at 253 (stating that repatriation clauses include profits and other payments that are made to a foreign investor); Dolzer & Stevens, supra note 93, at 93.

267 See United States - Honduras Investment Treaty, supra note 5, art. V(1)(d).

268 Id. art. V(1).

269 See Dolzer & Stevens, supra note 93, at 92.

270 See United States - Honduras Investment Treaty, supra note 5, art. III; see generally Sornarajah, supra note 2, at 253 (stating that repatriation of compensation is generally in a separate clause).

271 See United States - Honduras Investment Treaty, supra note 5, art. IV.

272 See id. art. IX (1).

273 See id. art. IV(2).

274 See generally Dolzer & Stevens, supra note 93, at 94.

275 United States - Honduras Investment Treaty, supra note 5, art. V(1)(e).

276 See generally Dolzer & Stevens, supra note 93, at 93-94 (addressing the issue of transferring personal remuneration).

277 See Vienna Convention, supra note 49, art. 31(1).

278 See United States - Honduras Investment Treaty, supra note 5, art. VII.

279 See id. art. V(1)(d).

280 See id. art. V; see generally Comeaux, supra note 14, at 108 (addressing currency reporting laws); U.N. Ctr. on Transnational Corporations, Bilateral Investment Treaties, supra note 50, at 44-45.

281 United States - Honduras Investment Treaty, supra note 5, art. V(4).

282 Id.

283 See id. Protocol para. (1) (confirming the understanding that Article V(4)(a) includes the application of Honduran labor laws relating to the protection of preferential creditor's rights); see generally Comeaux, supra note 14, at 108 (providing that a host state may pass laws protecting creditors rights which laws may interfere with an investor's right to freely transfer currency).

284 United States - Honduras Investment Treaty, supra note 5, art. V(4)(b).

285 Id. art. V(4)(c).

286 Black's Law Dictionary 482 (5th ed. 1979).

287 See United States - Honduras Investment Treaty, supra note 5, art. II(1).

288 See id. art. II(1).

289 Id. art. III(1).

290 Vienna Convention, supra note 49, art. 26 (setting forth the principle of pacta sunt servanda).

291 United States - Honduras Investment Treaty, supra note 5, art. V(1); see Siqueiros, supra note 49, at 263.

292 See generally Sornarajah, supra note 2, at 252 (quoting language in a Singapore - United Kingdom treaty permitting the implementation of exchange controls); Bilateral Investment Treaties 1959-1991, supra note 1, at 10 (stating that balance of payment concerns result in the inclusion of currency transfer limitations).

293 See Sornarajah, supra note 2, at 252; See generally Allied Bank Int'l v. Banco Credito Agricola de Cartago, 566 F. Supp. 1440 (S.D.N.Y. 1983) rev'd 757 F. 2d 516 (2d Cir. 1985) (interpreting the Foreign Sovereign Immunity Act and the Act of State doctrine in litigation before U.S. courts addressing the decision of a foreign sovereign to enact foreign exchange controls).

294 United States--Honduras Investment Treaty, supra note 5, art. V(1).

295 Id. art. III(2).

296 See Dolzer & Stevens, supra note 93, at 95 (noting that German treaties define "undue delay" to mean a transfer "effected within such period as is normally required for the completion of transfer formalities. The said period shall commence on the day on which the relevant request has been submitted and may on no account exceed two months.").

297 United States--Honduras Investment Treaty, supra note 5, art. V(2).

298 The International Monetary Fund is an organization composed of 184 member-countries with the purpose of fostering "international monetary cooperation, exchange stability, and orderly exchange arrangements...." The IMF plays an important role in the resolution of member-country exchange short-falls. Available at http://www.imf.org.

299 See Albright, supra note 26, at IX.

300 See Dolzer & Stevens, supra note 93, at 94.

301 United States - Honduras Investment Treaty, supra note 5, art. V(2).

302 Id.

303 Dolzer & Stevens, supra note 93, at 94.

304 See United States - Honduras Investment Treaty, supra note 5, art. VII; Robert, supra note 70, at 8.

305 United States - Honduras Investment Treaty, supra note 5, art. VII (1)(a).

306 See Albright, supra note 26, at X.

307 See Vandevelde, supra note 218, at 512.

308 Albright, supra note 26, at X.

309 United States - Honduras Investment Treaty, supra note 5, art. VII(1)(a).

310 Id.

311 See Bilateral Investment Treaties 1959-1991, supra note 1, at 10.

312 United States - Honduras Investment Treaty, supra note 5, art. VII(1)(a).

313 Id.

314 See Vienna Convention, supra note 49, art. 31(1).

315 United States - Honduras Investment Treaty, supra note 5, art. VII(1)(a).

316 Id.

317 Id.

318 See Albright, supra note 26, at X.

319 United States - Honduras Investment Treaty, supra note 5, art. I(a).

320 Cf. id. Annex (4) (reserving onto Honduras the right to withhold national treatment in "small scale industry and commerce with a total invested capital of no more than US $40,000").

321 United States - Honduras Investment Treaty, supra note 5, art. VII(2); see contra Albright, supra note 26, at X (stating that "top managerial personnel" are not automatically entitled to entry and that they must "independently qualify for an appropriate visa").

322 Albright, supra note 26, at X.

323 See Dolzer & Stevens, supra note 93, at 97; Sornarajah, supra note 2, at 253; Bilateral Investment Treaties 1959-1991, supra note 1, at 11; Robert, supra note 70, at 9- 10.

324 See generally Bilateral Investment Treaties 1959-1991, supra note 1, at 11; Comeaux, supra note 14, at 101; Sornarajah, supra note 2, at 253.

325 See United States - Honduras Investment Treaty, supra note 5, art. III.

326 See id.; see generally World Bank Guidelines, supra note 128, at 303 (addressing expropriation and "unilateral alterations and termination of contracts").

327 See United States - Honduras Investment Treaty, supra note 5, art. III.

328 Id. at art. III(1); see generally Sornarajah, supra note 2, at 254 (providing that some United States treaties state "any measure or series of measures"); Robert, supra note 70, at 9.

329 United States - Honduras Investment Treaty, supra note 5, art. III(1); see Dolzer & Stevens, supra note 93, at 98.

330 See Dolzer & Stevens, supra note 93, at 99.

331 See id. at 100.

332 United States - Honduras Investment Treaty, supra note 5, art. III(1).

333 See Dolzer & Stevens, supra note 93, at 100.

334 See generally Sornarajah, supra note 2, at 254 (explaining "creeping expropriation"); see also Rudolf Dolzer, Indirect Expropriation of Alien Property, 1 ICSID Review-Foreign Inv. L.J. 41 (1986); Dolzer & Stevens, supra note 93, at 99 n.268; Albright, supra note 26, at IX .

335 The Organization for Economic Co-operation and Development (OECD)is the successor to the Organization of European Economic Co-operation. It has twenty-nine members and provides a platform for the exchange of information and ideas on economic and social policy. Available at http://www.oecd.org.

336 See Draft Convention on the Protection of Foreign Property and Resolution of the Council of the Organization for Economic Cooperation and Development on the Draft Convention, OECD Publication No. 23081 (1967), reprinted in 7 I.L.M. 117 (1968).

337 Starrett Housing Corp. v. The Government of the Islamic Republic of Iran, Iran-U.S. Cl. Trib. Rep., 23 I.L.M. 1090 (1983).

338 See Sornarajah, supra note 2, at 254.

339 See id.

340 See United States - Honduras Investment Treaty, supra note 5, art. III(1).

341 See id.; Albright, supra note 26, at IX; see generally U.N. Ctr. On Transnational Corporations, Bilateral Investment Treaties, supra note 50, at 53.

342 See Sornarajah, supra note 2, at 253.

343 See Dolzer & Stevens, supra note 93, at 104.

344 Sornarajah, supra note 2, at 253.

345 See Dolzer & Stevens, supra note 93, at 105.

346 See id. at 104-05.

347 See id. at 105; U.N. Ctr. On Transnational Corporations, Bilateral Investment Treaties, supra note 50, at 53-54.

348 See Sornarajah, supra note 2, at 253.

349 See id. at 253-54.

350 United States - Honduras Investment Treaty, supra note 5, art. II(1).

351 Dolzer & Stevens, supra note 93, at 106. But cf. Albright, supra note 26, at IX (offering no suggestion that the principles of Article II are applicable to expropriation or nationalization).

352 United States - Honduras Investment Treaty, supra note 5, art. III(1).

353 Id. art. III(2), (3) and (4); see also Albright, supra note 26, at IX; U.N. Ctr. On Transnational Corporations, Bilateral Investment Treaties, supra note 50, at 55.

354 Dolzer & Stevens, supra note 93, at 108; Robert, supra note 70, at 10.

355 See Alan C. Swan & John F. Murphy, Cases and Materials On The Regulation of International Business and Economics 774 (1991).

356 See Sornarajah, supra note 2, at 256.

357 See id. at 254.

358 Id. at 254; see also U.N. Charter, supra note 129, art. 2(2)(c) (providing for the payment of “appropriate compensation”).

359 See Sornarajah, supra note 2, at 258.

360 United States - Honduras Investment Treaty, supra note 5, art. III(2).

361 Id.

362 See Bilateral Investment Treaties 1959-1991, supra note 1, at 11; Escobar, supra note 61, at 90.

363 See Treaty Between The Government of the United States of America and the Government of the Republic of Panama Concerning the Treatment and Protection of Investments, S. Treaty Doc. 99-14 (1986), reprinted in 21 I.L.M. 1227 (1982).

364 Dolzer & Stevens, supra note 93, at 110 (quoting the side-letter between the United States and Panama).

365 Id. at 110-11 (quoting Article III of the United States - Haiti investment treaty).

366 Bilateral Investment Treaties 1959-1991, supra note 1, at 11 (providing that "market value" is generally used to determine the value of expropriated investments); Escobar, supra note 61, at 90.

367 World Bank Guidelines, supra note 128, at 304; see also Dolzer & Stevens, supra note 93, at 111.

368 See generally World Bank Guidelines, supra note 128, at 304; see also Dolzer & Stevens, supra note 93, at 111.

369 NAFTA, supra note 181, art. 1110(2).

370 Dolzer & Stevens, supra note 93, at 111.

371 United States - Honduras Investment Treaty, supra note 5, art. III(2).

372 Id.

373 Id.

374 See Dolzer & Stevens, supra note 93, at 113.

375 See United States - Honduras Investment Treaty, supra note 5, art. III.

376 See generally Dolzer & Stevens, supra note 93, at 113 (providing that British treaties address the periodic payment of compensation).

377 See Treaty Between the Government of the United States of America and the Government of the Republic of Egypt Concerning the Encouragement and Reciprocal Protection of Investment, S. Treaty Doc. 99-24, Protocol (1986) [hereinafter United States - Egypt Investment Treaty].

378 See id.

379 Dolzer & Stevens, supra note 93, at 112; United States - Egypt Investment Treaty, supra note 377, Protocol.

380 Dolzer & Stevens, supra note 93, at 112 (quoting the language of German investment treaties).

381 Id.

382 United States - Honduras Investment Treaty, supra note 5, art. III(2); see Dolzer & Stevens, supra note 93, at 112.

383 United States - Honduras Investment Treaty, supra note 5, art. III(3) and (4).

384 See Dolzer & Stevens, supra note 93, at 113.

385 United States - Honduras Investment Treaty, supra note 5, art. III(3).

386 Id. art. III(4).

387 Id. art. III(4)(a).

388 See id. art. III(4)(a).

389 Id. art. III(4)(b).

390 See Treaty Between the Government of the United States of America and the Government of the Republic of El Salvador Concerning the Encouragement and Reciprocal Protection of Investment, Mar. 10, 1999, Protocol (1) [hereinafter United States - El Salvador Investment Treaty]. The treaty has been signed, but has not yet been ratified. It is available through the U.S. Dep't of State.

391 Id. Protocol para. (1).

392 United States - Honduras Investment Treaty, supra note 5, art. III(1).

393 See Dolzer & Stevens, supra note 93, at 106.

394 See id. at 107.

395 See id. at 106.

396 See id.

397 See id.; see United States - Honduras Investment Treaty, supra note 5, art. II (4) (addressing the obligation of the Parties to provide "effective means of asserting claims and enforcing rights with respect to covered investments.")

398 See generally Dolzer & Stevens, supra note 93, at 107 (quoting the investment treaty between the United States and Tunisia as providing for "prompt review by the appropriate judicial or administrative authorities," but further mandating that the review confirm that the taking complied with the principles of international law).

399 See Kenneth J. Vandevelde, United States Investment Treaties: Policy and Practice 125 (1992).

400 See United States - Honduras Investment Treaty, supra note 5, art. IX(2) and (3).

401 See Bilateral Investment Treaties 1959-1991, supra note 1, at 10; McGhie, supra note 11, at 117.

402 See United States - Honduras Investment Treaty, supra note 5, art. IV.

403 Id. art. IV(1) and (2).

404 Id. art. IV(1); see Robert, supra note 70, at 9; Siqueiros, supra note 49, at 262.

405 See United States - Honduras Investment Treaty, supra note 5, art. IV(2)(a) and (b).

406 See id. art. IV(1) (referencing "losses that investments suffer in its territory"); see id. art. IV(2) (specifying "that covered investments suffer losses in its territory"); see id. art. I (e) (defining "covered investment").

407 Id. art. IV(1) and (2); see Dolzer & Stevens, supra note 93, at 83.

408 See Henkin, supra note 10, at 766; see generally Sornarajah, supra note 2, at 263 (addressing "ordinary mob violence" that the host state failed to control).

409 United States - Honduras Investment Treaty, supra note 5, art. IV(1) and (2).

410 Id. art. IV(1).

411 See id. art. XV(1).

412 See id. art. IV(2).

413 Id. art. IV(2) (a) and (b).

414 Id. art. IV(2) (b).

415 See Shihata, supra note 130, at 57-58.

416 See id.

417 United States - El Salvador Investment Treaty, supra note 390, at art. XIV(1).

418 See id.; cf. Vandevelde, supra note 14, at 703.

419 See Burmah Oil Co. v. Lord Advocate, [1965] App. Cas. 75, (H.L. 1964).

420 See id.

421 See Asian Agricultural Products Ltd. v. The Republic of Sri Lanka, Award of June 27, 1990 of ICSID in Case No. ARB/87/3, Yearbook Comm. Arb'n. XVII 106 (1992); see also McGhie, supra note 11, at 114.

422 See Asian Agricultural Products Ltd., No. ARB/87/3.

423 Id.; see Sornarajah, supra note 2, at 260-63.

424 See id.

425 See id.

426 See id. at 263.

427 United States - Honduras Investment Treaty, supra note 5, art. II (4); see generally Committee on International Investment and Multinational Enterprise, Organization For Economic Cooperation and Development, Workshop on "Foreign Direct Investment Policy and Promotion In Latin America" Report (1999) (stressing the importance of a transparent judicial and regulatory system).

428 United States - Honduras Investment Treaty, supra note 5, art. II(4).

429 Id.

430 Id.

431 See Vienna Convention, supra note 49, art. 31(1).

432 See United States - Honduras Investment Treaty, supra note 5, art. IX.

433 Id. art. IX(1).

434 Id. art. IX.

435 Id. art. IX(2)(a).

436 Id. art. II(4).

437 Id. art. II(5).

438 See id. art. IX, X and XI; see World Bank Guidelines, supra note 128, at 306 (addressing dispute settlement).

439 See Dolzer & Stevens, supra note 93, at 119.

440 See Robert, supra note 70, at 11.

441 Sornarajah, supra note 2, at 266.

442 See Carlyn Kolker, When Nations Go Bust, The American Lawyer, Nov. 2003, at 92.

443 See United States - Honduras Investment Treaty, supra note 5, art. VIII.

444 See Dolzer & Stevens, supra note 93, at 121; McGhie, supra note 11, at 119.

445 See Dolzer & Stevens, supra note 93, at 121.

446 United States - Honduras Investment Treaty, supra note 5, art. VIII; see Siqueiros, supra note 49, at 264.

447 See McGhie, supra note 11, at 119.

448 See Vienna Convention, supra note 49, art. 31 (stating that treaties should be interpreted in good faith).

449 See Dolzer & Stevens, supra note 93, at 123.

450 United States - Honduras Investment Treaty, supra note 5, art. VIII and X; Siqueiros, supra note 49, at 264.

451 Sornarajah, supra note 2, at 272.

452 See Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, U.S.- Nicar., 9 U.S.T. 449.

453 See Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U. S.), 1984 I.C.J. 392 (Jurisdiction and Admisibility) [hereinafter Nicar. v. U. S.].

454 See Shihata, supra note 130, at 58 n.49.

455 Nicar. v. U. S., 1984 I.C.J. at 442, para 113.; see generally Asian Agricultural Products Ltd. v. The Republic of Sri Lanka, Award of June 27, 1990 of ICSID in Case No. ARB/87/3 Yearbook Comm'n. Arb'n. XVII 106 (1992) (a case in which the conduct of a civil war was subject to inquiry by a tribunal established to address investment disputes).

456 See Sornarajah, supra note 2, at 273.

457 See United States - Honduras Investment Treaty, supra note 5, art. X.

458 Id. art. VIII.

459 See id. art. X.

460 See Sornarajah, supra note 2, at 273; see Escobar, supra note 61, at 92.

461 United States - Honduras Investment Treaty, supra note 5, art. X(1).

462 See Dolzer & Stevens, supra note 93, at 129.

463 United States - Honduras Investment Treaty, supra note 5, art. X(1).

464 See generally Dolzer & Stevens, supra note 93, at 129 (stating that treaties of the Peoples Republic of China state that the international law applicable to the resolution of disputes is only that international law recognized by both parties to the treaty).

465 Loewen Group, Inc. v. United States, NAFTA arbitration, ICSID Case No. ARB (AF)/98/3, Response of the United States of America to the November 9, 2001 Submissions of the Governments of Canada and Mexico Pursuant to NAFTA Article 1128 (Dec. 7, 2001) (citing Restatement (Third) Foreign Relations Law § 102(2)).

466 Parry, supra note 3, at 82.

467 See Report of the United Nations Commission on International Trade Law, Arbitration Rules of the United Nations Commission on International Trade Law, U.N. Comm'n on Int'l Trade Law, U.N. GAOR 31st Sess., Supp. No. 17, U.N. Doc. A/31/17 (1976).

468 See United States - Honduras Investment Treaty, supra note 5, art. X(1); McGhie, supra note 11, at 120; Dolzer & Stevens, supra note 93, at 125.

469 See United States - Honduras Investment Treaty, supra note 5, art. X(1); see generally Permanent Court of Arbitration: Optional Rules for Arbitrating Disputes Between Two States, effective Oct. 20, 1992, reprinted in 32 I.L.M. 572 (1993) (based on the UNCITRAL rules, the Optional Rules "reflect the public international law character of disputes between states, and diplomatic practice appropriate to such disputes."); Dolzer & Stevens, supra note 93, at 128.

470 See United States - Honduras Investment Treaty, supra note 5, at art. X(1).

471 See id. at art. X(2); McGhie, supra note 11, at 119; see generally Dolzer & Stevens, supra note 93, at 124 (discussing the establishment of arbitral panels).

472 See United States - Honduras Investment Treaty, supra note 5, art. X(2); McGhie, supra note 11, at 119.

473 See United States - Honduras Investment Treaty, supra note 5, art. X(2).

474 See id.

475 Black's Law Dictionary, supra note 286, at 919 ("Lat. With the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like").

476 See United States - Honduras Investment Treaty, supra note 5, art. X(2); see Dolzer & Stevens, supra note 93, at 124.

477 See United States - Honduras Investment Treaty, supra note 5, art. X(2).

478 See Dolzer & Stevens, supra note 93, at 126; McGhie, supra note 11, at 120.

479 See Dolzer & Stevens, supra note 93, at 126.

480 See United States - Honduras Investment Treaty, supra note 5, art. X(3).

481 See id.

482 See Dolzer & Stevens, supra note 93, at 127.

483 See United States - Honduras Investment Treaty, supra note 5, art. X(4); see generally Dolzer & Stevens, supra note 93, at 124 (suggesting that sharing arbitral costs or having the tribunal assess costs facilitates the independence of the arbitrators).

484 United States - Honduras Investment Treaty, supra note 5, art. X(4).

485 See McGhie, supra note 11, at 119.

486 See United States - Honduras Investment Treaty, supra note 5, art. IX; see Dolzer & Stevens, supra note 93, at 145.

487 See Sornarajah, supra note 2, at 262.

488 See Dolzer & Stevens, supra note 93, at 146.

489 United States - Honduras Investment Treaty, supra note 5, art. IX(1); see McGhie, supra note 11, at 120; Comeaux, supra note 14, at 108 (examining Article IX of the United States prototype investment treaty).

490 United States - Honduras Investment Treaty, supra note 5, art. IX(1).

491 Id. art. I(d).

492 Id. art. IX(1).

493 Id. art. I(d).

494 See generally Sornarajah, supra note 2, at 267 (stating that the type of disputes that may be arbitrated should be identified in “wide terms”).

495 See id. at 262 n.95 (stating that wars involving self-determination are “inherently unsuitable for settlement by tribunals constituted to settle investment disputes”).

496 See id. at 263.

497 See United States - Honduras Investment Treaty, supra note 5, art. IX(2).

498 See Comeaux, supra note 14, at 108-09.

499 See United States - Honduras Investment Treaty, supra note 5, art. IX(3)(b)(i),(ii),(iii) and (iv); McGhie, supra note 11, at 121; Georges R. Delaume, Consent to ICSID Arbitration, in The Changing World of International Law in the Twenty-First Century 155, 168 (Joseph J. Norton et al. eds., 1998).

500 United States - Honduras Investment Treaty, supra note 5, art. IX(3)(a); cf. United States - El Salvador Investment Treaty, supra note 390, art. IX(3)(a) (which states “ninety days”).

501 United States - Honduras Investment Treaty, supra note 5, art. IX(3)(a).

502 See Robert, supra note 70, at 11; McGhie, supra note 11, at 121; Escobar, supra note 61, at 91 (referencing this provision of U.S. BIT practice as the “fork-in-the-road”).

503 United States - Honduras Investment Treaty, supra note 5, art. IX(3)(a).

504 See id. art. IX(3)(b).

505 See id.

506 Id.

507 See id.

508 Id.

509 Id.

510 See id. art. IX(2)(a).

511 See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Aug. 27, 1965, art. 25(1), 17 U.S.T. 1270, 1280, 575 U.N.T.S. 159, 174 [hereinafter ICSID Convention]; see generally Antonio R. Parra, The Role of ICSID in the Settlement of Investment Disputes, ICSID News, Winter 1999 at 5, available at http://www.worldbank.org/icsid/news/n-16-1-5.htm..

512 See Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for the Settlement of Investment Disputes, ICSID Doc. 11, art. 4(2) (1979).

513 ICSID Convention, supra note 511, art. 25(1).

514 See Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 4 I.L.M. 524, 527 (stating that consent is the “cornerstone” of the Convention); see also Delaume, supra note 499, at 166.

515 See McGhie, supra note 11, at 122.

516 United States - Honduras Investment Treaty, supra note 5, art. IX(4); see Delaume, supra note 499, at 168.

517 See United States - Honduras Investment Treaty, supra note 5, art. IX(4)(a); Delaume, supra note 499, at 168.

518 See Dolzer & Stevens, supra note 93, at 132; Delaume, supra note 499, at 165-66.

519 See Dolzer & Stevens, supra note 93, at 131; Delaume, supra note 499, at 156.

520 United States - Honduras Investment Treaty, supra note 5, art. IX (6).

521 Id.

522 Id.

523 See Islamic Republic of Iran and United States, Award No. 586-A27-FT (June 5, 1998), available at http://www.iusct.org/awards/award-586-a27-ft-eng.pdf; see generally Anuj Desai, Arbitral & Judicial Decision: Case No. A27: The Iran-United States Claims Tribunal's First Award of Damages for Breach of the Algiers Declaration, 10 Am. Rev. Int'l Arb. 229 (1999) (questioning the decision of the Iran-United States Claims Tribunal rendering an award in favor of Iran and against the United States for violating the Algiers Declaration. The arbitral award stemmed from decisions of a U.S. District Court and Court of Appeals declining to recognize and enforce a previous award of the Claims Tribunal in favor of Iran against a U.S. national.); McGhie, supra note 11, at 122 (suggesting diplomatic espousal to enforce an arbitral award).

524 See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, reprinted in 7 I.L.M. 1042 (1968) [hereinafter New York Convention].

525 See Delaume, supra note 499, at 168.

526 United States - Honduras Investment Treaty, supra note 5, art. IX(4)(b); Delaume, supra note 499, at 168.

527 See New York Convention, supra note 524, art. II.

528 A review of the World Wide Web site of the United Nations is available at http://www.unece.org/trade/tips/comarbit/listpart.htm, and it indicates that the United States is a signatory to the New York Convention, but does not list Honduras.

529 See Sornarajah, supra note 2, at 269; McGhie, supra note 11, at 121; Delaume, supra note 499, at 168. See also Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611(2000).

530 See Sornarajah, supra note 2, at 270; Shihata, supra note 194, at 214.

531 See Sornarajah, supra note 2, at 271-72.

532 See Elettronica Sicula S.p.A. (ELSI) (United States v. Italy) 1989 I.C.J. 15.

533 Id. at 42.

534 United States - Honduras Investment Treaty, supra note 5, art. IX(2).

535 See id. art. IX(2)(a)-(c).

536 Cf. Sornarajah, supra note 2, at 270 (providing that the presence of an arbitration clause in an investment contract does not, by itself, negate the rule).

537 See Kolker, supra note 442, at 90; see generally Robert L. Pritchard, The Lawyer's Role in Foreign Direct Investment and the Global Economy, 18 Int'l Bus. L. 358 (1990).

538 Jacques Werner, International Commercial Arbitration: From Merchants to Academic to Skilled Professional, Disp. Resol. Mag. Spring 1998, at 22, 24.

539 See Malcolm Richard Wilkey, Introduction to Dispute Settlement in International Trade and Foreign Direct Investment, 26 Law & Pol'y Int'l Bus. 613 (1995).

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End of Document

ANNEX 160

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1956

Volume II

Documents of the eighth session including the report of the Commission to the General Assembly

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UNITED NATIONS

take into account the necessity of definition and limitations in formulating the rules applicable to the various cases which may be provided for.

C. Codification by private bodies

Annex 7

PROJECTS ON "RESPONSIBILITY OF GOVERNMENTS" AND "DIPLOMATIC PROTECTION" PREPARED BY THE AMERICAN INSTITUTE OF INTERNATIONAL LAW (1925)

PROJECT NO. 15: RESPONSIBILITY OF GOVERNMENTS

Whereas it is expedient to determine the responsibility of American Republics with regard to foreigners for damages which they may suffer on the territory of those republics.

The latter have agreed to conclude the following convention:

Article I

The Government of each American Republic is obliged to maintain on its own territory the internal order and governmental stability indispensable to the fulfillment of international duties.

Article II

As a consequence of the rule formulated in the preceding article, the Governments of the American Republics are not responsible for damages suffered by foreigners, in their persons or in their property for any reason whatsoever, except when the said Governments have not maintained order in the interior, have been negligent in the suppression of acts disturbing this order, or, finally, have not taken precautions so far as they were able to prevent the occurrence of such damages or injuries.

PROJECT NO. 16: DIPLOMATIC PROTECTION

Whereas the cases in which diplomatic claims may be made are matters interesting them in a special manner,

The American Republics have concluded the following Convention:

Article I

The American Republics do not recognize in favor of foreigners other obligations or responsibilities than those established for their own nationals in their constitutions, their respective laws, and the treaties in force.

Article II

In accordance with the present convention, every American Republic has the right to accord diplomatic protection to its native or naturalized citizens.

The conditions under which an American Republic may grant diplomatic protection depend entirely on its internal legislation.

Article III

Every nation has the right to accord diplomatic protection to its nationals in an American Republic in cases in which they do not have legal recourse to the authorities of the country, or if it can be proved that there has been denial of justice by the said authorities, undue delay, or violation of the principles of international law.

Article IV

Denial of justice exists:

(*a*) When the authorities of the country where the complaint is made interpose obstacles not authorized by law in the exercise by the foreigner of the rights which he claims;

(*b*) When the authorities of the country to which the foreigner has had recourse have disregarded his rights without legal reason, or for reasons contrary to the principles of law;

(*c*) When the fundamental rules of the procedure in force in the country have been violated and there is no further appeal possible.

Article V

Every American Republic has the power to protect not only its own nationals but those of other countries when the latter have entrusted it with diplomatic representation or the supervision of their interests in the country where the claim is made.

Article VI

The American republic to which the diplomatic claim is presented may decline to receive this claim when the person in whose behalf it is made has interfered in internal or foreign political affairs against the Government to which the claim is made. The republic may also decline if the claimant has committed acts of hostility towards itself.

Article VII

A diplomatic claim is not admissible when the individual in whose behalf it is presented is at the same time considered a national by the law of the country to which the claim is made, in virtue of circumstances other than those of mere residence in the territory.

Article VIII

In order that a diplomatic claim may be admissible, the individual in whose behalf it is presented must have been a national of the country making the claim at the time of the occurrence of the act or event giving rise to the claim, and he must be so at the time the claim is presented.

Article IX

Every American Republic has the right to accord diplomatic protection not only to its nationals but also to the companies, corporations, or other juridical persons who, according to its laws, are of the nationality of the country.

Article X

American Republics are expressly forbidden to protect their nationals through diplomatic channels when the rights involved have been acquired by means of a voluntary or forced cession made subsequent to the act giving rise to the claim.

Article XI

All controversies arising between American Republics regarding the admissibility of a diplomatic claim under the present convention shall be determined by arbitration or by the decision of an international court when not settled by direct negotiation.

Annex 8

DRAFT ON "INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES ON THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS"[231] PREPARED BY THE INSTITUTE OF INTERNATIONAL LAW (1927)

The Institute of International Law expresses the hope of seeing sanctioned in the practice of the law of nations the whole of the following rules concerning the international responsibility of States by reason of injuries caused upon their territory, in time of peace, to the persons or property of foreigners.

I

The State is responsible for injuries caused to foreigners by any action or omission contrary to its international obligations,

[231] Harvard Law School, *op. cit.*, pp. 228-230.

whatever be the authority of the State whence it proceeds: constitutional, legislative, governmental, administrative, or judicial.

This responsibility of the State exists even when its organizations act contrary to the law or to the order of a superior authority.[232]

It exists likewise when these organs act outside their competence under cover of their status as organs of the State and making use of means placed at their disposal as such organs.

This responsibility of the State does not exist if the lack of observance of the obligation is not a consequence of a fault of its organs, unless in the particular case a conventional or customary rule, special to the matter, admits of responsibility without fault.

II

The State is responsible for the act of corporate bodies exercising public functions on its territory.

III

The State is not responsible for injurious acts committed by individuals except when the injury results from the fact that it has omitted to take the measures to which, under the circumstances, it was proper normally to resort in order to prevent or check such actions.

IV

Aside from cases where international law would call for a treatment of a foreigner preferable to that of a national, the State should apply to foreigners against injurious acts emanating from individuals, the same measures of protection as to its nationals. Foreigners should in consequence have at least the same right as the latter to obtain indemnity.

V

The State is responsible on the score of denial of justice:

(1) When the tribunals necessary to assure protection to foreigners do not exist or do not function.

(2) When the tribunals are not accessible to foreigners.

(3) When the tribunals do not offer the guaranties which are indispensable to the proper administration of justice.

VI

The State is likewise responsible if the procedure or the judgement is manifestly unjust, especially if they have been inspired by ill-will toward foreigners, as such, or as citizens of a particular State.

VII

The State is not responsible for injuries caused in case of mob, riot, insurrection or civil war, unless it has not sought to prevent the injurious acts with the diligence proper to employ normally in such circumstances, or unless it has not acted with like diligence against these acts or unless it does not apply to foreigners the same measures of protection as to nationals. It is especially obligated to give to foreigners the benefits of the same indemnities as to nationals with regard to communes or other persons. The responsibility of the State by reason of acts committed by insurgents ceases when it recognizes the latter as a belligerent party, and in all cases in regard to States which have recognized them as such.

The question of the degree to which a State is responsible for acts of insurgents, even when recognized as a belligerent party, in case they have become the government of the country, is reserved.

VIII

The principles stated in articles 3 and 4 govern also the international obligation resting upon the State to guarantee the rights foreigners have with regard to it by virtue of its internal law.

IX

A federal State is responsible for the conduct of the individual States, not only if it is contrary to its own international obligations, but also if it is contrary to the international obligations incumbent upon those States. It cannot escape this responsibility by invoking the fact that its constitution does not give it the right to control the particular States nor the right to require them to discharge their obligations.

Likewise a protecting State is responsible for the conduct of a protected State so far as the latter is bound to execute the international obligations of the protecting State, or so far as the latter represents the protected State towards third States wronged by it and employing the right to press their claims.

X

The responsibility of the State includes reparation for injuries suffered in so far as they are the consequences of a failure to observe an international obligation. It includes moreover, when need be, according to the circumstances and the general principles of the law of nations, a satisfaction to be given to the State which has been wronged in the person of its nationals, by way of more or less formal apologies and, in appropriate cases, punishment of the guilty, either disciplinary or otherwise.

XI

The damages include, when applicable, an indemnity for the injured persons as reparation for the moral suffering they have experienced.

When the responsibility of the State results solely from the fact that it has not taken the required steps after the accomplishment of the injurious act, it is only bound to make reparation for the injury resulting from the total or partial omission or these measures.

A State responsible for the conduct of other States is bound to see to the execution by them of the payments entailed by this responsibility and chargeable to them; if it is not possible for it to do so, it is bound to grant an equivalent compensation.

In principle the indemnity to be granted should be placed at the disposal of the wronged State.

The questions relating to the calculation of damages and to the relations of injured persons to their State and to the State against which the claim is brought are reserved.

XII

No demand for reparation can be brought through diplomatic channels of a State so long as the wronged individual has at his disposal effective and sufficient means to obtain for him the treatment due him.

Nor can any demand for reparation take place if the responsible State places at the disposal of the wronged individual an effective means of obtaining the corresponding damages.

FINAL VOEU

The Institute expresses the hope that by international conventions, where they do not already exist, the States will bind themselves in advance to submit all disputes concerning international responsibility of the State resulting from injuries caused on their territory to the persons and property of foreigners, first, to an international commission of inquiry, if that is necessary for an examination of the facts; next, to a process of conciliation; finally, if that does not succeed, to a judicial procedure before the Permanent Court

[232] The text of the second paragraph should be understood in the sense that the responsibility of the State exists whether its organs have acted in conformity with or contrary to the law or even the order of a superior authority. (Extract from the *procès-verbal* of 1 September 1927).

of Arbitration, the Permanent Court of International Justice, or any other international court of justice, for a definitive solution.

The Institute also expresses the hope that States will abstain from every coercive measure before having had recourse to the preceding measures.

Annex 9

DRAFT CONVENTION ON "RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS" [233] PREPARED BY HARVARD LAW SCHOOL (1929)

Article 1

A state is responsible, as the term is used in this convention, when it has a duty to make reparation to another state for the injury sustained by the latter state as a consequence of an injury to its national.

Article 2

The responsibility of a state is determined by international law or treaty, anything in its national law, in the decisions of its national courts, or in its agreements with aliens, to the contrary notwithstanding.

Article 3

A state is not relieved of responsibility because an injury to an alien is attributable to one of its political subdivisions, regardless of the extent to which the national government, according to its constitution, has control of the subdivision. For the purposes of this article, a dominion, a colony, a dependency, a protectorate, or a community under mandate, which does not independently conduct its foreign relations, is to be assimilated to a political subdivision.

Article 4

A state has a duty to maintain governmental organization adequate, under normal conditions, for the performance of its obligations under international law and treaties. In the event of emergencies temporarily disarranging its governmental organization, a state has a duty to use the means at its disposal for the performance of these obligations.

Article 5

A state has a duty to afford to an alien means of redress for injuries which are not less adequate than the means of redress afforded to its nationals.

Article 6

A state is not ordinarily responsible (under a duty to make reparation to another state) until the local remedies available to the injured alien have been exhausted.

Article 7

(*a*) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its higher authorities within the scope of the office or function of such authority, if the local remedies have been exhausted without adequate redress.

(*b*) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its subordinate officers or employees within the scope of his office or function, if justice is denied to the injured alien, or if, without having given adequate redress to the injured alien, the state has failed to discipline the officer or employee.

[233] Harvard Law School, *op. cit.*, pp. 140 ff.

Article 8

(*a*) A state is responsible if an injury to an alien results from its non-performance of a contractual obligation which it owes to the alien, if local remedies have been exhausted without adequate redress.

(*b*) A state is not responsible if an injury to an alien results from the non-performance of a contractual obligation which its political subdivision owes to an alien, apart from responsibility because of a denial of justice.

Article 9

A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.

Article 10

A state is responsible if an injury to an alien results from its failure to exercise due diligence to prevent the injury, if local remedies have been exhausted without adequate redress for such failure. The diligence required may vary with the private or public character of the alien and the circumstances of the case.

Article 11

A state is responsible if an injury to an alien results from an act of an individual or from mob violence, if the state has failed to exercise due diligence to prevent such injury and if local remedies have been exhausted without adequate redress for such failure, or if there has been a denial of justice.

Article 12

A state is responsible if an injury to an alien results from an act of insurgents, if the state has failed to use diligence to prevent the injury and if local remedies have been exhausted without adequate redress for such failure.

Article 13

(*a*) In the event of an unsuccessful revolution, a state is not responsible when an injury to an alien results from an act of the revolutionists committed after their recognition as belligerents either by itself or by the state of which the alien is a national.

(*b*) In the event of a successful revolution, the state whose government is established thereby is responsible under article 7, if an injury to an alien has resulted from a wrongful act or omission of the revolutionists committed at any time after the inception of the revolution.

Article 14

A state is responsible if an injury to an alien results from an act, committed within its territory, which is attributable to another state, only if it has failed to use due diligence to prevent such injury.

Article 15

(*a*) A state is responsible to another state which claims in behalf of one of its nationals only in so far as a beneficial interest in the claim has been continuously in one of its nationals down to the time of the presentation of the claim.

(*b*) A state is responsible to another state which claims in behalf of one who is not its national only if

(1) The beneficiary has lost its nationality by operation of law, or