IN THE ARBITRATION UNDER CHAPTER TEN
OF THE U.S.-OMAN FREE TRADE AGREEMENT
AND THE ICSID ARBITRATION RULES BETWEEN

ADEL A. HAMADI AL TAMIMI,

Claimant/Investor,

-and-

SULTANATE OF OMAN,

Respondent/Party.

(ICSID Case No. ARB/11/33)

SUBMISSION OF THE UNITED STATES OF AMERICA

1. The United States of America hereby makes this submission pursuant to Article 10.19.2 of the U.S.-Oman Free Trade Agreement ("U.S.-Oman FTA" or "Agreement"), which authorizes the non-disputing Party to make oral and written submissions to a tribunal regarding the interpretation of the Agreement. The United States does not, through this submission, take a position on how the following interpretation applies to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

2. The United States makes this submission to address two questions of treaty interpretation posed by the Tribunal in Procedural Order No. 11, dated May 26, 2014.

The Burden to Establish the Content of Customary International Law

3. The Tribunal posed the following question:

> *Footnote 1 of Chapter 10, requires that Article 10.5, the Minimum Standard of Treatment clause be interpreted in accordance with Annex 10-A. Under Annex 10-A, does a claimant bear the burden of proving the existence of an applicable rule of customary international law that is claimed to be breached by a respondent?*

4. The minimum standard of treatment referenced in Article 10.5 of the U.S.-Oman FTA is an umbrella concept incorporating a set of rules that, over time, has crystallized into customary

international law in specific contexts.[1] Article 10.5 thus reflects a standard that develops from State practice and *opinio juris*, as expressly stated in Annex 10-A, rather than an autonomous, treaty-based standard. Although States may decide, expressly by treaty, to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law, that practice is not relevant to ascertaining the content of the customary international law minimum standard of treatment.[2]

5. The burden is on a claimant to establish the existence and applicability of a relevant obligation under customary international law[3] that is not otherwise incorporated expressly in the text of Article 10.5.[4] "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."[5]

6. 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

[1] For further discussion on the crystallization of the minimum standard of treatment under customary international law, *see Methanex v. United States*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America at 43 (Nov. 13, 2000); *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Post-Hearing Submission of Respondent United States of America on Article 1105(1), and *Pope & Talbot* at 2-3 (June 27, 2002); *Glamis Gold Ltd. v. United States*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America at 219-20 (Sept. 19, 2006); *Grand River Enters. v. United States*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America at 89-93 (Dec. 22, 2008).

[2] *See, e.g., Glamis Gold*, Award ¶¶ 607-08 (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"); *see also Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. ¶ 55 (Judgment of Feb. 3) ("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.").

[3] *See, e.g., S.S. "Lotus" (France v Turkey)*, 1927 PCIJ (ser. A) No. 10, at 25-26 (Judgment of Sept. 27) (holding that the claimant had failed to "conclusively prove" the "existence of … a rule" of customary international law); *Rights of Nationals of the United States of America in Morocco (France v. United States)*, 1952 I.C.J. 176, 200 (Judgment of 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); *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶¶ 601-02 (June 8, 2009) (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).

[4] *See* U.S.-Oman FTA art. 10.5.2.

[5] *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Judgment of Nov. 20); *see also North Sea Continental Shelf (Federal Rep. of Germany v. Netherlands/Denmark)*, 1969 I.C.J. ¶ 74 (Judgment of Feb. 20) ("[A]n indispensable requirement [of showing a new rule of customary international law] 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 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.").

assume this task. Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.[6]

The tribunals in *ADF v. United States, Glamis Gold v. United States*, and *Methanex v. United States* likewise placed on the claimant the burden of establishing the content of customary international law.[7]

7. A tribunal determining whether a claimant has established the existence of a rule of customary international law must look to the elements set forth in Annex 10-A; namely, the "general and consistent practice of States that they follow out of a sense of legal obligation." These are also the criteria recognized by the International Court of Justice as necessary to establish a rule of customary international law.[8]

8. Arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, do not constitute evidence of the content of the customary international law standard required by Article 10.5 and Annex 10-A. Nor can these decisions serve as precedent for a tribunal determining the content of customary international law.[9]

9. State practice and *opinio juris* do not establish that the minimum standard of treatment of aliens imposes a general obligation of proportionality on States.[10] The principle of

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[6] *Cargill, Inc. v. Mexico*, NAFTA/ICSID Case No. ARB(AF)/05/2, Award ¶ 273 (Sept. 18, 2009) (emphasis added).

[7] *ADF Group Inc. v. United States*, 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 Gold*, 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*, NAFTA/UNCITRAL, Final Award Part IV, Chapter C ¶ 26 (Aug. 3, 2005) (citing to *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).

[8] *See, e.g., Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, 122 (Judgment of Feb. 3) ("In particular ... the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris.*"); *see also Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, 29 (Judgment of 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"); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 14, 97 (Judgment of June 27) ("[T]he 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").

[9] For instance, the award in *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award ¶ 109 (May 25, 2004), did not address the customary international law minimum standard of treatment.

[10] While some arbitral awards address proportionality as one factor in a discussion of expropriation, the principle of proportionality is not an independent source of obligation within the minimum standard of treatment. *See, e.g., Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award ¶ 122 (May 29, 2003); *Azurix v. Argentina* ICSID Case No. ARB/01/12, Award ¶¶ 311-12 (July 14, 2006).

proportionality, like good faith, "is not in itself a source of obligation where none would otherwise exist."[11]

10. Once a rule of customary international law has been established, the claimant must show that the State has engaged in conduct that violated that rule.[12] 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."[13]

The Governing Law Clause in Article 10.21

11. The Tribunal posed the following question:

> *Article 10.15(1)(a)(i) of the FTA permits the Tribunal to determine whether there has been a breach of any obligation set forth in Section A of that Chapter. Article 10.21, Governing Law, requires the Tribunal to "...decide the issues in dispute in accordance with this Agreement and applicable rules of international law." What is the relationship between the Tribunal's subject-matter jurisdiction and the Governing Law clause?*

12. Article 10.21 requires the Tribunal to apply international law both in interpreting the provisions of Chapter Ten, Section A, and as a rule of decision for claims of breach of Chapter Ten, Section A.[14] Article 10.21 does not give the Tribunal jurisdiction to hear claims of breach of any obligations other than the obligations listed in Chapter Ten, Section A. In particular, Article 10.21 does not expand the obligations listed in Article 10.5 beyond any protections recognized as a part of the minimum standard of treatment under customary international law.

[11] *Border and Transborder Armed Actions* (*Nicaragua v. Honduras*), 1988 I.C.J. 69, ¶ 94 (Judgment of Dec. 20) (addressing good faith).

[12] *See Feldman v. Mexico*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) (internal citation omitted) ("[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.").

[13] *S.D. Myers v. Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 263 (Nov. 13, 2000).

[14] *See, e.g., Apotex Inc. v. United States*, NAFTA/UNCITRAL, Award on Jurisdiction and Admissibility ¶¶ 280-282 (June 14, 2013) (relying on NAFTA Art. 1131, the governing law provision of the NAFTA, to apply the judicial finality requirement to claims brought under NAFTA Chapter Eleven).

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Respectfully submitted,

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