

BEFORE THE ADDITIONAL FACILITY OF THE  
INTERNATIONAL CENTRE FOR SETTLEMENT OF  
INVESTMENT DISPUTE (ICSID)

**BETWEEN:**

**MERCER INTERNATIONAL INC.**

**Claimant / Investor**

**AND:**

**GOVERNMENT OF CANADA**

**Respondent / Party**

**ICSID CASE NO. ARB(AF)/12/(3)**

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**GOVERNMENT OF CANADA**

**REPLY TO 1128 SUBMISSIONS**

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**12 June 2015**

Departments of Justice and of Foreign  
Affairs, Trade and Development  
Trade Law Bureau  
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## I. INTRODUCTION

1. The Claimant has made a number of imaginative legal arguments concerning the NAFTA in its submissions. It would have this Tribunal believe that Canada does not understand the NAFTA obligations it agreed to more than 20 years ago. The weakness of the Claimant's arguments, however, has been laid bare by the NAFTA Article 1128 submissions filed by the Governments of the United States of America and the United Mexican States in this arbitration.

2. The United States and Mexico have confirmed Canada's interpretation of the NAFTA provisions at issue in this arbitration. In particular, the NAFTA Parties agree that:

- the exception for procurement in NAFTA Article 1108(7) is broad and includes all of the contractual terms and conditions associated with the procurement of a good by a NAFTA Party or a state enterprise;
- the actions of a state enterprise only fall within the jurisdiction of a tribunal under NAFTA Article 1503(2) where it is exercising regulatory, administrative or other governmental authority;
- the limitation period in NAFTA Articles 1116(2) and 1117(2) begins when a claimant *first* acquires knowledge of a breach or loss, not when a measure "takes effect";
- NAFTA Articles 1102 (National Treatment) and 1103 (Most-Favoured Nation) only prohibit discrimination on the basis of nationality;
- the burden of proof with respect to Articles 1102 and 1103 rests and remains solely with the Claimant and does not shift to Canada;
- to establish a breach of Article 1102 or 1103 the "treatment" accorded to domestic or third party investors must be accorded in like circumstances to the "treatment" accorded to the Claimant;
- the treatment accorded to other domestic and foreign investors is a relevant factor in the assessment of nationality-based discrimination;
- the burden of proving a customary norm under NAFTA Article 1105 rests solely on the Claimant and requires proof of both state practice and *opinio juris*;

- the awards of international tribunals do not qualify as state practice for the purposes of proving the existence of a customary norm;
- no established rule of customary international law has emerged to prohibit economic discrimination against foreign investors; and
- the threshold to prove a breach of the customary international law minimum standard of treatment under Article 1105 is high.

3. NAFTA Chapter 11 Tribunals have found that the concordant views of the NAFTA Parties on the interpretation of these treaty should be given considerable weight.<sup>1</sup>

## **II. THE NAFTA PARTIES AGREE THAT THE EXCEPTION FOR PROCUREMENT IS BROAD**

4. NAFTA Article 1108(7)(a) establishes an exception from NAFTA Articles 1102 (National Treatment) and 1103 (Most Favoured Nation Treatment) for procurement by a NAFTA Party or a state enterprise. The NAFTA Parties agree that the exception is broad. The United States confirms that Article 1108(7)(a) “encompasses any and all forms of procurement by a NAFTA Party”<sup>2</sup> and Mexico confirms that the provision “is not qualified or limited in any manner.”<sup>3</sup> These views are consistent with Canada’s interpretation of the provision.<sup>4</sup>

5. The Claimant also concedes that the exception for procurement in Article 1108(7)(a) is broad.<sup>5</sup> In fact, it admits that if the objective of a generator baseline (“GBL”) in an Electricity

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<sup>1</sup> *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 UNTS 331 (entered into force January 27, 1980), Article 31(3) **RA-81**. *Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction, January 28, 2008, ¶¶ 181-189, **RA-82**; *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB (AF)/05/1) Award, June 19, 2007, ¶¶ 106 – 121, **RA-5**.

<sup>2</sup> 1128 Submission of the United States, 8 May 2015, ¶ 8.

<sup>3</sup> 1128 Submission of Mexico, 8 May 2015, ¶ 6.

<sup>4</sup> See Canada’s Counter-Memorial, ¶¶ 342-344.

<sup>5</sup> Claimant’s Reply, ¶ 620 (“Mercer agrees with Canada and the *ADF* tribunal that “procurement” refers to any “purchase by a government agency or entity of title to...possession of, for instance, goods, supplies, materials and machinery.”)

Purchase Agreement (“EPA”) is to establish the amount of electricity above which BC Hydro will purchase, then “such a measure would fall within the procurement exception.”<sup>6</sup>

6. The Claimant now alleges, however, that this procurement-related objective of the GBL is not “the basis for [its] claim.”<sup>7</sup> Rather, it asserts that its claim concerns the exclusivity provision in its EPA with BC Hydro, which prohibits the sale of electricity *below* the GBL to third parties. It then makes the unsubstantiated assertion that the exclusivity provision is not “a procurement-related term”<sup>8</sup> and thus does not fall within the Article 1108(7)(a) exclusion.

7. The Claimant’s assumption that it can evade the procurement exception by carving off specific terms and conditions of the EPA is incorrect. The United States explains that the exclusion for procurement “includes specifications in a procurement contract that are integral parts of a procurement project.”<sup>9</sup> Similarly, Mexico indicates that “... all of the contractual terms and conditions associated with the procurement of a good by a NAFTA Party or a state enterprise fall within the ambit of the term ‘procurement.’”<sup>10</sup>

8. The EPA is the contract through which BC Hydro procures electricity. Its very purpose is to set out the “terms and conditions” for the sale and purchase of electricity.<sup>11</sup> Contrary to the Claimant’s belief, the exclusivity provision is an integral term of the EPA because it, among other things, “protects BC Hydro’s procurement of electricity.”<sup>12</sup> It follows that both the exclusivity provision and the Claimant’s GBL fall squarely within the procurement exception in Article 1108(7)(a).

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<sup>6</sup> Claimant’s Reply, ¶ 617.

<sup>7</sup> Claimant’s Reply, ¶ 618.

<sup>8</sup> Claimant’s Reply, ¶ 618.

<sup>9</sup> 1128 Submission of the United States, ¶ 8.

<sup>10</sup> 1128 Submission of Mexico, ¶ 6.

<sup>11</sup> See BC Hydro and Zellstoff Celgar Limited Partnership Electricity Purchase Agreement, Bioenergy Call for Power – Phase I, dated January 27, 2009, p. MER00279990, **R-135**.

<sup>12</sup> Jim Scouras II, ¶ 9.

**III. THE NAFTA PARTIES AGREE THAT ARTICLE 1503(2) ONLY APPLIES WHERE A STATE ENTERPRISE EXERCISES REGULATORY, ADMINISTRATIVE OR OTHER GOVERNMENTAL AUTHORITY**

9. Canada and the Claimant agree that BC Hydro's actions do not fall within the ambit of Article 1503(2) when BC Hydro is "acting in a commercial capacity."<sup>13</sup> The Claimant, however, argues that BC Hydro was exercising "delegated governmental authority" when it set GBLs and included the exclusivity provision in its EPAs, and that Canada is liable under the NAFTA for those measures.

10. The NAFTA Parties agree that, according to Article 1503(2), a NAFTA tribunal will only have jurisdiction with respect to a state enterprise where it has exercised regulatory, administrative, or other governmental authority delegated to it by a Party.<sup>14</sup> The United States observes that the concept of "delegation" is explained in NAFTA Note 45 as including "...a legislative grant, [or] a government order, directive or other act[,] transferring to the monopoly [or state enterprise], or authorizing the exercise by the monopoly [or state enterprise] of governmental authority."<sup>15</sup> It also explains that a state enterprise must act under such an affirmative transfer or authorization of delegated governmental authority for its actions to fall within the ambit of NAFTA Article 1503(2). The Parties also rely on the *UPS* award for the proposition that activities having a "commercial character rather than a governmental one" are *not* covered by Article 1503(2).<sup>16</sup> Furthermore, Mexico observes that "[i]n considering which activities are commercial as opposed to governmental, the [*UPS*] tribunal referred to those 'rights and powers which [the state enterprise] shares with other businesses' such as 'the rights to enter

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<sup>13</sup> Claimant's Memorial, ¶ 406.

<sup>14</sup> Canada's Counter Memorial, ¶¶ 322-324; 1128 Submission of the United States, ¶ 2; 1128 Submission of Mexico, ¶ 7.

<sup>15</sup> 1128 Submission of the United States, ¶ 2. The United States notes that this definition refers to NAFTA Article 1502(3), but that it has been found to apply equally to Article 1502(3), given the identical language in these provisions. See *United Parcel Service of America, Inc. v. Government of Canada* (UNCITRAL), Award on the Merits and Dissenting Opinion, 24 May 2007, ¶ 69, **RA-46**.

<sup>16</sup> 1128 Submission of the United States, ¶ 3 [Emphasis added]; 1128 Submission of Mexico, ¶ 8. *United Parcel Service of America, Inc. v. Government of Canada* (UNCITRAL), Award on the Merits and Dissenting Opinion, 24 May 2007, ¶¶ 72-74, **RA-46**.

into contracts for purchase or sale and to arrange and manage their own commercial activities.”<sup>17</sup>

11. The GBL and the exclusivity clause in the EPA were neither the product of a delegated authority nor of any authority that was governmental in nature. They were rather terms in a procurement contract for the purchase of electricity negotiated by rational commercial actors. The Claimant alleges that the B.C. Utilities Commission (“BCUC”) through Order G-38-01 “directed” BC Hydro to negotiate GBLs with its customers, and that BC Hydro was thus “delegated governmental authority.” Order G-38-01 did not, however, discuss GBLs and did not relate to BC Hydro procurement, but established principles concerning the *export* of electricity by self-generators to the U.S. market through Powerex. BC Hydro adapted these principles to the Bioenergy Call for Power Phase I when it developed the concept of GBLs, and then separately made a decision to include the exclusivity provision in the EPA, in order to protect its procurement. The negotiations that resulted in these terms and conditions being agreed to by the parties in the EPA were commercial activities and not exercises of delegated governmental authority. The Tribunal therefore lacks jurisdiction to hear the Claimant’s claim of breach of Article 1503(2).

#### **IV. THE NAFTA PARTIES AGREE ON THE INTERPRETATION OF ARTICLES 1116(2) AND 1117(2)**

12. The Claimant filed its NAFTA claim on April 30, 2012. The cut-off date pursuant to NAFTA Articles 1116(2) and 1117(2) is thus April 30, 2009. The Claimant, however, signed its EPA with BC Hydro well before this cut-off date, on January 27, 2009. It is the EPA that contains both Celgar’s GBL and the exclusivity provision, two measures the Claimant alleges breach the NAFTA.

13. The Claimant argues that the limitations period under Articles 1116(2) and 1117(2) only begins to run when a measure “takes effect.”<sup>18</sup> It thus claims that the EPA (and measures therein) only took effect after the BCUC reviewed the EPA pursuant to section 71 of the *Utilities*

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<sup>17</sup> Canada’s Counter Memorial, ¶¶ 322- 324; 1128 Submission of Mexico, ¶ 8.

<sup>18</sup> Claimant’s Reply, ¶ 606.

*Commission Act* on July 31, 2009. The Claimant even suggests that the limitations period did not start to run until September 27, 2010, which is the Commercial Operation Date (i.e. start date) of the EPA, because “the restrictions on sales to third parties did not take effect until” that date.<sup>19</sup>

14. The Claimant's argument that it could not have *first* acquired knowledge of breach and loss until the EPA “took effect” in this case is without merit. NAFTA Articles 1116(2) and 1117(2) emphasize the Claimant's constructive knowledge of breach and loss. As the United States explains, “[a]n investor or enterprise *first* acquires knowledge of an alleged breach and loss at a particular moment in time; that is, under Articles 1116(2) and 1117(2), knowledge is acquired as of a particular ‘date’.”<sup>20</sup> Mexico also confirms that “all three NAFTA Parties have agreed that the term ‘first acquired’ means that the time limitation starts when an investor first acquires knowledge of an alleged breach and loss at a particular moment in time.”<sup>21</sup>

15. The Claimant signed the EPA of its own volition on January 27, 2009. The EPA contains two measures the Claimant alleges breach the NAFTA and caused it loss – the GBL and the exclusivity provision. The Claimant's argument that actual or constructive knowledge could only have been acquired sometime *after* the Claimant voluntarily agreed to these terms simply makes no sense.

16. For these reasons, the Claimant *first* acquired knowledge of breach and loss pertaining to its GBL and exclusivity clause no later than the date the EPA was signed and the Tribunal has no jurisdiction to hear claims with respect to these measures.

## **V. THE NAFTA PARTIES AGREE ON THE INTERPRETATION OF NAFTA ARTICLES 1102 AND 1103**

17. Canada, the United States and Mexico also agree on the proper interpretation of NAFTA Articles 1102 and 1103.

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<sup>19</sup> Claimant's Reply, ¶ 615.

<sup>20</sup> 1128 Submission of the United States, ¶ 5.

<sup>21</sup> *Detroit International Bridge Company v. Government of Canada*, (UNCITRAL), 1128 Submissions of Mexico, ¶ 22, **RA-83**.

**A. NAFTA Articles 1102 and 1103 only Prohibit Differential Treatment on the Basis of Nationality**

18. The Claimant has insisted that nationality is irrelevant to the analysis of Article 1102 (National Treatment) and Article 1103 (Most-Favoured Nation Treatment). The NAFTA Parties, however, have all repeatedly confirmed that the objective of the provisions is to prevent nationality-based discrimination. The United States, for example, explains that:

These articles are intended to prevent discrimination on the basis of nationality. They are not intended to prohibit all differential treatment among investors or investments. They are designed to ensure that nationality is not the basis for differential treatment, in accordance with the provisions of the NAFTA.

All three NAFTA Parties agree that Articles 1102 and 1103 prohibit only nationality-based discrimination. The Parties' common, concordant, and consistent position constitutes the authentic interpretation of Articles 1102 and 1103 and, under the Vienna Convention on the Law of Treaties, "shall be taken into account, together with the context."<sup>22</sup>

19. Mexico also confirms that "the national treatment obligation is intended to prevent discrimination against investors of the other Parties (and their investments) on the basis of nationality."<sup>23</sup>

20. The Claimant is fundamentally mistaken when it ignores the central purpose of NAFTA Articles 1102 or 1103. To find a violation, it must do more than merely establish the existence of differential treatment, it must establish that nationality was the basis for the differential treatment.

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<sup>22</sup> 1128 Submission of the United States, ¶¶ 10, 11. *See also* United States' 1128 Submission *Mesa*, ¶ 12. "Article 1102 paragraphs (1) and (2) are not intended to prohibit all differential treatment among investors or investments. Rather, they are intended only to ensure that Parties do not treat domestically owned entities that are 'in like circumstances' with foreign-owned entities more favourably based on their nationality of ownership," **RA-84**.

<sup>23</sup> 1128 Submission of Mexico, ¶ 11.



**B. The Claimant has the Burden of Proving a Violation of NAFTA Articles 1102 and 1103**

21. Another misleading argument the Claimant makes with respect to NAFTA Articles 1102 and 1103 relates to the burden of proof. The Claimant asserts that it need only prove a *prima facie* breach of these obligations<sup>24</sup> before the burden shifts to Canada to prove that it had a rational governmental policy objective that justifies the differential treatment.<sup>25</sup>

22. The NAFTA Parties all agree that the Claimant must do more than establish a *prima facie* violation and that the burden never shifts to a respondent State. Mexico explains that:

[A] Claimant must do more than prove a *prima facie* violation of Articles 1102 and 1103. The burden does not shift to the respondent state to defend the appearance of differential treatment on rational governmental policy grounds. It is the claimant's burden to prove that it has been accorded less favourable treatment in like circumstances to other domestic or third party investors on the basis of nationality.<sup>26</sup>

23. The United States also confirms that “[n]othing in the text of Articles 1102 or 1103 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.”<sup>27</sup>

24. Even if the Claimant were to establish *prima facie* differential treatment under Articles 1102 or 1103, and Canada submits that it has not, the burden does not then shift to Canada to prove that it had a rational government policy objective. It is the Claimant's burden to establish a violation of NAFTA Articles 1102 and 1103; its burden shifting argument is simply incorrect.<sup>28</sup>

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<sup>24</sup> See e.g. Claimant's Reply, ¶ 130.

<sup>25</sup> Claimant's Reply, ¶¶ 162-183.

<sup>26</sup> 1128 Submission of Mexico, ¶ 14.

<sup>27</sup> 1128 Submission of the United States, ¶ 13. See United States' 1128 Submission *Mesa*, ¶ 15, RA-84.

<sup>28</sup> The Claimant devotes a substantial portion of its latest pleading to arguing that provincial policies relating to procurement were “not legitimate government policy.” See e.g., Claimant's Reply, ¶¶ 162-183. As Canada explained in its Rejoinder, Articles 1102 and 1103 do not open a door for the Claimant to attack government policy as being “illegitimate.” Canada Rejoinder, ¶¶ 247-250. Mexico takes a similar view, observing that a “NAFTA tribunal should accord significant deference to governmental policy making. It is not the role of a tribunal to sit retrospectively in judgment against the discretionary exercise of power ‘not made irrationally and not exercised in bad faith.’” 1128 Submission of Mexico, ¶ 14.

**C. NAFTA Articles 1102 and 1103 Require an Analysis of Whether the “Treatment” was Accorded in Like Circumstances**

25. The Claimant alleges that the circumstances in which “treatment” is accorded are irrelevant to the analysis of “like circumstances” in Articles 1102 and 1103. It states that the “like circumstances” analysis only requires it to establish that “the investment is in like circumstances to other investments within the territory of a contracting State.”<sup>29</sup>

26. The NAFTA Parties all confirm that NAFTA Articles 1102 and 1103 require that the “treatment” accorded to domestic and foreign investors be in like circumstances, not merely the “investments.”<sup>30</sup> Mexico writes:

Mexico agrees with Canada that the analysis under NAFTA Articles 1102 and 1103 is an analysis of the “treatment” accorded to the claimant versus the “treatment” accorded to domestic or third party investors. The question is whether the “treatment” was accorded in like circumstances, not whether the “investments” are in like circumstances.<sup>31</sup>

27. The United States also agrees that “[d]etermining what the ‘like circumstances’ are for any Article 1102 analysis depends on the nature of the *treatment* at issue and all the relevant facts of the case.”<sup>32</sup>

28. The Claimant’s articulation of the “like circumstances” test is inaccurate and overly simplistic. It must do more than simply show that two “investments” are in like circumstances; it must also prove that the treatment accorded to those investments was in like circumstances. In disconnecting the subject of the treatment from the circumstances in which the treatment was accorded the Claimant draws inapt comparisons, such as the treatment it was accorded by BC Hydro under the 2008 Bioenergy Call for Power Phase I in comparison to other contracts that predate that call by more than a decade.

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<sup>29</sup> Claimant’s Reply, ¶ 130.

<sup>30</sup> This concordant view finds support in the ordinary meaning of Article 1102 (and similarly Article 1103), which states that each NAFTA Party “shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors...”.

<sup>31</sup> 1128 Submission of Mexico, ¶ 13.

<sup>32</sup> *The Loewen Group, Inc. and Raymond L. Loewen, v The United States of America*, Counter-Memorial of the United States of America, p.120, **RA-85**.

29. The NAFTA Parties agree that Articles 1102 and 1103 require that all of the circumstances underlying the treatment be analyzed to determine whether the treatment at issue is properly compared. The Claimant has ignored this crucial requirement.

**D. The Treatment Accorded to Domestic and Other Foreign Investors is a Relevant Factor in the Assessment of Nationality-Based Discrimination**

30. The Claimant does not deny that Domtar, a U.S. corporation, was accorded identical treatment to other BC Hydro customers.<sup>33</sup> Nor does it deny that the Tolko (Riverside) sawmill received the same treatment as the Claimant.<sup>34</sup> The Claimant argues, however, that the treatment accorded by British Columbia to these other investors is irrelevant to a determination under Article 1102 or 1103.<sup>35</sup>

31. Canada, the United States and Mexico agree that the treatment accorded to other domestic or foreign investors is a relevant factor in the assessment of nationality-based discrimination. Mexico indicates that:

[A] NAFTA tribunal should only find a breach of Article 1102 where the impugned measure facially discriminates on the basis of nationality, or where it properly can be inferred in all of the circumstances that a facially neutral measure has the effect of discriminating *against foreign investors as a class* with no rational or good faith policy objectives. Mexico adds that such a finding will be most unlikely in situations where the treatment accorded to domestic investors is not materially different to that accorded to other foreign investors, particularly other investors of the claimant's home states.<sup>36</sup>

32. Similarly, the United States writes that “[d]e facto discrimination occurs when a facially neutral measure with respect to nationality is applied in a discriminatory fashion based on nationality,”<sup>37</sup> and that in order to establish discrimination on the basis of Article 1102 “a

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<sup>33</sup> Claimant's Reply, ¶ 152.

<sup>34</sup> Claimant Reply, ¶ 152.

<sup>35</sup> Claimant's Reply, ¶ 152 (“Canada does not acquire license to discriminate against some U.S. investors by treating one...American company favorably.”).

<sup>36</sup> 1128 Submission of Mexico, ¶ 15. [Emphasis added].

<sup>37</sup> 1128 Submission of the United States, ¶ 12.

Claimant must establish that a measure either on its face, or as applied, favors *nationals* over *non-nationals*.<sup>38</sup>

33. The treatment accorded to other domestic or foreign investors is therefore a relevant factor in the assessment of nationality based discrimination. The Claimant is wrong to dismiss the treatment accorded to Domtar and Tolko. The treatment these facilities received is evidence that the measures the Claimant complains of have nothing to do with nationality-based discrimination.

## **VI. THE NAFTA PARTIES AGREE ON THE INTERPRETATION OF NAFTA ARTICLE 1105**

34. The NAFTA Parties and the Claimant agree that the proper interpretation of NAFTA Article 1105 was confirmed by the NAFTA Free Trade Commission (“FTC”) in its 2001 binding Note of Interpretation.<sup>39</sup> 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.”<sup>40</sup> The Claimant acknowledges the binding effect of the FTC Note of Interpretation.<sup>41</sup>

35. This unanimity, however, falls apart with respect to the proper interpretation of the customary international law minimum standard of treatment in NAFTA Article 1105. Here the NAFTA Parties and the Claimant diverge substantially.

### **A. The Burden of Proving a Customary Norm Rests Solely with the Claimant and Requires Proof of Both State Practice and *Opinio Juris***

36. The Claimant argues that the Tribunal, and not the Claimant, bears the burden of determining the content of customary international law under Article 1105.<sup>42</sup> However, the

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<sup>38</sup> 1128 Submission of the United States, citing to its Rejoinder in *Grand River*, at fn. 14. [Emphasis added].

<sup>39</sup> 1128 Submission of the United States, ¶ 15; Canada's Counter-Memorial, ¶¶ 455-456; 1128 Submission of Mexico, ¶ 18; Claimant's Memorial, ¶ 643.

<sup>40</sup> NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions, 31 July 2001, B.2, **RA-31**.

<sup>41</sup> Claimant's Memorial, ¶ 643.

<sup>42</sup> Claimant's Reply, ¶ 497.

NAFTA Parties agree that the burden of proving the existence of a rule of customary international law rests solely on the party that alleges it.<sup>43</sup>

37. The United States writes that:

[T]he burden is on a 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*. 'The party which relies on custom,' therefore, 'must prove that this custom is established in such a manner that it has become binding on the other Party.'<sup>44</sup>

38. Mexico agrees:

[T]he burden is on the claimant to establish the existence of an obligation under customary international law that meets the requirements of State practice and *opinio juris*.<sup>45</sup>

39. The understanding of the NAFTA Parties has been confirmed in NAFTA jurisprudence. For example, the *Cargill* Tribunal expressly found that "the proof of change in custom is not an easy matter to establish. However, the burden of doing so falls clearly on the 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."<sup>46</sup>

40. The Claimant is incorrect when it suggests that the Tribunal bears the burden of establishing customary norms. The Claimant has offered no evidence of such norms and has thus failed to meet this burden with respect to NAFTA Article 1105.

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<sup>43</sup> Canada's Counter Memorial, ¶ 463; 1128 Submission of the United States, ¶ 27; 1128 Submission of Mexico, ¶ 19.

<sup>44</sup> 1128 Submission of the United States, ¶ 27.

<sup>45</sup> 1128 Submission of Mexico, ¶ 18.

<sup>46</sup> *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September, 2009, ¶ 273, **RA-6**.

**B. The Awards of International Tribunals Do Not Qualify as State Practice for the Purpose of Proving a Customary Norm**

41. The Claimant also asserts that the decisions of international investment tribunals are a source of state practice for the purpose of establishing a new customary norm.<sup>47</sup> Canada has explained in detail why the Claimant is mistaken<sup>48</sup> and the United States and Mexico confirm that “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 the purposes of evidencing customary international law.”<sup>49</sup>

**C. No Rule of Customary International Law has Emerged to Prohibit Economic Discrimination Against Foreign Investors**

42. The Claimant also posits “discriminatory treatment” that does not contravene NAFTA Articles 1102 and 1103 may nonetheless violate the minimum standard of treatment at customary international law.<sup>50</sup> The Claimant provides no state practice or *opinio juris* to support its argument that “discriminatory treatment” forms part of the minimum standard of treatment under customary international law.

43. To the contrary, all three NAFTA Parties agree that no established rule of customary international law has emerged to prohibit economic discrimination against investors. The United States explains that “there is no ‘categorical rule’ under customary international law requiring non-discrimination”<sup>51</sup> and that investors “enjoy no general right under international law to freely engage in economic activity.”<sup>52</sup> It explains that:

Customary international law does prohibit discrimination under certain circumstances. These include prohibitions against discriminatory takings or access to judicial remedies or treatment by the courts, as well as the obligation of States to compensate aliens and nationals on an equal basis

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<sup>47</sup> Claimant's Memorial, ¶ 647; Claimant's Reply, ¶ 490.

<sup>48</sup> Canada's Counter-Memorial, ¶¶ 465, Canada's Rejoinder, ¶¶ 464-466.

<sup>49</sup> 1128 Submission of the United States, ¶ 25. *See also* 1128 Submission of Mexico, ¶ 18.

<sup>50</sup> Claimant's Memorial, ¶ 854.

<sup>51</sup> 1128 Submission of the United States, ¶ 21.

<sup>52</sup> 1128 Submission of the United States, ¶ 22.

for damages incurred during such time of violence, insurrection, conflict or strife. Other than in these limited circumstances, however, no established rule of customary international law has emerged to prohibit economic discrimination against aliens.<sup>53</sup>

44. Mexico agrees “that Article 1105(1) does not provide a blanket prohibition on discrimination against foreign investors or their investments. Nationality-based discrimination falls under the purview of NAFTA Articles 1102 and 1103, and not Article 1105.”<sup>54</sup>

45. The concordant views of the NAFTA Parties are supported by the *Methanex* Tribunal, which found that “the plain and natural meaning of the text of Article 1105 does not support the contention that the ‘minimum standard of treatment’ precludes governmental differentiations as between nationals and aliens.”<sup>55</sup>

46. The Claimant’s unsubstantiated contention that Article 1105 broadly prohibits all forms of “discriminatory treatment” must therefore be rejected.

**D. The Threshold to Establish a Breach of the Minimum Standard of Treatment is High**

47. The NAFTA Parties all agree that the threshold for proving a violation of the customary international law minimum standard of treatment under Article 1105(1) is high and does not allow NAFTA tribunals to second guess government policy and decision-making.<sup>56</sup> The United States explains that Article 1105 “established a minimum ‘floor below which treatment of foreign investors must not fall’” and both Mexico and the United States agree with Canada that “[d]etermining a breach of the minimum standard of treatment ‘must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders’.”<sup>57</sup>

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<sup>53</sup> 1128 Submission of the United States, ¶ 23.

<sup>54</sup> 1128 Submission of Mexico, ¶ 20.

<sup>55</sup> *Methanex Award*, ¶¶ 14 to 16, **RA-28**.

<sup>56</sup> Canada’s Counter Memorial, ¶ 457. 1128 Submission of Mexico, ¶ 18.

<sup>57</sup> 1128 Submission of the United States, ¶ 28; 1128 Submission of Mexico, ¶ 19.

**VII. THE CONCORDANT VIEWS OF THE NAFTA PARTIES ON THE INTERPRETATION OF THE NAFTA SHOULD BE GIVEN CONSIDERABLE WEIGHT**

48. Article 31(3) of the *Vienna Convention on the Law of Treaties* (“VCLT”) provides that:

(3) There shall be taken into account:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

49. Concordant and consistent positions of the NAFTA Parties constitute an authentic interpretation of the NAFTA and, pursuant to Article 31(3) of the VCLT, “shall be taken into account” when these obligations are interpreted.<sup>58</sup> The International Law Commission has noted that “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 the purposes of its interpretation.”<sup>59</sup>

50. Canada submits that the concordant and consistent views of the NAFTA Parties concerning the interpretation of NAFTA Articles 1108(7)(a), 1503(2), 1116(2), 1117(2), 1102, 1103 and 1105 rise to the level of a subsequent agreement between the Parties for the purpose of Article 31(3)(a) of the VCLT. In the alternative, these concordant and consistent positions are evidence of a “subsequent practice” under Article 31(3)(b) of the VCLT.<sup>60</sup> It follows that these concordant views shall be taken into account by this Tribunal and given considerable weight.

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<sup>58</sup> 1128 Submission of the United States, ¶ 11; 1128 Submission of Mexico, ¶¶ 21-24.

<sup>59</sup> United Nations, *Yearbook of the International Law Commission 1966*, (New York:1976), (U.N. General Assembly Doc. A/CN.4/SEA/A/1966/Add.1), Vol II, at 221, ¶ 14, **RA-86**.

<sup>60</sup> *Canadian Cattlemen for Free Trade v. United States*, Award on Jurisdiction, ¶¶ 186, 188-189, **RA-82**; See also the due regard to the views of non-disputing Parties in *Bayview Irrigation District et al v. United Mexican States*, Award, ¶¶ 100, 106-7, **RA-5**. The *Commerce Group* tribunal reached a similar conclusion in the context of the CAFTA-DR, see *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011, ¶¶ 81-82, **RA-87**. See also Roberts, Anthea, “Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States,” *The American Journal of International Law*, 104:179, 2010. **RA-88**.



June 12, 2015

Respectfully submitted  
on behalf of Canada,

A handwritten signature in blue ink, appearing to be 'Sylvie Tabet', written in a cursive style.

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