

*RESOLUTE COMMENTS ON THE ARTICLE 1128 SUBMISSIONS
PUBLIC VERSION*

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT
AND THE 1976 UNCITRAL ARBITRATION RULES**

BETWEEN

RESOLUTE FOREST PRODUCTS INC.

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

PCA CASE No. 2016-13

RESOLUTE FOREST PRODUCTS INC.

**COMMENTS ON THE ARTICLE 1128 SUBMISSIONS
OF MEXICO AND THE UNITED STATES**

MAY 8, 2020

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I. INTRODUCTION

1. The United States and Mexico each has made an Article 1128 submission, but Mexico has limited itself to Article 1102. Although the United States has addressed both Articles 1102 and 1105, the bases of Resolute's claims, neither the United States nor Mexico has said anything about attribution; the applicability of Article 1108(7) exceptions to Resolute's claims; nor anything about the calculation of damages, all contested issues between the disputing parties.

2. Both the Mexican and U.S. Governments contend that their interpretations of NAFTA Chapter 11 constitute all there is to know, whether in the original text, in their Article 1128 submissions here and in other cases, or in subsequent meetings of the Free Trade Commission. Both discount or dismiss arbitral tribunals that have interpreted Chapter 11's provisions (unless those interpretations adhere to pronouncements of the NAFTA Parties).

II. ARTICLE 1102

3. The Mexican 1128 submission argues primarily that "proof of nationality-based discrimination" is required under NAFTA Article 1102. To satisfy the widely-adopted *UPS* test for nationality-based discrimination, however, differential treatment in like circumstances is sufficient without proof of intent to discriminate because of nationality. Mexico seems to imply that Resolute may not qualify under Article 1102 but the facts here show that Resolute, a foreign investor, was accorded less favorable treatment than a domestic investor in like circumstances, satisfying the Article 1102 criteria according to the *UPS* test.

4. The United States' 1128 submission on Article 1102 recognizes the "like circumstances" test but, in setting out basic principles, the United States concedes its inability to address the facts placing Resolute in "like circumstances" with Nova Scotia's supercalendered paper ("SC Paper") champion in a declining, North American market consisting of no more than five producers. The United States, therefore, is unable to reach a conclusion as to whether Resolute satisfies the discriminatory criteria of Article 1102.

A. Nationality-Based Discrimination

5. Resolute explained in its Reply Memorial that Article 1102(3) does not require proof of intentional nationality-based discrimination, which Canada argued in its Counter-Memorial.¹ Mexico appears to disagree with Resolute, contending that "the interpretation that Article 1102(3) does not require proof of nationality-based discrimination is incorrect"² which, according to Mexico, is a point on which "the NAFTA Parties have been consistent."³

6. Regardless how Mexico may define "nationality-based discrimination," Mexico concedes that what the Government of Nova Scotia (or "GNS") did to Resolute can be remedied under NAFTA Article 1102. Quoting from Canada's Rejoinder Memorial, Mexico states:

[I]n a situation where a Canadian province (for instance, Nova Scotia) would treat more favorably investors from another Canadian province (for instance, British Columbia) than its own local investors, a foreign investor from another NAFTA Party could still bring a claim alleging a breach of

¹ Resolute Reply Memorial ¶ 214 (Dec. 6, 2019) ("Resolute Reply Memorial").

² Second Submission of the United Mexican States ¶ 7 (Apr. 23, 2020) ("Second Mexican 1128 Submission").

³ Second Mexican 1128 Submission ¶ 3.

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Article 1102 based on the fact that it did not receive the treatment accorded by Nova Scotia to investors from British Columbia. There would still be a nationality element to such a claim.⁴

7. The scenario quoted by Mexico is what happened to Resolute: Nova Scotia treated Resolute, a foreign investor from the United States, less favorably than the investor who received the most favorable treatment among Canadian investors. As Mexico and Canada admit, “[t]here would still be a nationality element to such a claim.” Therefore, Resolute would meet this element of the three-part *UPS* test.⁵

8. Mexico contends that Article 1102(3) should be interpreted no differently from the rest of Article 1102⁶ (something that Canada also has argued⁷) and that Article 1102 protects investors “from a difference in treatment based on nationality.”⁸ However, Resolute has demonstrated that Article 1102 “does not require proof of discrimination based on nationality”⁹ (to the extent that “based on nationality” means proving

⁴ Second Mexican 1128 Submission ¶ 6 (quoting Canada Rejoinder ¶ 98).

⁵ Resolute Reply Memorial ¶ 212. That three part test requires: (1) the foreign investor or its investment has been accorded treatment by a province with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments; (2) the foreign investor or its investment is in like circumstances with the local investor or investment (*i.e.*, the investor or investment of the Party of which the province forms a part) that has been accorded the most favorable treatment by that province; and (3) that province has treated the foreign investor or investment less favorably than it treats the investor or investment accorded the most favorable treatment. *Id.*

⁶ See Second Mexican 1128 Submission ¶ 6 (“[T]he obligation of treatment for states and provinces set out in Article 1102(3) does not modify the purpose of Article 1102, which is to protect investors and investments that are in like circumstances, from a difference in treatment based on nationality”).

⁷ See Rejoinder Memorial of Canada on Merits and Damages ¶¶ 94-97 (Mar. 4, 2020) (“Canada Rejoinder”).

⁸ See Second Mexican 1128 Submission ¶ 6 (“[T]he obligation of treatment for states and provinces set out in Article 1102(3) does not modify the purpose of Article 1102, which is to protect investors and investments that are in like circumstances, from a difference in treatment based on nationality”).

⁹ Resolute Reply Memorial ¶ 226.

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something more than different treatment of investors of different nationalities in like circumstances). Resolute’s understanding of the law is supported by NAFTA Tribunals,¹⁰ non-NAFTA investment arbitration tribunals,¹¹ and leading commentators and scholars.¹² For example, the tribunal in *ADM v. Mexico* found that discrimination based on nationality “includes measures which are neutral on their face but which result in differential treatment.”¹³

9. The Non-Disputing Parties agree that discrimination must be “nationality-based” and contend that their prior submissions in various cases are evidence of a “subsequent agreement” or “subsequent practice” within the meaning of Art. 31(3) of the Vienna Convention on the Law of Treaties (“VCLT”).¹⁴ Submissions made by the NAFTA Parties in the course of an arbitration should not constitute evidence of “subsequent practice” within the meaning of Article 31 because the governments as respondents cannot define their defenses, as they go, as the law itself.

10. Even if these submissions were probative under Article 31, any weight would have to be limited. First, the NAFTA Parties did not agree on requirements for “nationality-based discrimination” in cases specifically invoking Article 1102(3). Canada conceded in its Rejoinder that the NAFTA Parties did not refer specifically to Article

¹⁰ Resolute Reply Memorial ¶¶ 226-231.

¹¹ Resolute Reply Memorial ¶ 232.

¹² Resolute Reply Memorial ¶¶ 233-237.

¹³ RL-092, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award ¶ 193 (November 21, 2007) (“*ADM v. Mexico Award*”).

¹⁴ See Second Submission of the United States of America ¶ 5 (Apr. 20, 2020) (“Second United States 1128 Submission”); Second Mexican 1128 Submission ¶¶ 9-15. Canada made a similar argument that Resolute has addressed previously. See Resolute Reply Memorial ¶¶ 238-243.

1102(3) in relation to “nationality-based discrimination.”¹⁵ Second, the NAFTA Parties have not agreed on what constitutes “nationality-based discrimination.” Absent such agreement, “the points of consensus can[not] be discerned”¹⁶ and Article 31 cannot be applied. And if these submissions somehow were to constitute “subsequent practice,” they would be but one factor under the VCLT, as noted by the tribunal in *Mobil Investments* (a decision relied upon by the United States).¹⁷

B. The “Like Circumstances” Test

11. The United States (but not Mexico) addressed the “like circumstances” element of the *UPS* test. The United States noted that, “[w]hen determining whether a claimant was in like circumstances with comparators, it or its investment should be compared to a national investor or investment that is alike in all relevant respects *but for* nationality of ownership.”¹⁸ But the United States acknowledges this inquiry is “fact-specific,”¹⁹ and that it “does not take a position, in this submission, on how the interpretation offered below applies to the facts of this case”²⁰

12. The United States also asserts that “the national treatment obligation under Article 1102 does not prohibit a NAFTA Party from adopting or maintaining measures that apply to or affect only a part of its national territory.”²¹ Similarly, the

¹⁵ See Canada Rejoinder n.173.

¹⁶ Mexico Second Article 1128 Submission ¶ 14.

¹⁷ CL-237, *Mobil Investments Canada Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility ¶160 (July 13, 2018).

¹⁸ Second United States 1128 Submission ¶ 8 (italics in original).

¹⁹ Second United States 1128 Submission ¶ 8.

²⁰ Second United States 1128 Submission ¶ 1.

²¹ Second United States 1128 Submission ¶ 10.

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United States cautions that “Article 1102(3) should not be construed as preventing a state or province from adopting or maintaining measures that apply only to investors or their investments operating (or seeking to operate) in that state or province.”²² Those issues are to be resolved by the like circumstances test.²³ The United States submission does not resolve the issue absent consideration of the facts of this case.

13. The United States observed that “[n]othing in Article 1102 requires that investors or investments of investors of a Party, regardless of the circumstances, be accorded the best, or most favorable, treatment given to any domestic investor or any investment of a domestic investor. Rather, the appropriate comparison is between the treatment accorded a foreign investment or investor and a domestic investment or investor in *like circumstances*.”²⁴ Resolute agrees. As explained in Resolute’s Reply Memorial, its investments are in like circumstances with PWCC/PHP,²⁵ the Canadian company that received the most favorable treatment from Nova Scotia. Consequently, Resolute was entitled to the same treatment.

14. The United States claims it is defending “location-based measures to achieve regulatory objectives,”²⁶ but the Nova Scotia Measures were not “location-based.” Instead, they were company-specific (in favor of PWCC) in the dwindling SC Paper market with a limited number of known competitors. In addition, Resolute is

²² Second United States 1128 Submission ¶ 12.

²³ Second United States 1128 Submission ¶¶ 10, 12.

²⁴ Second United States 1128 Submission ¶ 9 (italics in original).

²⁵ Resolute Reply Memorial ¶¶ 255-263.

²⁶ Second United States 1128 Submission n 7.

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neither arguing in favor of “nationally uniform treatment”²⁷ nor in favor of a standard that would prevent a state or province from adopting or maintaining any measure that applies only to investors or investments operating (or seeking to operate) in that state or province.²⁸ Rather, Resolute seeks a remedy for treatment by GNS that consciously harmed Resolute beyond the province’s borders. After causing extraterritorial effects, Nova Scotia (and Canada) cannot hide behind those very same borders to shield themselves from scrutiny for discrimination under Article 1102(3).

III. ARTICLE 1105

15. The United States argues that Resolute bears a heavy burden of proof: it must demonstrate, through both State practice and *opinio juris*,²⁹ the existence of a customary international law that allegedly has been violated and the content of that law. But international arbitral awards and other authorities Resolute has cited leave no doubt that fair and equitable treatment currently itself exists as a customary international law norm, while also providing guidance as to the types of government conduct that constitute a violation of that standard. In addition to that body of law, Resolute has referenced U.S. and Canadian practice with respect to companies in bankruptcy and explained how the GNS treatment of Port Hawkesbury breached fair and equitable

²⁷ Second United States 1128 Submission ¶ 10.

²⁸ Second United States 1128 Submission ¶ 12.

²⁹ The tribunal in *Windstream* explained that “the content of a rule of customary international law such as the minimum standard of treatment can be best determined on the basis of evidence of actual State practice establishing custom that also shows that the States have accepted such practice as law (*opinio juris*).” CL-123, *Windstream v. Canada*, UNCITRAL, PCA Case No. 2013-22, Award ¶ 351 (Sept. 27, 2016) (“*Windstream*”). However, “Article 1105(1) is indeed the customary international law minimum standard of treatment” so long as, “in accordance, or consistent with that standard, [] remain[s] ‘fair and equitable,’” *Id.* ¶¶ 355, 358. This standard has been detailed in numerous NAFTA decisions as Resolute explains below. See also *id.* ¶¶ 351-352.

treatment under Article 1105. Resolute has proven both the existence of the customary international law and its content. Now, this Tribunal must apply that law to the facts of this case.

16. The United States, echoing Canada, also argues for a narrow interpretation of the minimum standard of treatment under Article 1105, neglecting a quarter-century of evolving norms in favor of an incorrect, static view of customary international law.

A. Burden Of Proof Under Article 1105

17. Resolute agrees with the United States and Canada that the minimum standard of treatment according to Article 1105 reflects customary international law as evidenced by State practice and *opinio juris*. The decisions of international arbitral tribunals reflect both the historical State practice and *opinio juris*, and these decisions are ample evidence of the existence and content of fair and equitable treatment as a matter of customary international law.

18. By stating that a “perfunctory reference to these requirements is not sufficient,” the United States creates a misperception that an Article 1105 claimant must, to succeed,³⁰ necessarily establish both State practice and *opinio juris* in a “two-step approach.”³¹ However, a claimant does not bear the burden of proving State practice and *opinio juris* every time a breach of Article 1105 is identified. Such a burden is borne only when the claimant argues for a new customary international law norm that has yet to be established and recognized.

³⁰ Second United States 1128 Submission ¶ 18.

³¹ Second United States 1128 Submission ¶ 19.

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19. Fair and equitable treatment is currently recognized as a customary international law obligation.³² Resolute does not claim that the fair and equitable standard as incorporated in NAFTA Article 1105 should be construed more expansively than has been recognized in previous arbitral awards. Consequently, there is no need for a two-step analysis of State practice and *opinio juris*.

20. Resolute has shown through its citations to arbitral awards³³ and to U.S. and Canadian practices³⁴ that the Nova Scotia Measures violated the standard of fair and equitable treatment as it has been interpreted by other international tribunals. The Nova Scotia Measures exceeded the bounds of the fair and equitable treatment norm established under Article 1105 because they were egregious, malicious, fundamentally unfair, discriminatory, disproportionate, grossly inequitable and of an extraordinary scale.³⁵

21. The contemporary debate centers on how the minimum standard of treatment contained in Article 1105 should be applied, not—as the United States and

³² The fair and equitable treatment standard is an obligation under customary international law. CL-123, *Windstream* ¶ 357; CL-116, *Pope & Talbot v. Canada*, 40 ILM 258 (2001), Interim Award at 26 (June 26, 2000); RL-170, *Mobil v. Canada*, ICSID Case No. ARB(AF)/07/4, Award ¶ 152 (May 22, 2012) (“*Mobil Award*”); CL-101, *Merrill & Ring v. Canada*, ICSID Case No. UNCT/07/01, Award ¶ 211 (Mar. 31, 2010) (“*Merrill & Ring Award*”)(“[T]he Tribunal is satisfied that fair and equitable treatment has become a part of customary law.”); CL-118, *Cargill v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award ¶¶ 266-305 (Sept. 18, 2009) (citing CL-122, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award ¶ 121 (Oct. 11, 2002) & CL-130, *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award ¶ 178 (Jan 9, 2003)).

³³ See Resolute Memorial ¶¶ 237-248 (Dec. 28, 2018) (“Resolute Memorial”); Resolute Reply Memorial ¶¶ 87-95.

³⁴ See generally Expert Report of Alex Morrison of Ernst & Young ¶ 89 (December 6, 2019) (“CWS-EY”); C-241, Excerpts from *The 2018 Bankruptcy Yearbook, Almanac & Directory*, New Generation Research Inc. (28th ed. 2018).

³⁵ See Resolute Memorial ¶¶ 249-79, Resolute Reply ¶¶ 140-190, and authorities cited.

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Canada would have it—whether it is a rule of customary international law. As the *Windstream* tribunal found, “[t]he issue therefore is not whether the rule exists, but rather how the content of a rule that does exist...should be established. The Tribunal is therefore unable to accept the Respondent’s argument that the burden of proving the content of the rule falls exclusively on the Claimant. In the Tribunal’s view, it is for each Party to support its position as to the content of the rule with appropriate legal authorities and evidence.”³⁶

22. Direct proof of State practice and *opinio juris* are not always as necessary as the United States contends. International arbitral awards are appropriate legal authorities and evidence of the existence and content of customary international law. In both *Merrill & Ring v. Canada* and *Chemtura v. Canada*, the Canadian government admitted with respect to Article 1105 that arbitral “awards can play an important evidentiary role” in that they “sometimes contain valuable analysis of State practice and *opinio juris* in relation to a specific area of law, and future tribunals may choose to be guided by this analysis.”³⁷ That same *Merrill & Ring* tribunal found that judicial decisions “are a fundamental tool for the interpretation of the law and have contributed to its clarification and development.”³⁸

³⁶ CL-123, *Windstream* ¶ 350.

³⁷ *Merrill & Ring v. Canada*, ICSID Case No. UNCT/07/01, Canada's Rejoinder ¶¶ 160-161 (March 27, 2009), available at <https://www.italaw.com/sites/default/files/case-documents/italaw8465.pdf>; see also *Chemtura v. Canada*, UNCITRAL, Canada's Counter-Memorial ¶ 744 (October 20, 2008), available at <https://www.italaw.com/sites/default/files/case-documents/italaw8258.pdf>.

³⁸ CL-101, *Merrill & Ring Award* ¶ 188. Even the *Glamis* and *Cargill* tribunals – which favored a more restrictive approach to Article 1105 – acknowledged that arbitral awards “reflect customary international law” and “serve as illustrations of customary international law if they involve an examination of customary international law.” See CL-118, *Cargill v. United Mexican States*,

23. The *Windstream* tribunal observed that even the *Neer* case, frequently and fondly cited by the NAFTA governments as a bedrock principle of the minimum standard of treatment, was “an award (or more accurately, a decision of an international claims commission), not direct evidence of State practice, and [...] the *Neer* tribunal itself did not have any direct evidence relating to State practice before it.”³⁹ Thus, international arbitral awards may establish State practice indirectly and are appropriate evidence of the existence and content of well-recognized customary international law norms.

B. Substantive Content Of Article 1105

24. The United States asserts that Article 1105’s obligation to provide “fair and equitable treatment” has “crystallized...in only a few areas,” such as “the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings.”⁴⁰

25. The United States’ formulation, however, is not the fair and equitable treatment standard as it exists today under Article 1105. As the *Bilcon v. Canada* tribunal found, “NAFTA awards make it clear that the international minimum standard is not limited to conduct by host states that is outrageous. The contemporary minimum international standard involves a more significant measure of protection....The international minimum standard exists and has evolved in the direction of increased investor protection precisely because sovereign states—the same ones constrained by

ICSID Case No. ARB(AF)/05/2, Award ¶ 277 (Sept. 18, 2009); and CL-025, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award ¶ 605 (June 8, 2009) (“*Glamis Award*”).

³⁹ CL-123, *Windstream* ¶ 352.

⁴⁰ Second United States 1128 Submission ¶ 16.

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the standard—have chosen to accept it.”⁴¹ Therefore, “[c]onduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process has also been noted by NAFTA tribunals as constituting a breach of fair and equitable treatment, even in the absence of bad faith or malicious intention....What matters is that the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness.”⁴²

26. Consistent with these principles, Resolute explained in its Reply Memorial⁴³ that the unprecedented ensemble of Measures that GNS adopted, specifically to resurrect and advance PHP to the certain harm of Resolute, were precisely the types of fundamentally unfair and unjust state actions prohibited under Article 1105.

27. The United States argues, contrary to previous NAFTA awards and contrary to the literature on Article 1105, that the Tribunal should adopt an extreme and overly simplistic interpretation of the minimum standard of treatment according to which “the concepts of good faith, proportionality, and non-discrimination are not component elements of ‘fair and equitable treatment’” for purposes of NAFTA.⁴⁴

28. Good faith. Resolute agrees with the United States that Article 1105 does not impose a free-standing obligation of “good faith”, but it would be disingenuous to suggest that the principle of good faith is entirely alien to the minimum standard of

⁴¹ CL-104, *William Ralph Clayton and others v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability ¶¶ 433,438 (Mar. 17, 2015) (“*Bilcon*”).

⁴² CL-104, *Bilcon* ¶ 435 (citing CL-101, *Merrill & Ring Award* ¶¶ 207, 208, 210, 213 and other NAFTA tribunal authorities).

⁴³ Resolute Reply Memorial ¶ 88.

⁴⁴ Second United States 1128 Submission ¶ 20.

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treatment. Good faith is considered to be a “guiding principle” for applying the fair and equitable treatment standard under Article 1105.⁴⁵ Evidence of bad faith is sufficient to establish the existence of a violation of the minimum standard of treatment. Even the strict *Neer* definition recognized that treatment of an alien stemming from “bad faith” or “wilful neglect of duty” amounted to a violation of the minimum standard of treatment, which the *Glamis* tribunal confirmed: “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.”⁴⁶

29. Here, GNS devised a plan of unprecedented scale for the purpose of making PHP the lowest-cost producer to the foreseen detriment of Resolute, [REDACTED]

[REDACTED]

The GNS conduct is evidence of bad faith and wilful neglect for Resolute’s interests, which is irreconcilable with basic norms of fair and equitable treatment under Article 1105.

30. Non-discrimination. The United States seeks to limit Article 1105 to certain nationality-based discriminatory conduct even though NAFTA tribunals have stated that additional forms of discrimination are as impermissible as discrimination based on nationality. Duplicating its prior Article 1128 arguments in lieu of addressing

⁴⁵ *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Separate Opinion of Thomas Wälde ¶ 25 (December 1, 2005), available at <https://www.italaw.com/sites/default/files/case-documents/ita0432.pdf>.

⁴⁶ CL-025, *Glamis* Award ¶ 616.

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NAFTA tribunal decisions,⁴⁷ the United States contends that discriminatory treatment (except for certain limited circumstances) is permissible under Article 1105.⁴⁸ Whereas Article 1105 does not require governments to treat domestic and foreign investments identically, governments cannot harm foreign investments to advance their own national and provincial interests.⁴⁹ Customary international law prohibits such discrimination.

31. The United States ignores the NAFTA decisions cited by Resolute that address discrimination under Article 1105.⁵⁰ The tribunal in *Merrill & Ring v. Canada* defined a breach of the minimum standard of treatment as “[c]onduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process.”⁵¹ The tribunal in *Mobil v. Canada* applied a similar formulation, finding Article 1105 is breached by conduct “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.”⁵² And the tribunal in *S.D. Myers v. Canada* found that Canada’s policies and measures to ensure that hazardous PCB waste “should be disposed of...in Canada by Canadians” had breached Canada’s obligations under both Article 1102 and Article 1105, illustrating that discriminatory treatment may

⁴⁷ *Vento Motorcycles, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Submission of the United States ¶ 20 (Aug. 23, 2019), available at <https://www.state.gov/wp-content/uploads/2020/01/US-Article-1128-Submission-Vento-Motorcycles-v-Mexico-2019.08.23-508.pdf>.

⁴⁸ Second United States 1128 Submission ¶ 24.

⁴⁹ Resolute Reply Memorial ¶ 139.

⁵⁰ Resolute Reply Memorial ¶ 137.

⁵¹ CL-101, *Merrill & Ring Award* ¶ 208.

⁵² RL-170, *Mobil Award* ¶ 152; see also authorities cited in Resolute Memorial ¶¶ 240-245 and Resolute Reply Memorial ¶¶ 129-139.

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violate Article 1105.⁵³ These awards demonstrate that Article 1105’s prohibition on discriminatory conduct is broader than the limited standard proffered by the United States.

32. Proportionality. The United States again relies upon its own prior arguments relating to proportionality as authority, citing its own briefing in other arbitrations. The United States asserts that it “has long observed that State practice and *opinio juris* do not establish that the minimum standard of treatment of aliens imposes a general obligation of proportionality on States.”⁵⁴

33. Notwithstanding the United States’ prior reliance on its own arguments about proportionality, NAFTA and other international tribunals have applied proportionality to determine whether a violation of “fair and equitable treatment” has occurred.⁵⁵ For example, the tribunal in *S.D. Myers* considered the proportionality principle in its award, finding that Canada’s measures (limiting exports of certain products for processing in the United States) were not proportional to the goals Canada sought to achieve (protection of industry).⁵⁶ So, too, did the Tribunal in *ADM v. Mexico*, finding that “[t]he adoption of the Tax was not proportionate or necessary and reasonably connected to the aim said to be pursued.”⁵⁷

34. The United States contends that governments have “wide discretion” to carry out policies and tribunals do not have an “open-mandate to second-guess

⁵³ RL-059, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award ¶¶ 169-171, 265-269 (Nov. 13, 2000) (“*S.D. Myers* Partial Award”).

⁵⁴ Second United States 1128 Submission ¶ 23.

⁵⁵ See Resolute Reply Memorial ¶¶ 191-208.

⁵⁶ RL-059, *S.D. Myers* Partial Award ¶ 255 (emphasis added).

⁵⁷ RL-092, *ADM v. Mexico* Award ¶¶ 153, 158-159 (November 21, 2007).

government decision making.”⁵⁸ Resolute does not contend that governments are without discretion to exercise policy decisions but they, too, do not have an “open mandate.” Their discretion is not unlimited. There are limitations dictated by the facts in a case. In this case, the facts require a conclusion that Canada has breached those limits and, therefore, its obligations.⁵⁹

IV. CAUSATION AND DAMAGES

35. The United States’ causation and damages section⁶⁰ recites basic principles that Resolute had addressed previously in its Memorials and that generally are undisputed by Resolute or by Canada: (1) reparation for losses incurred “by reason or arising out of” a breach under Articles 1116 and 1117 is interpreted consistently with the general standard of causation under international law;⁶¹ (2) causation under international law and under NAFTA Chapter 11 requires the investor to establish some “sufficient causal link”;⁶² (3) a “sufficient causal link” exists when the breach is not only the factual cause, but also the proximate cause of the harm;⁶³ (4) factual causation

⁵⁸ Second United States 1128 Submission ¶ 23 (citing CL-131, *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 127 (Jan. 26, 2006) and RL-059, *S.D. Myers* Partial Award ¶ 261).

⁵⁹ See Resolute Reply Memorial ¶¶ 197-198, 208; see also *id.* ¶¶ 96-106.

⁶⁰ Mexico did not address these issues in its submission.

⁶¹ Second United States 1128 Submission ¶¶ 30-31; Resolute Reply Memorial ¶ 369; Counter-Memorial of Canada on Merits and Damages ¶ 331 (Apr. 17, 2019) (“Canada Counter-Memorial”).

⁶² Second United States 1128 Submission ¶ 32; Resolute Reply Memorial ¶ 369; Canada Counter-Memorial ¶¶ 329-30, 334.

⁶³ Second United States 1128 Submission ¶¶ 30-33; Resolute Reply Memorial ¶ 369; Canada Counter-Memorial ¶ 335.

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relies on the but-for test;⁶⁴ and (5) proximate causation excludes losses that are too “remote” and relies on flexible criteria such as “directness,” “foreseeability,” or “proximity,” among others.⁶⁵ These basic principles reflect the purpose of full reparation that “must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”⁶⁶

36. Resolute notes that the United States makes no mention of support for Canada’s unfounded legal arguments relating to causation and damages, including Canada’s claim that lost profits are too controversial to be recoverable under NAFTA Chapter 11,⁶⁷ and its arguments that concurrent causes necessarily render the causal nexus indirect;⁶⁸ or that quantification of damages based on market forecasts is inherently speculative.⁶⁹

⁶⁴ Second United States 1128 Submission ¶ 30; Resolute Memorial ¶¶ 11-12, 161, 266, 289-292, 308; Resolute Reply Memorial ¶¶ 1, 10, 24, 369, 380-384; Canada Counter-Memorial ¶ 335.

⁶⁵ Second United States 1128 Submission ¶¶ 31-33; Resolute Memorial ¶¶ 369, 382; Canada Counter-Memorial ¶¶ 334-35. Resolute underscores that, despite the formulation of the proximate causation standard in the Second United States 1128 Submission (at ¶ 33), the sources cited in support for this proposition confirm the position taken by Resolute and by Canada that the criteria of “directness”, “foreseeability” or “proximity” are not cumulative conditions. Rather, they are alternative criteria that can be used with flexibility depending on the facts of each case: “In some cases, the criterion of ‘directness’ may be used, in others ‘foreseeability’ or ‘proximity’.” CL-145, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* at art. 31, cmt. 10 (2001).

⁶⁶ RL-183, *Case Concerning the Factory at Chorzów (Germany v. Poland)* Judgment, 1928 P.C.I.J. (ser. A) No. 17, 13 September 1928, p. 47, ¶ 125 (cited in Canada Counter-Memorial ¶ 331; Resolute Memorial ¶ 291).

⁶⁷ Canada Rejoinder Memorial ¶¶ 212, 215.

⁶⁸ Canada Rejoinder Memorial ¶ 240.

⁶⁹ Canada Rejoinder Memorial ¶¶ 246-50.

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37. The causation and damages principles cited by the United States are fulfilled by Resolute in the present case. Resolute lost profits as the direct, but-for and foreseeable consequence of the bailout package that GNS gave to its national champion. Resolute's losses were not only foreseeable, but foreseen and intended.

38. The United States recognizes specifically the impact that deliberate intent may have on damages: "International as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure."⁷⁰ Here the consequences are proximate, not remote, and the intent is admitted.

Respectfully submitted,



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⁷⁰ Second United States 1128 Submission ¶ 31, n.49 (citing *Dix (U.S. v. Venezuela)*, 9 R.I.A.A. 119, 121).