BEFORE THE TRIBUNAL 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

SECOND SUBMISSION OF THE UNITED MEXICAN STATES

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1. The Government of Mexico makes this submission pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA) with respect to a question of interpretation of the NAFTA.[1] Mexico takes no position on the facts of this dispute. The fact that a question of interpretation arising in the proceeding is not addressed in this submission should not be taken to constitute Mexico's concurrence or disagreement with a position taken by either of the disputing parties.

Article 1102(3) (National Treatment)

2. One of the essential disciplines in NAFTA is national treatment.[2] Article 1102 sets out the national treatment obligation in Chapter Eleven (Investment). According to that provision, a NAFTA Party shall accord to investors of another NAFTA Party and their investments

[1] Article 1128 (Participation by a Party): "On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement."

[2] Distinguished authors have expressed that "[t]he principle of non-discrimination on the basis of nationality is at the core of the Parties' NAFTA obligations. Several NAFTA Chapters address national treatment. For example, in Chapters 3, 10, 14, and 17, the Parties adopted national treatment obligations with respect to trade in goods, government procurement, financial services, and intellectual property." Meg. N. Kinnear et al., *Investment Disputes under NAFTA* (Kluwer Law International, 2009), p. 10-1102.

"treatment no less favorable than that it accords, in like circumstances," to its investors and their investments with respect to "the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

3. As a general principle, the national treatment obligation in Article 1102 precludes discriminatory treatment on the basis of nationality, and the NAFTA Parties have been consistent on this point, as Canada explained in paragraph 250 of its Counter-Memorial.[3] Accordingly, not any difference in treatment results in a national treatment violation. Instead, as Canada explained, "[t]he purpose of [Article 1102] is… to ensure that the NAFTA Parties do not treat investors and investments that are 'in like circumstances' differently based on their nationality".[4]

4. Article 1102(3) provides that:

> "The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part."

5. This provision clarifies the treatment set out in Article 1102, paragraphs 1 and 2, for purposes of states or provinces of the NAFTA Parties. The United States has expressed the view, and Mexico concurs, that:

> "[Article 1102(3)] recognizes that states and provinces may have different standards for in-states (or in-province) and domestic out-of-state (or out-of-province) investors or their investments. Where a state or province accords different treatment to in-state (or in-province) investors or their investments and domestic out-of-state (or out-of-province) investors or their investments, investors from another NAFTA Party in like circumstances, or their investments, are entitled to receive the better of the treatment accorded by the state or province."[5]

6. However, the 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. In other words, "nationality must still form the basis for the least favorable treatment in order for that treatment

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[3] *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL), Canada's Counter-Memorial (17 April 2019).

[4] Canada's Counter Memorial, para. 90. See also, *Vento Motorcycles, Inc., v. United Mexican States* (ICSID Case No. ARB(AF)/17/3) United States' Submission pursuant to Article 1128, 23 August 2019, para. 4 ("[Article 1102] is not intended to prohibit all differential treatment among investors or investments. Rather, it is designed only to ensure that the Parties do not treat entities that are 'in like circumstances' differently based on nationality"), and Meg. N. Kinnear et al., *Investment Disputes under NAFTA* (Kluwer Law International, 2009), p. 1102-51 ("It seems unlikely that the NAFTA Parties… intended that any difference in treatment whatsoever could result in a national treatment violation. A claimant must meet its burden of proof that it is in like circumstances with the more favorable treated entity or class of entities, and that it has been accorded less favorable treatment that flows from, arises out of, or is otherwise connected to nationality.").

[5] *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL), United States' Submission pursuant to Article 1128, 14 June 2017, para. 16.

to constitute a breach of Article 1102."[6] Canada explains this point, and Mexico concurs, in the following terms:

> "[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 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".[7]

7. Therefore, the interpretation that Article 1102(3) does not require proof of nationality-based discrimination is incorrect.

8. The argument that the reference to the "nationality" of the investor of a Party in Article 1102(4)(b), demonstrates that where the NAFTA Parties intended to prohibit discrimination on the bases of nationality they did so expressly, does not support that interpretation that the lack of the reference to "nationality" in Article 1102(3) shows that this provision does not require roof of nationality-based discrimination. Article 1102(4) starts with the phrase "for greater certainty", which, as Canada mentioned, "makes it clear that [it] does not create a prohibition on nationality-based discrimination that does not already exist in Article 1102. Rather, it clarifies that the prohibition on nationality-based discrimination also applies to the requirement set out in Article 1102(4)."[8]

9. The NAFTA Parties have consistently agreed that Article 1102 is designed to protect against a discriminatory treatment based on the nationality of the foreign investor or the investment. The consensus is on Article 1102 in its entirety, not on Article 1102(1) and (2) only.

10. Accordingly, the *Vienna Convention on the Law of the Treaties* requires giving effect to common positions of the NAFTA Parties, such as in this case. Article 31(3) addresses the role of the parties to a treaty:

> "3. There shall be taken into account, together with the context:
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> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
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> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
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> (c) any relevant rules of international law applicable in the relations between the parties."

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[6] *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL), Canada's Rejoinder (4 March 2020), para. 97.

[7] Canada's Rejoinder, para. 98.

[8] Canada's Rejoinder, para. 102.

11. The International Law Commission, which was responsible for drafting the *Vienna Convention*, commented the following regarding Article 31(3)(a):

> *"Paragraph* 3(a) specifies as a further authentic element of interpretation to be taken into account together with the context any subsequent agreement between the parties regarding the interpretation of the treaty… But it is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty, it is to be regarded as forming part of the treaty. Thus, in the *Ambatielos* case [(Preliminary Objection), I.C.J. Reports 1952, p. 44] the Court said: "...the provisions of the Declaration are in the nature of an interpretation clause, and, as such, should be regarded as an integral part of the Treaty...". Similarly, 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.[9] [Emphasis added; footnotes omitted.]

12. The Commission considered that the subsequent practice of the parties to a treaty is also an authentic means of interpreting and applying the treaty:

> *"Paragraph* 3(b) then similarly specifies as an element to be taken into account together with the context: "any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation". The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty. Recourse to it as a means of interpretation is well-established in the jurisprudence of international tribunals. In its opinion on the *Competence of the ILO to Regulate Agricultural Labour* the Permanent Court said: "If there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the Treaty." At the same time, the Court referred to subsequent practice in confirmation of the meaning which it had deduced from the text and which it considered to be unambiguous. Similarly, in the *Corfu Channel* case, the International Court said: "The subsequent attitude of the Parties shows it has not been their intention, by entering into the Special Agreement, to preclude the Court from fixing the amount of the compensation." …The Commission considered that subsequent practice establishing the understanding of the parties regarding the interpretation of a treaty should be included in paragraph 3 as an authentic means of interpretation alongside interpretative agreements..."[10] [Emphasis added; footnotes omitted.]

13. Although formal notes of interpretation issued by the ministerial-level Free Trade Commission clearly constitutes "agreements" as to the meaning of the NAFTA, it is not

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[9] *United Nations, Yearbook of the International Law Commission 1966* (*UN Yearbook*) (New York: 1967) (U.N. General Assembly Doc. A/CN.4/SEA.A/1966/Add.1), Vol. II, p. 221 at para. 14.

[10] *UN Yearbook*, p. 221 at para. 15.

necessary for an "agreement" to be manifested in a similarly formal manner to fall within the meaning of Article 31(3) of the Vienna Convention.[11]

14. Common positions of the parties to the treaty are also capable of constituting an "agreement", or a subsequent practice establishing the agreement of the parties as to the scope and meaning of the treaty, provided that the points of consensus can be discerned.[12]

15. In sum, the consensus among the NAFTA Parties is evident: the national treatment obligation in Article 1102 (in its entirety) is designed to protect against a discriminatory treatment based on the nationality of the foreign investor or the investment. Therefore, Article 31(3) of the *Vienna Convention* requires giving effect to the common positions of the NAFTA Parties when interpreting the national treatment obligation set out in Article 1102.

Respectfully submitted,

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Secretariat of Economy

April 23, 2020

[11] *Methanex Corporation v. United States of America (UNCITRAL),* Final Award (3 August 2005), Part II, Chapter B, paras. 19-20; *Canadian Cattlemen for Fair Trade v. United States of America (UNCITRAL)*, Final Award (28 January 2008), para. 207.

[12] *Aguas del Tunari, S.A. v. Republic of Bolivia (ICSID),* Decision on Respondent's Objections to Jurisdiction (21 October 2005), paras. 251-263.