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Before the Additional Facility of the
**INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTES (ICSID)**

MERCER INTERNATIONAL INC.,
Claimant,

v.

GOVERNMENT OF CANADA,
Respondent.

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

CLAIMANT'S RESPONSE TO ARTICLE 1128 SUBMISSIONS

12 June 2015

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I. INTRODUCTION

1. Claimant Mercer International Inc. (“Mercer”) respectfully submits its response to the 8 May 2015 submissions from the Government of the United States of America (“United States 1128 Submission”) and the Government of the United Mexican States made pursuant to NAFTA Article 1128 and Procedural Order No. 7.

2. Mercer has addressed the core of the interpretation issues raised by the United States and Mexico in its Memorial dated 31 March 2014 and Reply dated 16 December 2014. Accordingly, this response will focus on the clarification of six salient points where the United States and Mexico appear either to misunderstand or to misrepresent the current state of international law and its application or relevance to this case.

3. First, the United States attempts to conjure limiting language into the delegation of authority provision of NAFTA Article 1503(2), by arguing that the delegation of governmental authority must be “affirmative”. No such restriction or qualification exists, and Article 1503(2) can only be construed properly to cover *all* delegations of authority to a state enterprise, including express, implied, or apparent. In any event, even if an “affirmative” delegation requirement could properly be read into Article 1503(2), the requisite “affirmative” delegation of governmental authority is present in the instant case.

4. Second, the United States’ interpretation of a continuing course of conduct with respect to the limitations period is not relevant to the question regarding when Mercer first acquired knowledge of the treaty breaches at issue, particularly with respect to the discrimination components of Mercer’s claims.

5. Third, Mercer essentially agrees with the United States’ position that the “procurement” subject to Article 1108 exemption “includes specifications in a procurement

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contract that are *integral* parts of a procurement contract.” (Emphasis added.) Mexico, however, is incorrect in asserting 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’.” The mere existence of a contractual term in a procurement contract cannot make that specific term “procurement” within the meaning of the Article 1108 exemption, unless it is a term related and integral to the procurement. A state cannot immunize a discriminatory, non-procurement necessary measure simply by placing it in a procurement contract. Such a construction would elevate form over substance.

6. Fourth, the United States’ and Mexico’s position regarding national treatment and most-favored-nation claims under Articles 1102 and 1103 would impermissibly eliminate *de facto* claims of discrimination. As consistently decided by NAFTA tribunals (and as the United States and Mexico at least superficially proffer), claims under Articles 1102 and 1103 are not limited to *de jure* discrimination. Therefore Claimant need not prove that the discrimination was based on nationality. It need only prove a discriminatory impact — treatment “less favorable” under the express terms of NAFTA Articles 1102 and 1103.

7. Fifth, there is no carve-out under international law that exempts discriminatory state acts from fair and equitable treatment requirements. The United States and Mexico concede that the Article 1105 standard of treatment has expanded significantly. Contrary to their protestations, however, tribunals have consistently recognized that the international standard of treatment includes protections against discrimination. Furthermore, NAFTA and CAFTA tribunals consistently have recognized that the international minimum standard of treatment includes protections against acts that are discriminatory, arbitrary, non-transparent, or grossly

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unfair, unjust or idiosyncratic. Neither the United States nor Mexico expresses specific objections in the Submission to the current state of international law in this regard.

8. Sixth, Mexico and the United States assert that the NAFTA Parties have repeatedly expressed a common view and understanding on certain NAFTA provisions and that the Tribunal should take into account this common view when addressing the interpretation of NAFTA provisions. The United States and Mexico fail to note that NAFTA has a specific mechanism for NAFTA Parties to issue “subsequent agreements”. The Free Trade Commission is the sole body that possesses the authority to interpret NAFTA; such authority does not lie in the mere coordinated expression of certain points of interpretation.

II. THE UNITED STATES AND MEXICO MISCONSTRUE DELEGATION OF AUTHORITY TO STATE ENTERPRISE UNDER ARTICLE 1503(2)

9. NAFTA Article 1503(2) reads:

Each Party shall *ensure*, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party’s obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) *wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.*¹

10. NAFTA Note 45 provides guidance regarding some of the acts that would be considered a “delegation” of governmental authority: “[A] ‘delegation’ includes a legislative grant, and a government order, directive or other act transferring to the [state enterprise], or

¹ Emphasis added.

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authorizing the exercise by the [state enterprise] of, governmental authority.”² Importantly, Note 45 does not provide an exhaustive list of what can be considered to be a “delegation”.

11. Furthermore, Note 45 conspicuously lacks any qualitative description of “delegation”. For instance, and despite the United States’ argument, Note 45 contains no requirement that a delegation be “affirmative”. Inexplicably, however, the United States argues that Article 1503(2) requires an “affirmative” transfer or authorization of governmental authority by the NAFTA Party to the state enterprise at issue for a tribunal to hold jurisdiction over a breach of Article 1503(2).³ The term “affirmative”, however, can be found nowhere in Article 1503(2) or NAFTA Note 45. The term “affirmative” is mere artifice.

12. Nor have NAFTA tribunals read into Article 1503(2) a requirement of an “affirmative” delegation of government authority. The tribunal in the *UPS II* case analyzed certain measures taken by Canada Post. In reviewing those measures, the tribunal concluded that the purpose of a provision such as 1503(2) is to ensure that NAFTA Parties do not breach their obligations by virtue of the State delegating powers to state entities.⁴ Mexico confirms its agreement with this interpretation of Article 1503(2): “Mexico also notes that the purpose of [Article 1503(2)] is to prevent a NAFTA Party from evading its own obligations through the transfer of governmental authority to . . . a state enterprise.”⁵

² Even though NAFTA Note 45 refers to monopolies, there is no reason not to apply this definition to state enterprises. Mercer addressed this issue in its Memorial, at ¶ 412; *see also*, CA-16, *United Parcel Service of America Inc. v. Government of Canada* (NAFTA), UNCITRAL (Award, 24 May 2007) (Keith, Cass, Fortier) (“*UPS II* (NAFTA)”), ¶ 69.

³ United States 1128 Submission, ¶ 2.

⁴ CA-16, *UPS II* (NAFTA), ¶ 70 (“An essential purpose of the two particular paragraphs is to ensure that a State Party does not avoid its own obligations under the Agreement as a whole (in terms of article 1502(3)(a)) or under chapters 11 and 14 (in terms of article 1503(2)) by delegating governmental authority to a monopoly (private or public) or to a State enterprise.”).

⁵ Mexico 1128 Submission, ¶ 7.

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13. Mercer agrees with Mexico and the *UPS* tribunal regarding the purpose of Article 1503(2). This purpose is fulfilled, however, only to the extent that Article 1503(2) is construed to cover *all* delegations of authority to a state enterprise, whether express, implied, or apparent, and including even instances in which the State subsequently approves or ratifies the conduct of its state enterprise after the fact.

14. In any event, there can be no denial that the requisite delegation of governmental authority is present in the instant case, “affirmative” or otherwise. The BC Government made the requisite delegation of authority through BCUC Order G-38-01. In Order G-38-01, the BCUC expressly “*direct{ed}*” BC Hydro to negotiate and thereby determine and regulate the setting of GBLs (and, correspondingly, set self-generators’ self-supply obligations and restrict electricity sales to third parties) with its customers, and BC Hydro thereafter exercised that delegated authority.⁶ Too, in Mercer’s case, the GBL and related restrictions on Celgar’s ability

⁶ C-5, BCUC, Order Number G-38-01 and Accompanying Commission Staff Report (5 April 2001), ¶ 1 (emphasis added) (“Order G-38-01”). See Mercer Reply ¶¶ 588, *et seq.* Notably, Mercer agrees with the United States in that a state enterprise’s exercise of “regulatory, administrative or governmental authority” is the exercise of “the NAFTA Party in its *sovereign capacity*; a state enterprise is not exercising ‘governmental authority’ merely because it acts as a commercial participant in the marketplace.” United States 1128 Submission, ¶ 3 (emphasis in original). Mercer has established that BC Hydro’s acts in determining and setting GBLs are exercises of regulatory and governmental authority. See Mercer Reply, ¶¶ 597, *et seq.*

Mexico, like Canada, misses the mark when focusing on the fact that the BCUC granted BC Hydro wide discretion in setting GBLs. Mercer has not argued that a state enterprise acting with wide discretion “in the manner in which it carries on business” is acting in a governmental or regulatory capacity. See Mexico 1128 Submission, ¶ 9. Rather, in response to Canada’s assertions that the essential regulatory aspects of setting GBLs remained with the BCUC (and not BC Hydro), Mercer pointed out that the BCUC granted, and BC Hydro in fact acted, with wide discretion in setting GBLs, including the fundamental regulatory aspects, confirming that BC Hydro was in fact acting in a regulatory and government function in determining and setting GBLs. See Mercer Reply, ¶¶ 590-595.

We also address Mexico’s interpretation distinguishing sovereign and commercial acts, which is confusing. Mercer agrees that BC’s actions in authorizing BC Hydro to enter into commercial contracts is not a delegation of governmental authority. Here, however, what is at issue is the power to restrict a private party’s ability to engage in electricity sales with third-parties, and, relatedly, to limit the obligations of Celgar’s utility to serve its self-generating

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to sell below-GBL energy to third parties, contained in its 2009 EPA with BC Hydro, subsequently were approved and made effective by the BCUC, when it approved the EPA on 31 July 2009. Thus, even if Canada had argued that BC Hydro had been acting without color of State authority, which it has not, the BCUC's ratification of those provisions both confirms the delegation to BC Hydro, and provides an independent basis of State action.

III. THE UNTIED STATES' ARGUMENTS WITH RESPECT TO THE LIMITATIONS PERIOD ARE UNSUPPORTED

A. The United States Has Misconstrued the Limitations Period of Articles 1116(2) and 1117(2) Applicable in this Case

15. As the United States points out, "NAFTA Articles 1116(2) and 1117(2) require a claimant to submit a claim to arbitration within three years of the 'date on which' the investor or enterprise 'first acquired, or should have first acquired, knowledge' of (i) the alleged breach, and (ii) loss or damage incurred by the claimant or enterprise."⁷ The United States further states that an investor "first acquires knowledge of an alleged breach and loss at a particular moment in time."⁸ Mercer agrees with the United States on these points; accordingly, Mercer established in

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customer. These are governmental not commercial acts because private parties lack the power to impose such restrictions and limitations on their own.

It matters not, as Mexico contends, that BC delegated "wide discretion" to BC Hydro. Mexico 1128 Submission, ¶ 9 ("Indeed, Mexico would observe that vesting a state enterprise with 'wide discretion' in a manner in which it carries on business, including its procurement practices, militates against the notion that such amounts to a delegation of *governmental* authority") (emphasis in the original). At issue is how BC Hydro exercised its delegated authority, and whether it stepped into the realm of regulatory or other inherently governmental activity, as it plainly did here. Indeed, if BC Hydro as a commercial actor had possessed the authority to control self-generator sales of their self-generated electricity, and to limit a self-generator's ability to purchase electricity, from BC Hydro while selling their own power, it would have had no reason to go to the BCUC to seek Order G-38-01 in the first place.

⁷ United States 1128 Submission, ¶ 5.

⁸ United States 1128 Submission, ¶ 5.

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its Memorial and Reply submissions that Mercer first acquired knowledge of the measures that breached Canada's investment protection obligations within the three-year limitations period.⁹

16. Instead of addressing the specific statute of limitations issue in controversy in this case, however — namely, the date upon which Canada's breaching measures became effective and therefore Mercer could have first acquired knowledge of them — the United States focuses on a mostly irrelevant interpretative point regarding continuing courses of conduct.¹⁰ The United States argues that first knowledge cannot be acquired at several points in time, and that a continuing course of conduct “does not renew the limitations period under Article 1116(2) and 1117(2).”¹¹

17. But a continuing course of conduct analysis is not relevant to the limitations period in this case. As Mercer noted in its Reply, this case involves two distinct sets of measures. First, Mercer challenges as discriminatory BCUC Order G-48-09, issued on 6 May 2009, which imposed a net-of-load standard on Celgar, whereas all other pulp mills in BC were entitled to access to utility power while selling self-generated electricity based on their historical usage. Mercer's Request for Arbitration was filed on 30 April 2012, and thus this claim falls squarely within the three-year limitations period. No one argues otherwise.

18. The second set of measures at issue concerns the GBL and related restrictions in Celgar's 2009 EPA with BC Hydro, approved and made effective by the BCUC on 31 July 2009, as noted above.¹² Canada has argued for an earlier trigger date, on the theory that Mercer knew how it had been treated when BC Hydro set its GBL, or alternatively, when it signed its EPA,

⁹ See Mercer Reply, ¶¶ 604, *et seq.*

¹⁰ United States 1128 Submission, ¶ 5.

¹¹ United States 1128 Submission, ¶ 5.

¹² See Canada Counter-Memorial, ¶339 (“[A] GBL, however, remains of no force until it, like the other EPA terms and conditions, receives the approval of the BCUC.”).

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even though (i) the impact of the measure was not known on the date BC Hydro set the GBL, (ii) the measure was not yet in effect on the date the contract was signed, and (iii) Mercer had not yet acquired knowledge of how its comparators were treated.

19. Indeed, to the extent that Mercer's claims involve a discriminatory treatment component, discriminatory treatment is not known until the later of (i) the effective date of Mercer's treatment and (ii) the date on which the treatment of a more favorably treated comparator is effective and made known to Mercer. The fact that the measures at issue involve ongoing courses of conduct is not relevant to the limitations period discussion in this case. This case involves treatment of Celgar and treatment of comparators, and the specific dates upon which Mercer could have acquired knowledge of the breaches (and consequent damage flowing from such breaches), caused by such *separate* instances of treatment.

20. The United States has misunderstood the application of Articles 1116(2) and 1117(2) to this case. Whether or not one views the measures that breach Canada's Chapter 11 obligations as continuing courses of conduct or discrete acts, the point at which Mercer acquired first knowledge (or the "trigger date") of those measures and the loss or damages incurred by the same was within the three-year limitations period. The earliest possible trigger date is 31 July 2009 — the day the measure imposed on Celgar took effect. And, with respect to Mercer's claims that BC treated Tembec and HSPP more favorably in their 2009 and 2010 EPAs, respectively, the earliest possible trigger date is the date on which the Tembec and HSPP EPAs took effect, both of which occurred later in time.

21. The United States also is incorrect in its unsupported argument that the relevant date for purposes of the limitations period in the context of national treatment and most-favored-nation claims is the later of "(1) the *first* comparator in like circumstances received treatment, or

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(2) the investor or investment received less favorable treatment.” This “first-comparator-only” argument has no basis in the NAFTA text, and is inconsistent with the objective of ensuring treatment no less favorable to nationals of NAFTA parties.

22. The United States appears to be concerned about a scenario in which a Government affords treatment to a claimant one day, and affords better treatment at different points in time to a class of comparators, *all of which it treats the same*. In that case, Mercer agrees that the limitations period runs from the date the claimant learns of the more favorable treatment to the first comparator — but only because everyone else was afforded the *same* treatment as that comparator. In such a case, the “more favorable” is the same as to all comparators, and the relevant date is the earliest date on which that treatment is afforded or the Claimant first acquires knowledge.

23. But that is not this case. Here, BC Hydro and BC did not treat all comparators the same. Each time Canada affords a comparator still better treatment than the treatment afforded to Celgar, Mercer has a new claim. This is not a resetting of the limitations period. This is a separate limitations period for each claim.

24. A simple example makes the point. Suppose Canada in Year 1 allowed Celgar to sell 10 percent of its below-load electricity, and in Year 2 allowed Canadian Comparator 1 to sell 12 percent. Mercer would have until Year 5 to file a NAFTA claim. Suppose further that in Year 6 Canada were to allow Canadian Comparator 2 to sell 75 percent of its below-load electricity. A claim by Mercer that Comparator 2 received more favorable treatment is not foreclosed by the fact that Canada’s treatment of Comparator 1 came more than three years’ earlier. The treatment afforded Comparator 2 is a new instance of less favorable treatment that has no linkage to the treatment afforded Comparator 1 because it is different treatment.

IV. THE PROCUREMENT EXCEPTION OF NAFTA ARTICLE 1108 CANNOT PROVIDE NAFTA PARTIES WITH A LOOPHOLE TO VIOLATE THE NATIONAL AND MOST-FAVORED-NATION TREATMENT PROTECTIONS AFFORDED IN NAFTA CHAPTER 11

25. Mercer essentially is in agreement with the United States' position (citing its Rejoinder in the *ADF* case) that the "procurement" subject to Article 1108 exemption "includes specifications in a procurement contract that are integral parts of a procurement contract."¹³ As the *ADF* tribunal established, "procurement" refers to "the obtaining by purchase by a governmental agency or entity of title to . . . possession of, for instance, goods, supplies, materials and machinery."¹⁴

26. As Mercer established in its Memorial and Reply, the GBL-related provisions of Celgar's 2009 EPA were not integral to the procurement or purchase by BC Hydro of a portion of Celgar's self-generated electricity.¹⁵ Simply stated, the GBL and its related restrictions *prohibit Celgar from selling other electricity, not purchased or paid for by BC Hydro, to third parties*. These are regulatory measures that effectively require Celgar to self-supply up to its GBL. They are not "integral" to BC Hydro's procurement, or necessary to secure for BC Hydro the benefits of its deal with Celgar, because these restrictions in no way affect the terms or conditions of Celgar's delivery to BC Hydro of the 238 GWh/year of firm energy Celgar committed to supply to BC Hydro in its 2009 EPA.¹⁶

27. Their mere existence in a procurement contract does not make the GBL and its related restrictions procurement-related measures. Mexico goes too far in its argument that "*all*

¹³ See United States 1128 Submission, ¶ 8.

¹⁴ CA-1, *ADF Group Inc. v. United States of America* (NAFTA), ICSID Case No. ARB (AF)/00/1, Award (9 January 2003) (Feliciano, deMestral, Lamm) ("*ADF* (NAFTA)"), ¶ 161.

¹⁵ See Mercer Memorial, ¶ 326; Mercer Reply, ¶¶ 616, *et seq.* BC Hydro purchases only electricity Celgar generates above its assigned GBL of 349 GWh/year.

¹⁶ See Memorial, ¶ 332; C-221, 2009 Celgar EPA, §§ 5, 7.3.

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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’ and are thus exempted from the application of Articles 1102 and 1103.”¹⁷ Such a construction would elevate form over substance, and enable a NAFTA Party to avoid its obligations under Chapter 11 simply by tucking regulatory and other measures into procurement agreements whenever the opportunity arose.

V. ARTICLES 1102 (NATIONAL TREATMENT) AND 1103 (MOST-FAVORED-NATION) ARE NOT LIMITED TO CLAIMS OF *DE JURE* DISCRIMINATION

A. The United States’ and Mexico’s Professed Requirement of Proof of Nationality-Based Discrimination Would Eliminate *De Facto* Claims of Discrimination under Articles 1102 and 1103

28. Although the United States and Mexico superficially concede that discrimination claims under Articles 1102 and 1103 encompass claims of *de facto* discrimination,¹⁸ both essentially argue that such *de facto* discrimination claims must prove the elements of a *de jure* discrimination claim. Such a construction is without basis.

29. For example, the United States asserts on the one hand: “Nationality-based discrimination under Articles 1102 and 1103 may be *de jure* or *de facto*. ***De jure discrimination occurs when a measure on its face discriminates*** between investors or investments in like circumstances ***based on nationality.***” The United States, on the other hand, also asserts: “***De facto discrimination occurs when a facially neutral measure with respect to nationality is***

¹⁷ Mexico 1128 Submission, ¶ 6 (emphasis added).

¹⁸ NAFTA tribunals have recognized that Article 1102 and 1103 protections extend to *de facto* discrimination claims. CA-1, *ADF*, ¶ 157; see also, e.g., CA-3, *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (NAFTA), ICSID Case No. ARB(AF)/04/05 (Award, 21 November 2007) (Cremades, Rovine, Siqueiros T.) (“*ADM (NAFTA)*”) ¶ 193, and CA-5, *Corn Products International Inc. v. United Mexican States* (NAFTA), ICSID Case No. ARB(AF)/04/1 (Decision on Responsibility, 15 January 2008) (Lowenfeld, de la Vega, Greenwood) (“*CPI (NAFTA)*”), ¶ 115.

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applied in a discriminatory fashion ***based on nationality.***¹⁹ This appears to be a distinction without much difference. In both cases, the United States appears to require evidence that the measure is based on nationality.

30. The United States appears to be arguing that while a *de facto* discrimination claimant does not need to prove that a measure discriminates based on nationality on its face, the claimant still must prove that a facially neutral measure is a measure “with respect to nationality.” Mercer submits that the United States’ attempt to distinguish the elements of a *de facto* discrimination from those of a *de jure* discrimination claim is fundamentally flawed. It is a distinction with no difference that has been rejected by several tribunals. NAFTA does not limit claims under Article 1102 to 1103 only to discrimination that blatantly is based on nationality.

31. As consistently decided by NAFTA tribunals, Article 1102 “by its terms suggests that it is sufficient to show less favorable treatment for the foreign investor in like circumstances”,²⁰ and claimants are not required to show separately that the less than favorable

¹⁹ United States 1128 Submission, ¶ 12 (emphasis added). *See also* Mexico 1128 Submission, ¶ 15 (“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 is properly inferred in all of the circumstances that a facially neutral measure has the effect of discriminating against foreign investors as a class.”)

²⁰ CA-6, *Marvin Roy Feldman Karpa v. United Mexican States* (NAFTA), ICSID Case No. ARB(AF)/99/1 (Award, 16 December 2002) (Kerameus, Covarrubias Bravo, Gantz) (“*Feldman* (NAFTA)”), ¶ 181 (“It is clear that the concept of national treatment as embodied in NAFTA and similar agreements is designed to prevent discrimination on the basis of nationality, or “by reason of nationality.” (U.S. Statement of Administrative Action, Article 1102.) However, ***it is not self-evident, as the Respondent argues, that any departure from national treatment must be explicitly shown to be a result of the investor’s nationality. There is no such language in Article 1102. Rather, Article 1102 by its terms suggests that it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances.*** In this instance, the evidence on the record demonstrates that there is only one U.S. citizen/investor, the Claimant, that alleges a violation of national treatment under NAFTA Article 1102 (transcript, July 13, 2001, p. 178), and at least one domestic investor (Mr. Poblano) who has been treated more favorably. For practical as well as legal reasons, the Tribunal is prepared to assume that the differential treatment is a result of the Claimant’s nationality, at least in the absence of any evidence to the contrary.”) (emphasis added).

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treatment was based on nationality.²¹ To prove a claim under NAFTA Articles 1102 or 1103, the investor must show only that (1) that the contracting State provided “treatment” with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments, (2) that the investment is in like circumstances to other investments within the territory of a contracting State, and (3) that such investment has received less favorable treatment.²² An intent to discriminate based on nationality is not a necessary element.

32. Before it launches into its fanciful depiction of what it believes to be a cognizable *de facto* discrimination claim, the United States appears to concede as much in its Article 1128 Submission: “Articles 1102 (National Treatment) and 1103 (Most-Favored-Nation Treatment) require the NAFTA Parties to accord no less favorable treatment to investors and investments of another Party to the extent they are in like circumstances with a Party’s own investors and investments or those of a third country.”²³

²¹ CA-15, *International Thunderbird Gaming Corp. v. United Mexican States* (NAFTA), UNCITRAL (Award, 26 January 2006) (van den Berg, Portal Ariosa, Wälde) (“*Thunderbird* (NAFTA)”, ¶ 177; *see also*, CA-14, *S.D. Myers, Inc. v. Government of Canada* (NAFTA), UNCITRAL (Second Partial Award, 21 October 2002) (Hunter, Schwartz, Chiasson) (“*S.D. Myers II* (NAFTA)”, ¶¶ 250, 252; CA-13, *Pope & Talbot Inc. v. Government of Canada* (NAFTA), UNCITRAL (Award on the Merits of Phase 2, 10 April 2001) (Dervaird, Greenberg, Belman) (“*Pope & Talbot II* (NAFTA)”, ¶ 79).

²² *See* CA-3, *ADM* (NAFTA), ¶ 193; CA-6, *Marvin Roy Feldman Karpa v. United Mexican States* (NAFTA), ICSID Case No. ARB(AF)/99/1 (Award, 16 December 2002) (Kerameus, Covarrubias Bravo, Gantz) (“*Feldman* (NAFTA)”, ¶ 181 (In such a case where there is a *de facto* difference in treatment, this difference would be able to be proven on its own based on the discriminatory results, “at least in the absence of any evidence to the contrary.”); CA-14, *S.D. Myers, Inc. v. Government of Canada* (NAFTA), UNCITRAL (Second Partial Award, 21 October 2002) (Hunter, Schwartz, Chiasson) (“*S.D. Myers II* (NAFTA)”, ¶ 254, (“Intent is important, but protectionist intent is not necessarily decisive on its own. The existence of an intent to favor nationals over non-nationals would not give rise to a breach of 1102 of the NAFTA if the measure in question were to produce no adverse effect on the non-national complainant. The word ‘treatment’ suggests that the practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11.”); CA-82, *Bilcon of Delaware et al v. Government of Canada* (NAFTA), UNCITRAL (Award on Jurisdiction and Liability, 17 March 2015) (Simma, McRae, Schwartz) (“*Bilcon* (NAFTA)”, ¶ 719 (“It should be noted that the *UPS* test does not require a demonstration of discriminatory intent. . .”).

²³ United States 1128 Submission, ¶ 9.

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33. As the tribunal in *Pope & Talbot II* pointed out, if NAFTA Articles 1102 and 1103 required proof of nationality-based treatment, this “would tend to excuse discrimination that is not facially directed at foreign owned investments.”²⁴ The Tribunal therefore should reject the highly restrictive interpretation advocated by the United States and Mexico.

34. Furthermore, contrary to the United States’ and Mexico’s arguments regarding the interpretation of Articles 1102 and 1103,²⁵ a claimant only has the burden of proving *prima facie* that it complies with the *UPS* three prong test.²⁶ Once it has done so, the burden shifts to the State to prove that the measure reflected a rational policy that was justified.²⁷

VI. THE UNITED STATES’ AND MEXICO’S ARGUMENTS WITH RESPECT TO ARTICLE 1105 (MINIMUM STANDARD OF TREATMENT) ARE ERRONEOUS

A. The United States Concedes an Evolving 1105 Standard but Misunderstands International Law on Discrimination

35. According to NAFTA Article 1105(1), “[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.” In 2001, the NAFTA Free Trade Commission (“FTC”) issued Notes of Interpretation in which it stated that “Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party,” and

²⁴ CA-13, *Pope & Talbot II*, ¶ 79.

²⁵ See United States 1128 Submission, ¶ 13; Mexico 1128 Submission, ¶ 14.

²⁶ See Mercer Memorial, ¶ 448, citing CA-16, *UPS II (NAFTA)*, ¶ 83. See also CA-6, *CPI (NAFTA)*, ¶ 117.

²⁷ See CA-82, *Bilcon (NAFTA)*, ¶ 723 (“Consistently with the approach taken in the Feldman case, however, the present Tribunal is also of the view that once a *prima facie* case is made out under the three-part *UPS* test, the onus is on the host state to show that a measure is still sustainable within the terms of Article 1102. It is the host state that is in a position to identify and substantiate the case, in terms of its own laws, policies and circumstances, that an apparently discriminatory measure is in fact compliant with the “national treatment” norm set out in Article 1102.”); CA-13, *Pope & Talbot II (NAFTA)*, ¶ 78; CA-6, *Feldman (NAFTA)*, ¶ 177.

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that “[t]he concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”²⁸

36. The United States and Mexico both concede that this is an evolving standard.²⁹

²⁸ CA-44, OAS, NAFTA Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission (31 July 2001).

²⁹ United States 1128 Submission, ¶17 (“Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas.”) (emphasis added); Mexico 1128 Submission, ¶19 (“Regulatory action violates ‘fair and equitable treatment’ under the minimum standard of treatment where, for example, it amounts to a denial of justice, as that term is understood in customary international law”) (citing United States 1128 Submission in *Mesa Power Group v. Canada*). Investment dispute tribunals have adopted this evolutionary trend of customary international law. CA-15, *Thunderbird* (NAFTA), ¶ 194; CA-4, *Cargill* (NAFTA), ¶ 284 (recognizing the dynamic nature of the minimum standard); CA-40, *Chemtura Corp. v. Government of Canada* (NAFTA), UNCITRAL (Award, 2 August 2010) (Kaufmann-Kohler, Brower, Crawford) (“*Chemtura* (NAFTA)”), ¶ 112 (recognizing evolution of the minimum standard since the *Neer* case). Tribunals interpreting other treaties have also recognized this evolution. See, e.g., CA-37, *Railroad Development Corporation v. Republic of Guatemala* (CAFTA-DR), ICSID Case No. ARB/07/23 (Award, 29 June 2012) (Sureda, Eizenstat, Crawford) (“*RDC* (CAFTA-DR)”), ¶ 216 (interpreting the minimum standard as incorporated in CAFTA-DR); CA-35, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2 (Award, 31 October 2012) (Hanotiau, Khan, Williams) (“*Deutsche Bank*”), ¶ 419-420 (citing *Waste Management II* (NAFTA)) (interpreting BIT); CA-45, *Mondev International Ltd. v. United States of America* (NAFTA), ICSID Case No. ARB(AF)/99/2 (Award, 11 October 2002) (Stephen, Crawford, Schwebel) (“*Mondev* (NAFTA)”), ¶ 116; accord CA-10, *Merrill* (NAFTA), ¶ 213 (“today’s minimum standard of treatment is broader than that defined in *Neer* and its progeny”); CA-40, *Chemtura* (NAFTA), ¶215 (a violation does not need to be outrageous); CA-13, *Pope & Talbot II* (NAFTA), 118 (fairness standard is an ordinary one, without any threshold limitation that the conduct be egregious, outrageous or shocking, or otherwise extraordinary); CA-39, *Waste Management, Inc. v. United Mexican States* (NAFTA), ICSID Case No. ARB(AF)/00/3 (Award, 30 April 2004) (Crawford, Civiletti, Magallón Gómez) (“*Waste Management II* (NAFTA)”), ¶ 91-93 (final award cites *Mondev* (NAFTA) and ADF as rejecting outrageous *Neer* standard); CA-36, *GAMI Investment, Inc. v. Government of the United Mexican States* (NAFTA), UNCITRAL (Award, 15 November 2004) (Paulsson, Reisman, Muró) (“*GAMI* (NAFTA)”), ¶ 95 (concurring with *Waste Management II* (NAFTA)); CA-1, *ADF* (NAFTA), ¶ 179 (“[W]hat customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 {sic} when the Award in the *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development.”); CA-82, *Bilcon* (NAFTA), ¶ 443 (“NAFTA Article 1105 is, then, identical to the minimum international standard. The crucial question—on which the Parties diverge—is what is the content of the contemporary international minimum standard that the tribunal is bound to apply. 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.”).

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The United States acknowledges,³⁰ for example, that the international minimum standard of treatment has evolved to encompass, *inter alia*, protections against denial of justice.³¹

37. Similarly, NAFTA and CAFTA tribunals consistently have recognized that the international standard of treatment includes protections against acts that are discriminatory,³² arbitrary,³³ non-transparent,³⁴ or grossly unfair, unjust or idiosyncratic.³⁵ Although Canada has attempted to deny that these protections exist under Article 1105, neither the United States nor Mexico expresses specific objections to the current state of international law in this regard. In fact, the United States and Mexico, through the United States' Article 1128 Submission in *Mesa Power Group v. Canada*, acknowledge that “[r]egulatory action violates ‘fair and equitable treatment’ under the minimum standard of treatment where, for example, it amounts to a denial of justice, as that term is understood in customary international law, or *constitutes manifest arbitrariness falling below international standards.*”³⁶

³⁰ Notably, the United States, rather than pointing to the oft-invoked state practice and *opinio juris* as the source of the “crystallization” of the minimum standard of treatment into customary international law, points to Professor Jan Paulsson’s treatise on denial of justice, one 1927 Mexico-United States General Claims award and the *Loewen* Award. See United States 1128 Submission, ¶ 17, nn. 21-23.

³¹ See United States 1128 Submission, ¶ 17.

³² See CA-39, *Waste Management II* (NAFTA), ¶ 98; CA-36, *GAMI* (NAFTA), ¶ 94; CA-38, *TECO* (CAFTA-DR), ¶ 454.

³³ See CA-21, *S.D. Myers I* (NAFTA), ¶¶ 262-263; CA-10, *Merrill* (NAFTA), ¶ 187; CA-39, *Waste Management II* (NAFTA), ¶ 98; CA-36, *GAMI* (NAFTA), ¶ 94; CA-38, *TECO* (CAFTA-DR), ¶ 454.

³⁴ See CA-38, *TECO* (CAFTA-DR), ¶ 457; CA-10, *Merrill* (NAFTA), ¶ 187; CA-39, *Waste Management II* (NAFTA), ¶ 98; CA-23, *Metalclad*, ¶ 76.

³⁵ See CA-39, *Waste Management II* (NAFTA), ¶ 98 (“the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic . . .”).

³⁶ Mexico 1128 Submission, ¶ 19 (quoting United States 1128 Submission in *Mesa Power Group v. Canada*) (emphasis added).

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38. In their submissions, however, the United States and Mexico argue that a fourth pillar of protection, that against discrimination, is not included in the canon of protections afforded by the international minimum standard of treatment.³⁷ The United States and Mexico maintain that the international minimum standard of treatment does not prohibit states from distinguishing between nationals and foreigners. The United States, for example, proffers the *Methanex* decision as a prime example of the principle that a State may treat nationals and aliens differently without running afoul of international standards, absent a specific agreement to the contrary.³⁸

39. But the United States' protests are inapposite. Mercer does not maintain that the international minimum standard of treatment forbids states from distinguishing between nationals and aliens. What the international standard of treatment does forbid is treatment that is discriminatory *per se*. In the NAFTA regime, Articles 1102 and 1103 specifically address the propriety of treating a foreigner differently in relation to nationals. Article 1105, by contrast, addresses the propriety of other forms of discrimination — treating an entity differently in relation to its own milieu, where that entity happens to be a covered investment.

³⁷ Mexico1128 Submission, ¶ 20.

³⁸ United States 1128 Submission, ¶ 21.

B. Tribunal Decisions and ISDS Regimes Constitute Important Sources of International Law

40. The United States and Mexico join Canada in attacking Mercer’s understanding of the contours of Article 1105 protections.³⁹ Facing the ordinary language problem that numerous tribunals in the investor-state dispute settlement regime face in interpreting the meaning of “fair and equitable treatment,” the United States and Mexico take pains to create a distinction between fair and equitable treatment obligations as seen through discrete “crystallizations” in customary international law, and fair and equitable treatment obligations as seen through wholly unrelated, “autonomous” agreements.⁴⁰

41. But even if such a distinction is recognized, the United States and Mexico are unable to deny the broad consensus that has emerged among arbitral decisions issued *specifically interpreting NAFTA and CAFTA provisions*, which decisions themselves constitute an important source of evidence concerning the content of customary international law.⁴¹ Further, it would be difficult for the United States and Mexico colorably to argue that the near universal and absolute proliferation of investor-state dispute settlement regimes throughout the world adopting

³⁹ See Mexico 1128 Submission, ¶ 18; United States 1128 Submission, ¶ 19.

⁴⁰ See Mexico 1128 Submission, ¶ 19; United States 1128 Submission, ¶ 25.

⁴¹ See CA-37, *Railroad Development Corporation v. Republic of Guatemala* (CAFTA-DR), ICSID Case No. ARB/07/23 (Award, 29 June 2012) (Sureda, Eizenstat, Crawford) (“RDC (CAFTA-DR)”), ¶ 217; CA-82, *Bilcon* (NAFTA), ¶ 441 (“In interpreting the international minimum standard, the Tribunal also drew guidance from earlier NAFTA Chapter Eleven decisions.”)

Although not expressly mentioned, the argument of the United States and Mexico regarding state practice and *opinio iuris* aims to preserve the analysis made in the *Neer* case, which sets a high threshold for a NAFTA State to breach the minimum standard of treatment. As Mercer has explained in its Memorial and its Reply, the *Neer* standard has evolved from its original formulation, and evidence of this evolution has been recognized by several tribunals. See Mercer Memorial, ¶¶ 643-51; Mercer Reply ¶¶ 479-485.

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and executing interpretations of “fair and equitable treatment” should not be taken as evidence of state practice for purposes of considering customary international law.⁴²

42. Even in the most recent NAFTA decision, *Bilcon*, the tribunal “drew guidance from earlier NAFTA Chapter Eleven decisions.”⁴³ In that case, the tribunal decided to apply the formulation made in *Waste Management*, based on its reading of NAFTA authorities to find that today’s minimum standard of treatment is broader than the one defined by the *Neer* case.⁴⁴ The *Bilcon* tribunal further noted that the contemporary international minimum standard involves a more significant measure of protection, which has evolved through the years for a greater protection for investors.⁴⁵ This has, as the *Bilcon* tribunal has put it, been accepted by the States because the standard protects their own nationals in other countries and encourages the inflow of visitors and investment.⁴⁶

⁴² The United States and Mexico fail to recognize the increasing reality of the growing number of bilateral investment treaties recognizing standards such as “fair and equitable treatment,” and this has inevitably resulted in a change of customary law. This rapid growth was documented by the *Chemtura* tribunal when it pointed to the accelerated development of customary international law through the inclusion of fair and equitable treatment clauses in investment treaties. See CA-40, *Chemtura Corp. v. Government of Canada* (NAFTA), UNCITRAL (Award, 2 August 2010), (Kaufmann-Kohler, Brower, Crawford) (“*Chemtura* (NAFTA)”) ¶¶ 121, 236 (“The minimum standard of treatment should not be rigidly interpreted and it should reflect evolving international customary law”). See also, CA-10, *Merrill* (NAFTA), ¶ 213 (“[T]oday’s minimum standard of treatment is broader than that defined in *Neer* and its progeny.”).

⁴³ CA-82, *Bilcon* (NAFTA), ¶ 441.

⁴⁴ CA-82, *Bilcon* (NAFTA), ¶¶ 442-444 (“The formulation of the “general standard for Article 1105” by the Waste Management Tribunal is particularly influential, and a number of other tribunals have applied its formulation of the international minimum standard based on its reading of NAFTA authorities . . .”).

⁴⁵ CA-82, *Bilcon* (NAFTA), ¶ 435, citing CA-10, *Merrill* (NAFTA), ¶¶ 207, 208, 210 and 213; CA-4, *Cargill* (NAFTA) ¶ 281; CA-1, *ADF* (NAFTA) ¶ 179; and CA-45, *Mondev* (NAFTA), ¶ 16.

⁴⁶ CA-82, *Bilcon* (NAFTA), ¶ 438 (“At the same time, the international minimum standard exists and has evolved in the direction of increased investor protection precisely because sovereign states—the same ones constrained by the standard—have chosen to accept it. States have concluded that the standard protects their own nationals in other countries and encourages the inflow of visitors and investment.”).

VII. COMMENTS FROM NAFTA NON-DISPUTING PARTIES ARE NOT A “SUBSEQUENT AGREEMENT” AND/OR A “SUBSEQUENT PRACTICE” UNDER ARTICLE 31(3) OF THE VIENNA CONVENTION ON THE LAW OF TREATIES FOR PURPOSES OF THE NAFTA

43. Mexico and the United States further submit that the NAFTA Parties have repeatedly expressed a common view and understanding on certain NAFTA provisions and, specifically, Mexico argues that the Tribunal must “take into account” such expressions of a common view “when addressing the interpretation of the aforementioned provisions of the NAFTA”.⁴⁷ Mexico uses as examples the following provisions: (i) exclusion applicable to procurement by a state enterprise; (ii) meaning of delegated government authority, (iii) proper interpretation and application of the national treatment and most-favored-nation treatment obligations, and (iv) proper interpretation and scope of the obligation to accord fair and equitable treatment.⁴⁸ The United States also refers to this “common, concordant and consistent” practice within the context of national treatment and most-favored-nation provisions.⁴⁹

44. The United States and Mexico fail to note that NAFTA has a specific mechanism for NAFTA Parties to issue “subsequent agreements”. The Free Trade Commission is the body that possesses the authority to interpret NAFTA; such authority does not lie in the mere coordinated expression of certain points of interpretation.⁵⁰

45. As indicated in Article 31(3) of the Vienna Convention on the Law of Treaties, an alleged “subsequent agreement” or “subsequent practice” “shall be taken into account, together

⁴⁷ Mexico 1128 Submission, ¶ 23.

⁴⁸ Mexico 1128 Submission, ¶ 22.

⁴⁹ United States 1128 Submission, ¶ 11.

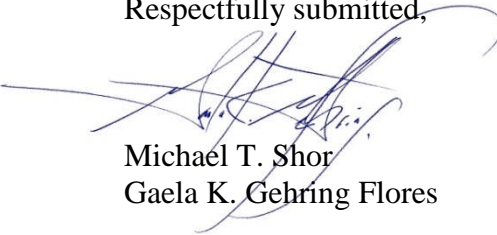
⁵⁰ CA-1, NAFTA, Art. 2001. The FTC is “{c}omprised {of} cabinet-level representatives of the Parties or their designees” and among other responsibilities the Commission “resolve{s} disputes that may arise regarding [NAFTA] interpretation or application”; *see also* NAFTA, Art. 1131. (“An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this section.”).

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with the context” to determine whether it is actually an agreement or practice. As can be noted from a careful review of the United States’ and Mexico’s Article 1128 submissions in this case alone, although a certain patina of agreement and coordination can be gleaned from their positions on interpretation, the NAFTA Parties are by no means in “agreement” on the variety of interpretive issues raised. In order to establish an agreement on any given interpretive practice, the NAFTA Parties would have to express such agreement in one text; not three different texts, all with variations ranging from the technical to the material. No evidence, other than a general assertion, has been provided by the United States, Mexico or Canada to prove a unified interpretation of the NAFTA provisions at issue in this case.

* * *

Respectfully submitted,



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