

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE  
NORTH AMERICAN FREE TRADE AGREEMENT  
AND THE 2010 UNCITRAL ARBITRATION RULES**

**BETWEEN:**

**WINDSTREAM ENERGY LLC**

**Claimant**

and

**GOVERNMENT OF CANADA**

**Respondent**

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**CLAIMANT'S REPLY TO THE ARTICLE 1128 SUBMISSIONS OF THE UNITED  
STATES AND MEXICO**

**January 29, 2016**

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## TABLE OF CONTENTS

	<b>Page</b>
II. Article 1110: No Broad Public Purpose Exception to Expropriation .....	1
III. Article 1105(1): The Minimum Standard of Treatment Under Customary International Law Requires the NAFTA Party to Treat an Investor Fairly and Equitably .....	2
A. Article 1105(1) Continues to Require that the NAFTA Parties Grant “Fair and Equitable Treatment in Accordance With International Law” .....	3
B. The Tribunal Should Be Guided by the Decisions of Other NAFTA Tribunals in Interpreting the Protections Afforded by Article 1105(1).....	5
C. State Practice and <i>Opinio Juris</i> Establish that the Fair and Equitable Treatment Standard Is Part of the Minimum Standard of Treatment Under Customary International Law .....	11
IV. Articles 1102 and 1103: No Requirement to Prove Discriminatory Intent .....	14

1. Windstream Energy LLC, on its own behalf and on behalf of its enterprise Windstream Wolfe Island Shoals Inc., respectfully submits this reply to the interpretative submissions made by the Government of the United States of America and the Government of Mexico dated January 12, 2016, pursuant to Article 1128 of NAFTA. This reply responds to the submissions of the United States and Mexico regarding the interpretation of Articles 1110, 1105(1), 1102 and 1103 of NAFTA. In response to the United States' submission regarding the application of the procurement exception in Article 1108, Windstream repeats and relies on its submissions in paragraphs 607 to 613 of its Reply Memorial that the procurement exception in Article 1108 does not apply here.

## **II. Article 1110: No Broad Public Purpose Exception to Expropriation**

2. As set out in detail at paragraphs 577 to 582 of Windstream's Memorial and paragraphs 487 to 505 of Windstream's Reply Memorial, there is no broad public purpose or public interest exception to expropriation under Article 1110. Moreover, even the tribunals that have found an exception to the prohibition against expropriation by justifying the expropriation under the police powers doctrine recognize that the doctrine has traditionally been narrowly construed, contrary to the formulations proposed by the United States and Mexico.<sup>1</sup>

3. The United States submits that in order to establish the existence of an indirect expropriation, the Tribunal must consider the following factors: (i) the economic impact of the government action; (ii) the extent to which that action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.<sup>2</sup> Mexico also submits that in determining whether an expropriation has occurred, the existence of an investor's distinct, reasonable investment-backed expectations is a factor. Both parties suggest that *bona fide* regulatory action taken in the public interest that adversely affects the value and/or viability of an investment of an investor of another Party will not ordinarily amount to an indirect expropriation.<sup>3</sup>

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<sup>1</sup> **CL-141**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2) Award, 16 September 2015 (“*Quiborax*”), ¶¶ 200, 238; **CL-029**, *Burlington Resources Inc. v. Ecuador* (ICSID Case No. ARB/08/5) Decision on Liability, 14 December 2012 (“*Burlington Resources*”), ¶ 506; **CL-084**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2) Award, 29 May 2003 (“*Tecmed*”), ¶ 119; **CL-080**, *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶¶ 258, 263.

<sup>2</sup> Article 1128 Submissions of the United States, ¶ 3.

<sup>3</sup> Article 1128 Submissions of Mexico, ¶¶ 12-13; Submissions of the United States, ¶ 7.

4. The Tribunal should reject this formulation of the requirements of Article 1110. Specifically, as set out in detail in Windstream’s Memorial and Reply Memorial, arbitral decisions do not support the existence of a broad “public policy” exception to expropriation. Indeed, even in the *Methanex* decision on which the United States, Mexico and Canada heavily rely, the Tribunal found that the measure in question was not expropriatory based on evidence that the measure was necessary to prevent proven harm – not based on a broad “public interest” rationale.<sup>4</sup> The *Chemtura* tribunal similarly found that an otherwise expropriatory measure was justified under the police powers doctrine where expert evidence established that the measure was necessary to prevent proven harm.<sup>5</sup> Even in cases where harm is proven, a measure does not fall within the narrow boundaries of the police powers doctrine if it is not truly necessary and proportionate to the measure’s stated rationale,<sup>6</sup> or if it is contrary to the investor’s legitimate expectations.<sup>7</sup>

5. Thus, for the reasons set out in detail in Windstream’s Memorial and Reply Memorial, the Tribunal should reject the submission, advanced by Canada and repeated by the United States and Mexico, that a broad public purpose exception to expropriation exists under Article 1110.

### **III. Article 1105(1): The Minimum Standard of Treatment Under Customary International Law Requires the NAFTA Party to Treat an Investor Fairly and Equitably**

6. Both the United States and Mexico submit that this Tribunal should ignore the interpretations of Article 1105(1) adopted by several NAFTA tribunals. Both urge the Tribunal to begin from first principles by assessing afresh the interpretation of Article 1105(1).<sup>8</sup> Neither proposes an interpretation of the content of the applicable standard under Article 1105(1). Rather, they both reiterate the positions they have asserted in other cases that the interpretation of Article

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<sup>4</sup> **CL-063**, *Methanex Corporation v. United States of America* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (“*Methanex*”), Part IV, Ch. D., ¶7.

<sup>5</sup> **CL-037**, *Chemtura Corporation v. Government of Canada* (UNCITRAL) Award, 2 August 2010 (“*Chemtura*”), ¶ 266.

<sup>6</sup> **CL-084**, *Tecmed*, ¶ 122; **CL-023**, *Burlington Resources*, ¶¶ 519, 528-529; **CL-043**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2) Award, 31 October 2012 (“*Deutsche Bank*”), ¶ 522; **CL-025**, *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12) Award, 14 July 2006 (“*Azurix*”), ¶ 311; **CL-059**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1) Decision on Liability, 3 October 2006, ¶¶ 189, 195.

<sup>7</sup> **CL-063**, *Methanex*, Part IV, Ch. D., ¶7.

<sup>8</sup> Article 1128 Submissions of the United States, ¶ 11; Article 1128 Submissions of Mexico, ¶ 6.

1105(1) depends on proof of a customary rule of international law through consistent State practice and *opinio juris*.<sup>9</sup>

7. The Tribunal should reject this position. Article 1105(1) continues to require that the NAFTA Parties grant to the investments of investors “fair and equitable treatment in accordance with international law”. The Tribunal’s task, in interpreting and applying Article 1105(1), is to determine whether that standard has been breached. In making this determination, the Tribunal should be guided by the interpretation of Article 1105(1) set out in the decisions of NAFTA tribunals. It may also be guided by the interpretation of the fair and equitable treatment standard in other arbitral decisions. These decisions establish that, in determining whether the fair and equitable treatment standard under Article 1105(1) has been breached, a tribunal should consider whether the state has breached specific commitments made to induce the investment that were reasonably relied upon by the investor.

8. In any event, as the uncontested evidence of Professor Dolzer establishes, state practice and *opinio juris* do establish that the provision of fair and equitable treatment to the investments of foreign investors is part of the minimum standard of treatment under customary international law.

**A. Article 1105(1) Continues to Require that the NAFTA Parties Grant “Fair and Equitable Treatment in Accordance With International Law”**

9. As explained in Windstream’s Memorial,<sup>10</sup> Article 1105(1) of NAFTA provides explicitly that “Each 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.” The NAFTA Free Trade Commission’s July 2001 *Notes of Interpretation* provide:

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<sup>9</sup> Article 1128 Submissions of the United States, ¶ 19.

<sup>10</sup> Windstream’s Memorial, ¶¶ 591-92.

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard to be afforded to investments of investors of another Party.

2. The 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.

10. The ordinary meaning of Article 1105(1), as interpreted by the *Notes of Interpretation*, continues to require that states accord “fair and equitable treatment” to the investments of investors. The *Notes of Interpretation* specify that this means treatment in accordance with the minimum standard of treatment under customary international law. The only logical interpretation of the *Notes of Interpretation* that preserves the language of Article 1105(1) is that the NAFTA Parties explicitly recognized that the modern minimum standard of treatment includes the requirement to grant fair and equitable treatment. As the *Pope & Talbot* tribunal concluded after the issuance of the *Notes of Interpretation*:

The Interpretation does not require that the concepts of “fair and equitable treatment” and “full protection and security” be ignored, but rather that they be considered included as part of the minimum standard of treatment that it prescribes. Parenthetically, any other construction of the Interpretation whereby the fairness elements were treated as having no effect, would be to suggest that the Commission required the word “including” in Article 1105(1) to be read as “excluding.” Such an approach has only to be stated to be rejected. Therefore, the Interpretation requires each Party to accord to investments of investors of the other Parties the fairness elements as subsumed in, rather than additive to, customary international law.<sup>11</sup>

11. The United States explicitly recognizes that the minimum standard of treatment includes the requirement to grant fair and equitable treatment.<sup>12</sup> As Professor Dolzer opines, to hold otherwise would be to read the requirement to grant fair and equitable treatment out of Article 1105(1).<sup>13</sup> Similarly, the *Bilcon* majority observed that “[t]he language of Article 1105 itself is the

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<sup>11</sup> **CL-140**, *Pope & Talbot v. Government of Canada* (UNCITRAL) Award in Respect of Damages, 31 May 2002, ¶¶ 53-54 (emphasis added).

<sup>12</sup> Article 1128 Submissions of the United States, ¶ 11.

<sup>13</sup> CER-Dolzer, ¶¶ 12-13.

necessary reference point in interpreting the international minimum standard. The search is to determine whether there has been a denial of ‘fair and equitable treatment’ and ‘full protection and security’.”<sup>14</sup>

12. Thus, Windstream need not establish independently through state practice or *opinio juris* that the minimum standard of treatment requires that the investments of foreign investors be treated fairly and equitably. Contrary to the positions they now assert, the NAFTA Parties explicitly recognized that it does via the *Notes of Interpretation*. Moreover, and in any event, as set out below based on the opinion of Professor Dolzer, state practice and *opinio juris* do establish that the minimum standard of treatment under customary international law requires that the investments of foreign investors be afforded fair and equitable treatment.

#### **B. The Tribunal Should Be Guided by the Decisions of Other NAFTA Tribunals in Interpreting the Protections Afforded by Article 1105(1)**

13. The Tribunal should be guided by the decisions of other NAFTA tribunals, and of tribunals interpreting the minimum standard of treatment under customary international law, in interpreting the content of Article 1105(1). NAFTA tribunals have consistently referred to the formulations of the content of Article 1105(1) adopted by other NAFTA tribunals, and other arbitral tribunals interpreting the fair and equitable treatment component of the minimum standard of treatment.<sup>15</sup> These tribunals have articulated the content of the standard without having found conclusive proof

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<sup>14</sup> **CL-134**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon Delaware Inc. v. Government of Canada* (PCA Case No. 2009-04) Award on Jurisdiction and Liability, 17 March 2015 (“*Bilcon*”), ¶ 441.

<sup>15</sup> **CL-134**, *Bilcon*, ¶¶ 435-443; **CL-064**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012 (“*Mobil*”), ¶¶ 138-153; **CL-091**, *Waste Management Inc. v. Mexico* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004 (“*Waste Management II*”), ¶ 98; **CL-066**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 (“*Mondev*”), ¶¶ 119, 126-127; **CL-031**, *Cargill Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009 (“*Cargill*”), ¶¶ 277-278; **CL-022**, *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1) Award, 9 January 2003 (“*ADF*”), ¶ 184; **CL-057**, *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) Arbitral Award, 26 January 2006 (“*International Thunderbird*”), ¶ 194. This practice is not confined to NAFTA tribunals, but has also been adopted by CAFTA tribunals: **CL-085**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23) Award, 19 December 2013 (“*TECO*”), ¶¶ 454-456; **RL-043**, *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Award, 29 June 2012 (“*Railroad Development*”), ¶¶ 217, 219.

of state practice or *opinio juris* to establish the specific types of conduct that would breach the minimum standard of treatment.

14. The NAFTA Parties insist that state practice and *opinio juris* must be proven independently in every case to establish the precise scope of the protections afforded by Article 1105(1). Yet this would amount to a wholesale rejection of the existing arbitral jurisprudence interpreting Article 1105(1). There is no reason for this Tribunal to adopt such a restrictive approach. Ironically, the NAFTA Parties themselves rely extensively on arbitral decisions and academic commentary in formulating their restrictive interpretation of the minimum standard of treatment.<sup>16</sup> Moreover, the NAFTA Parties do not offer any assistance to the Tribunal in determining how state practice and *opinio juris* concerning the precise scope of the requirement to grant fair and equitable treatment under Article 1105 would ever be established.

15. The better approach, which the Tribunal should follow here, is to be guided by the decisions of arbitral tribunals in determining the content of the protection afforded by Article 1105. As the *Bilcon* majority noted, “NAFTA Article 1105 has by now been the subject of considerable analysis and interpretation by numerous arbitral tribunals” and it was “guided by these earlier cases, particularly the formulation of the international minimum standard by the *Waste Management* Tribunal.”<sup>17</sup> The *Bilcon* majority then went on to review the formulations of the standard adopted in a number of other NAFTA cases, and found the formulation adopted by the *Waste Management* tribunal to be most compelling.<sup>18</sup> In doing so, it recognized that “NAFTA awards make it clear that the international minimum standard is not limited to conduct by host states that is outrageous” and that “[t]he contemporary minimum international standard involves a more significant measure of protection.”<sup>19</sup>

16. As in *Bilcon*, NAFTA tribunals have consistently referred to and adopted the formulation of the fair and equitable treatment component of the minimum standard of treatment reached by

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<sup>16</sup> Canada’s Counter-Memorial, ¶¶ 383-389; Canada’s Rejoinder Memorial, ¶¶ 218, 219; Article 1128 Submissions of the United States, ¶¶ 11, 17; Article 1128 Submissions of Mexico, ¶ 7.

<sup>17</sup> CL-134, *Bilcon*, ¶ 427.

<sup>18</sup> CL-134, *Bilcon*, ¶¶ 433-445.

<sup>19</sup> CL-134, *Bilcon*, ¶ 433.

the tribunal in *Waste Management II*, which set out the following articulation of the standard after surveying previous NAFTA awards:

[...] 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, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.<sup>20</sup>

17. The *Mobil* tribunal also extensively analyzed prior NAFTA decisions in arriving at its formulation of the content of Article 1105(1).<sup>21</sup> After reviewing prior NAFTA decisions, including in particular the *Waste Management II* formulation of the minimum standard of treatment guaranteed by Article 1105(1), the *Mobil* tribunal summarized the applicable standard in relation to Article 1105(1) “[o]n the basis of the NAFTA case-law and the parties’ arguments”<sup>22</sup> as follows:

(1) the minimum standard of treatment guaranteed by Article 1105 is that which is reflected in customary international law on the treatment of aliens;

(2) the fair and equitable treatment standard in customary international law will be infringed by conduct attributable to a NAFTA Party and harmful to a claimant 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;

(3) in determining whether that standard has been violated it will be a relevant factor if the treatment is made against a background of

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<sup>20</sup> **CL-091**, *Waste Management II*, ¶¶ 98-99. This formulation of the standard has been adopted by the following NAFTA tribunals: **CL-064**, *Mobil*, ¶ 141; **CL-031**, *Cargill*, ¶ 282; **CL-134**, *Bilcon*, ¶¶ 442-443; **CL-063**, *Methanex*, Part IV, Ch. C, ¶¶ 12, 26; **CL-061**, *Merrill & Ring*, ¶¶ 199, 208.

This formulation has also been adopted by CAFTA tribunals interpreting the content of the minimum standard of treatment: **CL-085**, *TECO*, ¶ 455; **RL-043**, *Railroad Development*, ¶ 219.

<sup>21</sup> **CL-064**, *Mobil*, ¶¶ 139-53.

<sup>22</sup> **CL-064**, *Mobil*, ¶ 152.

- (i) clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment, and
- (ii) were, by reference to an objective standard, reasonably relied on by the investor, and
- (iii) were subsequently repudiated by the NAFTA host State.<sup>23</sup>

18. Windstream has already set out the content of Article 1105(1) as interpreted by NAFTA tribunals, and other tribunals applying the minimum standard of treatment under customary international law, at paragraphs 591 to 603 of its Memorial and paragraphs 540 to 543 of its Reply Memorial. The Tribunal should be guided by these formulations in interpreting Article 1105(1), and disregard the NAFTA Parties' wholesale rejection of this existing jurisprudence.

19. Further, Windstream explained at paragraphs 597 to 599 of its Memorial and paragraph 540(a) of its Reply Memorial that a number of NAFTA tribunals have recognized that Article 1105(1) protects investors against unfair treatment arising from a state's breach of commitments or representations made to encourage the investor to invest that were reasonably relied upon by the investor, including most recently the *Bilcon* majority<sup>24</sup> and the *Mobil* tribunal.<sup>25</sup>

20. The United States submits, at paragraph 16, that the concept of legitimate expectations is not a component of fair and equitable treatment under customary international law that gives rise to an independent host State obligation. Yet even the *Glamis Gold* tribunal, on which the United States relies, found that a breach of an investor's legitimate expectations could constitute a breach of Article 1105(1) "where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct. In this way, a State may be tied to the objective expectations that it creates *in order to induce* investment."<sup>26</sup>

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<sup>23</sup> CL-064, *Mobil*, ¶ 152.

<sup>24</sup> CL-134, *Bilcon*, ¶ 442.

<sup>25</sup> CL-064, *Mobil*, ¶ 152.

<sup>26</sup> CL-053, *Glamis Gold Ltd. v. The United States of America* (UNCITRAL) Award, 8 June 2009, ¶ 621.

21. The articulations of the applicable standard by NAFTA tribunals reflects the evolution of the minimum standard of treatment beyond the outdated “shocking or outrageous” standard established by the United States-Mexico General Claims Commission in its 1926 *Neer* decision. This decision concerned the physical security of the alien, not the fair and equitable treatment of the investment of a foreign investor.<sup>27</sup> Because of this important distinction, the standard reflected in the *Neer* case is irrelevant to determining the content of the obligation to provide fair and equitable treatment to the investments of investors.<sup>28</sup> As the *Merrill & Ring* tribunal noted, “[n]o general rule of customary international law can thus be found which applies the *Neer* standard, beyond the strict confines of personal safety, denial of justice and due process.”<sup>29</sup> The *Bilcon* majority similarly observed that NAFTA tribunals have moved away from the standard articulated in *Neer* “towards the view that the international minimum standard has evolved over the years towards greater protection for investors.”<sup>30</sup>

22. Accordingly, the Tribunal should reject any formulation of the standard that seeks to erode the most basic formulation, founded on the language of Article 1105(1), that the investments of foreign investors must be afforded “fair and equitable treatment in accordance with international law”. This standard has been the subject of ample interpretation by NAFTA and other tribunals. While the United States recognizes that the minimum standard requires the granting of fair and equitable treatment, it states that “customary international law has crystallized to establish a minimum standard of treatment in only a few areas.” As an example of conduct that would breach this standard, the United States cites the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.<sup>31</sup> In support of this submission, the United States relies on commentary from Jan Paulsson regarding the requirement not to deny justice as well as an arbitral decision from 1927 and the *Loewen* tribunal’s discussion of the requirement not to deny justice. Despite its position that state practice and *opinio juris* are required to establish the content

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<sup>27</sup> **CL-066**, *Mondev*, ¶115; **CL-022**, *ADF*, ¶¶ 180-181; **CL-061**, *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL, ICSID Administered Case) Award, 31 March, 2010 (“*Merrill & Ring*”), ¶ 197.

<sup>28</sup> **CL-022**, *ADF*, ¶ 181 (“There appears no logical necessity and no concordant state practice to support the view that the *Neer* formulation is automatically extendible to the contemporary context of treatment of foreign investors and their investments by a host or recipient State”).

<sup>29</sup> **CL-061**, *Merrill & Ring*, ¶ 204.

<sup>30</sup> **CL-134**, *Bilcon*, ¶ 535.

<sup>31</sup> Article 1128 Submissions of the United States, ¶ 11.

of the fair and equitable treatment standard, the United States offers no such evidence in support of its interpretation of the fair and equitable treatment standard.

23. The Tribunal should reject the United States' submission that the obligation to provide "fair and equitable treatment" means anything less than what it says. Rather than relying on the restrictive categories proposed by the United States, the Tribunal should rely on the decisions of arbitral tribunals that actually consider whether the standard has been breached as the most reliable interpretive aids. As the *Railroad Development* tribunal noted, while arbitral awards do not constitute state practice, "it is also true that parties in international proceedings use them in their pleadings in support of their arguments of what the law is on a specific issue."<sup>32</sup> That Tribunal went on to adopt the *Waste Management II* tribunal's interpretation of the minimum standard of treatment under customary international law. Similarly, the *Cargill* tribunal explicitly noted that arbitral decisions interpreting Article 1105(1) or similar provisions that incorporate the customary international law standard are relevant to determining whether Article 1105(1) has been breached.<sup>33</sup> As noted above, NAFTA tribunals have repeatedly relied on the decisions of previous NAFTA tribunals in articulating the types of conduct that would breach the minimum standard of treatment.

24. The Tribunal may also be guided by the decisions of arbitral tribunals interpreting the "autonomous" fair and equitable treatment standard established under bilateral and multilateral investment treaties, which consider the content of the requirement to grant "fair and equitable treatment". As several arbitral tribunals have recognized, in many cases there is no functional difference between the content of the modern minimum standard of treatment and the "autonomous" fair and equitable treatment standard.<sup>34</sup> For example, the *CMS* tribunal stated:

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<sup>32</sup> **RL-043**, *Railroad Development*, ¶ 217.

<sup>33</sup> **CL-031**, *Cargill*, ¶ 278.

<sup>34</sup> **CL-070**, *Occidental Exploration and Production Company v. The Republic of Ecuador* (UNCITRAL, LCIA Case No. UN3467) Final Award, 1 July 2004, ¶¶ 189-190; **CL-040**, *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No. ARB/01/8) Award, 12 May 2005, ¶¶ 282-284 ("*CMS*"); **CL-129**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S., v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award, 29 July 2008, ¶ 611; **CL-025**, *Azurix*, ¶ 361; **CL-043**, *Deutsche Bank*, ¶ 419.

While the choice between requiring a higher treaty standard and that of equating it with the international minimum standard might have relevance in the context of some disputes, the Tribunal is not persuaded that this is relevant in this case. In fact, the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.<sup>35</sup>

**C. State Practice and *Opinio Juris* Establish that the Fair and Equitable Treatment Standard Is Part of the Minimum Standard of Treatment Under Customary International Law**

25. In any event, as Professor Dolzer opines, the inclusion of the fair and equitable treatment standard as part of the minimum standard of treatment under customary international law is established by state practice and *opinio juris*.<sup>36</sup> Professor Dolzer's opinion has not been challenged by competing expert evidence in this proceeding.

26. First, in Professor Dolzer's opinion, there is extensive and virtually uniform, and representative, state practice with respect to the provision of fair and equitable treatment to the investors of foreign states.<sup>37</sup> He reaches this conclusion on the basis that fair and equitable treatment provisions have become pervasive in the more than 2,800 bilateral and multilateral investment treaties that have been concluded as of the date of his report, including the 2,100 treaties surveyed in his report.<sup>38</sup> The fact that multilateral efforts to standardize foreign investment protection have all included fair and equitable treatment provisions also supports Professor Dolzer's opinion.<sup>39</sup>

27. Second, Professor Dolzer also opines that the requirement for *opinio juris* – that states consider that the practice “is rendered obligatory by the existence of a rule of law requiring it”<sup>40</sup> – is met. In Professor Dolzer's opinion, the fact that states have overwhelmingly included fair and

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<sup>35</sup> CL-040, CMS, ¶ 284.

<sup>36</sup> CER-Dolzer, ¶ 20.

<sup>37</sup> CER-Dolzer, ¶ 20.

<sup>38</sup> CER-Dolzer, ¶¶ 20-28.

<sup>39</sup> CER-Dolzer, ¶¶ 54-56.

<sup>40</sup> CER-Dolzer, ¶¶ 57-64.

equitable treatment provisions in investment protection treaties “constitutes the best evidence of what states consider themselves obliged to do under customary international law.”<sup>41</sup> He also concludes that *opinio juris* is established through the proliferation of a great number of model bilateral investment treaties, which further supports the conclusion that states are acting out of a sense of obligation in including fair and equitable treatment provisions in their bilateral investment treaties.<sup>42</sup>

28. Several NAFTA tribunals have accepted that the pervasiveness of fair and equitable treatment provisions in bilateral and regional investment treaties informs the content of the minimum standard of treatment.<sup>43</sup> As the *Mondev* tribunal noted:

[T]he vast number of bilateral and regional investment treaties (more than 2000) almost uniformly provide for fair and equitable treatment of foreign investments [...]. On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment. In the Tribunal’s view, such a body of concordant practice will necessarily have influenced the content of the rules governing the treatment of foreign investment in current international law.<sup>44</sup>

[...] In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for “fair and equitable treatment of [...] the foreign investor and his investments.”<sup>45</sup>

29. Similarly, the tribunal in *Merrill & Ring* stated:

The parties have extensively discussed whether the customary law standard might have converged with the fair and equitable treatment standard, but convergence is not really the issue. The situation is

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<sup>41</sup> CER-Dolzer, ¶ 58.

<sup>42</sup> CER-Dolzer, ¶¶ 59-64.

<sup>43</sup> **CL-066**, *Mondev*, ¶ 125; **CL-037**, *Chemtura*, ¶ 121 (observing that it could not “overlook the evolution of customary international law, nor the impact of [bilateral investment treaties] on this evolution”); **CL-140**, *Pope & Talbot*, ¶¶ 59, 62 (“applying the ordinary rules for determining the content of custom in international law, one must conclude that the practice of states is now represented by those treaties”).

<sup>44</sup> **CL-066**, *Mondev*, ¶ 117.

<sup>45</sup> **CL-066**, *Mondev*, ¶ 125.

rather one in which the customary law standard has led to and resulted in establishing the fair and equitable treatment standard as different stages of the same evolutionary process. A requirement that aliens be treated fairly and equitably in relation to business, trade and investment has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*. In the end, the name assigned to the standard does not really matter. What matters is that the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness. [...] [A]gainst the backdrop of the evolution of the minimum standard of treatment discussed above, the Tribunal is satisfied that fair and equitable treatment has become part of customary law.<sup>46</sup>

30. Moreover, as Judge Schwebel opines, “when BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs.”<sup>47</sup>

31. The United States and Mexico assert that the fact that states have entered into treaties containing fair and equitable treatment provisions constitutes a policy decision by a State, rather than an action taken out of legal obligation.<sup>48</sup> The Tribunal should reject this submission. It ignores that the sheer number and pervasiveness of bilateral investment treaties evidences that states, when entering into bilateral investment treaties, consider themselves bound by the obligation to provide fair and equitable treatment to foreign investors, as Professor Dolzer opines.<sup>49</sup>

32. Thus, the evidence establishes that, through state practice and *opinio juris*, the customary international law minimum standard of treatment includes the requirement to grant fair and equitable treatment to the investments of foreign investors. As set out above, the Tribunal should be guided by the decisions of NAFTA tribunals interpreting Article 1105(1) in interpreting whether that standard has been breached, and may also be guided by the decisions of other arbitral tribunals interpreting the fair and equitable treatment standard.

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<sup>46</sup> CL-061, *Merrill & Ring*, ¶¶ 210-11.

<sup>47</sup> CL-113, Schwebel S., “The Influence of Bilateral Investment Treaties on Customary International Law”, 2:5 *Transnational Dispute Management* 27 (2005), pp. 29-30.

<sup>48</sup> Article 1128 Submissions of the United States, ¶ 18; Article 1128 Submissions of Mexico, ¶ 19.

<sup>49</sup> CER-Dolzer, ¶ 58.

#### IV. Articles 1102 and 1103: No Requirement to Prove Discriminatory Intent

33. In its submission, the United States contends that Articles 1102 and 1103 “prohibit only nationality-based discrimination”<sup>50</sup> and “are designed to ensure that nationality is not the basis for differential treatment.”<sup>51</sup> This submission gives the inaccurate impression that a Claimant must prove that it was treated less favourably because of its nationality. On the contrary, Articles 1102 and 1103 establish no such requirement.

34. NAFTA tribunals have consistently and repeatedly held that the claimant is not required to demonstrate discriminatory intent in order to establish a violation of Article 1102 or 1103.<sup>52</sup> These tribunals have recognized that requiring a foreign investor to prove that discrimination is based on his nationality may be an “insurmountable burden,” as that information may only be available to the government.<sup>53</sup> It would thus “tend to excuse discrimination that is not facially directed at foreign owned investments.”<sup>54</sup>

35. As explained by the tribunal in *Feldman*:

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<sup>50</sup> Submissions of the United States, ¶ 28.

<sup>51</sup> Submissions of the United States, ¶ 27.

<sup>52</sup> **RL-024**, *Marvin Feldman v. Mexico* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002 (“*Feldman*”), ¶¶ 181-182; **CL-075**, *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL) Award on the Merits of Phase 2, 10 April 2001 (“*Pope & Talbot*”), ¶ 79; **CL-057**, *International Thunderbird*, ¶ 177; **CL-134**, *Bilcon*, ¶ 179.

<sup>53</sup> **RL-024**, *Feldman*, ¶ 182.

<sup>54</sup> **CL-075**, *Pope & Talbot*, ¶ 79.

It is clear that the concept of national treatment as embodied in NAFTA and similar agreements are designed to prevent discrimination on the basis of nationality, or “by reason of nationality” [...]. 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 favourable treatment for the foreign investor than for domestic investors in like circumstances. In this instance, the evidence on the record demonstrates that there is one U.S. citizen/investor, the Claimant, that alleges a violation of national treatment under NAFTA Article 1102 [...], and at least one domestic investor [...] 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.<sup>55</sup>

36. Moreover, the United States itself has previously submitted that a claimant does not have the burden of proving discriminatory intent: “[t]he requirement to show discrimination on the basis of nationality under Article 1102 does not require a showing of discriminatory intent. Rather, a Claimant must establish that a measure either on its face, or as applied, favors nationals over non-nationals.”<sup>56</sup>

37. Thus, to establish a breach of Article 1102, Windstream need only show that it received treatment less favourable than TransCanada in like circumstances. It need not establish that the less favourable treatment was because of Windstream’s status as a foreign investor.

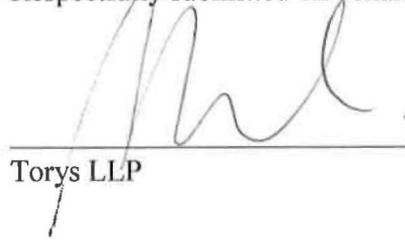
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<sup>55</sup> **RL-024**, *Feldman*, ¶ 181 (emphasis added).

<sup>56</sup> **CL-139**, *Mesa Power Group, LLC v. The Government of Canada* (UNCITRAL) Second Submission of the United States of America, 13 June 2015, fn. 2.

DATED: January 29, 2016

Respectfully submitted on behalf of Windstream Energy LLC,

A handwritten signature in black ink, appearing to be "M. L.", is written over a horizontal line. The signature is cursive and somewhat stylized.

Torys LLP

Counsel for the Claimant, Windstream Energy LLC