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

BETWEEN:

WINDSTREAM ENERGY LLC

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

REPLY TO THE 1128 SUBMISSIONS OF THE UNITED STATES AND MEXICO

January 29, 2016

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I. INTRODUCTION

1. The NAFTA Article 1128 submissions filed by the Governments of the United States of America and the United Mexican States in this arbitration confirm the long standing and consistent interpretation advanced by the NAFTA Parties with respect to the interpretation of key provisions of the NAFTA. The submissions also confirm that the broad interpretation advanced by the Claimant regarding the applicable legal standards and the role of the Tribunal find no basis in the text of the NAFTA as concluded and interpreted by the NAFTA Parties.

2. In summary, and contrary to the position advanced by the Claimant, the NAFTA Parties agree that:

With respect to NAFTA Article 1105 (Minimum Standard of Treatment):

- As set out in the binding note of interpretation issued by the Free Trade Commission on July 31, 2001, Article 1105 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be accorded to investments of investors of another Party. The concept of "fair and equitable treatment" does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens;

- The burden of proving a customary norm under NAFTA Article 1105 rests solely with the Claimant and requires proof of both State practice and *opinio juris.* In other words, the Claimant must prove that the specific rules of customary international law regarding the treatment of investment that it alleges have crystallized into a widespread and consistent State practice flowing from a sense of legal obligation;

- The decisions and awards of international courts and tribunals are not in themselves instances of State practice for the purpose of proving the existence of a customary norm and are only relevant to the extent they include an examination of State practice and *opinio juris*. References to prior arbitral awards, particularly those which do not undertake the necessary analysis of State practice and *opinio juris*, are insufficient to establish rules of customary international law;

- The treaty practice of certain States that have extended investor protection beyond what is required by customary international law is not relevant to ascertaining the content of the customary international law minimum standard of treatment;

- The minimum standard of treatment provides a minimum level of protection under which the treatment of investors must not fall;

- The customary international minimum standard of treatment does not contain a general prohibition against nationality-based discrimination; and

- The customary international law minimum standard of treatment does not contain an obligation not to interfere with investor's expectations or a guarantee against change in the regulatory framework.

With respect to NAFTA Article 1110 (Expropriation):

- For there to be an expropriation, there must a substantial deprivation of a property right;

- In addition to the economic impact of the government action on the investor, the extent of interference with distinct, reasonable, investment-backed expectations and the character of the government action must also be considered;

- Interference with an investor's expectations does not establish that there is an expropriation; and

- Non-discriminatory regulatory measures in the public interest which are taken in good faith will not ordinarily constitute indirect expropriation under NAFTA Article 1110.

With respect to NAFTA Articles 1102 and 1103 (National Treatment and Most-Favoured-Nation Treatment):

- NAFTA Articles 1102 and 1103 are intended to prevent nationality based discrimination. They are not intended to prohibit all differential treatment among investors or investments; and

- The burden to prove all the elements to establish a violation of these articles lies squarely with the Claimant.

II. THE AGREEMENT OF THE NAFTA PARTIES ON THE INTERPRETATION OF THE NAFTA SHOULD BE GIVEN CONSIDERABLE WEIGHT

3. The Vienna Convention on the Law of Treaties ("VCLT") directs tribunals to take into account the subsequent practice and agreement of States with respect to the interpretation of a treaty. In the context of NAFTA, the common, concordant and consistent views of the NAFTA Parties on the interpretation of Articles 1102, 1103, 1105 and 1110 should be given considerable weight.[1]

[1] **CL-116**, *Vienna Convention on the Law of Treaties* (1969), 1155 UNTS 331(entered into force January 27, 1980), Article 31(3) ("*Vienna Convention on the Law of Treaties*"); **RL-087**, *Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January 2008, ¶¶ 181-189 ("*Canadian Cattlemen*"); **RL-009**, *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB (AF)/05/1) Award, 19 June 2007, ¶¶ 106-121 ("*Bayview*").

4. Article 31(3) of the VCLT provides that:

> 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation […].[2]

5. The submissions of the NAFTA Parties before this Tribunal, together with the consistent submissions made by the NAFTA Parties before other NAFTA Tribunals, establish an agreement of the NAFTA Parties regarding the proper interpretation of Articles 1102, 1103, 1105 and 1110. The common, concordant and consistent positions of the NAFTA Parties on the interpretation of NAFTA Articles 1102, 1103, 1105 and 1110 constitute an authentic interpretation which, pursuant to Article 31(3) of the VCLT, "*shall be taken into account*" in interpreting these provisions. Moreover, the clear and long-standing agreement of the NAFTA Parties regarding the interpretation of these provisions should be given considerable weight.[3]

III. THE NAFTA PARTIES AGREE ON THE INTERPRETATION OF NAFTA ARTICLE 1105

6. The Claimant has conceded that the concept of "fair and equitable treatment" in NAFTA Article 1105 does not require treatment beyond what is required by the customary international law minimum standard of treatment of aliens.[4] As the NAFTA Parties reiterate in their submissions, to establish a rule of customary international law, the Claimant must prove that the specific rules of customary international law regarding the treatment of the investment that it alleges have crystallized into widespread and consistent State practice flowing from a sense of legal obligation. Yet, the Claimant has failed to do so.

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[2] **CL-116**, *Vienna Convention on the Law of Treaties*, Article 31(3).

[3] **RL-087**, *Canadian Cattlemen*, ¶¶ 186, 188-189; *See also* the views of non-disputing Parties in *Bayview*, ¶¶ 100, 106-107 (**RL-009**). The *Commerce Group* tribunal reached a similar conclusion in the context of the CAFTA-DR, see **RL-088**, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17) Award, 14 March 2011, ¶¶ 81-82. *See also* **RL-090**, Roberts, Anthea, "Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States," The American Journal of International Law, 104:179, 2010.

[4] See Claimant's Reply Memorial, ¶ 537.

A. The Burden of Proving a Customary Norm under NAFTA Article 1105 Rests Solely with the Claimant and Requires Proof of Both State Practice and *Opinio Juris*

7. Neither the Claimant's Memorial nor the Claimant's Reply Memorial contain any discussion of State practice and *opinio juris* necessary to prove a rule of customary international law. The Claimant failed to engage in the necessary analysis in its Reply Memorial despite Canada having explicitly pointed out this absence of the requisite analysis in its Counter-Memorial.[5]

8. In their submissions, the United States and Mexico confirm that proof of State practice and *opinio juris* are necessary to establish the content of the minimums standard of treatment.

9. The United States writes that:

> The twin requirements of State practice and *opinio juris* "must *both* be identified … to support a finding that a relevant rule of customary international law has emerged." A perfunctory reference to these requirements is not sufficient.[6]

10. In terms of the burden of proof, the United States writes that:

> A claimant must demonstrate that alleged standards that are not specified in the treaty has crystallized into an obligation under customary international law. To do so, the burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*.[7]

11. Mexico's submission is to the same effect: "[t]he burden is on the claimant to establish the existence of an obligation under customary international law that meets the requirements of State practice and *opinio juris*."[8]

12. The Claimant has not met its burden of proof. It has not established the existence and scope of a rule at customary international law with respect to the protection of an investor's legitimate

[5] Canada's Counter-Memorial, ¶ 370.

[6] 1128 Submission of the United States, 12 January 2016, ¶ 14 ("1128 Submission of the United States").

[7] 1128 Submission of the United States, ¶¶ 19-20.

[8] 1128 Submission of Mexico, 12 January 2016, ¶ 6 ("1128 Submission of Mexico").

expectations, an obligation to provide a stable regulatory framework, a prohibition against arbitrary or unfair treatment or discrimination. To the extent that the Claimant alleges that the customary international law standard has evolved to include these protections, it bears the burden of proving such evolution. As the *Cargill, Inc. v. United Mexican States* Tribunal expressly noted, "the proof of change in custom is not an easy matter to establish. However, the burden of doing so falls clearly on the Claimant. If the Claimant does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task. Rather, the Tribunal, in such an instance, should hold that the Claimant fails to establish the particular standard asserted."[9]

13. As the Claimant has offered no evidence of the customary norm it alleges to form part of the fair and equitable standard under customary international law, it has failed to meet this burden with respect to NAFTA Article 1105 and the claims must be dismissed.

B. The Decisions and Awards of International Courts and Tribunals Do Not Qualify as State Practice for the Purposes of Proving the Existence of a Customary Norm

14. The Claimant argues that treatment that "a) breaches commitments to the investor made to induce the investment or breaches the investor's legitimate expectations arising from state representations and assurances; b) fails to maintain regulatory fairness and predictability; c) is unfair, inequitable or unreasonable; d) is grossly unfair, unjust or idiosyncratic; e) is arbitrary, or f) is discriminatory" falls below the fair and equitable treatment standard in Article 1105.[10] However, the Claimant provides no evidence of State practice or *opinio juris* to support its argument. Instead, it relies solely on certain decisions of international investment tribunals.

15. Canada has explained why the Claimant's analysis is incorrect,[11] and the United States and Mexico concur that decisions of international investment tribunals are not a source of State practice for the purpose of establishing a new customary norm. As all three NAFTA Parties have repeatedly noted, "decisions of international courts and arbitral tribunals interpreting 'fair and

[9] **CL-031**, *Cargill Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September, 2009, ¶ 273.

[10] Claimant's Memorial, ¶ 596.

[11] Canada's Counter-Memorial, ¶ 377.

equitable treatment' as a concept of customary international law are not themselves instances of 'state practice' for the purpose of evidencing customary international law".[12]

16. Moreover, none of the decisions on which the Claimant relies as evidence of the customary international law minimum standard of treatment contain any analysis of State practice and *opinio juris*. Also telling is the fact that the decisions of international investment tribunals are inconsistent with respect to their identification of rules that have crystallized as part of the minimum standard of treatment. This highlights the shortcomings of the Claimant's reliance on certain decisions of investment tribunals as the sole basis for its establishing that a customary international law norm exists that protects an investor's legitimate expectations, creates an obligation to provide a stable regulatory framework, or prohibits against arbitrary or unfair treatment or discrimination.

C. Treaties Extending Protections Beyond that Required by Customary International Law Are Not Relevant to Ascertaining the Content of the Customary International Law Minimum Standard of Treatment

17. The Claimant argues that "the content of the so-called 'autonomous' fair and equitable treatment standard and the fair and equitable treatment standard as part of the minimum standard of treatment under customary international law is not substantially different."[13] The Claimant reaches this conclusion "based on the 'proliferation of BITs and other investment treaties that contain FET provisions, combined with the fact that states are acting out a sense of obligation in entering these provisions.'"[14]

18. All three NAFTA Parties have rejected the Claimant's position that decisions by other states to expressly extend treaty protection beyond what is required by the minimum standard of treatment at customary law are not relevant to ascertaining the content of Article 1105.[15]

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[12] 1128 Submission of the United States, ¶ 18; 1128 Submission of Mexico, ¶ 6; **RL-089**, Report of the International Law Commission on the work of its sixty-seventh session, 4 May to 5 June and 7 July to 7 August 2015, A/70/10, 2015, chap. VI, ¶ 65: "[The Special Rapporteur]concluded therein that, in seeking to ascertain whether a rule of customary international law had emerged, it was necessary in every case to consider and verify the existence of each element separately and that that generally required an assessment of different evidence for each element.".

[13] Claimant's Reply Memorial, ¶ 552.

[14] Claimant's Reply Memorial, ¶ 553.

[15] Canada's Counter-Memorial, ¶ 376; 1128 Submission of the United States, ¶ 18; 1128 Submission of Mexico, ¶ 6.

19. The United States explains that:

> States may decide expressly by treaty to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law. Extending such protections through "autonomous" standards in any particular treaty represents a policy decision by a State, rather than an action taken out of a sense of legal obligation. That practice is not relevant to ascertaining the content of Article 1105.[16]

20. Mexico agrees that "[a]lthough States may decide, expressly by treaty, to extend protections under the rubric of 'fair and equitable treatment' and 'full protection and security' beyond that required by customary international law, that practice is not relevant to ascertaining the content of the customary international law minimum standard of treatment."[17]

21. Thus, the Claimant's arguments that the autonomous fair and equitable treatment standard and the minimum standard of treatment under customary international law are similar standards, and that the autonomous standard has relevance to the customary international law standard, must be rejected.

D. The Minimum Standard of Treatment Provides a Minimum Level of Protection under which Treatment of Investors Must Not Fall

22. Canada explained in its Counter-Memorial that the "'floor' articulated in Article 1105 does not invite NAFTA tribunals to second-guess government policy and decision-making."[18]

23. Mexico notes in its submission that the "threshold for a violation of the minimum standard of treatment is high."[19] The United States provides an illustration of how this is reflected in the protection against denial of justice that forms part of the customary international law minimum standard of treatment. In the context of the obligation not to deny justice in adjudicatory proceedings, the relevant standard is judicial conduct that is "'notoriously unjust' or 'egregious' administration of justice 'which offends a sense of judicial propriety.'"[20]

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[16] 1128 Submission of the United States, ¶ 18.

[17] 1128 Submission of Mexico, ¶ 6.

[18] Canada's Counter-Memorial, ¶ 381.

[19] 1128 Submission of Mexico, ¶ 6.

[20] 1128 Submission of the United States, ¶ 11.

24. Having failed to establish the existence of the rules upon which it relies, the Claimant asks the Tribunal to second-guess domestic policy and decision-making and to question the domestic regulatory process.[21] There is no rule of customary international law that allows investment tribunals to engage in such second-guessing. None of the allegations made by the Claimant rises to the level of a breach of a rule of customary international law that is part of the minimum standard of treatment.

25. Moreover, as both the United States and Mexico have recalled, a determination of breach of the customary international law minimum standard of treatment "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders."[22]

E. NAFTA Article 1105 Does Not Contain a General Prohibition Against Nationality-Based Discrimination

26. The Claimant argues that "discriminatory treatment" that does not contravene NAFTA Articles 1102 and 1103 may nonetheless violate the minimum standard of treatment at customary international law.[23] The Claimant provides no State practice or *opinio juris* to support its argument that "discriminatory treatment" forms part of the minimum standard of treatment under customary international law.

27. To the contrary, all three NAFTA Parties agree that no established rule of customary international law has emerged that generally prohibits any nationality-based discrimination against foreign investors.[24]

28. The United States writes that:

> [T]he FTC note makes clear that a "determination that there has been a breach of another provision of" the NAFTA "does not establish that there has been a breach of" the minimum standard of treatment. Moreover, national treatment and most-factored-nation treatment, are not customary international law

[21] Claimant's Reply Memorial, ¶ 600.

[22] 1128 Submission of the United States, ¶ 21; 1128 Submission of Mexico, ¶ 6.

[23] Claimant's Reply Memorial, ¶ 602.

[24] Canada's Counter-Memorial, ¶ 442; 1128 Submission of the United States, ¶ 22; 1128 Submission of Mexico, ¶ 6.

> obligations. Rather, these are treaty obligations binding on the NAFTA Parties only by virtue of the Parties' agreement to the NAFTA.[25]

29. Mexico agrees "that Article 1105(1) does not provide a blanket prohibition on discrimination against foreign investors or their investments. Nationality-based discrimination falls under the purview of NAFTA Articles 1102 and 1103, and not Article 1105."[26]

30. The Claimant's unsubstantiated contention that Article 1105 broadly prohibits all forms of "discriminatory treatment" must therefore be rejected. As a result, the Claimant's allegations that Canada breached its Article 1105 obligations by failing to insulate the Claimant from potential losses while providing more favourable treatment to Samsung and TransCanada must fail.

F. NAFTA Article 1105 Does Not Contain an Obligation Not to Interfere with Investors' Expectations or a Guarantee Against Regulatory Change

31. The Claimant argues that Canada has breached of Article 1105 because the "moratorium on offshore wind development was a stark reversal of Ontario's repeatedly expressed commitment to offshore wind and to the Project, and a repudiation of the pro-investor principles enshrined in the Green Energy Act with respect to offshore wind."[27] According to the Claimant there is a breach of Article 1105 when a state "breaches the investor's legitimate expectations arising from state representations and assurances" or "fails to maintain regulatory fairness and predictability."[28]

32. Yet the Claimant failed to establish that such protections are part of the minimum standard of treatment at customary international law. To the contrary, all three NAFTA Parties have explicitly rejected the Claimant's argument that interference with an investor's expectations[29] or a failure to establish a stable regulatory framework breaches the minimum standard of treatment.

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[25] 1128 Submission of the United States, ¶ 22.

[26] 1128 Submission of Mexico, ¶ 6.

[27] Claimant's Memorial, ¶ 604.

[28] Claimant's Reply Memorial, ¶ 537.

[29] Canada's Counter-Memorial, ¶ 405; 1128 Submission of the United States, ¶¶ 16-17; 1128 Submission of Mexico, ¶ 6.

33. The United States writes that:

> The concept of "legitimate expectations" is not a component element of "fair and equitable treatment" under customary international law that gives rise to an independent host State obligation. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations.[30]

34. The United States further explains that "States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's 'expectations' about the state of regulation in a particular sector."[31]

35. Mexico concurs and notes that:

> States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's "expectations" about the state of regulation in a particular sector.[32]

36. Mexico also expressly endorses the following statement in Canada's Rejoinder:

> [N]othing in Article 1105 prevents a government from changing the regulatory environment, even if those changes result in significant additional burdens on the investor: Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made.[33]

37. The Claimant's unsupported assertions regarding the substantive content of Article 1105 must therefore be rejected. This includes its allegations that Canada breached its legitimate expectations arising out of the Ontario Government's public statements attracting investment in renewable energy, its policy to process a Renewable Energy Approval within six months, and its

[30] 1128 Submission of the United States, ¶ 16.

[31] 1128 Submission of the United States, ¶ 17.

[32] 1128 Submission of Mexico, ¶ 6.

[33] 1128 Submission of Mexico, ¶ 7.

processing of Crown land applications. Furthermore, the Claimant's allegations that the deferral of offshore wind development repudiated the approvals framework, and its claims that the decision was for reasons other than those publicly stated, must also be rejected, along with its claims of discriminatory treatment as compared to the treatment provided to other Crown land applicants as well as TransCanada and Samsung. None of these claims, even if true, could have breached a rule of customary international law.

IV. THE NAFTA PARTIES AGREE ON THE INTERPRETATION OF NAFTA ARTICLE 1110

38. The NAFTA Parties and the Claimant agree that a breach of NAFTA Article 1110 based on indirect expropriation requires a substantial deprivation of the economic value of a property right. While the Claimant argues that this the determinative factor, the NAFTA Parties emphasize the impact on the investor is only one of the relevant factors and that it must be considered together with the extent of interference with distinct reasonable investment backed expectations and the character of the measure.[34]

A. There Must Be a Substantial Deprivation of a Property Right

39. Without substantial deprivation of a property right there can be no expropriation. As the United States recalls, the examination of the expropriation claim must start with the identification of the property interest and its scope including applicable limitations.[35] As Mexico states, a finding of expropriation requires the existence of vested legal rights not contingent contractual rights.[36] As Canada set out in its submissions, the Claimant's contractual rights were contingent on obtaining regulatory approvals and permits and therefore did not constitute vested rights that can be expropriated.

B. Legitimate Regulatory Action in the Public Interest Will Not Ordinarily Constitute Indirect Expropriation under Article 1110

40. Canada has explained that "a non-discriminatory measure, designed to protect legitimate public welfare objectives such as health, safety and the environment, is not an indirect

[34] 1128 Submission of the United States, ¶¶ 3, 5; 1128 Submission of Mexico, ¶ 12.

[35] 1128 Submission of the United States, ¶ 3.

[36] 1128 Submission of Mexico, ¶ 11.

expropriation except in the rare circumstance where its impacts are so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith."[37]

41. The Claimant disputes Canada's position and states that "a public policy exception to expropriation is inconsistent with the plain language of Article 1110" and that "the rationale for the moratorium is not relevant to the expropriation analysis."[38] The Claimant further argues that "[t]he fact that Windstream's investments are now worthless as a result of the moratorium, or alternatively of the failure to insulate Windstream from its effects, is enough for the tribunal to conclude that Windstream's investments have been unlawfully expropriated contrary to Article 1110."[39]

42. In contrast to the Claimant's position, all three NAFTA Parties concur that the character of a measure is relevant to the indirect expropriation analysis and that bona fide regulatory action taken in the public interest is not ordinarily expropriatory or compensable.[40]

43. The United States writes that:

> The third factor [in the expropriation analysis] considers the nature and character of the government action, including whether such action involves physical invasion by the government or whether it is more regulatory in nature (i.e., whether "it arises from some public program adjusting the benefits and burdens of economic life to promote the common good"). In considering whether non-discriminatory regulatory actions by host States constitute an expropriation, tribunals "remain reluctant to second-guess the host State's decision to enact economic legislation or pass regulations to address a matter of legitimate public welfare.[41]

44. The United States quotes the *Methanex Corp. v. United States of America* Final Award, stating that a "'non-discriminatory regulation for a public purpose, which is enacted in

[37] Canada's Counter-Memorial, ¶ 495.

[38] Claimant's Memorial, ¶ 582.

[39] Claimant's Reply Memorial, ¶ 477.

[40] Canada's Counter-Memorial , ¶¶ 494-500; 1128 Submission of the United States, ¶¶ 6-7; 1128 Submission of Mexico, ¶ 13.

[41] 1128 Submission of the United States, ¶¶ 6-7.

accordance with due process' will not ordinarily be deemed expropriatory or compensable" and references similar clarifications made in the United States' 2012 Model BIT.[42]

45. Similarly, Mexico explains that "*[b]ona 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."[43]

46. Hence, the Claimant's argument that Ontario could not pause the development of offshore wind projects to allow time to complete the necessary scientific research and develop an adequately informed policy framework, without compensating investors that suffered economic loss, must be rejected.

C. Interference with an Investor's Expectations Does Not in Itself Amount to Indirect Expropriation

47. The Claimant's arguments with respect to a "state's specific commitments to the investor" or with respect to "the investor's legitimate expectations"[44] are misguided. Interference with an investor's distinct, reasonable, investment-backed expectations does not, on its own, amount to an indirect expropriation.

48. All three NAFTA Parties agree that interference with an investor's expectations is only one factor in an indirect expropriation analysis, and is not conclusive on its own.[45]

49. The United States explains that this factor "requires an objective inquiry of the reasonableness of the claimant's expectations, which 'depend in part on the nature and extent of governmental regulation in the relevant sector.'"[46]

[42] 1128 Submission of the United States, fn. 7.

[43] 1128 Submission of Mexico, ¶ 13.

[44] Claimant's Memorial, ¶ 587.

[45] Canada's Rejoinder Memorial, ¶ 123; 1128 Submission of the United States, ¶¶ 3, 5; 1128 Submission of Mexico, ¶ 12.

[46] 1128 Submission of the United States, ¶ 5.

50. Mexico writes that:

> The existence (or non-existence) of investor's "distinct, reasonable, investment-backed expectations" is at most a factor to consider in determining whether a measure or series of measures have risen to the level of an indirect expropriation. A host State's failure to satisfy such expectations does not amount to an indirect expropriation. Put simply, Article 1110 requires measures equivalent to expropriation of an "investment of an investor of another Party", not non-fulfillment or frustration of an investors' expectations, be they distinct, reasonable, legitimate or otherwise.[47]

51. Thus, the Claimant's argument that economic losses stemming from interference with an investor's expectations prima facie amounts to indirect expropriation must be rejected.

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

52. In its submissions, the Claimant has alleged Canada has breached Articles 1102 and 1103 by according it less favourable treatment than the treatment accorded to TransCanada and Samsung. The Claimant has made no effort to establish any nationality-based discrimination to support these claims. Instead it has simply pointed to differences in the treatment accorded to it and other investors.

53. The NAFTA Parties have consistently stated that NAFTA Articles 1102 and 1103 prohibit nationality-based discrimination.[48] Simply establishing that there are distinctions made between investors or that such distinctions result in less favourable treatment of a foreign investor is not sufficient to establishing a breach of the NAFTA's non-discriminatory provisions.[49] The onus is on the Claimant to establish all of the elements required to establish a breach of the non-discriminatory provisions.[50] This includes establishing that such discrimination was on the basis of nationality.

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[47] 1128 Submission of Mexico, ¶ 12.

[48] 1128 Submission of the United States, ¶ 27 (referring to numerous submissions of Canada, the United States and Mexico).

[49] 1128 Submission of the United States, ¶ 30.

[50] 1128 Submission of the United States, ¶ 29 (referring to numerous submissions of Canada, the United States and Mexico).

54. The Claimant clearly failed to meet this burden and to establish that there was any nationality based discrimination against the investor.

VI. CONCLUSION

55. As set out above, all three NAFTA Parties agree on the correct interpretation of Articles 1102, 1103, 1105 and 1110, underlining fundamental errors made in the arguments advanced by the Claimant. In considering whether Canada breached its obligations under Articles 1102, 1103, 1105 and 1110 in this arbitration, this Tribunal must take into account the NAFTA Parties common, consistent and concordant position.

January 29, 2016

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