



**IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE  
NORTH AMERICAN FREE TRADE AGREEMENT**

**MERCER INTERNATIONAL INC**

**v.**

**GOVERNMENT OF CANADA**

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**SUBMISSION OF MEXICO PURSUANT ARTICLE 1128 OF NAFTA**

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1. Pursuant to NAFTA Article 1128, the Government of Mexico is providing its views on certain matters of interpretation of the NAFTA. Mexico takes no position on the facts of this dispute.
2. Mexico has previously addressed the interpretation of provisions of NAFTA Chapter Eleven in its submissions in other disputes and reaffirms those prior submissions.
3. No inference should be drawn from the fact that Mexico has chosen to address only some of the issues raised by the disputing parties.

**I. NAFTA ARTICLE'S 1108(7) EXCLUSION APPLICABLE TO PROCUREMENT  
BY A STATE ENTERPRISE**

4. Mexico reiterates its Article 1128 submission in *Mesa Power LLC v Government of Canada (Mesa)* which observed, *inter alia*, that the ordinary meaning of the term "procurement" in Article 1108 is broad.<sup>1</sup>
5. Mexico also concurs in the United States' Article 1128 submission in *Mesa* which provides in pertinent part as follows:

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<sup>1</sup> See <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/mesa-mexico-1128-submission.pdf>.

15 ... Article 1108 thus exempts “procurement by a Party or state enterprise” from Chapter Eleven’s obligations with respect to national treatment, most-favored-nation treatment, and certain performance requirements.

16. The term “procurement” is not defined in the NAFTA. The ordinary meaning of the term on its face, however, encompasses any and all forms of procurement by a NAFTA Party. This reading is confirmed by the French and Spanish versions of the NAFTA, which each use the generic term for “purchases” in those languages. [Footnotes omitted.]<sup>2</sup>

6. The term “procurement” in Article 1108(7) is not qualified or limited in any manner. The article does not even make any reference to procurements by a Party under NAFTA Chapter 10, which is also subject to its own exceptions. Mexico accordingly submits 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” and thus are exempted from the application of Articles 1102 and 1103.

## **II. DELEGATED GOVERNMENT AUTHORITY UNDER ARTICLE 1503(2)**

7. Mexico refers to its third Article 1128 submission in *United Postal Service of America, Inc. v Government of Canada*, (UPS)<sup>3</sup> wherein Mexico observed as follows:

7. Mexico wishes to comment briefly upon the question discussed during the hearing regarding what it means for a monopoly or state enterprise to exercise “regulatory, administrative or other governmental authority”. Mexico agrees with Canada and the United States that the term “governmental authority” in this context means a sovereign power exercised in respect of third persons, as illustrated by the examples given in Articles 1502(3)(a) and 1503(2): i.e., the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges. Mexico also notes that the purpose of these particular provisions, as evidenced by their language (“acts in a manner that is not inconsistent with the Party’s obligations”), is to prevent a NAFTA Party from evading its own obligations through the transfer of governmental authority to a privately-owned organization or a state enterprise.

8. To interpret Articles 1502(3)(a) and 1503(2) as encompassing all activities of any monopoly performing any function formerly performed by a government would require ignoring the language of the provisions - in particular, the requirement to show that the monopoly acted in a manner inconsistent with the Party’s obligations.<sup>4</sup>

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<sup>2</sup> See <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/mesa-usa-1128-submission.pdf>.

<sup>3</sup> Archived at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/parcel.aspx?lang=eng>.

<sup>4</sup> Mexico observes that its reference to “any monopoly” in this paragraph equally applies to “any state enterprise”.

8. Mexico agrees with Canada's observation in paragraph 323 of its Counter-Memorial, that the *UPS* tribunal *correctly* held at paragraphs 72-74 of its award, that:

- Article 1502(2) has the effect of narrowing the range of the actions of State enterprises [...] that are covered by it;
- not all actions of all [...] State enterprises which are claimed to be inconsistent with the obligations of the Parties under the Agreement as a whole [...] are caught;
- the provisions have a restricted operation and operate only where the monopoly or enterprise exercises the defined authority and not where it exercises other rights or powers;
- activities having "a commercial character rather than a governmental one" are not covered by Article 1503(2); and
- in considering which activities are commercial as opposed to governmental, it is relevant to identify "rights and powers which [the state enterprise] shares with other businesses" such as "the rights to enter into contracts for purchase or sale and to arrange and manage their own commercial activities."

9. Mexico also agrees with Canada's statement at paragraph 213 of the Rejoinder that "[t]here is nothing in the text of Article 1503(2), nor in the related context or object and purpose of the NAFTA, that warrants a conclusion that "wide discretion" exercised by a state enterprise equates to it exercising a delegated governmental authority under Article 1503(2)". Indeed, Mexico would observe that vesting a state enterprise with "wide discretion" in the manner in which it carries on business, including its procurement practices, militates against the notion that such amounts to a delegation of *governmental* authority.

### **III. NATIONAL TREATMENT UNDER NAFTA ARTICLE 1102 AND MOST-FAVORED NATION TREATMENT UNDER NAFTA ARTICLE 1103**

10. The following remarks address both the interpretation of the national treatment obligation under Article 1102 and the most-favored-nation treatment obligation under Article 1103.

11. The NAFTA Parties have repeatedly made submissions to common effect on the proper interpretation and application of NAFTA Articles 1102 and 1103, both in their own submissions in cases where they are the disputing Party, and in their Article 1128 submissions in cases where one of the other Parties is the disputing Party. Mexico, Canada and the United States have consistently maintained that:

- the national treatment obligation is intended to prevent discrimination against investors of the other Parties (and their investments) on the basis of nationality;
- the claimant bears the onus of proving all of the elements required to establish a breach of the national treatment obligation, and this onus does not shift to the respondent State simply because there is an apparent difference between the treatment accorded to the claimant and the treatment accorded to a domestic or third party investor (or investment);
- the elements that the Claimant is required to establish, as Canada has stated at paragraphs 357 to 359 of the Counter-Memorial, are the following:
  - i) that the respondent state has accorded "treatment" (*i.e.*, a measure or measures, as defined in Article 201) to the claimant;
  - ii) that such treatment is less favorable than the treatment accorded to domestic investors their investments); and



- iii) that the less favorable treatment of the claimant (or its investment) was accorded “in like circumstances” to treatment accorded to domestic investors (or their investments) that the claimant identifies as comparators; or, put another way, that the claimant and the comparator(s) must be in like circumstances in the context of the measure(s) at issue.

12. Mexico agrees with the previous submissions of the United States and current submissions of Canada that the existence or absence of “like circumstances” requires a careful analysis of all of the relevant facts and circumstances. Mexico observes that there may be cases where the claimant and the domestic comparators do not operate in the same business sector but are none the less in like circumstances in the context of the measure(s) at issue (e.g. a discriminatory tax on foreign-owned enterprises). However, there will also be cases where the claimant and the domestic comparator(s) are competitors but are not in like circumstances in the context of the treatment at issue upon taking into account (*inter alia*) differences in the operations of the comparators (or their investments), the applicable regulatory regime, contractual terms, relative timing of the measures at issue, environmental conditions, specific market conditions, local needs or requirements, and all manner of other differences that may serve to distinguish the treatment that was accorded on either side.

13. Mexico agrees with Canada that the analysis under NAFTA Articles 1102 and 1103 is an analysis of the “treatment” accorded to the claimant versus the “treatment” accorded to domestic or third party investors. The question is whether the “treatment” was accorded in like circumstances, not whether the “investments” are in like circumstances.

14. Mexico also agrees with Canada that a Claimant must do more than prove a *prima facie* violation of Articles 1102 and 1103. The burden does not shift to the respondent state to defend the appearance of differential treatment on rational governmental policy grounds. It is the claimant’s burden to prove that it has been accorded less favorable treatment in like circumstances to other domestic or third party investors on the basis of nationality. Moreover, NAFTA tribunal should accord significant deference to governmental policy making. It is not the role of a tribunal to sit retrospectively in judgment against the discretionary exercise of sovereign power “not made irrationally and not exercised in bad faith”<sup>5</sup>.

15. Mexico further affirms that 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 properly can be inferred in all of the circumstances that a facially neutral measure has the effect of discriminating against foreign investors as a class with no rational or good faith policy objectives. Mexico adds that such a finding will be most unlikely in situations where the treatment accorded to domestic investors is not materially different to that accorded to other foreign investors, particularly other investors of the claimant’s home State.

#### **IV. INTERPRETATION OF THE MINIMUM STANDARD OF TREATMENT UNDER ARTICLE 1105**

16. The NAFTA Parties have repeatedly made submissions to common effect on the proper interpretation and application of NAFTA Article 1105, both in their own submissions in cases where they are the disputing Party, and in their Article 1128 submissions in cases where one of the other Parties is the disputing Party.

17. Mexico does not intend to reiterate here the totality of its views on the proper interpretation of Article 1105. It will focus instead on the interpretive questions central to this proceeding.

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<sup>5</sup> *Electrabel Award*, cited at footnote 486 of Canada’s Rejoinder.

18. Mexico agrees with Canada's submissions on the principles governing claims under Article 1105(1) as stated in paragraphs 454-470 of the Counter-Memorial and paragraphs 359-366 of the Rejoinder, including:

- the threshold for a violation of the minimum standard of treatment is high;
- the 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*; and
- decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary international law are not themselves instances of "State practice" for purposes of proving customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice.

19. Mexico also agrees with and endorses paragraphs 5-10 of the United States' Article 1128 Submission in *Mesa*, reciting here the pertinent parts of paragraphs 6, 8 and 9 which are directly relevant to the contested issues of interpretation in this proceeding:

6. ... the minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts. Article 1105 thus reflects a standard that develops from State practice and *opinio juris*, rather than an autonomous, treaty-based standard. Although 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. Arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, do not constitute evidence of the content of the customary international law standard required by Article 1105. While there may be overlap in the substantive protections both types of treaty provisions ensure, a claimant submitting a claim under an agreement such as NAFTA, in which fair and equitable treatment is defined by the customary international minimum standard of treatment, still must demonstrate that the obligations invoked are in fact a part of customary international law.

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8. 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. 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, or constitutes manifest arbitrariness falling below international standards.

9. The burden is on a 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*. "The party which relies on a custom," therefore, "must prove that this custom is established in such a manner that it has become binding on the other Party." Once a rule of

customary international law has been established, the claimant must show that the State has engaged in conduct that violated that rule. Determining a breach of the 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.” [Footnotes omitted].<sup>6</sup>

20. Mexico also agrees with Canada 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.

**V. ESTABLISHMENT OF A “SUBSEQUENT AGREEMENT” AND/OR A ‘SUBSEQUENT PRACTICE’ UNDER ARTICLE 31(3) OF THE VIENNA CONVENTION ON THE LAW OF TREATIES**

21. Article 31(3) of the Vienna Convention on the Law of Treaties provides that, in treaty interpretation:

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; and
- (c) any relevant rules of international law applicable in the relations between the parties.

22. As can be seen in the submissions referred to above – including Canada’s submission in its pleadings, Mexico’s Article 1128 submissions in this proceeding and prior proceedings, and the United States’ Article 1128 submissions in prior proceedings (plus, Mexico expects, an Article 1128 submission in this proceeding consistent with the United States’ prior Article 1128 submissions) – the NAFTA Parties have repeatedly expressed a common view or understanding of the questions of interpretation of the NAFTA that are discussed herein, namely:

- the exclusion applicable to procurement by a state enterprise under NAFTA Article 1108(7);
- the meaning of delegated government authority under NAFTA Article 1503(2);
- the proper interpretation and application of the national treatment and most-favored nation treatment obligations under NAFTA Articles 1102 and 1103, respectively; and
- the proper interpretation and scope of the obligation to accord fair and equitable treatment under NAFTA Article 1105.

23. Mexico submits that the cumulative effect of the repeated submissions of the NAFTA Parties on these questions of interpretation of the NAFTA by now amounts to a “subsequent *practice* in the application of the [NAFTA] which establishes the agreement of the parties regarding its interpretation”, if not a “subsequent *agreement* between the [NAFTA Parties] regarding the interpretation of the [NAFTA]” which

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<sup>6</sup> See <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/mesa-usa-1128-submission.pdf>.

the Tribunal must take into account when addressing the interpretation of the aforementioned provisions of the NAFTA.

24. Mexico considers the reasoning in the Award on Jurisdiction in *Canadian Cattlemen for Fair Trade v. United States of America* to be instructive on this issue, although Mexico submits that the degree of repetition and unanimity in the instant case enables this Tribunal to hold that there is a “subsequent agreement” among the NAFTA Parties as well as a “subsequent practice” with respect to the interpretive questions at issue.<sup>7</sup>

All of which is respectfully submitted,

  
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Carlos Véjar Borrego  
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May 8, 2015

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<sup>7</sup> *Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction, January 28, 2008, paras 181-189, <http://www.italaw.com/cases/188>.