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

BETWEEN:

MESA POWER GROUP, LLC

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

RESPONSE TO 1128 SUBMISSIONS

June 26, 2015

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I. INTRODUCTION

1. The Article 1128 submissions of the United States and Mexico confirm that all three NAFTA Parties are in agreement – the *Bilcon* tribunal was incorrect in its interpretations of NAFTA Article 1102 (National Treatment) and Article 1105 (Minimum Standard of Treatment). This unanimous agreement reflects an authoritative interpretation of the NAFTA that must be taken into account by this Tribunal in accordance with Article 31 of the *Vienna Convention on the Law of Treaties* (“Vienna Convention”).

2. In particular, the NAFTA Parties agree that: (i) the burden of proving a rule of customary international law under NAFTA Article 1105 rests solely on the claimant and requires proof of both State practice and *opinio juris*; (ii) the awards of investment tribunals do not qualify as state practice for the purposes of proving the existence of a rule of customary international law; (iii) a Chapter 11 tribunal does not have the jurisdiction to determine whether a challenged measure is consistent with domestic law; (iv) a breach of domestic law is not in and of itself a breach of Article 1105; (v) NAFTA Article 1102 only prohibits differential treatment on the basis of nationality; and (vi) the burden of proof with respect to Article 1102 rests and remains solely with the Claimant.

II. THE ARTICLE 1128 SUBMISSIONS MUST BE TAKEN INTO ACCOUNT BY THIS TRIBUNAL

3. Article 31(3) of the Vienna Convention provides that in interpreting a treaty, a Tribunal “shall...take [] 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”¹ and “(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”²

¹ Vienna Convention, Article 31(3)(a).

² Vienna Convention, Article 31(3)(b).

4. The use of the word “shall” indicates the mandatory nature of this provision.³ In other words, subsequent agreements and practice of the treaty parties regarding the interpretation of their obligations must be taken into consideration by the Tribunal.⁴ They cannot be ignored or cast aside.

5. Article 31(3)(a) does not limit the form of any subsequent agreement and, in the context of the NAFTA, such subsequent agreements on interpretation may be evidenced through submissions by non-disputing parties pursuant to NAFTA Article 1128.⁵ By agreeing with Canada’s pleadings in this arbitration, the submissions of the United States and Mexico have created a subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention.

6. NAFTA Chapter 11 tribunals have generally heeded their obligations under Article 31 of the Vienna Convention,⁶ and have accorded the concordant views of the NAFTA Parties on the interpretation of the treaty obligations considerable weight.⁷ This Tribunal should do the same.

³ This stands in contrast to optional nature of the Vienna Convention, Article 32 (Supplementary Means of Interpretation). See Vienna Convention, Article 32.

⁴ Canada agrees with the United States submission that the “Parties’ common, concordant, and consistent position constitutes the authentic interpretation of [the NAFTA] and, under the Vienna Convention on the Law of Treaties, ‘shall be taken into account, together with the context’”. See Second Submission of the United States of America, ¶ 3, fn 5 *citing to Canadian Cattlemen – Award on Jurisdiction*, ¶¶ 186-189.

⁵ Article 1128 submissions of the NAFTA Parties also satisfy the definition of subsequent practice contemplated in Article 31(3)(b) of the *Vienna Convention*. In *Canadian Cattlemen for Fair Trade*, the NAFTA tribunal found subsequent practice, for the purposes of Article 31(3)(b), from the submissions of the United States as respondent in the arbitration and its Article 1128 submission in another NAFTA arbitration, Mexico’s Article 1128 submission, and Canada’s statements when implementing the NAFTA and as respondent in another NAFTA arbitration. See Second Submission of the United States of America, ¶ 3, fn 5 *citing to Canadian Cattlemen – Award on Jurisdiction*, ¶¶ 186-189.

⁶ The *Bilcon* Award is at variance with this consistent practice. In that dispute, all three NAFTA Parties agreed with respect to the proper interpretation of Articles 1102 and 1105 of NAFTA. However, the *Bilcon* tribunal wrongfully ignored its obligation to take such agreement into account. Indeed, the *Bilcon* Award makes no reference to the Article 1128 submission of the United States and Mexico other than to take note that they were filed. See *Bilcon* Award, ¶ 100.

⁷ See Second Submission of the United States of America, ¶ 3, fn 5 *citing to Canadian Cattlemen – Award on Jurisdiction*, ¶¶ 186-189; **RL-043**, *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB (AF)/05/1) Award, 19 June 2007. Even when NAFTA tribunals have not explicitly acknowledged that there is an agreement for the purposes of Article 31(3)(a) of the Vienna Convention, they have consistently adopted the common positions of NAFTA Parties advanced in Article 1128 submissions. For example, see: **RL-062**, *Methanex Corporation. v. United States of America* (UNCITRAL) Preliminary Award on Jurisdiction, 7 August 2002, ¶ 147; **CL-121**, *The Loewen Group Inc. and Raymond Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003), ¶ 235; **CL-030**, *United Parcel Service of America Inc. v. Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002, ¶ 83-92; **CL-160**, *Marvin Roy Feldman Karpa v. United*

In particular, it is incumbent on this Tribunal to take into account the agreement of all three NAFTA Parties that the *Bilcon* Tribunal’s interpretation of Articles 1102 and 1105 was wrong.

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

7. Canada, the United States and Mexico agree on the proper interpretation of NAFTA Article 1105. All three NAFTA Parties agree⁸ that the NAFTA Free Trade Commission’s 2001 *Notes of Interpretation of Certain Chapter 11 Provisions* (the “FTC Note”) is binding on this Tribunal and reflects the high threshold for a breach of the Minimum Standard of Treatment.

8. The Claimant’s argument that the Tribunal should ignore the content of the FTC Note and its binding effect has been expressly rejected by all three NAFTA Parties, not to mention every other NAFTA tribunal to decide on the issue to date, including the *Bilcon* tribunal. Canada has consistently argued that the FTC Note is authoritative and binding.⁹ The United States confirms its agreement with this position in its Article 1128 submission, indicating that “[t]he Commission’s interpretation “shall be binding” on tribunals established under Chapter Eleven.”¹⁰ Similarly, Mexico has agreed that the “*Bilcon* tribunal...correctly dismissed the Claimant’s arguments with respect to the Note of Interpretation.”¹¹

9. Further, both the United States¹² and Mexico¹³ agree with Canada¹⁴ that the threshold for demonstrating a violation of Article 1105 is high – a point correctly noted by the *Bilcon* tribunal and consistent with the decisions of all NAFTA tribunals subsequent to the FTC Note’s issuance.

Mexican States (ICSID Case No. ARB (AF)/99/01) Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, ¶¶ 44-45 (Notice of arbitration constitutes the “claim” for time limitation period purposes under Article 1117:2); **CL-168**, *Mobil Investments, Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶¶ 291-295, 302-303, 346-350, 374.

⁸ Second Submission of the United States of America, ¶ 6; Second Submission of Mexico Pursuant to NAFTA Article 1128, ¶ 8.

⁹ Canada’s Counter-Memorial, ¶¶ 386-388; Canada’s Rejoinder, ¶¶ 141-144.

¹⁰ Second Submission of the United States of America, ¶ 6.

¹¹ Second Submission of Mexico Pursuant to NAFTA Article 1128, ¶ 8.

¹² Second Submission of the United States of America, ¶ 20: (“Accordingly, ‘there is a high threshold for Article 1105 to apply’”).

10. The NAFTA Parties further agree that the burden of proving the existence of a rule of customary international law rests solely on the party that alleges it.¹⁵ In order to meet this burden, the party alleging the existence of such a rule must demonstrate the requisite State practice and *opinio juris*.¹⁶ This understanding of the NAFTA Parties has also been confirmed in NAFTA jurisprudence.¹⁷

11. In this regard, Canada has explained at length in its pleadings as to why decisions of international investments tribunals are not a source of State practice for the purpose of establishing a new customary norm.¹⁸ In their Article 1128 submissions, the United States and Mexico confirm the same understanding, stating, respectively, that “[d]ecisions of international courts and tribunals do not constitute State practice or *opinio juris* for purposes of evidencing customary international law”¹⁹ and that “decisions of arbitral tribunals are not themselves a source of customary international law”.²⁰

12. It is therefore undisputed between the NAFTA Parties, and as such is an authoritative position that must be considered by this Tribunal, that the burden is on the Claimant to prove that

¹³ Second Submission of Mexico Pursuant to NAFTA Article 1128, ¶ 8: (“the threshold for establishing a breach of the minimum standard of treatment at customary international law is high”).

¹⁴ Canada’s Observations on the Bilcon Award, ¶ 15; Canada’s Counter-Memorial, ¶¶ 394-402; Canada’s Rejoinder, ¶ 146.

¹⁵ Canada’s Rejoinder, ¶ 147; Second Submission of Mexico Pursuant to NAFTA Article 1128, ¶ 9; Second Submission of the United States of America, ¶ 12. See also Second Submission of the United States of America, ¶ 8: (“Specifically, as addressed below, the Bilcon tribunal failed to recognize that the burden is on a claimant to establish the existence and applicability of a rule of customary international law, and failed to determine whether the Bilcon Claimants had met that burden.”).

¹⁶ Second Submission of Mexico Pursuant to NAFTA Article 1128, ¶ 9; Second Submission of the United States of America, ¶ 12; Canada’s Counter-Memorial, ¶¶ 389-393; Canada’s Rejoinder, ¶ 150.

¹⁷ Canada’s Counter-Memorial, ¶¶ 389-393; Canada’s Rejoinder, ¶ 147; **CL-072**, *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1) Award, 9 January 2003, ¶ 185: (“The investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that the current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts.”); See also, **RL-073**, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002, ¶ 84: (“the obligations imposed by customary international law may and do evolve. The law of state responsibility of the 1920s may well have been superseded by subsequent developments. It would be remarkable were that not so. *But relevant practice and the related understandings must still be assembled in support of a claimed rule of customary international law.*”[emphasis added]).

¹⁸ Canada’s Counter-Memorial, ¶¶ 389-393; Canada’s Rejoinder, ¶ 147.

¹⁹ Second Submission of the United States of America, ¶ 14.

²⁰ Second Submission of Mexico Pursuant to NAFTA Article 1128, ¶ 10.

customary international law has evolved to include the elements it claims are protected. In doing so, the Claimant cannot turn to the decisions of other international tribunals to demonstrate State practice. For example, the Claimant cannot turn to the decisions of international tribunals as evidence of State practice that the protection of an investor's expectations is required by the customary international law minimum standard of treatment. Indeed, as the United States indicates, there is "no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' 'expectations.'"²¹

13. The Claimant has offered no satisfactory evidence that the customary international law minimum standard of treatment contains any of the elements the Claimant alleges it does. Indeed, the Claimant has failed to undertake the necessary examination of State practice and *opinio juris* required to support its position. As a result, the Claimant has failed to meet its burden with respect to NAFTA Article 1105.

14. Finally, all three NAFTA Parties agree that this Tribunal has jurisdiction to analyse only whether a NAFTA Party has respected the customary international law minimum standard of treatment.²² It does not, contrary to the position taken by the *Bilcon* tribunal, have jurisdiction to make determinations with respect to compliance with domestic laws. Canada is in agreement with its treaty partners that, "a departure from domestic law could not in and of itself sustain a violation of Article 1105(1)"²³ and that "[m]aking a determination that the international law minimum standard has been breached on the basis of purported non-compliance with domestic law amounts to a failure to apply the proper law of the arbitration."²⁴

IV. ALL THREE NAFTA PARTIES AGREE ON THE INTERPRETATION OF ARTICLE 1102

15. Canada, the United States and Mexico also agree on the proper interpretation of NAFTA Article 1102. Indeed, all three NAFTA Parties agree that the *Bilcon* tribunal was incorrect in its interpretation of Article 1102 when it ignored the underlying objective of that provision –

²¹ Second Submission of the United States of America, ¶ 18.

²² Second Submission of the United States of America, ¶¶ 21, 22; Second Submission of Mexico Pursuant to NAFTA Article 1128, ¶ 11.

²³ Second Submission of the United States of America, ¶ 22.

²⁴ Second Submission of Mexico Pursuant to NAFTA Article 1128, ¶ 11.

protection against nationality-based discrimination – and when it found that the burden shifts to the respondent state as soon as the claimant has made only a *prima facie* case.

16. As Canada previously argued, a national treatment violation must be founded upon a finding of discrimination based on a foreign investor’s nationality.²⁵ This position has been unanimously supported by the United States²⁶ and Mexico.²⁷ Specifically, the United States agrees that “[a] claimant must establish that the measure, whether in law or in fact, treats foreign investors or investments less favorably than domestic investors or investments on the basis of nationality.”²⁸ By failing to require proof of nationality-based discriminatory treatment, the *Bilcon* tribunal erred in its interpretation of Article 1102. This Tribunal should not do the same, and instead, should follow the mandate given to it by the NAFTA Parties, and reaffirmed in the NAFTA Parties submissions here, by limiting its analysis with respect to Article 1102 to whether the Claimant has proven *nationality-based* discrimination. Any differing or broader interpretation put forward by the Claimant must be rejected.

17. The NAFTA Parties also agree that a claimant must do more than establish a *prima facie* violation of Article 1102 and that the burden never shifts to a respondent State. As Mexico indicates “the claimant always bears the legal burden of proving a national treatment violation and that the burden of disproving a national treatment violation never shifts to the respondent state.”²⁹ The United States also agrees that “[t]he burden to prove each element of a claim under Article 1102 rests and remains squarely with the claimant.”³⁰ In light of the positions of all three NAFTA Parties on the interpretation of Article 1102 in this regard,³¹ this Tribunal should not endorse the position taken by the *Bilcon* tribunal with respect to the burden of proof for a claim under Article 1102.

²⁵ Canada’s Counter-Memorial, ¶ 354; Canada’s Rejoinder, ¶¶ 91-92; Canada’s Post-Hearing Submission, p. 18, Line 32.

²⁶ Second Submission of the United States of America, ¶¶ 3, 4.

²⁷ Second Submission of Mexico Pursuant to NAFTA Article 1128, ¶ 4.

²⁸ Second Submission of the United States of America, ¶ 3.

²⁹ Second Submission of Mexico Pursuant to NAFTA Article 1128, ¶¶ 5, 7.

³⁰ Second Submission of the United States of America, ¶ 4.

³¹ Canada’s Observations on the *Bilcon* Award, ¶¶ 25-26.

V. CONCLUSION

18. All three NAFTA Parties agree on the interpretation of Articles 1102 and 1105 and the fundamental errors made by the *Bilcon* tribunal. As a result, this Tribunal must take into account the NAFTA Parties common, consistent and concordant position and give limited weight to the *Bilcon* award in considering whether Canada breached its obligations under Article 1102 and 1105 in this arbitration.

All of which is respectfully submitted,

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