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

MESA POWER LLC

v.

GOVERNMENT OF CANADA

(PCA CASE NO. 2012-17)

SECOND SUBMISSION OF MEXICO PURSUANT TO NAFTA ARTICLE 1128

1. Pursuant to NAFTA Article 1128, the Government of Mexico is providing its views on certain matters of interpretation of the NAFTA arising from the recent Award in *Bilcon of Delaware Inc. and others v. Government of Canada* (*"Bilcon"*)

2. No inference should be drawn from the fact that Mexico has chosen to address only some of the issues raised by the disputing parties in connection with the *Bilcon* Award. Mexico has previously addressed the interpretation of provisions of NAFTA Chapter Eleven in its submissions in this and other disputes, and Mexico re-affirms those prior submissions.

3. Mexico takes no position on the facts of this dispute.

Interpretation of NAFTA Article 1102

4. Article 1102 is intended to prevent discrimination on the basis on nationality. Mexico agrees that the NAFTA Parties are unanimously of the view that a national treatment violation requires a finding of discrimination based on a foreign investor's nationality. Mexico concurs in Canada's remarks in paragraphs 21 to 24 of its submission dated May 14, 2015.

5. The NAFTA Parties are also unanimously of the view that 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.

6. Mexico agrees that the claimant must establish three elements:

(i) that the respondent state has accorded "treatment" (i.e., a measure or measures, as defined in Article 201) to the claimant or to its investment;

(ii) that such treatment is less favorable than the treatment accorded to domestic investors (or to their investments if the treatment was accorded to the investment of the claimant); and

(iii) that the less favorable treatment of the claimant (or its investment) was accorded "in like circumstances" to the treatment accorded to the 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.

7. Mexico expressly disagrees with the *Bilcon* tribunal's statement that "once a *prima facie* case is made out under the three-part UPS test, the onus is on the host state to show that a measure is still sustainable within the terms of Article 1102". The onus or burden of establishing all of the elements of a national treatment claim always remains with the claimant, and it is more than just a *prima facie* burden.

Interpretation of NAFTA Article 1105

8. Mexico concurs in Canada's submissions that the *Bilcon* tribunal (i) correctly dismissed the Claimant's arguments with respect to the Note of Interpretation and (ii) correctly held that the threshold for establishing a breach of the minimum standard of treatment at customary international law is high.

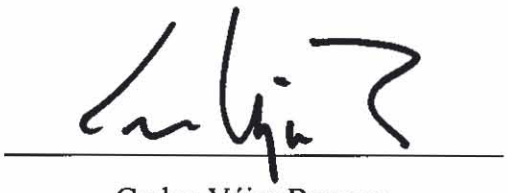
9. The NAFTA Parties have repeatedly and consistently submitted that Article 1105 reflects a standard that develops from State practice and *opinio juris*. As the United States stated in its first Article 1128 submission in this proceeding, "the burden is on a claimant to establish a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*".

10. Mexico concurs with Canada's submission that decisions of arbitral tribunals are not themselves a source of customary international law and that the *Bilcon* tribunal's reliance on *Merrill & Ring* was misplaced. The *Merrill & Ring* tribunal's *obiter dicta* on the interpretation and application of NAFTA Article 1105 fails to reflect a proper analysis of customary international law.

11. Finally, Mexico concurs with Canada's submission that, as noted in the dissenting opinion, the majority in *Bilcon* failed to engage in a proper analysis of customary international law when it apparently determined that failure to comply with applicable domestic law amounted to a failure to meet the minimum standard of treatment at international law. A tribunal only has the authority to decide whether the claimant has established, on the basis of state practice and *opinio juris*, that

the conduct complained of amounts to a violation of the international law minimum standard. Making 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.

All of which is respectfully submitted,



Carlos Véjar Borrego
General Counsel
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