

May 19, 2015

*By E-mail*

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Dear Professor Kaufmann-Kohler,

**Re: Mesa Power Group, LLC v. Government of Canada**

**A. PROCEDURAL HISTORY**

1. On May 4, 2015, the President of the Tribunal issued a letter on behalf of the Tribunal advising the disputing parties that the Tribunal would invite observations on the Award on Jurisdiction and Merits in *Bilcon et al. v. Canada*<sup>1</sup> by May 14, 2015.
2. In the last paragraph of the Tribunal's letter, the Tribunal invited the "Parties" to comment on "this submission" within the same time limit.
3. The term "Parties" is used within the NAFTA to refer to the signatories to the NAFTA. The term "disputing parties" is used to refer to the specific claimant and respondent in this arbitration. The use by the Tribunal of the term "Parties" led to some misunderstanding on the part of the Investor who assumed that the reference to "the Parties to comment on this submission" meant that the non-disputing Parties were invited to comment on the submission of the *Bilcon* Award by the May 14, 2015 deadline. It appears from the Tribunal's May 18, 2015 letter, that the Investor's understanding that this instruction was targeted to the other NAFTA Parties was not what the Tribunal intended to convey in its May 4 letter.
4. On its own, and without any procedure set out by the Tribunal, Canada notified the non-disputing Parties of the Investor's submission of the *Bilcon* award and of the relevant timeline for the submission of the comments on the *Bilcon v. Canada* award.
5. On May 14, 2015, Canada filed submissions with respect to the admissibility of new NAFTA Article 1128 submissions at the conclusion of its observations on the *Bilcon*

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<sup>1</sup> *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability, March 17, 2015 (*hereinafter referred to as Bilcon v. Canada*) (*Investor's Schedule of Legal Authorities at CL-351*); *Bilcon. v. Canada*, UNCITRAL, Dissenting Opinion of Professor Donald McRae, March 17, 2015 (*Investor's Schedule of Legal Authorities at CL-352*).

award. On that same day of May 14, 2015, letters were filed by the Government of the United States and by the Government of the United Mexican States. Both letters contained a similar message. Neither non-disputing Party filed any substantive observations but both governments asserted the right to be able to file a submission on the *Bilcon* award by a deadline that they set on their own of June 12, 2015.

6. The letter from the United States made the following statement:

While Article 1128 permits the non-disputing Parties to make submissions as of right and includes no time limit on such submissions, following review of the disputing parties' submissions on the *Bilcon* award, the United States will revert back to the Tribunal no later than Friday, June 12.

The letter from Mexico relied on the US Submission in stating that Mexico:

reserved its right to present a submission to the Tribunal as a non-disputing Party .... as proposed by the United State Department of State in its submission dated May 14, 2015.

7. The disputing parties were given ten days by the Tribunal to provide comments on the *Bilcon* Award. The non-disputing Parties asserted a right to have nearly three times as much time to file their own comments on a tribunal decision that each has had since March 2015.
8. On May 15, 2015, the Investor wrote to Tribunal to obtain leave to file comments on the demands of the non-disputing Parties and upon the comments made by Canada regarding Article 1128 in paragraphs 27 – 29 of its May 14<sup>th</sup> observations. The Tribunal granted leave for the filing of comments on the admissibility of NAFTA Article 1128 Submissions in its letter of May 18th.
9. This letter addresses the admissibility issues raised by the May 14, 2015, letters of the United States of America, the United Mexican States and in paragraphs 27 – 29 of Canada's Observations on the *Bilcon* award filed by Canada on May 14, 2015 and of the proposed future filings by United States of America and the United Mexican States.

## **B. THE TRIBUNAL GOVERNS THE CONDUCT OF THIS ARBITRATION**

10. The NAFTA makes absolutely clear that this NAFTA Tribunal constituted under the 1976 *UNCITRAL* Arbitration Rules has the authority to govern the conduct and operation of the arbitration.
11. Article 1131 established the governing law for the arbitration as being the NAFTA and applicable rules of international law. Article 1120 sets out that a disputing investor may submit a claim to arbitration under one of three different set of procedural rules and that those "arbitration rules shall govern the arbitration" except to the extent modified by Section B of the NAFTA.
12. The Mesa Power arbitration is governed by the 1976 *UNCITRAL Arbitration Rules*. Section 15 (1) of those rules provides that the Arbitration Tribunal has the power to conduct the arbitration as it considers appropriate provided that the parties are treated with equality. The section of the *UNCITRAL Rules* states:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

13. The Arbitration Tribunal has the authority to establish procedural timetables. In *Procedural Order No. 5*, the Tribunal recognized the need to maintain the arbitration schedule in relation to a request for a document production extension request from Canada, the Tribunal stated at paragraph 25:

Finally, the Tribunal insists that it expects the time limits now extended to be complied with in order to avoid that the calendar be further disturbed. The Tribunal has a duty to proceed efficiently and, subject to entirely unforeseeable and unavoidable circumstances.

14. The Tribunal has complete authority to address the content, context and timing of submissions made under NAFTA Article 1128. The Tribunal already exercised this authority.
15. The *Mesa* Tribunal posted a notice to potential *amici* and to the Non-disputing Parties on the website of the Permanent court of Arbitration in June 2013. This notice contained a section governing the submission of Article 1128 submissions.

2. The submission filed by a non-disputing party will:

- a) be dated and signed by the person filing the submission;
- b) be concise, and in no case longer than 20 typed pages, including any appendices;

16. The June 2013 notice thus recognized that the non-disputing Parties would be entitled to a single 20-page briefing, and both non-disputing Parties so filed. The non-disputing Parties at that point were not permitted, and did not file, any further briefings and were not permitted, and did not, participate in the hearing.
17. On May 14, 2015, all three NAFTA Parties filed writings regarding the admissibility of new NAFTA Article 1128 Submissions. Even then, the non-disputing Parties did not file comments on the *Bilcon* award, instead reserving their “rights” to file comments on their own schedule weeks after the parties to this proceeding fully briefed the issues raised by the *Bilcon* award.
18. The restrictions on the admissibility of NAFTA Article 1128 submissions have been clearly confirmed by a number of NAFTA arbitrations.
  - a. *Procedural Order No. 3* made by the Tribunal in *Detroit International Bridge Company (“DIBC”)* held that :

“NAFTA Article 1128 submissions by the other NAFTA Parties must be presented within the time frame fixed by the Tribunal in the schedule of proceedings.” [emphasis added]<sup>2</sup>

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<sup>2</sup> *Detroit International Bridge Company v Government of Canada, UNCITRAL, Procedural Order No. 3, March 27, 2013, at ¶3 (Investor’s Schedule of Legal Authorities at CL-344).*

In *DIBC*, the non-disputing Parties sought approval to attend and participate in the hearing. The Tribunal refused to grant this permission in *Procedural Order No. 6*, holding that there was no such entitlement in the NAFTA.<sup>3</sup> When asked by the non-disputing Parties to reconsider this decision, the *DIBC* Tribunal maintained its position in *Procedural Order No. 7* by saying:

There is no reference in these articles to the participation of non-disputing NAFTA Parties in hearings. Since they were finalized by the Disputing Parties and the Tribunal on the same day as the Confidentiality Order, which requires that hearings be held in camera and that transcripts be kept confidential, the Tribunal is not in a position to conclude that the absence of reference to the right of non-disputing NAFTA Parties to be present at the hearings was the result of an overlooking or of a misunderstanding. In this respect, it is worth noting that the schedule for the Hearing on Jurisdiction was adopted on the basis of a proposal of the Disputing Parties which left no room for participation of the non-disputing NAFTA Parties. [emphasis added]<sup>4</sup>

- b. In *Procedural Order No. 1* of the *Bilcon* claim, the *Bilcon* Tribunal clearly set out the Tribunal's authority to set deadlines for NAFTA Article 1128 submissions. The Tribunal states that 1128 submissions "shall be filed on a simultaneous basis on a date ordered by the Arbitral Tribunal".<sup>5</sup> In accordance with this Order, the Tribunal informed the non-disputing Parties of the opportunity to make submissions and corresponding deadlines in a letter dated March 28, 2013 and *Procedural Order No. 15*: "the non-disputing NAFTA Parties shall now have an opportunity to make any submissions pursuant to NAFTA Article 1128 by **April 19, 2013**."<sup>6</sup>
  - c. In *UPS v. Canada*, Mexico and the U.S. requested the opportunity to make NAFTA Article 1128 submissions. The Tribunal granted this request, but fixed a timetable setting out deadlines for the submissions.<sup>7</sup>
19. Other NAFTA Tribunals consistently have asserted the ability of Tribunals to control the conduct of the hearings by being able to limit NAFTA Article 1128 submissions as part of the arbitration process. Some examples include:
- a. In *Eli Lilly v. Canada*, the Tribunal held: "The non-disputing parties may make submissions of the Arbitral Tribunal within the meaning of Article 1128 of the NAFTA by the date indicated in Annex B"<sup>8</sup>;

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<sup>3</sup> *Detroit International Bridge Company v Government of Canada, UNCITRAL, Procedural Order No. 6, March 18, 2014, at ¶3 (Investor's Schedule of Legal Authorities at CL-345).*

<sup>4</sup> *Detroit International Bridge Company v Government of Canada, UNCITRAL, Procedural Order No. 7, March 25, 2014, at ¶3 (Investor's Schedule of Legal Authorities at CL-346).*

<sup>5</sup> *Bilcon v. Canada, UNCITRAL, Procedural Order No. 1, April 9, 2009, at ¶45 (Investor's Schedule of Legal Authorities at CL-347).*

<sup>6</sup> *Bilcon v. Canada, UNCITRAL, Procedural Order No. 15, October 17, 2012, at ¶45 (Investor's Schedule of Legal Authorities at CL-348); Bilcon v. Canada, UNCITRAL, Letter from Tribunal to Parties, March 28, 2013 (Investor's Schedule of Legal Authorities at CL-349).*

<sup>7</sup> *United Parcel Service of America Inc. v. Government of Canada, UNCITRAL, Award on Jurisdiction, November 22, 2002, at ¶5 (Investor's Schedule of Legal Authorities at CL-350).*

- b. In *Mercer International Inc. v. Canada*, the Tribunal held “Pursuant to NAFTA Article 1128, non-disputing NAFTA Parties are entitled to make submissions in this arbitration. Each disputing party shall be entitled to comment on any such Article 1128 submission, within a time frame to be fixed by the Tribunal”<sup>9</sup>;
  - c. In *V. G. Gallo v. Canada*, the Tribunal held: “NAFTA Article 1128 submissions by other NAFTA Parties should be presented not later than July 9, 2010”<sup>10</sup>; and
  - d. In *Apotex v. US*, the Tribunal held: “Pursuant to NAFTA Article 1128, non-disputing Parties may make submissions on questions of NAFTA treaty interpretation by the applicable date set forth in paragraph 14.”<sup>11</sup>
20. It is abundantly clear that this has the authority to set the procedural schedule governing the filing of NAFTA Article 1128 submissions and already has provided that schedule, which has been fully completed by both non-disputing Parties.

### **C. THE NAFTA PROCESS MUST PROVIDE FOR DUE PROCESS AND EQUALITY**

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21. NAFTA Article 1115 sets out the purpose of the investor-state dispute settlement process contained in Section B of NAFTA Chapter Eleven. It says:
- Article 1115: Purpose**
- Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.
22. Mexico and the United States have asserted the right to file Article 1128 submissions on their own schedule without the permission of the Tribunal and in contravention of the Tribunal’s prior order limiting Article 1128 submissions. Such extra submissions should not be admissible.
23. For its part, Canada asserts that NAFTA Article 1128 provides a right to the non-disputing Parties to be able to make submissions whenever they wish and without regard to the procedural rules established by the Tribunal.
24. A review of NAFTA Article 1128 demonstrates that the right to make statements is not without limits. Article 1128 states:

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<sup>8</sup> *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Procedural Order No. 1, May 26, 2014, at ¶17.1 (*Investor’s Schedule of Legal Authorities at CL-354*).

<sup>9</sup> *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Procedural Order No. 1, January 24, 2013 at ¶74 (*Investor’s Schedule of Legal Authorities at CL-355*).

<sup>10</sup> *Vito G. Gallo v. The Government of Canada*, UNCITRAL, PCA Case No. 55798, Procedural Order No. 1, June 4, 2008, at ¶39 (*Investor’s Schedule of Legal Authorities at CL-356*).

<sup>11</sup> *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Procedural Order No. 1, December 16, 2010, at ¶20.1 (*Investor’s Schedule of Legal Authorities at CL-357*).

On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.

25. Article 31 of the *Vienna Convention on the Law of Treaties* requires that the NAFTA be interpreted in a manner to give effectiveness to its terms. The purpose of the investor state dispute settlement system is set out in Article 1115. Accordingly, the Tribunal must interpret Article 1128 in conformity with the purpose of Section B of NAFTA contained in Article 1115 which expressly requires the Tribunal to assure due process before an impartial tribunal.
26. This Tribunal must reject Canada's assertion as there cannot be due process if the non-disputing Parties to the arbitration are entitled to file an unlimited number of submissions on interpretative issues, even after the arbitration process has concluded. The most basic principles of fairness require that equality be given between the disputing parties and that the impartial tribunal called for in NAFTA Article 1115 be granted conduct of the arbitration in accordance with the governing arbitration rules.
27. There is no reasonable basis to permit the non-disputing Parties to be able to hijack the Tribunal's procedural timetable by filing additional submissions outside of the time frames established by the Tribunal. It is solely for the Tribunal to determine reasonable and fair timetables for an arbitration. The non-disputing Parties cannot overtake the clear oversight role of the Tribunal. Such an approach would be unfair, would violate due process and would make the arbitration process inefficient. Such an interpretation clearly would be absurd.
28. In coming to its decision, the Tribunal must be mindful of the late stage of these proceedings and the effect that the requirement of due process and equal opportunity to comment still would impose in this arbitration. If the non-disputing Parties are allowed to file comments, then the Tribunal must grant an opportunity for the Parties to review and, if necessary, comment upon these Article 1128 Submissions. Undoubtedly, the non-disputing Parties will want to comment on the Investor's submission, and the process never will end.
29. It is clear that the positions asserted by the non-disputing Parties and Canada that there is an unlimited right to make submissions outside of the times provided by the Tribunal simply does violence to the clear equality and due process requirements of NAFTA Article 1115 and UNCITRAL Article 15. It must always be clear that the non-disputing Parties may not file comments beyond the procedures established by the Tribunal which is charged with the conduct of this arbitration under the relevant arbitration rules identified in the NAFTA in Article 1120.

#### D. NEXT STEPS

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30. The decision to admit additional observations from the non-disputing Parties is discretionary to the Tribunal provided that the disputing parties are given an fair and adequate opportunity to comment on these submissions in accordance with due process and the principle of equality of the disputing parties.
31. The arguments raised by the Investor here were identical to the arguments made by Bilcon with respect to the meaning of the NAFTA obligations for National Treatment, Most Favoured Nation Treatment and the international law standard of treatment. The arguments about state responsibility were also based in both claims on the very same legal foundations (the *ILC Articles of State Responsibility*).
32. Since non-disputing Party submissions cannot comment on the evidence in the claim (and are restricted by the NAFTA to being limited to the interpretation of legal issues), we cannot foresee how additional submissions would be necessary by the non-disputing Parties as the fundamental legal issues already were before them when they filed their last Article 1128 Submissions. In these circumstances, where new legal arguments have not been advanced in the *Bilcon Award* in relation to what was already argued in the *Mesa* pleadings and at the *Mesa* hearing, it is hard to understand the value that would be served by another round of submissions on the very same legal principles or how the non-disputing Parties' interpretation of the *Bilcon Award* would be of any need to this Tribunal who has the benefit of the Parties' brief. Because, unlike the Parties, the non-disputing Parties cannot comment on the evidence, they are not going to be able to apply the *Bilcon Award* to the evidence here. Their submissions simply would be of limited value to the Tribunal even if they were allowed.
33. The Investor is very concerned that the non-disputing Parties' submission will not be so limited – because if they were, there would be no need for them – and thus the Investor likely will have to seek to strike the submissions.
34. The objectives of the NAFTA Chapter Eleven dispute settlement process are to provide equality of treatment and due process before an impartial tribunal to the disputing parties. These objectives would not be well served by allowing further argument to take place after the Tribunal, years ago, properly set forth a limited role for the non-disputing Parties. For those reasons, the Investor opposes allowing further submissions at this time.
35. In the event that the Tribunal determines that it wishes to hear from the non-disputing Parties on the *Bilcon Award*, then the Investor will require that the Tribunal provide it with an adequate opportunity to review these submissions and to reply to them or seek to have them stricken if they violate the Tribunal's prior order.

36. The Tribunal's letter of May 18<sup>th</sup> did not permit the Investor to make comments outside of the topic of admissibility of the proposed new Article 1128 submissions from the non-disputing Parties. The Investor will not provide any detailed comments with respect to the proposed timeframe suggested by the non-disputing Parties other than a general observation that given the fact that new issues are not at issue, this time frame appears to be excessive (which again raise the concern that they will not be properly limited), and that should the Tribunal permit Article 1128 submissions to be filed, a shorter time frame would be more appropriate.

Yours very truly

Appleton & Associates International Lawyers  
Astigarraga Davis Mullins & Grossman, P.A.

A handwritten signature in blue ink, appearing to read "Barry Appleton".

Barry Appleton  
Counsel for the Investor

cc: Hon. Charles N. Brower  
Toby Landau QC  
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