

**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**

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**GOVERNMENT OF CANADA**

***Observations on the Award on Jurisdiction and Merits in William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada***

**May 14, 2015**

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1. The *Award on Jurisdiction and Merits* in the *Bilcon v. Canada* arbitration (the “*Bilcon* Award”) is of limited relevance in this arbitration because of the different nature of the measures in dispute. Moreover, as is explained below, the *Bilcon* Award should be given limited weight in light of the fundamental errors made by the Tribunal in considering whether Canada breached its obligations under Articles 1102 and 1105.

## THE BILCON TRIBUNAL’S CONCLUSIONS REGARDING ITS JURISDICTION

### I. The *Bilcon* Tribunal’s Conclusions With Respect to the Attribution to Canada of the Acts of the Joint Review Panel Are Both Wrong and Irrelevant in this Arbitration

2. The Claimant has argued in this arbitration that certain acts of the Ontario Power Authority (OPA) in implementing and administering Ontario’s Feed-in Tariff (FIT) Program are attributable to Canada. As Canada has explained in its submissions, the OPA is a state enterprise, and as such, under the *lex specialis* in Article 1503(2) of NAFTA, its conduct is only attributable to Canada if it is exercising delegated governmental authority.<sup>1</sup> The conduct of a state enterprise was not the issue in the *Bilcon* arbitration. In *Bilcon*, the Claimants alleged that certain acts of the Joint Review Panel (the “JRP”) set up to provide recommendations to government in the course of the environmental assessment of Bilcon’s proposed project violated Canada’s Chapter 11 obligations. The JRP was not a state enterprise, and as a result, most of the analysis of the *Bilcon* Tribunal on the issue of state responsibility is not directly applicable here.<sup>2</sup> However, to the extent that this Tribunal does consider these same principles, the conclusions reached by the *Bilcon* Tribunal with respect to whether the acts of the JRP could be attributed to Canada as a matter of international law are in error and should not be followed.

3. In assessing the responsibility of Canada for actions of the JRP, the *Bilcon* Tribunal appears to base its analysis on Article 4, dealing with conduct of organs of a State, and Article 5,

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<sup>1</sup> Canada’s Counter-Memorial, ¶¶ 291-293; Canada’s Post-Hearing Submission, p. 7, Lines 10-12.

<sup>2</sup> For example, while the *Bilcon* Tribunal assessed the responsibility of Canada for actions of the JRP pursuant to ILC Article 11, this provision is not applicable in the case at hand due to the *lex specialis* nature of NAFTA Article 1503(2). As a result, Canada offers no further comment on the *Bilcon* Tribunal’s analysis under Article 11. In any event, Canada also notes that the Claimant has not advanced an argument in these proceedings that the Government of Canada is responsible for the actions of the OPA under ILC Article 11, despite the fact that it highlighted the paragraphs of the *Bilcon* Award discussing this Article as particularly relevant in its letter of April 6, 2015.

dealing with conduct of persons or entities exercising elements of governmental authority, of the International Law Commission's *Articles on the Responsibility of States for Internationally Wrongful Acts*.<sup>3</sup> Yet, in its reasons, the Tribunal is entirely unclear as to which legal standard it is applying. Indeed, the *Bilcon* Tribunal's reasoning moves from alluding that the JRP is a *de facto* organ of the Government of Canada,<sup>4</sup> to indicating the JRP is a *de jure* organ of the Government of Canada,<sup>5</sup> to landing on a finding that the JRP is part of the "apparatus of Canada".<sup>6</sup> This last finding uses a term put forward by the Claimants in *Bilcon* that has no basis in customary international law. It is not found in the ILC's Articles themselves, their commentaries, any jurisprudence of the International Court of Justice or any other legal authority.

4. Moreover, the Tribunal's analysis under Article 4 is entirely lacking in substance. The *Bilcon* Tribunal fails to even discuss, for example, the tests laid out by the International Court of Justice in the *Genocide Convention* case or apply those tests to the JRP. Instead, the *Bilcon* Tribunal references the "clear statutory role"<sup>7</sup> of the JRP in making "formal and public recommendations," and the "statutorily mandated and important role"<sup>8</sup> of the JRP. Neither of these factors is the correct legal standard for an analysis of state responsibility at customary international law.

5. The surprising failure of the *Bilcon* Tribunal to rigorously apply the appropriate framework for analyzing questions of state responsibility led it to the erroneous conclusion that it had jurisdiction to consider the acts of the JRP. Neither its conclusions nor its approach should be endorsed by this Tribunal. However, even if this Tribunal were to consider the *Bilcon* Tribunal's reasoning, many of the factors it identified as relevant to its analysis fail to support the Claimant's position in this arbitration that the acts of the OPA can be attributed to Canada.

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<sup>3</sup> *Bilcon* Award, ¶ 306.

<sup>4</sup> *Bilcon* Award, ¶ 315, referring to the Commentary to ILC Article 4(2).

<sup>5</sup> *Bilcon* Award, ¶ 319.

<sup>6</sup> *Bilcon* Award, ¶¶ 308, 313, 321.

<sup>7</sup> *Bilcon* Award, ¶ 319.

<sup>8</sup> *Bilcon* Award, ¶ 320.

6. For example, the *Bilcon* Tribunal relied on the fact that the JRP was not a “body with an existence that precedes the assessment of a particular project or survives after its tasks are completed.”<sup>9</sup> To the extent that this Tribunal believes this to be a relevant factor in an analysis of state responsibility under customary international law, Canada notes that the OPA is a statutory state enterprise with independent legal personality that existed well before the FIT Program did and continues to exist to this day.<sup>10</sup> The OPA is not a transitory entity.

7. The *Bilcon* Tribunal also emphasized the fact that the report of the JRP had to be considered by the Government of Canada in making its decisions and that the JRP was, thus, a “mandated part of the environmental deliberation process” undertaken by the Minister of the Environment.<sup>11</sup> The *Bilcon* Tribunal explained further that the JRP was established to “contribute to government decision-making, rather than pursuing its own mission.”<sup>12</sup> Again, to the extent this Tribunal agrees that such factors are relevant, they are not true of the OPA. The OPA carries out its purposes independently of the Government of Ontario. As discussed in Canada’s Counter-Memorial, the “principle purpose [of the OPA] is to, among other things, ‘engage in activities in support of the goal of ensuring adequate, reliable and secure electricity supply and resources in Ontario.’ In doing so, the OPA acts independently, and not as an agent of the Crown.”<sup>13</sup>

8. Finally, the *Bilcon* Tribunal distinguished the findings in the *Jan de Nul* Award, upon which Canada has relied on in this arbitration,<sup>14</sup> on the grounds that the “JRP neither generally engaged in commercial activities nor did it display any commercial character in conducting its

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<sup>9</sup> *Bilcon* Award, ¶ 308.

<sup>10</sup> Canada notes that on January 1, 2015, amendments to the *Electricity Act, 1998* came into force to provide for the amalgamation of the OPA and the Independent Electricity System Operator (“IESO”). The amalgamated entity was continued under the IESO name. Accordingly, references to the OPA in these submissions are to this entity as it was prior to January 1, 2015.

<sup>11</sup> *Bilcon* Award, ¶¶ 310-312.

<sup>12</sup> *Bilcon* Award, ¶ 318.

<sup>13</sup> Canada’s Counter-Memorial, ¶ 276; Canada’s Post-Hearing Submission, p. 6, Line 9.

<sup>14</sup> *Bilcon* Award, ¶ 316.

hearings".<sup>15</sup> To the extent such factors are considered relevant by this Tribunal, Canada notes that the OPA does engage in commercial activities. Much like the Suez Canal Authority in the *Jan de Nul* case, the OPA designed a procurement program pursuant to which it entered into contracts with energy generators for the procurement of renewable energy. There was nothing governmental about any of its acts.<sup>16</sup> Accordingly, even if this Tribunal were to look at the reasoning of the *Bilcon* Tribunal, that reasoning actually supports a finding that the acts of the OPA here should not be attributed to the Government of Canada.

## **II. The *Bilcon* Tribunal's Reasoning with respect to Article 1116(2) Supports Canada's Arguments Concerning Article 1120**

9. As Canada indicated in its Objection to Jurisdiction,<sup>17</sup> its Counter-Memorial and Reply on Jurisdiction,<sup>18</sup> and its Post-Hearing Submission<sup>19</sup> this Tribunal lacks jurisdiction over the dispute due to the Claimant's failure to comply with Article 1120 of the NAFTA. While the *Bilcon* Tribunal did not have to decide whether the requirements of Article 1120 had been met in that case, the *Bilcon* Award does provide guidance on the timing requirements under Article 1116 of the NAFTA which are relevant to the case at hand and this Tribunal's application of Article 1120.

10. In particular, the *Bilcon* Tribunal explained, relying upon well-settled principles that have been endorsed by numerous other NAFTA tribunals, that it is appropriate to "separate a series of events into its distinct components" when applying the timing requirements under the NAFTA.<sup>20</sup> While the Tribunal was speaking to Article 1116, the analysis is equally applicable to other timing requirements, including those under Article 1120. Applying the reasoning of the *Bilcon*

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<sup>15</sup> *Bilcon* Award, ¶ 316. Canada wonders as to why the Tribunal even entered into this analysis given its apparent findings with respect to Article 4. Finding attribution pursuant to Article 5 would be unnecessary once a finding is made pursuant to Article 4.

<sup>16</sup> Canada's Counter-Memorial, ¶¶ 294-296, 302-305; Canada's Rejoinder, ¶ 23; Canada's Post-Hearing Submission, p. 8, Line 12.

<sup>17</sup> Canada's Objection to Jurisdiction, ¶¶ 18-38.

<sup>18</sup> Canada's Counter-Memorial, ¶¶ 234-259.

<sup>19</sup> Canada's Post-Hearing Submission, pp. 2-3, Lines 3-6.

<sup>20</sup> *Bilcon* Award, ¶ 266.

Tribunal, it is for this Tribunal then to look at each individual component of an event and answer two questions: (1) is that component on its own an “event giving rise to a claim” such that alleged damages were suffered by the Claimant; and (2) did that component of the event occur more than six months prior to the submission of the claim to arbitration. It is only when both of these questions can be answered in the affirmative that a claim can validly be submitted to arbitration and Canada’s consent perfected.

11. As Canada has explained in its submissions, the only event in this arbitration that could possibly answer the first of these questions in the affirmative is the OPA’s failure to offer the Claimant a FIT Contract on July 4, 2011.<sup>21</sup> It is only on this date that the Claimant could have suffered damage.<sup>22</sup> However, that event cannot answer the second question in the affirmative. Pursuant to Article 1120, the Claimant’s claim could have been submitted to arbitration no earlier than January 4, 2012. As the Claimant failed to wait until that date, Canada has not consented to arbitrate this claim.

#### **THE BILCON TRIBUNAL’S CONCLUSIONS REGARDING ARTICLE 1105**

12. The finding of the majority of the *Bilcon* Tribunal that there was a breach of Article 1105 is inapposite here because of both the differences in the facts at issue and the measures that are being challenged. Moreover, the finding is wrong on both the facts of that case, and as a matter of international law. In reaching the conclusion it did, the majority ignored relevant facts, engaged in unjustifiable speculation, failed to accord Canada due process, improperly intruded into the right of the Government to regulate, failed to appropriately apply the customary international law minimum standard of treatment, and exceeded its jurisdiction.

13. Amongst its many errors, the majority of the Tribunal in *Bilcon* gave itself jurisdiction to act as a Canadian court and make a determination that Canadian domestic law had been breached. As Professor McRae notes in his dissent, it had no jurisdiction to do so.<sup>23</sup> Further, the

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<sup>21</sup> Canada’s Post-Hearing Submission, p. 3, Line 5.

<sup>22</sup> Canada’s Counter-Memorial, ¶¶ 247-248, 251-252; Canada’s Post Hearing Submission, p. 3, Line 5.

<sup>23</sup> Dissenting Opinion of Professor Don McRae, ¶¶ 34-36, 43.

decision of the majority that the purported breach of Canadian law amounted to a breach of Article 1105 of NAFTA was made without considering the content of the applicable standards under the customary international law minimum standard of treatment.<sup>24</sup> In short, and as is explained below, the majority in *Bilcon* ignored its mandate, ignored customary international law and exceeded its jurisdiction in making the findings it did. However, while there are significant errors in the legal analysis and conclusion of the majority award in *Bilcon* with respect to Article 1105, Canada notes that the *Bilcon* Tribunal nevertheless correctly rejected some of the same arguments regarding the proper legal interpretation of Article 1105 that have been advanced by the Claimant in this arbitration.

**I. The *Bilcon* Tribunal Unanimously and Correctly Dismissed the Claimant's Arguments with respect to the Note of Interpretation of the Free Trade Commission**

14. In this arbitration, the Claimant argues that the Tribunal should be the first NAFTA tribunal to ignore the content of the NAFTA Free Trade Commission's 2001 *Notes of Interpretation of Certain Chapter 11 Provisions* (the "FTC Note")<sup>25</sup> and its binding effect. It makes three arguments in support of its claim<sup>26</sup>—all of which were also made by the Claimants in the *Bilcon* arbitration.<sup>27</sup> Each and every one of those arguments was flatly rejected by a unanimous tribunal in *Bilcon*. In particular, the Tribunal in *Bilcon* reiterated what all previous NAFTA tribunals have held, that "NAFTA Article 1105 is...identical to the minimum international standard"<sup>28</sup> and that "NAFTA tribunals are bound to interpret and apply the standard in accordance with customary international law."<sup>29</sup> The *Bilcon* Tribunal further explained that "the Tribunal agrees with Canada... 'fair and equitable treatment' and 'full protection and security' cannot be regarded as 'autonomous' treaty norms that impose additional

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<sup>24</sup> Dissenting Opinion of Professor Don McRae, ¶¶ 36-43.

<sup>25</sup> **RL-063**, NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter Eleven Provisions*, 31 July 2001.

<sup>26</sup> Claimant's Reply Memorial, ¶¶ 543, 553, 572, 596.

<sup>27</sup> *Bilcon* Award, ¶¶ 430-431.

<sup>28</sup> *Bilcon* Award, ¶ 433.

<sup>29</sup> *Bilcon* Award, ¶ 441.

requirements above and beyond what the minimum standard requires.”<sup>30</sup> This Tribunal should do the same and reject the attempts of the Claimant here to distort the obligations in Article 1105.

## **II. The Bilcon Tribunal Unanimously and Correctly Acknowledged that the Threshold for Demonstrating a Violation of Article 1105 Is High**

15. The *Bilcon* Tribunal also correctly noted, consistent with all previous NAFTA tribunals, that “there is a high threshold for Article 1105 to apply”<sup>31</sup> and that the customary international law minimum standard of treatment:

is not supposed to be the continuation of domestic politics and litigation by other means. Modern regulatory and social welfare states tackle complex problems...Even when state officials are acting in good faith there will sometimes be not only controversial judgments, but clear cut mistakes in following procedures, gathering and stating facts and identifying the applicable substantive rules. State authorities are faced with competing demands on their administrative resources and there can be delays or limited time, attention and expertise brought to bear in dealing with issues. The imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard.<sup>32</sup>

16. This Tribunal should reject the Claimant’s attempts to lower the threshold for a violation of Article 1105, and refuse to sit in judgment of complex political and discretionary decisions such as whether or not to enter into the *Green Energy Investment Agreement* with the Korean Consortium, how to award the capacity that would be created on the Bruce-to-Milton line, and how to procure electricity generation in general.

## **III. The Bilcon Tribunal Failed to Assess Customary International Law for the Purpose of Determining the Content of Article 1105**

17. After acknowledging that it was bound to apply the high threshold set by customary international law, the majority of the *Bilcon* Tribunal then failed to determine the positive content of Article 1105 by looking to customary international law. Instead, the majority looked

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<sup>30</sup> Bilcon Award, ¶ 432.

<sup>31</sup> Bilcon Award, ¶ 441.

<sup>32</sup> Bilcon Award, ¶ 437.

to the decisions of other international tribunals in order to conclude that the “international minimum standard has evolved over the years towards greater protection for investors.”<sup>33</sup> As Canada noted in its pleadings in this arbitration, and as all three NAFTA parties have consistently agreed, decisions of arbitral tribunals can describe and examine customary international law, but they are not themselves a source of customary international law.<sup>34</sup> The decisions upon which the *Bilcon* majority relied, and in particular, the decision of the tribunal in *Merrill and Ring v. Canada*,<sup>35</sup> do not conduct the required analysis of customary international law. This Tribunal should not ignore the standard that the NAFTA Parties have mandated it to apply. In order to establish a breach of Article 1105 the Claimant must prove, using state practice and *opinio juris*, that the complained of treatment falls below the treatment required by customary international law.<sup>36</sup>

#### **IV. The Bilcon Tribunal Had No Jurisdiction to Decide Alleged Violations of Domestic Law and Incorrectly Concluded that Such Alleged Violations Amounted to a Violation of the Customary International Law Minimum Standard of Treatment**

18. The majority in *Bilcon* facially acknowledged that “the mere breach of domestic law or any kind of unfairness does not violate the international minimum standard”<sup>37</sup> and that “errors, even substantial errors, in applying national laws do not generally, let alone automatically, rise to the level of international responsibility vis-à-vis foreign investors.”<sup>38</sup> However, it then completely disregarded this point and went on to base its entire decision on the mere fact that, in its view, the JRP erred in its application of the criteria it was required to consider under Canadian law. Indeed, the majority says in the *Bilcon* Award that the “problem” in that arbitration that it was assessing was “whether [Bilcon’s] application was assessed in a manner that complied with the

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<sup>33</sup> *Bilcon* Award, ¶ 435.

<sup>34</sup> Canada’s Counter-Memorial, ¶ 390; Submission of the United States of America Pursuant to NAFTA Article 1128, 25 July 2014, ¶ 6; **CL-138**, *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Award, 8 June 2009, ¶¶ 605-607; See also **RL-045**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶ 277.

<sup>35</sup> *Bilcon* Award, ¶ 436.

<sup>36</sup> Canada’s Counter-Memorial, ¶¶ 389-393; Canada’s Post-Hearing Submission, pp. 41-42, Lines 65-66.

<sup>37</sup> *Bilcon* Award, ¶ 436.

<sup>38</sup> *Bilcon* Award, ¶ 738.

laws that Canada and Nova Scotia chose to adopt.”<sup>39</sup> In addition, not only did it consider the problem as being one of compliance with the domestic laws of Canada, it also based all of its conclusions on factors related exclusively to Canadian law.<sup>40</sup> For example, its reference to the “legitimate expectations” of Bilcon – a principle which is not part of the customary international law minimum standard of treatment – is entirely based on the conclusion that Bilcon had the expectation that Canadian law would be properly applied.<sup>41</sup> Similarly, its conclusion that the treatment of Bilcon was arbitrary is based on nothing more than its own conclusion that Canadian law had not been complied with.<sup>42</sup>

19. As Professor McRae notes in his dissent, the majority did not evaluate whether the purported breach was inconsistent with customary international law.<sup>43</sup> Instead, despite its protestations to the contrary, the way the majority applied Article 1105 makes it clear that in its view a “[b]reach of NAFTA Article 1105...is equated with a breach of Canadian law.”<sup>44</sup> As Professor McRae indicates, this is inappropriate. In fact, it is a perversion of the standards embodied in Article 1105. NAFTA tribunals are not courts of appeal, and nor are they domestic courts charged with judicially reviewing administrative recommendations for compliance with Canadian law. Essentially, the analysis of the majority in the *Bilcon* Award transforms Article 1105 into grounds for undertaking a *de novo* review of any and all judicial or administrative action. In so doing, the majority decision in *Bilcon* applies a standard not found in customary international law and grossly oversteps the authority given to Chapter 11 tribunals. This Tribunal should not follow suit. NAFTA Chapter 11 tribunals have no jurisdiction to make determinations with respect to whether Canadian law has been respected. That authority rests only with Canadian courts. This Tribunal should instead analyse only whether or not Canada has respected

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<sup>39</sup> Bilcon Award, ¶ 600.

<sup>40</sup> Bilcon Award, ¶¶ 446-452.

<sup>41</sup> Dissenting Opinion of Professor Don McRae, ¶ 33.

<sup>42</sup> Dissenting Opinion of Professor Don McRae, ¶ 34.

<sup>43</sup> Dissenting Opinion of Professor Don McRae, ¶¶ 36-43.

<sup>44</sup> Dissenting Opinion of Professor Don McRae, ¶ 37.

the customary international law minimum standard of treatment. For all of the reasons already explained in Canada's submissions to date in this arbitration, there should be no doubt that it has.

## **THE BILCON TRIBUNAL'S CONCLUSIONS REGARDING ARTICLE 1102**

20. The award of the majority of the *Bilcon* Tribunal with respect to Article 1102 should be given no weight here because it fundamentally misapplies that obligation. In particular, the majority ignored the underlying objective of Article 1102, which is to protect against nationality-based discrimination.<sup>45</sup> Indeed, the majority in *Bilcon* found Canada in breach of its national treatment obligation on the basis of mere differences in treatment between Bilcon and certain other investors, with no consideration of whether these differences in treatment were nationality-based. The majority also, inappropriately and without notice, shifted the burden to Canada to demonstrate that the differences in treatment that it had identified could be justified. Each of these errors represents a fundamental defect in the majority's Article 1102 analysis. Further, as Canada has explained in its submissions in this arbitration and explains again below, each of these errors is at odds with the consistent positions of the NAFTA Parties and the decisions of other NAFTA tribunals.<sup>46</sup>

### **I. The Bilcon Tribunal Improperly Expanded Article 1102 Beyond Protection Against Nationality Based Discrimination**

21. The majority of the *Bilcon* Tribunal disregarded the central purpose of Article 1102, which is to protect NAFTA investors against nationality-based discrimination. As Canada explained in its submissions in this arbitration, the unanimous position of the NAFTA Parties, representing the authentic interpretation of this provision, is that a national treatment violation must be founded upon a finding of discrimination based on a foreign investor's nationality.<sup>47</sup> Notwithstanding that the *Vienna Convention on the Law of Treaties* requires that such an

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<sup>45</sup> Canada's Post-Hearing Submission, p. 18, Line 32.

<sup>46</sup> Canada's Counter-Memorial, ¶¶ 351-353, 355; Canada's Rejoinder, ¶¶ 91-92; Canada's Post-Hearing Submission p. 18, Line 32.

<sup>47</sup> Canada's Counter-Memorial, ¶ 354; Canada's Rejoinder, ¶¶ 91-92; Canada's Post-Hearing Submission, p. 18, Line 32.

interpretation be taken into account – a rule which the *Bilcon* Tribunal acknowledges elsewhere<sup>48</sup> – the *Bilcon* majority simply ignored it. Further, as Canada pointed out in its submissions in this arbitration, past NAFTA tribunals have also consistently held that Article 1102 is only about nationality-based discrimination.<sup>49</sup> The majority in *Bilcon* also failed to heed these authorities.

22. Instead, at the outset of its analysis, it merely observed that it needed to give “the reasonably broad language of Article 1102 its due” and that it “must also take into account the objects of NAFTA, which include according to Article 102(1)(c) “to increase substantially investment opportunities in the territories of the Parties.”<sup>50</sup> And at the end of its analysis, the majority noted only that the difference in treatment that it had identified as giving rise to NAFTA liability “was not consistent with the investment liberalizing objectives of NAFTA.”<sup>51</sup>

23. Article 102(1)(c) and the investment liberalizing objectives of NAFTA certainly provide relevant context to an Article 1102 analysis. However, contrary to the *Bilcon* majority’s approach, they are not the only relevant objectives, they do not justify ignoring the interpretation of this specific provision by the NAFTA Parties, they cannot expand or override the ordinary meaning of the text of Article 1102, and they do not trump the requirement that NAFTA tribunals must interpret and apply the Article 1102 in light of its underlying purpose.

24. After correctly acknowledging that a regulatory process can legitimately result in different outcomes for different proponents,<sup>52</sup> the majority in *Bilcon* determined that the JRP departed from the standards required of it by Canadian law. Then, solely on the basis of this determination, it found that Bilcon had been accorded less favourable treatment than other proponents in like circumstances. The majority’s approach ignored the issue of whether the difference in treatment that it identified was based upon Bilcon’s nationality. Indeed, nowhere in the majority’s award is

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<sup>48</sup> *Bilcon* Award, ¶ 430.

<sup>49</sup> Canada’s Counter-Memorial, ¶¶ 354-355; Canada’s Rejoinder, ¶¶ 93-100; Canada’s Post-Hearing Submission, p. 18, Line 32.

<sup>50</sup> *Bilcon* Award, ¶ 692.

<sup>51</sup> *Bilcon* Award, ¶ 724.

<sup>52</sup> *Bilcon* Award, ¶ 705.

there any consideration of whether other U.S. proponents were assessed in accordance with what it determined was the applicable standard under Canadian law or whether they were subject to the same treatment accorded to Bilcon. In the end, while the majority may have found that the JRP misapplied Canadian law and that Bilcon was treated differently than other proponents as a result, this is not sufficient to find a violation of Article 1102. By concluding to the contrary, the majority of the *Bilcon* Tribunal erred in its interpretation and application of Article 1102. This Tribunal should not do the same. Instead, it should respect the mandate given to it by the NAFTA Parties in Article 1102 and limit its consideration to whether the Claimant has proven that it was the subject of nationality-based discrimination.

## II. The Bilcon Tribunal Inappropriately Shifted the Burden of Proof to Canada

25. In its decision on Article 1102, the majority of the *Bilcon* Tribunal first endorsed the approach set down by the Tribunal in *UPS v. Canada* “that Bilcon had the affirmative burden of proving” that: (1) it was accorded “treatment”; (2) the treatment was “less favourable” than that accorded to domestic investors; and, that (3) the treatment was accorded “in like circumstances.”<sup>53</sup> Yet, rather than applying this affirmative burden, the majority then explained its “view 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.”<sup>54</sup>

26. Not only was Canada given no prior notice that it would have to discharge this burden, the approach of the majority in the *Bilcon* Award is neither supported by the wording of Article 1102 nor by the requirement of Article 24(1) of the *UNCITRAL Arbitration Rules* that the Claimant bears the burden of making out its claim.<sup>55</sup> It is also contrary to the *UPS* Tribunal’s unequivocal statement that the “legal burden...rests squarely with the Claimant. That burden never shifts to

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<sup>53</sup> Bilcon Award, ¶¶ 717-718 (emphasis added).

<sup>54</sup> Bilcon Award, ¶ 723.

<sup>55</sup> See also **CL-194**, *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL) Final Award, 26 January 2006, ¶ 176, wherein the Tribunal explained that in a claim under Article 1102 “[t]he burden of proof lies with Thunderbird, pursuant to article 24(1) of the UNITRAL Rules. In this respect, Thunderbird must show that its investment received treatment less favourable than Mexico has accorded, in like circumstances, to investments of Mexican Nationals.”

the Party, here Canada.”<sup>56</sup> It was fundamentally unfair for the majority to impose this burden on Canada without notice and to then base its liability finding on the very fact that Canada had not discharged its burden. In light of these defects, the majority’s approach to its Article 1102 analysis should not be endorsed in this or in any future NAFTA Chapter Eleven arbitration.

### **THE NON-DISPUTING NAFTA PARTIES HAVE THE RIGHT TO MAKE SUBMISSIONS WITH RESPECT TO THE BILCON AWARD**

27. NAFTA Article 1128 grants non-disputing NAFTA Parties the right to make a submission to the Tribunal on a question of interpretation of the NAFTA. The right of the NAFTA Parties to do so is also reflected in Paragraph 17.1 of Procedural Order No. 1 which states that “[t]he Governments of Mexico and the United States may make submissions to the Tribunal within the meaning of Article 1128 of the NAFTA”.

28. Article 1128 does not limit the number of submissions that a non-disputing party may make in the course of a NAFTA Chapter 11 arbitration. Indeed, it is often the case that multiple submissions are made. Moreover, Article 1128 does not limit the timing of non-disputing Party submissions – they can be made throughout the arbitral process, including following the oral hearing.

29. The applicability of the *Bilcon* Award to the current arbitration is very much a question related to the proper legal interpretation of the NAFTA. Indeed, the Claimant has acknowledged as much when it requested the Tribunal consider the *Bilcon* Award as the Tribunal was “interpreting the very same NAFTA provisions” that are at issue in this arbitration.<sup>57</sup> Given that the Tribunal has asked for the disputing parties’ views on the *Bilcon* Award, the United States and Mexico have the right to make submissions on the issues of interpretation of the NAFTA arising out of the submissions made by the disputing parties.

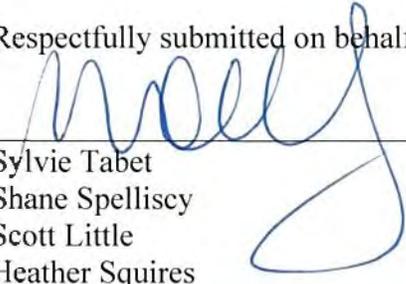
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<sup>56</sup> **RL-075**, *United Parcel Service of America, Inc. v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007, ¶¶ 83-84 (“*UPS – Award*”).

<sup>57</sup> Letter from the Claimant to the Tribunal dated April 16, 2015.

May 14, 2015

Respectfully submitted on behalf of Canada,



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