

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES OF 1976 (“UNCITRAL Rules”)**

-between-

**WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS
CLAYTON, DANIEL CLAYTON AND BILCON OF DELAWARE INC.**

(the “Investors” or “Bilcon”)

-and-

GOVERNMENT OF CANADA

(the “Respondent” or “Canada” and, together with the Investors, the “Disputing Parties”)

**PROCEDURAL ORDER NO. 19
(Regarding the Respondent’s Application to Stay the Proceedings)**

August 10, 2015

ARBITRAL TRIBUNAL

Judge Bruno Simma (President)
Professor Donald McRae
Professor Bryan Schwartz

Permanent Court of Arbitration (PCA) Case No. 2009-04

WHEREAS on March 17, 2015, the Tribunal rendered its Award on Jurisdiction and Liability (“Award”);

WHEREAS on June 17, 2015, Canada filed an application for set-aside of the Award before the Federal Court of Canada and a motion for a stay of the arbitral proceedings before the present Tribunal (“Motion”);

WHEREAS on June 23, 2015, Canada provided the Tribunal with the United States’ and Mexico’s Article 1128 submissions in respect of the Award;

WHEREAS on June 26, 2015, the Investors provided their response to Canada’s Motion, opposing the request for a stay of the proceedings;

WHEREAS on July 10, 2015, Canada replied to the Investors’ response of June 26, 2015; and whereas, on July 17, 2015, the Investors submitted a sur-reply to Canada’s reply of July 10, 2015;

THE TRIBUNAL NOW DECIDES AND ORDERS:

1. In its Procedural Order No. 3 the Tribunal ordered the bifurcation of this case into a first phase, on jurisdiction and liability, and a second phase to assess compensation if jurisdiction and liability were established.
2. On March 17, 2015, the Tribunal rendered its Award on Jurisdiction and Liability. The Award unanimously found in favor of the Investors, Bilcon et al., on jurisdiction in some respects, although it also found the claim to be time-barred in other respects.
3. The majority of the Tribunal then found Canada liable for breaches under Articles 1102 and 1105 of NAFTA in respect of some of its conduct, while rejecting liability in other respects. The dissent would have made no finding of liability.
4. Canada has now requested that the Tribunal stay its proceeding. It has informed the Tribunal that Canada has filed a motion in the Federal Court, Trial Division, to set aside the Tribunal’s Award, and that the Tribunal should stay its proceeding while the case in the Federal Court proceeds.
5. The Tribunal has requested and received two rounds of written submissions, has considered them carefully, and is now able to issue its decision.
6. For the purposes of this motion for a stay, Canada has included in its materials comments about this Tribunal’s Award that it has made to another Chapter 11 tribunal, in *Mesa Power Group LLC v Canada*. In the course of those comments, Canada states that this Tribunal’s reasoning or conclusions were correct in some regards, distinguishable in others, but in some significant respects mistaken. Canada characterizes some of the alleged errors of this Tribunal as being of a jurisdictional nature. The other Parties to NAFTA besides Canada have filed submissions in the *Mesa* case that approve some aspects of the Award by this Tribunal but criticize some other aspects. Since Canada made this application, the investor in *Mesa* has filed material that includes a rebuttal of various criticisms.
7. Canada argues that since the place of the arbitration is Toronto, Canada, the Award is subject to review in Canada’s domestic courts under the laws of Canada.
8. Canada submits that under Article 1136(3) of NAFTA an award cannot be enforced until three months have elapsed from the date the award was rendered or until a court has finally disposed

of a judicial review application in respect of the award. To proceed to the compensation phase, submits Canada, would be effectively to enforce its Award on Jurisdiction and Liability.

9. Bilcon argues that proceeding in the ordinary course to the compensation stage is not prevented by the provisions of NAFTA and is not "enforcing the award".
10. Article 1136(3) reads in part:
 - A disputing party may not seek enforcement of a final award until:
 - (a) in case of a final award made under the ICSID Convention:
 - (i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or
 - (ii) revision or annulment proceedings have been completed; and
 - (b) in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules:
 - (i) three months have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or
 - (ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.
11. The Tribunal notes that the text of Article 1136(3) embodies a clear distinction between:
 - the "*rendering*" of a final award *by a tribunal*;
 - the seeking of "*enforcement*" of a final award *by a disputing party*.
12. Under Article 1136(6), "enforcement" after an award is rendered may include taking steps in a domestic court to enforce the award; Article 1136(6) refers to the right of a disputing party to seek enforcement of an award under the ICSID Convention, the New York Convention or the Inter-American Convention. Article 1136(5) permits a party to seek a recommendation for compliance by the Commission created by NAFTA, and that might be viewed as an enforcement measure as well. Whether the "enforcement" route is a domestic court or the Commission, it involves an attempt by a disputing party to obtain the assistance of another entity to enforce the final award of a tribunal. The seeking of enforcement by a disputing party under Chapter 11 involves the intervention of a court or other body apart from the Tribunal.
13. The Tribunal concludes that by proceeding with this case, in accordance with Procedural Order No. 3, it would simply be continuing with its own process as an international tribunal constituted under NAFTA, rather than engaging in any kind of "enforcement" measure contemplated by Article 1136(3).
14. Bilcon submits that in any event Article 1136(3) only applies to a "final award" and no such "final award" has been issued in the present case. Bilcon argues that Article 1136(3) has to be read in the specific context of NAFTA. Article 1136(5) refers to seeking the intervention of the Commission by a party that was a disputing party; Bilcon suggests that the implication is that a final award is one that definitively concludes the matter, so that there are no longer disputing parties. As already noted, Articles 1136(5) and 1136(6) also refer to enforcement by international or domestic authorities apart from the Tribunal. Bilcon quotes the conclusion by Kinnear, Bjorklund and Hannaford in *Investment Disputes Under NAFTA: An Annotated Guide*

to NAFTA Chapter 11, that a final award for the purposes of Chapter 11 is one that ends the dispute. Canada cites the more general statement by *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, that an award can be final if it finally decides one aspect of the dispute. The Tribunal tends to agree with Bilcon that "a final award" for the specific purposes of Chapter 11 is one that ends the dispute. Even if Canada's position were correct that a "final award" is broad enough to include some forms of an interim award, the Tribunal cannot agree with Canada's larger point that carrying on with the next stage of proceedings is somehow an "enforcement" measure that is precluded by Article 1136(3).

15. In *S.D. Myers Inc. v. Government of Canada*, Canada, as in the present case, wished to pursue a judicial review after the jurisdiction and liability phase of a bifurcated proceeding and requested a stay from the tribunal. Canada and the investor in that case both agreed that while a stay was not required by law, the tribunal had the discretion to grant a stay as part of its general authority to control the proceedings. The tribunal in *S.D. Myers*, in Procedural Order No. 18 dated 26 February 2001, on the facts of that case found that Canada had not presented a persuasive case that the tribunal should not continue with the rest of the proceeding.
16. This Tribunal agrees with the *S.D. Myers* tribunal that it is within the scope of its discretion to grant a stay. In the view of the Tribunal it should exercise its discretion taking account of the fact that it had already decided, in Procedural Order No. 3, to bifurcate the proceeding and that it is appropriate to follow its earlier Procedural Order unless good reason can be shown by Canada to the contrary.
17. Canada submits that a stay would be consistent with the rationale behind bifurcation of an arbitral proceeding, which is to avoid wasted time and expense on litigating compensation beyond the scope of actual liability, if any.
18. Bilcon responds that the purpose of bifurcation is not to provide a dissatisfied party the opportunity to interrupt the course of the arbitration and re-litigate the merits of a liability award.
19. The Tribunal affirms that its purpose in directing bifurcation in this case was to facilitate the efficient litigation of the claim within the arbitration process.
20. Canada submits that a practical consideration in favor of a stay in this particular case is to the effect that a stay would protect both Parties against needless expense and inconvenience. The Parties might spend resources on litigating issues of compensation on the basis of the Award when it might turn out that the Federal Court will later set aside or direct the modification of the Award.
21. Bilcon responds that the intervening judicial process might add considerable expense and delay, with no resulting impact on the determination of compensation. It points out that in *Sattva Capital Corporation v. Creston Moly Corp.*, [2014] 2 S.C.R. 633, it took almost six years from the date of the arbitral award before the judicial review process was concluded. In that case, the Supreme Court of Canada ultimately ruled that a Court of Appeal should not have granted leave to appeal the arbitration award in the first place, and in any event, that the sole arbitrator had acted reasonably, and so had not made any error that the courts should correct.
22. The Tribunal would also note that any assessment of the Tribunal's Award on Jurisdiction and Liability at the present stage would take place without any further context that might be provided by this Tribunal's concluding award in this case.
23. Bilcon also raises concerns about loss of momentum in the arbitral process and the potential for witnesses or evidence that is currently available to diminish.

24. In the Tribunal's view, Canada has not shown that considerations of efficiency favor a departure from proceeding in accordance with Procedural Order No. 3. Nor has it shown that Bilcon's concern about erosion of evidence, a matter that touches on the fairness as well as efficiency of the proceedings, is unwarranted.
25. Canada submits that no irreparable financial harm would come to the Investors if a stay were granted, as the Investors could be compensated with interest and costs.
26. Bilcon responds by invoking the submission of the investor in *S.D. Myers* to the effect that "rarely do awards of costs and interest sufficiently compensate the successful claimant".
27. Without in any way prejudging this case, the Tribunal would note that there is no consensus among the international arbitration precedents that a tribunal in an international compensation case will order that the unsuccessful party will fully indemnify the successful party. Tribunals have often held that there should be at least some sharing of the costs of the litigation, even if there is some reimbursement by the more unsuccessful party to the more successful one.
28. Bilcon submits that Canada has no reasonable likelihood of success in a judicial review under the law of Canada. Canadian Courts, submits Bilcon, have recognized the importance of maintaining the autonomy of the international arbitration process and exhibiting deference to their decisions. In *Canada (Attorney General) v. S.D. Myers*, [2004] F.C.J. No. 29, the Federal Court of Canada rejected Canada's Judicial Review Application, observing, at paragraph 39 of its judgment that:

"Courts restrain themselves from exercising judicial review with respect to international arbitration tribunals so as to be sensitive to the need of a system for predictability in the resolution of disputes and to preserve the autonomy of the arbitration forum selected by the parties."
29. In the more recent case of *United Mexican States v. Cargill, Inc.*, [2011] O.J. No. 4320, at paragraph 46, the Ontario Court of Appeal held:

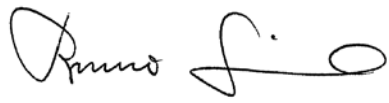
"Therefore, courts are to be circumspect in their approach to determining whether an error alleged under Article 34(2)(a)(iii) properly falls within that provision and is a true question of jurisdiction. They are obliged to take a narrow view of the extent of any such question. And when they do identify such an issue, they are to carefully limit the issue they address to ensure that they do not, advertently or inadvertently, stray into the merits of the question that was decided by the tribunal."
30. Bilcon submits that Canada is simply attempting to relitigate the merits of this Tribunal's Award on Jurisdiction and Liability, rather than raising any true issue of jurisdiction within the narrow terms permitted by *Cargill*.
31. Canada, in its second submission, argued that its "likelihood of success" on a potential judicial review is an "inappropriate and irrelevant consideration". It submits that the *S.D. Myers* tribunal did not include that factor in arriving at its decision, and that it is not appropriate for this Tribunal to delve into the merits of its own earlier award. Canada also argues that committees under ICSID considering stays generally do not consider likelihood of success, although the Investors respond that those committees were considering awards that finally disposed of the case.
32. The Tribunal does not consider it necessary to comment on "likelihood of success" in a judicial review in the Canadian courts. The Tribunal has already issued its Award on Jurisdiction and Liability pursuant to its mandate as an international dispute resolution body under NAFTA. The Tribunal wishes to maintain its impartial focus on deciding the rest of the case that is actually before it under its own mandate as a tribunal under NAFTA with the benefit of the full

submissions made directly to this Tribunal. It does not consider it necessary or appropriate to engage itself with arguments that have been or might eventually be made by disputing parties or interveners in a Canadian court. The Tribunal similarly does not consider it necessary or appropriate to comment on submissions in the *Mesa* case. The parties and interveners in that case have or will address the issues in that distinct forum, and the tribunal there can consider the issues as that tribunal considers necessary or appropriate in the context of its appreciation of that case as a whole.

33. For the reasons given, the Tribunal dismisses Canada's application for a stay.

Date: August 10, 2015

For the Arbitral Tribunal:

A handwritten signature in black ink, appearing to read 'Bruno Simma', written over a horizontal line.

Judge Bruno Simma
(Presiding Arbitrator)