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)

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 Government of Canada's request that the Tribunal dismiss the claims of Mesa Power Group LLC ("Mesa Power") on the ground that the Tribunal lacks the requisite jurisdiction.

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. Mexico has previously addressed the interpretation of provisions of NAFTA Chapter Eleven in its submissions in other disputes, and Mexico re-affirms those prior submissions.

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

I. SIX MONTH WAITING PERIOD

4. As Mexico has repeatedly stated, it considers that the arbitral tribunals established under Chapter Eleven must adhere to the requirements of section B for the initiation of arbitration proceedings, which constitute a fundamental part of the Agreement reached by the NAFTA Parties. Mexico considers that by entering into the Agreement, the NAFTA Parties made their consent to arbitration conditional upon compliance with the procedural requirements stipulated in Articles 1116, 1117, 1118, 1119, 1120, and 1121. Thus, tribunals have the duty to ensure that claimants comply with all of the requirements set out in the Chapter, and in this case Article 1120, which provides as follows:

> "Submission of a Claim to Arbitration

> Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration [...]".

5. The language of Article 1120 is clear. In order for an investor to submit a claim, six months must have elapsed. With respect to this particular case, this means that only when six months have elapsed from the time when the allegedly wrongful act occurred, a claim can be validly submitted to arbitration. The claim must be ripe at the time that it was filed.

6. The six–month waiting period was not casually incorporated by the NAFTA Parties. The waiting period plays an important role in the overall operation of Chapter Eleven, which is to provide a respondent Party with six months to learn of the events that may give rise to a claim, to meet with any potential claimants and to attempt to remedy the problem if appropriate. In other words, the waiting period provides an opportunity for the respondent Party to avoid having a potential dispute submitted to arbitration.

7. The disputing investor must comply with this procedural requirement, like the others specified in section B, in order for a tribunal to have jurisdiction over a dispute. Section B is a significant remedy, and the NAFTA Parties crafted the procedural requirements to set forth the precise circumstances in which they would agree to arbitrate. Accordingly, if a claim is submitted before the six-month waiting period has elapsed, a tribunal would lack jurisdiction even if such period has elapsed by the time the tribunal is constituted.

II. GOVERNMENT PROCUREMENT

8. Mexico observes that the ordinary meaning of the term "procurement" in Article 1108 is broad and should not be limited by Article 1001.5. The description of "procurement" in article 1001.5 is applicable for purposes of Chapter Ten as it is included in the provision that sets out the "scope and coverage" of chapter Ten. It does not apply to Chapter Eleven.

9. Article 1001 identifies procurement that will be subject to the disciplines of Chapter Ten and actually the context provided by this provision is relevant to understand that it was not intended to have effects on other chapters of NAFTA, like Article 1108 for instance.

10. There are important differences in the language used in GATT Article III:8(a) and NAFTA Article 1108. GATT Article III:8(a) makes reference to procurement "*by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale*" (*emphasis added*). This language is not present in Article 1108, which only makes reference to "*procurement by a Party or a state enterprise*".

III. STATE ENTERPRISES

11. The obligations of NAFTA Article 1503(2) apply when a state enterprise "exercises regulatory, administrative or other governmental authority". The term "governmental authority" in this context means a sovereign power exercised in respect of third persons, as illustrated by the examples given in NAFTA Articles 1502(3)(a) and 1503(2): *i.e.*, the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges. The purpose of these particular provisions, as evidenced by their language ("acts in a manner that is not inconsistent with the Party's obligations"), is to prevent a NAFTA Party from evading its

own obligations through the transfer of governmental authority to a privately-owned organization or a state enterprise. Thus, not all actions of a state enterprise are an exercise in "governmental authority" within the meaning of Article 1503(2). The tribunal in *UPS v. Canada* agreed with this view.[1]

12. In relation to the determination of whether an entity is a "state enterprise," NAFTA Chapter Fifteen establishes a *lex specialis*. The terms of the NAFTA, including the definition of "state enterprise," must be interpreted and applied in accordance with their ordinary meaning, consistent with Article 31 of the *Vienna Convention on the Law of Treaties*. The definition of "state enterprise" for purposes of Chapter Fifteen is established by Article 1505.

IV. SCOPE OF NAFTA ARTICLE 1103

13. Mexico disagrees with the suggestion in paragraph 51 of the Claimant's Reply Memorial that Article 1103 can be used to import language into the NAFTA from the Canada – Czech Investment Treaty, or to use that other treaty as an excuse to disregard the explicit wording of NAFTA Article 1108. Article 1103 applies to actual instances of treatment accorded to one or more investors of a third State, or their investments, which is more favorable than the treatment accorded, in like circumstances, to the claimant or its investment. The fact that another treaty theoretically offers different treatment is insufficient to establish a violation of Article 1103.

14. Mexico also observes that Article 1103 does not allow a comparison between the treatment accorded to the claimant (or its investment) and treatment accorded to other investors of the claimant's own Party (or their investments) -- in this case other investors of the United States (or their investments). The discrimination prohibited by Article 1103 must be on the basis of nationality, and therefore differing treatment of two investors of the same nationality cannot constitute a violation of Article 1103.

All of which is respectfully submitted,

Ana Carla Martínez Gamba
Deputy Director General

July 25, 2014

cc: Mr. Rahul Donde; Prof. Gabrielle Kaufmann-Kohler; the Honorable Charles N. Brower; Mr. Toby Landau, QC; Mr. Barry Appleton; Ms. Sylvie Tabet; Mr. Shane Spelliscy; Mr. Michael Owen; Mr. Ian Philp; Ms. Heather Squires; and Ms. Jennifer Hopkins.

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[1] *UPS v. Canada*, paras. 69-70, 78.