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

GOVERNMENT OF CANADA

Objection to Jurisdiction

3 December 2012

Department of Foreign Affairs
and International Trade
Trade Law Bureau
Lester B. Pearson Building
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I. OVERVIEW

1. The "foundation stone" of an arbitral tribunal's jurisdiction is the consent of the parties before it to arbitrate a particular dispute.[1] "This element of consent is essential. Without it, there can be no valid arbitration."[2] In Chapter 11 of NAFTA, the NAFTA Parties offer their consent to arbitrate certain investment disputes. However, that consent is neither universal nor unconditional. The NAFTA Parties offered it only with respect to particular types of claims brought by particular types of investors in particular circumstances. Specifically, in Articles 1118 to 1121 the NAFTA Parties conditioned their consent on a potential claimant following certain procedures and meeting certain requirements when submitting a claim to arbitration. These conditions on each Party's consent are a fundamental part of the agreement reached by the NAFTA Parties. They cannot be ignored or simply set aside because they prove inconvenient to a particular claimant, or incompatible with its litigation strategy.

2. In this case, the Claimant failed to respect the conditions placed on Canada's consent to Chapter 11 arbitration. In particular, it disregarded the requirement in Article 1120 that it wait six months from the events in question before submitting a claim to arbitration. Canada has not consented to the arbitration of this claim in these circumstances, and as a result, this Tribunal is without jurisdiction. Accordingly, the Tribunal should dismiss the claim in its entirety. In the alternative, the Tribunal should dismiss all of the claims arising from events that took place within the six month waiting period. Finally, in light of the circumstances surrounding the Claimant's disregard of the clearly described rules in NAFTA, the Tribunal should also award costs and legal fees to Canada.

II. FACTUAL BACKGROUND

3. The facts relevant to this jurisdictional objection concern the dates of the events which allegedly gave rise to the Claimant's claim and the date that the Claimant purported to submit this claim to arbitration. Accordingly, the factual background provided below is limited. It does not explain the reasons for, context of, or background surrounding the events in question.[3]

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[1] **RL-033**, Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed. (London: Thomson, Sweet & Maxwell, 2004), pp. 5-7 ("Redfern & Hunter").

[2] *Ibid*, p. 7.

[3] For example, while relevant to the merits of the Claimant's claims, the treatment accorded to Samsung C&T and the Korea Electric Power Corporation ("Korean Consortium") pursuant to the January 2010 Green Energy

Should this arbitration proceed to the merits, Canada will certainly provide all the additional factual information required to show that the Claimant's allegations are, in all respects, without merit.[4]

A. Ontario's Feed-in-Tariff Program

4. On May 14, 2009, the Government of Ontario enacted the *Green Energy and Green Economy Act, 2009* (the "GEA").[5] The GEA provides the Ontario Minister of Energy (the "Minister") with the authority to direct the Ontario Power Authority ("OPA") to establish a Feed-in Tariff Program ("FIT Program").[6] The OPA is an independent, not-for-profit non-share capital corporation which is responsible for procuring electricity supply and capacity for the province.[7]

5. The Minister exercised his authority under the GEA on September 24, 2009 and directed the OPA to establish the FIT Program to procure electricity supply and capacity from green energy producers.[8] In the same direction, the Minister mandated that the OPA require participants in the FIT program to meet certain domestic content goals.[9] The OPA initiated the FIT Program a week later, on October 1, 2009.

6. On November 19, 2009, the OPA released the FIT Program Overview[10] and the FIT Program Contract[11] to provide direction on the FIT Program to potential applicants and to set the

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Investment Agreement is irrelevant for the purposes of this objection. The treatment accorded to the Korean Consortium did not give rise to this claim; rather, according to the Claimant, it is the evidence that proves that the treatment the Claimant was accorded by Canada violated Articles 1102 and 1103 of NAFTA.

[4] In a challenge to the jurisdiction of an arbitral tribunal, a claimant's allegations of fact with respect to the merits are generally assumed to be correct. **RL-002**, *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5) Decision on Jurisdiction, 2 June 2010, ¶ 110 ("*Burlington Resources*"); See also **RL-028**, *Methanex Corp. v. United States* (UNCITRAL) Partial Award, 7 August 2002, ¶ 112 ("*Methanex – Partial Award*"); **RL-036**, *United Parcel Service of America v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002, pp. 33-37.

[5] **RL-025**, *Green Energy and Green Economy Act*, S.O. 2009, c. 12 ("*Green Energy Act*").

[6] *Ibid*, Sch. B, amending s. 25.35 of the *Electricity Act*, 1998.

[7] **RL-004**, *Electricity Act*, S.O. 1998, c. 15, Sch. A, s. 25.1, 25.2.

[8] **R-001**, Letter from the Honourable George Smitherman, Minister of Energy and Infrastructure to Colin Anderson, CEO, Ontario Power Authority (Sep. 24, 2009) (Tab 5 of the Notice of Arbitration). See **RL-025**, *Green Energy Act*, Sch. B, amending s. 25.35 of the *Electricity Act*, 1998.

[9] *Ibid.*

[10] **R-002**, Ontario Power Authority, FIT Program Overview, v. 1.1 (Sep. 30, 2009).

standard terms and contracting conditions. On the same day it also released the FIT Program Rules which established the methodology through which a province-wide priority ranking could be given to projects to determine the order in which they would be considered for a contract offer.[12]

7. Under the FIT Rules, applications received during the first 60 days of the FIT Program, October 1 to November 30, 2009 (the "Launch Period"), were ranked based on the status of their environmental approvals, their control of the major generation equipment required for their project, their previous experience developing renewable energy projects, and their financial capacity to support the construction of the project.[13] FIT Program applications for the Claimant's TTD and Arran projects were made during the Launch Period.[14]

8. FIT Contracts were awarded to certain Launch Period applicants on April 8, 2010.[15] Priority rankings of Launch Period applications that did not receive a contract in this initial round were posted on the OPA website on December 21, 2010.[16] The TTD and Arran projects did not receive a contract in April 2010, and received province-wide priority rankings of 91 and 96 respectively.

9. Under the FIT Rules, applications received after the end of the Launch Period were ranked based solely on the order in which they were received.[17] Updated priority rankings reflecting FIT Program applications received between the end of the Launch Period and June 3,

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[11] **R-004**, Ontario Power Authority, FIT Program Contract, Appendix 1 - Standard Definitions, v. 1.2 (Nov. 19, 2009). Available at: http://fit.powerauthority.on.ca/program-archives .

[12] **R-003**, Ontario Power Authority, FIT Program Rules, v. 1.2 (Nov. 19, 2009). Available at: http://fit.powerauthority.on.ca/program-archives .

[13] *Ibid,* s. 13.

[14] **R-007**, Ontario Power Authority, Launch Project Information (Dec. 21, 2010). Available at: http://fit.powerauthority.on.ca/Storage/11184_Launch_Project_Information_-_Dec_21_2010.pdf.

[15] **R-005**, Ontario Power Authority, Backgrounder (Apr. 8, 2010). Available at: http://fit.powerauthority.on.ca/april-8-2010-backgrounder.

[16] **R-006**, Ontario Power Authority, FIT Program, Program Update: Priority ranking for first-round FIT contracts posted (Dec. 21, 2010) (Tab 4 of the Notice of Arbitration). Available at: http://fit.powerauthority.on.ca/december-21-2010-program-update.

[17] **R-010**, Ontario Power Authority, Program Launch Rules: Requirements and Time-Stamping (undated). Available at: http://fit.powerauthority.on.ca/requirements-and-time-stamp.

2010, were posted on the OPA website on February 24, 2011.[18] FIT Program applications for two other projects allegedly owned by the Claimant, Summerhill and North Bruce, were submitted during this period.[19] The two Summerhill applications were ranked 318 and 319, and the two North Bruce applications were ranked 320 and 321.

10. The OPA announced the award of a second round of FIT Contracts on February 24, 2011.[20] None of the Claimant's proposed projects were awarded a FIT Contract in this round of contract offers.

11. On June 3, 2011, the Minister directed the OPA to provide a five (5) business day window for certain proponents, including the Claimant's projects, to change their connection points if they so wished.[21] The June 3, 2011 Ministerial directive resulted in s. 5.4.1 of the FIT Rules, which created a window, known as the "Connection Point Amendment Window," running from June 6 to June 10, 2011.[22] This version of the FIT Rules also included the FIT Program Price Schedule.[23] Also accompanying the changes made to the FIT Rules on June 3 was a new version of the FIT Contract.[24]

12. The OPA announced the award of additional FIT Contracts on July 4, 2011.[25] Some of the contract offers were made to FIT Program applicants who had elected to change the connection point of their highly ranked project during the Connection Point Amendment Window. None of the projects allegedly owned by the Claimant were offered a FIT contract.

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[18] **R-008**, Ontario Power Authority, FIT CAR Priority Ranking by Region (Feb. 24, 2011). Available at: http://fit.powerauthority.on.ca/Storage/11220_Priority_Ranking_FINAL_by_Region1.pdf.

[19] *Ibid.*

[20] **R-009**, Ontario Power Authority News Release: "Ontario Announces Second Round of Large-Scale Renewable Energy Projects" (Feb. 24, 2011). Available at: http://www.powerauthority.on.ca/news/ontario-announces-second-round-large-scale-renewable-energy-projects.

[21] **R-011**, Letter from the Honourable Brad Duguid, Minister of Energy to Colin Anderson, CEO, Ontario Power Authority (Jun. 3, 2011) (Tab 13 of the Notice of Arbitration).

[22] **R-012**, Ontario Power Authority, FIT Rules, v. 1.5 (Jun. 3, 2011) (Tab 1 of the Notice of Arbitration). Available at: http://fit.powerauthority.on.ca/program-archives.

[23] *Ibid.*

[24] **R-013**, Ontario Power Authority, FIT Contract, v. 1.5 (Jun. 3, 2011) (Tab 6 of the Notice of Arbitration). Available at: http://fit.powerauthority.on.ca/program-archives.

[25] **R-014**, Ontario Power Authority News Release: "Projects enabled by Bruce to Milton transmission line offered contracts" and List of Contract Offers for Bruce-Milton Capacity Allocation Process (Jul. 4, 2011). Available at: http://fit.powerauthority.on.ca/projects-enabled-bruce-milton-transmission-line-offered-contracts.

13. On August 2, 2011, the Minister of Energy directed the OPA to provide FIT Contract holders the opportunity to have the OPA's termination rights under section 2.4(a) of the FIT Contract waived.[26] The OPA gave effect to this direction on August 5, 2011 and advised FIT Contract holders that if they were to submit an accurate and complete waiver on or before August 15, 2011, the OPA would use commercially reasonable efforts to review and execute a waiver by September 30, 2011.[27]

14. Also on August 2, 2011, the Ministry of Energy, along with several other Ministries, announced improvements to the Renewable Energy Approvals (REA) process.[28] Additionally, on August 3, 2011, the Ontario Minister of Energy announced changes to the terms granted to Samsung C&T and its Consortium partners.[29]

B. The Claimant's Submission of a Claim to Arbitration

15. On July 6, 2011, two days after the OPA announced the third round of FIT Contract offers, the Claimant served Canada with a Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter 11. On October 4, 2011, three months after filing its Notice of Intent, two months after the last identified relevant event, and two days prior to an election in Ontario, the Claimant purported to serve a Notice of Arbitration on the Government of Canada. The Notice of Arbitration mentioned for the first time the actions and events in August 2011 as part of the Claimant's claim.

16. On five separate occasions, July 13, September 21, September 30, October 28, and December 30, 2011, Canada wrote to the Claimant with an offer to hold consultations.[30] The Claimant accepted none of these offers and no consultations have occurred.

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[26] **R-016**, Letter from The Honourable Brad Duguid, Minister of Energy to Colin Andersen, CEO, Ontario Power Authority (Aug. 2, 2011) (Tab 12 of the Notice of Arbitration).

[27] **R-019**, Ontario Power Authority News Release: "Option on Waiver of OPA Termination Rights" (Aug. 5, 2011). Available at: http://fit.powerauthority.on.ca/option-waiver-opa-termination-rights.

[28] **R-017**, Ontario Ministry of Energy News Release: "Moving Clean Energy Projects Forward" (Aug. 2, 2011). Available at: http://news.ontario.ca/mei/en/2011/08/moving-clean-energy-projects-forward.html.

[29] **R-018**, Ontario Ministry of Energy News Release: "Statement from Ontario Minister of Energy Brad Duguid (Aug. 3, 2011) (Tab 15 of Notice of Arbitration). Available at: http://news.ontario.ca/mei/en/2011/08/statement-from-ontario-minister-of-energy-brad-duguid.html.

[30] See **R-015**, Correspondence from the Department of Foreign Affairs and International Trade, Government of Canada to Barry Appleton, Appleton & Associates (Jul. 13, 2011, Sep. 21, 2011, Sep. 30, 2011, Oct. 28, 2011 and Dec. 30, 2011).

III. LEGAL ARUGMENT

17. The Claimant has attempted to submit its claim to arbitration under Chapter 11 of NAFTA without respecting the conditions to Canada's consent. In particular, it failed to wait the required six months from the events giving rise to its claim before submitting that claim to arbitration. Canada has not consented to arbitration in such circumstances, and accordingly, this Tribunal is without jurisdiction to hear this claim. At the very least, the Tribunal is without jurisdiction to hear a claim concerning any alleged measures or events that did not occur six months prior to October 4, 2011 (i.e. April 4, 2011). Moreover, the Claimant's failure to satisfy these conditions appears to have been deliberate and the result of an interpretation of the relevant provisions of Chapter 11 that it must have known was unreasonable. In such circumstances, the Claimant should be required to bear all costs and legal fees associated with this proceeding to date.

A. Canada's Consent to Arbitrate Claims is Conditioned on a Claimant Satisfying Certain Requirements

18. In Chapter 11 of NAFTA, Canada, the United States and Mexico consent to arbitrate certain disputes brought by investors of one of the other Parties. Specifically, Article 1122(1) of NAFTA provides that "[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement."[31] However, as made clear by the plain language of this provision, that consent is not unconditional. Rather, as agreed by all three of the NAFTA Parties, the consent is conditioned upon the claim to arbitration being submitted "in accordance with the procedures" contained in Chapter 11.[32] The conditional nature of each Party's consent is further emphasized by Article 1121(1)(a) which provides that the potential claimant's consent must also be given "in accordance with the procedures set out in this Agreement."[33] As explained by the tribunal in *Methanex v. United States*:

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[31] When a claim is submitted depends on the particular arbitral rules selected by a Claimant. In an UNCITRAL Arbitration, a claim is submitted to arbitration when the Notice of Arbitration is received by the respondent. (**RL-030**, NAFTA, Chapter 11, Article 1137 (1)(c).

[32] *Ibid*, Article 1122(1). **RL-022**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Counter-Memorial on Preliminary Questions, 8 September 2000, ¶ 127; **RL-029**, *Methanex Corp. v. United States* (UNCITRAL) Memorial on Jurisdiction and Admissibility of Respondent United States of America, 13 November 2000, p. 74.

[33] **RL-030**, NAFTA, Chapter 11, Article 1121(1)(a).

> In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.[34]

19. The pre-conditions and formalities in Articles 1118 to 1121 include the requirement that the potential claimant submit a Notice of Intent to Submit a Claim to Arbitration specifying the "issues and factual basis for the claim",[35] waive the ability to bring certain other types of proceedings,[36] and most importantly for Canada's objection here, observe a six-month waiting period prior to submitting a claim to arbitration.[37]

1. Canada Has Not Consented to the Arbitration of Disputes Unless Six Months Have Elapsed Since All of the Events Giving Rise to an Alleged Claim

20. Article 1120, titled "Submission of a Claim to Arbitration" provides, in relevant part:

> 1. 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 under:
>
> [...]
>
> (c) the UNCITRAL Arbitration Rules.

21. Pursuant to the Article 31 of the Vienna Convention on the Law of Treaties, this language is to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

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[34] **RL-028**, *Methanex – Partial Award*, ¶ 120.

[35] **RL-030**, NAFTA, Chapter 11, Article 1119(c).

[36] *Ibid*, Article 1121(1)(b) and (2)(b).

[37] *Ibid*, Article 1120(1); **RL-031**, Department of External Affairs, North American Free Trade Agreement: Canadian Statement on Implementation, in Canada Gazette 68, at 154 (Jan. 1, 1994) ("Canadian Statement on Implementation of NAFTA").

22. The ordinary meaning of "provided" is "on the condition or understanding that".[38] The ordinary meaning of "may" in this context is expressing the concept of "permission".[39] Further, the ordinary meaning of "events giving rise to a claim" is each and every event which led to the claim being filed. Indeed, the plural use of the term "events" affords no other reasonable explanation. If the intent had been to refer to simply some of the precipitating events, or the first event in the chain of events that led to the claim, the singular term "event", or language such as "any of the events," would have been used. It was not.

23. Accordingly, the ordinary meaning of NAFTA Article 1120 is that an investor is permitted to submit a claim to arbitration on the condition that six months have elapsed since all of the events which gave rise to the claim.[40] Inversely, if six months have not elapsed since all of the events allegedly giving rise to the claim, then the NAFTA Parties agreed that an investor is not permitted to seek arbitration. If an investor attempts to do so, the submission of the claim is not "in accordance with the procedures set out" in the NAFTA and hence, is invalid. In such circumstances, there is no consent to arbitrate the dispute.

24. This interpretation is further supported by the very purpose of this provision. The waiting period found in Article 1120 plays an important role in the overall operation of Chapter 11. It accords the respondent State the right to be informed about the dispute before the formal submission of a claim, and provides a period of time during which the respondent State may attempt to resolve the matter. As explained by Canada when adopting the domestic legislation necessary to implement NAFTA:

> Six months must have elapsed since the events giving rise to the claim before a claim may be submitted to arbitration; this is

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[38] **RL-017**, *Black's Law Dictionary*, 8th ed., *s.v.* "provided that", p. 1261.

[39] **RL-032**, *The Shorter Oxford English Dictionary*, 5th ed., *s.v.* "may", p. 1725.

[40] The language in the French and Spanish versions of NAFTA confirms this ordinary meaning. The French version provides, in relevant part, "et à condition que six mois se soient écoulés depuis les événements qui ont donné lieu à la plainte, un investisseur contestant pourra soumettre la plainte à l'arbitrage." Similarly, the Spanish text provides, "y siempre que hayan transcurrido seis meses desde que tuvieron lugar los actos que motivan la reclamación, un inversionista contendiente podrá someter la reclamación a arbitraje". Like the English text, both the French and Spanish versions emphasize the fact that complying with the waiting period is a condition on the permission granted to a potential claimant to submit a claim to arbitration under Chapter 11. Further, both use the plural form of events, "événements" in French and "actos" in Spanish, confirming that waiting period applies to all of the events giving rise to the claim. See: http://www.nafta-sec-alena.org/en/view.aspx.

> intended to permit time to resolve the matter amicably, before invocation of dispute resolution proceedings.[41]

25. The tribunal in *Merrill & Ring v. Canada* concluded similarly, holding with respect to these provisions in Chapter 11:

> The Tribunal has no doubt about the importance of the safeguards noted and finds that they cannot be regarded as merely procedural niceties. They perform a substantial function which, if not complied with, would deprive the Respondent of the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim announced. This would be hardly compatible with the requirements of good faith under international law and might even have an adverse effect on the right of the Respondent to a proper defence.[42]

26. This position has also been articulated by other arbitral tribunals interpreting similar provisions in other international investment treaties.[43] For example, the tribunal in *Burlington Resources Inc. v. Ecuador* noted that a waiting period in an international investment treaty is "designed precisely to provide the State with an opportunity to redress the dispute before the investor decides to submit the dispute to arbitration."[44] That tribunal further explained:

> [B]y imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the Treaty effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host state an *opportunity* to redress the problem before the investor submits the dispute to arbitration.[45]

27. Similarly, the tribunal in *Murphy v. Ecuador* held:

> The purpose of such requirement is that during this "cooling-off period," the parties should attempt to resolve their disputes amicably, without resorting to arbitration or litigation, which

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[41] **RL-031**, Canadian Statement on Implementation of NAFTA, p. 154.

[42] **RL-027**, *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Decision on a Motion to Add a New Party, 31 January 2008, ¶ 29 ("*Merrill & Ring*").

[43] **RL-024**, *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9) Award, 16 September 2003, pp. 14.1-14.5 ("*Generation Ukraine*"); **RL-015**, *Limited Liability Company AMTO v. Ukraine*, SCC Arbitration No. 080/2005, Final Award, 26 March 2008, pp. 34-38 ("*AMTO*").

[44] **RL-002**, *Burlington Resources*, ¶ 312.

[45] *Ibid*, ¶ 315.

> generally makes future business relationships difficult. It is not an inconsequential procedural requirement but rather a key component of the legal framework established in the BIT and in many other similar treaties, which aims for the parties to attempt to amicably settle the disputes that might arise resulting of the investment made by a person or company of the Contracting Party in the territory of the another State.[46]

28. This waiting period is especially critical when the measures in question are those of a sub-national government. In such cases, the federal government must coordinate efforts to understand the claim and the underlying facts with that sub-national government. If not afforded the required time to do so, the ability of the respondent State to defend the claim would be potentially prejudiced.

2. The Claimant's Interpretation of Article 1120 is Contrary to its Ordinary Meaning and Purpose

29. The Claimant has submitted that the requirements of Article 1120 are met, and hence a NAFTA Party's consent to arbitration is given, provided six months have passed since at least some of the events giving rise to the claim.[47] Such an interpretation of Article 1120 is not only inconsistent with the plain meaning of the provision, but is contrary to the principle that meaning and effect must be given to all of the terms of a treaty.[48]

30. If the NAFTA Parties had wished to specify that the six month period ran only from the first event relevant to a claim, they could have done so. As shown above, the drafting would have been relatively simple. They did not do so, and instead chose to use the plural term "events" to make clear that the waiting period begins to run only after all of the events giving rise to the claim have occurred.

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[46] **RL-011**, *Murphy Exploration and Production Company International v. Republic of Ecuador* (ICSID Case No. ARB/08/4) Award on Jurisdiction, 15 December 2010 ("*Murphy Exploration*").

[47] **R-020**, Letter from Barry Appleton, Appleton & Associates to Sylvie Tabet, Trade Law Bureau, Department of Foreign Affairs and International Trade, Government of Canada (Dec. 28, 2011).

[48] **RL-019**, *The Corfu Channel Case*, 1949 I.C.J. Reports 15, p. 24; **RL-026**, *Libyan Arab Jamahiriya v. Chad*, 1994 I.C.J. Reports 648, p. 23; **RL-037**, *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R, 29 April 1996, p. 23: ("One of the corollaries of the "general rule of interpretation" in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility").

31. In the light of the purpose of the article, the decision of the NAFTA Parties in Article 1120 could hardly have been otherwise. As explained above, Article 1120 is designed to provide the respondent State with a chance to inform itself about the measures in question and to provide an *opportunity* to redress the issue through consultation and negotiation. If a claim could be submitted to arbitration prior to all of the events giving rise to a claim having happened, the respondent State would not be in a position to understand the totality of the claim brought against it. Not only would this make it impossible for the respondent State to assess the merits of the allegations, but it would impair the effectiveness of consultations and negotiations.

32. Indeed, in other cases, the fact that the waiting period was observed for certain aspects of the claim was not considered sufficient to allow the entire claim to proceed. For example, in *Burlington Resources,* the tribunal found that it had jurisdiction over certain claims with respect to which there was no question that the claimant had waited the time required by the treaty. However, it also held that it did not have jurisdiction over the claims arising less than six months from the Request for Arbitration, explaining that the claimants had failed to abide by the conditions for acceptance of arbitration contained in the investment treaty with respect to those particular claims.[49]

B. The Tribunal Lacks Jurisdiction Because Canada Has Not Consented to Arbitrate the Claimant's Claim

33. As pleaded in the Notice of Arbitration, the events giving rise to the alleged claim in this arbitration occurred as late as August 5, 2011. The Claimant purported to submit a Notice of Arbitration only 60 days later, on October 4, 2011. The Claimant has not respected the six-month waiting period, thereby depriving Canada of the opportunity, afforded to it by Article 1120, to be informed beforehand of the complaints regarding Ontario's measures, and to pursue an amicable resolution of the dispute.

34. Tribunals have found that a claimant's failure to abide by a six month waiting period is sufficient to defeat the jurisdiction of a tribunal.[50] For example, in *Burlington Resources*, the tribunal found that the failure to accord host States the right to be informed about the dispute at

[49] **RL-002**, *Burlington Resources*, ¶¶ 312, 317-318.

[50] *Ibid*, ¶¶ 312, 315; **RL-011**, *Murphy Exploration*, ¶ 157.

least six months before the claim is submitted to arbitration "suffices to defeat jurisdiction."[51] Similarly, in *Murphy*, the tribunal dismissed the claim for lack of jurisdiction, finding that the waiting period of a bilateral investment treaty "constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration [...]."[52] It further explained that holding the waiting period to be anything other than "mandatory and jurisdictional in nature" would improperly leave it to "the investor [to] decide whether or not to comply with [an explicit treaty requirement] as it deems fit".[53] Finally, in *Enron v. Argentina*, the tribunal held that the "failure to comply with [the waiting period] would result in a determination of lack of jurisdiction."[54]

35. The fact that six months have now elapsed since all of the events giving rise to this alleged claim is irrelevant to this question of jurisdiction. In both *Burlington Resources* and *Murphy*, the waiting periods had also expired more than a year prior to the tribunals rendering of their respective awards on jurisdiction.[55] In fact, in both cases, the waiting period had expired prior to the respondent filing its written objection to the tribunal's jurisdiction. In neither case did the tribunal consider this important. Indeed, in light of the time frames required for a decision on a question such as this, it will almost always be the case that six months will have elapsed at the time a decision on jurisdiction is made. Holding that to be relevant, instead of considering the factual situation at the time the claim was actually submitted, would render waiting period clauses such as Article 1120 superfluous and without consequence.

36. On this point, the decision in *Ethyl v. Canada* with respect to the effect of a Claimant's failure to abide by Article 1120's waiting period is, as explained by the tribunal in *Merrill & Ring*, is wrong.[56] There is no "general principle that an investor may ignore consultation or

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[51] **RL-002**, *Burlington Resources*, ¶ 315.

[52] **RL-011**, *Murphy Exploration*, ¶ 149.

[53] *Ibid*, ¶ 148.

[54] **RL-005**, *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic* (ICSID Case No. ARB/01/3) Decision on Jurisdiction, 14 January 2004, ¶ 88. In that case the tribunal found that, as a matter of fact, the claimant had complied with the required waiting period.

[55] **RL-002**, *Burlington Resources*, ¶¶ 53-92; **RL-011**, *Murphy Exploration*, ¶¶ 1-30.

[56] **RL-027**, *Merrill & Ring*, ¶¶ 28-29. Since *Ethyl*, other NAFTA Tribunals have similarly emphasized the need for a potential claimant to comply with all of the conditions required in Articles 1118-1121. **RL-028**, *Methanex – Partial Award*, ¶ 120; **RL-021**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, ¶ 46.

settlement clauses with impunity."[57] Tribunals should be "hesitant to interpret a clear provision of [an investment treaty] in such a way as to render it superfluous, as would be the case if a 'procedural' characterization of the requirement effectively empowered the investor to ignore it at its discretion."[58] At least one court has vacated an arbitral award as a result of the tribunal's failure to enforce the conditions on submission to arbitration found in the treaty, holding that the tribunal had rendered its decision "without regard to the contracting parties' agreement establishing a precondition to arbitration."[59]

37. Further, it is also irrelevant whether attempts to resolve the dispute would have been successful. As the tribunal in *Murphy* noted, the obligation to negotiate "is an obligation of means, not of results," adding that "[t]here is no obligation to reach, but rather to try to reach, an agreement."[60] Such a period of discussion "is an important element of the dispute resolution process".[61] Moreover, even if this factor was considered, in the current case, as was the case in *Burlington Resources*[62], the Claimant has not advanced any evidence suggesting that negotiations would have proven futile. In fact, the Government of Canada wrote to the Claimant with an offer of consultations on July 13, September 21, September 30, October 28 and December 30, 2011.[63] The Claimant has not availed itself of Canada's offers and no consultations have occurred as a result.

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[57] **RL-015**, *AMTO*, pp. 34-35.

[58] **RL-024**, *Generation Ukraine*, ¶ 14.3.

[59] **RL-016**, *Republic of Argentina v. BG Group PLC*, 665 F.3d 1363, 1366, 17 January 2012. The decision in this case appears to have been expressly grounded on a particular interpretation of U.S. law with respect to the question "arbitrability". Canada expresses no view as to whether that interpretation is correct as a matter of U.S. law; however, Canada notes that under the applicable arbitration laws in both Canada and the United States, courts can set aside or vacate arbitral awards, or portions thereof, on the grounds that the tribunal dealt with a matter over which it had no jurisdiction. . See **RL-018**, *Commercial Arbitration Act*, R.S.C., 1985, c. 17 (2nd Supp.), Article 34(2)(a)(ii); and **RL-038**, *Federal Arbitration Act*, 9 U.S.C. § 10(a)(4). Similarly, under the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958*, courts can refuse to recognize and enforce an arbitral award on the same grounds. **RL-035**, United Nations, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 1958, Art. V(c). Available at: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

[60] **RL-011**, *Murphy Exploration*, ¶ 135.

[61] **RL-015**, *AMTO*, pp. 34-35.

[62] **RL-002**, *Burlington Resources*, ¶ 314.

[63] See **R-015**, Correspondence from the Department of Foreign Affairs and International Trade, Government of Canada to Barry Appleton, Appleton & Associates (Jul. 13, 2011, Sep. 21, 2011, Sep. 30, 2011, Oct. 28, 2011 and Dec. 30, 2011).

38. In these circumstances, the Tribunal should dismiss the Claimant's claim in its entirety. Allowing this claim to proceed will only send a message to other potential claimants that the provisions of NAFTA can be ignored with impunity. In the instant case, the Claimant waited only 60 days after the last of the events allegedly giving rise to its claim before submitting a Notice of Arbitration. Unless the provisions of NAFTA are enforced, future claimants will likely push the boundaries even further. Put simply, if a Claimant can ignore Article 1120 by filing its Notice of Arbitration four months early, there is nothing as a matter of principle that will stop the next claimant from filing a joint Notice of Intent/Notice of Arbitration—that is, essentially eliminating both the waiting period and the requirement to file a separate Notice of Intent all together. That is not the deal that was reached by the NAFTA Parties, and it is not behaviour that this Tribunal should condone or endorse. The time to put a stop to the blatant disregard of the jurisdictional provisions of international investment treaties and to instead send the message that all such provisions will be given effect is now. The provisions of NAFTA are clear, and so should be the consequences for their wilful disregard.

C. In the Alternative, the Tribunal Should Dismiss All Claims Related to Events that Occurred Subsequent to April 4, 2011

39. The Claimant has articulated a claim allegedly arising from events that occurred less than six months before it submitted its claim to arbitration, and it is that claim, as cast by the Claimant, that should be dismissed. In the alternative, the Tribunal should dismiss any claims that arise from events that occurred within the six month period preceding the submission of the claim to arbitration. This was the approach followed by the tribunal in *Burlington Resources*, where the tribunal found that it only had jurisdiction over those claims for which the claimant had complied with the relevant waiting period.[64]

40. In this case, the Claimant submitted its Notice of Arbitration on October 4, 2011. Accordingly, at that time, it was permitted to submit a dispute to arbitration that arose out of events occurring prior to April 4, 2011. Further, under Article 1119, a claimant is only permitted to submit a dispute to arbitration if it has given notice to Canada of the issues and factual bases underlying its claim in a formal Notice of Intent. In its purported Notice of Arbitration, the Claimant references measures and events that occurred in August 2011, after it filed its Notice of

[64] **RL-002**, *Burlington Resources*, ¶¶ 317-18.

Intent. In direct contravention of Article 1119, no Notice of Intent has ever been provided to Canada with respect to claims based on these measures.

41. Accordingly, Canada cannot be considered to have consented to arbitrate any disputes arising from events subsequent to April 4, 2011 and nor can it be considered to have consented to arbitrate any disputes for which proper notice pursuant to Article 1119 has not been provided.

D. The Claimant Should be Required to Bear the Relevant Costs and Legal Fees Associated with this Proceeding

42. Pursuant to NAFTA Article 1135 and Articles 38 to 40 of the UNCITRAL Rules, Canada should be awarded all of the costs of the arbitration to date, as well as it legal fees related to this objection to jurisdiction.[65]

43. Article 40(1) of the UNCITRAL Arbitration Rules provides that, in principle, the costs of an UNCITRAL arbitration are to be borne by the unsuccessful party. In this case, a dismissal on jurisdictional grounds would make the Claimant the "unsuccessful party" and thus the appropriate party to bear the costs of these proceedings. In other cases where the claims have been dismissed as a matter of jurisdiction, tribunals have ordered the claimant to bear the costs of the proceedings.[66]

44. Further, regardless of the result in this matter, the necessity of arguing this issue has been brought about solely by the Claimant. The Claimant has wilfully disregarded the procedures set out in NAFTA Chapter 11 and has therefore irresponsibly forced this proceeding. In fact, the Claimant could have simply waited six months and resubmitted its Notice of Arbitration before seeking to constitute this Tribunal; it chose not to.

45. In such circumstances, it is reasonable that the Claimant bear the financial consequences of its own choice. Indeed, while erring on the effect of the claimant's disregard of Article 1120, the tribunal in *Ethyl v. Canada* was correct to determine that where the waiting period has been ignored, it is the claimant who should bear the costs of the proceedings on jurisdiction.[67]

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[65] **RL-034**, UNCITRAL Arbitration Rules (1976), General Assembly Resolution 31/98, Articles 38-40.

[66] **RL-023**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Award, 15 September 2011, ¶¶ 346-359); **RL-020**, *Saba Fakes v. Republic of Turkey* (ICSID Case No. ARB/07/20) Award, 14 July 2010, ¶¶ 153-155.

[67] **RL-006**, *Ethyl*, ¶ 88.

IV. PRAYER FOR RELIEF

46. Canada respectfully requests that the Tribunal:

(a) dismiss the claim on the grounds that it does not have jurisdiction;

(b) in the alternative, dismiss those parts of the claim that allegedly arise out of events occurring subsequent to April 4, 2011;

(c) award costs and legal fees to Canada; and

(d) grant any other relief that the tribunal deems just and appropriate in the circumstances.

December 3, 2012

Respectfully submitted on behalf of Canada,

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