IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES

MESA POWER GROUP, LLC

Investor

v.

GOVERNMENT OF CANADA

Respondent

INVESTOR'S REPLY MEMORIAL AND REJOINDER ON JURISDICTION

April 30, 2014

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CONTENTS

PART ONE: SUMMARY

1. The production of renewable power requires significant amounts of private investment to fund the building of wind facilities and to enable their connection to the transmission grid. With such large scale investments at stake, investors need to be assured that the rule of law is followed and that Power Purchase Agreements are awarded and administered in a fair, non-arbitrary and transparent manner. The Ontario FIT program was announced in 2009 as a rules-based transparent competitive process.

2. Mesa Power Group participated in Ontario's government-led renewable power FIT program. Mesa sought access to the Ontario transmission grid to be able to qualify for a twenty year long renewable energy Feed-in Tariff Power Purchase Agreement (PPA) for each of four wind generation investment facilities that it owned in Ontario.

3. The complaints raised by the Investor address extraordinary events which include manipulation of the FIT Contract process. This was a process where transparent and relevant criteria such as compliance with the expressed FIT Rules were ignored while wholly irrelevant considerations such as political support for the current Ontario government were considered.

4. Under the NAFTA, Canada must provide Mesa with treatment equal to the best treatment provided to any other investor (or investment) from another NAFTA Party or a Non-NAFTA Party who is in like circumstances to Mesa. The evidence produced in this arbitration demonstrates that Ontario entered into an arrangement which provided more favourable treatment to investments of Investors from Korea than the treatment provided to Mesa. Similarly, more favourable treatment was provided to investments of Investors from other NAFTA Parties than was provided to Mesa. The NAFTA requires that the best level of treatment in Ontario be provided to the investments owned by Mesa. The circumstances of this more favourable treatment are made even more egregious by the secret and non-transparent approach taken by Ontario, which kept the exact nature of the preferential treatment secret at the time it was provided and "under wrap" and away from the public until well after this arbitration was commenced.

5. Fundamentally, Ontario has taken a well-considered energy policy, a Feed-in Tariff regime, and spoiled it through the predominance of politics over sound public policy.

   a) First, Ontario imposed performance requirements upon persons who sought to obtain Power Purchase Agreements under the Feed-in Tariff regime. These performance requirements were totally prohibited from being imposed under the NAFTA and also under binding WTO obligations taken by Canada.

b) Then Ontario entered into a secret deal with the members of the Korean Consortium, part of which formed the *Green Energy Investment Agreement* (*GEIA*) and part of which is still secret under the terms of an Memorandum of Understanding signed between certain Korean Companies and Ontario in 2008 which appears to have been expressed in a Framework Agreement which was executed in the fall of 2009. The terms of this secret Framework Agreement have not been disclosed by Canada but the Memorandum of Understanding made clear that this was a binding exclusive partnership between Ontario and the Korean Companies.

c) By the summer of 2011, Ontario in addition was not operating the FIT Program in a fair and non-arbitrary manner. By that time, the political fortunes of the incumbent Liberal Party had turned sour and it appeared that the Party's electoral prospects for re-election were very uncertain. As a result, it appears that renewable energy Power Purchase Agreements could be obtained in exchange for promises of support for the governing political party. Such irrelevant political considerations in the operation of Ontario's energy policy resulted in capricious modifications to and abusive administration of the FIT Program rules.

6. Officials publicly told proponents that the rules were being followed, but privately the officials were actually providing preferred bidders with inside information. This abuse of process favoured better treated proponents over those like Mesa who believed that reliance on the rules would be the basis upon which contract decisions would be based. The context in which the Investor's complaints arise demonstrate that the paramount concern of the Government of Ontario was not about compliance with the rule of law, but instead with the retention of political power by the existing Ontario government.

7. Mesa's treatment was highly anomalous relative to ordinary regulatory practice, and was substantially different from the treatment afforded to other projects. The difference in treatment was politically motivated, arbitrary, discriminatory and contrary to the rule of law. It clearly fell below the minimum standard of treatment required under NAFTA 1105. The less favourable treatment also violated Canada's obligations of national treatment and most favoured nation treatment under the NAFTA.

8. Journalist Peter Wolchak has filed a witness statement which discusses the political context to the Ontario energy issues in this arbitration. Mr. Wolchak recounts the heavy political context associated with Ontario's renewable energy policies, including the FIT Program and the *Green Energy Investment Agreement*. His statement describes:

a) The volatile political situation in Ontario in advance of the 2011 Ontario General Election and how the political future of the incumbent Liberal government was very uncertain;

b) The fact that the incumbent government sought political support from companies seeking to obtain renewable energy Power Purchase Agreements and that companies such as NextEra made the maximum permitted political donations to the Ontario Liberal Party in the summer of 2011;

c) The election-related decision by the government to cancel two gas plants in politically sensitive areas and the resulting issues arising from the government's apparent non-disclosure and then cover up of the costs of the cancellations;

d) The impact arising from the government not accurately disclosing the true costs related to the cancellation of two gas plants near politically-sensitive constituencies during the election;

e) The subsequent failure to disclose accurate information about the gas plants in the Ontario Legislature, including the subsequent police investigation of staff in the Premier's office with respect to the willful destruction of electronic records surrounding the costs of the gas plant cancelations; and

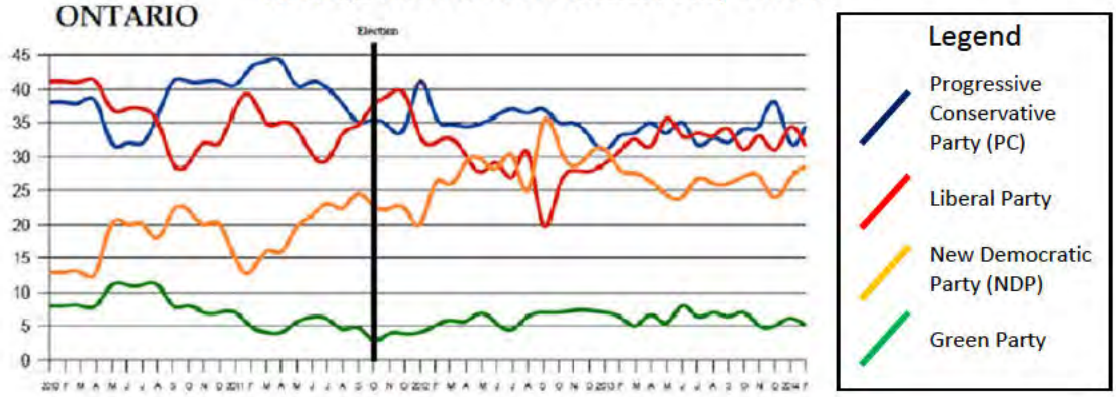
f) The issuance of a search warrant by the Ontario courts to address allegations of the willful destruction of evidence on the orders of the Chief of Staff to the Premier of Ontario.

9. The political situation in Ontario looked fairly poor for the governing Liberal Party. The opposition Progressive Conservative Party was well ahead of the Liberals leading up the 2011 general election. The Liberals were very determined to retain power and by the end of the campaign had closed the gap with the Conservatives.[1] When the Liberals won the election, it was said that Liberal Premier Dalton McGuinty "achieved what few thought possible".[2] The following chart sets out in graphic form the situation of the various political parties.

[1] Counsel Public Affairs, 2011 Ontario Election Debate Analysis, September, 2011, at p.1 ***(Investor's Schedule of Exhibits at C-0650)***

[2] Counsel Public Affairs, 2011 Ontario Election Analysis, October 7, 2011, at p.1 ***(Investor's Schedule of Exhibits at C-0651)***

Average Results of Provincial Polls, Ontario



Source: ThreeHundredEight.com[3]

10. The process to which the government of Ontario subjected Mesa was characterized by fundamental departures from the rule of law, marked by an abuse of process and natural justice. In this process, Mesa was deceived by government energy regulators, who led Mesa to believe one thing, while behind the scenes the reality of what they were doing was different, in violation of Canadian administrative law, international law, and the NAFTA.

11. The meaning of the international standard of treatment in NAFTA Article 1105 is well known, and has been well canvassed by international tribunals, including NAFTA tribunals. In these proceedings, Canada purports to advance a meaning of the international law standard of treatment that is narrow and simply not in keeping with the text of the Treaty. Canada suggests a threshold standard of breach that is also inconsistent with the principles of state responsibility set out by the International Law Commission and by previous international investor-state tribunals. If Canada's approach were to be followed, there would be no effective protection for rule of law and fundamental fairness issues within the NAFTA.

12. In any event, a simple review of the facts of this claim indicates that, by any measure, the treatment imposed by Canada upon the Investor was egregiously unjust and discriminatory and falls below the threshold for fair and equitable treatment, even as argued by Canada.

13. The same governmental actions also resulted in according less favourable treatment to Mesa than that given to local Canadian companies, and to companies owned by nationals of non-NAFTA Party states and other NAFTA Party states, who received renewable Power Purchase Agreements.These improprieties included the arbitrary and

[3] Average Results of Provincial Polls, Ontario, http://www.threehundredeight.com/p/ontario.html ***(Investor's Schedule of Exhibits at C-0644)***

capricious application of the FIT Program rules and ranking criteria; and unfair rule changes designed to prefer certain favoured investments over ordinary applicants. What has become clear is that there is nothing about the nature of renewable power energy purchases in Ontario that were normal or ordinary.

14. In its Counter Memorial, Canada proposes constructions of National Treatment and Most-Favoured Nation treatment that are divorced from the relevant sources of international law for interpreting the meaning of these kinds of obligations. Canada's theory is inconsistent with the fundamental principles which underscore the meaning of Most Favoured Nation treatment, National Treatment, as well as with the context, meaning and objectives of the Treaty. The Investors definition of the National Treatment obligation is based on the negotiating history of the NAFTA, the NAFTA's text, principles, rules, and objectives, and the decisions of other international tribunals.

15. The evidence shows that Mesa is in "like circumstances" with others who have sought renewable energy Power Purchase Agreements in Ontario, and who were treated much more favourably.

16. Indeed, the government measures impugned in this claim are contrary to the core of modern international law, which is reflected in the obligations in Section A of NAFTA Chapter Eleven. The Investor relies on this law, which is the very reason why the NAFTA was put in place, on its signature in December 1992, by the NAFTA Parties.

17. The broader context of the conduct complained of in this dispute is that of a provincial government which has been repeatedly found to have engaged in political manipulation and interference in regulatory processes when it suited its own partisan interests. This conduct culminated in the resignation of the then-Ontario premier in disgrace, after the exposure of attempts to frustrate an inquiry into the massive misuse of government funds to appease local interests through the deceptive withholding or destruction of subpoenaed documents related to another energy project in Ontario.[4] The Premier had also gone to lengths such as proroguing the province's legislature to block a parliamentary inquiry.[5]

I. MESA'S INVESTMENT IN ONTARIO

18. Mesa Power Group partnered with General Electric to make investments in renewable energy in North America through the American Wind Alliance. The parties to the

[4] CBC News, "Dalton McGuinty staffers broke law by deleting gas plant emails," June 5, 2013 ***(Investor's Schedule of Exhibits at C-0004)***

[5] National Post Article, Kelly McParland "Here lies the wreckage of Dalton McGuinty's self-serving gas plant decisions," September 10, 2013 ***(Investor's Schedule of Exhibits at C-0057)***

American Wind Alliance worked jointly to enable renewable energy projects in the FIT Program.

19. Mesa came to Ontario following many decades of success of its principals in the energy business. T. Boone Pickens, the controlling shareholder of the Mesa Group of Companies, which includes Mesa Power Group, began in the oil and gas business but had shifted the company's focus to clean and secure energy, including wind in North America. Mesa was involved in the development of large wind energy projects in Texas before it invested in Ontario. Since initiating its investments in Ontario, Mesa successfully developed a 300MW wind project in Texas which it subsequently sold to another company. In 2009, Mesa started to develop a windpower project in Minnesota, which it sold in 2013.

20. Mesa worked with knowledgeable and experienced Ontario wind developers to develop its project. This included working with the development team for the then-largest wind project in Ontario. The developers, along with Mesa, had a track record of success and familiarity with the Ontario energy process.

21. Mesa had good reason to believe that Ontario would treat its investment in a fair manner. The Honourable Sandra Pupatello, was the Deputy Premier of Ontario and the Minister of Economic Development and Trade. Minister Pupatello personally encouraged the controlling shareholder of Mesa, Dallas Texas based T. Boone Pickens, to come to Ontario in 2010 to make investments in Ontario, including Ontario's renewable energy sector.[6] At this time, neither the Minister or her officials indicated to Mr. Pickens that there was any route available to accessing the Ontario market other than through the FIT Program. Mr. Pickens was not invited to engage in negotiations with the Ontario government that could lead to market access by-passing the FIT Program or any other special arrangement.

22. While the Minister stressed to Mr. Pickens that Ontario had a desirable climate for investment, and the province was seeking positive impacts on the local economy and overall economic development benefits, she in no way suggested that commitments in this regard, whether binding or merely aspirational or cosmetic, could be exchanged for preferential access to the Ontario renewable energy market.

23. Mesa reasonably expected that the Government of Ontario and the Ontario Power Authority would rely upon the public FIT Program rules and that they would follow them. Mesa reasonably expected that Ontario would hold a rules-based fair competition

[6] E-mail from Sally Geymuller to Cole Robertson, April 15, 2011 ***(Investor's Schedule of Exhibits at C-0648)*** Minister Pupatello retired from politics in 2011 and was appointed in 2014 by the Government of Ontario to be the chair of Hydro One, a corporation controlled by the Government of Ontario.

to obtain Power Purchase Agreements that were based on expenditure from the Ontario Power Authority of funds paid by the ratepayers of Ontario that was "fairly run, transparent and where all applicants were treated equally."[7] Mesa took the FIT Rules and government representations about the FIT Program seriously. It legitimately expected that the Government and the Ontario Power Authority would fairly administer the FIT Rules without acting in a capricious and abusive manner. Mesa prepared its investments on the basis that the FIT Rules would be respected.[8]

24. Accordingly, what transpired was that relevant considerations under the FIT Program rules were ignored. Instead, irrelevant considerations arising from electioneering, politicization, or favouritism became paramount. Despite Canada's assurances to the contrary, other applicants to the FIT Program received better treatment than Mesa and other Investors seeking access to the Ontario electricity grid obtained better treatment than Mesa.

II. THE FIT PROGRAM WAS NOT ADMINISTERED FAIRLY

25. Canada acted in an arbitrary manner in assessing launch period applications.

26. Canada relies on the existence of a document from a consultant, London Economics International (LEI), to justify the fairness of its administration of the FIT Program. A careful review of the London Economics Report shows that it is not reliable, independent, nor the fairness audit which Canada purports it to be.

27. The Expert Report of Auditor Gary Timm examined the LEI Report. In the expert opinion of Auditor Gary Timm, the LEI Report is not reliable nor is it accurate. The auditor opines that the conclusions of the LEI Report should not be relied upon by the Tribunal.[9]

28. Auditor Timm also identifies the fact that London Economics International had a pre-existing business relationship with the Ontario Power Authority and that its report did not constitute any independent analysis whatsoever.[10] Indeed, the London Economics International report is not even an independent evaluation. According to the audit expert, the London Economics International Report does not constitute an "audit" and it is not an independent or reliable basis to establish that the FIT Program was fairly run.[11]

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[7] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶¶31, 57; Witness Statement of T. Boone Pickens (CWS – Pickens), at ¶¶17

[8] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶57; Witness Statement of T. Boone Pickens (CWS – Pickens), at ¶¶16-17

[9] Expert Report of Gary Timm, at ¶¶4.8, 5.1-5.3

[10] Expert Report of Gary Timm, at ¶¶2.2, 4.5

[11] Expert Report of Gary Timm, at ¶¶4.5-4.8, 5.2

III. THE RANKING PROCESS WAS NOT DONE ACCORDING TO THE FIT RULES

29. A review of the applications filed by Mesa's investments demonstrates that the ranking was made in an absence of careful review and without due regard to the actual applications themselves and the FIT Rules.

30. Within his Expert Report, Auditor Gary Timm has confirmed that the evaluation of Mesa's launch period investments had been improperly scored by the Ontario Power Authority.[12] Auditor Timm carefully reviewed the FIT Rules and also had the opportunity to consult the spreadsheet document which Canada reports was the basis upon which ranking scores were calculated. Mr. Timm was able to identify numerous circumstances within the two launch period FIT applications made by Mesa where the Ontario Power Authority ignored relevant information in the applications and made decisions which exceeded the terms of the FIT Rules.[13]

31. These errors are even more egregious because Mesa Power wrote to the Government of Ontario on May 20, 2011 seeking to have their ranking score reviewed because of concerns that the Investor had over incorrect scoring of the applications made by its investments.

32. Shawn Cronkwright from the Ontario Power Authority responded to Mesa's request by saying that the scoring was correct but without any explanation for the calculations.[14]

33. Canada admits that the government officials believed that Mesa had asked the wrong question to them when it asked if the scores were properly ranked.[15] Mr. Cronkwright, claims that the Ontario Power Authority officials believed that Mesa asked the wrong question.[16]

34. But it appears that the Ontario Power Authority actually had been in error by capriciously ignoring the FIT Rules and the materials submitted before it. Such an error would have been apparent had a careful and thorough review of the two launch period applications been taken in response to Mesa's 2011 request. Canada has provided no evidence to demonstrate that the Ontario Power Authority fairly or reasonably undertook any review of the applications submitted by Mesa prior to responding to Mesa with the incorrect information.

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[12] Expert Report of Gary Timm, at ¶¶7.1-7.4
[13] Expert Report of Gary Timm, at ¶¶6.7-6.13, 6.14-6.26, 7.1-7.4
[14] Letter from Shawn Cronkwright (OPA) to Mark Ward (Mesa), Chuck Edey (Leader Resources Corp.) and Michael Bernstein (Capstone Infrastructure Corp.), June 17, 2011 ***(Investor's Schedule of Exhibits at C-0154)***
[15] Counter Memorial, at ¶¶217-224
[16] Witness Statment Shawn Cronkwright (RWS – Cronkwright), at ¶¶21-24

35. Based on the independent review of the evaluation spreadsheets undertaken by Mr. Timm, it appears that the Ontario Power Authority did not take adequate care to address the legitimate expectations of Mesa and its investments that the ranking would be properly reviewed, that the concerns raised in its letter would be addressed, and that the results of the ranking would be accurate and reliable.

IV. INVESTMENTS UNDER THE *GEIA* AND THE FIT WERE IN LIKE CIRCUMSTANCES IN SEEKING RENEWABLE ENERGY PPAs FROM ONTARIO

36. Canada's principal defense with respect to Mesa's Most Favoured Nation Treatment claim is that Mesa's investments are not in like circumstances with investments owned by the Korean Consortium and its joint venture partners. Canada did not file any response to the Investor's allegations in the Memorial that better treatment was provided to investors and investments from non NAFTA Parties or other NAFTA Parties. Canada has made no other substantive defense.[17]

37. Mesa was in like circumstances to the investments owned by the Korean Consortium and its joint venture partners. The *Green Energy Investment Agreement* did not require any special investment on the part of the Korean Consortium despite Canada's vociferous repetition of this statement. This mischaracterization appears frequently in the Counter Memorial.[18]

38. In an attempt to differentiate the *GEIA* from the FIT Program, Canada relies on a press release issued by the Government of Ontario at the time of the signing of the *GEIA* which proclaims that the *GEIA* would result in over 16,000 jobs and require the members of the Korean Consortium to invest over $7 billion in new investment. At the time this press release was issued, the terms of the *GEIA* were completely secret. No one in the public was able to see the terms of the *GEIA* or to understand the nature of its provisions. During the course of this arbitration the terms of the *GEIA* have become public.

39. A review of the terms of the *GEIA* demonstrates that the members of the Korean Consortium, and their joint-venture partners, are in the very same circumstances to applicants seeking a Power Purchase Agreement under the FIT Program. The only difference is the name applied to the Power Purchase Agreement but there was no

[17] Canada relied on its improper assertion of an Article 1108(7) procurement exception affirmative defence as well. This exception could never apply to the NAFTA Article 1103 with respect to Mesa. Canada has entered into a broader MFN obligation with the Czech Republic than in the NAFTA as under the Czech Treaty there is no procurement exception to the provision of MFN Treatment to investors and their investments. As a result, the operation of Article 1103 requires that there be no recourse to Article 1108(7) by Canada. The inapplicability of the NAFTA Article 1108(7) exception is discussed in Part Three of the Reply Memorial.

[18] Counter Memorial, at ¶¶116-122

difference in substance or otherwise to form to the Power Purchase Agreements under both agreements. Investments that sought renewable Power Purchase Agreements under the *GEIA* and the FIT all sought the same result: a 20 year long renewable power-purchase agreement with expenditure from the Ontario Power Authority which was paid by the ratepayers of Ontario.

40. The previously-secret terms of the *GEIA* disclose a significantly better level of treatment provided to the Investments under the *GEIA* over those provided to investments under the FIT like those owned by Mesa.[19]

41. There is no functional difference between any of these applicants. All produce renewable energy for the same market, in the same manner, for the same term and under the same financial parties.[20] In all respects, a Power Purchase Agreement under the *GEIA* is like a Power Purchase Agreement under the FIT Program. The *GEIA* contract terms were based on the FIT standard contract, the contracting party was the Ontario Power Authority; the generator went through the very same grid and sold the electricity through the grid to the same ratepayers for the very same twenty year contract duration.[21]

42. Power Purchase Agreements under the *GEIA* were required to meet the very same conditions imposed on FIT proponents under the FIT Program concerning Ontario minimum domestic content, land access, documentation, domestic content, quarterly status reports, and waiver forms.[22]

43. The Expert Report of Seabron Adamson has examined the terms of the *GEIA* and the FIT Program as well as the operation of the Ontario Electricity Market.[23] Mr. Adamson concluded that the investments of Samsung and Pattern under the *GEIA* competed with investments owned by Mesa and NextEra under the FIT Program, to obtain access to the Ontario transmission grid to acquire twenty year fixed price renewable energy Power Purchase Agreements funded by Ontario ratepayers from the Ontario Power Authority.[24]

44. Mr. Adamson concludes that *GEIA* proponents and FIT proponents all received a contract in exactly the same form for exactly the same term and for exactly the same base amount per kW/hour.[25] Mr. Adamson also concludes that:

[19] Expert Report of Seabron Adamson, at ¶46
[20] Expert Report of Seabron Adamson, at ¶69
[21] Expert Report of Seabron Adamson, at ¶69
[22] Expert Report of Seabron Adamson, at ¶97
[23] Expert Report of Seabron Adamson
[24] Expert Report of Seabron Adamson, at ¶¶88, 89
[25] Expert Report of Seabron Adamson, at ¶19

a) *GEIA* proponents and FIT proponents all were required to follow the same Ontario minimum content requirements;

b) *GEIA* proponents and FIT proponents all were required to follow the same regulatory processes. The only difference is that the *GEIA* proponents were treated better;

c) The *GEIA* did not require any type of investment made by the Korean Consortium over the type of investment made by a FIT applicant;

d) The FIT Contract and the *GEIA* Contract were virtually indistinguishable from each other in form and in substance;

e) FIT Projects and *GEIA* Projects were of a similar scope and size; and

f) In all fundamental ways, the position of the Korean Consortium investors was similar to the position of a FIT proponent like Mesa. [26]

45. Ontario's press backgrounder from January 2010 was designed to be misleading and had wholesale errors and mischaracterizations of the content of the secret agreement. The provisions in the *GEIA* do not require one dollar of additional investment by the Korean Consortium, nor do they require the hiring of one person in Ontario outside of the requirements imposed under the Ontario minimum content rules. Canada's argument that the *GEIA* requires this different behaviour is fictitious.

46. The *GEIA* proponents and the FIT proponents are all like and form a class of persons who all seek to obtain power-purchase agreements from the Government of Ontario within the limited transmission capacity within the Ontario electricity grid. Canada must know that the press statements do not reflect truthful information yet Canada's continued reliance on these press statements as the sole information about the substance of the *GEIA* can only be used to mislead the Tribunal into inaccurate conclusions. Such behaviour by Canada must be singled out by the Tribunal. Misleading an international tribunal cannot be done in good faith and such actions are irresponsible and reprehensible.

47. Mr. Admanson has examined the position of members of the Korean Consortium and their joint venture partners in comparison with FIT Applicants such as Mesa. [27] He has concluded that

a) All of these companies competed against each other for Power Purchase Agreements in Ontario subject to the overall electricity transmission limits in the province;

[26] Expert Report of Seabron Adamson, at ¶¶28, 29, 43, 47, 56, 88, 89, 97, 98
[27] Expert Report of Seabron Adamson

b) Samsung and Pattern Energy admitted that they saw Mesa Power as a competitor;

c) Pattern Energy even attempted to purchase the wind power projects owned by Mesa Power; and

d) There can be no question that Samsung and Pattern Energy must be considered to be in the same market for Power Purchase Agreements as FIT applicants. [28]

48. Mr. Adamson identified areas where the *GEIA* provided better treatment to members of the Korean Consortium over FIT Applicants. This better treatment includes:

a) Better access to government officials in environmental regulatory matters;

b) Facilitated aboriginal consultations;

c) Access to guaranteed priority transmission up to 2500MW;

d) Access to fast tracked contract approval; and

e) The ability to increase the size of individual projects by 10% without further government consent within the 2500MW transmission cap. [29]

V. THE TRIBUNAL HAS JURISDICTION TO RULE ON THESE CLAIMS

49. As set out in Part Eight of this Reply Memorial, it is clear that the Tribunal has full jurisdiction to hear all of the Investor's claims. The measures which gave rise to the claim arose well before the six-month period required for before the filing of the Notice of Arbitration.

50. This Tribunal has jurisdiction to decide on all of the issues raised in the Investor's claim. Canada has not been able to meet its burden to establish a defense that there is a defect to the Tribunal's jurisdiction.

a) Canada has clearly given its consent to this arbitration and this consent is set out in the NAFTA. The question of consent is not a question of jurisdiction, but is a question of admissibility. The Tribunal should dismiss Canada's consent complaints, be they on jurisdiction or admissibility, based in any event as the consent to arbitration is clearly present;

b) There are no procedural irregularities present in the Investor's submission of its claim to arbitration, and even if there was a procedural irregularity, this does not deprive the Tribunal of jurisdiction to hear the claim;

c) Mesa is an American investor with indirectly owned investments in the territory of Canada;

[28] Expert Report of Seabron Adamson, at ¶¶75, 76, 80, 87-89
[29] Expert Report of Seabron Adamson, at ¶¶97-99, 102, 103, 105-108

d) The Investor has pleaded that the government measures at issue relate to the Investor and its investments and that these measures are inconsistent with obligations contained in Section A of NAFTA Chapter Eleven;

e) The claim was brought in a timely manner; and

f) State responsibility is an issue of admissibility and not a matter of jurisdiction. In this claim, there cannot be jurisdictional issues arising from the question of state responsibility. This is a matter for determination by the Tribunal in the merits and Canada's jurisdictional complaints must be dismissed.

VI. THE TRIBUNAL MUST DISMISS CANADA'S RELIANCE ON THE PROCUREMENT EXCEPTION

51. Canada's reliance on the Article 1108 procurement exception is misplaced for the following reasons:.

a) Canada has relied on Article 1108(7)(a), an exception to the Article 1102 and Article 1103 obligations, which is invalid for use as a result of Canada's provision of better treatment to Czech Investors in like circumstances under the Canada – Czech investment Treaty. The NAFTA Article 1103 MFN obligation requires Canada to provide substantive MFN in this situation, which means that Canada is stopped from using the exception with respect to Articles 1102 and 1103 obligations. The Investor relied upon this argument in its Memorial, but Canada filed no defense to this MFN claim; and

b) Canada is not entitled to rely on its remaining Article 1108(8)(b) exception affirmative defense with respect to the imposition of Ontario minimum local content obligations in violation of Article 1106(1) for the simple reason that the measure engaged by the Ontario Power Authority cannot be considered to be a procurement by a government or state enterprise. This exception can only apply if Canada is able to establish on a balance of probabilities that it has actually engaged in a particular procurement and that the procurement has a nexus to the specific NAFTA inconsistent measures.

52. The term procurement is not defined in Chapter Eleven, but other NAFTA tribunals considering this exception have relied on the definition of procurement in Chapter Ten, which is dedicated to the topic of government procurement. It is abundantly clear that the Power Purchase Agreements do not meet the terms of government procurement as it is naturally understood by its ordinary meaning or by the meaning ascribed within Chapter Ten of the NAFTA.

a) The Ontario Power Authority does not obtain any power arising from the Power Purchase Agreements, and in fact it really does not pay for the power, but is simply a

financial conduit to collect funds that have already been billed and paid by ratepayers;

b) The power is not used by the government which is a requirement of the meaning of the term procurement in NAFTA Chapter Ten or the natural meaning given to government procurement in international economic law. All of the power that is obtained through a Power Purchase Agreement with the Ontario Power Authority is instantaneously sold to third parties – be they commercial or residential users-and this power is not reserved exclusively for the use of the government, nor is it delivered exclusively to the government. The power immediately goes to consumers who purchase the power at the appropriate ratepayer prices. Such transactions are simply not within the meaning of the Article 1108 procurement exception; and

c) Even in the event that Canada can establish that its expenditure is procurement, it still has not demonstrated that the procurement at issue is related to the otherwise NAFTA inconsistent measures to which it seeks to apply the exception. This was also the finding of the WTO Appellate Body in *Canada – Renewable Energy* which considered the use of the analogous procurement exception in GATT Article III:8.

53. Accordingly, Canada's attempt to rely on this affirmative defense cannot succeed.

VII. CANADA'S MEASURES ARE INCONSISTENT WITH THE NAFTA

54. Canada has filed no substantive response to the Investor's Most Favoured Nation Treatment argument other than to claim that by definition the Investor and its investments cannot be like to the investors and investments of investors owned by the Korean Consortium under the *GEIA*. This argument simply confuses the better treatment provided to the members of the Korean Consortium with the fundamental question of likeness.

55. There is absolutely no difference between the members of the Korean Consortium and their investments and the Investor and its investments.

a) The only difference in that the Korean Consortium is treated better but treatment does not define likeness; and

b) Canada has simply filed no defence, with the Investor's claims that Canada's measures constitute prohibited performance requirements. Any reasonable reader of the terms of the NAFTA would know that Canada's actions are simply indefensible in the face of the commitments they made, expressly in the terms of the treaty.

56. With respect to the issue of treatment, Canada has filed no defense to the Investor's claims that the investments of the Korean Consortium obtained better treatment that the Investor and its investment.

57. On the issue of national treatment, Canada did not contest the issue of likeness to arguments that FIT applicants were in like circumstances to Mesa. Canada gave a general defense that no FIT application was treated better than Mesa and its investments. Mesa alleged that all persons seeking renewable energy Power Purchase Agreements were in like circumstances to the Investor and its investments. This class of persons included the Canadian investments of members of the Korean Consortium and their joint venture partners. They too were in like circumstances to Mesa.

58. Canadian investments such as Boulevard Associates Canada, Inc., the Canadian investment of NextEra, received highly-preferential treatment and advanced knowledge of the government's decision making. This treatment was better than that provided to Mesa. Based on this advanced knowledge NextEra, Upper Canada Transmission and Boulevard were able to have the government to modify the FIT Rules to advantage their applications and to harm those of Mesa. Such information was not available generally, and its application was preferential to Boulevard, Upper Canada Transmission and their parent, NextEra as well as being profoundly unfair to the interest of the Investor. Similarly, Canadian investments of members of the Korean Consortium and their joint venture partners received better treatment than Mesa. Such better treatment is inconsistent with NAFTA Article 1102.

59. With respect to the requirement to provide the International Law Standard of Treatment, the facts of this case and the administration of the FIT Program and the *GEIA* reveal an energy expenditure program that was run in a capricious and arbitrary manner, was not transparent and was manifestly unfair to the Investor and its Investments. These violations include the following:

a) Failure to follow the procedures set out in the FIT Rules requiring the running of the Economic Connection Test (ECT) every six months;

b) Capricious running of the "test runs" that determined who would win FIT contracts and then having government official to meet with preferred candidates, and order rule modifications that would favour the preferred bidders and disfavour competitors; and

c) Arbitrary disqualification of "priority point bids" during the ranking process.

60. All the violations complained of by the Investor were carried out directly by the Government of Ontario, or by the Ontario Power Authority, which was statutorily directed by Ontario to carry out the measure. Each measure carried out by the Ontario Power Authority was done under legal requirement under the *Electricity Act*.

61. The Ontario Power Authority is not a state enterprise under the laws of Ontario. Although it meets the general definition of state enterprise in NAFTA Article 201, it does

not meet the special definition for a state enterprise in Article 1503(2).[30] Accordingly Article 1503(2) does not apply with respect to the actions of the Ontario Power Authority. At all times with respect to the measures at issue in this arbitration, the Ontario Power Authority was acting within the direction of Ontario under the mandatory requirements of the *Electricity Act*. All of its actions are actions that are attributable to the Government of Ontario under Chapter Eleven, rather than actions under Chapter Fifteen.

VIII. SUBSTANTIAL DAMAGES ARISING FROM CANADA'S NAFTA VIOLATIONS

62. A Reply Expert Statement from Robert Low, CBV and Richard Taylor, CBV has been filed with this Reply Memorial. The Reply Expert Statement addresses serious methodological errors made by Canada's expert in the Counter Memorial. Most of these errors made by Canada's experts were on the terms of the FIT Program and the *GEIA*. Other errors related to fundamental misunderstandings of NAFTA obligations on the part of Canada's experts.

IX. SUPPORTING STATEMENTS

63. This Reply Memorial is supported by the following Witness and Expert Statements:

a) The Witness Statement of T. Boone Pickens, Chief Executive Officer of Mesa Group and the owner of Mesa Power Group LLC. Mr. Pickens has had more than fifty years of experience in the energy sector. He was formerly the chief executive officer of Mesa Petroleum until it was sold to BP in 2002. He is a well-known advocate for the promotion of North American clean energy;

b) The Reply Witness Statement of Cole Robertson from Mesa Power Group LLP. Mr. Robertson addresses operational matters in connection with the Investor, the Investments and the FIT Program applications;

c) The Expert Statement of Seabron Adamson, an electricity expert and economist with Charles River Associates. Mr. Adamson has reviewed the terms of the *Green Energy Investment Agreement* and the FIT Program to provide an understanding of these agreements and its relationship to the members of the Korean Consortium and upon FIT Applicants such as the Investments. He has considered issues arising from short-notice FIT Program rule changes from June 2011;

d) The Expert Statement of Gary Timm, an expert auditor, with the Ottawa office of Deloitte LLP. Mr. Timm has reviewed the Ontario Power Authority's review of the

[30] This matter about how the OPA does not meet the Canada specific definition of a state enterprise for the purposes of NAFTA Chapter Fifteen is discussed infra in Part Eight.

applications submitted by the Investments, and has also reviewed the reliability of the London Economics International Report which has been heavily relied upon by Canada;

e) The Reply Expert Statement of Robert Low, CBV and Richard Taylor, CBV, from the Toronto office of Deloitte LLP on the valuation of damages. Mssrs Low and Taylor have identified serious errors made in the Defense valuation report provided by Berkeley Consulting Group; and

f) The Witness Statement of journalist Peter Wolchak addressing the political context to the measures in this arbitration. Mr. Wolchak reports on the context of Ontario's renewable energy policies, including the FIT Program and the *Green Energy Investment Agreement*. He also describes the volatile political situation in Ontario in advance of the 2011 Ontario General Election and the implication of the election related decision by the government to cancel two gas plants in politically sensitive areas and the resulting issues arising from the government's apparent non-disclosure and then cover up of the costs associated with this change in energy policy.

PART TWO: THE FACTS

I. THE FEED-IN TARIFF AND THE *GREEN ENERGY INVESTMENT AGREEMENT*

64. Canada has made a number of erroneous factual statements and, in so doing, has misconstrued specific facts on the record (and the relevance of those facts) in an attempt to suggest that there has been no breach of the obligations contained in Section A of Chapter Eleven. This is simply an incorrect statement. Within this part of the Memorial, the Investor will demonstrate that the statements made by Canada with respect these facts are incorrect. These statements relate to Canada's allegations that:

a) The particular conduct and acts of the OPA are not attributable to Canada;[31]

b) There could never be a violation of the international law standard of treatment arising from the preferential treatment secretly provided to members of the Korean Consortium, particularly under the *GEIA* and the reservation of capacity for the Korean Consortium;[32] and

c) There could not be a similar violation arising from Canada's measures throughout the FIT Program relating to the administration of the FIT Program, including the ranking process,[33] the decision for allocating capacity made available by the Bruce to Milton line[34] and the decision not to run the ECT,[35] particularly with reference to Mesa's legitimate expectations.

65. This requires the Investor to respond by providing the particular regulatory framework and factual context upon which the OPA, Ministry of Energy and Premier's Office operated.

A. The Feed-in Tariff (FIT)

66. On September 24, 2009, the Minister of Energy announced the Ontario renewable energy Feed-in Tariff Program (FIT Program). The Program was ordered by the Government to be implemented by the Ontario Power Authority pursuant to the Minister of Energy's powers to direct the Ontario Power Authority to undertake governmental orders under section 35.25 of the *Electricity Act*.[36] Other Ontario laws and policies also supported this same policy.

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[31] Counter Memorial, at ¶293
[32] Counter Memorial, at ¶403
[33] Counter Memorial, at ¶433
[34] Counter Memorial, at ¶409
[35] Counter Memorial, at ¶¶406, 427
[36] Electricity Act, 1998, S.O. 1998, c.15 ***(Investor's Schedule of Exhibits at C-0401)***

67. The Ontario Power Authority created a process whereby proponents could apply for renewable energy Power Purchase Agreements. The agreements would have a twenty-year duration and the power generators would connect directly to the IESO-controlled Ontario Electricity Grid and sell the power to consumers who would pay for it. The payment from the consumers would then be collected through a number of entities. Payment for the power would be remitted by the Ontario Power Authority from funds obtained from the ratepayers.

68. Ontario had a limited amount of electricity transmission access. Getting transmission access was a critical factor as renewable Power Purchase Agreement proponents needed part of the limited transmission access to transmit power to market. Without transmission access, they could not sell power.

B. The *Green Energy Investment Agreement* (*GEIA*)

69. On January 21, 2010, the *Green Energy Investment Agreement*[37] was signed at a public ceremony by, the Ontario Minister of Energy and senior corporate representatives from two Korean companies, Samsung and Korean Electric Company. Jointly these companies are referred to as the Korean Consortium.

70. The terms of the *GEIA* were secret at the time of the signature ceremony.

71. A press release was issued at the time of the signing which stated that the *GEIA* would result in $7 billion in new investment and in the creation of 16,000 new jobs for Ontario.[38]

72. As described in detail in Part Five of this Reply Memorial, the information about investment and new jobs in the press release was inaccurate and misleading. Indeed, the terms of the *GEIA* did not require the members of the Korean Consortium to create any new jobs or make any investment other than that which would arise from any investment that sought a Power Purchase Agreement under the FIT Program.

73. The arrangements with the Korean Consortium were done in secret. The Auditor General of Ontario reported that the Ontario Power Authority and the Ontario Energy Board had no advance knowledge about the *GEIA*.[39]

74. Also unknown to the public was that the Government of Ontario had entered into a Memorandum of Understanding with the Korean Consortium in December 12, 2008 and

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[37] *Green Energy Investment Agreement*, January 21, 2010 ***(Investor's Schedule of Exhibits at C-0322)***

[38] Ministry of Energy Archived Backgrounder, "Ontario Delivers $7 Billion Green Investment" ***(Respondent's Schedule of Exhibits at R-076)***

[39] 2011 Annual Report of the Auditor General, Chapter 3, VFM Section 3.03 Electricity Sector – Renewable Energy Initiatives, at p.108 ***(Investor's Schedule of Exhibits at C-0228)***

also in a Framework Agreement which was signed in October 2009 after the FIT Program was announced.[40]

75. The Framework Agreement has not been provided by Canada in this arbitration. An earlier draft of the terms of the Framework Agreement, provided by Samsung C & T provides that Ontario and the Korean Consortium were exclusive partners with respect to the terms of the agreement.[41] The Agreement specified that Ontario would guarantee reserved transmission access for the renewable energy projects that would be developed by members of the Korean Consortium.

76. On April 1, 2010, the Ontario Minister of Energy issued a directive to the Ontario Power Authority directing it to negotiate Power Purchase Agreements with the Korean Consortium.[42] This same directive confirmed that 2500MW of renewable energy power transmission had been reserved for the exclusive benefit for projects from the Korean Consortium.[43]

77. The Ontario Minister of Energy instructed the OPA to take certain actions with respect to the *GEIA* through a series of Ministerial directions:

a) On September 30, 2009, the Minister of Energy directed the OPA to set aside 240MW and 260MW of transmission capacity for members of the Korean Consortium;[44]

b) The Power Purchase Agreement obtained under the *GEIA* was for a 20 year Feed-in Tariff contract "substantially similar" to the FIT contract. On April 1, 2010, the Minister of Energy directed the Ontario Power Authority to negotiate Power Purchase Agreements with the Korean Consortium.[45] The Minister also directed the Ontario Power Authority that the Power Purchase Agreements entered into with the

[40] Email from Mohamed Dhanani (Ministry of Energy) to Hagen Lee, October 1, 2009 ***(Investor's Schedule of Exhibits at C-0339)***; Draft Framework Agreement by and Among Her Majesty The Queen in Right of Ontario, Korean Electric Power Corporation and Samsung C&T Corporation, September 25, 2009 Article 1(1.1) ***(Investor's Schedule of Exhibits at C-0328)***

[41] Draft Framework Agreement by and Among Her Majesty The Queen in Right of Ontario, Korean Electric Power Corporation and Samsung C&T Corporation, September 25, 2009 Article 1(1.1) ***(Investor's Schedule of Exhibits at C-0328)***

[42] Letter from Energy Minister Duguid to OPA, Direction to OPA, April 1, 2011 ***(Investor's Schedule of Exhibits at C-0089)***

[43] Letter from Energy Minister Duguid to OPA, Direction to OPA, April 1, 2011 ***(Investor's Schedule of Exhibits at C-0089)***

[44] Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, September 30, 2009 ***(Investor's Schedule of Exhibits at C-0105)***

[45] Letter from Energy Minister Duguid to OPA, Direction to OPA, April 1, 2011 ***(Investor's Schedule of Exhibits at C-0089)***

Korean Consortium should be "substantially similar to those under the OPA's FIT Contract and the FIT Program Rules;"[46]

c) This same directive confirmed that 2500MW of renewable energy power transmission had been reserved for projects from the Korean Consortium;[47]

d) On September 17, 2010, the Minister of Energy directed the OPA to hold in reserve "500MW of transmission capacity to be made available in the Bruce area…" in addition to the 240MW and 260MW already reserved for the Korean Consortium as of the September 30, 2009 direction; and

e) On July 29, 2011, the Minister of Energy and the Korean Consortium amended the *GEIA* so as to allow for a one year extension of their commercial operation date to match the requirements of the FIT Program and to allow for more flexibility and time to obtain necessary approvals in advance of construction. The OPA subsequently signed six PPAs with the Korean Consortium.

78. Through these directives, Samsung received a guaranteed right of first refusal on transmission access in certain transmission zones in the Province of Ontario. For example, Samsung was guaranteed 500MW of transmission access in the Haldimand, Essex and Chatham-Kent transmission zone, totalling 20% of all available capacity in this region.[48] Samsung was also guaranteed "priority access" to 500MW of transmission capacity in the Bruce Region of Ontario.[49]

79. Investors wishing to obtain renewable Power Purchase Agreements had no advance warning about the *GEIA*, or its predecessor agreements. The Framework Agreement made clear that it was an exclusive arrangement between the Government of Ontario and the members of the Korean Consortium. Only the Members of the Korean Consortium (or joint venture partners of the Korean Consortium which were controlled by the Korean Consortium) were able to obtain the benefits of the *GEIA*.[50]

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[46] Letter from Energy Minister Duguid to OPA, Direction to OPA, April 1, 2011 ***(Investor's Schedule of Exhibits at C-0089)***

[47] Letter from Energy Minister Duguid to OPA, Direction to OPA, April 1, 2011 ***(Investor's Schedule of Exhibits at C-0089)***

[48] Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, September 30, 2009 ***(Investor's Schedule of Exhibits at C-0105)***

[49] *Green Energy Investment Agreement*, at ¶7.3 ***(Investor's Schedule of Exhibits at C-0322)***

[50] Draft Framework Agreement by and Among Her Majesty The Queen in Right of Ontario, Korean Electric Power Corporation and Samsung C&T Corporation, September 25, 2009, Article 1(1.1) ***(Investor's Schedule of Exhibits at C-0328)***

II. MESA'S INVESTMENT

80. Mesa Power Group, LLC is a US corporation owned by T. Boone Pickens. Mr. Pickens has an extensive and successful history in the energy business, where he has been a renowned figure in the industry. He achieved a successful career in the oil and gas industry spanning many decades. Under Mr. Pickens' leadership Mesa Petroleum become one of the largest oil and gas companies in the world. After building Mesa into a credible and trusted global leader in the oil and gas industry, Mr. Pickens sold Mesa in 2002 for $6 billion.

81. Mr. Pickens formed Mesa Power Group, LLC in order to refocus his energy-business towards renewable and cleaner energy sources. The shift was rooted in Mr. Pickens' well-known belief that North America needed to rely upon more of its energy in cleaner and renewable sources, like natural gas, wind, and solar in order to facilitate a shift away from a dependence on oil and secure a safer and more sustainable energy future.[51]

82. In order to alert the American public to what he viewed as an insecure, unhealthy and environmentally-unsustainable dependence on imported oil, Mr. Pickens developed the Pickens Plan to advocate for an economy based on clean and renewable energy sources. Mr. Pickens has invested over $100 million to see the Pickens Plan realized.[52] To date it has garnered national attention and millions of supporters.[53] Mr. Pickens advocates for the Pickens Plan in numerous settings. He regularly appears on television as a commentator on energy matters and meets with top decision-makers in civil society and government.[54] He also maintains an active social medial presence to advocate for the Pickens Plan ensuring he reaches as many audiences as possible. Mr. Pickens engages in social media often on clean and renewable energy issues. He has amassed more than 2 million social media followers.[55]

83. When Mesa Power Group, LLC was formed in 2008 the name Mesa was chosen to signify the extent to which Mr. Pickens wanted to associate his push for clean and renewable energy with the success of the Mesa brand started with Mesa Petroleum in

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[51] Pickens Plan background information, 2014 ***(Investor's Schedule of Exhibits at C-0429)***
[52] Pickens Plan background information, 2014 ***(Investor's Schedule of Exhibits at C-0429)***
[53] Pickens Plan background information, 2014 ***(Investor's Schedule of Exhibits at C-0429)***
[54] Time Magazine, "T. Boone Pickens," by Ted Turner, April 30, 2009 ***(Investor's Schedule of Exhibits at C-0630)***; The New York Times, "Pass the Boone Pickens Bill," April 11, 2011 ***(Investor's Schedule of Exhibits at C-0631)***; *Texas Monthly, "There Will Be Boone," September 2008* ***(Investor's Schedule of Exhibits at C-0632)***; D Magazine, "Being Boone Pickens," June 2008 ***(Investor's Schedule of Exhibits at C-0633)***; Pickens Plan TV spot 1, July 7, 2008 ***(Investor's Schedule of Exhibits at C-0645)***; Pickens Plan TV spot 2, August 1, 2008 ***(Investor's Schedule of Exhibits at C-0646)***; T. Boone Pickens Senate Testimony - CSPAN, September 26, 2008 ***(Investor's Schedule of Exhibits at C-0647)***
[55] Witness Statement of T. Boone Pickens (CWS – Pickens), at ¶10

the 1950s.[56] It was a way to demonstrate that the years of experience, expertise, and success that Mesa had in the oil and gas energy sector would be continued through Mesa Power Group, LLC's operations in the wind-energy sector.

84. Mesa began its expansion into the renewable-energy sector in the United States. Before launching its FIT applications in Ontario, Mesa was engaged in a 1000MW wind project in Texas. The project was in the advanced development stages. Mesa has assembled wind leases for more than 100,000 acres of land for wind sites and more than 24 metrological towers had already been erected. However, due to the 2008 financial collapse, the decrease in demand meant that the project was no longer financially viable; as such, it was discontinued.[57] Mesa was also in development of a second, 50MW wind project in Goodhue, Minnesota valued at USD $179 million. The project did not proceed because unforeseen regulatory changes arose later in the process.[58] More recently, Mesa completed the development and sale of a 211MW wind project in Texas, the Stephens Ranch Wind Energy Project, which it sold to Starwood Energy Group Global, LLC.[59] The total transmission capacity of the project will reach 377MW with a project sited on more than 40,000 acres.

85. When Mesa Power Group, LLC came to Canada in 2009 to participate in Ontario's FIT Program, it was not the first time Mr. Pickens participated in Canada's energy sector. Mr. Pickens spent time living Alberta at an earlier stage in his career in the late 1960s working in the Canadian oil and gas sector.[60] These experiences in Alberta provided Mr. Pickens and Mesa their first exposure to energy policies and issues in Canada, and some of the associated regulatory oversight regimes that governed them as he dealt with the acquisition of mineral rights and land leases.

86. The decision to invest in Ontario's FIT Program was simple. The FIT Program was in line with Mr. Pickens' belief in promoting and greater reliance on renewable energy sources, and the FIT Program offered the highest price for transmission of wind energy. Mesa Power Group, LLC believed it would have a similarly positive experience in Ontario as Mr. Pickens and Mesa had previously had in Alberta.

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[56] T. Boone Pickens, *The First Billion is the Hardest: Reflections on a Life of Comebacks and America's Energy Future* (New York: Three Rivers Press, 2008), at p.55 ***(Investor's Schedule of Exhibits at C-0428)***

[57] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶18

[58] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶19

[59] Bloomberg News Article headed "Starwood Energy Closes Financing on 211-Megawatt Texas Wind farm," January 7, 2014 ***(Investor's Schedule of Exhibits at C-0432)***

[60] PR Newswire News Article headed "Starwood Energy Group Closes Financing with GE, Citi and Santander on 211-Megawatt Wind Project in Texas," January 7, 2014 ***(Investor's Schedule of Exhibits at C-0433)***; T. Boone Pickens, *The First Billion is the Hardest: Reflections on a Life of Comebacks and America's Energy Future* (New York: Three Rivers Press), at pp.143-144 ***(Investor's Schedule of Exhibits at C-0428)***

87. Throughout the time that Mesa Power Group, LLC had made its investments in Alberta, Mr. Pickens received support and encouragement from officials in the Government of Ontario. A telephone meeting between Mr. Pickens and Ontario's Minister of Economic Development and Trade Sandra Pupatello in 2011 to discuss the development of Ontario's energy sector, its decision to focus on cleaner and renewable energies, and opportunities for investment provided encouragement to Mr. Pickens that Ontario was serious about increasing its reliance on clean and renewable energy.[61]

88. Mesa Power Group, LLC's participation in the FIT Program was done through its subsidiaries. Mesa Power Group, LLC registered four separate Unlimited Liability Companies in the Province of Alberta – TTD Wind Project, ULC and Arran Wind Project, ULC on November 17, 2010 and North Bruce Project, ULC and Summerhill Project, ULC on April 6, 2010. It was through these ULCs that Mesa Power Group submitted its FIT applications.

III. WHY MESA PARTICIPATED IN THE FIT PROGRAM

89. Mesa was eager to expand its secure, clean and renewable energy projects outside of the United States to help further the objectives of the Pickens Plan. When Ontario's FIT Program was announced, with the high price offered for wind energy, Mesa wanted to play a role in furthering Ontario's commitment to wind energy.[62]

90. Another reason reinforcing Mesa's enthusiasm for Ontario's FIT Program was the fact that it would be designed, implemented, and administered by the Government of Ontario, through the OPA. Mesa expected that any large-scale regulatory program so associated with governmental priorities would be run in good faith, transparently, and fairly, treating all applicants equally and evaluating them based on merit – as would be expected in any democracy committed to the rule of law.[63]

91. Mesa was confident that its participation in the FIT Program would be positive. Mr. Pickens had been encouraged by his discussion with Minister Pupatello and felt that Ontario's commitment to launching a serious and effective FIT Program was genuine.[64] Ontario's modeling of its FIT Program on the model of the successful German FIT Program provided further confidence that Ontario was putting in place the right program capable of achieving its desired results.[65]

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[61] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶33
[62] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶31
[63] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶32
[64] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶33
[65] Ontario Power Authority, FIT Program Benefits, 2014 ***(Investor's Schedule of Exhibits at C-0434)***

92. The Witness Statement of T. Boone Pickens states how Mesa believed that Ontario's "commitment to fairness and transparency" made investing in Ontario "a safe and predictable venture."[66] Mr. Pickens adds that Mesa's investments in Ontario were premised on a legitimate expectation that the FIT Program would be a "rules-based fair competition… where all applicants were treated equally."[67]

IV. COMPANY AGREEMENT BETWEEN AMERICAN WIND ALLIANCE AND GENERAL ELECTRIC

93. On [redacted] Mesa Power Group, LLC, through its subsidiary American Wind Alliance, entered into an agreement with GE Energy, LLC, a Delaware limited liability company..[68] The company's purpose was to advance Mesa and GEE's common interest in advancing and developing wind power projects in North America.[69] Membership in the company, which was [redacted] between Mesa and GEE, were [redacted] over the wind projects that the company was to develop.[70] As the membership was [redacted] between Mesa and GEE, decisions were made by agreement between the members.[71]

94. The agreement stipulated that wind turbines for projects would be [redacted] by GEE or its affiliates.[72] Mesa was also given [redacted] of capacity.[73] The agreement also contemplated and provided for the transfer of membership interests.[74]

95. Mesa's agreement with GEE was concluded because it merged two leaders in the renewable energy field, combining experience, technical abilities and expertise, financial capabilities, and business foresight towards the shared goal of developing wind power projects in North America. GEE's manufacturing capabilities also meant that Mesa would be able to acquire the necessary wind turbines for each project. When it was learned that Ontario's FIT Program had specific domestic-content requirements, Mesa was able

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[66] Witness Statement of T. Boone Pickens (CWS – Pickens), at ¶16
[67] Witness Statement of T. Boone Pickens (CWS – Pickens), at ¶17
[68] Limited Liability Company Agreement of American Wind Alliance, LLC, [redacted] ***(Investor's Schedule of Exhibits at C-0435)***
[69] Limited Liability Company Agreement of American Wind Alliance, LLC, [redacted], at Section 3.01 ***(Investor's Schedule of Exhibits at C-0435)***
[70] Limited Liability Company Agreement of American Wind Alliance, LLC, [redacted], at Section 3.01 ***(Investor's Schedule of Exhibits at C-0435)***
[71] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶7
[72] Limited Liability Company Agreement of American Wind Alliance, LLC, [redacted], at Section 3.15 ***(Investor's Schedule of Exhibits at C-0435)***
[73] Limited Liability Company Agreement of American Wind Alliance, LLC, [redacted], at Section 3.16 ***(Investor's Schedule of Exhibits at C-0435)***
[74] Limited Liability Company Agreement of American Wind Alliance, LLC, [redacted], at Article 8 ***(Investor's Schedule of Exhibits at C-0435)***

to secure GEE's assurance that it would be able to manufacture wind turbines that would comport with those requirements.[75] As a result, the Master Turbine Sales Agreement between Mesa and GE was amended in [redacted] to bring it in line with the FIT Program.[76]

96. On [redacted], the venture between Mesa and GEE ended.[77] GEE took back two wind projects that it had contributed to the American Wind Alliance. Mesa retained the Arran and Twenty Two Degrees wind projects and paid additional funds to purchase GEE's membership interests in AWA LLC.[78] The Mesa Group of Companies became the full owner of the American Wind Alliance.[79]

V. THE SELECTION OF WIND PROJECTS AND MESA'S ONTARIO TEAM

97. Mesa was first approached to participate in the development of Ontario wind projects in late 2008. Chuck Edey, one of Ontario's most successful wind project developers who was then engaged in developing the largest wind project in Ontario,[80] approached Mesa. Mr. Edey inquired if Mesa was interested in participating in the development of the TTD and Arran wind projects, which it had already begun at that stage, for Ontario's FIT predecessor, the RES Program.[81] However, given the 2008 financial crisis, the effects it had on external demand, and how that affected Mesa's Texas project, Mesa was not looking to expand its operations at that time.[82]

98. In June 2009 Mesa was again approached about the development of the TTD and Arran wind projects. As financial conditions had improved, and Mesa was confident that the development of the TTD and Arran projects was progressing smoothly, it was eager to participate in their development.[83] They became the first projects to be developed by Mesa Power Group, LLC through AWA LLC.

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[75] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶23, 27
[76] Amended and Restated Master Turbine Sale Agreement between General Electric Company and Mesa Power Pampa, LLC, [redacted] ***(Investor's Schedule of Exhibits at C-0379)***
[77] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶10
[78] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶10
[79] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶10; The investor disputes Canada's contention, at ¶¶481-482 of the Counter Memorial, that Mesa is not entitled to full damages for its losses as it allegedly only owned 50% of the underlying wind projects. This is clearly not a correct statement. Mr. Robertson points out in his Reply Witness Statement that the Mesa Group of Companies at all times owned and controlled the wind power investments.
[80] Leader Wind Corp Project A and Leader Wind Corp Project B were subsequently sold to Enbridge.
[81] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶30
[82] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶30
[83] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶30

VI. THE STORY OF MESA'S ONTARIO FIT APPLICATIONS

99. Mesa began working on FIT applications as soon as the program was announced and details became available.[84] Canadian subsidiaries of Mesa Power Group, LLC made six sets of FIT applications. On November 25, 2009 TTD Wind Project, ULC and Arran Project, ULC each submitted a FIT application for Mesa's TTD and Arran projects. On May 29, 2010 four additional applications were submitted by North Bruce Project, ULC and Summerhill Project, ULC for the North Bruce Energy I and II and Summerhill Wind Energy I and II wind projects.

100. The TTD and Arran projects were submitted during the initial "launch period," which ran from October-November 2009.[85] Projects that were submitted during this period were scored on four criteria:

a) Whether the project was exempt from the Renewable Energy Approval (REA) Process;[86]

b) Guaranteed access to wind turbine supply. Applicants had to show that they owned or were executing a contract with an equipment supplier to supply a certain type of equipment needed to generate the electricity. The required equipment was referred to as a "Major Equipment Component," which was further regulated in the FIT Rules;[87]

c) Expertise in wind power development. The FIT Rules required the Applicant Control Group or any three full-time employees to have "successful experience with planning and developing one or more similar facilities;" and

d) Financial Capacity. This was described in the FIT Rules as requiring that "any one person or one group of person must account for 15% or more of the direct or indirect economic interest in the applicant and has an individual tangible net worth or collective tangible net worth of $500 or more per kW of proposed contract capacity at the end of the most recent fiscal year."

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[84] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶37; Briefing Note on FIT Program Launch Logistics, May 19, 2009 ***(Investor's Schedule of Exhibits at C-0608)***

[85] Chapter 3-Deadlines for Requested Information, May 2011 ***(Investor's Schedule of Exhibits at C-0612)***; Chapter 5-Issuing Requests from Applicants, May 2011 ***(Investor's Schedule of Exhibits at C-0613)***; Chapter 6-FIT Email Communications, May 2011 ***(Investor's Schedule of Exhibits at C-0614)***; Chapter 7-Assigning FIT Tickets, May 2011 ***(Investor's Schedule of Exhibits at C-0616)***; Chapter 12-Reception Script and Protocols, May 2011 ***(Investor's Schedule of Exhibits at C-0615)***

[86] The REA is the Ontario Ministry of Environment regulatory oversight and approval process for renewable energy projects. FIT Standard Definitions, Version 1.0, at p.17 ***(Investor's Schedule of Exhibits at C-0416)***

[87] The Domestic Content Grid is listed under Exhibit D of the FIT Contract; Ontario Power Authority, Feed-In Tariff Program, FIT Rules 1.1, Section 13.1(i), September 30, 2009 ***(Investor's Schedule of Exhibits at C-0263)***

101. Mesa's second set of FIT applications were submitted outside the initial launch period and were ranked based on the date they were received.[88]

102. All FIT applications were prepared by the Mesa team and its local partners and collaborators.[89] The projects were controlled by the Applicant Control Group, a term defined in the FIT Rules as, "the Applicant, any Person that Controls the Applicant, or any Person that is Controlled by the Applicant."[90] For example, the Applicant Control Group for the Investor's TTD project consisted of Mesa Power Group, Mesa Wind, American Wind Alliance, AWA TTD Development, 22 Degrees Holding, TTD Wind Project.[91]

A. Incorrect ranking applied to Mesa's FIT Projects

103. Of the available four criteria points that launch-period applications could apply for, Mesa applied for three criteria points, omitting the first because the projects were not REA exempt.

104. Under the Equipment Control Criterion of the FIT Rules, it was required that the Applicant Control Group "[1] own or has executed a fixed or guaranteed maximum price contract with an equipment supplier... and [2] Equipment Component must have undergone, or will have undergone prior to delivery to the Applicant Control Group, any one of the Designated Activities set out in the applicable Domestic Content Grid in Exhibit D to the FIT Contract."[92]

105. The project's Applicant Control Groups met both these requirements. Each of the TTD and Arran projects submitted a Confirmation letter from GE to state both projects had executed a fixed price contract with GE to supply wind-turbine generators.[93] The second criteria was also met as General Electric was supplying wind turbines to other FIT applicants that were compliant with the domestic-content requirements. GE was known throughout the province as being close with the government and committed to supporting its renewable energy objectives. To this end, GE and Ontario entered into an

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[88] Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.2, November 19, 2009, at Section 4.1(a) ***(Investor's Schedule of Exhibits at C-0143)***

[89] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶37

[90] Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.2, November 19, 2009, at Section 13.4(a)(ii) ***(Investor's Schedule of Exhibits at C-0143)***

[91] Corporate chart of Mesa Power Group as at October, 2011 ***(Investor's Schedule of Exhibits at C-0055)***

[92] Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.2, November 19, 2009, at Section 13.4(a)(ii) ***(Investor's Schedule of Exhibits at C-0143)***

[93] Arran Wind Project FIT Application, November 25, 2009, at bates 105262 ***(Investor's Schedule of Exhibits at C-0129)*** Twenty Two Degree Wind Project FIT Application, November 25, 2009, at bates 108000 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009, at bates 105262 ***(Investor's Schedule of Exhibits at C-0365)***

MOU on September 29, 2009.[94] Mesa knew this,[95] and it is why on all its FIT applications the Investor knowingly confirmed that its equipment would abide by the FIT Program's domestic content requirements.[96]

106. The OPA failed to award a point to the Applicants under this criterion. The OPA's Evaluation Criteria Checklist indicates that the Applicants did not pass the test for this criterion under [redacted] The Checklist asks: [redacted] The evaluator answered [redacted] for the Applications.[97]

107. The second criteria point Mesa applied for, relevant experience, was awarded if, "the Applicant Control Group has, or any three full-time employees of the Applicant Control Group each have, successful experience with planning and developing one or more Similar Facilities."[98] Mesa met this requirement and submitted materials to that effect from three Directors of the Applicant Control Groups of the projects, Mark Ward, Brian Case, and Chuck Edey, to demonstrate that the Applicant Control Group of each project met the requirements:[99]

a) Mr. Edey, an officer of the applicants TTD Wind Project ULC and Arran Wind Project ULC and Director of Leader Resources Corp , enclosed his CV detailing his experience in all aspects of wind generation development, from concept to in-service, meaning from the inception to operation phases of wind projects, as well as the fact that he was responsible for the successful transaction of a fully-developed 200MW wind project to Enbridge Inc. He had specialist expertise with similar facilities as Mr. Ward

[94] Draft Memorandum of Understanding between General Electric Company and The Ministry of Economic Development and Trade of the Government of Ontario, September 28, 2009 ***(Investor's Schedule of Exhibits at C-0437)***; News Wire News Article headed "Ontario Signs MOU with General Electric Canada," September 29, 2009 ***(Investor's Schedule of Exhibits at C-0489)***

[95] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶20

[96] See FIT application and undertaking: "By submitting this Application, the Applicant agrees and acknowledges that the Applicant has read and understood the FIT Rules, obtained independent legal advice, and agrees to comply with all requirements contained therein." Twenty Two Degree Wind Project FIT Application, November 25, 2009, at bates 107902 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009, at bates 105165 ***(Investor's Schedule of Exhibits at C-0129)***

[97] FIT Evaluation Criteria Checklist: TTD Project, Microsoft Excel tab "Criteria #4" Counter 85 Column O and Arran Project, Excel tab "Criteria #4" Counter 84 85 Column O ***(Respondent's Schedule of Exhibits at R-072)***

[98] Ontario Power Authority, Feed-In Tariff Program, FIT Rules 1.1 Section 13.4(a)(iii) ***(Investor's Schedule of Exhibits at C-0258)***, "Similar Facility" is defined as "an electricity generation facility, other than the Project, that is located anywhere in the world, which (i) uses the same Renewable fuel as the Project, and (ii) has a Nameplate Capacity of at least 25% of the proposed Contract Capacity of the Project." FIT Rules 1.1 Section 13.1(l) ***(Investor's Schedule of Exhibits at C-0258)***

[99] Twenty Two Degree Wind Project FIT Application, November 25, 2009, at bates 107918-107926 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009, at bates 105181-105189 ***(Investor's Schedule of Exhibits at C-0129)***

and Mr. Case. Since the TTD and Arran projects were 150MW and 115MW, respectively, Mr. Edey's past experience demonstrated that the Applicant Control Group satisfied the requirement of "planning and developing" a "Similar Facility," namely a wind power project, whose nameplate capacity, 200MW, was more than 25% of the proposed capacity of each of the TTD and Arran projects;

b) Mr. Ward, Director of Mesa Power and AWA, LLC, enclosed a statement detailing his experience running wind projects of 1000MW in North America. Since the TTD and Arran projects were 150MW and 115MW, respectively, Mr. Ward's past experience satisfied successfully "planning and developing" a "Similar Facility," and demonstrates that the Applicant Control Group developed wind power projects whose nameplate capacity, 1000MW, was more than 25% of the proposed capacity of each of the TTD and Arran projects; and

c) Mr. Case, Director of AWA, LLC, enclosed a statement detailing his experience with the origination and co-development of wind energy projects with GE customers and GE's successful development of over 7,000MW of global power generation projects. Mr. Case's experience demonstrates the Applicant Control Group possessed extensive knowledge and experience in the development of power generation, including wind energy, far exceeding the proposed capacity for TTD and Arran;

108. The OPA failed to award a point to the Applicants under this criterion. The OPA's Evaluation Criteria Checklist indicates that the Applicants did not pass the test for this criterion under [redacted] The Checklist asks: [redacted] The evaluator answered [redacted] for the Applicants.[100]

109. The final criteria point the Investor applied for, for financial capacity, was awarded if an applicant could demonstrate that the "Designated Equity Provider" had a "Tangible Net Worth of $500 or more per kW of proposed Contract Capacity at the end of the most recent fiscal year."[101] To prove Tangible Net Worth an applicant had to provide an audited financial statement for the most recent fiscal year, and calculations, in the form of a summary, to describe the Tangible Net Worth Calculations.[102]

[100] FIT Evaluation Criteria Checklist: TTD Project, Microsoft Excel tab "Criteria #4" Counter 85 Column H and Arran Project, Excel tab "Criteria #4" Counter 84 85 Column H ***(Respondent's Schedule of Exhibits at R-072)***

[101] Ontario Power Authority, Feed-In Tariff Program, FIT Rules 1.2 Section 13.4(a)(iv) ***(Investor's Schedule of Exhibits at C-0143)*** The "Designated Equity Provider" is "any one group of Persons that together account for 15% or more of the Economic Interest in the Applicant."

[102] Ontario Power Authority, Feed-In Tariff Program, FIT Rules 1.2 Section 13.4(a)(iv)(A) ***(Investor's Schedule of Exhibits at C-0143)***

110. The Investor met this requirement. The FIT applications included a Guaranty that GE maintained at least 15% or more direct, or indirect, economic interest in the Applicant.[103] Also included was GE's audited financial statement for 2008, which was the most recent completed fiscal year.[104] The required calculations, in summary form, are derived from the information listed on page 52 of GE's 2008 audited financial statement.[105]

111. The OPA failed to award a point to the Applicants under this criterion. The OPA's Evaluation Criteria Checklist indicates that the Applicants did not pass the test for this criterion under [redacted] The Checklist asks: [redacted] The evaluator answered [redacted] for the Applicants.[106]

112. Notwithstanding the fact that the Investor met all three criteria point requirements, and provided the requisite documentation with the TTD and Arran FIT applications, it was not awarded any of the points it applied for. It is for this reason that Mesa wrote to the OPA to explain its ranking on May 20, 2011.[107] However, Mesa did not receive a response until June 17, 2011 – after the contract process for the Bruce region had finished, after Version 1.5 of the FIT Rules was issued, and after the accompanying connection-point change window had closed.[108]

B. The FIT Rules and Start of the FIT Program

113. The roll out of the FIT Program was not a smooth regulatory process and left prospective FIT applicants having to navigate a changing landscape of FIT Rules and requirements. Ontario's regulators were continuously updating and modifying the program. From the time the program was announced in September 2009 through 2012

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[103] Twenty Two Degree Wind Project FIT Application, November 25, 2009, at bates 107928 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009, at bates 105191 ***(Investor's Schedule of Exhibits at C-0129)***

[104] Twenty Two Degree Wind Project FIT Application, November 25, 2009, at bates 107930 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009, at bates 105193 ***(Investor's Schedule of Exhibits at C-0129)***

[105] Twenty Two Degree Wind Project FIT Application, November 25, 2009, at bates 107933 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009, at bates 105196 ***(Investor's Schedule of Exhibits at C-0129)***

[106] FIT Evaluation Criteria Checklist: TTD Project, Microsoft Excel tab "Criteria #4" Counter 85 Column I and Arran Project, Excel tab "Criteria #4" Counter 84 Column I ***(Respondent's Schedule of Exhibits at R-072)***

[107] Letter from Mark Ward (Mesa), Chuck Edey (Leader Resources) and Michael Bernstein (Capstone Infrastructure) to Shawn Cronkwright (OPA), May 20, 2011 ***(Investor's Schedule of Exhibits at C-0098)***; Email from Jason Collins (Ministry of Energy) to Anna Defrancesco (Ministry of Energy), Maria Papastathis (Ministry of Energy), and Shantie Prithipal (Ministry of Energy), July 7, 2011 ***(Investor's Schedule of Exhibits at C-0062)***

[108] Letter from Shawn Cronkwright (OPA) to Mark Ward (Mesa), Charles Edey (Leader Resources), and Michael Bernstein (Capstone Infrastructure), June 17, 2011 ***(Investor's Schedule of Exhibits at C-0195)***

the FIT Rules changed 10 times, forcing applicants to adapt and modify their prospective or existing applications.[109] The numerous changes to the FIT Rules added a measure of uncertainty to FIT applicants – the effect of the FIT Rule changes meant that an applicant's understanding of a certain FIT rule on one day would not necessarily be true on the next day.[110] Notwithstanding the unexpected uncertainty, Mesa dealt with the unpredictability of the FIT Rules, including adapting its applications to address significant and unforeseen changes that came out in FIT Rules Version 1.5 concerning changing connection points.

114. Frequent changes to the FIT Program were compounded by the lack of effective communication from the Ontario Power Authority to FIT applicants. The substantial rule changes on June 3, 2011 were issued without advanced notice.

C. Short notice changes to the FIT Rules

115. On June 3, 2011 the OPA established a five day period during which projects participating in the process could change their connection points. Changes were permitted for a period of five days from June 6 through June 10.[111]

116. The FIT connection point rule change permitted unsuccessful FIT Applicants from another transmission region to be able to engage in a second attempt to obtain transmission access by connecting in the Bruce Region. This was an unprecedented change in the program that severely hurt applicants in the Bruce Region (who only had one opportunity to obtain a FIT Contract) while advantaging others. For example, a FIT applicant from the West of London zone could have two opportunities to bid for a FIT Contract (once in the West of London zone and then if unsuccessful, in the Bruce zone based on the connection point change).

117. In its May 2010 webinar presentation to FIT proponents, the Ontario Power Authority stated that there would be a three week period given to proponents to make changes in

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[109] Ontario Power Authority, Feed-In Tariff Program, FIT Rules 1.1, September 30, 2009 ***(Investor's Schedule of Exhibits at C-0258)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules, Version 1.2, November 19, 2009 ***(Investor's Schedule of Exhibits at C-0143)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.3, March 9, 2010 ***(Investor's Schedule of Exhibits at C-0185)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.3.1, July 2, 2010 ***(Investor's Schedule of Exhibits at C-0218)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.3.2, October 29, 2010 ***(Investor's Schedule of Exhibits at C-0242)***; FIT Rules Version 1.4, December 8, 2010 ***(Investor's Schedule of Exhibits at C-0239)***; Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011 ***(Investor's Schedule of Exhibits at C-0005)***; Ontario Power Authority, FIT Rules Version 1.5.1, July 15, 2011 ***(Investor's Schedule of Exhibits at C-0237)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules, Version 2.0, August 10, 2012 ***(Investor's Schedule of Exhibits at C-0058)***; FIT Rules Version 2.1, December 14, 2012 ***(Investor's Schedule of Exhibits at C-0240)***

[110] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶¶57, 60

[111] Ontario Power Authority, Allocating Capacity and Offering FIT Contracts for Bruce to Milton Enabled Projects, June 3, 2011 ***(Investor's Schedule of Exhibits at C-0140)***

applications prior to the scheduled August, 2010 ECT.[112] FIT proponents were given two months advance notice prior to the planned opening of the changed window in July 2010 – so effectively there was nearly three months advance notice. There was no notice provided to FIT applicants in June 2011.

118. As the FIT process continued to unfold, other developments signalled to Mesa that the process for attaining renewable-energy PPAs was not as straightforward as it was reasonably expected to be in Ontario. When the Korean Consortium concluded and signed the *Green Energy Investment Agreement* on January 21, 2010 Mesa was blindsided. While it had been diligently preparing its FIT applications, and ensuring it put together the most competitive package, it had no idea that Ontario was in negotiation with the Korean Consortium to award it the exact same thing Mesa was competing for: PPAs for wind energy transmission in Ontario.[113]

119. Mesa discovered that it was not the only entity not consulted on the *GEIA*. The Government of Ontario failed to consult the Ontario Energy Board and the Ontario Power Authority, even though it was in the midst of running the FIT Program to award transmission capacity for Ontario given away under the *GEIA*.[114]

120. The effect of the *GEIA* was that 2,500MW of transmission capacity for wind projects, awarded through PPAs were set aside, removing them from the overall amount of transmission capacity available under the FIT Program.[115] When the Ontario Power Authority announced that an extra 1,200MW of transmission capacity would be available from the Bruce to Milton line it turned out that only 750MW was available to FIT applicants; the remainder was set aside for the Korean Consortium.[116]

121. When contracts were awarded in the Bruce Region, Mesa's projects fell within the top 415MW that remained.[117] Had it not been for the 500MW that was removed from the FIT Program and provided to the Korean Consortium, Mesa's TTD and Arran projects would have fallen within the available transmission capacity for Bruce and been awarded contracts.

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[112] Ontario Power Authority, Presentation, "The Economic Connection Test - Approach, Metrics and Process," May 19, 2010, at p.39 ***(Investor's Schedule of Exhibits at C-0088)***

[113] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶57

[114] 2011 Annual Report of the Auditor General, Chapter 3, VFM Section 3.03 Electricity Sector – Renewable Energy Initiatives, at p.108 ***(Investor's Schedule of Exhibits at C-0228)***

[115] *Green Energy Investment Agreement*, January 21, 2010, Article 3 ***(Investor's Schedule of Exhibits at C-0322)***

[116] Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010 ***(Investor's Schedule of Exhibits at C-0073)***; Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, June 3, 2011 ***(Investor's Schedule of Exhibits at C-0046)***; Ontario Power Authority, "FIT Contract Offers for the Bruce-Milton Capacity Allocation Process," July 4, 2011 ***(Investor's Schedule of Exhibits at C-0292)***

[117] Ontario Power Authority, "FIT Car Priority Ranking by Region," July 4, 2011 ***(Investor's Schedule of Exhibits at C-0293)***

122. The *GEIA* also provided the Korean Consortium a higher price for units of wind energy, by way of an Economic Development Adder.[118] This was not available to Mesa despite the fact that both of their products – units of wind energy in Ontario's transmission grid were identical and indistinguishable.

D. Delay of the ECT

123. In addition to removing transmission capacity that could have been awarded under FIT contracts, the Korean Consortium also delayed the awarding of FIT contracts. The first round of FIT contracts was awarded in April 2010.[119] Mesa's projects did not receive a contract in this round. Two more stages of awarding contracts were planned but required certain transmission capacity and availability tests to be conducted. The second round of FIT contracts was for applications submitted between December 2009 and June 2010 and required the OPA to run a Transmission Availability Test (TAT). The third round of contracts, which Mesa's TTD and Arran projects were competing for, required the OPA to conduct an Economic Connection Test (ECT). The running of the ECT was dependent on the OPA completing the TAT round.[120]

124. Mesa was given specific assurances that the first ECT would begin in August 2010.[121] The OPA wrote to Mesa in April 2010 that the ECT "is scheduled to be performed during the summer of this year" and "the ECT process will be initiated in August 2010."[122] The letter further confirmed that the results of the August 2010 ECT "will be available in early 2011."[123] This was confirmed to Mesa by the OPA during a webinar in May.[124] Mesa further expected that, as set out in the FIT Rules, the ECT would be run every six months thereafter.[125]

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[118] *Green Energy Investment Agreement*, January 21, 2010, Article 9.3 ***(Investor's Schedule of Exhibits at C-0322)***; *Green Energy Investment Agreement* – Amending Agreement, By and Among Her Majesty The Queen In Right Of Ontario as represented by the Minister of Energy And Korea Electric Power Corporation And Samsung C&T Corporation, July 29, 2011 ***(Investor's Schedule of Exhibits at C-0282)***

[119] Ontario Power Authority, News Release, "Ontario Announces 184 Large-Scale Renewable Energy Projects," April 8, 2010 ***(Investor's Schedule of Exhibits at C-0080)***

[120] Memorial, at ¶¶565-566; Preliminary Notes on ECT Schedule, by Tracy Garner (OPA), September 20, 2010 ***(Investor's Schedule of Exhibits at C-0624)***

[121] Letter from JoAnne Butler, Ontario Power Authority, to Charles Edey, April 8, 2010 ***(Investor's Schedule of Exhibits at C -0182)***

[122] Letter from JoAnne Butler, Ontario Power Authority, to Charles Edey, April 8, 2010 ***(Investor's Schedule of Exhibits at C -0182)***

[123] Letter from JoAnne Butler, Ontario Power Authority, to Charles Edey, April 8, 2010 ***(Investor's Schedule of Exhibits at C -0182)***

[124] Ontario Power Authority, Presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010, at p.39 ***(Investor's Schedule of Exhibits at C-0088)***

[125] FIT Rules V. 1.2, November 19, 2009, s. 5.4(a) ***(Investor's Schedule of Exhibits at C-0143)***

125. As admitted to by Canada, the OPA delayed the ECT it had scheduled for August 2010 in order to accommodate the Korean Consortium.[126] The ECT could not be run at that time because the Korean Consortium had not finalized connection points for its projects under the *GEIA*, which granted the Consortium priority access to transmission capacity.[127]

126. The Investor was never notified by Ontario and the OPA that the scheduled ECT was delayed to accommodate the Korean Consortium and its projects under the *GEIA*.

127. In November 2010, the Ministry of Energy released its Long-Term Energy Plan (LTEP). The LTEP established new objectives for transmission capacity allocation and transmission planning. In particular, it set a target of 10,700MW for allocations to renewable energy generators by 2018.[128]

128. Canada states that the LTEP's target for renewable energy allocations was the primary reason for not running the ECT from November 2010 onwards.[129] However, Canada merely implies that the release of the LTEP caused a suspension of the expected ECT, and has not explained how they are causally related.[130] In fact, in her Witness Statement, Sue Lo claims that the LTEP did not rule out the ECT as originally designed.[131]

129. Evidence shows that officials initially did not expect the LTEP to affect either the timing of the first ECT nor established ECT procedures.[132]

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[126] Witness Statement of Bob Chow (RWS – Chow), at ¶38

[127] 2011 Auditor General's Report, Chapter 3 – Electricity Sector – Renewable Energy Initiatives, at p.116 ***(Investor's Schedule of Exhibits at C-0228)***; Email from Ceiran Bishop (Ministry of Energy) to Samira Viswanathan (Ministry of Energy) and Faruq Remtulla (Ministry of Energy), November 18, 2010 ***(Investor's Schedule of Exhibits at C-0159)***

[128] Ontario's Long-Term Energy Plan, Ministry of Energy, pp.10 and 37 ***(Investor's Schedule of Exhibits at C-0414)***; Canada's Counter Memorial, at ¶167

[129] Canada's Counter Memorial, at ¶¶194-195; Witness Statement of Sue Lo (RWS – Lo), at ¶¶39-40

[130] While Canada has suggested that the ECT was delayed due to a long-term cap of 10,700MW established in the LTEP, it has not provided a sufficient explanation as to why that cap precluded the anticipated ECT from running its course, which would have allocated the transmission capacity that was available at the time. Indeed, Canada has not referred to any contemporaneous documents to demonstrate that from November 2010, the ECT was suspended as a result of the LTEP.Transcript taken August 10, 2012, on the Cross-Examination of Susan Lo, on her Affidavit, sworn August 3, 2012, re Divisional Court Court File No. 352112, between Skypower CL 1 LP, et al, Applicants and Minister of Energy (Ontario) and Ontario Power Authority, Respondents ***(Investor's Schedule of Exhibits at C-0620)***

[131] Witness Statement of Sue Lo (RWS – Lo), at ¶40

[132] Email from Samira Viswanathan (Ministry of Energy) to Tomas Nikolakakos (Ministry of Energy), November 18, 2010 ***(Investor's Schedule of Exhibits at C-0583)***; Email from Tracy Garner (OPA) to Kristin Jenkins (OPA), et al, November 23, 2010 ***(Investor's Schedule of Exhibits at C-0584)***; OPA, Posting of the FIT Priority Ranking & Next Steps – Communications Plan, with edits from Ministry of Energy, November 23, 2010 ***(Investor's Schedule of Exhibits at C-0585)***; OPA, Transmission-Related Questions and Answers – November 22, 2010, with edits from Ministry of Energy, November 23, 2010 ***(Investor's Schedule of Exhibits at C-0586)***; OPA, Updated FIT Schedule, with edits from Ministry of Energy, November 23, 2010 ***(Investor's Schedule of Exhibits at C-0587)***; Email from

130. It was not until December 2010 that officials realized that the LTEP might require changes to the FIT processes as these had been represented to proponents. At this time it was discovered that the target of 10,700MW set by the LTEP had not accounted for all allocations expected through the FIT Program.[133] This meant that if the FIT Program were carried out as planned the resulting allocations would exceed 10,700MW.[134] Although it was initially hoped that drastic changes to the established processes would not be necessary, officials ultimately determined that the only way to meet the 10,700MW target was to modify the ECT process so as to limit allocations resulting from it.[135]

131. Around this same time, the OPA also was informed by the Ministry of Energy that the LTEP had established a new context for its carrying out of the FIT Program.[136] In considering the implications of the LTEP for the FIT Program, the OPA determined that the LTEP set objectives that "compet[ed] and potentially conflict[ed]" with those of the FIT Rules.[137] The OPA further observed that the LTEP would require a change in the FIT Program's allocation approach, noting specifically that the outcome of the ECT would "need to recognize LTEP targets."[138]

132. In the face of this tension between the LTEP and FIT Rules, the OPA recommended moving up the date of the contemplated Two-Year Review of the FIT Program from the Fall of 2011 to January 2011.[139] This would have provided a means for authorities to modify the procedures for the ECT set out in the FIT Rules in a clear and transparent manner and through a process that was expressly provided for in the FIT Rules.

Kiristin Jenkins (OPA) to Mirrun Zaveri (Ministry of Energy), November 24, 2010 ***(Investor's Schedule of Exhibits at C-0588)***; OPA, Updated FIT Schedule, November 24, 2011 ***(Investor's Schedule of Exhibits at C-0589)***; Email from Samira Viswanathan (Ministry of Energy) to Mirrun Zaveri (Ministry of Energy) and Pearl Ing (Ministry of Energy), December 8, 2010 ***(Investor's Schedule of Exhibits at C-0591)***

[133] Email from Jason Collins (Ministry of Energy) to Andrew Mitchell (Ministry of Energy), December 6, 2010 ***(Investor's Schedule of Exhibits at C-0590)***

[134] Email from Ceiran Bishop (Ministry of Energy) to Jonathan Norman (Ministry of Energy) and Rick Jennings (Ministry of Energy), December 7, 2010 ***(Investor's Schedule of Exhibits at C-0590)***

[135] Handwritten notes, Karen Slawner (Ministry of Energy), February 7, 2011 ***(Investor's Schedule of Exhibits at C-0469)***

[136] Email from Jason Collins (Ministry of Energy) to Andrew Mitchell (Ministry of Energy), December 6, 2010 ***(Investor's Schedule of Exhibits at C-0590)***; Ministry of Energy presentation, "Transmission Availability Test and Economic Connection Test," December 7, 2010, at p.11 ***(Investor's Schedule of Exhibits at C-0592)***

[137] OPA presentation, "FIT Program Analysis – Policy Strategy Development," December 23, 2010, at p.14 ***(Investor's Schedule of Exhibits at C-0445)***

[138] OPA presentation, "FIT Program Analysis – Policy Strategy Development," December 23, 2010, at p.30 ***(Investor's Schedule of Exhibits at C-0445)***

[139] OPA presentation, "FIT Program Analysis – Policy Strategy Development," December 23, 2010, at p.29 ***(Investor's Schedule of Exhibits at C-0445)***; Email from Jason Collins (Ministry of Energy) to Andrew Mitchell (Ministry of Energy), December 6, 2010 ***(Investor's Schedule of Exhibits at C-0590)***

However, officials chose not to accelerate the Two-Year Review and instead waited until October 2011 to initiate the process.

133. In early 2011, the Ministry of Energy and the OPA began considering modifications to the ECT process in order to not exceed meet the LTEP's 10,700MW target.[140] This resulted in a request from the Ministry for the OPA to implement an ECT process that did not involve an Individual Project Assessment (IPA) phase.[141] The IPA was envisioned as the first phase of the ECT, and would have resulted in the allocation of newly available transmission capacity to generators.[142]

134. However, because a process without an IPA would not have resembled an ECT as originally contemplated, the OPA recommended instead that the ECT process be abandoned.[143]

135. Authorities spent nearly four months attempting to modify the ECT process to conform to the LTEP. At no point during this time did they inform FIT proponents that the process they had expected would be delayed and potentially would be changing. Authorities also did not notify proponents once it was decided that the ECT process would be abandoned. Instead, proponents were repeatedly told that the anticipated ECT would be forthcoming.[144]

136. As Canada admits, the OPA never ran a single ECT.[145] In March 2012, the Ministry of Energy released its Two-Year Review Report on the FIT Program. Among its recommendations was that the FIT Program not proceed with the ECT.[146] FIT Rules v. 2.0, released in August 2012, eliminated the ECT from the FIT Program.[147]

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[140] Handwritten Notes, Karen Slawner (Ministry of Energy), February 7, 2011 ***(Investor's Schedule of Exhibits at C-0469)***; OPA presentation, "ECT Process Options", February 15, 2011 ***(Investor's Schedule of Exhibits at C-0655)***; Ministry of Energy presentation, "FIT Contract Awards: Next Steps (TAT/DAT + ECT)", February 17, 2011 ***(Investor's Schedule of Exhibits at C-0656)***; Ministry of Energy presentation, "DRAFT -- ECT Design Considerations", undated ***(Investor's Schedule of Exhibits at C-0657)***

[141] OPA presentation, "Economic Connection (ECT) & Program Evolution," March 21, 2011, at p.3 ***(Investor's Schedule of Exhibits at C-0438)***

[142] Counter Memorial, at ¶100

[143] OPA Draft Memorandum, May 3, 2011 ***(Investor's Schedule of Exhibits at C-0439)***

[144] Memorial, at ¶¶740-748

[145] Canada's Counter Memorial, at ¶¶429-431

[146] Ontario Feed-In Tariff Program – Two-Year Review Report, March 19, 2012, at p.20 ***(Investor's Schedule of Exhibits at C-0354)***

[147] Ontario Power Authority, Feed-In Tarriff Program, FIT Rules, Version 2.0, August 10, 2012 ***(Investor's Schedule of Exhibits at C-0058)***

E. Development of the Bruce to Milton allocation process

137. The transmission capacity enabled by the new Bruce to Milton line was originally intended to be allocated to FIT proponents through the first ECT.[148] However, because officials decided not to proceed with the ECT as contemplated in the FIT Rules the allocation of Bruce to Milton capacity required the development of a separate process.[149]

138. At the request of the Ministry of Energy, the OPA began developing a discrete Bruce to Milton process in the spring of 2011. The Ministry directed the OPA to design a process that allocated a limited amount of capacity in order to meet the LTEP's target of 10,700MW for renewable allocations.[150] The Ministry expressed no requirement that the process developed by the OPA conform to the procedures of an ECT.

139. With these instructions from the Ministry of Energy in mind, the OPA developed a process for Bruce to Milton allocation that officials referred to as a "special TAT."[151] This process was so called because it would have determined contract awards for projects based on the connection points identified in their original applications. The process would not have involved connection point changes[152] or generator-paid upgrades.[153]

140. The OPA cited several considerations in favour of its proposed TAT approach to Bruce to Milton allocation. First, officials recognized that performing the Bruce to Milton allocation through a TAT would require only minor changes to the FIT Rules and would not require a Ministerial Direction from the OPA.[154] Second, using a process that did not resemble an ECT would enable authorities to defer decisions regarding changes to the ECT until the Two-Year Program Review, to be conducted later in 2011.[155] Finally, the special TAT process would have aligned with the LTEP's target for renewable allocations.

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[148] Email from Andrew Mitchell (Ministry of Energy) to Andrew Mitchell (Ministry of Energy) and Sue Lo (Ministry of Energy) ***(Investor's Schedule of Exhibits at C-0159)***; Draft letter from Tracy Garner (OPA), September 20, 2010 ***(Investor's Schedule of Exhibits at C-0436)***

[149] Canada's Counter Memorial, at ¶¶194-196

[150] OPA presentation, "Economic Connection Test (ECT) & Program Evolution," March 21, 2011, at p.3 ***(Investor's Schedule of Exhibits at C-0438)***

[151] Handwritten notes, "Our Recommendations – BxM Contract Awards," April 26, 2011 ***(Investor's Schedule of Exhibits at C-0440)***; OPA Draft Memorandum, May 3, 2011 ***(Investor's Schedule of Exhibits at C-0439)***

[152] OPA Draft Memorandum, May 3, 2011, at p.2 ***(Investor's Schedule of Exhibits at C-0439)***

[153] Handwritten notes, "Our Recommendations – BxM Contract Awards," April 26, 2011 ***(Investor's Schedule of Exhibits at C-0440)***

[154] Ministry of Energy presentation, "DRAFT – Bruce to Milton Next Steps," April 28, 2011, at p.8 ***(Investor's Schedule of Exhibits at C-0441)***; Ministry of Energy presentation, "REVISED DRAFT – Bruce to Milton Next Steps," May 6, 2011, at p.8 ***(Investor's Schedule of Exhibits at C-0442)***

[155] Ministry of Energy presentation, "DRAFT – Bruce to Milton Next Steps," April 28, 2011, at p.8 ***(Investor's Schedule of Exhibits at C-0441)***

By not permitting generator-paid upgrades and connection point changes, a special TAT process would have resulted in less capacity allocations than alternative approaches.[156]

141. Although the Ministry of Energy was considering other options for Bruce to Milton allocation at this time, Ministry officials appear to have been supportive of the OPA's proposed plan. For example, in an email sent on April 26, 2011 Ministry official Tiffany Chow suggested that the Ministry's working slide deck on Bruce to Milton allocation be revised "to more firmly recommend a TAT-like process."[157]

142. Despite the OPA's recommendation of a special TAT process and the support the plan enjoyed among Ministry officials, and despite the fact that the process largely conformed to the existing FIT Rules and would not have required a Ministerial Direction, the Bruce to Milton allocation process did not occur through a special TAT. As Canada states, the process used for Bruce to Milton allocation was a "regional ECT-like process."[158] Unlike the OPA's proposed process, the agreed-upon Bruce to Milton process permitted both connection point changes and generator-paid upgrades.

143. The decision to proceed with an ECT-like process instead of a special TAT was made following an intervention by the Minister of Energy and the Premier in May 2011. On May 11, Ministry of Energy officials received a request from the Minister of Energy's Office and the Premier's Office to develop a new Bruce to Milton process in advance of its meeting the following day. The process that the Ministry was instructed to develop included both a connection point change window and generator-paid upgrades.[159]

144. At the meeting on May 12, the Minister of Energy's Office and the Premier's Office expressed their desire for a Bruce to Milton process that included connection point changes.[160] This process that the Ministry of Energy and Premier's Office advocated for contrasted with the OPA's preferred route.

145. In her Witness Statement, Sue Lo confirms that the compressed timeline associated with the connection-point change window was due to the Premier's Office.[161]

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[156] OPA Draft Memorandum, May 3, 2011 ***(Investor's Schedule of Exhibits at C-0439)***

[157] Email from Tiffany Chow (Ministry of Energy) to Ceiran Bishop (Ministry of Energy), April 26, 2011 ***(Investor's Schedule of Exhibits at C-0443)***

[158] Canada's Counter Memorial, at ¶412; Witness Statement of Bob Chow (RWS – Chow), at ¶41; RWS – Cronkwright, at ¶17; Witness Statement of Sue Lo (RWS – Lo), at ¶46

[159] Email from Sunita Chander (Ministry of Energy) to Shawn Cronkwright (OPA), May 11, 2011 ***(Investor's Schedule of Exhibits at C-0444)***

[160] Email from Sue Lo (Ministry of Energy) to Pearl Ing (Ministry of Energy), et al., May 12, 2011 ***(Investor's Schedule of Exhibits at C-0083)***; Email from Sue Lo (Ministry of Energy) to JoAnne Butler (OPA), May 12, 2011 ***(Investor's Schedule of Exhibits at C-0604)***

[161] Witness Statement of Sue Lo (RWS – Lo), at ¶50; Email from Jason Chee-Aloy to Colin Anderson, JoAnne Butler, Michael Lyle, et. al., January 14, 2010 ***(Investor's Schedule of Exhibits at C-0606)***

146. Once the decision was made to adopt the plan advanced by the Minister of Energy and the Premier, the OPA worked to implement a Bruce to Milton process that included both a connection point change window and generator-paid upgrades.[162]

147. The request by the Minister of Energy's Office and the Premier's Office on May 11 came only hours after a meeting between NextEra's Senior VP, Al Wiley, and the Minister of Energy's Director of Policy, Andrew Mitchell. The topic of the May 11 meeting was whether a connection point change window would be opened prior to the next round of FIT contract awards. This was said to be "a very significant issue for NextEra."[163]

148. NextEra used this meeting as a means to ensure that its projects stood the best chance of receiving contracts. In the absence of a *GEIA*-like agreement, which it preferred[164], its strategy was to push for individual changes to the FIT Program that would benefit its projects.

149. One week after the Premier and Ministry of Energy imposed their preferred process for Bruce to Milton allocation, an OPA analyst stated to her colleague that the Ministry of Energy "expects a very specific outcome" from the Bruce to Milton allocation.[165] Specifically, she suggested that the Ministry advocated including connection point changes and generator-paid upgrades to ensure that certain projects would be awarded contracts.[166]

150. During the change window, four of NextEra's projects moved their connection points from the West of London to the Bruce region, and were awarded contracts in the latter. Furthermore, one of NextEra's projects in the Bruce region, Goshen – a 102MW project, received a contract on the basis of its commitment to pay for upgrades at its connection point, L7S, whose published transmission capacity was only 30MW.[167] Without prior knowledge that it would have been able to include generator-paid upgrades, NextEra's Goshen project would not have connected to L7S because its published capacity was significantly lower than what Goshen required. When the change window was announced, NextEra was prepared with a very comprehensive technical document to

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[162] Witness Statement of Bob Chow (RWS – Chow), at ¶45; Email from Kristin Jenkins (OPA) to Sue Lo (Ministry of Energy), May 16, 2011 ***(Investor's Schedule of Exhibits at C-0606)***

[163] Email from Phil Dewan (Counsel Public Affairs) to Sue Lo (Ministry of Energy), May 11, 2011 ***(Investor's Schedule of Exhibits at C-0090)***

[164] Email from Bob Lopinski (Counsel Public Affairs) to Craig MacLennan (Ministry of Energy) et al., April 1, 2010 ***(Investor's Schedule of Exhibits at C-0136)***; Email from Christopher Quirke (Ministry of Energy) to Petra Fisher (Ministry of Energy), April 30, 2010 ***(Investor's Schedule of Exhibits at C-0191)***

[165] Email from Tracy Garner (OPA) to Bob Chow (OPA), May 18, 2011 [emphasis added] ***(Investor's Schedule of Exhibits at C-0449)***

[166] Email from Tracy Garner (OPA) to Bob Chow (OPA), May 18, 2011 ***(Investor's Schedule of Exhibits at C-0449)***

[167] Ontario Power Authority, FIT Program, Transmission Availability Table, June 3, 2011 ***(Investor's Schedule of Exhibits at C-0166)***

change its connection point for Goshen to L7S that day and filed its transmission license application.[168]

151. If a connection point change window and generator-paid upgrades had not been part of the Bruce to Milton process, that is, if Bruce to Milton allocation had occurred through the special TAT process advocated by the OPA, then only one of NextEra's projects would have received a Bruce to Milton contract.

152. In mid-April 2011, the OPA was requested by the Ministry of Energy to perform a "dry run" of the Bruce to Milton allocation process.[169] The parameters of the test included no connection point change window and no generator-paid upgrades; as such the test effectively simulated the OPA's proposed "special TAT" process.[170]

153. One of the purposes of the "dry run" was to determine the projects that would receive contracts under the OPA's preferred scenario. In an email to OPA CEO Colin Andersen, Shawn Cronkwright (Director, OPA, Renewables Procurement) expressed concerns about providing the results to the Ministry of Energy.[171] Ultimately, the decision was made to share the results with the Ministry only if necessary during a meeting, and on a one-time-only basis.[172]

154. The results of the dry run showed that [redacted] The results also showed that [redacted]

155. At the time the dry run was conducted Mesa was not aware of its results. Furthermore, was not aware that a process for awarding Bruce to Milton contracts was being

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[168] Application for Transmission License, Upper Canada Transmission, June 3, 2011 ***(Investor's Schedule of Exhibits at C-0634)***

[169] Email from Shawn Cronkwright (OPA) to Colin Andersen (OPA), April 13, 2011 ***(Investor's Schedule of Exhibits at C-0446)***

[170] Bruce Area and West of London Area Scenario Analysis, April 14, 2011 ***(Investor's Schedule of Exhibits at C-0484)***

[171] Email from Shawn Cronkwright (OPA) to Colin Andersen (OPA), April 13, 2011 ***(Investor's Schedule of Exhibits at C-0446)***

[172] Email from Shawn Cronkwright (OPA) to Colin Andersen (OPA), April 14, 2011 ***(Investor's Schedule of Exhibits at C-0447)***

[173] Bruce Area and West of London Area Scenario Analysis, April 14, 2011 ***(Investor's Schedule of Exhibits at C-0448)***; Bruce Area Scenario Analysis, Table of results, April 14, 2011 ***(Investor's Schedule of Exhibits at C-0448)*** [redacted]

[174] Bruce Area Scenario Analysis, Table of results, April 14, 2011 ***(Investor's Schedule of Exhibits at C-0448)*** [redacted]

developed that reversed the underlying purpose of the FIT Rules, which was to have shovel-ready projects.

156. The Bruce to Milton process was materially different from the ECT that had been represented to FIT proponents as the next step of the FIT Program. First, unlike an ECT, the Bruce to Milton process did not include a Network Planning phase which would have assessed proposed expansions to the transmission system.[175]

157. Second, the Bruce to Milton process included caps on the amount of capacity allocated in the Bruce and West of London regions, respectively.[176] There was never any such cap envisioned as part of an ECT.

158. A cap of 300MW on allocations was imposed in the West of London region, despite the fact that as much as 550MW were projected to be physically enabled in the region.[177] If there had been no cap imposed and all of the capacity physically enabled in the region had been allocated, some projects in West of London that moved to Bruce in order to get contracts would likely have stayed in West of London, placing Mesa's projects in a better position to get contracts in Bruce.

159. Furthermore, more capacity was physically enabled in the Bruce region than the 750MW made available through the Bruce to Milton process.[178] Thus, Mesa's projects could have received contracts if no cap had been imposed in the region.

160. The Bruce to Milton process also altered the FIT process by permitting projects to connect to the 500kV blackstart line. The 500kV line had previously been unavailable to proponents because its sole purpose was to support the Bruce nuclear facility.

161. The 500kV line was not meant to be an available connection point and the TAT Tables did not publish it as one, leaving off its specific B562L and B563L connection points from available options. NextEra made a specific inquiry with the OPA about connecting to the 500kV line, and eventually gained approval to connect to the unpublished connection points.[179]

162. After NextEra gained approval to connect to B562L and B563L, internal discussions between the IESO, Hydro One, and OPA acknowledged that connection to the 500kV

[175] Counter Memorial, at ¶104
[176] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA June 3, 2011 ***(Investor's Schedule of Exhibits at C-0046)***
[177] Ministry of Energy presentation, "Bruce to Milton Transmission Line – FIT Contract Awards," May 26, 2011 ***(Investor's Schedule of Exhibits at C-0626)***
[178] "Bruce Area Test for BxM Capacity Allocation," by Kun Xiong (OPA), July 26, 2011, at p.1 ***(Investor's Schedule of Exhibits at C-0626)***
[179] Ontario Power Authority, "FIT Contract Offers for the Bruce-Milton Capacity Allocation Process," July 4, 2011 ***(Investor's Schedule of Exhibits at C-0292)***

line was problematic.[180] Information from the Korean Consortium, whose K2 project was previously approved to connect to B562L and B563L, demonstrate the severe technical complications that went along with connecting these projects to the Bruce to Milton 500kV line, and showed that the 500kV circuit was [redacted].[181]

163. The act of connecting to unpublished connection points was not listed as permissible in the FIT Rules. The expectations established by the FIT Rules was that projects which were shovel-ready and connected to established connection points would be rewarded. Instead, connection points were made available to NextEra without testing their feasibility, placing the reliability of the Bruce nuclear station at risk.

F. Awarding FIT contracts

164. With the majority of activity to advance the FIT Program happening without the knowledge of proponents, the process for awarding FIT contracts was, on the surface, dragging out. As delays in performing critical components of the FIT Program upon which the Investor was depending seemed to keep getting pushed back, Mesa took the proactive step and reached out to the Ontario Power Authority to ensure it was in the best position possible.[182]

165. Mesa wrote to the Ontario Power Authority to confirm its understanding of the ranking process and the ranking of Mesa's projects on May 20, 2011.[183] Mesa wrote to Shawn Cronkwright explicitly asking the OPA to confirm their understanding of the ranking system and requested that the OPA clarify their COD Acceleration Days score: [184]

> Our understanding of the OPA process is that all projects were assessed and placed in the FIT CAR Priority ranking based on the existing capacity at the particular interconnection listed in the application. Further, we understand the ranking took an explicit consideration of the number of acceleration days, [redacted] We would greatly appreciate your feedback as to whether we have interpreted the OPA process correctly.[185]

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[180] Email from Bob Chow to Kun Xiong, August 16, 2011***(Investor's Schedule of Exhibits at C-0481)***; Email from Gabriel Adam to Mike Falvo, June 15, 2011 ***(Investor's Schedule of Exhibits at C-0477)***; and Email from John Sabiston to Hydro One, IESO, OPA, July 4, 2011 ***(Investor's Schedule of Exhibits at C-0478)***

[181] Briefing Note, "Transmission and Distribution Considerations for Korean Consortium - Purchase of Existing Projects Proposal," July 2009 ***(Investor's Schedule of Exhibits at C-0326)***

[182] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶59

[183] Letter from Mark Ward (Mesa), Chuck Edey (Leader Resources) and Michael Bernstein (Capstone Infrastructure) to Shawn Cronkwright (OPA), May 20, 2011 ***(Investor's Schedule of Exhibits at C-0098)***

[184] Letter from Mark Ward (Mesa), Chuck Edey (Leader Resources) and Michael Bernstein (Capstone Infrastructure) to Shawn Cronkwright (OPA), May 20, 2011 ***(Investor's Schedule of Exhibits at C-0098)***; Notes on the OPA Bruce Region Priority Rankings, Undated ***(Investor's Schedule of Exhibits at C-0074)***

[185] Letter from Mark Ward (Mesa), Chuck Edey (Leader Resources) and Michael Bernstein (Capstone Infrastructure) to Shawn Cronkwright (OPA), May 20, 2011 ***(Investor's Schedule of Exhibits at C-0098)***

166. Mesa's letter listed in detail the breakdown of Twenty Two Degree Wind Project and Arran Wind Project's Commercial Operation Date ("COD") acceleration days calculation along with their date of first lease and dollars spent to date.[186] When the OPA responded on July 17, 2011, after the contracts had been awarded, the response did not provide confirmation of Mesa's COD calculations.[187] The OPA declined to provide any further information regarding the criteria score of Mesa's projects and their rankings on the purported basis that the information was confidential.[188] This was in spite of Mesa's specific request for feedback. In its letter, Mesa specifically requested "feedback as to whether we have interpreted the OPA process correctly."[189]

167. The OPA's delay in responding to the Investor's inquiry would have deprived Mesa of using the information in the response to ensure that it was best positioned for the unexpected changes that arose in June 2011. However, the response sent to the Investor lacked any actual information and failed to respond to the Investor's request for information.

168. In its response, the OPA did not address the specific questions Mesa raised about ranking calculations. Instead, in a failure to live up to the FIT Program's goal of transparency, Mesa was told that the basis for how its own projects were ranked was confidential.[190]

169. When FIT contracts were awarded on July 4, 2011 Mesa lacked an adequate basis to understand how it had dropped in the rankings from a position where it should have been awarded contracts to one where it did not receive any.[191] Its letter to the OPA was an attempt to prevent it from such informational gaps and to ensure that it was not taken by surprise.

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[186] Letter from Mark Ward (Mesa), Chuck Edey (Leader Resources) and Michael Bernstein (Capstone Infrastructure) to Shawn Cronkwright (OPA), May 20, 2011 ***(Investor's Schedule of Exhibits at C-0098)***

[187] Letter from Shawn Cronkwright, Ontario Power Authority, to Mark Ward, Mesa Power Group LLC, Charles Edey, Leader Resources Services Corp.and Michael Bernstein, Capstone Infrastructure Corp., June 17, 2011 ***(Investor's Schedule of Exhibits at C-0195)***

[188] Letter from Shawn Cronkwright, Ontario Power Authority, to Mark Ward, Mesa Power Group LLC, Charles Edey, Leader Resources Services Corp.and Michael Bernstein, Capstone Infrastructure Corp., June 17, 2011. The OPA claimed in their response letter that "Consistent with all OPA procurement process, once the evaluation process has been completed, the results are kept strictly confidential." ***(Investor's Schedule of Exhibits at C-0195)***

[189] Letter from Mark Ward (Mesa), Chuck Edey (Leader Resources) and Michael Bernstein (Capstone Infrastructure) to Shawn Cronkwright (OPA), May 20, 2011 ***(Investor's Schedule of Exhibits at C-0098)***

[190] Letter from Shawn Cronkwright (OPA) to Mark Ward (Mesa), Charles Edey (Leader Resources), and Michael Bernstein (Capstone Infrastructure), June 17, 2011 ***(Investor's Schedule of Exhibits at C-0195)***

[191] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶58

G. Criminal investigation of the Government of Ontario for breach of trust while in office and destruction of public documents

170. Serious evidence of misfeasance at the highest levels in the Government of Ontario during the period of the events described above has resulted in a scandal and a continuing criminal investigation.[192] The revelations question the integrity of the Government of Ontario and its commitment to full transparency of how it handled major decisions related to provincial energy policy, which includes the FIT Program.

171. Press stories have revealed that the judicial authorities authorized the issuance of criminal search warrants in connection with the investigation that the Ontario Premier's Office and Ministry of Energy destroyed documents ordered to be produced related to the decisions made to cancel two Ontario gas plants.[193] The police search warrants reveal that on the evening before the Premier of Ontario resigned the hard drives of its office computers were wiped clean.[194] Police are now alleging that the Premier's Chief of Staff is involved in a criminal "breach of trust while in public office."[195] Previously this matter about Ontario's non-production of relevant evidence involving energy policy was being investigated internally without the indication of police involvement.

172. The entities of the Ontario government under criminal investigation are within the same decision-making apparatus that directed the FIT Program. Without lawful authority, the Ontario Ministry of Energy, and the OPA, failed to produce up to 20,000 pages of documents required by domestic law.[196]

173. OPA executive Michael Killeavy wrote an email to a colleague that stated, "This is really a mess. We are going to get into trouble."[197]

174. The actions and conduct of the Ontario Government in not fairly producing this evidence was condemned by Ontario's Information and Privacy Commissioner. The provincial police are currently investigating criminal wrongdoing through the systematic deletion of government communications.

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[192] Witness Statement of Peter Wolchak (CWS – Wolchak), at ¶¶47-49
[193] Witness Statement of Peter Wolchak (CWS – Wolchak) , at ¶¶35-46
[194] The Star News Article headed "Gas Plant Scandal: Police Follow Data Trail From Premier's Office," March 28, 2014 ***(Investor's Schedule of Exhibits at C-0450)***
[195] Ottawa Citizen News article headed "Gas Plant Investigation Revealed: McGuinty Chief of Staff Committed Breach of Trust, Police Allege" March 28, 2014 ***(Investor's Schedule of Exhibits at C-0451)***
[196] The Globe and Mail News Article headed "Why aren't heads rolling at the Ontario Power Authority," February 22, 2013 ***(Investor's Schedule of Exhibits at C-0452)***
[197] The Globe and Mail News Article headed "Ontario Liberals' gas-plant cancellations cost $1-billion," October 9, 2013 ***(Investor's Schedule of Exhibits at C-0453)***

175. The evidence of a cover up to protect the government from producing evidence of embarrassing and politically harmful energy decisions is deeply troubling to the rule of law.

176. There is reason to believe documents associated with the FIT Program were affected by the decision to delete government emails. The criminal investigation by the Ontario Provincial Police into the deletion of emails addresses provincial energy policy at the same time as the administration of the FIT Program, and by the same individuals. Emails were deleted to hide the decision to cancel two gas plants that were to be built in two separate Ontario ridings. The cancellation of the gas plants was announced before a provincial election in an attempt to secure the ridings for the incumbent government. Much like with the FIT Program, the Premier's Office and Ministry of Energy went to great lengths to ensure that its priorities and objectives were achieved, despite the cost.

177. The ongoing scandal related to the destruction of documents by Ontario government officials impacts documents that the Tribunal has ordered Canada to produce. The gas plant investigation implicates many of the same government officials involved in the FIT program. Craig MacLennan, the former Chief of Staff to the Minister of Energy has admitted to systematically deleting communications.[198] The email accounts of Chris Morley, Jamison Steeve, and Sean Mullin who were working in the Premier's office in the period leading up to the 2011 provincial election were deleted after they left the Premier's Office in the summer of 2012.[199]

178. These officers were involved with the FIT Program and the Investor has specifically requested documents that would be in their possession or that they were privy to. Further, other officials central to the FIT program provided testimony at the gas plant investigation hearings, including the OPA's JoAnne Butler, former Ontario Premier Dalton McGuinty, and former Ministers of Energy Christopher Bentley and Brad Duguid. Michael Killeavy, the OPA executive who knew the agency was "going to get into trouble" was involved in the FIT Program and liaised with FIT applicants.[200]

179. For example, we know that officers from the Minister's Office and the Premier's Office met with, and expressed opinions and preferences on FIT Program policy. In particular, through April and May 2011, the Minister's office and Premier's office met to determine the process for the OPA to allocate transmission capacity in the Bruce Region. We also

[198] Testimony of Craig MacLennan before the Standing Committee on Justice Policy, June 18, 2103 ***(Investor's Schedule of Exhibits at C-0488)***

[199] Toronto Star, "Power Plant Cancellations: OPP to investigate diluted emails," June 7, 2013 ***(Investor's Schedule of Exhibits at C-0454)***

[200] *Windstream Energy LLC v. Government of Canada*, Canada's Amended Response to Notice of Arbitration at ¶34 ***(Investor's Schedule of Legal Authorities at CL-0336)***

know that members of the Premier's Office met with NextEra representatives in March 2011.[201]

180. The communications that are the subject of police investigation are from the same period in fall 2011 as critical documents sought in this NAFTA arbitration in relation to the FIT Program. Documents from the same period, involving the same individuals associated with the gas plant scandal, have been ordered by the Tribunal.[202]

181. The Ontario Information and Privacy Commissioner has already determined that the "routine deletion of emails … to avoid transparency and accountability" regarding decisions involving the energy sector, was in violation of the *Archives and Recordkeeping Act*.[203] The ongoing searches that are being conducted by the Ontario Provincial Police in relation to deletion of government communications generate concerns whether Canada is complying with its obligations to produce all relevant documents in this arbitration.

[201] Email from Sue Lo (Ministry of Energy) to PhilDewan (Counsel Public Affairs), May 12, 2011 ***(Investor's Schedule of Exhibits at C-0090)***

[202] See Annex A to Procedural Order No. 4, Investor's Request No. 70

[203] The Canadian Press News Article headed "Power Plant Cancellations: OPP to investigate deleted emails," June 7, 2013 ***(Investor's Schedule of Exhibits at C-0454)***

PART THREE: CANADA CANNOT APPLY THE PROCUREMENT DEFENCE IN NAFTA ARTICLE 1108

182. NAFTA Article 1108(7) sets out a limited exception to the NAFTA's national treatment, most favoured nation treatment and senior management obligations contained in NAFTA Chapter Eleven. The two procurement exceptions in Articles 1108(7)(a) and 1108(8)(b) provide that Articles 1102, 1103, 1106(1)(b), (c), (f) and (g), 1106(3)(a) and (b) and 1107 do not apply to "procurement by a Party or a state enterprise."

183. The Article 1108 exception applies to the procurement by a Party or a state enterprise. The definition of "state enterprise" for the purpose of NAFTA Article 1108(8)(a) is a general definition in Article 201, which provides that:

> **state enterprise** means an enterprise that is owned, or controlled through ownership interests, by a Party

I. MFN BLOCKS RELIANCE ON THE ARTICLE 1108(7) PROCUREMENT EXCEPTION

184. The Article 1108(7)(a) Procurement Exception cannot apply because of substantive MFN obligations. Reflected in NAFTA Article 1103, MFN is one of the overarching objectives of the NAFTA itself, as stated in Article 103. Any interpretation of MFN must take into account the fundamental nature of this norm in relation to the fundamental NAFTA bargain that was entered into by the NAFTA Parties."

185. The Investor set out the reasons why the Article 1108(7)(a) procurement exception cannot apply as an affirmative defense to Canada's Article 1102 and 1103 violations for the reasons set out in the Memorial. At paragraph 589, the Investor set out the existence of more favourable treatment being provided by Canada to investors and investments under the provisions of the Canada – Czech Investment Treaty[204]. This treaty imposes identical national treatment and most favoured nation treatment obligations as that imposed by NAFTA Articles 1102 and 1103. However, the Canada – Czech treaty does not include any procurement exception in its terms.

186. Thus an investor who receives treatment from Canada under the Canada – Czech Treaty would receive more favourable treatment than an investor under the NAFTA who is subjected to a procurement exception.

187. While tribunals have been divided on whether MFN applies to provide an investor with more favourable treatment in the case of procedural dispute settlement provisions arising from another treaty, the applicability of MFN to better substantive protections in other treaties is well established.. Given the absence of any contrary argument by Canada, the Tribunal should apply the more favourable provisions of the Czech-Canada

[204] Agreement Between Canada and the Czech Republic for the Promotion and Protection of Investments (2009) ("Canada-Czech BIT") ***(Investor's Schedule of Legal Authorities at CL-134)***

Treaty, which do not provide a procurement exception or defense to material treatment of the investor that would otherwise fall below the standards of Most-Favoured Nation or National Treatment.

188. Accordingly, the Tribunal should dismiss Canada's invocation of the Article 1108(7) procurement exception in light of the existence of the better treatment provided under the Canada – Czech treaty and given the fact that Canada chose to file no defense to this claim.

II. BURDEN OF PROOF

189. There is a general interpretative presumption that exceptions are to be strictly and narrowly construed. The *Canfor* NAFTA Tribunal held that exceptions in international instruments are to be interpreted narrowly:

> The present Tribunal subscribes to the view expressed by the GATT Panel in Canada - Import Restrictions on Ice Cream and Yoghurt: "The Panel.... noted, as had previous panels, that exceptions were to be interpreted narrowly and considered that this argued against flexible interpretation of Article XI:2(c)(i)."[205]

190. The Tribunal in *Chevron v. Ecuador* noted that there is a reversal of the burden of proof where a respondent raises a defense to the effect that a claim is precluded. The Tribunal states:

> As a general rule, the holder of a right raising a claim on the basis of that right in legal proceedings bears the burden of proof for all elements required for the claim. However, an exception to this rule occurs when a respondent raises a defense to the effect that the claim is precluded despite the normal conditions being met. In that case, the respondent must assume the burden of proof for the elements necessary for the exception to be allowed.[206]

191. The Tribunal in *RosInvestCo v. Russia* notes that the burden of proof shifts to the Respondent with regard to any exception on which the respondent relies in its defense. The Tribunal stated:

> Taking into account the above contentions of the Parties, the Tribunal notes that the Parties seem to agree on the principle that the burden of proof generally lies with the Claimant to establish the facts on which the claim is based. The Tribunal confirms that view and only adds

[205] *Canfor Corporation v. United States of America and Terminal Forest Products Ltd. v. United States of America*, Decision on Preliminary Question (June 6, 2006), at ¶187 ***(Investor's Schedule of Legal Authorities at CL-005)***, citing *Canada - Import Restrictions on Ice Cream and Yoghurt, Report of the Panel adopted at the Forty-fifth Session of the Contracting Parties on December 5, 1989 (L/6568-36S/68)*

[206] *Chevron Corporation (U.S.A) and Texaco Petroleum Corporation (U.S.A) v. The Republic of Ecuador*, Interim Award (December 1, 2008), at ¶138 ***(Investor's Schedule of Legal Authorities at CL-204)***

> that, however, the burden of proof can shift to the Respondent with regard to any exception on which the Respondent relies in its defense.[207]

192. The Tribunal must follow the mandatory interpretative instructions in NAFTA Article 102. The procurement exception is a derogation from two of the key interpretative rules and principles of the NAFTA (most favoured nation treatment and national treatment) and thus must be interpreted restrictively in order to meet the interpretative requirements specific to NAFTA, and the definitive statements within NAFTA itself of its object and purpose.

193. This approach was followed by the *SGS v Philippines* Tribunal who considered the general objectives of investment treaties and concluded that there is a general presumption to resolve uncertainties in interpretation in favour of the objective of these treaties, which is the protection of investments. The *SGS* Tribunal stated:

> [i]t is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.[208]

194. As a party relying upon an exception, Canada has to bear the burden to establish that its measure fits within the meaning of the exception clause.

III. THE MEANING OF THE ARTICLE 1108 PROCUREMENT EXCEPTION

195. The NAFTA does not set out a definition in Chapter Eleven for the term procurement by a Party or state enterprise. But the term "procurement" is defined in Chapter Ten of the NAFTA. The definition in Chapter Ten corresponds to the ordinary meaning of the term and the treatment of procurement in international economic law more generally. The NAFTA otherwise provides no other definition for the term "procurement."

196. Canada asserts that this definition in Chapter Ten is irrelevant to the application of the procurement exception in NAFTA 1108[209] (even though no other definition is provided in 1108 or Chapter Eleven generally). Canada provides no supporting material (such as case law, legislative history, scholarly authority) to support this blanket proposition. As will be explained below, the one case cited by Canada, *ADF Group*, explains the relevance, not the irrelevance of the NAFTA's own definition of procurement. In sum, there is nothing but mere assertion to support the counter-intuitive notion that the NAFTA's own definition is irrelevant to the meaning of procurement used in NAFTA Article 1108.

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[207] *RosInvestCo v. Russia*, Final Award (September 12, 2010), at ¶250 ***(Investor's Schedule of Legal Authorities at CL-205)***

[208] *SGS Société Générale de Surveillance v. Republic of the Philippines* (Decision of the Tribunal on Objections to Jurisdiction) (January 29, 2004), at ¶116 ***(Investor's Schedule of Legal Authorities at CL-206)***

[209] Counter Memorial, at ¶328

197. The NAFTA provides interpretive guidance on how to give meaning to this term.

a) NAFTA Article 102 requires the NAFTA be interpreted in accordance with its objectives, interpretative rules and principles; and

b) NAFTA Article 1131 requires that the Treaty and applicable rules of international law be applied. Such applicable rules are set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

198. The NAFTA does provide a definition for the term "Government Procurement" in the NAFTA chapter dedicated to the topic of government procurement and procurement related measures. The NAFTA otherwise provides no other definition of procurement.

199. When considering the meaning of the Article 1108 procurement exception, other NAFTA Tribunals have applied the meaning for government procurement in Chapter 10 for the Article 1108 exception term "procurement by a Party."

a) There is also an ordinary meaning of the term "procurement" which is consistent with the meaning in Chapter 10 of the NAFTA;

b) Procurement requires more than the simple expenditure of money. For there to be procurement, items have to be purchased and acquired by the government purchaser; and

c) Financial assistance, such as guarantees or financing, do not constitute procurement.

200. Procurement is a widely used term of art in international law. The use of the undefined term "procurement" in the NAFTA relied on this widely used term of art – and the natural meaning of this term should be used by the Tribunal. The term of art is used extensively by the NAFTA Parties in the WTO/GATT.

201. All of the meanings of procurement are consistent. The application of the WTO / GATT meaning of Procurement is consistent with the meaning in NAFTA Chapter Ten of the term "procurement," which is consistent with its ordinary and natural meaning.

IV. CANADA HAS NOT DEMONSTRATED THAT THE FIT CONTRACT CONSTITUTES PROCUREMENT

202. Canada has not met its burden to establish that the FIT Contract is a procurement by a Party or state enterprise:

a) Canada confirms that the measure that it relies upon for the Article 1108 exception is the FIT Contract;

b) The Ontario Power Authority expends money but it does not acquire the electricity, nor the title to the electricity, that is the subject of the FIT Contract. The electricity generated under the FIT Contract is instantaneously sold to customers for use in homes and businesses in Ontario;

c) The Government of Ontario has not alleged that it uses or consumes this power for its own exclusive use;

d) The Ontario Power Authority does not acquire title to the power generation assets such as the wind farms, or wind turbines, that generate the renewable power that is the subject of the FIT Contract. The renewable power generation assets are investments made by the generators themselves and these investments are retained entirely by the power generators;

e) Electricity obtained from a FIT Contract is immediately sold to ratepayers in Ontario who pay for the power that they consume:

    i) The Energy regulators ensure that surplus capacity of energy is not produced to avoid blackouts and brownouts.[210] So there is general equilibrium in the system between electricity generated and consumption. So the electricity is consumed immediately by the ratepayers;

    ii) Under the terms of the FIT Contract, the Ontario Power Authority spends for the power generated, but this power has already been sold and consumed by the ratepayers before the Ontario Power Authority is required to settle its expenditure for power under the FIT Contract; and

    iii) In its Counter Memorial, Canada confirmed that the cost of power under a FIT Contract is borne entirely by the ratepayers.[211]

f) There is no dispute that the Ontario Power Authority:

    i) Uses ratepayer funds for its expenditure on the renewable energy obtained from FIT Contract generators. The term “ratepayer” is generally used when

[210] Counter Memorial, at ¶¶28-29 which states: “If at any moment, the demand exceeds supply, then consumers will experience voltage dips (brownouts) or blackouts.”

[211] Counter Memorial, at ¶277. Canada states: “Contrary to what the Claimant alleges, the OPA is funded by ratepayers in the Province of Ontario, and not through public funds.” In an accompanying footnote, Canada points to Article 25.20(1) of the *Electricity Act* (Counter Memorial, at fn.593)

discussing the users of electricity. The Hogan Report, filed by Canada with the WTO in *Canada-Renewable Energy*, confirms that the term "ratepayers" means the same as consumers;[212]

ii) Does not receive title to the electrical power under the FIT Contracts;

iii) Does not take delivery or otherwise receive the electrical power that is the subject of the FIT Contracts;

iv) Does not take any steps to ensure that the electrical power obtained by Power Purchase Agreements issued by the Ontario Power Authority are used exclusively for use by the Government of Ontario; and

v) Carries out its expenditure for renewable electricity under statutory requirement at the direction of the Ontario Minister of Energy.[213]

g) The Ontario Power Authority provides a payment and settlement function in the renewable energy market that is the subject of the FIT Contract. The Ontario Power Authority simply acts as an intermediary which finances the expenditure for the electricity obtained under renewable power contracts, such as a FIT Contract. In this manner, the Ontario Power Authority is a central financing body, coordinating the payments that are made by others, for power that is also going to others. This is a market facilitation role in the brokering of electricity between non-governmental actors: private generators and private consumers. This role does not entail the acquisition of electricity by the Ontario Power Authority. Electricity itself is simply never in the hands of the Ontario Power Authority throughout this process.[214]

203. Canada has, however, only established that the Ontario Power Authority makes contractual payments to electricity generators. There are many circumstances where the payer under a contract may be an intermediary or otherwise someone different than the party who obtains the goods or services in question. This is the case here. This one fact goes little distance to discharging Canada's burden of proof that the measures constitute "procurement" for under the NAFTA, under other international law regimes that deal with procurement, and under the ordinary meaning of that term, payment is neither a necessary or sufficient indication of whether the purpose or pith and substance of a measure is to procure goods or services. In complex markets, payment is

[212] "Overview of the Electricity System in the province of Ontario," by William W. Hogan ("Hogan Report"), March 28, 2013, at pp.20, 27, 28-29 ***(Investor's Schedule of Exhibits at C-0320)***
[213] Counter Memorial, at ¶317
[214] Expert Report of Seabron Adamson, at ¶¶64-68, 114

often made by intermediaries who have no intention to obtain, possess or use the goods and services in question: this is the case here. Thus, proof of a payment by the Ontario Power Authority is insufficient to establish even a *prima facie* case that the measures constitute "procurement" by the Ontario Power Authority.

204. Canada has not demonstrated that there is a nexus between the FIT Contract and Canada's measures which are inconsistent with the obligations in NAFTA Chapter Eleven (such as violations of national treatment, most favoured nation treatment or the imposition of prohibited local content violations). Canada is required to establish that there is a nexus between its measures and the procurement exception.

205. The relationship between the challenged measures, which discriminate based on national origin, with respect to energy generation equipment, and the role of the Ontario Power Authority in brokering electrical energy itself between non-governmental actors, is unclear to say the least. It is simply not explained by Canada. Canada through invoking the procurement exception, Canada seeks to discriminate with respect to the national origin of equipment, yet the Ontario Power Authority does not deal in equipment and the conditions for purchases of equipment are irrelevant to its functions. This factual finding is supported by the findings of fact and related characterizations affirmed by the WTO Appellate Body in *Canada – Renewable Energy* at paragraph 5.79 of its decision.[215]

206. In light of an examination of the measures, the spending of funds by the Ontario Power Authority in the FIT Program does not constitute procurement by a Party or state enterprise. Accordingly, the Tribunal should dismiss Canada's Article 1108 defense.

V. THE ROLE OF THE ONTARIO POWER AUTHORITY

207. Canada admits that the Ontario Power Authority is owned by the Province of Ontario.[216] Canada claims that this makes the Ontario Power Authority a state enterprise under the general definition of state enterprise in NAFTA Article 201.[217]

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[215] *Canada – Certain Measures Affecting The Renewable Energy Generation Sector, Canada – Measures Relating To The Feed-In Tariff Program*, WT/DS412/AB/R, WT/DS426, Reports of the Appellate Body (February 19, 2013) ("*Canada - Renewable Energy* - AB Report"), at ¶5.79 ***(Investor's Schedule of Legal Authorities at CL-002)***

[216] Counter Memorial, at ¶276. Canada states: "The fact is that the OPA is a non-share capital corporation…" but in the same paragraph, they say "not an agent."

[217] Counter Memorial, at ¶¶273-280. The Ontario Power Authority is not considered under applicable provincial law to be a state enterprise in Ontario. Its employees are not public servants and Ontario's *Electricity Act* makes this separation explicit in section 25.3 which provides that the Ontario Power Authority is not a Crown Agent. Thus the OPA does not meet the Canadian-specific definition for a state enterprise in Annex 1505 for the purposes of Chapter Fifteen, but the Ontario Power Authority meets the definition of state enterprise for the purposes of the general Article 201 definition of state enterprise which is applicable in NAFTA Chapter Eleven.

208. The WTO panel in *Canada – Renewable Energy* spent a considerable amount of time in establishing findings about the factual operations underpinning the Ontario electricity system and the FIT Program. International Tribunals can engage in efficient dispute resolution by relying on findings of fact that have been made by other Tribunals. Indeed, Canada has provided no basis in its Counter Memorial why this Tribunal should not rely upon any of the factual findings made by the WTO about the FIT Program in *Canada – Renewable Energy*. This NAFTA Tribunal can rely upon findings of fact which have been determined by the WTO panel about the operation of Ontario's renewable energy FIT Program.[218]

209. The WTO panel in *Canada – Renewable Energy* found that:

a) The price paid by ratepayers for electricity in Ontario is divided into two components. The Hourly Ontario Energy Price (HOEP) and the Global Adjustment;[219]

b) The Independent Electricity System Operator (IESO) collects the HOEP prices from ratepayers and remits it to generators;[220]

c) The Ontario Power Authority guarantees generators that they will receive the contract price, and if that price is above the HOEP price, the Ontario Power Authority is responsible for the financing of this amount, which is collected through the Global Adjustment component in electricity rates from Ontario ratepayers;[221] and

d) The Ontario Power Authority does not take any form of possession over electricity supplied by FIT generators, including legal title.[222]

210. WTO rulings are binding on Canada as a WTO Member. The findings about the FIT program at the WTO were based on a detailed examination of the facts of the FIT

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[218] *Canfor Corporation v. The United States of America,* Decision on Preliminary Question (June 6, 2006), at ¶327 ***(Investor's Schedule of Legal Authorities at CL-005)***; *Bosnia and Herzegovina v. Serbia and Montenegro*, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Reports Of Judgments, Advisory Opinions and Orders, Judgment of February 26, 2007, at ¶206 ***(Investor's Schedule of Legal Authorities at CL-203)***

[219] *Canada – Certain Measures Affecting the Renewable Energy Generation Sector, Canada – Measures Relating To The Feed-In Tariff Program, Report of the Panel, WT/DS412/R, WT/DS426/R (December 19, 2012 ("Canada - Renewable Energy - Panel Report")*, at ¶7.54 ***(Investor's Schedule of Legal Authorities at CL-001)***

[220] *Canada - Renewable Energy - Panel Report*, at ¶¶7.204 and 7.206 ***(Investor's Schedule of Legal Authorities at CL-001)***

[221] *Canada - Renewable Energy - Panel Report*, at ¶¶7.204 and 7.206 ***(Investor's Schedule of Legal Authorities at CL-001)***; The Ontario Power Authority otherwise provides a guarantee of the Global Adjustment part of the price for electrical power, if the price for electricity is above the HOEP price.

[222] *Canada - Renewable Energy - Panel Report*, at ¶7.232 and footnote 449 ***(Investor's Schedule of Legal Authorities at CL-001)***

program by both an international tribunal of first instance and an appellate tribunal. In addition, Canada made many of the same arguments that it is making now before the WTO, and the facts about the FIT simply did not support the view that the local content requirements could be described as in relation to "procurement."[223]

211. Assistant Deputy Minister for Renewable Power, Rick Jennings, confirmed in his witness statement that electrical energy in the grid is not stored but is delivered in essentially instantaneous balance to ratepayers. He stated:

> In every electricity system (unless it is heavily subsidized by the government) electricity customers or ratepayers ultimately have to pay for generation, transmission and distribution or else the system is underbuilt and they have to cope with rotating outages[224]

212. Mr. Jennings confirmed that this power is only used by the consumer and is not delivered to the Ontario Power Authority or to the government of Ontario for its own use. Mr. Jennings states:

> The challenge of electricity is that unlike other goods or services that may be procured by a government, electricity, once generated, must be simultaneously transmitted and consumed. It cannot simply be stored away in a warehouse waiting for transmission capacity to become available or for demand to require it to be brought out of mothballs. Thus, as anyone familiar with the industry knows, there is always a constant need to instantaneously balance supply and demand.[225]

213. The 2011 Ontario Auditor General's Report, explains that electricity that is delivered into the grid is paid for by the ratepayer.[226] The Hogan Report filed by Canada at the WTO and *Canada – Renewable Energy* further explains that "the Global Adjustment is collected from all consumers."[227] The Ontario Power Authority is only responsible for contributing the Global Adjustment portion of the FIT Contract (as the IESO pays the HOEP).[228] So the Global Adjustment portion of the FIT Contract expenditure also comes from the ratepayers.

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[223] The Investor realizes that WTO adopted reports are not binding on the Tribunal, but they are binding on Canada, and highly relevant to the credibility of Canada's characterizations of the operation of the FIT as "procurement."

[224] Witness Statement of Rick Jennings (RWS – Jennings), at ¶14

[225] Witness Statement of Rick Jennings (RWS – Jennings), at ¶5

[226] Annual Report of the Auditor General of Ontario, 2011, at ¶¶89-95 ***(Investor's Schedule of Exhibits at C-0228)*** We note that while Canada has placed reliance in its Counter Memorial to the 2011 Ontario Auditor General's Report, Canada did refute any factual observations made by the Auditor General about the nature of the electricity market. Canada has made reference to comments made by the OPA and by the Ministry of Energy in the Auditor General's Report.

[227] Hogan Report, at p.27 ***(Investor's Schedule of Exhibits at C-0320)***

[228] *Canada - Renewable Energy - Panel Report*, at ¶¶7.204 and 7.206 ***(Investor's Schedule of Legal Authorities at CL-001)***

214. The delivery from power generator to consumer is virtually instantaneous and there is a balance in the system between power generators and the ratepayers who use (and pay for) the electricity. Canada stated in its Counter Memorial that:

> in order to maintain a safe and reliable electrical system, operators must ensure that the supply of electricity from generation is in an essentially instantaneous balance with the demand for it at all times.[229]

215. A binding instruction on the Ontario Power Authority issued in the form of a Directive was dated on September 24, 2009. This Directive from the Ontario Minister of Energy to the President of the Ontario Power Authority directed that the Ontario Power Authority engage in a Feed-in Tariff Program that would impose minimum local content requirements on FIT applicants.[230] Canada admits that because of this direction "the FIT Program itself can be considered a procurement program of a provincial government in Canada."[231] Canada confirms the purpose of the FIT Program is for the "Hourly Delivered Electricity at the Contract Price."[232]

VI. THE DEFINITION OF PROCUREMENT

216. Chapter Eleven of the NAFTA does not contain an express definition for the term procurement by a Party or state enterprise. Neither is there a definition in the general definitions chapter of the treaty in Chapter Two. The NAFTA otherwise provides no other express definition of procurement.

217. The NAFTA provides interpretive guidance on how to give meaning to this term.

a) NAFTA Article 102 requires the NAFTA be interpreted in accordance with its objectives, interpretative rules and principles;

b) NAFTA Article 1131 requires that the Treaty and applicable rules of international law be applied. Such applicable rules are set out in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties.* Article 31(1) of the *Vienna Convention on the Law of Treaties* provides that "a treaty shall 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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[229] Counter Memorial, at ¶29. Canada has set out the following references to this quote in a footnote 9 to its Counter Memorial: Witness Statement of Bob Chow (RWS – Chow), at ¶15; RWS-Jennings, at ¶5; Dorey Report, at ¶¶5 and 28. Mr. Dorey in his Expert Report, at ¶2 stated "Electricity is unlike any other commodity. It is not easily stored and must be consumed at virtually the moment it is generated."

[230] Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), September 24, 2009 ***(Investor's Schedule of Exhibits at C-0264)***

[231] Counter Memorial, at ¶338

[232] Counter Memorial, at ¶317

218. NAFTA Article 102 and Article 31(1) of the *Vienna Convention* suggest that a review of the context and purpose of the Treaty is important.

219. NAFTA Article 102 provides that national treatment and most favoured nation treatment are interpretative rules and principles of the NAFTA. Since the exception under NAFTA Article 1108 is a specific derogation from national treatment and MFN obligations (in Articles 1102 and 1103), it is clear that any exception to these obligations would need to be construed restrictively.

220. A review of the NAFTA discloses that the term procurement is used in the following circumstances:

a) NAFTA Chapter Ten, which is dedicated to measures related to Government Procurement, which has numerous references to procurement;

b) Chapter Eleven, in the Article 1108 exception;

c) A scope exclusion in Chapter Twelve in Article 1201(2)(c) (which is worded like Article 1108);[233] and

d) Article 1502(4) which contains an exception about government procurement for monopolies by governmental agencies of goods or services. [234]

221. It is logical to believe that the drafters of the NAFTA presumed that the definition of the term "procurement" in the NAFTA would be internally consistent within the NAFTA and that if any presumption for a different meaning should take place, then it would have been specified. [235]

VII. NAFTA CHAPTER TEN HAS A DEFINITION FOR GOVERNMENT PROCUREMENT

222. The only definition in the NAFTA for procurement is the definition contained in the NAFTA Government Procurement chapter. This definition, in Article 1001(5), says:

> Procurement includes procurement by such methods as purchase, lease or rental, with or without an option to buy. Procurement does not include:

[233] Article 1202(c) states that Chapter Twelve does not apply to "procurement by a Party or a state enterprise"
[234] Article 1502(4) states that ¶3 does not apply to procurement by governmental agencies of goods or services for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or the provision of services for commercial sale.
[235] For example, the term state enterprise is defined generally by NAFTA Article 201 to mean an enterprise that is owned or controlled by a Party but when Canada sought a narrower definition for the purposes of Chapter Fifteen, a specific definition was added for the meaning of a state enterprise in Canada which was narrower and more specific.

1. non-contractual agreements or any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services to persons or state, provincial and regional governments;

223. Article 1001(5) does not address the limitations on the entities covered by the procurement obligations in the NAFTA as these limits are described in other parts of Chapter Ten.[236] Article 1001(5) sets out a definition for the term "government procurement" and this definition has been relied upon by other NAFTA Tribunals to understand the context and meaning of the undefined procurement exception contained in Article 1108.

224. Canada relied on the definition of procurement contained in NAFTA Article 1001(5) when it applied the Article 1108 procurement exclusion in *UPS v. Canada*. The Separate Award of Arbitrator Ronald Cass did not agree that the commercial arrangement at issue (an intergovernmental funding agreement related to customs inspection of the mail) was really a procurement agreement but some other type of agreement. In his decision, he considers Canada's position on the meaning of procurement in Article 1108. The Award states:

> Canada declares that any government conduct that results in payments to another party in exchange for any good or service constitutes procurement. *See* Canada Counter Memorial, Merits Phase, at ¶564-568. Although it quotes language from NAFTA Article 1001(5) stating that procurement is a "purchase, lease, or rental, with or without an option to buy," Canada argues in fact for a far broader definition of "procurement."[237]

225. Canada took the position that the *UPS* Tribunal should look at the definition in NAFTA Article 1001(5) in giving meaning to the term procurement. Canada argued:

> The term "procurement" is not defined in the NAFTA, but Article 1001(5) provides context for its interpretation. It lists the methods by which a procurement can be entered into as including "purchase, lease or rental, with or without an option to buy." Sub-paragraphs (a) and (b) exclude certain items from being procurements, none of which apply to Customs paying Canada Post for the provision of services.
>
> The absence of a definition of "procurement" is itself a suggestion that the Parties intended the term to be given its ordinary meaning throughout the NAFTA, subject to the exclusions in Article 1001(5). This was the approach taken in the only Chapter 11 arbitration to consider the exception in Article 1 108(7). In *ADF v. United States*, the Tribunal accepted the following definition of procurement:

[236] These limits were carefully negotiated by the NAFTA Parties and set out in ¶¶1-4 and in Annexes to the NAFTA, such as Annex 1001.1a-3 which provided that the obligations in NAFTA Chapter Ten would not apply to state or provincial state enterprises. These limits are different from the substantive definition of the term government procurement used in NAFTA Chapter Ten.

[237] *United Parcel Service v. Canada*, Award & Separate Opinion of Dean Ronald A. Cass, 2007 WL 5366485 (May 24, 2007) ("*U.P.S. - Award*"), at ¶67 ***(Investor's Schedule of Legal Authorities at CL-148)***

> In its ordinary or dictionary connotation, "procurement" refers to the act of obtaining, "as by effort, labor or purchase." To procure means "to get; to gain; to come into possession of." In the world of commerce and industry, "procurement" may be seen to refer ordinarily to the activity of obtaining by purchase goods, supplies, services and so forth. Thus, governmental procurement refers to the obtaining by purchase by a governmental agency or entity of title to or possession of, for instance, goods, supplies, materials and machinery.[238]

226. So while Canada now claims that the definition in Article 1001(5) should not be used to understand the meaning of Government Procurement, Canada took an opposite position in the *UPS* Claim on interpreting the very same article.

227. The United States relied upon the Article 1108 procurement exception to defend highway construction local content requirements imposed under a "Buy America" requirement under US federal law in the *ADF Group* NAFTA claim. In this case, the State of Virginia obtained funding from the US federal government to build state owned highways. These highways were paid for by funds transferred to the State of Virginia for roads owned by the State of Virginia. Virginia imposed the Buy America rules to require US-located steel fabrication upon ADF Group, a Canadian firm with a contract for highway construction who had steel fabrication facilities in Canada.

228. The specific question in the *ADF Group* claim was did the Article 1108 procurement exception apply to procurement requirements imposed by a state government in connection with the construction of a state owned highway. In this context, the *ADF Group* Tribunal was asked to consider the issue of the meaning of the NAFTA Article 1108 procurement exception. In *ADF Group*, the Tribunal found that the State of Virginia purchased the steel at issue, and it was used to build the highway which was owned by the State of Virginia.

229. The *ADF Group* Tribunal considered spending measures similar to those in the US *Clean Water Act* that were reserved from the NAFTA by a reservation in Annex I under Article 1108. The Tribunal determined that government funds spent under this measure which resulted in private property not retained by the government, but instead passed along to private owners, was doubtfully procurement at all. The *ADF Group* Tribunal stated:

> The flow of federal funds may be coursed through a "public body" but brings about a "privately owned" facility. The operation and maintenance of the facility upon construction become the responsibility of its private owner(s). We consider that the propriety of characterizing such a fact situation as "governmental procurement" or "procurement by a Party" is at least open to serious doubt.[239]

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[238] *United Parcel Service v. Canada*, Counter Memorial, June 22, 2005, at ¶¶564-565 ***(Investor's Schedule of Legal Authorities at CL-207)***

[239] *ADF Group Inc. v. United States*, Award, 2003 WL 24083234 (January 9, 2003) ("*ADF Group - Award*"), at ¶169 ***(Investor's Schedule of Legal Authorities at CL-072)***

VIII. THE ORDINARY MEANING OF PROCUREMENT

230. The *ADF Group* Tribunal concluded that reference to a dictionary could be helpful to ascertain the ordinary meaning of the term procurement. It came to the conclusion that for there to be procurement there had to be possession or "obtaining" of the good or service. The Tribunal stated:

> In its ordinary or dictionary connotation, "procurement" refers to the act of obtaining, "as by effort, labor or purchase." To procure means "to get; to gain; to come into possession of." In the world of commerce and industry, "procurement" may be seen to refer ordinarily to the activity of obtaining by purchase goods, supplies, services and so forth. Thus, governmental procurement refers to the obtaining by purchase by a governmental agency or entity of title to or possession of, for instance, goods, supplies, materials and machinery. [240]

231. The *ADF Group* Tribunal identified what was ordinarily excluded from the ordinary definition of procurement. The Tribunal found that governmental assistance in the form of financing was not a part of procurement. The Tribunal stated:

> What is excluded from the scope of procurement is the governmental assistance to the public entity or agency engaged in procurement, especially assistance in the form of financing or funding of the procurement activity by providing "grants, loans, equity infusions, guarantees, fiscal incentives." In other words, the government entity or agency providing or arranging for funds for the purchase of goods, supplies, materials, etc. used or to be used in the construction of a government project, is not itself thereby engaged in procurement. [241]

232. The separate opinion of Arbitrator Ronald Cass in the UPS NAFTA Claim agreed with the reliance upon the definition of procurement in NAFTA Chapter Ten taken by the *ADF Group* Tribunal in obtaining an understanding of what the meaning Article 1108.[242]

IX. PROCUREMENT IS A TERM OF ART

233. The term procurement used throughout the NAFTA was a term well known to the drafters of the NAFTA. It is used extensively in the WTO. As such, it is a term of art under the *Vienna Convention on the Law of Treaties*. Article 33(3) of the UNCITRAL Arbitration Rules instructs the Tribunal to "take into account usages of the trade applicable to the transaction."

234. Thus, recourse can be had to the meaning of procurement used in international economic law, such as in the WTO.

235. The Investor's Memorial made specific reference to the meaning of procurement in the WTO Agreement on Government Procurement (GPA).[243] This multilateral agreement can

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[240] *ADF Group* – Award, at ¶161 ***(Investor's Schedule of Legal Authorities at CL-072)*** Footnotes in the excerpt have not been reproduced.
[241] *ADF Group* – Award, at ¶161 ***(Investor's Schedule of Legal Authorities at CL-072)***
[242] *UPS* – Separate Opinion of Cass, at ¶¶64-71 ***(Investor's Schedule of Legal Authorities at CL-148)***

provide guidance as to the meaning of procurement as "a term of art" or as a term of the trade."

236. In Canada's General Notes to Appendix I of the GPA, Canada defines procurement as "contractual transactions to acquire property or services *for the direct benefit or use of the government*."[244]

237. Canada has raised an unspecified concern that the definition of procurement can include public provision to address concerns regarding the sale of medicines for hospitals.[245]

a) First, such concerns only address the issue of "commercial resale." They do not arise from situations where a government purchases goods and then uses it for some public good. In such circumstances, the government contracting body expends funds and obtains possession and title to the goods. This situation is very different from the facts in this arbitration where no title or possession pass to the Ontario Power Authority;

b) In any event, should a procurement take place, the drafters of the NAFTA have already considered such concerns. The NAFTA Parties included reservations under Article 1108 to address such situations. For example, to address the need to provide assistance to economically disadvantaged persons would be inconsistent with NAFTA Chapter 11 obligations. Canada made a reservation in Annex II-C-8 to this effect.

> Canada reserves the right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities.

c) Canada also made a reservation for the provisions of social services that identified that inconsistent measures that would otherwise violate NAFTA Articles 1102 and 1103 could be taken in relation to a number of social services, which include public training, health and child care. The Reservation states:

> Canada reserves the right to adopt or maintain any measure with respect to the provision of public law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care.

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[243] Memorial, at ¶¶472-473

[244] Memorial, at ¶473, referring to *Canada - FIT EU Submission*, at ¶120 ***(Investor's Schedule of Legal Authorities at CL-202)***

[245] Counter Memorial, at ¶330

d) The making of these reservations were sovereign acts that were carefully considered by each NAFTA Party.

238. There is no question that a tribunal would have to consider exceptions and reservation related defences on a case by case basis. Depending on how for example a health system or postal system are designed, one may have to consider whether obtaining goods and services as a means to delivering some other public good, is consistent with the NAFTA definition of procurement. In particular, a tribunal would have to consider on a case by case basis to see whether the measure fit within one of the many detailed reservations made to the NAFTA.

239. But this question does not arise with respect to the current claim as Canada has not asserted any reservation as being applicable – only the Article 1108 procurement exception. However, Canada alleges no facts here that show that the Ontario Power Authority is obtaining electricity in the first place, nor even less any that suggest the Ontario Power Authority is obtaining electricity to provide a public good. The public good that the Ontario Power Authority provides is a brokerage or market intermediation role between non-governmental actors. The provision of this public good does not entail the obtaining or acquisition of electricity. The payment and settlement role of the Ontario Power Authority operates through contractual devices that allow this function without electricity being procured by the Ontario Power Authority itself.

X. CANADA HAS NOT DEMONSTRATED THAT THE FIT CONTRACT CONSTITUTES PROCUREMENT

240. The WTO Panel in *Canada – Renewable Energy* noted that the Ontario Power Authority does not take any form of possession over electricity supplied by FIT generators, including legal title.[246] The Ontario Power Authority does not take title to the electricity that is subject to a FIT Contract.[247] Expending money is not the same as procurement of a good.

241. The Ontario Power Authority also never controls the energy for which it expends funds under a FIT Contract.

242. Canada confirmed that the electricity system was "in an essentially instantaneous balance" between the generators who supply power and the ratepayers who use (and pay for) the electricity.[248] All electricity generated is not stored but immediately

[246] *Canada-Renewable Energy*-Panel Report, at ¶7.232 and footnote 449 ***(Investor's Schedule of Legal Authorities at CL-001)***
[247] Annual Report of the Auditor General of Ontario, 2011, at ¶¶93-95 ***(Investor's Schedule of Exhibits at C-0228)***
[248] Counter Memorial, at ¶29

consumed by customers. This power is only used by the consumer and is not delivered to the Ontario Power Authority nor to the Government of Ontario for its own use.

243. While the Ontario Power Authority expends funds for power under the terms of a Power Purchase Agreement, such as the FIT Program, it never receives the power itself. Instead the power goes for commercial sale immediately to ratepayers.

244. Thus, while the Ontario Power Authority executes a contract which purports to purchase renewable power from generators, it does not acquire title, possession or control of the electricity. The electricity is immediately sent by the generator into the transmission grid and "nearly instantaneously" sent to customers for immediate use.

245. The ratepayers pay for the power and this is collected and remitted to various entities including the Ontario Power Authority and the IESO. Fundamentally, the role of the Ontario Power Authority under the FIT Contract is to finance the expenditure of the electrical power from funds that come from ratepayers who have the power that was generated.[249]

246. The Ontario Power Authority is expending funds up to sixty days after the electricity that has been delivered to the ratepayers and charged to their accounts.[250]

a) Article 4.2(b) of the FIT Contract states the Ontario Power Authority "shall deliver a settlement statement within 20 business days after the end of each calendar month in the term that is the subject of the statement."

b) Article 4.2(c) states that the Ontario Power Authority shall "remit to the FIT Contract generator full payment in respect of the statement no later than the last Business Day of the month following the end of the Settlement period."

247. Thus, the Ontario Power Authority could have up to 60 days from the date upon which energy has been charged to a consumer's electricity bill before the Ontario Power Authority has to expend payment to the FIT Contract generator from funds paid by the ratepayers.

248. In the *ADF Group* arbitration, the State of Virginia purchased fabricated steel for highway construction. Virginia owned the highway and obtained ownership and possession of the steel in the highway. This is a measure in the proper nature of procurement.

249. The expenditure of funds for electricity that is not owned, controlled or possessed by the Ontario Power Authority is very unlike the procurement that took place in Virginia

[249] Expert Report of Seabron Adamson, at ¶¶68, 114
[250] FIT Contract Version 1.5 at Article 4.2 ***(Investor's Schedule of Exhibits at C-0263)***

that was at issue in the *ADF Group* claim. The Ontario Power Authority's spending activity is simply not procurement.

250. Canada relied upon the *ADF Group* award in its Counter Memorial but it failed to address another key statement by this NAFTA Tribunal. The *ADF Group* Tribunal considered the situation of a program similar to the US *Clean Water Act* that was the subject of a reservation under a different paragraph of NAFTA Article 1108. Under this program, private recipients receive property from the expenditure of public funds. This example is similar to the situation under the FIT Program, where an expenditure takes place, and where the goods are not retained by any governmental body but instead are made available for private owners. Such commercial circumstances where government does not possess the goods for its own use simply do not constitute procurement by a Party or a state enterprise under NAFTA Article 1108.

251. As a result, Canada has not established that the purchase of renewable power by the Ontario Power Authority can constitute a procurement that would permit the application of NAFTA Article 1108.

252. Canada makes a passing reference that it takes possession of Environmental Attributes arising from FIT Contracts.[251] Environmental Attributes are attributes, like carbon credits, that arise from the physical construction of a renewable power projects. They are generally sold on exchanges and sold like shares.[252] In the opinion of expert Seabron Adamson, the transfer of Environmental Attributes from a FIT Generator to the Ontario Power Authority is not for the benefit or use of the Ontario Power Authority or the government of Ontario, but is entirely for the purposes to ensure that the generator did not flood the carbon credit market with credits. The government had no direct use for these attributes and their only purpose would be for resale. [253]

253. This particular transfer does not constitute a procurement of renewable power.[254]

254. Canada says clearly in paragraph 317 of the Counter Memorial that "The FIT Rules confirm that the OPA is purchasing electricity" and Canada confirms that this purchase is for "Hourly Delivered Electricity at the Contract Price." Canada contends that the alleged purchase of electricity is at the heart of the measure. The measures that Canada wishes to have exempted by the NAFTA procurement exception in Article 1108 all relate to what Canada claims is the purchase of electricity. None of the measures relate in any way to the potential future transfer of environmental attributes.

[251] Counter Memorial, at ¶318
[252] Expert Report of Seabron Adamson, at ¶115
[253] Expert Report of Seabron Adamson, at ¶¶117, 118
[254] Expert Report of Seabron Adamson, at ¶¶119, 120

255. Environmental Attributes are evidently not goods nor are they services. While these attributes may come to the Ontario Power Authority, their possession has not been shown by Canada to be in the nature of a procurement. Canada has not alleged that in fact any of these attributes are actually in the possession of the OPA. Where an environmental attribute is the basis for a tradeable financial instrument, any dealings in such instruments would have to be assessed not under Chapter 11 but under the Financial Services Chapter of NAFTA (Chapter Fourteen).

256. But, in any case Canada has not shown any relationship between the measures it is seeking to justify, the NAFTA inconsistent actions (violations of national treatment, MFN Treatment and domestic content requirements with respect to renewable energy equipment) and the acquisition or holding or any such attributes by the Ontario Power Authority.

257. It is clear that the role of the Ontario Power Authority is required by statute to follow the directives of the Government of Ontario to finance the purchase of renewable power by guaranteeing that the purchase price in the Power Purchase Agreement is paid to the power generators. Thus the measures taken by the Ontario Power Authority do not constitute procurement under the ordinary meaning of the term. They only constitute a form of governmental assistance, like a financing transaction or guarantee. Such activities do not constitute procurement.

XI. COMMERCIAL SALE OF THE CONTRACTED GOODS AND SERVICES IS NOT CONSISTENT WITH PROCUREMENT BY A PARTY

258. Procurement by a Party or state enterprise means procurement for the use of the government. It does not include schemes where the good or services is offered for resale to the market.

259. The definition of procurement in Article 1001(5) excludes from goods that are resold from the definition of procurement. The Article states:

> Procurement does not include:
>
> > non-contractual agreements or any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and **government provision of goods and services to persons** or state, provincial and regional governments; (emphasis added)

260. The Investor has already identified how the spending by the Ontario Power Authority at the direction of the Minister of Energy constitutes a form of governmental assistance such as a cooperative agreement, loan, guarantee or fiscal incentive. Thus, the

expenditure on renewable power under the FIT Contract could not constitute a procurement.

261. In addition, the power arising from the spending under the FIT Contract is a government provision of goods and services to persons. Thus, the FIT Contract is not eligible to be covered by the NAFTA Article 1108 procurement exception on yet another ground.

262. In any event, the ordinary meaning of the term procurement by a party is the same as the term government procurement used in the WTO.

263. The Investor set out in its Memorial examples of the meaning of procurement within the WTO and GATT.[255] The clear meaning of procurement always excludes any activities where there is commercial resale of the good or service.[256]

264. Canada has no response in its Counter Memorial to these arguments. Canada simply asserts that the wording of GATT Article III:8 is different from that contained in the NAFTA.[257] However, Canada gives no account of how the different wording of the GATT provision was decisive in the WTO Appellate Body's determination that there was not "procurement." In fact, an examination of the Appellate Body's decision reveals that the fact that the wording concerning "commercial resale" appears in GATT Article III:8 played no role in the Appellate Body's determination that there was no procurement under the FIT Program; it was clear to the Appellate Body that the measures Canada was seeking to defend were not a "procurement" without having to consider that specific wording.

265. There is no logical nexus between Canada's "procurement" that it claims takes place unde***r*** the FIT Contract and the measures that Canada seeks to excuse from NAFTA inconsistency. The invocation of an exception requires that the defending party show, on the facts, some rational relationship or connection between the measure and the alleged procurement. The WTO Appellate Body found that the Ontario local content requirements were not related to the alleged procurement of electrical energy and that thus these requirements could not be considered as "procurement." This finding by the WTO had nothing to do with any additional language contained in the GATT provision in question that does not appear in the corresponding NAFTA Chapter Eleven procurement exception, but rather the unavoidable logic that for the exception to apply, the treatment that is otherwise internationally wrongful (in this case contrary to prohibited minimum Ontario domestic content requirements) must be in relation to the objective of procurement. One cannot exempt just any policy from fundamental disciplines of

[255] Memorial, at ¶¶445-479
[256] Memorial, at ¶¶447-455
[257] Counter Memorial, at ¶325

non-discrimination by merely labeling it "procurement," otherwise, this would undermine the substance of the NAFTA obligations radically.

266. In this arbitration, Canada has to show:

a) The relationship to the minimum Ontario domestic content requirements, and the objective which was the "procurement" of renewable-generated electricity for Ontario consumers;

b) The relationship between the national treatment violations and the objective of "procuring" renewable energy for Ontario consumers; and

c) The relationship between the most favoured nation treatment violations, such as the better treatment provided to investments from other NAFTA Parties or from Non-NAFTA Parties, and the objective of "procuring" renewable energy for Ontario consumers.

Canada has failed to meet this necessary task and thus the exception cannot be successfully applied by Canada.

267. Thus even if, *arguendo*, Canada could establish that the mere fact of payment by the Ontario Power Authority constituted "procurement," Canada would still fail in discharging its burden of proof that the challenged measures are "procurement."

268. Canada appears to suggest that the NAFTA Article 1108 procurement exception is somehow self-judging, such that by declaring the FIT program as being for the procuring of renewable energy within its own legislation and administrative orders Canada is entitled to invoke the exception.[258]

a) This is plainly contrary to the understanding of Article 1108 in the jurisprudence.

b) Canada's approach would also significantly undermine the legal security of the core commitments in the NAFTA, if article 1108 were understood as self-judging in this way. In any event the language cited by Canada, which is "designed to procure," "for procurement," and "to procure" merely designates procurement as a *goal or object* of the FIT program. It does not state who is procuring for whom, nor that any particular feature of the FIT program is a procurement by the government.

c) With respect to the local content requirements specifically, which are clearly a violation of NAFTA otherwise, the investor reiterates that Canada has given no explanation of how these relate to the *object* of procuring renewable energy. Indeed Canada itself suggests that the requirements relate to the different objective of

[258] Counter Memorial, at ¶¶315 and 316

creating additional employment in the province of Ontario to address cyclical economic conditions. It is plain that Canada cannot justify measures unrelated to the objective of procuring or procurement through an exception for procurement (even assuming that any procurement within the meaning of 1108 is going on, which the Investor clearly contests).

269. Finally, Canada attempts to distinguish NAFTA Chapter Ten from NAFTA Chapter Eleven on the basis that Chapter Ten is about exclusions of procurement from the NAFTA, rather than constituting a positive coverage of obligations about procurement in the NAFTA.[259] Canada's approach demonstrates a fundamental misunderstanding about the NAFTA. The objective of Chapter Ten was to cover procurement within the NAFTA at a time when the WTO Agreement on Government Procurement was not widely accepted. The intent of the NAFTA is not to insulate certain transactions (purchase etc.) from discipline under provisions of Chapter 11, or to subject them to different disciplines under Chapter 10, but rather to ensure that the proper disciplines apply where the purpose of the government is to obtain goods and services for its own use.

270. The fundamental reason why the FIT Contract cannot constitute a procurement is because the government is not obtaining goods and services for its own use. All that the Ontario Power Authority is doing is expending funds that have already been charged to ratepayers for electricity that is being delivered to the ratepayers. There is no government consumption or usage involved in this transaction –and that is one of the fundamental reasons why it could never constitute procurement.

[259] Counter Memorial, at ¶329

PART FOUR: THE IMPOSITION OF PERFORMANCE REQUIREMENTS IN VIOLATION OF NAFTA ARTICLE 1106

A. Canada imposed two prohibited performance requirements

271. NAFTA Article 1106 prohibits the imposition of a list of specific industrial policy measures which are referred to as performance requirements. Paragraph (1) of Article 1106 provides that:

> No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:
>
> (a) to export a given level or percentage of goods or services;
>
> (b) to achieve a given level or percentage of domestic content;
>
> (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;…

272. Ontario required the Ontario Power Authority to impose prohibited performance requirements in contravention of paragraphs (b) and (c) of NAFTA Article 1106(1).

273. Canada has not contested that its measures are inconsistent with NAFTA Article 1106. It has only filed an affirmative defense that the NAFTA Article 1108(8)(a) procurement exception applies.[260] Canada bears the burden of proving this affirmative defense, which for the reasons set out in Part Three of this Reply Memorial, it has not met.

274. Accordingly, this affirmative defense should be dismissed and the Tribunal should conclude that Canada has acted inconsistently with its Article 1106(1) obligations in the imposition of Ontario minimum local content requirements to obtain a renewable energy Power Purchase Agreement in the FIT Program.

275. The imposition of performance requirements regarding domestic-content requirements in the FIT Program was brought about from:

a) The *Electricity Act, 1998*, as amended, including in particular Part II.1 (Ontario Power Authority), and Part II.2, (Management of Electricity Supply, Capacity and Demand) thereof, including, in particular, Section 25.35 (Feed-in tariff Program),[261] which provided the statutory authority to the Minister of Energy and the Ontario Power Authority to design, implement, and administer the Ontario FIT Program;

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[260] Counter Memorial, at ¶¶307-308

[261] *Electricity Act*, 1998, S.O. 1998, c.15 Schedule A, last amended 2010, c.8 ***(Investor's Schedule of Exhibits at C-0401)***

b) The *Green Energy Act, 2009,* as enacted on May 14, 2009[262] and FIT Direction dated September 24, 2009, from George Smitherman, Deputy Premier and Minister of Energy and Infrastructure, to Colin Anderson, Chief Executive Officer, Ontario Power Authority, directing OPA to develop a FIT Program and to include a requirement that the applicant submit a plan for meeting the domestic content goals in the FIT Rules;[263] and

c) The FIT Rules, at paragraph 6.4(a)(i), which required projects that became operational after January 1, 2012 to achieve a domestic content level of 50%;[264] and

d) The FIT Contract at Section 2.4(b)(iii) and Exhibit D, Domestic Content, incorporate the domestic content requirements into the FIT contract.[265]

276. These government measures breached the NAFTA's prohibition on performance requirements set out in Article 1106(1)(b) and (c) and first affected the Investor on November 25, 2009 when TTD Wind Project ULC and Arran Project ULC submitted their FIT applications which required Mesa to commit to an undertaking to adhere to all the FIT Rules, including the domestic content requirements.[266]

277. Mesa was again affected by this breach on May 29, 2010 North Bruce Project ULC and Summerhill Project ULC submitted their FIT applications and also had to commit to the same undertaking to adhere to all the FIT Rules, including the domestic content requirements.[267]

278. Mesa had acquired knowledge of the requirement of this measure as a result of the undertaking it had to commit to with each FIT application it submitted.[268] Knowledge of loss first arose on August 5, 2010.

279. Mesa suffered further loss when it had to restructure its existing turbine contract with GE.[269]

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[262] *Green Energy Act*, S.C. 2009 c.12, Schedule. A ***(Investor's Schedule of Exhibits at C-0003)***

[263] Direction from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), September 24, 2009 ***(Investor's Schedule of Exhibits at C-0264)***; FIT Contract, Version 1.5, Section 2.4(b)(iv) ***(Investor's Schedule of Exhibits at C-0263)***

[264] Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011, at ¶6.4(a)(i) ***(Investor's Schedule of Exhibits at C-0005)***

[265] FIT Contract, Version 1.5, Section 2.4(b)(iii) and Exhibit D ***(Investor's Schedule of Exhibits at C-0263)***

[266] Twenty Two Degree Wind Project FIT Application, November 25, 2009 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009 ***(Investor's Schedule of Exhibits at C-0365)***

[267] North Bruce Wind Energy I, FIT application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0360)***; North Bruce Wind Energy II, FIT Application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0361)***; Summerhill Wind Energy I, FIT Application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0362)***; Summerhill Wind Energy II, FIT Application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0363)***

[268] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶25-26

[269] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶29

280. On September 24, 2009, the Minister of Energy directed the Ontario Power Authority to require FIT projects to use a qualifying percentage of goods produced in Ontario in the generation of electricity.[270] Further to this direction, the Ontario Power Authority imposed the Ontario minimum domestic content requirements into the FIT Rules.[271] To obtain a renewable energy Power Purchase Agreement under the FIT Program, an applicant was required to comply.

281. The amount of Ontario domestic content required varied depending on project type and its commercial operation date. For example, the applications made by the Investments owned by the Investor were required to have a 50% level of Ontario minimum domestic content for equipment and services as these projects would be operational after January 1, 2012.[272]

282. In addition, the FIT contract terms provided in section 2.4(b)(iii) that a contract holder had to complete and file its Domestic Content Report within 60 days of reaching Commercial Operation.[273] If a contract holder did not meet the required amount of Ontario minimum domestic content, the contract holder would be in default.[274]

283. The amount of Ontario domestic content was set out in the FIT Program rules as being a given percentage of content. However, the formula for calculating the content established a regime where the qualifying percentage had to be met from categories. Each category had a contribution limitation imposed on how much content could qualify towards the total Ontario minimum domestic content. All content over that contribution limit was set to zero. For example, the percentage contribution of the turbine blades was limited under the FIT Rules to a maximum contribution of 18% within the overall minimum Ontario domestic content calculation. So if the cost of the blades came to 25% of the total cost, then only the first 18% could count and the rest of the FIT Program minimum Ontario domestic content would have to be found in other categories. As a result, the actual percentage of domestic content required under the FIT Program was actually substantially higher than the stated percentage.

284. To meet the Ontario minimum domestic content requirements in the FIT Rules, the Investor had to ensure that contracts for goods and services purchased by its Investments were compliant with the Ontario domestic minimum content requirements. Otherwise, an Investment could not receive the benefits of a twenty year

[270] Direction from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), September 24, 2009 ***(Investor's Schedule of Exhibits at C-0264)***
[271] FIT Rules Version 1.1, at ¶6.4(a)(i) ***(Investor's Schedule of Exhibits at C-0258)***
[272] FIT Rules Version 1.1, at ¶6.4(a)(i) ***(Investor's Schedule of Exhibits at C-0258)***; *GEIA*, Article 9.2 ***(Investor's Schedule of Exhibits at C-0322)***
[273] FIT Contract, Version 1.5, Section 2.4(b)(iii), 2.11(c), and Annex D ***(Investor's Schedule of Exhibits at C-0263)***
[274] FIT Rules, Version 1.1, Section 6.4(a)(i), 6.4(b) ***(Investor's Schedule of Exhibits at C-0258)***

long Feed-in Tariff contract supported by the ratepayers of Ontario under the FIT Program.

285. The largest single component for a Wind Farm Project was the supply of wind generation turbine assemblies (this would include the turbine, the nacelle, the turbine blades and associated assemblies).

286. Canada claims that the Investor failed to link any harm to the breach of Article 1106.[275] This statement is simply incorrect.[276]

287. In the context of responding to Canada's incorrect characterization of the Master Turbine Sales Agreement in the Counter Memorial,[277] Cole Robertson has commented in his Reply Witness Statement on how Ontario's imposition of prohibited performance requirements resulted in loss to the company.[278] The Reply Witness Statement of Cole Robertson addresses the difficulties that the Investor had to identify turbines that were suited to the needs of its wind farms that would also meet the Ontario minimum content requirements.[279] Mr. Robertson states that Ontario's minimum domestic content requirements had the effect of interrupting Mesa's existing business relationships as it had to find new suppliers for goods and services. Complying with Ontario's requirements forced Mesa to rely on goods and providers that were less efficient or more expensive. The minimum Ontario local content also compelled Mesa to use a less-efficient 1.6XL wind turbine as Mesa was not able to use the 2.5XL turbine that it preferred as it could not obtain a guarantee of its compliance with the Ontario requirements.

288. The Investor had to make operational compromises and select less suitable wind turbines for its facility solely to be able to obtain wind turbines that would meet the requirements of the Ontario minimum domestic content rules in the FIT Program.[280] The Investor wanted to use larger sized wind turbines to optimize its wind power operations at its four Ontario wind farm facilities. However, to meet the local content requirements, the Investor entered into an Agreement with General Electric to obtain 1.6MW wind turbines around August 5, 2010 as these were the only wind turbines at

[275] Counter Memorial, at ¶455
[276] The Investor raised the harm caused to it arising from the breach of Article 1106 at ¶488 in its Memorial.
[277] Counter Memorial, at ¶477
[278] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶¶22-27
[279] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶¶22-27
[280] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶25

that time that General Electric could confirm would satisfy the FIT Program's Ontario domestic content requirement.[281]

289. Canada suggests in its Counter Memorial that a breach of NAFTA Article 1106 requires a prior finding of a breach of another NAFTA obligation.[282] This statement is entirely incorrect. NAFTA Article 1116 makes clear that a claim can be commenced with respect to a breach of an obligation in Section A of Chapter Eleven. Thus, there is no requirement that any particular obligation be breached as a condition precedent for another breach.

290. We also note that the Expert Reply Valuation Report of Mr. Low and Mr. Taylor has made clear that damages with respect to a violation of NAFTA Article 1106 do not require a finding of breach of any other NAFTA Chapter Eleven obligation.[283]

291. The Expert Reply Valuation Report of Robert Low and Richard Taylor addresses the harm that has arisen to the Investor as a result of the imposition of these prohibited performance requirements upon its Investment. The Export Valuation Report has calculated that the amount of loss and harm arising from the imposition of prohibited Ontario minimum domestic content rules was $110.8 million.[284]

[281] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶25. A number of FIT Projects have used the GE 1.6MW turbine model to comply with domestic content requirements. Adelaide – Wind Turbine Specification Report, February 2012 ***(Investor's Schedule of Exhibits at C-0635)***; Bluewater – Wind Turbine Specification Report, June 2012 ***(Investor's Schedule of Exhibits at C-0636)***; Bornish – Wind Turbine Specification Report ***(Investor's Schedule of Exhibits at C-0637)***; East Durham – Wind Turbine Specification Report ***(Investor's Schedule of Exhibits at C-0638)***; Goshen – Wind Turbine Specification Report, January 2013 ***(Investor's Schedule of Exhibits at C-0639)***

[282] Counter Memorial, at ¶456

[283] Deloitte Reply Valuation Report, at ¶4.1

[284] Deloitte Reply Valuation Report, at ¶¶1.3, 7.20

PART FIVE: NAFTA ARTICLE 1103 MOST FAVOURED NATION TREATMENT

I. OVERVIEW ON MFN TREATMENT

292. Often, in the case of investment obligations, the issue of Most Favoured Nation Treatment arises where an investor seeks to rely on a provision of another investment treaty, with more favourable substantive, and most often, procedural provisions. While such situations arise in this arbitration, we are primarily concerned with better material treatment of the Investor relative to investors from foreign countries.

293. This issue arises because Ontario entered into a set of non-transparent policies whereby it advantaged a group of investors from Korea (and their joint venture partners) by providing them with substantial preferential treatment over that provided to others. This better treatment was contained in a number of agreements, some of which are still secret to this day.

294. Canada does not contest that the members of the Korean Consortium (who are investors of Korean nationality) and their joint venture partner (who is an investor of American nationality) received treatment that was more favourable relative to the treatment provided to Mesa. However Canada claims that Mesa, while being in like circumstances with every other renewable competitor for access to the grid in Ontario, was not in like circumstances with the members of the Korean Consortium, or their joint venture partner, who all received more favorable treatment from Ontario. Canada's argument is based solely on the notion that the members of the Korean Consortium made binding commitments of an industrial policy nature in return for the special treatment, which Mesa (and all other competitors) did not make.

295. Through expert and other evidence, the Investor will show that Canada's theory is lacking in any factual basis: the members of the Korean Consortium, and their joint venture partners (of American nationality), made no binding commitments of an industrial policy nature to obtain access to the Ontario grid on more favorable terms.

296. Prior to the Korean Consortium locking up exclusive rights to scarce transmission capacity, which would not have been revocable to provide Mesa access in exchange for whatever commitments it might have offered, It did not even have the incomplete and misleading information about the arrangement with the Korean Consortium that the Ontario government released. Even if Canada's theory had a factual foundation, there would still be a violation of MFN because Mesa never had the opportunity to make industrial policy commitments in return for preferred market access.

297. In sum, the "unlike circumstances" asserted by Canada, even if its theory had a basis in fact (which it does not), would the78mselves be the product of the Korean Consortium

having had an opportunity to strike a deal on different terms, which Mesa was never in any way provided. Canada can surely not avoid the MFN obligation in NAFTA by asserting unlike circumstances that were produced by the very misconduct that the investor is complaining of, and which, as this memorial will detail, also constituted a violation of fair and equitable treatment, the international standard of treatment.

298. The first document which set out this special treatment is the 2008 Memorandum of Understanding between the Korean Consortium and the Government of Ontario.[285] This document established that Ontario and the Korean Consortium were in an exclusive partnership. Under the terms of the secret Memorandum of Understanding (MOU), the members of the Korean Consortium started having private meetings with senior Ontario energy officials in 2009. The minutes from these Korean Consortium/Ministry of Energy Working Group meetings indicate that a deal was already in place by August 2009 for Ontario to provide 2500MW of transmission pipeline to the members of the Korean Consortium. Also , the minutes demonstrate that secret government information was being provided to the members of the Korean Consortium including discussions of what would later be released to the market as the FIT Program, all before it was publically announced.[286]

299. The second document is the Framework Agreement.[287] The Investor has only been able to locate a draft version of this agreement as well as an email between Ontario Ministry of Energy officials and Samsung discussing the process for its signature.[288]

300. We know from government emails that the Framework Agreement was actually executed and signed by Ontario and the Korean Consortium in 2009, but Canada has refused to provide a copy of this relevant document. In the face of this refusal, the Tribunal should draw the negative inference that these other documents indicate a margin of more favorable treatment to the members of the Korean Consortium relative to the Investor that is at least as wide as that revealed by the draft. In any case, Canada has provided no contrary evidence that would meet the Investor's claim that the terms of its arrangements with the Samsung group were not other than as indicated in the draft agreement.

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[285] Memorandum of Understanding by and among Her Majesty The Queen In Right Of Ontario, Korea Electric Power Corporation and Samsung C&T Corporation, December 12, 2008 ***(Investor's Schedule of Exhibits at C-0536)***

[286] Minutes of a Korean Consortium – Ministry of Energy, August, 7,2009 ***(Investor's Schedule of Exhibits at C-0329)***

[287] Draft Framework Agreement by and Among Her Majesty The Queen In Right of Ontario, Korea Electric Power Corporation and Samsung C&T Corporation, September 25, 2009 ***(Investor's Schedule of Exhibits at C-0328)***

[288] Email from Mohamed Dhanani (Ministry of Energy) to Hagen Lee, October 1, 2009 ***(Investor's Schedule of Exhibits at C-0339)***

301. We also note that Samsung C & T did not provide a copy of the final Framework Agreement despite being ordered to do so by the New Jersey District Court during the Section 1782 application. This omission was raised in the Declaration of Samsung's former Ontario government affairs employee, Zohrab Mawani who was responsible to work under this agreement and the *GEIA*.[289] It appears that this Framework Agreement had obligations in force between the Korean Consortium and Ontario – but Canada refuses to provide this document. In any event, there were also enforceable obligations int he Memorandum of Understanding, another document Canada refuses to produce.

302. Finally, there are the terms of the *Green Energy Investment Agreement* itself. Ontario signed this agreement in January 2010, but the terms of the agreement were kept secret from the public until after this arbitration commenced. Indeed, the terms of the *GEIA*, were kept secret from the Ontario Power Authority until after they were signed.

303. These secret terms provided much more favourable treatment for the members of the Korean Consortium than the treatment that was provided to Mesa and to other FIT applicants.

304. While the agreement was not released, the Government of Ontario issued a press backgrounder at the time of the signing of the *GEIA*.[290] It is clear that the backgrounder did not provide sufficient disclosure of the fundamental terms of the *GEIA*.

305. The press backgrounder announced that the Korean Consortium would be required to create 16,000 jobs and invest $7 billion under the *GEIA*. This was the only knowledge of the terms of the *GEIA* known by the public at the time of its signing, or while the FIT Program was underway.

306. The press backgrounder did not indicate a fact that was well-known to the members of the Korean Consortium and to the officials in the Ministry of Energy. The minutes of the Korean Consortium / Ministry of Energy Working Group held under the MOU identify that the revenue to the members of the Korean Consortium from the 2500 MW of transmission that Ontario had promised to the Korean Consortium under the MOU was worth approximately $20 billion.[291] None of this information, which had been known to the government for many months was disclosed when the GEIA was announced in January 2010.

307. The Ontario Government's January 21, 2010 press release about the *GEIA* was the only public information available about the *GEIA* until after this arbitration commenced. The

[289] Declaration of Zohrab Mawani, August 15, 2013, at ¶47 ***(Investor's Schedule of Exhibits at C-0406)***
[290] *GEIA* Press Backgrounder, January 21, 2010 ***(Investor's Schedule of Exhibits at C-0511)***
[291] Minutes of a Korean Consortium – Ministry of Energy, August, 7,2009 ***(Investor's Schedule of Exhibits at C-0329)***

press release has been referred to in an entirely inaccurate way by Canada in its Counter Memorial and within witness statements relied upon by Canada in this arbitration.

308. There were no burdensome requirements imposed upon the members of the Korean Consortium that were different from requirements imposed upon a FIT Applicant. Canada gives the impression that the members of the Korean Consortium were required to do something special in exchange for the significant benefits being provided to them under the *GEIA*. Nothing could be further from the truth.

309. Mr. Goncalves demonstrates an incorrect understanding of the *GEIA* in his Defense Valuation Report. Mr. Goncalves suggests that the *GEIA* imposed a "large-scale manufacturing investment and job creation" burden on the members of the Korean Consortium. He states:

> Deloitte does not consider that to obtain the *GEIA* benefits, Mesa Power should have borne similar responsibilities for large-scale manufacturing investments and job creation borne by the KC.[292]

310. Mr. Goncalves statement is entirely incorrect. There is no job creation or large-scale manufacturing requirements imposed by the terms of the *GEIA*.

311. Another mischaracterization occurs in Canada's Counter Memorial at paragraph 347 where Canada states:

> With respect to its most-favoured-nation claim, the Claimant seeks to compare the treatment that it was accorded in the FIT Program with the treatment accorded to the Korean Consortium pursuant to the *GEIA*. In so doing, it ignores the glaring differences between the circumstances in which the treatment accorded to each of them. In particular, the Korean Consortium agreed to investments into manufacturing in Ontario valued at $7 billion. The Claimant did not. [293]

312. Perhaps the most glaring misstatement is in Canada's Counter Memorial at paragraph 463 which states:

> In particular, whereas the Korean Consortium had to earn its transmission priority for each phase of the *GEIA*, the Claimant suggests that it should have been entitled to the same transmission priority without having to earn it.[294]

313. Energy expert Seabron Adamson carefully reviewed the terms of the *GEIA* in his Expert Report. He concluded that members of the Korean Consortium did not have to make any extra investments in job creation in exchange for the benefits of the *GEIA*. Members of the Korean Consortium did not have to make any extra investments in manufacturing in exchange for the benefits of the *GEIA*. If the members of the Korean Consortium made any additional investments, this was entirely a matter of commercial

[292] Goncalves Defense Valuation Report, at ¶33
[293] Counter Memorial, at ¶347
[294] Counter Memorial, at ¶463

reasonableness on their part and not because of any binding requirement under the *GEIA*. And to the extent that the members of the Korean Consortium were to receive the Economic Adder, all that was required was the designation of a manufacturing partner, rather than any requirement to engage in any manufacturing.[295]

314. Colin Edwards worked with the Korean Consortium as its joint venture partner in Ontario. He admitted in his sworn deposition that, to his knowledge, there was never any suggestion that the Korean Consortium would invest in any manufacturing facilities in Ontario.[296] Moreover, expert Seabron Adamson has concluded that the demand for components from the FIT Program was large enough to stimulate manufacturing in Ontario on its own.[297]

315. This level of better treatment under the *GEIA* significantly reduced the project completion risk for projects undertaken by the members of the Korean Consortium and their joint venture partners.

316. In addition to the members of the Korean Consortium, others from outside Canada were treated better in Ontario. While Ontario was secretly required to be the exclusive partner of the Korean Consortium under the secret Memorandum of Understanding, Ontario appeared to be unfaithful to this agreement. Ontario was privately giving similar treatment to others. NextEra, an investor from another NAFTA Party, certainly sought to get treatment that was similar to that provided under the *GEIA*.

317. NextEra wanted to obtain better information and discussions about the operation of the FIT program. We can see that NextEra had extensive meetings with energy regulatory officials to this end.[298] NextEra appears to have also had the ear of the Minister.[299] Two of NextEra's lobbyists had deep ties to the governing Liberal Party:

    a) Bob Lopinski was previously the Premier's Director of Issues Management and Legislative Affairs.[300]

    b) Phil Dewan served as Premier McGuinty's Chief of Staff while he was leader of the Official Opposition.[301]

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[295] Expert Report of Seabron Adamson, at ¶35

[296] Transcript of Colin Edwards Deposition, at p.31 ***(Investor's Schedule of Exhibits at C-0537)***

[297] Expert Report of Seabron Adamson, at ¶¶41, 42

[298] Lobbyist Registration Form, Phil Dewan, Counsel Public Affairs for Nextera, February 25, 2010 ***(Investor's Schedule of Exhibits at C-0652)***; Lobbyist Registration Form, Bob Lopinski, Counsel Public Affairs for Nextera, March 8, 2010 ***(Investor's Schedule of Exhibits at C-0653)***; Counsel Public Affairs, Team Summary, April 29, 2014 ***(Investor's Schedule of Exhibits at C-0649)***

[299] Email from Jonathan Norman (Ministry of Energy) to Sunita Chander (Ministry of Energy) and Cieran Bishop (Ministry of Energy), January 19, 2011 ***(Investor's Schedule of Exhibits at C-0654)***

[300] "Bob Lopinski", Counsel Public Affairs, Team Summary, April 29, 2014 ***(Investor's Schedule of Exhibits at C-0649)***

318. On April 13, 2011, the Ministry of Energy ordered a "test run" that determined the projects that would obtain FIT contracts in the Bruce region.[302] In this "test run", [redacted] Documents reveal that the Energy Minister's policy advisor met after the test run results were provided to him with the senior Ontario representative for NextEra, Alan Wiley.[305] The next day the FIT Rules were changed internally in a way favourable to NextEra.[306] These changes were announced on June 3, 2011. As a result of the rule changes, [redacted]

319. The records of the Ontario Electoral Commission reveal that shortly thereafter, NextEra made a number of political donations to the Ontario Liberal Party.[307] Such donations would make NextEra one of the largest corporate donors to the Ontario Liberal Party in the run up to the 2011 general election.

320. Treatment by regulators must be even-handed towards the investor in relation to all like investors and investments.[308] This means an Investor is entitled to treatment equivalent to the most favourable treatment granted to any investor or investment that is "in like circumstances." This occurs under both NAFTA Articles 1102 and 1103.

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[301] "Phil Dewan", Counsel Public Affairs, Team Summary, April 29, 2014 ***(Investor's Schedule of Exhibits at C-0649)***

[302] Email from Shawn Cronkwright (OPA) to Colin Andersen (OPA), April 13, 2011 ***(Investor's Schedule of Exhibits at C-0446)***; Email from Shawn Cronkwright (OPA) to Colin Andersen (OPA), April 14, 2011 ***(Investor's Schedule of Exhibits at C-0447)***

[303] Bruce Area and West of London Area Scenario Analysis, April 14, 2011 ***(Investor's Schedule of Exhibits at C-0448)***; Bruce Area Scenario Analysis, Table of results, April 14, 2011 ***(Investor's Schedule of Exhibits at C-0448)*** [redacted]

[304] Bruce Area Scenario Analysis, Table of results, April 14, 2011 ***(Investor's Schedule of Exhibits at C-0448)*** [redacted]

[305] This meeting took place on May 11, 2010. Email from Phil Dewan (Counsel Public Affairs) to Sue Lo (Ministry of Energy), May 11, 2011 ***(Investor's Schedule of Exhibits at C-0090)***

[306] Email from Sunita Chander (Ministry of Energy) to Shawn Cronkwright (OPA), May 11, 2011 ***(Investor's Schedule of Exhibits at C-0444)***; Email from Shawn Cronkwright (OPA) to JoAnne Butler (OPA) and Sue Lo (Ministry of Energy), May 11, 2011 ***(Investor's Schedule of Exhibits at C-0444)***; Email from Sue Lo (Ministry of Energy) to Pearl Ing (Ministry of Energy), et al, May 12, 2011 ***(Investor's Schedule of Exhibits at C-0473)***

[307] NextEra's Political Contributions to the Ontario Liberal Party, 2011 ***(Investor's Schedule of Exhibits at C-0522)***

[308] *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, Award, 2004 WL 3254661 (May 25, 2004) ("*Siemens* - Award"), at ¶17 ***(Investor's Schedule of Legal Authorities at CL-060)***; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (July 14, 2006) ("*Azurix* - Award"), at ¶360 ***(Investor's Schedule of Legal Authorities at CL-070)***; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (February 6, 2007) ("*Siemens* - Award"), at ¶290 ***(Investor's Schedule of Legal Authorities at CL-144)***

II. CANADA DID NOT PROVIDE MFN TREATMENT

321. NAFTA Article 1103 establishes a requirement where the treatment provided to an American Investor, like Mesa, is compared to more favourable treatment provided to an investor, or investment, from either a Non-NAFTA Party or from a NAFTA Party other than the host state. The ultimate ownership of that better treated investment is irrelevant. This obligation is further reinforced by the terms of NAFTA Article 1104, which makes clear that the best treatment offered in the jurisdiction (under MFN treatment or national treatment) is what needs to be provided to a foreign investor under either NAFTA Articles 1102 or 1103.

322. Ontario provided treatment under the *GEIA* that was more favourable to investments of Non-NAFTA Parties or other NAFTA Parties (and their joint venture partners) than it provided in like circumstances to the Investor and its investments.

323. The Investor made reference in its Memorial to the consideration by the NAFTA Chapter Twenty panel on the meaning of the MFN obligation in NAFTA Article 1203 in *Re: Cross Border Trucking*.[309] The NAFTA Article 1203 MFN obligation for cross border services is virtually identical to the wording of Article 1103 except that the basis of comparison is upon service providers in Article 1203 rather than investors or investments in Article 1103.

324. The NAFTA Chapter Twenty panel noted Canada's argument about the meaning of the MFN obligation in this NAFTA state-to-state dispute. The panel noted Canada's position on the meaning of the MFN obligation required a comparison between a foreign service provider providing services into the United States with a domestic American service provider providing services in the United States. [310] The Chapter Twenty panel stated:

> the major issue in interpreting Article 1202 is a comparison between a foreign service provider providing services cross-border (here, from Mexico into the United States), and a service provider providing services domestically. Canada also contends that a "blanket" refusal by the United States to permit Mexican carriers to obtain operating authority to provide cross-border truck services would necessarily be less favorable than the treatment accorded to U.S. truck services providers in like circumstances.[311]

325. The same approach to interpretation should be followed by this Tribunal in the meaning to be given to Article 1103.

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[309] Memorial, at ¶322

[310] *In the Matter of Cross-Border Trucking Services*, NAFTA Secretariat File No. USA-MEX-98-2008-01, Final Report of the Panel (February 6, 2001) ("*Cross- Border Trucking* - Panel Report"), at ¶244 ***(Investor's Schedule of Legal Authorities at CL-069)***

[311] *Cross- Border Trucking* - Panel Report, at ¶244 ***(Investor's Schedule of Legal Authorities at CL-069)***

326. The NAFTA Tribunal in *ADF Group* also considered the meaning of Article 1103. The ADF Tribunal found that the substantive meaning of Article 1103 permitted the NAFTA Tribunal to provide substantively better treatment given by the United States arising from other investment treaties to the Canadian claimant under the MFN obligation.[312]

327. The *ADF* Tribunal also looked at the "best in jurisdiction treatment" obligation which is imposed by NAFTA Article 1104. The Tribunal examined the NAFTA text and concluded:

> As we read it, an investor of another NAFTA Party is entitled to claim the benefit of the best standard of treatment which the NAFTA party affords to its own nationals under Article 1102 and even to a non-party under Article 1103 (2). Moreover, the investor is entitled to the benefit of the "better treatment" by virtue of Article 1104 without having to allege and prove breach by the respondent Party of its obligations under both Articles 1102 and 1103. It is sufficient for the investor to allege and seek to prove breach of Article 1102 in order to be entitled to claim the benefit of Article 1104 by seeking to show that more favorable treatment is accorded to investors of another Party, or even investors of a non-Party (such as Albania and Estonia). In our view, that is precisely what the Investor here was trying to show.[313]

328. The goal of MFN Treatment is to ensure equality of competitive opportunities by creating a level playing field between all trading partners.[314] So Canada is required to provide the very best treatment provided in jurisdiction offered under NAFTA Articles 1102 or 1103.

329. The Canadian *Statement on Implementation* of the NAFTA identified the need of the NAFTA drafters to create open markets that remove barriers to trade. The goal, which was also reflected in the NAFTA objectives, was to establish a more stable and predictable economy that reduces sudden and unpredictable change.

> The NAFTA thus stands in the tradition of Canadian tradecraft, a tradecraft that carefully mixed bilateral, regional and multilateral initiatives into a coherent set of laws, regulations, policies and practices, attuned to the circumstances of the moment but good enough to endure. It allowed Canadians gradually to move towards more open markets based on the concept that measures that distort the efficient allocation of resources are likely to lower national and global welfare while the removal of such
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> For the business sector, Canadian tradecraft involves establishing a more stable and more predictable economic climate at home and abroad. It recognizes that business thrives in an orderly setting and stagnates when there is sudden and unpredictable change. Only by having a set of rules which treat all traders the same, which are widely known and uniformly applied and which provide for the orderly and equitable resolution of disputes will entrepreneurs have the confidence to compete, invest in the future and look beyond their own shores. And only if we

[312] *ADF Group* – Award, at ¶137 ***(Investor's Schedule of Legal Authorities at CL-072)***
[313] *ADF Group* – Award, at ¶137 ***(Investor's Schedule of Legal Authorities at CL-072)***
[314] Memorial, at ¶373

> have a business sector that has confidence about its future can we expect it to invest, innovate and generate jobs with a future.[315]

330. This general view was made even clearer in the commentary about the meaning of Article 1103. Canada in the *Statement on Implementation* says

> Article 1103 requires that a Party may not treat an investor or investment from a non-NAFTA country more favourably than **an** investor or investment from a NAFTA country (i.e., Canada must treat US and Mexican investors and investments as favourably as it treats, for example, European or Japanese investors or investments). The treatment required by Article 1104 is the better of national treatment and most-favoured-nation treatment.[316]

331. There is absolutely no question that Canada as a NAFTA Party must provide the best treatment provided to foreign companies in like circumstances (be they from NAFTA Parties or other jurisdictions) to Mesa.

332. The Investor continues to rely on the arguments contained in the Memorial,[317] which are summarized at paragraph 16 of the Memorial.[318]

333. The measures complained of concerning Canada's failure to adhere to Article 1103 relate to special privileges and inducements provided to the Korean Consortium to facilitate its Power Purchase Agreements and priority access to renewable energy transmission capacity in Ontario. These are:

a) The conclusion of a Memorandum of Understanding between the Ontario Ministry of Energy and the Korean Consortium on December 12, 2008 as a first step to granting the Korean Consortium preferential access to transmission capacity in Ontario;

b) The Framework Agreement between the Government of Ontario and the Korean Consortium, concluded on September 25, 2009 and signed on October 29, 2009, which set the stage for the signing of the *Green Energy Investment Agreement* and provided basis for the Korean Consortium's preferential access to transmission capacity in Ontario;

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[315] *Canadian Statement on Implementation, North American Free Trade Agreement,* Canada Gazette Part 1, January 1, 1994 ("*Canadian Statement on Implementation*"), at p.72 ***(Investor's Schedule of Legal Authorities at CL-012)***

[316] *Canadian Statement on Implementation*, at p.149 ***(Investor's Schedule of Legal Authorities at CL-012)***

[317] The Investor set out its arguments about the meaning of the Most Favoured Nation Treatment obligation in Article NAFTA Article 1103 at ¶¶514-608 of its Memorial.

[318] Memorial, at ¶16 says "Ontario, and thereby Canada, failed to provide treatment to the Investments in accordance with most favoured nation treatment as required by NAFTA Article 1103 by failing to provide Mesa and its Investments with treatment with respect to electricity transmission access and Power Purchase Agreements [and] other treatment in the regulatory and administrative process as favourable as that provided to other companies from other NAFTA Parties or from non-NAFTA parties who were in like circumstances with Mesa."

c) The Ministerial direction on September 30, 2009 by Ontario Minister of Energy Brad Duguid to the OPA to set aside 240MW of transmission capacity in Haldimand County and 260MW of transmission capacity in Essex County and Chatham-Kent for the Korean Consortium, even before the signing of the *GEIA*. This direction decreased the transmission capacity for renewable energy that could be awarded through the FIT Program and permitted the Korean Consortium to select its desired connection points;[319]

d) The signing of the *Green Energy and Investment Agreement* between the Government of Ontario and the Korean Consortium on January 21, 2010, including all special benefits and assistance it conferred on the Korean Consortium compared to Mesa in order to facilitate its renewable-energy PPA;

e) The Ministerial direction on September 17, 2010 by Ontario Minister of Energy Brad Duguid to the OPA to set aside 500MW of transmission capacity in the Bruce region for the Korean Consortium. This direction decreased the transmission capacity for renewable energy that could be awarded through the FIT Program and permitted the Korean Consortium to select its desired connection points;[320] and

f) The decision in August 2010 not to run the Economic Connection Test despite the fact that it was required by the FIT Rules and represented to the Investor.[321] The decision to delay the ECT was because the Korean Consortium had yet to select connection points for its projects;[322]

    i) These measures breached NAFTA Article 1103 and constitute a composite act that occurred when the *GEIA* was concluded in January 2010. The composite act continued after the conclusion of the *GEIA* and the date of the breach is dated to the first act in the series, December 12, 2008. The Investor was first affected in September 2009 when it was seeking to make its investment in Ontario and the Government of Ontario entered into the Framework Agreement with the Korean Consortium and the Minister of Energy directed transmission capacity be set aside for the Korean Consortium, removing it

[319] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, April 1, 2011 ***(Investor's Schedule of Exhibits at C-0089)***

[320] Letter from Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, September 17, 2010 ***(Investor's Schedule of Exhibits at C-0119)***

[321] Ontario Power Authority presentation, "The Economic Connection Test - Approach, Metrics and Process," May 19, 2010 ***(Investor's Schedule of Exhibits at C-0088)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 5.4(a) ***(Investor's Schedule of Exhibits at C-0347)***

[322] Witness Statement of Bob Chow (RWS – Chow), at ¶38

from the FIT competition.[323] Both of these measures ensured that the Investor would be precluded from competing for set amounts of transmission capacity that was being set aside for the Korean Consortium;

ii) The Investor was also affected on January 21, 2010 when the Korean Consortium secured renewable-energy PPAs in Ontario for its own projects without having to go through an open competition and on terms more favourable than awarded under the FIT contract;[324]

iii) Mesa was again affected by this breach on May 29, 2010 when North Bruce Wind Project ULC and Summerhill Wind Project ULC submitted their FIT applications and the Investor was provided less favourable treatment in the access to transmission and thus put in a less competitive position to compete for renewable-energy PPAs, compared to the Korean Consortium, which by that time had secured its own PPAs on more favourable terms than under the FIT contract;[325]

iv) All of the Investor's investments were again affected in August 2010 when the Economic Connection Test was not run as required by the FIT Rules, and as represented to Mesa, because the Korean Consortium had not finalized its selection of connection points.[326] This decision prevented the TTD and Arran projects from receiving FIT contracts;

v) All of Mesa's investments were affected by this measure on September 17, 2010 when it was no longer able to compete for the 500MW of transmission capacity in the Bruce region that was set aside for the Korean Consortium;[327] and

vi) On September 17, 2010, the Investor was first able to be aware of loss arising from Canada's breaches upon the publication of the Minister's Direction to the Ontario Power Authority to reserve of 500MW of transmission in the Bruce region for the exclusive use of the Korean Consortium. At this time,

[323] Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, September 30, 2009 ***(Investor's Schedule of Exhibits at C-0105)***

[324] OPA FIT application submitted for Twenty Two Degree Wind Energy Project, November 25, 2009 ***(Investor's Schedule of Exhibits at C-0364)*** OPA FIT Application submitted for Arran Wind Project, November 25, 2009 ***(Investor's Schedule of Exhibits at C-0129)***

[325] North Bruce Wind Energy I, FIT application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0360)***; North Bruce Wind Energy II, FIT Application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0361)***; Summerhill Wind Energy I, FIT Application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0362)***; Summerhill Wind Energy II, FIT Application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0363)***

[326] Witness Statement of Bob Chow (RWS – Chow), at ¶38

[327] Letter from Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, September 17, 2010 ***(Investor's Schedule of Exhibits at C-0119)***

> Mesa was first able to confirm that it suffered loss under the FIT Program due to better treatment provided to the Canadian investments of the Korean Consortium.[328]

334. Canada did not meet its obligation to provide Most Favoured Nation Treatment to the Investor and its Investments under Article 1103:

a) Mesa and its Investments were in like circumstances with those seeking to obtain transmission access and Power Purchase Agreements, as were the members of the Korean Consortium, and the investments owned by the Korean Consortium's joint venture partner, Pattern Energy;

b) Mesa and its Investments were in like circumstances with the members of the Korean Consortium, and with the investments of members of the Korean Consortium during that period of time before the signing of the *GEIA* in January 10, 2010 when Ontario provided better treatment to these Non-Party investors and their investments;

c) Better treatment has been provided throughout this period of time to the members of the Korean Consortium, and investments owned by their joint venture partners, were provided with better treatment than Mesa and its Investments; and

d) As described in Part Seven below, Canada has obliged itself to provide a better level of international law treatment to investments of investors from Non-NAFTA Parties than it has to investments owned by Mesa.[329]

335. The members of the Korean Consortium received better treatment as follows:

a) The members of the Korean Consortium received automatic rights under the *GEIA* to increase individual power project size within an overall 2500MW province-wide transmission limit;

b) The members of the Korean Consortium were provided with preferential access to government officials to address regulatory environmental approvals,

c) Preferred pricing;

d) Assistance with technical and regulatory approvals;

e) Faster contract approvals than under FIT;

f) Assistance with obtaining property for energy projects;

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[328] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶44

[329] For ease, this substantive MFN argument is addressed in Part Seven along with the consideration of the meaning of the International Law Standard of Treatment and the potential effect of the July 2001 statement of the NAFTA Free Trade Commission.

g) Assistance with Aboriginal consultations;

h) Information about transmission and other energy related information. This favourable treatment was not provided to Mesa; and

i) The members of the Korean Consortium were provided with treatment "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition" of Mesa's investment.[330]

336. The arguments presented by the Investor all address better terms of access to renewable energy Power Purchase Agreements from the Ontario Power Authority. Canada offered the members of the Korean Consortium the possibility of negotiating better conditions of market access for renewable power purchase contracts than were offered to Mesa (or indeed any other investor or investment that was not connected to the Korean Consortium).

337. Canada did not dispute Mesa's claim that the Investors and investments of Non-Parties or other NAFTA Parties under the *Green Energy Investment Agreement* receive treatment more favourable than that received by the Investor and its investments under the FIT Program. Canada simply asserts that Mesa, and indeed all other participants in the renewably-generated electricity market in Ontario, while in "like circumstances" among themselves are not in like circumstances with the members of the Korean Consortium and their joint venture partner. Canada also relies on an affirmative defense under 1108(7)(a) of NAFTA, the procurement exception, which has been addressed at length in Part Three of this Memorial.

III. INVESTMENTS UNDER THE *GREEN ENERGY INVESTMENT AGREEMENT* ARE IN LIKE CIRCUMSTANCES TO MESA'S INVESTMENTS

338. The investments and investors receiving treatment under the *Green Energy Investment Agreement* are in like circumstances to Mesa and its investments. All these investments sought to do the same thing: to offer renewable energy that each investment would generate in Ontario into the IESO-controlled Ontario transmission grid for sale to the ratepayers of Ontario by way of a twenty year Feed-in Tariff contract with expenditure from the Ontario Power Authority.

339. There is no functional difference between any of these applicants. All produce renewable energy for the same market, in the same manner, for the same term and under the same financial parameters.

[330] Memorial, at ¶514

340. In all respects, a Power Purchase Agreement under the *GEIA* is like a Power Purchase Agreement under the FIT Program. The *GEIA* contract terms were based on the FIT standard contract, the contracting party was the Ontario Power Authority; the generator went through the very same grid and sold the electricity through the grid to same ratepayers for the very same twenty year contract duration.

341. The *GEIA* provides that the PPA entered into by the Ontario Power Authority "shall be substantially in the form of the FIT Contract used by the OPA at the time such PPA is being entered into…"[331]

342. Power Purchase Agreements under the *GEIA* were required to meet the very same Ontario minimum domestic content requirements as those imposed under the FIT Program.[332] Korean Consortium projects were subject to similar conditions as FIT proponents concerning, among other things, land access, documentation, domestic content, quarterly status reports, and waiver forms.

343. There was a period of time when the members of the Korean Consortium operated by way of a Framework Agreement before the *GEIA* was signed. This Framework Agreement was executed after the FIT Program was put in place. At this time, the members of the Korean Consortium were seeking to obtain transmission access to the IESO-Controlled Ontario Grid to sell renewable energy through twenty year long Power Purchase Agreements with expenditure from the Ontario Power Authority just like FIT applicants such as Mesa.

344. The Expert Report of Seabron Adamson examined the operation of the Ontario Electricity Market, the FIT Program and the *GEIA*. Mr. Adamson concluded that the investments of Mesa, Samsung, Pattern, Suncor and NextEra all competed with each other in order to access to the Ontario transmission grid in order to obtain twenty year fixed price renewable energy Power Purchase Agreements from the Ontario Power Authority.[333]

345. In coming to this conclusion Mr. Adamson also considered the fact that competitors for the limited amount of electricity transmission access, including persons who worked for Samsung or Pattern Energy identified themselves in sworn statements as being competitors of Mesa and its investments in Ontario.[334]

346. Mr. Adamson also considered the fact that renewable power generator investments owned by members of the Korean Consortium under the *GEIA* had to comply with

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[331] *Green Energy Investment Agreement*, January 21, 2010, Article 9.1 ***(Investor's Schedule of Exhibits at C-0322)***
[332] *GEIA*, Article 9.2 ***(Investor's Schedule of Exhibits at C-0322)***
[333] Expert Report of Seabron Adamson, at ¶75
[334] Expert Report of Seabron Adamson, at ¶¶76, 80

identical regulatory requirements as renewable power generator investments under the FIT to sell the same type of renewable energy to Ontario ratepayers in the Ontario transmission grid.[335] Mr. Adamson concludes that there simply was no appreciable difference between *GEIA* proponents and FIT proponents.[336]

347. Mr. Adamson also examined the issue as to whether there were different requirements imposed upon proponents under the *GEIA* from those under the FIT. Mr. Adamson provided a careful review of the obligations under the *GEIA* and the obligations under the FIT. While Mr. Adamson identified many examples where members of the Korean Consortium received better treatment under the *GEIA* than a FIT applicant would receive, he could not identify any differences in obligation that would make the proponents dissimilar.[337]

348. A press backgrounder was released to the Ontario public by the Premier of Ontario and the Ontario Minister of Energy at the signing of the *GEIA* on January 10, 2010. The actual terms of the *GEIA* were not released until long after this arbitration commenced. The Press backgrounder issued by the Premier and the Minister stated that the *GEIA* would result in new investment of $7 billion and the creation of 16,000 jobs.

349. Mr. Adamson carefully examined the Ontario press backgrounder which has been extensively relied upon by Canada in its Counter Memorial. He was able to conclude that there was absolutely no requirement on the Members of the Korean Consortium under the *GEIA* that was substantively different than a requirement under the FIT.[338]

a) Both *GEIA* and FIT proponents were required to meet the Ontario minimum domestic content requirements.[339]

b) Both *GEIA* and FIT proponents were required to locate their wind power generation facilities in Ontario.[340]

c) There was no requirement upon *GEIA* or FIT proponents to hire any service provider outside of the Ontario minimum domestic content requirements, nor any requirement to create any manufacturing plants or manufacturing jobs.[341]

350. The only difference identified by Mr. Adamson was a benefit provided to members of the Korean Consortium in the event that a member could identify new jobs created by the orders necessary to fulfil the Ontario minimum domestic content. In such a

[335] Expert Report of Seabron Adamson, at ¶¶69, 75, 97
[336] Expert Report of Seabron Adamson, at ¶¶57, 69, 89
[337] Expert Report of Seabron Adamson, at ¶¶57, 69, 89
[338] Expert Report of Seabron Adamson, at ¶¶19, 46
[339] Expert Report of Seabron Adamson, at ¶¶34, 43
[340] Expert Report of Seabron Adamson, at ¶¶55, 62, 75
[341] Expert Report of Seabron Adamson, at ¶¶19, 29, 33

circumstance, members of the Korean Consortium were entitled to receive a better price than FIT Proponents: a 2% price increase above the FIT Contract price as the Economic Development Adder (that is an additional.27 cents.). Such a benefit, which arose simply from identifying existing common obligations imposed upon FIT and *GEIA* proponents, could not create any meaningful difference between the proponents in the opinion of expert Adamson.[342]

351. Mesa and its investments under the FIT Program were like to the members of the Korean Consortium, and their investments, under the *GEIA*. An examination of the specifics of the *GEIA* supports the expert opinion of Mr. Adamson. The *GEIA* did not obligate Samsung, KEPCO or their joint venture partners such as Pattern Energy, to create one additional job in Ontario in connection to the very substantial preferences provided to them under the contract. The only obligations were the obligations in the *GEIA* to follow the minimum domestic content requirements for projects that would apply to those persons applying for Power Purchase Agreements under the FIT Program.[343]

352. It is clear from the terms of the *GEIA*, that the members of the Korean Consortium were not responsible for creating any jobs on their own. Recital B to the *GEIA* identifies that 900 jobs could be created by Manufacturing Partners in Ontario. The Recital states:

> (B) WHEREAS, the Korean Consortium intends to develop, construct and operate wind and solar generation projects in Ontario which in total aggregate up to 2,500MW of capacity and, with its Manufacturing Partners, to establish and operate facilities in Ontario for the manufacture of wind and solar generation equipment and components (the Project), which is estimated to create approximately 900 jobs in Ontario;

353. Section 8 of the *GEIA* is entitled Manufacturing Commitments however the section does not have any binding manufacturing commitments within it. Instead, it only requires commercially reasonable actions to be endeavoured. The *GEIA* says:

> 8.1 As part of the Project, the Korean Consortium will endeavour on a commercially reasonable basis to bring Manufacturing Plants to the Ontario for the Components comprising towers and blades for wind generation facilities, solar inverters and solar modular assembly for solar Generation facilities in accordance with the Operational Time frame on the time frame set out below:

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[342] Expert Report of Seabron Adamson, at ¶¶35, 45, 95, 96

[343] *GEIA*, Article 8.8 ***(Investor's Schedule of Exhibits at C-0322)***; The only way to explain the additional 10,000 jobs arising out of the Green Energy and Green Investment Act is consider the aggregation effect of the normal and ongoing jobs generated from the ongoing support teams that would be needed by each renewable power generator to operate their own individual facilities or the effect of manufacturing jobs that were created by those who needed to meet the minimum Ontario local content requirements to obtain a renewable energy power purchase contract from Ontario.

Phase	Component	Operational Time Frame
1	Solar Inverters	December 31, 2011
1	Towers	December 31, 2011
2	Solar Module Assemblies	August 31, 2012
4	Blades	December 31, 2011

1. ...

8.3 The Parties acknowledge and agree that the Economic Development Adder payable pursuant to Article 9 is in consideration of the Korean Consortium's attraction of Manufacturing Plants to the Province of Ontario, or in the case of solar inverters, the arrangements to procure solar invertors from an existing manufacturing plant currently located in Ontario as described in Article 8.2, all within the Operational Time Frame identified in Article 8.1, and the jobs that result therefrom. For greater certainty, bringing Manufacturing plants to Ontario includes the use of existing facilities for new purposes.

354. Section 8.3 makes clear that the commitment set out in Section 8 are directly related to the payment to the Korean Consortium of the Economic Development Adder – which was a price incentive on the existing 13.5 cent per kilowatt hour price of one half a cent per kilowatt hour of power supplied. This amount was later reduced to only 0.27 cents per kilowatt hour.

355. The *GEIA Amending Agreement* provides that "in the event that a Manufacturing Plant ceases operation prior to December 31, 2016, the Economic Development Adder shall be reduced by 25 percent."[344]

356. The obligation in the *GEIA* was not to create jobs. The obligation was to identify jobs that were created in Ontario, from new or existing plants. Such jobs identified could simply be the jobs that would arise from meeting the Ontario minimum domestic content requirements for the renewable energy facilities that would receive preferential treatment under the *GEIA*.

357. The *GEIA* made clear that the members of the Korean Consortium could claim credit for the jobs produced as a result of the construction of Consort renewable energy power facilities by investments owned or controlled by members of the Korean Consortium.[345] As a result, the investment that would be made in Ontario by the members of the

[344] *Green Energy Investment Agreement* – Amending Agreement, By and Among Her Majesty the Queen In Right of Ontario as represented by the Minister of Energy and Korea Electric Power Corporation and Samsung C&T Corporation, July 29, 2011, at p.13 ***(Investor's Schedule of Exhibits at C-0282)***

[345] *GEIA*, Article 8.8 ***(Investor's Schedule of Exhibits at C-0322)***

Korean Consortium would only be the amounts expended by the Korean Consortium on building specific renewable energy projects.[346]

358. The Korean Consortium under the *GEIA* and the FIT Proponents were in identical circumstances with respect to requirements to invest in Ontario.

359. The failure to meet the commitment to endeavour on a commercially reasonable basis to bring Manufacturing Plants was only related to the Economic Development Adder and did not result in a breach of the overall *GEIA*. The failure to meet the commitment would also not result in the withholding of any preferences under the *GEIA* other than the half cent per kilowatt hour price boost from the Economic Development Adder.

360. There is no other mention in the *GEIA* about job creation. Samsung, KEPCO, nor Pattern were ever obligated to provide any local jobs in Ontario outside of the jobs that would be normally associated by the mandatory Ontario minimum local content required to meet the terms of FIT Program. In this respect regarding Ontario minimum domestic treatment, the Korean Consortium members under the *GEIA* and the FIT Program proponents were treated in exactly the same circumstances as to the performance expected of them.

IV. BETTER TREATMENT WAS PROVIDED TO INVESTMENTS OF INVESTORS FROM NON-NAFTA PARTIES OR OTHER NAFTA PARTIES

361. Canada must provide treatment as favourable as it provides to investments and investors in like circumstances to those from any other NAFTA Party or from any non-NAFTA Party

362. In its Counter Memorial, Canada has demonstrated a misunderstanding of the clear wording of its obligations under NAFTA Article 1103. Article 1103 provides that Canada must provide treatment to Mesa as favourable as that provided to any Non-NAFTA Party entity or any entity from another NAFTA Party. The relevant words of Article 1103 states:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to ……
> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, **to investments of *investors of any other Party*** or of a non-Party with respect to ….. (*emphasis added)*

363. Canada has re-interpreted this clear text to mean something less than what is set out in the obligation. Canada says:

[346] *GEIA*, Articles 3.1 and 3.2 ***(Investor's Schedule of Exhibits at C-0322)***

> It is fundamental to any allegation of breach that the allegedly more favourable treatment has been accorded to another investor of the appropriate nationality. In particular, in the context of a dispute between a US investor and Canada, the relevant comparator investors and investments for the purposes of …..Article 1103 would be either Mexican or nationals of a non-NAFTA Party. Indeed confirming that the right comparators are being offered treatment is the first fundamental step in an Article 1102 or 1103 analysis.[347]

364. The Investor agrees with Canada that confirming the identity of the right comparators is a fundamental first step in the analysis of Article 1103. Canada's misunderstanding stems from Canada's faulty understanding of the explicit words of NAFTA Article 1103.

365. With respect to the MFN obligation owed by Canada, the "investors of any other Party" of the NAFTA are investors from the United States and Mexico. There are only three parties to the NAFTA. The investor must always establish diversity of nationality with the host state that is the respondent of its claim. If the drafters of the NAFTA had intended to exclude the requirement that the investor be treated as favourably other investors of its own nationality in the territory of Canada, they would have used the wording "the other Party" not "any other Party," which can have no possible construction other than referring to *more than one* other party than the host state, thus in this case both Mexico and the United States.

366. Canada states that the relevant comparator investments under NAFTA Article 1103 must "be either Mexican or nationals of a non-NAFTA Party." This statement is incomplete. The correct comparator investments under NAFTA Article are Americans, Mexicans or nationals of a non-NAFTA Party (such as Korea). Those are the nationalities of the investments which have been used by the Investor in this arbitration.

367. Canada does not challenge the fact that the *GEIA* gave very substantial preferences to the members of the Korean Consortium. These preferences were outlined in detail in the Investor's Memorial.[348] The Investor previously confirmed that these preferences were:

1. Guaranteed reserved access to 2500MW of electricity transmission capacity;[349]
2. Facilitated access to contract approval by Ontario energy regulators and policy staff;[350]
3. Assistance in addressing technical and regulatory approvals;[351]

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[347] Counter Memorial, at ¶351
[348] Memorial, at ¶¶531-599
[349] *Green Energy Investment Agreement* ("*GEIA*"), January 21, 2010, Article 3 ***(Investor's Schedule of Exhibits at C-0322)***
[350] *GEIA*, Article 7.3(a) ***(Investor's Schedule of Exhibits at C-0322)***
[351] *GEIA*, Article 7.3(a) ***(Investor's Schedule of Exhibits at C-0322)***; Email from Wookyung Kim (Samsung) to Sue Lo (Ministry of Energy), Pearl Ing (Ministry of Energy), Carolyn Caldwell (Ministry of Energy) and Paul Johnson (Ministry of Energy), August 2, 2011 ***(Investor's Schedule of Exhibits at C-0619)***

4. Assistance in addressing aboriginal consultation issues;[352]
5. The opportunity to modify the size of specific renewable energy projects within the reserved 2500MW of transmission capacity;[353] and
6. The ability to receive an additional price incentive over the 13.5 FIT Contract price in the event that the terms of the Economic Development Adder.[354]

368. The better treatment provided to the Korean Consortium is not solely provided for in the *GEIA*. In fact, the Korean Consortium received better treatment by way of receiving a reservation of capacity months before the *GEIA* or the Framework Agreement were signed.[355]

369. Seabron Adamson in his Expert Report considered the operation of the *GEIA*. He concluded that the *GEIA* provided better treatment to members of the Korean Consortium than that provided to FIT proponents. He concluded that the effects of the *GEIA* was to have a systemic de-risking of many of the ordinary operational risks that would arise in a renewable energy project.[356] These reduced risks and associated benefits of better treatment accruing exclusively to Members of the Korean Consortium included:

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[352] *GEIA*, Article 5.2(f) ***(Investor's Schedule of Exhibits at C-0322)***; Section 5.2 of the *GEIA* outlines the responsibilities of the Working Group. The Korean Consortium benefitted from attending at least 18 Working Group meetings from March 2010 through March 2011. Minutes/Agenda of April 15, 2010 Working Group Meeting ***(Investor's Schedule of Exhibits at C-0554)***; Minutes/Agenda of April 27, 2010 Working Group Meeting ***(Investor's Schedule of Exhibits at C-0555)***; Minutes/Agenda of May 4, 2010 Working Group Meeting ***(Investor's Schedule of Exhibits at C-0556)***; Minutes/Agenda of May 11, 2010 Working Group Meeting ***(Investor's Schedule of Exhibits at C-0557)***; Minutes/Agenda of June 14/16, 2010 Working Group Meeting ***(Investor's Schedule of Exhibits at C-0558)***; Minutes/Agenda of July 5/7, 2010 Working Group Meeting ***(Investor's Schedule of Exhibits at C-0559)***; Minutes/agenda of July 20, 2010 Working Group Meeting ***(Investor's Schedule of Exhibits at C-0560)***; Minutes/Agenda of August 11, 2010 Working Group Meeting ***(Investor's Schedule of Exhibits at C-0561)***; Minutes/Agenda of August 25, 2010 Working Group Meeting ***(Investor's Schedule of Exhibits at C-0562)***; Minutes/Agenda of September 10, 2010 Working Group Meeting ***(Investor's Schedule of Exhibits at C-0563)***; Minutes/Agenda of October 5, 2010 Working Group Meeting ***(Investor's Schedule of Exhibits at C-0564)***; Minutes/Agenda of October 19, 2010 Working Group Meeting ***(Investor's Schedule of Exhibits at C-0565)***; Minutes/Agenda of November 4, 2010 Working Group Meeting ***(Investor's Schedule of Exhibits at C-0566)***; Minutes/Agenda of December 8, 2010 Working Group Meeting ***(Investor's Schedule of Exhibits at C-0567)***; Minutes/Agenda of January 13, 2011 Working Group Meeting ***(Investor's Schedule of Exhibits at C-0568)***; Minutes/Agenda of February 15, 2011 Working Group Meeting ***(Investor's Schedule of Exhibits at C-0569)***; Agenda of March 30, 2011, Working Group Meeting ***(Investor's Schedule of Exhibits at C-0570)***; Working Group Meeting Terms of Reference ***(Investor's Schedule of Exhibits at C-0571)*** The Korean Consortium was also assisted through Implementation Task Force meetings. Resolution of the Implementation Task Force, November 2, 2010 ***(Investor's Schedule of Exhibits at C-0572)***; Implementation Task Force Terms of Reference, June 1, 2010,***(Investor's Schedule of Exhibits at C-0573)***

[353] *GEIA*, Article 3.4 ***(Investor's Schedule of Exhibits at C-0322)***

[354] *GEIA*, Article 9.3 ***(Investor's Schedule of Exhibits at C-0322)***

[355] Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, September 30, 2009 ***(Investor's Schedule of Exhibits at C-0105)***

[356] Expert Report of Seabron Adamson, at ¶¶109-112

a) Reduction in price risk due to the 20 year term of the contract and with the benefit of the Economic Development Adder;

b) Increase in price in the event that the economic development adder or the aboriginal adder is applied;

c) Reduction in risk because the Korean Consortium obtained a guaranteed amount of transmission capacity up to 2500MW;

d) Ability to unilaterally increase the size of individual renewable energy projects by 10% up to a limit of 2500MW.

e) Increase in speed in obtaining contract approvals from the Ontario Power Authority;

f) Increase in speed in obtaining Regulatory Environmental Approvals and other technical assistance from government officials and energy regulatory personal from Ontario owned energy enterprises;

g) Better assistance with aboriginal consultations;

h) Better treatment to obtain property sites for additional wind farms;[357]

370. Mr. Adamson concluded that there was the same treatment to FIT Proponents and *GEIA* proponents with respect to:

a) The financial risk that the Ontario Power Authority would not pay over the Ontario ratepayer funds;

b) The need to meet Ontario minimum domestic content requirements; and

c) The need to obtain regulatory environmental approvals.

371. Both the Witness Statement and the Reply Witness Statement of Cole Robertson note that the joint venture partners of the Korean Consortium contacted Mesa in an attempt to purchase each of Mesa's Ontario wind projects seeking FIT contracts.[358] When the Korean Consortium attempted to purchase the North Bruce project it noted that it was in the [redacted][359] The Korean Consortium indicated, [redacted]

[357] Expert Report of Seabron Adamson, at ¶¶45, 102-104, 109-112
[358] Witness Statement of Cole Robertson at ¶30-31; Reply Witness Statement of Cole Robertson at ¶¶71-73
[359] Witness Statement of Cole Robertson at ¶30-31; Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶73

[redacted] The Korean Consortium was interested in buying all of Mesa's Ontario wind projects.[361]

372. The Korean Consortium sought to acquire wind projects that failed the FIT process to transform them into successful *GEIA* projects. As Mr. Low and Mr. Taylor conclude in their Reply Valuation Report: "[I]t appears that Pattern Renewable Holdings Canada ULC and Samsung believed they could have developed projects in the *GEIA* ranked as low as 39 and 40 as evidenced by the January 12, 2011 offer for North Bruce."[362] The ability to convert failed FIT projects into successful *GEIA* projects is a form of better treatment that was available to the Korean Consortium and its joint venture partners and their Canadian subsidiaries that was not afforded to Mesa through the FIT Program. Mesa was only able to obtain a FIT contract, and access to a Power Purchase Agreement, if its project applications ranked highly enough. The Korean Consortium, however, did not need to concern itself with the technicalities of ranking and distilling applications. These investors were able to dispense with formalities that the Investor's applications were contingent upon, seek out projects that stood no chance of a FIT contract, and secure Power Purchase Agreements for them.

373. Accordingly, Canada has provided more favourable treatment to investments of investors or investors from Non-Parties or from other NAFTA Parties in like circumstances than it provided to Mesa and its Investments.

V. ESTABLISHMENT, CONDUCT AND OPERATION OF THE INVESTMENT

374. NAFTA Article 1103 requires that the treatment must be with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

375. The Article 1103 MFN obligation is about treatment no less favourable with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. The *GEIA* constitutes a form of treatment that is addressed by the scope of Article 1103, which applies to treatment more favourable with respect to establishment, expansion, conduct and operation of an investment in Canada by an investor from another NAFTA Party or a non NAFTA Party.

376. The Treatment provided by the Ontario Power Authority and the Government of Ontario to the Korean Consortium and its joint venture partners relates to the

[360] Letter from Pattern Renewable Holdings Canada, ULC to Mark Ward (Mesa Power Group), September 22, 2010 ***(Investor's Schedule of Exhibits at C-0423)***
[361] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶67-68
[362] Deloitte Reply Valuation Report, at ¶5.6

establishment, expansion, conduct or operation of economic activity and as such provides better treatment than that received by the Investor and its investments.

VI. INVESTMENT PROMOTION AGREEMENTS ARE NOT EXCLUDED FROM MFN

377. The NAFTA Article 1103 obligation requires that treatment no less favourable than that provide to an investment of an investor of another Party or a non-Party be given to the investor of a Party from another NAFTA state. The obligation naturally covers all better treatment provided to the Investor or its Investment with respect to the establishment, alienation, conduct, management, operation, control and alienation of its investment.

378. The natural and ordinary meaning of Most Favoured Nation Treatment obligation in NAFTA Article 1103 requires that a consideration be given to its terms.

379. Better treatment arising from obligations in a state contract has long been recognized as being inconsistent with the core of MFN treatment. In 1910, Former US Secretary of State, Elihu Root, explained in a speech to the American Society of International Law the effect of an MFN clause was that it was essentially "a commercial clause."[363] Martins Paparanskis quotes another speech from Mr. Root where he explains the nature of the MFN obligation by stating:

> if any state chooses to extend privileges to alien residents …, the state will be forbidden by the operation of the treaty to discriminate against the resident citizens of the particular country with which the treaty is made and will be forbidden to deny to them the privileges which it grants to the citizens of other foreign countries.[364]

380. Plain and simple, the MFN treatment obligation compares treatment. It makes no difference whether the source of that better treatment arises from a contract, legislation, policy or practice. The source is simply irrelevant – what is relevant is whether more favourable treatment is provided.

381. There is absolutely no support for Canada's argument that agreements like the *Green Energy Investment Agreement* constitute a class of international agreement that is exempt from the application of MFN treatment obligations within the NAFTA text.[365] A review of the NAFTA demonstrates that the *GEIA* would clearly be covered by the obligations of the treaty. Indeed having not provided the legal instruments in question in its evidence, and indeed refusing to provide them, Canada cannot be considered to

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[363] E. Root, "The Basis of Protection to Citizens Residing Abroad" (1910) 4 ASIL Proceedings, cited in Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatmen*, Oxford University Press, 2013 ("*Paparinskis*"), at 105.) ***(Investor's Schedule of Legal Authorities at CL-103)***

[364] Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment*, at 105 ***(Investor's Schedule of Legal Authorities at CL-103),*** relying on E. Root, "The Real Question under the Japanese Treaty and the San Francisco School Board Resolution" (1907) 1 AJIL, 273, at pp.277-278

[365] There is no meaningful support for this position in international law. See Stephen Pogany, "Economic Development Agreements" 7 *ICSID Rev 1* (1992) ***(Investor's Schedule of Legal Authorities at CL-338)***

have come close to meeting its burden of proof that the GEIA can, in light of all of its terms and conditions, be characterized this way. But in any case, based on the evidence available, and if one accepts Canada's own statements about the content of the GEIA, the characterization as a kind of agreement excluded from NAFTA obligations is incorrect.

382. The Klockner Tribunal considered the operation of an Economic Development Agreement with Cameroon. The Tribunal had no difficulty in rejecting the view that there is a special legal regime applicable to economic development agreements. The Tribunal emphasised that it did not intent to apply new or exceptional legal principles only because they concern projects affecting the economic and social development of a given country.[366]

383. The NAFTA was very clear to identify international agreement categories that would be exempt from the coverage of the MFN treatment obligation. NAFTA Article 1108(6) provides exceptions to the NAFTA Chapter Eleven MFN obligations to be listed by each Party in Annex IV. Canada made exceptions to the Chapter Eleven MFN treatment obligation for all bilateral investment treaties that Canada had entered into before the coming into force of the NAFTA (on January 1, 1994).[367] Canada also exempted all future foreign programs to which it was a party.[368]

384. The coverage of the NAFTA cannot be circumvented by an unspecified sectoral carveout for an unspecified type of agreement governing investments (which is the subject of the obligations under Chapter Eleven in general and Article 1103 in particular).

385. The NAFTA has specific sectors which are excluded from the MFN Treatment obligation. In addition, specific types of agreements are exempted from MFN Treatment. With respect to other NAFTA Chapter Eleven obligations, Canada has also reserved against specific contractual agreements in Article 1108 reservations.

386. Canada also exempted certain sectors in their entirety from coverage under the MFN obligation in Article 1103, including aviation, fisheries, telecommunications and maritime matters.

387. Canada also made specific reservations to NAFTA Article 1103 for NAFTA non-conforming measures within reservations which were negotiated and listed in Annexes I and II (under Article 1108).

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[366] *Klöckner v. Cameroon*, Award, October 21, 1983, 2 ICSID Reports 9, at p.59 ***(Investor's Schedule of Legal Authorities at CL-285)***

[367] NAFTA Annex IV.- Canada

[368] NAFTA Annex IV. - Canada

388. It is clear that Canada believed that investment promotion agreements, and specific contracts between a government entity and a private party could constitute a measure that was covered by the NAFTA. For example, Canada excluded:

a) Investment agreements made with private "project owners" in connection with the Hibernia Offshore development.[369]

b) Contracts for the development of petroleum projects in the Yukon Territory

c) Contracts for development in relation to Nova Scotia offshore petroleum.

389. Canada has demonstrated in the NAFTA that it knew how to exclude specific agreements, types of agreement and sectors from the coverage of MFN treatment and did so. The NAFTA is clearly capable of covering treatment arising from an investment promotion agreement and it Canada had intended to exclude MFN treatment from investment promotion agreements; it would have done so explicitly in the treaty.

390. Canada claims that obligations under investment promotion agreements could never be considered "in like circumstances" to an obligation under an investment treaty like the NAFTA.[370] There is no support for this contention in the NAFTA. Instead Canada relies upon a statement made by a 2010 UNCTAD MFN Discussion paper to this effect.[371]

391. The 2010 UNCTAD paper on MFN Treatment contains no discussion about this issue. It merely refers to a 1999 UNCTAD discussion paper.[372] A review of the 1999 UNCTAD MFN discussion paper reveals that the paper is discussing a different issue. The 1999 UNCTAD MFN paper says:

> If a host country granted special treatment or incentives to an individual investor in an investment contract between it and the host country (so-called "one-off" deals), there would be no obligation under the MFN clause to treat other foreign investors equally. The reason is that a host country cannot be *obliged* to enter into an individual investment contract. Freedom of Contract prevails over the MFN standard.[373]

392. It is clear from reading the original statement in the 1999 UNCTAD MFN discussion paper that the concern raised by the author is about the propriety of imposing specific-performance like obligations on states which would force them to enter into specific contractual agreements with foreign investors and their investments. The question

[369] Canada's reservation is at Annex I.
[370] Counter Memorial, at ¶¶371-373
[371] Counter Memorial, at ¶374 relying on *Most Favoured Nation Treatment*, United Nations Conference on Trade and Development (UNCTAD), UNCTAD Series on Issues in International Investment Agreements II (New York and Geneva: 2010) ("*MFN*, UNCTAD") ***(Investor's Schedule of Legal Authorities at CL-066)***, at ¶29
[372] United Nations Conference on Trade and Development (UNCTAD), "Most Favoured Nation Treatment" UNCTAD Series on Issues in International Investment Agreements (New York and Geneva: 1999) ("MFN, UNCTAD (1999)") at p.6 ***(Investor's Schedule of Legal Authorities at CL-054)***
[373] UNCTAD, Most Favoured Nation Treatment (1999), at p.6 ***(Investor's Schedule of Legal Authorities at CL-054)***

posed is whether a MFN treatment clause can forcibly compel a sovereign government to enter into the very same contractual terms with another investment? The UNCTAD Report says that the power of freedom of contract means that no specific performance can be ordered on a government. A government cannot be ordered to enter into a specific contract with a foreign investor.

393. NAFTA Investor State Tribunals do not have the power to make a final award that would order Canada to enter into a specific contract with the Investor or its Investments.[374] The scope of the statement in the 1999 UNCTAD document does not cover the situation where damages are ordered to compensate another investor or investment who has not received the treatment as favourable as that provided to the best treated investor. Accordingly, the concerns that are addressed in the UNCTAD MFN paper do not arise.

394. The position articulated in the UNCTAD 1999 MFN Report or the 2010 UNCTAD MFN Report was not based on any jurisprudence of any kind, or on any treaty provision. It was a simple assertion made by the author of the 1999 Report that was repeated without adequate reference in a later iteration of the UNCTAD discussion paper series.

395. The Tribunal in *Paushok v. Mongolia* considered whether there was a breach of MFN treatment when a stabilization clause that had been offered to a Canadian company, Boroo, was not offered to Paushok. On the facts, the Tribunal concluded that Paushok had actually been offered the option to be treated as favourably as Boroo (the better treated Canadian company) but it declined to be treated in the same manner. [375]

396. The approach from the *Paushok* Tribunal is relevant to the current arbitration. Paushok knew that it could obtain a stabilisation agreement if it applied. Paushok did not apply while Boroo did. In the current arbitration, Canada never indicated to any other foreign investors generally that they could have a deal like the *GEIA*.

397. Indeed a review of the secret Framework Agreement entered into by Ontario and the Korean Consortium indicates that this arrangement was an exclusive partnership between Ontario and the Korean Consortium.[376]

398. The terms and operation of the *GEIA* were secret. Indeed the Ontario Auditor General reports that the terms of the *GEIA* were kept secret from the Ontario Power Authority

[374] NAFTA Article 1135 deals with Final Awards and this type of award is prohibited.

[375] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011 ("*Paushok* - Award")***(Respondent's Schedule of Legal Authorities at RL-065)***

[376] Draft Framework Agreement by and Among Her Majesty The Queen In Right of Ontario, Korea Electric Power Corporation and Samsung C&T Corporation, September 25, 2009 ***(Investor's Schedule of Exhibits at C-0328)***

who was to administer its terms until it was signed by the members of the Korean Consortium and the Premier of Ontario.[377]

399. The existence of the FIT program, with its detailed policies and rules, led to the reasonable expectation that the unique avenue of access was through the FIT Program and set alone by the written conditions of the FIT Program alone, as well as any other generally applicable laws and regulations that applied in Ontario.

400. In considering the MFN obligation, the *Paushok* Tribunal relied upon the brief statement in the 2010 UNCTAD MFN Report about investment promotion agreements. It does not appear that 1999 MFN Report, upon which the 2010 UNCTAD MFN Report comment was based, was made available to the Tribunal.

401. The *Paushok* Tribunal was also apparently unaware that the fact situation at issue in their particular claim was considered in the 1999 UNCTAD Report. The 1999 UNCTAD MFN Report concluded that foreign investors who are "all treated equally" as being candidates for special privilege or incentive would be in like circumstances. The 1999 UNCTAD MFN Treatment Report stated:

> The relevance of MFN in this particular instance is that all foreign investors would be treated equally for purposes of being potential candidates for the special privilege or incentive which in practice could only be granted to one individual investor.[378]

402. The *Paushok* Tribunal concluded that investment treaties did not compel states to enter into contractual agreements with specific foreign parties. The *Paushok* Tribunal stated "it is a matter of policy for a State to decide if it wishes to enter into such agreements."[379] However, as a result of the 1999 UNCTAD MFN Report not being made available to the Paushok Tribunal, the *Paushok* Tribunal made an inadvertent misstatement of the law regarding MFN when it concluded that treatment under investment promotion treaties cannot be considered to be "in like circumstances" with treatment provided under investment treaties. A reading of the UNCTAD MFN Report would not support this view.

403. The NAFTA Article 1103 MFN treatment obligation requires treatment as favourable, that is even handed treatment, in all the aspects of treatment stated in NAFTA Article 1103. Canada is free to enter into, or not enter into, an agreement with any given investor, so long as the *result* is treatment no less favourable of investors in like circumstances. The result, however in the current case is clearly less favourable treatment of Mesa than Samsung, another investor in like circumstances. In any event,

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[377] 2011 Annual Report of the Auditor General, Chapter 3, VFM Section 3.03 Electricity Sector – Renewable Energy Initiatives, at p.108 ***(Investor's Schedule of Exhibits at C-0228)***

[378] UNCTAD, Most Favoured Nation Treatment (1999), at p.7 ***(Investor's Schedule of Legal Authorities at CL-054)***

[379] *Paushok* - Award, at ¶476 ***(Respondent's Schedule of Legal Authorities at RL-065)***

the existence or non-existence, of an agreement with an investor cannot alter the obligations of a party to other Parties of the treaty, nor would it affect its responsibility to perform them in good faith, under the general rules of treaty law.

404. The Investor agrees with Canada and the supporting UNCTAD documents that the NAFTA Article 1103 MFN obligation should not be interpreted as prohibiting Canada from entering into an agreement with any investor or investment with which Canada seeks to contract. Nor does the MFN obligation require that Canada enter into an agreement with the Investor. The MFN obligation in NAFTA Article 1103 requires even-handedness in all the aspects of treatment with respect to the establishment, management, conduct and operation of investments. The mere existence of an agreement with an investor of another nationality cannot obviate the duty of even-handed treatment under Article 1103, unless there is some particular exception or reservation that applies. The legal security of the NAFTA would be fundamentally undermined if a NAFTA party could reduce the scope of its obligations simply by entering into an agreement with a private actor. In this way, a NAFTA Party is free to make an agreement that contains better treatment but at the same time, the Party is not free to ignore its obligations of even-handedness under NAFTA Article 1103.

A. Conclusion

405. Canada has breached its obligations under NAFTA Article 1103 by providing better treatment to investors and investments of investors from other NAFTA Parties or non-NAFTA Parties who are in like circumstances to the Investor and its Investments.

406. It is clear that members of the Korean Consortium were not required to do anything different from an ordinary FIT Applicant but the members of the Korean Consortium received significantly better treatment than ordinary FIT Applicants.

407. The Investor and its Investments are in like circumstances to the general class of applicants who competed to obtain access for transmission in the IESO-controlled Ontario transmission grid to be able to sell renewable energy through twenty year long Feed-in Tariff Power Purchase Agreements through the Ontario Power Authority.

408. In addition, other investments owned by the nationals of other Parties to the NAFTA, in like circumstances, also received more favourable treatment than Mesa. For the reasons set out above, Canada has breached its most-favoured nation treatment obligation in Article 1103 by not treating the Investor and its Investment as favourably as investors and investments of investors from other states.

409. Rather than providing treatment equal to the most favourable treatment available, Canada actually provided much less favourable treatment to the Investor and its

Investment. By comparison, Canada provided more favourable treatment to investments from other NAFTA Parties and non-NAFTA Parties. The Investor and its Investment have suffered injury, loss, harm and damage as a result of Canada's failure to meet its NAFTA Article 1103 Most Favoured Nation treatment obligation. Thus Canada has therefore breached its NAFTA Article 1103 obligation to provide most favoured nation treatment to Mesa and its investments.

PART SIX: NAFTA ARTICLE 1102 NATIONAL TREATMENT

I. NATIONAL TREATMENT

410. A breach of Canada's national treatment obligation in Article 1102 exists when:

a) The Investor or its investments were in like circumstances to investors or investments of investors from Canada;

b) Those investors or investments of investors from Canada received more favourable treatment than the Investor or its investments; and

c) The more favourable treatment was provided with respect to the establishment, acquisition, expansion, management, conduct, operation or sale or other disposition of investments.

411. Canada gave better treatment than that provided to the Investor and its Investments to the following Canadians who were in like circumstances:

a) Samsung Renewable Energy Inc. ("Samsung Canada"), a Canadian corporation owned by Samsung,[380]

b) Pattern Renewable Holdings Canada, a Canadian corporation owned by Pattern Energy Group,[381]

c) Boulevard Associates, a corporation incorporated in the province of New Brunswick Canada, owned by NextEra,[382] and

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[380] Certificate of Status and Corporation Profile Report of Samsung Renewable Energy Inc., dated April 4, 2014 ***(Investor's Schedule of Exhibits at C-0472)***

[381] Corporation Profile Report of Pattern Renewable Holdings Canada, ULC, dated April 4, 2014 ***(Investor's Schedule of Exhibits at C-0578)***; Pattern entered into a joint venture with Samsung to fill the first [redacted] that Samsung received through the *GEIA* (Transcript of Colin Edwards deposition, at p.60. Ln. 2-5 ***(Investor's Schedule of Exhibits at C-0537)***; The Power Purchase Agreements were entered into by entities jointly owned by Samsung and Pattern in order to execute the benefits received under *GEIA*: South Kent Wind, LP, Power Purchase Agreement, s. 6.1 ***(Investor's Schedule of Exhibits at C-0284)***; Grand Renewable Wind, LP, Power Purchase Agreement, s. 6.1 ***(Investor's Schedule of Exhibits at C-0285)***; SP Ontario Wind Development, LP, Power Purchase Agreement, s. 6.1 ***(Investor's Schedule of Exhibits at C-0286)***; and K2 Wind Ontario, LP, Power Purchase Agreement, s. 6.1 ***(Investor's Schedule of Exhibits at C-0287)***; Canada does not contest that Pattern Renewable Holdings Canada, ULC is the "wholly-owned Canadian subsidiary of California-based Pattern Energy Group," see, Canada's Counter Memorial, at ¶356

[382] Certificate of Incorporation, Boulevard Associates Canada, Inc, September 25, 2009 ***(Investor's Schedule of Exhibits at C-0579)***; Boulevard owns four FIT projects, see FIT Priority Rankings for Goshen Wind Energy Centre; East Durham Wind Energy Centre, Bluewater Wind Energy Centre, and Jericho Wind Energy Centre ***(Investor's Schedule of Exhibits at C-0073)***; NextEra also owns Bornish Wind LP, Inc., Corporation Profile Report, Bornish Wind LP, Inc., dated April 2, 2014 ***(Investor's Schedule of Exhibits at C-0580)***, which owns the Bornish Wind Energy Centre FIT project, see FIT Priority Rankings for Bornish Wind Energy Centre ***(Investor's Schedule of Exhibits at C-0073)***; These five FIT projects are all owned by NextEra. See, "NextEra Energy Canada: Who We Are" ***(Investor's Schedule of Exhibits at C-0548)***, and "Bluewater Project" ***(Investor's Schedule of Exhibits at C-***

d) Suncor Energy Products, a Canadian corporation.[383]

412. The better treatment provided to Canadian FIT applicants was provided over the course of the design, implementation and administration of the FIT Program. These were:

a) The *Electricity Act, 1998*, as amended, including in particular Part II.1 (Ontario Power Authority), and Part II.2, (Management of Electricity Supply, Capacity and Demand) thereof, including, in particular, Section 25.35 (Feed-in tariff Program),[384] which provided the statutory authority to the Minister of Energy and the Ontario Power Authority to design, implement, and administer the Ontario FIT Program;

b) The *Green Energy Act, 2009,* as enacted on May 14, 2009;[385] the FIT Direction dated September 24, 2009, from George Smitherman, Deputy Premier and Minister of Energy and Infrastructure, to Colin Anderson, Chief Executive Officer, Ontario Power Authority, directing OPA to develop a FIT Program;[386]

c) The decision in August 2010 not to run the Economic Connection Test despite the fact that it was required by the FIT Rules and represented to the Investor.[387] The decision to delay the ECT was because the Korean Consortium had yet to select connection points for its projects.[388]

d) Private meetings and communications between the Ontario Power Authority and FIT competitors that began on October 5, 2010 and continued through February and May 2011, which led to the FIT Program and Rules being modified to benefit certain FIT applicants;[389]

0545), "Bornish Project" ***(Investor's Schedule of Exhibits at C-0551)***, "East Durham Project" ***(Investor's Schedule of Exhibits at C-0546)***, "Goshen Project" ***(Investor's Schedule of Exhibits at C-0552)***, and "Jericho Project" ***(Investor's Schedule of Exhibits at C-0547)***; Canada does not contest that Boulevard Associates Canada, Inc. Is "a subsidiary of NextEra Energy Inc.," see, Canada's Counter Memorial, at ¶358

[383] Corporate Profile Report of Suncor Energy Products, Inc. Dated April 23, 2014 ***(Investor's Schedule of Exhibits at C-0553)***; Suncor owns the Cedar Point Wind Power Project Phase I FIT Project, see FIT Priority Rankings for Cedar Point Wind Power Project Phase I ***(Investor's Schedule of Exhibits at C-0073)***

[384] *Electricity Act*, 1998, S.O. 1998, c.15 Schedule A, last amended 2010, c.8 ***(Investor's Schedule of Exhibits at C-0401)***

[385] *Green Energy Act*, S.C. 2009 c.12, Schedule. A ***(Investor's Schedule of Exhibits at C-0003)***

[386] Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), September 24, 2009 ***(Investor's Schedule of Exhibits at C-0264)***

[387] Ontario Power Authority Presentation "The Economic Connection Test Approach, Metrics and Process," May 19, 2010 ***(Investor's Schedule of Exhibits at C-0088)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 5.4(a) ***(Investor's Schedule of Exhibits at C-0347)***

[388] Witness Statement of Bob Chow (RWS – Chow), at ¶38

[389] Email from Bob Lopinski (Counsel Public Affairs) to Sonya Rachel Konzak (Ministry of Energy), Shantie Prithipal (Ministry of Energy), Sue Lo, and Rick Jennings (Ministry of Energy), September 20, 2010 ***(Investor's Schedule of Exhibits at C-0094)***; Email from Bob Lopinski (Counsel Public Affairs) to Pearl Ing (MEI), February 25, 2011 ***(Investor's Schedule of Exhibits at C-0319)*** The Ministry of Energy also met with NextEra on May 11 and May 13, 2011. Email from Phil Dewan (Counsel Public Affairs) to Sue Lop (Ministry of Energy), May 12, 2011 ***(Investor's***

e) The FIT Priority Rankings released on December 21, 2010 and based on administration of the FIT Rules Versions 1.1-1.4 between September 30, 2009-December 8, 2010.

f) The FIT Direction dated June 3, 2011 from the Minister of Energy to Colin Anderson, Chief Executive Officer, Ontario Power Authority, concerning the connection-point change window that deviated from the FIT Rules and which NextEra had advanced notice of; and

g) All versions of the FIT Rules, Version 1.1-2.1, issued and amended by the OPA from September 30, 2009-December 14, 2012,[390] which were not followed by the OPA in the administration of the FIT Program, and the FIT Contract, Version 1.5 (June 3, 2011), including General Terms and Conditions, Exhibits, and Standard Definitions, issued by the OPA after it had failed to administer the FIT Program in a fair, transparent, and non-arbitrary manner.[391]

    i) These measures breached NAFTA Article 1102 and first affected all four of the Investor's investments in August 2010 when the Economic Connection Test was not run as required by the FIT Rules, and as represented to Mesa, because the Korean Consortium had not finalized its selection of connection points.[392] This decision prevented the TTD and Arran projects from receiving FIT contracts.

    ii) December 21, 2010 when the Investor became aware that other Canadian investments received more favourable treatment in the consideration of their FIT applications than the Investor.

    iii) The Investor was again affected in January 2011 when the Canadian District Energy Association, a lobby group, launched a campaign to benefit the projects of Mesa's FIT Program competitor, NextEra. This effort included

Schedule of Exhibits at C-0090); Email, Update NextEra Meeting, October 5, 2010 ***(Investor's Schedule of Exhibits at C-0602)***; Email from Samira Viswanathan to Christopher Quirke, September 20, 2010 ***(Investor's Schedule of Exhibits at C-0601)***

[390] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA June 3, 2011 ***(Investor's Schedule of Exhibits at C-0046)*** and FIT Rules Version 1.1 - September 30, 2009 ***(Investor's Schedule of Exhibits at C-0258)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules, Version 1.2, November 19, 2009 ***(Investor's Schedule of Exhibits at C-0143)***; FIT Rules Version 1.3, March 9, 2010 ***(Investor's C-0218)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.3.2, October 29, 2010 ***(Investor's Schedule of Exhibits at C-0242)***; FIT Rules Version 1.4, December 8, 2010 ***(Investor's Schedule of Exhibits at C-0239)***; Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011 ***(Investor's Schedule of Exhibits at C-0005)***; FIT Rules Version 1.5.1, July 15, 2011 ***(Investor's Schedule of Exhibits at C-0237)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules, Version 2.0, August 10, 2012 ***(Investor's Schedule of Exhibits at C-0058)***; FIT Rules Version 2.1, December 14, 2012 ***(Investor's Schedule of Exhibits at C-0240)***

[391] FIT Contract version 1.5, at Exhibit D ***(Investor's Schedule of Exhibits at C-0263)***

[392] Witness Statement of Bob Chow (RWS – Chow), at ¶38

secret communications between the Government of Ontario and NextEra to re-align the FIT Program to provide more favourable treatment to NextEra. The public culmination of these efforts was the June 3, 2011 direction for a connection-point change window by the Minister of Energy and the awarding of FIT contracts on July 4, 2011.

iv) The Investor was also affected on June 10, 2011 when Suncor, a Canadian competitor to Mesa, changed its connection points to the B562L or B563L on the Bruce to Longwood 500kV blackstart line. The Investor was made aware of this when FIT contracts were awarded on July 4, 2011.

v) On September 17, 2010, the Investor was first able to be aware of loss arising from Canada's breaches upon the publication of the Minister's Direction to the Ontario Power Authority to reserve of 500MW of transmission in the Bruce region for the exclusive use of the Korean Consortium. At this time, Mesa was first able to confirm that it suffered loss under the FIT Program due to better treatment provided to the investors from non NAFTA Parties and other NAFTA Parties such as the members of the Korean Consortium and its Joint venture partners such as Pattern Energy.[393]

vi) Due to the non-transparent nature of how the FIT Program was administered, many of the earlier breaches of Article 1102, including violations of fairness and the rule of law that resulted in unfairly better treatment being provided to NextEra were not known to the Investor as they happened. Such unfair treatment included: NextEra's advanced notice of rule changes and the ability to change connection points between regions, the ability of Mesa's competitors to connect to the 500kV Bruce to Longwood blackstart line, and secret communications between the Government of Ontario and NextEra to re-align the FIT Program to benefit NextEra. Private communications and meetings began without Mesa's knowledge in October 2010 and included getting support from the Premier's Office for changing the FIT Rules to allow its projects to change connection points in June 2011.[394] The public culmination of these efforts was the June 3, 2011 direction for a connection-point change window by the Minister of Energy and the subsequent awarding of FIT contracts on July 4, 2011.

[393] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶44
[394] Email from Sue Lo (Ministry of Energy) to Pearl Ing and Sunita Chander (Ministry of Energy), May 12, 2011 ***(Investor's Schedule of Exhibits at C-0083)***

A. The Investor and its investments were in like circumstances with investors or investments of investors of another Party

413. All those seeking access to the Ontario transmission grid to obtain renewable-energy Power Purchase Agreements in Ontario are in like circumstances with the Investor and its investments. Canada admits that a portion of those seeking renewable-energy Power Purchase Agreements in Ontario are in like circumstances with the Investor and its investments. Canada admits that all FIT applicants are in like circumstance with Mesa's investments.[395]

414. Investors and investments outside the FIT Program were, just like FIT applicants, seeking to obtain transmission access to the IESO-controlled Ontario transmission grid in order to obtain renewable-energy Power Purchase Agreements for transmission capacity in Ontario. Ontario only has a finite amount of transmission capacity. All of these investments were attempting to secure access to a finite amount of transmission capacity to enable them to obtain renewable energy Power Purchase Agreements under a 20 year Feed-in Tariff regime.

415. Canada ignores the Investor's central point, which is that it and its investments are in like circumstances with all investors and investments who are seeking renewable-energy Power Purchase Agreements in Ontario.[396] This includes those seeking Power Purchase Agreements under the FIT Program, but it also includes those seeking Power Purchase Agreements through the *GEIA*, or other instruments. The name given to a Power Purchase Agreement is not what matters. The test is one of function, not of name.

416. The likeness of the investments owned by Canadian investment of members of the Korean Consortium, (and of those Canadian investments owned by their joint venture partner) was addressed in Part Five above. Like the Investor, Canadian investments owned by members of the Korean Consortium, such as Samsung Canada and Pattern Renewable Holdings, were competing for limited Ontario transmission capacity in order to obtain renewable-energy power-purchase agreements under a 20 year duration Feed-in Tariff regime in Ontario. They are all, therefore, in like circumstances.

B. The investors or investments of investors of another Party received more favourable treatment than the Investor or its investments

417. Applications submitted by Mesa's and Pattern's Canadian investments both sought renewable-energy power-purchase agreements from the Ontario Power Authority. Compared to Mesa, Pattern's the applications submitted by Pattern's Canadian

[395] Counter Memorial, at ¶364
[396] Counter Memorial, at ¶364

investments received treatment from the Government of Ontario and Ontario Power Authority that was far more favourable in their efforts to secure these renewable-energy power-purchase agreements.

418. While Canada denies that any applicant under the FIT Program received better treatment than Mesa, Canada has not denied that Canadian investments owned by members of the Korean Consortium received more favourable treatment. Indeed, Canada filed absolutely no response with respect to the more favourable treatment provided to the parent corporations of these Canadian enterprises with respect to the Article 1103 claim asserted by the Investor.[397]

419. Canadian Investments of members of the Korean Consortium (and the Canadian investments of their joint venture partner) were given guaranteed access to 2,500MW of transmission capacity that was purposely set aside for them, removing the need to compete with other energy producers for a portion of Ontario's finite transmission capacity.[398] This stands in stark contrast with the Investor, who was required to undergo a rigorous, costly, and timely regulatory bidding process to compete for a portion of Ontario's finite transmission capacity, without any guarantee that it would be awarded renewable-energy power-purchase agreements.

420. Canadian Investments of members of the Korean Consortium (and the Canadian investments of their joint venture partner) also benefited from secret meetings with officials of the Government of Ontario and the Ontario Power Authority.[399] The meetings were meant to facilitate the investments' acquisition of renewable-energy power-purchase agreements and provide special assistance for the necessary regulatory approvals.[400] By contrast, the Investor was not provided with any private assistance and was required to undergo the regulatory bidding process on its own.

421. Canadian Investments of members of the Korean Consortium (and the Canadian investments of their joint venture partner) received special assistance with the required

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[397] See Part Four above.

[398] *Green Energy Investment Agreement,* January 21, 2010 ***(Investor's Schedule of Exhibits at C-0322)***

[399] OPA Negotiations with Korean Consortium, Draft Meeting Minutes Meeting #1: June 23, 2010 ***(Investor's Schedule of Exhibits at C-0151)***; OPA Negotiations with Korean Consortium, Draft Meeting Minutes Meeting #2: July 7, 2010 ***(Investor's Schedule of Exhibits at C-0115)***; July 20, 2010 ***(Investor's Schedule of Exhibits at C-0150)***; August 18, 2010 ***(Investor's Schedule of Exhibits at C-0274)***; OPA Negotiations with Korean Consortium, Draft Meeting Minutes, Meeting #5: September 22, 2010, Undated ***(Investor's Schedule of Exhibits at C-0254)***; OPA Negotiations with Korean Consortium, Draft Meeting Minutes, Meeting #6: December 8, 2010, Undated ***(Investor's Schedule of Exhibits at C-0271)***; OPA Negotiations with Korean Consortium, Draft Meeting Minutes, Meeting #7: February 1, 2011, Undated ***(Investor's Schedule of Exhibits at C-0272)***; OPA Negotiations with Korean Consortium, Draft Meeting Minutes, Meeting #8: March 4, 2011, Undated ***(Investor's Schedule of Exhibits at C-0273)***; OPA Negotiations with Korean Consortium, Agenda, Meeting #9: May 6, 2011 ***(Investor's Schedule of Exhibits at C-0128)***

[400] Declaration of Zohrab Mawani, August 15, 2013, at ¶30 ***(Investor's Schedule of Exhibits at C-0406)***

Aboriginal consultations, which were also facilitated by the Government of Ontario in order to make the consultation process simpler and improve the prospect for it concluding swiftly and successfully.[401] Mesa was not provided with any offer to facilitate the consultations it would have had to engage in with the Aboriginal communities.

422. The contractual approval process was fast tracked for Canadian investments of members of the Korean Consortium (and the Canadian investments of their joint venture partner). The Investor was not given such an option and was forced to participate in a regulatory competition that was often delayed.[402]

423. The Canadian investments of members of the Korean Consortium (and the Canadian investments of their joint venture partner) were able to increase the size of their projects by ten percent; thereby modifying the terms of their renewable-energy power-purchase agreements.[403] This increase in size and contract modification was not available to the Investor.

424. Canadian Investments of members of the Korean Consortium (and the Canadian investments of their joint venture partner) had the ability to choose their connection points, and their delay in doing so forced the Ontario Power Authority to push back conducting the required Economic Connection Test to accommodate the investments of the Korean Consortium finalizing connection points.[404] The Investor, by comparison, was not allowed to delay any step in the FIT Program, was not permitted to select connection points, and was harmed because the Economic Connection Test was pushed back to accommodate Pattern.

425. Canadian Investments of members of the Korean Consortium (and the Canadian investments of their joint venture partner) obtained renewable-energy power-purchase agreements in the Bruce Region over the Investor because they were able to take advantage of being provided the first 450MW of the Bruce region's enabled capacity.[405] The Investor did not have any transmission capacity set aside for it, but the projects of its investments would have received FIT contracts had investments of the Korean Consortium not been provided with the 450MW in the Bruce region.

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[401] Declaration of Zohrab Mawani, August 15, 2013, at ¶30 ***(Investor's Schedule of Exhibits at C-0406)***

[402] Draft Summary of Framework Agreements, Ledger for Discussion, August 13, 2009, at p.8 ***(Investor's Schedule of Exhibits at C-0331)***

[403] *GEIA* s. 3.4 ***(Investor's Schedule of Exhibits at C-0322)***

[404] Declaration of Zohrab Mawani, August 15, 2013, at ¶32 ***(Investor's Schedule of Exhibits at C-0406)***

[405] Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), September 24, 2009 ***(Investor's Schedule of Exhibits at C-0264)***

426. The Government of Ontario and the Ontario Power Authority also provided more favourable treatment to NextEra's Canadian projects than was provided to the Investor and its projects.

427. NextEra's Goshen, Bornish and Adelaide projects were awarded FIT contracts on a basis that was not available to the investments of the Investor through its participation in the FIT Program. These projects would have not received contracts because they would not have passed the TAT.[406] The Goshen project, however, was still able to obtain a contract on the basis that NextEra was to provide generator paid upgrades.[407] The Investor's investments were not given this option and as a result of not passing the TAT were scheduled for the ECT, which was the proscribed course set out in the FIT Rules but never actually carried out. Providing NextEra's investments with FIT contracts based on generator paid upgrades contravened the established ECT process that the Investor's investments were required to follow.

428. NextEra's ability to secure contracts by way of generator paid upgrades was assisted in part from lobbying and political pressure to ensure a preferable outcome in the Bruce region for NextEra.[408] In contrast, the [redacted]

429. NextEra's investments benefited from being able to cause a sudden change to the FIT process that would allow its projects to connect to the unpublished 500kV blackstart line.[412] This was an unprecedented change to the FIT process as not only was the line unpublished, but it had an ulterior safety and reliability purpose as the support line for

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[406] Hydro-One – OPA SW Transmission Meeting, February 10, 2010 ***(Investor's Schedule of Exhibits at C-0474)***

[407] Witness Statement of Bob Chow (RWS – Chow), at ¶27

[408] E-mail from Phil Dewan (Counsel Public Affairs) to Sue Lo (Ministry of Energy), May 12, 2011 ***(Investor's Schedule of Exhibits at C-0090)***

[409] Bruce Area and West of London Area Scenario Analysis, April 14, 2011 ***(Investor's Schedule of Exhibits at C-0484)***; Bruce Area Scenario Analysis, Table of results, April 14, 2011 ***(Investor's Schedule of Exhibits at C-0448)*** [redacted]

[410] Bruce Area Scenario Analysis, Table of results, April 14, 2011 ***(Investor's Schedule of Exhibits at C-0448)*** [redacted]

[411] Ontario Power Authority, "FIT Contract Offers for the Bruce to Milton Allocation Process", July 4, 2011 ***(Investor's Schedule of Exhibits at C-0292)***

[412] Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011, at s.5.4.1 ***(Investor's Schedule of Exhibits at C-0005)***

the Bruce nuclear facility. The Investor's investments were not permitted to influence the course of the FIT Program and only selected known connection points that did not interfere with the province's electrical safety and reliability plan.

430. NextEra's investments had advanced and special knowledge of the ability to connect to the 500kV line, as well as the fact that they could connect to the L7S connection point, which came from knowledge over and above the publicized TAT Tables. This knowledge was a product of secret meetings NextEra had with officials in the Minister of Energy and the Premier's Office. As the Investor was not given any special and private meetings, it did not have advanced notice of the ability to connect to the 500kV line or the L7S.

431. Canada also provided more favourable treatment to Suncor, in allowing that investor's investment to connect to the 500kV line, along with NextEra's investments.[413]

432. NAFTA Article 1102 establishes a requirement where the treatment provided to an American Investor, like Mesa, is compared to more favourable treatment provided to an investor, or investment, with the nationality from the host state, Canada. The ultimate ownership of that better treated investment is irrelevant. This obligation is further reinforced by the terms of NAFTA Article 1104, which makes clear that the best treatment offered in the jurisdiction (under MFN treatment or national treatment) is what needs to be provided to a foreign investor under either NAFTA Articles 1102 or 1103. The text of Article 1102 is clear as to the nationality of Parties to whom the obligation is owed or for the comparison of treatment. The comparison is always between the Investor or its investment and a better treated Canadian enterprise.[414]

433. Boulevard Associates and Pattern Canada received better treatment than the investments owned by Mesa.[415] Nowhere in its memorial does Canada dispute this fact or provide evidence to the contrary. Thus, only issue for the Tribunal to determine is whether Mesa's investments are in like circumstances to these particular Canadian nationals. Canada accepts that all FIT applicants are in "like circumstances" [416] and NextEra is clearly within that universe. Accordingly, there appears to be no further issue as to whether Canada breached the National Treatment obligation in treating Mesa less favourably than NextEra.

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[413] Minutes of Meeting, re NextEra/Suncor Joint Meeting with HONI/IESO, September 21, 2011 ***(Investor's Schedule of Exhibits at C-0219)***

[414] The Investor relies upon its similar arguments on this same point which were discussed in Part Five in relation to Canada's similar errors on the MFN obligation.

[415] Counter Memorial, at ¶¶357 and 359

[416] Counter Memorial, at ¶364

434. In its Counter Memorial, Canada has demonstrated a misunderstanding of the clear wording of its obligations under NAFTA Article 1102. Article 1102 provides that Canada must provide treatment to Mesa as favourable as that provided to any local. The relevant words of Article 1102 state:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, **to its own investors** with respect to ……
> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, **to investments of its own *investors*** with respect to **.....**
> 3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part. (*emphasis added)*

435. Canada has re-interpreted this clear text to mean something less than what is set out in the obligation. Canada says:

> It is fundamental to allegation of breach that the allegedly more favourable treatment has been accorded to another investor of the appropriate nationality. In particular, in the context of a dispute between a US investor and Canada, the relevant comparator investors and investments for the purposes of Article 1102 are Canadian... Indeed, confirming that the right comparators are being offered treatment is the first fundamental step in an Article 1102 or 1103 analysis.[417]

Canada then continues to say that treatment that is provided by Canada to a Canadian investor does not meet this standard. Canada confirms the Investor's statement that Pattern Canada is a Canadian enterprise that is owned by a US incorporated parent. Canada then states:

> It is an investment of a U.S. investor. As such, the treatment accorded to it simply cannot serve as the basis for a national treatment claim. Thus, there is no need to consider whether the treatment of which the Claimant complains was accorded in like circumstances or whether it was no less favourable. [418]

436. As Canada did with Article 1103,[419] Canada's demonstrates a profound misunderstanding of the explicit words of NAFTA, this time NAFTA Article 1102. NAFTA Article 1102 creates a comparison between Mesa and any Canadian enterprise that receives better treatment. There is nothing in the text of NAFTA Article 1102 which provides that the benefits of this obligation are denied to investments of investors of other NAFTA Parties but this is the modification to the clear NAFTA text that Canada

[417] Counter Memorial, at ¶351
[418] Counter Memorial, at ¶357
[419] See the discussion of this topic in Part Five of this Reply Memorial.

advocates in its Counter Memorial. Such an interpretation has no textual support of any kind and clearly does violence to the clear words of the NAFTA obligation.

437. With respect to the Article 1102 NAFTA national treatment obligation owed by Canada, Canada's own investors include those Canadian enterprises which received better treatment. These include the better treatment provided to Pattern Renewable Holdings Canada, Boulevard Associates, and Samsung Canada.[420]

438. The NAFTA clearly states that there must be a diversity of nationality between the Claimant and the host state to bring a claim. Article 1102(1) states that "Each Party [Canada] shall accord to investors of another Party [United States] treatment no less favourable...to its [Canada's] *own investors*," whereas Article 1139 defines an "Investor of a Party" includes a national or an enterprise of such Party, that has made an investment. Under Article 201, an "enterprise" is any entity constituted under applicable law and includes a corporation. Boulevard Associates and Pattern Canada, as juridical nationals of Canada, are Canadian enterprises and are thus of the same nationality as the host state.

439. Similarly, Article 1102(2) states that "Each Party [Canada] shall accord to investments of investors of another Party [United States] treatment no less favourable...to *investments* of *its* [Canada's] *own investors*," whereas Article 1139 broadly defines an "Investment" as including an enterprise. Clearly, the Canadian corporations of Boulevard Associates and Pattern Canada are investments of Canada.[421]

440. Canada, however, attempts to reverse the operation of NAFTA's clear terms, as well as the established principles in *Barcelona Traction*[422] and *Electronica Sicula (ELSI)*[423], that the nationality of a corporation (and thereby of the nationality of the enterprise and Investor) is the place of incorporation (or *siege social*), which can be separate to the nationality of the shareholders. Similar arguments have been expressly rejected in cases against Argentina (*CMS Gas*[424], *Lanco*[425], *Vivendi*[426], *Azurix*[427], *Enron*[428], *LG & E*[429]) and in *Tokios v Ukraine*.[430]

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[420] Canada has conveniently provided evidence of the Canadian nationality of Pattern Renewable Holdings Canada and Boulevard Associates in ¶¶ 356 – 358 of the Counter Memorial. Evidence of the Canadian nationality of Samsung Canada is set out in the Certificate of Status and Corporation Profile Report, Samsung Renewable Energy Inc., April 4, 2014 ***(Investor's Schedule of Exhibits at C-0472)***

[421] Certificate of Incorporation, Boulevard Associates Canada Inc, September 25, 2009 ***(Investor's Schedule of Exhibits at C-0579)***

[422] *Case concerning the Barcelona Traction, Light and Power Company, Limited*, Judgement of February 5, 1970, at ¶67 ***(Investor's Schedule of Legal Authorities at CL-329)***

[423] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, I.C.J. Reports 1989 (20 July 1989)("*Elettronica*") ***(Investor's Schedule of Legal Authorities at CL-100)***

[424] *CMS Gas Transmission Company v. Argentine Republic,* ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction (July 17, 2003), at ¶48. The Tribunal found "no bar in current international law to the concept of

441. NAFTA Article 1104 reinforces this principle, which clearly states that each Party must accord to investors of another Party and to investments of investors of another Party the better treatment required under Articles 1102 and 1103. Canada must accord better treatment to American nationals and to their investments who are in like circumstances, and that must be the best treatment under Articles 1102 and 1103. Canada's attempts to reduce the nationality of those investments or investors where better treatment is measured. If followed, the Tribunal would have Canada provide the worst treatment, which would create an absurd result which the *Vienna Convention* cautions the Tribunal to avoid.

442. The Investor has addressed the issue of intentional discrimination in paragraphs 272-282 of its Memorial. Canada has not addressed any of the legal arguments which demonstrate that there is no requirement to establish intentional nationality based discrimination with NAFTA Articles 1102 or 1103 which were raised by the Memorial.

443. Canada simply ignores the Investor's argument and states that the NAFTA Tribunal in *Loewen* required a finding of nationality based discrimination.[431]

444. The Investor stands by jurisprudence which demonstrates that there is no need to demonstrate intentional nationality –based discrimination in order for there to be a violation of NAFTA Articles 1102 or 1103.

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allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders." ***(Investor's Schedule of Legal Authorities at CL-321)***

[425] *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Jurisdiction of the Arbitral Tribunal (December 8, 1998), at ¶10 ***(Investor's Schedule of Legal Authorities at CL-322)***

[426] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002), at ¶50: "Moreover it cannot be argued that CGE did not have an 'investment' in CAA from the date of the conclusion of the Concession Contract, or that it was not an 'investor' in respect of its own shareholding, whether or not it had overall control of CAA. Whatever the extent of its investment may have been, it was entitled to invoke the BIT in respect of conduct alleged to constitute a breach of Articles 3 or 5." ***(Investor's Schedule of Legal Authorities at CL-323)***

[427] *Azurix Corp.v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction (December 8, 2003), at ¶74: "We conclude the discussion on *ius standi* by affirming the *ius standi* of Azurix in these proceedings: Azurix is the investor that made the investment through indirectly owned and controlled subsidiaries." ***(Investor's Schedule of Legal Authorities at CL-324)***

[428] *Enron Corporation and Ponderosa Assets, L.P.v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (January 14, 2004), at ¶38 ***(Investor's Schedule of Legal Authorities at CL-325)***

[429] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction (April 30, 2004), at ¶52 ***(Investor's Schedule of Legal Authorities at CL-326)***

[430] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (April 29, 2004), at ¶¶53-56 ***(Investor's Schedule of Legal Authorities at CL-327)***

[431] Counter Memorial, at ¶355

445. it should also be noted that Canada has misconstrued findings in the *Loewen* decision. The NAFTA Tribunal in *Loewen* went on to find a violation of NAFTA Article 1105 based in part on discrimination against the Canadian investor.

446. NAFTA Article 1102 does not require proof of discriminatory bias or animus. Canada actually relies on the exact passage from the *ADM* case which provides an objective, reasonableness test for whether national treatment has been violated[432]: The *ADM* Tribunal stated:

> Nationality discrimination is established by showing that a foreign investor has unreasonably been treated less favourably than domestic investors in like circumstances.[433]

447. Nothing in this test suggests any inquiry into intent or animus. The simple test for national treatment is to establish a diversity of nationality between the more favourably treated local investor or investment and the claimant. Under MFN treatment, the only test is to demonstrate that more favourable treatment is provided to an investor or investment that comes from a Non-Treaty Party or another Treaty Party.

C. The more favourable treatment was with respect to the establishment, acquisition, expansion, management, conduct, operation or sale or other disposition of investments

448. The more favourable treatment that Ontario provided to investors or investments of investors of another Party was with respect to the management, conduct, and operation of their investments, and was less favourable to the Investor with respect to the management, conduct, and operation of its investments, as each sought to obtain renewable-energy Power Purchase Agreements under the FIT Program.

[432] Counter Memorial, at ¶355
[433] Counter Memorial, at ¶355 which relies on ¶205 of *ADM* – Award ***(Respondent's Schedule of Legal Authorities at RL-040)***

PART SEVEN: NAFTA ARTICLE 1105 THE INTERNATIONAL LAW STANDARD OF TREATMENT

I. OVERVIEW

449. Beginning in 2009, the Government of Ontario created a regulatory framework and market structure for access of renewable-generated energy to the Ontario grid, which the Government promised would be "a standardized, open, and fair process."[434]

450. Before the ink was dry on this purportedly "standardized, open, and fair process," Ontario was contriving a back channel for certain commercial parties to access the grid that instead of being "standardized" was exclusive and custom-made to the needs of some parties, instead of being "open" was embedded in secret, covert deals, and instead of being "fair," gave enormously preferential treatment to the parties in those secret covert deals. Mesa was shut out of the back channel, in good faith and it followed the law and regulations that had been set forth as "standardized, open, and fair," expecting to be treated even-handedly.

451. But, in Ontario, there was a corruption of the regulatory process for renewable energy that corresponded both temporally and in kind to the general wave of corruption in the Ontario government, especially in the energy sector, corruption which led to the resignation of the province's Premier and to criminal and civil investigations that continue to this day.

452. Where Ontario did purport to apply the supposedly "standardized, open, and fair" regulatory framework, it always found ways to manipulate the results to favor privileged political and economic interests, with great harm done to the investor.

453. The most shocking example of this was requiring market actors change fundamentally their operations within five days, if they were to be able to have access to an important part of the Ontario market.

454. Only insiders who had prior knowledge of the impending regulatory change through their connections to politicians and officials, and prepared themselves in advance, could have logistically or economically met the five day deadline. And that is exactly what happened. That this kind of corruption could nevertheless infect a government in a free and democratic society operating under the rule of law for more than a century is a vivid reminder of Lord Acton's insight that the possibility of corruption is inherent in the very nature of power.

455. In a recent decision under the Central American – DR Free Trade Agreement, *Teco v. Guatemala*, the CAFTA-DR tribunal, in finding a violation of fair and equitable treatment

[434] Counter Memorial, at ¶58

in the operation of the electricity system, referred to complete lack of candor in the regulatory process, noting that the government had repeatedly not followed its own regulatory framework and instead operated arbitrarily and in non-transparent ways.[435] This is precisely the kind of unfair and inequitable treatment with which Mesa was faced in Ontario.

456. Canada claims that none of the measures raised by Mesa in its Memorial, under 11 different headings, constitute a breach of NAFTA Article 1105. Canada summarized these issues as follows:

1. The reservation of 500MW of transmission capacity in the Bruce Region for the Korean Consortium;
2. The decision as how to allocate the capacity made available by the Bruce to Milton Line; and
3. The decision not to run an ECT. [436]

457. Canada also claims that there could never be a violation of the international law standard of treatment arising from the preferential treatment secretly provided to the members of the Korean Consortium by Ontario.[437] Canada says that:

> There is nothing manifestly arbitrary, grossly unjust or egregious or shocking about a government entering into an investment agreement in which it accords certain advantages to a particular investor in exchange for certain investment commitments by that investor.[438]

Unfortunately, Canada's argument is simply inconsistent with the considerable jurisprudence developed under the international law standard of treatment. Furthermore, while Canada has not expressed the correct test for governmental conduct that violates the international standard of treatment, Canada is also incorrect on the fact arising in this arbitration. Both of these errors will be addressed in detail below.

458. In the submissions that follow, the Investor will

a) Articulate its view of the proper standard of treatment under NAFTA 1105, and the corresponding threshold of international responsibility;

b) Respond to Canada's view of the proper standard, and explain why this view is wrong and implies a threshold of international responsibility inappropriate to treaty-based investor protection; and

c) Finally, Canada has suggested in its Counter Memorial that, in interpreting Article 1105 of the NAFTA the Tribunal is faced with certain specific binding constraints

[435] *Teco v. Guatemala* ***(Respondent's Schedule of Exhibits at RL-071)***
[436] Counter Memorial, at ¶403
[437] Counter Memorial, at ¶¶405-409
[438] Counter Memorial, at ¶406

such that it may not interpret this provision as it would interpret an ordinary treaty in accordance with the rules of interpretation of customary international law as reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*. The Investor contests this restriction of the mandate of the Tribunal as a treaty interpreter and will explain why it is not bound by the constraints alleged by Canada.

459. The Investor emphasizes that it is not challenging any laws of general application. Nor is it inviting the Tribunal to impugn the general standards of rule of law and administrative fairness that exist in the Canadian state. The Investor' claim is based on the very unusual treatment provided to Mesa or which arise with respect to the granting of access to the Ontario electrical transmission grid or in respect of the award of renewable energy power purchase contracts. The standard of treatment asserted by the Investor applies to those acts of misconducts and would in no way put in question the normal or proper operation of Canada's laws, regulations and policies.

II. THE INTERNATIONAL LAW STANDARD OF TREATMENT

A. The proper standard for treatment under NAFTA Article 1105 and the threshold for international responsibility

i. The Autonomous "Fair and Equitable Treatment" Standard and the International Law Standard Have Converged

460. Since it is clear that the state of customary international law is reflected in international jurisprudence, and since that jurisprudence demonstrates that there is now a convergence between the "fair and equitable treatment" standard and the international law standard, the question about the impact of the Note of Interpretation is largely academic. Whether "fair and equitable treatment" is an autonomous standard to be interpreted in accordance with all the sources of international law, or whether it is to be understood as restricted to only customary international law, the end result appears to be the same: NAFTA Article 1105(1) requires Canada to accord foreign investors "fair and equitable treatment" in accordance with the plain and ordinary meaning of the term.

461. NAFTA Tribunals have determined that for the purposes of NAFTA Article 1105(1), to the extent that customary law is to be applied, it is to be applied as it stands today.[439] Recent jurisprudence on the "fair and equitable treatment" standard indicates that, while it is possible that there may still be some residual difference between the

[439] *ADF* – Award, at ¶179 ***(Investor's Schedule of Legal Authorities at CL-072)***

autonomous standard and customary law standard,[440] this difference is fast disappearing.

462. The *Azurix* Tribunal explained this convergence as follows:

> 1. …the minimum requirement to satisfy the [fair and equitable treatment] standard has evolved…and its content is substantially similar whether the terms are interpreted in their ordinary meaning…or in accordance with customary international law.[441]
> 2. …The question whether fair and equitable treatment is or is not additional to the minimum treatment required under international law is a question about the substantive content of fair and equitable treatment and, whichever side of the argument one takes, the answer to the question may in substance be the same.[442]

463. The Tribunal in *CMS Gas* took this one step further, and determined that there is in fact no difference between the autonomous "fair and equitable treatment" standard and the international minimum standard:

> …the treaty standard of fair and equitable treatment…is not different from the international law minimum standard and its evolution under customary law.[443]

464. This view was further adopted by the Tribunal in the *Rumeli* case, which, after noting that there was agreement even between the parties that "fair and equitable" encompasses such concepts as transparency, arbitrary or discriminatory treatment, good faith, and procedural due process,[444] stated as follows:

> The only aspect [of the fair and equitable treatment obligation] is that for Respondent, the concept does not raise the obligation on Respondent beyond the international minimum standard of protection. The Arbitral Tribunal considers that this precision is more theoretical than real. It shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law.[445]

465. If the "fair and equitable treatment" standard is in fact part of customary international law, then it has greatly advanced the international law standard far beyond what Canada would have the Tribunal believe. Indeed, such has been the development of the "fair and equitable treatment" standard in recent years that the plain meaning

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[440] *Sempra Energy International v. Argentine Republic* (ICSID No. ARB/02/16) Award, 28 September 2007, at ¶302 ***(Respondent's Schedule of Legal Authorities at RL-070)***; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID No. ARB/01/3), Award, 22 May 2007, at ¶258 ***(Respondent's Schedule of Legal Authorities at RL-049)***

[441] *Azurix* – Award, at ¶361 ***(Investor's Schedule of Legal Authorities at CL-070)***

[442] *Azurix* – Award, at ¶364 ***(Investor's Schedule of Legal Authorities at CL-070)***

[443] *CMS Gas*, at ¶284 ***(Investor's Schedule of Legal Authorities at CL-073)***

[444] *Rumeli*, at ¶609 ***(Investor's Schedule of Legal Authorities at CL-064)***

[445] *Rumeli*, at ¶611 ***(Investor's Schedule of Legal Authorities at CL-064)***

approach, on the one hand, and, on the other, the minimum standard approach, have largely converged.

ii. The standard of treatment under NAFTA Article 1105

466. At its core, the International Law Standard is a standard of conduct of the State with respect to foreign investments. The duty to act in good faith is the "fundamental norm underpinning international legal responsibility."[446] Several NAFTA and non-NAFTA Awards have recognized that the duty to act in good faith is an independent obligation within the International Law Standard.[447]

467. Good faith is an integral part of the international law standard of treatment.

468. For instance, the *S.D. Myers* Tribunal said, "Article 1105 imports into the NAFTA the international law requirements of due process, economic rights, *obligations of good faith* and natural justice."[448] Similarly, the *Tecmed* Tribunal said that "the commitment of fair and equitable treatment included in Article 4(1) of the [Spain-Mexico] Agreement is an expression and part of the *bona fide* principle recognized in international law."[449]

469. In the *de Sabla* case, the United States – Panama General Claims Commission held that a state does not provide treatment in accord with the international law standard of treatment where the design and application of an administrative process is deficient. Panama's deficiency in the *de Sabla* case centered on a sudden change in the regulatory process with respect to land registration, giving rise to an unreasonably brief response period for the Claimant and resulting in damage to her. The US- Panama Claims Commission determined that the application of the administrative process violated the international minimum standard of treatment, notwithstanding that the sudden change in regulatory was of general application.[450]

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[446] Franck, T. *Fairness in International Law and Institutions* (Clarendon Press, 1995), at pp.42-43 ***(Investor's Schedule of Legal Authorities at C-075)***

[447] *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States,* ICSID Case No. ARB(AF)/00/2, Award, 2003 WL 24038436 (May 29, 2003) ("*TECMED*"), at ¶153 ***(Investors' Schedule of Legal Authorities at CL-035)***; *Eureko B.V. v. Republic of Poland*, Partial Award, 2005 WL 2166281 (19 August 2005) ("*Eureko*"), at ¶235 : "The Tribunal finds apposite the words of an ICSID Tribunal in a recent decision that the guarantee of fair and equitable treatment according to international law means that:... this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment..." ***(Investors' Schedule of Legal Authorities at CL-080)***; *TECMED*, at ¶154 ***(Investor's Schedule of Exhibits at CL-035)***

[448] *S.D. Myers, Inc. v. Government of Canada,* First Partial Award, 2000 WL 34510032 (November 13, 2000), at ¶¶134, 243 [emphasis added] ***(Investors' Schedule of Legal Authorities at CL-033)***

[449] *TECMED*, at ¶153 ***(Investors' Schedule of Legal Authorities at CL-035)***

[450] *Marguerite de Joly de Sabla (United States) v. Panama* (1934) 28 AJIL 602; (1933) 6 RIAA 358 ("*Marguerite de Joly*"), at 363 ***(Investor's Schedule of Legal Authorities at CL-097)***; The US – Panama General Claims Commission

470. Similarly, in the recent CAFTA-DR Tribunal decision in *Teco v Guatemala*, the CAFTA-DR Tribunal found that a energy regulatory body's failure to follow its own public procedural rules was inconsistent with the customary international law minimum standard of treatment of aliens.[451]

(1) Arbitrariness

471. It has been well-established by NAFTA Tribunals that arbitrary measures constitute a breach of the international law standard under NAFTA Article 1105:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed... if the conduct is *arbitrary*...[452]

472. A state breaches customary international law obligations when it acts arbitrarily. A state, therefore, breaches its customary international law obligation when it acts on "prejudice or preference rather than on reason or fact."[453]

473. The subsequent *GAMI* NAFTA decision adopted the *Waste Management* Tribunal's description of the standard.[454] In finding that Mexico breached Article 1105 by refusing on irrelevant grounds to issue a permit to construct a landfill, the *Metalclad* decision also applied the principle that arbitrary conduct breaches Article 1105.[455]

474. In the *Metalclad* award*,* the Tribunal decided Mexico breached its NAFTA Article 1105 obligation by acting on the basis of irrelevant considerations.[456] Other investor-state

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stated "the period allowed for opposition by the laws, 15 days after a 30-day positing of the *edicto*, also seems unreasonably brief"

[451] *Teco Guatemala Holdings, LLC v Republic of Guatemala* (ICSID) Award, 19 December 2013, at ¶¶457, 583, 588 ***(Respondent's Schedule of Legal Authorities at RL-71)*** whereby the Tribunal determined that Guatemala violated Article 10.5 of the CAFTA-DR by relying on and adopting a report on tariff calculations by rather than the expert determination completed under the established regulatory process. The Tribunal found that Article 10.5 was breached, despite that fact that the government regulator was not bound by the expert determination.

[452] *Waste Management, Inc. v. United Mexican States*, Award, 2004 *WL* 3249803 (April 30, 2004) ("*Waste Management II")*, at ¶98 ***(Investor's Schedule of Legal Authorities at CL-091)***

[453] *Lauder v. Czech Republic*, 2001 WL 347860000, Final Award (September 3, 2001) ("*Lauder*"), at ¶232 ***(Investor's Schedule of Legal Authorities at CL-095)***

[454] *GAMI Investments v. Mexico*, Final Award, 2004 WL 3270068 (November 15, 2004) ("*GAMI*"), at ¶95 ***(Investor's Schedule of Legal Authorities at CL-195)***

[455] *Metalclad Corporation v. United Mexican States,* Award, 2000 WL 34514285 (August 30, 2000) ("*Metalclad*"), at ¶86 and 101:..". the authority of the municipality only extended to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations.. was improper, as was the municipality's denial of the permit for any reason other than those related to the physical construction or defects in the site. The Tribunal therefore holds that Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105." ***(Investor's Schedule of Legal Authorities at CL-098)***

[456] *Metalclad*, at ¶92 ***(Investor's Schedule of Legal Authorities at CL-098)***

tribunals have similarly concluded that a state acts arbitrarily or discriminatorily when it acts on the basis of prejudice or preference and not on reason or fact. In *Lauder v. Czech Republic*, for example, the ICSID Tribunal said:

> The Treaty does not define an arbitrary measure. According to Black's Law Dictionary, arbitrary means "depending on individual discretion;... founded on prejudice or preference rather than on reason or fact."... The measure was arbitrary because it was not founded on reason or fact, nor on the law... but on mere fear reflecting national preference.[457]

475. The *Pope & Talbot* NAFTA Tribunal also found Canada breached Article 1105 by acting on prejudice rather than on reason or fact. Canada breached the obligation by threatening the investor, denying its "reasonable requests for pertinent information" and requiring the investor "to incur unnecessary expense and disruption in meeting SLD's requests for information."[458]

476. Both the *Waste Management* and *GAMI* Tribunals recognized an independent obligation under Article 1105 to not act in an arbitrary or discriminatory manner. The *GAMI* Tribunal quoted the following passage from *Waste Management*:

> Taken together, the *S.D. Myers*, *Mondev, ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is *arbitrary*, grossly unfair, unjust or idiosyncratic, is *discriminatory* and exposes the claimant to sectional or racial prejudice.[459]

477. In the *Thunderbird* NAFTA claim, the Tribunal characterised "manifest arbitrariness in administration of proceedings" as "constituting proof of an abuse of right."[460] Similarly, the *Azinian* Tribunal noted that "clear and malicious misapplication of the law" constitutes denial of justice and abuse of rights.[461]

478. The NAFTA Tribunal in *Loewen found*:

> Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a

[457] *Lauder*, at ¶221, 232 ***(Investor's Schedule of Legal Authorities at CL-095)***
[458] *Pope & Talbot,* Award on the Merits Phase 2 (April 10, 2001), at ¶¶177-181 ***(Investor's Schedule of Legal Authorities at CL-039)***
[459] *Waste Management II*, at ¶98 ***(Investor's Schedule of Legal Authorities at CL-091),*** quoted in *GAMI* at ¶89 [emphasis added] ***(Investor's Schedule of Legal Authorities at CL-195)***
[460] *International Thunderbird Gaming Corporation v. United Mexican States,* Award, 2006 WL 247692 (January 26, 2006) ("*Thunderbird* - Award"), at ¶197 ***(Investor's Schedule of Legal Authorities at CL-194)***
[461] *Azinian, Davitian, & Baca v. United Mexican States* ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999 ("*Azinian*"), at ¶103 ***(Investor's Schedule of Legal Authorities at CL-104)***

> sense of judicial propriety is enough, even if one applies the [FTC] Interpretation according to its terms.[462]

479. The *Metalclad* Tribunal considered a claim that Mexico breached its Article 1105 obligations through the actions of one of its municipalities. The municipality in question was only legally allowed to consider construction issues when granting or denying building permits. The municipality exceeded that authority when it refused the investor's permit on environmental grounds.[463] In finding that this conduct amounted to a breach of Article 1105, the Tribunal said:

> Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105.[464]

The Tribunal, therefore, found a breach of Article 1105 because Mexico acted on the basis of irrelevant considerations.

480. These cases demonstrate comprehensive broad support among NAFTA tribunals for finding that NAFTA Article 1105 is inclusive of an independent obligation not to act arbitrarily or discriminate against investors from other parties.

481. Non-NAFTA tribunal decisions also demonstrate that the international law standard requires states to avoid acting arbitrarily. As observed by the *CMS* Tribunal "[a]ny measure that might involve arbitrariness... is in itself contrary to fair and equitable treatment."[465] Similarly, in finding that Poland failed to provide fair and equitable treatment, the *Eureko* Tribunal said Poland "acted not for cause but for purely arbitrary reasons..."[466]

482. The *Occidental* Tribunal found that Ecuador breached its obligation to provide fair and equitable treatment by acting in an arbitrary manner.[467]

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[462] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003) ("*Loewen*"), at ¶132 [emphasis added] ***(Investor's Schedule of Legal Authorities at CL-121)***

[463] The *Metalclad* tribunal, at ¶86 ***(Investor's Schedule of Legal Authorities at CL-098)***: "Even if Mexico is correct that a municipal construction permit was required, the evidence also shows that, as to hazardous waste evaluations and assessments, the federal authority's jurisdiction was controlling and the authority of the municipality only extended to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations in the case of what was basically a hazardous waste disposal landfill, was improper, as was the municipality's denial of the permit for any reason other than those related to the physical construction or defects in the site."

[464] *Metalclad*, at ¶101 ***(Investor's Schedule of Legal Authorities at CL-098)***

[465] *CMS Gas Transmission v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 2005 *WL* 1201002 (May 12, 2005), at ¶290 ***(Investor's Schedule of Legal Authorities at CL-073)***

[466] *Eureko*, at ¶233 ***(Investor's Schedule of Legal Authorities at CL-080)***

[467] *Occidental Exploration and Production Company v. the Republic of Ecuador,* LCIA Case No. UN 3467, Final Award, 2004 WL 3267260 (July 1, 2004) ("*Occidental*"), at ¶163, finding that the investor: "was confronted with a variety of practices, regulations and rules dealing with the question of VAT... this resulted in a confusing

483. WTO jurisprudence illustrates the kind of actions that have been found to be arbitrary for purposes of international law. In the *US-Shrimp* case, the Appellate Body considered whether a refusal to issue import certificates fell within the general exceptions of GATT Article XX. Measures do not fall within the Article XX exceptions if they amount to "arbitrary discrimination." The US had refused the certificates because the shrimp had not been caught under a particular form of regulatory program. The Appellate Body found that the US arbitrarily discriminated by "requir[ing] countries applying for certification [to import shrimps]...[to] adopt a comprehensive regulatory program that is essentially the same as the United States' program, without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries."[468]

484. The Appellate Body stated as follows with respect to the US import certification process:

> ...with respect to neither type of certification [for import] is there a transparent, predictable certification process that is followed by the competent United States government officials. The certification processes... consist principally of administrative *ex parte* inquiry or verification by staff...[469]

The Appellate Body also noted that the US provided "no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification is made;"[470] and that "no formal written, reasoned decision... is rendered on applications [and] [n]o procedure for review of, or appeal from, a denial of an application is provided."[471]

485. The Appellate Body concluded that "exporting Members applying for certification whose applications are rejected are denied basic fairness and due process, and are discriminated against, *vis-à-vis* those Members which are granted certification."[472] This decision indicates that a process that denies an applicant a meaningful opportunity to respond to arguments against it or denies it a mechanism to appeal an unreasoned decision is arbitrary and unfair.

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situation.. it is that very confusion and lack of clarity that resulted in some form of arbitrariness.." ***(Investor's Schedule of Legal Authorities at CL-027)***

[468] *United States - Import Prohibition of Certain Shrimp and Shrimp Products* - Report of the Appellate Body, WT/DS58/AB/R, October 12, 1998 ("*US-Shrimp*"), at ¶177 ***(Investor's Schedule of Legal Authorities at CL-083)***

[469] *US-Shrimp* at ¶180 ***(Investor's Schedule of Legal Authorities at CL-083)***

[470] *US-Shrimp* at ¶180 ***(Investor's Schedule of Legal Authorities at CL-083)***

[471] *US-Shrimp* at ¶180 ***(Investor's Schedule of Legal Authorities at CL-083)***

[472] *US-Shrimp* at ¶181 ***(Investor's Schedule of Legal Authorities at CL-083)***

486. Fundamentally both international human rights law and international investment law "contain rules regarding the treatment of individuals within a State."[473] International human rights law is "a relevant rule for the purposes of interpretation of treaty rules or would provide an appropriate source of analogy," that "may enter the interpretative process" because "human rights rules may contain functionally analogous obligations regarding the treatment of investors and investment." [474] It is for this reason that multiple international investment tribunals have drawn on international human rights case law.[475]

487. The protection of individuals from arbitrariness is an objective of international human rights[476] as well as constituting an integral part of the international law standard of treatment within NAFTA Article 1105.The decisions of the European Court of Human Rights support the fact that state conduct will be arbitrary in "the absence of a legitimate aim."[477] It is in this vein that courts have treated procedural safeguards "as elements of lawfulness."[478] The jurisprudence supports the conclusion that "restrictive measures must have some basis in domestic law, and be accessible and foreseeable."[479]

488. Arbitrary state conduct is not tolerated under international human rights law. Despite a wide ambit for public policy considerations, judges closely scrutinize "*ad hoc* abuses and formal and procedural safeguards."[480]

489. When scrutinizing the conduct in question to protect procedural safeguards, decisions arising from international human rights tribunals should be seen as one of the valid "interpretative authorities" to assist international investment treaty tribunals when

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[473] Paparinskis, at 176 ***(Investor's Schedule of Legal Authorities at CL-103)***

[474] Paparinskis, at 8 and 175 ***(Investor's Schedule of Legal Authorities at CL-103)***

[475] *Mondev International Ltd. v. United States*, Award, 2002 WL 32841359 (October 11, 2002) ("*Mondev* - Award"), at ¶141 ***(Investor's Schedule of Legal Authorities at CL-034)***; *International Thunderbird Gaming Corporation v. The United Mexican States*, 2006 WL 247692, UNCITRAL, Separate Opinion of Thomas Wälde (December 1, 2005) ***(Investor's Schedule of Legal Authorities at CL-299)***; *Thunderbird* - Award, at ¶27 ***(Investor's Schedule of Legal Authorities at CL-194)***; *Total S.A. v. The Argentine Republic,* ICSID Case No. ARB/04/01, Decision on Liability (December 27, 2010), at ¶129 ***(Investor's Schedule of Legal Authorities at CL-258)***

[476] Paparinskis, at 232 ***(Investor's Schedule of Legal Authorities at CL-103)*** refers to *Broniowski v. Poland* (App no 31443/96) [GC] (2004) ECHR 2004-V ***(Investor's Schedule of Legal Authorities at CL-291)***; *Carbonara and Ventura v. Italy* (App no 24638/94) (2000) ECHR 2000-VI ***(Investor's Schedule of Legal Authorities at CL-292)*** and *Handyside v UK* (App no 5493/72) (1976) Series A no 24 ***(Investor's Schedule of Legal Authorities at CL-293)*** He writes: "The recent case law has also elaborated the obligations of States to follow their legislative policies, and to ensure that the form of the measures and the procedural safeguards protect from arbitrariness."

[477] Paparinskis, at 233 ***(Investor's Schedule of Legal Authorities at CL-103)*** citing *Handyside v. UK* ***(Investor's Schedule of Legal Authorities at CL-293)*** and *Sporrong and Lonnroth v. Sweden* (App nos 7151175 and 7152/75) (1982) Series A no 52 ***(Investor's Schedule of Legal Authorities at CL-295)***

[478] Paparinskis, at 236 ***(Investor's Schedule of Legal Authorities at CL-103)***

[479] Paparinskis, at 235 ***(Investor's Schedule of Legal Authorities at CL-103)***

[480] Paparinskis, at 237 ***(Investor's Schedule of Legal Authorities at CL-103)***

assessing the administration of justice as protected by "a treaty obligation to provide fair and equitable treatment."[481]

490. Rights protected in international human rights law as related to the administration of justice have been endorsed by international investment tribunals as necessary of protection in the investment context.

491. In *Thunderbird* the Tribunal spoke of a "failure to provide due process (constituting an administrative denial of justice)."[482]In contrast to the international human rights law concept of denial of justice, *Thunderbird* supports the proposition that administrative denials of justice in international investment law can be found in the absence of the exhaustions of domestic remedies. Mr. Paparinskis describes this as follows:

> The better view of this practice is that parties and Tribunals used 'denial of justice' not as a term of art of the primary rule on the administration of judicial justice but as a descriptive reference to breaches of procedural propriety.[483]

He continues and states that the cases fall "within the international standard's requirements for compliance with certain procedural criteria, but situated outside the international standard's rules on the administration of justice, and therefore do not require full exhaustion of judicial remedies."[484]

(2) The protection against abuse of rights

492. Canada has an obligation within the international law standard of treatment to protect against the abuse of rights which harm the investments of against foreign investors. The *Azinian* NAFTA decision[485] and the writings of eminent scholars such as Prof. Bin Cheng[486] and Sir Hersch Lauterpacht,[487] reinforce this rule as a standalone obligation under customary international law.

493. In his treatise about the central role general principles of law within international law, Professor Bin Cheng has explained that the obligation to act in good faith includes an obligation on the state not to abuse powers. He wrote:

> The principle of good faith requires that every right be exercised honestly and loyally. Any fictitious exercise of a right for the purpose of evading either a rule of law or a contractual

[481] Paparinskis, at 181 ***(Investor's Schedule of Legal Authorities at CL-103)***
[482] *Thunderbird* - Award, at ¶197 ***(Investor's Schedule of Legal Authorities at CL-194)***
[483] Paparinskis, at 209 ***(Investor's Schedule of Legal Authorities at CL-103)***
[484] Paparinskis, at 209 ***(Investor's Schedule of Legal Authorities at CL-103)***
[485] *Azinian,* at ¶103 ***(Investor's Schedule of Legal Authorities at CL-104)***
[486] Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1987: Cambridge University Press), at 123 ***(Investor's Schedule of Legal Authorities at CL-078)***
[487] Lauterpacht, *The Function of Law in the International Community* (Oxford University Press, 1933), at 289 ***(Investor's Schedule of Legal Authorities at CL-105)***

> obligation will not be tolerated. Such an exercise constitutes an abuse of the right, prohibited by law. [488]

He further explained that:

> [T]he theory of abuse of rights (*abus de droit*), recognised in principle both by the Permanent Court of International Justice and the International Court of Justice is merely an application of this principle [of good faith] to the exercise of rights.[489]

494. This long-standing principle also applies within the context of abuses of administrative authority. The roots of the principle of abuse of rights date to the foundations of modern international law. In the *Bering Fur Seals* case, the Tribunal accepted that the malicious exercise of a right was an abuse of a state's authority.[490]

495. In considering similar early developments of the law, Sir Hersch Lauterpacht effectively tied the concept of abuse of rights to the flexible evolution of international law.[491] He demonstrates that the principle allows for international tribunals to ensure that the actions of states are judged in accordance with modern views of morality.[492] As such, from the beginning, the concept of abuse of rights is reasonably similar to an evolving customary international standard.

496. In the context of the international law standard of treatment, the abuse of rights arises in three principal ways, namely:

a) A state exercises powers in such a way as to hinder an investor in the enjoyment of their rights, resulting in injury to the investor;

b) A fictitious exercise of a right; or

c) An abuse of discretion in the exercise of governmental powers. [493]

The NAFTA should be read as preserving and affirming the right to regulate for legitimate purposes but each of these manifestations of governmental action is a fundamental violation of the most longstanding part of the international law standard of treatment.

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[488] Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Portland: Hart Publishing, 2006) ("Panizzon (2006)"), at 31 ***(Investor's Schedule of Legal Authorities at CL-106)***, referencing Cheng, at 121-32 ***(Investor's Schedule of Legal Authorities at CL-078)***

[489] Cheng, at 121 ***(Investor's Schedule of Legal Authorities at CL-078)***

[490] Cheng, at 121-122 ***(Investor's Schedule of Legal Authorities at CL-078)***, citing *Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering's sea and the preservation of fur seals,* Decision of 15 August 1893 ***(Investor's Schedule of Legal Authorities at CL-298)***

[491] Lauterpacht, at 287 ***(Investor's Schedule of Legal Authorities at CL-105)***

[492] Lauterpacht, at 287 ***(Investor's Schedule of Legal Authorities at CL-105)***

[493] Panizzon, at 30 ***(Investor's Schedule of Legal Authorities at CL-106)***

497. Alexandre Kiss in his article on Abuse of Rights in the *Encyclopedia of Public International Law* agrees with this type of three part abuse of rights taxonomy and concludes that no proof of intention to cause harm is necessary where there is an abuse of discretion in the exercise of governmental powers.[494] However, such intent is necessary when looking at the fictitious exercise of a right (such as where a right is exercised intentionally for an end that is different from that for which that right was created).[495]

498. The *Azinian* Award confirmed how protection against the abuse of rights was contained within the international law standard guaranteed under NAFTA Article 1105. It stated:

> There is a fourth type of denial of justice, namely clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of "pretence of form" to mask a violation of international law.[496]

499. Patent abuses of administrative decision-making will violate the "fair and equitable treatment" standard. In his Separate Opinion for *Impregilo v Argentina*, Judge Charles N. Brower carefully examined a series of actions by Argentina that were "nothing less than deliberate abuse of administrative power with a political motive."[497]

500. In *Impregilo v Argentina,*[498] the investor was an indirect minority shareholder in AGBA, a company that operated a water and sewerage services concession in the Province of Buenos Aires. The provincial authorities had terminated the contract and transferred the concession to a state-owned entity, listing a host of contract breaches by AGBA as justification for its decision. In response, Impregilo initiated an arbitration under the Argentina-Italy BIT, alleging that various actions by provincial authorities frustrating and terminating AGBA's performance of the concession breached provisions of the BIT, including the obligations on fair and equitable treatment and expropriation.

501. In his Separate Opinion, Judge Brower described a "behavioral pattern": a series of unreasonable legislative and regulatory burdens, delays, unduly extensive information

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[494] Alexandre Kiss, "Abuse of Rights," *Max Plank Encyclopedia of Public International Law* (vol 1), at ¶¶5-6 ***(Investor's Schedule of Legal Authorities at CL-294)***

[495] *Free Zones of Upper Savoy and the District of Gex* (France v. Switzerland), at p.C.I.J., Judgment, 7 June 1932 ***(Investor's Schedule of Legal Authorities at CL-109)***; Cheng, at 123 ***(Investor's Schedule of Legal Authorities at CL-078)***

[496] *Azinian*, at ¶103 ***(Investor's Schedule of Legal Authorities at CL-104)***

[497] Separate Opinion of Judge Charles N. Brower, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17 (June 21, 2011), at ¶7. Judge Brower concurred with the majority of the Tribunal that had accepted Impregilo's arguments on "fair and equitable treatment." However, he disagreed with the deferential attitude towards government actions, which he believed constituted further violations of Argentina's "fair and equitable treatment" obligations under the treaty. ***(Investor's Schedule of Legal Authorities at CL-110)***

[498] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (June 21, 2011) ***(Investor's Schedule of Legal Authorities at CL-007)***

requests and cost-raising tactics on the part of the Province of Buenos Aires – acts that transcended mere "contractual violations" and constituted substantial and undue interference with the investment.[499]

502. In another example, the Tribunal in *PSEG Global, Inc. v. Turkey* had observed that the fair and equitable treatment was essential towards the obligation to afford a stable and predictable legal framework. As such, the fair and equitable treatment obligation was breached due to the abuse of authority displayed by certain State organs and by the delivery of inconsistent administrative acts.[500]

(3) Transparency

503. "Transparency is considered to enhance the predictability and stability of the investment relationship and thus to represent an incentive for the promotion of investment."[501] Chapter 18 of the NAFTA is largely dedicated to the importance of transparency. The fair and equitable treatment standard also requires that Canada provide investors with a transparent and fair business environment. The NAFTA Tribunal in *Metalclad* defined the host State's obligation for transparency as including:

> … all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.[502]

504. The customary international law standard is also breached where a party acts without transparency. As stated by the NAFTA Tribunal in the *Waste Management (II)* dispute, where the "minimum standard of treatment of fair and equitable treatment is infringed... if the conduct... involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with... a complete lack of transparency and candour in an administrative process."[503]

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[499] Separate Opinion of Judge Charles N Brower, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, June 21, 2011, at ¶12-14, 15. Judge Brower further described events that "fit into the pattern of the Province [of Buenos Aires] disruptive actions," and emphasized how a "series of steps" can culminate into a breach of the "fair and equitable treatment" standard. ***(Investor's Schedule of Legal Authorities at CL-110)***

[500] *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Uretim ve Ticaret Limited Sirketi v. Turkey*, ICSID Case No. ARB/02/5, Award (January 19, 2007) ("*PSEG*"), at ¶¶246-256, particularly ¶¶247-248 ***(Investor's Schedule of Legal Authorities at CL-102)***

[501] Roland Klager, *Fair and Equitable Treatment in International Investment Law* (Cambridge University Press, 2011), at 228 ***(Investor's Schedule of Legal Authorities at CL-101)***

[502] *Metalclad,* at ¶76 ***(Investor's Schedule of Legal Authorities at CL-098)*** This transparency obligation was vacated by a reviewing domestic law court which held that transparency was not an independent ground of the international law standard of treatment.

[503] *Waste Management II*, at ¶98 ***(Investor's Schedule of Legal Authorities at CL-091)***

505. The duty of transparency is a broad one, explained by Martins Paparinskis as conduct which is "in apparent breach of domestic law, or justified only by sparse reasoning and sometimes addressing the choice of different means, matters may be reasonably expected or procedural improprieties."[504] After completing a review of the general concept and application of the obligation, Mr. Paparinskis summaries the appropriate test as one where an investor needs to be provided with "sufficient accessibility in light of local practices, where the investor has relied on competent assistance."[505]

506. Roland Klager also undertakes a significant analysis of transparency obligations under international law, and considers that the "notion of transparency in this context is concerned with the openness and clarity of the host state's legal regime and procedures."[506] This is not surprising as "number of international investment agreements have expressly incorporated transparency obligations" into investment treaties.[507]

(4) Full protection and security

507. NAFTA Article 1105 contains explicitly the obligation of full protection and security. The obligation to provide full protection and security includes an obligation upon governments to provide a stable legal and business environment to foreign investors. For example, the *Azurix v. Argentina* Tribunal noted that the obligation to provide full protection and security includes an obligation to provide a "secure investment environment," noting:

> It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view.[508]

The Tribunal went on to note that the qualifier "full" supports its interpretation of protection and security going beyond the physical realm.[509]

508. Full protection and security must be read to include protection for the rule of law and fundamental fairness, and the legitimate expectation of an investor to be afforded full protection and security in a manner corresponding to this understanding. This understanding was endorsed by the Tribunal in *Metalclad*.

> Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly

[504] *Paparinskis,* at 248, at fns.270-274, citing *Maffezini, Rumeli, Vivendi II, Tecmed, Saluka,* and *PSEG* ***(Investor's Schedule of Legal Authorities at CL-103)***
[505] *Paparinskis,* at 249, at fn.287 ***(Investor's Schedule of Legal Authorities at CL-103)***
[506] *Klager*, at 228 ***(Investor's Schedule of Legal Authorities at CL-101)***
[507] *Klager*, at 228 ***(Investor's Schedule of Legal Authorities at CL-101)***
[508] *Azurix* – Award, at ¶408 ***(Investor's Schedule of Legal Authorities at CL-070)***
[509] *Azurix* – Award, at ¶408 ***(Investor's Schedule of Legal Authorities at CL-070)***

> process and timely disposition in relation to an investor of a party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.[510]

509. The Tribunal in *CMS Gas v. Argentina* said "[t]here can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment."[511]

510. The *Occidental v. Ecuador* Tribunal found that, after Occidental had made investments, Ecuador changed its tax law "without providing any clarity about its meaning and extent" and that the state's "practice and regulations were also inconsistent with [the] changes [to the law]."[512] The *Occidental* Tribunal, therefore, recognized a state may act inconsistently with an investor's legitimate expectations, and breach its obligation to treat an investor fairly and equitably, by failing to adhere to the rule of law by not following its own laws.

511. An interpretation of full protection and security to include an investor's legitimate expectation to benefit from full protection and security such that it reaches beyond the physical security of the investment, to include the rule of law and due process, is consistent with international law.[513]

512. In *Opel Austria*[514], the European Court of First Instance (CFI) took the opportunity to identify that individuals will have their legitimate expectations protected. As Prof. Panizzon comments:

> In *Opel Austria*, the CFI explicitly used general public international law to support its conclusion that the individual economic operator, Opel Austria was entitled to protection of its legitimate expectations and that Austria was entitled to oppose according to the principle of good faith, the creation of a regulation that would become illegal within the few days of Austria's entry into the EEA.[515]

513. The *Paushok v Mongoli* Tribunal noted that other tribunals, included that in *Rumeli* found that "respect of the investor's reasonable and legitimate expectations" are part of the definition of the fair and equitable treatment standard.[516] Therefore one cannot disassociate legitimate expectations with the other factors that make up the Fair and Equitable Treatment standard, which include, "transparency, good faith, conduct that

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[510] *Metalclad*, at ¶99 ***(Investor's Schedule of Legal Authorities at CL-098)***
[511] *CMS Gas* - Award, at ¶274 ***(Investor's Schedule of Legal Authorities at CL-073)***
[512] *Occidental*, at ¶84 ***(Investor's Schedule of Legal Authorities at CL-027)***
[513] *Paparinskis*, at 252-253 ***(Investor's Schedule of Legal Authorities at CL-103)***
[514] *Opel Austria GmbH v Council* [1997], Case T-115/94, ECR-II-39 ***(Investor's Schedule of Legal Authorities at CL-296)***
[515] *Panizzon*, at 19 ***(Investor's Schedule of Legal Authorities at CL-106)***
[516] *Paushok*, at ¶253 ***(Respondent's Schedule of Legal Authorities at RL-065)***

cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, lacking in due process or procedural propriety."[517]

514. At its core, reasonable expectations related to process is rooted in fairness.[518] The framework for assessing whether or not the expectations were met is set out by an analysis of whether or not the rule of law has been followed. The Tribunal in *LG&E Energy Corp. v. Argentina* said as much when it described legitimate expectations as such:

> [The expectations] are based on the conditions offered by the host state at the time of the investment; they may not be established unilaterally by one of the parties; they must exist and be enforceable by law; in the event of infringement by the host state, a duty to compensate the investor for damages arises except for those caused in the event of state of necessity; however, the investor's fair expectations cannot fail to consider parameters such as business risk or industry's regular patterns.[519]

515. Furthering the argument that an investor's legitimate expectations relate to the legal environment, and its proper operation, the Tribunal in *Parkerings-Compagniet AS* v. *Lithuania* said,

> In principle, an investor has a right to a certain stability and predictability of the legal environment of the investment. The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment.[520]

516. International law at the WTO has also expressed a connection between an investor's legitimate expectations and the requirements of full protection and security and how those translate into a stable and fair environment guided by a commitment to due process.

517. In the *US Section 301* case, the Tribunal looked to the WTO treaty's preamble to stress the critical role of full protection and security to fulfill the multilateral trade objectives of the WTO. The Panel stated:

> 7.75 Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble…

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[517] *Paushok*, at ¶253 ***(Respondent's Schedule of Legal Authorities at RL-065)***
[518] *Klager*, at 167 ***(Investor's Schedule of Legal Authorities at CL-101)***
[519] *LG&E Energy Corp and others v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (October 3, 2006), at ¶130 ***(Investor's Schedule of Legal Authorities at CL-117)***
[520] *Parkerings-Compagniet AS* v. *Lithuania*, ICSID Case No. ARB/05/8, Award (September 11, 2007), at ¶333 ***(Investor's Schedule of Legal Authorities at CL-057)***

> 7.76 The security and predictability in question are of "the multilateral trading system." The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators.[521]

518. Marion Panizzon argues that treaty goals can prove the basis for a "claim of frustration of expectations."[522] Trade between State Parties to the NAFTA would be severely frustrated and hindered if investors could not legitimately expect that their investments would benefit from fair and transparent treatment at the hands of regulators. Any standard but that would lead to an unpredictability and risk that would work against securing the NAFTA's stated objectives of increasing trade and economic opportunity.

(5) Non-discrimination

519. NAFTA Tribunals have found that the protections provided to investments of Investors from other NAFTA Parties in NAFTA Article 1105 extend to the protection against nationality-based discrimination: "It is the responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice."[523]

520. In addition, Mr. Klager addresses the place of non-discrimination in his treatise as an "essential element that is inherent in the concept of fair and equitable treatment," that is "strongly supported by arbitral tribunals as an element of fair and equitable treatment."[524] He notes that "the word can be employed neutrally to mean mere differentiation" or it can be taken to mean "an unfair, arbitrary or unreasonable distinction," which he states is the more predominate interpretation in international law.[525]

521. In his scholarly treatise about the meaning of the international standard of treatment, Martins Paparinskis says that non-discrimination is an essential element of the classical international law meaning of the international law standard. He states:

> In the classical international law, the obligation to treat persons and property of aliens in a non-discriminatory manner was well-established....., the historical narrative, starting from the prominent prohibitions of discriminatory administration of justice in particular and the discriminatory conduct in general, suggests that when new rules are developed, they go with, rather than against, the grain of non-discrimination. There are no obvious examples of other

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[521] *United States – Sections 301-310 of the Trade Act of 1974, Report of the Panel*, 22 December 1999, WT/DS152/R ***(Investor's Schedule of Legal Authorities at CL-297)***
[522] *Panizzon*, at 158 ***(Investor's Schedule of Legal Authorities at CL-106)***
[523] See *Loewen*, at ¶123 ***(Investor's Schedule of Legal Authorities at CL-121)***; see also *Waste Management II*, at ¶98 ***(Investor's Schedule of Legal Authorities at CL-091)***
[524] *Klager*, at 187, 195 ***(Investor's Schedule of Legal Authorities at CL-101)***
[525] *Klager*, at 188 ***(Investor's Schedule of Legal Authorities at CL-101)***

> customary rules on the treatment of aliens that would permit discrimination. If non-discrimination is accepted as constituting a non-exhaustive core of the international standard of the first half of the twentieth century, the proper question to ask is whether subsequent practice and *opinio juris* in favour of lawfulness of discriminatory conduct have changed the rule.[526]

522. After reviewing the historical development of the law, Mr. Paparinskis concludes that non-discrimination has been and still is part of the international law standard under customary international law. He opines:

> On balance, the role of non-discrimination in the classical law was so great that very clear and consistent practice and *opinio juris* regarding lawfulness of discriminatory conduct would be required to change it. While the treaty-making practice suggests a shift in that direction, it has not yet been expressed in an appropriate form to affect and change customary law. The better view therefore is that discrimination is still a part of the international standard, requiring reasonable justification for different treatment of similar cases. In any event, at least some instances of discrimination may trigger other aspects of the international standard. Conduct motivated by bias and prejudice may be too arbitrary to qualify as undertaken for a public purpose. The same factors could breach the minimal requirements of form. Finally, discrimination may be relevant in terms of procedural propriety; for example, when a State favours another investor in negotiations.[527]

523. For instance, in the *Loewen* NAFTA arbitration, the Tribunal recognized the principle of non-discrimination, and held that this meant conduct that was "free of sectional or local prejudice."[528] The *Waste Management II* Tribunal adopted the language of *Loewen*, and referred to a customary law prohibition on conduct that "is discriminatory and exposes the claimant to sectional or racial prejudice."[529]

iii. The threshold for international responsibility

524. The *Merrill & Ring* Tribunal noted:

> A requirement that aliens be treated fairly and equitably in relation to business, trade, and investment […] has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*.[530]

The Tribunal continued, and held:

> "…customary international law has not been frozen in time … it continues to evolve in accordance with the realities of the international community."[531]

This evolutionary approach was also endorsed by *Waste Management II*.[532]

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[526] *Paparinskis,* at 246 (footnotes omitted) ***(Investor's Schedule of Legal Authorities at CL-103)***
[527] *Paparinskis,* at 247 (footnotes omitted) ***(Investor's Schedule of Legal Authorities at CL-103)***
[528] *Loewen*, at ¶123 ***(Investor's Schedule of Legal Authorities at CL-121)***
[529] *Waste Management II,* at ¶98 ***(Investor's Schedule of Legal Authorities at CL-091)***
[530] *Merrill & Ring Forestry L.P.v. Canada,* UNCITRAL Arbitration, Award, March 31 2010 ("*Merrill & Ring*"), at ¶213 ***(Investor's Schedule of Legal Authorities at CL-036)***
[531] *Merrill & Ring*, at ¶193 ***(Investor's Schedule of Legal Authorities at CL-036)***

525. NAFTA Tribunals have determined that for the purpose of NAFTA Article 1105(1), to the extent that customary law is to be applied, it is to be applied as it stands today.[533] Recent jurisprudence suggests that, while it is possible that there may still be some residual difference between the autonomous standard and customary law standard, this difference is fast disappearing.[534]

526. Indeed, a range of investment arbitral awards and decisions seem less interested in the theoretical discussion on the relationship between the "fair and equitable treatment" and the customary international law standard of treatment, and instead, have turned their attention to the content of the "fair and equitable treatment" and "full protection and security" obligations.[535]

Judge Stephen Schwebel has remarked that the *Neer* formula is quite "far from" the International Law Standard.[536] He has stated that in his experience as an official of the U.S. Government at the time when the NAFTA was negotiated, there was "no whisper" about the *Neer* criteria.[537] He elaborated on his view that the *Neer* claim was an unpersuasive authority for the interpretation of the International Law Standard:

> The United States, Canada and Mexico apparently rely on the award of the Claims Commission in *Neer* as setting a standard for the interpretation of NAFTA Article 1105. The Claims Commission was an international tribunal. Why should its terse, barely reasoned opinion – which examines no State practice at all – be the fount of customary international law as respects what is an international delinquency, while the judgments of contemporary international tribunals do not

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[532] *Waste Management*, at ¶93 ***(Investor's Schedule of Legal Authorities at CL-091)***

[533] *ADF*, at ¶179 ***(Investor's Schedule of Legal Authorities at CL-072)***; *Loewen*, at ¶133 ***(Investor's Schedule of Legal Authorities at CL-121)***

[534] *Sempra*, at ¶302 ***(Respondent's Schedule of Legal Authorities at RL-070)***; *Enron,* at ¶258 ***(Respondent's Schedule of Legal Authorities at RL-049)***; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL Arbitration Rules, Partial Award, 17 March 2006 ("Saluka"), at ¶291 ***(Investor's Schedule of Legal Authorities at CL-081)*** In *Saluka,* the Tribunal noted that "it appears that the difference between the Treaty standard [of fair and equitable treatment] and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real."

[535] *Rumeli*, at ¶611 ***(Investor's Schedule of Legal Authorities at CL-064)***; *CMS Gas*, at ¶284 ***(Investor's Schedule of Legal Authorities at CL-073)*** Stephan Schill summarized the reasons for a "convergence" on the content of fair and equitable treatment and the customary standard, remarking: "First, some tribunals consider that the inclusion of the fair and equitable treatment in the vast web of investment treaties has transformed the standard itself into customary international law. Second, even in the absence of such an explicit transformation, other tribunals interpret the international minimum standard as an evolutionary concept that has developed since the days of traditional international law, thus leveling possible differences between treaty and custom." *See* Stephan Schill, *Fair and Equitable Treatment, the Rule of Law and Comparative Public Law, in International Investment Law and Comparative Public Law*, Stephan Schill, ed. (Oxford University Press, 2010), at 153 ***(Investor's Schedule of Legal Authorities at CL-279)***

[536] Judge Stephen M. Schwebel, "Is Neer Far From Fair And Equitable?," Remarks at the International Arbitration Club, London, May 5, 2011 ***(Investor's Schedule of Legal Authorities at CL-267)***

[537] Judge Stephen M. Schwebel, "Is Neer Far From Fair And Equitable?" Remarks at the International Arbitration Club, London, May 5, 2011 ***(Investor's Schedule of Legal Authorities at CL-267)***

> influence the content of customary international law in that regard? How is it that the governments of these States in their pleadings in the International Court of Justice invoke prior judgments of the Court, and, if my recollection is correct, awards of international arbitral tribunals but hold them of no account in the evolution of customary international law in the NAFTA context?[538]

527. Many other Tribunals – NAFTA and non-NAFTA alike – have taken a similar approach, confirming that a violation of "fair and equitable treatment" need not be triggered by an act that can be characterized as "outrageous" or "egregious."[539]

528. Several tribunals have determined that a violation of "fair and equitable treatment" may be triggered by behaviour that is simply "unreasonable."[540] The Tribunal in *Saluka* drew a close relationship between "reasonableness" and "fair and equitable treatment:"

> The standard of "reasonableness" has no different meaning in this context than in the context of the "fair and equitable treatment" standard with which it is associated; and the same is true with regard to the standard of "non-discrimination." The standard of "reasonableness" therefore requires…a showing that the State's conduct bears a reasonable relationship to some rational policy, whereas the standard of "non-discrimination" requires a rational justification of any differential treatment of a foreign investor.[541]

529. The nexus between "fair and equitable treatment" and the duty to act "reasonably" was affirmed by the Tribunal in the award in *Continental Casualty*, which stated:

> …the fair and equitable standard is aimed at assuring that the normal law-abiding conduct of the business activity by the foreign investor is not hampered without good reasons by the host government and other authorities.[542]

530. The Tribunals in *MTD Equity*, *Azurix*, and *Siemens* all affirmed that, in the context of "fair and equitable treatment" analysis, what is required is "treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment."[543] Where the treatment in question is seen to be unjust or not even-handed, there may be a violation of "fair and equitable treatment."

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[538] Judge Stephen M. Schwebel, "Is Neer Far From Fair And Equitable?" Remarks at the International Arbitration Club, London, May 5, 2011 ***(Investor's Schedule of Legal Authorities at CL-267)***

[539] *Pope & Talbot* – Award on the Merits of Phase II, at ¶118 ***(Investor's Schedule of Legal Authorities at CL-039)***; *ADF*, at ¶181 ***(Investor's Schedule of Legal Authorities at CL-072),*** *Waste Management II*, at ¶98 ***(Investor's Schedule of Legal Authorities at CL-091)***; *GAMI*, at ¶95 ***(Investor's Schedule of Legal Authorities at CL-195)***

[540] *Iurii Bogdanov, Agurdino-Invest Ltd., Agurdino-Chimia and JSC v Republic of Moldova,* 2004 WL 235957, SCC Arbitration, Arbitral Award, 22 September 2005, at 10 ***(Investor's Schedule of Legal Authorities at CL-318)***; *Eureko,* at ¶234 ***(Investor's Schedule of Legal Authorities at CL-080)***

[541] *Saluka*, at ¶460 ***(Investor's Schedule of Legal Authorities at CL-081)***

[542] *Continental Casualty Company v. Argentine Republic,* ICSID Case No. ARB/03/9, Award (September 5, 2008), at ¶254 ***(Investor's Schedule of Legal Authorities at CL-143)***

[543] *MTD Equity* at ¶113 ***(Investor's Schedule of Legal Authorities at CL-060)***; *Azurix* at ¶360 ***(Investor's Schedule of Legal Authorities at CL-070)***; and *Siemens* – Award, at ¶290 ***(Investor's Schedule of Legal Authorities at CL-144)***

B. The test is a flexible one to be applied in all the circumstances

531. What amounts to a violation of the "fair and equitable treatment" standard is necessarily specific to each case. Admittedly, there is as of yet no general agreement on the precise content and scope of the customary standard of "fair and equitable treatment." This stems from the inherently supple nature of the standard. There simply is no easy formula that can apply to all cases. As the *Waste Management* Tribunal noted, "the standard is to some extent a flexible one which must be adapted to the circumstances of each case."[544]

532. While this may lead to a certain level of uncertainty as to exactly what constitutes a violation of "fair and equitable treatment," there is at least this much that *is* certain: the more grievous and numerous the violations of these various indicia, the more likely there is to be a violation of the duty to provide "fair and equitable treatment." What is also certain is that the trend has for some time now been evolving towards a higher customary law standard of investment protection from Prof. Schreuer terms "state interference."[545]As a result, there is without questions a higher customary law standard of treatment, incorporating modern notions of administrative fairness and due process of law.

533. Bearing all this in mind, all this Tribunal needs to ask itself is this: in light of all the circumstances of this case, with a view to all the sources of international law, and in the understanding that there has in recent years been a rapid convergence between the autonomous treaty standard of "fair and equitable treatment" and the customary international law standard, has Canada violated its obligation to accord the Investor the type of "fair and equitable treatment" guaranteed by NAFTA Article 1105(1)?

534. As straightforward as this question may seem, at this point in the discussion it still remains somewhat abstract. As the *Mondev* Tribunal pointed out:

> A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.[546]

535. And as the Tribunal in *Rumeli* put it:

> The precise scope of the [fair and equitable treatment] standard is…left to the determination of the Tribunal which will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable.[547]

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[544] *Waste Management II*, at ¶99 ***(Investor's Schedule of Legal Authorities at CL-091)***

[545] See, for example, Schreuer, C., *"*Fair and Equitable Treatment in Arbitral Practice*"* (June 2005) 6:3 *The Journal of World Investment & Trade,* 357 ("Schreuer (2005)") at 370, where he states that there is an "evolving trend towards a higher standard of protection against State interference." ***(Investor's Schedule of Legal Authorities at CL-145)***

[546] *Mondev*, at ¶118 ***(Investor's Schedule of Legal Authorities at CL-034)***

C. The effect of Most Favoured Nation Treatment obligations

536. The NAFTA contains an obligation for Most Favoured Nation treatment (MFN) within NAFTA Article 1103. The NAFTA also refers to MFN as one of its interpretative rules and principles underpinning its overall interpretation in Article 102.

537. MFN clauses can identify the content of the state's obligations by use of a variable parameter based on a state's obligations to others. The basis for this better treatment will be the more favourable treatment that is offered by these obligations and must be subject to the terms of any restrictions contained in the terms of the MFN clause. The Investor has discussed substantive MFN treatment in Part Five of this Reply.

538. Martins Paparinskis considers the operation of MFN clauses on the meaning of the international minimum standard in treaties. He concludes that MFN clauses can be applied to substantive obligations. He states: "it should be possible to treat more detailed rules on fair and equitable treatment on the scale of favourability."[548] He then considers the practical ways to assess favourability and concludes that:

> MFN clauses are applicable to incorporate more favourable substantive rules in general and more favourable parts of substantive rules in particular, they do not seem easily applicable to criteria developed by case law. The criterion of 'favourability' can be applied only if matter can be compared on the spectrum of greater and lesser favourability.[549]

539. In an accompanying footnote, Mr. Paparinskis examines cases on favourability. He states that the word favourable means:

> Favourable is 'attended with advantage or convenience', *Oxford English Dictionary* (Volume V, 2nd edn Clarendon Press, Oxford 1989) 774–5; the first meaning of 'advantage' is 'superior position', ibid Volume I 184; and 'superior' is '[i]n a positive or absolute sense (admitting comparison with *more* and *most*): Supereminent in degree, amount, or (most commonly) quality; surpassing the generality of its class or kind', ibid Volume XVII 229; cf *Berschader* Weiler (n 154) [22]; *ICS Inspection and Control Services Limited (United Kingdom) v Argentina*, PCA Case no 2010-9, Award on Jurisdiction, 10 February 2012 [318]–[325]; Paparinskis, 'MFN Clauses and International Dispute Settlement' (n 158) 47–56. [550]

540. Accordingly, if a MFN clause in another treaty obliged Canada to provide treatment to investments of foreign investors that would be advantageous or surpassing the quality of that provided to investments under NAFTA Article 1105, then more favourable treatment would need to be provided by Canada under Article 1103 with respect to the

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[547] *Rumeli*, at ¶610 ***(Investor's Schedule of Legal Authorities at CL-064)***
[548] Paparinskis, at 134 ***(Investor's Schedule of Legal Authorities at CL-103)***
[549] Paparinskis, at 134 ***(Investor's Schedule of Legal Authorities at CL-103)***
[550] Paparinskis, at 134, at fn.162 ***(Investor's Schedule of Legal Authorities at CL-103)***

conduct, management, operation, control or disposition of investments of investors in like circumstances.

541. The MFN obligation requires this Tribunal to provide treatment as favourable to the Investor as that provided to other investors who would receive treaty protection for their investments under other investment protection treaties negotiated by Canada. To be invoked, MFN requires the establishment of diversity of nationality. There must be an investment of an investor that receives better treatment in like circumstances than the investments of the Investor in this arbitration claim. So what is necessary is to establish a diversity of nationality.

542. Canada is a party to many bilateral investment treaties with non NAFTA-states. These treaties state the fair and equitable treatment obligation in terms that are similar (or even broader) than NAFTA Article 1105. However, Canada and the other parties to these treaties have not negotiated interpretive notes or other instruments that are claimed to narrow the meaning of Fair and Equitable Treatment in the treaty itself.

543. If, contrary to the Investor's position, and to the extent that this Tribunal accepts the invocation of the Notes of Interpretation as suggested by Canada to narrow the obligations of a NAFTA Party under Article 1105 to less than it otherwise be, that same invocation would result in less favourable treatment being provided to the investor under the NAFTA than to investors of non-NAFTA states parties to Canada's BITs. This constitutes a violation of the Most-Favoured Nation obligation in NAFTA Article 1103. In such a circumstance, the comments of the *Pope and Talbot* tribunal, in rejecting such a narrowing interpretation, are apposite.[551]

544. Canada has negotiated other treaties with such protections since the coming into force of the NAFTA on January 1, 1994. Each of these treaties uses identical or similar text to Article 1105 of the NAFTA that has not been subject to "amendments" under the Notes of Interpretation. A number of investment treaties have been signed by Canada in which Canada is required to provide foreign investors with this better "autonomous" level of international law treatment. The treaties with these particular formulations are between Canada and: Armenia[552], Barbados[553], Costa Rica[554],Croatia[555], Ecuador[556],

[551] Certificate of Incorporation for for the North Bruce Holdings ULC, under the Alberta Business Corporations Act, April 6, 2010, at ¶47 ***(Investor's Schedule of Legal Authorities at CL-032)***

[552] Agreement between the Government of Canada and the Government of the Republic of Armenia for the promotion.and protection of investment, 29 March 1999 ***(Investor's Schedule of Legal Authorities at CL-304)***

[553] Agreement between the Government of Canada and the Government of Barbados for the promotion and protection of investment, 17 January 1997 ***(Investor's Schedule of Legal Authorities at CL-303)***

[554] Agreement between the Government of Canada and the Government of Costa Rica for the promotion and protection of investment, 29 September 1999 ***(Investor's Schedule of Legal Authorities at CL-310)***

Egypt[557], Lebanon[558], Philippines[559], Thailand[560], Trinidad & Tobago[561], Ukraine[562], Uruguay[563], and Venezuela.[564] Each of these treaties, apart from Venezuela[565], offers the following general international law standard of protection to investments of foreign investors covered by the treaty:

> Each Contracting Party shall accord investments or returns of investors of the other Contracting Party
>
> a) Fair and equitable treatment in accordance with principles of international law, and
>
> b) Full protection and security

545. These broader investment protections provided by Canada under the operation of the Treaties that are in force to the investments of other similarly-situated investors from third party states constitute more favourable treatment actually provided by Canada than that provided to Mesa. Ensuring that such better treatment is incorporated into the NAFTA is consistent with the objectives of the NAFTA.

546. In addition, the definition of an investor and of an investment in each of these third treaties is based upon an near identical model to that contained in Article 1139 of the NAFTA. The wording used in each of these third party treaties says:

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[555] Agreement between the Government of the Republic of Croatia and the Government of Canada for the promotion and protection of investments, 30 January 2001 ***(Investor's Schedule of Legal Authorities at CL-288)***

[556] Agreement between the Government of Canada and the Government of the Republic of Ecuador for the promotion and reciprocal protection of investment, 6 June 1997 ***(Investor's Schedule of Legal Authorities at CL-307)***

[557] Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the promotion and protection of investment, 3 November 1997 ***(Investor's Schedule of Legal Authorities at CL-301)***

[558] Agreement between the Government of Canada and the Government of the Lebanese Republic for the promotion and protection of investment 19 June 1999 ***(Investor's Schedule of Legal Authorities at CL-305)***

[559] Agreement between the Government of Canada and the Government of the Philippines for the promotion and protection of investment, 13 November 1996 ***(Investor's Schedule of Legal Authorities at CL-302)***

[560] Agreement between the Government of Canada and the Government of Thailand for the promotion and protection of investment, 24 September 1998 ***(Investor's Schedule of Legal Authorities at CL-308)***

[561] Agreement between the Government of Canada and the Government of Trinidad and Tobago for the promotion and protection of investment, 8 July 1996 ***(Investor's Schedule of Legal Authorities at CL-306)***

[562] Agreement between the Government of Canada and the Government of Ukraine for the promotion and protection of investment, 24 July 1995 ***(Investor's Schedule of Legal Authorities at CL-300)***

[563] Agreement between the Government of Canada and the Government of Uruguay for the promotion and protection of investment, 2 June 1999 ***(Investor's Schedule of Legal Authorities at CL-309)***

[564] Agreement between the Government of Canada and the Government of Venezuela for the promotion and protection of investment, 28 January 1998 ***(Investor's Schedule of Legal Authorities at CL-311)***

[565] The Venezuela BIT reads: "Each contracting party shall, in accordance with the principles of international law, accord investments or returns of investors of the other Contracting Party fair and equitable treatment and full protraction and security." Agreement between the Government of Canada and the Government of Venezuela for the promotion and protection of investment, 28 January 1998 ***(Investor's Schedule of Legal Authorities at CL-311)***

> Investor: any natural person possessing the citizenship or of permanently residing in [Country] in accordance with its law or any enterprise incorporated or duly constituted in accordance with applicable laws in [the country] and who makes the investment in [the receiving country] and who does not possess the citizenships of [the receiving country].
>
> Investment means any kind of asset owned or controlled either directly or indirectly through an investor of a third State, by an investor of one Contracting Party in the territory of the other Contracting party in accordance with the latter's laws and, in particular, though not exclusively, includes:
>
> a) Movables and immovable property and any related property rights such as mortgages, liens or pledges;
>
> b) Shares, stock, bonds and debentures or any other form of participation in a company, business enterprise or joint ventures;
>
> c) Money, claims to money, and claims to performance under contract having a financial value;
>
> d) Goodwill;
>
> e) Intellectual property rights;
>
> f) Rights conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources.
>
> But does not mean real estate or other property, tangible or intangible, not acquired in the expectation or use for the purpose of economic benefit or other business purposes.
>
> Any change in the form of an investment does not affect its character as an investment.

Thus, investments of investors from any of the enumerated third party states who operated in like circumstances were entitled to more favourable treatment from Canada. And such similar investments received such treatment in the context of the conduct, operation, management or control of their investments.

547. Fair and equitable treatment in accordance with the principles of international law" is simply more favourable to the investments of a foreign investor than the fair and equitable treatment text in Article 1105 if the Notes of Interpretation are given the effect requested by Canada.

548. As a result of the MFN obligation in Article 1103, Canada is required to extend treatment as favourable as Canada already is required to provide to investments of investors from third party states under the "autonomous standard" to the investments of such investors.

549. In any case, the interpretation of NAFTA Article 1105 that the Tribunal adopts cannot have the result that Canada provides less favourable treatment to the Investor than that

afforded to investors of non-NAFTA Parties operating in like circumstances under other treaties to which Canada is bound.

550. Viewing the Notes of Interpretation as restricting the ordinary meaning of the international law standard and Fair and Equitable Treatment would have just this effect, since the Notes of Interpretation do not require this restriction. Thus there is no argument under these other treaties for restricting the ordinary meaning of Fair and Equitable Treatment or Full Protection and Security.

551. The application of the MFN clause in this way is consistent with the object and purpose of NAFTA, that of comprehensive economic integration, which as the *Pope & Talbot* Tribunal noted, could not be consistent with a lower standard of treatment than under BITs with states with much less close and interdependent economic relations.

552. The operation of the MFN obligation requires that the Tribunal consider the content of the "autonomous" international law standard that has been considered at length by many other international law tribunals. Accordingly, whether it is provided under NAFTA Article 1105 or under the operation of NAFTA Article 1103, Canada must provide treatment to Mesa's investments in accordance with the full spectrum of International law including but not limited to customary international law.

553. There is no *lex specialis* within the NAFTA that prohibits this Tribunal from considering, for the purposes of guidance in its interpretive exercise, the decisions of other courts and tribunals interpreting non-NAFTA treaty provisions. Such decisions are among the sources of law in Article 38 of the *Statute of the ICJ*. Obviously, in considering such decisions, a NAFTA tribunal will have to assess their relevance given the object and purpose of the NAFTA. However, the Notes of Interpretation themselves, in referring to custom, suppose some kind of common ground in international law concerning at least the broad parameters of what is fair and equitable. It would be thus highly surprising if the views of other tribunals interpreting this, or closely similar language, in different treaties were of no assistance.

554. In the recent ICJ decision in *Antarctic Whaling*, Judge Trindade in a separate concurring opinion referred to international instruments relating to a single subject matter (in this case conservation) as not being approached in isolation to one another, but with a "systemic outlook."[566] A similar approach should be followed when different international economic law instruments which related to a single subject matter, are

[566] *Case Concerning Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Separate Opinion of Judge Cancado Trinidade, 31 March 2014, at ¶¶25-26 ***(Investor's Schedule of Legal Authorities at CL-319)*** A similar approach is called for under the *Vienna Convention on the Law of Treaties*, Article 31(3)(c) ***(Investor's Schedule of Legal Authorities at CL-011)***

involved on the same topics such as procurement, most favoured nation treatment or national treatment.

555. The reliance on an MFN clause of the treaty being applied to accord to the investor the standard of fair and equitable treatment guaranteed to investors of other parties through another treaty is not unprecedented.

556. While there has been some debate about the ability to use MFN to address procedural advantages, there has been no debate on the use of MFN clauses to address differences in treatment with respect to substantive treatment provided to foreign investors and their investment. In addition, MFN clauses were found to have substantive effect by international investment Tribunals in at least the following: *MTD v Chile*[567], in *Siemens v. Argentina*, [568] *Gas Natural SDG v. Argentina*[569], *Suez Santa Fe v. Argentina*[570], *Bershader v. Russia*[571], *Rosinvest v. Russia*[572] and *Société Générale v. Dominican Republic*.[573]

557. The use of MFN with regards to the "fair and equitable" standard is not unprecedented in investment law.[574] In *Rumeli Telekom SA and others v. Kazakhstan* the Tribunal used the MFN requirements of the treaty to apply the fair and equitable standard, eventually finding that:

> That the process that led to the decision of the Working Group lacked transparency and due process and was unfair, in contradiction with the requirements of the fair and equitable treatment principle. Since the Working Group acted as an organ of the State, the violation amounts to a breach of the BIT by the Republic.[575]

As such, it is both necessary and reasonable for the Investor to benefit from treatment from Canada that is fair and equitable by application of the MFN provisions of the NAFTA.

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[567] *MTD Equity*, at ¶104 ***(Investor's Schedule of Legal Authorities at CL-060)***

[568] *Siemens A.G. v. Argentine Republic,* ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, at ¶86 ***(Investor's Schedule of Legal Authorities at CL-021)***

[569] *Gas Natural SDG, S.A. v. The Argentine Republic,* ICSID Case No. ARB/03/10, Decision on Preliminary Questions on Jurisdiction, 17 June 2005, at ¶29 ***(Investor's Schedule of Legal Authorities at CL-257)***

[570] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (May 16, 2006), at ¶¶63-66 ***(Respondent's Schedule of Legal Authorities at CL-278)***

[571] *Vladimir Berschader and Moïse Berschander v. The Russian Federation,* SCC Case No. 080/2004, Award, 21 April 2006, at ¶181 ***(Investor's Schedule of Legal Authorities at CL-262)***

[572] *RosInvestCo UK Ltd. v. The Russian Federation,* SCC Case No. V079/2005, Award on Jurisdiction, 1 October 2007, at ¶¶124-139 ***(Investor's Schedule of Legal Authorities at CL-259)***

[573] *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A. v. The Dominican Republic,* UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, at ¶¶40-41 ***(Investor's Schedule of Legal Authorities at CL-260)***

[574] Klager, at 269, discusses a number of examples of the adoption of MFN clauses by tribunals. ***(Investor's Schedule of Legal Authorities at CL-101)***

[575] Rumeli, at ¶618 [emphasis added] ***(Investor's Schedule of Legal Authorities at CL-064)***

D. Canada has advanced an improper interpretation for the international law standard of treatment and the threshold of international responsibility

i. Canada's improper interpretation of the international law standard of treatment

558. Canada makes reference to the Notes of Interpretation issued by the NAFTA Free Trade Commission on July 31, 2001. Canada suggests that this Tribunal must give binding interpretative weight to the Notes of Interpretation because of the operation of NAFTA Article 1131.[576]

559. Not every conceivable interpretation made by the Free Trade Commission will be capable of being given effect. Only those interpretations which actually interpret words of the treaty can be given effect. Interpretations which actually amend the treaty are *ultra vires* of the Free Trade Commission and thus violate the rule of law and cannot be given effect.

560. There is a difference between the meaning of the term "international law" and the meaning of the term "customary international law." The term "customary international law" is well known in international law and it refers to a mere subset of the full meaning of the term "international law." There was absolutely no confusion in the use of words "international law" used by the NAFTA framers within NAFTA Article 1105. They explicitly selected these words to provide the wide and general protections to the investments of investors of other NAFTA Parties under international law which included the protections from treaty law, general principles of law and decisions of jurists and tribunals. The wording in NAFTA Article 1105 included the narrower protections provided under customary international law along with these other sources. So the substitution of the broad protections covered by the express wording, with a narrower set of protections appears on its face to constitute a modification of the NAFTA Treaty.

561. The *Vienna Convention* is an expression of customary international law. The NAFTA Parties not only did not contract out of custom but through Article 1131, the NAFTA Parties specifically reaffirmed the applicability of the international law rules of treaty interpretation which are codified in the *Vienna Convention*.

562. The Notes of Interpretation leave unaltered NAFTA Article 1131(1), which directs a tribunal to apply "applicable rules of international law" to NAFTA Chapter 11 disputes. These rules include all the sources enumerated in Article 38(1) of the *ICJ Statute* – not just the rules of customary international law. The primary source of treaty

[576] NAFTA Article 1131(1) confirms that NAFTA Tribunals constituted under Section B of Chapter 11 of NAFTA "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." ***(Respondent's Schedule of Legal Authorities at RL-030)***

interpretation is the wording of the treaty itself, and NAFTA Article 1131(1) is clear: a tribunal shall apply "applicable rules of international law." A tribunal cannot, on the one hand, be directed to apply all the applicable rules of international law, and, on the other, be restricted to applying only the rules of customary international law. The Notes of Interpretation said nothing about discontinuing the applicability of NAFTA Article 1131(1) with respect to NAFTA Article 1105(1). As a result, NAFTA Article 1131(1) continues to apply to the entirety of NAFTA Chapter 11. This gives rise to an irresolvable conflict. In such a situation, the strict wording of the treaty itself necessarily trumps a loose interpretation thereof.

563. The Notes of Interpretation cannot amend the NAFTA but may only govern the interpretation of the Treaty. Furthermore, the Notes of Interpretation are best understood as constituting a subsequent agreement or a subsequent practice of the state parties. Either way, such conduct must always be subordinate to the ordinary meaning of the treaty words, and cannot lead to a reading of the Treaty that contradicts its ordinary meaning taking into account all of the considerations mentioned in Article 31 of the *Vienna Convention*.

564. The Notes of Interpretation run counter to the plain and ordinary meaning of NAFTA Article 1105(1). The general rule of treaty interpretation requires that a treaty be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[577] NAFTA Article 1105(1) clearly states that Canada must "accord investments of investors of another Party treatment in accordance with *international law*" – not *customary* international law. The ordinary meaning of "international law" refers to all sources of international law enumerated in Article 38(1) of the *ICJ Statute* – not only customary international law. The drafters of the NAFTA were fluent in the language of international law, and were surely alert to the distinction.[578]

565. In the end, carrying the Notes of Interpretation through to their logical conclusion would deprive the words "fair and equitable treatment" in NAFTA Article 1105(1) of any meaning, thereby leading to an absurd or unreasonable result. This runs counter to one of the most basic tenets of treaty interpretation, by which no words in a treaty are to be deprived of their meaning, or otherwise interpreted, so as to be rendered superfluous.

566. This Tribunal also must take into account the existence of over 2580 bilateral investment treaties, the vast majority of which contain fair and equitable treatment

[577] *Vienna Convention on the Law of Treaties*, Article 31(1) ***(Investor's Schedule of Legal Authorities at CL-011)***

[578] In the *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Judgement, ICJ Reports 1952 at 105, the court accepted the principle that a legal text should be interpreted to give effect to every word in the text. ***(Investor's Schedule of Legal Authorities at CL-313)***

provisions. The overwhelming existence of this widespread acceptance of this obligation makes clear the widespread recognition and acceptance of this obligation by state parties.[579]

567. The Notes of Interpretation have a real legal effect under NAFTA Article 1131, but that legal effect is controlled and determined by the general customary rules and by other provisions within the text of the NAFTA such as NAFTA Article 2202, which sets out the applicable process for modifications to the treaty.

568. The *Vienna Convention* makes clear that where a treaty contains a *lex specialis*, that *lex specialis* applies.[580] The Notes of Interpretation on their own terms refer not to a *lex specialis* in the NAFTA that governs modifications of the treaty but to another provision regarding interpretation. As a result, there is no evidence on the face of the Notes of Interpretation, nor in the NAFTA, to establish the intent to contract out of customary international law rules of interpretation as set out in articles 31 and 32 of the *Vienna Convention*.

569. As a result, the Notes of Interpretation cannot amend the NAFTA but may only govern the interpretation of the Treaty in a manner permitted by Articles 31 and 32 of the *Vienna Convention*. Further, the Notes of Interpretation are best understood as constituting a subsequent agreement or a subsequent practice of the Parties. Either way, the resulting interpretation must always be subordinate to the ordinary meaning of the treaty words, and cannot lead to a reading of the treaty that contradicts its ordinary meaning taking into account all of the considerations mentioned in Article 31 of the *Vienna Convention*. Such subsequent practice of the Parties must be proved by a Party seeking to rely upon it and requires far more evidence than that which has been provided by any Party in this arbitration.

570. The Notes of Interpretation require that the Tribunal direct themselves in particular to custom in ascertaining the standard of treatment required by the ordinary meaning of "treatment in accordance with international law including Fair and Equitable Treatment and Full Protection and Security." Custom is a minimum standard of treatment that provides a floor for the interpretation of international law and what is fait and equitable.

571. Taking into account the Notes of Interpretation, the Tribunal must articulate a standard of treatment that makes sense on an overall basis, taking together all of the relevant

[579] Publically available copies of bilateral investment treaties can be found on Westlaw's bilateral investment treaty service (ICA-BITREATIES).

[580] *Vienna Convention on the Law of Treaties*, Article 55 ***(Investor's Schedule of Legal Authorities at CL-011)***

provisions of Article 31, guided above all by the ordinary meaning of the words and the objectives of the Treaty which is set out in NAFTA Article 102.

572. The Notes of Interpretation cannot be read to exclude the consideration of sources of law other than custom because of the following:

a) It is well established that treaties and other conventional instruments, are possible evidence of custom or may crystallize, codify or clarify custom. It would thus be utterly contradictory to interpret notes that direct the Tribunal to consider custom as excluding the Tribunal from consideration of this kind of normative material.

b) Such a reading would contradict in any case the ordinary meaning of "international law" in Article 1105 and would thus not under the *Vienna Convention* be a permissible approach to the Notes of Interpretation.

c) Based on the Notes of Interpretation, a Tribunal is required to pay particular attention to the fusion of the concepts of "fair equitable treatment" with standards of treatment drawn from custom. The Notes of Interpretation suggest a strong presumption of the harmony of fairness and equity with customary international law standards.

573. The Notes of Interpretation have a real legal effect under NAFTA Article 1131, but that legal effect is controlled and determined by the general customary rules and by other provisions within the text of the NAFTA such as NAFTA Article 2202, which sets out the applicable process for modifications to the treaty.

574. Even if there were any lingering doubts about the appropriateness of the Notes of Interpretation in light of a textual analysis of the ordinary wording of NAFTA Article 1105(1), viewing NAFTA Article 1105(1) in light of the objects and purpose of the NAFTA adds further weight to the little likelihood the Parties intended to restrict the meaning of NAFTA Article 1105(1) to just customary international law. NAFTA Article 102(1) sets out the objectives of the NAFTA. These include the following:

a) Promoting transparency;

b) Eliminating barriers to trade in, and facilitating the cross-border movement of, goods and services; and

c) Promoting conditions of fair competition.

There is nothing about interpreting the protections of NAFTA Article 1105(1) to be limited to those recognized only by customary international law that serves to achieve these objectives.

575. Although it is clear on its face that NAFTA Article 1105(1) was never intended to be limited in this way, even in the event that any lingering uncertainty might justify

recourse to the *travaux préparatoires* of the NAFTA, this supplementary means of treaty interpretation confirms that NAFTA Article 1105(1) was never intended to exclude general principles of law.

576. Shortly after the Notes of Interpretation were issued, the *Pope & Talbot* Tribunal requested Canada to produce all drafting history materials supporting the intention of the Parties to limit the reference to "international law" in NAFTA Article 1105(1) to "customary international law." In response, Canada produced some 1,500 pages of documents in 43 drafts of Chapter Eleven of the NAFTA. In all those pages and drafts, the Tribunal was unable to detect a single intention by the Parties to restrict the meaning of "international law" in NAFTA Article 1105 to "customary international law."[581]

577. This gives rise to the third key reason why Canada's interpretation of the Notes of Interpretation is not binding on this Tribunal: they do not constitute a valid "interpretation" of NAFTA Article 1105, but, as Professor Charles "Chip" Brower lays out clearly, are instead an "amendment."[582] A valid interpretation would have addressed the logical inconsistency left between NAFTA Articles 1131(1) and 1131(2) – namely, requiring international tribunals on the one hand to decide issues in accordance with "applicable rules of international law," and, on the other, requiring them to decide issues only in accordance with customary international law. A valid interpretation would also presumably be reflected in the ordinary meaning of the words of the treaty, and, failing that, at least be supportable by reference to its objects and purposes. At the very least, a valid interpretation would be supportable by reference to the *travaux préparatoires* of the treaty itself. Yet nowhere is any such support to be found for the Notes' interpretation of NAFTA Article 1105(1).

578. It is for this reason that after a detailed review of the drafting history of the NAFTA, the *Pope & Talbot* Tribunal concluded that the substance of the Notes of Interpretation does in fact amount to an "amendment" of the NAFTA, not an "interpretation."[583]

579. The effect of these changes has been examined by Sir Robert Jennings, former president of the International Court of Justice. He considered the impact of the Notes of Interpretation within an expert opinion filed in the *Methanex v. United States* NAFTA arbitration. Sir Robert considered the wording of the interpretation and whether the Notes of Interpretation were an interpretation of words within the NAFTA or whether it

[581] The public version of the negotiating history is available in Barry Appleton, *NAFTA: Legal Text and Interpretive Materials*, Vol. 3 (West Publishing, 2007) ***(Investor's Schedule of Legal Authorities at CL-164)***

[582] Charles H. Brower, II, "Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105" *International Arbitration News* (Summer 2005) ***(Investor's Schedule of Legal Authorities at CL-314)***

[583] *Pope & Talbot* - Award on Damages, at ¶47 ***(Investor's Schedule of Legal Authorities at CL-032)***

constituted a modification of the NAFTA. In coming to his conclusions, Sir Robert noted the wording of Article 1105 and stated that "the words including 'fair and equitable treatment and full protection and security' are part of the actual text of the Article." He set out detailed reasons why he believes that the Notes of Interpretation operated to remove such words.[584]

580. Sir Robert noted that the Notes of Interpretation attempts to modify the text of Article 1105 by importing additional language, in this case the words "aliens" and "customary." Sir Robert found this to amount to "materially changing the text" that in fact "betray[s] the aim of this so-called interpretation" by replacing the "plainly stated requirements" of the article.[585] He went on to state:

> Article 1105 does not provide a rule for the treatment of aliens, nor is it concerned with the customary international law about the treatment of aliens. It is a treaty provision defining the treatment required by the treaty for investments of investors of another party.[586]

581. In general, Sir Robert found that the word customary in the Notes of Interpretation is an interpolation by the Free Trade Commission, as is also the word 'aliens'.[587] This is a "curiously crab-like way of going about an interpretation of a given text. It is as if the Commission's drafters were apprehensive lest there might indeed now be a modern customary law dealing with investors and investments, and it is this that moves them to insist so blatantly that it is the former law about the treatment of aliens that, for obvious reasons, they much prefer."[588]

582. Sir Robert concludes his analysis by finding that:

> The issue, in a nutshell, is this: if the three governments are suggesting that NAFTA (and the hundreds of BITs) does *not* require a State to provide fair and equitable treatment, the suggestion is preposterous. It cannot be reconciled with the text of Article 1105(1), nor with any canon of interpretation of international law. If that is indeed the position of the three governments, then the Tribunal should treat the "interpretation as an attempted amendment that has no binding effect."[589]

583. This understanding of the Notes of Interpretation as an "amendment" as opposed to an "interpretation" is an important one. There is nothing indelible about the NAFTA; as NAFTA Article 2202 makes clear, the Parties may agree to amend any of its provisions at any time. An amendment is required where the Parties have reconsidered a

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[584] *Methanex Corporation v. The United States of America*, 2005 WL 1950817, UNCITRAL, Second Opinion of Professor Sir Robert Jennings, Q.C. (September 6, 2001) ("Opinion by Sir Robert Jennings") ***(Investor's Schedule of Legal Authorities at CL-312)***

[585] Opinion by Sir Robert Jennings, at 3 ***(Investor's Schedule of Legal Authorities at CL-312)***

[586] Opinion by Sir Robert Jennings, at 5 ***(Investor's Schedule of Legal Authorities at CL-312)***

[587] Opinion by Sir Robert Jennings, at 5 ***(Investor's Schedule of Legal Authorities at CL-312)***

[588] Opinion by Sir Robert Jennings, at 5 ***(Investor's Schedule of Legal Authorities at CL-312)***

[589] Opinion by Sir Robert Jennings, at 6 ***(Investor's Schedule of Legal Authorities at CL-312)***

fundamental aspect of their agreement, and would like to change it. This, however, requires that all Parties agree, and go through their respective processes to give legal effect to the amended agreement. By contrast, an "interpretation" is required not where a change to a fundamental aspect of an agreement is required, but rather where a mere clarification of, or elaboration upon the terms of that agreement is needed. Unlike a formal "amendment," an "interpretation" is much easier to bring about; rather than requiring the Parties themselves to renegotiate the agreement – a process which can be cumbersome and time-consuming – an "interpretation" may be issued by a subsidiary body – in this case the Free Trade Commission. If the Parties wanted to amend Article 1105(1) of the NAFTA, they were – and indeed still are – fully within their rights to do so. However, an amendment is a serious matter that requires the Parties to follow the proper procedures. In the case of the Notes of Interpretation, the Parties did not follow the proper procedures; rather, they sought to amend the NAFTA through a less cumbersome and more politically expedient channel. This was an improper attempt to circumvent the requirements of the NAFTA, and disguise an "amendment" in the garb of an "interpretation." This amendment is therefore *ultra vires* the powers of the Free Trade Commission, and of no legal force or effect.

ii. The Earlier Attempts to Modify the Treaty

584. There is a history of the NAFTA Trade Ministers overstepping their authority under the NAFTA by attempting to circumvent the legitimate and legal process for modification of this treaty. For example, the first such episode occurred in 1996.

585. NAFTA Article 1108 provides specific time limits on the making of certain reservations to NAFTA Annex I. Such reservations had to be made to the other NAFTA Parties within two years of the January 1, 1994 entry into force of the NAFTA. So the filing of reservations had to be made by January 1, 1996. Such a date was a known variable that did not require, nor permit any interpretation. Despite this clear textual guidance within the treaty text, on March 28, 1996, the NAFTA Trade Ministers issued letters of exchange which they styled as a Free Trade Commission Interpretative Statement to the effect to effect of interpreting the date of March 28, 1996 to be January 1, 1996.[590]

586. Despite its purported wording as a binding document, these letters of exchange could never constitute a *bona fide* interpretation of the treaty – as what they purport to do is modify the terms of the NAFTA (by changing the January 1, 1996 deadline to March 29,

[590] The set of the letters of exchange have been published in their entirety in Barry Appleton, *NAFTA: Legal Text and Interpretive Materials* (West Publishing, 2007), Volume I, at pp.1154-1165 ***(Investor's Schedule of Legal Authorities at CL-256)***

1996). Simply, there was nothing to interpret as the deadline date for filing reservations was clearly set out in Article 1108(2).

587. The March 29, 1996 letters of exchange were simply a modification to the wording in Article 1108 of the treaty. In such a circumstance, the NAFTA required amendment to effect such change. Elected government representatives needed to be consulted for there to be binding effect. A mere "interpretative statement" made by appointed members of the executive branch of government could not circumvent the plain meaning of the terms of the treaty.

588. Canada referred to the effect of the Notes of Interpretation made by the Free Trade Commission on July 31, 2001. Similarly, any portion of the Notes of Interpretation issued by the Free Trade Commission which modify the meaning of NAFTA Article 1105 also cannot be binding until they also conform to the procedures required by NAFTA Article 2202 for all modifications of the NAFTA.

589. To the extent that such Notes of Interpretation modify the terms of the treaty, then such statements are an improper and ineffective exercise of powers under NAFTA Article 1131(2) because such an act would be inconsistent with the express terms of NAFTA Article 2202 and also NAFTA Article 1131(1).

590. Article 2202 refers to modifications that are agreed and then approved in accordance with the appropriate legal procedures in each Party. The binding interpretation could demonstrate agreement, but it would not constitute an applicable legal procedure for Mexico nor for the United States. Both countries require consent from elected legislative bodies (the Mexican Congress and the US Senate). In Canada, the applicable legal procedure would require more consideration of the nature of the modification to understand what would be involved.

591. No amendments to the NAFTA have been introduced under applicable legal procedures in any of the three NAFTA Parties.

592. In any event, this Tribunal need not actually rule that the Notes of Interpretation are actually an amendment for two reasons:

a) The content of the customary international law would appear to addresses the specific aspects covered by NAFTA Article 1105 which are the present in this dispute; and

b) The operation of the MFN treatment obligation in NAFTA Article 1103 needs to be given effect. While the Notes of Interpretation purport to limit the scope of the international law standard from applying to all international law to only customary international law, nothing in the Notes of Interpretation reduce the scope of the

MFN clause contained in NAFTA Article 1103 or the interpretative principle of MFN which is a mandatory interpretative rule and principle of the NAFTA set out in Article 102(1).

593. In summary, a breach of the international law standard of treatment does not require anything more than a finding of inconsistency with that standard on the part of a NAFTA Party. In light of the facts in this claim, there are clearly violations of NAFTA that are inconsistent with the obligations contained in NAFTA Article 1105 even under the strained and narrow NAFTA analysis presented by Canada.

594. With respect to the interpretation of the NAFTA Treaty, the Investor asserts that:

a) The *Vienna Convention on the Law of Treaties* (*Vienna Convention*) is an expression of customary international law. The NAFTA Parties not only did not contract out of custom but through Article 1131 the NAFTA Parties specifically reaffirmed the applicability of the international law rules of treaty interpretation which are codified in the *Vienna Convention.*

b) Article 1131, the provision on which the Free Trade Commission Notes of Interpretation (Notes of Interpretation) are based, do not demonstrate any intention on the part of the NAFTA Parties to contract out of the customary international law rules of treaty interpretation contained in Articles 31 and 32 of the *Vienna Convention*. Indeed, Article 1131 confirms the applicability of the international law rules set out in Articles 31 and 32. Thus, it is clear that *Vienna Convention* Articles 31 and 32 are the framework in which the Notes of Interpretation are to be applied.

c) The *Vienna Convention* makes clear that where a treaty contains a *lex specialis*, that *lex specialis* applies.[591]

d) The Notes of Interpretation on their own terms refer not to a *lex specialis* within the NAFTA that governs modifications of the treaty but instead have included another specific textual provision that governs all modifications to the treaty and another regarding interpretation. As a result, there is no evidence in the Notes of Interpretation, nor in the NAFTA, that is capable of establishing the necessary intent to contract out of the customary international law rules of interpretation as set out in Articles 31 and 32 of the *Vienna Convention*.

e) The NAFTA contains specific rules addressing modification of the treaty. As a result,, the NAFTA provision on which the Notes of Interpretation are based simply do not permit modifications Thus, the Notes of Interpretation cannot modify obligations under the Treaty unless those modifications contained in the Notes of Interpretation

[591] *Vienna Convention on the Law of Treaties* (1969), Article 55 ***(Investor's Schedule of Legal Authorities at CL-011)***

are first compliant with the specified treaty process in Article 2202 required for modifications of the treaty.

f) As a result, the Notes of Interpretation cannot amend the NAFTA but may only govern the interpretation of the treaty in a manner permitted by Articles 31 and 32 of the *Vienna Convention*. Further, the Notes are best understood as constituting evidence regarding a subsequent practice of the state parties. Either way, such conduct must always be subordinate to the ordinary meaning of the treaty words, and cannot lead to a reading of the treaty that contradicts with the treaty's ordinary meaning taking into account all of the considerations mentioned in Article 31 of the *Vienna Convention*. Such subsequent practice of the Parties must be proven by a Party seeking to rely upon it and requires far more evidence than that which has been provided by any NAFTA Party in this arbitration.

g) The Notes of Interpretation require that the Tribunal direct itself in particular to custom in ascertaining the standard of treatment required by the ordinary meaning of "treatment in accordance with international law including Fair and Equitable Treatment and Full Protection and Security." Custom is a minimum standard of treatment that provides a floor for the interpretation of international law and what is fair and equitable.

h) Taking into account the Notes of Interpretation, the Tribunal must articulate a standard of treatment that makes sense on an overall basis, taking together all of the relevant provisions of Article 31, guided above all by the ordinary meaning of the words and the objectives of the treaty which are set out in NAFTA Article 102.

i) The Notes of Interpretation cannot be read to exclude the consideration of sources of law other than custom because of the following:

    i) It is well established that treaties and other conventional instruments, indicate possible evidence of custom or may crystallize, codify or clarify custom. It would thus be utterly contradictory to interpret notes that direct the Tribunal to consider custom as excluding the Tribunal from consideration of this kind of normative material.

    ii) Such a reading would contradict in any case the ordinary meaning of "international law" in Article 1105 and would thus not under the *Vienna Convention* be a permissible approach to the Notes of Interpretation.

    iii) Based on the Notes of Interpretation, a Tribunal is required to pay particular attention to the fusion of the concepts of "fair equitable treatment" with standards of treatment drawn from custom. The Notes of Interpretation

suggest a strong presumption of the harmony of fairness and equity with customary international law standards.

j) The Notes of Interpretation have a legal effect under NAFTA Article 1131, but that legal effect is controlled and determined by the general customary rules and by other provisions within the text of the NAFTA such as NAFTA Article 2202, which sets out the applicable process for modifications to the treaty.

595. The Investor understands that the Notes of Interpretation were the product of governments responding to public apprehension, given the varying approaches of early NAFTA tribunals, where a completely open-ended conception of fair and equitable tribunal could lead to risks that a state could incur liability even for uniform and conscientious enforcement of laws of general application. It is understandable that governments would be concerned about an impression of unfettered arbitrator discretion and to make explicit their understanding that what is fair and equitable is not a subjective matter but connected to specific international law reference points common beyond the NAFTA itself.

596. For all the above reasons, this Tribunal should consider itself at liberty to interpret the meaning of "fair and equitable treatment" as contained in NAFTA Article 1105(1) as an autonomous standard in accordance with all the normal and well-accepted sources of international law – not just customary international law.

iii. Canada's improper view of the threshold for international responsibility

597. Canada has cited the 1926 decision in *LFH Neer and Pauline Neer (United States v Mexico)* as an expression of the International Law Standard.[592] This claim was presented to the US Mexico Claims Commission by the United States on behalf of the family of Paul Neer, who had been killed in Mexico. The claim held that the Mexican authorities had failed to properly prosecute those responsible and reimburse the family of Neer. The Commission held that the failure by the Mexican authorities to apprehend and punish those guilty of the murder of the American national did not violate the international minimum standard on the treatment of aliens. In dictum, the Commission expressed the language that Canada has referenced in its Counter Memorial. The Commission stated:

> And it seems to be possible to indicate with still further precision the broad, general ground upon which a demand for redress based on a denial of justice may be made by one nation upon another. It has been said that such a demand is justified when the treatment of an alien reveals an obvious error in the administration of justice, or fraud, or a clear outrage.[593]

[592] Canada's Counter Memorial, at ¶400

[593] *L. F.H. Neer and Pauline E. Neer (United States.) v. United Mexican States*, 15 October 1926), 4 Rep.Int'l Arb. Awards ("*Neer*"), at 65 ***(Investor's Schedule of Legal Authorities at CL-141)***

598. The Commission's decision in the *Neer* claim was only relevant in those specific circumstances, and only related to the concept of denial of justice encompassed in cases of indirect responsibility.[594] The American member of the Commission formulated a different test in his Separate Opinion, arguing that the standard for treatment was one of "pronounced degree of improper governmental administration."[595]

599. The *Neer* claim Commission's examination of how "far short" of international standards was Mexico's conduct was never relied on by other international courts or tribunals as enunciating a single standard of review.[596] In addition, specialized commentary made it "clear" that "Neer is relevant only in cases of failure to arrest and punish private actors of crimes against aliens."[597]

600. Several academic commentaries have suggested that *Neer* is not controlling at all in cases where government conduct is alleged to have fallen below a minimum standard of treatment.[598] Rather than applying the *Neer* claim, highly-respected commentators have

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[594] Jan Paulsson and Georgios Petrochilos, "Neer-ly Misled?" *ICSID Review – Foreign Investment Law Journal* Vol. 22, No. 2 (2007) ("Paulsson and Petrochilos, *Neer-ly Misled?*") at pp.255-256. Paulsson and Petrochilos cite an extensive quotation from the *Chattin* case, a decision handed down two weeks after *Neer*, to demonstrate that *Chattin* "puts the *Neer* formula in context and shows its proper historical confines…. The *Neer* standard had its place within a system of state responsibility predicated on a distinction between direct and indirect responsibility. The Commission intended the standard to apply only in 'denial of justice' cases." [emphasis added] ***(Investor's Schedule of Legal Authorities at CL-274)***; *See B.E. Chattin (United States.) v. United Mexican States,* 23 July 1927,at 282, 285 (1927) ("*B.E. Chattin*") ***(Investor's Schedule of Legal Authorities at CL-316)***

[595] *L. F.H. Neer and Pauline E. Neer (United States.) v. United Mexican States,* 15 October 1926), 4 Rep.Int'l Arb. Awards ("*Neer*"), at 65 ***(Investor's Schedule of Legal Authorities at CL-141)***; Paulsson and Petrochilos, "Neer-ly Misled?," at 244 ***(Investor's Schedule of Legal Authorities at CL-274)***

[596] Paulsson and Petrochilos "Neer-ly Misled?" at 244-245. "[N]o other international court of tribunal (including the claims commissions established by Mexico and other countries in the 1920s, and the Iran-United States Claims Tribunal), have relied on *Neer* as enunciating a single standard of review." ***(Investor's Schedule of Legal Authorities at CL-274)*** There is only one express reference to a minimum standard in *Starrett Housing Corp.v Iran*, 4 Iran-United States CTR 122 (1983-I), in the Dissenting Opinion of Judge Kashani ("Opinion of Judge Kashani") but Judge Kashani does not mention Neer. ***(Investor's Schedule of Legal Authorities at CL-275)***

[597] Paulsson and Petrochilos "Neer-ly Misled?" at 247 ***(Investor's Schedule of Legal Authorities at CL-274)***

[598] For instance, some authors have made general statements that the minimum standard of treatment protects the property of aliens, but the extent of such protections was never tied to the *Neer* case. Roth noted that the threshold of the minimum international standard is the "expression of the common standard which civilized states have observed and still are willing to observe with regard to aliens." *See* A. H. Roth, *The Minimum Standard of International Law Applied to Aliens* (A.W. Sijthoff's Uitgeversmaatschappij N.V., 1949) ("A.H. Roth (1949)"), at 87 ***(Investor's Schedule of Legal Authorities at CL-272)***; Sir Robert Jennings & Sir Arnold Watts' opined on the international standard of treatment by noting that "[i]t has been repeatedly laid down there exists in this matter a minimum international standard, and that a state which fails to measure up to that standard incurs international responsibility." The editors cite to *Roberts* and not *Neer*. In fact, Sir Robert Jennings and Sir Arnold Watts, eds., *Oppenheim's International Law*, 9th ed., Volume I (Longman: 1996) ("Jennings and Watts (1940)"), at 931 ***(Investor's Schedule of Legal Authorities at CL-266)***; Similarly, the writings of Borchard does not cite to the *Neer* claim as a test of international standards; *see* E. Borchard, "The Minimum Standard of Treatment of Aliens," 38 *Michigan Law Review* 445 (1940), 454-455 ***(Investor's Schedule of Legal Authorities at CL-264)***

cited to other decisions of the United States-Mexico Claim Commission, such as *Harry Roberts*, issued two weeks after *Neer*, which maintained that the equality of treatment with national detainees "is not the ultimate test of the propriety of the acts of the authorities in the lights of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization."[599]

601. The earliest expression of the *Neer* claim in investment arbitrations was from Canada in the *S.D. Myers* and *Pope & Talbot* disputes.[600] Beginning in the *S.D. Myers* dispute, Canada revived the 1926 award by citing it as reflection of the type of breach that would constitute a violation of the minimum standard of treatment.[601]

602. In the *Pope & Talbot* dispute, Canada referred to the *Neer* claim as the "standard habitually practiced among civilized nations" or even "general principles of law."[602] In Canada's Counter Memorial in *Pope & Talbot*, Canada had submitted that "[o]ther international bodies have applied the *Neer* standard … the seminal statement of the meaning of the international minimum standard," yet, neither of the two cases cited by Canada to support this argument refer to *Neer*.[603]

603. In any event, neither Tribunal endorsed Canada's submissions that Article 1105(1) required a breach to rise to the level of "an outrage" or "egregiousness."[604] As explained by Arbitrator Schwartz in his Separate Opinion for *S.D Myers v Canada,*[605] the inclusion of a "minimum standard" in the title was intended to avoid gaps in treaty protections

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[599] *Harry Roberts (U.S.A.) v. United Mexican States (Roberts Case),* 4 R. International Arbitration Awards 77, 80 (1926) ("Roberts") ***(Investor's Schedule of Legal Authorities at CL-315)*** The *Roberts* claim involved a claim for mistreatment in prison. *See* J.L. Brierly, *The Law of Nations*, 6th ed. (Oxford University Press, 1963), at 280-281 ***(Investor's Schedule of Legal Authorities at CL-261)***

[600] Paulsson and Petrochilos "Neer-ly Misled?," at 248 ***(Investor's Schedule of Legal Authorities at CL-274)***

[601] *S.D. Myers v Government of Canada,* Canada's Counter Memorial (Merits), dated October 5, 1999, at ¶289 ***(Investor's Schedule of Legal Authorities at CL-263)***

[602] Canada's Second Phase Counter Memorial in *Pope & Talbot v Government of Canada* (October 10, 2000), at ¶266 ***(Investor's Schedule of Legal Authorities at CL-273)***

[603] *Pope & Talbot v Government of Canada*, Canada's Counter Memorial (October 10, 2000) ("Pope & Talbot – Counter Memorial"), at ¶258 *et seq.,* see especially ¶266, 309, 325 ***(Investor's Schedule of Legal Authorities at CL-237)***; *see Chevreau* (France v United Kingdom; Beichmann, Sole Arbitrator), 2 Rep.Int'l Arb. Awards 1113, 1123 (1931) ("Chevreau") ***(Investor's Schedule of Legal Authorities at CL-265)***; and *Amco v. Indonesia I,* Award, 20 November 1984, 1 ICSID Rep.413 (1984) ("Amco Asia - Annulment"), at ¶172 ***(Investor's Schedule of Legal Authorities at CL-170),*** upheld in material part*, Amco v. Indonesia I, Decision on the Application for Annulment,* 16 May 1986, 1 ICSID Rep.509 (1986), at ¶59-60 ***(Investor's Schedule of Legal Authorities at CL-269)***; *see also* Paulsson and Petrochilos "Neer-ly Misled?," at 248 ***(Investor's Schedule of Legal Authorities at CL-274)***

[604] *S.D. Myers, Inc. v. Government of Canada, First Partial Award,* 2000 WL 34510032, 13 November 2000. ("*S.D. Myers*") at ¶263; ***(Investor's Schedule of Legal Authorities at CL-033)*** The *Pope & Talbot Tribunal* dismissed Canada's submission on the requirements of international law, *Pope & Talbot* – Award on Phase 2, at ¶109 ***(Investor's Schedule of Legal Authorities at CL-039)***

[605] *S.D. Myers Inc. v Government of Canada,* Separate Opinion of Prof. Bryan Schwartz*,* dated November 13, 2000 ("S.D. Myers – Schwartz Separate Opinion"), at ¶225 ***(Investor's Schedule of Legal Authorities at CL-042)***

for foreign investors.[606] However, the standard need not require that a party accord the same treatment inflicted on its own nationals, rather, the treatment must be "in accordance with international law."[607] This includes the obligation to provide fair and equitable treatment and full protection and security.[608]

604. In addition to such commentary, NAFTA Tribunals have observed that the minimum standard of treatment and other similar claims concerned the treatment of natural persons and concentrated on denial of justice. For instance, the *Mondev* Tribunal observed that the *Neer* claim was not relevant towards the international standard of treatment of foreign investment when the duty espoused in the *Neer* claim involved Mexico's responsibility for the acts of private parties.[609]

605. Canada has cited several cases as support for its assertion that the threshold for a violation of the International Law Standard is "high," and requires action that amounts to "gross misconduct or manifest unfairness" to breach the international standard of treatment.[610] Canada has overlooked the context of the quotations.[611]

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[606] *S.D. Myers* – Schwartz Separate Opinion*,* November 13, 2000 ***(Investor's Schedule of Legal Authorities at CL-042)***

[607] This responds to the point that in some cases, a home State may treat its nationals less fair than that which international law requires.

[608] *Black's Law Dictionary,* 5th ed. (West Publishing, 1979), at 482 and 535. The plain definition of "equitable" means "[j]ust; conformable to the principles of justice and right." and "fair" means "[h]aving the qualities of impartiality and honesty" and "free from prejudice, favouritism and self-interest." ***(Investor's Schedule of Legal Authorities at CL-023)***

[609] *Mondev International Ltd. v. United States,* ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002l ("*Mondev*"), at ¶123. The Tribunal found: "A reasonable evolutionary interpretation of Article 1105(1) is consistent both with the *travaux*, with normal principles of interpretation and with the fact that … the terms 'fair and equitable treatment' and 'full protection and security' had their origin in bilateral treaties in the post-war period. In these circumstances the content of the minimum standard today cannot be limited to the content of customary international law as recognized in the arbitral decisions of the 1920s." ***(Investor's Schedule of Legal Authorities at CL-034)***

[610] Canada's Counter Memorial, at ¶¶397-402

[611] *See Mondev* Award, at ¶127 ***(Investor's Schedule of Legal Authorities at CL-034)*** The quote cited by Canada from the Tribunal's analysis on the applicable standard for denial of justice. As such, it does not represent the standard applicable to a threshold for the violation of Article 1105 and its context is limited; *See ADF* Award, at ¶181. The quote cited provides an example of what would not constitute a violation of Article 1105. The Tribunal looked for "something more than simply illegality or lack of authority," but this does not equate to "gross misconduct." Moreover, the *ADF* Tribunal rejected the use of the *Neer* formula in the Award. The Tribunal states: "There appears no logical necessity and no concordant state practice to support the view that the *Neer* formulation is automatically extendible to the contemporary context of treatment of foreign investors and their investments by a host or recipient State." *ADF* Award, at ¶190, note 184 ***(Investor's Schedule of Legal Authorities at CL-072)*** : *See* Article 7 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, text in James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) ("*Crawford (2009)*"), at 106 ***(Investor's Schedule of Legal Authorities at CL-006)***; The *Waste Management II* – Award, Tribunal surveyed

606. For instance, a vast majority of NAFTA and non-NAFTA Tribunals examining "fair and equitable treatment" have contributed to a body of concordant practice to conclude that "[i]t would be surprising if this practice and the vast number of provisions it reflects were to be interpreted as meaning no more than the *Neer* Tribunal (in a very different context) meant in 1927."[612]

iv. Canada's reliance on the Glamis Gold award

607. In response to the vast majority of awards that find the *Neer* formula to be inapplicable in the contemporary legal context, Canada has recited the one award that supports its assertions. Indeed, the *Glamis* award stands alone in its finding that the customary international law requires an extremely cautious interpretation of fair and equitable treatment under NAFTA Article 1105.[613]

608. In *Glamis,* a key element of the Tribunal's reasoning was its acceptance of the United States government's interpretation of the minimum standard of treatment of aliens which advocated a limited standard of review under the *Neer* doctrine and a high liability threshold. However, the *Glamis* Tribunal only accepted this reasoning with the understanding that the *Neer* standard could be adapted to more modern considerations.[614] As such, it did acknowledge that "the *Neer* standard, when applied with current sentiments and to modern situations, may find shocking and egregious events not considered to have reached that level in the past."[615]

609. Notwithstanding the outlier *Glamis* Award, other NAFTA Tribunals have taken a different approach than *Glamis* to identify the content of the international customary standard and its relationship with fair and equitable treatment. These NAFTA decisions, such as *Pope & Talbot,*[616] collectively demonstrate that NAFTA Tribunals have generally declined to rely on the extreme adjectives created by the *Neer* formula in describing the state's conduct. For instance, the Investor point out the following evaluations of the meaning of the fair and equitable treatment standard:

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several NAFTA Awards to provide a flexible definition of the elements of Article 1105, but did not mandate the *Neer* formula imposing a "high" threshold for treatment. ***(Investor's Schedule of Legal Authorities at CL-091)***

[612] *Mondev* - Award, at ¶117 ***(Investor's Schedule of Legal Authorities at CL-034)***

[613] *Glamis Gold, Ltd v. United States of America,* UNCITRAL Arbitration, Award, 8 June 2009 ("*Glamis*"), at ¶¶600, 601, 605, 612, and ¶613 ***(Investor's Schedule of Legal Authorities at CL-138)***

[614] *Glamis* – Award, at ¶613 ***(Investor's Schedule of Legal Authorities at CL-138)***

[615] *Glamis* – Award, at ¶616 ***(Investor's Schedule of Legal Authorities at CL-138)***

[616] *Pope & Talbot*, Award on the Merits, Phase 2, April 10, 2001, at ¶¶177-181. 54. The Pope & Talbot tribunal found Canada breached Article 1105 through threatening the investor, denying its "reasonable requests for pertinent information" and requiring the investor "to incur unnecessary expense and disruption in meeting [the] request for information." ***(Investor's Schedule of Legal Authorities at CL-039)***

a) *Pope & Talbot* – Award on Merits – rejecting the *Neer* formula, "[F]airness elements under ordinary standards applied in the NAFTA countries, without any threshold limitations that the conduct complained of be 'egregious', 'outrageous', or 'shocking', or otherwise extraordinary."[617]

b) *Mondev* – Award – rejecting the *Neer* formula, "[I]s intended to provide a real measure of protection to investments and … has evolutionary potential. A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of a particular case."[618]

c) *Merrill & Ring* – Award – rejecting the *Neer* formula, "[E]xcept for cases of safety and due process, today's minimum standard provides for the fair and equitable treatment of aliens within the confines of reasonableness."[619]

d) *Chemtura* – Award – rejecting the *Neer* formula:

> In line with *Mondev*, the Tribunal will take into account of the evolution of international customary law in ascertaining the content of the international minimum standard …[regarding] whether the protection granted … is lessened by a margin of appreciation …. This is not an abstract assessment circumscribed by a legal doctrine about the margin of appreciation of specialized regulatory agencies. It is an assessment that must be *conducted in concreto*.[620]

610. Thus, despite Canada's assertions, NAFTA Tribunals since the issuance of the Notes of Interpretation that have had to consider on their own the applicability of the *Neer* formula have rejected the *Neer* formula, as constituting the with the exception of one outlier, one claim that avoids the debate entirely and the two cases where the disputing parties amongst themselves agreed to apply the *Neer* formula.[621] In addition, almost all of the NAFTA that followed the Notes of Interpretation NAFTA Awards have rejected the idea that the *Neer* formula could be applied to the current content of the customary international law standard of treatment.

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[617] *Pope & Talbot* - Award on the Merits, Phase 2, April 10, 2001, at ¶118 ***(Investor's Schedule of Legal Authorities at CL-039)***

[618] *Mondev* - Award, at ¶119 ***(Investor's Schedule of Legal Authorities at CL-034)***

[619] *Merrill* - Award, at ¶213 ***(Investor's Schedule of Legal Authorities at CL-036)***

[620] *Chemtura Corporation v. Government of Canada*, Ad Hoc UNCITRAL (NAFTA) Award (August 3, 2010) ("*Chemtura* – Award"), at ¶¶122-123 ***(Investor's Schedule of Legal Authorities at CL-090)***

[621] Exceptions include the outlier *Glamis* case, the *Loewen* case, which never addressed the *Neer* formula, and those two cases where the disputing parties agreed amongst themselves to adopt the customary international law standard to be the content of fair and equitable treatment. Such an agreement was made in *Cargill, Incorporated v. United Mexican States,* Ad Hoc UNCITRAL (NAFTA) Award, ICSID Case No. ARB(AF)/05/2 (NAFTA), 18 September 2009, at ¶269 ***(Respondent's Schedule of Legal Authorities at RL-045)*** and in *Mobil Investments Inc. v. Government of Canada*, ICSID Case No ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (May 22, 2012) ("*Mobil* - Decision on Liability"), at ¶135 ***(Investor's Schedule of Legal Authorities at CL-168)***

611. This, in addition to the aforementioned observations by former International Court of Justice Judge Stephen Schwebel, suggests that the majority of NAFTA Awards that reject the *Neer* formula, "may be more persuasive to the contemporary critic than those in *Glamis Gold*."[622]

612. According to Sir Robert, the re-interpretation of Article 1105 to use the *Neer* standard is misplaced. The *Neer* award is not a proper basis for customary international law:

> But quite apart from the rather startling anachronism of trying to apply to investors and investments in [the 21st century] the standards for the protection of aliens against bandits in 1924, the *Neer* case was not a parallel case to [investor protection] in 1926. The present claim is not a claim based upon a customary law 'international delinquency', but a claim based upon the express terms of the NAFTA Agreement. [623]

613. Sir Robert's criticisms are echoed by Martins Paparinskis in his recent treatise on the *International Minimum Standard of Treatment and Equitable Treatment*.[624] Mr. Paparinskis states that investment arbitration cases do "not raise the issue of the mistreatment of an alien by the State."[625] Rather, what has to be considered is that fair and equitable treatment is a standard used in hundreds of BITs.[626] As described elsewhere, this standard is a general one that takes into account various elements of international law.

614. The Notes of Interpretation, which are not in any case a binding constraint on this Tribunal, cannot be considered a binding import of the *Neer* standard as this case does not reflect the evolution of customary international law since that case, and there is no proof that *Neer* ever actually represented the customary international law standard. Indeed, the US – Mexican Claims Commission did not generally adopt the *Neer* standard as reflective of customary international law standards during its sitting. Instead, the Claims Commission appeared to consider consistency with international law in cases such as the *Roberts* claim.[627]

615. Article 31(3)(c) of the *Vienna Convention* requires that a treaty be interpreted in light of "any relevant rules of international law applicable in the relations between the parties."[628]

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[622] Judge Stephen M. Schwebel, "Is Neer Far From Fair And Equitable?" Remarks at the International Arbitration Club, London, 5 May 2011 ***(Investor's Schedule of Legal Authorities at CL-267)***
[623] Opinion by Sir Robert Jennings, at 4 ***(Investor's Schedule of Legal Authorities at CL-312)***
[624] Martins Paparinskis, *The International Minimum Standard of Treatment and Equitable Treatment* (2013: Oxford University Press) ***(Investor's Schedule of Legal Authorities at CL-103)***
[625] Paparinskis, at 49 ***(Investor's Schedule of Legal Authorities at CL-103)***
[626] Opinion by Sir Robert Jennings, at 5 ***(Investor's Schedule of Legal Authorities at CL-312)***
[627] *Roberts* ***(Investor's Schedule of Legal Authorities at CL-315)***
[628] *Vienna Convention on the Law of Treaties,* Article 31(3)(c) ***(Investor's Schedule of Legal Authorities at CL-011)***

616. The International Court of Justice in its jurisdictional award in *Diallo* says that even *ratione materiae* of diplomatic protection has evolved beyond the traditional minimum standard for treatment of aliens and now includes *inter alia* international human rights[629]. Martins Paparinskis carefully considers the impact of such decisions in his treatise and has specifically relied on decisions taken by the European Court of Human Rights based on international law in his analysis of the international law standard. In light of the International Court's decision in *Diallo*, this Tribunal should also follow such an approach and reject the limits suggested by Canada on the "autonomous standard."[630]

617. Roland Klager in his treatise on *Fair and Equitable Treatment in International Investment Law* points out, "seeking to resolve current, sophisticated investor–state disputes by means of coarse formulas from the 1920s are seen as equally unhelpful."[631] A standard of customary international law, regardless of what one labels such a standard, cannot be defined in a vacuum and must account for the numerous bilateral investment treaties and treaties of friendship and commerce that incorporate the fair and equitable treatment standard.[632]

v. Relevance of the difference between the Investor and Canada on the standard of treatment to the resolution of this dispute

618. In relying on *Glamis Gold* to propose the *Neer* articulation as the proper standard of treatment, Canada must accept the *Glamis* Tribunal's proviso as to how this standard is to be applied in contemporary circumstances. As the *Glamis* Tribunal insisted, a tribunal would need to ascertain what is the meaning of egregious or shocking mistreatment in contemporary circumstances, against the current norms of the international community, as reflected in relevant legal material.

619. Many of the situations in the awards cited by the Investor in articulating its own view of the proper standard were clearly egregious in contemporary perspective, and understood to be so by the tribunals. Those tribunals understood themselves as articulating the evolving legal standard; would it have made a material difference to how they ascertained the content of fair and equitable treatment, if instead they had

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[629] *Ahmado Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Preliminary Objections, Judgment, 24 May 2007, I.C.J. Reports 2007 ("*Republic of Guinea v. Republic of Congo*"), at ¶39 ***(Investor's Schedule of Legal Authorities at CL-276)***

[630] Paparinskis, at 80 ***(Investor's Schedule of Legal Authorities at CL-103)***

[631] Roland Klager, *Fair and Equitable Treatment in International Investment Law* (Cambridge University Press, 2011) ("*Klager*"), at ¶75 ***(Investor's Schedule of Legal Authorities at CL-101)***

[632] Klager, at ¶91 ***(Investor's Schedule of Legal Authorities at CL-101)***; *Railroad Development Corporation (RDC) v. Republic of Guatemala,* ICSID Case No. ARB/07/23, 29 June 2012 ("*RDC*"), at ¶219 ***(Investor's Schedule of Legal Authorities at CL-271)***

interpreted the jurists' intuitions that led to their findings as intuitions not about evolving law but evolving international community norms of what is acceptable and what is not?

620. Canada's reliance on *Neer* based on *Glamis*, moreover, must take into account that the *Glamis* tribunal while singling out *Neer*, was essentially suggesting a strong presumption against custom having evolved since the formative pre-Second World War period. But in this formative period, as Professor Paparinskis has ably demonstrated in his treatise, *Neer* was but one influence, and in fact state practice suggests that arbitrary administration and discriminatory treatment in government contracting, inter alia, were already by the time of the Hague Conference being widely considered as elements of "fair and equitable treatment." [633]

621. An adequate examination of state practice and *opinio juris* in the period identified in *Glamis* would extend considerably beyond *Neer*, which as explained, was narrowly confined to diplomatic espousal of denial of justice claims. The treatment of Mesa, the investor in this dispute, as detailed below, entails the kinds of government misconduct that were broadly speaking contemplated as disciplined by "fair and equitable treatment" well before the Second World War. Therefore, if this Tribunal were decide to apply *Glamis*, as urged by Canada, many of the acts and omissions described would fall below that standard.

622. Admittedly, some portion of the conduct that caused harm to the investor might be not viewed as of serious international concern against the community norms of the 1920s and 1930s. But as noted in the *Glamis* award itself, the *Glamis* Tribunal while preferring the general legal formulas from this period, demands in the end that the acceptability of conduct from an international perspective be judged by contemporary international community norms and sensibilities, not those of the 1920s and 1930s. Thus, Canada in this dispute at any rate, cannot escape international responsibility for the fundamental injustice and harm it has done to the Investor and its Investments.

623. Canada's various measures that resulted in Mesa not receiving contracts was the proximate and supervening cause of the loss of the full deposit. In any event, the Commentary to the ILC Articles on State Responsibility state that when the extent of loss caused by the state cannot be sufficiently isolated from the losses caused by a third party, then the state should be held "responsible for <u>all the consequences</u>."[634]

[633] Paparinskis, at p.89 ***(Investor's Schedule of Legal Authorities at CL-103)***
[634] Commentary 13 to Article 31 of the ILC Articles on State Responsibility

624. Similarly, in *CME v Czech Republic,* the Tribunal concluded that international practice does not "support the reduction or attenuation of reparation of concurrent causes" and didn't reduce damages because of the interference of a third party. [635]

625. Canada advances a theory of contributory negligence on the part of Mesa in its Counter Memorial.[636] This argument, however, is simply fictitious: it is not supported by the facts[637] or in law.[638]

E. Canada's interpretation of NAFTA Article 1105 would require the Tribunal to deviate from the standards of treaty interpretation as set out in the Vienna Convention on the Law of Treaties

626. The "applicable rules" of international law mentioned in NAFTA Article 1131 include the *Vienna Convention*, which the Parties have found to be representative of the customary rules for the interpretation of a treaty provision to determine the meaning of that treaty provision.[639]

627. The *Vienna Convention* rules are drafted in mandatory language. Article 31 of the *Vienna Convention* requires one interpret a treaty "in good faith" and "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Article 31(2) sets out the context of a treaty as encompassing the preamble of the treaty, and its annexes.

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[635] *CME Czech Republic BV v Czech Republic,* Partial Award (2001*)*, at ¶583 ***(Investor's Schedule of Legal Authorities at CL-340)***; See also *UNCC Decision 15, UNCCGC, 8th Sess, UN Doc. S/AC.26/1992/15*, at ¶9(III): "Where the full extent of the loss, damage, or injury arose as a direct result of Iraq's unlawful invasion and occupation of Kuwait, it should be compensated notwithstanding the fact that it may also be attributable to the trade embargo and related measures." ***(Investor's Schedule of Legal Authorities at CL-337)***

[636] Counter Memorial, at ¶477

[637] The facts do not support the conditions necessary for contributory negligence on the part of Mesa. Even assuming for the sake of argument that there are other related causes to the loss of the turbine deposit, these cannot be attributed to Mesa. Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶¶18, 48

[638] A review of the Commentary to the ILC Articles on State Responsibility (Commentary 5 to ILC Article 39) demonstrates that it relates to conduct that must be "wilful or negligent." Thus Canada must demonstrate that there was a manifest lack of care. Canada did not establish that Mesa's conduct ever met this standard.

[639] The International Court of Justice has indicated the *Vienna Convention* expresses customary law, *see* recently, *Case Concerning The Gabcikovo-Nagymaros Project (Hungary v. Slovakia)* [1997] I.C.J. Rep.7, Judgment, 25 September 1997 ("*Gabcikovo-Nagymaros*"), at ¶¶38, 62, 46, 99 ***(Investor's Schedule of Legal Authorities C-176)***, *see* the *Eureko Tribunal* observing that the *Vienna Convention* is the "[a]uthoritative codification of the law of treaties … a treaty in force among the very great majority of the States of the world community," *Eureko B.V. v Republic of Poland,* Partial Award and Dissenting Opinion, August 19, 2005 ("*Eureko* – Partial Award"), at ¶247 ***(Investor's Schedule of Legal Authorities at CL-080)***; *see* Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000), at 11 ***(Investor's Schedule of Legal Authorities at CL-277)***; J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford University Press, 2012), at ¶2.25 ***(Investor's Schedule of Legal Authorities at CL-286)***

628. Article 31 of the *Vienna Convention* requires the treaty interpreter to take into account, together with the context of a treaty:

a) Any subsequent agreement regarding the interpretation of a treaty;

b) Any subsequent practice in the application of the treaty; and

c) And relevant rules of international law applicable.[640]

629. Under NAFTA Article 1131(1), the Tribunal is required to apply the rules of treaty interpretation – including the rules embodied in Articles 31 and 32 of the *Vienna Convention* – to clarify the existing provisions of the NAFTA.[641] NAFTA Article 1131 states:

> **Governing Law**
>
> 2. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
>
> 3. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

630. The NAFTA must be interpreted in a manner consistent with the terms of the NAFTA itself and with applicable rules of international law, such as those codified in Articles 31 and 32 of the *Vienna Convention*. Article 1131(2) says that an interpretation issued by the Free Trade Commission is binding.

631. The Investor has made submissions in its Memorial[642] on the meaning that should be given to NAFTA Article 1105.

632. This Tribunal must pay appropriate regard to the Notes of Interpretation issued by the Free Trade Commission along with the NAFTA text and applicable rules of international law. This requires that the Tribunal consider the words in the text of the treaty and to give them effect.

633. Under Article 31 of the *Vienna Convention*, the Tribunal is required to look at the words contained in the NAFTA first, to see if they are unclear and thus require interpretation. To the extent that NAFTA Article 1105 has wording that is clear on its face, then this tribunal has no need for recourse to interpretation.

634. The NAFTA clearly limits what can be interpreted by way of Article 1131(2). NAFTA Article 2202 sets out a process for modification of the treaty by the Parties. Changes

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[640] *Vienna Convention on the Law of Treaties,* Article 31(3)(a) (b) and (c) ***(Investor's Schedule of Legal Authorities at CL-011)***

[641] Memorial, at ¶335. By their acceptance to be bound by customary international law in NAFTA Article 1105, the NAFTA Parties accepted the international law standard of treatment.

[642] Memorial, at ¶¶329-431

must be agreed and approved in accordance with the applicable legal procedures of each Party. NAFTA Article 2202 states:

> **Article 2202: Amendments**
>
> 1. The Parties may agree on any modification of or addition to this Agreement.
> 2. When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement.

635. Thus any modification of the NAFTA requires the assent of democratically-elected representatives sitting in each of the three Parties, following the proper and constitutionally mandated process for treaty ratification of each state. If such a process is not followed, then proposed treaty modifications cannot be given force or effect until they are compliant with the explicit terms of NAFTA Article 2202.

636. Thus the limits on what can be a proper interpretation in NAFTA Article 1131(2) are set out by the wording of NAFTA Article 2202. The Free Trade Commission could never issue a binding statement that is inconsistent with other terms of the treaty, such as NAFTA Article 2202.

637. The NAFTA should be interpreted in such a manner to be consistent with the objects and purpose of the Treaty (as set out in Article 102) as well as to ensure that treaty provisions are read to give effect to them.

638. A Tribunal must look at an interpretation to determine for itself whether the content of that Interpretation is an interpretation or a change. If the "interpretation" constitutes a change, then for it to be binding, it must also comply with the terms of NAFTA Article 2202.

639. Article 1131 of the NAFTA does not empower the Free Trade Commission to amend the NAFTA as that power is exclusively reserved by Article 2202 only for democratically elected Parliamentarians and members of congress in accordance with appropriate domestic requirements. For example, in the United States a two-thirds majority of the Senate is required to give its assent before a treaty can be adopted or modified. In Mexico, the congress must vote on treaties.

III. CANADA BREACHED ITS OBLIGATIONS UNDER ARTICLE 1105

640. Canada did not accord the international law standard of treatment to Mesa. Canada treated Mesa in a discriminatory manner by allowing extraneous, including political, considerations to circumvent a rules-based stable regulatory process.

641. Canada's non-transparent conduct which caused delay, economic harm, and deprivation to Mesa, contrary to its obligation of good faith, by misrepresenting the regulatory considerations with respect to access to transmission and with regard to obtain

renewable energy Power Purchase Agreements to the Investors. Canada abused those rights owed to Mesa and its Investments, unfairly exercising government powers for a political motive, then concealing material evidence to be applied to protect Mesa's legitimate legal rights through the arbitral process.

642. NAFTA Article 1105 requires that Canada provide Mesa's Investments with the international law standard of treatment. By its terms, NAFTA Article 1105 includes Fair and Equitable Treatment and Full Protection and Security but the obligation is broader than these two obligations. In addition to these two particular concepts, there are other well know expressions of the international law standard such as the protection of legitimate expectations and protection against abuse of rights.

643. The conduct in question rises to the level of a breach of the international law standard of treatment. Clear examples of just some of the wrongs committed by officials in this case include:

a) Affording Mesa only five days to be able to modify interconnection points, when competitors such as NextEra had many months of advance notice that such a policy change could take place.

b) By secret non-transparent arrangements made with the members of the Korean Consortium and with others, such as NextEra, all of which were unfair to applicants such as the investment of the Investor.

c) By failing to follow the FIT Program rules in a fair and transparent manner, such as:

    i) Not running the Economic Connection Test required under the FIT Rules, even after leading Mesa to believe that the Economic Connection Test would be run, when this was known by the OPA not to be the case;

    ii) By improperly applying the Pre-Launch ranking criteria, even after leading Mesa to believe that a review of the ranking had been taken and that the evaluation of Mesa's projects were correct;

    iii) By not providing the same information to all FIT Program proponents in the Transmission Availability Test Tables; and by

d) Pervasive political interference in the ordinary working of the regulatory process, with key decisions such as whether and when to change rules, and internal practices, contractual requirements and rules for the protection of the electoral interests of particular politicians, with political staffers and handlers regularly running interference with the normal channels of regulatory decision making and normal hierarchical processes; and

644. Both independently and even more cumulatively, the wrongs committed by Ontario constituted breaches of Canada's obligations under NAFTA Article 1105.

A. The Sudden Connection Point Change Process was Arbitrary and Advanced Notice to NextEra was Unfair

645. The change to the FIT Process as a result of the five-day connection point change window in June 2011 constituted a sudden, significant, and arbitrary departure from the established FIT Process. Before the last-minute change window was announced, the Investor had no reason to suspect that such a fundamental change would be announced, without notice or consultation. Until that point, the Investor was following the existing process and procedure that had been laid out in the FIT Rules. The change that was announced came without any advanced notice or consultation to Mesa, constituted a fundamental change to the FIT Program, and provided Mesa with a very short time to engage in substantial changes to its applications. In the circumstances, it was an unforeseen, arbitrary, and unfair change to the FIT Program.

646. From the launch of the FIT Program in 2009, until June 3, 2011, the established process for awarding contracts was an ECT. The ECT was a region-specific test, which determined whether there was sufficient transmission capacity available to connect projects. Regions were clearly defined by Transmission Availability Tables and the FIT Priority Rankings.[643] However, on June 3, 2011, Ontario suddenly changed the FIT process such that within days, certain proponents that wanted to change regions could do so. That process was not only unprecedented, but it undermined the purpose of awarding contracts to proponents that were "shovel-ready."[644]

647. In his Expert Report, Seabron Adamson reviewed the process leading to the announcement of the connection point change in the FIT Program on June 3, 2011. Mr. Adamson concluded that the five day period of time was wholly-inadequate to permit such a substantial modification of this Feed-in Tariff program. [645] According to Mr. Adamson, only those proponents who had actively prepared in advance of the announcement could possibly do the required technical engineering and planning work necessary to know whether connection point changes involving new transmission corridors could safely or economically be accomplished. Given the massive amount of

[643] Ontario Power Authority, FIT Program, Transmission Availability Table, June 3, 2011 ***(Investor's Schedule of Exhibits at C-0166)***; FIT CAR Priority Ranking by Region, February 24, 2011 ***(Investor's Schedule of Exhibits at C-0233)***

[644] OPA Briefing Note, FIT Program Launch Logistics, May 19, 2009 ***(Investor's Schedule of Exhibits at C-0608)***

[645] Expert Report of Seabron Adamson, at ¶¶133-135

time and money that would need to be expended on such an effort, only a proponent with advance knowledge could reasonably be expected to do this type of work.[646]

648. The Investor does not dispute that in advance of the ECT a connection point window was scheduled to occur within designated regions.[647] However, the connection point window that was planned for the ECT in 2010 was markedly different from the 2011 amendment to the rules that allowed connection point changes between the West of London and Bruce regions. The ECT connection point change window was described in detail in two presentations provided by the OPA in March and May 2010. That window was announced several months in advance and proponents were informed that they would have several weeks to change connection point. In contrast, the June 2011 window and the accompanying rule changes were announced with apparently no consultation the OPA gave only days advance notice to FIT applicants.

649. Notice of the connection point window was reduced from several weeks to just two days and the window to change itself was reduced from several weeks to five days.

650. Officials tasked with implementing the Bruce to Milton process at Hydro One expressed some concern that the five day window as a "very short period."[648] Officials from the Ontario Power Authority expressed frustration with the compressed timeline.[649]

651. Previous rule changes of less significance and impact were preceded by advance public consultation. The June 3, 2011 rule change however, did not.

652. Canada admits that the sudden change was directed by the Ministry of Energy. In her Witness Statement, Sue Lo admits that the change window was set for only five days in part due to a preference expressed by the Premier's Office.[650] Moreover, documents from the OPA indicate that the short amount of time permitted for connection point changes was determined by the Ministry of Energy.[651]

653. Usually, the Ministry of Energy and the Ontario Power Authority sought input through webinars for proposed changes to the FIT process. But that was not the case for the connection point change window.[652] The Ministry and the Ontario Power Authority did

[646] Expert Report of Seabron Adamson, at ¶134
[647] Memorial, at ¶700
[648] Email from Bing Young to Patricia Lightburn, June 6, 2011 ***(Investor's Schedule of Exhibits at C-0321)***
[649] Email from Tracy Garner (OPA) to Bob Chow (OPA), dated May 12, 2011 ***(Investor's Schedule of Exhibits at C-0482)***
[650] Witness Statement of Sue Lo (RWS – Lo), at ¶50
[651] Ontario Power Authority, Internal Document, "Bruce to Milton Capacity Allocation, Internal Use Only, Questions and Answers," May 27, 2011, at 11 ***(Investor's Schedule of Exhibits at C-0289)***
[652] Charles Edey, an Officer of Mesa's wind projects, was a member of the Canadian Wind Energy Association (CanWEA) through Leader Wind Resource Services. Mr. Edey, informed that organization that he did not support a connection point change window and wrote a letter to the Minister of Energy stating that the view expressed

not seek out public input and implemented a window that allowed Proponents significantly less time to plan and prepare changes to their applications.

654. NextEra's advanced knowledge of the connection point changes enabled it to strategically plan so that all of its projects could receive contracts, to the detriment of Mesa projects. Leading up to the June 3rd, 2011 rule change, NextEra and its agents were in regular communications with representatives of the Ministry of Energy, the Ontario Power Authority, Hydro One and the IESO to advocate for a connection point window[653] to allow it to connect to the Bruce to Longwood line.

B. Ontario's secret arrangements were unfair to Mesa

i. Ontario granted special privileges to Samsung

655. The agreements Ontario concluded with the Korean Consortium, culminating with the *GEIA*, constituted unfair and non-transparent violations of the international law standard. At the same time that Mesa was involved in a public regulatory competition for FIT contracts and Power Purchase Agreements, Ontario was providing the same Power Purchase Agreements to the Korean Consortium. The non-transparent nature of the negotiations and the agreements provided the Korean Consortium an unfair benefit over Mesa, which was competing for exactly what Ontario provided through the *GEIA*, namely guaranteed transmission and revenue.

656. The secret sole-source contractual arrangements made with the members of the Korean Consortium, and the other non-transparent arrangements made with NextEra were grossly unfair to applicants who followed the established rules for access to the Ontario transmission grid, such as the Investor.

657. In addition, to the extent that the *GEIA* was publicly discussed, the government of Ontario made material misrepresentations at the highest levels as to the content and terms of the *GEIA*. These representations were fundamentally misleading as to the opportunities available to access the renewable energy market in Ontario, as well as to the conditions that access could be obtained.

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by the association "does not reflect the majority of [FIT] applicants with MWs on the current queue list." Letter from Charles Edey, Leader Resources to Brad Duguid, Minister of Energy, May 30, 2011 ***(Respondent's Schedule of Exhibits at R-114)***

[653] Email from Bob Lopinski (Counsel Public Affairs) to Sonya Rachel Konzak (Ministry of Energy), Shantie Prithipal (Ministry of Energy), Sue Lo (Ministry of Energy), and Rick Jennings (Ministry of Energy), September 20, 2010 ***(Investor's Schedule of Exhibits at C-0094)***; Email from Bob Lopinski (Counsel Public Affairs) to Pearl Ing (Ministry of Energy), February 25, 2011 ***(Investor's Schedule of Exhibits at C-0319)***; Email from Phil Dewan (Counsel Public Affairs) to Sue Lo (Ministry of Energy), May 12, 2011 ***(Investor's Schedule of Exhibits at C-0090)***

658. There is yet another secret deal in place between Ontario and the members of the Korean Consortium. Canada has produced emails between the Ministry of Energy and Hagan Lee from Samsung which indicated that on a "Framework Agreement" was ready for signature and that a signing was to take place on October 24, 2010.[654] A negotiating draft of this document from September 2010 was produced by Samsung under the Section 1782 process as a Highly Confidential document.[655]

659. The Memorandum of Understanding (MOU) that was produced by Samsung was reviewed by Energy Economist Seabron Adamson in his Expert Statement. Mr. Adamson concludes that the MOU established an exclusive partnership between Ontario and the members of the Korean Consortium.[656] This exclusive partnership appears to still be in force and no legal document has been produced by Canada to show that this arrangement has lapsed, or is no longer in effect.

660. The Berkeley Research Group Defense Valuation Report also made reference to the existence of the Framework Agreement.[657] Similarly, Zohrab Mawani, a former Samsung employee who worked on the negotiation of Power Purchase Agreements under the terms of the *GEIA* swore in a declaration made under oath for use in the courts of the State of New Jersey in 2013 that there was a Framework Agreement, and that Samsung had not complied with the terms of the Section 1782 subpoena by not producing this document.[658]

ii. Ontario granted special privileges to NextEra - Connection to the Special-Purpose Bruce to Longwood line

661. Permitting NextEra's projects to connect to the Bruce to Longwood 500kV line was unfair to Mesa because the connection points should not have been available, as they were not listed on the TAT Table of June 3, 2011.[659] It is unfair to permit one applicant in a public regulatory competition to select connection points that are unpublished and off-limits. In these circumstances, allowing NextEra to select the unpublished B562L and B563L connection points provided it with an unfair advantage as compared to Mesa, which simply followed established FIT Rules. Bob Chow acknowledges that after a

[654] Email from Mohamed Dhanani (MEI) to Hagan Lee (Samsung) on October 1, 2009 ***(Investor's Schedule of Exhibits at C-0339)***
[655] Draft Framework Agreement by and Among Her Majesty The Queen in Right of Ontario, Korean Electric Power Corporation and Samsung C&T Corporation, September 25, 2009 Article 1(1.1) ***(Investor's Schedule of Exhibits at C-0328)***
[656] Expert Report of Seabron Adamson, at ¶¶21-22
[657] Goncalves Defense Valuation Report, Attachment, at ¶44
[658] Declaration of Zohrab Mawani, at ¶47 ***(Investor's Schedule of Exhibits at C-0406)***
[659] Ontario Power Authority, Draft ECT Communications Roll-out, April 28, 2011 ***(Investor's Schedule of Exhibits at C-0116)***

previous project was given permission to connect those points, "the IESO had been reluctant to allow connections to this line because it is a critical back up line for a Bruce Nuclear Facility when it is operating the full capacity."[660]

662. Three of NextEra's Projects and one Suncor project connected to the Bruce to Longwood 500kV line at Connection Point B562L or B563L.[661] These were:

a) Bornish (NextEra)

b) Jericho (NextEra)

c) Adelaide (NextEra)

d) Cedar Point II (Suncor)

663. These projects had previously either selected the S2N connection point, or were "enabler requested."[662] In early 2010, Hydro One and the IESO determined that Bornish and Adelaide, which had identified S2N as their preferred connection point, were "not technically feasible."[663] The decision to allow these projects to move from S2N to the 500kV Bruce to Longwood line reinforces the pattern of preferential treatment that was afforded to NextEra, and calls into question the impartiality of the Ontario Power Authority.

664. Canada makes only one mention of the Bruce to Longwood line in its Counter Memorial, stating that proponents were permitted to change their connection point to that line[664] relying on the witness statement of Mr. Chow. Mr Chow noted that the TAT tables of June 3, 2011 included a note indicating that proponents interested in connecting to a 500kV line should contact the IESO, which states: "Applicants should contact the IESO for information regarding connection to a 500kV circuit."[665] However, the table, which lists the available capacity at circuits to which proponents can connect, does not list any specific connection point on the Bruce to Longwood 500kV line such as B562L or B563L – to which NextEra and Suncor's projects were granted permission to connect. Nor did the TAT table make any reference to the Bruce to Longwood line itself which was used for transmitting large quantities of power from the Bruce Nuclear Facility.[666]

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[660] Witness Statement of Bob Chow (RWS – Chow), at ¶47

[661] Memorial, at ¶¶651-675

[662] NextEra's Bornish and Adelaide projects both listed S2N as their preferred connection points. Jericho was enabler requested. Cedar Point II originally requested to connect at N21W

[663] Hydro One – OPA Southwest Transmission Meeting, February 10, 2010 ***(Investor's Schedule of Exhibits at C-0474)***

[664] Counter Memorial, at ¶378; Witness Statement of Bob Chow (RWS – Chow), at ¶46

[665] Ontario Power Authority, FIT Program, Transmission Availability Table, June 3, 2011 ***(Investor's Schedule of Exhibits at C-0166)***; Memorial, at ¶670; Witness Statement of Bob Chow (RWS – Chow), at ¶46

[666] Witness Statement of Bob Chow (RWS – Chow), at ¶46

665. Moreover, this announcement was made on June 3, 2011 – a Friday; only three days before the June 6, 2011 Connection Point Amendment Window was opened. This was the first time that the Transmission Availability Table contained any information about connections to the 500kV line. This short time frame was insufficient for a proponent such as Mesa to do all the necessary planning to successfully connect to this line, particularly given the "complicated technical requirements and financial costs of connecting to a 500kV line."[667] Awarding contracts to projects that required significant and costly transmission upgrades to be developed and constructed with the project is largely inconsistent with the stated goal of awarding contracts to projects that were the most "shovel-ready."[668]

666. Mr. Chow notes that another project, Kingsbridge II, was granted approval to connect to the Bruce to Longwood line at connection point B562L, referencing an IESO System Impact Assessment (SIA) from February 9, 2007.[669] Later however, a briefing note from July 8, 2009 on transmission and distribution considerations for the Korean Consortium, who later brought the K2 project under the *GEIA*, [redacted][670] As such, connecting at B562L or B563L was not a feasible option.

667. Numerous internal communications between the IESO, Hydro One, and the OPA demonstrate that connecting to the Bruce to Longwood 500kV line was undesirable and made the system unreliable:

a) In a June 15, 2011 email, for example, Gabriel Adam of the IESO mentioned that the IESO team "will evaluate the feasibility of having unbalanced injections into the two 500kV lines."[671]

b) On July 4, 2011, an internal Hydro One email says that 400MW of projects will be connecting to the Bruce to Longwood 500kV line. John Sabiston of Hydro One then says: "the work to conduct the assessments for these and the associated connection work will be a major work effort over the next two to three years in the department."[672] In allowing NextEra's projects to connect to the Bruce to Longwood 500kV line, a disproportionate amount of Hydro One and IESO resources went to securing the fate of the four NextEra projects.

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[667] Witness Statement of Bob Chow (RWS – Chow), at ¶47
[668] OPA Briefing Note, FIT Program Launch Logistics, May 19, 2009 ***(Investor's Schedule of Exhibits at C-0608)***
[669] Witness Statement of Bob Chow (RWS – Chow), at ¶46. Kingsbridge II was owned by Capital Power, and was subsequently subsumed into the *GEIA* by the Korean Consortium.
[670] Briefing Note, Transmission and Distribution Considerations for Korean Consortium, Purchase of Existing Projects Proposal ***(Investor's Schedule of Exhibits at C-0326)***
[671] Email from Gabriel Adam to Mike Falvo, June 15, 2011 ***(Investor's Schedule of Exhibits at C-0477)***
[672] Email from John Sabiston to Hydro One, IESO, OPA, July 4, 2011 ***(Investor's Schedule of Exhibits at C-0478)***

c) Only two days after the contract awards, on July 6, 2011, a Southwestern Ontario Transmission Study mentions that [redacted] As NextEra ended up connecting more than 235MW to that line, (they connected 283MW)[674] [redacted]

d) On August 16, 2011, emails were circulated between Hydro One and the OPA. Summarizing the meeting, Kun Xiong of Hydro One mentioned that Hydro One informed NextEra that "T-tap to 500kV is not allowed…"[675]

668. By contrast, Canada does not provide any report or study to demonstrate that it was feasible to connect to the Bruce to Longwood line.

669. These government communications demonstrate that connecting NextEra's projects to the 500kV Bruce to Longwood line diverted a significant amount of resources from the IESO and Hydro One to the detriment of other FIT proponents, and resulted in a series of technical complications. Despite all of these concerns, Canada makes just one reference to the 500kV Bruce to Longwood line in its Counter Memorial.[676]

670. The Report of Steve Dorey fails to provide any detail regarding the Bruce to Longwood line, and instead discusses what was already known, and which is not at issue in this case: that the Bruce to Milton 500kV line was intended in part to permit the development of renewable generation potential in the Bruce area.[677]

671. The Investor does not dispute that the Bruce to Milton line was intended to provide additional transmission capacity for renewable energy projects.[678] While both lines originated at the Bruce Nuclear facility and carried electricity generated by renewable energy projects, only the Bruce to Longwood line was intended to be a "critical back up line for Bruce Nuclear Facility…"[679]

672. Canada has failed to address serious technical considerations regarding the fact that NextEra's projects were permitted to connect to the back-up line, and the fact that

[673] Southwestern Ontario Transmission Study, July 6, 2011, at p.2 ***(Investor's Schedule of Exhibits at C-0479)***
[674] Email from Bob Chow to Kun Xiong, June 10, 2011 ***(Investor's Schedule of Exhibits at C-0480)***
[675] Email from Bob Chow to Kun Xiong, August 16, 2011 ***(Investor's Schedule of Exhibits at C-0481)***
[676] Canada makes only one mention of the Bruce to Longwood 500 kV line (Canada's Counter Memorial, at ¶378), only to mention that connection points on this line, while not listed in the TAT Tables, were available connection points.
[677] Expert Report of Steve Dorey at ¶¶88-90
[678] Counter Memorial¶¶15, 185-186
[679] Witness Statement of Bob Chow (RWS – Chow), at ¶47

awarding contracts to projects requiring the construction of lengthy transmission lines is fundamentally inconsistent with the purpose of awarding contracts to projects that were "shovel-ready."

673. The decision to allow connection point changes and generator paid upgrades, together with NextEra's authorization to connect to L7S and the Bruce to Longwood 500kv line demonstrates a pattern of preferential treatment to NextEra. Without a change to the FIT Rules, a revision of the Transmission Availability Table, and a shift in policy from prohibiting the connection of renewable projects to the Bruce to Longwood line, NextEra would not have been able to obtain contracts for all of its projects. As Mesa reasonably expected, it would have received these contracts. Additional transmission would have been available in the Bruce region for Mesa's TTD and Arran projects, which did not require transmission upgrades, and which had sufficient and available transmission capacity.

674. Clearly, Ontario did not treat Mesa fairly and equally. The lack of fairness when coupled with the lack of candour to those following the rules resulted in a program in which fairness was simply not a relevant consideration. Such behaviour has long been found to fall below the minimum standard of treatment required to be provided to a foreign investor under international law. Accordingly, such actions constitute a violation of NAFTA Article 1105.

C. Ontario failed to follow the FIT Program Rules in a fair and transparent manner

675. The behavior by government employees and administrative decision makers contravened basic precepts of Canadian administrative law, and violated the procedural safeguards that should have been followed. This led to an unjust regulatory and administrative process that violated Mesa's right to be treated in accordance with the common-law principles of procedural fairness and natural justice.[680] The entire process amounted to "an arbitrary exercise of delegated powers."[681]

676. The senior representatives from Mesa have filed witness statements in this arbitration which confirm that they expected Mesa and its investments to be treated in a fair and transparent manner in Ontario with respect to obtaining access to the Ontario transmission grid and with respect to obtaining power purchase agreements under a feed-in-tariff program.[682]

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[680] *Dunsmuir v. New Brunswick (Board of Management)* (2008) SCC 9, [2008] 1 S.C.R. 190 ("*Dunsmuir*"), at ¶129 ***(Investor's Schedule of Legal Authorities at CL-332)***

[681] *Dunsmuir,* at ¶104 ***(Investor's Schedule of Legal Authorities at CL-332)***

[682] Witness Statement of T. Boone Pickens (CWS – Pickens), at ¶¶16, 17, 20; Witness Statement of Cole Robertson (CWS-Robertson), at ¶¶57-58

677. Mesa was owed a duty of fairness by the OPA through its administration of the FIT Program. This is a longstanding principle of Canadian administrative law that the OPA was bound to follow. In *Cardinal v. Director of Kent Institution* the Supreme Court of Canada held,

> [T]here is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual.[683]

The Supreme Court has found that the obligation to act fairly depends on three circumstances:

> (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights.[684]

Canada did not behave in a manner that corresponded to this obligation. In the circumstances, Mesa was owed a high degree of fairness.

678. The OPA made critical decisions about Mesa's business activities and had the ability to decide if it would or would not be able to proceed with its investment in Ontario; a decision that Mesa was not able to appeal.[685] Mesa was entirely dependent on the process established by the OPA to secure its FIT contract and proceed with the investments in Ontario. It expected the process to be followed and in these circumstances, the Supreme Court of Canada states, "it will generally be unfair for [administrative decision makers] to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights."[686] However, when administering the FIT Program and dealing with Mesa, the OPA did just that.

679. By administering the FIT Program the way it did, the OPA further contravened its own Code of Conduct, which sets out that one of the OPA's "core values" and "general principles" is "accountability."[687] The actions of all Ontario public servants, including those employed by the Ministry of Energy, were in contravention of the Ontario Public

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[683] C*ardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 ("*Cardinal*"), at p.653 ***(Investor's Schedule of Legal Authorities at CL-333)*** affirmed in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 ("*Baker*"), at ¶20 ***(Investor's Schedule of Legal Authorities at CL-334)***

[684] *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 ("*Knight v. Indian Head School*"), at p.669 ***(Investor's Schedule of Legal Authorities at CL-335)***

[685] *Baker*, at ¶24, states that the lack of an appeal adds to the importance of the duty of fairness owed ***(Investor's Schedule of Legal Authorities at CL-334)***

[686] *Baker*, at ¶26 ***(Investor's Schedule of Legal Authorities at CL-334)***

[687] OPA Code of Conduct for Employees ***(Investor's Schedule of Exhibits at C-0582)***

Service *Guide to Public Service Ethics & Conduct*.[688] Their conduct was not in conformity with the requirements to uphold the public trust by acting with "fairness and equity" and "openness and transparency" as required by the *Guide*.[689]

680. These violations of Canadian administrative law amounted to a breach of Mesa's right to be treated fairly and equitably as expected in a stable business environment such as Ontario.

681. The following sections demonstrate how the administration of the FIT Program constituted an abuse of process that violated the international law standard and Mesa's right to a fair, reasonable, and transparent regulatory competition that was in line with its legitimate expectations of a stable and predictable business environment.

i. The OPA failed to run an ECT as required by the FIT Rules, and the process was materially different

682. Contrary to repeated and clear representations made to the Investor, and contrary to the FIT Rules, Ontario did not run the ECT as scheduled. Regulators reached a decision not to conduct an ECT, but never communicated this to the Investor. The failure of the OPA to communicate what it knew without question is a violation of the promise of transparency, basic notions of fairness, and any semblance of due process that Mesa was entitled to as it participated in Ontario's FIT Program. The delay of the ECT and eventual decision not to run an ECT denied Mesa an opportunity to obtain contracts for two of its projects.[690]

683. Canada admits it failed to run even a single ECT.[691] The failure to run an ECT every six months as required by Section 5.4(a) of the FIT Rules constituted an arbitrary failure by regulators to follow the same rules that Mesa was required to abide by. The decision not to run the ECT, which was publicly slated to be run, was made on a non-transparent basis, depriving the Investor of any indication to expect the fundamental change to the FIT Program design it constituted. Ultimately, not running the ECT as required by the FIT Rules deprived Mesa of an opportunity to obtain a FIT contract.[692]

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[688] Ontario Public Service Guide to Public Service Ethics & Conduct, April 29, 2013 ***(Investor's Schedule of Exhibits at C-0625)***

[689] Ontario Public Service Guide to Public Service Ethics & Conduct, April 29, 2013, s.3 ***(Investor's Schedule of Exhibits at C-0625)***

[690] It should be noted that, even if the FIT Rules permitted the OPA to make changes to the FIT Program, the sections of the Rules regarding the ECT, such as s. 5.4(a), were not amended until FIT Rules v. 2.0 in August 2012. Therefore, from the commencement of the FIT Program in September 2009 until August 2012, the OPA was under an obligation to run an ECT every six months, yet it failed to run even a single ECT. Canada has not denied that the OPA's failure to run an ECT was in violation of the FIT Rules.

[691] Counter Memorial, at ¶¶429-431

[692] Memorial, at ¶¶755-762

684. Prior to the June 3rd rule change, the OPA made repeated and consistent representations to FIT applicants that the next step in the FIT program would be an Economic Connection Test. All of the proponents expected that an ECT would be the next step in the FIT program and at no point did the OPA indicate that there would be a departure from the ECT process to award contracts.

685. The Bruce to Milton allocation process was materially different from the ECT process established in the FIT Rules and cannot mitigate the fact that an ECT was never run. The changes imposed by the Minster's direction constituted an arbitrary modification of the FIT Program and the resulting process was inconsistent with the ECT in several significant ways:

a) The ECT did not include a cap on the amount of transmission capacity allocated.[693] In the Bruce to Milton Allocation Process, a cap of 750MW in Bruce Region and 300MW in West of London was imposed.[694]

b) The ECT included a step to assess the feasibility of expansions to the transmission system.[695] This phase was an essential component of an ECT as contemplated in the FIT Rules and as publicly communicated to FIT proponents.[696]Unlike the ECT, the Bruce to Milton process did not include a phase for proposing and assessing new expansions to the transmission system to accommodate additional FIT projects.

c) The Connection Point Window that was scheduled to take place as part of the ECT was to occur over the course of several weeks, and was limited to allowing specific projects to change connection points.[697] The Ministerial direction provided almost no advance notice to proponents of the opportunity to change connection points and allowed a very limited amount of time for proponents to be able to assess the feasibility of connection point options.

d) The ECT process was regional, and at no point prior to the June 3rd rule change did Ontario indicate to proponents that connection point changes would be allowed

[693] OPA presentation, "FIT Program Analysis – Policy Strategy Development," December 23, 2010, at pp.4-5 ***(Investor's Schedule of Exhibits at C-0445)***

[694] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA June 3, 2011 ***(Investor's Schedule of Exhibits at C-0046)***

[695] Ontario Power Authority, Presentation, "The Economic Connection Test - Approach, Metrics and Process," May 19, 2010, pp.13-34 ***(Investor's Schedule of Exhibits at C-0088)***

[696] Ontario Power Authority, Feed-In Tariff Program, FIT Rules, Version 1.2, November 19, 2009, s. 5.4(a) ***(Investor's Schedule of Exhibits at C-0143)***; Ontario Power Authority, Presentation, "The Economic Connection Test - Approach, Metrics and Process," May 19, 2010, pp.13-34 ***(Investor's Schedule of Exhibits at C-0088)***

[697] Ontario Power Authority, Presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010, at p.39 ***(Investor's Schedule of Exhibits at C-0088)***

between regions. The Bruce to Milton process allowed changes between regions at the direction of the Minister of Energy.[698]

(1) The decision to not conduct an ECT

686. Canada's explanation of the primary cause of the delay and eventual cancellation of the ECT relates to objectives set out in the Ministry of Energy's Long-Term Energy Plan (LTEP), which was released in November 2010.[699] Canada's explanation ignores the fact that the ECT was supposed to be originally run in August 2010, several months prior to the release of the LTEP. It also ignores the OPA's specific representation to Mesa that "the ECT process will be initiated in August 2010".[700] Further, Canada has not provided any specific reason why the LTEP necessitated delay of the ECT.

687. Ontario internally adopted the position that the LTEP "compet[ed] and potentially conflict[ed]" with the objectives set out in the FIT Rules,[701] and would require a change in the FIT Program's approach.[702] Ontario never communicated this decision to the Investor.[703] Mesa continued to rely on the justified belief that an ECT was both necessary and forthcoming as this is what the OPA had expressly stated.[704]

688. More than six months after the ECT process was scheduled to start, the OPA and Ministry of Energy were actively considering alternative options to award FIT contracts in the Bruce and West of London regions instead of the ECT.[705] In the course of these discussions, the OPA noted that "clear communication to the industry" would be

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[698] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, June 3, 2011 ***(Investor's Schedule of Exhibits at C-0046)***

[699] Witness Statement of Sue Lo (RWS – Lo), at ¶¶39-40

[700] Letter from JoAnne Butler, Ontario Power Authority, to Charles Edey, April 8, 2010 ***(Investor's Schedule of Exhibits at C-0182)***

[701] OPA presentation, "FIT Program Analysis – Policy Strategy Development," December 23, 2010, at p.14 ***(Investor's Schedule of Exhibits at C-0445)***

[702] The presentation specifically noted that the outcome of the ECT would "need to recognize LTEP targets." OPA presentation, "FIT Program Analysis – Policy Strategy Development," December 23, 2010, at p.30 ***(Investor's Schedule of Exhibits at C-0445)***; At slide 29 of the presentation, the OPA suggested that the Two-Year Review of the FIT Program be advanced from the fall of 2011 to Jaunary 2011 which potentially could have resolved the tension between the LTEP and ECT

[703] Reply Witness Statement of Cole Robertson (RWS – Robertson), at ¶57

[704] Letter from JoAnne Butler, Ontario Power Authority, to Charles Edey, April 8, 2010 ***(Investor's Schedule of Exhibits at C-0182)***; Ontario Power Authority, Presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010 ***(Investor's Schedule of Exhibits at C-0088)***

[705] For example, a February 7, 2011 meeting between the OPA and Ministry of Energy officials discussed changing the ECT from a province-wide process to one conducted on a regional basis and eliminating the preliminary Individual Project Assessment (IPA) portion of the ECT for all regions except those enabled by the Bruce to Milton line. Handwritten Notes, Karen Slawner (Ministry of Energy), February 7, 2011 ***(Investor's Schedule of Exhibits at C-0469)***

necessary to inform them that the ECT would not be conducted as expected.[706] To the contrary, Mesa had only received "clear communication" that the ECT was going to occur.[707] If the ECT had been run as expected by May 2011, Mesa would have received contracts for its TTD and Arran projects.

689. The transmission capacity enabled by the Bruce to Milton line in the Bruce and West of London regions was to be allocated through the first ECT, regardless of whether the Bruce to Milton line had received final approval by that time.[708] If the line had received approval prior to an ECT, then the projects enabled by the line would have been immediately offered FIT contracts. If the line had not received approval prior to an ECT, then projects enabled by the line would have been moved to the FIT Production Line until the line received approval, at which time these projects would be offered FIT contracts.[709]

690. As the Bruce to Milton line received its final approval in May 2011,[710] there were two scenarios which led to the same outcome of Mesa receiving a FIT contract for the TTD and Arran projects:

a) If an ECT were was carried out in August 2010, as expressly represented to Mesa,[711] Mesa's TTD and Arran projects would have secured a place in the FIT Production line, in which case Mesa was in a promising position to receive a FIT contract.[712]

[706] OPA presentation, "Economic Connection (ECT) & Program Evolution," March 21, 2011, at pp.13-14 ***(Investor's Schedule of Exhibits at C-0438)*** The OPA also noted that the FIT Rules would have to be amended to reflect the changes to the ECT.

[707] Letter from JoAnne Butler, Ontario Power Authority, to Charles Edey, April 8, 2010 ***(Investor's Schedule of Exhibits at C-0182)***; Ontario Power Authority, Presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010 ***(Investor's Schedule of Exhibits at C-0088)***

[708] Email from Tracy Garner (OPA) to Bob Chow (OPA), September 20, 2010 ***(Investor's Schedule of Exhibits at C-0623)***; Draft letter from Tracy Garner (OPA), September 20, 2010 ***(Investor's Schedule of Exhibits at C-0436)***; Email from Ceiran Bishop (Ministry of Energy) to Samira Viswanathan (Ministry of Energy) and Faruq Remtulla (Ministry of Energy), November 18, 2010 ***(Investor's Schedule of Exhibits at C-0159)***

[709] Feed-In Tariff Program, FIT Rules, Version 1.2, November 19, 2009, s. 5.4(c)(i) ***(Investor's Schedule of Exhibits at C-0143)***; Draft letter from Tracy Garner (OPA), September 20, 2010 ***(Investor's Schedule of Exhibits at C-0436)***; Email from Ceiran Bishop (Ministry of Energy) to Samira Viswanathan (Ministry of Energy) and Faruq Remtulla (Ministry of Energy), November 18, 2010 ***(Investor's Schedule of Exhibits at C-0159)***

[710] Ministry of Natural Resources, Notice of Decision made under the provision of the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990 (May 10, 2011) ***(Respondent's Schedule of Exhibits at R-105)***

[711] Ontario Power Authority presentation, "The Economic Connection Test - Approach, Metrics and Process," May 19, 2010, at p.39 ***(Investor's Schedule of Exhibits at C-0088)***

[712] The placement of Mesa's TTD and Arran projects in the FIT Production Line and their subsequent awarding of contracts in May 2011 would have preceded any of NextEra's projects changing connection points from West of London to Bruce.

b) If the ECT had been run at the time of the Bruce to Milton line's final approval in May 2011, then Mesa's TTD and Arran projects would have been awarded FIT contracts.

691. In either case, had the established ECT process been carried out as it was expected, and no later than July 4, 2011, Mesa's TTD and Arran projects would have received a FIT contract.

(2) Ontario's cap on transmission capacity departed from the established ECT process

692. The ECT process under the FIT Rules did not contemplate any limits on transmission capacity allocation to FIT projects other than those necessarily set by the physical limitations of the electricity transmission system. Investors expected that the OPA would offer contracts to proponents as long as there was sufficient transmission capacity available for the project to connect to the transmission system and there was transmission available to Mesa.

693. However, because of the change made by the Ministerial Direction of June 3rd, less capacity was allocated to FIT projects through the Bruce to Milton process than was physically enabled in both the Bruce and West of London regions. Specifically, the caps on allocations imposed by the Minister had the effect of withholding capacity that was physically enabled in both regions by the Bruce to Milton line.[713]

694. The Minister of Energy's direction of June 3 imposed a cap of 750MW on allocations in the Bruce Region. However, a study carried out by the OPA in July 2011, revealed that the physical limit in the Bruce region was actually greater than the 750MW cap.[714]

695. The caps imposed by the Minister's June 3rd direction departed from the established procedures of an ECT, and were contrary to the purpose of the FIT Program. Early in the FIT process, the OPA characterized the FIT Program as an "open ended program" that included "no MW cap" and was designed to secure "as many MW as possible on the existing transmission system" for renewable energy projects.[715] Moreover, officials were

[713] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, June 3, 2011 ***(Investor's Schedule of Exhibits at C-0046)***

[714] "Bruce Area Test for BxM Capacity Allocation," prepared by Kun Xiong (OPA), July 26, 2011 ***(Investor's Schedule of Exhibits at C-0471)***

[715] OPA presentation, "FIT Program Analysis – Policy Strategy Development," December 23, 2010, at pp.4, 6 ***(Investor's Schedule of Exhibits at C-0445)***; At page 8, the OPA also states that the FIT Rules were designed to ensure "[p]rogram certainty" for the FIT Program for its first two years.

clearly reluctant to impose a cap and considered alternative approaches that expressly avoided doing so.[716]

696. In addition, the Minister of Energy set an artificial cap of 300MW in the West of London region, which negatively impacted Mesa's projects in the Bruce Region.[717] Prior to June 3, 2011 the Bruce to Milton line was projected to physically enable 550MW of transmission capacity in West of London,[718] and officials were fully aware that imposing a cap of only 300MW withheld a significant amount of available capacity from FIT proponents.[719]

697. The cap appears to have been imposed for the benefit of the Korean Consortium.[720] Prior to June 3, authorities had planned to set aside a certain amount of capacity in the West of London for the Korean Consortium.[721] The Ministerial Direction of June 3 achieved this by imposing the cap and thereby holding back 250MW which could be used for the Consortium's projects. [722]

698. As the expected ECT process would not have involved any caps on the amount of capacity, but would instead have resulted in the allocation of all capacity physically enabled by the line, Mesa would have had the opportunity to obtain a FIT contract through the ECT. That opportunity was unfairly and arbitrarily removed on the direction of the Minister of Energy.

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[716] Email from Sunita Chander (Ministry of Energy) to Ceiran Bishop (Ministry of Energy), May 13, 2011 ***(Investor's Schedule of Exhibits at C-0605)***

[717] If the 300MW cap on allocations in West of London had not been imposed, and all of the 550MW physically enabled in the region had been allocated through the Bruce to Milton process, several projects in the West of London that moved their connection point during the change window to the Bruce region likely would not have moved into the Bruce Region, where there was more transmission capacity available.

[718] Ministry of Energy presentation, "Bruce to Milton Transmission Line – FIT Contract Awards," May 26, 2011, at p.3 ***(Investor's Schedule of Exhibits at C-0626)***

[719] A draft Ministerial Direction prepared on May 27, 2011 set the cap for the West of London region of 550MW. The final draft of the Direction circulated on May 31 reduced this number to 300MW, which caused Ministry of Energy officials to question what had happened to the remaining 250MW of transmission capacity. Email from Yuna Kim (Ministry of Energy) to Sunita Chander (Ministry of Energy), May 31, 2011 ***(Investor's Schedule of Exhibits at C-0628)***

[720] Given the lack of document production by Canada on this issue, the Investor can only infer this was in fact the case.

[721] Memorial, at ¶711; Ministry of Energy, Presentation, "Bruce to Milton Transmission Line: FIT Contract Awards," Undated, at p.4 ***(Investor's Schedule of Exhibits at C-0269)***; Email from Sunita Chander (Ministry of Energy) to Ceiran Bishop (Ministry of Energy), May 16, 2011 ***(Investor's Schedule of Exhibits at C-0658)***

[722] Memorial, at ¶714; Email from Sue Lo (Ministry of Energy) to Andrew Mitchell (Ministry of Energy), May 19, 2011 ***(Investor's Schedule of Exhibits at C-0603)***

(3) The FIT Rules only allowed limited connection point changes prior to the ECT

699. Only specific categories of projects were permitted to change connection points prior to an ECT, under the FIT Rules. In particular, Sections 5.3(d), 5.5(b), 5.5(d) and 5.6(b) do not allow NextEra's projects (or any other transmission connected projects) to change connection points prior to an ECT.[723]

700. In particular:

a) Section 5.3(d) only applies to projects connected to the distribution system that are required undergo a Distribution Availability Test, which does not apply to NextEra's projects. There is no similar provision for a connection change window prior to an ECT for projects that connect to the Transmission system;[724]

b) Section 5.5(b) of the FIT Rules, does not contain any information regarding connection point changes;[725]

c) Sections 5.5(d) and 5.6(b) of the FIT Rules apply only to projects that are in the FIT Production Line and the FIT Reserve.[726]

701. These are specifically addressed in the Investor's Memorial at paragraphs 701-702. Connection point changes could be made as part of the ECT process to the distribution system. Mesa does not take issue with this process. Yet Canada has failed to show how any of the sections allowed a FIT applicant to change connection points if the applicant had requested to connect to the *transmission* system

702. Such a process did <u>not</u> conform to the connection point change procedure contemplated in the FIT Rules.

703. If the Bruce to Milton connection point change window was consistent with the FIT Rules, none of NextEra's projects would have been permitted to change connection points, and TTD and Arran would have still been within the top 750MW of projects in the Bruce Region that would have received a FIT contract.

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[723] Contrary to Witness Statement of Bob Chow (RWS – Chow), fn 15, at ¶29; Witness Statement of Sue Lo (RWS – Lo), at ¶46; Witness Statement of Jim MacDougall (RWS – MacDougall, at ¶44; Counter Memorial, at ¶425

[724] See FIT Rules Version 1.1 Section 5.2 ***(Investor's Schedule of Exhibits at C-0258)***

[725] Witness Statement of Bob Chow (RWS – Chow), fn.15

[726] As of June 2011 there were no projects in either the FIT Production Line or the FIT Reserve. A project could only be placed into the FIT Production Line or FIT Reserve after an ECT had been completed. Because no ECT had ever occurred, none of the projects in either the Bruce or West of London region could have been in the FIT Reserve or FIT Production Line in 2011.

(4) The ECT was regional and connection point changes were not allowed between regions prior to June 3, 2011

704. While Canada asserts that the division of the rankings *by Region* was only for informational and planning purposes, the facts do support that position.[727] The FIT Rules explicitly stated to proponents that the process for awarding contracts through an ECT was regional. Prior to the June 3, 2011 rule change the word "region" appeared in the FIT Rules twice - Section 5.1(b) and Section 5.4(a).[728] Each reference to "region" in the FIT indicates that the ECT will be run, separately, for every region of the province every six months.

705. Indeed from August 2010, the Ministry of Energy considered sending each individual applicant their regional ranking only, and not the provincial ranking.[729] In fact, Ontario considered that an applicant's regional ranking was "a better indicator of whether or not a particular project will be offered a FIT contract" than its provincial ranking.[730]

706. While Canada asserts that proponents were always permitted to change connection point between regions,[731] Canada has not identified a single document, rule or presentation to demonstrate that applicants were informed that they would be allowed to change connection points into another region.[732] Neither the OPA's webinar presentations to FIT proponents in March and May 2010, nor the presentation by Bob Chow from November 2010 referenced in the expert report of Steve Dorey, state that connection point changes between regions would be permitted.[733]

707. If NextEra could not change connection points from the West of London region into the Bruce Region, Mesa's projects would have been within the top 750MW of capacity and would have received a FIT contract.

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[727] Counter Memorial, at ¶¶89, 169; Witness Statement of Bob Chow (RWS – Chow), at ¶29

[728] The word region also appears twice in Exhibit B to the FIT Production Line. FIT Rules Version 1.3, March 9, 2010 ***(Investor's Schedule of Exhibits at C-0185)***

[729] Ministry of Energy presentation, "Priority Ranking Release: Issues to be Addressed," August 26, 2010, at p.12 ***(Investor's Schedule of Exhibits at C-0483)***

[730] FIT – Application Review Text and Standard Responses, May 9, 2011, at p.33 ***(Investor's Schedule of Exhibits at C-0617)***; OPA, Appendix A –Standardized Text, May 2011, at p.31 ***(Investor's Schedule of Exhibits at C-0618)***

[731] Canada's Counter Memorial, at ¶102 and ¶¶413-415; Witness Statement of Bob Chow (RWS – Chow), at ¶30

[732] Canada cites only the Bob Chow's Witness Statement, and his observation that not allowing changes between regions "would have made no sense whatsoever" from a technical electrical standpoint. Witness Statement of Bob Chow (RWS – Chow), at ¶30

[733] Ontario Power Authority presentation, "The Economic Connection Test Process," March 23, 2010 ***(Investor's Schedule of Exhibits at C-0034)***; Ontario Power Authority, Presentation, "The Economic Connection Test - Approach, Metrics and Process," May 19, 2010 ***(Investor's Schedule of Exhibits at C-0088)***; Bob Chow, *FIT Status and the ECT Process*, Presentation to 2010 APPrO Conference, November 17, 2010 ***(Respondent's Schedule of Exhibits at Dorey-19)***, cited in Expert Report of Steve Dorey, at ¶108

(5) The FIT Rules did not permit enabler requested projects to select a connection point prior to the ECT

708. Canada has failed to cite any section of the FIT Rules or any other document that states that projects that did not select connection points in their original application - "enabler requested" projects - would be allowed to select connection points in advance of an ECT.[734]

709. Indeed, while projects that originally selected a connection point were permitted to change their status to enabler requested during a connection point change window, the OPA did not provide for projects to change from enabler requested to identifying a connection point.[735]

710. The decision to permit enabler-requested projects to identify connection points during the change window enabled two of NextEra's projects, Bluewater and Jericho, to participate in the Bruce to Milton allocation process. Both of these projects identified connection points in the Bruce region and consequently jumped ahead of Mesa's projects in the rankings to earn FIT contracts in that region.[736] Officials knew that permitting enabler requested projects to identify connection points would be beneficial to NextEra.[737]

711. If the Bruce to Milton process had been run pursuant to the ECT procedures established in the FIT Rules, then NextEra's Bluewater and Jericho projects would not have been eligible to receive contracts through the Bruce to Milton allocation process.[738] This arbitrary change allowed two of NextEra's projects that otherwise would not have been eligible to participate in the Bruce to Milton process. As such, an additional 210MW would have been available in the Bruce region which potentially could have been allocated to Mesa's projects.

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[734] The Investor explained in its Memorial (¶722 and 728) that the Bruce to Milton allocation process deviated from the procedures contemplated in the FIT Rules by allowing enabler requested projects to identify connection points during the connection point change window.

[735] Ontario Power Authority, Presentation, "The Economic Connection Test - Approach, Metrics and Process," May 19, 2010, at p.46 ***(Investor's Schedule of Exhibits at C-0088)***

[736] Memorial, at ¶729-730

[737] Ministry of Energy Briefing Note, "Bruce to Milton Contract Awards," June 15, 2011, at p.2 ***(Investor's Schedule of Exhibits at C-0172)***

[738] Enabler requested projects were explicitly excluded by the OPA from the Bruce to Milton process. Ontario Power Authority, "Questions and Answers, Bruce to Milton Contract Allocation Process," June 8, 2011, at p.1 ***(Investor's Schedule of Exhibits at C-0291)***

ii. Mesa's projects were improperly ranked and Mesa was misled to believe that a review of this ranking was undertaken

712. Part of the OPA's responsibility in administering the FIT Program was to rank applications. Decisions made when ranking applications was one of the ways in which the OPA carried out the instructions it received pursuant to the FIT Direction issued to the OPA by Deputy Premier and Minister of Energy and Infrastructure George Smitherman on September 24, 2009.[739] As a result, Ontario is responsible for the OPA's measures in this regard as matter of state responsibility.

713. Ranking of FIT applications did not fairly or reasonably assess projects against the published metrics set out in the FIT Rules.[740] Regulators disregarded evidence submitted with FIT applications and failed to award the Investor's projects with the criteria it bid for, and for which it provided all the necessary information to demonstrate that it met that criteria. The arbitrary evaluation of the Investor's FIT applications was made in an absence of careful review and without due regard to the actual applications themselves and the FIT Rules. Mesa applied for criteria that it should have been awarded points for but was not.

714. When the Twenty Two Degree Wind Project ULC and the Arran Wind Project ULC's FIT applications were submitted during the FIT Launch Period, they sought points for three of the four available criteria:[741]

a) Guaranteed access to wind turbine supply;

b) Expertise in wind power development; and

c) Financial Capacity.

715. The applications submitted by Mesa's investments have been independently reviewed by auditor Gary Timm. Auditor Timm's report confirms that the OPA incorrectly evaluated the Investor's applications.[742]

716. Both TTD and Arran ("The Applicants") elected to bring their projects into commercial operation 365 days earlier than otherwise required by the FIT Contract.[743]

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[739] Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), September 24, 2009 ***(Investor's Schedule of Exhibits at C-0264)***

[740] Expert Report of Gary Timm, at ¶¶7.1-7.4

[741] Twenty Two Degree Wind Project ULC and Arran Wind Project ULC did not qualify for the first criterion because the two projects were not REA exempt.

[742] Expert Report of Gary Timm, at ¶¶7.1-7.4

[743] Twenty Two Degree Wind Project FIT Application, November 25, 2009, at bates 107905 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009, at bates 105168 ***(Investor's Schedule of Exhibits at C-0129)***

717. This, in addition to the 3 ranking points the Investor applied for, made for a total of [redacted] COD Acceleration Days in the Investor's FIT applications.[744]

718. Canada suggests that Mesa's TTD and Arran projects did not merit any award points under the launch period ranking criterion[745] and that they were properly ranked.[746] These claims do not hold up in the face of the information and materials submitted in the Investor's applications.

719. When judged against the evaluation criteria published by the OPA in the FIT Rules, the Investor should have been awarded the points it applied for. As a result, it was denied a proper ranking score. The denial of each individual ranking point added to the cumulative effect of the OPA's errors and disregard for its own rules, and ultimately deprived Mesa of the chance at a FIT contract that it should have been given.

(1) OPA's improper review of Mesa's bid for Criterion 2, Major Equipment Control.

720. FIT Rule Section 13.4(a)(ii) states that a proponent may execute a fixed price contract with a Major Equipment Component supplier, or own a major equipment component to receive a point.[747] The Major Equipment Component must have undergone prior to delivery, one of the Designated Activities set out in the FIT Program Ontario Domestic Content Grid in Exhibit D to the FIT Contract.[748]

721. Under this criteria, the OPA's Evaluation Criteria Checklist asks: [redacted] The evaluator answered [redacted] for the Applications.[749]

722. The OPA's failure to award a point to the Applicants under this criterion was improper. The Applicants explicitly agreed to comply with all the requirements of the FIT Rules in the submission of the FIT applications. Each application stated:

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[744] Twenty Two Degree Wind Project FIT Application, November 25, 2009 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009 ***(Investor's Schedule of Exhibits at C-0129)***

[745] Counter Memorial, at ¶433; Witness Statement of Richard Duffy (RWS – Duffy), at ¶51

[746] Counter Memorial, at ¶433; Witness Statement of Richard Duffy (RWS – Duffy), at ¶51

[747] Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 13.4(a) ***(Investor's Schedule of Exhibits at C-0258)***

[748] Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 13.4(a) (ii) ***(Investor's Schedule of Exhibits at C-0258)***

[749] FIT Evaluation Criteria Checklist: TTD Project, Microsoft Excel tab "Criteria #4" Counter 85 Column O and Arran Project, Excel tab "Criteria #4" Counter 84 85 Column O ***(Respondent's Schedule of Exhibits at R-072)***

> By submitting this Application, the Applicant agrees and acknowledges that the Applicant has read and understood the FIT Rules, obtained independent legal advice, and agrees to comply with all requirements contained therein.[750]

723. Both Applicants also submitted a Confirmation letter from General Electric (GE), a member of the Applicant Control Group stating that each Applicant executed a fixed price contract with GE for supply of wind turbine generators.[751] Other FIT applicants submitted similar letters from GE under this criteria, including Skyway 127 Wind Project submitted by Skyway 127 Wind Energy Inc. and Cedar Point Phase II Wind Power Project submitted by Suncor Energy Products Inc.[752]

724. The OPA was well aware of GE's commitment as a supplier in Ontario – there was only a limited number of manufacturers committed to the Ontario market at the time. The Government of Ontario signed a Memorandum of Understanding with GE to enhance the economy and job market, and to establish global centres within Ontario focusing on clean energy on September 29, 2009.[753]

725. The Applicants committed to comply with the FIT Rules, and the Control Group certified that it had turbines that would be used for this project. The Applicants qualified for this point, and was improper and capricious for the OPA to deny Mesa a point for equipment.

(2) The OPA's improper review of Mesa's bid for Criterion 3, Prior Experience.

726. Based on the FIT Rules**,** to obtain a bid point for experience, there were two ways that a project could meet the experience requirement – either the Applicant Control Group[754] has experience with a "Similar Facility"[755], or three full time employees of the applicant

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[750] Twenty Two Degree Wind Project FIT Application, November 25, 2009, at bates 107902 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009, at bates 105165 ***(Investor's Schedule of Exhibits at C-0129)***

[751] Twenty Two Degree Wind Project FIT Application, November 25, 2009, at bates 108000 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009, at bates 105262 ***(Investor's Schedule of Exhibits at C-0129)***

[752] Cedar Point Phase II Wind Project FIT application ***(Investor's Schedule of Exhibits at C-0490)*** and Skyway 127 Wind Project FIT application ***(Investor's Schedule of Exhibits at C-0491)***

[753] Draft Memorandum of Understanding between General Electric Company and The Ministry of Economic Development and Trade of the Government of Ontario, September 28, 2009 ***(Investor's Schedule of Exhibits at C-0437)***; News Wire News Article headed "Ontario Signs MOU with General Electric Canada," September 29, 2009 ***(Investor's Schedule of Exhibits at C-0489)***

[754] According to FIT Rules, Applicant Control Group "means the Applicant, any person that Controls the applicant or any person controlled by the Applicant." Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 13.4(a)(ii) ***(Investor's Schedule of Exhibits at C-0258)***

[755] According to FIT Rules, Similar Facility "means an electricity generation facility, other than the project, that is located anywhere in the world, which (i) uses the same Renewable Fuel as the project, and (ii) has a Nameplate Capacity of at least 25% of the proposed Contract Capacity of the Project." Ontario Power Authority, Feed-In

could have experience with a "Similar Facility." Applicant Control Group and Similar Facility are both defined terms.[756] The FIT Rules states:

> The Applicant Control Group has, or any three full-time employees of the Applicant Control Group each have, successful experience with planning and developing one or more Similar Facilities. The Similar Facility(ies) used to support this requirement must have been developed under circumstances where the Applicant Control Group had, or the three full-time employees each had, as applicable, primary responsibility for such Similar Facility(ies), either for planning and development or as design/builder.[757]

727. Under this criterion, the OPA's Evaluation Criteria Checklist asks: [redacted] The evaluator answered [redacted] for the Applicants.[758]

728. The Applicants met this requirement and submitted materials to that effect from three Directors of the Applicant Control Groups of the projects, Mark Ward, Brian Case, and Chuck Edey, to demonstrate that the Applicant Control Group of each project met the requirements:[759]

a) Mr. Ward, Director of the Applicants enclosed a statement detailing his experience running wind projects of 1000MW of wind generation in North America. Since the TTD and Arran projects were 150MW and 115MW, respectively, Mr. Ward's past experience satisfied "planning and developing" a "Similar Facility," and demonstrates that the Applicant Control Group developed wind power projects whose nameplate capacity, 1000MW, was more than 25% of the proposed capacity of each of the TTD and Arran projects;

b) Mr. Case, Director of the Applicants enclosed a statement detailing his experience with the origination and co-development of wind energy projects with GE customers

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Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 13.1(l) ***(Investor's Schedule of Exhibits at C-0258)***

[756] According to FIT Rules, Similar Facility "means an electricity generation facility, other than the project, that is located anywhere in the world, which (i) uses the same Renewable Fuel as the project, and (ii) has a Nameplate Capacity of at least 25% of the proposed Contract Capacity of the Project." Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 13.1(l) ***(Investor's Schedule of Exhibits at C-0258)*** According to FIT Rules, Applicant Control Group "means the Applicant, any person that Controls the applicant or any person controlled by the Applicant." Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 13.4(a)(ii) ***(Investor's Schedule of Exhibits at C-0258)***

[757] Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 13.4(a)(iv) ***(Investor's Schedule of Exhibits at C-0258)***

[758] FIT Evaluation Criteria Checklist: TTD Project, Microsoft Excel tab "Criteria #4" Counter 85 Column H and Arran Project, Excel tab "Criteria #4" Counter 84 85 Column H ***(Respondent's Schedule of Exhibits at R-072)***

[759] Twenty Two Degree Wind Project FIT Application, November 25, 2009, at bates 107918-107926 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009, at bates 105181-105189 ***(Investor's Schedule of Exhibits at C-0129)***

and his successful development of over 7,000MW of global power generation projects. Mr. Case's experience demonstrates the Applicant Control Group possessed extensive knowledge and experience in the development of power generation, including wind energy, far exceeding the proposed capacity for TTD Wind Project and Arran Wind Project; and

c) Mr. Edey, as the Director of the Applicants, also filed an authorization in the Applications as the signing authority for the TTD project and the Arran project to the Ontario Power Authority for the purpose of obtaining a Feed-in Tariff Contract.[760]

d) Mr. Edey outlined his experience in "all aspects of wind generation development from concept to in-service. Responsibilities include the acquisition of land, power purchase contracts; development contracts, wind resource assessments including management of meteorological tower erection, environmental, permitting stakeholder relations, procurement and equity investments to support renewable energy strategy of the group's project in Wind development."[761]

e) Mr. Edey also identified his experience as being "[d]irectly responsible for Ontario Power Generation's negotiations of the partnership terms and for the contractual agreements for maintenance and ongoing operations for a 9MW wind farm jointly developed with British Energy."[762]

f) Clearly, there was ample experience shown by Mesa's Applicant Control Groups under this criteria.

729. The Applicants also filed a description of the experience of American Wind Alliance, Mesa Power, GE Energy and Leader Resources Services. Leader Resources Services, it was submitted, "successfully developed and sold multiple wind projects including 200MW of wind generation to Enbridge, which was the largest sales to date at that time." This project was larger than either of the Applicants'.[763]

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[760] Twenty Two Degree Wind Project FIT Application, November 25, 2009, at bates 107915 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009, at bates 105178 ***(Investor's Schedule of Exhibits at C-0129)***

[761] Twenty Two Degree Wind Project FIT Application, November 25, 2009, at bates 107922 1st paragraph ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009, at bates 105185 1st paragraph ***(Investor's Schedule of Exhibits at C-0129)***

[762] Twenty Two Degree Wind Project FIT Application, November 25, 2009, at bates 107922 3rd paragraph ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009, at bates 105185 3rd paragraph ***(Investor's Schedule of Exhibits at C-0129)***

[763] Twenty Two Degree Wind Project FIT Application, November 25, 2009, at bates 107918 6th paragraph ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009, at bates 105181 6th paragraph ***(Investor's Schedule of Exhibits at C-0129)***

730. The OPA's exclusion of the Investor's wind power experience – set out as required by the FIT Rules in the filings by the directors of the Applicants, is an arbitrary departure from the FIT Rules. The OPA excluded the evidence of wind power experience in the hands of Mr. Edey, whom is an officer of Arran Wind project, ULC and TTD Wind project, ULC, part of the Applicant Control Group.

731. In addition, its Counter Memorial, Canada arbitrarily defined Leader Resources Services Corp. as an outside consultant during the FIT Program launch period.[764] The OPA excluded the experience of external consultants in establishing wind power.[765] Nowhere in the FIT Rules does it state that consultants' experience is excluded.[766] This arbitrary modification taken by Canada is only disclosed on the confidential internal FIT Evaluation Spreadsheet that was not made available to applicants.[767]

732. In light of the extensive experience of Mr. Ward, Mr. Case, and Mr. Edey, there could have been no question that the TTD and Arran projects fully qualified to receive experience points. The OPA's failure to provide this point for Prior Experience was arbitrary and capricious.

(3) The OPA's improper assessment of Mesa's bids for Criterion 4, Financial Capacity.

733. In order to satisfy this criterion the applicable FIT Rule states that the Designated Equity Provider[768] must have a Tangible Net Worth of $500 or more per kW of proposed Contract Capacity at the end of the most recent fiscal year.[769]

734. This criterion also requires that the Applicant provide financial documentation including an audited financial statement of the most recent fiscal year and provide calculations in a form of a summary outlining and describing the Tangible Net Worth calculations.[770] Section 13.4(a)(iv)(A) states:

> **(A) Financial Documentation.** The Applicant must attach an audited balance sheet for the Designated Equity Provider(s), in conformity with GAAP (or IFRS if the Designated Equity

[764] Counter Memorial, at ¶129
[765] Witness Statement of Richard Duffy (RWS – Duffy), at ¶36
[766] Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 13.4(a)(iii) ***(Investor's Schedule of Exhibits at C-0258)***
[767] FIT Evaluation Criteria Checklist ***(Respondent's Schedule of Exhibits at R-072)***
[768] Definition of "Designated Equity Provider" is "any one Person that accounts for 15% or more of the direct or indirect Economic Interest in the Applicant, or if applicable, any one group of Persons that together account for 15% or more of the Economic Interest in the Applicant." Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 13.4(a)(iv) ***(Investor's Schedule of Exhibits at C-0258)***
[769] Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 13.4(a)(iv) ***(Investor's Schedule of Exhibits at C-0258)***
[770] Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 13.4(a)(iv)(A) ***(Investor's Schedule of Exhibits at C-0258)***

Provider has adopted such standard), with respect to the most recent fiscal year, provided that where the most recent fiscal year has ended less than 90 days prior to the Program Launch, the Applicant may submit such financial statements in respect of the previous fiscal year. Notwithstanding the foregoing, a Designated Equity Provider who is an individual shall be permitted to provide an unaudited balance sheet or other financial documentation satisfactory to the OPA, acting reasonably, demonstrating Tangible Net Worth, instead of an audited balance sheet, together with a statutory declaration of such person stating that such unaudited balance sheet or other financial documentation presents fairly, in all material respects, the Tangible Net Worth of the Designated Equity Provider. All Designated Equity Provider(s) other than individuals, that do not provide audited balance sheets, do not satisfy the requirements of this Section 13.4(a)(iv)(A).

(B) Calculation. The Applicant must attach a summary outlining and describing the calculation used to determine the Tangible Net Worth of Designated Equity Provider(s) pursuant to Section 13.4(a)(iv).[771]

735. Under this criteria, the OPA's Evaluation Criteria Checklist asks: [redacted] The evaluator answered [redacted] for the Applicants.[772]

736. As required by the rule, the TTD and Arran applicants each submitted a Guaranty that GE maintained at least 15% or more direct, or indirect, economic interest in the Applicant.[773]

737. The Applicants submitted GE's audited financial statement for the year 2008, which was at the time the most recent fiscal year.[774]

738. The Tangible Net Worth calculations can be derived from the information listed on page 52 of GE's audited financial statement for the year 2008.[775]

739. The GE audit statement is a summary of other financial statements of the company, such as the general ledger.[776] On page 52 of this 2008 summary, GE's Tangible Net Worth (TNW) can be calculated as follows:

[771] Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 13.4(a)(iv)(A) ***(Investor's Schedule of Exhibits at C-0258)***

[772] FIT Evaluation Criteria Checklist: TTD Project, Microsoft Excel tab "Criteria #4" Counter 85 Column I and Arran Project, Excel tab "Criteria #4" Counter 84 Column I ***(Respondent's Schedule of Exhibits at R-072)***

[773] Twenty Two Degree Wind Project FIT Application, November 25, 2009, at bates 107928 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009, at bates 105191 ***(Investor's Schedule of Exhibits at C-0129)***

[774] Twenty Two Degree Wind Project FIT Application, November 25, 2009, at bates 107930 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009, at bates 105193 ***(Investor's Schedule of Exhibits at C-0129)***

[775] Twenty Two Degree Wind Project FIT Application, November 25, 2009, at bates 107933 lines 9, 10, 22, and 35 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009, at bates 105196 lines 9, 10, 22, and 35 ***(Investor's Schedule of Exhibits at C-0129)***

[776] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶40

GE's Total Assets		$797,769M
GE's Total Liabilities		$684,157M
GE's Intangible Liabilities	$81,759 (Goodwill) + $14,997 (Other Liabilities) =	$96,756M
GE's Tangible Net Worth	$797,769 - $684,157 - $96,756 =	$16,856M
Twenty Two Degree Wind Project	$16,856M/150000kW =	$112,373M/kW
Arran Wind Project	$16,856M/115000kW =	$146,574M/kW
Both projects combined	**$16,856M/265000kW =**	**$63,608M/kW**

740. According to the audited statement, GE has a Tangible Net Worth of $500 or more per kilowatt of proposed contract capacity at the end of 2008.

741. The Applicants also submitted Mesa Power Group's financial statement (for all entities) for the year 2008, but the Applicants did not submit audited financial statements as it was a private company that was not audited.[777]

742. Canada failed to mention in its Counter Memorial any information about GE's audited financial statement of year 2008 or about the Guarantee that GE Energy maintains at least 15% or more, direct or indirect, economic interest in the applicant. These two documents submitted by the Applicant provide sufficient evidence for Financial Capacity and if the OPA was following the FIT Rules, it should have found so as well.

743. Only an arbitrary departure from the FIT Rules by evaluators can explain depriving the Investor of the criteria points it applied for in the face of the evidence it submitted. The information and materials put forward by the Investor were clear and corresponded to the FIT Rules. The OPA's administration of the FIT Rules during the application evaluation and ranking process was unfair and arbitrary, and constituted a disregard of the basic principle of fairness.

(4) Ontario's failure to give explanation regarding the ranking process

744. The arbitrary process of ranking FIT launch applications and the unfair deprivation of points that Mesa should have been awarded is compounded by the fact that Mesa

[777] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶42

wrote to the Government of Ontario in 2011 seeking to have its ranking score reviewed, knowing something was wrong.[778] Mesa was was entitled to have its concerns adequately addressed; they were not addressed at all. In conversations with the Investor and during the application period, the OPA made no mention of any concerns regarding project applications even though the topic of conversation was the applications themselves.[779]

745. Mesa explained that it believed that the scores for the applications made by its Investments were incorrectly tallied. In its letter May 20, 2011 letter, Mesa laid out specific details and provided its breakdown of calculations for its TTD and Arran projects.[780] It was a request for feedback from the OPA by a proponent upon a discovery that some error may have taken place.

746. The OPA ignored Mesa's May 20 letter and chose to not respond until June 17, 2011, after the initiation of the contract offer process for the Bruce Region and, most importantly, after FIT Rules version 1.5 was published, which enabled projects in the West of London Region to move into Bruce Region.[781] Given the critical importance placed on a project's ranking – a project's chance at success was entirely dependent on being properly and competitively ranked, the manner in which the OPA handled Mesa's request fails to live up to the most basic tenets of administrative fairness and transparency.

747. When the OPA did respond, it did so with information regarding the priority ranking process applied to the applications, but without any reference to the information upon which Mesa based its understanding which were specifically listed in the letter.[782] Mesa provided specific information to support its interpretation of how the points should have been awarded to Mesa's investment in the ranking process.

748. In his Witness Statement, Shawn Cronkwright acknowledges the requests made by Mesa.[783] However, Mr. Cronkwright does not actually address the information provided by Mesa in its letter.

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[778] Letter from Mark Ward (Mesa), Chuck Edey (Leader Resources) and Michael Bernstein (Capstone Infrastructure) to Shawn Cronkwright (OPA), May 20, 2011 ***(Investor's Schedule of Exhibits at C-0098)***

[779] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶43

[780] Letter from Mark Ward (Mesa), Chuck Edey (Leader Resources) and Michael Bernstein (Capstone Infrastructure) to Shawn Cronkwright (OPA), May 20, 2011 ***(Investor's Schedule of Exhibits at C-0098)***

[781] Letter from Shawn Cronkwright, Ontario Power Authority, to Mark Ward, Mesa Power Group LLC, Charles Edey, Leader Resources Services Corp.and Michael Bernstein, Capstone Infrastructure Corp., June 17, 2011 ***(Investor's Schedule of Exhibits at C-0195)***

[782] Letter from Shawn Cronkwright, Ontario Power Authority, to Mark Ward, Mesa Power Group LLC, Charles Edey, Leader Resources Services Corp. and Michael Bernstein, Capstone Infrastructure Corp., June 17, 2011 ***(Investor's Schedule of Exhibits at C-0195)***

[783] Witness Statement of Shawn Cronkwright ¶23

749. Canada attempts to justify the OPA's failure to adequately address Mesa's concerns about such a crucial matter to its FIT applications by stating that the government officials believed that Mesa phrased its question improperly.[784] Mr. Cronkwright claims that he responded to what the officials believed was the wrong question.[785]

750. The refusal by Ontario officials to disclose this information, even in the document production process, amounts to arbitrary abuse of authority, and a violation of Mesa's right to a fair, good faith, and transparent process as protected by Article 1105.

751. Had the OPA responded to Mesa's May 20, 2011 request with a reasonable review of the two launch period Applications, it should have noticed that it unfairly deprived the projects of the three criteria points they applied for. Canada has provided no evidence to demonstrate that the OPA fairly or reasonably undertook any review of the applications submitted by Mesa prior to responding to Mesa with the incorrect information.

752. Instead, the continued refusal by the OPA to engage in a fair, non-arbitrary, and transparent application of the FIT Program and evaluation of the FIT Rules, violated the Investor's right to be treated according to the international law standard of treatment.

(5) The alleged Fairness Monitor and London Economics' Fairness Report

753. Canada relies on the report generated by London Economics International, LLC ("LEI Report")[786], who was engaged by the OPA during the launch application ranking process. The LEI Report was never released to FIT applicants, nor was its existence disclosed until this arbitration.[787]

754. Auditor Gary Timm carefully reviewed the LEI Report in his expert report. He concluded that LEI could not operate as an independent fairness monitor and that LEI's Report should be viewed as an independent.[788]

755. Mr. Timm found that LEI's role was not compatible with the role of an independent fairness monitor. Its role was broader than that of a fairness monitor.[789] LEI's role involved:[790]

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[784] Witness Statement of Shawn Cronkwright ¶22; Canada's Counter Memorial, ¶218
[785] Witness Statement of Shawn Cronkwright, ¶26.
[786] Contract between the OPA and London Economics International ***(Respondent's Schedule of Exhibits at R-082)***
[787] E-mail from JoAnne Butler (OPA) to Patricia Philips (OPA), Colin Anderson (OPA), Shawn Cronkwright (OPA) et al., June 30, 2011 ***(Investor's Schedule of Exhibits at C-0492)***
[788] Expert Report of Gary Timm, at ¶¶4.5-4.8, 5.1-5.3
[789] Expert Report of Gary Timm, at ¶5.2
[790] London Economics International's FIT Launch Period Criteria Evaluation Independent Process Review Report, March 31, 2010, at p.1 ***(Respondent's Schedule of Exhibits at R-082)***

a) Acting as an advisor to the OPA on the initial setup of the evaluation framework;

b) Providing guidance on key issues; and

c) Monitoring the OPA's evaluation of the launch applications.

756. Mr. Timm found that the role of a fairness monitor is that of an observer completely independent from the process being monitored to ensure that the process is being conducted in a fair and transparent manner on a foundation of accountability repeatability and auditability.[791] LEI could never meet these criteria of independence and objectivity because:

a) LEI provided guidance on the composition of the evaluation team, assignment of roles within the team, the content of the evaluation checklist and the design of the spreadsheet.[792]

b) LEI also provided direction on interpretation of the requirements of the FIT Rules throughout the process.[793] Surprisingly, the LEI Report does not provide specifications of this guidance on interpretation.

757. LEI had significant involvement in the design of the FIT launch ranking process. Essentially, LEI was reviewing and monitoring a process it helped design. Throughout the evaluation process an independent fairness monitor would identify potential fairness-related issue and leaving it to the organization responsible for the process to address the issues.[794] LEI's interpretation of the FIT Rules may have had significant impact in how individual launch FIT applications were evaluated.[795] Again, LEI was reviewing and monitoring a process while simultaneously it provided guidance with respect to appropriate interpretation of the FIT Rules. In the light of this activity, the LEI could never be considered as an independent "fairness monitor."

758. The Evaluation Criteria Checklist used for evaluating applications established a series of questions for each criterion to be considered by the evaluators. These questions were considered in a linear manner and were to be followed in order.[796] Expert Auditor Timm notes that this resulted in some questions that were not covered by the FIT Rules.[797] For example, a statement, such as [redacted] is meant to indicate whether or not the Similar Facility was "successfully

[791] Expert Report of Gary Timm, at ¶4.4
[792] LEI Report, March 31, 2010 at p.13, Section 3.2 ***(Respondent's Schedule of Exhibits at R-082)***
[793] LEI Report, March 31, 2010 at p.15 ***(Respondent's Schedule of Exhibits at R-082)***
[794] Expert Report of Gary Timm, at ¶4.5
[795] LEI Report, March 31, 2010 at p.13, Section 3.2 ***(Respondent's Schedule of Exhibits at R-082)***
[796] LEI Report, March 31, 2010 at p.7, Section 2.1.1 ***(Respondent's Schedule of Exhibits at R-082)***
[797] Expert Report of Gary Timm, at ¶¶4.9-4.13

developed" under prior experience in the Evaluation Criteria Checklist.[798] However, nowhere in the FIT Rules does it state that a Similar Facility must reach commercial operation in order to be deemed successfully developed.[799]

759. Mesa was left unaware of these interpretations and criteria not expressed in the FIT Rules and "read into" them. Mesa was never provided an adequate opportunity to respond, and as a result, Mesa was unable to provide responsive evidence to support the factors that the evaluators considered relevant that were not expressed in the FIT Rules.

760. LEI's Report made no indication that the principles of accountability, repeatability and auditability were taken into consideration during the review of FIT launch applications.[800]

761. LEI audited a sample of 72 applications to compare their results with those of the OPA's review team[801] and states that "LEI and the OPA made some adjustments."[802] Apparently there were issues with the OPA's evaluation process and the subsequent ranking of the FIT launch applications. The LEI Report, however, did not produce identical results with the OPA, despite the inconsistencies between LEI's audit and the OPA's ranking evaluation reported in the LEI Report. The LEI Report states:

> After carefully reviewing the results of the LEI evaluation against the OPA's evaluation the two parties came to the conclusion that there were no discrepancies.
>
> While there were some initial differences between the LEI and OPA scoring, LEI and the OPA made some adjustments given a more detailed understanding of specific nuances in the criteria. The initial differences were primarily the result of a consistent difference of interpretation of the submitted evidence by a single applicant with multiple applications.[803]

It is difficult to understand how LEI was able to conclude that there were no discrepancies while inconsistencies existed and were identified. Again LEI's Report does not mention the percentage of the applications reviewed and resulted in differences between the LEI and the OPA scoring.[804] This raises serious questions about the propriety of the auditing process and the results arising from that faulty process.

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[798] FIT Evaluation Criteria Checklist: "Criteria #3" tab, guided question 2.1e ***(Respondent's Schedule of Exhibits at R-072)***; Expert Report of Gary Timm, at ¶¶4.11-4.12

[799] Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 13.4(a)(iii) ***(Investor's Schedule of Exhibits at C-0258)***

[800] LEI Report, March 31, 2010, Section 3.3.1, at p.14 ***(Respondent's Schedule of Exhibits at R-082)***

[801] Witness Statement of Richard Duffy (RWS – Duffy), at ¶55

[802] LEI Report, March 31, 2010, at p.15 ***(Respondent's Schedule of Exhibits at R-082)***

[803] LEI Report, March 31, 2010, at p.15 ***(Respondent's Schedule of Exhibits at R-082)***

[804] Expert Report of Gary Timm, at ¶4.32

762. Mesa did not receive any audit results or documents showing discussions about these inconsistencies. No effort has been made to reconcile the discrepancies between the interpretation made by LEI and the OPA.

763. The FIT Program and application process was a major undertaking for proponents. Applicants expended considerable resources to prepare them in a manner that corresponded with the FIT Rules. Differences in interpretations of the criteria under the FIT Rules between the OPA and LEI Report demonstrate the OPA's own fairness monitor cannot conclude that the ranking process was done fairly and without error.

764. Auditor Timm is of the opinion that LEI's Report is not reliable and that it should not be relied upon by the Tribunal as proof that the FIT Program was fairly administered.

iii. Ontario provided NextEra with information regarding connection capacity that was not available in the Transmission Availability Tables

765. NextEra was granted unfair preference as it was permitted to connect to the transmission system based on information that was not available to other FIT applicants.

766. NextEra's Goshen project has a nameplate capacity of 102MW and selected the connection point L7S.[805] Before the rule change on June 3, 2011, the OPA released to FIT proponents an updated TAT Table setting out available transmission capacity at all connection points in the Bruce and West of London regions. According to the Table, the circuit at which Goshen was to connect, L7S, had only 30MW of capacity available, which was insufficient to accommodate NextEra's project.[806] Goshen did not change its connection point and was in fact awarded on a FIT contract on July 4, 2011, based on its connection point of L7S.[807]

767. In his witness statement, Mr. Bob Chow states that the amount of capacity can vary at different points on the same circuit.[808] Mr. Chow goes on to say that information in the TAT Tables reflects the minimum amount of capacity at a given connection point, not the maximum. [809] Mr. Chow does not identify a single rule, presentation or document to support his claim that the TAT Table reflected the minimum capacity available.

768. The Expert Report of Seabron Adamson confirms that the TAT Table listed L7S as having only 30MW available and that proponents without any additional information would

[805] Memorial, at ¶¶638-644
[806] Ontario Power Authority, FIT Program, Transmission Availability Table, June 3, 2011, at p.1 ***(Investor's Schedule of Exhibits at C-0166)***
[807] Ontario Power Authority, "FIT Contract Offers for the Bruce-Milton Capacity Allocation Process," July 4, 2011 ***(Investor's Schedule of Exhibits at C-0292)***
[808] Witness Statement of Bob Chow (RWS – Chow), at ¶10
[809] Witness Statement of Bob Chow (RWS – Chow), at ¶32

have determined that there was insufficient capacity at this point to connect a project greater than 30MW. [810]

769. Hydro One, the OPA, and the IESO confirm that projects seeking to connect to L7S would not be viable. For example, notes from a Hydro One-OPA Transmission meeting of February 10, 2010, reveal that projects located at the L7S connection point would not pass an ECT if it were to be held because there was insufficient capacity at that circuit.[811] If NextEra's Goshen project was not in a position to pass an ECT, it would not have received a contract.

770. Hydro One and the OPA considered options that would allow projects to connect at the L7S circuit. Some of the options considered were:

1. Doing nothing, and allowing the applicants to find another connection point;
2. Rebuilding L7S at 230kV line;
3. Building a new line; and
4. Developing a 500/230 autotransformer on the Bruce to Longwood 500kV line.[812]

771. Surely, a project which required little transmission upgrades (as was the case with Mesa's TTD and Arran projects), would be more shovel-ready than a project that either required a rebuilding of the connection point; the building of a new line; or the developing of a 500/230 autotransformer. That NextEra's Goshen project ended up receiving a contract at the L7S connection point demonstrates that the Ontario Power Authority was not as concerned with shovel-readiness as it purported to be.

772. The "do nothing" option is exactly what should have occurred, as that was the fair process. In awarding a FIT Contract to NextEra's Goshen project at connection point L7S, the Ontario Power Authority demonstrated a clear preference for NextEra.

773. Further, in a May 19, 2011 Kum Xiong of the OPA informed Bob Chow that if projects were to connect at L7S it would result in overloading.[813]

774. The only explanation is that NextEra offered to pay for the required transmission upgrades. As Bob Chow states, the IPA process "allowed a FIT applicant that had failed the TAT due to insufficient capacity to obtain a contract by committing to bear the cost of any upgrades required to that part of the system in order to create the capacity the applicant required to connect to the grid." [814]

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[810] Expert Report of Seabron Adamson, at ¶¶123-129
[811] Hydro One-OPA SW Transmission Meeting, February 10, 2010 ***(Investor's Schedule of Exhibits at C-0474)***
[812] Hydro One-OPA SW Transmission Meeting, February 10, 2010 ***(Investor's Schedule of Exhibits at C-0474)***
[813] Email from Kun Xiong (OPA) to Bob Chow, May 19, 2011 ***(Investor's Schedule of Exhibits at C-0475)***
[814] Witness Statement of Bob Chow (RWS – Chow), at ¶27

775. The only way that NextEra's Goshen project could connect to the L7S connection point was to pay for the required upgrades to the circuit. In allowing proponents such as NextEra to pay for upgrades in order to receive a contract, the Ontario Power Authority not only changed the process, it also allowed projects to connect which would have been less "shovel-ready" than their competitors in light of the delay entailed in these transmission upgrades.

776. In March 2011, Bob Chow mentioned that he hoped NextEra understands that "FIT contracts for their projects can only come through the ECT process, regardless that they have a solution and willing to pay for it [sic]."[815] Thus, under the established process for awarding contracts, NextEra would not have been permitted to connect to L7S. As a result of the rule change, NextEra was able to connect to this point which was not previously allowed under the FIT Rules.

D. The processes of the FIT Program were subject to pervasive political influence

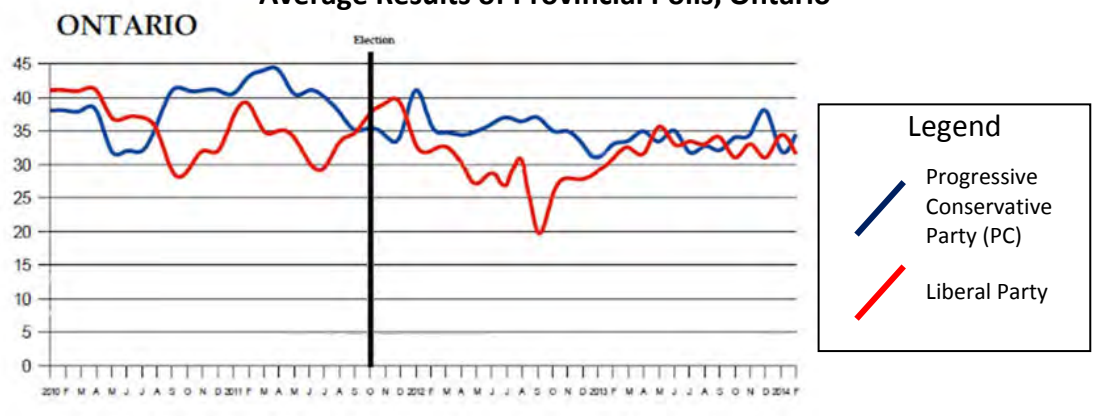
777. The modification of the FIT Program on the account of political influences constitutes an unfair, arbitrary, and non-transparent interference in a public regulatory program. Mesa had the right to be treated impartially throughout the FIT Program. Instead, the FIT Program's administration denied Mesa's right to participate in a fair and transparent regulatory competition with all applicants being equal.

i. The June 2011 changes to the FIT Rules were designed to benefit NextEra

778. The Witness Statement of Peter Wolchak notes that the relationship between NextEra and the Government of Ontario was not one sided. The evidence demonstrates clearly that NextEra received significant beneficial treatment from the Government of Ontario in connection with its energy business. This business included the benefits it received in being able to connect its previously unsuccessful, West of London region projects into the transmission grid in the Bruce region. Mr. Wolchak reports from public records that in 2011 NextEra made corporate donations to the Ontario Liberal Party around the time of the June 3, 2011 rule changes, which reached the maximum donation amount permitted under Ontario law.[816] This was at the same time when the Liberals were trailing in provincial polls behind the Progressive Conservative Party, as shown in the chart below:

[815] Email from Bob Chow to John Sabiston (Hydro One), March 4, 2011 ***(Investor's Schedule of Exhibits at C-0476)***
[816] Witness Statement of Peter Wolchak (CWS - Wolchak), at ¶30

Average Results of Provincial Polls, Ontario



Source: ThreeHundredEight.com[817]

779. The Investor outlined in its Memorial how the Bruce to Milton allocation process was designed to benefit projects owned by NextEra.[818] The Investor has received additional evidence confirming that authorities developed a process for awarding contracts that favoured NextEra, and that the government improperly changed the rules to allow NextEra to obtain Power Purchase Agreements to the detriment of other proponents. The evidence demonstrates that the modifications to the FIT Program benefitting NextEra originated within the Ministry of Energy.

780. Once it was determined that the ECT would not be used to award FIT contracts, the OPA and the Ministry of Energy began to develop a process to award contracts in regions enabled by the new Bruce to Milton transmission line. As of April 2011, the OPA was proposing a "special TAT" process that did not include either connection point changes or generator-paid upgrades.[819] In mid-April 2011, the OPA conducted a "dry run" of the Bruce to Milton Allocation process that determined which projects would receive contracts using the OPA's preferred approach.[820] [redacted]

[redacted]

[817] Average Results of Provincial Polls, Ontario, http://www.threehundredeight.com/p/ontario.html ***(Investor's Schedule of Exhibits at C-0644)***

[818] Memorial, at ¶¶711-726

[819] Handwritten notes "Our Recommendations-BxM Contract Awards", April 26, 2011 ***(Investor's Schedule of Exhibits at C-0440)***; OPA Draft Memorandum, May 3, 2011 ***(Investor's Schedule of Exhibits at C-0439)***

[820] Bruce Area and West of London Area Scenario Analysis, April 14, 2011 ***(Investor's Schedule of Exhibits at C-0484)***

[redacted] The OPA shared this information with the Ministry of Energy, despite its reluctance to do so.[822]

781. On May 11, 2011 the Minister of Energy's Director of Policy, Andrew Mitchell, met with NextEra's Senior Vice President, Al Wiley, to discuss whether a connection point change window would occur prior to the next round of FIT contract awards, which was "a very significant issue for NextEra."[823]

782. Within hours of this meeting with NextEra, the Minister's Office and Premier's Office instructed the Ministry of Energy to develop an option for awarding FIT contracts that included both connection point changes and generator paid upgrades,[824] both of which were necessary for NextEra to receive contracts for all six of its projects. The next day a meeting occurred between Ministry of Energy officials and representatives of the Ministry of Energy's Office and the Premier's Office at which it was decided that the Bruce to Milton process would include connection point changes.[825] The OPA was not involved in this decision.

783. One week after instructions on changing the rules were imposed by the Premier and Ministry of Energy, an OPA analyst stated to her colleague that the Ministry of Energy "expects a very specific outcome" from the Bruce to Milton allocation.[826] Specifically, she suggested that the Ministry advocated including connection point changes and generator-paid upgrades to ensure that certain projects would be awarded contracts, though she warned that the Ministry's "plan is not fool proof," as these projects could still fail for technical reasons.

784. The records of the Ontario Electoral Commission reveal that NextEra made the maximum permissible political donations to the Ontario Liberal Party in 2011.[827]

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[821] Bruce Area and West of London Area Scenario Analysis, April 14, 2011 ***(Investor's Schedule of Exhibits at C-0484)***; Bruce Area Scenario Analysis, Table of results, April 13, 2011 ***(Investor's Schedule of Exhibits at C-0448)*** [redacted]

[822] Email from Shawn Cronkwright (OPA) to Colin Andersen (OPA), April 13, 2011 ***(Investor's Schedule of Exhibits at C-0446)***; Email from Shawn Cronkwright (OPA) to Colin Andersen (OPA), April 14, 2011 ***(Investor's Schedule of Exhibits at C-0447)***

[823] Email from Phil Dewan (Registered lobbyist for NextEra from Counsel Public Affairs) to Sue Lo (Ministry of Energy), May 11, 2011 ***(Investor's Schedule of Exhibits at C-0090))***

[824] Email from Sunita Chander (Ministry of Energy) to Shawn Cronkwright (OPA), May 11, 2011 ***(Investor's Schedule of Exhibits at C-0444)***

[825] Email from Sue Lo (Ministry of Energy) to Pearl Ing (Ministry of Energy), et al, May 12, 2011 ***(Investor's Schedule of Exhibits at C-0473)***

[826] Email from Tracy Garner to Bob Chow, May 18, 2011 [emphasis added] ***(Investor's Schedule of Exhibits at C-0449)***

[827] Nextera's Political Contributions to the Ontario Liberal Party, 2011 ***(Investor's Schedule of Exhibits at C-0522)***; Witness Statement of Peter Wolchak (CWS – Wolchak), at ¶30

785. Based on the results of the dry-run, if connection point changes and generator-paid upgrades had not been part of the Bruce to Milton process, that is, if Bruce to Milton allocation had occurred through the special TAT process proposed by the OPA, [redacted] The decision to allow a connection point window and generator paid-upgrade greatly benefitted NextEra because it enabled NextEra to get contracts for six projects instead of [redacted]

786. The Premier's Office also intervened regarding the allocation of capacity in the West of London Region. The Ministry of Energy was directed to tailor its plan in respect of projects in the West of London region in a way that directly benefitted certain projects, including those of NextEra. The Investor raised the matter of the influence of the Premier's Office with respect to this aspect of the Bruce to Milton plan in its Memorial.[830] Canada has failed to address this issue.

787. The Ministry of Energy's initial plan for the Bruce to Milton allocation process called for splitting the West of London region into two regions, West of London and London/London East, and then setting aside all of the capacity available in the new West of London region (200MW) for the Korean Consortium.[831] However, this plan would have resulted in the exclusion of all projects located in the new West of London region, including four of NextEra's projects, from the Bruce to Milton process, and was overruled by the Premier's Office.[832]

788. As an alternative to setting aside the capacity in the new West of London region, the Premier's Office instructed the Ministry of Energy to explore setting aside capacity in the new London/London East region instead.[833] In this connection, Sue Lo observed that:

[redacted]

[828] Email from Shawn Cronkwright (OPA) to Colin Andersen (OPA), April 14, 2011 ***(Investor's Schedule of Exhibits at C-0447)***; Bruce Area Scenario Analysis, Table of results, April 13, 2011 ***(Investor's Schedule of Exhibits at C-0448)*** [redacted]

[829] During the change window, four of NextEra's projects moved their connection points from the West of London to the Bruce region, and were awarded contracts. Furthermore, one of NextEra's projects in the Bruce region, Goshen, received a contract on the basis of its commitment to pay for upgrades at its connection point.

[830] Memorial, at ¶¶711-715

[831] Memorial, at ¶711; Ministry of Energy, Presentation, "Bruce to Milton Transmission Line: FIT Contract Awards," Undated, at p.4 ***(Investor's Schedule of Exhibits at C-0269)***

[832] Memorial, at ¶712

[833] Email from Sue Lo (Ministry of Energy) to Pearl Ing, Mirrun Zaveri, Sunita Chander and Samira Viswanathan (Ministry of Energy), May 12, 2011 ***(Investor's Schedule of Exhibits at C-0083)***

[redacted]

The initial plan to reserve transmission capacity for the Korean Consortium in the new West of London Region was abandoned because it would have disadvantaged certain "high profile" projects in the region, such as four of NextEra's projects. The fact that officials were willing to alter a central aspect of their plan solely on the basis of its anticipated consequences for certain projects, including NextEra's, speaks to the extent to which improper considerations entered into its decision-making leading up to the June 3rd rule change.

789. The Ministerial Direction that instituted the Bruce to Milton allocation process ultimately did not call for a split of the West of London region, nor did it include any reservation of capacity for the Korean Consortium.[835] As a result, all of NextEra's projects in the West of London region were able to participate in the Bruce to Milton process, and all of them received contracts through that process.

790. The intervention of the Premier's office and Minister's office to develop a process that was different from the recommendations of the OPA, demonstrates that the "ECT-like" process used for Bruce to Milton allocation was chosen for the improper purpose of advancing particular projects. Canada has not offered any evidence to show that the approach that was imposed by the Minister's Office was based on fair, proper considerations. The recommendations of the Ontario Power Authority, which was tasked with implementing the process, were disregarded in favour of instructions from political actors within the Ontario Government who were motivated by a desire to satisfy the demands of certain projects.

791. In summary, Fair and Equitable Treatment protects good faith, and ensures fairness. What amounts to a violation of the "fair and equitable treatment" standard is necessarily specific to each case. However, there are clear patterns, in that there are certain kinds of improper conduct attributable to government that have been repeatedly found, either singularly or cumulatively, by arbitral panels of distinguished jurists to violate the obligation of fair and equitable treatment. For instance conduct tainted by, or connected to, political interference or manipulation of the regulatory process, has consistently been held to violate the standard, as has misrepresentation of material legal and regulatory facts to an investor. Such conduct, in and of itself,

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[834] Email from Sue Lo (Ministry of Energy) to Andrew Mitchell (Ministry of Energy), May 12, 2011 ***(Investor's Schedule of Exhibits at C-0629)***

[835] Memorial, at ¶713; Letter from Minister Brad Duguid to Colin Andersen (OPA), Direction to the OPA, June 3, 2011 ***(Investor's Schedule of Exhibits at C-0046)***

represents serious impropriety. There simply is no easy formula that can apply to all cases. As the *Waste Management* Tribunal noted, "the standard is to some extent a flexible one which must be adapted to the circumstances of each case."[836]

792. This fundamental obligation needs to be considered in the context of the highly developed legal and regulatory framework in North America, where citizens have a basic expectation of fairness, transparency and the applicability of the rule of law.

793. The CAFTA –DR Tribunal in *Teco v. Guatemala*, found Guatemala's non-transparent and non-rules based administration of its electricity regime to constitute a violation of the customary international law minimum standard of treatment. [837] According to the *Teco* Tribunal, state conduct that demonstrates "a complete lack of candor in the conduction of the regulatory process" or actions by a state that "are taken in manifest disregard of the applicable legal rules and in breach of due process in regulatory matters" amount to a violation of the International Law Standard.[838]

794. In addition, Contemporary notions of administrative fairness and due process of law form part of the content of the customary standard.

795. The *RDC v Guatemala* Tribunal, considered situations of abuse of rights in the administrative context, and related the issues to the applicable standards of treatment under the equivalent to Article 1105 of the NAFTA. In that case, the state imposed circular requirements that an investor meet certain conditions as a pre-requisite for other conditions, and then the state refused to allow the investor to meet the first pre-requisite conditions.[839] The same standard applies to Canada's treatment of Mesa. The lack of transparency and candor were the norm, not the exception, and this lack was most glaring where the Investor had the most at stake. Mesa was subjected to treatment that was arbitrary and unfair, in addition to lacking in transparency and candor.

796. In order not to be arbitrary, "restrictive measures must have some basis in domestic law, and be accessible and foreseeable."[840] Many tribunals have found that the guarantee of full protection and security extends beyond physical security, and is similar

[836] *Waste Management* at ¶99 ***(Investor's Schedule of Legal Authorities at CL-091)***
[837] *Teco v. Guatemala*, at ¶483 ***(Respondent's Schedule of Legal Authorities at RL-071)***
[838] *Teco v. Guatemala*, at ¶¶492-493 ***(Respondent's Schedule of Legal Authorities RL-071)***
[839] The *Railway Development Corporation (RDC)* claim was decided under customary international law as the CAFTA has included limitations on the international law standard of treatment similar to those purportedly imposed by the NAFTA Free Trade Commission Note of Interpretation. ***(Investor's Schedule of Legal Authorities at CL-271)***
[840] Paparinskis, at p.235 ***(Investor's Schedule of Legal Authorities at CL-103)***

to the protection provided by fair and equitable treatment, and is meant to ensure a stable environment for investors.[841] The Tribunal in *Eureko*, found that Poland:

> acted for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character.[842]

797. The *Biwater Gauff* Tribunal held that the content of the full security and protection standard "may extend to matters other than physical security."[843] The failure to do so is a manifest violation of the obligation of full protection and security owed to the investor.

798. These breaches arose from governmental measures which led to the OPA administering the FIT Program as it did. They were:

a) The *Electricity Act, 1998*, as amended, including in particular Part II.1 (Ontario Power Authority), and Part II.2, (Management of Electricity Supply, Capacity and Demand) thereof, including, in particular, Section 25.35 (Feed-in tariff Program),[844] which provided the statutory authority to the Minister of Energy and the Ontario Power Authority to design, implement, and administer the Ontario FIT Program;

b) The *Green Energy Act, 2009,* as enacted on May 14, 2009;[845] the FIT Direction dated September 24, 2009, from George Smitherman, Deputy Premier and Minister of Energy and Infrastructure, to Colin Anderson, Chief Executive Officer, Ontario Power Authority, directing OPA to develop a FIT Program, which in turn required the OPA to develop a method for accepting, evaluating, and awarding contracts;[846]

c) The decision in August 2010 not to run the Economic Connection Test despite the fact that it was required by the FIT Rules and represented to the Investor.[847] The decision to delay the ECT was because the Korean Consortium had yet to select connection points for its projects.[848]

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[841] *Azurix*, at ¶408 ***(Investor's Schedule of Legal Authorities at CL-070)***

[842] *Eureko B.V. v Republic of Poland,* Partial Award and Dissenting Opinion, August 19, 2005, at ¶333 ***(Investor's Schedule of Legal Authorities at CL-080)***

[843] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22 (July 24, 2008) at ¶729 ***(Investor's Schedule of Legal Authorities at CL-092)***

[844] *Electricity Act*, 1998, S.O. 1998, c.15 Schedule A, last amended 2010, c.8 ***(Investor's Schedule of Exhibits at C-0401)***

[845] *Green Energy Act*, S.C. 2009 c.12, Schedule. A ***(Investor's Schedule of Exhibits at C-0003)***

[846] Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), September 24, 2009 ***(Investor's Schedule of Exhibits at C-0264)***

[847] Ontario Power Authority, Presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010, at p.39 ***(Investor's Schedule of Exhibits at C-0088)***; FIT Rules v.1.1., s.5.4(a) ***(Investor's Schedule of Exhibits at C-0258)***

[848] Witness Statement of Bob Chow (RWS – Chow), at ¶38

d) Private meetings and communications between the Ontario Power Authority and FIT competitors that began on October 5, 2010 and continued through February and May 2011, which led to the FIT Program and Rules being modified to benefit certain FIT applicants;[849]

e) The February 17, 2011 direction from Ontario Minister of Energy Brad Duguid directing the OPA to plan for 10,700MW of renewable energy capacity, excluding hydroelectric, by 2018, which set a cap on the amount of transmission capacity the OPA could make available under the FIT Program;[850]

f) The June 3, 2011 direction from Ontario Energy Minister Brad Duguid to the OPA setting a cap on the transmission capacity of FIT contracts of 750MW in the Bruce region and 300MW in the West of London region, which set a limit on how much transmission capacity the OPA could award in the regions Mesa was being considered for;[851] and

g) All versions of the FIT Rules, Version 1.1-2.1, issued and amended by the OPA from September 30, 2009-December 14, 2012,[852] which were not followed by the OPA in the administration of the FIT Program.

799. These measures breached NAFTA Article 1105 and first affected the Investor on November 25, 2009 when TTD Wind Project ULC and Arran Project ULC submitted their FIT applications and became subjected to Ontario's unfair and arbitrary design,

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[849] Email from Bob Lopinski (Counsel Public Affairs) to Sonya Rachel Konzak (Ministry of Energy), Shantie Prithipal (Ministry of Energy), Sue Lo, and Rick Jennings (Ministry of Energy), September 20, 2010 ***(Investor's Schedule of Exhibits at C-0094)***; Email from Bob Lopinski (Counsel Public Affairs) to Pearl Ing (MEI), February 25, 2011 ***(Investor's Schedule of Exhibits at C-0319)***; The Ministry of Energy also met with NextEra on May 11 and May 13, 2011. Email from Phil Dewan (Counsel Public Affairs) to Sue Lop (Ministry of Energy), May 12, 2011 ***(Investor's Schedule of Exhibits at C-0090)***; Email, Update NextEra Meeting, October 5, 2010 ***(Investor's Schedule of Exhibits at C-0602)***; Email from Samira Viswanathan to Christopher Quirke, September 20, 2010 ***(Investor's Schedule of Exhibits at C-0601)***

[850] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, February 17, 2011 ***(Investor's Schedule of Exhibits at C-0267)***

[851] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, June 3, 2011 ***(Investor's Schedule of Exhibits at C-0046)***

[852] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA June 3, 2011 ***(Investor's Schedule of Exhibits at C-0046)*** and FIT Rules Version 1.1 - September 30, 2009 ***(Investor's Schedule of Exhibits at C-0258)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules, Version 1.2, November 19, 2009 ***(Investor's Schedule of Exhibits at C-0143)***; FIT Rules Version 1.3, March 9, 2010 ***(Investor's Schedule of Exhibits at C-0185)***; FIT Rules Version 1.3.1, July 2, 2010 ***(Investor's Schedule of Exhibits at C-0218)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.3.2, October 29, 2010 ***(Investor's Schedule of Exhibits at C-0242)***; FIT Rules Version 1.4, December 8, 2010 ***(Investor's Schedule of Exhibits at C-0239)***; Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011 ***(Investor's Schedule of Exhibits at C-0005)***; FIT Rules Version 1.5.1, July 15, 2011 ***(Investor's Schedule of Exhibits at C-0237)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules, Version 2.0, August 10, 2012 ***(Investor's Schedule of Exhibits at C-0058)***; FIT Rules Version 2.1, December 14, 2012 ***(Investor's Schedule of Exhibits at C-0240)***

implementation, and administration of the FIT Program, which it was required to do as a result of direction from the Government of Ontario.[853]

a) Mesa was again affected by this breach on May 29, 2010 when North Bruce Project ULC and Summerhill Project ULC submitted their FIT applications and it was again subjected to the continuing unfair and arbitrary administration of the FIT Program;[854]

b) All of the Investor's investments were again affected in August 2010 when the Economic Connection Test was not run as required by the FIT Rules, and as represented to Mesa, because the Korean Consortium had not finalized its selection of connection points.[855] This decision prevented the TTD and Arran projects from receiving FIT contracts;

c) The release of the FIT Program rankings on December 21, 2010 was an arbitrary and capricious failure to follow the FIT Rules because the TTD and Arran projects were ranked 8th and 9th in the Bruce region but were not awarded the points they were entitled to under the FIT Rules. This provided the first indication to the Investor of loss as Mesa had calculated that it should have been ranked higher in the FIT process;[856]

d) All four of Mesa's projects were affected by the failure to conduct an Economic Connection Test, despite it being set out in the FIT Rules;[857] and

e) Due to the non-transparent nature of how the FIT Program was administered, many of the earlier breaches of Article 1105, including violations of fairness and the rule of law, were not known to the Investor, including the private communications and meetings between the Government of Ontario and NextEra to modify the FIT Program to benefit NextEra. These communications began without Mesa's knowledge in October 2010 and included getting support from the Premier's Office for changing the FIT Rules to allow its projects to change connection points in June 2011.[858] The public culmination of these efforts was the June 3, 2011 direction for a connection-point change window by the Minister of Energy and the awarding of FIT

[853] Twenty Two Degree Wind Project FIT Application, November 25, 2009 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009 ***(Investor's Schedule of Exhibits at C-0365)***

[854] North Bruce Wind Energy I, FIT application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0360)***; North Bruce Wind Energy II, FIT Application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0361)***; Summerhill Wind Energy I, FIT Application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0362)***; Summerhill Wind Energy II, FIT Application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0363)***

[855] Witness Statement of Bob Chow (RWS – Chow), at ¶38

[856] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶43

[857] Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 5.2(b) ***(Investor's Schedule of Exhibits at C-0258)***

[858] Email from Sue Lo (Ministry of Energy) to Pearl Ing and Sunita Chander (Ministry of Energy), May 12, 2011 ***(Investor's Schedule of Exhibits at C-0083)***

contracts on July 4, 2011. It was on June 3, 2011 and again on July 4 that Mesa was able to confirm that it suffered loss under the FIT Program due to its arbitrary and capricious application.[859]

[859] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶51

PART EIGHT: JURISDICTIONAL ARGUMENTS

I. THE TRIBUNAL HAS JURISDICTION TO HEAR THIS CLAIM

800. This Tribunal has jurisdiction to decide on all of the issues raised in the Investor's claim. Canada has not been able to meet its burden to establish a defense that there is a defect to the Tribunal's jurisdiction.

a) Canada has clearly given its consent to this arbitration and this consent is set out in the NAFTA. The question of consent is not a question of jurisdiction, but is a question of admissibility.

b) There are no procedural irregularities present in the Investor's submission of its claim to arbitration, and even if there was a procedural irregularity, this does not deprive the Tribunal of jurisdiction to hear the claim.

c) Mesa is an American investor with indirectly owned investments in the territory of Canada;

d) The Investor has pleaded that the government measures at issue relate to the Investor and its investments and that these measures are inconsistent with obligations contained in Section A of NAFTA Chapter Eleven;

e) The claim was brought in a timely manner;

f) State responsibility is an issue of admissibility and not a matter of jurisdiction. In this claim, there cannot be jurisdictional issues arising from the question of state responsibility. This is a matter for determination by the Tribunal in the merits and Canada's jurisdictional complaints must be dismissed.

801. The dispute settlement and related provisions of NAFTA Chapter Eleven are a comprehensive, self-contained regime: these provisions establish the requirements that must be met for the Investor to invoke the jurisdiction of the tribunal. Canada has not met its burden of proof with respect to its objections to jurisdiction.

802. Almost all the matters raised by Canada are either not relevant at all to jurisdiction, such as state responsibility, or are requirements of the NAFTA of a procedural nature (the six month waiting period), or, in the case of consent, not relevant to a NAFTA Arbitration held under the UNCITRAL Arbitration rules, where the dispute settlement provisions of the NAFTA are complete and self-executing, not requiring any further agreement to arbitrate or other act of consent on the part of the state. The only genuinely jurisdictional matter raised by Canada is whether Mesa falls within the NAFTA definition of an investor or investment. The Investor has established conclusive evidence that it is an American juridical national and Canada has not challenged that fact. Further, the

Investor has produced evidence to demonstrate that it owns the investments in Canada at issue in this arbitration. In any case, as the Investor will show, even though the requirements invoked by Canada are not, except for the last one, jurisdictional, the Investor has in fact met all of them.

803. The only live question as to jurisdiction before the Tribunal is whether Mesa falls within the NAFTA definition of "investor" or "investment" and has the requisite nationality.

A. Burden

804. Article 24 of the 1976 *UNCITRAL Arbitration Rules*, which govern this arbitration, states, "Each party shall have the burden of proving the facts relied on to support his claim or defence."[860] Accordingly:

a) Mesa must prove its allegations that Canada breached its Article 1102, 1103, 1105, and 1106 NAFTA obligations and it must demonstrate that this Tribunal has jurisdiction to hear its claims.

b) Canada bears the burden of proof for the jurisdictional defences it raises. The Investor bears the burden to establish the Tribunal's jurisdiction under NAFTA Chapter 11.

805. Tribunals in *Apotex*,[861] *Bayview*,[862] *Saipem*[863] and *Grand River*[864] have confirmed that the party bringing the claim bears the burden of proving its case. In discharging this burden, the Investor has also demonstrated it has met all the jurisdictional requirements in Chapter Eleven.

806. The Tribunal possesses the requisite jurisdiction to hear this claim. The Tribunal in *ICS Inspection v. Argentina* found that a tribunal should decline jurisdiction if there is ambiguity as to its existence.[865] There is no ambiguity in the present case.

807. The party asserting a jurisdictional defence bears the burden of proving that defence.

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[860] UNCITRAL Arbitration Rules (1976), Rule 24(1)

[861] *Apotex Inc. v. United States*, UNCITRAL, Award on Jurisdiction and Admissibility, June 14, 2013 ("*Apotex*"), at ¶149-150 ***(Investor's Schedule of Legal Authorities at CL-289)***

[862] *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, June 19, 2007 ("*Bayview*"), at ¶122 ***(Investor's Schedule of Legal Authorities at CL-317)***

[863] *Saipem S.p.A v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award (June 30, 2009) ("*Saipem*") ***(Investor's Schedule of Legal Authorities at CL-341)***

[864] *Grand River Enterprises Six National, Ltd., et al. v. United States of America*, UNCITRAL, Award, January 12, 2011 ("*Grand River*"), at ¶122 ***(Investor's Schedule of Legal Authorities at CL-320)***

[865] *ICS Inspection and Control Services Limited (United Kingdom) v. The Argentine Republic*, PCA Case No. 2010-09, Award on Jurisdiction (February 10, 2012) ("*ICS Inspection* - Jurisdiction"), at ¶280 ***(Investor's Schedule of Legal Authorities at CL-068)***

a) In the *Pac Rim Cayman v. El Salvador* dispute the Tribunal declared, "if there are positive objections to jurisdiction, the burden lies on the Party presenting those objections."[866]

b) In affirming that Egypt had the burden to prove its jurisdictional objections, the *Siag v. Egypt* Tribunal stated, "it is a widely-accepted principle of law that the party advancing a claim or defence bears the burden of establishing that claim or defence."[867] This is also the approach at the International Court of Justice.[868]

808. As Canada has not been able to establish its jurisdictional defences, the Tribunal must conclude that it has jurisdiction to hear the Investor's claim.

B. Canada's objections are in large part not of a jurisdictional character

809. The matters invoked by Canada as jurisdictional objections are in almost all cases not relevant to the jurisdiction of this tribunal. In the one area, where an objection could be jurisdictional, Canada has actually not challenged the American nationality of the Investor.

810. Consent to arbitration is not properly a jurisdictional question. It is properly a question of admissibility. As a result, Canada's assertion that there is a jurisdictional question because Canada has not provided its consent to the arbitration is simply absurd.

811. There is no question that Canada consented to this arbitration in NAFTA Article 1120. As a matter of treaty law, this is a settled matter. The consent of this state Party is contained in the NAFTA and this consent cannot be withdrawn unilaterally without a modification to the NAFTA. Accordingly, Canada's admissibility argument that there is no consent to arbitration (and to whatever extent the Tribunal finds that this is a jurisdictional argument) should be dismissed in its entirety.

812. There is no separate issue of the state's consent where a treaty provides a comprehensive set of jurisdiction-determining provisions, as does the NAFTA. The Tribunal is bound to interpret those provisions in accordance with the customary international law of treaty interpretation which is set out in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*. Whether a given provision of the NAFTA is a condition of jurisdiction or some other kind of norm is not a matter of applying a

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[866] *Pac Rim Cayman LLP v. The Republic of El Salvador,* ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdiction Objections (June 1, 2012) ("*Pac Rim*"), at ¶2.11 ***(Investor's Schedule of Legal Authorities at CL-252)***

[867] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009) ("*Siag v. Egypt*"), at ¶318 ***(Investor's Schedule of Legal Authorities at CL-253)***

[868] *Oil Platforms (Islamic Republic of Iran v. United States of America),* Preliminary Objection, Judgment, I.C.J. Reports 1996,803 *("Oil Platforms - Preliminary Objection")*, at ¶57 ***(Investor's Schedule of Legal Authorities at CL-020)***

concept of "consent" but properly interpreting the treaty, above all the ordinary meaning of the words in light of context, object and purpose. Obviously if this were an ICSID arbitration then the Tribunal would need to address 'consent" under the *Washington Convention*. But it is not.

813. Tribunals such as those of *Lauder*[869] and *Biwater Gauff* each have held that the six month waiting period is not a jurisdictional provision, but was procedural and directory in nature.[870]

814. The ordinary meaning of 'events giving rise to a claim' under Article 1120 connotes that events that relate to claim can occur not only prior to the claim, but also continue after. The *Biwater Gauff* Tribunal stated:

> Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding. If it did so, the provision would have curious effects, including:
>
> i. Preventing the prosecution of a claim, and forcing the claimant to do nothing until six months have elapsed, even where further negotiations are obviously futile, or settlement obviously impossible for any reason;
>
> ii. Forcing the claimant to recommence an arbitration started too soon, even if the six month period has elapsed by the time the Arbitral Tribunal considers the matter.[871]

Accordingly, any condition precedent should not be interpreted rigidly and in a manner that would defeat purpose of arbitration.

815. The NAFTA sets out the procedure for initiating an arbitration. The Investor has followed this procedure.

a) Mesa provided Canada with a Notice of Intent and Notice of Arbitration in conformity with the requirements of the NAFTA.[872]

b) Mesa attempted to engage in consultations in accordance with Article 1118 to settle the dispute outside of arbitration. These efforts were not successful.

816. Canada's efforts to circumvent the process for commencing an arbitration cannot be interpreted to mean it has refused consent to arbitrate.[873] Canada's cooperation is what has not been forthcoming. There is no latitude under the NAFTA for Canada to refuse to

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[869] *Lauder v. Czech Republic*, Final Award, 2001 WL 34786000 (September 3, 2001) ("*Lauder* - Final Award"), at ¶¶190-191 ***(Investor's Schedule of Legal Authorities at C-095)***

[870] See also *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Dissenting Opinion of Judge Charles N. Brower (August 15, 2012), at ¶¶13-14 ***(Investor's Schedule of Legal Authorities at CL-330)***

[871] *Biwater Gauff v. Tanzania*, at ¶343 ***(Investor's Schedule of Legal Authorities at CL-092)***

[872] Mesa Notice of Intent, July 6, 2011; Notice of Arbitration, October 6, 2011

[873] Letter from Barry Appleton to Josh O'Neill (DFAIT), dated July 13, 2011 ***(Investor's Schedule of Exhibits at C-0103)***; Letter from Barry Appleton to Josh O'Neill (DFAIT), dated September 23, 2011 ***(Investor's Schedule of Exhibits at C-0468)***

consent to arbitrate. Canada is bound by the jurisdictional clauses of the NAFTA, and if these clauses, properly read, confer jurisdiction, then there is no further issue about "consent."

C. The Investor has met the six month waiting period after sufficient events arising that establish Canada's wrongful conduct

817. The Investor has met the requirement of a six month waiting period after sufficient events arising that establish wrongful conduct that is the basis for its claim. Mesa's Notice of Arbitration was filed on October 4, 2011. According to NAFTA Article 1120, the Investor was required to wait six months from the time of events giving rise to a claim before filing its Notice of Arbitration. The six month waiting period took place between April 4, 2011 and October 4, 2011.

818. Canada has asserted that the Investor did not comply with this requirement. Canada's position on this issue is in certain respects unclear, and indeed confused.

a) Canada at some points in its Counter Memorial suggests that the Investor must wait six months after *all* events relevant to its claim have occurred.[874] This reading is, to the say the least implausible, because it means an investor could *never* file a notice of arbitration in the case of on-going wrongful conduct, as by definition there would always be events happening within six months.

b) Elsewhere in its Counter Memorial, however, perhaps recoiling from the absurd consequences of that position, Canada suggests much more sensibly that "*sufficient*" acts and omissions must have arisen six months before filing the Notice of Arbitration to constitute the allegedly wrongful conduct that establishes the claim.[875]

819. The Investor will show that, as was already indicated in its Memorial, events that arose more than six months prior to filing its Notice of Arbitration are *sufficient*, on the Investor's theory of its claim, to establish the wrongful conduct it complains of as in violation of the NAFTA, which caused it substantial damage.[876] But Canada also misreads NAFTA Article 1120 as depriving the Tribunal of the inherent jurisdiction to consider any later occurring events in its arbitration of this dispute. As the Investor will show below this proposition is inconsistent with prior NAFTA jurisprudence and the very nature, purpose and object of a provision such as NAFTA Article 1120. Put bluntly, if NAFTA tribunals could only consider events that the investor was aware of as the basis of its claim six months before the filing of the Notice of the Arbitration, document production

[874] Counter Memorial, at ¶240
[875] Counter Memorial, at ¶252
[876] Memorial, at ¶¶890-921

would be inutile, as nothing discovered could be considered by the Tribunal. Such an absurd result should be avoided by this Tribunal.

820. The waiting period provision is not designed for the Tribunal to determine prior to the merits whether a claim existed at a particular point in time and the scope of that claim. These are clearly issues for merits. To determine whether "sufficient" events arose six months prior to filing the Notice of Arbitration, the Tribunal must begin from the Investor's good faith understanding of its claim. It must consider the internationally wrongful conduct the Investor alleges as the basis of the claim. And it must ask, based upon the investor's theory of law, are there "sufficient" acts and omissions six months prior to filing the Notice that, if proven, would establish internationally wrongful conduct of a sort that would allow the investor to succeed with the claim as filed? NAFTA Article 1120 is about good faith conduct in relation to the host state. It must not be used as an indirect avenue of challenging the Investor's claim as the Investor defines or understands it, or the Investor's view of the law and the facts. It does not matter that, on a different theory of the law or different facts than those alleged by the Investor, it might not have had "sufficient" acts and omissions six months prior to filing its claim. The relevant perspective is the Investor's good faith understanding of the law and facts as they appeared when it filed its Notice of Arbitration, and in relation to the claim as stated.

821. Absent evidence of bad faith, a Tribunal should normally defer to the Investor's judgment about its claim arose when assessing whether it complied with such a requirement. As long as the Investor has acted in good faith and reasonably in coming to the conclusion that it had a claim at a particular point in time, and waited six months from that point, the waiting period should not be a bar for the Investor to prove its claim on the merits.

822. It is abundantly clear that in this arbitration, the Investor has acted in good faith and has been reasonable in arriving at the conclusion that it waited six months before bringing its Notice of Arbitration. The Notice of Arbitration conforms to the requirements of the NAFTA, as it was filed well after the NAFTA Article 1120 six-month waiting period had lapsed.

a) Canada's measure related to prohibited domestic content requirements affected the Investor on November 25, 2009 and the measure caused harm on August 5, 2010.

b) Measures related to the Korean Consortium affected the Investor on January 21, 2010 and the Investor first became aware of harm on September 17, 2010; and

c) Measures related to discriminatory treatment affected the Investor on December 21, 2010 and the harm was immediate.

d) These measures all occurred prior to six months before the filing of the Notice of Arbitration. Each of these measures in and of itself constitutes an internationally wrongful act under the NAFTA. For ease, they are set out in the following chart:

Measure	Administration of FIT Program to Investment	Granting of Privileges to Korean Consortium	Private Meeting with Competitors to Facilitate Connection Point Changes
Date	September 17, 2010	September 17, 2010	October 5, 2010

823. The Tribunal has jurisdiction over all of the measures pleaded by Mesa. Canada has not discharged its burden to demonstrate otherwise, nor has it contested the Tribunal's jurisdiction over measures other than the June 4, 2011 direction or July 4, 2011 awarding of FIT contracts.[877]

824. The dates on which breach and damage for each NAFTA article first arose are:

NAFTA Article:	1106	1103	1105	1102
Date of Breach:	August 5, 2010	September 17, 2010	December 21, 2010	September 17, 2010

i. Mesa was first affected by a measure on November 25, 2009

825. NAFTA Article 1106 prohibits a state from imposing or enforcing performance requirements. It also prohibits a state from enforcing "any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment."

826. The first measure complained of by the Investor is Canada's breach of Article 1106(1)(b) and (c), which took place on November 25, 2009, on the basis that:

a) The Investor had been seeking to invest in Canada, and made an investment in Canada by incorporating its investments TTD Wind Project ULC and Arran Wind Project ULC in the Province of Alberta on November 17, 2009.[878]

b) When the Investor prepared and submitted its FIT applications on November 25, 2009 it had to undertake to abide by the FIT Program's domestic-content requirements that were inconsistent with Article 1106.

[877] Counter Memorial, at ¶¶260-261

[878] Certificate of Incorporation for TTD Wind Project ULC under the Alberta Business Corporations Act, November 17, 2009 ***(Investor's Schedule of Exhibits at C-0087)***; Certificate of Incorporation for Arran Wind Project ULC under the Alberta Business Corporations Act, November 17, 2009 ***(Investor's Schedule of Exhibits at C-0049)***

827. The domestic content preferences and requirements in the FIT Contract were directed by the Ontario Minister of Energy.[879] As a condition of applying for the FIT Contract, the Applicant was required to agree to the requirements mandated by the Minister which were set out in the FIT Contract. The commitment read, "By submitting this Application, the Applicant agrees and acknowledges that the Applicant has read and understood the FIT Rules, obtained independent legal advice, and agrees to comply with all requirements therein."[880]

828. Mesa first suffered harm arising from this breach on August 5, 2010 thus with respect to this breach sufficient events occurred well before 6 months of filing that amounted to international wrongful conduct on which the claim filed was based.

829. NAFTA Article 1120 required the Investor to wait six months since events giving rise to a claim before it could file its Notice of Arbitration. The Investor waited more than six months to lapse between August 5, 2010 and the time Mesa commenced its claim in October 2011.

830. The Investor brought a claim with regards to two investments, North Bruce Project ULC and Summerhill Project ULC, which did not make FIT applications until May 29, 2010. Its applications were brought under different provisions in the FIT Rules and were not judged on the same criteria as Mesa's previous applications. Instead, they were ranked based on the time their applications were submitted.

831. Accordingly, there are two dates that are relevant for events that first give rise to the claim – November 25, 2009 and May 29, 2010. Both of these dates are more than six months before the Notice of Arbitration was filed in October 2011.

832. Harm first arose from these breaches on August 5, 2010.

833. In addition to the measures related to performance requirements, other breaches arising from Ontario's renewable-energy power-purchase agreements have arisen since events that first gave rise to this claim on November 25, 2009. These measures are all related to the subject-matter of this dispute and arose naturally as a part of Ontario's unfair application of its renewable-energy policies towards the Investor and its Investments. These measures include:

    a) The capricious and arbitrary FIT rankings in December 2010;

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[879] Letter from George Smitherman (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, September 24, 2009 ***(Investor's Schedule of Exhibits at C-0051)***

[880] See FIT application and undertaking: "By submitting this Application, the Applicant agrees and acknowledges that the Applicant has read and understood the FIT Rules, obtained independent legal advice, and agrees to comply with all requirements contained therein." Twenty Two Degree Wind Project FIT Application, November 25, 2009, at bates 107902 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009, at bates 105165 ***(Investor's Schedule of Exhibits at C-0129)***

b) The failure to conduct an ECT test;

c) Arbitrary and capricious changes to the FIT Rules including the June 3, 2011 direction to allow a five-day window for connection point changes from June 6-11, 2011; and

d) The signing of the *Green Energy Investment Agreement* between the Government of Ontario and the Korean Consortium on January 21, 2010.

834. Later breaches that arose with regards to most favoured nation treatment, national treatment, and the international law standard of treatment all arose in the context of the same dispute that began in November 2009.

ii. The proper interpretation to be given to Article 1120

835. NAFTA Article 1120 requires an Investor wait six months "since events giving rise to a claim." This requirement satisfies the objective of providing disputing parties an opportunity to resolve their disputes.

836. The wording of the Article 1120 requirement also recognizes that some claims are comprised of a series of events. Thus, Article 1120 only requires an investor to wait six months from the time that events that give rise to a claim have arisen, and not six months from the time that *all* events relevant to the disposition of the investor's claim have taken place."

837. Requiring an investor to wait six months after 'all events' have transpired would lead to various absurd results and remove ripe claims from being resolved by arbitration, just because events were connecting to ongoing courses of conduct. Under this scenario, if the events spanned over a period of more than three years, the claim would be time-barred. It would also lead to higher costs for investors, who would have to commence various NAFTA claims before different tribunals, which could provide inconsistent results. Indeed, a NAFTA Party could intentionally cause more harm to the Investor to defeat a claim that would otherwise be ripe for arbitration. In addition, states who host foreign investment would be subject to the uncertainty and cost of defending an in principle limitless set of different claims based on events occurring on an ongoing basis, while the real dispute is about whether a particular set of policies violates the treaty. Such a meaning would subvert the utility of arbitration, rather than promote it as an effective and efficient forum to bring disputes.

838. The ordinary meaning that Mesa has advanced for interpreting the wording of Article 1120 is consistent with the principles of interpretation set out in Article 31 of the *Vienna Convention on the Law of Treaties*.[881]

[881] *Vienna Convention on the Law of Treaties*, Article 31 ***(Investor's Schedule of Legal Authorities at CL-011)***

839. It was this interpretation of Article 1120 that permitted the Tribunal in *Ethyl* to allow knowledge of future events to comprise events giving rise to a claim.[882] The fact that the Investor was aware that the legislation was likely to be enacted is not a basis to distinguish *Ethyl* from this claim. In *Ethyl*, the legislation was not yet in force and various contingencies may have arisen that would have prevented the legislation from coming into force. In any event, while Canada accepts that some events can fall within the 6-month period, it does not provide a proper basis to distinguish those events that are likely to occur, from others. Canada's narrow interpretation of Article 1120 would defeat the purpose and intent of that provision.

840. Article 1120 is purposely worded in a manner that relates *events* that give rise to a claim, nothing more. It does not require an investor to demonstrate that each 'event' caused harm. Article 1116(1) addresses loss or damage arising from a breach, not Article 1120. An *event* is not the same as a 'breach'; rather an event, or series of events, can give rise to a breach, which in turn give rise to a claim. Canada attempts to conflate these simple concepts. 'Events giving rise to a claim' cannot mean an investor needs to demonstrate each and every event caused loss or damage. The six-month requirement in Article 1120 is triggered merely when an event gives rise to a claim.

841. A *dispute* is not the same as an 'event'. The decisions in *Burlington Resources v. Ecuador* and *Murphy v. Ecuador* are not relevant to NAFTA Article 1120 because the waiting period under the US-Ecuador BIT and the NAFTA are not the same.[883]

842. The Investor noted, and Canada did not refute, that the US-Ecuador BIT requires that "six months have elapsed from the date on which the *dispute* arose,"[884] whereas the NAFTA chose expressly different wording, requiring six months "since events giving rise to a claim."[885] Clearly, a *dispute* follows from an event, or series of events, but they are not the same. These two provisions cannot be read as imposing the same requirements on Investors and a determination made under one treaty cannot inform the interpretation under the other.

843. In fact, the disputing parties are in agreement that NAFTA has a notice requirement in Article 1119 relating to a dispute, whereas the waiting period in Article 1120 relates to

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[882] *Ethyl Corp. v. Canada*, Jurisdiction Award, 1998 WL 34334636 (June 24, 1998) ("*Ethyl Corp -Jurisdiction Award*"), at ¶¶87-88 ***(Investor's Schedule of Legal Authorities at CL-013)***

[883] Counter Memorial, at ¶246

[884] Memorial, at ¶866, quoting The Treaty Between the United States of America and the Republic of Ecuador Concerning The Encouragement and Reciprocal Protection of Investment, With Protocol and a Related Exchange of Letters, Signed at Washington on August 27, 1993 ("US-Ecuador Treaty"), at ¶3 ***(Investor's Schedule of Legal Authorities at CL-165)***

[885] NAFTA Article 1120

"events giving rise to a claim."[886] It would be repetitive and unnecessary if both provisions addressed the same matter. This distinction is instructive and reinforces that the terminology of the US-Ecuador BIT cannot be interpreted to mean and require the same as NAFTA Article 1120.

844. The Investor's interpretation of Article 1120, the six-month period, and phrase 'events giving rise to a claim' are sufficiently flexible that they rightly contemplate that where an investor is engaged with a particular regime where events are ongoing over time, certain events may fall within the six month period, or even after the commencement of the arbitration. This is the reality of ongoing and evolutionary regulatory programs.

845. The question is whether subsequent breaches arising from an earlier claim are within the jurisdiction of the Tribunal. To allow a state to continue conduct within the 6-month notice period would insulate the wrongful party from the scope of the treaty. This situation is akin to a victim being the subject of torture arising on a certain date. The tribunal would lose jurisdiction over the wrongful conduct simply if the offending state continued the commission of torture beyond the 6-month point. Various tribunals, including NAFTA tribunals, have determined that continuing wrongful acts fall within a tribunal's jurisdiction where that conduct arises from earlier conduct. If Canada has an obligation to cease wrongful behaviour and if Canada fails to stop engaging in a wrongful scheme, then the tribunal has jurisdiction and cannot be deprived of its jurisdiction because the wrongful conduct is ongoing.

846. An example is the *Pope & Talbot* decision, whereby Canada inappropriately audited the Investor after that arbitration had commenced. The Tribunal determined that the act of the audit did not deprive the Tribunal of jurisdiction as it was related to the earlier measures that was the subject of the claim.

847. In *Pope & Talbot* the Tribunal determined that when an Investor challenges a regime, which can give rise to a host of measures, an Investor should not be jurisdictionally precluded from challenging certain measures that may have arisen later.[887] Measures that arose as the challenged regime evolved could be included in the Investor's original claim and did not have to form the basis of a separate pleading. The Tribunal in *Pope* held, "the Claim asked the Tribunal to consider the Regime not as a static program, but as it evolved over the years."[888]

848. The same is being asked of this Tribunal. The Investor has listed numerous measures associated with the evolution of the FIT Program over the years and should not have to

[886] Counter Memorial, at ¶245
[887] *Pope & Talbot* – Award "Super Fee," at ¶28 ***(Investor's Schedule of Legal Authorities at CL-156)***
[888] *Pope & Talbot* – Award "Super Fee," at ¶24 ***(Investor's Schedule of Legal Authorities at CL-156)***

institute a new claim because some events that took place as part of the FIT Program fell within six months of the Notice of Arbitration.

849. Indeed, the Tribunal in *Philip Morris v. Uruguay* relied on events that took place subsequent to the Notice of Arbitration to assist it in confirming jurisdiction. In line with the decision in *Pope* and the argument being advanced by the Investor, the Tribunal found that subsequent, related measures cannot be outside the Tribunal's jurisdiction. The *Philip Morris* Tribunal stated, "It would not be in the interest of justice to oblige the Applicants, if it wishes to pursue its claims, to initiate fresh proceedings."[889] This Tribunal should adopt the same approach with regards to measures that fall within the six-month period before the filing of the Notice of Arbitration but form part of the same series of events related and connected to the FIT Program.

D. Mesa is an Investor with Investments under NAFTA

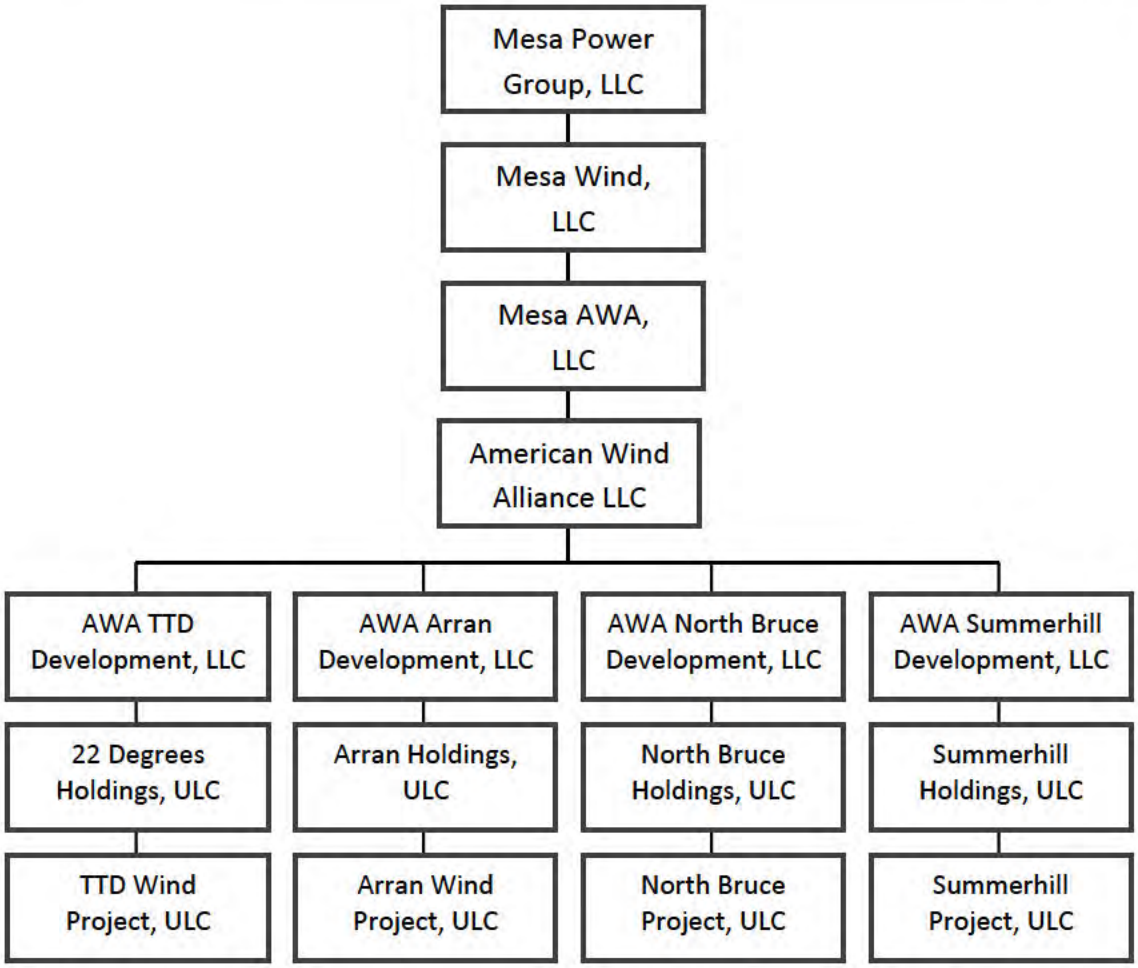
850. Mesa is an American Investor with investments in Canada.[890] Canada has not contested this fundamental assertion in its Counter Memorial. Mesa is a Delaware Limited Liability Corporation with headquarters in Dallas, Texas.[891]

851. Mesa is part of a much larger corporate group of companies which are all indirectly owned or controlled by T. Boone Pickens, a legendary American energy investor, who previously was the President and Chief Executive Officer of Mesa Petroleum. Collectively, the companies in this group have been referred to as the Mesa Group of Companies. Its Corporate Organisation at the date of the filing of the Notice of Arbitration on October 4, 2011 is as follows:

[889] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013) ("*Philip Morris*"), at ¶24 ***(Investor's Schedule of Legal Authorities at CL-255)***

[890] Memorial, at ¶30-33

[891] Certificate of Formation, Mesa Renewables, July 11, 2008 ***(Investor's Schedule of Exhibits at C-0117)***, LLC Agreement of Mesa Renewables, LLC, May 20, 2008 ***(Investor's Schedule of Exhibits at C-0039)*** The Certificate of Formation notes in section 2 that the name of Mesa Renewables was changed to Mesa Power Group, LLC.



852. The Investor's claim relates to measures adopted by the Government of Canada in relation to Mesa its Investments in accordance with NAFTA Article 1101(a) and (b). Mesa owns and controls these entities, which are further described within this Reply Memorial.[892]

853. Mesa owns eight enterprises as investments in Canada through the Mesa Group of Companies, which were incorporated unlimited liability companies in the Canadian province of Alberta. Four of these companies are holding companies. Each holding company owns a specific Alberta wind project company:

a) TTD Wind Project ULC, an unlimited liability corporation incorporated in the Province of Albert on November 17, 2009;[893]

b) Arran Project ULC, an unlimited liability corporation incorporated in the Province of Alberta on November 17, 2009;[894]

[892] See also the Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶¶9-11, which provides further information on the ownership and control of entities belonging to Mesa Power Group, LLC.
[893] Certificate of Incorporation for TTD Wind Project ULC ***(Investor's Schedule of Exhibits at C-0087)***

c) North Bruce Project ULC, an unlimited liability corporation incorporated in the Province of Alberta on April 6, 2010;[895]

d) Summerhill Project ULC, an unlimited liability corporation incorporated in the Province of Alberta on April 6, 2010.[896]

e) Each of the four wind project ULC's owned wind leases in Ontario and made applications for FIT Contracts.

854. Mesa's Investments are themselves owned and controlled by four "holding" companies which were also registered in Alberta.[897] The four holding companies are owned by four Delaware incorporated "development corporations."[898]

855. All four development corporations are owned and controlled by the American Wind Alliance, LLC a Delaware corporation,[899] which is in turn owned and controlled by Mesa AWA, LLC.[900]

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[894] Certificate of Incorporation for Arran Project ULC ***(Investor's Schedule of Exhibits at C-0049)***

[895] Certificate of Incorporation for North Bruce Project ULC ***(Investor's Schedule of Exhibits at C-0050)***

[896] Certificate of Incorporation for Summerhill Project ULC ***(Investor's Schedule of Exhibits at C-0041)***

[897] Certificate of Incorporation for 22 Degree Holdings ULC under the Alberta Business Corporations Act dated November 17, 2009 ***(Investor's Schedule of Exhibits at C-0026)***, and TTD Wind Project ULC Share Register ***(Investor's Schedule of Exhibits at C-0499)***; Certificate of Incorporation for Arran Holdings ULC under the Alberta Business Corporations Act dated November 17, 2009 ***(Investor's Schedule of Exhibits at Investor's Schedule of Exhibits at C-0047)***, and Arran Wind Project ULC Share Register ***(Investor's Schedule of Exhibits at C-0494)***; Certificate of Incorporation for North Bruce Holdings ULC under the Alberta Business Corporations Act dated April 6, 2010 ***(Investor's Schedule of Exhibits at C-0032)***, North Bruce Project ULC Share Register ***(Investor's Schedule of Exhibits at C-0496)***; Certificate of Incorporation for Summerhill Holdings ULC under the Alberta Business Corporations Act dated April 6, 2010 ***(Investor's Schedule of Exhibits at C-0053)***, and Summerhill Project, ULC Share Register ***(Investor's Schedule of Exhibits at C-0498)***

[898] Certificate of Correction of Mesa AWA TTD Development LLC, to AWA TTD Development LLC ***(Investor's Schedule of Exhibits at C-0458)***, and 22 Degree Share Register ***(Investor's Schedule of Exhibits at C-0493),*** Certificate of Formation of AWA Arran Development LLC, from the State of Delaware, dated September 14, 2009 ***(Investor's Schedule of Exhibits at C-0256)***, and Arran Holding ULC Share Register ***(Investor's Schedule of Exhibits at C-0456),*** Certificate of Formation of AWA North Bruce Development LLC, from the State of Delaware, dated March 31, 2010 ***(Investor's Schedule of Exhibits at C-0063)***, and North Bruce Holdings Share Register ***(Investor's Schedule of Exhibits at C-0495)***; and Certificate of Formation of AWA Summerhill Development LLC, from the State of Delaware, March 31, 2010 ***(Investor's Schedule of Exhibits at C-0065)*** and Summerhill Holdings, ULC Share Register ***(Investor's Schedule of Exhibits at C-0497)***

[899] Limited Liability Company Agreement of American Wind Alliance, LLC, June 4, 2009 ***(Investor's Schedule of Exhibits at C-0435)***; Limited Liability Company Operating Agreement of AWA TTD Development LLC ***(Investor's Schedule of Exhibits at C-0461)***; Limited Liability Company Operating Agreement of AWA Arran Development LLC ***(Investor's Schedule of Exhibits at C-0236)***; Limited Liability Company Operating Agreement of AWA North Bruce Development LLC ***(Investor's Schedule of Exhibits at C-0462)***; Limited Liability Company Operating Agreement of AWA Summerhill Development LLC ***(Investor's Schedule of Exhibits at C-0231)***

[900] Mesa Power Group Consent to Assignment of AWA Agreement June 6, 2009 ***(Investor's Schedule of Exhibits at C-0463)***, and Mesa Power Group Assignment and Assumption of AWA Agreement, July 1, 2009 ***(Investor's Schedule of Exhibits at C-0464)***

856. Mesa AWA, LLC, is a Delaware Corporation.[901] It is owned and controlled by Mesa Wind LLC, itself a Delaware Corporation.[902] Mesa Wind, LLC is in turn owned and controlled by Mesa Power Group, LLC, the Investor.[903]

857. NAFTA Article 1139 defines an investment as including an "enterprise" owned by nationals of one NAFTA Party in the territory of another NAFTA Party. TTD Wind Project ULC, Arran Wind Project ULC, North Bruce Project ULC, and Summerhil Project ULC were each enterprises operating in Canada and indirectly owned by US nationals thereby making them investments according to the NAFTA.[904]

858. NAFTA Article 1139 defines an investor of a Party as someone "that seeks to make, is making or has made an investment."[905] Accordingly, Mesa is an Investor. Mesa was incorporated on November 17, 2009 and from the time of its formation, it indirectly owned investments in Canada. Since its incorporation, it has had an investment, in Arran Wind Project ULC and TTD Wind Project ULC. The definition of the term investor in Article 1139 includes one "seeking to make an investment," Mesa therefore meets the definition of a NAFTA Investor with respect to the other two wind applicant companies, North Bruce Project ULC and Summerhill Project ULC even before these companies made their FIT applications in May 2010.[906]

859. Mesa's first investment in November 2009 was not a one-off investment. Mesa always intended to achieve several hundred megawatts of wind turbine projects in Canada from the time AWA LLC was formed with a view to establishing wind projects in June 2009.[907] The North Bruce and Summerhill projects where simply an expansion of the original Investment.[908]

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[901] Certificate of Formation of Mesa AWA, LLC, from the State of Delaware, dated June 12, 2009 ***(Investor's Schedule of Exhibits at C-0465)***

[902] Certificate of Formation of Mesa Wind, LLC, from the State of Delaware, dated May 20, 2008 ***(Investor's Schedule of Exhibits at C-0010)***, Limited Liability Company of Mesa AWA, LLC dated June 15, 2009 ***(Investor's Schedule of Exhibits at C-0466)***

[903] Limited Liability Company Agreement of Mesa Wind, LLC, dated May 20, 2008 ***(Investor's Schedule of Exhibits at C-0467)***

[904] NAFTA Article 1139, "Investment." NAFTA Article 201 defines enterprise as, "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association."

[905] NAFTA Article 1139, "Investor of a Party."

[906] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶¶37-40

[907] AWA LLC Agreement, Annex B – Project Development Work, Limited Liability Company Agreement, American Wind Alliance between GE Energy LLC and Mesa Power Group, LLC, Annex B – Project Development Work, June 4, 2009 ***(Investor's Schedule of Exhibits at C-0435)***; Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶11. In the end, Mesa applied for a total of 565MW worth of transmission capacity.

[908] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶40

E. The measures related to Mesa and are attributable to organs of Canada

i. Canada is responsible for the acts of the Ontario Power Authority

860. The issue of state responsibility are not properly a jurisdictional question. It is entirely a question of admissibility. Canada's decision to raise state responsibility as a jurisdictional defense is improper and should be dismissed on this ground alone.

861. In this arbitration, Canada has actually admitted that there is state responsibility for actions where the Ontario Power Authority is mandated to act at the direction of the government under Ontario provincial law.

862. Numerous of the international wrongful measures alleged by the Investor are acts and omissions of the Premier of Ontario and the Ontario Minister and the Ministry of Energy. Canada does not contest that these actors are state organs within the meaning of ILC Article 4. The Investor has indicated that in each instance where the Investor was harmed, and where the proximate cause of the injury was a measure of the Ontario Power Authority, that the final cause of this measure was a mandatory direction from an organ, thus establishing state responsibility under ILC Article 8.

863. The Investor's Memorial detailed how Canada is responsible for the actions of the Ontario Power Authority. Canada has this responsibility because of Article 8 of the ILC Articles of State Responsibility.[909]

864. ILC Article 8 applies to any instrumentality directed to do an act by a state. Article 8 provides that conduct is attributable to the state:

> if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

865. In his commentary on Article 8, Professor Crawford states,

> where… the state was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State.[910]

This description accurately captures the relationship between Ontario and the OPA as it concerns its renewable-energy policy and objectives.

866. The Government of Ontario used the Ontario Power Authority as an instrument to carry out provincial government policy, and achieve a desired result as it concerned

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[909] Memorial, at ¶75

[910] Crawford (2002), at pp.112-113 ***(Investor's Schedule of Legal Authorities at CL-006)***; See also *Encana Corporation v. Republic of Ecuador*, UNCITRAL, Award (February 3, 2006), at ¶154 ***(Investor's Schedule of Legal Authorities at CL-343)***; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (October 8, 2009) ***(Investor's Schedule of Legal Authorities at CL-342)***

renewable energy. The Ontario Power Authority was under a statutory requirement to carry out these polices under the terms of the *Electricity Act*, and it did carry out these requirements.

867. Directions from Ontario's Minister of Energy to the Ontario Power Authority regarding the FIT Program, which as required were all followed, are documented at pages 42-45 of the Investor's Memorial. These directions, and the actions of the Ontario Power Authority to follow these and other directions it is given by the Minister of Energy, refute Canada's claim that the Ontario Power Authority acts independently. The directions demonstrate that Ontario was using the Ontario Power Authority to achieve its governmental renewable energy objectives through the FIT Program and through the *Green Energy Investment Agreement*.[911]

868. The Ontario Power Authority might be vested with certain decision-making capabilities, but it is an entity that in relation to the FIT Program and the *GEIA* was dependent on the Government of Ontario, namely the Minister and Ministry of Energy for direction.

869. Canada in its Counter Memorial has not disputed that the wrongful acts of OPA that the investor identified were done under the direction of the Minister and Ministry of Energy.[912] Nor does Canada disagree with the Investor on the proper reading of Article 8 of the ILC Articles or suggest that the ILC Articles are not applicable in this dispute.

ii. Claims under NAFTA Chapter Fifteen

870. It its Memorial the Investor pleaded that Canada was responsible for the acts of the Ontario Power Authority, IESO, and Hydro One under Article 1503(2), concerning state enterprises.[913]

871. The Investor no longer maintains these claims under NAFTA Article 1503(2). Instead it maintains its claims on the same measures under Chapter Eleven.

872. The Ontario Power Authority cannot be covered by the obligations of Chapter Fifteen for a technical reason. The Ontario Power Authority does not meet the definitional requirement of a state enterprise under a Canada – specific definition which is set out in Annex 1505. As a result, the Ontario Power Authority is not subject to review under NAFTA Chapter Fifteen.

873. The only issue that remains to be determined is that of Canada's state responsibility for the acts of the Ontario Power Authority in following Ontario's instructions while carrying out its directions under ILC Article 8, which Canada has chosen not to defend.

[911] Counter Memorial, at ¶276
[912] Counter Memorial, at ¶293
[913] Memorial, at ¶¶81, 92, and 101

874. Since the full extent of the violations of the NAFTA have taken place by the actions of officials of the Government of Ontario, or through measures which occurred through the mandatory direction of such officials by the Ontario Power Authority, there is no need to maintain any further Chapter Fifteen claims against the other Ontario entities such as the IESO or Hydro One.

875. The measures complained of by the Investor are all breaches of Canada's NAFTA obligations under Chapter Eleven. Canada has full responsibility for these measures taken by officials of the Government of Ontario or by the Ontario Power Authority under the direction of Ontario in carrying out Ontario's renewable-energy policy that resulted in those breaches.

876. The Investor withdraws its claims under NAFTA Article 1503(2). A full understanding of the evidence has revealed that the wrongful conduct that caused harm to Mesa was conduct of state organs or at the direction of organs, and not that of state enterprises within the meaning of Chapter 15.

iii. The Measures relate to Mesa

877. The acts raised in this arbitration all constitute government measures related to Mesa's investments in Ontario. Each measure, and associated breach, stems from the design, implementation, and administration of Ontario transmission access or in connection to Ontario renewable energy Power Purchase Agreements starting in fall 2009 carried out by, or at the direction of, the Government of Ontario.

878. The Investor has pleaded four distinct, but connected breaches.[914] They are:

Ontario Minimum Domestic Content Measures

a) The requirement for Ontario minimum domestic content. This was brought about from:

    i) The *Electricity Act, 1998*, as amended, including in particular Part II.1 (Ontario Power Authority), and Part II.2, (Management of Electricity Supply, Capacity and Demand) thereof, including, in particular, Section 25.35 (Feed-in tariff Program),[915] which provided the statutory authority to the Minister of Energy and the Ontario Power Authority to design, implement, and administer the Ontario FIT Program;

[914] Answer on Canada's Preliminary Objections on Jurisdiction, February 19, 2013, at ¶11
[915] *Electricity Act*, 1998, S.O. 1998, c.15 Schedule A, last amended 2010, c.8 ***(Investor's Schedule of Exhibits at C-0401)***

ii) The *Green Energy Act, 2009,* as enacted on May 14, 2009[916] and FIT Direction dated September 24, 2009, from George Smitherman, Deputy Premier and Minister of Energy and Infrastructure, to Colin Anderson, Chief Executive Officer, Ontario Power Authority, directing Ontario Power Authority to develop a FIT Program and to include a requirement that the applicant submit a plan for meeting the domestic content goals in the FIT Rules (Ministerial Direction September 24, 2009);[917]

iii) The FIT Rules, at paragraph 6.4(a)(i) of Version 1.1, which required projects that became operational after January 1, 2012 to achieve a domestic content level of 50%;[918] and

iv) The FIT Contract at Section 2.4(b)(iii) and Annex D, Domestic Content which incorporated the domestic content requirements into the FIT contract.[919]

a. These government measures are inconsistent with the NAFTA's prohibition on performance requirements set out in Article 1106(1)(b) and (c). These measures first affected the Investor on November 25, 2009 when TTD Wind Project ULC and Arran Project ULC submitted their FIT applications which required Mesa to commit to an undertaking to adhere to all the FIT Rules, including the domestic content requirements;[920]

b. Mesa was again affected by this same measure when on May 29, 2010 North Bruce Project ULC and Summerhill Project ULC submitted their FIT applications and also had to commit to the same undertaking to adhere to all the FIT Rules, including the domestic content requirements;[921]

c. Additional damage arose when Mesa had to make decisions to utilize sub-optimal wind turbines and assemblies for its wind sites specifically in order to comply with the Ontario Minimum domestic content rules which limited the choices available to the Investor;

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[916] *Green Energy Act*, S.C. 2009 c.12, Schedule. A ***(Investor's Schedule of Exhibits at C-0003)***

[917] Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), September 24, 2009 ***(Investor's Schedule of Exhibits at C-0264)***; FIT Contract, v1.1, September 30, 2009, s.2.4(b)(iii) ***(Investor's Schedule of Exhibits at C-0109)***

[918] Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011, at ¶6.4(a)(i) ***(Investor's Schedule of Exhibits at C-0005)***

[919] FIT Contract, v1.1, September 30, 2009, s.2.4(b)(iii) ***(Investor's Schedule of Exhibits at C-0109)***

[920] Twenty Two Degree Wind Project FIT Application, November 25, 2009 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009 ***(Investor's Schedule of Exhibits at C-0365)***

[921] North Bruce Wind Energy I, FIT application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0360)***; North Bruce Wind Energy II, FIT Application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0361)***; Summerhill Wind Energy I, FIT Application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0362)***; Summerhill Wind Energy II, FIT Application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0363)***

d. Mesa first acquired knowledge of the requirement of this measure as a result of the undertaking it had to commit to with each FIT application it submitted.[922] Thus, knowledge of loss arose on August 5, 2010; and

e. Mesa suffered further loss when it had to restructure its existing turbine contract with General Electric.[923]

***Arbitrary*, Unfair, Capricious or Abusive Administrative measures**

b) The arbitrary and capricious failure to follow the FIT Program rules with respect to the evaluation and ranking of applications. These breaches arose from governmental measures which led to the Ontario Power Authority administering the FIT Program as it did. They were:

i) The *Electricity Act, 1998*, as amended, including in particular Part II.1 (Ontario Power Authority), and Part II.2, (Management of Electricity Supply, Capacity and Demand) thereof, including, in particular, Section 25.35 (Feed-in tariff Program),[924] which provided the statutory authority to the Minister of Energy and the Ontario Power Authority to design, implement, and administer the Ontario FIT Program;

ii) The *Green Energy Act, 2009,* as enacted on May 14, 2009;[925] the FIT Direction dated September 24, 2009, from George Smitherman, Deputy Premier and Minister of Energy and Infrastructure, to Colin Anderson, Chief Executive Officer, Ontario Power Authority, directing the Ontario Power Authority to develop a FIT Program, which in turn required the Ontario Power Authority to develop a method for accepting, evaluating, and awarding contracts;[926]

iii) The decision in August 2010 not to run the Economic Connection Test despite the fact that it was required by the FIT Rules and represented to the Investor.[927] The decision to delay the ECT was because the Korean Consortium had yet to select connection points for its projects;[928]

iv) Private meetings and communications between the Ontario Power Authority and FIT competitors that began on October 5, 2010 and continued through

[922] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶25-26
[923] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶29
[924] *Electricity Act*, 1998, S.O. 1998, c.15 Schedule A, last amended 2010, c.8 ***(Investor's Schedule of Exhibits at C-0401)***
[925] *Green Energy Act*, S.C. 2009 c.12, Schedule. A ***(Investor's Schedule of Exhibits at C-0003)***
[926] Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), September 24, 2009 ***(Investor's Schedule of Exhibits at C-0264)***
[927] ***(Investor's Schedule of Exhibits at C-0088)***; FIT Rules, v.1.1, September 30, 2009, s.5.4(a) ***(Investor's Schedule of Exhibits at C-0258)***
[928] Witness Statement of Bob Chow (RWS – Chow), at ¶38

February and May 2011, which led to the FIT Program and Rules being modified to benefit certain FIT applicants;[929]

v) The February 17, 2011 direction from Ontario Minister of Energy Brad Duguid directing the OPA to plan for 10,700MW of renewable energy capacity, excluding hydroelectric, by 2018, which set a cap on the amount of transmission capacity the Ontario Power Authority could make available under the FIT Program;[930]

vi) The June 3, 2011 direction from Ontario Energy Minister Brad Duguid to the Ontario Power Authority setting a cap on the transmission capacity of FIT contracts of 750MW in the Bruce region and 300MW in the West of London region, which set a limit on how much transmission capacity the Ontario Power Authority could award in the regions Mesa was being considered for;[931] and

vii) All versions of the FIT Rules, Version 1.1-2.1, issued and amended by the Ontario Power Authority from September 30, 2009-December 14, 2012,[932] which were not followed by the Ontario Power Authority in the administration of the FIT Program.

a. These measures breached NAFTA Article 1105 and first affected the Investor on November 25, 2009 when TTD Wind Project ULC and Arran Project ULC submitted their FIT applications and became subjected to Ontario's unfair and arbitrary design, implementation, and administration

[929] Email from Bob Lopinski (Counsel Public Affairs) to Sonya Rachel Konzak (Ministry of Energy), Shantie Prithipal (Ministry of Energy), Sue Lo, and Rick Jennings (Ministry of Energy), September 20, 2010 ***(Investor's Schedule of Exhibits at C-0094)***; E-mail from Bob Lopinski (Counsel Public Affairs) to Pearl Ing (Ministry of Energy), February 25, 2011 ***(Investor's Schedule of Exhibits at C-0319)***; Email from Phil Dewan (Counsel Public Affairs) to Sue Lop (Ministry of Energy), May 12, 2011 ***(Investor's Schedule of Exhibits at C-0090)***

[930] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, February 17, 2011 ***(Investor's Schedule of Exhibits at C-0267)***

[931] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, June 3, 2011 ***(Investor's Schedule of Exhibits at C-0046)***

[932] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, June 3, 2011 ***(Investor's Schedule of Exhibits at C-0046)*** and FIT Rules Version 1.1 - September 30, 2009 ***(Investor's Schedule of Exhibits at C-0258)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules, Version 1.2, November 19, 2009 ***(Investor's Schedule of Exhibits at C-0143)***; FIT Rules Version 1.3, March 9, 2010 ***(Investor's Schedule of Exhibits at C-0185)***; FIT Rules Version 1.3.1, July 2, 2010 ***(Investor's Schedule of Exhibits at C-0218)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.3.2, October 29, 2010 ***(Investor's Schedule of Exhibits at C-0242)***; FIT Rules Version 1.4, December 8, 2010 ***(Investor's Schedule of Exhibits at C-0239)***; Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011 ***(Investor's Schedule of Exhibits at C-0005)***; FIT Rules Version 1.5.1, July 15, 2011 ***(Investor's Schedule of Exhibits at C-0237)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules, Version 2.0, August 10, 2012 ***(Investor's Schedule of Exhibits at C-0058)***; FIT Rules Version 2.1, December 14, 2012 ***(Investor's Schedule of Exhibits at C-0240)***

of the FIT Program, which it was required to do as a result of direction from the Government of Ontario;[933]

b. Mesa was again affected by this breach on May 29, 2010 when North Bruce Project ULC and Summerhill Project ULC submitted their FIT applications and it was again subjected to the continuing unfair and arbitrary administration of the FIT Program;[934]

c. All of the Investor's investments were again affected in August 2010 when the Economic Connection Test was not run as required by the FIT Rules, and as represented to Mesa, because the Korean Consortium had not finalized its selection of connection points.[935] This decision prevented the TTD and Arran projects from receiving FIT contracts;

d. The release of the FIT Program rankings on December 21, 2010 was an failure to follow the FIT Rules. The Arran and TTD projects were ranked 8th and 9th in the Bruce region but were not awarded the points they were entitled to under the FIT Rules. This provided the first indication to the Investor of loss as Mesa had calculated that it should have been ranked higher in the FIT process;[936]

e. All four of Mesa's projects were affected by the failure to conduct an Economic Connection Test, despite it being set out in the FIT Rules;[937] and

f. Due to the non-transparent nature of how the FIT Program was administered, many of the earlier breaches of Article 1105, including violations of fairness and the rule of law, were not known to the Investor, including the private communications and meetings between the Government of Ontario and NextEra to modify the FIT Program to benefit NextEra. These communications began without Mesa's knowledge in October 2010 and included getting support from the Premier's Office for changing the FIT Rules to allow its projects to change connection points

[933] Twenty Two Degree Wind Project FIT Application, November 25, 2009 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009 ***(Investor's Schedule of Exhibits at C-0365)***

[934] North Bruce Wind Energy I, FIT application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0360)***; North Bruce Wind Energy II, FIT Application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0361)***; Summerhill Wind Energy I, FIT Application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0362)***; Summerhill Wind Energy II, FIT Application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0363)***

[935] Witness Statement of Bob Chow (RWS – Chow), at ¶38

[936] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶43

[937] Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 5.2(b) ***(Investor's Schedule of Exhibits at C-0258)***

in June 2011.[938] The public culmination of these efforts was the June 3, 2011 direction for a connection-point change window by the Minister of Energy and the awarding of FIT contracts on July 4, 2011. It was on June 3, 2011 and again on July 4, 2011 that Mesa was able to confirm that it suffered loss under the FIT Program due to its arbitrary and capricious application.[939]

Better Treatment provided in Ontario to other foreign investments or Investors

c) The special privileges and inducements provided to the Korean Consortium to facilitate its Power Purchase Agreements and priority access to renewable energy transmission capacity in Ontario. These are:

i) The conclusion of a Memorandum of Understanding between the Ontario Ministry of Energy and the Korean Consortium on December 12, 2008 as a first step to granting the Korean Consortium preferential access to transmission capacity in Ontario;

ii) The Framework Agreement between the Government of Ontario and the Korean Consortium, concluded on September 25, 2009 and signed on October 29, 2009, which set the stage for the signing of the *Green Energy Investment Agreement* and provided a further basis for the Korean Consortium's preferential access to transmission capacity in Ontario;

iii) The Ministerial direction on September 30, 2009 by Ontario Minister of Energy Brad Duguid to the Ontario Power Authority to reserve 500MW of transmission capacity for the Korean Consortium, even before the signing of the *GEIA*. This direction decreased the transmission capacity for renewable energy that could be awarded through the FIT Program and permitted the Korean Consortium to select its desired connection points;[940]

iv) The signing of the *Green Energy and Investment Agreement* between the Government of Ontario and the Korean Consortium on January 21, 2010, including all special benefits and assistance it conferred on the Korean Consortium compared to Mesa in order to facilitate its renewable-energy PPA;

[938] Email from Sue Lo (Ministry of Energy) to Pearl Ing and Sunita Chander (Ministry of Energy), May 12, 2011 ***(Investor's Schedule of Exhibits at C-0083)***

[939] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶51

[940] Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, September 30, 2009 ***(Investor's Schedule of Exhibits at C-0105)***

v) The Ministerial direction on September 17, 2010 by Ontario Minister of Energy Brad Duguid to the Ontario Power Authority to set aside 500MW of transmission capacity in the Bruce region for the Korean Consortium. This direction decreased the transmission capacity for renewable energy that could be awarded through the FIT Program and permitted the Korean Consortium to select its desired connection points;[941] and

vi) The decision in August 2010 not to run the Economic Connection Test despite the fact that it was required by the FIT Rules and represented to the Investor.[942] The decision to delay the ECT was because the Korean Consortium had yet to select connection points for its projects.[943]

a. These measures breached NAFTA Article 1103 and constitute a composite act that occurred when the *GEIA* was concluded in January 2010. The composite act continued after the conclusion of the *GEIA* and the date of the breach is dated to the first act in the series, December 12, 2008. The Investor was first affected in September 2009 when it was seeking to make its investment in Ontario and the Government of Ontario entered into the Framework Agreement with the Korean Consortium and the Minister of Energy directed transmission capacity be set aside for the Korean Consortium, removing it from the FIT competition.[944] Both of these measures ensured that the Investor would be precluded from competing for set amounts of transmission capacity that was being set aside for the Korean Consortium;

b. The Investor was also affected on January 21, 2010 when the Korean Consortium secured renewable-energy PPAs in Ontario for its own projects without having to go through an open competition and on terms more favourable than awarded under the FIT contract;[945]

c. Mesa was again affected by this breach on May 29, 2010 when North Bruce Projects ULC and Summerhill Projects ULC submitted their FIT applications and the Investor was required to compete for renewable-

[941] Letter from Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, September 17, 2010 ***(Investor's Schedule of Exhibits at C-0119)***

[942] ***(Investor's Schedule of Exhibits at C-0088)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 5.4(a) ***(Investor's Schedule of Exhibits at C-0347)***

[943] Witness Statement of Bob Chow (RWS – Chow), at ¶38

[944] Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, September 30, 2009 ***(Investor's Schedule of Exhibits at C-0105)***

[945] Twenty Two Degree Wind Project FIT Application, November 25, 2009 ***(Investor's Schedule of Exhibits at C-0364)***; Arran Wind Project FIT Application, November 25, 2009 ***(Investor's Schedule of Exhibits at C-0365)***

energy PPAs, compared to the Korean Consortium which by that time had secured its own PPAs on more favourable terms than under the FIT contract;[946]

d. All of the Investor's investments were again affected in August 2010 when the Economic Connection Test was not run as required by the FIT Rules, and as represented to Mesa, because the Korean Consortium had not finalized its selection of connection points.[947] This decision prevented the TTD and Arran projects from receiving FIT contracts; and

e. Mesa's investments first became aware that they were suffering loss arising from these breaches on September 17, 2010 when they were no longer able to compete for the 500MW of transmission capacity in the Bruce region was set aside for the Korean Consortium.[948]

Better Treatment provided in Ontario to local investments or Investors

d) Better treatment provided to FIT applicants from Canadian investments or investors, such as Boulevard Associates, compared to those investments owned by Mesa, which was provided over the course of the design, implementation and administration of the FIT Program. These were:

i) The *Electricity Act, 1998*, as amended, including in particular Part II.1 (Ontario Power Authority), and Part II.2, (Management of Electricity Supply, Capacity and Demand) thereof, including, in particular, Section 25.35 (Feed-in tariff Program),[949] which provided the statutory authority to the Minister of Energy and the Ontario Power Authority to design, implement, and administer the Ontario FIT Program;

ii) The *Green Energy Act, 2009,* as enacted on May 14, 2009;[950] the FIT Direction dated September 24, 2009, from George Smitherman, Deputy Premier and Minister of Energy and Infrastructure, to Colin Anderson, Chief Executive

[946] North Bruce Wind Energy I, FIT application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0360)***; North Bruce Wind Energy II, FIT Application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0361)***; Summerhill Wind Energy I, FIT Application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0362)***; Summerhill Wind Energy II, FIT Application, May 29, 2010 ***(Investor's Schedule of Exhibits at C-0363)***

[947] Witness Statement of Bob Chow (RWS – Chow), at ¶38

[948] Letter from Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, September 17, 2010 ***(Investor's Schedule of Exhibits at C-0119)***

[949] *Electricity Act*, 1998, S.O. 1998, c.15 Schedule A, last amended 2010, c.8 ***(Investor's Schedule of Exhibits at C-0401)***

[950] *Green Energy Act*, S.C. 2009 c.12, Schedule. A ***(Investor's Schedule of Exhibits at C-0003)***

Officer, Ontario Power Authority, directing the Ontario Power Authority to develop a FIT Program;[951]

iii) The decision in August 2010 not to run the Economic Connection Test despite the fact that it was required by the FIT Rules and represented to the Investor.[952] The decision to delay the ECT was because the Korean Consortium had yet to select connection points for its projects;[953]

iv) Private meetings and communications between the Ontario Power Authority and FIT competitors that began on October 5, 2010 and continued through February and May 2011, which led to the FIT Program and Rules being modified to benefit certain FIT applicants;[954]

v) The FIT Priority Rankings released on December 21, 2010 and based on administration of the FIT Rules Versions 1.1-1.4 between September 30, 2009-December 8, 2010;

vi) The FIT Direction dated June 3, 2011 from the Minister of Energy to Colin Anderson, Chief Executive Officer, Ontario Power Authority, concerning the connection-point change window that deviated from the FIT Rules and which NextEra had advanced notice of; and

vii) All versions of the FIT Rules, Version 1.1-2.1, issued and amended by the OPA from September 30, 2009-December 14, 2012,[955] which were not followed by the Ontario Power Authority in the administration of the FIT Program, and

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[951] Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), September 24, 2009 ***(Investor's Schedule of Exhibits at C-0264)***

[952] ***(Investor's Schedule of Exhibits at C-0088)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 5.4(a) ***(Investor's Schedule of Exhibits at C-0347)***

[953] Witness Statement of Bob Chow (RWS – Chow), at ¶38

[954] Email from Bob Lopinski (Counsel Public Affairs) to Sonya Rachel Konzak (Ministry of Energy), Shantie Prithipal (Ministry of Energy), Sue Lo, and Rick Jennings (Ministry of Energy), September 20, 2010 ***(Investor's Schedule of Exhibits at C-0094)***; E-mail from Bob Lopinski (Counsel Public Affairs) to Pearl Ing (Ministry of Energy), February 25, 2011 ***(Investor's Schedule of Exhibits at C-0319)***; Email from Phil Dewan (Counsel Public Affairs) to Sue Lo (Ministry of Energy), May 12, 2011 ***(Investor's Schedule of Exhibits at C-0090)***

[955] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, June 3, 2011 ***(Investor's Schedule of Exhibits at C-0046)*** and FIT Rules Version 1.1 - September 30, 2009 ***(Investor's Schedule of Exhibits at C-0258)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules, Version 1.2, November 19, 2009 ***(Investor's Schedule of Exhibits at C-0143)***; FIT Rules Version 1.3, March 9, 2010 ***(Investor's Schedule of Exhibits at C-0185)***; FIT Rules Version 1.3.1, July 2, 2010 ***(Investor's Schedule of Exhibits at C-0218)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.3.2, October 29, 2010 ***(Investor's Schedule of Exhibits at C-0242)***; FIT Rules Version 1.4, December 8, 2010 ***(Investor's Schedule of Exhibits at C-0239)***; Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011 ***(Investor's Schedule of Exhibits at C-0005)***; FIT Rules Version 1.5.1, July 15, 2011 ***(Investor's Schedule of Exhibits at C-0237)***; Ontario Power Authority, Feed-In Tariff Program, FIT Rules, Version 2.0, August 10, 2012 ***(Investor's Schedule of Exhibits at C-0058)***; FIT Rules Version 2.1, December 14, 2012 ***(Investor's Schedule of Exhibits at C-0240)***

the FIT Contract, Version 1.5 (June 3, 2011), including General Terms and Conditions, Exhibits, and Standard Definitions, issued by the OPA after it had failed to administer the FIT Program in a fair, transparent, and non-arbitrary manner.[956]

a. These measures breached NAFTA Article 1102 and first affected all four of the Investor's investments in August 2010 when the Economic Connection Test was not run as required by the FIT Rules, and as represented to Mesa, because the Korean Consortium had not finalized its selection of connection points.[957] This decision prevented the TTD and Arran projects from receiving FIT contracts;

b. December 21, 2010 when the Investor became aware that other Canadian investments received more favourable treatment in the consideration of their FIT applications than the Investor;

c. The Investor was again affected in January 2011 when the Canadian District Energy Association, a lobby group, launched a campaign to benefit the projects of Mesa's FIT Program competitor, NextEra. This effort included secret communications between the Government of Ontario and NextEra to re-align the FIT Program to provide more favourable treatment to NextEra. The public culmination of these efforts was the June 3, 2011 direction for a connection-point change window by the Minister of Energy and the awarding of FIT contracts on July 4, 2011;

d. The Investor was also affected on June 10, 2011 when Suncor, a Canadian competitor to Mesa, changed its connection points to B562L or B563L on the Bruce to Longwood 500kV line. The Investor was made aware of this when FIT contracts were awarded on July 4, 2011; and

e. Due to the non-transparent nature of the administration of the FIT Program, many of the earlier breaches of Article 1102, including violations of fairness and the rule of law that secured better treatment to NextEra, such as NextEra's advanced notice of rule changes and the ability to change connection points between regions, the ability of Mesa's competitors to connect to the 500kV Bruce to Longwood blackstart line, and secret communications between the Government of Ontario and NextEra to re-align the FIT Program to benefit NextEra, were not known to the Investor as they happened. Private communications and meetings

[956] FIT Contract version 1.5, at Exhibit D ***(Investor's Schedule of Exhibits at C-0263)***
[957] Witness Statement of Bob Chow (RWS – Chow), at ¶38

began without Mesa's knowledge in October 2010 and included getting support from the Premier's Office for changing the FIT Rules to allow its projects to change connection points in June 2011.[958] The public culmination of these efforts was the June 3, 2011 direction for a connection-point change window by the Minister of Energy and the subsequent awarding of FIT contracts on July 4, 2011. On September 17, 2010, the Investor was first able to be aware of loss arising from Canada's breaches upon the reservation of 500MW of transmission. Mesa was able to confirm that it suffered loss under the FIT Program due to better treatment provided to the Canadian investments of the Korean Consortium.[959]

879. Each of these governmental measures was taken by the Government of Ontario or by its mandatory direction to instrumentalities.

[958] Email from Sue Lo (Ministry of Energy) to Pearl Ing and Sunita Chander (Ministry of Energy), May 12, 2011 ***(Investor's Schedule of Exhibits at C-0083)***

[959] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶44

PART NINE: DAMAGES

I. THE OBLIGATION TO PAY DAMAGES

880. The Investor set out its damages claim in Part Six of its Memorial. The Investor's damages claim was supported by a valuation report produced by Robert Low, CBV and Richard Taylor, CBV. Canada has filed a responsive damages argument and has filed an expert report from Berkeley Research Group (BRG).

881. The Investor disputes Canada's calculations on damages for the reasons set out below. In general, Canada has misconstrued key facts and in a number of instances has also misapplied the governing law dealing with damages. The Reply Valuation Report supplied by Mr. Low and Mr. Taylor addresses the errors made by Canada and its expert.

882. Under international law, the Investor is entitled to full compensation from Canada for all harm caused to it and to its investments resulting from Canada's unlawful actions. The purpose of damages is to restore the Investor to the position it would have been in "but for" Canada's NAFTA breaches. The well-established international law compensation principle is that damages should wipe out the consequences of the wrongful act and put the harmed party back to the *status quo*.[960]

883. The NAFTA requires that the Investor be compensated for the breach of Canada's obligations in NAFTA Chapter Eleven. The calculation of damages also needs to take into account what would have been earned by the Investor and the Investments but for Canada's unlawful actions.

884. The Investor has produced a Reply Valuation Report from Robert Low and Richard Taylor. The Reply Valuation Report sets out an independent expert calculation of the quantification of the damage sustained by the Investor and its Investments which takes into account the points raised by Canada and the effects of evidence produced by Canada after the filing of the Investor's Memorial. As more fully set out in the *Reply Valuation Report*, the Investor has suffered substantial loss in the value of its investments in Canada. The midpoint of total losses is CAD$657.7 million. And with pre-judgement interest, the midpoint of total losses is CAD$736.2 million.

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[960] *Case Concerning the Factory at Chorzów,* Merits Award, Permanent Court of International Justice, September 13, 1928, PCIJ, Series A, No. 17 ("*Chorzów* - Merits Award"), at p.47 ***(Investor's Schedule of Legal Authorities at CL-169)***; *Amco Asia Corp. v. Indonesia*, Award, ICSID Reports Volume 1, 413 (November 20, 1984) ("Amco Asia - Award"), at ¶267, adopted the reasoning of the Chorzow Factory Case, calling it the "basic precedent" in international law on compensation ***(Investor's Schedule of Legal Authorities at CL-170)***

II. LEGAL ISSUES

885. The international law principle of compensation requires Canada to compensate the Investor for all loss caused to the Investor and its Investments resulting from Canada's violation of its international law obligations.

886. The main legal and accounting principles of valuation are set out in paragraphs 928 to 948 of the Investor's Memorial and have not been challenged by Canada. The principles are:

a) **The But For test** – Once a violation has been established, the remedial objective of an international tribunal is to place the injured Investor and its Investments in the position they would have been in but for the illegal conduct. In the words of the *S.D. Myers* NAFTA Tribunal, "Compensation should undo the material harm inflicted by a breach of an international obligation."[961]

b) **Consequential damages** - In *Sapphire International Petroleum Arbitration*, the Tribunal held that:

> This compensation includes the loss suffered (*damnum emergens*), for example the expenses incurred in performing the contract, and the profit lost (*lucrum cessans*), for example the net profit which the contract would have obtained. The award of compensation for the lost profit or the loss of a possible benefit has been frequently allowed by international arbitral tribunals.[962]

c) **Lost Profits** - Damages for lost profits includes loss that is a foreseeable consequence of the breach, where the lost profits can be calculated with reasonable certainty.[963]

d) **Mitigation** - The duty of mitigation is a general principle of law, which forms part of the principles of international law.[964] The duty of mitigation is also reflected in the

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[961] *S. D. Myers* - First Partial Award, at ¶315 ***(Investor's Schedule of Legal Authorities at CL-033)***

[962] *Sapphire International Petroleums Ltd. v. National Iranian Oil Company,* Arbitral Award, March 15, 1963, 35 ILR 136 ("*Sapphire* - Award"), at p.186 ***(Investor's Schedule of Legal Authorities at CL-172)***

[963] In J. Gillib Wetter and Stephen Schwebel "Some Little-Known Cases on Concessions - The *Greek Telephone Company Case*" (1964) 40 *British Yearbook of International Law* 216 ("Gillib and Schwebel (1964)"), at 221, the Tribunal found that Greece must compensate the investor for the lost profits "for what it would have obtained" had the concession contract been implemented by the State ***(Investor's Schedule of Legal Authorities at CL-087)*** In *Sea-Land Service, Inc. v. Iran*, Iran, Award 135-33-1, June 20, 1984 (1984) 6 Iran-US CTR 149 ***(Investor's Schedule of Legal Authorities at CL-116)***, the Tribunal cited its decision in *Pomeroy et al. v. Iran,* Iran - United States Claims Tribunal, Case No. 40, Award No. 50-40-3, 2 Iran-US CTR 372 (June 8, 1983,) ("*Pomeroy* - Award") ***(Investor's Schedule of Legal Authorities at CL-173)*** as a basis for this determination.

[964] *Middle East Cement Shipping and Handling Co. S.A. v. The Arab Republic of Egypt,* ICSID ARB/99/6, Award (April 12, 2002) *("Middle East Cement* - Award"),* at ¶167 ***(Investor's Schedule of Legal Authorities at CL-114)***

Commentary to Article 31 of the *ILC Articles*. The Commentary to Article 31 notes that mitigation of damage is an element affecting the scope of reparation.[965]

e) **Interest and Costs** - International tribunals have broad discretion to take into account all relevant circumstances, including equitable considerations on a case by case basis, to ensure that full compensation ensues.[966] These types of considerations usually take the form of an award dealing with opportunity loss (that is, interest of some form) and awards of costs.

III. SUMMARY OF VALUATION REPORT

887. The Investor's losses arising from Canada's failure to act in accordance with its Treaty Obligations have been calculated by Robert Low and Richard Taylor in their *Reply Valuation Report*. On the basis of the international law of damages, the Investor's compensable losses include:

a) Losses as a result of Canada's failure to meet its Treaty obligations;

b) Losses arising from the failure to be able to effectively operate the Investments;

c) Interest; and

d) Professional fees and costs of this arbitration.

888. The award of interest is to compensate the Investor and the Investment from the time of the breach of September 17, 2010, through to the date of the award.

889. The compound rate of interest is appropriately based on a rate of return equal to commercial interest rates. In any event, the rate should not be less than the Prime rate quoted on the Bank of Canada website compounded annually.[967]

890. The valuation methodology in summary is comprised of:

a) The certainty of the Investor obtaining a contract for the Projects, given the prominent market position of the Investor and the Investment, as well as the nature

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[965] Crawford (2002), at p.205 ***(Investor's Schedule of Legal Authorities at CL-006)***

[966] *Compañia del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, Case No. ARB/96/1, Final Award (February 17, 2000) ("*Compañia del Desarrollo de Santa Elena* - Award"), at ¶90-92 ***(Investor's Schedule of Legal Authorities at CL-115)*** This view was also maintained by a number of Iran-US Claims Tribunal awards such as those in the *American International Group, Inc. v. Iran*, Iran - United States Claims Tribunal, Case No. 2, Award 93-2-3, December 19, 1983, 4 Iran-US CTR 96 ("*AIG*- Award"), at p.109 ***(Investor's Schedule of Legal Authorities at CL-177)***; *Phillips Petroleum Co. Iran v. Iran*, Iran - United States Claims Tribunal, Case No. 39, Award 425-39-2, 29 June 1989, 21 Iran-US CTR 79 ("*Phillips Petroleum* - Award"), at ¶¶111-112, 157 ***(Investor's Schedule of Legal Authorities at CL-178)***; and *Starrett Housing Corp.v. Iran*, Iran - United States Claims Tribunal, Award, 32-24-1, 4 Iran-US CTR 112 (December 19, 1983) ("*Starrett Housing* - Award"), at ¶157 ***(Investor's Schedule of Legal Authorities at CL-179)***

[967] Deloitte Reply Valuation Report, at ¶7.19

and characteristics of the *Green Energy Act*, and the contract entered into between the Government of Ontario and the Korean Consortium;

b) The total is the volume of revenue lost by the Investor and Investment;

c) The revenue loss is then assessed to produce a loss of cash flow attributable to the Investor and the Investment after deducting all appropriate expenses, and considering required capital investment. This figure constitutes the net cash flow discounted to its present value equivalent at the date of loss using a risk-adjusted rate of return considered to be appropriate.

d) This base lost cash flow figure is then adjusted for out of pocket losses and an applicable rate of interest (still to be applied) to produce the total amount required to put the Investor and the Investment in the position they would have been in but for the wrongful acts of Canada, net of the costs of this arbitration, including professional representation.

A. Valuation Errors made by Canada and its expert

891. Canada filed a defense valuation report from Christopher Goncalves of Berkeley Research Group with its Counter Memorial. Mr. Goncalves report is replete with incorrect legal conclusions about the meaning of the NAFTA and the meaning of the *GEIA*. These legal errors result in errors in the Berkeley Research Group Defense valuation report.

892. Mr. Goncalves states of his report that he was "asked to assume that the alleged violations were in fact inconsistent with Canada's treaty obligations" but Mr. Goncalves actually does not adopt this assumption.[968]

893. Mr. Goncalves appears to stray outside of the proper ambit of his expertise when he engages in legal conclusions about the Investor's legal arguments. As a result of this, Mr. Goncalves errs in his valuation, which does not properly value the Investor's claim. In taking such an approach, Mr. Goncalves makes misstatements about the impact of the *GEIA* upon the risk profile for a FIT Application.

894. Canada completely misrepresented the meaning of the *GEIA* in its Counter Memorial and Mr. Goncalves has relied upon this misinformation. Amongst the many misstatements, is the following:

> In particular, whereas the Korean Consortium had to earn its transmission priority to each phase of the *GEIA*, the Claimant suggests that it should have been entitled to the same transmission priority without having to earn it.[969]

[968] Goncalves Defense Valuation Report, at ¶2.

895. The implication of the *GEIA* has been carefully considered in the Expert Report of Seabron Adamson. Mr. Adamson reviewed the terms of the *GEIA* and the FIT Program. Mr. Adamson has concluded that Mesa had to provide essentially the same investment commitments as the members of the Korean Consortium, and their joint venture partners.[970]

896. It is clear that Mr. Goncalves misunderstands the extent of the benefits provided by the *GEIA*. Mr. Goncalves excludes the application of the *GEIA* to Mesa's two lowest ranking projects; however, if the benefits of the *GEIA* were provided to Mesa, then Mesa would have been able to apply the *GEIA*'s benefits to guarantee 500MW of guaranteed transmission access in the Bruce region for its two lowest ranked projects. Some of this additional capacity could have been applied to one of the two remaining Mesa applications but, Mesa's higher ranked projects would have been entitled to the other benefits of the *GEIA* while obtained any additional transmission access beyond that under the *GEIA* from the FIT program.

897. Mr. Goncalves has an incorrect understanding of the *GEIA*. As a result, he unfairly criticizes the Deloitte Valuation Report, claiming that Deloitte does not consider that Mesa would have to bear "similar responsibilities for large scale manufacturing investments and job creation borne by the KC."[971] Mr. Goncalves' statement is incorrect.

898. Mr. Goncalves states that the Mesa wind power applications still faced material completion risks and that "there was no evidence" that Mesa power would not have such risk. [972] Again, this statement demonstrates a misunderstanding of the nature of the preferential benefits provided to the members of the Korean Consortium under the *GEIA*.

899. The effect of the *GEIA* was to have a systemic de-risking of many of the ordinary development and construction risks that would arise in a renewable energy project. Better treatment was provided to the Korean Consortium under the *GEIA* through reduced project risks as follows:

a) There was the opportunity to obtain an enhancement over the FIT Contract price in the event that an adder was applicable;

b) Total reduction in risk of obtaining the first 2500MW of transmission capacity;

[969] Goncalves Defense Valuation Report, at ¶76. See also Counter Memorial, at ¶463
[970] Expert Report of Seabron Adamson, at ¶46; Canada also misstates these same points in its Counter Memorial, at ¶¶369 – 370
[971] Goncalves Defense Valuation Report, at ¶33
[972] Mr. Goncalves also makes similar statements about REA developmental risk at ¶149.

c) Increased project flexibility due to the ability to unilaterally modify the size of individual renewable energy projects plus or minus 10% with a limit of 2500MW of transmission capacity.

d) Expedited approval process from the Ontario Power Authority, the IESO and Ontario Hydro;

e) Expedited assistance in obtaining Regulatory Environmental Approvals and other technical assistance from government officials and energy regulatory personal from Ontario owned energy enterprises;

f) Better assistance with aboriginal consultations;

g) Better treatment to obtain property sites for wind farms and other development assistance; and

h) Elimination of the termination for cause provisions which otherwise appeared in the *proforma* FIT Contract.

900. Because Mesa was entitled to receive treatment equivalent to the best treatment provided in the jurisdiction, it was entitled to receive the same treatment that reduced completion risk of power projects provided to the members of the Korean Consortium, and to their joint venture partners, such as Pattern Energy and its Canadian investment, Pattern Renewable Holdings Canada.[973] Accordingly, Mr. Goncalves was required to apply this same level of risk mitigation to the Mesa applications, but he did not.

901. Furthermore, Mr. Goncalves has ignored the instructions given by NAFTA Article 1104, which requires that the best level of treatment in the jurisdiction under either Article 1102 or 1103 be provided to an investor like Mesa. This best level of treatment was provided to members of the Korean Consortium, and to their joint venture partners, such as Pattern Energy and its Canadian investment, Pattern Renewable Holdings Canada.

902. The Deloitte Valuation Report imposed the same costs upon Mesa as those imposed upon the Members of the Korean Consortium. Mr. Goncalves has erred when he criticizes Mr. Low and Mr. Taylor for not including costs for the benefits provided by the *GEIA*.[974] A review of the *GEIA* indicates that there are no additional costs imposed upon a member of the Korean Consortium under the *GEIA* than there was for an applicant for a

[973] Canada clearly misunderstands this point when it argues in ¶465 of the Counter Memorial that the best treatment provided in the jurisdiction should not be provided to Mesa, but the worst.
[974] Goncalves Expert Report, at ¶110

FIT Contract.[975] Since there were no additional costs, the Deloitte Valuation Report was correct in not adding any additional cost in their Valuation Report.

903. Mr. Goncalves comes to an erroneous legal conclusion about the effect of the NAFTA in Paragraph 110(b). Mr. Goncalves concludes that Deloitte erred by concluding that "all FIT Program Applicants" should be entitled to enjoy the benefits of the *GEIA*. This statement is incorrect as follows:

a) Deloitte did not suggest that all FIT Applicants should be entitled the benefits of the *GEIA*. Deloitte provided that Mesa, as an American Investor entitled to the benefit of NAFTA Article 1103 and 1102 was entitled to be given treatment equal to the most favourable treatment provided to investors, and investments of investors, in the jurisdiction in like circumstances to Mesa. This is a very different statement from that reported by Mr. Goncalves.

b) Mr. Goncalves demonstrates a misunderstanding of the NAFTA in his analysis. The NAFTA only imposes obligations upon Canada to provide treatment to investors, or investments of investors, from another NAFTA Party. NAFTA Articles 1116 and 1117 impose some limitation periods upon the timing of bringing such claims. So the class of those who could demand equivalent treatment to the members of the Korean Consortium would not extend to every FIT Applicant. Mr. Goncalves' statement is thus erroneous.

c) Equally inaccurate, are the additional conclusions made by Mr. Goncalves arising from these erroneous statements. Mr. Goncalves relies on such statements in paragraph 112 when he states that no damages should be quantified for the better treatment provided under the Economic Development Adders or the 10% Capacity expansion right which was provided only to the members of the Korean Consortium, and to their joint venture partners, such as Pattern Energy and its Canadian investment, Pattern Renewable Holdings Canada. If this better level of treatment was provided to the members of the Korean Consortium, and to their joint venture partners,[976] then there is a requirement to provide compensation to address the less favourable treatment provided to Mesa and its investments.

904. Mr. Goncalves also makes errors with respect to the issue of wind turbines. It is clear that the Investor has established a causal link between Canada's measures and the losses arising from the loss of the turbine deposit These errors are addressed in the

[975] Expert Report of Seabron Adamson, at ¶32
[976] Expert Report of Seabron Adamson, at ¶46

Deloitte Reply Valuation Report at paragraphs 6.1 to 6.3, inclusive[977] and also in the Reply Witness Statement of Cole Robertson.[978]

905. Similarly, Mr. Goncalves made additional errors with respect to disallowing losses arising out of Mesa's use of General Electric's 1.6MW wind turbine due to the imposition of the Ontario minimum domestic content requirements as well as with regard to errors he has made on the costs of the turbines. Both of these errors are addressed by the Deloitte Reply Valuation Report of Mr. Low and Mr. Taylor. [979]

B. Damage suffered by the Investor

906. The *Reply Valuation Report* calculates the total damage resulting from Canada's actions that were inconsistent with its Treaty obligations. The Report calculates the resulting damages that flow from the economic losses.[980]

907. The *Reply Valuation Report* includes the additional costs the Investor incurred, defined in the Report as "Past Costs Incurred," and also included is the forfeited deposit by the Investor to GE, based on the nature and mechanics of the damages calculation.[981]

i. Discount Cash Flow Analysis

908. The valuators have used the discounted cash flow approach (DCF) for economic loss, which was considered the most appropriate and reliable.[982] Cash flows are identified for a period of 20 years into the future and discounted to the date of the analysis by an appropriate discount rate. As the revenue stream was provided in the FIT Contract and guaranteed by the OPA for 20 years, the valuators concluded:

> Revenues can be forecast with a relatively high degree of confidence. The price per kWh is established by contract while the wind production can be reasonably estimated, with estimates supported by independent wind studies, and therefore revenues were readily determinable[983]

909. The *Reply Valuation Report* also calculates future losses using the Investor's Production Forecast. It uses the DCF approach to determine the economic losses sustained over the future loss period. The DCF approach calculates the present value of future losses by converting the losses to their present value equivalent. The discount rate used to convert the future losses to their present value equivalent reflects both the time value of money and the perceived risk of the loss arising as forecast. The DCF approach is

[977] Deloitte Reply Valuation Report, at ¶¶6.1-6.3
[978] Reply Witness Statement of Cole Robertson (CWS – Robertson), at ¶46-50
[979] Deloitte Reply Valuation Report, at ¶¶7.17-7.18
[980] Independent Valuation Report of Low and Taylor of Deloitte, November 18, 2013, at ¶4.66
[981] Independent Valuation Report of Low and Taylor of Deloitte, November 18, 2013, at ¶4.66
[982] Independent Valuation Report of Low and Taylor of Deloitte, November 18, 2013, at ¶4.4, 4.5, 4.6, 4.7 and 4.8
[983] Independent Valuation Report of Low and Taylor of Deloitte, November 18, 2013, at ¶4.7(a)

based on a projection of future cash flows that would have been realized from the ongoing operations of the affected investment.[984]

910. The cash flows to be discounted are determined on an after-tax, after interest and after debt repayment basis. In arriving at the discounted cash flows, Deloitte adjusted the after-tax equity rate of return to be applied to those cash flows having regard to the weighted average cost of capital (WACC) as set out in Paragraph 7.9 of the Reply Valuation Report. The WACC represents a weighted average of the after-tax cost of debt, and the after-tax cost of equity where the weighting is based on the company's target debt-equity ratio, measured at market. The Valuation Report determined the appropriate WACC to be 5.50 to 5.75%.[985]

911. NAFTA Article 1104 ensures that the best treatment in the jurisdiction is to be provided in the event that there is a difference between national treatment and most favoured nation treatment:

> **Article 1104: Standard of Treatment**
>
> Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.

912. Based on this, the *Reply Valuation Report* concludes the midpoint damages of the loss incurred by the Investor is broken down as follows:[986]

a) Damages for breaches of Article 1102, 1103 or 1105 $657,683,000

b) Damage for breach of Article 1106 $110,750,000

913. The damages for category (a) includes damages in category (b). Thus categories (a) and (b) are not additive, and the damages in category (b) would only be applicable if the Tribunal did not find a breach of Articles 1102, 1103 or 1105.

914. Legal costs have not been included in this total, and are an appropriate addition at the discretion of the Tribunal.

915. In total, the valuators calculate the midpoint of the Investor's losses due to Canada's breach of the Treaty, excluding legal and arbitration costs, to be CDN$657,683,000.[987]

916. While the Reply Valuation Report recognizes the need to consider pre and post-judgment interest, those amounts have not been included in the amounts stated above.

[984] Independent Valuation Report of Low and Taylor of Deloitte, November 18, 2013, at ¶4.4
[985] Independent Valuation Report of Low and Taylor of Deloitte, November 18, 2013, at ¶4.54
[986] Independent Valuation Report of Low and Taylor of Deloitte, November 18, 2013, at ¶4.3
[987] Independent Valuation Report of Low and Taylor of Deloitte, November 18, 2013, at ¶4.54

PART TEN: RELIEF REQUESTED

917. In view of the facts and law set out in this Reply Memorial, the Investor respectfully request that the Tribunal grant the following relief:

a) A Declaration that Canada has acted in a manner inconsistent with its Treaty obligations under NAFTA Articles 1102, 1103,1104, 1105 and 1106;

b) Damages in the amount of CDN$657,683,000 plus interest from September 24, 2009, at a rate set by the Tribunal; and

c) An award in favour of the Investor for their costs, disbursements and expenses incurred in the arbitration for legal representation and assistance, plus interest, and for the costs of the Tribunal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Appleton & Associates International Lawyers Date: April 30, 2014