

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

BETWEEN:

WINDSTREAM ENERGY LLC

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

REJOINDER MEMORIAL

November 6, 2015

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TABLE OF ABBREVIATIONS

Abbreviation	Definition
AOR	Applicant of Record
BRG	Berkeley Research Group
COD	Commercial Operation Date
CWA	<i>Clean Water Act, 2006, S.O. 2006, c. 22</i>
DCF	Discounted Cash Flow
DOE	Department of Energy
EA	Environmental Assessment
EBR	Environmental Bill of Rights
EPA	<i>Environmental Protection Act, R.S.O. 1990, c. E.19</i>
ERT	Environmental Review Tribunal
FIT	Feed-in Tariff
FTC	Free Trade Commission
GEGEA	<i>Green Energy and Green Economy Act, 2009</i>
IESO	Independent Electricity System Operator
MCOD	Milestone Date of Commercial Operation
MEI	Ministry of Energy and Infrastructure
MNR	Ministry of Natural Resources
MOE	Ministry of the Environment
MOU	Memorandum of Understanding
MPP	Member of Provincial Parliament
MTC	Ministry of Tourism and Culture
MW	Mega Watt
NAFTA	North American Free Trade Agreement
NTP	Notice to Proceed
OPA	Ontario Power Authority
PCIJ	Permanent Court of International Justice
PPA	Power Purchase Agreement

Abbreviation	Definition
REA	Renewable Energy Approval
REA Regulation	<i>Environmental Protection Act</i> , R.S.O. 1990, c. E.19, O. Reg. 359/09
REFO	Renewable Energy Facilitation Office
SOI	Statement of Intent
TSA	Turbine Supply Agreement
VCLT	<i>Vienna Convention on the Law of Treaties</i> , (1969)
WWIS	Windstream Wolfe Island Shoals Inc.

INTRODUCTION

I. Overview

1. In its Counter-Memorial, Canada demonstrated that the Government of Ontario's deferral of offshore wind development was a legitimate, prudent regulatory action that did not breach NAFTA and was not the cause of the failure of the Claimant's Project. The Claimant disagrees. Its Reply Memorial attempts to portray the deferral as an abrupt repudiation of the regulatory framework arising out a desire to "kill" offshore wind development. The Claimant submits that it expected to be able to proceed through the existing regulatory framework for offshore wind, meet its FIT Contract deadlines and realize the revenue under the FIT Contract. The Claimant agrees that the deferral of offshore wind did not cancel its Project, but it argues that it had that effect. Ultimately, despite the over 2500 exhibits before this Tribunal, none of the Claimant's allegations are supported.

2. The evidence shows that the right to revenue under the FIT Contract was contingent on obtaining all necessary permits, and that the Claimant knew the regulatory rules governing offshore wind projects had yet to be written. In fact, the Claimant acknowledged the lack of a regulatory path to develop its Project on more than 20 occasions prior to signing its FIT Contract. The reality is that, in contrast to the cautious approach adopted by every other offshore wind proponent in the province, the Claimant took a big gamble. Despite knowing the risks related to offshore wind development, and despite the early stage of development of its Project, it nevertheless applied for and entered into a FIT Contract, putting a \$6 million letter of credit on the line. Having accepted significant risk on the highly speculative expectation of significant returns, it now turns to NAFTA arbitration as an insurance policy and seeks an astronomical return of 1,300 per cent on the money it claims it spent (or 13,000 per cent on money that can be verified and substantiated based on the evidence before this Tribunal).

3. Notwithstanding its new attempts to reinvent the past and to focus on irrelevant issues,¹ the Claimant's Reply Memorial relies on the same factually inaccurate claims and unsubstantiated

¹ The Claimant points to statements, including by representatives in the Premier's Office, contained in documents that Canada produced on May 8, 2015. Nevertheless, the Claimant maintains its request, at paragraph 52 of its Reply Memorial, that the Tribunal draw an adverse inference from the deletion of emails in the Premier's Office. Its request should be dismissed for the reasons set out in paragraphs 570-576 of Canada's Counter-Memorial.

theories, all of which fail to demonstrate any breach of NAFTA Chapter 11. As Canada demonstrated in its Counter-Memorial and further elaborates on in this submission, the decision to defer the development of offshore wind until the regulatory framework has been finalized was motivated by the Minister of the Environment's concerns about environmental and health effects. Without the adequate science to design specific requirements for offshore wind projects as of February 11, 2011, MOE was unwilling to allow any offshore wind proponent to proceed through the Renewable Energy Approval ("REA") process. There were simply too many unknowns.

4. Former Minister Wilkinson made this decision on the basis of the information available at that time, and in consultation with three other Ministers who brought the interests of their Ministries and constituents to the table. This included consideration of the cost of additional offshore wind energy procurement, demand for renewable energy in the context of Ontario's overall supply mix, and public opposition to offshore wind. Ultimately, while one may agree or disagree with the decision, the deferral was not motivated by improper reasons as the Claimant suggests. The evidence before the Tribunal simply does not support the Claimant's narrative and conspiracy theories.

5. Instead, the evidence confirms that while there were efforts by the Ontario Government to develop green energy, the specific requirements for offshore wind were far from being developed when the Claimant applied for a FIT Contract and the Claimant accepted this risk. In 2009, the Government of Ontario introduced the *Green Energy and Green Economy Act, 2009* ("GEGEA"), which paved the way for the creation of Ontario's FIT Program, a renewable energy procurement program through which the Ontario Power Authority ("OPA") offered 20-year fixed price FIT Contracts for various classes of generation facilities, including ground-mounted solar, onshore wind, anaerobic digestion, biofuel, biogas, thermal treatment and offshore wind facilities. The FIT Program aimed to get shovels in the ground immediately in order to fulfill the government's goal of stimulating the economy following the 2008 financial crisis.

6. Applications to the FIT Program were simple, requiring only basic information about the connection point of the FIT applicant's proposed project and the proposed project size. If there

was sufficient transmission capacity at a FIT applicant's chosen connection point, a FIT Contract offer was made. The responsibility to determine whether the project site could be secured and all permits acquired within the aggressive timelines built into the FIT Contract fell squarely on the FIT applicant. Proponents of offshore wind projects had to commit to bring their projects to Commercial Operation within four years of signing the FIT Contract. For larger projects this meant that they would have needed to complete much of the project development work prior to applying to the FIT Program. The timelines simply did not allow anything else.

7. Only two offshore wind proponents applied for a FIT Contract. Of these, the Claimant was the only one to apply for a project greater than 10 MW, and the only one that had not secured its site. SouthPoint Wind, the only other applicant, applied for three FIT Contracts of 10 MW each despite having secured the Crown land to develop thousands of megawatts of electricity. A number of other offshore wind proponents elected not to apply to the FIT Program at that time but continued to develop their projects. Since 300 MW of transmission capacity could easily be accommodated at the Claimant's chosen connection point, it was offered a FIT Contract on May 4, 2010, approximately one month after being notified of its successful application. It was the only offshore wind FIT applicant to receive an offer. In contrast to the more prudent approach taken by the other offshore wind proponents, the Claimant proceeded on the basis that "it is better to start large [...] and scale down, than the other way."²

8. From the moment it learned it would be offered a FIT Contract, the Claimant assessed its chances of meeting the four-year Commercial Operation deadline as "unlikely."³ It immediately sought extensions from the OPA for both this deadline and the deadline to sign the FIT Contract. The Claimant continued to delay the signature of its FIT Contract throughout the summer of 2010. In the meantime, and after having notified the Claimant, the Ministry of the Environment ("MOE") posted an Offshore Wind Policy Proposal Notice on Ontario's Environmental Registry established under the province's *Environmental Bill of Rights, 1993* ("EBR"). This policy proposal indicated that regulatory work to develop the environmental rules and requirements for

² R-0507, E-mail from Ian Baines, Windstream Energy Inc. to David Mars, White Owl Capital (Aug. 11, 2008).

³ R-0529, Windstream Wolfe Island Shoals Inc., Current Project Status and Regulatory Issues (Jun. 8, 2010).

offshore wind projects was ongoing and it proposed a five-kilometre shoreline exclusion zone (or “setback”) for all offshore wind projects.

9. The five-kilometre setback proposal had major implications for the Claimant’s proposed Project. Over 80 per cent of the Crown land that it had applied for, but had not yet been granted access to, fell within five kilometres of the shoreline. By the Claimant’s own admission, a five-kilometre setback would render its Project unfeasible since it would require the Claimant to swap its original Crown land applications for new Crown land grid cells outside the setback. However, at the time, the Ministry of Natural Resources (“MNR”) was not accepting new Crown land applications and was conducting a policy review of where, when and how it made Crown land available for proposed offshore wind projects.

10. Yet, on August 20, 2010, without having conducted a proper feasibility study, without any clarity on MOE’s outstanding decision with respect to the proposed five-kilometre setback, without the MNR’s permission to use the original site or any assurance that it would be allowed to swap that site for a new site, and expressly acknowledging that it had no means “to assess the permitting risk related to signing the contract”,⁴ the Claimant executed the FIT Contract. It agreed to the OPA’s terms, which required the Claimant to meet a Milestone Commercial Operation Date (“MCOB”) of five years from May 4, 2010, rather than four years, and assumed all regulatory risk in doing so.

11. In addition to the five-kilometre setback, MOE’s Offshore Wind Policy Proposal outlined further considerations that would inform the clear, up-front provincial rules necessary to finalize the regulatory framework. The considerations it highlighted for developing specific requirements for offshore wind included drinking water, noise, fish, animal and bird habitat and other ecological considerations, and setbacks from shipping lanes, marine archeological sites and natural heritage resources. Additionally, it stated that the REA process for offshore wind projects would be the subject of a future Environmental Registry posting that would outline requirements for offshore wind development in the form of amendments to the REA Regulation and the REA process.

⁴ C-0270, E-mail from Uwe Roeper, ORTECH to Pearl Ing, Ministry of Energy (May 25, 2010).

12. While MOE was continuing its work to develop the approvals process for offshore wind projects in the fall of 2010 and into 2011, the path forward for offshore wind in general was being discussed across the Government. On January 6, 2011, [REDACTED]

[REDACTED]
[REDACTED]
However, once it became clear that it would take time to finalize the regulatory framework [REDACTED], the Government was left with only one option: to defer offshore wind development. The only question that remained was how to treat the Claimant's Project, given that it was the only offshore wind project with a FIT Contract. The options were [REDACTED]

[REDACTED]
[REDACTED]
13. Given the Minister of the Environment's view that the rules and requirements for offshore wind projects be developed first, and his refusal to allow a pilot project of 100 or more turbines, he insisted on the implementation of a full deferral. Offshore wind was a new technology in North America at the time of the deferral, and remains so today. Minister Wilkinson was well aware that Canada shares responsibility for protecting the Great Lakes with the United States, and that Ontario's southern neighbours were also concerned about the lack of science to inform the development of a regulatory framework on offshore wind.

14. Just prior to the public announcement of the deferral, Government representatives informed the Claimant about the decision and assured the Claimant that MNR would not cancel its Crown land applications, unlike all other applications. The Ontario Government also informed the Claimant that, in order to "freeze" its FIT Contract, it would need to secure contract amendments from the OPA. In subsequent discussions, the OPA offered the Claimant an extension of its MCOB by up to five years, the immediate return of half of its security deposit, and a general waiver of certain quarterly reporting requirements during the delay. These offers were reasonable in light of the Ontario Government's projected timeline of three to five years to complete the science with the [REDACTED]. Yet the Claimant accepted none of these offers and instead took the negotiations as an opportunity to pursue much more advantageous terms through unreasonable demands that included swapping its offshore wind project for a solar project so large it could be seen from outer space. When the OPA refused its unreasonable demands, the Claimant chose to bring a NAFTA claim instead of choosing an option that would

have preserved its chances of developing its Project at a later date, or exercising its force majeure termination rights under the FIT Contract, a remedy that would have seen the return of all of its security.

15. The Claimant asks the Tribunal to ignore all these facts. In its Reply Memorial, like the remainder of its pleadings, the Claimant asks the Tribunal to ignore the detailed and extensive decision-making process engaged in by elected officials and Ministry staff, and assume that all of the meetings, all of the expressions of concern via email, and all of the debate about the state of the science were nothing more than an elaborate ruse designed to conceal the true nefarious purpose behind the deferral. There is no reason for the Tribunal to entertain the Claimant's musings. The Claimant has now submitted 579 pages of written argument, approximately 2,000 pages of expert testimony, 175 pages of witness testimony and over 2,000 documents as exhibits in this arbitration, but it fails to show that Canada has breached any obligation under NAFTA Chapter 11. Canada's Rejoinder Memorial addresses each of its claims as follows:

16. First, Canada responds to the Claimant's confusion with respect to the Tribunal's jurisdiction over actions of the OPA, a State enterprise. While the Claimant has still not established that the Tribunal has jurisdiction over any acts or omissions of the OPA, ultimately it does not matter. The two measures identified by the Claimant, namely the deferral on offshore wind development along with the failure to lift the deferral in time for the Claimant to meet its FIT Contract timelines, and the failure to insulate the Claimant from the effects of the deferral, are measures of the Government of Ontario, not the OPA. The Claimant itself admits this.

17. Second, Canada explains how the Claimant has failed to rebut the argument that Articles 1102 and 1103 do not apply in this dispute because the measures at issue involves procurement pursuant to Article 1108. The Claimant's position that the procurement exception only applies to the procurement process and not to the decision to procure or the treatment directly resulting from it would render Article 1108 meaningless. Canada also explains that the Claimant has not proven that government possession is a necessary condition of procurement, but even if it were, the Claimant's argument would fail because Ontario does take possession of the electricity.

18. Third, Canada shows that the Claimant has still not proven that Canada has breached Articles 1102 or 1103. In its Reply Memorial, the Claimant has not even attempted to respond to Canada's Article 1103 arguments. With respect to Article 1102, the Claimant continues to inappropriately compare the treatment it was accorded after the deferral on offshore wind to the treatment accorded to TransCanada, an investor with a Power Purchase Agreement ("PPA") for a gas-fired plant, which did not participate in the FIT Program and operated under a regulatory regime that was different than the one applicable to renewable energy projects. The Claimant attempts to read out "like circumstances" from Article 1102, urging the Tribunal to focus instead on like treatment. The Claimant therefore misapplies the like circumstances analysis and provides no rationale as to why the circumstances surrounding the treatment, particularly the separate procurement programs and regulatory regimes, should be ignored. Most importantly, the Claimant also fails to provide evidence that it was subject to any nationality-based discrimination.

19. Fourth, Canada demonstrates that the Claimant has still not proven that the alleged measures violate Article 1110. To begin with, the revenue stream of the FIT Contract, the only asset it has valued for the purposes of its damages submission, is not an investment capable of being expropriated. At the time of the alleged breach, the FIT Contract merely conferred contingent rights to that revenue stream rather than a demonstrable entitlement to a certain economic benefit. However, even if the FIT Contract did confer such a right, the Claimant has failed to prove that it has been indirectly expropriated. The measures complained of did not substantially deprive the Claimant of its investment because its investment had no value at the time of the alleged breach. Moreover, the deferral was a temporary measure, and any permanent effect it had on the Claimant was a direct result of the Claimant's actions alone. The Claimant's FIT Contract remains in effect with all the conditions precedent, rights and obligations therein.

20. Canada also demonstrates that the Claimant had no reasonable, investment-backed expectations that the revenue stream under the FIT Contract would materialize. Finally, Canada shows that the decision to defer offshore wind development was a non-discriminatory measure of general application, taken in good faith in pursuit of a legitimate public welfare objective and does not amount to an expropriation. Contrary to the Claimant's assertion, international law recognizes that the use of police powers by the State does not amount to an expropriation.

21. Fifth, the Claimant has still failed to prove that the alleged measures violated Article 1105, either through the imposition of the deferral or the failure to insulate the Claimant from its effects. The Claimant continues to misapply Article 1105, still failing to prove through evidence of State practice and *opinio juris* the existence of a rule of customary international law with respect to any of the treatment it identified in its Reply Memorial. In particular, the Claimant has not met its burden of proving that a rule of customary international law exists to protect against treatment that “breaches the investor’s legitimate expectations”, is “arbitrary or grossly unfair”, or is “discriminatory”.

22. The conduct of the Government of Ontario does not come close to breaching Canada’s obligations under Article 1105. Further, the Claimant inaccurately characterized the Ontario Government’s actions. The decision to defer offshore wind development was taken in good faith based on the need to develop science-based regulatory requirements. The Claimant had no expectations that it could proceed through the existing regulatory framework for offshore wind when it applied for the FIT Contract in November 2009 and again when it signed the FIT Contract in August 2010 because it was well aware that the rules for offshore wind projects had yet to be written. The measures taken were neither arbitrary nor grossly unfair, and by merely equating different treatment to discrimination, the Claimant has not shown that it was discriminated against.

23. Sixth, with respect to damages, even if the Tribunal were to find a breach of Canada’s NAFTA obligations, the Claimant did not suffer any losses as a result of that breach. The Claimant’s Reply Memorial has presented a completely new and different Project program and schedule in response to the deficiencies identified by Canada’s expert, URS, tacitly admitting that its 2010 plans would not have allowed it to meet the FIT Contract timelines. The Claimant should not get the benefit of hindsight to continually re-craft its damages case and indeed its entire program for the Project. Further, the Claimant’s use of 2015 information to design a 2010 Project has merely replaced its former problems with new ones. In the end, the correction of these errors in the revised 2015 program does not provide any further clarity for the Tribunal. The fact is, given the timelines of the FIT Contract, that the Claimant did not have the luxury of time to fix these deficiencies during the development and construction of its Project. As a result,

the 2015 program does not change the conclusion in the first URS Report that the Project would not have been viable within the FIT Contract timelines.

24. Yet, even if the Tribunal were to ignore this fact, real world experience from renewable energy financing expert Green Giraffe demonstrates that absent access to Crown land and given Windstream's lack of progress towards obtaining environmental permits, the Project had no material value on the marketplace. As Canada's damages expert BRG demonstrates, even if the Tribunal were to rely on the discounted cash flow ("DCF") methodology proposed by the Claimant, the Claimant's valuation is derived from an incorrect "but for" analysis. When this error is corrected, BRG reveals that the Project had no value on the valuation date. As a result, the Claimant is not entitled to the damages it seeks.

25. In the end, the Claimant cannot blame the failure of its Project on the Government of Ontario. It was well aware that the regulatory framework for the approval of offshore wind projects was unfinished when it signed the FIT Contract. The Claimant alone bore the development risks of its Project. The Tribunal must resist the Claimant's attempt to use the NAFTA as an insurance policy for its failed business, which had no value independent of any action of the Government of Ontario. Its claims must fail.

II. Materials Submitted by Canada in Support of this Rejoinder

26. In support of this Rejoinder, Canada has submitted the following witness statements and expert reports:

- **Second Witness Statement of Marcia Wallace ("RWS-Wallace-2"):** Dr. Wallace confirms that the Ontario Government included the requirement to submit an offshore wind facility report in the REA Regulation as a placeholder for regulatory rules and requirements that remained under development. She also confirms, with reference to EBR postings on the Environmental Registry, that MOE informed the public of the underdeveloped state of the regulatory framework for offshore wind facilities.
- **Second Witness Statement of Doris Dumais ("RWS-Dumais-2"):** Ms. Dumais confirms that MOE had limited regulatory experience transferable to the approval of a 300 MW offshore wind project as of April 2010, and corrects and clarifies statements made by the Claimant's expert witness Sarah Powell regarding the Ontario Government's experience regulating large-scale onshore wind projects at that time. Ms. Dumais also confirms that while the adaptive management approach is

a well-established principle of environmental protection, it could not be applied in the context of the REA process for the Claimant's Project given its sheer scale at 300 MW and the absence of a baseline against which to assess it.

- **Second Witness Statement of Rosalyn Lawrence ("RWS-Lawrence-2"):** Ms. Lawrence explains that the Claimant's belief that a reconfiguration of its Crown land grid cells was assured is not reasonably based, and that, given the complexity and size of its reconfigured project, MNR may have taken years to process the Claimant's application. She also confirms that the Claimant incorrectly calculates MNR's base land rental fee for the sake of its damages.
- **Second Witness Statement of Susan Lo ("RWS-Lo-2"):** Ms. Lo explains that MEI had concerns about low energy demand and the ratepayer impacts of large future offshore wind projects, but that these concerns did not apply to the Claimant's Project, which had already been offered a FIT Contract and was accounted for in Ontario's Long-Term Energy Plan. While MEI considered the adoption of [REDACTED]
- **Rejoinder Expert Report of URS ("RER-URS-2"):** URS responds to the key technical and environmental matters raised in the Claimant's Reply Memorial and accompanying expert reports and witness statements, based on the Claimant's new and revised 2015 programme and schedule. In particular, URS concludes that the Project is not feasible in the FIT Contract timelines even given the Claimant's 2015 programme due to incorrect assumptions and outstanding Project risks.
- **Expert Report of Green Giraffe ("RER-Green Giraffe"):** Green Giraffe has provided an expert report assessing the financeability of the Project and the assumptions used for the cost of debt and cost of equity by Messrs. Low & Taylor, ultimately concluding that the Project had no material value on the marketplace. Green Giraffe also provides expert opinion on the development of offshore wind farms and their valuation at different stages of development in the European market and refutes Deloitte's use of the DCF methodology for the Project. Green Giraffe is a specialist advisory boutique focused on the offshore wind sector with a particular expertise in arranging the financing of Projects at various stages of development.
- **Rejoinder Expert Report of Christopher Goncalves, Berkeley Research Group ("RER-BRG-2"):** Berkeley Research Group has provided an expert report responding to the reply report of Messrs. Low & Taylor. They explain that the report of Messrs. Low & Taylor continues to greatly overstate any damages to the Claimant arising from the measures that have been challenged in this arbitration and when a correct DCF methodology is applied, the Project has no value.

THE CLAIMANT HAS NOT ESTABLISHED THAT ITS CLAIMS RELATE TO THE ACTIONS OF THE OPA AND, IF THEY DO, THAT THE TRIBUNAL HAS JURISDICTION OVER ANY ALLEGED ACTIONS OF THE OPA

I. Summary of Canada's Position

27. The Claimant continues to assert that the Tribunal has jurisdiction over acts or omissions of the OPA.⁵ However, as set out below, this issue is entirely irrelevant to the arbitration. The alleged measures that form the basis of the Claimant's claim pertain to the acts and omissions of the Ontario Government, particularly MEI and the Premier's Office. The Claimant has not challenged any acts or omissions of the OPA. As such, there is no need for the Tribunal to consider the Claimant's jurisdictional arguments related to the OPA.

28. Moreover, even if the Claimant was challenging any acts or omissions of the OPA, it has failed to establish the Tribunal's jurisdiction over such claims. The parties agree that the OPA is a State enterprise for the purposes of NAFTA Article 1503(2). To engage Canada's international responsibility under that provision, the Claimant must establish that the OPA engaged in specific acts or omissions when "exercis[ing] any regulatory, administrative or other governmental authority that [Canada] has delegated to it".⁶ The Claimant takes the position that, as a creature of statute, the OPA is always exercising delegated governmental authority. This is legally incorrect. Moreover, the Claimant has failed to identify any specific acts or omissions taken by the OPA in the exercise of delegated governmental authority. As such, the Tribunal should reject the Claimant's arguments regarding attribution of the OPA's actions to Canada.

II. The Claimant Is Not Challenging Any Measures Adopted or Maintained by the OPA

29. In its Counter-Memorial, Canada pointed out that despite arguing at length that the acts of the OPA were attributable to Canada at international law, the Claimant was not actually alleging that any of the measures of the OPA breached Canada's obligations under the NAFTA. The Claimant's Reply Memorial further confirms that the measures of the OPA are not at issue in this dispute. As explained below, nowhere in its legal arguments does the Claimant allege that any measures of the OPA breach Articles 1102, 1103, 1105 and 1110.

⁵ Claimant's Reply Memorial, ¶¶ 632-640.

⁶ NAFTA Article 1503(2).

30. In its Reply Memorial, the Claimant has alleged that:

- (i) the "Ontario Government's vastly different treatment of two electricity project proponents with power purchase agreements with the OPA"⁷ and the "Ontario Government[s], and in particular the Premier's Office[s], [decision] to keep TransCanada 'whole'"⁸ breached Articles 1102 and 1103;
- (ii) the imposition of the deferral by "the Premier's Office and MEI"⁹, and the failure of "MEI . . . to direct the OPA to [ensure Windstream's FIT Contract would be "frozen"] or otherwise to ensure that the Government's promises to Windstream were fulfilled"¹⁰ breached Article 1110; and
- (iii) the imposition of the deferral by "the Premier's Office and MEI"¹¹ and the "Ontario Government's failure to fulfil its commitments to 'freeze' the FIT Contract"¹² breached Article 1105.

31. As is apparent from the above claims, the Claimant challenges only the measures of organs of the Government of Ontario. The Claimant¹³ and Canada¹⁴ agree that any alleged measure by MEI, MOE, MNR or the Premier's Office is attributable to Canada at international law.¹⁵

32. Yet, the Claimant continues to advance arguments relating to the alleged control that MEI has over the OPA.¹⁶ This issue is not relevant to the arbitration. While it is true that the Minister of Energy has the authority to direct the OPA to undertake certain initiatives through the form of Minister's letters of direction,¹⁷ the absence of any such direction is an action or omission of MEI itself, regardless of MEI's relationship with the OPA. The Claimant seems to agree. In its Reply

⁷ Claimant's Reply Memorial, ¶ 615 (emphasis added).

⁸ Claimant's Reply Memorial, ¶ 619 (emphasis added).

⁹ Claimant's Reply Memorial, ¶ 334 (emphasis added).

¹⁰ Claimant's Reply Memorial, ¶ 532 (emphasis added).

¹¹ Claimant's Reply Memorial, ¶ 334 (emphasis added).

¹² Claimant's Reply Memorial, ¶ 601.

¹³ Claimant's Memorial, ¶¶ 509-511.

¹⁴ Canada's Counter-Memorial, ¶ 306.

¹⁵ **RL-029**, James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (New York: Cambridge University Press, 2002), Article 4 ("*ILC Articles – Commentary*").

¹⁶ Claimant's Reply Memorial, ¶¶ 627-631.

¹⁷ **C-0003**, *Electricity Act, 1998*, S.O. 1998, c. 15, s. 25.32; Canada's Counter-Memorial, ¶ 336.

Memorial, it makes clear that “[i]t is MEI’s failure [...] that is attributable to Canada”¹⁸ and that the failure to “freeze” the Claimant’s FIT Contract is “an omission of MEI, not of the OPA.”¹⁹

33. As such, while Canada disagrees with the Claimant’s characterization of the negotiations around Windstream’s FIT Contract, the fact is that the acts of the OPA during these negotiations are not being challenged by the Claimant. Therefore, there is no need for the Tribunal to decide whether or not the conduct of the OPA can be attributed to Canada at international law.

III. Alternatively, the Claimant Has Failed to Meet its Burden of Establishing that this Tribunal Has Jurisdiction to Consider Measures Adopted or Maintained by the OPA

34. Despite the fact that its legal arguments only allege that the measures of organs of the Government of Ontario have breached Canada’s obligations under the NAFTA, the Claimant continues to argue that “in the event the Tribunal disagrees that the failure to fulfill the Government’s commitments to ‘freeze’ the FIT Contract is an omission of MEI or the Premier’s Office, then it is necessarily an omission of the OPA.”²⁰ Leaving aside the fact that the Ontario Government never made any such commitment to the Claimant, the actions of the OPA in these negotiations cannot be attributed to Canada as a matter of international law.

35. Both Canada and the Claimant agree that the OPA is a State enterprise and, as a result, pursuant to Article 1503(2), only its acts done in the exercise of delegated governmental authority are attributable to Canada.²¹ The Claimant argues that “the OPA was exercising delegated governmental authority in failing to implement MEI’s commitment to ‘freeze’ the FIT Contract or [MEI’s] decision to keep Windstream ‘whole’”.²² However, the Claimant makes no effort to prove this assertion or to respond to the explanations provided by Canada.²³

¹⁸ Claimant’s Reply Memorial, ¶ 625.

¹⁹ Claimant’s Reply Memorial, ¶ 626.

²⁰ Claimant’s Reply Memorial, ¶ 632. Canada notes that while the Claimant points to paragraphs 505, 514 and 536-541 of its Reply Memorial in support of this argument, these paragraphs appear to be quoted in error. For example, paragraph 505 states, in its entirety: “Thus the Tribunal should reject Canada’s argument that a broad public purpose exception to expropriation applies under Article 1110.”

²¹ Claimant’s Reply Memorial, ¶ 633; Canada’s Counter-Memorial, ¶¶ 310-316.

²² Claimant’s Reply Memorial, ¶ 633.

²³ Canada’s Counter-Memorial, ¶¶ 300-317.

36. The Claimant continues to argue that because the OPA was established by legislation, everything it does is an exercise of delegated governmental authority.²⁴ This argument must fail since it would render the language in Article 1503(2) meaningless. If the NAFTA Parties had intended to make themselves responsible for every breach of Chapter 11 by a State enterprise, they could have done so. They did not. Instead, they crafted Article 1503(2), which makes clear that only a limited set of acts of State enterprises are subject to Chapter 11. As Canada stated in its Counter-Memorial, “[t]he fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.”²⁵ Although these corporate entities may be owned by the State, they are “considered to be separate, [and] *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority”.²⁶

37. The OPA was not exercising delegated governmental authority in its negotiations with the Claimant. There is nothing inherently governmental about the conduct of negotiations by the OPA to settle a dispute pertaining to the commercial terms of a contract to supply electricity.²⁷ Indeed, the Claimant provides no legal authority or facts to support its argument that the OPA was exercising delegated governmental authority when it entered into commercial negotiations with the Claimant following the Government of Ontario’s decision to defer offshore wind. It has not pointed to a single example where the renegotiation of a commercial contract was found to be an exercise of delegated government authority. In fact, the evidence further demonstrates that the OPA was not exercising governmental authority, for two reasons.

²⁴ Claimant’s Reply Memorial, ¶¶ 632-640.

²⁵ Canada’s Counter-Memorial, ¶ 308 citing to **RL-029**, *ILC Articles - Commentary*, Article 8, p. 112 (citing, for example, the Workers’ Councils considered in *Schering Corporation v. The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 5, p. 361 (1984), *Otis Elevator Company v. The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 14, p. 283 (1987) and *Eastman Kodak Company v. The Government of Iran*, Iran-U.S. C.T.R., vol. 17, p. 153 (1987)).

²⁶ **RL-029**, *ILC Articles – Commentary*, Article 8, p. 112; **RL-031**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13) Award, 6 November 2008, ¶ 170 (“*Jan de Nul – Award*”); **CL-088**, *United Parcel Service of America, Inc. v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007, ¶¶ 57, 62, 77-78 (“*UPS – Award*”).

²⁷ Canada’s Counter-Memorial, ¶ 315; **RL-031**, *Jan de Nul – Award*, ¶¶ 169-170; **CL-088**, *UPS – Award*, ¶¶ 57, 62, 77-78.

38. First, pursuant to the Minister of Energy's September 24, 2009 letter of direction, the OPA designed a procurement program, the FIT Program, through which it entered into commercial contracts with suppliers of renewable energy. The OPA was not delegated any authority to make decisions on permits, licenses, approvals or any other similar regulatory instruments. All relevant exercises of governmental authority were to be carried out by the relevant ministries of the Government of Ontario. The fact that the OPA created the FIT Program pursuant to a letter of direction from the Minister of Energy is not sufficient to demonstrate that the OPA was exercising delegated government authority when negotiating with the Claimant following the deferral on February 11, 2011.

39. Second, despite the Claimant's argument otherwise,²⁸ the FIT Program's overall objective of encouraging the greater use of renewable energy sources in Ontario does not mean that all activities carried out under that Program are an exercise of delegated governmental authority. Commercial negotiations between contract counter-parties, such as the Claimant and the OPA, cannot be considered to be the exercise of delegated governmental authority even if carried out for the public good and in furtherance of the policy objectives of the government. Much like Canada Post in *UPS v. Canada* or the Suez Canal Authority in *Jan de Nul v. Egypt*, the OPA implemented government policy objectives in designing and implementing the FIT Program, but there was nothing governmental about any of its acts.

40. The Claimant's attempt to distinguish the case at hand from that in *Jan de Nul* is misguided and merely re-states the Claimant's position in its Memorial. Canada has fully responded to this issue in its Counter-Memorial,²⁹ and will not repeat itself here except to reiterate that, as the *Jan de Nul* Tribunal stated, "[w]hat matters is not the 'service public' element, but the use of 'prérogatives de puissance publique' or governmental authority."³⁰ Much like the Suez Canal Authority was acting as any other contractor would, regardless of its status as State enterprise, the OPA, in negotiating options with the Claimant following the February 11, 2011 deferral

²⁸ Claimant's Reply Memorial, ¶¶ 638-639.

²⁹ Canada's Counter-Memorial, ¶¶ 310-317.

³⁰ **RL-031**, *Jan de Nul – Award*, ¶ 170; See also **CL-056**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24) Award, 18 June 2010, ¶ 202 explaining that: ("[i]t is not enough for an act of a public entity to have been performed in the general fulfilment of some general interest, mission or purpose to qualify as an attributable act.").

decision, was acting in a commercial nature as a counter-party to the contract. There is nothing inherently governmental about entering into commercial negotiations with a contractual counter-party.

IV. Conclusion

41. The Claimant challenges measures of the Government of Ontario, not measures of the OPA. Accordingly, the Claimant's arguments about whether acts of the OPA can be attributed to Canada for the purposes of Chapter 11 are irrelevant. However, even if the Claimant were challenging measures of the OPA relating to the negotiations after the announcement of the deferral, it has failed to prove that the Tribunal has jurisdiction to consider whether such measures violated Canada's obligations under the NAFTA.

CANADA HAS NOT VIOLATED ITS NAFTA OBLIGATIONS

I. Articles 1102 and 1103 Do Not Apply to the Deferral by Virtue of the Procurement Exemption in Article 1108

A. Summary of Canada's Position

42. As Canada explained in its Counter-Memorial, if a measure involves procurement by a Party or a State enterprise, then pursuant to Article 1108, Articles 1102 and 1103 do not apply.³¹ In this regard, it is open to the NAFTA Parties to carry out procurement programs even where doing so would otherwise amount to discriminatory treatment in violation of those Articles.

43. The Claimant challenges the treatment it received as the holder of a procurement contract in the FIT Program, alleging that it was less favourable than the treatment accorded to other investors who held procurement contracts outside the FIT Program. In particular, the Claimant argues that it was subject to less favourable treatment than that accorded to TransCanada by the Ontario Government with respect to "the means by which the Ontario Government implemented

³¹ Canada's Counter-Memorial, ¶ 322.

a termination of their respective projects.”³² It also alleges, without any supporting argument, that the treatment it was accorded was less favourable than that accorded to Samsung.³³

44. In essence, the Claimant is asking the Tribunal to assess treatment relating to different procurement contracts. The different procurement processes were designed around the special circumstances of each industry, including the need for each type of electricity, the costs associated, the group of providers and other commercial realities. Comparing the separate decisions to procure and the terms and conditions of those procurement contracts would fundamentally interfere with NAFTA Parties' right to procure absent the obligations contained in Articles 1102 and Article 1103.³⁴ In an attempt to escape this conclusion, the Claimant argues that Article 1108 only applies to the act of procuring itself, and not to subsequent treatment that cancels or delays that procurement contract.³⁵ This is incorrect. As explained below, such an interpretation would require the Tribunal to ignore the plain language of Article 1108.

B. Freezing the Claimant's FIT Contract Is a Measure Involving Procurement

1. The Ordinary Meaning of Article 1108 Includes All Treatment Involving Procurement Contracts

45. In its Reply Memorial, the Claimant argues that all exceptions in investment treaties, including the procurement exception, must be construed narrowly.³⁶ The Tribunal should reject such an attempt to place an artificial and unwarranted constraint on how this treaty provision is to be interpreted. The customary rules of treaty interpretation, as embodied in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (“VCLT”), apply to all provisions in the NAFTA including Article 1108. Article 1108 is neither to be interpreted broadly nor narrowly as

³² Claimant's Reply Memorial, ¶ 609.

³³ Claimant's Reply Memorial, ¶ 539.

³⁴ Canada notes that the Claimant has not responded to Canada's arguments that Article 1108 precludes the Claimant's claim under Article 1103 (Canada's Counter-Memorial, ¶¶ 318-337). Accordingly, Canada rests on the submissions it previously made.

³⁵ Claimant's Reply Memorial, ¶ 611.

³⁶ Claimant's Reply Memorial, ¶ 610.

a matter of principle. Rather, its specific terms should be interpreted in accordance with their ordinary meaning in their context and in light of their object and purpose.³⁷

46. NAFTA Chapter 11 tribunals have followed this rule whether interpreting a substantive obligation or an exception.³⁸ For example, the Tribunal in *Mobil v. Canada* resisted the “proposition that Article 1108 reservations are to be interpreted restrictively” and held that “[t]he task of ascertaining the meaning of a reservation, like the task of interpreting any other treaty text, involves understanding the intention of the NAFTA Parties, and it is to be achieved by following the customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the VCLT.”³⁹

47. As explained in Canada's Counter-Memorial, the ordinary meaning of “procurement” as used in Article 1108, in its context and in light of its object and purpose, has been expressly considered and applied in two NAFTA Chapter 11 disputes. The *ADF Group Inc. v. United States* Tribunal held that “[i]n 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’.”⁴⁰ The Tribunal in *ADF* noted that the “pertinent issue” was whether the measure “constituted or involved ‘procurement by a Party’.”⁴¹ As Canada explained in its Counter-Memorial, the *UPS* Tribunal adopted a similar interpretation of procurement.⁴² Accordingly, if the measures at issue involve the acquisition of products or services by a Party or State enterprise, then Article 1108 applies. There are no limitations or other restrictions on this language in Article 1108 that could justify a narrower interpretation.

48. In an effort to avoid this result, the Claimant argues that the relevant measure is not an act of procuring but “the failure to keep Windstream ‘whole’ after the moratorium decision was

³⁷ **CL-116**, *Vienna Convention on the Law of Treaties* (1969), Article 31(1) (“VCLT”).

³⁸ See, for example, **CL-064**, *Mobil Investments Canada, Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶¶ 251, 254 (“*Mobil – Decision*”).

³⁹ **CL-064**, *Mobil – Decision*, ¶¶ 250-255.

⁴⁰ **CL-022**, *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1) Award, 9 January 2003, ¶ 161 (“*ADF – Award*”).

⁴¹ **CL-022**, *ADF – Award*, ¶ 160.

⁴² **CL-088**, *UPS – Award*, ¶ 131.

made.”⁴³ According to the Claimant, this purported distinction matters because Article 1108 only applies to the act of “procuring” itself, and not to subsequent treatment provided to an investor under a procurement contract. In fact, the Claimant goes so far as to suggest that Article 1108 does not apply to “a decision to cancel the investor’s procurement contract.”⁴⁴

49. There is nothing in the language of Article 1108 itself that justifies such a contortion of the language. If accepted, the Claimant’s position would mean that a measure to procure (i.e. entering a FIT Contract) would be exempt from Article 1102 and 1103, but a measure to delay or stop that procurement (i.e. cancelling or pausing the implementation of that a FIT Contract) would not be. This is an absurd result. The term “procurement” covers all aspects of a procurement process, including any stoppage of it or other decisions related to it.

50. The Claimant’s entire notion of being kept “whole” is inextricably tied to the fact that it had a FIT Contract. Indeed, the deferral decision and how it related to the Claimant expressly involved the Claimant’s FIT Contract.⁴⁵ Similarly, any decision as to whether the Claimant would be able to take advantage of that FIT Contract notwithstanding the deferral also necessarily involves the Claimant’s FIT Contract. Accordingly, since the measures at issue here involve the FIT Program (a procurement program), and the Claimant’s FIT Contract (a procurement contract), they involve procurement and are thus covered by Article 1108.⁴⁶

⁴³ Claimant’s Reply Memorial, ¶ 609.

⁴⁴ Claimant’s Reply Memorial, ¶ 611.

⁴⁵ See for example, **C-0464**, Ministry of Energy, Presentation, “Offshore Wind: Options for Moving Forward” (Jan. 21, 2011), slides 4-6; **C-0921**, Ministry of Energy, Presentation, “Offshore Wind: Options for Moving Forward” (Jan. 13, 2011), slides 6-9; **C-0942**, E-mail from Brenda Lucas, Ministry of Environment to Sean Mullin, Premier’s Office et al (Jan. 24, 2011); **C-0965**, E-mail from Andrew Block, Ministry of Energy to Andrew Mitchell, Ministry of Energy and Craig MacLennan, Ministry of Energy (Feb. 4, 2011); **C-0966**, E-mail from Martha Murray, Ministry of Environment to Richard Linley, Ministry of Natural Resources et al (Feb. 8, 2011).

⁴⁶ However, even if this Tribunal agrees with the Claimant that an exception must be construed narrowly (which it should not), this does not mean that the narrowest interpretation possible is not, in fact, a broad one. This was the exact finding in *Canfor v. United States*. At issue in that case was the application of NAFTA Article 1901(3). The *Canfor* Tribunal carefully considered the text of Article 1901(3), and having decided to apply a narrow interpretation, it held that the provision in fact “sets forth a broad exclusion”. The language of Article 1108 would require the same approach as adopted by the Tribunal in *Canfor*. The narrowest interpretation possible would lead to the conclusion that Article 1108 creates a broad exclusion for procurement. **CL-030**, *Canfor Corporation v. United States of America and Terminal Forest Products Ltd. v. United States of America* (UNCITRAL) Decision on Preliminary Question, 6 June 2006, ¶ 262.

2. Article 1108 Does Not Require that the Government Take Possession of or Title to the Goods or Services Procured

51. In a further attempt to avoid this result, the Claimant argues that the FIT Program cannot constitute procurement because “‘procurement’ refers to the obtaining of title to or possession of a good or a service” and “‘procurement’ does not extend to procurement of electricity by the OPA for the purpose of reselling it to customers”.⁴⁷ The Claimant has no authority to support this restrictive interpretation of Article 1108.⁴⁸

52. Nothing in the words of Article 1108 requires that procurement be for government benefit or use and not for the purpose of resale to the public. Such a limitation could have been included in Article 1108, but it was not, and the Claimant cannot be permitted to introduce it now. Indeed, the measures before both of the NAFTA Chapter 11 Tribunals that have applied the exception to date involved procurement for the benefit of the public, not the government. *ADF* involved the procurement of a highway interchange, which was meant for public use and not solely for the use of the government. In *UPS*, the Tribunal determined that certain services were covered by Article 1108 despite the fact that the services were provided for the benefit of, and paid for by, the persons or companies importing goods by mail rather than by the government.⁴⁹ Neither Tribunal required government ownership or possession of the procured goods or services.

53. Moreover, even if this were a relevant consideration (and it is not), as the WTO Appellate Body concluded when undertaking its own analysis of Ontario's FIT Program, “the Government of Ontario takes possession over electricity and therefore purchases electricity.”⁵⁰ In short, even if the Claimant could prove that possession is a necessary condition of procurement, the Claimant's argument would fail because Ontario does take possession of the electricity.

⁴⁷ Claimant's Reply Memorial, ¶ 612.

⁴⁸ As Canada explains below, the Claimant incorrectly cites to *ADF* in ¶ 610 of its Reply Memorial.

⁴⁹ The fee is described as “the government's efforts to help recover costs from those who benefit from services, and is similar to arrangements in the United States and other countries.” Available at: <http://www.canadapost.ca/tools/pg/manual/PGcustoms-e.asp>; <http://www.cbsa-asfc.gc.ca/import/postalpostale/duty-droits-eng.html>.

⁵⁰ **RL-086**, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector, Canada – Measures Relating to the Feed-In Tariff Program* (WT/DS412/AB/R, WT/DS426/AB/R), Reports of the Appellate Body, 19 February 2013, at ¶¶ 5.127-5.128.

C. Conclusion

54. Based on the foregoing, Ontario's treatment of the Claimant was provided under a procurement contract, and as such, Article 1108 applies. Accordingly, Articles 1102 and 1103 do not apply to the conduct at issue and the claims based on those Articles must be dismissed.

II. The Claimant Has Still Failed to Demonstrate a Violation of Articles 1102 and 1103

A. Summary of Canada's Position

55. In its Reply Memorial, the Claimant continues to allege that Canada has violated Articles 1102 and 1103 by according it less favourable treatment than the treatment accorded to TransCanada and Samsung.⁵¹ Even assuming that Article 1108 does not apply and that the Tribunal can consider these allegations, the claims are baseless.

56. With regard to Article 1102, the Claimant continues to inappropriately compare the treatment it was accorded after the deferral to the treatment accorded to TransCanada following Ontario's decision not to proceed with TransCanada's Oakville gas plant.⁵² Specifically, it misapplies the like circumstances analysis by conflating the elements of treatment and circumstances. It argues that it is in like circumstances with TransCanada because of similar treatment accorded to them, namely, having received a PPA, being placed in Force Majeure, allegedly having its project cancelled, and allegedly being promised to be kept "whole".⁵³ It then erroneously argues that Canada has breached Article 1102 through the Government of Ontario's different treatment of the Claimant and TransCanada.⁵⁴ The Claimant provides no rationale as to why the circumstances surrounding the treatment, for example, the separate legal regimes, procurement programs or commercial realities, should be ignored. In effect, it has read "like circumstances" out of the Article 1102 test.

⁵¹ Claimant's Reply Memorial, ¶ 606. Since the Claimant provides no response to the Canada's arguments that it failed to prove that the Ontario Government breached Canada's obligations under Article 1103 through its treatment of Samsung, Canada rests on the arguments it made in paragraphs 355 to 357 of its Counter-Memorial that Samsung is not in like circumstances with the Claimant.

⁵² Claimant's Reply Memorial, ¶¶ 614-624.

⁵³ Claimant's Reply Memorial, ¶¶ 619-620.

⁵⁴ Claimant's Reply Memorial, ¶¶ 606-624.

57. The Claimant also fails to establish that its circumstances are more like those of TransCanada, rather than the circumstances of other offshore wind proponents that sought to participate in the FIT Program. The Claimant's argument is essentially that all alleged PPA cancellations should be treated the same irrespective of the circumstances that led to them, their implications, or their different commercial realities. There is no merit to such a position. Even if the Tribunal were to compare the treatment accorded to the Claimant and TransCanada, the Claimant provides no evidence that any difference of treatment was based on the nationality of the investors. As a result, its allegations with respect to a breach of Article 1102 must be rejected.

58. With regard to Article 1103, the Claimant refers only to its argument in paragraph 645 of its Memorial, without responding to Canada's arguments. As such, Canada maintains its position as set out in paragraphs 355 to 357 of its Counter-Memorial that the Claimant has not been accorded treatment in like circumstances to Samsung, and therefore there has been no breach of Canada's obligations under Article 1103.

B. The Claimant Misidentifies Treatment as Circumstances

59. In its Reply Memorial, the Claimant argues that it is in like circumstances with TransCanada because they both received PPAs from the OPA and were subsequently placed in Force Majeure, following which their projects were cancelled while at the same time being promised that they would be kept "whole".⁵⁵ As already shown in Canada's Counter-Memorial,⁵⁶ it is not true that the Claimant's FIT Contract was cancelled or that the Claimant was told that it would be kept "whole". However, even if that were true, the legal analysis that the Claimant applies is wrong. All of the actions identified by the Claimant to demonstrate like circumstances constitute treatment, not circumstances. The circumstances are the underlying context in which the treatment was accorded, not the treatment itself.

60. By conflating treatment and the circumstances in which it was accorded, the Claimant would effectively strike the like circumstances requirement from Articles 1102 and 1103 of the

⁵⁵ Claimant's Reply Memorial, ¶¶ 616-623.

⁵⁶ Canada's Counter-Memorial, ¶¶ 265-268; RWS-Cecchini, ¶ 17.

NAFTA. As the *ADM v. Mexico* Tribunal made clear, the comparator investors and investments must be found to be “in like circumstances” before considering the treatment accorded.⁵⁷ The requirement to establish that the comparators are in like circumstances is a precondition to a finding of less favourable treatment. As such, the “like circumstances” and “more favourable treatment” analysis cannot be conflated.

C. TransCanada and the Claimant Are Not in Like Circumstances

61. Canada has already shown that TransCanada and the Claimant were not in like circumstances,⁵⁸ and it will not repeat itself here. In short, TransCanada was not a participant in the FIT Program, and thus, it was accorded treatment in fundamentally different circumstances. In its Reply Memorial, the Claimant responds that the “process by which contracts were procured is irrelevant” because the alleged discriminatory treatment was not accorded “during the procurement process.”⁵⁹ This assertion is without merit. In the context of the deferral on offshore wind, the Claimant’s status as a FIT Contract holder is a directly relevant circumstance in assessing the treatment accorded to it.⁶⁰ In fact, the decision to “freeze” the Claimant’s Project was entirely based on the terms and conditions of its FIT Contract and the FIT Rules. In contrast, TransCanada received a PPA pursuant to a Request for Proposals for a gas-fired electricity generation facility, not a renewable energy facility.⁶¹ Its PPA was not a FIT Contract. Indeed, TransCanada was not even eligible to participate in the FIT Program, as it was not a renewable energy generating facility.⁶² As explained in Canada’s Counter-Memorial, given that TransCanada was not a FIT Contract holder, none of the circumstances surrounding the FIT Program applied to it.⁶³

⁵⁷ **CL-023**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/05) Award, 21 November 2007, ¶ 196 (“*ADM – Award*”).

⁵⁸ Canada’s Counter-Memorial, ¶¶ 349-354.

⁵⁹ Claimant’s Reply Memorial, ¶ 615.

⁶⁰ Canada’s Counter-Memorial, ¶ 348.

⁶¹ Canada’s Counter-Memorial, ¶ 350.

⁶² **R-0091**, FIT Program Rules, v. 1.3, s. 2.1(a).

⁶³ Canada’s Counter-Memorial, ¶¶ 349-354.

62. Similarly, following the announcement of the deferral on February 11, 2011, the circumstances surrounding the FIT Program continued to apply to the Claimant. As the counterparty to the FIT Contract, the OPA offered to discuss certain contractual implications of the deferral with the Claimant.⁶⁴ These discussions were based solely on the Claimant's FIT Contract. In this regard, the Claimant's status as a FIT Contract holder was a precondition to the treatment accorded to it. In contrast, the discussions with TransCanada occurred outside of the context of the standardized FIT Program. Accordingly, the Claimant and TransCanada were not accorded treatment in like circumstances.

D. The Absence of an Identical Comparator Does Not Permit the Claimant to Ignore Comparators in "Like" Circumstances

63. As Canada previously established,⁶⁵ the absence of an identical comparator does not permit the Claimant to ignore comparators in more "like" circumstances than its chosen comparator. Citing the *Methanex v. United States* Tribunal, the Claimant states that "it would be perverse to refuse to find and to apply less 'like' comparators when no identical comparators existed".⁶⁶ However, the Claimant provides no support for its argument that TransCanada is a more appropriate comparator than other proponents of offshore wind projects in Ontario, such as SouthPoint Wind.⁶⁷ The Claimant's comparison of the language of the Force Majeure provisions of their procurement contracts does not demonstrate that TransCanada and the Claimant were in like circumstances. Indeed, while it is true that none of the other proponents of offshore wind projects had a FIT Contract, it is equally true that neither did TransCanada.

64. Of greater relevance is the fact that the other proponent of an offshore wind project that applied for a FIT Contract was subject to the same legal and regulatory regime as the Claimant. The deferral applied to that proponent's project as well as all other offshore wind projects, whether owned by Canadian, U.S. or other investors, but it did not apply to TransCanada. There

⁶⁴ RWS-Cecchini, ¶ 16.

⁶⁵ Canada's Counter-Memorial, ¶¶ 359-360.

⁶⁶ Claimant's Reply Memorial, ¶ 624; **CL-063**, *Methanex Corporation v. United States of America* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter B, ¶ 17 ("*Methanex - Award*").

⁶⁷ Claimant's Reply Memorial, ¶ 624.

is no reason to ignore these comparators. MNR cancelled their applications for Crown land, including those that already had Applicant of Record (“AOR”) status.⁶⁸ In fact, because of its FIT Contract, the Claimant received better treatment than any other proponent of an offshore wind project in Ontario when the deferral was announced and implemented, since its Crown land applications were not cancelled.

65. Article 1102 does not require Canada to offer the Claimant additional advantages that were not made available to all of the other investors who were subject to the same measures that the Claimant alleges breach Canada's obligations under the NAFTA. The Claimant's attempts to ignore the treatment accorded to other proponents of offshore wind projects, including the other FIT applicant, must be rejected.

E. There Is No Evidence of Nationality-Based Discrimination

66. Even if the Tribunal were to conclude that the Claimant is in like circumstances with TransCanada, which Canada maintains it is not, the Claimant fails to establish that it was accorded less favourable treatment due to its nationality.

67. The national treatment obligation in Article 1102 is designed to protect against nationality-based discrimination.⁶⁹ Consequently, in order to demonstrate a violation of Article 1102, the

⁶⁸ Canada's Counter-Memorial, ¶¶ 358-360; **C-0725**, Ministry of the Environment, Policy Decision Notice, Renewable Energy Approval Requirements for Off-shore Wind Facilities – An Overview of the Proposed Approach (EBR Registry Number: 011-0089) (Feb. 11, 2011) (“EBR Decision Notice”); **C-0346**, Ministry of Natural Resources, EBR Posting 011-0907.

⁶⁹ On behalf of the United States, see **RL-071**, *The Loewen Group Inc., and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB (AF)/98/3) Counter-Memorial of the United States of America, 30 March 2001, p. 123: (“[T]hey have no evidence of any “nationalistic” bias on the part of the Mississippi judiciary.”). On behalf of Mexico see **RL-066**, *GAMI Investments, Inc. v. Mexico* (UNCITRAL) Statement of Defense, 24 November 2003, ¶ 273: (“A violation of national treatment requires discrimination on the basis of nationality.”). See also, **RL-080**, *Methanex Corporation v. The United States of America* (UNCITRAL) Mexico Fourth Submission pursuant to Article 1128, 30 January 2004, ¶ 16: (“When applying the national treatment rule, the *only* relevant issue of status is the investor's nationality. Where a breach of Article 1102 is alleged, it is less favourable treatment based on the Claimant's Canadian nationality *only* that can give rise to a finding of breach of Article 1102”). On behalf of Canada, see **RL-083**, *Pope & Talbot v. Government of Canada* (UNCITRAL) Counter-Memorial of the Government of Canada, 29 March 2000, ¶ 166: (“Article 1102(2) does not prevent a Party from implementing a measure that affects investments differently as long as the measure neither directly nor indirectly discriminates on the basis of nationality as between foreign and domestic investments.”). See also **RL-085**, *United Parcel Service of America, Inc. v. Government of Canada* (UNCITRAL) Counter Memorial (Merits Phase) of the Government of Canada, 22 June 2005, ¶ 585: (“The terms of Article 1102...reveal the article's general purpose of preventing nationality-based discrimination.”). See also **RL-079**, *Methanex Corporation v. The United States of America* (UNCITRAL) Canada's Fourth Submission pursuant to Article 1128, 30 January 2004, ¶ 5: (“[Article 1102] prohibits treatment which

Claimant must establish that it was accorded less favourable treatment than a Canadian investor because it is an investor of another NAFTA Party. The Claimant provides no evidence that this was the case. Instead, it simply states that TransCanada was able to reach a solution with the OPA, whereas Windstream was not able to do so following the Ontario Government's deferral of offshore wind development.⁷⁰ However, the fact that TransCanada and Windstream reached different negotiated outcomes does not even suggest, let alone establish, the occurrence of discrimination on the grounds of nationality. In the absence of any proof of nationality-based discrimination, the Claimant's Article 1102 claim must be dismissed.

F. Conclusion

68. The Claimant still fails to meet its burden of proving that the treatment accorded to it by Ontario following the deferral decision breached Canada's obligations under Articles 1102 and 1103. With respect to its Article 1102 claim, the Claimant fails to establish that it was accorded treatment in like circumstances with the one comparator it identifies. Further, the comparator it identifies is the wrong one. The fact is that the treatment accorded to the Claimant was not less favorable than that accorded to all other offshore wind proponents in Ontario. Finally, there is simply no evidence of nationality-based discrimination. With respect to Article 1103, the Claimant has not provided any further response. Canada maintains its position that there is no breach of Article 1103. The claims under Articles 1102 and 1103 must both be dismissed.

discriminates on the basis of the foreign investment's nationality."); See also **RL-073**, *Mesa Power Group, LLC v. Government of Canada*, (UNCITRAL) Counter-Memorial of the Government of Canada, 28 February 2014, ¶ 354: ("all three NAFTA Parties have agreed that the national treatment obligation is designed to protect against discrimination on the basis of nationality."); **RL-074**, *Mesa Power Group, LLC v. Government of Canada*, (UNCITRAL) Rejoinder of the Government of Canada, 2 July 2014, ¶ 91: ("the purpose of Article 1102 is to prevent nationality-based discrimination."); **RL-036**, *Mesa Power Group LLC v. Government of Canada* (UNCITRAL) Submission of the United States of America, 25 July 2014, ¶ 11: ("NAFTA's national treatment provision, Article 1102, is designed to prohibit discrimination on the basis of nationality.") ("*Mesa – 1128 Submission of the United States*"); **RL-072**, *Mesa Power Group LLC v. Government of Canada* (UNCITRAL) Submission of Mexico, 25 July 2014, ¶ 14: ("The discrimination prohibited by Article 1103 must be on the basis of nationality..."). This agreement of the NAFTA Parties constitutes "subsequent practice" under Article 31(3)(b) of the *Vienna Convention on the Law of Treaties*, **CL-116**, VCLT, Article 31 (3)(b); **CL-060**, *The Loewen Group Inc., and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB (AF)/98/3) Award, 26 June 2003, ¶ 139: ("only to nationality-based discrimination and that it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality") ("*Loewen – Award*"); **CL-023**, *ADM - Award*, ¶ 205: ("Article 1102 prohibits treatment which discriminates on the basis of the foreign investor's nationality. Nationality discrimination is established by showing that a foreign investor has unreasonably been treated less favourably than domestic investors in like circumstances").

⁷⁰ Claimant's Reply Memorial, ¶ 622.

III. The Claimant Has Still Failed to Demonstrate a Violation of Article 1110

A. Summary of Canada's Position

69. In its Counter-Memorial, Canada explained why the Claimant had failed to prove that the measures of the Government of Ontario it challenged breached Canada's obligations under Article 1110.⁷¹ Canada also explained that, in the context of an expropriation claim, the Tribunal must consider three questions: (1) what is the investment at issue; (2) is that an investment capable of being expropriated; and (3) did the challenged measures amount to an expropriation of that investment.⁷² In its Reply Memorial, the Claimant still fails to adequately to answer these questions.

70. First, the Claimant continues to confuse the issue with respect to the investment that it claims the measures of the Ontario Government expropriated. It alleges that its investment is its enterprise, its FIT Contract and its "Project", the latter being a catch-all term for the first two as well as a collection of other studies and alleged assets.⁷³ However, the Claimant does not argue that all of these alleged investments have been expropriated. It has valued only the estimated net revenue from the operation of a wind project in accordance with its FIT Contract as having been expropriated.⁷⁴ Indeed, the Claimant equates its FIT Contract with "a guaranteed revenue stream over a 20-year period".⁷⁵ Canada refuted this inappropriate assertion in its Counter-Memorial.⁷⁶

71. Second, the Claimant has failed to rebut Canada's explanation that the FIT Contract, understood in the way that the Claimant has equated it with a right to a revenue stream, is not an investment capable of being expropriated.⁷⁷ Canada reiterates that the FIT Contract, at the time of the alleged breach, gave rise only to a contingent interest in a potential future revenue stream. The Claimant's attempt to distract the Tribunal by focusing on the existence and validity of its

⁷¹ Canada's Counter-Memorial, ¶¶ 458-504.

⁷² Canada's Counter-Memorial, ¶ 463.

⁷³ Claimant's Reply Memorial, ¶¶ 455-458; Claimant's Memorial, ¶ 493.

⁷⁴ Claimant's Reply Memorial, ¶¶ 736-737; Claimant's Memorial, ¶¶ 679-683.

⁷⁵ Claimant's Memorial, ¶ 3.

⁷⁶ Canada's Counter-Memorial, ¶¶ 471-473.

⁷⁷ Canada's Counter-Memorial, ¶¶ 465-473.

FIT Contract is misleading. Rights under the FIT Contract could only have been expropriated if those rights had vested such that they provided a demonstrable economic benefit or asset of value. As the rights to a guaranteed 20-year revenue stream had not vested at the time in question, they were not capable of being expropriated.

72. Third, even if the right to the revenue stream under the FIT Contract were capable of being expropriated, the Claimant has failed to prove that it has in fact been expropriated. The Claimant misstates the international law test for indirect expropriation, suggesting that any regulatory measure that has a negative effect on value amounts to an expropriation. That is wrong. As Canada has shown,⁷⁸ and will further show below, the measures at issue did not substantially deprive the Claimant of its investment because that investment had no value at the time of the alleged breach. Moreover, the challenged measures are non-discriminatory regulatory measures of general application, taken in good faith in pursuit of a legitimate public welfare objective. Such measures do not amount to an indirect expropriation.

73. For all of the reasons explained in Canada's Counter-Memorial and further explained below, the Tribunal should dismiss the claims of a breach of NAFTA Article 1110.

B. The Claimant Alleges that Ontario Expropriated Its Right to a Revenue Stream Under the FIT Contract

74. The Claimant argues that Canada has mischaracterized the investment that the Claimant alleges was expropriated by taking out of context the Claimant's statement that the FIT Contract gives Windstream Wolfe Island Shoals ("WWIS") Inc. a right to a guaranteed revenue stream.⁷⁹ In its Reply Memorial, the Claimant purports to clarify its allegation that WWIS Inc., the FIT Contract and the "WWIS Project"⁸⁰ each constitutes an investment capable of being expropriated.⁸¹

⁷⁸ Canada's Counter-Memorial, ¶¶ 479-481.

⁷⁹ Claimant's Reply Memorial, ¶¶ 457-458.

⁸⁰ In paragraph 493 of its Memorial, the Claimant defines the WWIS Project as including "all of the following which are the result of a commitment of capital": the FIT Contract, a \$6 million letter of credit, the work product of WWIS Inc. in connection with the development of the Project including wind resource studies, the data that WWIS Inc. has collected or acquired in connection with the Project including wind resource data and meteorological data, a

75. However, the Claimant has not actually alleged and the evidence does not support a claim that the Claimant's enterprise has been expropriated. NAFTA tribunals have considered the following criteria in determining whether a claimant has established indirect expropriation of an enterprise:

(i) whether the investor remained in control of its investment, (ii) whether it directed its day-to-day operations, (iii) whether its officers and employees were detained by the State, (iv) whether the State supervised the work of the investor's officers and employees or not, (v) whether the State had taken the proceeds of sales other than through taxation, (vi) whether the State interfered with management or shareholders' activities, (vii) whether the State prevented the distribution of dividends to shareholders, (viii) whether the State interfered with the appointment of directors or management, and (ix) whether the State had taken any other actions ousting the investor from full ownership and control of the investment.⁸²

76. The Claimant has not even attempted to argue that any of these criteria are met in this case. Nor could it. At all times, the Claimant has retained full direction and control over the operation of its enterprise WWIS Inc. The Ontario Government has never directed the day-to-day operations of the enterprise or detained or supervised its corporate officers or employees in their work. Nor has the Ontario Government ever interfered with the activities of management or shareholders of the enterprise, prevented the enterprise from distributing dividends to its shareholders, interfered with directorial or managerial appointments of the enterprise, or taken any other action ousting the Claimant from full ownership and control of WWIS Inc.

77. Similarly, the Claimant has not actually alleged that it has effectively lost possession of, or full direction and control over, the assets that it argues comprise the WWIS Project, namely the work product of WWIS Inc. in connection with the development of the Project, the data that

meteorological tower, a turbine supply agreement with Siemens, and land leases concluded in connection with the Project.

⁸¹ Claimant's Reply Memorial, ¶¶ 447, 457-458, 473-477.

⁸² **CL-037**, *Chemtura Corporation v. Government of Canada* (UNCITRAL) Award, 2 August 2010, ¶ 245 ("Chemtura – Award") citing **CL-074**, *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Interim Award, 26 June 2000, ¶ 100 ("Pope & Talbot – Interim Award"). See also **CL-061**, *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Award, 31 March 2010, ¶¶ 146-147 ("Merrill & Ring – Award"); **RL-024**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/02/1) Award and Dissenting Opinion, 16 December 2002, ¶ 152 ("Feldman – Award"); **CL-063**, *Methanex – Award*, Part IV, Chapter D, ¶ 16.

WWIS Inc. has collected or acquired in connection with the Project, a meteorological tower, a TSA with Siemens, and land leases concluded in connection with the Project.⁸³

78. As is clear from the damages valuations that it presents, the Claimant's allegation of expropriation focuses entirely on one element of its investment, the FIT Contract, which the Claimant asserts is its "most valuable asset".⁸⁴ The Claimant asserts that the FIT Contract satisfies paragraph (g) of the definition of "investment" in NAFTA Article 1139 because the Claimant could not execute it without depositing a \$6 million letter of credit with the OPA. It also relies on paragraph (h) of Article 1139 because it claims that the FIT Contract is intangible personal property under Ontario law.⁸⁵ It further alleges that "WWIS engaged in developing the Project with the expectation that doing so would result in an economic benefit to WWIS, and by extension to its parent, Windstream" and that the FIT Contract was acquired in the expectation or used for the purpose of economic benefit or other business purposes.⁸⁶

79. However, as *Emmis v. Hungary*, the very case the Claimant relies on, states, "it is important to emphasize that the protection from expropriation in relation to rights conferred under contract still requires identification of a property interest or asset held by the claimant."⁸⁷ Indeed, as that Tribunal held, the question for the purposes of an expropriation claim is what rights conferred under a contract were allegedly taken, and whether they were actual property interests or assets held at the relevant time by the Claimant.⁸⁸ Based on the facts in that case, the Tribunal concluded that while property rights under Hungarian law included intangible assets, the specific broadcasting agreement at issue did not confer any rights for the relevant period constituting valuable assets capable of expropriation.⁸⁹ As demonstrated by *Emmis*, it is not sufficient to identify the existence and validity of the FIT Contract; the Claimant must also prove

⁸³ Claimant's Memorial, ¶ 493.

⁸⁴ Claimant's Reply Memorial, ¶¶ 6, 664, 741; CER-Deloitte (Low & Taylor)-2, ¶ 2.3.

⁸⁵ Claimant's Reply Memorial, ¶¶ 448, 456-471.

⁸⁶ Claimant's Memorial, ¶ 495; Claimant's Reply Memorial, ¶ 463.

⁸⁷ **RL-022**, *Emmis International Holding, B.V., et al. v. The Republic of Hungary* (ICSID Case No. ARB/12/2) Award, 16 April 2014, ¶ 165 ("*Emmis – Award*").

⁸⁸ **RL-022**, *Emmis – Award*, ¶¶ 150, 158-177.

⁸⁹ **RL-022**, *Emmis – Award*, ¶¶ 192, 221.

that the specific rights in question under the Contract have vested such that they are capable of being expropriated, and that there was an expropriation.

80. In its Reply Memorial, the Claimant misses these points entirely. Relying on the incorrect assertion by its expert that “Canada states in the Counter-Memorial that the FIT Contract does not give WWIS to a ‘vested right’,”⁹⁰ the Claimant dedicates three pages of its Reply Memorial to demonstrating that the FIT Contract is a valid contract that constitutes intangible personal property under Ontario law.⁹¹ However, Canada has never argued the contrary.

81. There is no dispute that the FIT Contract is a valid and binding contract that imposes some vested rights and obligations on the OPA and the Claimant.⁹² For example, both parties maintain their Force Majeure termination rights under Section 10.1(g), which allow either party to terminate the FIT Contract if events of Force Majeure delay the COD for an aggregate of more than 24 months after the original MCOB.⁹³ Termination for Force Majeure by either party would also require the OPA to return Windstream's letter of credit it deposited as Completion and Performance Security.⁹⁴

82. However, the Claimant is not alleging that there has been an indirect expropriation of these rights or any other alleged vested rights that they have under the FIT Contract. Similarly, Ms. Powell does not identify any property interests or rights to assets that were allegedly expropriated. Further, the Claimant's damages claims do not seek to value these rights in any way. To the contrary, the only alleged right under the FIT Contract that the Claimant actually claims has been expropriated – i.e. the only alleged right which it values in its damages claim –

⁹⁰ Ms. Powell's assertion is based on an inaccurate partial quotation. Canada's full quotation reads: “Contrary to its allegations, the Claimant never had a vested right in the business activity of generating revenue from the operation of a wind project in accordance with its FIT Contract.” Canada's Counter-Memorial, ¶ 471; CER-Powell-2, ¶ 82.

⁹¹ Claimant's Reply Memorial, ¶¶ 465-471.

⁹² Claimant's Reply Memorial, ¶ 468; **C-0680**, Letter from the Ontario Power Authority to Adam Chamberlain, Borden Ladner Gervais (Jan. 10, 2014).

⁹³ **R-0092**, FIT Contract, v. 1.3, s. 10.1(g): (“If, by reason of one of more events of Force Majeure, the Commercial Operation Date is delayed by such event(s) of Force Majeure for an aggregate of more than 24 months after the original Milestone Date for Commercial Operation (prior to any extension pursuant to Section 10.1(f)), then notwithstanding anything in this Agreement to the contrary, either Party may terminate this Agreement upon notice to the other Party and without any costs or payments of any kind to either Party, and all Completion and Performance Security shall be returned or refunded (as applicable) to the Supplier forthwith.”).

⁹⁴ **R-0092**, FIT Contract, v. 1.3, s. 10.1(g).

is the alleged right that it had as a FIT Contract holder to sell 300 MW of electricity to the OPA at the set price of 19 cents per kWh for a term of 20 years. Said differently, and as the Claimant itself admitted in its introduction to its Memorial,⁹⁵ it is the Claimant's alleged right to a revenue stream under the FIT Contract that must be considered in order for this Tribunal to determine whether it was a right that was capable of expropriation at the time of the alleged breach.

C. The Alleged Right to a Revenue Stream under the FIT Contract Was Not Capable of Being Expropriated at the Time of the Alleged NAFTA Breach

83. Canada's Counter-Memorial explained that the Claimant's alleged right to a guaranteed revenue stream under the FIT Contract was not an interest capable of being expropriated at the time of the alleged breach because it was only contingent and not yet vested.⁹⁶ As NAFTA tribunals have consistently held, rights that are contingent or that have not been acquired are not capable of being expropriated.⁹⁷ At the time of the alleged breach, the FIT Contract did not give the Claimant, in the words of the Tribunal in *Merrill & Ring Forestry LP v. Canada*, "an actual and demonstrable entitlement [...] to a certain benefit".⁹⁸

84. Even the cases cited by the Claimant do not support its position. For example, the Tribunal in *Emmis* actually concluded in the very same paragraph cited by the Claimant that "the loss of a right conferred by contract may be capable of giving rise to a claim of expropriation but only if it gives rise to an asset owned by the claimant to which a monetary value may be ascribed. [...] Contractual or other rights accorded to the investor under host state law that do not meet this test will not give rise to a claim of expropriation."⁹⁹

⁹⁵ Claimant's Memorial, ¶ 3.

⁹⁶ Canada's Counter-Memorial, ¶¶ 465-473.

⁹⁷ Canada's Counter-Memorial, ¶ 468; **RL-024**, *Feldman – Award*, ¶ 152: ("However, as with S.D. Myers, it may be questioned as to whether the Claimant ever possessed a 'right' to export that has been 'taken' by the Mexican government."); **CL-057**, *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) Award, 26 January 2006, ¶ 208: ("[C]ompensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited.") (*Thunderbird – Award*); **CL-061**, *Merrill & Ring – Award*, ¶ 142: ("The right concerned would have to be an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument. This reasoning underlies the *Feldman* tribunal's conclusion that an investor cannot recover damages for the expropriation of a right it never had. Expropriation cannot affect potential interests.").

⁹⁸ Canada's Counter-Memorial, ¶¶ 465-473; **CL-061**, *Merrill & Ring – Award*, ¶ 142.

⁹⁹ **RL-022**, *Emmis – Award*, ¶ 169 (emphasis added).

85. Similarly, the Claimant's reliance on the award in *PSEG Global v. Turkey* is misplaced. The *PSEG* merits award, which dismisses the expropriation claim in three paragraphs, does not address whether the concession contract in that case was an investment capable of being expropriated at the time of the alleged measure.¹⁰⁰ Instead, the jurisdictional award in *PSEG* addressed the existence and validity of an alleged contract because Turkey had argued, as a jurisdictional point, that there was no "valid and binding agreement to which both parties have expressed their consent to be bound."¹⁰¹ In determining that a valid and binding concession contract existed, the Tribunal indicated that "the fact that economically the project might be difficult to execute or even become unfeasible does not render the Contract invalid."¹⁰² It found that the parties were bound by the rights and obligations under the contract even though the concession agreement provided for its re-negotiation and the outcome of that re-negotiation was uncertain.¹⁰³ These conclusions are irrelevant to the issues in this arbitration. In *PSEG* the question was purely a jurisdiction one – did an investment exist that was protected by the Treaty.¹⁰⁴ As Canada has made clear above, that is not the issue before the Tribunal here.

86. The Claimant also invites a false analogy between its FIT Contract and the example provided by the *Merrill & Ring* Tribunal of "an existing contract for a certain volume of logs, at a certain price",¹⁰⁵ which the Tribunal remarked could be capable of expropriation where there was the requisite degree of interference by the State. Here, the Claimant has an existing contract to sell energy produced from a proposed 300 MW offshore wind project for 19 cents per kWh. However, the real question is whether this contractual "right" to a revenue stream was a vested right that the Claimant possessed at the time of the challenged measure. In this regard, the Claimant has failed to address Canada's arguments. As Canada explained in its Counter-

¹⁰⁰ **CL-076**, *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Award, 19 January 2007, ¶¶ 278-280. The Tribunal only had to consider the issues of the contract's existence and validity of the contract in its jurisdictional decision. **CL-077**, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Decision on Jurisdiction, 4 June 2004, ¶¶ 79-105 ("PSEG – Jurisdiction").

¹⁰¹ **CL-077**, *PSEG – Jurisdiction*, ¶ 71.

¹⁰² **CL-077**, *PSEG – Jurisdiction*, ¶ 85 (emphasis added).

¹⁰³ **CL-077**, *PSEG – Jurisdiction*, ¶¶ 87-88, 96.

¹⁰⁴ **CL-077**, *PSEG – Jurisdiction*, ¶¶ 79-105.

¹⁰⁵ **CL-061**, *Merrill & Ring – Award*, ¶ 149.

Memorial, the FIT Contract provided only a potential, speculative interest in a future revenue stream, contingent upon, among other things, obtaining the required permits and reaching Commercial Operation by the deadlines required.¹⁰⁶ As such, it had no certain and demonstrable right to the revenue stream that it values in the context of its expropriation claim.

87. For this reason, the Claimant's attempts to distinguish the cases relied upon by Canada must also fail. The Claimant asserts that cases relied on by Canada are not relevant because there was no contract granting the claimants' rights to engage in the activities at issue in the respective cases, i.e. broadcasting, operating a gambling facility, or exporting cigarettes or logs.¹⁰⁷ This distinction would only be relevant if the Claimant had a contract that granted it the vested right to develop and operate its Project and to sell the energy it generated to the OPA. It did not. The Claimant had an opportunity to do this if it met certain conditions. The Claimant fails to recognize that, while the case at hand involves a contract, a contractual right may be expropriated only where it confers a demonstrable asset, not a speculative or contingent interest.

88. The interests that the Claimant alleges were expropriated were not the sort of interests that are capable of being expropriated at the time of the alleged breach. Its claim should be dismissed on this basis alone. However, as discussed below, even if the FIT Contract were an investment capable of being expropriated, the Claimant has still failed to establish an expropriation in this case.

D. The Deferral and the Alleged Failure to Insulate the Claimant from It Did Not Amount to an Indirect Expropriation of the Claimant's Investment

1. The Claimant Misstates the Test for Indirect Expropriation

89. The Claimant argues that the Government of Ontario's deferral of offshore wind development and its alleged "failure to insulate Windstream's investments from the effects" of

¹⁰⁶ Canada's Counter-Memorial, ¶¶ 45-70.

¹⁰⁷ Claimant's Reply Memorial, ¶ 464.

the deferral “rendered WWIS, the Project and the FIT Contract worthless” and amounts to an unlawful expropriation under Article 1110.¹⁰⁸

90. In its Counter-Memorial, Canada explained that an indirect expropriation occurs “from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure.”¹⁰⁹ Measures have an effect “equivalent to direct expropriation” when there is a “taking” of fundamental ownership rights that causes a substantial deprivation of investment.¹¹⁰

91. Canada also previously explained how, in an analysis of indirect expropriation, three factors provide guidance on whether there has been a substantial deprivation of an investment, though none is determinative either alone or in combination: (1) the economic impact of the measure or series of measures, (2) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations, and (3) the character of the measure or series of measures.¹¹¹ In considering these factors, the Tribunal should be guided by the NAFTA Parties’ understanding that non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives cannot be considered to be indirect

¹⁰⁸ Claimant’s Reply Memorial, ¶¶ 447, 453. It is not clear whether the Claimant is alleging that these measures constitute a single breach of Article 1110 or separate breaches. In its Memorial, the Claimant first characterized the deferral on offshore wind and the failure to insulate the Claimant from its effects at issue as one indirect expropriation in breach of Article 1110. Claimant’s Memorial, ¶¶ 22, 542: (“Ontario’s measures have substantially deprived Windstream of its investments and, therefore, amount to an unlawful expropriation of those investments, in breach of Article 1110 of NAFTA.”). However, in its Reply Memorial, the Claimant argues that the measures form two independent expropriations and separate breaches of Article 1110. Specifically, the Claimant asserts at paragraph 533 of its Reply Memorial that “[a]s explained in paragraphs 542 and 555 to 565 of Windstream’s Memorial, this [alleged] failure [to insulate Windstream’s investments from the effects of the deferral] is an independent breach of Article 1110.” However, these paragraphs in the Memorial contain no reference to an independent breach. Obviously, it is impossible to expropriate the same investment twice. Moreover, the Claimant’s damages arguments and expert reports analyze the measures as a single breach occurring not on February 11, 2011, the day the deferral was imposed, but on the last possible date on which the deferral could have been lifted and development of the Project restarted to achieve Commercial Operation before triggering the OPA’s Force Majeure termination right on May 4, 2017. Claimant’s Memorial, ¶¶ 318-325, 557, 662; Claimant’s Reply Memorial, ¶ 641, 672; CER-Deloitte (Bucci)-1, p. 9; CER-Deloitte (Low & Taylor)-1, ¶ 1.20; CER-Deloitte (Bucci)-2, p. 4; CER-Deloitte (Low & Taylor)-2, ¶¶ 1.7-1.12. Analyzing the measures together is the correct approach, as the Claimant did in both the merits and damages arguments in its Memorial, and continues to do in the damages arguments in its Reply Memorial. The Tribunal should disregard the Claimant’s new assertion on the merits of Article 1110 that its investment has been expropriated on two independent occasions.

¹⁰⁹ Canada’s Counter-Memorial, ¶ 475(a).

¹¹⁰ Canada’s Counter-Memorial, ¶¶ 462, 477.

¹¹¹ Canada’s Counter-Memorial, ¶ 475.

expropriations, except where they are so severe in light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith.¹¹²

92. As Canada explained, this understanding of indirect expropriation is reflected in the interpretative annexes contained in recent Canadian and U.S. investment treaties.¹¹³ The Claimant asserts that by referring to these annexes as an interpretative aid, “Canada seeks to unilaterally alter the language of Article 1110” and to add a broad public purpose exception to the provision.¹¹⁴ It bases this claim on the fact that the NAFTA Parties have not adopted a similar interpretative annex for NAFTA Chapter 11.¹¹⁵ However, the Claimant is wrong, as the lack of such an annex in the NAFTA is irrelevant. These annexes merely explain what the NAFTA Parties mean and have always meant by the term “indirect expropriation”,¹¹⁶ as affirmed by other submissions.¹¹⁷ They are expressly for greater certainty and “do not change the nature of the substantive obligations that existed under [...] prior agreements; instead, they merely elucidate, for the benefit of tribunals charged with interpreting the treaty, the Parties’ intent in agreeing to those obligations.”¹¹⁸

93. These principles also demonstrate that the Claimant’s reliance¹¹⁹ on the so-called “sole effects” doctrine is misplaced. According to this doctrine, “when making this determination [of whether a governmental measure constitutes an indirect expropriation], reference [may] be had

¹¹² Canada’s Counter-Memorial, ¶¶ 475, 494-504.

¹¹³ Canada’s Counter-Memorial, ¶ 475.

¹¹⁴ Claimant’s Reply Memorial, ¶¶ 504-505.

¹¹⁵ Claimant’s Reply Memorial, ¶¶ 504-505.

¹¹⁶ Canada’s Counter-Memorial, ¶ 475.

¹¹⁷ See **RL-066**, *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Counter-Memorial of the United States of America, 19 September 2006, pp. 159-160; **RL-078**, *Methanex Corporation v. United States of America* (UNCITRAL) Amended Statement of Defense of Respondent United States of America, 5 December 2003, ¶ 405, n. 636; **RL-068**, *Grand River Enterprises v. United States of America* (UNCITRAL) Counter-Memorial of the United States of America, 22 December 2008, p. 147.

¹¹⁸ **RL-035**, Andrea J. Menaker, “Benefiting From Experience: Developments in the United States’ Most Recent Investment Agreements” (2006), 12:1 U.C. Davis J. Int’l L. Pol’y, p. 122; **RL-061**, Andrew Newcombe, “Canada’s New Model Foreign Investment Protection Agreement” (Aug. 2004), pp. 5-6.

¹¹⁹ Claimant’s Reply Memorial, ¶ 503, fn. 796.

only to the effect of the measure on the property allegedly expropriated.”¹²⁰ In support of this approach, the Claimant relies primarily on cases outside of the NAFTA context, specifically *Vivendi II v. Argentina*, *Azurix v. Argentina*, and *Santa Elena v. Costa Rica*.¹²¹ However, these Tribunals were not interpreting NAFTA Article 1110, and the Claimant has not suggested any reason why they should outweigh the NAFTA precedents Canada has cited. The “sole effects” doctrine has not been endorsed by the NAFTA Parties, and has been rejected by commentators.¹²²

94. In any event, as Canada explained in its Counter-Memorial,¹²³ *Santa Elena* did not present the question of whether a regulatory measure amounted to an indirect expropriation. There was no question that a direct expropriation had occurred, as Costa Rica had issued an expropriation decree for the property in question.¹²⁴ The Tribunal’s statement that expropriatory environmental measures engage a State’s obligation to pay compensation¹²⁵ must be read in this context. Specifically, the fact that an expropriation had a public purpose could not render it non-compensable. However, Canada is not arguing that a public purpose alone immunizes a measure from being an expropriation.

95. The Claimant also overlooks the *Azurix* Tribunal’s holding that “the issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim. In the exercise of their public policy function, governments take all sorts of measures that

¹²⁰ **CL-108**, B. Mostafa, “The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law”, 15 *Austl. Int’l L.J.* 267 (2008), p. 267 (emphasis added).

¹²¹ Claimant’s Reply Memorial, ¶¶ 490-500.

¹²² See **RL-081**, Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer, 2009), § 7.24: (“Under customary international law, not all deprivations of property are expropriatory. [...] International law authorities have regularly concluded that no right to compensation arises for reasonably necessary regulations passed for the ‘protection of public health, safety, morals or welfare’ or for government regulations that are ‘non-discriminatory and ... within the commonly accepted taxation and police powers of states.’ [...] International investment arbitration] awards have confirmed that states may justify deprivations based on the exercise of what are called the state’s ‘police powers,’ [...] International authorities recognize three broad categories of police power regulation that might justify non-compensation where there is a deprivation [including] protection of human health and the environment”).

¹²³ Canada’s Counter-Memorial, ¶ 499.

¹²⁴ **CL-042**, *Compania del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1) Final Award, 17 February 2000, ¶ 17 (“*Santa Elena – Final Award*”).

¹²⁵ **CL-042**, *Santa Elena – Final Award*, ¶ 72.

may affect the economic value of investments without such measures giving rise to a need to compensate.”¹²⁶

96. In addition, the arguments rejected by the Tribunal in *Vivendi II* are not those advanced by Canada in this case, as Canada has not argued that any act of State must be presumed to be regulatory, absent proof of bad faith, or any State act causing loss of property cannot be classified as expropriatory.¹²⁷

97. The Claimant also overstates the conclusions of the Tribunal in *Pope & Talbot v. Canada*. In that case, the Tribunal rejected the notion that regulations could only be expropriatory if they were discriminatory.¹²⁸ This is not at issue here. More importantly, the *Pope & Talbot* Tribunal acknowledged that “not [...] every regulatory restraint can be likened to expropriation” and that a distinction may therefore be drawn at some point between the non-compensable regulation and expropriation.¹²⁹ Indeed, as Canada has explained, determining whether a measure constitutes an indirect expropriation requires a contextual inquiry that goes beyond purely the effects of a measure on the investment.¹³⁰

¹²⁶ **CL-025**, *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12) Award, 14 July 2006, ¶ 310.

¹²⁷ See **CL-041**, *Compagnia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina* (ICSID Case No. ARB/97/3) Award, 20 August 2007, ¶¶ 7.5.20-7.5.21 (“*Vivendi – IP*”).

¹²⁸ **CL-074**, *Pope & Talbot – Interim Award*, ¶ 99.

¹²⁹ **CL-074**, *Pope & Talbot – Interim Award*, ¶ 99, fn.71-72.

¹³⁰ **RL-065**, *Eli Lilly and Company v. Government of Canada* (UNCITRAL) Counter-Memorial of the Government of Canada, 27 January 2015, ¶ 407 citing **CL-081**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000, ¶¶ 281, 285 (holding that “international law makes it appropriate for tribunals to examine the purpose and effect of government measures.”) (“*S.D. Myers – Partial Award*”); **RL-081**, Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, (Wolters Kluwer, 2009), ¶ 7.7: (“the case-by-case, fact-based inquiry for indirect expropriation focusing on economic impact, legitimate expectations and the character of the government action is generally consistent with customary international law authorities on the scope of expropriation and the developing IIA jurisprudence on the scope of expropriation under IIAs.”); **RL-069**, M. Kinnear, A. Bjorklund and J. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, (Kluwer, 2006), at pp. 1110-15-1110-17 (noting that many observers have concluded “that the best approach is a fact-based, case-by-case assessment which draws on various factors discussed above [the effect of the measure, the context of government action and the purpose of the measure, legitimate investor expectations, and the intent of the host state]”).

2. The Claimant Has Failed to Establish any Substantial Deprivation of the Economic Value of Its Investment

98. As set out in Canada's Counter-Memorial, the deferral does not amount to an indirect expropriation because its economic impact did not substantially deprive the Claimant of the value of its investment.¹³¹ In its Reply Memorial, the Claimant argues again that it was substantially deprived of its investments because they were rendered worthless by the Ontario measures in question.¹³² This is wrong. The Claimant's Project was already valueless on the date of the alleged breach, and thus nothing Ontario did or did not do could have had any economic impact upon those investments. Alternatively, to the extent that the Tribunal believes that the Claimant's investment did have some value on the relevant date, any loss in the value resulted not from Ontario's deferral or subsequent actions or omissions, but from the Claimant's own failure to ensure that its FIT Contract remained "frozen" during the deferral by reaching a negotiated solution with its contractual counter-party, the OPA.

(a) The FIT Contract and Project Had No Value

99. An offshore wind project that has been permitted and built still has operational risk associated with it, but it has significant value.¹³³ An offshore wind project that has been fully permitted (which industry considers to be a project that has secured site access, all of its necessary permits, revenue support (e.g. a FIT Contract) and grid access) and has secured appropriate financing, is significantly more risky due to construction risks, but again, it has value.¹³⁴ However, as the experts from Green Giraffe, URS, and BRG all confirm, an offshore wind project that is not fully permitted and has not secured financing bears extraordinary risk¹³⁵ and as a result, has little to no material value depending on the circumstances.¹³⁶

¹³¹ Canada's Counter-Memorial, ¶¶ 477-489; **CL-074**, *Pope & Talbot – Interim Award*, ¶ 102; **CL-061**, *Merrill & Ring – Award*, ¶ 145; **CL-054**, *Grand River Enterprises Six Nations, Ltd, et al v. United States of America* (UNCITRAL) Award, 12 January 2011, ¶ 148; **CL-053**, *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Award, 8 June 2009, ¶ 357 ("*Glamis – Award*").

¹³² Claimant's Reply Memorial, ¶¶ 472-485.

¹³³ RER-Green Giraffe, ¶¶ 103-104.

¹³⁴ RER-Green Giraffe, ¶¶ 101-102.

¹³⁵ RER-BRG-2, ¶¶ 93, 104-107; RER-Green Giraffe, ¶¶ 94, 68-86; RER-URS-2, ¶¶ 16; RER-URS-1, ¶¶ 68-69.

¹³⁶ RER-Green Giraffe, ¶¶ 23, 70.

100. In this regard, it is important to recall that while the experts agree that obtaining a contract with 20 years of guaranteed revenue is typically a significant milestone in the development of an offshore wind project,¹³⁷ the value of such a contract cannot be considered in the abstract. It must be considered vis-à-vis the specific project for which it was offered – i.e. the specific terms of the Claimant's FIT Contract must be reviewed in order to determine whether it was a boon or a bane to its proposed Project's value. In this regard, it is essential to recall that the deadlines that the FIT Contract imposed on proponents to bring their projects into Commercial Operation necessarily required some level of development to have occurred prior to signing the FIT Contract – especially for large-scale projects like the Claimant's.¹³⁸ Otherwise, FIT applicants ran the risk of not being able to meet the aggressive timelines in the FIT Contract.

101. Given the Claimant's early stage of development, or complete lack thereof, when it signed the FIT Contract, its contractual deadlines were more than just aggressive. As URS concludes, they were impossible for the Claimant to meet.¹³⁹ As explained in Part III. D. 3(b) of Canada's damages arguments below, a project like the Claimant's, which had not secured site access, did not have a single one of the necessary permits, had a FIT Contract that imposed aggressive deadlines that could almost certainly not have been met, and had not been able to secure any significant financing of either equity or debt, is nothing more than a speculative sparkle in a developer's eye which has no material value in the real world. Accordingly, nothing that Ontario did substantially deprived the Claimant's investments of value and no indirect expropriation occurred.

(b) Even if the Claimant's Project Did Have Value, the Claimant's Own Actions Caused that Value to Be Reduced to Zero

102. As Canada explained in its Counter-Memorial, for a measure to be expropriatory the taking must be "permanent, and not ephemeral or temporary."¹⁴⁰ The evidence before this Tribunal leads

¹³⁷ RER-Green Giraffe, ¶¶ 68-69; RER-BRG-2, ¶¶ 28, 92.

¹³⁸ RER-URS-2, ¶¶ 4-8, 23(e), 175, 180-182.

¹³⁹ RER-URS-2, ¶¶ 3-9, 80.

¹⁴⁰ Canada's Counter-Memorial, ¶ 477 citing **RL-025**, *Fireman's Fund Insurance Company v. United Mexican States* (ICSID Case No. ARB(AF)/02/01) Award, ¶ 176(d) ("*Fireman's Fund – Award*"); **CL-053**, *Glamis – Award*, ¶ 360. See also **RL-048**, Christoph Schreuer, "*The Concept of Expropriation under the ETC and Other Investment*

to only one conclusion: the deferral is a temporary measure that was adopted to allow the Government of Ontario the time necessary to do the science required and develop the regulatory framework for assessing offshore wind projects. In its Reply Memorial, the Claimant argues that Canada has misunderstood the law, as the question is not whether the measure is permanent, but whether it results in a permanent deprivation of the value of the investment.¹⁴¹ Canada never argued that whether there was a permanent effect on the Claimant's investment is an irrelevant question. However, as Canada established in its Counter-Memorial,¹⁴² it is only relevant if the alleged permanent deprivation of value resulted from the measure that is alleged to be the expropriation. In this case it did not. Any allegedly permanent effect of the deferral on the Claimant's investments resulted from its own unwillingness to negotiate with the OPA on commercially reasonable terms to secure amendments that would have "frozen" its FIT Contract.¹⁴³

103. The Claimant blames the OPA for refusing to agree to the Claimant's unreasonable demands and the Ontario Government for failing to intervene in the Claimant's contract negotiations with the OPA. However, as explained in Canada's Counter-Memorial, and as summarized again below, the responsibility lies entirely upon the Claimant. The OPA, as contract counter-party, and the Ontario Government made reasonable proposals to attenuate the effects of the deferral on the Claimant's FIT Contract. Instead of negotiating reasonably, the Claimant sought much more favourable terms for itself that went well beyond "freezing" its FIT Contract. As a result, it was the Claimant that failed to insulate its own investment from the effects of the deferral, despite the OPA having given it the opportunity to do so.

(i) The Deferral Is a Temporary Measure

104. The Ontario Government adopted the deferral to ensure that offshore wind projects did not proceed in Ontario until an adequately informed policy framework could be developed based on the results of necessary scientific research, particularly regarding "measures for protecting

Protection Treaties", in 2 Transnational Dispute Management 1 (May 2005) pp. 28-29 and generally at p. 29: ("The deprivation would have to be permanent or for a substantial time.").

¹⁴¹ Claimant's Reply Memorial, ¶¶ 481-485.

¹⁴² Canada's Counter-Memorial, ¶¶ 477-481.

¹⁴³ Canada's Counter-Memorial, ¶¶ 487-489.

drinking water, transportation and navigation, and potential effects on fish and wildlife and shoreline ecosystems”, as well as the need for “a better understanding of how noise behaves over water and ice, foundation designs, [and] water quality impacts”.¹⁴⁴

105. The Claimant complains that the MOE has not completed the studies it identified as necessary in its research plan, and that the scientific studies that the Ontario Government has already completed in relation to offshore wind are not relevant to its Project.¹⁴⁵ These complaints are ill-founded. The MOE, which is leading the research program, has actively pursued the research in good faith.

106. As Canada explained in its Counter-Memorial, the initial research plan proposal, developed by MOE in March and April 2011¹⁴⁶ [REDACTED]

[REDACTED]

107. The Claimant attempts to minimize the significance of Ontario's efforts to conclude an [REDACTED] [REDACTED] claiming that such efforts are irrelevant because Ontario did not conduct any

¹⁴⁴ C-0725, EBR Decision Notice.

¹⁴⁵ Claimant's Reply Memorial, ¶ 511.

¹⁴⁶ See ¶¶ 277-293 of Canada's Counter-Memorial; R-0228, Ministry of the Environment, “Offshore Wind Development Research Plan” (Mar. 29, 2011); R-0230, Ministry of the Environment, Offshore Wind Development Research Plan, Vol. 1 (Mar. 31, 2011); R-0231, Ministry of the Environment, Offshore Wind Development Research Plan, Vol. 2 (Apr. 4, 2011); R-0232, Ministry of the Environment, Offshore Wind Development Research Plan, Vol. 3 (Apr. 5, 2011).

¹⁴⁷ R-0128, [REDACTED]

¹⁴⁸ RWS-Wallace-1, ¶ 42; R-0170, Ministry of the Environment, [REDACTED] (Oct. 26, 2010) (“MOE Research Priorities”).

¹⁴⁹ R-0232, Ministry of the Environment, Offshore Wind Development Research Plan, Vol. 3 (Apr. 5, 2011), p. 1.

research while [REDACTED]

[REDACTED] The Claimant appears to forget the fact that the Great Lakes are a shared waterway between both Canada and the United States. [REDACTED]

108. As Canada explained in its Counter-Memorial, [REDACTED] was delayed because of the 2011 general election in Ontario.¹⁵² The Claimant rejects this explanation,¹⁵³ and claims that “because of electoral concerns, the Ontario Government simply was not serious about [REDACTED]”¹⁵⁴ However, this assertion lacks merit, as there is no evidence that Mr. Wilkinson based his decision on its anticipated effects on the election. Mr. Wilkinson has attested that whether he imposed the deferral or allowed development of offshore wind projects to proceed, his decision would please some and upset others.¹⁵⁵

109. Moreover, Ontario Government officials knew the October 6, 2011 election was around the corner because of Ontario’s fixed election date law, which provides for a general election on the

¹⁵⁰ Claimant’s Reply Memorial, ¶¶ 442-443.

¹⁵¹ **R-0238**

R-0246

R-0256,

¹⁵² Canada’s Counter-Memorial, ¶ 283.

¹⁵³ Claimant’s Reply Memorial, ¶ 444.

¹⁵⁴ Claimant’s Reply Memorial, ¶ 444 citing C-1061, E-mail from Ken Cain, Ministry of Natural Resources to Ottavio Cicconi, Ministry of Natural Resources (Jan. 11, 2012), p. 2.

¹⁵⁵ RWS-Wilkinson, ¶ 22.

first Thursday in October every four years.¹⁵⁶ Putting ██████ on hold in the immediate run-up to the 2011 election was to be expected since the Legislature was about to be dissolved, and the incumbent government was about to enter “caretaker mode”.¹⁵⁷ As stated in a letter to senior officials before the election period, “the government addresses only very routine or urgent issues during this time.”¹⁵⁸ ██████ was a non-routine policy initiative and was not urgent, so it is hardly surprising that the Ontario Government put ██████ on hold just prior to the drop of the the writ for the election on September 7, 2011.

110. In this context, it is also hardly surprising that government officials would state that the Ontario Government had ██████ and that the Energy Minister’s Office and the Premier’s Office ██████ of ██████ of 2011, or that they ██████ before election.”¹⁵⁹ This was to be expected, and the Claimant’s suggestion that such documents prove bad faith on the part of the Government of Ontario is completely

¹⁵⁶ **R-0493**, *Election Act*, R.S.O. 1990, c. E.6, ss. 9(2), 9.1(5). Available at: <http://www.ontario.ca/laws/statute/s05035>.

¹⁵⁷ Pursuant to the constitutional convention known as the “caretaker convention”, during an election in Canada “the government retains its full panoply of legal powers [...], and of course [...] has to continue to govern [...] by convention, it is expected to behave as a caretaker and to restrain the exercise of its legal authority.” Provinces such as Ontario observe a similar caretaker convention as that applicable at the federal level, where the convention has been clarified by guidelines issued by the Privy Council Office of Canada (**R-0501**, Peter W. Hogg, *Constitutional Law of Canada* 5th ed. (Toronto: Carswell, 2007) (loose-leaf updated 2014, release 1, ch. 9 at 9-10.1.) These guidelines provide that that “a government should restrict itself – in matters of policy, expenditure and appointments – to activity that is: (a) routine, or (b) non-controversial, or (c) urgent and in the public interest, or (d) reversible by a new government without undue cost or disruption, or (e) agreed to by opposition parties (in those cases where consultation is appropriate).” (**R-0628**, Privy Council Office for Canada, website excerpt, “Guidelines on the Conduct of Ministers, Ministers of State, Exempt Staff and Public Servants During an Election” (Aug. 2, 2015), p. 2. Available at: <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=convention&doc=convention-eng.htm>). See also **R-0612**, Lieutenant Governor of Ontario, website excerpt, “The Crown-in-Council” (2015): (“Upon the Lieutenant Governor’s invitation [to the proposed successor to form a government] being accepted, a time and a date are agreed upon for the swearing-in of a new Executive Council. In the interim, the outgoing Premier and ministers continue to serve their offices, albeit in a limited fashion as constrained by the caretaker convention, which prescribes that the government only act on routine matters.”). Available at: <http://www.lgontario.ca/en/crown/pages/crown-in-council.aspx>.

¹⁵⁸ **R-0573**, Letter from Shelley Jamieson, Cabinet Office to Deputy Ministers (Sep. 6, 2011), p. 1.

¹⁵⁹ **C-1028**, E-mail from Ken Cain, Ministry of Natural Resources to Rosalyn Lawrence, Ministry of Natural Resources et al (Jul. 22, 2011); **C-1061**, E-mail from Ken Cain, Ministry of Natural Resources to Ottavio Cicconi, Ministry of Natural Resources (Jan. 11, 2012), p. 2; **C-1043**, E-mail from Leo Tasca, Ministry of Energy to Jason Collins, Ministry of Energy et al (Oct. 4, 2011), p. 1.

unfounded. It is also disproved by the fact that work on █████ resumed immediately after the election culminating in the finalization of the plan proposal in February 2012.¹⁶⁰

111. █████
█████ In light of this, and as described in Canada's Counter-Memorial,¹⁶² Ontario developed a new plan to complete the scientific research between 2013 and 2016. It focuses on noise, water and sediment quality, technical standards and safety, and decommissioning and valuation of financial assurances. The plan was being drawn up when the Claimant filed a Notice of Arbitration on January 28, 2013.

112. Pursuant to this plan, MOE initiated procurement processes to commission a study on sound propagation modelling methodologies to predict offshore wind facility noise impacts, and a study on decommissioning requirements for offshore wind projects (the "noise study" and "decommissioning study").¹⁶³

113. The Claimant asserts that MOE issued the above requests for proposal merely "to give the impression that it is proceeding with the scientific research."¹⁶⁴ Relying on an e-mail between MEI and MNR officials, it argues that MEI requested funding for offshore wind energy research in 2013/2014 █████.¹⁶⁵ This is false. The e-mail cited by the Claimant states that funding was requested █████

█████¹⁶⁶ While the e-mail also notes MEI's understanding that █████

¹⁶⁰ Canada's Counter-Memorial, ¶ 292.

¹⁶¹ Canada's Counter-Memorial, ¶ 293.

¹⁶² Canada's Counter-Memorial, ¶¶ 294-299.

¹⁶³ **R-0383**, Merx Opportunity Abstract, "Technical Evaluation to Predict Offshore Wind Farm Noise Impacts in Ontario" (Sep. 9, 2014) ("Noise Study RFP"); **R-0384**, Merx Opportunity Abstract, "Assessment of Offshore Wind Farm Decommissioning Requirements" (Sep. 9, 2014) ("Decommissioning Study RFP").

¹⁶⁴ Claimant's Reply Memorial, ¶ 413.

¹⁶⁵ Claimant's Reply Memorial, ¶ 413 citing **C-1094**, E-mail from Jennifer Block, Ministry of Energy to Ken Cain, Ministry of Natural Resources (Mar. 6, 2013).

¹⁶⁶ **C-1094**, E-mail from Jennifer Block, Ministry of Energy to Ken Cain, Ministry of Natural Resources (Mar. 6, 2013).

[REDACTED]
[REDACTED] this conclusion is offered as a relevant consideration by MEI, and not as MOE's and MNR's justification for undertaking the studies.¹⁶⁷ Acknowledging such considerations is to be expected and it does not establish any bad faith as the Claimant alleges.

114. In January 2015, MOE retained Valcoustics Inc. ("Valcoustics") and GL Garrad Hassan Canada Inc. ("Garrad Hassan"), to conduct the noise study and decommissioning study, respectively.¹⁶⁸ While the studies have not yet been finalized, the drafts and related documents, which Canada has included as exhibits to this submission,¹⁶⁹ reject onshore sound modeling for offshore wind projects¹⁷⁰ and recommend measures to ensure that some form of financial assurance is made to fund decommissioning of offshore wind project.¹⁷¹ The noise and decommissioning studies are "two steps in the process of evaluating and understanding the

¹⁶⁷ **C-1094**, E-mail from Jennifer Block, Ministry of Energy to Ken Cain, Ministry of Natural Resources (Mar. 6, 2013).

¹⁶⁸ **R-0621**, Ministry of the Environment, Information Note, "Technical Evaluation of Sound Propagation Modelling Methodologies to Predict Offshore Wind Farm Noise Impacts in Ontario" (Jun. 30, 2015), p. 2 ("June Noise Study Note"); **R-0622**, Ministry of the Environment, Information Note, "Assessment of Offshore Wind Farm Decommissioning Requirements" (Jun. 30, 2015), p. 2 ("June Decommissioning Study Note").

¹⁶⁹ **R-0621**, June Noise Study Note; **R-0622**, June Decommissioning Study Note; **R-0626**, Ministry of the Environment, Information Note, "Technical Evaluation of Sound Propagation Modelling Methodologies to Predict Offshore Wind Farm Noise Impacts in Ontario" (Jul. 8, 2015) ("July Noise Study Note"); **R-0627**, Ministry of the Environment, Information Note, "Assessment of Offshore Wind Farm Decommissioning Requirements" (Jul. 8, 2015) ("July Decommissioning Study Note"); **R-0631**, Ministry of the Environment, Information Note, "Technical Evaluation of Sound Propagation Modelling Methodologies to Predict Offshore Wind Farm Noise Impacts in Ontario" (Sep. 2, 2015) ("September Noise Study Note"); **R-0632**, Ministry of the Environment, Information Note, "Assessment of Offshore Wind Farm Decommissioning Requirements" (Sep. 2, 2015) ("September Decommissioning Study Note"); **R-0629**, Valcoustics Canada Ltd., Report (Draft), "Technical Evaluation: Sound Propagation Modelling for Offshore Wind Farms, Draft v. 1.2.0" (Aug. 27, 2015), p. 1; **R-0624**, GL Garrad Hassan Canada Inc., Report (Draft), "Assessment of Offshore Wind Farm Decommissioning Requirements", Chapters 1 and 2 (Jul. 1, 2015). Ms. Dumais confirms that financial assurance may be necessary to ensure proper decommissioning of a project at the end of its life or if the owner abandons it (RWS-Dumais-2, ¶ 17). **R-0620**, GL Garrad Hassan Canada Inc., Report (Draft), "Assessment of Offshore Wind Farm Decommissioning Requirements", Chapter 5 (Jun. 30, 2015). See also **R-0625**, GL Garrad Hassan Canada Inc., Report (Draft), "Assessment of Offshore Wind Farm Decommissioning Requirements", Chapter 3 (Jul. 1, 2015); **R-0636**, GL Garrad Hassan Canada Inc., Report (Draft), "Assessment of Offshore Wind Farm Decommissioning Requirements", Chapter 4 (Oct. 9, 2015).

¹⁷⁰ **R-0629**, Valcoustics Canada Ltd., Report (Draft), "Technical Evaluation: Sound Propagation Modelling for Offshore Wind Farms, Draft v. 1.2.0" (Aug. 27, 2015), p. 1

¹⁷¹ **R-0620**, GL Garrad Hassan Canada Inc., Report (Draft), "Assessment of Offshore Wind Farm Decommissioning Requirements", Chapter 5 (Jun. 30, 2015), p. 1. Doris Dumais, former Director of MOE's Approval Program for renewable energy projects, confirms that MOE would have to assess decommissioning requirements for offshore wind projects before approving one. RWS-Dumais-2, ¶ 17.

science related to offshore wind farms”¹⁷² and MOE expects they will “help inform [Ontario’s] policy development related to offshore wind farms.”¹⁷³

(ii) Any Effect that this Temporary Deferral Has Had on the Claimant’s Investment Is Because of the Claimant’s Own Choices

115. The Claimant argues that the temporary nature of the deferral is irrelevant because its effect on the Claimant was permanent.¹⁷⁴ However, it was the Claimant’s own actions that caused the effects of a temporary measure to become permanent. Ontario and the OPA reasonably sought to accommodate the Claimant and allow it the opportunity to proceed with the development of its Project at a later date.

116. As Canada explained in its Counter-Memorial, the OPA and the Ontario Government held a conference call with the Claimant in advance of the deferral’s public announcement. On that call, Richard Linley of the Minister of Natural Resource’s Office explained that although “MNR [would] be cancelling all existing Crown Land Applications for access to lake beds for offshore wind development”, this would not apply to Windstream.¹⁷⁵ The Claimant was also assured that the Ontario Government was not cancelling the Project.¹⁷⁶ In the conference call, the Claimant’s lobbyist, Chris Benedetti, noted that he understood that “things are essentially on hold until such time as the province can establish a regulation under the [...] REA pertaining to offshore wind, [and that] there will be no further movement on offshore wind development for anybody, but essentially the Windstream project is the only one that is [...] ‘deferred’ or ‘frozen’ whereas all other projects are essentially quashed or cancelled”.¹⁷⁷ Importantly, Mr. Benedetti acknowledged that, in addition to Ontario’s actions of freezing the Claimant’s Crown land applications, the

¹⁷² **R-0621**, June Noise Study Note, p. 3; **R-0622**, June Decommissioning Study Note, p. 3; **R-0626**, July Noise Study Note, p. 3; **R-0627**, July Decommissioning Study Note, p. 3; **R-0631**, September Noise Study Note, p. 3; **R-0632**, September Decommissioning Study Note, p. 3.

¹⁷³ **R-0621**, June Noise Study Note, p. 3; **R-0622**, June Decommissioning Study Note, p. 3; **R-0626**, July Noise Study Note, p. 3; **R-0627**, July Decommissioning Study Note, p. 3; **R-0631**, September Noise Study Note, p. 1; **R-0632**, September Decommissioning Study Note, p. 3.

¹⁷⁴ Claimant’s Reply Memorial, ¶¶ 481-485.

¹⁷⁵ **C-0484**, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011), pp. 3, 6.

¹⁷⁶ **C-0484**, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011), p. 6.

¹⁷⁷ **C-0484**, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011), p. 7.

Claimant had to engage in a discussion with the OPA for the purpose of “ensur[ing] that the requirements embedded in the FIT contract reflect this situation and that there’s no penalties or anything that would be incurred by Windstream.”¹⁷⁸ Contract amendments had to be secured from the OPA as it, not Ontario, was the Claimant’s FIT Contract counter-party. In this regard, Andrew Mitchell of MEI noted that the OPA had agreed to “sit down with [the Claimant] to negotiate a number of pieces including the Force Majeure provisions, the two-year Force Majeure termination clause associated with those provisions and the security deposits” in an attempt to create an acceptable solution.¹⁷⁹ As Perry Cecchini, the OPA’s FIT Contract Manager, notes, it was these three areas that the OPA told MEI they were willing to negotiate over to preserve the Claimant’s FIT Contract.¹⁸⁰

117. Despite having acknowledged that it would have to reach an agreement with the OPA if it wanted to insulate its FIT Contract from the effects of the deferral,¹⁸¹ the Claimant failed to do so on its own accord. Canada cannot be blamed for the Claimants’ failed negotiations on account of its unreasonable positions.

118. First, the Claimant refused to acknowledge that the counter-party to the FIT Contract and any renegotiations of its terms was the OPA and not the Government of Ontario.¹⁸² Instead, the Claimant initially sought to deal with MEI.¹⁸³ Its allegation that “Mr. MacLennan had advised that the OPA would be negotiating on the government’s behalf”¹⁸⁴ is baseless. During the February 11, 2011 conference call, Mr. MacLennan merely indicated that Ontario would defer to the OPA, the FIT Contract counter-party, with respect to issues regarding the Claimant’s FIT

¹⁷⁸ **C-0484**, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011), p. 7.

¹⁷⁹ **C-0484**, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011), pp. 2-3.

¹⁸⁰ Canada’s Counter-Memorial, ¶ 488; RWS-Cecchini, ¶¶ 18-22.

¹⁸¹ Claimant’s Reply Memorial, ¶¶ 532, 535.

¹⁸² **R-0223**, Letter from Adam Chamberlain, Borden Ladner Gervais to Perry Cecchini and Michael Killeavy, Ontario Power Authority (Feb. 23, 2011).

¹⁸³ **C-0505**, E-mail from David Mars, White Owl Capital to Chris Benedetti, Sussex Strategy (Feb. 17, 2011); **C-0506**, E-mail from Ian Baines, Windstream Energy Inc. to Chris Benedetti, Sussex Strategy et al (Feb. 18, 2011).

¹⁸⁴ Claimant’s Reply Memorial, ¶ 378.

Contract.¹⁸⁵ The Claimant's incorrect assumption that the OPA would be acting as MEI's agent was formally corrected in the OPA's March 18, 2011 response letter, which stated that the OPA was not the agent of the Government of Ontario or any other corporation or agency, including Hydro One and the Independent Electricity System Operator ("IESO").¹⁸⁶

119. Second, the Claimant treated the negotiations as not about keeping its FIT Contract on hold, but as an avenue to pursue even more advantageous terms unrelated to the effects of the deferral. The Claimant admits as much when it states that the reason it initially sought to negotiate with MEI rather than the OPA was that several of its requests "went beyond the purview of the OPA" and "beyond keeping the contract on hold".¹⁸⁷ However, the OPA had only offered to hold discussions on means to keep the Claimant's FIT Contract "frozen", not to provide the Claimant with leverage to negotiate a better contract than the one to which it had originally committed. As stated by Perry Cecchini, "the OPA was of the view that any resulting agreement with Windstream needed to work within the general confines of the FIT Contract";¹⁸⁸ it could not fundamentally alter the balance of the contract. In this regard, it was utterly unreasonable for the Claimant to demand an extension of the MCOB until such date as the Claimant elected to resume the Project, the return of the full amount of the security deposit, the removal of time limitations on Force Majeure and the removal of the OPA's termination right.¹⁸⁹ It was equally unreasonable to demand that the Domestic Content Requirements be removed, since this would have been inconsistent with the *Electricity Act* and would have run counter to the GEGEA's objectives of creating jobs and stimulating the economy.¹⁹⁰

¹⁸⁵ **C-0484**, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011), p. 5: ("So we're going to have to defer to the OPA right now and legal counsel to ensure that we're giving you clear answers, if that's okay we would like to schedule a meeting between yourselves and the OPA to discuss that.").

¹⁸⁶ **R-0226**, Letter from Michael Killeavy, Ontario Power Authority to Adam Chamberlain, Borden Ladner Gervais LLP (Mar. 18, 2011).

¹⁸⁷ Claimant's Reply Memorial, ¶ 378; **C-0506**, E-mail from Ian Baines, Windstream Energy Inc. to Chris Benedetti, Sussex Strategy et al (Feb. 18, 2011), p. 2.

¹⁸⁸ RWS-Cecchini, ¶ 19.

¹⁸⁹ **R-0223**, Letter from Adam Chamberlain, Borden Ladner Gervais LLP to Perry Cecchini and Michael Killeavy, Ontario Power Authority (Feb. 23, 2011).

¹⁹⁰ CWS-Smitherman, ¶¶ 7-11; **C-1004**, Ministry of Energy Chart, OPA Proposed Response to Windstream (Mar. 18, 2011).

120. In contrast, the OPA negotiated in good faith and made reasonable offers that would have achieved the goal of “freezing” the Claimant’s FIT Contract. In particular, given the Ontario Government’s projected schedule of three to five years to complete the science [REDACTED], the OPA’s offer to extend Windstream’s MCOB by a maximum of five years was a reasonable offer.¹⁹¹ In addition, the OPA proposed to reduce the Claimant’s costs of maintaining its FIT Contract by returning half of its security deposit and generally waiving its quarterly reporting requirements during the delay, with the exception of reports regarding material adverse effect or Force Majeure notices and reports on compliance with the applicable Domestic Content Levels.¹⁹²

121. The Claimant never accepted these reasonable offers and thus failed to ensure that its FIT Contract remained “frozen”. Furthermore, its argument that accepting the OPA’s offer “would not have done Windstream any good”¹⁹³ should be rejected. Such an argument does not reflect the circumstances and knowledge that the parties had at the time of the negotiations. The OPA’s proposal was informed by and reflected the Government of Ontario’s belief at the time that it needed three to five years to undertake the scientific research. The fact that circumstances changed, after the Claimant refused the offer, when [REDACTED], is irrelevant and cannot be used by the Claimant now to show the reasonableness of its actions.

122. In short, the Claimant’s refusal to agree to the reasonable contractual amendments proposed by the OPA cannot now allow it to claim that Canada expropriated its investment. A claimant cannot be allowed to itself turn a temporary measure into a permanent effect and then cry foul under an expropriation provision in an international treaty.

¹⁹¹ RWS-Cecchini, ¶¶ 19, 22.

¹⁹² **R-0226**, Letter from Michael Killeavy, Ontario Power Authority to Adam Chamberlain, Borden Ladner Gervais LLP (Mar. 18, 2011).

¹⁹³ Claimant’s Reply Memorial, ¶ 601.

3. The Claimant Has Failed to Establish any Interference with its “Distinct, Reasonable, and Investment-Backed Expectations”

123. As explained above, in considering whether a measure constitutes an indirect expropriation, the Tribunal must consider, amongst other things, whether the measure interfered with an investor's distinct, reasonable and investment-backed expectations.¹⁹⁴ This is not to say that a measure that interferes with such expectations is *prima facie* an indirect expropriation. Rather, as held by the Tribunal in *Glamis Gold v. United States*, the purpose of considering such expectations “is to limit recoveries to property owners who can demonstrate that ‘they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.’”¹⁹⁵

124. In assessing the Claimant's alleged expectations, the Tribunal must bear in mind that “not every business problem experienced by a foreign investor is an indirect or creeping expropriation under Article 1110 [...]. As the *Azinian* Tribunal observed: ‘It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities’”.¹⁹⁶ NAFTA Article 1110 is not intended to eliminate normal commercial risks of a foreign investor or to operate as an insurance policy for the Claimant's imprudent business plan.¹⁹⁷

125. The Claimant alleges that the deferral and the failure to insulate the Claimant from it amount to an expropriatory measure which deprived it of the value of its right to a guaranteed revenue stream under its FIT Contract. Accordingly, the appropriate question is whether the Claimant had any distinct, reasonable expectations when it made its investment that the regulatory regime for offshore wind would be developed prior to May 22, 2012 (the date upon which the Claimant alleges the measures in question rendered its Project valueless), so that it would have been able to meet the conditions of its FIT Contract, including reaching Commercial Operation by the stipulated MCOB.

¹⁹⁴ Canada's Counter-Memorial, ¶ 490.

¹⁹⁵ **CL-053**, *Glamis – Award*, fn. 704 citing *Cane Tenn Inc. v. United States*, 63 Fed. Cl. 715 (2005).

¹⁹⁶ **RL-024**, *Feldman - Award*, ¶ 112 citing **RL-007**, *Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States* (ICSID Case No. ARB(AF)/97/2) Award, 1 November 1999, ¶ 83.

¹⁹⁷ **CL-091**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), 30 April 2004, ¶¶ 160, 177 (“*Waste Management II – Award*”); **RL-025**, *Fireman's Fund – Award*, ¶¶ 184, 218.

126. The Claimant asserts that it had reasonable, investment-backed expectations “arising from Ontario’s heavy solicitation of investment in offshore wind development and of Windstream’s investment in the Project specifically.”¹⁹⁸ Implicit in this assertion is its claim that it expected there to be a clear regulatory path to allow it to develop its Project in the timeframe consistent with its FIT Contract, that it would be able to secure access to the Crown land for its Project, and that it would be able to obtain its permits in a timely fashion. In fact, the Claimant did not expect any of this to be the case when it signed its FIT Contract in August 2010.

127. The Claimant alleges that it was solicited to invest in offshore wind development in Ontario by general statements made by the former Ministers of Natural Resources and Energy, and by the creation of the FIT Program, which included offshore wind projects and required an REA.¹⁹⁹ Even if the Tribunal were to accept that the Claimant’s description of its expectations (and it should not), any such expectations based solely upon the above alleged “solicitations” would not be the sort of distinct, reasonable and investment-backed expectations that could be a relevant factor in finding a breach of Article 1110. Ontario made no written binding assurances or any other specific commitment to the Claimant sufficient to create legitimate expectations.²⁰⁰ The bottom line is that, as the Tribunal in *Methanex* found, the Claimant “did not enter the [...] market because of special representations made to it.”²⁰¹ The Claimant’s own documents show that it entered the market with full knowledge of the risk that the regime it now challenges would become its reality.

**(a) The Claimant Did Not Expect that the Regulatory Framework
Would be Completed in Time for it to Proceed with Its Contract
Within the FIT Contract Timelines**

128. For the purposes of this arbitration, the Claimant appears to be alleging that when it made its investment, it had expectations that there would be a well-defined regulatory path that would allow it to proceed with its Project in a timeframe consistent with its FIT Contract, that it would be able to secure access to the Crown land for its Project, and that it would be able to obtain its

¹⁹⁸ Claimant’s Reply Memorial, ¶ 523.

¹⁹⁹ Claimant’s Reply Memorial, ¶¶ 524-525.

²⁰⁰ Claimant’s Reply Memorial, ¶¶ 522-530.

²⁰¹ **CL-063**, *Methanex – Award*, Part IV, Chapter D, ¶ 10.

permits in a timely fashion. However, the evidence clearly establishes that the Claimant held no such expectations at the time it signed its FIT Contract. As demonstrated below, the Claimant was well aware that the REA Regulation did not offer any certainty or clarity on the regulatory rules and requirements for offshore wind projects, and that MNR was conducting a review of its policy on where, when and how to make Crown land available for offshore wind projects. The Claimant may have had hopes and dreams that a well-defined regulatory path would exist in time, but it did not have the type of reasonable investment backed expectations that are relevant to an Article 1110 analysis.

129. There are many examples that demonstrate the Claimant's knowledge in this regard. For example, a slide presentation prepared for the Claimant by ORTECH Power on the FIT Program, dated August 2009 (before the Claimant applied to the FIT Program) states in relation to the REA process that “[c]oncerns exist over staff constraints at MOE to process REA applications. Will it be faster? ... to be determined.”²⁰²

130. On April 27, 2010, soon after the OPA announced that the Claimant had been offered a FIT Contract, ORTECH reminded the Claimant that “off-shore permitting is a new area and lacks well defined study criteria”.²⁰³ Genivar Consultants also told the Claimant that “there is no defined scope of work for the field studies” required to obtain approvals and permits, because “no offshore wind farm has previously been through the permitting processes”.²⁰⁴

131. On May 10, 2010, six days after the Claimant received its FIT Contract offer, ORTECH went further, telling the Claimant that “the regulatory agencies do not have well established guidelines for off-shore projects adding to the uncertainty of the REA process” and that “many of the rules governing off-shore projects have yet to be written.”²⁰⁵

²⁰² **C-0130**, ORTECH Consulting, Presentation, “FIT Program, What Has Changed? Everything!” (Aug. 2009), p. 5 (emphasis added).

²⁰³ **C-0235**, Letter from Leah Deveaux, ORTECH to Nancy Baines, Windstream (Apr. 27, 2010), p. 1 (emphasis added).

²⁰⁴ **R-0526**, Letter from Sunil Kumar, GENIVAR Consultants LP to Mr. Mark Bell, Windstream Energy Inc. (Apr. 29, 2010), p. 1 (emphasis added).

²⁰⁵ **R-0105**, ORTECH Consulting, Project Management Plan for the Wolfe Island Shoals Wind Farm, Rev.0 (May 10, 2010), pp. 11-12 (“ORTECH Project Management Plan”) (emphasis added).

132. On May 13, 2010, the Claimant stated in a letter to MEI's Renewable Energy Facilitation Office ("REFO") that it was "struggling with the expectation in the FIT Contract that the Project will achieve Commercial Operations in 4 years on the one hand and the considerable regulatory uncertainty caused by unknown setback requirements for off-shore wind, uncertainty in the site release process for Crown land, and uncertainty in the detailed requirements of the REA [for off-shore wind projects] on the other."²⁰⁶

133. Then, on May 21, 2010, as the initial deadline for the Claimant to sign back the FIT Contract approached, Mr. Roeper reported to Mr. Baines after a meeting between ORTECH and the Claimant's legal counsel, that "if we don't get some indication of where the government is on the permitting guidelines we cannot assess the permitting risk related to signing the contract."²⁰⁷

134. On June 6, 2010, ORTECH adopted a similar position, telling the Claimant that "the proposed timeframe [for MNR's policy review on access to Crown land for offshore wind projects] is way too long for the FIT Contract. Not only has MNR not finalized the site release revisions (that have been continually revised over the past 10 years, not just since 2009), but the MNR fails to respond to the urgency to resolve timing issues related to the FIT contract award."²⁰⁸ ORTECH noted that this was particularly problematic because "the REA process is to follow behind site release".²⁰⁹

135. On June 8, 2010, two days after ORTECH's e-mail, a document prepared by the Claimant, entitled "Current Project Status and Regulatory Issues" noted:

Key Concerns – A High Degree of Regulatory Uncertainty: Lots of unknowns:
- Setback requirements. Haven't been defined by the MOE for off-shore projects. How do we even start our turbine layout to commence the REA without this key piece of information? – MOE REA Process. How long will this process take for off-shore projects? – MNR Site Release Process. When

²⁰⁶ **C-0258**, Letter from Ian Baines, Windstream to Mirrun Zaveri, Ministry of Energy (May 13, 2010), p. 1 (emphasis added).

²⁰⁷ **C-0270**, E-mail from Uwe Roeper, ORTECH to Pearl Ing, Ministry of Energy (May 25, 2010) (see e-mail from Uwe Roeper to Ian Baines on May 21, 2010 on p. 2) (emphasis added).

²⁰⁸ **R-0528**, E-mail from Uwe Roeper, ORTECH to Ian Baines, Windstream Energy Inc. (Jun. 7, 2010), p. 5 (emphasis added).

²⁰⁹ **R-0528**, E-mail from Uwe Roeper, ORTECH to Ian Baines, Windstream Energy Inc. (Jun. 7, 2010), p. 5.

will we secure our Crown leases? The MNR has yet to issue the policy and procedures for wind project site release. This decision remains in government hands. – We are attempting to meet/work together with stakeholders from the MNR, MOE and MEI to create a focus group to address concerns related to this project. [...] Risk that MNR policy changes will render our originally selected sites unworkable. – We will push to achieve COD within 4 years; unlikely based on previous approvals experience.²¹⁰

136. Further, the Claimant's expectations are even more telling with respect to the MOE announcement of the proposed five-kilometre setback on June 25, 2010. For example, on June 17, 2010, the Claimant wrote to MOE stating: "We are deeply concerned about rumors that the Ministry of Environment is contemplating an arbitrary set-back distance of 5 km. If this were true, it would significantly reduce the available water surface of this project and would force the Project into water depths beyond 25 meters. [...] Such water depths [...] would render this project uneconomical. Hence, a 5 km set-back requirement would surely stop this project".²¹¹

137. Subsequently, on June 22, 2010, Mr. Baines wrote that if the five-kilometre setback happened, "Windstream would lose 85% of the water that we have been approved for under the Crown land site release process and 63% of the turbines in the project. The project would die instantly."²¹² Mr. Baines also said he wanted his lobbyist Chris Benedetti to communicate to the Ontario Government that as a result of the five-kilometre setback proposal, "[t]he project will be cancelled as it can't be built [...] Ontario's Green Energy Act will be seen as a joke [...] and investors will flee".²¹³ On June 22, 2010, Mr. Benedetti communicated the "concern that even the release of a draft 5km requirement will cause investors to flee."²¹⁴

²¹⁰ **R-0529**, Windstream Wolfe Island Shoals Inc., Current Project Status and Regulatory Issues (Jun. 8, 2010) (emphasis added); see also **R-0528**, E-mail from Uwe Roeper, ORTECH to Ian Baines, Windstream Energy Inc. (Jun. 7, 2010), p.1.

²¹¹ **R-0530**, Letter from Ian Baines, Windstream Energy Inc. to Mansoor Mahmood, Ministry of the Environment (Jun. 17, 2010), p. 2 (emphasis added).

²¹² **R-0531**, E-mail from Ian Baines, Windstream Energy Inc. to Jim Vanden Hoek (Jun. 22, 2010) (emphasis added).

²¹³ **R-0532**, E-mail from Ian Baines, Windstream Energy Inc. to Nancy Baines, David Mars, Uwe Roeper and Hank Van Bakel (Jun. 22, 2010) (emphasis added).

²¹⁴ **R-0533**, E-mail from Chris Benedetti, Sussex Strategy to Utilia Amaral, Ministry of the Environment (Jun. 22, 2010) (emphasis added).

138. The Claimant also submitted formal comments on the MOE's Offshore Wind Policy Proposal Notice on June 25, 2010, the same day it was posted on the Environmental Registry. It stated unequivocally that there was a "lack of clarity on the off-shore rules [which] work[ed] against the project timing".²¹⁵ It further commented that the proposed setback "threaten[ed] to prevent development of this project unless the project layout is reconfigured" because "[o]f the 48,000 acres of lake area under application, 82% of the land will be removed by the 5 km rule."²¹⁶ The Claimant also complained that the proposed setback requirement would "greatly impede achieving the commercial milestones embedded in the FIT contract".²¹⁷ In the Claimant's assessment, the proposal "essentially nullifies [...] the FIT contract".²¹⁸

139. The Claimant's consultant, ORTECH, also made a submission in response to the MOE's Offshore Wind Policy Proposal Notice. In this submission, ORTECH's Vice-President stated that "ORTECH believes the issue of the proposed 5 km setback should be clarified quickly" and "urge[d] the government [...] to minimize the current level of regulatory and associated investment uncertainty as quickly as possible".²¹⁹

140. On June 29, 2010, in an attempt to secure additional time to influence the Ontario Government's offshore wind policy and resolve the regulatory uncertainty, the Claimant's lawyer, Adam Chamberlain, e-mailed the OPA to request an extension to the deadline to sign back the FIT Contract, stating:

Windstream has been operating in an environment in which regulatory requirements related to off-shore wind projects and the Renewable Energy Approval have been in a state of change [...] There was an expectation that an announcement would be made by the Ontario Government that would provide

²¹⁵ **C-0294**, Windstream Energy Inc. Briefing Document, Wolfe Island Shoals (Off-Shore Wind Project) Working with a 5 km Set-Back (Jun. 24, 2010), p. 2 (emphasis added).

²¹⁶ **C-0294**, Windstream Energy Inc. Briefing Document, Wolfe Island Shoals (Off-Shore Wind Project) Working with a 5 km Set-Back (Jun. 24, 2010), p. 1 (emphasis added).

²¹⁷ **C-0294**, Windstream Energy Inc. Briefing Document, Wolfe Island Shoals (Off-Shore Wind Project) Working with a 5 km Set-Back (Jun. 24, 2010), p. 1 (emphasis added).

²¹⁸ **C-0294**, Windstream Energy Inc. Briefing Document, Wolfe Island Shoals (Off-Shore Wind Project) Working with a 5 km Set-Back (Jun. 24, 2010), p. 1 (emphasis added).

²¹⁹ **C-0918**, ORTECH Consulting, Report, "Submission Regarding Discussion Paper on Offshore Wind Facilities: Renewable Energy Approval Requirements, EBR Number: 011-0089" (Sep. 27, 2010), p. 3 (emphasis added).

more certainty in this area. Unfortunately, the announcement in the Discussion Paper did not provide any certainty.²²⁰

141. Subsequently, on July 2, 2010, Ms. Baines wrote to Chris Benedetti and Adam Chamberlain that the Claimant was “in a ‘Catch 22’ situation: [it had] already lost the critical June study period, and further delays only add[ed] to the time necessary to do the studies and get the project built.”²²¹ However, if they went ahead with the studies, they “could burn [REDACTED] and find that the set-back has changed.”²²²

142. A week later, in a July 8, 2010 email, Mr. Baines expressed concern about “sound restrictions”, “disturbance of a sensitive bottom area”, “impact to shipping channels”, “coast guard restrictions”, “radar or light house operations”, “airport flight path” and “sediment transport”. In his words, “[a]ll of these could come out of our REA study and become the next regulatory concerns. And of course, it presumes that the 5 km set back is not increased.”²²³

143. In response to this “lack of clarity”, the Claimant made three requests before it signed its FIT Contract. First, it asked MNR to replace the Crown land it had applied for in 2008 with different adjacent areas in a so-called “grid cell swap”.²²⁴ Second, it asked MEI to direct the OPA to “change the amount of time allowed to complete the project in the [FIT Contract] by the additional time needed to obtain replacement land AOR Status and final approval of all set-back requirements.”²²⁵ Finally, it asked MOE to confirm that the five-kilometre setback would not

²²⁰ **R-0535**, E-mail from Scott Brownrigg, Sussex Strategy to Chris Benedetti and Nancy Baines (Jun. 29, 2010), p. 2.

²²¹ **R-0536**, E-mail from Nancy Baines, Windstream Energy Inc. to Chris Benedetti, Sussex Strategy and Adam Chamberlain, Borden Ladner Gervais (Jul. 2, 2010), p. 1.

²²² **R-0536**, E-mail from Nancy Baines, Windstream Energy Inc. to Chris Benedetti, Sussex Strategy and Adam Chamberlain, Borden Ladner Gervais (Jul. 2, 2010), p. 1.

²²³ **R-0538**, E-mail from Ian Baines, Windstream Energy Inc. to Chris Benedetti, Sussex Strategy and Nancy Baines (Jul. 8, 2010), p. 1.

²²⁴ **C-0294**, Windstream Energy Inc. Briefing Document, Wolfe Island Shoals (Off-Shore Wind Project) Working with a 5 km Set-Back (Jun. 24, 2010), p. 2.

²²⁵ **C-0294**, Windstream Energy Inc. Briefing Document, Wolfe Island Shoals (Off-Shore Wind Project) Working with a 5 km Set-Back (Jun. 24, 2010), p. 2.

apply to Pigeon Island, a rock body in the middle of the Project area, and to a small tip of land jutting out 2 km from the Wolfe Island shoreline, since this would effectively kill the project.²²⁶

144. The Ontario Government granted none of these requests. On August 9, 2010, MNR wrote to inform the Claimant that MNR was “prepared to discuss limited re-configuration of [the Claimant’s] existing applications to allow a sufficient size of area to site [its] proposed 300 MW offshore wind farm”²²⁷ but that “any discussion will only occur once the policy proposal Environmental Registry posting regarding the 5 kilometre shoreline exclusion zone has been concluded, as well as MNR’s own consideration of where, when and how the Government will make Crown land available for off-shore wind projects”.²²⁸

145. MNR provided the Claimant with a draft of this letter before it was finalized. The internal notes of the Claimant on MNR’s draft point out that “when and how the Government makes Crown land available for off-shore wind projects’ is open-ended and has taken two plus years to date” and that “under the new rules AOR comes after [the] open-ended and time consuming process.”²²⁹ The Claimant’s lobbyist Chris Benedetti asked MNR to revise the draft letter, based on input from Windstream and its legal counsel. Mr. Benedetti made two specific requests. First, he explained that “without some indication of when site release will happen, it’s very difficult for the investors to move forward.”²³⁰ Therefore, he asked for “language [to] be added that provides some specificity on when the site release process might be concluded”.²³¹ Specifically, he asked

²²⁶ **C-0294**, Windstream Energy Inc. Briefing Document, Wolfe Island Shoals (Off-Shore Wind Project) Working with a 5 km Set-Back (Jun. 24, 2010), p. 2.

²²⁷ **C-0334**, Letter from Eric Boysen, Ministry of Natural Resources to Ian Baines, Windstream Energy Inc. (Aug. 9, 2010), p. 1.

²²⁸ **C-0334**, Letter from Eric Boysen, Ministry of Natural Resources to Ian Baines, Windstream Energy Inc. (Aug. 9, 2010), p. 1.

²²⁹ **R-0542**, Draft Letter from Eric Boysen, Ministry of Natural Resources to Ian Baines, Windstream Wolfe Island Shoals Inc. (Aug. 3, 2010), pp. 1-2; Claimant’s Reply Memorial, ¶¶ 576, 580.

²³⁰ **C-0328**, E-mail from Richard Linley, Ministry of Natural Resources to Chris Benedetti, Sussex Strategy (Aug. 5, 2010), p. 2.

²³¹ **C-0328**, E-mail from Richard Linley, Ministry of Natural Resources to Chris Benedetti, Sussex Strategy (Aug. 5, 2010), p. 2.

that MNR include in the letter a statement that “[i]t is agreed that Applicant of Record Status will be confirmed within 30 days of conclusion of the set-back requirements.”²³²

146. Second, Mr. Benedetti communicated the Claimant’s hope that MNR would expand the areas it was willing to consider for the purposes of reconfiguring the Claimant’s grid cell applications. MNR’s letter required that any reconfigured grid cells “must be in the close proximity to the geographic area”²³³ of two of its existing grid cell applications not affected by the five-kilometre setback proposal.

147. MNR rebuffed the Claimant’s requested edits, informing Mr. Benedetti that “[t]he letter isn’t open to negotiation”.²³⁴ Mr. Benedetti then apologized, saying he was only requesting the changes “to help sell [the project] to the investors.”²³⁵ Ultimately MNR did not agree to the Claimant’s requested changes.

148. On August 10, 2010, in an email exchange with the OPA, the Claimant acknowledged that while it “understood that [the project’s] unique nature carried risks, at the time the application was made under the FIT program it was expected that at least some of the regulatory uncertainty would be resolved prior to the signing of a FIT agreement. Unfortunately, that has not been the case.”²³⁶

149. Ten days after this last exchange, on August 20, 2010, the Claimant signed its FIT Contract. The above evidence demonstrates over 20 occasions prior to signature where the Claimant acknowledged concerns about the lack of a clear regulatory path forward for it to develop its Project in accordance with FIT Contract deadlines. This is further reflected by Mr. Baines’ own comments again a few months after it signed its FIT Contract. In December 2010,

²³² **R-0542**, Draft Letter from Eric Boysen, Ministry of Natural Resources to Ian Baines, Windstream Wolfe Island Shoals Inc. (Aug. 3, 2010), p. 1.

²³³ **R-0542**, Draft Letter from Eric Boysen, Ministry of Natural Resources to Ian Baines, Windstream Wolfe Island Shoals Inc. (Aug. 3, 2010), p. 1.

²³⁴ **C-0328**, E-mail from Richard Linley, Ministry of Natural Resources to Chris Benedetti, Sussex Strategy (Aug. 5, 2010), p. 1.

²³⁵ **C-0328**, E-mail from Richard Linley, Ministry of Natural Resources to Chris Benedetti, Sussex Strategy (Aug. 5, 2010), p. 1; see also RWS-Lawrence-2, ¶¶ 7-12.

²³⁶ **C-0340**, E-mail from Paul Ungerman, Ministry of Energy to Chris Benedetti, Sussex Strategy (Aug. 10, 2010), p. 1.

the Conference Board of Canada published a report funded by Vestas Offshore, titled "Ontario's Future Offshore Wind Power Industry". That report acknowledges that "[m]any of the standards, regulations, and screening approaches required for offshore wind must still be developed."²³⁷ When Mr. Baines became aware of the imminent release of this report, he wrote to Vestas to try to block it because he was concerned that the report did not adequately reflect the uncertainty in the regulatory environment. He wrote that the "[p]rovincially mandated setback from shore is not known," that "[t]he report assumes access to crown lake bottom which is not currently allowed", and that "MNR site release policy has not been set and that future restrictions of an unknown nature will be mandated".²³⁸

150. The Claimant's position that it made its investments based on the reasonable expectation that there was or would soon be a regulatory path forward and that such regulations would allow its project to proceed to development is disingenuous. It is nothing more than a construct for the purposes of this dispute and is not supported by the evidence. To the contrary, the facts show that prior to signing its FIT Contract, the Claimant had many concerns and no reasonable expectation.

(b) Even if the Claimant Expected to Be Able to Develop Its Project, Its Expectations Were Not Based on Government Assurances

151. As noted above, the Claimant alleges that it was solicited to invest in offshore wind development by: (1) general statements made by the then-Minister of Natural Resources (Minister Cansfield) and then-Minister of Energy and Infrastructure (Minister Smitherman) in 2008 and 2009; (2) the inclusion of offshore wind projects in the FIT Program and the REA regulation; and (3) various statements made by staff at the Ontario Government and the OPA around the time that it signed its FIT Contract and thereafter.²³⁹ Even if the Tribunal were to accept that the Claimant's description of its expectations (and it should not), any such expectations based solely upon the above alleged "solicitations" are not sufficient to establish distinct, reasonable and investment-backed expectations relevant to Article 1110.

²³⁷ **C-0396**, Conference Board of Canada, Report, "Employment and Economic Impacts of Ontario's Future Offshore Wind Power Industry" (Dec. 2010), p. 9.

²³⁸ **R-0547**, Letter from Ian Baines, Windstream Wolfe Island Shoals Inc. to Scott Keating, Vestas, p. 1 (Dec. 7, 2010).

²³⁹ Claimant's Reply Memorial, ¶¶ 524-525.

(i) **Any Alleged Expectations Arising out of General Statements by Ministers Were Unreasonable**

152. The Claimant asserts that it relied upon statements by former Ministers in making its investment in Ontario. However, the timing and context of such statements shows that any such reliance was completely unreasonable.

153. For example, the Claimant alleges that it relied on former Minister Cansfield's statements that Ontario was "open for business" for offshore wind and that "[a]ll proposed facilities must go through an environmental assessment"²⁴⁰ when it "appl[ie]d for Crown land to develop the Project" and when it applied for its FIT Contract.²⁴¹ However, reliance on Minister Cansfield's general statements is untenable for one very simple reason: they were made in January 2008, prior to the development of the FIT Program and the REA process – i.e., before the existence of the regulatory framework applicable to the Claimant's Project. As explained by Dr. Wallace, prior to the FIT Program, renewable energy projects were subject to the environmental assessment ("EA") regime in Ontario. However, the Claimant was well aware that the Government of Ontario had replaced the environmental assessment ("EA") regime with the REA for renewable energy projects when it applied to the FIT Program.²⁴² Thus, to suggest that it reasonably expected that "offshore wind facilities would be subject to the existing environmental assessment process"²⁴³ based on former Minister Cansfield's January 2008 statements is disingenuous.

154. The Claimant also says that it developed reasonable expectations based on former Minister Smitherman's representations that the GEGEA provided "certainty that environmental approvals would be granted in a timely way, within a service guarantee."²⁴⁴ In particular, David Mars

²⁴⁰ C-0058, Press Release (MNR), Ontario Lays Foundation for Offshore Wind Power (Jan. 17, 2008) (emphasis added); Claimant's Reply Memorial, ¶ 524.

²⁴¹ CWS-Mars-2, ¶¶ 8-9. Mr. Mars also claims to have relied on Minister Cansfield's letter informing Windstream that it had to apply for a FIT Contract if it wanted to maintain priority over other applicants for the Crown land it had applied for. CWS-Mars-2, ¶¶ 17-18. His statement that the letter provided "a great deal of clarity around our applications for Crown land" is inexplicable, since Mr. Mars also admits that "MNR still had not granted us AOR status." CWS-Mars-2, ¶18.

²⁴² Claimant's Reply Memorial, ¶ 80.

²⁴³ Claimant's Reply Memorial, ¶ 58.

²⁴⁴ Claimant's Reply Memorial, ¶ 524.

claims that he relied on Mr. Smitherman's representations when making the decision to continue to invest in the Project, and that "these statements and commitments by the Ontario Government prompted Mr. Ziegler and [him] to seek additional investment for Windstream."²⁴⁵

155. However, former Minister Smitherman's statements were made before and upon the introduction of the GEGEA in the Ontario legislature, prior to its coming into force and implementation.²⁴⁶ At that time, there was no certainty. The legislation had not been enacted, the FIT Program had not been created, and the REA Regulation did not exist. The statements may have sought to promote the goals of the GEGEA, but they did not, and could not, accurately reflect Ontario's efforts to operationalize the streamlined approvals process for renewable energy projects. As such, these statements could not have created a reasonable or objective expectation that the regulatory framework was or would be fully developed for offshore wind projects when the Claimant decided to invest in WWIS Inc. and its Project.

156. Moreover, the GEGEA did not actually impose any requirement for the MOE to issue an REA within a specific amount of time. Mr. Smitherman's statement when the GEGEA was introduced that the Ontario Government would review decisions on REA applications within six months of receiving a complete application was merely aspirational. Although MOE sought to implement such a service standard, there was never, in fact, any guarantee that it would be able to meet this standard in each individual case.²⁴⁷ Rather, as Ms. Dumais, former Director of the Approvals Program,²⁴⁸ has explained, while the term "guarantee" was used for a time, it is only and has never been treated as more than an aspirational "standard".²⁴⁹ This has been confirmed by the Ontario Superior Court. Specifically, in *Big Thunder Windpark Inc. v. Ontario*, the Court refused the applicants' request for an order to compel the Director appointed under the

²⁴⁵ CWS-Mars-2, ¶¶ 13-14.

²⁴⁶ The statements were made on February 23, 2009, whereas the GEGEA was enacted on May 14, 2009. **C-0114**, Notes for a Statement to the Legislature by George Smitherman, Minister of Energy, Introduction of the Proposed *Green Energy and Green Economy Act, 2009* (Feb. 23, 2009); **C-0116**, Excerpt of Legislative Assembly of Ontario, *Official Reports of Debates (Hansard)*, 39th Parl., 1st Sess., No. 112 (Feb. 23, 2009).

²⁴⁷ Claimant's Reply Memorial, ¶ 84(a); **C-0116**, Excerpt of Legislative Assembly of Ontario, *Official Reports of Debates (Hansard)*, 39th Parl., 1st Sess., No. 112 (Feb. 23, 2009); RWS-Dumais-1, ¶ 61.

²⁴⁸ RWS-Dumais-2, ¶ 37.

²⁴⁹ RWS-Dumais-1, ¶ 61.

Environmental Protection Act (“EPA”) to make the REA decision, holding that the applicant “wish[ed] to impose a time limit on the Director to make a decision because of the service standard adopted by the Ministry. However, that standard does not give rise to any enforceable right, as it is not prescribed by a statute or regulation.”²⁵⁰

157. In fact, as Ms. Dumais explains, MOE had taken up to 20 months to review REA applications for large-scale onshore wind projects.²⁵¹ The Claimant’s own expert, Sarah Powell, acknowledged in an article published by the Association of Power Producers of Ontario in June 2011 that the REA process presented “much more of a learning curve than people had anticipated” and that some developers had “an overly optimistic attitude, combined with an erroneous notion of a ‘simplified’ application process [...]. [The] REA is less about simplifying and more about streamlining [...]”²⁵² Ms. Dumais confirms that Ms. Powell’s experience is consistent with her own, as the MOE was requesting significant additional information from proponents in order to continue reviewing their REA applications and avoid having to return them as incomplete.²⁵³

158. Ultimately, even Mr. Smitherman has acknowledged that there was not and has never been a service “guarantee”. In December 2011, nearly two years after leaving provincial politics, Mr. Smitherman published a report containing his own personal critique of the FIT Program.²⁵⁴ The report expressed Mr. Smitherman’s personal views and reflections as a private citizen that his previous claims of certainty around the six-month service “guarantee” and REFO’s ability to enforce it did not actually reflect the content of the GEGEA. He stated that “[i]n [their] eagerness to create a bold, visionary policy that would position Ontario as a leader, [the governing party was] guilty of overlooking some critical barriers to success. Nowhere was [its] failure more

²⁵⁰ **R-0369**, *Big Thunder Windpark, Inc. v. Her Majesty the Queen in Right of Ontario*, 2014 ON SC 3050, ¶ 6.

²⁵¹ **R-0244**, Roma Ihnatowycz, Association of Power Producers of Ontario Article, “Ontario’s Renewable Energy System – How is it Working?” (Jun. 1, 2011), p. 1.

²⁵² RWS-Dumais-2, ¶ 26.

²⁵³ RWS-Dumais-2, ¶ 31.

²⁵⁴ **R-0577**, G&G Global Solutions, Report, “Charting the Course Ahead: Feed In Tariff 2.0 Review Process” (Dec. 14, 2011) (“FIT Critique”). The report was not commissioned or endorsed by the Ontario Government. Available at: <http://www.gandgglobal.com/FIT%20Review.pdf>.

notable than in [their] inability to anticipate the barriers presented by the government's own regulatory structures."²⁵⁵

159. Finally, contrary to what the Claimant asserts, the GEGEA did not create the REFO with the objective of ensuring that the Government achieved the six-month service "guarantee".²⁵⁶ This objective does not appear in the GEGEA at all.²⁵⁷ As Mr. Baines himself recognized, the role of the REFO was "help[ing] developers with red tape".²⁵⁸ Such a limited mandate for the REFO was what the Government desired because legislators heard complaints about the limited role of REFO during legislative committee hearings on the bill,²⁵⁹ but did not amend the draft provisions to give it greater power. REFO's role remained purely facilitative. Ms. Lo confirms that its role is only to offer "support" by assisting proponents in navigating through existing regulatory approvals and permitting processes and conveying the general interests of the developer community to the relevant government ministries, aboriginal and community groups, manufacturers, and suppliers.²⁶⁰ After all, MEI, the ministry where REFO is located, has no mandate in the area of environmental review; this is the mandate of the MOE, with input from MNR and the Ministry of Tourism and Culture ("MTC").

²⁵⁵ **R-0577**, FIT Critique, p. 8 (emphasis added).

²⁵⁶ CWS-Smitherman, ¶ 25.

²⁵⁷ **C-0123**, GEGEA, Sched. A, s. 11(2).

²⁵⁸ **R-0564**, Ian Baines, Note, "The background to the Wolfe Island Shoals wind project" (Mar. 17, 2011), p. 2.

²⁵⁹ For example, representatives of the First Nations Energy Alliance stated that "[i]t is not clear how the REFO being housed under MEI could substantively address [...] concerns with MNR" and "it is unclear as to the role and the powers of the facilitator, and its role in ensuring the achievement of the province's renewable energy objectives." These individuals called for changes to REFO's objectives clause that would allow its "role [...] to be strengthened [...] in order to have a real impact" and to "provide more guidance to the REFO on what 'facilitation' exactly means. [...] The objects of the REFO set out in subsection 10(2) of the Green Energy Act need[ed] to be improved upon so that it is clear what 'facilitation' means, and the powers of the REFO in relation to other ministries." **R-0512**, Legislative Assembly of Ontario, Standing Committee on General Government, *Official Report of Debates (Hansard)*, 39th Parl., 1st Sess., G-22 (Apr. 14, 2009) at G-463. Available at: http://www.ontla.on.ca/committee-proceedings/transcripts/files_pdf/14-APR-2009_G022.pdf; **R-0513**, Legislative Assembly of Ontario, Standing Committee on General Government, *Official Report of Debates (Hansard)*, 39th Parl., 1st Sess., G-23 (Apr. 15, 2009) at G-520-523. Available at: http://www.ontla.on.ca/committee-proceedings/transcripts/files_pdf/15-APR-2009_G023.pdf.

²⁶⁰ RWS-Lo-1, ¶ 18.

(ii) **Any Expectations Based Solely on the Inclusion of Offshore Wind Projects in the FIT Program and the REA Regulation Were Unreasonable**

160. The Claimant also argues that the inclusion of offshore wind projects in the FIT Program and REA Regulation constituted a solicitation of investment in such projects.²⁶¹ However, the fact is that the GEGER, the FIT Rules and the REA Regulation provided no regulatory certainty in the REA process for offshore wind projects. Unlike for solar and onshore wind projects, the REA Regulation and guidelines lacked the detailed requirements against which offshore wind projects would be assessed.

161. The lack of certainty and clarity around the rules and requirements for offshore wind projects is reflected in policy documents described by Dr. Wallace, who led the development of the REA Regulation. As she explains, the Ontario Government's public communications offered no certainty or clarity for offshore wind requirements, and in fact reflected a lack thereof.²⁶² Public communications occurred through EBR postings, as set out in Canada's Counter-Memorial.²⁶³ These postings, which are made for the express purpose of notifying and consulting the public on government decision-making,²⁶⁴ show that any expectation that a fully-developed regulatory path existed or would soon exist for offshore wind projects based on the mere inclusion of offshore projects in the FIT Program was unreasonable.

162. The first EBR posting was the MOE's REA Regulation Notice on June 9, 2009.²⁶⁵ The posting attached a document summarizing the proposed approach to regulating renewable energy projects, including a section dedicated to offshore wind. That section stated: "The Ministry of the Environment and Ministry of Natural Resources are working together to develop future setbacks related to off-shore wind energy facilities that will address natural heritage, coastal impacts, and

²⁶¹ Claimant's Reply Memorial, ¶ 524.

²⁶² RWS-Wallace-2, ¶¶ 20-31.

²⁶³ Canada's Counter-Memorial, ¶ 117.

²⁶⁴ Canada's Counter-Memorial, ¶ 429; **R-0010**, *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, ss. 15-18.

²⁶⁵ **R-0070**, Ministry of the Environment, "Regulation Proposal Notice: Proposed Ministry of the Environment Regulations to Implement the Green Energy and Green Economy Act, 2009" (EBR Registry No. 010-6516) (Jun. 9, 2009), p. 15 (emphasis added) ("REA Regulation Proposal Notice").

noise emissions.”²⁶⁶ Thus, after the GEGEA was introduced, and before the REA Regulation was established, developers were on notice that standardized setbacks for offshore wind projects would be coming in the future.²⁶⁷ Further, while the paper noted that “[i]t is proposed that for offshore wind turbine facilities, the proponent shall submit a noise study that would take into account the unique noise conditions created by off-shore development,”²⁶⁸ it did not include any noise guidelines for proponents.²⁶⁹ This is because the Ontario Government had not yet developed any. As explained by Dr. Wallace, the REA Regulation Proposal Notice was intended to caution the public, including potential developers of offshore wind projects such as Windstream, that the regulation for offshore wind projects was not yet complete.²⁷⁰

163. On September 24, 2009, the day the REA Regulation came into force, the MOE made a second EBR posting with its decision on the regulation stating, in relation to offshore wind:

There are special rules for wind facilities that include turbines in contact with surface water, other than wetlands. These facilities require an REA and are required to submit an off-shore wind facility report as part of the application. The Ministry of the Environment and the Ministry of Natural Resources continue to work on a coordinated approach to off-shore wind facilities which would include province-wide minimum separation distance standards for noise.²⁷¹

164. A third EBR posting, a draft technical bulletin, was posted on March 10, 2010. The posting states with respect to offshore wind projects that “[the regulation] does not specify setback distances” (for noise, property, or roads) but that “turbine siting will be an important factor

²⁶⁶ **C-0126**, Ministry of the Environment, “Proposed Content for the Renewable Energy Approval Regulation under the Environmental Protection Act” (Jun. 9, 2009), p. 1 (“Proposed REA Regulation Content”).

²⁶⁷ RWS-Wallace-2, ¶ 18.

²⁶⁸ **R-0070**, REA Regulation Proposal Notice.

²⁶⁹ RWS-Wallace-2, ¶ 20.

²⁷⁰ RWS-Wallace-2, ¶ 21.

²⁷¹ **R-0072**, REA Regulation Decision Notice, p. 2 (emphasis added). The Claimant accuses Dr. Wallace of misrepresenting this document by saying that it indicated that there “would be” special rules applicable to offshore wind projects. Claimant’s Reply Memorial, ¶¶ 15, 217, 594. As Dr. Wallace points out, it is actually the Claimant that misquotes her, since she said that the document indicated that special rules “would apply” to offshore wind projects. RWS-Wallace-2, ¶ 25 (referring to RWS-Wallace-1, ¶ 21).

assessed in the Off-shore Wind Facility Report required for application for the REA.”²⁷² Dr. Wallace has confirmed that this draft technical bulletin was intended to provide basic guidance in the absence of prescriptive rules.²⁷³ She also confirms it was intended to be read in the context of MOE’s previous postings on the REA Regulation, and particularly their statements that the MOE and MNR were working together to develop setbacks related to offshore wind energy facilities.²⁷⁴

165. The fourth EBR posting at issue is MOE’s Offshore Wind Policy Proposal Notice of June 25, 2010, which contained the five-kilometre setback proposal.²⁷⁵ While the Claimant seeks to reinvent the meaning of this document,²⁷⁶ as Dr. Wallace confirms²⁷⁷ and as stated in the document itself, the purpose of the posting was to signal MOE’s intention “to provide greater certainty and clarity on off-shore wind requirements”.²⁷⁸ It was yet another caution to all that certainty and clarity were lacking.²⁷⁹ The posting stated that feedback provided by the public in response to the proposal would “inform the work that will be completed to finalize the approach and the off-shore wind specific requirements under the REA regulation”²⁸⁰ and “inform our work to more fully develop the approach and off-shore wind specific-requirements”.²⁸¹

166. In the posting and the attached discussion paper, the MOE also clearly indicated that further regulatory amendments and changes to the REA process would supplement this proposal.²⁸² Specifically, the posting stated that “[t]his approach will also be supplemented by the outcome of research underway [...] and will be the subject of subsequent Environmental

²⁷² **C-0194**, Ministry of the Environment, “Technical Bulletin Six: Required Setbacks for Wind Turbines” (Mar. 1, 2010), p. 5 (emphasis added).

²⁷³ RWS-Wallace-2, ¶ 27.

²⁷⁴ RWS-Wallace-2, ¶ 27.

²⁷⁵ **R-0118**, Ministry of the Environment, “Policy Proposal Notice: Renewable Energy Approval Requirements for Off-shore Wind Facilities – An Overview of the Proposed Approach” (EBR Registry No. 011-0089) (“Offshore Wind Policy Proposal Notice”).

²⁷⁶ Claimant’s Reply Memorial, ¶¶ 222-227.

²⁷⁷ RWS-Wallace-2, ¶¶ 27-29.

²⁷⁸ **R-0118**, Offshore Wind Policy Proposal Notice, p. 1 (emphasis added).

²⁷⁹ RWS-Wallace-2, ¶ 29.

²⁸⁰ RWS-Wallace-2, ¶ 29 (emphasis added).

²⁸¹ **C-0298**, Offshore Wind Discussion Paper, p. 1 (emphasis added).

²⁸² **C-0298**, Offshore Wind Discussion Paper, p. 1.

Registry postings that will outline requirements for off-shore wind development as proposed amendments to O. Reg. 359/09 and the REA process.²⁸³ The Claimant's own summary of the discussion paper acknowledged that feedback that MOE receives "will inform their work to more fully develop the approach and off-shore wind specific requirements that would be articulated as amendments to the Renewable Energy Approval (REA) regulation (O.Reg. 359/09)."²⁸⁴ There is therefore no question that the Claimant was on notice that Ontario's offshore wind policy was still under development.

167. There was also a lack of certainty and clarity in the regulatory framework for developing offshore wind projects in Ontario because MNR was conducting a review of its policies for making Crown land available for offshore wind projects.²⁸⁵ MOE's Offshore Wind Policy Proposal Notice on June 25, 2010, advised that "MNR [was] undertaking a phased review of Ontario's current process for making Crown land available for renewable energy projects" and that this review would "include consideration of where, when and how the Government makes Crown land available for off-shore wind projects."²⁸⁶

168. On August 18, 2010, MNR posted its own Policy Proposal Notice entitled "Offshore Windpower: Consideration of Additional Areas to be Removed from Future Development".²⁸⁷ The purpose of this posting was "[t]o invite comment on potential offshore areas and criteria that should be taken into consideration which may constrain future development as part of the Crown land application process" and "to invite comment on where, when and how the Government should make offshore areas of Crown land available for offshore wind development."²⁸⁸

169. Every single one of these public postings discussed above was made before Windstream signed its FIT Contract on August 20, 2010. Accordingly, the Claimant's allegation that "the

²⁸³ **R-0118**, Offshore Wind Policy Proposal Notice, p. 1 (emphasis added).

²⁸⁴ **R-0642**, Summary of the Discussion Paper entitled "Off-Shore Wind Facilities Renewable Energy Approval Requirements" (undated), p.1. **R-0537**, Hand-written Notes produced by Windstream (Jul 7, 2010) (emphasis added).

²⁸⁵ RWS-Lawrence-2, ¶ 7.

²⁸⁶ **R-0118**, Offshore Wind Policy Proposal Notice, p. 1.

²⁸⁷ **C-0346**, Ministry of Natural Resources, EBR Posting 011-0907.

²⁸⁸ **C-0346**, Ministry of Natural Resources, EBR Posting 011-0907, p. 2.

Ontario Government never communicated to developers that it considered the regulatory framework applicable to offshore wind projects to be ‘under-developed’²⁸⁹ is false. As a representative of SouthPoint Wind publicly acknowledged, the “rules [governing offshore wind projects] have yet to be written”.²⁹⁰ Furthermore, the Claimant’s repeated assertions²⁹¹ that the Ontario Government never gave any indication that it was considering a deferral on offshore wind development before Windstream applied for or entered into its FIT Contract are nothing more than red herrings. Prior to January 2011, no decision had been taken to defer offshore wind development in Ontario.²⁹² To require governments to announce policy options prior to making a final decision would be unreasonable. Accordingly, any alleged expectation of the Claimant’s arising from the mere inclusion of the offshore wind in the FIT Program and in the REA are not reasonable.

(iii) Any Expectations Based on Statements of Alleged Support by Government Representatives Are Both Unsupported and Unreasonable

170. The Claimant’s witnesses contend that the Claimant invested in Ontario based on alleged statements of support for the Project by representatives of the Ontario Government. However, the Claimant has tendered no evidence that it ever received any representation that the regulatory rules and requirements for offshore wind projects would be developed in time and in such a manner as to necessarily allow it to fulfill its FIT Contract. The alleged statements of support the Claimant refers to are either not independently supported by the evidence or insufficiently specific to found any reasonable, investment-backed expectations.

171. For example, Mr. Baines maintains that in a meeting on April 19, 2010, soon after the OPA announced that the Claimant had been offered a FIT Contract, officials offered reassurance the Claimant’s Project could access Crown land for the purpose of studying the wind resource and

²⁸⁹ Claimant’s Reply Memorial, ¶ 569.

²⁹⁰ **R-0525**, Chatham Daily News Article, “SouthPoint Wind holds info session” (Mar. 30 2010). Available at: <http://www.chathamdailynews.ca/2010/03/30/southpoint-wind-holds-info-session>.

²⁹¹ Claimant’s Reply Memorial, ¶¶ 244-252; 565-570; CWS-Baines-2, ¶¶ 44-48.

²⁹² RWS-Lo-2, ¶ 4.

commence the REA process in a timely fashion.²⁹³ However, he fails to identify who specifically made the allegedly reassuring statements and what their specific reassurances were. In contrast, both Ms. Dumais of MOE and Ms. Lawrence of MNR have confirmed that the officials they sent on their behalf reported back that no commitments were made.²⁹⁴ Moreover, the two witness statements and handwritten notes of Mr. Roeper, who also attended the meeting, do not corroborate Mr. Baines' assertion.²⁹⁵

172. Mr. Baines also claims to have assumed that the lack of any written response from REFO to his May 13, 2010 letter²⁹⁶ constituted a positive expression of support for the Project.²⁹⁷ This position is not only untenable, it is absurd. The fact that there was no response cannot reasonably be interpreted as an indication of support. Any developer willing to operate on the basis of such an assumption does so at his own risk.

173. Mr. Baines also claims that government officials made representations in support of the Project at a meeting on June 15, 2010.²⁹⁸ However, this assertion is not supported by the meeting minutes, as Mr. Baines suggests.²⁹⁹ To the contrary, although the meeting minutes indicate that Mr. Baines “[was] looking for a commitment”,³⁰⁰ there is no evidence that any such commitment was given. The only specific representation Mr. Baines identifies as having reassured him is a question from an MOE official asking what the “drop dead” date for the Project was.³⁰¹ Mr. Baines claims to have understood this comment as “a commitment to help Windstream move through the regulatory approvals process, especially since at the time the Project was stalled because of MNR’s failure to approve [its] Crown land applications.”³⁰² This is absurd.³⁰³ It is

²⁹³ CWS-Baines-2, ¶ 16.

²⁹⁴ RWS-Dumais-1, ¶ 21; RWS-Lawrence-1, ¶¶ 29-32; RWS-Lawrence-2, ¶ 4.

²⁹⁵ CWS-Roeper-1, ¶ 24; CWS-Roeper-2, ¶¶ 49-50; **C-0221**, Handwritten Notes of Uwe Roeper, ORTECH (Apr. 19, 2010), p. 1.

²⁹⁶ **C-0258**, Memorandum from Adam Chamberlain, BLG to Windstream Energy (Jun. 17, 2010), p. 1.

²⁹⁷ CWS-Baines-2, ¶ 22-24; CWS-Baines-1, ¶ 78.

²⁹⁸ CWS-Baines-2, ¶ 25.

²⁹⁹ CWS-Baines-1, ¶ 79.

³⁰⁰ **C-0285**, Memorandum from Adam Chamberlain, BLG to Windstream Energy (Jun. 17, 2010), p. 1.

³⁰¹ CWS-Baines-2, ¶¶ 25-27.

³⁰² CWS-Baines-2, ¶ 27.

unreasonable to assume that a question as to when the Project needed its approvals by constituted a commitment that the Ontario Government would develop the regulatory framework in time to meet the Claimant's deadlines.

174. Finally, Mr. Baines claims that he relied upon the discussions with MNR about site access in August 2010 and that he interpreted MNR's response as "a clear signal to [the Claimant] that MNR would work with [them] to deal with the challenges facing the Project."³⁰⁴ However, as described above, MNR actually rebuffed the Claimant's attempts to extract assurances in relation to its applications for access to Crown land for the Project.³⁰⁵ As Ms. Lawrence, Assistant Deputy Minister of Policy at MNR, has confirmed, the Claimant's interpretation of this letter for the purposes of this arbitration is not reasonable, since MNR's letter provided no assurance that MNR would grant a grid cell swap.³⁰⁶

(iv) Any Alleged Expectations Based on the OPA's Extension of the Sign-Back Deadline or the Milestone Date for Commercial Operation Were Unreasonable

175. The Claimant also asserts that the OPA's extension of the deadline to accept its FIT Contract offer and its one-year extension to the MCOD in its FIT Contract offer "gave significant comfort to Windstream" because MEI allegedly intervened to obtain the extensions on behalf of the Claimant, which assured them that the Ontario Government supported the Project.³⁰⁷ Mr. Mars goes so far as to claim that he interpreted the extension as a representation that Windstream "would be able to bring the project to Commercial Operation by the deadline in [their] FIT Contract."³⁰⁸

176. However, the evidence establishes that the OPA decided of its own volition to extend the deadline to accept the FIT Contract offer and to grant the one-year extension. Mr. Cecchini has confirmed that the OPA extended the deadline in acknowledgment of the uncertainty facing the

³⁰³ Canada's Counter-Memorial, ¶ 437.

³⁰⁴ CWS-Baines-2, ¶ 33.

³⁰⁵ See above ¶ 147.

³⁰⁶ RWS-Lawrence-2, ¶¶ 7-12.

³⁰⁷ Claimant's Reply Memorial, ¶ 134; CWS-Baines-2, ¶ 39; CWS-Mars-2, ¶¶ 37-40.

³⁰⁸ CWS-Mars-2, ¶ 37.

Claimant, and to give it time to assess the regulatory risk before signing the FIT Contract.³⁰⁹ Indeed, Mr. Cecchini states that the OPA “wanted Windstream to have the opportunity to acquire additional information about setback requirements [...] and have sufficient time to consider the regulatory risk it would be taking on by signing the FIT Contract.”³¹⁰ Mr. Cecchini has also confirmed that the OPA decided not only to offer the extra year to Windstream but that an extension would also be granted to all future FIT proponents that were successful in obtaining a FIT Contract for an offshore wind project.³¹¹ There was no specific representation to the Claimant in support of its Project.

4. The Deferral Is a Non-Discriminatory Regulatory Measure Taken in Good Faith in Pursuit of a Legitimate Public Welfare Objective and Is Accordingly Not an Expropriation

177. As explained in Canada's Counter-Memorial, the deferral is a non-discriminatory measure designed to protect a legitimate public welfare objective and therefore does not amount to an indirect expropriation under Article 1110.³¹² Such a measure cannot constitute an indirect expropriation except in the rare circumstance where its impacts are so severe in light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith.³¹³

178. The Claimant asserts that Canada is advocating for “a broad public policy exception to indirect expropriation” unrecognized by law.³¹⁴ That is incorrect. Nor is Canada asserting “a blanket exception for regulatory measures”, as the Claimant argues in its attempt to analogize with the *Pope & Talbot* case.³¹⁵ Indeed, the Tribunal in *Feldman v. Mexico* recognized that “in some circumstances government regulatory activity can be a violation of Article 1110.”³¹⁶ Moreover, Canada's argument is not that the Tribunal should recognize an “exception” or “defence” to what would otherwise constitute an expropriation, as the Claimant suggests. Rather,

³⁰⁹ RWS-Cecchini, ¶ 11.

³¹⁰ RWS-Cecchini, ¶ 12.

³¹¹ RWS-Cecchini, ¶ 13.

³¹² Canada's Counter-Memorial, ¶¶ 494-504.

³¹³ Canada's Counter-Memorial, ¶¶ 495.

³¹⁴ Claimant's Reply Memorial, ¶ 486.

³¹⁵ Claimant's Reply Memorial, ¶ 496.

³¹⁶ **RL-024**, *Feldman – Award*, ¶ 110.

Canada's argument is that the Tribunal should accept well-established principles of international law recognized in the *Feldman* case and other cases Canada cited in its Counter-Memorial,³¹⁷ and conclude that in fact there has been no expropriation.

179. The Claimant suggests that the *Feldman* Tribunal held that “[i]f there is a finding of expropriation, compensation is required, even if the taking is for a public purpose, non-discriminatory and in accordance with due process of law.”³¹⁸ However, it also ruled that “governments must be free to act in the broader public interest”, for example “through protection of the environment”, and that customary international law recognizes that “[r]easonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation.”³¹⁹ The Tribunal further noted that “[i]f there is no expropriatory action, factors a-d [of NAFTA Article 1110, including the public purpose requirement] are of limited relevance.”³²⁰ The Tribunal thus distinguished between the principle allowing reasonable government regulation in the public interest, and the requirement for a government regulation that is expropriatory to have a public purpose in order to be lawful. The same distinction between expropriation and legitimate public welfare regulation not requiring compensation is also drawn in the NAFTA cases *S.D. Myers v. Canada* and *Fireman's Fund v. Mexico*,³²¹ and in non-

³¹⁷ Canada's Counter-Memorial, ¶¶ 494-497.

³¹⁸ Claimant's Reply Memorial, ¶ 496; **RL-024**, *Feldman – Award*, ¶ 98.

³¹⁹ **RL-024**, *Feldman – Award*, ¶ 103.

³²⁰ **RL-024**, *Feldman – Award*, ¶ 98.

³²¹ **CL-081**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000, ¶¶ 281-282: (“The general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA [...]. Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs.”); **RL-025**, *Fireman's Fund – Award*, ¶176(j): (“To distinguish between a compensable expropriation and a non-compensable regulation by a host State, the following factors (usually in combination) may be taken into account: whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized; and the bona fide nature of the measure.”).

NAFTA cases including *LG&E v. Argentina* and *Tecmed v. Mexico*.³²² The Claimant's arguments fail to account for this distinction.

180. The Claimant asserts that the deferral does not fall within the ambit of these principles because it was not adopted in good faith or for the purpose of protecting the environment, and because the deferral is disproportionate to its goals³²³ and that, unlike in those cases, Canada has failed to prove potential harm to the public in this case.³²⁴ It further argues that the Ontario Government's decision to defer the development of offshore wind projects "was and is not necessary to address legitimate scientific or environmental concerns," because "Windstream, like all project proponents, was already subject to a detailed regulatory framework under the REA Regulation," which was sufficient to protect the environment.³²⁵

181. However, these arguments must fail. As Canada noted in its Counter-Memorial, the Government of Ontario deferred offshore wind development in order to finalize the regulatory requirements for offshore wind.³²⁶ This decision that cannot be described as having been taken in bad faith or as being disproportionate to its goals.³²⁷ As discussed above, the REA Regulation did not provide a fully-developed regulatory framework for offshore wind projects.³²⁸

182. The Government deferred offshore wind development on February 11, 2011, because it needed to adopt an adequately informed policy framework for a streamlined approvals process on offshore wind. Knowing that the regulatory requirements would be the subject of intense

³²² **CL-059**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1) Decision on Liability, ¶¶ 194-195 citing **CL-084**, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2) Award, 29 May 2003, ¶ 115: ("It is important not to confound the State's right to adopt policies with its power to take an expropriatory measure. 'This determination is important because it is one of the main elements to distinguish, from the perspective of an international tribunal between a regulatory measure, which is an ordinary expression of the exercise of the state's police power that entails a decrease in assets or rights, and a de facto expropriation that deprives those assets and rights of any real substance.' With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose.").

³²³ Claimant's Reply Memorial, ¶¶ 507-530.

³²⁴ Claimant's Reply Memorial, ¶ 501.

³²⁵ Claimant's Reply Memorial, ¶ 254.

³²⁶ Canada's Counter-Memorial, ¶¶ 252-262.

³²⁷ Canada's Counter-Memorial, ¶¶ 494-504.

³²⁸ RWS-Wallace-1, ¶¶ 12-18; RWS-Wallace-2, ¶¶ 3-18.

stakeholder scrutiny and subsequent litigation, the Government also needed to ensure that the approvals process was defensible from a scientific and public policy perspective. These concerns were equally shared by other jurisdictions with responsibilities for the Great Lakes.³²⁹ This uncertainty was also reflected in the EBR postings issued on February 11, 2011 and the accompanying press release which refers to drinking water impacts, effects of ice build-up on support structures, foundation designs and impacts to shoreline ecosystems and wildlife, and noise emissions.³³⁰

183. The Government's press release, which echoes these reasons, quoted Mr. Wilkinson, then Minister of the Environment, who stated that "[o]ffshore wind on freshwater lakes is a recent concept that requires a cautious approach until the science of environmental impact is clear."³³¹ Linda Jeffrey, then Minister of Natural Resources, agreed that "[w]e need to base any future decisions on the best available scientific data."³³² This was the message that was communicated to the Claimant during the conference call held in advance of the public announcement.

184. In the words of the Minister of the Environment's Senior Policy Advisor, MOE was "not ready to move forward with the REA regulations." Ms. Lucas explained that the Ministry had received over 1,400 comments during its public consultation on the five-kilometre setback proposal, which raised more questions than answers, leaving "a lot of questions, not enough information, [and] not enough science to [...] build an offshore specific REA regulation."³³³ She also stated that there were "questions about how [MOE] would evaluate the reports and studies that any individual project brought in to us in terms of how they would be able to mitigate any of those concerns from [...] fish and bird habitat to ice, freeze and thaw issues to noise issues over

³²⁹ Canada's Counter-Memorial, ¶ 256; RWS-Wilkinson, ¶ 12; **R-0001**, *Treaty between the United States and Great Britain relating to boundary waters, and questions arising between the United States and Canada*, 11 January 1909, 36 Stat. 2448 (entered into force 5 May 1910); **R-0327**, *Protocol Amending the Agreement Between Canada and the United States of America on Great Lakes Water Quality, 1978, as Amended on October 16, 1983, and on November 18, 1987* (Sep. 7, 2012) (entered into force 12 February 2013).

³³⁰ **C-0725**, EBR Decision Notice, pp. 1-2; **C-0482**, Offshore Crown Land Policy Review Decision Notice; **C-0485**, Ministry of Environment, News Release, Ontario Rules Out Offshore Wind Projects (Feb. 11, 2011).

³³¹ **C-0725**, EBR Decision Notice, pp. 1-2; **C-0482**, Offshore Crown Land Policy Review Decision Notice; **C-0485**, Ministry of Environment, News Release, Ontario Rules Out Offshore Wind Projects (Feb. 11, 2011) (emphasis added).

³³² **C-0725**, EBR Decision Notice, pp. 1-2; **C-0482**, Offshore Crown Land Policy Review Decision Notice.

³³³ **C-0484**, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011), p. 3.

water”.³³⁴ In short, there was just “too much uncertainty for [the Ontario Government] to go forward on that now, [as they were] not ready with the REA regulation.”³³⁵ The MOE would “take the time and do more science work [including] work with the other Great Lakes jurisdictions, learn[ing] from things like the pilot project [...] proposed in Ohio.”³³⁶

185. Former Minister Wilkinson has confirmed that the public announcements in the EBR postings and press release “reflected [his] decision, as Minister of the Environment, that based on the information available at the time and applying the precautionary principle, Ontario lacked the science necessary to inform the regulatory changes required to allow large-scale offshore wind development to proceed while ensuring protection of human health and the environment.”³³⁷ Mr. Wilkinson recognized that MOE “needed to establish the regulatory requirements that an offshore wind facility would have to satisfy” under the REA Regulation, but that the state of the science did not allow it to do so as of February 11, 2011.³³⁸

186. Mr. Wilkinson’s decision was heavily influenced by the unknown effect that “the construction of an offshore wind facility might have on drinking water.”³³⁹ The Claimant suggests that this is not credible because “there is no evidence that MOE officials ever gave Minister Wilkinson advice on the sufficiency of the *Clean Water Act* regulatory framework to address potential impacts to drinking water.”³⁴⁰

187. However, the Claimant appears to have missed the point, since Mr. Wilkinson was precisely concerned about the lack of advice provided by officials on potential drinking water impacts when he asked them about it. As Mr. Wilkinson stated:

When I asked about [how the construction of turbine towers might displace the contaminated sediment], Ministry officials could not assure me that Ontario’s

³³⁴ C-0484, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011), p. 3.

³³⁵ C-0484, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011), p. 3.

³³⁶ C-0484, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011), p. 3.

³³⁷ RWS-Wilkinson, ¶ 4.

³³⁸ RWS-Wilkinson, ¶¶ 6-17.

³³⁹ RWS-Wilkinson, ¶ 10.

³⁴⁰ Claimant’s Reply Memorial, ¶ 284.

drinking water would not be impaired, or if it were, for how long. They simply didn't know. I was unhappy with this uncertainty, and I was not prepared to proceed with the development of large offshore wind projects in those circumstances.³⁴¹

188. Potential drinking water impacts weighed heavily on Mr. Wilkinson as he was involved in legislative reforms on drinking water that arose out of the Walkerton tragedy,³⁴² in which the contamination of drinking water resulted in seven deaths, thousands of illnesses, community devastation and alarm about the safety of Ontario's drinking water.³⁴³ Mr. Wilkinson says he had "heard directly the testimony of survivors of the tragedy, and the bitter lessons learned about the overarching need to keep sources of drinking water safe."³⁴⁴ This drove his adherence to the precautionary principle on issues related to drinking water.

189. Moreover, the Claimant's assertion³⁴⁵ that any drinking water concerns relating to offshore wind development could be addressed exclusively through the *Clean Water Act, 2006*³⁴⁶ ("CWA") is misleading and inaccurate. The CWA provides a mechanism for source protection committees, composed of a mix of stakeholder representatives such as conservation authorities and municipalities,³⁴⁷ to develop protection plans for drinking water sources. However, no source protection plans were in effect when the Claimant signed its FIT Contract.³⁴⁸ Even if a source protection plan had been in place, such plans relate primarily to the 21 drinking water threats prescribed by regulation, all of which are land-based activities and do not address threats posed

³⁴¹ RWS-Wilkinson, ¶ 10 (emphasis added).

³⁴² RWS-Wilkinson, ¶ 15.

³⁴³ RWS-Wilkinson, ¶ 14.

³⁴⁴ RWS-Wilkinson, ¶ 15.

³⁴⁵ Claimant's Reply Memorial, ¶¶ 271-280.

³⁴⁶ **R-0043**, *Clean Water Act, 2006*, S.O. 2006, c. 22 ("CWA").

³⁴⁷ The activities relating to development of a source protection plan are undertaken by a source protection committee made up of a mix of stakeholders including municipalities and industry, with technical and scientific support from the relevant conservation authority. **R-0502**, Ministry of the Environment, "The *Clean Water Act*: A Plain Language Guide" (Jun. 29, 2007), pp. 9-12.

³⁴⁸ Indeed, the plan for the source water protection area closest to the Project only came into effect in 2015 and does not deal with activities related to the construction and operation of an offshore wind project. **R-0617**, Cataraqui Source Protection Committee, "Cataraqui Source Protection Plan" (Apr. 1, 2015). Available at: <http://cleanwatercataraqui.ca/publications/approvedSourceProtectionPlan/SP-Plan-Revised-Feb2015-MapAppendix.pdf>.

by the construction and operation of a wind project in the offshore environment.³⁴⁹ MOE's five-kilometre setback proposal for offshore wind turbines recognized that existing intake protection zones under the CWA may have been insufficient to address these threats.³⁵⁰ However, at the time no-one could confirm to Minister Wilkinson that a distance of five kilometres as proposed was sufficient, leading him to conclude that further scientific research was required.

190. The Claimant also attempts to undermine Mr. Wilkinson's reliance on the precautionary principle,³⁵¹ arguing that it cannot apply because there was no "sound and credible threat" to Ontario's drinking water from offshore wind development.³⁵² However, Mr. Wilkinson has attested that the complete absence of information on drinking water impacts was sufficient to engage the principle in his mind, considering his mandate to protect the environment, human health and safety.³⁵³ There is no evidence to suggest that Mr. Wilkinson did not reasonably and in good faith consider that there was a serious and credible threat to Ontario's drinking water due to offshore wind development in the absence of a fully developed regulatory framework.

191. Ultimately, the evidence demonstrates that the decision to defer offshore wind was not taken in bad faith, as the Claimant has argued. Indeed, if Ontario followed the Claimant's preferred approach, it would simply have to hope for the best while allowing the bottom of Lake Ontario to be scraped and levelled off for 130 3,000-tonne³⁵⁴ gravity based foundations to be

³⁴⁹ **R-0500**, *General*, O. Reg. 287/07, s. 1.1 (For example, prescribed drinking water threats include handling and storage of fuel, application of pesticide to land, and operating sewage works). Available at: <http://www.ontario.ca/laws/regulation/070287>. Source protection plans address prescribed drinking water threats. **R-0043**, CWA, s. 22. Source protection plans only address activities other than prescribed drinking water threats in very particular circumstances and based on information provided by the MOE. **C-1499**, Ministry of the Environment, "Technical Rules: Assessment Report *Clean Water Act, 2006*" (Dec. 12, 2008), pp. 57-58.

³⁵⁰ Specifically, the discussion paper notes that the Ontario Government had introduced several pieces of legislation to ensure the protection of drinking water from the Great Lakes, giving the CWA, which established intake water protection zones and described rules for their delineation, as an example. The paper nonetheless proposes a separate "shoreline exclusion zone [to] establish a distance [from current and planned] drinking water intakes, [and] ensure that sediment dredging and other construction-related activities do not impact any drinking water intakes". **C-0298**, Offshore Wind Discussion Paper, p. 2.

³⁵¹ As explained in Canada's Counter-Memorial, the precautionary principle aims to anticipate and avoid environmental damage before it occurs, in recognition of the need to protect human health and the environment by taking precautionary measures while scientific studies are undertaken to identify the risk or risks associated with a course of action. Canada's Counter-Memorial, ¶ 501.

³⁵² Claimant's Reply Memorial, ¶ 286.

³⁵³ RWS-Wilkinson, ¶ 10.

³⁵⁴ RER-URS-1, ¶ 183(c).

dropped into place, rather than taking a more prudent and precautionary approach to development. Protection of the environment calls for more than what the Claimant desires and it was the need for precaution which drove Minister Wilkinson to make his decision to defer offshore wind development until Ontario was comfortable that such projects would not threaten the drinking water of Ontarians and the environment in general.

192. The Claimant also asserts that the deferral was disproportionate because Ontario had other “options, such as truly ‘freezing’ the FIT Contract or allowing Windstream to pursue an alternative project.”³⁵⁵ However, Canada has already established that “freezing” Windstream’s FIT Contract was something to be negotiated between Windstream and the OPA, in which the Ontario Government could not reasonably have been expected to intervene. Canada has also explained that the standard FIT Contract and FIT Rules do not allow an electricity supplier to substitute a different project using another renewable energy technology at another location.³⁵⁶ The OPA reasonably rejected these proposals.

E. Conclusion

193. In conclusion, the Claimant has failed to establish that any of its investments were indirectly expropriated by the Ontario Government’s deferral on the development of offshore wind projects. The Claimant’s right to a revenue stream under its FIT Contract, the only interest it includes in its damages valuation, is not an interest capable of being expropriated because it is highly contingent and speculative. The Claimant also fails to apply to the correct test in its expropriation analysis, ignoring the weight of NAFTA jurisprudence that focuses on the three elements of substantial deprivation, interference with distinct, reasonable investment-backed expectations, and the character of the measure or series of measures. The FIT Contract had no value that the Claimant could be substantially deprived of, and any reduction in value of the FIT Contract resulted from the Claimant’s own unreasonable actions given the temporariness of the measure and the Claimant’s failure to negotiate with the OPA in order to protect its FIT Contract from the effects of the deferral.

³⁵⁵ Claimant’s Reply Memorial, ¶ 521.

³⁵⁶ Canada’s Counter-Memorial, ¶¶ 452-453.

194. The Claimant has also failed to establish any interference with distinct, reasonable, and investment-backed expectations, given that it knew that the rules governing offshore wind projects had yet to be written and there was no certainty that they would be established in time to allow the Claimant to meet its deadlines under the FIT Contract. Such an expectation, even if held by the Claimant, was not reasonable, distinct, or investment-backed. Finally, the Claimant fails to recognize that, as a non-discriminatory regulatory measure taken in good faith in pursuit of a legitimate public welfare objective, the deferral cannot be an expropriation.

IV. The Claimant Has Still Failed to Demonstrate a Violation of Article 1105

A. Summary of Canada's Position

195. In its Reply Memorial, the Claimant alleges breaches of Article 1105 through two separate measures: (1) the imposition of the deferral itself; and (2) the subsequent actions of the Ontario Government in failing to lift the deferral or otherwise insulate the Claimant from its effects. However, the Claimant continues to rely on an inappropriate and unsupported, legal standard in its arguments. In particular, the Claimant has not established, through evidence of State practice and *opinio juris*, that customary international law protects against treatment that “breaches the investor’s legitimate expectations”, is “arbitrary or grossly unfair”, or “is discriminatory”.

196. When applying the proper standard, it is clear that the Government of Ontario has not breached the minimum standard of treatment of aliens. The decision to defer offshore wind development was motivated by the need to develop science-based requirements before allowing any development of offshore wind projects. Article 1105 does not allow a tribunal to second guess the appropriate level of regulation, its necessity, or how quickly governments should adopt or fully develop regulation.

197. Finally, even if the Tribunal assumes that customary international law extends as far as the Claimant argues (which it does not), the facts still do not prove a breach of Article 1105. First, the imposition of the deferral was not arbitrary or grossly unfair. Second, the imposition of the deferral did not contravene any expectations of the Claimant when it made its investments in Ontario. Indeed, the Claimant was well aware when it signed its FIT Contract in August 2010 that the regulatory rules for offshore wind projects had yet to be written. Third, the Ontario

Government's subsequent conduct with respect to the Claimant was also not arbitrary or grossly unfair. Fourth, the Claimant cannot demonstrate that it was subject to any discrimination by Ontario.

B. Article 1105 Requires Canada to Accord the Customary International Law Minimum Standard of Treatment

1. The Claimant Bears the Burden of Proving the Existence of a Relevant Rule of Customary International Law Through State Practice and *Opinio Juris*

198. In its Reply Memorial, the Claimant continues to advance an Article 1105 standard that is unsupported in law. As it did in its Memorial,³⁵⁷ the Claimant alleges that the content of Article 1105 includes, “among other conduct, a breach of commitments made to induce the investment, a breach of the investors’ legitimate expectations arising from a State’s representations and assurances, arbitrary treatment and grossly unfair treatment.”³⁵⁸ It also argues that “discriminatory treatment may amount to a breach of Article 1105.”³⁵⁹

199. As Canada explained in its Counter-Memorial, the NAFTA Free Trade Commission Note of Interpretation of July 31, 2001 (the “FTC Note”), which is binding on this Tribunal, is explicit that Article 1105 does not require more than the treatment accorded at customary international law under the minimum standard of treatment.³⁶⁰ Further, it is a well-established principle of international law that the party alleging the existence of a rule of customary international law bears the burden of proving it.³⁶¹ To establish a customary norm, the Claimant must demonstrate both consistent State practice and *opinio juris*.³⁶²

³⁵⁷ Claimant’s Memorial, ¶ 596.

³⁵⁸ Claimant’s Reply Memorial, ¶ 537.

³⁵⁹ Claimant’s Reply Memorial, ¶ 602.

³⁶⁰ Canada’s Counter-Memorial, ¶ 375.

³⁶¹ Canada’s Counter-Memorial, ¶ 370, **RL-056**, *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States)*, [1952] I.C.J. Rep. 176, Judgment, 27 August 1952, p. 200; **RL-011**, Ian Brownlie, *Principles of Public International Law*, 7th ed. (New York: Oxford University Press, 2008) p. 12; **CL-022**, *ADF – Award*, ¶ 185; **CL-087**, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002, ¶ 84 (“*UPS – Award on Jurisdiction*”).

³⁶² **CL-069**, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark v. Federal Republic of Germany/Netherlands)*, 1969 I.C.J. Reports 3, (Judgment, 20 February 1969) ¶¶ 77-78: (“Not only must the acts

200. The Claimant has failed to do so. In fact, it attempts to avoid its burden of showing State practice and *opinio juris* by relying solely on the awards of arbitral tribunals.³⁶³ For example, it argues that tribunal decisions applying the legitimate expectations doctrine provide useful guidance with respect to the application of Article 1105(1).³⁶⁴ However, State practice cannot be demonstrated solely through the decisions of past arbitral tribunals.³⁶⁵ Only States can engage in relevant actions which, if followed out of *opinio juris* and in concert with enough other States, coalesce into binding custom.³⁶⁶ Moreover, as Canada pointed out in its Counter-Memorial, the awards upon which the Claimant seeks to rely do not involve the application of customary international law, but rather the autonomous fair and equitable treatment standard under various bilateral investment treaties (“BITs”).³⁶⁷ Arbitral awards interpreting the autonomous standard are of no persuasive value for Article 1105 because the standard they apply is not rooted in customary international law, such as the standard guaranteed by the NAFTA.³⁶⁸

201. The Claimant attempts to get around this issue by arguing that “the proliferation of BITs and other investment treaties that contain [fair and equitable treatment] provisions, combined with the fact that States are acting out of a sense of obligation when entering into these

concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.” (*North Sea Continental Shelf*).

³⁶³ Claimant’s Reply Memorial, ¶¶ 540, 546-551.

³⁶⁴ Claimant’s Reply Memorial, ¶ 552.

³⁶⁵ Canada’s Counter-Memorial, ¶ 377. **CL-053**, *Glamis – Award*, ¶¶ 605-607. As the Glamis Tribunal held, discussions of custom in arbitral awards can provide helpful “illustrations of customary international law if they involve an examination of customary international law.” However, “[a]rbitral awards...do not constitute State practice and thus cannot create or prove customary international law.” See also **CL-031**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶¶ 277 (“*Cargill – Award*”); and **RL-043**, *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Award, 29 June 2012, ¶ 217.

³⁶⁶ **CL-069**, *North Sea Continental Shelf*, ¶ 77.

³⁶⁷ Canada’s Counter-Memorial, ¶¶ 371-379.

³⁶⁸ Canada’s Counter-Memorial, ¶¶ 376-377.

provisions³⁶⁹ provides evidence that the content of the autonomous fair and equitable treatment standard and the customary international law minimum standard of treatment in Article 1105(1) are substantively similar. Such arguments are unconvincing. The content of the obligation to accord fair and equitable treatment in NAFTA is defined only with respect to the minimum standard of treatment in customary international law. To the extent that other States have adopted an autonomous standard that has evolved differently, it has no bearing on the content of the provision in the NAFTA. In the words of the *Cargill v. Mexico* Tribunal, “significant evidentiary weight should not be afforded to autonomous clauses inasmuch as it could be assumed that such clauses were adopted precisely because they set a standard other than that required by custom.”³⁷⁰

202. Indeed, none of the awards cited by the Claimant, NAFTA or otherwise, undertakes the requisite examination of State practice and *opinio juris* necessary to prove that the customary international law minimum standard of treatment of aliens has the same substantive content as the autonomous fair and equitable treatment standard. In any event, as discussed below, such awards do not establish the existence of a rule of customary international law that guarantees the protection of “commitments reasonably relied upon by an investor”,³⁷¹ prohibits arbitrary and grossly unfair treatment including that “taken for a motive other than [its] stated rationale”,³⁷² or prohibits treatment with discriminatory effect.³⁷³

³⁶⁹ Claimant’s Reply Memorial, ¶ 553; CER-Dolzer, ¶ 64.

³⁷⁰ **CL-031**, *Cargill – Award*, ¶ 276; See also **CL-087**, *UPS – Award on Jurisdiction*, ¶ 97: (“[I]n terms of opinio juris there is no indication that [BITs for the protection of investment] reflect a general sense of obligation. [...] [T]he very fact that many of the treaties do expressly create a stand-alone obligation of fair and equitable treatment may be seen as giving added force to the ordinary meaning of Article 1105(1)”, which is that fair and equitable treatment is included within the minimum standard of treatment at customary international law).

³⁷¹ Claimant’s Reply Memorial, ¶ 549.

³⁷² Claimant’s Reply Memorial, ¶ 597.

³⁷³ Claimant’s Reply Memorial, ¶ 602.

(a) **The Claimant Has Still Not Proven that the Customary International Law Minimum Standard of Treatment Protects an Investor's Legitimate Expectations**

203. Relying on a handful of previous NAFTA decisions, the Claimant argues that “Article 1105(1) protects an investor’s legitimate expectations arising from specific commitments made to induce [an] investment.”³⁷⁴ However, these decisions do not actually support its position.

204. The Claimant first asserts that “the *Mobil* Tribunal established a three-part test for a Claimant to establish a breach of Article 1105(1) based on a breach of legitimate expectations”, requiring that: (1) clear and explicit representations were made in order to induce the investment; (2) such representations were reasonably relied upon by the claimant; and (3) these representations were subsequently repudiated.³⁷⁵ This is incorrect. The *Mobil* Tribunal looked to these “factual propositions” as “a relevant factor”, but it did not “legislate a new standard which is not reflected in the existing rules of customary international law.”³⁷⁶ In doing so it expressly held that “Article 1105 [does not] reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made.”³⁷⁷ The Tribunal explained that Article 1105 applied only where changes in the regulatory framework are “inconsistent with the customary international law standard”.³⁷⁸

205. The Claimant also relies on the *Bilcon* decision, asserting that that Tribunal applied the same test outlined in *Mobil* concerning legitimate expectations in finding a breach of Article 1105(1).³⁷⁹ However, *Bilcon* provides no assistance to the Tribunal here. As all three NAFTA Parties have agreed, the majority of the Tribunal in that case misapplied the minimum standard of treatment at customary international law.³⁸⁰ Despite acknowledging that it was bound to apply

³⁷⁴ Claimant’s Reply Memorial, ¶¶ 545-551.

³⁷⁵ Claimant’s Reply Memorial, ¶ 546 citing **CL-064**, *Mobil – Decision*, ¶ 152.

³⁷⁶ **CL-064**, *Mobil – Decision*, ¶¶ 153.

³⁷⁷ **CL-064**, *Mobil – Decision*, ¶ 153 (emphasis added).

³⁷⁸ **CL-064**, *Mobil – Decision*, ¶ 153 (emphasis added).

³⁷⁹ Claimant’s Reply Memorial, ¶ 548, citing **CL-134**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015, ¶¶ 445-54 (“*Bilcon – Award*”).

³⁸⁰ **RL-075**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Second Submission of the United States of America, 12 June 2015, ¶¶ 8-22; **RL-076**, *Mesa Power Group, LLC v. Government of Canada*

the high threshold set by customary international law, the majority of the *Bilcon* Tribunal failed to determine the positive content of Article 1105 by looking to customary international law in reaching its conclusion that “the reasonable expectations of the investor are a factor to be taken into account” in assessing a breach of Article 1105.³⁸¹ Instead, the majority looked to the decisions of other international tribunals in order to conclude that the “international minimum standard has evolved over the years towards greater protection for investors.”³⁸² As Canada has already noted, and as all three NAFTA Parties have consistently agreed, decisions of arbitral tribunals can describe and examine customary international law, but they are not themselves a source of customary international law.³⁸³

206. Further, the decisions upon which the *Bilcon* majority relied, and in particular, the decision of the Tribunal in *Merrill & Ring*, also do not conduct the required analysis of customary international law. The Claimant points to the statement of the *Merrill & Ring* Tribunal that “any investor will have an expectation that its business may be conducted in a normal framework free of interference from government regulations which are not underpinned by appropriate public policy objectives.”³⁸⁴ However, the *Merrill & Ring* Tribunal cited no authority for this statement, and did not explain how it represented customary international law.

207. The Claimant also relies on the separate opinion of Arbitrator Wälde in *Thunderbird*, which stated that the “legitimate expectation principle” has grown from a “subsidiary interpretative principle” to a “self-standing subcategory and independent basis for a claim under the ‘fair and equitable standard as under Art. 1105.’”³⁸⁵ However, the other members of the Tribunal did not endorse this statement in the award. Nor did the *Thunderbird* Tribunal recognize that a breach of specific commitments, reasonably relied upon by an investor and

(UNCITRAL) Second Submission of Mexico Pursuant to Article 1128, 12 June 2015, ¶¶ 10-11; **RL-077**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Government of Canada Response to 1128 Submissions, 26 June 2015, ¶ 14.

³⁸¹ **CL-134**, *Bilcon – Award*, ¶ 455.

³⁸² **CL-134**, *Bilcon – Award*, ¶ 435.

³⁸³ See above at ¶ 200; Canada's Counter-Memorial, ¶ 377; **RL-036**, *Mesa – 1128 Submission of the United States*, ¶ 6; **CL-053**, *Glamis – Award*, ¶¶ 605-607; See also **CL-031**, *Cargill – Award*, ¶ 277.

³⁸⁴ **CL-061**, *Merrill & Ring – Award*, ¶ 233 cited at Claimant's Reply Memorial, ¶ 551.

³⁸⁵ **RL-052**, *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) Separate Opinion of Thomas Walde, 1 December 2005, ¶ 37 cited at Claimant's Reply Memorial, ¶ 549.

subsequently repudiated by the State would in and of itself amount to a breach of Article 1105.³⁸⁶ The *Thunderbird* Tribunal only listed the fact that it had found no “legitimate expectations” on the part of the investor as one reason among others for concluding that the investor had not met its burden to demonstrate that Mexico’s conduct violated the minimum standard of treatment.³⁸⁷

208. The Claimant also relies on the statement of the Tribunal in *Glamis* to the effect that “a state may be tied to the objective expectations that it creates in order to induce investment.”³⁸⁸ However, the *Glamis* Tribunal was merely agreeing with the holding in *Thunderbird* that legitimate expectations relate to an examination under Article 1105(1) in such situations “where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct.”³⁸⁹

209. In sum, the *Thunderbird*, *Glamis* and *Mobil* Tribunals merely determined that a breach of “clear and explicit representations made...in order to induce the investment” could be a “relevant factor” in assessing whether a measure amounts to the type of egregious behaviour prohibited by the customary international law minimum standard of treatment.³⁹⁰ None of these tribunals held that a breach of legitimate expectations in and of itself could amount to a breach of 1105(1).³⁹¹

210. Finally, the Claimant also relies on the awards in *Enron v. Argentina*, *Tecmed v. Mexico*, *Sempra v. Argentina*, and *Duke Energy v. Ecuador* to support its assertion that Article 1105 protects an investor’s legitimate expectations.³⁹² However, these cases apply the autonomous fair and equitable treatment standard under the Argentina-U.S., Ecuador-U.S., and Mexico-Spain

³⁸⁶ Claimant’s Reply Memorial, ¶ 549.

³⁸⁷ **CL-057**, *Thunderbird – Award*, ¶¶ 195-201.

³⁸⁸ Claimant’s Reply Memorial, ¶ 550 citing **CL-053**, *Glamis – Award*, ¶ 621.

³⁸⁹ **CL-053**, *Glamis – Award*, ¶ 621 citing **CL-057**, *Thunderbird – Award*, ¶ 147.

³⁹⁰ **CL-057**, *Thunderbird – Award*, ¶¶ 147-148; **CL-053**, *Glamis – Award*, ¶¶ 620-621; **CL-064**, *Mobil – Decision*, ¶ 152.

³⁹¹ Canada’s Counter-Memorial, ¶¶ 406-409.

³⁹² Claimant’s Reply Memorial, ¶ 550 citing **RL-023**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Award, 22 May 2007 (“*Enron*”), ¶ 262; **CL-084**, *Tecmed*, ¶ 154; **RL-049**, *Sempra Energy International v. Argentine Republic* (ICSID No. ARB/02/16) Award, 28 September 2007 (“*Sempra Energy*”), ¶ 298; **CL-044**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19) Award (“*Duke Energy*”), 18 August 2008, ¶ 340.

BITs, which do not refer to customary international law.³⁹³ As Canada explained in its Counter-Memorial, such decisions are irrelevant to determining a breach of Article 1105.³⁹⁴

(b) The Claimant Has Still Not Proven that the Customary International Law Minimum Standard of Treatment Protects Against Arbitrary or Unfair Treatment

211. The Claimant also argues that tribunals have found that merely arbitrary or grossly unfair measures such as “measures taken for a motive other than their stated rationale amount to a breach of the fair and equitable treatments standard.”³⁹⁵ It argues that this is “particularly the case where the measure was motivated by political expediency.”³⁹⁶ Again, the decisions of tribunals interpreting an autonomous standard offer the Tribunal no guidance,³⁹⁷ and furthermore, the NAFTA cases that the Claimant cites do not actually stand for this proposition.

212. The NAFTA tribunals referred to by the Claimant have not found a general prohibition of the sort the Claimant alleges. Rather, they have reviewed particular instances of conduct and have held that measures breach of Article 1105 where: (1) the sole purpose of a measure was to damage the Claimant’s investment “to the greatest extent possible” and “[t]here is no other relationship between the means and the end”;³⁹⁸ (2) the government had no legal authority to deny a permit, and additional actions were taken that were procedurally and substantively deficient;³⁹⁹ and (3) the stated purpose of the measure was merely pretextual and the real intent

³⁹³ **RL-023**, *Enron*, ¶¶ 251-268 and **RL-049**, *Sempra*, ¶¶ 290-304 citing Art. II(2)(a) of the Argentina-U.S. BIT: (“Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.”); **CL-084**, *Tecmed*, ¶ 64 citing Article 3(1) of the Mexico-Spain BIT: (“Each Contracting Party shall guarantee fair and equitable treatment in its territory pursuant to international law for investments made by investors from another Contracting Party”.); **CL-044**, *Duke Energy*, ¶ 313 citing Article II(3)(a) of the Ecuador-U.S. BIT: (“Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.”).

³⁹⁴ Canada’s Counter-Memorial, ¶¶ 371-379.

³⁹⁵ Claimant’s Reply Memorial, ¶ 597.

³⁹⁶ Claimant’s Reply Memorial, ¶ 597 relying on **CL-031**, *Cargill – Award*, ¶ 299; **CL-081**, *S.D. Myers – Partial Award*, ¶¶ 183, 185, 193-195; **CL-049**, *Eureko B.V. v. Republic of Poland* (UNCITRAL) Partial Award, 19 August 2005, ¶¶ 198, 233; **CL-041**, *Vivendi II*, ¶¶ 5.2.5; **CL-045**, *Eastern Sugar B.V. v. Czech Republic* (SCC Case No. 088/2004) Partial Award, 27 March 2007, ¶ 265

³⁹⁷ See above at ¶¶ 201-202; Canada’s Counter-Memorial, ¶¶ 371-379.

³⁹⁸ **CL-031**, *Cargill – Award*, ¶¶ 298-299.

³⁹⁹ **CL-062**, *Metalclad – Award*, ¶ 97.

was to protect national investors (and disadvantage foreign competitors).⁴⁰⁰ These decisions do not show that the tribunals considered that the minimum standard of treatment at customary international law protects against all instances of what it might consider to be merely arbitrary or unfair treatment.

(c) The Claimant Has Still Not Proven that the Customary International Law Minimum Standard of Treatment Protects Against Discrimination

213. The Claimant continues to assert that the Ontario Government's more favourable treatment of TransCanada, Samsung and other renewable energy proponents breached Article 1105(1).⁴⁰¹ However, as set out in Canada's Counter-Memorial, Article 1105 does not protect against nationality-based discrimination.⁴⁰² The Claimant incorrectly asserts that Canada cited no legal authority to support this position in its Counter-Memorial.⁴⁰³ As Canada has demonstrated, the binding FTC Note expressly rejects the notion that a claimant can rely on its claims under Articles 1102 and 1103 to establish a breach of Article 1105.⁴⁰⁴ Since it is binding on the Tribunal, the FTC Note itself is sufficient legal authority for Canada's position.

214. Moreover, none of the cases the Claimant cites support its position that less favourable treatment under Articles 1102 or 1103 is relevant to the analysis under Article 1105. For example, in *Loewen v. United States*, sectional or local prejudice was only considered with regards to the application of the customary international law standard concerning the "denials of justice in litigation between private parties" and the obligation "to maintain and make available to aliens, a fair and effective system of justice."⁴⁰⁵ Similarly, the *Waste Management II v. United*

⁴⁰⁰ **CL-081**, *S.D. Myers – Partial Award*, ¶¶ 193-195.

⁴⁰¹ Claimant's Reply Memorial, ¶¶ 539, 602-605.

⁴⁰² Canada's Counter-Memorial, ¶ 442.

⁴⁰³ Claimant's Reply Memorial, ¶ 602.

⁴⁰⁴ Canada's Counter-Memorial, ¶ 442; **CL-010**, NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions (31 July 2001), ¶ 3: ("A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).").

⁴⁰⁵ **CL-060**, *Loewen – Award*, ¶ 129.

States Tribunal referred only to conduct which “is discriminatory and exposes the claimant to sectional or racial prejudice.”⁴⁰⁶ None of those situations are relevant to the case at hand.

215. The Claimant’s analysis under Article 1105 also relies on statements by the Tribunal in *Unglaube v. Costa Rica* regarding discrimination.⁴⁰⁷ However, these statements were not made in the course of interpreting the fair and equitable treatment standard of the Costa Rica-Germany BIT.⁴⁰⁸ Rather, the Tribunal made the statements relied on by the Claimant when interpreting a provision that explicitly protects against arbitrary or discriminatory treatment of investments.⁴⁰⁹ The fact that Germany and Costa Rica included a separate provision prohibiting impairment by “arbitrary means or discriminatory treatment” potentially suggests that they did not believe it forms part of the autonomous fair and equitable treatment standard, let alone customary international law.

2. The Threshold for Establishing a Breach of the Customary International Law Minimum Standard of Treatment of Aliens Is High

216. As stated in Canada’s Counter-Memorial, the threshold for establishing a breach of the customary international law minimum standard of treatment under Article 1105(1) is high, requiring evidence of egregious conduct, such as serious malfeasance, manifestly arbitrary behaviour or denial of justice.⁴¹⁰ The Claimant characterizes Canada’s position as “extreme” and argues that several NAFTA tribunals have rejected it.⁴¹¹ However, the Claimant misrepresents the decisions it cites to counter Canada’s position, as the Claimant’s authorities relate solely to the evolution of the content of customary international law and not the threshold to establish a breach of Article 1105(1).

⁴⁰⁶ **CL-091**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), 30 April 2004, ¶ 98.

⁴⁰⁷ Claimant’s Reply Memorial, ¶ 602.

⁴⁰⁸ **CL-127**, *Unglaube v. Republic of Costa Rica* (ICSID Case No. ARB/08/1) Award, 16 May 2012, ¶ 240: (“Article 2(1) of the Treaty states: ‘Each Contracting Party shall in its territory promote as far as possible investments by nationals or companies of the other Contracting Party and admit such investments in accordance with its legislation. It shall in any case accord investments fair and equitable treatment.’”) (“*Unglaube*”).

⁴⁰⁹ **CL-127**, *Unglaube*, ¶¶ 260-263: (“Article 2(3) of the Treaty reads as follows: Neither Contracting Party shall in any way impair by arbitrary measures or unjustified discriminatory treatment the management, maintenance, use, or enjoyment of investments in its territory of nationals or companies of the other Contracting Party.”).

⁴¹⁰ Canada’s Counter-Memorial, ¶¶ 380-389.

⁴¹¹ Claimant’s Reply Memorial, ¶ 542.

217. The Claimant relies on the *Mondev v. United States* Tribunal's holding, as endorsed by the *Chemtura v. Canada* and *ADF* Tribunals, that "[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious."⁴¹² However, as held in *Glamis*, this merely refers to the idea that the customary international law standard is to be "applied with current sentiments and to modern situations," such that a tribunal "may find shocking and egregious events not considered to reach this level in the past."⁴¹³

218. The Claimant's assertion that the *Glamis* Tribunal is the only NAFTA tribunal to uphold this high standard⁴¹⁴ is incorrect. As set out in Canada's Counter-Memorial, the high threshold for establishing a breach of Article 1105(1) has been upheld by many other tribunals including *S.D. Myers*, *Thunderbird*, *Waste Management II*, *Cargill*, and *Mobil*.⁴¹⁵ Moreover, while the majority misapplied the legal standard under Article 1105(1), as described above, the *Bilcon* Tribunal also unanimously held that "there is indeed a high threshold for Article 1105 to apply".⁴¹⁶

219. The cases referred to by the Claimant do not require any other conclusion. For example, while the Claimant relies on the *Pope & Talbot* Tribunal's statements,⁴¹⁷ that Tribunal's findings are inconsistent with all the subsequent NAFTA decisions including *Waste Management II*,⁴¹⁸ upon which the Claimant also relies. Further, the Claimant's reliance on *Deutsche Bank v. Sri Lanka* and *TECO v. Guatemala* cases is also misplaced.⁴¹⁹ The *Deutsche Bank* case is not

⁴¹² **CL-066**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002, ¶ 116; **CL-037**, *Chemtura – Award*, ¶¶ 121-122; **CL-022**, *ADF – Award*, ¶ 180. The *GAMI* Tribunal cited by the Claimant also endorses the *ADF* Tribunal's view that "customary international law as reflected in Article 1105 is 'constantly in a process of development', and concludes that the proper standard is that articulated in *Waste Management II* (**CL-051**, *GAMI Investments, Inc. v. The Government of the United Mexican States* (UNCITRAL) Final Award, 15 November 2004, ¶ 95 ("GAMI")).

⁴¹³ **CL-053**, *Glamis – Award*, ¶ 613.

⁴¹⁴ Claimant's Reply Memorial, ¶ 543.

⁴¹⁵ Canada's Counter-Memorial, ¶¶ 383-387.

⁴¹⁶ **CL-134**, *Bilcon – Award*, ¶ 437.

⁴¹⁷ **CL-075**, *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Award on the Merits of Phase 2, 10 April 2001, ¶ 118.

⁴¹⁸ See Canada's Counter-Memorial, ¶¶ 385-389.

⁴¹⁹ Claimant's Reply Memorial, ¶ 543 citing **CL-085**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23) Award, 19 December 2013, ¶¶ 449-55 ("*TECO*"); **CL-120**, *Deutsche Bank AG v.*

relevant to the Tribunal's analysis, as it applies an autonomous fair and equitable treatment standard under the Germany-Sri Lanka BIT.⁴²⁰ *TECO* applied the minimum standard of treatment under Article 10.5 of the Dominican Republic-Central America Free Trade Agreement, which like Article 1105 of the NAFTA refers to customary international law.⁴²¹ However, in doing so, the Tribunal adopted the same threshold described in *Waste Management II* and *Glamis*;⁴²² that is, it used the same threshold described by Canada above.

220. In assessing whether Article 1105(1) has been breached, NAFTA tribunals have accorded a high level of deference to domestic authorities in governing affairs within their own borders. As stated by the *S.D. Myers* Tribunal, “[w]hen interpreting and applying the ‘minimum standard’ a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision making.”⁴²³ The approach of the *S.D. Myers* Tribunal was expressly endorsed in *GAMI v. Mexico* and *Cargill*,⁴²⁴ and the *Chemtura* Tribunal similarly held that “the role of a Chapter 11 Tribunal is not to second-guess the correctness of the science-based decision-making of highly specialized national regulatory agencies.”⁴²⁵ Furthermore, as held by the Tribunal in *Mobil*, nothing in Article 1105 prevents a government from changing the regulatory environment, even if those changes result in significant additional burdens on the investor: “Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement

Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/09/2) Award, 31 October 2012, ¶¶ 419-420 (“*Deutsche Bank*”).

⁴²⁰ **CL-120**, *Deutsche Bank*, ¶ 409: (“Article 2(1) of the Treaty [...] provides that ‘[Each Contracting State] shall in any case accord such investments fair and equitable treatment’ establishes an autonomous standard of fair and equitable treatment.”).

⁴²¹ **CL-085**, *TECO*, ¶ 443: (“The minimum standard applicable to this case is defined as follows in Article 10.5, paragraph 2, of the Dominican Republic-Central America Free Trade Agreement: “For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.”).

⁴²² **CL-085**, *TECO*, ¶¶ 454-455.

⁴²³ **CL-081**, *S.D. Myers – Partial Award*, ¶ 261; **RL-046**, *S.D. Myers, Inc. v. Government of Canada*, (UNCITRAL) Separate Opinion by Dr. Bryan Schwartz, Concurring Except with Respect to Performance Requirements, in the Partial Award of the Tribunal, 12 November 2000, ¶ 230.

⁴²⁴ **CL-051**, *GAMI*, ¶ 93; **CL-031**, *Cargill – Award*, ¶ 292.

⁴²⁵ **CL-037**, *Chemtura – Award*, ¶ 134 (Tribunal noting that Claimant agreed with the Respondent that the role of Chapter 11 tribunals is not to second-guess the correctness of science-based decision making of highly specialized national regulatory agencies).

that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made."⁴²⁶

C. Ontario's Measures Were Consistent with the Customary International Law Minimum Standard of Treatment

1. The Decision to Defer Offshore Wind Development Was a Legitimate Policy Decision Made after Due Deliberation and Consultation

221. As explained in Canada's Counter-Memorial⁴²⁷ and above,⁴²⁸ the decision to defer the development of offshore wind projects was made by the Minister of the Environment, with the support of the Ministers of Natural Resources and Energy, so that regulators could conduct the scientific research necessary to inform the development of rules, requirements and standards that offshore wind proponents would need to satisfy prior to the issuance of a REA.⁴²⁹ Indeed, throughout the many government meetings and discussions on offshore wind that occurred in the fall of 2010 and in January 2011,⁴³⁰ the one constant consideration was the need to finalize the regulatory approvals process.

222. For example, at the January 6, 2011 Energy Issues Meeting,⁴³¹ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁴³² Brenda Lucas, Minister Wilkinson's Senior Policy Advisor, attended that meeting, and reported back to him that one of the "key issues for MOE" with the [REDACTED]

⁴²⁶ CL-064, *Mobil – Decision*, ¶ 153.

⁴²⁷ Canada's Counter-Memorial, ¶¶ 252-262.

⁴²⁸ See above at ¶¶ 182-186.

⁴²⁹ RWS-Wilkinson, ¶ 10; Canada's Counter-Memorial, ¶¶ 401-404; RWS-Dumais-2, ¶ 17.

⁴³⁰ Canada's Counter-Memorial, ¶¶ 235-251.

⁴³¹ Canada's Counter-Memorial, ¶ 251.

⁴³² C-0430, Ministry of Energy Presentation, Offshore Wind: Options for Moving Forward (Jan. 6, 2011); C-0902, E-mail from Eric Boysen, Ministry of Natural Resources to Ken Cain, Ministry of Natural Resources et al (Jan. 6, 2011); C-0450, E-mail from Jason R. Collins, Ministry of Energy to Pearl Ing, Ministry of Energy (Jan. 11, 2011); C-0900, Ministry of Environment Memorandum (Confidential Advice to the Minister) from Brenda Lucas to Minister Wilkinson (Jan. 6, 2011); C-0895, E-mail from Craig MacLennan, Ministry of Energy to Andrew Mitchell, Ministry of Energy (Jan. 5, 2011). RWS-Lo- 2, ¶¶ 8-10.

[REDACTED]⁴³³ Ms. Lucas stated that [REDACTED]

[REDACTED]

[REDACTED]⁴³⁴

223. In preparation for the next Energy Issues Meeting on January 13, 2011, MEI staff drafted a communications plan based on the preferred option at the meeting on January 6, 2011.⁴³⁵

However, by that point, the Minister of the Environment's Office had raised concerns [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁴³⁷

224. The sole remaining question at that point became what to do with the Claimant's Project and how to reconcile the deferral decision with the fact that the Claimant had a FIT Contract. In this regard, three options were discussed: [REDACTED]

[REDACTED]

[REDACTED]⁴³⁸

225. Of the three options presented, Mr. Wilkinson's office communicated to MOE staff on that same day that he preferred a full deferral on offshore wind and that he did not support the option

⁴³³ C-0900, Ministry of Environment Memorandum (Confidential Advice to the Minister) from Brenda Lucas to Minister Wilkinson (Jan. 6, 2011), p. 2 (emphasis added).

⁴³⁴ C-0900, Ministry of Environment Memorandum (Confidential Advice to the Minister) from Brenda Lucas to Minister Wilkinson (Jan. 6, 2011), p. 2 (emphasis added).

⁴³⁵ C-0917, Ministry of Energy Agenda, Energy Issues Meeting (Jan. 13, 2011); C-0916, Communications Strategy Summary: Offshore Wind – January 2011 (Jan. 12, 2011).

⁴³⁶ C-0900, Ministry of Environment Memorandum (Confidential Advice to the Minister) from Brenda Lucas to Minister Wilkinson (Jan. 6, 2011), p. 2; see also RWS-Lo-2, ¶ 11 RWS-Lo-2, ¶ 11.

⁴³⁷ C-0458, E-mail from Pearl Ing, Ministry of Energy to Marcia Wallace, Ministry of Environment et al (Jan. 13, 2011).

⁴³⁸ C-0921, Ministry of Energy Presentation, Offshore Wind: Options for Moving Forward (Draft 3) (Jan. 13, 2011), pp. 6-9.

of [REDACTED]

[REDACTED]⁴⁴⁰

226. The day after the meeting at which these options were discussed, January 14, 2011, Sue Lo of MEI sent an e-mail to her colleagues at MOE, MNR, and MTC confirming that MEI would develop a “communications plan” with “the preferred option being: moratorium on offshore wind for next 3-5 years to provide time to develop the science and create the uniform rules and policies in collaboration with the Great Lakes States. The preferred option will also involve discussions with the developer of the Wolfe Island shoals project such that the project won't proceed until the science and uniform rules and policies have been developed.”⁴⁴¹

227. The next business day, Monday January 17, 2011, the Minister of Energy's Chief of Staff, Craig MacLennan, informed the office of the Minister of Consumer Services, John Gerretsen, about the direction for offshore wind. Mr. Gerretsen was the Member of Provincial Parliament (“MPP”) for Kingston and the Islands, the riding closest to the Project. Mr. Gerretsen's office was told that the plan was that no applications for offshore wind projects would be accepted while Ontario developed the necessary science, and that the Claimant's Project would be delayed during this time.⁴⁴² The alternative was [REDACTED]

[REDACTED]⁴⁴³

228. The Ministers of the Environment, Energy, Natural Resources and Minister Gerretsen scheduled a meeting to discuss the options. In this context, MEI officials were asked to prepare a presentation, with input from MOE and MNR which included information on a “Decision Point

⁴³⁹ **R-0208**, E-mail from Marcia Wallace, Ministry of Environment to Doris Dumais, Ministry of Environment (Jan. 13, 2011), p. 1; RWS-Wallace-1, ¶ 61.

⁴⁴⁰ RWS-Wilkinson, ¶ 17; RWS-Dumais-1, ¶¶ 32-34; RWS-Wallace-1, ¶ 66; **C-0943**, E-mail from Craig MacLennan, Ministry of Energy to Chris Morley, Premier's Office (Jan. 24, 2011), p. 1.

⁴⁴¹ **C-0180**, E-mail from Paul Evans, Ministry of Environment to Sue Lo, Ministry of Energy et al (Jan. 14, 2011), p. 2; **R-0552**, E-mail from Petra Fisher, Ministry of Energy to Jennifer Heneberry, Ministry of Energy (Jan. 14, 2011), p. 2; **C-0924**, Ministry of Energy, “Offshore Wind Direction: Assumptions” (Jan. 14, 2011).

⁴⁴² **C-0928**, E-mail from Craig MacLennan, Ministry of Energy to Utilia Amral, Ministry of Consumer Services and Sabrina Grando, Ministry of Consumer Services (Jan. 17, 2011), p. 1.

⁴⁴³ **C-0928**, E-mail from Craig MacLennan, Ministry of Energy to Utilia Amral, Ministry of Consumer Services and Sabrina Grando, Ministry of Consumer Services (Jan. 17, 2011), p. 1; **C-0933**, E-mail from Craig MacLennan, Ministry of Energy to Alicia Johnston, Ministry of Energy et al. (Jan. 18, 2011).

between t[w]o options on the Windstream project, with a brief description of pros/cons and how we would operationalize the option.”⁴⁴⁴ The options were: [REDACTED]

[REDACTED]⁴⁴⁵ Despite the importance the Claimant puts on this language [REDACTED] was only used internally and was never used in any representation to the Claimant. It was not even used by MEI in the presentation it prepared for the Ministers. The presentation MEI developed, dated Friday, January 21, 2011, set out the options as follows: [REDACTED]

[REDACTED]⁴⁴⁶

229. The ministerial meeting was held on Monday, January 24, 2011.⁴⁴⁷ At the meeting,

[REDACTED]⁴⁴⁸ The option of [REDACTED]

[REDACTED]⁴⁴⁹ Further, during the meeting the Ministers acknowledged that [REDACTED]

[REDACTED]⁵⁰ Consistent with his position in earlier discussions, Minister Wilkinson

⁴⁴⁴ **R-0213**, E-mail from Samira Viswanthan, Ministry of Energy to Mirrun Zaveri, Ministry of Energy (Jan. 20, 2011).

⁴⁴⁵ **R-0213**, E-mail from Samira Viswanthan, Ministry of Energy to Mirrun Zaveri, Ministry of Energy (Jan. 20, 2011).

⁴⁴⁶ **C-0464**, Ministry of Energy, Presentation, “Offshore Wind: Options for Moving Forward” (Jan. 21, 2011), slides 4-6.

⁴⁴⁷ **R-0553**, Ontario Government Meeting Invitation (Jan. 24, 2011).

⁴⁴⁸ **C-0943**, E-mail from Craig MacLennan, Ministry of Energy to Chris Morley, Premier’s Office (Jan. 24, 2011), pp. 1-2.

⁴⁴⁹ **C-0943**, E-mail from Craig MacLennan, Ministry of Energy to Chris Morley, Premier’s Office (Jan. 24, 2011), p. 1; *see also* **R-0554**, E-mail from Chris Morley, Premier’s Office to Sean Hamilton, Ministry of Environment (Jan. 24, 2011).

⁴⁵⁰ **C-0943**, E-mail from Craig MacLennan, Ministry of Energy to Chris Morley, Premier’s Office (Jan. 24, 2011), p. 1.

[REDACTED]

[REDACTED]⁴⁵¹

230. Following the January 24, 2011 meeting, Brenda Lucas raised similar concerns regarding [REDACTED]. In her correspondence with Mr. Mitchell of the Minister of Energy's Office and Richard Linley of the Minister of Natural Resources' Office, she stated that:

[REDACTED]

[REDACTED]

[REDACTED]⁴⁵² Therefore, Ms. Lucas wanted MEI to [REDACTED]

[REDACTED]⁴⁵⁴

231. Staff from the Ministers' Offices and the Premier's Office met the day after the Minister's meeting, on January 25, 2011, to discuss the offshore direction that had been provided by the Ministers.⁴⁵⁵ In her summary of the call, Ms. Lucas stated "[w]e'll announce a moratorium on offshore (asap)" and that MOE was [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁴⁵⁶

232. However, Minister Wilkinson still had concerns about allowing the Windstream Project to proceed. On January 27, 2011, Minister Wilkinson's Chief of Staff, Sean Hamilton, wrote to the Minister of Natural Resources' Office and the Premier's Office stating that that they "need[ed] to

⁴⁵¹ **C-0943**, E-mail from Craig MacLennan, Ministry of Energy to Chris Morley, Premier's Office (Jan. 24, 2011), p. 1.

⁴⁵² **C-0942**, E-mail from Brenda Lucas, Ministry of Environment to Sean Mullin, Premier's Office et al (Jan. 24, 2011), p. 1 (emphasis added).

⁴⁵³ **C-0942**, E-mail from Brenda Lucas, Ministry of Environment to Sean Mullin, Premier's Office et al (Jan. 24, 2011), p. 1.

⁴⁵⁴ Canada's Counter-Memorial, ¶ 250; RWS-Dumais-1, ¶¶ 32-34.

⁴⁵⁵ **C-0946**, Meeting Invitation, "FW: MEETING - with Andrew, Richard, Craig, Alicia, Erika, Brenda, Aaron and Sean" (Jan. 25, 2011).

⁴⁵⁶ **C-0947**, E-mail from Brenda Lucas, Ministry of Environment to Sean Hamilton, Ministry of Environment and Martha Murray, Ministry of Environment (Jan. 25, 2011), p. 1; **C-0948**, E-mail from Martha Murray, Ministry of Environment to Brenda Lucas, Ministry of Environment et al (Jan. 25, 2011).

chat” about offshore wind, because the Minister of the Environment’s Office was [REDACTED]

[REDACTED]⁴⁵⁷

233. A meeting was then organized on the same day, between the four Ministers’ Chiefs of Staff and the Premier’s Office to clarify the direction on offshore wind, as it applied to Windstream.⁴⁵⁸

Later that day, Mr. Hamilton wrote to Mr. MacLennan at the Minister of Energy’s Office and Mr. Mullin at the Premier’s Office, explaining that from MOE’s perspective [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵⁹ Mr. Hamilton further stated [REDACTED]

[REDACTED]

[REDACTED]⁴⁶⁰

234. Thus, on January 27, 2011, Mr. Hamilton communicated Minister Wilkinson’s decision that the deferral on REA applications for offshore wind projects would apply to Windstream. On February 11, 2011, the Government of Ontario announced that it would not proceed with offshore wind development “until the necessary scientific research is completed and an adequately informed policy framework can be developed.”⁴⁶¹ The announcement stated that in the meantime, “Ontario will work with our U.S. neighbours to undertake collaborative research

⁴⁵⁷ **R-0555**, E-mail from Sean Hamilton, Ministry of Environment to Craig MacLennan, Ministry of Energy, et al. (Jan. 27, 2011), p. 1.

⁴⁵⁸ **R-0556**, E-mail from Andrew Mitchell, Ministry of Energy to Craig MacLennan, Ministry of Energy (Jan. 27, 2011).

⁴⁵⁹ **C-0959**, E-mail from Andrew Mitchell, Ministry of Energy to Craig MacLennan, Ministry of Energy and Sean Mullin, Premier’s Office (Jan. 28, 2011). Mr. Hamilton was referring to the proposed LEEDCo offshore wind project in Lake Erie, which has been under development since 2009 and remains under development more than six years later. **R-0445**, LeedCo, website excerpt, “About”.

⁴⁶⁰ **C-0959**, E-mail from Andrew Mitchell, Ministry of Energy to Craig MacLennan, Ministry of Energy and Sean Mullin, Premier’s Office (Jan. 28, 2011), p. 2 (emphasis added).

⁴⁶¹ **C-0725**, EBR Decision Notice, p. 1.

and study that will ensure that any future projects are designed and implemented in a manner that is protective of human health, cultural heritage and the environment."⁴⁶²

235. In sum, the facts set out in Canada's Counter-Memorial and above detail how the Government of Ontario arrived at the decision to defer offshore wind development, which resulted in the cancellation of all offshore wind projects, except the Claimant's.⁴⁶³ This decision, which considered the policy concerns raised by multiple Ministries, and was based on Mr. Wilkinson's concerns regarding environmental considerations and the need for sound science to back up any regulations. The record shows that this decision was the sort of public policy decision that a government, acting in the public interest to protect human health, cultural heritage and the environment, is expected to make. The evidence as a whole does not demonstrate the type of serious malfeasance that amounts to a violation of Article 1105.

2. The Claimant's Allegations of a Breach of Article 1105(1) Are Unfounded

236. The Claimant asks that the Tribunal ignore the facts presented above, ignore the detailed and extensive decision-making process engaged in by elected officials and Ministry staff, and assume that all of the meetings, all of the expressions of concern via email, and all of the debate about the state of the science were nothing more than an elaborate ruse designed to conceal the true nefarious purpose behind the deferral. There is no reason for the Tribunal to engage in such a fantastical exercise. The Government's decision to defer offshore wind development, and the subsequent treatment of the Claimant's Project, was not arbitrary or unfair, contrary to the Claimant's legitimate expectations, or discriminatory.

(a) The Decision to Implement the Deferral Was Not Arbitrary or Grossly Unfair

237. In its Reply Memorial, the Claimant alleges three reasons why the Government of Ontario's decision to defer offshore wind was arbitrary and grossly unfair.⁴⁶⁴

⁴⁶² C-0725, EBR Decision Notice, pp. 1-2.

⁴⁶³ C-0725, EBR Decision Notice.

⁴⁶⁴ Claimant's Reply Memorial, ¶¶ 584-600.

238. First, the Claimant alleges that the deferral was unnecessary to achieve its stated environmental objective as there was already a regulatory framework for offshore wind.⁴⁶⁵ According to the Claimant, “detailed regulatory requirements that protect human health and the environment” already apply and it is the Claimant’s burden, under the existing undeveloped REA process for offshore wind projects to conduct the studies necessary to prove that its Project is environmentally sound.⁴⁶⁶ This is incorrect. In the absence of scientifically sound rules on offshore wind development, the MOE could not assess a project for the purposes of issuing a REA. As explained in Canada’s Counter-Memorial,⁴⁶⁷ the Claimant’s continued allegation that the deferral constituted a repudiation of the regulatory framework for offshore wind⁴⁶⁸ is simply wrong. Contrary to the Claimant’s argument,⁴⁶⁹ the deferral did not prevent it from complying with technology-specific requirements for offshore wind facilities in the REA Regulation, because no such requirements existed at the time. For the Claimant to argue that this did not matter because other regulatory requirements existed, purposely overlooks the fact that the REA was not only a condition of its FIT Contract, but a legal requirement that it had to meet prior to construction.⁴⁷⁰

239. Second, the Claimant argues that the decision was not motivated by “legitimate scientific concerns” because “little research has been done”.⁴⁷¹ In making this argument, the Claimant completely dismisses Ontario’s efforts to collaborate with ██████████ to undertake the necessary research.⁴⁷² Canada has already responded to these allegations, and will not repeat itself here.⁴⁷³ The Claimant also dismisses Ontario’s efforts to develop the regulatory framework

⁴⁶⁵ Claimant’s Reply Memorial, ¶¶ 584-589.

⁴⁶⁶ Claimant’s Reply Memorial, ¶ 586.

⁴⁶⁷ Canada’s Counter-Memorial, ¶¶ 401-403.

⁴⁶⁸ Claimant’s Reply Memorial, ¶¶ 590-595.

⁴⁶⁹ Claimant’s Reply Memorial, ¶ 593.

⁴⁷⁰ Proceeding to construction prior to receiving an REA would contravene s. 47.3(1) of the EPA and therefore be an offence under s. 186(1) of the EPA. **C-0105**, *Environmental Protection Act*, R.S.O. 1990, c. E.19, ss. 47.3(1), 186(1).

⁴⁷¹ Claimant’s Reply Memorial, ¶ 600.

⁴⁷² Claimant’s Reply Memorial, ¶¶ 409-446.

⁴⁷³ Canada’s Counter-Memorial, ¶¶ 281-293; See above at ¶¶ 106-111.

for offshore wind, which Canada has also already addressed.⁴⁷⁴ While it is true that the scientific research did not go according to the initial plan, the delays experienced do not reflect on the legitimacy of the decision that was made at the time.

240. Third, despite all of the evidence on the deferral decision, as well as the reasons why Minister Wilkinson ultimately made the decision he did after hearing out his colleagues, the Claimant still seeks to characterize the scientific considerations as a pretext. The Claimant insists that the decision was actually “motivated by the desire to ‘kill’ offshore wind projects” because of public opposition to offshore wind,⁴⁷⁵ concerns regarding the impact of offshore wind procurement on the energy supply mix and the impact that would have on ratepayers,⁴⁷⁶ and “electoral politics.”⁴⁷⁷ The evidence does not to support any of these claims.

241. Canada does not dispute that the Government of Ontario was aware of public opposition to offshore wind. As explained by former Minister Wilkinson, the opposition to offshore wind development meant that it was particularly important for the regulatory framework to be supported by sound science.⁴⁷⁸ Furthermore, Minister Wilkinson also recognized there was also public support for offshore wind. As a result, he was aware that any decision he made would be popular with some and unpopular with others.⁴⁷⁹ That is, of course, the nature of regulation generally – not everyone will emerge content. It is absurd for the Claimant to suggest that the consideration of public concerns by elected officials is somehow a breach of Article 1105.

242. Canada also does not dispute that MEI considered the ratepayer impacts of procuring additional energy from offshore wind projects. At the time, Ontario was aware of several proposals for future offshore wind projects which would have resulted in thousands of megawatts being added to Ontario's transmission system.⁴⁸⁰ From MEI's perspective, the

⁴⁷⁴ Canada's Counter-Memorial, ¶¶ 294-299; See above at ¶¶ 111-114.

⁴⁷⁵ Claimant's Reply Memorial, ¶¶ 598-599.

⁴⁷⁶ Claimant's Reply Memorial, ¶¶ 598-599.

⁴⁷⁷ Claimant's Reply Memorial, ¶ 596.

⁴⁷⁸ RWS-Wilkinson, ¶ 9.

⁴⁷⁹ RWS-Wilkinson, ¶ 22.

⁴⁸⁰ RWS-Lo-1, ¶ 19; RWS-Lo-2, ¶ 5.

introduction of future large-scale offshore wind projects raised concerns regarding ratepayer impacts.⁴⁸¹ However, these concerns related only to future energy procurement, not the procurement contracts that the OPA had already offered, such as the Claimant's.⁴⁸² Further, ratepayer impacts are not improper considerations. Article 1105 does not prevent elected officials charged with managing public finances from considering the full context of their decisions when making policy choices.

243. Finally, there is absolutely no merit to the Claimant's allegation of some sort of "electoral" conspiracy, and certainly no evidence whatsoever to support such an inflammatory charge. The Claimant identifies several individuals in its alleged conspiracy, including Chris Morley, Minister Gerretsen, Pat Hoy and Bruce Crozier (MPPs whose ridings were located near the Great Lakes Region and close to other proposed offshore wind projects).

244. With respect to Mr. Morley, the Claimant relies entirely on two e-mails sent on January 11, 2011, to support its arguments that the "Premier's Office and MEI likely drove the decision" based on political motivations.⁴⁸³ A quick review of those e-mails shows that they do not support such an allegation. In the first e-mail, Mr. Morley responded to a draft press release by stating:

Sorry, folks. This isn't good enough. The purpose of this release is to kill all projects except the Kingston one, not suck and blow. Please turn this around so it kills the projects, not sounds like we're in favour of offshore wind.⁴⁸⁴

245. Shortly thereafter, Mr. Morley sent the second e-mail, which states:

The longer this goes on the closer I get to writing a news release myself that says,

A large black rectangular redaction box covers the text of the second email. A small superscripted number '485' is visible at the bottom left corner of the redaction.

⁴⁸¹ RWS-Lo-2, ¶ 6.

⁴⁸² RWS-Lo-2, ¶¶ 4, 8, 11; RWS-Lo-1, ¶ 36.

⁴⁸³ Claimant's Reply Memorial, ¶ 334.

⁴⁸⁴ C-0911, E-mail from Chris Morley, Premier's Office to Alicia Johnston, Ministry of Energy (Jan. 11, 2011), p. 1.

⁴⁸⁵ C-0910, E-mail from Chris Morley, Premier's Office to Craig MacLennan, Ministry of Energy and Sean Mullin, Premier's Office (Jan. 11, 2011).

246. The Claimant urges the Tribunal to interpret these e-mails as a nefarious direction from Mr. Morley that offshore wind projects should be killed based on politically expeditious motivations in the Premier's Office. However, the evidence makes clear that Mr. Morley was well aware of the concerns aired by the three Ministries, and in particular the Minister of the Environment's position that Ontario should not proceed with any development of offshore wind projects until the necessary scientific research was completed and an adequately informed policy framework could be developed. Such a decision fell squarely within the mandate of the Minister of the Environment, who is responsible for administering the EPA and REA Regulation. [REDACTED]

[REDACTED]

there was no need for the Premier's Office or Premier to resolve the matter.⁴⁸⁷ The fact that Minister Wilkinson was the driver of the decision, not Chris Morley, is corroborated by the Claimant's own contemporaneous understanding.⁴⁸⁸

247. With respect to former Minister Gerretsen, the Claimant equivocates on whether he was a force for or against offshore wind in Ontario. The Claimant accuses Mr. Gerretsen of being a "driver" of the five-kilometre setback proposal,⁴⁸⁹ while at the same time [REDACTED]⁹⁰ Ian Baines also claims in an e-mail that he "had a long chat with Minister Gerretsen" who was "clearly on side and [was] lobbying his colleagues to move this project forward."⁴⁹¹ This suggests that Mr. Gerretsen was actually strongly opposed to the deferral, not in favour of it. In any event, the Claimant's

⁴⁸⁶ **R-0553**, Ontario Government Meeting Invitation (Jan. 24, 2011).

⁴⁸⁷ Nevertheless, it is important to note that even if the Tribunal were to agree with the Claimant that it was the Premier's Office, rather than the Minister of the Environment, who decided to defer offshore wind (and it should not), that fact would be irrelevant. Regardless of who made the decision, at the end of the day, the Government of Ontario's decision to defer offshore wind development was due to a lack of scientific information to inform the development of standardized regulatory rules and requirements.

⁴⁸⁸ **R-0560**, E-mail from Ian Baines, Windstream Energy Inc. to Nancy Baines et al. (Feb. 15, 2011).

⁴⁸⁹ Claimant's Reply Memorial, ¶ 348; Claimant's Memorial, ¶ 342; **C-0223**, E-mail from Eric Boysen, Ministry of Natural Resources to Rosalyn Lawrence, Ministry of Natural Resources et al (Apr. 20, 2011).

⁴⁹⁰ Claimant's Reply Memorial, ¶ 354.

⁴⁹¹ **R-0578**, E-mail from Bliss Baker, Bentham Associates to Ian Baines, Windstream Energy Inc. (Dec. 19, 2011). see also **R-0559**, E-mail from Nancy Baines to Chris Benedetti, Sussex Strategy (Feb. 12, 2011) in which Nancy Baines notes that: "John Gerretsen went to bat for us and had a serious confrontation with John Wilkinson over the future of our project".

position regarding Mr. Gerretsen's involvement lacks coherence and does not establish any relevant facts to inform the Tribunal's deliberation.

248. With respect to Pat Hoy and Bruce Crozier, the Claimant states that they were also "consulted about" the proposed five-kilometre setback shortly before it was announced.⁴⁹² However, the exhibits relied upon simply state that political staff arranged a briefing with them, as they were "concerned" about it and "need[ed] to be briefed,"⁴⁹³ and that Mr. Hoy did not consider five-kilometres enough "from a visual standpoint."⁴⁹⁴ The relevant exhibits also contain proposed communications lines for MPPs from Mr. Gerretsen's office, which his Outreach and Communications Advisor hoped would be "helpful for [...] drafting specific messaging for Crozier/Hoy."⁴⁹⁵ The fact that local politicians were informed of the content of MOE's Offshore Wind Policy Proposal and the announcement of the deferral and expressed concerns of themselves and their constituents is hardly surprising or improper.

249. In sum, the evidence does not support the Claimant's allegation that the deferral on offshore wind development was arbitrary and grossly unfair, or motivated by political expediency rather than by legitimate science concerns.

(b) Neither the Decision to Implement the Deferral nor Ontario's Subsequent Treatment of the Claimant Contravened the Claimant's Expectations

250. The Claimant alleges that the deferral breached its expectations that the regulatory approvals and granting of Crown land for offshore wind would be processed in a "timely" manner.⁴⁹⁶ Since it has already addressed this issue above, Canada will not repeat itself, except to reiterate that the Claimant acknowledged the lack of a regulatory path to develop its Project on

⁴⁹² Claimant's Reply Memorial, ¶ 351.

⁴⁹³ **C-0824**, E-mail from Sean Mullin, Premier's Office to Jonathan Espie, Premier's Office et al (Jun. 23, 2010), p. 2.

⁴⁹⁴ **C-0823**, E-mail from Lindsay Maskell, Ministry of Natural Resources to jespie@liberal.ola.org (Jun. 23, 2010), p. 1.

⁴⁹⁵ **C-0825**, E-mail from Utilia Amaral, Ministry of Environment to Lyndsay Miller, Ministry of Environment (Jun. 23, 2010), p. 3; **C-0828**, E-mail from Lyndsay Millar, Ministry of Environment to Utilia Amaral, Ministry of Environment, pp. 1-2.

⁴⁹⁶ Claimant's Reply Memorial, ¶¶ 555-583.

over 20 occasions prior to executing its FIT Contract.⁴⁹⁷ There is no doubt that the Claimant recognized that the rules for offshore wind “had yet to be written” – a recognition shared by governmental officials⁴⁹⁸ and others in the offshore wind industry.⁴⁹⁹ Moreover, it clearly did not rely on aspirational statements made by former Ministers. Even if it did, such statements cannot constitute clear and explicit representations as the Claimant would like to portray them, let alone binding assurances. Ultimately, the Claimant had no legitimate expectations that it would be permitted to proceed through the regulatory framework for offshore wind projects before it was fully developed in a manner properly informed by scientific research. It nevertheless took a gamble and entered into its FIT Contract knowingly.⁵⁰⁰ It now seeks to hold the Government of Canada responsible because its own irresponsible bet did not pay out – that is not the purpose of Article 1105.

(c) Ontario's Measures with Respect to the Claimant's Project after the Implementation of the Deferral Were Not Arbitrary or Grossly Unfair

251. The Claimant alleges that Ontario's failure to follow through with its promise to “freeze” its FIT Contract such that it could continue after the deferral was lifted constitutes a breach of Article 1105.⁵⁰¹ However, aside from maintaining its Crown land applications, the Government was under no obligation to insulate the Claimant from the effects of the deferral decision. The Claimant provides no evidence of any requirement or commitment made by the Ontario Government that it would take extra steps, such as directing the OPA to agree to the Claimant's unreasonable demands. Canada has already explained its position at length above,⁵⁰² and will not repeat it here. To reiterate, the OPA made reasonable offers that would have achieved Windstream's goal of freezing its FIT Contract, and it was the Claimant who refused these reasonable offers and thus failed to ensure that its FIT Contract remained “frozen”. The

⁴⁹⁷ See above at ¶¶ 129-250.

⁴⁹⁸ See above at ¶¶ 161-168.

⁴⁹⁹ See above at ¶ 169.

⁵⁰⁰ See above at ¶¶ 128-150.

⁵⁰¹ Claimant's Reply Memorial, ¶ 601.

⁵⁰² See above at ¶¶ 117-122.

Claimant's assertion that the Ontario Government failed to "freeze" its FIT Contract should therefore be dismissed.

(d) Neither the Imposition of the Deferral nor Ontario's Subsequent Conduct Discriminated Against the Claimant

252. The Claimant points to different treatment vis-a-vis itself and TransCanada, Samsung, or other renewable energy developers as a basis for its allegation that Canada's actions are discriminatory in breach of Article 1105.⁵⁰³ However, the different treatment that it received was accorded solely because the Claimant was not in like circumstances with the comparators it has selected.⁵⁰⁴ Indeed, the Claimant does not actually allege any discrimination – neither nationality-based nor any other invidious type of discriminatory treatment – with respect to its Crown land applications, which were much more complex than those of other applicants given the large application area and environmental considerations.⁵⁰⁵ It also conveniently ignores the fact that all other offshore wind Crown land applicants had their applications cancelled and their status revoked, whereas it did not.⁵⁰⁶

253. Further, the fact that Minister Smitherman's statements regarding "certainty" prior to the enactment of the GEGEA did not distinguish between different types of renewable energy projects does not establish that all renewable energy types would be subject to the same approvals process.⁵⁰⁷ The REA Regulation and MNR's policy review on access to Crown land for offshore wind projects made clear that the rules for offshore wind projects had yet to be written. Accordingly, the different treatment of offshore wind developers is not discriminatory. Even if these allegations were true, none could amount to a breach of Article 1105.

D. Conclusion

254. The Claimant's allegations that Ontario's deferral on offshore wind development and its subsequent failure to lift the deferral or otherwise insulate the Claimant from its effects violate

⁵⁰³ Claimant's Reply Memorial, ¶¶ 602-605.

⁵⁰⁴ Canada's Counter-Memorial, ¶¶ 347-357.

⁵⁰⁵ RWS-Lawrence-2, ¶ 12.

⁵⁰⁶ Claimant's Reply Memorial, ¶ 624.

⁵⁰⁷ Claimant's Reply Memorial, ¶ 605.

Article 1105 are baseless. From the outset, the Claimant has failed to prove the existence of a rule of customary international law that protects against treatment that is arbitrary or grossly unfair, breaches the investor's legitimate expectations, or is discriminatory. Moreover, the allegations made by the Claimant are baseless. The decision to defer the development of offshore wind projects until the relevant science could be completed and the regulatory framework established was a legitimate policy decision based on extensive deliberations and consultations amongst relevant Ministries and officials. Ontario's conduct was consistent with the customary international law minimum standard of treatment.

THE CLAIMANT IS NOT ENTITLED TO THE DAMAGES IT SEEKS FOR THE ALLEGED VIOLATIONS OF THE NAFTA

I. Summary of Canada's Position

255. As Canada noted in its Counter-Memorial, the Claimant can only recover damages in this arbitration if it can prove that the alleged breach actually caused the losses it seeks to recover.⁵⁰⁸ The Claimant failed to meet this burden in its Memorial and has failed again in its Reply Memorial. The Project has never been anything more than a speculative and unrealistic venture. The Claimant applied for and entered into a FIT Contract in which it committed to develop a 300 MW offshore wind project involving 130 turbines within five years despite the fact that it had not conducted a single feasibility study, lacked access to its proposed Project site, and was subject to unresolved publicly posted regulatory proposals from MOE including a five-kilometre setback that, if implemented, would render the Project valueless by the Claimant's own admission.

256. No evidence exists to support the Claimant's allegations that the Project was feasible within the FIT Contract timelines. In fact, when the Claimant's construction programme and schedule are appropriately considered and corrected, it is clear that the Project could not have been built within the FIT Contract timelines. Moreover, even if the Tribunal were to find otherwise, Green Giraffe demonstrates that absent access to Crown land and given Windstream's lack of progress towards obtaining environmental permits, the Project had no material value in the market place. Finally, even if the Tribunal were to rely on the DCF methodology proposed by

⁵⁰⁸ Canada's Counter-Memorial, ¶¶ 517-521.

the Claimant (which it should not), as BRG demonstrates, the Claimant's valuation is derived from an incorrect "but for" analysis that, when corrected, also reveals the Project had no value on the valuation date.

257. In the end, what Windstream considered its most valuable asset, the FIT Contract, turned out to be an insurmountable hurdle. Given the early stage of the Project's development, by signing a FIT Contract that required it to reach Commercial Operation in five years, the Claimant turned its Project into one that, as of the date of the alleged breaches, was valueless. This was a failed project from the start, something that is not uncommon in the offshore wind industry. As such, not only should the Claimant be unable to recover any damages for its alleged future lost profits, it would also be inappropriate for the Tribunal to award the Claimant any of its investment costs. It is not for this Tribunal to give the Claimant a windfall by reimbursing it for its poor business decisions that wiped out the value of everything it invested. However, even if the Tribunal were to delve into the investment costs at issue, Canada's audit reveals that, at most, the Claimant is entitled to 10 per cent of the investment costs it claims.

II. The Claimant Can Only Recover as Damages the Actual Losses Caused by the Alleged Wrongful Conduct

258. Canada and the Claimant agree that the purpose of compensation is to re-establish the situation that would have existed absent the unlawful act.⁵⁰⁹ This is the standard that the NAFTA Parties adopted in Articles 1116 and 1117 by providing that a claim for arbitration can only be brought if an "investor has incurred loss or damage by reason of, or arising out of" a substantive breach of a Party's Chapter 11 obligations.⁵¹⁰ It is also the standard applied in investor-State arbitration more generally,⁵¹¹ following the decision of the Permanent Court of International Justice ("PCIJ") in the *Chorzow Factory* case.⁵¹²

⁵⁰⁹ Claimant's Reply Memorial, ¶ 666; Canada's Counter-Memorial, ¶ 511.

⁵¹⁰ NAFTA Article 1116, emphasis added.

⁵¹¹ See for example, **RL-010**, *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (ICSID Case No. ARB/05/22) Award, 24 July 2008, ¶¶ 776-778 ("*Biwater Gauff – Award*"); **CL-044**, *Duke Energy*, ¶ 468.

⁵¹² **CL-034**, *Case Concerning the Factory at Chorzow (Germany v. Poland)* (1928), 17 P.C.I.J. Ser. A No. 17, 13 September 1928, p. 47 ("*Chorzow*").

259. As recognized by the *LG&E v. Argentina* Tribunal, the appropriate question to ask in a damages analysis is: what did the investor lose by reason of the unlawful act?⁵¹³ Said differently, the issue the Tribunal must resolve is, assuming a breach has occurred, what is “the situation which would, in all probability, have existed” if “all consequences of” the breach are “wiped out”.⁵¹⁴ As Canada noted in its Counter-Memorial, the burden is on the Claimant to show both that the alleged breach caused it a loss, and the actual and specific quantum of that loss.⁵¹⁵ At the heart of this analysis is the requirement for the Claimant to demonstrate a “sufficient causal link” between the alleged breach of the NAFTA and the loss sustained by the investor.⁵¹⁶

III. The Claimant Has Failed To Prove That Any of the Challenged Measures Caused It Actual Loss, Let Alone the Specific Losses It Seeks

260. Canada demonstrated at length in its Counter-Memorial why the Claimant has failed to show a causal link between its alleged breaches of Article 1102,⁵¹⁷ 1103,⁵¹⁸ 1105⁵¹⁹ and 1110⁵²⁰ and any loss it allegedly suffered. The Claimant continues to fail to meet the burden of proof in its Reply Memorial. Notably, it has failed to put forward a valid “but for” scenario and valuation date that allows the Tribunal to properly calculate the damages to which the Claimant would be entitled in the event a breach is found for each specific breach it alleges. As Canada demonstrates below, when a proper “but for” analysis is applied, it is evident that the Claimant

⁵¹³ **RL-070**, *LG&E Energy Corp. et al v. Argentine Republic* (ICSID Case No. ARB/02/1) Award, 25 July 2007, ¶ 45.

⁵¹⁴ **CL-044**, *Duke Energy*, ¶ 468. Canada also notes that in *Merrill & Ring*, the claimant alleged that Canada’s log export restraint regime violated Articles 1102, 1103, 1105, 1106 and 1110 of NAFTA. Employing Mr. Low of Deloitte as its valuator, the claimant alleged that its past and future revenues from the export of logs should be assessed on the basis that but for Canada’s wrongful log export regime, it should be operating without those constraints, but that its principle and larger competitors should still be subject to that regime. The Tribunal in *Merrill & Ring* ruled that one cannot selectively place different log exporters in different categories of the but for scenario. Thus, the Tribunal in that case recognized that the damages scenario posited by the claimant was not a scenario that would re-establish the situation as if the wrongful act had not been committed. **CL-061**, *Merrill & Ring Forestry – Award*, ¶ 260.

⁵¹⁵ Canada’s Counter-Memorial, ¶¶ 517-521; **RL-024**, *Feldman – Award*, 16 December 2002, ¶ 194.

⁵¹⁶ **RL-047**, *S.D. Myers Inc. v. Canada* (UNCITRAL) Second Partial Award, 21 October 2002, ¶ 140 (“*S.D. Myers – Second Partial Award*”); **RL-010**, *Biwater Gauff – Award*, ¶ 779.

⁵¹⁷ Canada’s Counter-Memorial, ¶¶ 524-526.

⁵¹⁸ Canada’s Counter-Memorial, ¶¶ 524-526.

⁵¹⁹ Canada’s Counter-Memorial, ¶¶ 527-556.

⁵²⁰ Canada’s Counter-Memorial, ¶¶ 527-556.

has not proven that the specific losses it claims were caused by any of the alleged breaches. The Claimant is seeking damages that are the result of the failure of its business due to factors arising from its own errors and misjudgement and not the alleged breaches of the NAFTA at issue in this arbitration.

A. The Claimant's "But For" Scenarios Fail to Address the Alleged Breaches

261. In its Reply Memorial, the Claimant has alleged that the imposition of a deferral was "inconsistent with Windstream's legitimate expectations", "arbitrary and grossly unfair", and "discriminatory", in breach of Article 1105.⁵²¹ The Claimant further argues that the Ontario Government's failure to lift the offshore wind deferral,⁵²² or alternatively, its alleged failure to insulate Windstream from the deferral's effects,⁵²³ by May 22, 2012, when the Claimant alleges its investments became worthless, breached Article 1110 and that "the Ontario Government's failure to fulfil its commitment to 'freeze' the FIT Contract"⁵²⁴ breached Article 1105. Finally, the Claimant has also alleged that the "Ontario Government's vastly different treatment of two electricity project proponents with power purchase agreements with the OPA" and the decision of the Ontario Government to keep TransCanada "whole" breached Articles 1102 and 1103.⁵²⁵

262. When it comes to quantifying its alleged damages, however, the Claimant provides only a single valuation for the alleged breach of Articles 1110, 1102, and 1105⁵²⁶ without consideration of the underlying measures or the timing of the alleged breaches. In short, while the Claimant has put forward two "but for" scenarios for the Tribunal to consider, neither adequately address the alleged breaches.

263. First, the Claimant has alleged that it is entitled to between \$277.8 and \$369.5 million, without interest, in damages "if the Tribunal finds the moratorium to be a breach of Article 1110,

⁵²¹ Claimant's Reply Memorial, ¶¶ 544-605.

⁵²² Claimant's Reply Memorial, ¶ 473: ("As a result of drastic delays caused by the moratorium, the Project no longer has any hope of achieving commercial operation by the deadlines set out in the FIT Contract").

⁵²³ Claimant's Reply Memorial, ¶¶ 531-533.

⁵²⁴ Claimant's Reply Memorial, ¶ 601.

⁵²⁵ Claimant's Reply Memorial, ¶ 615; Claimant's Reply Memorial, ¶ 619.

⁵²⁶ As with its Memorial, the Claimant fails to put forward a valuation of Article 1103. See CER-Deloitte (Low & Taylor)-2, ¶ 1.16.

1105 and 1102.”⁵²⁷ This valuation is illogical for a breach of Articles 1102 and 1110 as the Claimant has not even alleged that the mere implementation of the deferral is a breach of those Articles. Further, as discussed below, the Claimant uses a valuation date that is entirely irrelevant.

264. Second, the Claimant has alleged that it is entitled to between \$299.3 and \$392.3 million,⁵²⁸ “in the event the Tribunal finds that the moratorium did not breach Articles 1110, 1105 or 1102 of NAFTA, but rather the failure to keep Windstream whole following the imposition of the moratorium constituted a breach of these articles.”⁵²⁹ The method the Claimant uses to arrive at this number is also illogical. It provides a “but for” scenario that arbitrarily imposes a three-year deferral ending on February 11, 2014 and applies a valuation date that pre-dates the breach.

265. In what follows, Canada lays out the correct “but for” scenario for each breach of the NAFTA alleged by the Claimant. When these “but for” analyses are applied, the Tribunal can only be left with one conclusion: neither the decision of the Ontario Government to defer the development of offshore wind projects on February 11, 2011, nor the failure to lift the deferral or insulate Windstream from its effects by May 22, 2012, caused the Claimant harm. As such, the Claimant is not entitled to any damages in this arbitration.

B. The Claimant Improperly Relies on a 2015 Project Development and Construction Programme

266. In response to Canada's Counter-Memorial, the Claimant seeks to reinvent the past. The Claimant argues that the programme that it appended to, and relied on in its Memorial to demonstrate its damages theory,⁵³⁰ and the one that it was relying on in the course of its operations prior to the alleged breaches, was never intended to be relied upon.⁵³¹ Now, in order to demonstrate that the Project would have reached Commercial Operation prior to July 20, 2017 (the Supplier Default Date in its FIT Contract), the Claimant relies on a new programme created

⁵²⁷ Claimant's Reply Memorial, ¶¶ 641-642; CER-Deloitte (Low & Taylor), ¶ 1.8 (emphasis added).

⁵²⁸ Claimant's Reply Memorial, ¶ 642; CER-Deloitte (Low & Taylor), ¶ 1.8.

⁵²⁹ Claimant's Reply Memorial, ¶ 642 (emphasis added).

⁵³⁰ Claimant's Memorial, ¶¶ 315-316, 318, 557, 667; Claimant's Reply Memorial, ¶¶ 672, 677, 679-688.

⁵³¹ Claimant's Reply Memorial, ¶ 687.

in 2015 by its experts hired for this arbitration – SgurrEnergy, COWI, Weeks Marie, WSP and Baird.⁵³²

267. Through the 2015 redesign of its Project, the Claimant has tacitly admitted that its initial plans would have resulted in Project failure. Its new programme, developed only after it had the benefit of Canada's analysis and that of Canada's experts, relies on five witness statements, over 800 pages of expert reports and supporting evidence that apply today's knowledge and numerous recently conducted studies that were not available to the Claimant when it signed the FIT Contract in 2010.⁵³³ This new programme is also based on a proposed Project location and Project design that is drastically different than what Claimant previously proposed and uses substantially more development and construction resources (though notably it still misses its MCOB by four months).⁵³⁴ As URS notes, the fact that the Claimant has been required to significantly alter its programme and schedule highlights the "deficiencies in the original planning", the "lack of adequate preparatory work prior to applying to the FIT Program in November 2009 and signing the FIT Contract in August 2010" and "a likely underestimation in 2010/11 of the complexities associated with a project of this magnitude."⁵³⁵

268. The Claimant should not get the benefit of information and analysis only available in 2015 to prove in hindsight that its Project had value. The development and construction obstacles identified in Canada's Counter-Memorial are the very things that the Claimant needed to have considered and addressed prior to applying to the FIT Program. After all, it bore sole responsibility to bring its Project into Commercial Operation by the MCOB.⁵³⁶ Accordingly, the feasibility of the Project within the timelines of the FIT Contract should be assessed as it was planned by Windstream in 2010/2011 – "not as it has been hypothesized by consultants hired by the Claimant solely for the purposes of this arbitration using 2015 hindsight."⁵³⁷

⁵³² CER-SgurrEnergy-2, ¶ 66.

⁵³³ RER-URS-2, ¶¶ 5, 11-15. See generally, ¶¶ 101-155.

⁵³⁴ RER-URS-2, ¶¶ 4, 10-15, 112-155.

⁵³⁵ RER-URS-2, ¶ 4, 181.

⁵³⁶ RWS-Cecchini, ¶ 6.

⁵³⁷ RER-URS-2, ¶ 8.

269. However, as Canada demonstrates below, even if the Tribunal were to rely on the expert reports and witness statements put forward by the Claimant in its Reply Memorial, they do not change the fact that the Claimant has not proven that the loss it claims was caused by any of the alleged breaches. Even under the new 2015 programme, the Claimant would not have been able to develop its Project in the timelines required by its FIT Contract.

C. The Claimant Has Failed to Prove That It Suffered Damages as a Result of the Alleged Breach of Articles 1102 and 1103

270. The Claimant provides no evidence that the decision to keep TransCanada “whole” or offer Samsung a solar project within the context of the Green Energy Investment Agreement caused it any loss. The Claimant’s damages calculation for the breach of Article 1102 is based entirely on a scenario that but for the alleged failure to insulate Windstream from the effects of the deferral, the Claimant would have been able to bring its Project into Commercial Operation.⁵³⁸ However, despite being challenged by Canada to do so in Canada’s Counter-Memorial,⁵³⁹ the Claimant has made no effort to explain how there is a causal link between the treatment accorded to TransCanada and the fact that the Claimant could not bring its Project into commercial operation. Whether or not the quantum of damages suffered would be “equivalent to the amount assessed for breaches of Article 1110 and 1105”⁵⁴⁰ is irrelevant. Even if that were true, causation has still not been proven and thus the claim for damages based on Article 1102 must be dismissed. Further, in its Memorial⁵⁴¹ and again in its Reply Memorial,⁵⁴² the Claimant did not even attempt to quantify the losses it allegedly suffered as a result of a breach of Article 1103 and thus those claims must be dismissed for failure to meet its burden to prove quantum alone.

D. The Claimant Has Failed to Prove that It Suffered Damages as a Result of the Decision to Defer Offshore Wind in Alleged Violation of Article 1105

271. The Claimant alleges that the decision by Ontario to defer offshore wind development on February 11, 2011 breached Canada’s obligations under Article 1105 because it was

⁵³⁸ Claimant’s Reply Memorial, ¶¶ 731-737.

⁵³⁹ Canada’s Counter-Memorial, ¶¶ 524-526.

⁵⁴⁰ CER-Deloitte (Low & Taylor)-2, ¶ 1.14.

⁵⁴¹ CER-Deloitte (Low & Taylor)-1, ¶ 1.34.

⁵⁴² CER-Deloitte (Low & Taylor)-2, ¶ 1.16.

“inconsistent with Windstream’s legitimate expectations”, “arbitrary and grossly unfair” and “discriminatory”.⁵⁴³ As has been shown above, Ontario’s decision to temporarily defer the development offshore wind projects in order to conduct the necessary science to develop a regulatory framework did not breach Article 1105. However, even if it did, the deferral did not cause the Claimant any loss. In fact, by the time this decision was made, it could not cause damage to the Claimant because the Project already had no value.⁵⁴⁴

1. The Appropriate “But For” Scenario and Valuation Date for an Alleged Breach of Article 1105 Based on the Decision to Defer Offshore Wind Assumes a Project Restart and Valuation Date of February 11, 2011

272. To calculate damages the Claimant has constructed a “but for” analysis that assumes the Ontario Government did not adopt a deferral on February 11, 2011 and that, instead, on that date the Project was able to proceed with development.⁵⁴⁵ It alleges that in this “but for” scenario, the Project would more likely than not have achieved Commercial Operation by May 2016.”⁵⁴⁶ While Canada agrees with the Claimant that the correct “but for” analysis for the deferral decision on February 11, 2011 assumes that the deferral never happened,⁵⁴⁷ the Claimant’s use of May 22, 2012 for the valuation date⁵⁴⁸ in this “but for” is entirely misguided.

273. A correct damages valuation for an alleged breach of Article 1105 due to the decision to issue a deferral on February 11, 2011 necessarily has a project development restart date and a valuation date of February 11, 2011. Applying the test laid out in *Chorzow Factory*, the position the Claimant would have been in “but for” the breach is the position it was in on February 11, 2011. This is also the appropriate date to value the Claimant’s investments in such a scenario – not May 22, 2012. Indeed, if the deferral never occurred on February 11, 2011, and Windstream was able to proceed with Project development on that date, the May 22, 2012 date relied on as the valuation date in the report of Messrs. Low and Taylor becomes completely irrelevant. The

⁵⁴³ Claimant’s Reply Memorial, ¶¶ 544-605.

⁵⁴⁴ RER-BRG-2, ¶¶ 14-15, 36-37, 41, 43, 230, 233.

⁵⁴⁵ Claimant’s Reply Memorial, ¶¶ 666-669.

⁵⁴⁶ Claimant’s Reply Memorial, ¶¶ 677-686.

⁵⁴⁷ Claimant’s Reply Memorial, ¶ 666.

⁵⁴⁸ Claimant’s Reply Memorial, ¶¶ 729-730.

May 22, 2012 date is only relevant if the Claimant is in Force Majeure status until that date. As Mr. Bucci notes, failing to lift the deferral by this date resulted in the Claimant using the entirety of the 24 months of Force Majeure permitted under the FIT Contract.⁵⁴⁹ As a result, the Claimant's financing would have run out since the Project would not have been able to reach Commercial Operation before the FIT Contract's specific Force Majeure Supplier Default Date of May 4, 2017. However, if the Project was to restart development in February 2011 with the deferral being lifted at that time, the assumption must be that the Project was no longer in Force Majeure status. If so, Mr. Bucci's hypothetical no longer applies and the May 22, 2012 date becomes irrelevant.⁵⁵⁰

274. As a result of the Claimant's erroneous valuation date in its "but for" scenario, the Claimant has not offered a quantification of the loss arising out of the imposition of the deferral, itself. By the Claimant's own logic, lifting the deferral prior to May 22, 2012 would have resulted in the Project achieving Commercial Operation within the timelines of the FIT Contract. As such, a deferral that was lifted any time before May 22, 2012 would not have caused the Claimant to lose the full value of its Project. Yet, the Claimant offers no valuation for the Tribunal that demonstrates what loss the Claimant would have incurred if the deferral had been of a shorter duration. Due to the Claimant's failure to meet its burden by establishing and proving the quantum of damages it alleges, the Claimant's Article 1105 claim must be rejected.

2. The Project Had No Value on February 11, 2011 Because It Could Not Be Constructed Within the Time Frames Required by the Claimant's FIT Contract

275. If the Tribunal were to apply a proper "but for" analysis to the alleged breach of Article 1105 arising solely from the imposition of the deferral, it is clear that the Claimant has failed to prove causation. Canada and the Claimant agree on the appropriate FIT Contract milestones to be applied in the scenario where the deferral never occurred and the Project was allowed to proceed with development on February 11, 2011.⁵⁵¹

⁵⁴⁹ CER-Deloitte (Bucci)-2, s. 3.1, pp. 4-5.

⁵⁵⁰ Indeed, according to Mr. Bucci and the SgurrEnergy Report, if the project re-started by February 2012 it would have reached Commercial Operation in time. CER-Deloitte (Bucci)-2, ¶ 3.1; CER-SgurrEnergy-2, ¶ 15.

⁵⁵¹ Claimant's Reply Memorial, ¶ 679.

276. Specifically, and as summarized in the chart below, notwithstanding any events of Force Majeure, the Claimant had five years to bring the Project into Commercial Operation.⁵⁵² If the Claimant failed to do so, then it would be subject to a reduction in the term of its FIT Contract and, if that failure persisted for an additional 18 months, the OPA retained the unilateral right to terminate the Claimant's FIT Contract.⁵⁵³ As such, failure to reach Commercial Operation by July 20, 2017, could result in the OPA terminating the Claimant's FIT Contract.⁵⁵⁴

MILESTONE	DATE
Original MCOB	May 4, 2015
Revised MCOB adjusted for Force Majeure: <ul style="list-style-type: none"> • First adjustment – 81 days of Force Majeure from November 22, 2010 to February 11, 2011 • Second adjustment – assumed 180 days of Force Majeure if the REA is appealed to the Environmental Review Tribunal⁵⁵⁵ 	January 20, 2016
Supplier Default Date	July 20, 2017 ⁵⁵⁶

277. According to the Claimant, if it had been able to re-start activities on February 11, 2011, “all the steps necessary to bring the Project to Commercial Operation would more likely than not have been completed by **May 2016**.”⁵⁵⁷ However, while the Claimant's new 2015 programme may have sought to remedy the mistakes in the Claimant's original programme, its doing so has resulted in new errors and incorrect assumptions.

278. Most notably, under its new programme, Windstream is still not able to meet the MCOB required by the FIT Contract. In fact, the Claimant's own experts now agree with Canada that the Project could not be built within five years, i.e. by January 20, 2016. Instead, the Claimant is

⁵⁵² Canada's Counter-Memorial, ¶ 529; C-0347, E-mail from Nancy Baines to Ian Baines et al. (Aug. 19, 2010); C-0349, Letter from JoAnne Butler, Ontario Power Authority to Windstream Wolfe Island Shoals (Aug. 18, 2010); C-0348, FIT Contract, FIT Ref. # FIT-FALCB9K (May 4, 2010); C-0243, Schedule 2, FIT Contract, Special Terms and Conditions, Wind (Off-Shore Facilities) (May 4, 2010).

⁵⁵³ Canada's Counter-Memorial, ¶ 529; R-0092, FIT Contract, v. 1.3, s. 9.1(j).

⁵⁵⁴ R-0092, FIT Contract, v. 1.3, s. 9.2(a).

⁵⁵⁵ R-0643, IESO FIT Contract Form of Amending Agreement Re: MCOB Extension for Appeal of REA (The “Amending Agreement”) (2015-01) (undated).

⁵⁵⁶ Canada notes the error in the Claimant's calculation; Eighteen months following the adjusted MCOB of January 20, 2016 would lead to a supplier default date of July 20, 2017, not 2018 as appears in the Claimant's Reply Memorial.

⁵⁵⁷ Claimant's Reply Memorial, ¶ 677.

forced to rely on four months of the 18 month buffer period provided by the OPA. This alone raises questions as to the financeability of the Project.⁵⁵⁸ Moreover, the new programme is only able to reach commercial operation that early because it does not follow the proper sequencing of events based on the FIT Contract itself, Ontario law, or that of the Claimant's own experts.⁵⁵⁹ It also remains unreasonably optimistic and fails to adequately account for possible risks that could result in Project delays.⁵⁶⁰ It is clear that this new programme has been created solely for the purpose of this arbitration in order to finish at a specific date, not for the purpose of realistically determining how long it would have taken to actually develop and construct the Claimant's Project.⁵⁶¹

279. In response, URS has provided an adjusted and corrected programme and schedule.⁵⁶² When the appropriate adjustments are made, it becomes clear that the Project would not have reached Commercial Operation until **August 11, 2018**, more than a year after the Supplier Default Date of July 20, 2017 and more than two and a half years after the MCOB of January 20, 2016.⁵⁶³ Such a result means that the Project could not have reached Commercial Operation within the timelines of the FIT Contract even absent the deferral and, consequently, the Claimant has failed to prove that the alleged breaches caused the alleged damage.

(a) The Claimant's 2015 Project Schedule Must Be Revised to Correct for Errors and Assumptions that Seriously Impact the Project Timelines

280. The Claimant's original programme allowed 31 months for permitting and 31 months for construction activities, running almost consecutively, leading to a 60-month programme.⁵⁶⁴ As noted above, after reviewing Canada's criticisms of the viability of this schedule, the Claimant

⁵⁵⁸ RER-Green Giraffe, ¶¶ 38, 139-140. See also, RER-URS-2, ¶¶ 44, 349(b).

⁵⁵⁹ RER-URS-2, ¶¶ 2-13, 14, 127, 206-220.

⁵⁶⁰ RER-URS-2, ¶¶ 15-16, 23-65. See generally, Chapter 4.

⁵⁶¹ RER-URS-2, ¶ 15.

⁵⁶² RER-URS-2, Chapter 5, s. 5.2.

⁵⁶³ RER-URS-2, ¶¶ 70, 424, 473.

⁵⁶⁴ **C-0375**, Spreadsheet – Wolfe Island Shoals Wind Farm – Overall Project Development Schedule Highlights (Oct. 29, 2011); **C-0711**, Spreadsheet (WWIS) Overall Project Development Schedule Highlights (Detailed – COD May 2017) (Aug. 1, 2014).

has revised it significantly. It now allows 36 months for permitting (including a probable appeal of the REA to Ontario's Environmental Review Tribunal ("ERT")) and 46 months for construction activities.⁵⁶⁵ However, in order to fit within a 63-month overall timeline, the Claimant has said that it would start construction of its onshore facilities prior to obtaining its REA.⁵⁶⁶ Such an approach contradicts its own expert evidence, which states the onshore facilities would be permitted as part of the REA process,⁵⁶⁷ that REA must be obtained prior to obtaining a NTP from the OPA,⁵⁶⁸ and that a NTP must be obtained prior to undertaking any and all construction.⁵⁶⁹ Thus, if the Claimant's own permitting expert is correct, construction on the onshore facilities could not possibly begin prior to the completion of permitting activities.⁵⁷⁰ Correction for this error alone means that installation of the offshore foundations cannot occur until three years after that contemplated in the 2015 programme,⁵⁷¹ with a result that the overall COD is pushed out over two years, past the supplier default date.⁵⁷²

281. Further, the Claimant makes many unrealistic or implausible assumptions that, when corrected, add more time to the Project schedule. For example, the Claimant is unlikely to "have been able to secure the required [REDACTED] equity funding to self-finance the Project prior to completing the ERT process",⁵⁷³ it unusually "assume[s] that Financial Close occurs concurrently with the completion of the permitting process,"⁵⁷⁴ it "unrealistically shortened the lead times of individual activities,"⁵⁷⁵ including the procurement of its turbines despite the express wording of

⁵⁶⁵ See RER-URS-2, ¶¶ 11(c)(i)-(ii), 119, 119(a)-(b) discussing increased construction and development times.

⁵⁶⁶ RER-URS-2, ¶¶ 13, 224.

⁵⁶⁷ CER-WSP, s. 3.2.1.1,

⁵⁶⁸ **R-0092**, FIT Contract, v. 1.3, s. 2.4.

⁵⁶⁹ Claimant's Reply Memorial, ¶ 469. It should be noted as well that it is illegal under the *Environmental Protection Act* to commence construction prior to obtaining an REA. **C-0105**, *Environmental Protection Act*, R.S.O. 1990, c. E.19, ss. 47.3(1), 186(1).

⁵⁷⁰ CER-WSP, s. 3.2.1.1.

⁵⁷¹ RER-URS-2, ¶¶ 459, 473.

⁵⁷² RER-URS-2, ¶ 473.

⁵⁷³ RER-URS-2, ¶¶ 14, 31-33, 233-240. The Claimant has put forward no evidence that it had the required money in hand, and its own documents raise suspicions in this regard. See **R-0641**, Ortech Power, Submission to the Ontario Power Authority on Behalf of Windstream Wolfe Island Shoals Inc. (undated).

⁵⁷⁴ RER-URS-2, ¶ 14.

⁵⁷⁵ RER-URS-2, ¶ 14.

the Turbine Supply Agreement (“TSA”),⁵⁷⁶ and it “substantially increased the level of resources employed to construct the Project” without any evidence that such resources were available.⁵⁷⁷

282. When the relevant adjustments are made to the Claimant’s proposed schedule to take into account the advice of its own experts,⁵⁷⁸ the binding procurement lead times under the TSA,⁵⁷⁹ an appropriate time for mobilization following the lifting of the deferral,⁵⁸⁰ the appropriate time to complete the permitting process⁵⁸¹ and the lead time for financial closure,⁵⁸² the relevant time to construct the onshore manufacturing facilities,⁵⁸³ foundation manufacture⁵⁸⁴ and installation,⁵⁸⁵ the construction of the offshore electrical substation,⁵⁸⁶ turbine erection⁵⁸⁷ and commissioning,⁵⁸⁸ the result is that the Claimant’s Project would not have reached Commercial Operation until **August 11, 2018**⁵⁸⁹ at the earliest:

MILESTONE	WINDSTREAM SCHEDULE DATE	URS REVISED SCHEDULE DATE
Restart of Project	February 11, 2011	February 11, 2011
REA Granted and ERT appeal exhausted	February 11, 2014	October 15, 2014
Construction of onshore facilities begins	August 1, 2012	February 16, 2015
Procurement of wind Turbines	February 11, 2014	February 16, 2015
Financial Closure	February 11, 2014	January 16, 2015
OPA Issuance of NTP	September 10, 2013	February 15, 2015
Construction of offshore facilities begins	April 1, 2014	April 1, 2017
Commercial Operation Date	May 23, 2016	August 11, 2018

⁵⁷⁶ RER-URS-2, ¶¶ 49, 364-365, 427(b), 468, 508(a)(iii).

⁵⁷⁷ RER-URS-2, ¶ 14.

⁵⁷⁸ RER-URS-2, ¶¶ 119(a), 121, 223, 428(a).

⁵⁷⁹ RER-URS-2, ¶ 468.

⁵⁸⁰ RER-URS-2, ¶¶ 432-433.

⁵⁸¹ RER-URS-2, ¶¶ 436-453.

⁵⁸² RER-URS-2, ¶¶ 449-453.

⁵⁸³ RER-URS-2, ¶¶ 454-456.

⁵⁸⁴ RER-URS-2, ¶¶ 457-458.

⁵⁸⁵ RER-URS-2, ¶¶ 459-463.

⁵⁸⁶ RER-URS-2, ¶¶ 464-466.

⁵⁸⁷ RER-URS-2, ¶¶ 467-470.

⁵⁸⁸ RER-URS-2, ¶ 471.

⁵⁸⁹ RER-URS-2, ¶¶ 472-473.

283. Accordingly, simply adjusting the schedule to account only for these errors and unrealistic assumptions results in a COD that is more than two and a half years following the MCOB required by the Claimant's FIT Contract, and over a year following the Supplier Default Date.⁵⁹⁰

(b) Even the Revised and Corrected Project Timeline Remains Unreasonably Optimistic

284. Even with corrections to the Claimant's programme to account for the obvious errors and incorrect assumptions illustrated above, the Claimant's 2015 programme remains unreasonably optimistic as it fails to adequately address the risks associated with the Project. The Claimant's 2015 programme "always assumes that the best possible outcome for Windstream would be realized whenever a risk manifested. This is inappropriate".⁵⁹¹ URS therefore retains its view from its first report – "the Project is still at any early stage in its development process, which, when combined with its 'First of a Kind' nature for the Ontario market, and lack of developer experience, makes the project vulnerable to considerable risks during both the development and construction phases."⁵⁹² URS further notes:

[t]hese risks could have either derailed the Project entirely or impacted on Project costs and schedule, such that, [...] it is still not reasonable to conclude at this time that the Project was viable within the confines of the FIT Contract timelines.⁵⁹³

285. For example, the 2015 Project programme fails to address URS's concern that, on the valuation date, the Claimant's Project was in the early stages of development,⁵⁹⁴ which the Claimant's own experts admit.⁵⁹⁵ Indeed, the Claimant's own documents acknowledge the lack of work carried out in developing the Project at the time it applied to the FIT Program.⁵⁹⁶ The fact

⁵⁹⁰ RER-URS-2, ¶ 72.

⁵⁹¹ RER-URS-2, ¶ 16.

⁵⁹² RER-URS-1, ¶¶ 2-18.

⁵⁹³ RER-URS-2, ¶ 18.

⁵⁹⁴ RER-URS-2, ¶ 18.

⁵⁹⁵ CER-Sgurr-2, p. 10.

⁵⁹⁶ **C-0237**, E-mail from Nancy Baines, Windstream Energy, Inc. to Ian Baines, Windstream Energy, Inc. et al. (Apr. 28, 2010); **R-0508**, Letter from Ian Baines, Ontario Clean Power to The Honourable Donna Cansfield, Minister of Natural Resources (Nov. 20, 2008).

that the Claimant has now, over five years after signing the FIT Contract, put forward expert reports speaking to the feasibility of the Project, or various early stage technical studies addressing numerous environmental risks, does not change the fact that none of these studies were completed at the time the FIT Contract was signed. Instead, it further emphasizes that the Claimant did not appreciate the complexity and magnitude of the Project at the time it signed the FIT Contract, and as recently as the date it submitted its Memorial in this arbitration.⁵⁹⁷

286. Moreover, even considering the Claimant's new expert reports, considerable risks remain. In particular, the Claimant's Project faced significant general project risks related to Windstream's lack of offshore wind power experience,⁵⁹⁸ its inappropriate programme,⁵⁹⁹ pre-financial close funding risks,⁶⁰⁰ the "first of a kind" nature of the project,⁶⁰¹ and various other project management risks.⁶⁰² It also faced numerous development risks, relating to omissions from its 2015 programme,⁶⁰³ the negotiation of Crown land access,⁶⁰⁴ and permitting and design,⁶⁰⁵ as well as serious risks related to financing that alone put the viability of the Project into question.⁶⁰⁶ Finally, the Project continued to face substantial construction risks⁶⁰⁷ including

⁵⁹⁷ RER-URS-2, ¶¶ 4, 161, 183.

⁵⁹⁸ RER-URS-2, ¶¶ 165-195.

⁵⁹⁹ RER-URS-2, ¶¶ 197-200.

⁶⁰⁰ RER-URS-2, ¶¶ 226-240.

⁶⁰¹ RER-URS-2, ¶¶ 270-273, 301-302, 358-360, 361-363.

⁶⁰² RER-URS-2, ¶¶ 201-225.

⁶⁰³ RER-URS-2, ¶¶ 241-249.

⁶⁰⁴ RER-URS-2, ¶¶ 250-252.

⁶⁰⁵ RER-URS-2, ¶¶ 263-347.

⁶⁰⁶ RER-URS-2, ¶¶ 348-360; RER-Green Giraffe, ¶¶ 132-135. As Green Giraffe notes, the Claimant's plan to use significant pre-financial close equity is also a major development risk. Leaving aside the lack of evidence demonstrating the Claimant or its investors had the required funds, Green Giraffe notes, in its extensive experience with negotiating financing for offshore wind projects, that they have "never seen any project developer, utility or otherwise, put such an amount at risk before [the final investment decisions]." RER-Green Giraffe, ¶ 134. The evidence suggests that the same was true in this case. The Claimant had tried on several occasions to obtain equity investments, or to seek out further financing, but had been unable to do so. **C-0215**, Memorandum from William Ziegler and David Mars to ██████████, Ken Hannan and Steven Webster (Apr. 14, 2010); **C-0417**, Memorandum from William Ziegler and David Mars to ██████████, Ken Hannan, Steven Webster, ██████████ (Dec. 29, 2010); **R-0551**, Windstream Wolfe Island Shoals, Confidential Investment Memorandum (Jan. 2011).

⁶⁰⁷ RER-URS-2, ¶¶ 361-418.

those associated with the onshore manufacturing facilities,⁶⁰⁸ procurement,⁶⁰⁹ and vessel availability.⁶¹⁰

287. As URS notes:

[the] fact remains that Windstream would have faced very serious risks, and it is common on all projects for at least some of the risks to be realised, often resulting in delays in completion and cost overruns. Windstream's implied assumption that it would have been able to successfully manage every time the effect of any risk materialising, gives a misleading impression and oversimplifies the complexity of bringing a project of this magnitude to a successful conclusion.⁶¹¹

288. Green Giraffe similarly concludes:

we do not see in [the Claimant's background] the relevant offshore wind experience that would have allowed them to run the full development, contracting and financing process within the required timelines. We can only underline that this is a very high risk investment, with a high risk of the funds being stranded for years and never returned to the investors.⁶¹²

289. The Claimant dismisses these risks, arguing, for example, that "it is very common in the development of renewable energy projects to change project layouts up to the start of construction."⁶¹³ However, the Claimant did not have the luxury of time to continually redevelop its Project. With only five years to achieve Commercial Operation, the FIT Contract did not allow for the type of iterative process envisioned by the Claimant to deal with what it admits were "previously unknown constraints."⁶¹⁴

⁶⁰⁸ RER-URS-2, ¶¶ 369-376.

⁶⁰⁹ RER-URS-2, ¶¶ 364-368.

⁶¹⁰ RER-URS-2, ¶¶ 406-418.

⁶¹¹ RER-URS-2, ¶ 161.

⁶¹² RER-Green Giraffe, ¶ 135.

⁶¹³ Claimant's Reply Memorial, ¶ 702.

⁶¹⁴ Claimant's Reply Memorial, ¶ 702.

3. The Project Had No Value on February 11, 2011 Because of Its Riskiness and High Costs

290. As Canada has argued in its Counter-Memorial, a DCF methodology is not an appropriate way to value Windstream's investment given the highly speculative nature of its lost profits as a non-operating, early stage investment.⁶¹⁵ In its Reply Memorial, the Claimant continues to argue that its profits could have been predicted with certainty as it had a binding FIT Contract that provided a fixed rate for electricity produced.⁶¹⁶ However, as demonstrated in Canada's Counter-Memorial and below, this is simply not the case.⁶¹⁷ The riskiness of the Claimant's Project and the early stage of its developments make profits anything but predictable and therefore, as a matter of law, the DCF method is not appropriate.

291. Moreover, as Green Giraffe notes, given the early stage of project development, the market would have considered future profits too speculative to have value and would not have used a DCF methodology to value the Project on the date of the alleged breach.⁶¹⁸ When a proper market valuation is carried out, Green Giraffe notes that the Project likely had had no material value to a potential buyer, and no value at all if the Claimant's approach was to stay in charge until financial close by financing the Project themselves.⁶¹⁹

292. Finally, even if this Tribunal were to assume that the Claimant's Project could have been constructed in the timelines required (and it should not), and were to assume that the DCF methodology is appropriate in this case (and also it should not), the Claimant's Project was still so risky and so expensive that applying a DCF shows that the Project had no value. As BRG concludes, on February 11, 2011 the Project failed to have any value despite the Claimant having a FIT Contract.⁶²⁰

⁶¹⁵ Canada's Counter-Memorial, ¶¶ 560-565.

⁶¹⁶ Claimant's Reply Memorial, ¶ 645.

⁶¹⁷ Canada's Counter-Memorial, ¶¶ 548-556; See above at ¶¶ 293-296.

⁶¹⁸ RER-Green Giraffe, ¶¶ 22, 94-97.

⁶¹⁹ RER-Green Giraffe, ¶¶ 35-38, 136-144.

⁶²⁰ RER-BRG-2, ¶¶ 36-37, 45 and Figure 1 (see generally, Chapter 4). While the BRG Report is focused primarily on the May 22, 2012 valuation date, the conclusions drawn from that scenario apply equally to a scenario with a February 11, 2011 valuation date.

(a) A DCF Is Not the Appropriate Valuation Methodology Given the Speculative Nature of the Claimant's Project

293. The Claimant alleges that because the FIT Contract establishes a fixed price for electricity sold by the Project,⁶²¹ the Project's electricity output can be reasonably estimated,⁶²² the majority of the Project's capital and operating costs can be assessed using benchmark data,⁶²³ and the engineering for the Project would not involve novel technology,⁶²⁴ there is no speculation when it comes to estimating lost profits.⁶²⁵ As a result, it claims that DCF is the appropriate valuation methodology for this arbitration.⁶²⁶ This is wrong.

294. The FIT Contract itself did not provide a guarantee that the Project would be permitted, developed and reach Commercial Operation.⁶²⁷ The Claimant had no automatic or guaranteed right to any of the necessary permits and approvals, and the failure to obtain a single one could have resulted in substantial costs or the failure of the Project altogether. Indeed, the Claimant's understanding of the FIT Contract fails to take into account any of the requirements built therein. The Claimant seems to entirely ignore, for example, the fact that the OPA will not issue a NTP until a supplier has, among other things, the required permitting and financing.⁶²⁸ The Claimant had neither, and as a result, it is inappropriate to assume away the risk that the Project would not only fail to reach NTP, but also meet Commercial Operation. As BRG indicates, the reality is that for many FIT Contract holders, these risks materialize.⁶²⁹

295. The Claimant's argument that it has accounted for Project risks in its DCF analysis⁶³⁰ also cannot be supported. As BRG notes, "Deloitte's discount rate is also unreasonable in light of the risks faced by Windstream at the Valuation Date [...] Deloitte does not adequately account for or

⁶²¹ CER-Deloitte (Low & Taylor)-2, ¶ 2.5(a).

⁶²² CER-Deloitte (Low & Taylor)-2, ¶ 2.5(a).

⁶²³ CER-Deloitte (Low & Taylor)-2, ¶¶ 2.5(b) and (c).

⁶²⁴ CER-Deloitte (Low & Taylor)-2, ¶ 2.5(d).

⁶²⁵ Claimant's Reply Memorial, ¶ 646.

⁶²⁶ Claimant's Reply Memorial, ¶¶ 647-651.

⁶²⁷ RWS-Cecchini, ¶ 6; RER-BRG-1, ¶ 77; RER-BRG-2, ¶¶ 27-28, 93, 119-123.

⁶²⁸ **R-0092**, FIT Contract, v. 1.3, s. 2.4(a); RER-URS-2, ¶ 27.

⁶²⁹ RER-BRG-2, ¶ 245.

⁶³⁰ Claimant's Reply Memorial, ¶¶ 716-717.

address these risks in its quantification of the applicable discount rate to Windstream.”⁶³¹ Strikingly, Deloitte’s lack of appropriate risk quantification leads to the absurd conclusion that Windstream is entitled to a 1,300 per cent return on the money it alleges to have invested to date.⁶³²

296. Ignoring its own failure to meet its burden, the Claimant attempts to shift focus away from itself and alleges that “Canada has not submitted any evidence to establish that the DCF methodology is an inappropriate valuation methodology.”⁶³³ This is false. Canada refuted the Claimant’s arguments about the use of DCF in its Counter-Memorial and supported its argument with both legal authority⁶³⁴ and evidence,⁶³⁵ noting that the correct valuation methodology for an asset that is not a going concern is, at best, investment costs incurred.⁶³⁶ Further the Claimant has mischaracterized Canada’s position by arguing that BRG does not dispute that the DCF approach is appropriate since BRG used that very methodology.⁶³⁷ BRG only uses this methodology to show that even if the Claimant’s methodology were used, it is evident that the Project had no value.⁶³⁸ The inappropriateness of using DCF is also established by market realities. As Green Giraffe notes based on its extensive transactional experience in the offshore wind sector, prior to financial close, offshore wind projects are “not usually valued on the basis of future cash flows, as these are still viewed as highly speculative due to the absence of [financial close], up to the actual date for such event.”⁶³⁹

297. The new authorities put forward by the Claimant do not rebut the evidence and authorities put forward by Canada in its Counter-Memorial and here on this point. In fact, they do not

⁶³¹ RER-BRG-2, ¶ 26.

⁶³² RER-BRG-2, ¶¶ 30, 347.

⁶³³ Claimant’s Reply Memorial, ¶ 645.

⁶³⁴ Canada’s Counter-Memorial, ¶¶ 561-562.

⁶³⁵ Canada’s Counter-Memorial, ¶¶ 563-565.

⁶³⁶ Canada’s Counter-Memorial, ¶¶ 560, 565.

⁶³⁷ CER-Deloitte (Low & Taylor)-2, ¶ 2.2.

⁶³⁸ RER-BRG-2, ¶¶ 17-19.

⁶³⁹ RER-Green Giraffe, ¶¶ 22, 94.

support its position that it should be entitled to lost profits at all.⁶⁴⁰ For example, in *Anatolie Stati v. Kazakhstan*, the Tribunal held that a claimant “must meet a high standard of proof to establish a claim for lost profits”⁶⁴¹ and that “a high threshold of sufficient probability must be applied to a claim for lost opportunity.”⁶⁴² And while the Tribunal held that this standard could be met by showing a proven track record of profitability, or through a binding contractual agreement that establishes an expectation of profit, the Tribunal found the standard was not met in that case because the outstanding construction and development risks associated with the Project prevented the Claimant from providing sufficient evidence that they would have realized the alleged lost profits they sought to recover.⁶⁴³ As discussed above, the Claimant has not met its burden of proof in this case for exactly the same reason – the FIT Contract itself did not provide a guarantee that the Project would be permitted, developed and reach Commercial Operation.⁶⁴⁴

298. Similarly, the Claimant's reliance on *Karaha Bodas v. PLN* does not support its position. While the contract in that case eliminated commercial risks of market availability, price fluctuations and inflation like the FIT Contract,⁶⁴⁵ elimination of such commercial risks is not analogous to removing risks associated with the development and construction of a project like the Claimant's as highlighted by URS.⁶⁴⁶

⁶⁴⁰ The Claimant also cites to numerous cases to demonstrate that future risks do not prevent the use of a DCF analysis. However, whether or not DCF was the proper valuation methodology was not discussed by the Tribunal in the majority of these cases. For example, in *Gold Reserve v. Venezuela* and *Lemire v. Ukraine*, the parties and their experts agreed that the DCF methodology was appropriate (**CL-121**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1) Award, 22 September 2014, ¶ 690; **CL-123**, *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18) Award, 28 March 2011, ¶ 254). In other instances, the investment in question was a going concern, unlike the Claimant's Project (See for example, **CL-040**, *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8) Award, 12 May 2005, ¶ 48; **CL-047**, *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15) Award, 31 October 2011, ¶ 78; **CL-031**, *Cargill – Award*, ¶ 186).

⁶⁴¹ **CL-118**, *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd. v. Kazakhstan*, Case No. 1:14 cv-00175-ABJ, 19 December 2013, ¶ 1688 (“*Stati*”).

⁶⁴² **CL-118**, *Stati*, ¶ 1689.

⁶⁴³ **CL-118**, *Stati*, ¶¶ 1690-1691.

⁶⁴⁴ RWS-Cecchini, ¶ 6; RER-BRG-1, ¶ 77; RER-BRG-2, ¶¶ 27-28, 93, 119-123.

⁶⁴⁵ **CL-124**, *Karaha Bodas Company LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and PT.PLN (Persero)*, ad hoc ¶¶ 125-126.

⁶⁴⁶ RER-URS-2, Chapter 4.

299. The Claimant's continued reliance on *Ioan Micula v. Georgia* is also misplaced. While it is true the Tribunal in that case indicated a DCF may be appropriate where the claimant benefits "from a long-term contract or concession that guaranteed a certain level of profit," the fact remains that the Claimant did not have a guaranteed revenue stream or level of profit. As discussed above,⁶⁴⁷ and as noted by BRG,⁶⁴⁸ URS⁶⁴⁹ and Green Giraffe,⁶⁵⁰ the risks associated with the development and construction of this Project were significant and it is unreasonable for the Claimant to assume that the Project would have been able to reach Commercial Operation in the time periods required by the FIT Contract.

300. The situation in this case is also not analogous to *Khan Resources v. Mongolia*, as the Claimant asserts.⁶⁵¹ Two agreements were at issue in *Khan*, the main contract or "Founding Agreement" establishing a joint venture to develop a uranium exploration and extraction project, and a "Minerals Agreement" on the development of mineral deposits at a specific site.⁶⁵² Once established, the joint venture in *Khan* obtained the necessary mining and exploration licences.⁶⁵³ It also obtained financing, specifically \$14 million in seed money from private investors, \$6.3 million in an initial public offering on the Toronto Stock Exchange, and \$25 million in a follow-on offering.⁶⁵⁴ Hence, in the case of *Khan*, the project had site access, permits, and an agreement with a State enterprise that offered revenue support and financing. In such circumstances, the Tribunal held that Mongolia's invalidation of the licences⁶⁵⁵ substantially deprived the Claimants of their investments.⁶⁵⁶ None of the circumstances that supported an award in favour of the claimant in *Khan* exist in the case before this Tribunal.

⁶⁴⁷ See above at ¶ 294.

⁶⁴⁸ RER-BRG-2, ¶¶ 242-253.

⁶⁴⁹ RER-URS-2, Chapter 4.

⁶⁵⁰ RER-Green Giraffe, ¶¶ 132-144, 155-177.

⁶⁵¹ Claimant's Reply Memorial, ¶ 474.

⁶⁵² **CL-125**, *Khan Resources Inc. v. Mongolia*, PCA Case No. 2011-09, Award on the Merits, 2 March 2015, ¶¶ 44-45 ("*Khan Resources – Award*").

⁶⁵³ **CL-125**, *Khan Resources – Award*, ¶¶ 54-56.

⁶⁵⁴ **CL-125**, *Khan Resources – Award*, ¶ 58.

⁶⁵⁵ **CL-125**, *Khan Resources – Award*, ¶¶ 71-90.

⁶⁵⁶ **CL-125**, *Khan Resources – Award*, ¶¶ 309-312.

301. Finally, the Claimant's use of the fact that the OPA relied on the DCF methodology to determine the respective net present values of TransCanada's proposed gas-fired plant in Oakville and of the replacement project that it was awarded⁶⁵⁷ also fails to support its case. While TransCanada's project had not yet obtained all permitting, it was proceeding through a well-established regulatory process for a well-known technology in Ontario with known operational costs. Indeed, many other similar power plants have been built elsewhere in Ontario. As such, the speculation that makes the DCF methodology inappropriate for the Claimant's Project did not apply to the valuation of a gas-fired plant.

302. In light of the speculative nature of the project, its early stage of development, the known development and construction risks, and the questions surrounding the Claimant's ability to secure the necessary debt and equity investment for the Project, there is no reason why the Tribunal should depart from the well-established approach to damages for non-operating projects and accept the use of the DCF methodology in the circumstances of this particular case.

**(b) The Project Had No Value on the Market Place in February 2011
Given Its Lack of Permitting and Crown Land Access**

303. At the time Windstream signed its FIT Contract, it did not have any permits for the Project, nor did it have access to the Crown land it needed to build the Project. It had failed to conduct any of the necessary environmental studies and it had applied for AOR status for parcels of Crown land that, if a five-kilometre setback was implemented, would have been virtually useless to it, even by its own admission.⁶⁵⁸ Indeed, an e-mail from Ian Baines to David Mars in July 2009 highlights this risk, noting that "[a]pplicants who apply to FIT Program without Applicant of Record Status do so at their own risk, should they be offered a FIT Contract, but for any reason

⁶⁵⁷ Claimant's Reply Memorial, ¶¶ 659-660.

⁶⁵⁸ **R-0540**, E-mail from Ian Baines, Windstream Energy Inc. to David Mars, White Owl Capital (Jul. 11, 2010); **R-0534**, Windstream Energy Inc. Briefing Document, Wolfe Island Shoals (Off-Shore Wind Project) Working with a 5 km Set-Back (Jun. 24, 2010); **R-0531**, E-mail from Ian Baines, Windstream Energy Inc. to Jim Vanden Hoek (Jun. 22, 2010); **R-0532**, E-mail from Ian Baines, Windstream Energy Inc. to Nancy Baines, David Mars, Uwe Roeper and Hank Van Bakel (Jun. 22, 2010); **C-0294**, Windstream Energy Inc. Briefing Document, Wolfe Island Shoals (Off-Shore Wind Project) Working with a 5 km Set-Back (Jun. 24, 2010); **R-0533**, E-mail from Chris Benedetti, Sussex Strategy to Utilia Amaral, Ministry of Environment (Jun. 22, 2010).

are not granted the necessary Access Rights to develop their project.”⁶⁵⁹ Indeed, the Claimant itself acknowledges that site control is necessary for any project to be viable,⁶⁶⁰ and that the failure to access the requisite Crown land meant that “investors [would] flee.”⁶⁶¹ Yet the Claimant continues to maintain that the Project had value on the marketplace.

304. Contrary to the Claimant’s assertion that a comparable transactions methodology would lead to the same value for the Project as its DCF methodology,⁶⁶² real world experience demonstrates that absent access to Crown land and given the Claimant’s lack of progress towards obtaining environmental permits, the Project had no material value on the marketplace.⁶⁶³ As Green Giraffe notes, the value of a development phase offshore wind project is highly dependent on whether the project has reached certain milestones, such as, site control, permits, a revenue regime and grid access.⁶⁶⁴ A project with all of these items has more value than a project that has only some, or none of these.⁶⁶⁵ In contrast, a project like the Claimant’s that is in the early stages of permitting, is stuck in an unpredictable regulatory process with no well-defined path to permitting, and is the first to go through the process in a country, has no material value.⁶⁶⁶

305. Of fundamental importance to the value of a development phase project, such as the Claimant’s, is whether site control is obtained.⁶⁶⁷ Indeed, without site access, there is no project to sell, only an idea. As Green Giraffe indicates, “not having site control would definitely be seen as fundamental weakness and would prevent a project from having any material value.”⁶⁶⁸ Green Giraffe confirms that it is not aware of a single market transaction where value has been

⁶⁵⁹ **R-0517**, E-mail from Ian Baines, Windstream Energy Inc. to David Mars, White Owl Capital (Jul. 22, 2009) (emphasis added).

⁶⁶⁰ CWS-Mars-1, ¶ 24; **R-0517**, E-mail from Ian Baines, Windstream Energy Inc. to David Mars, White Owl Capital (Jul. 22, 2009).

⁶⁶¹ **R-0532**, E-mail from Ian Baines, Windstream Energy Inc. to Nancy Baines, David Mars, Uwe Roesper and Hank Van Bakel (Jun. 22, 2010).

⁶⁶² Claimant’s Reply Memorial, ¶¶ 662-663.

⁶⁶³ RER-Green Giraffe, ¶¶ 132, 144, 178.

⁶⁶⁴ RER-Green Giraffe, ¶¶ 68-86.

⁶⁶⁵ RER-Green Giraffe, ¶¶ 69-70, 94-102.

⁶⁶⁶ RER-Green Giraffe, ¶¶ 23, 94.

⁶⁶⁷ RER-Green Giraffe, ¶¶ 70, 97.

⁶⁶⁸ RER-Green Giraffe, ¶¶ 70, 97.

ascribed to a project that did not have the exclusive right to the site on which it wishes to operate.⁶⁶⁹ Moreover, Green Giraffe concludes from a market sale perspective that, “if Windstream’s plan was to fund the Project itself and thereby stay in control until FC/FIC, the Project likely had no value at all at the time.”⁶⁷⁰

(c) A DCF Analysis Reveals the Project Had No Value on February 11, 2011

306. Even if the Tribunal were to agree with the Claimant that the DCF method is an appropriate valuation methodology for the Claimant’s Project, a correct DCF valuation reveals that the Project had no value on February 11, 2011. Deloitte’s failure to account for development and construction risks, as well as various errors and incorrect assumptions in its analysis, cause Deloitte to drastically overvalue the Project. When corrections are made for these errors and assumptions, a DCF valuation reveals that, even absent the deferral, the Project was valueless.

(i) The Claimant’s DCF Analysis Incorrectly Assumes the Project Faced no Development and Construction Risk

307. In valuing damages, Deloitte assumes that the Project did not face any development and construction risk.⁶⁷¹ As was the case in its first expert report, Deloitte once again assumes that all environmental and other associated approvals are received,⁶⁷² that a five-kilometre setback is implemented by MOE,⁶⁷³ that financing is secured from both debt and equity investors,⁶⁷⁴ that the OPA issues a NTP,⁶⁷⁵ and that the 2015 programme created by SgurrEnergy is achieved.⁶⁷⁶ The Claimant assumes away any risk associated with each of these events by arguing that anything otherwise would result in another breach of the NAFTA as it was “contrary to the Ontario

⁶⁶⁹ RER-Green Giraffe, ¶ 97.

⁶⁷⁰ RER-Green Giraffe, ¶¶ 38, 178 (emphasis added).

⁶⁷¹ RER-BRG-2, ¶ 54(d), 92-126; CER-Deloitte (Low & Taylor)-2, ¶ 3.1.

⁶⁷² CER-Deloitte (Low & Taylor)-2, ¶ 3.1(b).

⁶⁷³ CER-Deloitte (Low & Taylor)-2, ¶ 3.1(a).

⁶⁷⁴ CER-Deloitte (Low & Taylor)-2, ¶ 3.1(c).

⁶⁷⁵ CER-Deloitte (Low & Taylor)-2, ¶ 3.1(d).

⁶⁷⁶ CER-Deloitte (Low & Taylor)-2, ¶ 3.1(e).

Government's commitment to provide 'certainty' to FIT Contract holders."⁶⁷⁷ However, such assumptions are unrealistic and inappropriate.⁶⁷⁸

308. As Canada noted in its Counter-Memorial,⁶⁷⁹ a correct "but for" scenario continues to assume the Project would have faced the numerous project developmental and construction risks identified above. These risks are comprehensively identified in the URS, BRG and Green Giraffe reports and need not be repeated here. A "but for" scenario is intended to erase the consequences of the breach, not remove risks unrelated to the breach altogether. Deloitte's "minimal adjustment" for risk "is not adequate to reflect the real risk faced by the Project."⁶⁸⁰ By continuing to value Windstream as a "late-stage Project" because it has a FIT Contract (and despite the Claimant's expert, SgurrEnergy, indicating the Project was in the early stage of development),⁶⁸¹ Deloitte "dismisses the significant amount of remaining development, permitting, and financing work that still needs to be completed prior to obtaining financing and beginning construction."⁶⁸² While a FIT Contract was a necessary milestone for the Project, for the Claimant, the FIT Contract and the deadlines it imposed were actually a significant hurdle to the Project's successful development, not an advantage.⁶⁸³ As a result, Deloitte's value for the Project is not in line with the real world.⁶⁸⁴ In its analysis, BRG has corrected for all of these unreasonable assumptions regarding risk.⁶⁸⁵ These corrections result in a reduction in claimed damages by approximately \$186 million.

(ii) Deloitte Relies on an Inappropriate Valuation Date

309. As discussed above, in valuing the damages allegedly suffered by the Claimant by the imposition of the deferral itself, Deloitte has used the wrong valuation date. In doing so, Deloitte

⁶⁷⁷ Claimant's Reply Memorial, ¶ 675.

⁶⁷⁸ RER-BRG-2, ¶¶ 54, 92-94.

⁶⁷⁹ Canada's Counter-Memorial, ¶¶ 550-553.

⁶⁸⁰ RER-BRG-2, ¶ 103.

⁶⁸¹ CER-Sgurr-2, p. 10.

⁶⁸² RER-BRG-2, ¶ 120.

⁶⁸³ RER-URS-2, ¶¶ 7, 18, 159-161; RER-Green Giraffe, ¶ 179.

⁶⁸⁴ RER-Green Giraffe, ¶¶ 132, 144, 178; RER-BRG-2, Figure 1, ¶¶ 103, 134 (see generally, Chapter 4).

⁶⁸⁵ RER-BRG-2, Figure 1.

has valued the Project as of May 22, 2012, instead of February 11, 2011, the correct valuation date for such a breach. Adjusting the valuation to reflect this date as the restart of development results in a reduction of claimed damages by approximately \$16 million.⁶⁸⁶

(iii) Deloitte Continues to Ignore Binding Agreements Signed by the Claimant and Make Calculation Errors that Inflate the Value of the Project

310. Deloitte maintains that the fact that the Claimant signed a binding [REDACTED] TSA is irrelevant, as the agreement would have been re-negotiated to a lower price and that many of the other terms would not apply.⁶⁸⁷ In order to value the TSA, Deloitte relies on a cost estimate provided by 4C.⁶⁸⁸ Yet the Claimant has put forward no evidence that the TSA would have been renegotiated downwards. Absent this, it is inappropriate to simply assume a better price for the sake of its damages analysis. Moreover, such an assumption is completely out of touch with market realities.⁶⁸⁹ The number used by Deloitte is based on the prices for the turbines in the European market. However, as Green Giraffe notes, at the relevant time, prices for turbines in North America were 50 to 200 per cent higher than the same turbines in Europe.⁶⁹⁰ It is incorrect for Deloitte to simply assume away this fact and rely on average European prices in 2011. Further, as noted by Green Giraffe, it is expected that prices would not have been negotiated down, but rather would “go up as Siemens’s scope is clarified or extended in line with bankability requirements.”⁶⁹¹

311. As BRG notes, leaving aside all other adjustments that BRG has made to the Deloitte valuation and all other areas of disagreement, if the Tribunal were simply to rely on [REDACTED]

[REDACTED]
[REDACTED] As such, simply

⁶⁸⁶ RER-BRG-2, Figure 1, ¶ 330.

⁶⁸⁷ CER-Deloitte (Low & Taylor)-2, ¶¶ 6.1-6.3.

⁶⁸⁸ CER-Deloitte (Low & Taylor)-2, ¶ 6.3.

⁶⁸⁹ RER-Green Giraffe, ¶¶ 132, 144, 178.

⁶⁹⁰ RER-Green Giraffe, ¶ 116.

⁶⁹¹ RER-Green Giraffe, ¶¶ 45, 174.

⁶⁹² RER-BRG-2, Figure 1, ¶¶ 37, 174-185.

recognizing the existence of the binding TSA that the Claimant chose to sign with Siemens eliminates all of the value of the Project.⁶⁹³

(iv) Deloitte Continues to Make Numerous Calculation Errors in Its Damages Analysis

312. Deloitte also makes numerous errors and omissions, including with respect to the base land rent and decommissioning costs.⁶⁹⁴ Adjustments for these costs reduce the Project value by a further \$99 million.⁶⁹⁵

(v) As a Result, The Project Had a Negative Net Present Value on February 11, 2011

313. The combined impact of all the errors and unreasonable assumptions made by Deloitte is a reduction in the value of the Project of \$483 million resulting in a net negative value for the Project on the valuation date.⁶⁹⁶ The imposition of the deferral itself was therefore not the cause of any loss to the Claimant as the Project was a failure before the deferral was even adopted.

E. The Claimant Has Failed to Prove that It Suffered Damages as a Result of the Failure to Lift the Deferral or Insulate the Claimant from the Deferral's Effects Prior to May 22, 2012 in Alleged Violation of Articles 1105 and 1110

314. The Claimant alleges that the length of the deferral without any efforts by Ontario to insulate it from its effects has resulted in a breach of Article 1110 and a second independent breach of Article 1105. Specifically, the Claimant has alleged that Ontario's failure to lift the deferral prior to its financing running out on May 22, 2012 breached Article 1110,⁶⁹⁷ that the failure to insulate it from the deferral's effects such that its investments become worthless on

⁶⁹³ RER-BRG-2, ¶¶ 37, 174-185, Figure 1.

⁶⁹⁴ RER-BRG-2, ¶¶ 186-202, Figure 1.

⁶⁹⁵ RER-BRG-2, ¶¶ 186-202, Figure 1.

⁶⁹⁶ RER-BRG-2, ¶ 37, Figure 1.

⁶⁹⁷ Claimant's Reply Memorial, ¶ 473: ("As a result of the drastic delays caused by the moratorium, the Project no longer has any hope of achieving commercial operation by the deadlines set out in the FIT Contract").

May 22, 2012 breached Article 1110,⁶⁹⁸ and that the “Ontario Government’s failure to fulfil its commitment to ‘freeze’ the FIT Contract”⁶⁹⁹ breached Article 1105.

315. As has been shown above, Ontario’s failure to lift the deferral or, absent this, the failure to insulate the Claimant from its effects, did not breach Articles 1105 and 1110. In the alternative, even if it did, it did not cause the Claimant any harm. As was the case with the deferral decision itself, by the time this decision was made (whether it is the failure to lift the deferral or alternatively, take steps to insulate the Claimant from its effects), it was impossible to cause damage to the Claimant for the same reason discussed above: the Claimant’s Project already had no market value since it was a foregone conclusion on May 22, 2012 that the Project would not be able to meet Commercial Operation within the time frames outlined in the FIT Contract.⁷⁰⁰ Further, even if the Claimant is able to convince the Tribunal otherwise, the Project still had no value on May 22, 2012, because of its riskiness and its high costs.⁷⁰¹

⁶⁹⁸ Claimant’s Reply Memorial, ¶¶ 531-533.

⁶⁹⁹ Claimant’s Reply Memorial, ¶ 601.

⁷⁰⁰ RER-URS-2, ¶¶ 70, 80; RER-BRG-2, ¶¶ 14-16, 230.

⁷⁰¹ RER-BRG-2, Chapter 4; RER-Green Giraffe, ¶¶ 136-144.

1. The Appropriate “But For” and Valuation Date for an Alleged Breach of Articles 1105 and 1110 Based on the Failure to Lift the Deferral Prior to May 22, 2012 or Insulate the Claimant from the Deferral’s Effects by that Time

316. According to the Claimant, its investments became substantially worthless on the date on which it was no longer possible for the Project to reach Commercial Operation before triggering the OPA’s termination rights under section 10.1(g) of the FIT Contract.”⁷⁰² This date, according to the Claimant, is May 22, 2012.⁷⁰³ This scenario necessarily leads to the conclusion that the deferral itself did not cause the Claimant’s loss on the date it was implemented, but rather only when it failed to be lifted by May 22, 2012, or, when Ontario failed to insulate the Claimant from the effects of the OPA’s termination rights by that date. Therefore, even though the Claimant appears to argue these as three separate breaches, the appropriate “but for” scenario is the same. Indeed, the Claimant alleges that had the deferral been lifted on or before that date, then the Project would have reached Commercial Operation before the Supplier Default Date in the FIT Contract.⁷⁰⁴ Similarly, had the Claimant been kept “whole” or “frozen” prior to this date, it would allegedly not have become worthless either.⁷⁰⁵

317. Yet when it comes to valuing the failure to lift the deferral, or alternatively, the alleged failure to keep the Claimant “whole”, again, it fails to offer a “but for” scenario that takes into account the actual breach. First, even though the Claimant uses a valuation date of May 22, 2012, its first “but for” scenario uses a project schedule that assumes away the breach with Project development starting as of February 11, 2011. This is illogical. If the breach is the failure to lift the deferral or insulate the Claimant from its effects by May 22, 2012, a correct “but for” scenario would assume that the deferral was lifted, or the Claimant insulated from its effects, on May 22, 2012, the day before the Claimant allegedly suffered loss, such that the project could proceed with development at that time.

⁷⁰² Claimant’s Reply Memorial, ¶ 729; CER-Deloitte (Bucci)-2, ss. 3.1, p. 5, 3.10-3.13, pp. 15-16.

⁷⁰³ Claimant’s Reply Memorial, ¶ 729; CER-Deloitte (Bucci)-2, ss. 3.1, p. 5.

⁷⁰⁴ CER-Deloitte (Bucci)-2, s. 3.1.

⁷⁰⁵ CER-Deloitte (Bucci)-2, s. 3.1.

318. While the Claimant offers an additional “but for” scenario to purportedly calculate its losses arising from Ontario’s alleged failure to keep the Claimant’s FIT Contract “frozen”, or keep them “whole” during the deferral, such a “but for” is of no use to this Tribunal. This “but for” assumes that the FIT Contract is frozen for three years without triggering any OPA termination rights and then, on February 11, 2014, the deferral is lifted allowing the Project to resume development. The Claimant puts forward no evidence to show why imposing an arbitrary three year deferral would put it in the position it would have been in had Ontario kept the Claimant’s FIT Contract “frozen” during the deferral. As the Claimant notes, the deferral has lasted longer than three years.⁷⁰⁶ A proper “but for” scenario would have Ontario acting in a manner that “freezes” the Claimant’s FIT Contract on May 22, 2012 rather than the Claimant’s Project becoming worthless. As a result, the correct “but for” scenario is the same as that used if the failure to lift the deferral by May 22, 2012 is seen as the breach.

2. The Claimant May Not Choose Between the Date of the Award and the Date of the Breach for an Alleged Breach of Article 1110

319. The Claimant continues to argue that it is entitled to choose either the date of the breach or the date of the award [as a valuation date] for its expropriation claim.⁷⁰⁷ In the Claimant’s view, it can only be fully compensated for Canada’s alleged breaches, if it is “put in the same situation it would have been in on the date of the award.”⁷⁰⁸ While the Claimant cannot point to any NAFTA case that applied this biased approach, it relies on *Feldman* and *S.D. Myers* to support its argument that NAFTA drafters intended to leave it open to tribunals to determine a reasonable approach to damages in all scenarios except lawful expropriation.⁷⁰⁹ However, neither of these NAFTA decisions concerned damages for expropriation. *Feldman* and *S.D. Myers* addressed damages only in the context of breaches of Articles 1102 and 1105.⁷¹⁰ In fact, both Tribunals were careful to state that their remarks regarding discretion were not applicable to violations of the expropriation provision in the NAFTA without making any distinction between lawful and

⁷⁰⁶ Claimant’s Reply Memorial, ¶ 11.

⁷⁰⁷ Claimant’s Reply Memorial, ¶¶ 738-739.

⁷⁰⁸ Claimant’s Reply Memorial, ¶¶ 738-739.

⁷⁰⁹ Claimant’s Reply Memorial, ¶ 739.

⁷¹⁰ **RL-024**, *Feldman – Award*, ¶ 194; **RL-047**, *S.D. Myers – Second Partial Award*, ¶ 5.

unlawful expropriation.⁷¹¹ Further, the *Metalclad v. Mexico* Tribunal confirmed that in the case of a breach of Article 1110(2) of the NAFTA, compensation should equal the fair market value on the date immediately before the expropriation.⁷¹² This was also the approach taken by numerous other non-NAFTA tribunals.⁷¹³

320. All the cases cited by the Claimant (*Yukos v. Russia*, *ADC v. Hungary*, *Siemens v. Argentina*, and *Kardassopoulos v. Georgia*)⁷¹⁴ fail to support its position. First, a correct reading of *Siemens* demonstrates that the Tribunal used the valuation at the date of the expropriation, not the date of the award.⁷¹⁵ The same is true with respect to the decision in *Kardassopoulos*.⁷¹⁶ Only in *Yukos* and *ADC* were dates subsequent to the dates of expropriation used for fair market valuations, and importantly both of these decisions concerned investments that were already in operation at the time of the expropriation and continued to operate after the expropriation.⁷¹⁷ That is simply not the case here. At the time of the alleged breach all the Claimant had was a concept

⁷¹¹ **RL-024**, *Feldman – Award*, ¶ 197, where the Tribunal stated that “it is obvious that in both of these earlier cases, which as here involved non-expropriation violations of Chapter 11, the tribunals exercised considerable discretion in fashioning what they believed to be reasonable approaches to damages consistent with the requirements of NAFTA”; **RL-081**, *S.D. Myers – Partial Award*, ¶¶ 306-309, where the Tribunal states that “[b]y not identifying any particular methodology for the assessment of compensation in cases not involving expropriation, the Tribunal considers that the drafters of the NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case.”

⁷¹² **CL-062**, *Metalclad – Award*, ¶ 118.

⁷¹³ **CL-092**, *Wena Hotels Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Award on Merits, 8 December 2000, ¶ 118; **RL-064**, *CME Czech Republic B.V. v. Czech Republic* (UNCITRAL) Final Award, 14 March 2003, ¶ 423; **CL-084**, *Tecmed*, ¶ 187; **CL-055**, *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia* (UNCITRAL, PCA Case No. 2011-17) Award, 31 January 2014, ¶ 435; **CL-052**, *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States* (ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4) Award, 16 June 2010, ¶¶ 12-44 (“*Gemplus*”); **CL-129**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/016) Award, 29 July 2008, ¶¶ 792-793; **CL-118**, *Stati*, ¶ 1496.

⁷¹⁴ Claimant’s Reply Memorial, ¶ 738 citing **CL-093**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (PCA Case No. AA 227) Final Award, 18 July 2014, ¶ 1763 (“*Yukos*”); **CL-021**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* (ICSID Case No. ARB/03/16) Award, 2 October 2006, ¶¶ 496-497 (“*ADC*”); **CL-082**, *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8) Award, 6 February 2007, ¶ 353 (“*Siemens*”); **CL-122**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia* (ICSID Case Nos. ARB/05/18 & ARB/07/15) Award, 3 March 2010, ¶ 514 (“*Kardassopoulos*”).

⁷¹⁵ **CL-082**, *Siemens*, ¶¶ 377, 379-385.

⁷¹⁶ **CL-122**, *Kardassopoulos*, ¶ 517.

⁷¹⁷ **CL-093**, *Yukos*, ¶¶ 1766-1769; **CL-021**, *ADC*, ¶¶ 483-494. Further, the Tribunal in *ADC* noted that a valuation date of the award is to be used only in exceptional circumstances, only where the value of the property has considerably increased between the date of the expropriation and the date of the award.

– they did not have an operational offshore wind project. In fact, even if development had continued after the alleged breach, the Project would not be in operation today. Further, in both *Yukos* and *ADC* there were intervening events that justified the later valuation date in order to prevent unjust enrichment of the State.⁷¹⁸ That is also not the case here.

321. There is no reason for the Tribunal to allow the Claimant to apply a “best of both worlds” approach to valuation. Indeed, allowing Claimant’s to elect their valuation date based on hindsight is, as Arbitrator Stern recently noted, “unacceptable”.⁷¹⁹ It should not be for the Claimant to, on one hand reap the benefits of an increase, while on the other hand, if the value of the investment has decreased following the alleged expropriation, ask for the higher valuation on the date of expropriation. According to Arbitrator Stern:

The solution suggested by *ADC* and *Yukos* is biased in favor of the investors and that the solution which systematically applies the harshest damages on the Respondent State resembles punitive damages, which are excluded in international law. A legal solution cannot just be based on what is more favorable to one of the parties.⁷²⁰

322. In the end, the Tribunal need not even engage in such an analysis. The Claimant cannot point to any factual events that demonstrate a change in value of the Project. The Project was in the very early stages of development and the Claimant cannot demonstrate that the value of its investment has considerably increased since the date of the alleged expropriation. Indeed, the difference in valuation from May 22, 2012 to June 18, 2015 relied upon by the Claimant relates only to the different time value of money, not any other factor.⁷²¹ The Claimant’s Project never came into operation and did not increase in value at any point after the alleged wrongful expropriation. As such, the appropriate valuation date to be used by the Tribunal for an alleged breach of Article 1110 is the date of the alleged breach – May 22, 2012.

⁷¹⁸ **CL-093**, *Yukos*, ¶¶ 1766-1769; **CL-021**, *ADC*, ¶¶ 483-494.

⁷¹⁹ **RL-084**, *Quiborax S.A., Non Metallic Minerals S.A., Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2) Partially Dissenting Opinion of Professor Brigitte Stern, 7 September 2015, ¶ 53 (“*Quiborax – Partial Dissent*”).

⁷²⁰ **RL-084**, *Quiborax – Partial Dissent*, ¶ 56.

⁷²¹ CER-Deloitte (Low & Taylor)-2, ¶¶ 1.10-1.11.

3. The Project Had No Value on May 22, 2012 Because It Could Not Be Constructed Within the Timeframes Required by the Claimant's FIT Contract

323. In the scenario where the date of the breach is May 22, 2012, and the but for world is one in which the Project was allowed to proceed with development on that date, the same errors and assumptions made by the Claimant's experts that Canada has highlighted above must be corrected. As discussed, the Project continued to face substantial development, and construction risks.⁷²² These risks remain whether the Project recommenced development on February 11, 2011 or May 22, 2012 and in both scenarios, the Project would still not be able to reach Commercial Operation prior to the Supplier Default Date in the FIT Contract.⁷²³

324. Under a scenario with a May 22, 2012 project restart date, the following project schedule would apply:

MILESTONE	DATE
Original MCOB	May 4, 2015
Revised MCOB adjusted for Force Majeure: <ul style="list-style-type: none"> • First adjustment – 546 days of Force Majeure from November 22, 2010 to May 22, 2012 • Second adjustment – assumed 180 days of Force Majeure if the REA is appealed to the Environmental Review Tribunal⁷²⁴ 	April 29, 2017
Supplier Default Date	October 29, 2018

325. As URS notes, a delay in the Project restart date from February 11, 2011 to May 22, 2012 (15 months) means that the Claimant's Project would not have reached Commercial Operation until **October 28, 2019**, almost a full year after the supplier default date of October 29, 2018 and two and a half years after the MCOB of April 29, 2017.⁷²⁵ As BRG concludes, such a result

⁷²² See above at ¶¶ 284-289.

⁷²³ RER-URS-2, ¶¶ 70, 473, 483.

⁷²⁴ **R-0643**, IESO FIT Contract Form of Amending Agreement Re: MCOB Extension for Appeal of REA (The "Amending Agreement") (2015-01) (undated).

⁷²⁵ RER-URS-2, ¶¶ 70, 483.

means that the failure to lift the deferral did not cause the Claimant any harm – the Project was valueless even without the failure to lift the deferral or insulate the Claimant from its effects.⁷²⁶

4. The Project Had No Value on May 22, 2012 Because of Its Riskiness and High Costs

326. As noted above, the DCF methodology is not appropriate for a Project at the Claimant's early stage of development.⁷²⁷ This is the case regardless of whether the Project restarts on February 11, 2011, or May 22, 2012. In fact, if the Project had restarted development on May 22, 2012, it faced an additional risk in that the 63-month Project schedule relied on by the Claimant would have made the Project unfinanceable given the Force Majeure provisions of the FIT Contract and the strict requirements of lenders.⁷²⁸ With only one day of Force Majeure remaining under its FIT Contract, the Claimant would not have been able to secure financing for its Project.⁷²⁹

327. Further, when a DCF method is applied to this scenario, the combined impact of all the errors and unreasonable assumptions made by Deloitte is a reduction in the value of the Project of \$505 million.⁷³⁰ The Project therefore retains a negative net present value.⁷³¹ The failure to lift the deferral or insulate the Claimant from its effects were therefore not the cause of any loss to the Claimant as the Project was a failure before any alleged measures were even adopted.

IV. In the Alternative, the Claimant Failed to Prove the Investment Costs It Claims

328. Given that the failure of the Project was a foregone conclusion even before the alleged breach, it is unlikely that the Project could have been sold for even the value of its sunk costs at the date of the breach. As such, it would be inappropriate for the Tribunal to award the Claimant any investment costs. Doing so would give the Claimant a windfall by reimbursing it for its own bad business decisions that wiped out the value of everything that it invested. However, in the

⁷²⁶ RER-BRG-2, ¶¶ 16, 230.

⁷²⁷ See above at ¶¶ 293-302.

⁷²⁸ RER-Green Giraffe, ¶ 140.

⁷²⁹ RER-Green Giraffe, ¶ 140.

⁷³⁰ RER-BRG-2, ¶ 37, Figure 1.

⁷³¹ RER-BRG-2, ¶ 37, Figure 1.

event the Tribunal determines that the Project could have been built in time and that the Project had some positive value despite its riskiness and high costs, given the speculative nature of its Project the only way to quantify these losses is to determine the Claimant's investment costs.⁷³²

329. However, the Claimant has failed to prove it is entitled to the investment costs it seeks. In its Reply Memorial, the Claimant has increased its sunk costs from \$15 million in its Memorial⁷³³ to \$17 million.⁷³⁴ However, it still has not provided the evidence to substantiate such a claim. Instead, it relies on a sample of invoices provided,⁷³⁵ arguing that, in any event, "it is well established that a Claimant is not required to establish its incurred costs with absolute certainty," citing the *Vivendi II* decision.⁷³⁶ As explained below, this is wrong and the Claimant has still failed to meet its burden of proving the quantum of its investment costs.

330. First, the Claimant's reliance on *Vivendi II* is misplaced. The Tribunal in that case did not say that approximations were permitted with respect to investment costs. It was discussing the fair market value of lost profits arising out of a concession agreement and allowable approximations that can be made in that context.⁷³⁷

331. Second, the Claimant has included in its sunk cost calculation numerous expenditures made following the date of the alleged breaches.⁷³⁸ It alleges that such costs are properly included as had the deferral been lifted, the Claimant "would be required to resume project development in order to avoid being in default under the FIT Contract and forfeiting its \$6 million in

⁷³² Canada's Counter-Memorial, ¶¶ 560-565.

⁷³³ Claimant's Memorial, ¶ 678; CER-Deloitte (Low & Taylor)-1, Schedule 3b.

⁷³⁴ CER-Deloitte (Low & Taylor)-2, Schedule 3b.

⁷³⁵ Claimant's Reply Memorial, ¶ 724; CER-Deloitte (Low & Taylor)-2, ¶ 6.25(a).

⁷³⁶ Claimant's Reply Memorial, fn. 1183 citing **CL-041**, *Vivendi – II*, ¶¶ 8.3.16.

⁷³⁷ **CL-041**, *Vivendi – II*, ¶¶ 8.3.10-8.3-16. The *Vivendi II* Tribunal noted during its analysis on damages that approximations are inevitable when damages cannot be fixed with uncertainty. In support of this statement, the *Vivendi II* Tribunal cited *American International Group* and *Payne*. However approximations were not made in relation to sunk costs in either of those cases. Further, the *Vivendi II* Tribunal did not hold that approximate sunk costs on the basis of a partial audit were acceptable. See: **RL-063**, *American International Group, Inc. et al. v. The Islamic Republic of Iran and Central Insurance of Iran (Bimeh Markazi Iran)*, Case No. 2, Award No. 93-2-3, 19 December 1983, p. 109; **RL-082**, *Thomas Earl Payne v. Iran*, Case No. 335, Award No. 245-335-2, 8 August 1986, 12 Iran-U.S. C.T.R. 3, ¶¶ 35-37.

⁷³⁸ See for example, RER-BRG-2, Attachment 3, ¶¶ 40-41, 44-47; CER-Deloitte (Low&Taylor)-2, Schedule 3b.

security.”⁷³⁹ However such losses cannot be included in any assessment of investment costs as investment costs are to be assessed as of the date of the breach, at the latest. To award the Claimant money that it did not spend would be giving it an unjustified windfall. For example, the \$6 million Letter of Credit will be returned to the Claimant if it fails to meet Commercial Operation prior to the Force Majeure termination date (May 4, 2017) in the FIT Contract.⁷⁴⁰

332. Third, the Claimant is not entitled to certain sunk costs that were incurred prior to the breach in the particular circumstances of this case. As early as June 25, 2010, the date of MOE's Offshore Wind Policy Proposal Notice proposing a five kilometer set-back, the Claimant knew that its Project may not be able to proceed.⁷⁴¹ It is unreasonable for the Claimant to have incurred any costs following that date until it knew the results of that policy decision. Further, even if the Tribunal believed some costs after this date to be recoverable, it is also unreasonable for the Claimant to seek costs after the date in which the Claimant entered Force Majeure under the FIT Contract (November 22, 2010) and by its own admission could not proceed with the Project.⁷⁴² Finally and ultimately, even if the Tribunal were to ignore the two previous dates, the clear cut-off for sunk costs is the date of the measures in question, i.e. February 11, 2011, for the deferral or, at best, May 22, 2012, the date the Claimant's Project allegedly became worthless. Beyond these dates all costs would have been incurred after the alleged breaches of the NAFTA.

333. Fourth, when it comes to proving the quantum of its losses, the Claimant's own documents do not support its claims. Canada's expert, BRG, has conducted a full audit of all evidence and supporting documents put forward by the Claimant in support of its claim for investment costs.⁷⁴³ The results are startling. The Claimant has attempted to recover numerous costs that cannot be

⁷³⁹ Claimant's Reply Memorial, ¶ 728.

⁷⁴⁰ **R-0092**, FIT Contract, v. 1.3, s. 10.1(g).

⁷⁴¹ **R-0534**, Windstream Energy Inc. Briefing Document, Wolfe Island Shoals (Off-Shore Wind Project) Working with a 5 km Set-Back (Jun. 24, 2010); **R-0531**, E-mail from Ian Baines, Windstream Energy Inc. to Jim Vanden Hoek (Jun. 22, 2010); **R-0532**, E-mail from Ian Baines, Windstream Energy Inc. to Nancy Baines, David Mars, Uwe Roeper and Hank Van Bakel (Jun. 22, 2010); **C-0294**, Windstream Energy Inc. Briefing Document, Wolfe Island Shoals (Off-Shore Wind Project) Working with a 5 km Set-Back (Jun. 24, 2010), pp. 1-2; **R-0533**, E-mail from Chris Benedetti, Sussex Strategy to Utilia Amaral, Ministry of Environment (Jun. 22, 2010); **R-0540**, E-mail from Ian Baines, Windstream Energy Inc. to David Mars, White Owl Capital (Jul. 11, 2010).

⁷⁴² **C-0408**, FIT Contract Form of Force Majeure Notice (Dec. 10, 2010), pp. 3-4.

⁷⁴³ RER-BRG-2, Attachment 3.

verified either because the Claimant failed to provide an invoice or supporting documentation⁷⁴⁴ or because there was no evidence in the underlying invoice or supporting documentation to show that the total invoice or some portion thereof should be allocated to the Project specifically.⁷⁴⁵ It has further attempted to recover as investment costs the money it paid to hire experts in this very arbitration.⁷⁴⁶ The Claimant has also been so bold that it claims costs completely unrelated to offshore wind, let alone the Project. For example, it has claimed costs relating to its projects in Wyoming,⁷⁴⁷ its membership fees for the Ontario Waterpower Association,⁷⁴⁸ and money it paid to print corporate brochures.⁷⁴⁹ It is disingenuous for the Claimant to seek damages for costs incurred that are blatantly not investment costs, and even more concerning that it took an audit from Canada to uncover this information.

334. BRG's audit of all evidence provided by the Claimant to substantiate its sunk costs reveals that as of June 25, 2010, the date when it knew its Project might not be able to proceed, the Claimant had invested only \$0.208 million.⁷⁵⁰ If the Claimant is awarded any investment costs (and it should not be), the award should be limited to this amount. Further, by November 22, 2010, the date the Claimant entered Force Majeure status, it had invested only \$0.528 million.⁷⁵¹ By February 11, 2011, the date of the Deferral, it had invested only \$0.921 million.⁷⁵² Finally, by its own May 22 valuation date, it had only spent \$1.746 million.⁷⁵³ As such, should the Tribunal decide that the Claimant is entitled to its investment costs, the Claimant should be awarded a mere fraction of the \$17 million it says that it spent.

⁷⁴⁴ RER-BRG-2, Attachment 3 - ¶¶ 16, 18, 43-47, 50-53.

⁷⁴⁵ RER-BRG-2, Attachment 3 - ¶¶ 17, 34, 42.

⁷⁴⁶ RER-BRG-2, Attachment 3 - ¶ 33.

⁷⁴⁷ C-1899, CD containing invoices and bank statements – e.g. folder called “Virginia Johnson”.

⁷⁴⁸ C-1899, CD containing invoices and bank statements – e.g. folder called “Ontario Water power association”.

⁷⁴⁹ C-1899, CD containing invoices and bank statements – e.g. folder called “COLOURPHILL”.

⁷⁵⁰ RER-BRG-2, Attachment 3, ¶ 36.

⁷⁵¹ RER-BRG-2, Attachment 3, ¶ 37.

⁷⁵² RER-BRG-2, Attachment 3, ¶ 38.

⁷⁵³ RER-BRG-2, Attachment 3, ¶ 39.

V. Pre- and Post-Award Interest

335. As Canada demonstrated in its Counter-Memorial, the burden is on the Claimant to prove the damages it seeks.⁷⁵⁴ This includes any claims for pre- and post-award interest.⁷⁵⁵ As Canada noted in its Counter-Memorial, the Claimant failed to establish why it is entitled to interest in this particular case – it failed to cite to a single fact at all.⁷⁵⁶ The Claimant's lack of evidence continues in its Reply Memorial, arguing only that "[t]he purpose of interest is to ensure that the claimant receives the full present value of the compensation it should have received."⁷⁵⁷ It fails to cite to a single document that demonstrates why its claim to compensation is not fully satisfied by a pre-interest amount.

336. While Canada and the Claimant agree that if interest is to be awarded a 3.0 per cent interest rate based on the Canadian bank prime interest rate compounded annually should be used, it is neither Canada nor the Tribunal's responsibility to make the Claimant's case for it. Therefore, should the Tribunal find a breach of NAFTA, and determine that damages are appropriate, Canada asks the Tribunal to deny the Claimant's request for pre- and post-award interest.

CONCLUSION AND PRAYER FOR RELIEF

337. For the foregoing reasons, and for the reasons in Canada's Counter-Memorial, Canada respectfully requests that the Tribunal dismiss the Claimant's claims in their entirety and with prejudice, order that the Claimant bear the costs of this arbitration, including Canada's costs for legal representation and assistance, and grant any further relief it deems just and proper.

⁷⁵⁴ Canada's Counter-Memorial, ¶ 517.

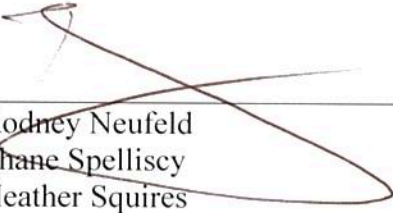
⁷⁵⁵ **RL-029**, *ILC Articles – Commentary*, Article 38(1), p. 235.

⁷⁵⁶ Canada's Counter-Memorial, ¶ 568.

⁷⁵⁷ Claimant's Reply Memorial, ¶ 743.

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