

**AN ARBITRATION UNDER CHAPTER 11 OF THE NAFTA  
AND THE UNCITRAL ARBITRATION RULES, 1976**

between

**MESA POWER GROUP, LLC**

Claimant

and

**GOVERNMENT OF CANADA**

Respondent

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**PROCEDURAL ORDER NO. 1**

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**ARBITRAL TRIBUNAL:**

Professor Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

The Honourable Charles N. Brower

Toby Landau, QC

## 1. BACKGROUND

- 1.1 Following the first hearing held on 12 October 2012 and a further written consultation of the Parties on procedural matters, the Tribunal issues the present order.

## 2. THE PARTIES AND THEIR REPRESENTATIVES

- 2.1 The Claimant is:

**Mesa Power Group, LLC**  
8117 Preston Road Suite 260 West  
Dallas, TIC 75225 United States

("Mesa Power" or "the Claimant")

The Claimant is represented in this arbitration by:

**Mr. Barry Appleton**  
Appleton & Associates International Lawyers  
77 Bloor Street West, Suite 1800  
Toronto, ON M5S 1M2  
Canada  
Tel.: + 416 966 8800  
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E-mail: [bappleton@appletonlaw.com](mailto:bappleton@appletonlaw.com); [aa40@appletonlaw.com](mailto:aa40@appletonlaw.com)

All correspondence and documents in this arbitration will be delivered to this address of counsel for the Claimant.

- 2.2 The Respondent is:

**The Government of Canada**  
Office of the Deputy Attorney General of Canada  
284 Wellington Street  
Ottawa, ON KIA OH8 Canada

("Canada" or "the Respondent")

The Respondent is represented in this arbitration by:

**Ms. Sylvie Tabet, General Counsel and Director**  
Mr. Shane Spelliscy, Counsel  
Mr. Michael Owen, Deputy Director and Counsel  
Mr. Ian Philp, Counsel  
Ms. Heather Squires, Counsel

Ms. Jennifer Hopkins, Counsel  
Trade Law Bureau (JLT)  
Foreign Affairs and International Trade, Canada  
125 Sussex Drive  
Ottawa, Ontario  
Canada K1A 0G2

E-mail: [shane.spelliscy@international.gc.ca](mailto:shane.spelliscy@international.gc.ca); [melissa.perrault@international.gc.ca](mailto:melissa.perrault@international.gc.ca)

All hard copy correspondence and documents in this arbitration will be delivered to the attention of Mr. Shane Spelliscy at this address of counsel for the Respondent and all email correspondence will be delivered to both of the e-mail addresses on the above e-mail distribution list.

### **3. THE ARBITRAL TRIBUNAL**

#### **3.1 The Tribunal is composed of:**

**Prof. Gabrielle Kaufmann-Kohler (Presiding Arbitrator)**

Lévy Kaufmann-Kohler  
Rue du Conseil-Général 3-5  
P.O. Box 552  
1211 Geneva 4  
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**The Honorable Charles N. Brower (Arbitrator)**

20 Essex Street Chambers  
20 Essex Street  
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**Toby Landau, QC (Arbitrator)**

Essex Court Chambers  
24 Lincoln's Inn Fields,  
London WC2A 3EG  
United Kingdom  
Tel.: +44 (0)20 7813 8000  
E-mail: [tlandau@essexcourt.net](mailto:tlandau@essexcourt.net)

- 3.2 Each arbitrator is and shall remain at all times impartial and independent of the Parties and the Tribunal will take into account the IBA Guidelines on Conflict of Interest, 2004. Each arbitrator will provide the Parties with a Statement of Independence.
- 3.3 The Parties confirm that the Tribunal has been duly constituted in accordance with Article 1123 of the NAFTA. The Parties have no objections whatsoever to the constitution of the Tribunal and to the appointment of the Arbitrators in respect of matters known to them on the date of this Procedural Order.
- 3.4 The Tribunal has appointed a Secretary with the consent of the Parties. The Secretary is:
- Mr. Rahul Donde  
Lévy Kaufmann-Kohler  
Rue du Conseil-Général 3-5  
P.O. Box 552  
1211 Geneva 4  
Switzerland  
Tel.: +41 22 809 6200  
Fax: +41 22 809 6201  
E-mail: [rahul.donde@lk-k.com](mailto:rahul.donde@lk-k.com)
- 3.5 Mr. Donde is and shall remain at all times impartial and independent of the Parties. His cv has been circulated to the Parties.

#### **4. POSITION OF THE PARTIES AND REQUESTS FOR RELIEF**

##### **A. The Claimant's Position**

- 4.1 Sections A to C below have been adapted from the submissions of the respective Parties. They do not reflect any finding by the Tribunal nor any admission by the other Party. The Parties' allegations and legal arguments will be further elaborated in the forthcoming written submissions.
- 4.2 This claim arises out of the arbitrary and unfair application of various government measures related to the regulation and production of renewable energy in Ontario. Canada, through its subnational organs imposed sudden and discriminatory changes to the established scheme for renewable energy, namely the Feed-In-Tariff Program (the "FIT Program").
- 4.3 The subject of this unlawful treatment is Mesa Power. It owns Mesa Wind, LLC, which, in turn, owns and controls Mesa AWA, LLC. Mesa Power wholly owns and controls (through Mesa AWA) four wind farm investments in south-western Ontario: TTD Wind

Project ULC, Arran Project ULC, North Bruce Project, ULC and Summerhill Project, ULC (collectively referred to as the “Investments” or the “Wind Farm Investments”).

- 4.4 On 14 May 2009, the Ontario legislature enacted the Green Energy Act (the “Act”). The Act created the FIT Program that encouraged the production of renewable energy in Ontario. The Ontario Power Authority (“the OPA”), a state enterprise owned and controlled by the Province of Ontario, was responsible for implementing the Program, including the setting of prices and the administration of contracts.
- 4.5 Through long-term fixed price contracts with the OPA, the FIT Program guaranteed electrical grid access to renewable energy producers. The renewable energy producers in the FIT Program received a premium price for renewable energy, and a guaranteed market for the energy they produce.
- 4.6 To be considered for the FIT Program, wind power projects were initially required to achieve a minimum of 25% of domestic content. This level was increased to 50% for power projects that became operational after 1 January 2012. Wind power projects over 10kW were required to obtain a minimum amount of this domestic content from the Province of Ontario. The 50% domestic content rule would affect all of the Investor’s projects.
- 4.7 Wind power projects over 10 MW were also required to be evaluated under the FIT Program. Projects were evaluated against other projects in their geographic electricity transmission zone (which was defined by the Program). The evaluation considered four components: expertise of wind power development, financial capacity, guaranteed access for wind turbine supply and permitting. The evaluation of these criteria resulted in a priority ranking score. This priority ranking score was then used to award contracts to program applicants within each geographic region.
- 4.8 A successful applicant under the FIT Program would receive a Power Purchase Agreement from the OPA, that guaranteed a set purchase price over a twenty year period. In July 2011, this guaranteed purchase price was 13.5 cents per kilowatt hour.
- 4.9 On 21 January 2010, a Korea-based company, Samsung C&T (“Samsung”) signed a \$7 billion green energy investment agreement with Ontario’s Premier and Ontario’s Minister of Energy. While the existence of an agreement was public, the terms of the agreement were secret. This secret agreement granted Samsung significantly better access to supply renewable energy to the provincial energy grid than to other energy providers in the province. Samsung received a guaranteed right of first refusal on transmission access in certain transmission zones in the Province of Ontario.

- 4.10 Initial rankings for projects were issued in December 2010. The results of the ranking raised some concerns about the criteria used for ranking. Around 20 May 2011, a representative of Mesa Power wrote to the OPA asking for more information about the method used for ranking because of concerns that proper ranking methodology had not been applied. In its response, the OPA refused to provide any substantive explanation or to disclose the ranking methodology.
- 4.11 On 3 June 2011, the OPA issued a new set of rules for awarding FIT Program contracts based on a directive it received from the Ontario Minister of Energy. As a result of these new rules, the Wind Farm Investments lost their priority ranking and were not offered FIT Program contracts, even though there was still available transmission capacity at each of their respective interconnects.
- 4.12 In August 2011, various Ontario ministries published revised guidelines relating to the Renewable Energy Approvals process. These changes allowed proponents with FIT Contracts to avoid certain development work. However, at the same time Mesa Power aggressively developed its projects believing that when Ontario would award FIT Contracts, they would need to be operational by 2013. In contrast, the proponents awarded with FIT Contracts faced a short timeline to develop their projects and asked for a relaxation of the original rules.
- 4.13 On 2 August 2011, the Ministry of Energy directed the OPA to offer FIT Contract holders (the “Supplier”) the opportunity to have the OPA’s termination rights waived. On 5 August 2011, the OPA further notified proponents that subject to some conditions, the OPA would use commercially reasonable efforts to review and execute the waiver before the Ontario general election.
- 4.14 Rather than allow the FIT Program to be impartially assessed through the ordinary approval process, Ministers and other government officials used extraordinary unilateral Ministerial directives to interfere with Mesa Power’s property rights and the conduct and operations of its investments. These measures were taken without any consultation or notice to Mesa Power or its Investments. The arbitrary and non-transparent use of these extraordinary powers resulted in a direct and immediate benefit to the better treated companies, and were taken in the context of an upcoming Ontario provincial election to be held on 6 October 2011.
- 4.15 The Province of Ontario is a subnational government of Canada. Pursuant to Article 105 of the NAFTA, Canada is responsible for Ontario’s observance of the NAFTA. As a result of the actions by the Province of Ontario and the OPA, Canada failed to meet its international obligations contained in Chapter 11 of the NAFTA. In particular, Canada failed to accord treatment to Mesa Power and its Wind Farm Investments as required by the international law standard of treatment contained in Article 1105 of the NAFTA.

Additionally, Canada violated Article 1106 of the NAFTA by imposing a variety of prohibited Canadian and Ontario content requirements and “buy local” performance requirements on the Investor and its Investments as a precondition to obtaining approval of commercial contracts under the FIT Program.

- 4.16 Canada also failed to meet its obligations to provide national treatment (in accordance with Article 1102 of the NAFTA) by providing more favorable transmission treatment to a Canadian company in like circumstances, Boulevard Associates Canada, Inc., and local subsidiaries of Korea-based Samsung, which was also in like circumstances. Further, Canada violated its most favored nation treatment obligation (Article 1103 of the NAFTA), when it provided more favorable transmission treatment to the local subsidiary of a company owned by a non-NAFTA party which was in like circumstances, namely Korea-based Samsung, than that provided to the Investor and its Investments. In addition, Canada violated Article 1104 of the NAFTA (standard of treatment).
- 4.17 Finally, in addition to the violations stated above, Canada also breached its obligations under Article 1503(2) of the NAFTA by failing to ensure through regulatory control, administrative supervision, or the application of other measures that the OPA acted in a manner consistent with Canada’s obligations under Chapter 11 of the NAFTA, wherever the OPA exercised regulatory, administrative or other governmental authority.
- 4.18 The effect of these governmental measures caused substantial loss and damage to Mesa Power and to the Investor’s related business operations. The losses include the consequential losses arising therefrom and from the interference with its establishment, acquisition, expansion, management, conduct, operation and sale of its investments, as a result of unfair and arbitrary governmental actions contrary to the protections of the rule of law and Chapter 11 of the NAFTA.

#### B. The Claimant’s Request for Relief

4.19 The Claimant claims:

- a. Damages of not less than CDN\$775 million in compensation for loss, harm, injury, moral damage, loss of reputation, and damage caused by or resulting from Canada’s breach of its obligations under Part A of Chapter 11 of the NAFTA;
- b. Costs of these proceedings, including all professional fees and disbursements;
- c. Fees and expenses incurred to mitigate the effect of the unlawful governmental measures taken by Canada;
- d. Pre-award and post-award interest at a rate to be fixed by the Tribunal; and

- e. Such further relief as counsel may advise and the Tribunal may deem appropriate.<sup>1</sup>

### C. The Respondent's Position

- 4.20 The investment agreement referred to by the Claimant ("the Green Energy Investment Agreement"), provided that Samsung and the Korea Electric Power Corporation (the "Korean Consortium") would open four new manufacturing plants for renewable energy technologies and supply 2,500 megawatts of wind and solar generating capacity into the Ontario grid. In exchange for this substantial investment, Ontario agreed to allocate certain transmission capacity to the Korean Consortium for its renewable energy projects, as long as key milestones and requirements were met.
- 4.21 It was not possible for the OPA to procure all of the renewable energy from every producer who applied to participate in the FIT Program. In light of this system constraint, the OPA adopted a methodology, the FIT Program Rules, through which a province-wide priority ranking was given to projects so as to determine the order in which they would be considered for a contract offer. Based on the objective criteria in the FIT Program Rules, the TTD and Arran Projects received province-wide priority rankings of 91 and 96 respectively. The two phases of the Summerhill Project received province-wide priority rankings of 318 and 319, and the two phases of the North Bruce Project received province-wide priority rankings of 320 and 321.
- 4.22 All of the projects allegedly owned by the Claimant are located in the Bruce area, an area in Ontario which has a strong wind resource but limited transmission capacity. As a result, none of these projects was offered a FIT contract when contracts were awarded by the OPA in 2010 and early 2011.
- 4.23 In order to increase transmission capacity in the Bruce area and a neighbouring area, a new transmission line was built, known as the "Bruce to Milton" line. Much of the new capacity created by this new line was to be allocated to renewable energy producers, including FIT Program applicants and the Korean Consortium.
- 4.24 On 3 June 2011, the Minister of Energy directed the OPA to allocate some of the new capacity created by this new line (which came into service in June 2012) to proposed FIT projects.
- 4.25 As part of the allocation process, FIT Program applicants were offered a window during which they could change the point at which they wished to connect their project to the grid. This period, known as the "Connection Point Amendment Window", ran from 6

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<sup>1</sup> Notice of Arbitration cum Statement of Claim dated 4 October 2011, ¶37.



June to 10 June 2011. After the close of the Connection Point Amendment Window, FIT Program applications for projects were considered on the basis of their provincial rankings. A proposed project's provincial ranking was not altered by whether or not it chose to change its connection point.

- 4.26 The OPA announced contract offers on 4 July 2011. Some of the contract offers were made to FIT Program applicants who had elected to change the connection point of their highly ranked project during the Connection Point Amendment Window. None of the projects allegedly owned by the Claimant was offered a FIT contract.
- 4.27 On 6 July 2011, two days after the OPA announced the contract offers, the Claimant served Canada with a Notice of Intent to Submit a Claim to Arbitration against the Government of Canada under Chapter 11 of the NAFTA ("the Notice of Intent").
- 4.28 Three months later, on 4 October 2011, the Claimant purported to serve a Notice of Arbitration on Canada ("the Notice of Arbitration"). In addition to alleging that the measures identified in the Notice of Intent gave rise to a NAFTA claim, the Claimant also identified new alleged events and measures that occurred as late as 5 August 2011.
- 4.29 The Government of Canada wrote to the Claimant with an offer to hold consultations on five separate occasions. However, the Claimant did not accept any of these offers and no consultations have occurred as a result.
- 4.30 The Claimant has failed to respect the conditions precedent for submitting a claim to arbitration under Chapter 11 of the NAFTA. In particular, in contravention of Article 1120(1) of the NAFTA, the Claimant purported to submit its Notice of Arbitration without waiting six months from the occurrence of the events giving rise to its claim. As a result, Canada has not consented to the submission of this claim to arbitration and the Tribunal lacks jurisdiction to adjudicate it.
- 4.31 Canada denies that any of the measures mentioned in the Notice of Intent or in the invalid Notice of Arbitration breach Canada's obligations under Chapter 11 of the NAFTA. Rather, in making its renewable energy procurement decisions under the FIT Program, the Government of Ontario and the OPA acted in a non-discriminatory manner consistent with all of Canada's obligations under NAFTA.
- 4.32 None of the measures of the Government of Ontario in designing or administering the Act, the FIT Program, or in entering into the Green Energy Investment Agreement, violated Articles 1102 or 1103 of the NAFTA. The Claimant and the Claimant's investments were accorded no less favourable treatment than that accorded to

Canadian or other non-NAFTA party investors or investments of such investors in like circumstances.

- 4.33 All of the measures identified in the Notice of Intent and invalid Notice of Arbitration are consistent with Canada's obligations under Article 1105 of the NAFTA. The treatment accorded to the Claimant's investments was consistent with the customary international law minimum standard of treatment of aliens.
- 4.34 The FIT Program does not contain any performance requirements that are prohibited by Chapter 11 of the NAFTA. None of the measures that the Claimant identifies as violations of Article 1106 of the NAFTA caused the Claimant to suffer any damage. Thus, the condition for bringing a claim that is contained in Article 1116(1) of the NAFTA, namely that the investor "has incurred loss or damage by reason of, or arising out of" the allegedly breaching measure, has not been met.
- 4.35 There has been no breach of Article 1502(3) of the NAFTA as no state enterprise has acted in a manner inconsistent with Canada's obligations under NAFTA Chapter 11 in the exercise of regulatory, administrative or other governmental authority that has been delegated to it.
- 4.36 Finally, Articles 1108(7)(a) and 1108(8)(b) of the NAFTA provide that procurement by a Party or state enterprise is not subject to the obligations in Articles 1102, 1103 and 1106 of the NAFTA.
- 4.37 In conclusion, none of the measures identified by the Claimant in its Notice of Intent or invalid Notice of Arbitration are inconsistent with Canada's obligations under Chapter 11 of the NAFTA.
- 4.38 These arguments are without prejudice both to Canada's position that no valid claim has been submitted to arbitration, and to Canada's right to fully set forth its arguments in subsequent filings.

#### D. The Respondent's Request for Relief

- 4.39 The Respondent requests that:
- a. The Tribunal dismiss the Claimant's claims for a lack of jurisdiction;
  - b. If it determines that it has jurisdiction, the Tribunal dismiss the Claimant's claims in their entirety;

- c. Pursuant to NAFTA Article 1135(1) and Article 40 of the UNCITRAL Arbitration Rules, the Tribunal require the Claimants to bear all costs of the arbitration, including Canada's costs of legal assistance and representation; and
- d. The Tribunal grant such other relief as it deems appropriate.

## 5. JURISDICTION

5.1 The Claimant invokes Section B of Chapter 11 of the NAFTA and specifically Articles 1116, 1120 and 1122 of the NAFTA as authorities for this arbitration. These Articles provide:

“Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

- (a) Section A or Article 1503(2) (State Enterprises), or
- (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in manner inconsistent with the Party's obligations under Section A,
- (c) in accordance with the following paragraphs of this Article.

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

Article 1120: Submission of a Claim to Arbitration

1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:

- (a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;
- (b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or
- (c) the UNCITRAL Arbitration Rules.

2. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.

#### Article 1122: Consent to Arbitration

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.

2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;

(b) Article II of the New York Convention for an agreement in writing; and

(c) Article I of the InterAmerican Convention for an agreement.”

5.2 Nothing in this Procedural Order should be construed as a waiver of any jurisdictional objection that the Respondent may intend to raise.

#### **6. LEGAL SEAT OF THE ARBITRATION**

6.1 The Parties disagree on the seat of the arbitration. The seat will be subsequently determined by the Tribunal in light of the submissions of the Parties.

6.2 The Tribunal may, in its discretion, convene hearings at any location other than the seat of arbitration and will decide on such location after hearing the Parties and taking into account all relevant circumstances.

#### **7. APPLICABLE SUBSTANTIVE LAW**

7.1 Article 1131 of the NAFTA provides that:

##### **“Article 1131: Governing Law**

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.”

## **8. APPLICABLE PROCEDURAL LAW**

- 8.1 The procedure in this arbitration shall be governed by the 1976 UNCITRAL Arbitration Rules except as modified by the provisions of Section B of Chapter 11 of the NAFTA (per Article 1120(2) of the NAFTA).
- 8.2 If these provisions and rules do not address a specific procedural issue, the Tribunal shall, after consultation with the Parties, determine the applicable procedure. In addition, the Tribunal may seek guidance from, but shall not be bound by, the 2010 IBA Rules on the Taking of Evidence in International Commercial Arbitration.

## **9. LANGUAGE**

- 9.1 The proceedings shall be conducted in English.

## **10. WRITTEN SUBMISSIONS**

- 10.1 The Parties shall submit their allegations of facts and law in a detailed, specific and comprehensive manner, and shall respond specifically to all allegations of facts and law made by the other Party.
- 10.2 Following each factual and legal allegation, the Parties shall, whenever possible, identify the evidence adduced or to be adduced in support of that allegation.
- 10.3 The Parties may include with their Reply and Rejoinder submissions only evidence responding to or rebutting matters raised by the other Party's immediately preceding written submission or documents produced by that other Party in the period following that submission. As a general rule, the Tribunal shall not receive any evidence that has not been introduced with the written submissions, unless the Tribunal determines that exceptional circumstances exist.
- 10.4 On the date on which the submission is due, the relevant Party shall submit an electronic version of its written submissions, including its briefs, memorials, expert reports and witness statements, and an index of its exhibits and legal authorities by e-mail (preferably, in MS Word format or "searchable" PDF format) to the other disputing party, to the Registry and to each arbitrator. Together with or within three days following the filing of its written submissions by e-mail, the submitting Party shall send by post or courier one copy of their written submissions (without exhibits or legal authorities) if possible in mini-bundle format and one copy of its exhibits in standard letter size to the other disputing party, to the Registry, and to each arbitrator as well as two copies to the President. In addition, CD-Roms or a USB key containing the

submissions, the exhibits and the legal authorities in electronic format (preferably, in MS Word format or “searchable” PDF format) for each individual document (which should be clearly labelled) shall be sent by post or courier to the other disputing party, to the Registry, and to each arbitrator.

## **11. DOCUMENTS**

11.1 The Parties shall identify each exhibit submitted to the Tribunal with a distinct number.

11.2 Each exhibit submitted by the Claimant shall commence with the letter “C” followed by the applicable consecutive number, *i.e.* C-1, C-2, and so forth. Each exhibit submitted by the Respondent shall commence with the letter “R” followed by the applicable consecutive number, *i.e.* R-1, R-2, and so forth.

11.3 Each legal authority submitted by the Claimant shall commence with the letters “CL” followed by the applicable consecutive number, *i.e.* CL-1, CL-2, and so forth. Each legal authority submitted by the Respondent shall commence with the letters “RL” followed by the applicable consecutive number, *i.e.* RL-1, RL-2, and so forth.

11.4 The Parties shall submit all exhibits in chronological or other appropriate order in files with separate tabs for each exhibit. A list describing each of the exhibits by exhibit number, date, type of document, author and recipient, as applicable, shall be included at the beginning of each exhibit file.

11.5 The Parties shall submit all exhibits together with written submissions expressly referring to them. In exceptional cases, the Tribunal may allow a Party to submit additional exhibits at a later stage of the proceedings if appropriate in view of all the relevant circumstances.

11.6 All exhibits and legal authorities shall be submitted in the original language together with a translation into English (if the document is in a language other than English). Whenever lengthy documents need to be translated, the translation may be limited to the relevant passages together with such other portions of the document as may be necessary to put those passages in proper context. Nonetheless, the Tribunal or the other Party may request a full translation into English of exhibits or legal authorities which are deemed of special importance to the dispute.

11.7 Upon request of the Tribunal or of the other Party, a Party shall identify the author of any translation by name and capacity, and the author shall confirm that, to the best of his or her knowledge, the translation accurately reflects the contents of the original document. Non-certified translations shall be considered sufficient unless questioned

by the other Party or by the Tribunal. For ease of reference, the Parties shall paginate any translation in the same way as the original document.

11.8 All documents, including both originals and copies, submitted to the Tribunal shall be deemed to be authentic unless disputed by the other Party.

11.9 The Parties shall either submit all documents to the Tribunal in complete form or indicate the respects in which any document is incomplete.

## **12. DOCUMENT PRODUCTION**

12.1 At the request of a Party filed within the time limit specified by the Tribunal for this purpose, the Tribunal may order the other Party to disclose to the requesting Party documents or limited categories of documents within its possession, custody or control. Such a request for production shall identify each document or category of documents sought with a sufficient degree of precision and establish its relevance and materiality to the dispute. The Tribunal will, in its discretion, rule upon the disclosure of the documents or categories of documents having regard to the legitimate interests of the other Party and all of the surrounding circumstances.

12.2 Documents shall be disclosed in response to such a request in electronic format only by sending via post or courier by the date fixed by the Tribunal for such disclosure, a CD-ROM, USB key or other similar media containing the documents in electronic format with each individual document clearly labelled with a unique identifying number. The media should also contain an Index of the documents contained. In addition, the Respondent will provide the Claimant with paper copies of the electronic documents it produces.

12.3 Documents so disclosed shall not be considered to be part of the record unless and until one of the Parties subsequently submits them in evidence to the Tribunal. In such a case, Section 11 above applies to the production by the requesting Party of documents or categories of documents communicated by the other Party.

12.4 In addition, the Tribunal may of its own motion order a Party to produce documents at any time.

12.5 Requests for document disclosure shall take the form of a so-called "Redfern Schedule" as attached (Annex A).

12.6 Each Party may withhold from disclosure documents which it considers not subject to production based on specific grounds of privilege as set out in Article 9 of the 2010 IBA Rules.

### **13. WITNESSES**

13.1 Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.

13.2 For each witness, a written and signed witness statement shall be submitted to the Tribunal. A witness who has not submitted a written witness statement may provide testimony to the Tribunal only in extraordinary circumstances and upon a showing of good cause. If these conditions are met, the opposing Party shall be given an appropriate opportunity to respond to such testimony.

13.3 Each witness statement shall state the witness's name, birthday, present address and involvement in the case, and the evidence the witness is offering including, if applicable, an indication of the source for the witness' knowledge.

13.4 Witness statements shall be submitted together with the Parties' written memorials. The witness statements shall be numbered discretely from other documents and include each witness's surname (e.g. "CWS (Claimant's witness statement) - [surname of witness]"). Where a witness submits more than one witness statement, his or her subsequent witness statements shall be numbered accordingly (e.g. "CWS-[surname of witness]-2").

13.5 Each Party shall be responsible for summoning its own witnesses to the applicable hearing, except when the other Party has waived cross-examination of a witness and the Tribunal does not direct his or her appearance.

13.6 Each Party shall advance the costs of appearance of its own witnesses. The Tribunal will decide upon the appropriate allocation of such costs in the final award or at the time the arbitration is concluded.

13.7 At the request of a Party, the Tribunal may summon a witness to appear.

13.8 If a witness cannot appear during the scheduled dates or without notice fails to appear when first summoned to a hearing, the Tribunal may, at its discretion, summon the witness to appear a second time, if it is satisfied that: (1) there was a compelling reason for the witness' first failure to appear; (2) the testimony of the witness is relevant



to the adjudication of the dispute; and (3) providing a second opportunity for the witness to appear will not unduly delay the proceeding.

13.9 The Tribunal may consider the witness statement of a witness who provides a valid reason for failing to appear when summoned to a hearing, having regard to all the surrounding circumstances, including the fact that the witness was not subject to cross-examination. A witness who is not called for cross-examination has a valid reason not to appear. The Tribunal shall not consider the witness statement of a witness who fails to appear and does not provide a valid reason.

13.10 If required, the Tribunal shall make a procedural order prior to the first hearing with respect to the language in which the witnesses will testify and the requirements for the translation of any testimony in a language other than English.

13.11 At any hearing the examination of each witness shall proceed as follows:

- a) the Party summoning the witness may briefly examine the witness for the purpose of introducing the witness, correcting, if necessary, any errors in the witness statement and addressing matters arisen after the witness statement was given, if any;
- b) the adverse Party may then cross-examine the witness;
- c) the Party summoning the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination, with re-cross examination – limited to the witness’s testimony on re-examination – at the discretion of the Tribunal; and
- d) the Tribunal may examine the witness at any time, either before, during or after examination by one of the Parties

13.12 Unless agreed otherwise, a fact witness shall not be present in the hearing room during the opening statement, the hearing of oral testimony, nor shall he or she read any transcript of any oral testimony, prior to his or her examination. This limitation does not apply to expert witnesses and to a witness of fact if that witness is a party representative.

13.13 The Tribunal shall at all times have complete control over the procedure for hearing a witness. In particular, the Tribunal may, in its discretion:

- a) refuse to hear a witness if it considers that the facts with respect to which the witness will testify are either proven by other evidence or are irrelevant;
- b) limit or refuse the right of a Party to examine a witness when it appears that a question has been addressed by other evidence or is irrelevant; or
- c) direct that a witness be recalled for further examination at any time.

13.14 It shall not be improper for counsel to meet witnesses and potential witnesses to establish the facts, prepare the witness statements, and prepare the examinations.

13.15 A decision by a Party not to call a witness to appear for testimony at a hearing shall not be considered to reflect an agreement as to the correctness of the content of the witness statement.

#### **14. EXPERTS**

14.1 Each Party may retain and submit the evidence of one or more experts to the Tribunal. Expert reports shall be accompanied by any documents or information upon which they rely, unless such documents or information have already been submitted as exhibits with the Parties' memorials, in which case reference to such exhibits shall be sufficient. The procedural rules set out in the above Section 13 shall apply by analogy to the evidence of experts.

14.2 Subject to Article 1133 of the NAFTA, the Tribunal may, on its own initiative or at the request of a Party, appoint one or more experts. The Tribunal shall consult with the Parties on the selection, terms of appointment - including expert fees - and conclusions of any such expert. The Tribunal may, on its own initiative or at the request of any Party, take oral evidence of such expert(s). The procedural rules set out in Section 13 above shall apply by analogy.

14.3 Each expert report shall include a statement of qualifications of the expert in the claimed area of expertise, and shall attach a current *curriculum vitae* evidencing such qualifications.

## **15. PROCEDURAL REQUESTS**

15.1 All procedural requests shall be made in writing. Unless otherwise ordered by the Tribunal, the other disputing party shall have five business days, not including the day on which the request was made, to reply in writing to a request. No further submissions on a request shall be made by either party without the express authorization of the Tribunal in advance.

## **16. NOTIFICATIONS AND COMMUNICATIONS**

16.1 Each Party shall address all communications, submissions and documents directly to each member of the Tribunal, with a copy to the other disputing party and the Registry.

16.2 All notifications and communications in this arbitration shall be valid, provided that they are made: (a) in the case of the Tribunal, to each of its members at the addresses set out in Section 3 above, or as subsequently notified during the course of the proceedings; (b) in the case of the Parties, to their respective counsel at the addresses set out in Section 2 above, or as subsequently notified during the course of the proceedings. Any changes in the addresses or other particulars set out in Section 2 above shall be notified to the Parties' counsel, the Tribunal and the Secretary of the Tribunal. Prior to the receipt of such notification, all communications and notifications may be validly made to addresses set out in Section 2 above.

16.3 Subject to section 10.4 above, all notifications and communications by the Parties and by the Tribunal, except for awards, shall be made, by e-mail. In case of e-mail communication by a Party to the Tribunal, a confirmation copy shall be dispatched within the following three business days, but the transmission shall be deemed to have been made on the date of the actual receipt of the e-mail communication.

## **17. NON-DISPUTING PARTIES**

17.1 The Governments of Mexico and the United States may make submissions to the Tribunal within the meaning of Article 1128 of the NAFTA. They shall be entitled to receive a copy of the evidence and submissions referred to in Article 1129 of the NAFTA.

## **18. AMICI**

18.1 If a request for the submission of an amicus curiae brief is filed, the Tribunal will give the appropriate directions in the exercise of its powers under Article 15 of the UNCITRAL Rules and take into consideration the recommendation of the North American Free Trade Commission on non-disputing party participation of 7 October 2003.

## **19. CALENDAR**

19.1 The calendar of this arbitration, with the different possible procedural scenarios is attached as Annex B and made an integral part of this Order.

## **20. TIME LIMITS**

20.1 The arbitrators and the Parties agree that the Presiding Arbitrator may sign procedural rulings alone provided that the Presiding Arbitrator consults with the other arbitrators, excepting requests for time extension where the urgency of the request is such that no consultation with the other arbitrators is feasible.

## **21. STATUS OF ORDERS**

21.1 Any Order of the Tribunal may, at the request of a Party or at the Tribunal's own initiative, be varied if the circumstances so require.

## **22. TRANSPARENCY**

22.1 All filings to the Tribunal, hearing transcripts, orders and awards generated during the course of this arbitration shall be made available to the public, subject to redaction of confidential information. The Parties and the PCA have agreed that the PCA will publish on its website memorials, hearing transcripts, orders and awards.

22.2 Hearings shall be open to the public. The Tribunal may hold portions of hearings in camera to the extent necessary to ensure the protection of confidential information.

## **23. FEES AND EXPENSES OF THE MEMBERS OF THE ARBITRAL TRIBUNAL AND OF THE SECRETARY OF THE TRIBUNAL**

- 23.1 Subject to revision, the time spent on this arbitration by the members of the Tribunal shall be compensated at the rate of USD 550 per hour, plus VAT if applicable. The time spent by the Secretary of the Tribunal shall be compensated at the rate of USD 280 per hour, plus VAT if applicable.
- 23.2 All secretarial, administrative, and translation expenses incurred in relation to the arbitration shall be reimbursed at cost. All travelling expenses reasonably incurred in relation to the arbitration shall be reimbursed at cost. The Parties shall be responsible for the VAT if applicable.
- 23.3 Subject to the disbursement of any fees and expenses from the sums deposited in accordance with Section 25, all fees and expenses shall be paid within 30 days of their quarterly invoice. The Tribunal may withhold any award or decision until such fees and expenses have been paid.
- 23.4 In the event of cancellation, except for a cancellation requested by the Tribunal, less than four weeks before the start of the hearing, the Tribunal may charge 30% of its notional daily sitting rate, based on an eight-hour day multiplied by the number of days reserved for the hearing. In the event of cancellation or postponement, except for a cancellation or postponement requested by the Tribunal, more than four weeks, but less than eight weeks before the start of the hearing, the Tribunal may charge 10% of its daily sitting rate multiplied by the number of days reserved for the hearing. Any fees charged pursuant to this paragraph are fees of the Tribunal pursuant to UNCITRAL Arbitration Rule Article 38(a), and as such, are to be apportioned between the Parties by the Tribunal as it deems reasonable in the circumstances.

## **24. CASE ADMINISTRATION**

- 24.1 The International Bureau of the Permanent Court of Arbitration shall act as registry ("the Registry") in this arbitration under the following terms:
- a. The Registry shall manage deposits made by the Parties to cover the costs of the arbitration, subject to the Tribunal's supervision;
  - b. The Registry shall maintain an archive of filings and submissions;
  - c. If needed, the Registry shall make its hearing and meeting rooms at the Peace Palace in The Hague available to the Parties and the Tribunal at no charge. Costs of catering, court reporting, or other technical support associated with hearings or meetings at the Peace Palace or elsewhere shall be borne by the Parties;

- d. The Registry shall provide such other registry services as the Tribunal may direct; and
- e. Work carried out by the Registry will be paid in accordance with the PCA's Schedule of Fees. PCA fees and expenses will be paid in the same manner as the Tribunal's fees and expenses.

24.2 The contact details of the Registry are as follows:

Permanent Court of Arbitration  
Attn.: Mr. Aloysius Llamzon  
Peace Palace  
Carnegieplein 2  
2517 KJ The Hague  
The Netherlands  
Tel: +31 70 302 4151  
Fax: +31 70 302 4167  
E-mail: [lllamzon@pca-cpa.org](mailto:lllamzon@pca-cpa.org)

## 25. ADVANCE OF ARBITRATION COSTS

25.1 In accordance with Article 41(1) of the UNCITRAL Rules and in order to ensure sufficient funds for the Tribunal's fees and expenses, on 30 July 2012, the Tribunal requested the Parties to deposit, within a period of 30 days, a sum of CAD 100,000 in equal parts on the following account:

Bank:	ING Bank N.V. Schenkkade 65 2519 AS The Hague The Netherlands
Account number:	68.55.45.369
IBAN:	NL75 INGB 0685 5453 69
BIC:	INGBNL2A
Beneficiary Name:	Permanent Court of Arbitration
Reference:	MPG-CA

25.2 On 13 August 2012 and 28 August 2012, the Claimant and the Respondent respectively deposited the aforesaid amounts.

25.3 The Registry will review the adequacy of the deposit from time to time and, at the request of the Tribunal, may invite the Parties to make supplementary deposits.

25.4 When making a request for a supplementary deposit, or upon the request of a Party, the Registry shall provide the Parties with a statement of accounts detailing the fees and expenses of the Tribunal and the Registry to date.

25.5 Any transfer fees or other bank charges will be charged by the PCA to the deposit. No interest will be paid on the deposit.

25.6 The unused balance held on deposit at the end of the arbitration shall be returned to the Parties as directed by the Tribunal.

## **26. RECORD OF HEARINGS**

26.1 The hearings before the Tribunal shall be transcribed.

26.2 Live Note transcription software, or comparable software, shall be used to make the hearing transcripts instantaneously available to the disputing parties and Members of the Tribunal in the hearing room. The transcripts of proceedings should be made available on a same day service basis.

26.3 The Tribunal shall establish, as necessary, procedures and schedules for the correction of transcripts. If the disputing parties disagree on corrections to be made to transcripts, the Tribunal shall determine whether or not any such corrections are to be adopted.

## **27. DISPOSAL OF RECORD**

27.1 Six months after the Tribunal has notified the final award to the Parties, the arbitrators shall be at liberty to dispose of the record of the arbitration, unless the Parties ask that the documents be returned to them or to their counsel, which will be done at the expense of the requesting Party.

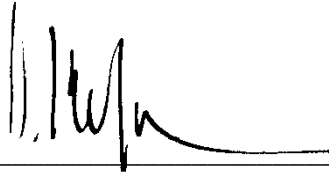
## **28. IMMUNITY OF THE ARBITRATORS**

28.1 The Parties shall not seek to make the Tribunal or any of its members liable in respect of any act or omission in connection with any matter related to this arbitration, save where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing. The Parties shall not require any member of the Tribunal to be a party or

witness in any judicial or other proceedings arising out of or in connection with this arbitration.

Date: 21 November 2012

For the Arbitral Tribunal

A handwritten signature in black ink, consisting of several vertical strokes followed by a horizontal line that curves to the right.

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Prof. Gabrielle Kaufmann-Kohler