

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

**MESA POWER GROUP, LLC**

Investor

**v.**

**GOVERNMENT OF CANADA**

Respondent

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**MEMORIAL OF THE INVESTOR**

**November 20, 2013**

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## TABLE OF CONTENTS

PART ONE: SUMMARY .....	1
I. Overview .....	1
A. The Investor .....	8
B. The Investments .....	8
i. Canadian Business Operations.....	12
C. The Dispute at the World Trade Organization over the FIT Program .....	12
D. The Ontario Power Authority .....	16
E. The Independent Electricity System Operator .....	22
F. Hydro One .....	24
II. CHRONOLOGY OF EVENTS .....	27
III. BREACH OF OBLIGATIONS.....	28
IV. INTERPRETATION OF THE NAFTA.....	31
A. Relevant Provisions of NAFTA .....	31
B. Interpretation in Accordance with the Vienna Convention on the Law of Treaties .....	32
C. The Expansion of International Law .....	35
i. The NAFTA Free Trade Commission Interpretation.....	35
PART TWO: STATEMENT OF FACTS.....	39
I. Canada is Responsible for the OPA's Measures.....	39
A. The FIT Program .....	39
i. Directions as to domestic content .....	41
ii. Direct Ministry of Environment Involvement & Influence Over the Process of the OPA.....	45
II. Power and electricity in Ontario .....	47
III. Power generation .....	49
IV. Power Transmission, Distribution and Commercial Sale .....	51
V. The Feed-In-Tariff Program.....	52
VI. Participation in the FIT Program: The process for obtaining a contract.....	54
A. Domestic Content Requirements .....	56
B. The TAT .....	56
C. The ECT .....	57
VII. Facts in the present dispute.....	57
A. Changes to the FIT Program Rules & Connection Point Changes.....	59
B. Revisions to REA Process .....	62
C. Waiver of Termination Rights.....	63
D. The Korean Consortium's Green Energy Investment Agreement .....	65
E. Boulevard's Involvement in the FIT Program .....	68

---

PART THREE: SUBSTANTIVE LEGAL ISSUES .....	70
I. Performance Requirements- Article 1106 .....	70
II. NATIONAL TREATMENT .....	73
A. Likeness .....	74
B. Treatment No Less Favorable.....	78
C. "With Respect to the Establishment, Acquisition, Expansion, Management, Conduct, Operation, and Sale or Other Disposition of Investments" .....	81
III. MOST FAVORED NATION TREATMENT .....	82
A. Likeness .....	84
B. Treatment No Less Favorable.....	85
C. "With Respect to the Establishment, Acquisition, Expansion, Management, Conduct, Operation, and Sale or Other Disposition of Investments" .....	89
IV. INTERNATIONAL LAW STANDARD OF TREATMENT .....	90
A. The Protection of Customary International Law .....	91
B. Fair and Equitable Treatment.....	93
i. The Duty to Act in Good Faith.....	93
ii. Fairness and Reasonableness .....	94
iii. Treatment Free from Arbitrary Conduct .....	98
iv. Transparency.....	102
v. Protection Against Abuse of Rights .....	103
vi. Procedural Fairness.....	105
vii. Legitimate Expectations.....	107
viii. Treatment Free from Political Motivation .....	108
ix. Treatment Free from Discriminatory Conduct .....	109
C. The Law of Full Protection and Security.....	111
D. The Severity of Violations of International Standards .....	114
E. The Test is a Flexible One to be Applied in All the Circumstances.....	116
V. ARTICLE 1503(2): STATE ENTERPRISES MUST COMPLY WITH NAFTA CHAPTER 11.....	117
VI. The Procurement defense Cannot Apply.....	120
A. The Article 1108 Defense .....	120
B. Procurement Under the NAFTA .....	121
i. The Concept of a "Procurement" .....	121
ii. Government Purposes .....	122
iii. "Commercial Resale" .....	122
iv. Article XVII of the GATT: State Trading Enterprises .....	123
v. WTO Agreement on Government Procurement.....	125
vi. The WTO's conclusions on the nexus of the Procurement Exemption .....	125
PART FOUR: THE LAW APPLIED TO THE FACTS.....	128
I. Performance Requirements.....	129
A. The Domestic Content Requirement is a Breach of Article 1106(1) .....	129

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B.	Mesa took steps to secure Domestic Content .....	133
II.	MOST FAVORED NATION TREATMENT .....	135
A.	Likeness .....	135
B.	Canada Provided Better Treatment to the Korean Consortium .....	139
i.	The Government of Ontario reserved preferential transmission capacity for the Korean Consortium .....	141
ii.	The Korean Consortium received better contract price for energy .....	144
iii.	The Korean Consortium was able to purchase the projects of unsuccessful FIT Applicants.....	145
iv.	Samsung delayed the ECT test that was never carried out .....	146
v.	Working Group meetings provided Samsung with preferred access and opportunities .....	150
vi.	The Korean Consortium was able to increase its contract size .....	151
vii.	Additional Government Assistance.....	151
C.	Canada provided better treatment regarding exceptions to others .....	153
i.	Negotiation of the Green Energy Investment Agreement.....	154
ii.	The Korean Consortium was granted a force majeure provision .....	156
iii.	The Korean Consortium was granted beneficial Notice to Proceed provisions .....	156
iv.	The Korean Consortium benefited through its Aboriginal Participation Level.....	156
D.	Establishment, Expansion, Conduct and Operation .....	157
E.	Conclusion .....	157
III.	NATIONAL TREATMENT .....	159
A.	Pattern Renewable Holdings Canada, is in like circumstances with the Investor.....	159
i.	Pattern Canada received Better Treatment than Mesa .....	160
ii.	Pattern Canada obtained PPA terms that were more favorable than the standard FIT contract available to proponents like Mesa Power .....	161
iii.	Pattern received privileged information and assistance through meetings with senior Ontario Government Representatives.....	162
B.	Boulevard Associates Canada, Inc. is in like circumstances with the Investor.....	163
i.	Canada Provided Preferential Treatment to Boulevard Associates Canada, Inc.....	164
C.	NextEra Energy Resources, LLC is in like circumstances with the Investor.....	167
i.	NextEra's privileged access to information as to the capacity availability at L7S .....	167
ii.	NextEra had a close relationship with the Ontario Power Authority. ....	168
iii.	Ontario granted special privileges to NextEra by allowing NextEra's projects to connect to the 500 kV transmission line. ....	170
D.	Establishment, Expansion, Conduct and Operation .....	176
E.	Conclusion .....	176
IV.	INTERNATIONAL LAW STANDARD OF TREATMENT .....	177
i.	Unexpected and arbitrary changes to the FIT Rules.....	177
ii.	NextEra influenced changes to the FIT Rules.....	184
iii.	OPA unfairly permitted enabler requested projects to select connection points.....	187
iv.	Failing to conduct an Economic Connection Test as required by the FIT Rules .....	188
v.	Mesa Power expected its projects to participate in the ECT in 2010, and not conducting the ECT deprived Mesa of the opportunity to compete for a FIT contract .....	192
vi.	The failure to conduct an ECT prior to the Bruce-to-Milton Capacity Allocation process caused Mesa Power to lose contract awards .....	193

vii. Delay in the FIT process in order to benefit Samsung and its partners.....	194
viii. Failure to give reasons regarding the ranking process and the June 3, 2011 Rules changes.....	197
ix. The MOE and the OPA failed to give reasons and explanations of the FIT ranking process to the Investor .....	198
x. Unfair ranking of projects .....	200
xi. The 2010 project ranking under the FIT Program was arbitrary .....	202
xii. Failure to operate the FIT Program fairly and transparently was contrary to Mesa's reasonable and legitimate expectations .....	203
<b>PART FIVE: JURISDICTION .....</b>	<b>206</b>
<b>I. The Legal Context.....</b>	<b>207</b>
A. Interpretation.....	207
B. The Legal Regime of Articles 1120, 1119 and 1118 .....	209
i. Article 1119 Notice Requirement .....	210
ii. Article 1118 Consultation Issue .....	210
iii. Article 1120 waiting period.....	212
C. US-Ecuador BIT notice provision is not comparable to Article 1120 .....	213
D. The NAFTA Parties rejected the approach of the US-Ecuador BIT .....	215
E. The timing requirements of Articles 1119 and 1120.....	216
<b>II. The Factual Context .....</b>	<b>221</b>
A. Domestic Content Requirements of the FIT Program .....	221
B. Ontario's Mismanagement of FIT Program Rankings.....	223
C. The Korean Consortium.....	224
D. Meeting with competitors and advanced notice of Connection Point changes .....	225
<b>III. Conclusion.....</b>	<b>228</b>
<b>PART SIX: DAMAGES .....</b>	<b>229</b>
<b>I. The Obligation to Pay Damages .....</b>	<b>229</b>
<b>II. Legal Issues .....</b>	<b>229</b>
A. The "But For" Test .....	229
B. Consequential damages .....	230
C. Lost Profits.....	231
D. Mitigation .....	233
E. Opportunity Loss: Interest and Costs .....	233
<b>III. Summary of Valuation Report .....</b>	<b>235</b>
A. Damage Suffered by the Investor.....	236
i. Discount Cash Flow Analysis .....	236
<b>PART SEVEN: RELIEF REQUESTED .....</b>	<b>238</b>

## PART ONE: SUMMARY

### I. OVERVIEW

1. This case involves unfairness and abuse of the renewable energy regulatory process by the Government of Ontario. The objective of increasing the production and use of renewable energy is laudable— but the Government of Ontario, through inappropriate measures, transformed sustainable energy policies into discriminatory local development policies, where transparent and objective criteria were replaced with political favoritism, cronyism and local preference.
2. These non-legitimate objectives were achieved through the imposition of discriminatory non-transparent "buy local" contract requirements upon foreign investors who made investments in Ontario in the expectation that the Power Purchase Agreement process would be conducted in good faith, openly, transparently and on the basis of the program rules. Instead, Power Purchase proponents found capricious and arbitrary decisions, inherent discrimination against foreign entrants, and last-minute non-transparent and arbitrary changes, which frustrated the long-term renewable energy contracts of those foreign investors who "played by the transparent rules of the game".
3. Renewable energy is presenting societies with tremendous opportunities to diversify their energy supplies in an environmentally sustainable manner. With the growth in popularity of environmentally-sustainable energy consciousness, producers of renewable energy have played an important role in facilitating societal shifts towards more sustainable energy production. This shift presented increased investment opportunities for renewable energy producers to expand to new markets, bringing the benefits of renewable energy to new locations.
4. A key reform of the Ontario electricity system introduced in the *Electricity Restructuring Act of 2004* was the creation of the Ontario Power Authority (OPA), which was responsible for overall long-term system planning, ensuring reliable and secure electricity supply, and promoting the diversification of Ontario's electricity supply with a particular emphasis on renewable and clean energy.<sup>1</sup>
5. The Ontario Government has developed a series of programs to secure renewable energy. These programs included the Renewable Energy Standard Offer Program

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<sup>1</sup> *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, Report of the Panel, WT/DS412/R, 19 December 2012 ("Canada - Renewable Energy - Panel Report"), at para. 7.24 (***Investor's Schedule of Legal Authorities at CL-001***)

- (RESOP) and the Renewable Energy Supply (RES) Requests for Proposals (RFP) which occurred in three phases I, II, and III.<sup>2</sup>
6. The RESOP Program was developed in 2005, and was open to smaller facilities with up to 10 MW of capacity.<sup>3</sup> The RES program, in contrast, was for large renewable energy projects. This competitive bid program had three rounds of contract offers. RES I, developed in 2004, awarded contracts for facilities with an aggregate capacity of 395 MW.<sup>4</sup> A year later in June 2005, the OPA issued the RES II RFP for 1,000 MW of renewable generation capacity. RES II differed from RES I in that it was limited to wind or solar projects, whereas RES I allowed bids from other renewable sources. Like RES I Contracts, the RES II Contracts were for a term of 20 years and were awarded to those proposed renewable generation projects with the lowest proposed prices.<sup>5</sup> More than three years later, in August of 2008, the OPA issued the RES III RFP for 500 MW. All three RES Programs offered contracts with 20-year terms.<sup>6</sup>
  7. In the spring of 2009, the Province of Ontario undertook a major shift in its energy policy. The Government of Ontario launched a Renewable Energy Feed-In-Tariff Program (FIT Program) to promote the generation, and consumption of renewable energy in the province.<sup>7</sup>
  8. The *Green Energy Act* was enacted on May 14, 2009 and created the FIT Program.<sup>8</sup> The FIT Program encouraged the production of renewable energy in Ontario. The renewable electric power obtained through the FIT Program is sold into the Ontario electrical grid for use by individual customers across Ontario. The Ontario Power Authority, a public body controlled by the Province of Ontario, is responsible for implementing the Program, including the setting of prices and the administration of contracts.<sup>9</sup>
  9. Ontario's grossly unfair and contrived governmental measures resulted in direct and calculated harm to foreign-owned wind farm projects.
  10. The victim of this unfair behavior was Mesa Power Group, LLC (Mesa), a Delaware limited liability Corporation. It owns Mesa Wind, LLC (Mesa Wind), which in turn owns and controls Mesa AWA, LLC (Mesa AWA).<sup>10</sup> Mesa participated in the laudable goals of

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<sup>2</sup> Hogan Report, at pp. 30-34 (*Investor's Schedule of Exhibits at C-0320*)

<sup>3</sup> Hogan Report, at pp. 32-33 (*Investor's Schedule of Exhibits at C-0320*)

<sup>4</sup> Hogan Report, at pp. 31-32 (*Investor's Schedule of Exhibits at C-0320*)

<sup>5</sup> Hogan Report, at p. 32 (*Investor's Schedule of Exhibits at C-0320*)

<sup>6</sup> Hogan Report, at p. 32 (*Investor's Schedule of Exhibits at C-0320*)

<sup>7</sup> Hogan Report, at p. 32 (*Investor's Schedule of Exhibits at C-0320*)

<sup>8</sup> *Green Energy Act*, 2009, SO 2009, c.12, Sched. A (*Investor's Schedule of Exhibits at C-0003*)

<sup>9</sup> *Electricity Act*, 1998, S.O. 1998, c. 15 (*Investor's Schedule of Exhibits at C-0401*)

<sup>10</sup> Corporate Chart of the Mesa Power Group, as at October, 2011 (*Investor's Schedule of Exhibits at C-0055*)

- Ontario's renewable energy production program through its ownership of wind farm projects located in the province of Ontario.
11. The broader context of the conduct complained of in this dispute is that of a provincial government which has been repeatedly found to have engaged in political manipulation and interference in the regulatory processes when it suited its own partisan interests. This conduct culminated in the resignation of the then-Ontario premier in disgrace, after the exposure of attempts to frustrate an inquiry into the massive misuse of government funds to appease local interests through the deceptive withholding or destruction of subpoenaed documents related to another energy project in Ontario.<sup>11</sup> The Premier had also gone to lengths such as proroguing the province's legislature to block a parliamentary inquiry.<sup>12</sup>
  12. Another scandal had its origins in the Premier using a decree to bypass a competitive bidding process to hire a CEO of a government agency in the health administration sector who in turn without following normal procedures spent large amounts of the agency's budget on a small number of highly paid "consultants". In that case, the Premier lied to the public that an independent review was being conducted while never actually signing the contract with the independent auditor that was supposed to conduct the review.<sup>13</sup>
  13. The treatment of Mesa, in this case is, in fact, just another episode in a saga of maladministration, scandal, political interference, manipulation and contempt for the rule of law that dominated Ontario until the resignation of the Premier early in 2013. Fortunately, the investor can rely on the protection of the NAFTA to ensure that fairness and the rule of law are protected.
  14. Ontario, and thereby Canada, failed to provide treatment to the Investments in accordance with the obligations of NAFTA Article 1106 by imposing minimum domestic content restrictions upon the Investor as a precondition of participating in the renewable electrical energy market in Ontario.
  15. Ontario, and thereby Canada, failed to provide treatment to the Investments in accordance with national treatment as required by NAFTA Article 1102 by failing to provide Mesa and its Investments with treatment with respect to electricity

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<sup>11</sup> CBC News, News Release, "Dalton McGuinty staffers broke law by deleting gas plant emails", June 5, 2013 (*Investor's Schedule of Exhibits at C-0004*)

<sup>12</sup> National Post Article "Kelly McParland: Here lies the wreckage of Dalton McGuinty's self-serving gas plant decisions", September 10, 2013 (*Investor's Schedule of Exhibits at C-0057*)

<sup>13</sup> Office of the Auditor General of Ontario, Special Report, "Ontario's Electronic Health Records Initiative", October, 2009, at pp. 8, 36 (*Investor's Schedule of Exhibits at C-0007*); Globe and Mail, News Release, "McGuinty quietly drops eHealth review", July 22, 2009 (*Investor's Schedule of Exhibits at C-0008*)



transmission access and Power Purchase Agreements other treatment in the regulatory and administrative process as favourable as that provided to other domestic Canadian companies who were in like circumstances with Mesa.

16. Ontario, and thereby Canada, failed to provide treatment to the Investments in accordance with most favoured nation treatment as required by NAFTA Article 1103 by failing to provide Mesa and its Investments with treatment with respect to electricity transmission access and Power Purchase Agreements other treatment in the regulatory and administrative process as favourable as that provided to other companies from other NAFTA Parties or from non-NAFTA parties who were in like circumstances with Mesa.
17. Ontario, and thereby Canada, failed to provide treatment to the Investments in accordance with international law standard of treatment contained in NAFTA Article 1105 as a result of:
  - a) Government of Ontario actions to change the rules for awarding Wind Power Purchase Agreement contracts under the FIT Program. This governmental direction had the result of having the OPA ignore technical considerations of the merits of the Investor's wind farms, relying instead on capricious and irrelevant political considerations in the awarding of the contracts;
  - b) Modifying governing rules for transmission interconnection in a non-transparent, unpredictable manner, not based on legitimate regulatory considerations;
  - c) Imposing prohibited "buy local" performance requirements as a precondition of obtaining approval of commercial contracts under the FIT Program. These requirements were doubled during the operation of the FIT Program. Another prohibited performance requirement imposed by the FIT Program required Ontario-based content as a precondition for a long-term contract under the Program; and
  - d) Providing more favorable transmission treatment to Korea-based Samsung,<sup>14</sup> to Samsung's Canadian-based local wind projects in Ontario and to energy investments seeking Power Purchase Agreements from Boulevard Power, Canada, a domestic Canadian company.

All of this treatment was more favourable than that provided to the Investor and its Investments which were in like circumstances with these other investments in the acquisition of transmission access and a Power Purchase Agreement. The effect of these

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<sup>14</sup> On January 21, 2010, Samsung C&T signed a \$7 billion green energy investment agreement with Ontario's Premier and Ontario's energy minister. This agreement granted Samsung significantly better access to supply renewable energy to the provincial energy grid than to other energy providers in the province.

- various measures has caused loss and damage to Mesa Power and to the Investor's related business operations.
18. In May 2009 the Government of Ontario launched the Feed-In-Tariff Program to promote the generation, and consumption of renewable energy in the province. It is in this context that Mesa entered Ontario's energy market.
  19. Under the FIT Program, interested parties were invited to apply for a Power Purchase Agreement (PPA). A FIT PPA guaranteed wind and solar energy producers a fixed price per unit of electricity produced for a period of 20 years.<sup>15</sup> Applicants to the FIT program were ranked according to pre-announced criteria. Applicants with the highest rankings were awarded contracts, based on available transmission capacity within Ontario's capacity-bound power grid.<sup>16</sup> In order to be awarded a FIT contract, proponents also had to guarantee that a certain amount of equipment used and services provided in the generation of the facility to produce their energy was manufactured in Ontario.<sup>17</sup>
  20. The Preamble to the *Green Energy Act* states that the "Government of Ontario is committed to fostering the growth of renewable energy projects, which use cleaner sources of energy, and to removing barriers to and promoting opportunities for renewable energy projects and to promoting a green economy."<sup>18</sup> In his review of government spending, the Ontario Auditor General has reported that "attract[ing] investment in renewable energy" was one of the main priorities of the Act.<sup>19</sup>
  21. The *Green Energy Act* which created the FIT Program and was supported by accompanying Ministerial Directions, were strong market signals from Ontario encouraging investment in its renewable electricity sector.
  22. The *Act* also included features to encourage investors to invest in Ontario's green-energy market. To ensure that the programs were operated in a manner that maximized investor confidence, the statutory scheme provided that:
    - a) The renewable energy producers in the FIT Program receive a guaranteed price for renewable energy supplied to the Ontario electricity grid, and a guaranteed market for the energy produced and supplied to the grid.<sup>20</sup>

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<sup>15</sup> Hogan Report, at p. 35 (*Investor's Schedule of Exhibits at C-0320*)

<sup>16</sup> Ontario Power Authority, Feed-In Tariff Program, Program Overview, August, 2010 (*Investor's Schedule of Exhibits at C-0141*)

<sup>17</sup> Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011, at para. 6.4 (*Investor's Schedule of Exhibits at C-0005*)

<sup>18</sup> *Green Energy Act*, S.C. 2009 c.12, Preamble (*Investor's Schedule of Exhibits at C-0003*)

<sup>19</sup> Annual Report of the Auditor General of Ontario, 2011, at p. 87 (*Investor's Schedule of Exhibits at C-0228*)

<sup>20</sup> Ontario Power Authority, Feed-In Tariff Program, Program Overview, August, 2010, Section 1.3 (*Investor's Schedule of Exhibits at C-0141*)

- b) To be considered for the FIT Program, wind power projects were initially required to achieve a minimum of 25% of domestic content from the province of Ontario.<sup>21</sup> This level was increased to 50% for power projects that became operational after January 1, 2012.<sup>22</sup> Wind power projects over 10 kW were further 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:
- i) expertise of wind power development,
  - ii) financial capacity,
  - iii) guaranteed access for wind turbine supply and
  - iv) permitting.<sup>23</sup>

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.

23. A successful applicant under the FIT Program would receive a PPA from the OPA, that guaranteed a purchase price over a twenty year period.<sup>24</sup> In July 2011, this guaranteed purchase price was 13.5 cents per kilowatt hour.<sup>25</sup>
24. On January 21, 2010, two Korean-based companies, Samsung C&T (Samsung) and Korean Electric Power Company (KEPCO) signed a \$7 billion *Green Energy Investment Agreement (GEIA)* with Ontario's Minister of Energy<sup>26</sup> (Samsung and KEPCO together are referred to as the "Korean Consortium").<sup>27</sup> While the existence of the Agreement was public, the terms of the agreement were kept secret before this NAFTA claim was commenced. 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. In exchange for providing renewable energy, the *GEIA* reserved a fixed amount of Ontario's overall transmission capacity for renewable energy PPAs from members of the Korean Consortium.

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<sup>21</sup> Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011, at para. 6.4(a)(i) (*Investor's Schedule of Exhibits at C-0005*)

<sup>22</sup> Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011, at para. 6.4(a)(i) (*Investor's Schedule of Exhibits at C-0005*)

<sup>23</sup> In the event of a tie, then preference would be given to the project with the earliest dated wind lease.

<sup>24</sup> Ontario Power Authority, Feed-In Tariff Program, Program Overview, August, 2010, at para. 6.4 (*Investor's Schedule of Exhibits at C-0141*)

<sup>25</sup> Ontario Power Authority, Feed-In Tariff Program, Program Overview, August, 2010, at p. 13 (*Investor's Schedule of Exhibits at C-0141*)

<sup>26</sup> Green Energy Investment Agreement, January 21, 2010 (*Investor's Schedule of Exhibits at C-0322*)

<sup>27</sup> Green Energy Investment Agreement, January 21, 2010, Article 9.1 (*Investor's Schedule of Exhibits at C-0322*)

25. Samsung thereby received a guaranteed right of first refusal on transmission access in certain transmission zones in the Province of Ontario. For example, Samsung was guaranteed 500 MW of transmission access in the Haldimand, Essex and Chatham-Kent transmission zone, totalling 20% of all available capacity in this region.<sup>28</sup> Samsung was also guaranteed "priority access" to 500 MW of transmission capacity in the Bruce Region of Ontario.<sup>29</sup> No other company was granted such favourable treatment.
26. Mesa applied under the FIT Program for six different PPAs to sell wind energy. It applied for its first two projects on November 25, 2009: Arran Wind Energy and Twenty Two Degrees Wind Energy Projects, and its second set of projects on May 29, 2010, Summerhill I and II and North Bruce I and II.<sup>30</sup>
27. Japan and the EU brought challenges to the operation of the FIT Program before the World Trade Organization (WTO). Concerns were raised about the FIT Program's discriminatory domestic minimum content requirements imposed on every FIT proponent, which provided more favourable treatment to local content and local service providers over foreign ones. National Treatment and Subsidies concerns were also raised. Canada defended the FIT Program by claiming that it was not a subsidy and also on the basis that the other violations were justified within the WTO's Procurement Exception to the national treatment obligation (in GATT Article III:8).
28. The WTO Panel ruled against Canada. It found that the minimum domestic content rules were discriminatory and also violations of national treatment. 1) It found that the minimum domestic content requirements violated the National Treatment obligation in the General Agreement on Tariffs and Trade but also the performance requirements provisions of the WTO investment code, the Trade-Related Investment Measures (TRIMs) Agreement.
29. An appeal of the panel report was taken to the WTO Appellate Body (AB). The AB came to the same conclusions as the panel, but on different grounds. For the AB, Canada could not rely on the procurement exception for Canada's national treatment violation because the FIT Program was not related to the government procurement of energy itself, but imposed a minimum domestic content requirement upon producers of

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<sup>28</sup> Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, September 30, 2009 (*Investor's Schedule of Exhibits at C-0105*)

<sup>29</sup> Green Energy Investment Agreement, at para. 7.3 (*Investor's Schedule of Exhibits at C-0322*)

<sup>30</sup> OPA FIT application submitted for Twenty Two Degree Wind Energy Project, November 25, 2009 (*Investor's Schedule of Exhibits at C-0364*) and OPA FIT Application submitted for Arran Wind Project, November 25, 2009 (*Investor's Schedule of Exhibits at C-0129*) See also OPA FIT Applications for North Bruce I (*Investor's Schedule of Exhibits at C-0360*), North Bruce II (*Investor's Schedule of Exhibits at C-0361*), Summerhill I (*Investor's Schedule of Exhibits at C-0368*), and Summerhill II (*Investor's Schedule of Exhibits at C-0369*)

renewable power. Also, the AB concluded that there was not sufficient evidence to establish whether there was a subsidy present.<sup>31</sup>

#### **A. The Investor**

30. Mesa is a Delaware Limited Liability Corporation created in July 2008.<sup>32</sup> Its head office is in Dallas, Texas.<sup>33</sup> The Mesa group of companies were created to oversee and develop renewable energy projects, notably in the wind sector.<sup>34</sup>
31. The day to day operations of the Mesa are overseen by Cole Robertson, Vice President of Finance, who is in charge of day-to-day operations and Mark Ward, Chief Development Officer and Executive Vice-President.<sup>35</sup>

#### **B. The Investments**

32. Mesa wholly owns and controls the following four wind farm investments in southwestern Ontario:
- a) TTD Wind Project ULC (TTD) is an unlimited liability corporation incorporated in the Province of Alberta.<sup>36</sup> The TTD Wind Project is designed to allow for the generation of 150 MW of wind power;
  - b) Arran Project ULC (Arran) is an unlimited liability corporation incorporated in the Province of Alberta.<sup>37</sup> The Arran Project is designed for the generation of 115 MW of wind power;
  - c) North Bruce Project ULC (North Bruce) is an unlimited liability corporation incorporated in the Province of Alberta.<sup>38</sup> The North Bruce Project applied for Power Purchase Agreements under the FIT Program for 200 MW of wind power; and
  - d) Summerhill Project ULC (Summerhill) is an unlimited liability corporation incorporated in the Province of Alberta.<sup>39</sup> The Summerhill Project applied for Power Purchase Agreements under the FIT Program for 100 MW of wind power.

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<sup>31</sup> The WTO process is discussed in considerable more detail in Part One: I(C)

<sup>32</sup> Certificate of Formation, Mesa Renewables, LLC, from the State of Delaware, July 11, 2008 (*Investor's Schedule of Exhibits at C-0117*)

<sup>33</sup> Limited Liability Company Agreement of Mesa Renewables, LLC, May 20, 2008, at p. 1 (*Investor's Schedule of Exhibits at C-0039*)

<sup>34</sup> CWS - Robertson, at para. 7.

<sup>35</sup> CWS - Robertson, at para. 2.

<sup>36</sup> Certificate of Incorporation for TTD Wind Project ULC under the *Alberta Business Corporations Act*, November 17, 2009 (*Investor's Schedule of Exhibits at C-0087*)

<sup>37</sup> Certificate of Incorporation for Arran Wind Project ULC, November 17, 2009 (*Investor's Schedule of Exhibits at C-0049*)

<sup>38</sup> Certificate of Incorporation for North Bruce Project, ULC, April 6, 2010 (*Investor's Schedule of Exhibits at C-0050*)

33. Mesa's ownership of enterprises in Canada qualifies as an Investment under Article 1139(a) of the NAFTA.<sup>40</sup> Mesa Power owns the Ontario wind projects through four companies incorporated in the Canadian Province of Alberta.<sup>41</sup> In addition to the interests in the enterprise, Mesa's interests include:
- a) Real estate and other property, both tangible and intangible, including interests in lands and leases in Ontario on which wind turbines were to be built;<sup>42</sup> and
  - b) Tangible and intangible property "acquired in the expectation or used for the purpose of economic benefit or other business purposes" and
  - c) "Interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory"<sup>43</sup>, including rights to receive a FIT contract from the Ontario Power Authority (OPA) based upon their priority ranking.

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<sup>39</sup> Certificate of Incorporation for for the Summerhill Project ULC, under the Alberta Business Corporations Act, April 6, 2010 (*Investor's Schedule of Exhibits at C-0041*)

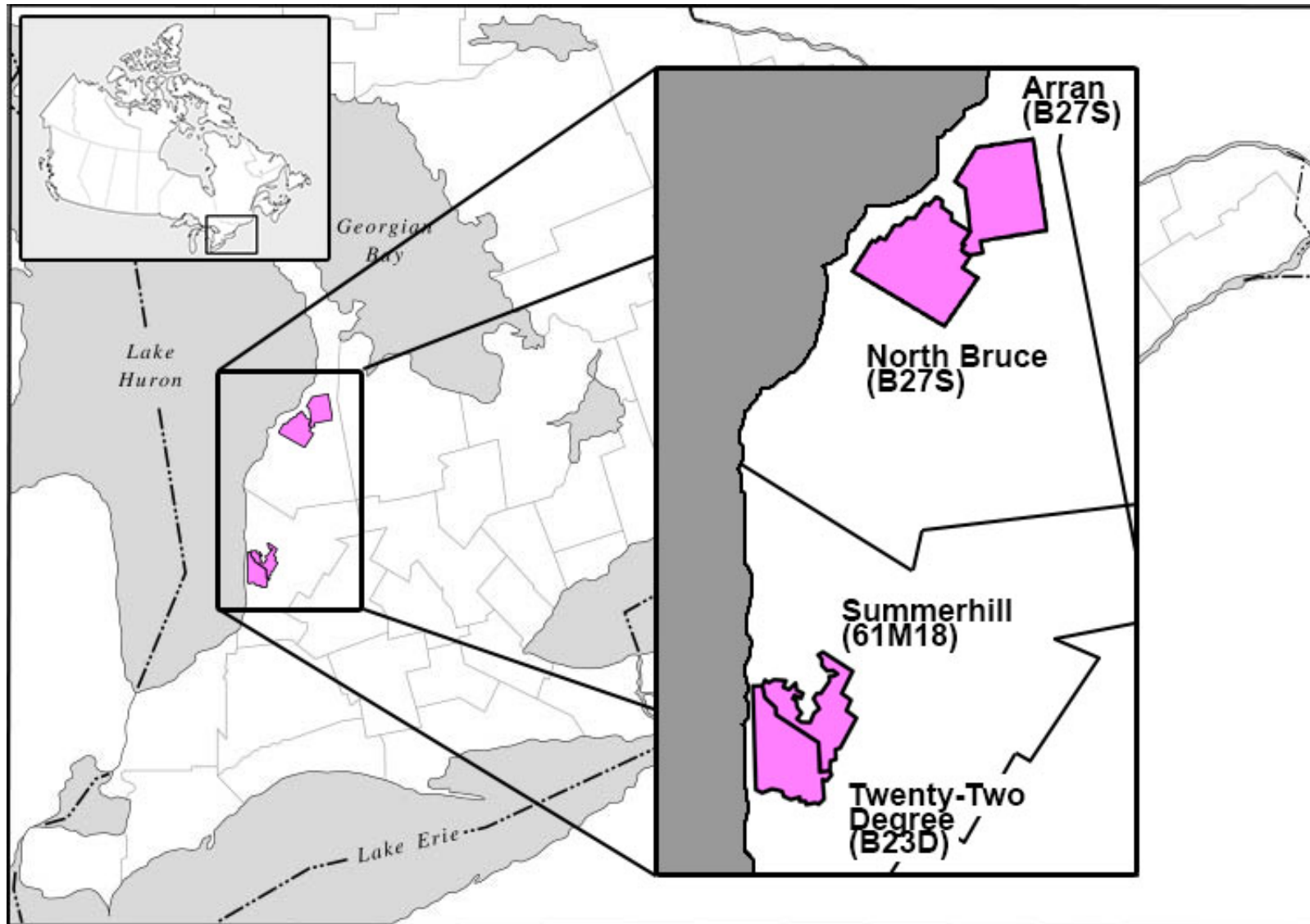
<sup>40</sup> NAFTA Article 1139 "Investment means: (a) an enterprise"

<sup>41</sup> NAFTA Article 201 Definitions of General Application: "**enterprise** means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association"

<sup>42</sup> See the OPA FIT application submitted for Twenty Two Degrees Wind Project on November 25, 2009, for sample leases (*Investor's Schedule of Exhibits at C-0364*)

<sup>43</sup> NAFTA Article 1139

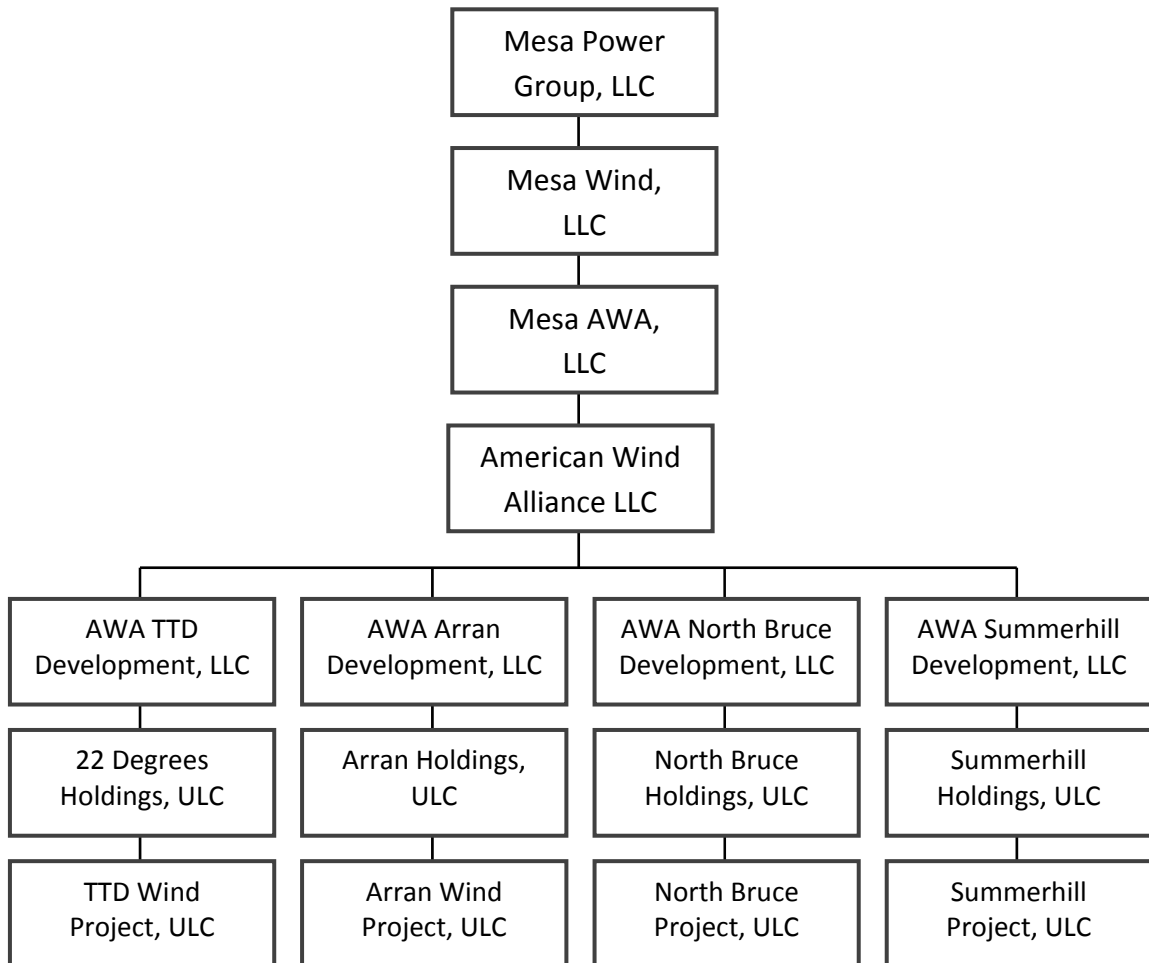
34. The graphic below reflects the location of Mesa Power's four wind projects within the province of Ontario:



Map modified from the original by Cartographic Office, Department of Geography.

Brock University Map Library

35. The Corporate Organisation of the Mesa Group is outlined below:



36. The wind power investments at issue in this arbitration are owned by Mesa through four Alberta corporations: TTD Wind Project ULC, Arran Project ULC, North Bruce Project, ULC, and Summerhill Project ULC (collectively "Mesa's Investments").<sup>44</sup>

37. Since Mesa's Investments in Canada are ultimately wholly-owned by an American enterprise, Mesa Power Group, LLC ("Mesa") meets the definition of an American investor with a Canadian investment as defined by NAFTA Article 1139.

<sup>44</sup> Certificate of Incorporation for TTD Wind Project ULC under the *Alberta Business Corporations Act*, November 17, 2009 (***Investor's Schedule of Exhibits at C-0087***); Certificate of Incorporation for Arran Wind Project ULC under the *Alberta Business Corporations Act*, November 17, 2009 (***Investor's Schedule of Exhibits at C-0049***); North Bruce Project, ULC Certificate of Incorporation Certificate of Incorporation for North Bruce Project ULC under the *Alberta Business Corporations Act*, November 17, 2009 (***Investor's Schedule of Exhibits at C-0050***); Certificate of Incorporation for Summerhill Project ULC under the *Alberta Business Corporations Act*, November 17, 2009 (***Investor's Schedule of Exhibits at C-0041***)



*i. Canadian Business Operations*

38. Mesa decided to invest in Ontario in 2009 following the announcement of Ontario's *Green Energy and Green Economy Act (the Green Energy Act)*.<sup>45</sup> Mesa commenced investments with plans and other works by local wind power energy developers.
39. Leader Resources Services Corp submitted two FIT applications during the FIT Launch Period on Mesa's behalf: TTD Wind Project and the Arran Project.<sup>46</sup> Mesa Power, on May 29, 2010, made four additional FIT applications for two additional wind projects, the North Bruce Project and the Summerhill Project.<sup>47</sup>
40. Mesa's developers in Ontario managed the FIT process and the obtaining of necessary permits and easements along with undertaking necessary site studies.<sup>48</sup>

**C. The Dispute at the World Trade Organization over the FIT Program**

41. After the announcement of the FIT Program by Ontario, concerns were raised by some of Canada's international trading partners about the patent unfairness and discrimination that was contained in provisions of the FIT Program. Eventually, both the European Union and Japan raised formal complaints about the operation of Ontario's FIT Program to the WTO.
42. Canada is required to answer at the WTO for measures taken by its sub-national governments. As a result, Canada was required to respond to the EU and Japanese complaints.
43. A WTO panel was struck to consider the operation of the Ontario FIT Program. The complaints at the WTO primarily focused on the FIT minimum domestic content requirements imposed by Ontario, which were found to be inconsistent with prohibited performance requirements contained in the WTO Trade-Related Investment Measures Code (TRIMs Agreement). There were also complaints about violations of national treatment and whether the FIT Program constituted a subsidy.<sup>49</sup>

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<sup>45</sup> CWS - Robertson, at para. 8.

<sup>46</sup> CWS - Robertson, at para. 21; See also OPA FIT application submitted for Twenty Two Degree Wind Energy Project, November 25, 2009 (*Investor's Schedule of Exhibits at C-0364*) and OPA FIT Application submitted for Arran Wind Project, November 25, 2009 (*Investor's Schedule of Exhibits at C-0129*)

<sup>47</sup> Summerhill Wind Energy I, FIT Application, May 29, 2010 (*Investor's Schedule of Exhibits at C-0362*), Summerhill Wind Energy II, FIT Application, May 29, 2010 (*Investor's Schedule of Exhibits at C-0363*), North Bruce Wind Energy I, FIT Application, May 29, 2010 (*Investor's Schedule of Exhibits at C-0360*), North Bruce Wind Energy II, FIT Application, May 29, 2010 (*Investor's Schedule of Exhibits at C-0361*)

<sup>48</sup> CWS - Robertson, at para. 15.

<sup>49</sup> Both complainants claimed that the challenged measures are inconsistent with Articles 3.1(b) and 3.2 of the Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade

44. The Panel concluded that Canada did not meet its WTO commitments through the operation of the FIT program.
45. At the WTO, Canada denied that there was a violation of the TRIMs Agreement,<sup>50</sup> denied a violation of national treatment<sup>51</sup> and pleaded that the FIT Program did not constitute a subsidy.<sup>52</sup> Canada also alleged that it was justified in violating the local domestic content prohibitions in the TRIMs Agreement because Canada viewed the FIT Program as constituting government procurement not with a view to commercial resale under Article III:8 of the GATT.<sup>53</sup>
46. The Panel Reports were circulated to WTO Members on December 19, 2012.<sup>54</sup> The WTO Panel made findings in three principal areas: Minimum Domestic Content, National Treatment and Subsidies.
  - a) The Panel's Minimum Domestic Content Findings:
    - i) The Panel concluded that Canada had violated the TRIMs Agreement because the FIT Program imposed minimum domestic content as a requirement for the Program,<sup>55</sup>
    - ii) Canada had purported to invoke a defence to this question, that under Article III:8(a) of the GATT 1994, the FIT Program is not subject to the national

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Negotiations, 231 (1999), 1869 U.N.T.S. 14 ("SCM Agreement") (***Investor's Schedule of Legal Authorities at CL-198***); Article 2.1 of the TRIMs Agreement: Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations, 143 (1999), 1868 U.N.T.S. 186 ("TRIMs Agreement") (***Investor's Schedule of Legal Authorities at CL-199***); Article III:4 of the General Agreement on Tariffs and Trade 1994 (GATT). Further information about the factual aspects of these disputes is set forth in greater detail in paragraphs 2.1 and 7.9-7.68 of the Panel Report, and in section 4 of the Appellate Body Reports. Canada - Renewable Energy - Panel Report, at paras. 7.166-7.167 (***Investor's Schedule of Legal Authorities at CL-001***); Canada – Certain Measures Affecting The Renewable Energy Generation Sector, Canada – Measures Relating To The Feed-In Tariff Program, WT/DS412/AB/R, Reports of the Appellate Body, (February 19, 2013) ("Canada - Renewable Energy - AB Report"), at paras. 5.124 and 5.128 (***Investor's Schedule of Legal Authorities at CL-002***)<sup>50</sup> Canada - Measures Affecting the Renewable Energy Generation Sector, WT/DS412, First Written Submission of Canada (December 22, 2011) ("Canada - Measures Affecting the Renewable Energy Generation Sector"), at paras. 100-101 (***Investor's Schedule of Legal Authorities at CL-003***)<sup>51</sup> Canada - Measures Affecting the Renewable Energy Generation Sector, at paras. 62-99 (***Investor's Schedule of Legal Authorities at CL-003***)<sup>52</sup> Canada – Measures Relating to the Feed-in Tariff Program, WT/DS426, First Written Submission of Canada (March 6, 2012) ("Canada - Measures Relating to the Feed-in Tariff Program"), at paras. 5s-81 (***Investor's Schedule of Legal Authorities at CL-004***)<sup>53</sup> Canada - Measures Affecting the Renewable Energy Generation Sector, at paras. 62-101 (***Investor's Schedule of Legal Authorities at CL-003***)<sup>54</sup> Canada - Renewable Energy - Panel Report (***Investor's Schedule of Legal Authorities at CL-001***)<sup>55</sup> Canada - Renewable Energy - Panel Report, at paras. 7.166-7.167 (***Investor's Schedule of Legal Authorities at CL-001***)

treatment obligations of Article III.<sup>56</sup> Canada contended this is because the laws and requirements that create and implement the FIT Program are laws and requirements that govern the procurement of renewable electricity for the governmental purpose of securing an electricity supply for Ontario consumers from clean sources, and "not with a view to commercial resale or with a view to use in the production of goods for commercial sale".<sup>57</sup> Both Japan and the European Union contested that characterization,<sup>58</sup> and

- iii) In the result, the Panel concluded that Canada could not meet its burden to prove that the defence under Article III:8 applied because the electricity that was being obtained was for commercial resale to Ontario consumers through the Ontario power grid.<sup>59</sup>
- b) The Panel's National Treatment Findings:
  - i) The Panel also concluded that the TRIMs violation of the FIT Program also violated national treatment obligations in the GATT.<sup>60</sup> While Article III:8(a) of the GATT provides a limited exception to National Treatment for government procurement-related measures, the FIT Program did not constitute government procurement based on the definition in Article III:8 (a).<sup>61</sup> The FIT Panel held that the Program is not a procurement when its workings are properly understood, and does not meet the requirement that it be "not with a view to commercial resale."<sup>62</sup>
- c) The Panel's Subsidy Findings:
  - i) Canada also contended before the Panel that the FIT Program did not meet the definition of a subsidy under the broad definitions in the WTO Subsidies and Countervailing Duties Agreement.<sup>63</sup> Over the objections of Japan and the

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<sup>56</sup> *Canada - Measures Affecting the Renewable Energy Generation Sector*, at paras. 66-99 (***Investor's Schedule of Legal Authorities at CL-003***)

<sup>57</sup> *Canada - Measures Affecting the Renewable Energy Generation Sector*, at paras. 66-99 (***Investor's Schedule of Legal Authorities at CL-003***)

<sup>58</sup> *Canada - Renewable Energy - Panel Report*, at paras. 7.74-7.77 and 7.81-7.85 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>59</sup> *Canada - Renewable Energy - Panel Report*, at para. 7.152 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>60</sup> *Canada - Renewable Energy - Panel Report*, at para. 7.167 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>61</sup> *Canada - Renewable Energy - Panel Report*, at para. 7.152 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>62</sup> *Canada - Renewable Energy - Panel Report*, at paras. 7.146-7.151 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>63</sup> *Canada - Measures Affecting the Renewable Energy Generation Sector*, at paras. 102-150 (***Investor's Schedule of Legal Authorities at CL-003***); *Canada - Measures Relating to the Feed-in Tariff Program*, at para. 48-81 (***Investor's Schedule of Legal Authorities at CL-004***)

European Union, the Panel, in a split-decision, concluded that there was no subsidy.<sup>64</sup>

47. The WTO AB issued a Report on May 25, 2013. The AB concluded that there was a violation of the TRIMs Agreement<sup>65</sup> and the Complainant failed to establish that the challenged measures confer a 'benefit' within the meaning of the SCM Agreement Article 1.1(b) and there a subsidy did not exist. There was no challenge before the AB to the panel finding that Canada violated national treatment, so this panel finding continued.<sup>66</sup>

a) The AB's Minimum Domestic Content Findings:

- i) The AB concluded that Canada had violated the TRIMS Code because the program imposed minimum domestic content as a requirement for the program;<sup>67</sup> and
- ii) The AB rejected Canada's use of the procurement exception in Article III:8(a) of the GATT 1994, by finding that the laws and requirements that create and implement the FIT Program requiring minimum domestic content were not laws and requirements that govern the procurement of renewable electricity but laws related to the procurement of machinery by those seeking to apply to the program – and thus do not meet the requirements of the exception.<sup>68</sup>

b) The AB's National Treatment Findings:

- i) Canada did not challenge the Panel finding that the FIT Program violated the GATT Article III:4 national treatment obligation.<sup>69</sup> Canada was unsuccessful in its appeal of the Panel finding that the GATT Article III:8(a) procurement exception was applicable. Therefore, the finding that the FIT Program violates national treatment stands.<sup>70</sup>

c) The AB's Subsidy Findings:

- i) Over the objections of Japan and the European Union, the AB held that there was no subsidy in the FIT Program.<sup>71</sup> The AB was critical of the panel's choice of benchmark but it found insufficient factual findings from the Panel to be able to

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<sup>64</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.328 (*Investor's Schedule of Legal Authorities at CL-001*)

<sup>65</sup> *Canada - Renewable Energy* - AB Report, at para. 5.79 (*Investor's Schedule of Legal Authorities at CL-002*)

<sup>66</sup> *Canada - Renewable Energy* - AB Report, at para. 5.85 (*Investor's Schedule of Legal Authorities at CL-002*)

<sup>67</sup> *Canada - Renewable Energy* - AB Report, at para. 5.85 (*Investor's Schedule of Legal Authorities at CL-002*)

<sup>68</sup> *Canada - Renewable Energy* - AB Report, at para. 5.79 (*Investor's Schedule of Legal Authorities at CL-002*)

<sup>69</sup> *Canada - Renewable Energy* - AB Report, at para. 5.85 (*Investor's Schedule of Legal Authorities at CL-002*)

<sup>70</sup> *Canada - Renewable Energy* - AB Report, at para. 5.79 (*Investor's Schedule of Legal Authorities at CL-002*)

<sup>71</sup> *Canada - Renewable Energy* - AB Report, at para. 5.246 (*Investor's Schedule of Legal Authorities at CL-002*)

complete the analysis of whether a benefit under SCM Article 1(1)(b) was conferred.<sup>72</sup>

48. Canada has contended that the FIT program is not a subsidy since its inception. In a Minister's Office Briefing Note dated April 28, 2010, the Ministry of Energy stated that "the domestic content policy of the Feed-in Tariff Program... does not represent a subsidy because the FIT prices are paid for by the province's electricity customers."<sup>73</sup>
49. The NAFTA Tribunal in *Canfor v. United States* determined that expressions by a disputing party of a legal position on measures at issue in a NAFTA arbitration before another economic law fact finding tribunal, such as the WTO, were expressions of that government's position and that admissions against interest made in another process were relevant and admissible before the NAFTA Tribunal.<sup>74</sup>

#### D. The Ontario Power Authority

50. The Ontario Power Authority (OPA) is listed as an "agency" of the Government of Ontario on the Government's *All Agencies List*<sup>75</sup>, responsible for managing Ontario's electricity supply<sup>76</sup> and resources in order to meet its medium and long-term needs.<sup>77</sup>
51. The OPA was established under the *Electricity Restructuring Act, 2004*, which amended the *Electricity Act, 1998*, as "[a] corporation without share capital"<sup>78</sup>, and operates its

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<sup>72</sup> *Canada - Renewable Energy* - AB Report, at para. 5.219 (***Investor's Schedule of Legal Authorities at CL-002***)

<sup>73</sup> Ministry of Energy and Infrastructure "Meeting with Solar Consortium to Discuss Demand and Supply of Solar PV Modules" Slideshow, April 28, 2010 (***Investor's Schedule of Exhibits at C-0173***)

<sup>74</sup> *Canfor Corporation v. The United States of America*, Decision on Preliminary Question (June 6, 2006) ("*Canfor v. US*") (***Investor's Schedule of Legal Authorities at CL-005***)

<sup>75</sup> The Government of Ontario defines "agency" as "a provincial government organization: [i] which was established by the government, but is not part of a ministry; [ii] which is accountable to the government; [iii] to which the government appoints the majority of the appointees; and [iv] to which the government has assigned or delegated authority and responsibility, or which otherwise has statutory authority and responsibility to perform a public function or service." Public Appointments Secretariat, *All Agencies List* (***Investor's Schedule of Exhibits C-0419***); Public Appointments Secretariat, *General Information* (***Investor's Schedule of Exhibits at C-0420***)

<sup>76</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.37 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>77</sup> In *Canada - Renewable Energy* - Panel Report, at para. 7.37 (***Investor's Schedule of Legal Authorities at CL-001***), the WTO Panel found that the OPA "is an "agency" of the Government of Ontario." The Panel states that the OPA "falls within the "legislative responsibility" of the Government of Ontario's Ministry of Energy, and receives and executes directives from the Minister of Energy." Significantly, the WTO Report of the Appellate Body (*Canada – Certain Measures Affecting the Renewable Energy Generation Sector*) found, "while it is true that the OPA is the entity charged with paying FIT suppliers for delivered electricity and Hydro One is the entity transmitting electricity, both entities were found by the Panel to be "public bod[ies]" within the meaning of Article 1.1(a)(1) of the SCM Agreement," and thus, its actions are "attributable to the government," para. 5.124. The Appellate Body determined that "the Government of Ontario purchases electricity through the FIT Program and Contracts," *ibid.* Further, footnote 464 of the WTO Panel Report stated that "There is no dispute between the parties that the OPA and the IESO are "public bodies" for the purpose of the SCM Agreement."

<sup>78</sup> *Electricity Restructuring Act, 2004*, S.O. 2004, c. 23 - Bill 100, assented to December 9, 2004, s. 25.2(1). A search for cases citing s. 25.1 of the *Electricity Act, 1998* or the *Electricity Restructuring Act, 2004* did not produce any

- business and affairs on a not-for-profit basis<sup>79</sup>. It falls within the "legislative responsibility" of the Government of Ontario's Ministry of Energy<sup>80</sup>, and receives and executes directives and directions from the Ministry of Energy<sup>81</sup>.
52. The OPA has been given responsibility for exercising "all powers and performing all duties of the Crown", as stated in subsection 25.32(4) ("Transition") of the *Electricity Act*, 1998:
- (4) Despite subsection (2), the Minister may direct the OPA to assume, as of such date as the Minister considers appropriate, responsibility for exercising all powers and performing all duties of the Crown, including powers and duties to be exercised and performed through an agency of the Crown,
    - (a) under any request for proposals, draft request for proposals, another form of procurement solicitation issued by the Crown or through an agency of the Crown or any other initiative pursued by the Crown or through an agency of the Crown,
      - (i) that was issued or pursued after January 1, 2004 and before the Board's first approval of the OPA's procurement process under subsection 25.31 (4), and
      - (ii) that relates to the procurement of electricity supply or capacity or reductions in electricity demand or to measures for the management of electricity demand; and
    - (b) under any contract entered into by the Crown or an agency of the Crown pursuant to a procurement solicitation or other initiative referred to in clause (a).<sup>82</sup>
53. When assessing bids and granting contracts for electricity in Ontario the OPA is governed by the *Ontario Power Authority Procurement Process Regulations*.<sup>83</sup>
54. The OPA was also the subject of judicial review in *Skypower v. Minister of Energy and Ontario Power Authority*.<sup>84</sup>
55. The OPA is a publicly-funded entity established by the Minister of Energy. The OPA's budget is set by the Ministry of Energy as part of the annual provincial budget of the

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cases. A search for the term "legislative responsibility" produced 112 cases in Ontario. A review of the cases did not provide any meaningful discussion/definition of the term nor any analysis as to whether it implied the entity was a public body/agent of the Crown (***Investor's Schedule of Exhibits at C-0144***)

<sup>79</sup> *Electricity Restructuring Act, 2004*, S.O. 2004, c. 23 - Bill 100, assented to December 9, 2004, Section. 25.1(2) (***Investor's Schedule of Exhibits at C-0144***)

<sup>80</sup> Ontario Power Authority, Website, "Ontario's energy sector today", Undated (***Investor's Schedule of Exhibits at C-0250***)

<sup>81</sup> Ontario Power Authority, "Directives to OPA from Minister of Energy" August 16, 2013 (***Investor's Schedule of Exhibits at C-0245***)

<sup>82</sup> *Electricity Act*, 1998 subsection 25.32(2) states that "the OPA shall not enter into a procurement contract that does not comply with, (a) the regulations; or (b) a direction issued under subsection (4), (4.1), (4.2), (4.3), (4.4), (4.5), (4.6) or (4.7) or section 25.35." (***Investor's Schedule of Exhibits at C-0401***)

<sup>83</sup> *Electricity Act*, 1998: Ontario Power Authority Procurement Process, O. Reg 426/04 (***Investor's Schedule of Exhibits at C-0401***)

<sup>84</sup> *Skypower CL 1 LP et al. v. Minister of Energy (Ontario) et al.* 2012 ONSC 4979, Reasons for Judgment, September 10, 2012 (***Investor's Schedule of Exhibits at C-0006***)

- Ontario Ministry of Finance.<sup>85</sup> OPA employees are subject to the *Public Sector Salary Disclosure Act*.<sup>86</sup>
56. The Minister is responsible for appointing the board members of the OPA, who in turn appoint a CEO.<sup>87</sup> The OPA's board, made up of the CEO and ten other individuals, is responsible for managing and supervising the management of the OPA's business and affairs.<sup>88</sup>
57. OPA's employees are considered to be "public sector" employees in keeping with their inclusion in the Public Sector Salary Disclosure<sup>89</sup>, where "public sector", according to the *Public Sector Salary Disclosure Act, 1996*, means:
- the Crown in right of Ontario, every agency thereof, and every authority, board, commission, corporation, office or organization of persons a majority of whose directors, members or officers are appointed or chosen by or under the authority of the Lieutenant Governor in Council or a member of the Executive Council.<sup>90</sup>
58. There are numerous other ways in which the Minister of Energy is responsible for the management of the OPA and its exercise of governmental authority. While the OPA drafts its by-laws, they must be approved by the Minister.<sup>91</sup> The Minister also controls and directs the OPA through the approval of the OPA's yearly business plan, which must be submitted and approved by the Minister<sup>92</sup>.
59. The OPA is set up to act as an extension of the Ministry of Energy and its Minister, both of which are directly involved in technical and substantive aspects of the OPA. It is a primary means to execute and achieve their policy objectives, such as facilitating Ontario's power supply to include a larger reliance on renewable energy and administering the FIT Program. Ministerial directives and directions empower the OPA and grant it the requisite governmental authority to carry out its tasks.
60. The Minister's authority to issue directives and directions is rooted in the *Act* (as amended in 2004). Subsection 25.35 of the *Act* provides:

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<sup>85</sup> Ministry of Energy, The Estimates 2012-13, Ministry Program Summary, July 4, 2013, at p. 1 (*Investor's Schedule of Exhibits at C-0102*)

<sup>86</sup> Ministry of Finance, Disclosure for 2011 under the Public Sector Salary Disclosure Act, 1996, "Other Public Sector Employers", Undated, at pp. 45-47 (*Investor's Schedule of Exhibits at C-0249*)

<sup>87</sup> *Electricity Act*, 1998, Section 25.4(2) and 25.6(1) (*Investor's Schedule of Exhibits at C-0401*)

<sup>88</sup> *Electricity Act*, 1998, Section 25.4(1) (*Investor's Schedule of Exhibits at C-0401*)

<sup>89</sup> Ministry of Finance, Disclosure for 2011 under the Public Sector Salary Disclosure Act, 1996, "Other Public Sector Employers", Undated, at pp. 45-47 (*Investor's Schedule of Exhibits at C-0249*)

<sup>90</sup> Public Sector Salary Disclosure Act, 1996, S.O. 1996, Chapter 1, Schedule A, s.2(1) (*Investor's Schedule of Exhibits at C-0402*)

<sup>91</sup> *Electricity Act* 1998 s 25.16 (*Investor's Schedule of Exhibits at C-0401*)

<sup>92</sup> *Electricity Act*, 1998, s 25.22 (*Investor's Schedule of Exhibits at C-0401*)

1. The Minister may direct the OPA to develop a feed-in tariff program that is designed to procure energy from renewable energy sources under such circumstances and conditions, in consideration of such factors and within such period as the Minister may require.
2. Where the Minister has issued a direction under subsection (1), the Minister may issue, and the OPA shall follow in preparing its feed-in tariff program, directions that set out the goals to be achieved during the period to be covered by the program...

The power to issue directions enables the Minister of Energy to direct the OPA in various areas including "procurement solicitation" relating to the "procurement of electricity supply", administrative matters and the establishment and administration of the FIT Program.<sup>93</sup>

61. The OPA is not permitted to enter into procurement contracts that do not comply with the Regulations or with a direction from the Minister.<sup>94</sup>
62. Nothing about the FIT Program – not form or substance, was possible in the absence of governmental authority and governmental action that empowered the OPA to act. There is no definition of "directions" in the Act, and ministerial directions take many different forms, including verbal communications and emails.
63. Once the first direction creating the FIT Program was issued by the Minister, a series of subsequent directions further defined and implemented the Program, bestowing the requisite governmental authority in the OPA to carry out the Program.
64. The Minister's directions are publically available and accessible on the OPA's website.<sup>95</sup>
65. The OPA exercises "all powers and performing all duties of the Crown."<sup>96</sup> Ontario's Ministry of Energy has legislative responsibility over it,<sup>97</sup> and must give it directives and directions in order for it to fully function.<sup>98</sup>
66. The OPA is therefore, without doubt, an organ of the Government of Ontario in accordance with principles set out in Article 4 of the ILC Articles on State Responsibility.
67. From the very beginning, it was known that the OPA was created to be part of the structure of the Ontario government. During the debates of the *Electricity Restructuring Act, 2004* before the Standing committee on Social Policy, Ontario's Minister of Energy, Mr. Dwight Duncan, declared about the OPA, "*they'll be an arm of the government of*

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<sup>93</sup> *Electricity Act, 1998*, ss 25.32(4.1) (***Investor's Schedule of Exhibits at C-0401***)

<sup>94</sup> Limits on the OPA's powers regarding procurement contracts are set out in s. 25.32(2) of the *Electricity Act, 1998* (***Investor's Schedule of Exhibits at C-0401***)

<sup>95</sup> Ontario Power Authority, "Directives to OPA from Minister of Energy" August 16, 2013 (***Investor's Schedule of Exhibits at C-0245***)

<sup>96</sup> *Electricity Act, 1998*, ss. 25.32(4) ("Transition") (***Investor's Schedule of Exhibits at C-0401***)

<sup>97</sup> Ontario Power Authority, Website, "Ontario's energy sector today", Undated (***Investor's Schedule of Exhibits at C-0250***)

<sup>98</sup> Ontario Power Authority, "Directives to OPA from Minister of Energy" August 16, 2013 (***Investor's Schedule of Exhibits at C-0245***)



- Ontario*.<sup>99</sup> This status is confirmed by the OPA being listed as an "agency" of the Government of Ontario on the Government's *All Agencies List*.<sup>100</sup>
68. In his commentary on the ILC Articles, Professor James Crawford notes, "The reference to a "State organ" covers all the individual or collective entities which make up the organization of the State and act on its behalf."<sup>101</sup> Professor Crawford concludes, "The reference to a State organ in Article 4 is intended in the most general sense."<sup>102</sup>
69. Professor Crawford also explains that "It is not sufficient to refer to internal law for the status of State organs... A State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law."<sup>103</sup>
70. Canada admitted before the WTO that the Ontario Power Authority was a governmental agency, and acknowledged that the panel report confirms the admission:
- Canada points out that there is no dispute between the parties that the OPA is a governmental agency<sup>104</sup>.
71. The WTO Panel also expressly held, "*The OPA is an 'agency' of the Government of Ontario responsible for managing Ontario's electricity supply and resources in order to meet its medium and long-term needs*."<sup>105</sup>
72. Canada admitted that "*it does not dispute that in certain instances the OPA exercises governmental authority or acts directly upon the instructions of Ontario, such that its actions are attributable to Canada*."<sup>106</sup>
73. The Panel then observed that government "purchases [of] goods" require the involvement of the "government" or a "public body". In the Panel's view, this is what

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<sup>99</sup> Standing committee on social policy, Electricity Restructuring Act Official Report of Debates (Hansard), August 9, 2004, at p. SP-7 (*Investor's Schedule of Exhibits at C-0196*)

<sup>100</sup> The Government of Ontario defines "agency" as "a provincial government organization: [i] which was established by the government, but is not part of a ministry; [ii] which is accountable to the government; [iii] to which the government appoints the majority of the appointees; and [iv] to which the government has assigned or delegated authority and responsibility, or which otherwise has statutory authority and responsibility to perform a public function or service." Public Appointments Secretariat, All Agencies List (*Investor's Schedule of Exhibits at C-0419*); Public Appointments Secretariat, General Information (*Investor's Schedule of Exhibits at C-0420*)

<sup>101</sup> James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (New York: Cambridge University Press, 2002) ("Crawford (2002)") at 94 (*Investor's Schedule of Legal Authorities at CL-006*)

<sup>102</sup> Crawford (2002), at p. 95 (*Investor's Schedule of Legal Authorities at CL-006*)

<sup>103</sup> Crawford (2002), at p. 98 (*Investor's Schedule of Legal Authorities at CL-006*)

<sup>104</sup> *Canada - Measures Affecting the Renewable Energy Generation Sector*, at para. 70 (*Investor's Schedule of Legal Authorities at CL-003*)

<sup>105</sup> *Canada - Renewable Energy - Panel Report*, at para. 7.37 (*Investor's Schedule of Legal Authorities at CL-001*)

<sup>106</sup> *Canada's Request for Bifurcation*, at para. 10

- happens through the FIT Program and Contracts, where the combined actions of all three "public bodies" involved (i.e. the OPA, Hydro One Inc., and the IESO) show that the Government of Ontario purchases electricity within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.<sup>107</sup> The Panel was also clear that because the purchase was for commercial resale, the measures were not covered by Article III:8 of the GATT.<sup>108</sup>
74. The WTO Appellate Body upheld the finding of the WTO Panel<sup>109</sup> that the OPA was a public body,<sup>110</sup> and the Appellate Body maintained the Panel's characterization of the OPA as a public body.<sup>111</sup>
75. As the OPA was directed by the Minister of Energy with respect to the FIT Program, all of the actions taken by the OPA in this arbitration impute responsibility to Canada under ILC Article 8.
76. Article 8 provides:
- Conduct directed or controlled by a State
- The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.
77. To the extent that any actions are not covered by ILC Article 8, then there is state responsibility for Canada under ILC Article 4.
78. The actions of the OPA were directed by the Ontario Ministry of Energy. The Minister's directives were issued pursuant to his statutory authority.
79. Most of the operations involved in the FIT Program were taken by the OPA under the directives and direction of the Minister of Energy. In those circumstances, the actions of the OPA, acting under the direction of the Ministry, result in undeniable State Responsibility under Article 8 of the ILC Articles on State Responsibility.
80. To the extent that Canada is not responsible for the OPA under ILC Articles 8 and 4, Canada retains plenary responsibility to ensure adequate supervision and control of the OPA under Article 1503(2) of the NAFTA. In addition, the obligation of full protection and security, which is an integral part of NAFTA 1105, requires Canada to exercise due diligence that the treatment of the investor by the OPA does not undermine the protection of a stable, transparent, non-arbitrary regulatory framework.

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<sup>107</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.239 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>108</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.152 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>109</sup> *Canada - Renewable Energy* - Panel Report, at paras. 7.231-7.239 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>110</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.37 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>111</sup> *Canada - Renewable Energy* - AB Report, at paras. 5.124 and 5.128 (***Investor's Schedule of Legal Authorities at CL-002***)

81. In any case, as the facts will establish, the specific relevant conduct of the OPA was intertwined with and inseparable from the acts and omissions of government officials giving the OPA directions or otherwise influencing or guiding its conduct.

**E. The Independent Electricity System Operator**

82. Electrical power in Ontario is historically a "governmental" matter and, until 1998, electricity was administered by Ontario Hydro, a crown agency. Under the restructured Ontario power sector, entities within the sector continued to exercise governmental authority.

83. The Independent Electricity System Operator (IESO) is owned and controlled by the Province of Ontario.<sup>112</sup> The IESO was established under the *Electricity Act, 1998* to run day to day operation of the power supply in Ontario, and to forecast immediate consumption needs.<sup>113</sup> It is a crown corporate entity without share capital that is involved in all aspects of the system, including generation, transmission, and distribution. The IESO also establishes the Hourly Ontario Energy Prices, which is the hourly price set for the cost of electricity to Ontario consumers on a floating basis, influenced by supply and demand.<sup>114</sup> The IESO then collects payments and distributes them to electricity generators through the Ontario Power Authority.<sup>115</sup>

84. The IESO operates under a Board of Directors appointed by the Minister of Energy<sup>116</sup> and conducts its business and affairs on a not-for-profit basis<sup>117</sup>. It falls within the "legislative responsibility" of the Government of Ontario's Ministry of Energy<sup>118</sup>, and is required to submit a yearly business plan for approval to the Minister<sup>119</sup> as well as any other report requested by the Minister.<sup>120</sup>

85. The operation of Ontario's power supply, in particular the transmission system, is managed and operated entirely by the IESO as part of the Government of Ontario. Under Section 5 of the *Electricity Act, 1998* the IESO is authorized, among other things, to:

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<sup>112</sup> Ministry of Energy, The Estimates 2012-13, Ministry Program Summary, July 4, 2013, at p. 1 (*Investor's Schedule of Exhibits at C-0102*)

<sup>113</sup> Ministry of Energy, The Estimates 2012-13, Ministry Program Summary, July 4, 2013, at p. 1 (*Investor's Schedule of Exhibits at C-0102*)

<sup>114</sup> *Canada - Renewable Energy - Panel Report*, at p. 43 (*Investor's Schedule of Legal Authorities at CL-001*)

<sup>115</sup> *Canada - Renewable Energy - Panel Report*, at p. 49 (*Investor's Schedule of Legal Authorities at CL-001*)

<sup>116</sup> *Electricity Act, 1998*, s. 7(2)(b) (*Investor's Schedule of Exhibits at C-0401*)

<sup>117</sup> *Electricity Act, 1998*, Part II, s. 5(2) (*Investor's Schedule of Exhibits at C-0401*)

<sup>118</sup> Ontario Power Authority, Website, "Ontario's energy sector today", Undated (*Investor's Schedule of Exhibits at C-0250*)

<sup>119</sup> *Electricity Act, 1998*, s. 19.1(1) (*Investor's Schedule of Exhibits at C-0401*)

<sup>120</sup> *Electricity Act, 1998*, s. 22(1) (*Investor's Schedule of Exhibits at C-0401*)

- a) enter into agreements with transmitters giving the IESO authority to direct the operation of their transmission systems;
  - b) direct the operation and maintain the reliability of the IESO-controlled grid;
  - c) participate in the development by any standards authority of standards and criteria relating to the reliability of transmission systems.<sup>121</sup>
86. The IESO is listed as an "agency" of the Government of Ontario on the Government's *All Agencies List*.<sup>122</sup>
87. The WTO Panel considered the role of the IESO, and concluded that the IESO had two roles, including a financial role.<sup>123</sup> The Panel stated:
- This not only involves the IESO monitoring and directing the movement of electricity across the IESO-controlled grid, but also the settlement of payments between market participants. In this latter respect, the IESO explains its role as follows: "In the physical market, we collect funds from buyers and transfer funds to sellers. We do not actually take title to energy, and we are, by law, revenue neutral". The settlement process in the physical market comprises four steps: (i) gathering and processing metering data to produce settlement-ready data; (ii) using the settlement-ready data to determine revenue owed to suppliers, costs for consumers, and various overhead costs payable by market participants; (iii) invoicing participants; and (iv) transferring funds between energy purchasers and suppliers.<sup>124</sup>
88. The IESO meets the requirements of a state organ as it is an entity that "make[s] up the organization of the State and acts on its behalf" to ensure a working power supply system for the Province.<sup>125</sup>
89. ILC Article 4 provides that organs are those that exercise "legislative, executive, judicial, or any other functions."<sup>126</sup> The establishment, composition, purpose, and function of the IESO shows that, in the words of Professor Crawford, it is "a body which does in truth act as one of its organs".<sup>127</sup>

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<sup>121</sup> *Electricity Act*, 1998 section 5(1) (***Investor's Schedule of Exhibits at C-0401***)

<sup>122</sup> The Government of Ontario defines "agency" as "a provincial government organization: [i] which was established by the government, but is not part of a ministry; [ii] which is accountable to the government; [iii] to which the government appoints the majority of the appointees; and [iv] to which the government has assigned or delegated authority and responsibility, or which otherwise has statutory authority and responsibility to perform a public function or service." Public Appointments Secretariat, *All Agencies List (Investor's Schedule of Exhibits at C-0419)*; Public Appointments Secretariat, *General Information (Investor's Schedule of Exhibits at C-0420)*

<sup>123</sup> IESO: Settlement Statements and Invoices (***Investor's Schedule of Exhibits at C-0415***)

<sup>124</sup> *Canada - Renewable Energy - Panel Report*, at para. 7.40 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>125</sup> Crawford (2002), at p. 94 (***Investor's Schedule of Legal Authorities at CL-006***) In addition to looking at how organs are official classified, Professor Crawford in the Commentary to the ILC Articles, states one must also undertake a qualitative analysis as "[t]he reference to a State organ in Article 4 is intended in the most general sense." p. 95

<sup>126</sup> *International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 ("*ILC Articles with Commentaries*"), at p. 40 (***Investor's Schedule of Legal Authorities at CL-08***)

<sup>127</sup> Crawford (2002), at p. 98 (***Investor's Schedule of Legal Authorities at CL-006***)

90. In the alternative that the IESO is not considered to be an organ of the state under Article 4 of the *ILC Articles on State Responsibility*, the IESO exercises delegated governmental authority, making it an agency of the state under ILC Article 5.<sup>128</sup> Article 5 of the ILC Articles provides that the conduct of a state entity is attributable to the state if it is empowered by the law of the state to exercise elements of governmental authority. The conduct of a state entity may also be attributable to the state where the functions it exercises are of a public character akin to that of a state organ. The acts of such an entity are attributable to the state even if the entity operates with independent discretion, and its conduct was not under the control of the state.<sup>129</sup>
91. Examples of the governmental authority that the IESO is empowered by to:
- a) activities that have historically always been conducted by Crown Agencies, including: acting as the Reliability Co-ordinator for the province,
  - b) operating the wholesale electricity market,
  - c) managing the settlements and financial operations of the \$10 billion wholesale market and oversee emergency preparedness activities for Ontario's power system.
92. As the IESO is a state enterprise pursuant to the definition in Annex 1505, Canada also retains plenary responsibility to supervise and ensure the compliance of the IESO with the obligations of NAFTA Chapter Eleven pursuant to NAFTA Article 1503(2). In addition, the obligation of full protection and security, which is an integral part of NAFTA 1105, requires Canada to exercise due diligence that the treatment of the investor by the IESO does not undermine the protection of a stable, transparent, non-arbitrary regulatory framework.

#### **F. Hydro One**

93. Hydro One is wholly owned and controlled by the Government of Ontario,<sup>130</sup> and is responsible for operating transmission and distributions systems throughout Ontario. It was established under the *Energy Competition Act*, 1998 to "operate generation facilities and distribution systems in, and shall distribute electricity within, such communities as may be prescribed by regulation."<sup>131</sup> The largest of its subsidiaries, Hydro One Networks, operates 97% of the high voltage transmission grid throughout

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<sup>128</sup> *ILC Articles with Commentaries*, Article 5 (*Investor's Schedule of Legal Authorities at CL-08*)

<sup>129</sup> *ILC Articles with Commentaries*, at p. 43, at para. (7) (*Investor's Schedule of Legal Authorities at CL-08*)

<sup>130</sup> HydroOne Website Page, Shareholder Directives (*Investor's Schedule of Exhibits at C-0418*); 2011 Annual Report of the Auditor General, at p. 34 (*Investor's Schedule of Exhibits at C-0228*)

<sup>131</sup> *Electricity Act*, 1998 s. 48.1(1) (*Investor's Schedule of Exhibits at C-0401*)

- Ontario, serving approximately 1.3 million customers in rural areas across the Province.<sup>132</sup>
94. Hydro One is a critical part of Ontario's network of energy agencies and acts on behalf of the Province. It falls within the "legislative responsibility" of the Government of Ontario's Ministry of Energy<sup>133</sup>, and receives and executes directions from the Ministry of Energy<sup>134</sup>.
95. Hydro One exercises the powers of the Province to operate generation facilities and distributions systems in accordance with conditions and restrictions prescribed by regulation. As the sole shareholder of Hydro One, the Ministry of Energy retains the power to acquire, hold, dispose of and otherwise deal with the securities, debt obligations, or any other interest of Hydro One or any of its subsidiaries.<sup>135</sup>
96. In its operation of generation facilities and distributions systems, and its distribution of electricity within communities, Hydro One carries out "legislative, executive, judicial, or any other functions" as required by the text of ILC Article 4.
97. Hydro One also works with other public bodies in the energy sector, such as the IESO and the OPA, in relation to transmission capacity, demand management and conservation.
98. Hydro One's operating budget is part of the Ministry of Energy's yearly reports and is listed as an "agency" of the Government of Ontario on the Government's *All Agencies List*.<sup>136</sup>
99. Hydro One also qualifies as an agency under ILC Article 5.
100. Hydro One exercises governmental authority previously exercised by the Crown Agency, Ontario Hydro and continues to exercise control and authority over the Ontario power sector.

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<sup>132</sup> HydroOne Website Page, Our Subsidiaries (*Investor's Schedule of Exhibits at C-0417*)

<sup>133</sup> Ontario Power Authority, Website, "Ontario's energy sector today", Undated (*Investor's Schedule of Exhibits at C-0250*)

<sup>134</sup> Ontario Power Authority, "Directives to OPA from Minister of Energy" August 16, 2013 (*Investor's Schedule of Exhibits at C-0245*)

<sup>135</sup> *Electricity Act*, 1998, s 49(1) (*Investor's Schedule of Exhibits at C-0401*)

<sup>136</sup> Ministry of Energy and Infrastructure. "Results-based Plan Briefing Book 2010-2011." pp. 33-34 (*Investor's Schedule of Exhibits at C-0403*); the Government of Ontario defines "agency" as "a provincial government organization: [i] which was established by the government, but is not part of a ministry; [ii] which is accountable to the government; [iii] to which the government appoints the majority of the appointees; and [iv] to which the government has assigned or delegated authority and responsibility, or which otherwise has statutory authority and responsibility to perform a public function or service." Public Appointments Secretariat, All Agencies List (*Investor's Schedule of Exhibits at C-0419*); Public Appointments Secretariat, General Information (*Investor's Schedule of Exhibits at C-0420*)

101. Hydro One is a state enterprise pursuant to the definition in Annex 1505. Canada also has responsibility to supervise and ensure the compliance of Hydro One with the obligations of NAFTA Chapter Eleven pursuant to NAFTA Article 1503(2). In addition, the obligation of full protection and security, which is an integral part of NAFTA 1105, requires Canada to exercise due diligence that the treatment of the investor by the Hydro One does not undermine the protection of a stable, transparent, non-arbitrary regulatory framework.

## II. CHRONOLOGY OF EVENTS

Date	Steps
May 14, 2009	The Ontario Government enacts the <i>Green Energy and Green Economy Act, 2009</i> enabling the Minister of Energy to establish a feed-in tariff program ("FIT") for renewable energy.
September 24, 2009	Minister of Energy issues a direction to the Ontario Power Authority ("OPA") to establish the FIT Program and initial FIT Rules released by the OPA
November 25, 2009	Two of Mesa's projects, Arran Wind Energy and Twenty Two Degrees Wind Energy, submit FIT Applications
January 21, 2010	<i>Green Energy Investment Agreement</i> between Samsung, KEPCO (together the "Korean Consortium") and the Government of Ontario is signed. Agreement gives the Korean Consortium preferential treatment and access to Power Purchase Agreements for renewable energy.
April 1, 2010	Minister of Energy issues direction to the OPA to begin negotiating Power Purchase Agreements with the Korean Consortium and to give priority to these projects over FIT Program projects when assessing transmission availability.
May 29, 2010	Four additional Mesa projects, Summerhill Wind Energy I and II and North Bruce Energy I and II, submit FIT Applications
December 21, 2010	FIT Priority Ranking List released. Arran and Twenty Two Degrees Wind Projects ranked 8 <sup>th</sup> and 9 <sup>th</sup> in the Bruce Transmission Area.
June 2010 - May 2011	Meetings held between NextEra, the Ontario Government and a number of energy sector state entities including the OPA to discuss NextEra's projects and the possibility of changing connection points.
June 3, 2011	Minister of Energy direction for a connection point amendment window in FIT Rules version 1.5 released.
June 6-10, 2011	Connection Point Amendment window opened, allowing FIT applicants to change their connection points while maintaining their provincial ranking. As a result, projects in the Bruce Region are bumped out of contention for FIT contracts.
July 4, 2011	OPA announces FIT contracts for the Bruce Region. None of Mesa's projects are offered contracts.
July 29, 2011	Minister of Energy issues a direction to the OPA to enter into a Power Purchase Agreement with the Korean Consortium or its Project Companies
July 29, 2011	The Korean Consortium and Government of Ontario amend the <i>GEIA</i> so as to allow for a one year extension of their commercial operation date so as to match the requirements of the FIT Program and to allow for more flexibility and time to obtain necessary approvals in advance of construction.
August 3, 2011	OPA signs six Power Purchase Agreements with the Korean Consortium. The terms of the PPAs are comparable to those of the FIT contracts with a special bonus price, the "Economic Development Adder" specified in the <i>GEIA</i> (0.27 cents per kWh for wind)
August 10, 2012	FIT version 2.0 rules released. Ranking system is changed to include new factors.
June 12, 2013	The Minister of Energy issues a direction cancelling the FIT Program for projects over 500 kw. All of Mesa's projects were over 500 kw.



### III. BREACH OF OBLIGATIONS

102. This arbitration involves measures taken by the Government of Ontario and its instrumentalities, and includes measures taken by its officials and agents, and by measures taken by its public agencies, including the OPA, the IESO and Hydro One.
103. The measures relating to the FIT Program includes, but is not limited to:
- a) the *Electricity Act, 1998*, as amended, including in particular Part II.1 (Ontario Power Authority), and Part II.2, (Management of Electricity Supply, Capacity and Demand) thereof, including, in particular, Section 25.35 (Feed-in tariff Program);<sup>137</sup>
  - b) the *Green Energy Act, 2009*, as enacted on May 14, 2009;<sup>138</sup>
  - c) the *Electricity Restructuring Act, 2004*, including in particular Section A, Section 28, enacting Part II.1 of the *Electricity Act, 1998*;<sup>139</sup>
  - d) FIT Direction dated September 24, 2009, from George Smitherman, Deputy Premier and Minister of Energy and Infrastructure, to Colin Anderson, Chief Executive Officer, Ontario Power Authority, directing OPA to develop a FIT Program and to include a requirement that the applicant submit a plan for meeting the domestic content goals in the FIT Rules (Ministerial Direction (September));<sup>140</sup>
  - e) FIT Direction dated April 1, 2011 from the Minister of Energy to Colin Anderson, Chief Executive Officer, Ontario Power Authority, (Ministerial Direction (April 2011));<sup>141</sup>
  - f) FIT Direction dated June 3, 2011 from the Minister of Energy to Colin Anderson, Chief Executive Officer, Ontario Power Authority, (Ministerial Direction (June 2011));<sup>142</sup>
  - g) FIT Direction dated August 2, 2011 from the Ontario Minister of Energy to Colin Anderson, Chief Executive Officer, Ontario Power Authority, (Ministerial Direction (August 2, 2011));<sup>143</sup>

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<sup>137</sup> *Electricity Act, 1998*, S.O. 1998, c.15 Schedule A, last amended 2010, c.8 (***Investor's Schedule of Exhibits at C-0401***)

<sup>138</sup> *Green Energy Act*, S.C. 2009 c.12, Schedule. A (***Investor's Schedule of Exhibits at C-0003***)

<sup>139</sup> *Electricity Restructuring Act, 2004*, S.O. 2004, c. 23 - Bill 100, assented to December 9, 2004, Section 25.1(1) (***Investor's Schedule of Exhibits at C-0144***)

<sup>140</sup> Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), September 24, 2009 (***Investor's Schedule of Exhibits at C-0264***)

<sup>141</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, April 1, 2010 (***Investor's Schedule of Exhibits at C-0079***)

<sup>142</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA June 3, 2011 (***Investor's Schedule of Exhibits at C-0046***)

- h) FIT Rules, Version 1.5 issued on June, 3 2011 and amended on July 15, 2011 by the OPA;<sup>144</sup>
- i) FIT Contract, Version 1.5 (June 3, 2011), including General Terms and Conditions, Exhibits, and Standard Definitions, issued by the OPA;<sup>145</sup>
- j) FIT Application Form (December 1, 2009);<sup>146</sup>
- k) FIT Price Schedule (August 13, 2010), issued by the OPA;<sup>147</sup>
- l) Public Press Release from Minister of Energy, the Honourable Brad Duguid, August 3, 2011;<sup>148</sup>
- m) FIT Program Interpretations of the Domestic Content Requirements, issued by the OPA; and<sup>149</sup>
- n) all amendments or extensions of the foregoing, replacement measures, renewal measures, implementing measures, and related measures.

Each of these governmental measures was taken by the Government of Ontario or by its agents, agencies or instrumentalities.

104. The rejection of the Investor's four wind power projects was a further step in a continuing course of arbitrariness, discrimination, and unfairness that began in November 25, 2009. These measures constituted a failure to provide fair and equitable treatment to Mesa's Investment. Canada has thereby violated its Article 1105 obligation through the Government of Ontario's unfair, arbitrary and discriminatory actions. These measures include, but are not limited to:

- a) Unannounced last-minute changes, contrary to the reasonable and legitimate expectations of the Investment;
- b) Failure to provide reasons for the ranking methodology applied by the OPA;
- c) Undue political interference and discriminatory treatment of the Investment and blatant favoritism to other investments;
- d) Failure to provide transparent administration of the FIT Program;

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<sup>143</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Anderson (OPA), Direction to the OPA, August 2, 2012 (*Investor's Schedule of Exhibits at C-0084*)

<sup>144</sup> FIT Rules Version 1.5.1, July 15, 2011 (*Investor's Schedule of Exhibits at C-0237*);

<sup>145</sup> FIT Contract version 1.5, at Exhibit D (*Investor's Schedule of Exhibits at C-0263*)

<sup>146</sup> For example, see Online OPA FIT Application, Arran Wind Energy, Undated (*Investor's Schedule of Exhibits at C-0188*)

<sup>147</sup> FIT Price Schedule, August 13, 2010 (*Investor's Schedule of Exhibits at C-0045*)

<sup>148</sup> Ontario Ministry of Energy Article "Statement from Ontario Minister of Energy Brad Duguid," dated August 3, 2011 (*Investor's Schedule of Exhibits at C-0022*)

<sup>149</sup> FIT Contract version 1.5, at Exhibit D (*Investor's Schedule of Exhibits at C-0263*)

- e) Imposition of irrelevant political considerations when assessing the Investment; and
- f) Failure to apply relevant considerations such as the technical merits of the Investor's wind farm.

Each of the ways in which the Government treated the Investment in an unfair, arbitrary and discriminatory way constitutes a violation of NAFTA Article 1105.

- 105. NAFTA Article 1106 requires Canada to not impose domestic minimum content requirements on an investor. Canada violated this obligation through the imposition of minimum domestic content requirements in the FIT Program. This violation began on November 25, 2009.
- 106. NAFTA Article 1102 requires Canada to provide treatment equivalent to the most favourable treatment given to a local investment in Canada in like circumstances. Canada violated its national treatment obligation by providing more favourable treatment to local companies who were in like circumstances with Mesa, such as Pattern Canada and Boulevard Canada. These violations began on November 25, 2009.
- 107. NAFTA Article 1103 requires Canada to provide treatment equivalent to the most favourable treatment given to an investor or investment from another NAFTA Party or non-NAFTA Party in like circumstances. This breach began on November 25, 2009.
- 108. Canada violated its Most Favoured Nation obligation by providing more favourable treatment to renewable energy power purchase competitors, such as Samsung, Pattern Energy and NextEra, all of whom who were in like circumstances with Mesa.
- 109. NAFTA Article 1104 entitles the Investor to better treatment as required by NAFTA Articles 1102 and 1103.
- 110. The OPA also acted on the direction of, and as agent for, the Province of Ontario. In these circumstances, Canada is responsible directly for the measures and conduct of the OPA under Article 4 and 8 of the ILC *Articles of State Responsibility*.
- 111. Canada did not comply with its obligations under NAFTA Article 1503(2), by failing to ensure through regulatory control, administrative supervision, or the application of other measures, that the OPA, the IESO and Hydro One acted in a manner consistent with Canada's obligations under NAFTA Chapter Eleven, in their exercise of regulatory, administrative and governmental authority.

#### IV. INTERPRETATION OF THE NAFTA

##### A. Relevant Provisions of NAFTA

112. NAFTA Article 102(2) sets out the manner in which the NAFTA is to be interpreted and applied:

2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

Coupled with the objectives of the NAFTA, set out in Article 102, the preamble is an integral part of the NAFTA.

113. NAFTA Article 1131(1) confirms that Tribunals constituted under Section B of Chapter 11 of NAFTA "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

114. In the *Canadian Marketing Practices* case, the NAFTA Chapter Twenty Panel addressed the principles to be applied in the interpretation of the NAFTA:

The Panel also attaches importance to the trade liberalization background against which the agreements under consideration must be interpreted. Moreover, as a free trade agreement, the NAFTA has the specific objective of eliminating barriers to trade among the three contracting Parties. The principles and rules through which the objectives of the NAFTA are elaborated are identified in NAFTA Article 102(1) as including national treatment, most-favored nation treatment and transparency. Any interpretation adopted by the Panel must, therefore, promote rather than inhibit the NAFTA's objectives.<sup>150</sup>

115. The *Vienna Convention on the Law of Treaties* sets out the applicable rules of international law for the interpretation of treaties.<sup>151</sup> Canada's *Statement of Implementation* provides that NAFTA Article 102(2) affirms "a basic provision of customary international law regarding the interpretation of international agreements as set out in the *Vienna Convention on the Law of Treaties*."<sup>152</sup>

116. In the *Ethyl* case, the NAFTA Tribunal noted that "Canada is a party to the *Vienna Convention*" and that "the United States accepts it as a correct statement of customary international law."<sup>153</sup> The Tribunal concluded that "given that 84 States are parties to the

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<sup>150</sup> *In the Matter of Tariffs Applied by Canada to Certain U.S. – Origin Agricultural Products*, Final Report of the Panel, Secretariat File No. CDA-95-2008-01, (December 2, 1996) ("*Origin Agricultural Products* - Panel Report"), at para. 122 (***Investor's Schedule of Legal Authorities at CL-010***)

<sup>151</sup> *Vienna Convention on the Law of Treaties* (1969) (***Investor's Schedule of Legal Authorities at CL-011***)

<sup>152</sup> *Canadian Statement on Implementation*, North American Free Trade Agreement, Canada Gazette Part 1, January 1, 1994 ("*Canadian Statement on Implementation*"), at p. 76 (***Investor's Schedule of Legal Authorities at CL-012***)

<sup>153</sup> *Ethyl Corp. v. Canada*, Jurisdiction Award, 1998 WL 34334636 (June 24, 1998) ("*Ethyl Corp* - Jurisdiction Award"), at para. 52 (***Investor's Schedule of Legal Authorities at CL-013***) reprinted in *The Islamic Republic of Iran v The United States of America*, Doc No. 32-A18-FT (6 Apr. 1984), 5 Iran-U.S. Cl. Trib. Rep. 251, 259 (1984)

*Vienna Convention* (as of 15 April 1998), and that Articles 31 and 32 'were adopted without a dissenting vote', [the Articles of the *Vienna Convention*] clearly 'may be considered as declaratory of existing law'.<sup>154</sup>

117. The objectives of the NAFTA, which are also critical to its proper interpretation are set out in Article 102(1):

**Article 102: Objectives**

The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:

- a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
- b) promote conditions of fair competition in the free trade area;
- c) increase substantially investment opportunities in the territories of the Parties;
- d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
- e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
- f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement. [emphasis added]

**B. Interpretation in Accordance with the Vienna Convention on the Law of Treaties**

118. Article 31 of the *Vienna Convention* reflects customary international law, when interpreting treaties, including the NAFTA.<sup>155</sup> The International Court of Justice has held that customary international law finds expression in Article 31 of the *Vienna Convention*.<sup>156</sup>

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("Iran-US (1984)") (***Investor's Schedule of Legal Authorities at CL-014***), where U.S. courts look to the Convention when interpreting the text of a treaty, see, e.g. *Kreimerman v. Casa Veerkamp*, A.S. de C.V. 22 F.3d 634, 638 (5th Cir. 1994), cert. den'd, 115 S.Ct. 577 (1994) ("*Kreimerman*") (***Investor's Schedule of Legal Authorities at CL-014***); *Day v. Trans World Airlines, Inc.* 528 F.2d 31, 33 (2d Cir. 1975), cert. den'd, 429 U.S. 890 (1976) ("*Day*") (***Investor's Schedule of Legal Authorities at CL-014***)

<sup>154</sup> "Legal rules concerning the interpretation of treaties constitute one of the Sections of the Vienna Convention which were adopted without a dissenting vote at the Conference and consequently may be considered as declaratory of existing law". *Ethyl Corp - Jurisdiction Award*, at para. 52 (***Investor's Schedule of Legal Authorities at CL-013***) (citing Aréchaga, E. Jiménez de, "International Law in the Past Third of a Century", in *Collected Courses of The Hague Academy of International Law*, vol. 159 (The Netherlands: Suthoff & Noordhoff, 1978), at p. 9 (Chapter 1) ("Jiménez (1978)") (***Investor's Schedule of Legal Authorities at CL-017***))

<sup>155</sup> *Vienna Convention on the Law of Treaties* (1969) (***Investor's Schedule of Legal Authorities at CL-011***); see A.D. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1986) ("McNair (1986)", at p. 465 (***Investor's Schedule of Legal Authorities at CL-018***))

<sup>156</sup> See *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994 ("*Territorial Dispute*"), at para. 41 (***Investor's Schedule of Legal Authorities at CL-019***); see *Oil Platforms (Islamic Republic of Iran v.*

119. Article 31 provides:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.<sup>157</sup>

120. The Tribunal in *Siemens v Argentina* held:

Both parties have based their arguments on the interpretation of the Treaty in accordance with Article 31(1) of the *Vienna Convention*. This Article provides that a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The Tribunal will adhere to these rules of interpretation in considering the disputes provisions of the treaty.<sup>158</sup>

121. The *Methanex* Tribunal held that Article 31(1) of the *Vienna Convention* is comprised of three principles:

- a) The first general principle, good faith;
- b) The second general principle, interpretation in accordance with the ordinary meaning of a term; and
- c) The third general principle, the term is not to be examined in isolation or *in abstracto*, but in the context of the treaty and in the light of its object and purpose.<sup>159</sup>

122. In addition to context, a tribunal may also consider the application of Articles 31(3) and 32 of the *Vienna Convention*:

Article 31(3): There shall also be taken into account, together with the context:

- i) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- ii) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

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*United States of America*), Preliminary Objection, Judgment, I.C.J. Reports 1996,803 ("*Oil Platforms* - Preliminary Objection"), at para. 23 (***Investor's Schedule of Legal Authorities at CL-020***)

<sup>157</sup> *Vienna Convention on the Law of Treaties* (1969) (***Investor's Schedule of Legal Authorities at CL-011***)

<sup>158</sup> *Siemens A.G. v. Argentine Republic*, Decision on Jurisdiction, 2004 WL 3249805 (August 3, 2004) ("*Siemens* - Decision on Jurisdiction"), at para. 80 (***Investor's Schedule of Legal Authorities at CL-021***)

<sup>159</sup> *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 2005 WL 1950817 (August 3, 2005) ("*Methanex* - Award on Jurisdiction"), Part II, Ch. B, at para. 16 (***Investor's Schedule of Legal Authorities at CL-022***)

iii) any relevant rules of international law applicable in the relations between the parties.

Article 32: Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- a) leaves the meaning ambiguous or obscure; or
- b) leads to a result which is manifestly absurd or unreasonable.<sup>160</sup>

123. The ordinary meaning of the term "context" is set out in Black's Law Dictionary: "The context of a particular sentence or clause in a statute, contract, will, etc., comprises those parts of the text which immediately precede and follow it."<sup>161</sup>

124. Article 31(2) of the *Vienna Convention* also indicates that the "context" for treaty interpretation includes its preamble and annexes, as well as (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; and (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.<sup>162</sup>

125. When States adopt a treaty that encompasses areas previously covered by customary law, "it is well understood that, in practice, rules of [general] international law can, by agreement, be derogated from in particular cases or as between particular parties".<sup>163</sup> However, this does not imply an extinction of prior customary law, or the rules regarding treaty interpretation.<sup>164</sup> In this regard, the International Law Commission (ILC) noted:

... Nor does the fact that agreements often set aside prior customary law translate into any automatic presumption in favor of later law. In fact it would be wrong to assume that there is a stark opposition between custom and treaty. On the one hand, treaties may be a part of the process of the creation of customary law. On the other hand, customary behavior undoubtedly affects the interpretation and application of treaties and may, in some cases, modify treaty law.

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<sup>160</sup> *Vienna Convention on the Law of Treaties* (1969), arts. 31(3), 32 (***Investor's Schedule of Legal Authorities at CL-011***)

<sup>161</sup> *Black's Law Dictionary, 5th Edition* (St Paul: West Publishing Co, 1979) at 290 ("*Blacks* (1979)"), at p. 290 (***Investor's Schedule of Legal Authorities at CL-023***)

<sup>162</sup> *Vienna Convention on the Law of Treaties* (1969), art. 31.2 (***Investor's Schedule of Legal Authorities at CL-011***)

<sup>163</sup> *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* I.C.J. Reports 1969, 3 ("*Continental Shelf Cases* (1969)"), at para. 72 (***Investor's Schedule of Legal Authorities at CL-024***) See also *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Merits) I.C.J. Reports 1982, 18 ("*Continental Shelf Case* (1982)"), at para. 24 (***Investor's Schedule of Legal Authorities at CL-025***)

<sup>164</sup> "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" Report of the Study Group of the International Law Commission, finalized by Martii Koskeniemi, Fifty-eighth session, Geneva, 13 April 2006, A/CN.4/L.682 ("*Fragmentation of International Law*"), at para. 224 (***Investor's Schedule of Legal Authorities at CL-026***) (citing, see especially Hugh Thirlway, *International Customary Law and Codification* (Leiden: Sijthoff, 1972), at pp. 95-108).

Because, as explained above, there is no general hierarchy of sources in international law, the relationship between a particular treaty and a particular customary norm will always remain to be decided on a case-by-case basis.<sup>165</sup>

126. The ILC also noted that the potential to "modify treaty law" "is presumed in a minimal way by Article 31(3)(b) [of the *Vienna Convention*] that obliges the interpreter to have regard to the subsequent practice of treaty parties."<sup>166</sup> Another case is that of inter-temporal law, where "subsequent custom affects the interpretation of the open-ended or "mobile" terms of the treaty."<sup>167</sup>

### C. The Expansion of International Law

127. As the context of the Treaty develops, the NAFTA must continue to be interpreted according to the rules set out in the *Vienna Convention*, such as the following:

- a) Interpretation in Good Faith in Accordance with Ordinary Meaning;
- b) Context; and
- c) Object and Purpose.

Collectively, this analytic framework provides a common sense approach to the application of NAFTA provisions.

#### i. *The NAFTA Free Trade Commission Interpretation*

128. The FTC has issued several statements concerning the interpretation of some Chapter 11 provisions, including, Notes of Interpretation of Certain Chapter 11 Provisions (the FTC Note), and Statements of the NAFTA Free Trade Commission on the Operation of Chapter 11.<sup>168</sup> The FTC Note was adopted to "clarify and affirm the meaning of certain Chapter 11 provisions,"<sup>169</sup> whereas the Statements were adopted to "enhance the transparency and efficiency of Chapter 11 and *provide guidance* to investors and to Tribunals constituted under Section B of the Chapter."<sup>170</sup>

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<sup>165</sup> Fragmentation of International Law, at para. 224 (*Investor's Schedule of Legal Authorities at CL-026*)

<sup>166</sup> Fragmentation of International Law, at para. 224, note 288 (*Investor's Schedule of Legal Authorities at CL-026*)

<sup>167</sup> Fragmentation of International Law, at para. 224, note 288 (*Investor's Schedule of Legal Authorities at CL-026*)

<sup>168</sup> "Notes of Interpretation of Certain Chapter 11 Provisions" (NAFTA Free Trade Commission, 31 July 2001), in Appleton, B. *NAFTA: Legal Text and Interpretative Materials* (West Publishing, 2007) Vol 3, 1-3 ("Appleton IV (2007)") (*Investor's Schedule of Legal Authorities at CL-189*); Statements of the NAFTA Free Trade Commission on the Operation of Chapter 11, October 7, 2003 ("Statements of the NAFTA Free Trade Commission") (*Investor's Schedule of Legal Authorities at CL-028*)

<sup>169</sup> Appleton IV (2007), at p. 1 (*Investor's Schedule of Legal Authorities at CL-189*)

<sup>170</sup> Statements of the NAFTA Free Trade Commission (*Investor's Schedule of Legal Authorities at CL-028*)



129. Professor Salacuse has noted that the distinction between these objectives "is especially important in the light of Article 31(3)(a) of the *Vienna Convention*".<sup>171</sup>
130. To provide a single method for interpretation of the terms "fair and equitable treatment" and "full protection and security" as contained in Article 1105(1), the FTC Note provided:
- Minimum Standard of Treatment in Accordance with International Law
1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
  2. 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 the customary international law minimum standard of treatment of aliens.
  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).<sup>172</sup>
131. In its Jurisdictional Award, the NAFTA Tribunal in the *UPS* case recognized that "in any event the FTC's interpretation is binding on Chapter 11 Tribunals including this one."<sup>173</sup>
132. Based on NAFTA Article 1131(1), the FTC Note must be applied "in accordance with... applicable rules of international law."
133. Canada's *Statement on Implementation* provides that Canada always intended that the *Vienna Convention* apply to all "Notes" to the NAFTA.<sup>174</sup> Article 31(3) of the *Vienna Convention* requires that treaty interpreters shall *take into account, together with the context of the treaty*, all subsequent agreements, subsequent practice, relevant rules of international law applicable as between the NAFTA State parties regarding the interpretation and application of the NAFTA. Thus, when interpreting the FTC Note, NAFTA Tribunals are bound to take into account, *together with the context of the treaty*,

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<sup>171</sup> Salacuse, J.W., *The Law of Investment Treaties* (New York: Oxford University Press, 2010); Excerpts ("Salacuse (2010)"), at p. 149 (***Investor's Schedule of Legal Authorities at CL-029***) (Salacuse noted that in comparison, while the FTC Note was debated as "an amendment" or "a subsequent agreement", the Statements of the NAFTA Free Trade Commission on the operation of Chapter 11 represent "mere 'recommendations' and thus lack binding character").

<sup>172</sup> Appleton IV (2007), at p. 2 (***Investor's Schedule of Legal Authorities at CL-189***)

<sup>173</sup> *United Parcel Service v. Canada*, Award on Jurisdiction, 2002 WL 32824213 (November 22, 2002) ("U.P.S. - Jurisdiction"), at para. 96 (***Investor's Schedule of Legal Authorities at CL-030***)

<sup>174</sup> *Canadian Statement on Implementation*, at p. 76 (***Investor's Schedule of Legal Authorities at CL-012***) ("Paragraph 2 of article 102 affirms a basic provision of customary international law regarding the interpretation of international agreements as set out in the Vienna Convention on the Law of Treaties. The Parties shall interpret and apply the provisions of the Agreement in the light of its objectives and in accordance with applicable rules of international law. For example, the "Notes" to the Agreement that follow the main body of the text set out agreed interpretations on various provisions of the Agreement, and thus are essential to an accurate understanding of the text.")

all NAFTA provisions in the light of the NAFTA's objectives, and in accordance with applicable rules of international law.

134. Article 1 of the *ILC Articles on State Responsibility* confirms that a failure to accord the international law standard of treatment is a breach of international law. Article I states:

Every internationally wrongful act of a State entails the international responsibility of that State.<sup>175</sup>

Article 12 of the ILC Articles on State Responsibility states:

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.<sup>176</sup>

135. In the *Pope & Talbot* claim, the Tribunal held:

Canada considers that the principles of customary international law were frozen in amber at the time of the *Neer* decision. It was on this basis that it urged the Tribunal to award damages only if its conduct was found to be an "egregious" act or failure to meet internationally required standards. The Tribunal rejects this static conception of customary international law for the following reasons: First, as admitted by one of the NAFTA Parties, and even by counsel for Canada, there has been evolution in customary international law concepts since the 1920's...Secondly, since the 1920's, the range of actions subject to international concern has broadened beyond the international delinquencies considered in *Neer* to include the concept of fair and equitable treatment....<sup>177</sup>

136. The *Mondev* Tribunal followed a similar approach. The Tribunal rejected the application of the *Neer* standard to investment protection cases because *Neer* did not deal with foreign investment but rather a state's duty to investigate crimes:

The Tribunal would observe, however, that the *Neer* case, and other similar cases that were cited, concerned not the treatment of foreign investment as such but the physical security of the alien. Moreover the specific issue in *Neer* was that of Mexico's responsibility for failure to carry out an effective police investigation into the killing of a United States citizen by a number of armed men who were not even alleged to be acting under the control or at the instigation of Mexico. In general, the State is not responsible for the acts of private parties, and only in special circumstances will it become internationally responsible for a failure in the conduct of the subsequent investigation. Thus, there is insufficient cause for assuming that provisions of bilateral investment treaties, and of NAFTA, while incorporating the *Neer* principle in respect of the duty of protection against acts of private parties affecting the physical security of aliens present on the territory of the State, are confined to the *Neer* standard of outrageous treatment where the issue is the treatment of foreign investment by the State itself.<sup>178</sup>

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<sup>175</sup> *ILC Articles (Investor's Schedule of Legal Authorities at CL-009)*

<sup>176</sup> *ILC Articles (Investor's Schedule of Legal Authorities at CL-009)*

<sup>177</sup> *Pope & Talbot Inc v. Government of Canada*, Award on Damages, 2002 WL 32824211 (May 31, 2002) ("*Pope & Talbot - Award on Damages*"), at para. 57-60 (*Investor's Schedule of Legal Authorities at CL-032*) A similar conclusion was reached in *S.D. Myers, Inc. v. Government of Canada*, First Partial Award, 2000 WL 34510032 (November 12, 2000) ("*S. D. Myers - First Partial Award*"), at para. 259 (*Investor's Schedule of Legal Authorities at CL-033*)

<sup>178</sup> *Mondev International Ltd. v. United States*, Award, 2002 WL 32841359 (October 11, 2002) ("*Mondev - Award*"), at para. 115 (*Investor's Schedule of Legal Authorities at CL-034*)

137. The Tribunal also rejected the *Neer* standard as being inapplicable to contemporary international law. The Tribunal held:

Secondly, *Neer* and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be. In particular, both the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to what those terms - had they been current at the time - might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.<sup>179</sup>

138. The Mondev Tribunal's decision was subsequently approved in the *TECMED* claim<sup>180</sup> and was also followed by the NAFTA Tribunal in *Merrill & Ring v. Canada*.<sup>181</sup>

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<sup>179</sup> *Mondev* – Award, at para. 116 (***Investor's Schedule of Legal Authorities at CL-034***)

<sup>180</sup> *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, Award, 2003 WL 24038436 (May 29, 2003) ("*TECMED* - Award"), at para. 153 (***Investor's Schedule of Legal Authorities at CL-035***)

<sup>181</sup> *Merrill & Ring* - Award, at para. 163, 213 (***Investor's Schedule of Legal Authorities at CL-036***)

## PART TWO: STATEMENT OF FACTS

139. The Statement of Facts is based on the documents referenced below and the witness statements and expert reports filed with this Memorial:
- a) The Witness Statement of Cole Robertson, Vice President of Finance for Mesa Power Group LLC, in regard to the impact of the measures; and
  - b) The Independent Valuers' Report of Robert Low, CBV and Richard Taylor, CBV, of Deloitte LLP, confirming the Investor's damages arising from Canada's NAFTA violations.
140. Following the Statement of Facts, the Memorial contains the following additional parts:
- a) Part Three considers the substantive legal issues;
  - b) Part Four considers the application of the law;
  - c) Part Five considers jurisdictional and procedural issues;
  - d) Part Six sets out the damage caused to the Investor; and
  - e) Part Seven sets out the relief requested by the Investor.

### I. CANADA IS RESPONSIBLE FOR THE OPA'S MEASURES

#### A. The FIT Program

141. In his September 24, 2009 direction, Energy Minister Smitherman directed the OPA to "develop a feed-in tariff program".<sup>182</sup> The directions included provisions that covered the setting of prices, and the length of contract term.<sup>183</sup>
142. The Minister specifically directed that:

"The FIT Program should provide for a 20-year power purchase agreement in respect of all renewable fuels other than waterpower, and a 40-year power purchase agreement in respect of waterpower projects."

"The OPA shall amend the FIT Program, including the pricing schedule, and its Support Programs at least once every two years and report to the Minister with results and suggestions for improvement."

"The OPA... not to enter into FIT contracts for energy generated by ground-mounted solar photovoltaic generation facilities greater than 100kW where those facilities are located on prime agricultural land."<sup>184</sup>

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<sup>182</sup> The "feed-in tariff program" is defined as a program for procurement, including a procurement process, providing standard program rules, standard contracts and standard pricing regarding classes of generation facilities differentiated by energy source or fuel type, generator capacity and the manner by which the generation facility is used, deployed, installed or located.

<sup>183</sup> Other provisions included the inclusion of aboriginal communities, restriction on contracts, and the establishment of community engagement programs.

143. The FIT Program Rules were amended nine times between September 2009 and December 2012.<sup>185</sup> Amendments to the Support Programs were included in a number of the Rule changes between 2009 and 2012.<sup>186</sup> The price schedule was amended on April 5, 2012.<sup>187</sup> In March 2012, a Two-Year Program Review was presented by Fareed Amin, Deputy Minister to the Minister of Energy.<sup>188</sup> The Review had been conducted with the support of the Ministry of Energy and the OPA and included information regarding the progress of the Program, results of consultation with the renewable energy sector and recommendations for improvement.
144. While the Minister's Direction empowered the OPA, it also limited the OPA in relation to certain actions. For example, the OPA was not permitted to enter into FIT contracts for solar photovoltaic generation facilities greater than 100kW when they were located on prime agricultural land.<sup>189</sup>
145. In relation to the governance of the program, the Minister's Direction specifically ordered the OPA to adopt the policies and procedures that are the subject of this arbitration:

"OPA will establish appropriate policies and procedures with respect to the administration of the Programs..."<sup>190</sup>

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<sup>184</sup> Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), September 24, 2009 (*Investor's Schedule of Exhibits at C-0264*)

<sup>185</sup> FIT Rules Version 1.1 - September 30, 2009 (*Investor's Schedule of Exhibits at C-0258*); Ontario Power Authority, Feed-In Tarriff Program, FIT Rules, Version 1.2, November 19, 2009 (*Investor's Schedule of Exhibits at C-0143*); FIT Rules Version 1.3, March 9, 2010 (*Investor's Schedule of Exhibits at C-0185*); FIT Rules Version 1.3.1, July 2, 2010 (*Investor's Schedule of Exhibits at C-0218*); Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.3.2, October 29, 2010 (*Investor's Schedule of Exhibits at C-0242*); FIT Rules Version 1.4, December 8, 2010 (*Investor's Schedule of Exhibits at C-0239*); Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011 (*Investor's Schedule of Exhibits at C-0005*); FIT Rules Version 1.5.1, July 15, 2011 (*Investor's Schedule of Exhibits at C-0237*); Ontario Power Authority, Feed-In Tarriff Program, FIT Rules, Version 2.0, August 10, 2012 (*Investor's Schedule of Exhibits at C-0058*); FIT Rules Version 2.1, December 14, 2012 (*Investor's Schedule of Exhibits at C-0240*)

<sup>186</sup> For example, Version 1.3 of the FIT Rules, s. 9.1(g) amended the definition of Community Participation Project to read "Community Participation Project means either (i) a Project in respect of which the Applicant or the Supplier is a Community Investment Member or (ii) where the Applicant or Supplier is not itself a Community Investment Member, a Project that has a Community Participation Level greater than or equal to 10%." (underlined text added in new version). FIT Rules Version 1.3, March 9, 2010 (*Investor's Schedule of Exhibits at C-0185*)

<sup>187</sup> Ontario Power Authority, FIT Price Schedule Verison 2.0, April 5, 2012 (*Investor's Schedule of Exhibits at C-0056*)

<sup>188</sup> Ontario Government Press Release, "Moving Clean Energy Forward, Creating Jobs, McGuinty Government Takes Steps to Ensure Successful Renewable Energy Program", March 22, 2012 (*Investor's Schedule of Exhibits at C-0097*)

<sup>189</sup> Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), September 24, 2009 (*Investor's Schedule of Exhibits at C-0264*)

<sup>190</sup> Letter Letter from George Smitherman (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, September 24, 2009, at p. 7 (*Investor's Schedule of Exhibits at C-0051*)

*i. Directions as to domestic content*

146. The *Electricity Act, 1998* also sets out that the Minister may issue a direction to the OPA with regard to domestic content.<sup>191</sup> The OPA was accordingly directed to require wind and solar PV projects "contain a defined percentage of domestic content" and that "the amount of domestic content will increase over time", such that for wind projects:
- a) Developers who have a milestone date for commercial operation on or before Dec. 31, 2011 will have to meet a domestic content requirement of 25%.
  - b) Developers who have a milestone date for commercial operation on or after January 1, 2012 will have to meet a domestic content requirement of 50%.<sup>192</sup>
147. The FIT Program Rules 2.0 of December 14, 2012, amended these requirements, so that: "for On-Shore Wind Facilities, the Minimum Required Domestic Content Level is 50%."<sup>193</sup> As the Mesa projects had not yet become operational, they were made subject to the 50% domestic content requirement.<sup>194</sup>
148. Other directions from the Minister of Energy to the OPA, specifically related to the FIT Process, Domestic Content, Connection Point Changes, and the Korean Consortium, are highlighted in the chart below:

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<sup>191</sup> The *Electricity Act, 1998*, s. 25.35(3) (***Investor's Schedule of Exhibits at C-0401***)

<sup>192</sup> Letter from George Smitherman (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, September 24, 2009, at p. 3 (***Investor's Schedule of Exhibits at C-0051***)

<sup>193</sup> Ontario Power Authority, Feed-In Tarriff Program, FIT Rules, Version 2.0, August 10, 2012, Section 8.4(a)(i) (***Investor's Schedule of Exhibits at C-0058***)

<sup>194</sup> Their original COD was May 6, 2011, see OPA FIT Application for TTD, November 25, 2009, at p. 20 (***Investor's Schedule of Exhibits at C-0364***) However, contracts were not awarded in time for this operational date to be achieved.

a) FIT Process

<b>Energy Ministerial Directions to the OPA</b>	
<b>Date</b>	<b>Key Directions</b>
September 24, 2009	<p>Energy Minister Smitherman directed the OPA to establish the FIT Program:</p> <p>The FIT Program should provide for a 20-year power purchase agreement in respect of all renewable fuels other than waterpower, and a 40-year power purchase agreement in respect of waterpower projects.</p> <p>The OPA shall amend the FIT Program, including the pricing schedule, and its Support Programs at least once every two years and report to the Minister with results and suggestions for improvement.</p> <p>The OPA... not to enter into FIT contracts for energy generated by ground-mounted solar photovoltaic generation facilities greater than 100kW where those facilities are located on " prime agricultural land</p> <p>OPA will establish appropriate policies and procedures with respect to the administration of the Programs...<sup>195</sup></p>
February 17, 2011	<p>Energy Minister Duguid directed the OPA to plan for 10,700 MW of renewable energy generating capacity, excluding hydroelectric, by 2018<sup>196</sup></p>
June 3, 2011	<p>Energy Minister Duguid directed the OPA to offer FIT contracts for up to 750 MW in the Bruce Region and up to 300 MW in the West of London Region<sup>197</sup></p>
April 5, 2012	<p>Energy Minister Bentley directed the OPA to award microFIT and Small FIT contracts, to reserve capacity for Aboriginal participation projects, and that the OPA "shall not run the Economic Connection Test."<sup>198</sup></p>
July 11, 2012	<p>Energy Minister Bentley directed the OPA to modify the FIT Program to prioritize projects that had municipal support, and to not enter into contracts with projects whose connection point was more than 50 km from its project location.<sup>199</sup></p>

<sup>195</sup> Letter from George Smitherman (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, September 24, 2009 (*Investor's Schedule of Exhibits at C-0051*)

<sup>196</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, February 17, 2011 (*Investor's Schedule of Exhibits at C-0267*)

<sup>197</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, June 3, 2011 (*Investor's Schedule of Exhibits at C-0046*)

<sup>198</sup> Letter from Chris Bentley (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, April 5, 2012 (*Investor's Schedule of Exhibits at C-0052*)

<sup>199</sup> Letter from Minister Bentley (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, July 11, 2012, (*Investor's Schedule of Exhibits at C-0210*)

Energy Ministerial Directions to the OPA	
Date	Key Directions
June 12, 2013	Energy Minister Chiarelli directed the OPA to "not procure any additional MW under the FIT Program for Large FIT projects", to "begin to develop a competitive procurement process for large [projects]", and to revise the FIT program to "provide municipalities with incentives under the Program similar to incentives currently provided to communities". <sup>200</sup>

b) Domestic Content

Energy Ministerial Directions to the OPA	
Date	Key Directions
September 24, 2009	Energy Minister Smitherman directed the OPA that "the amount of domestic content will increase over time" such that "developers who have a milestone date for commercial operation on or after January 1, 2012 will have to meet a domestic content requirement of 50%." <sup>201</sup>
June 12, 2013	Energy Minister Chiarelli stated that: "It is the Ministry's desire and intent" that the FIT program be "brought into compliance with [the WTO] rulings." The Ministry intends to "pursue the necessary legislative steps and other steps" to bring the program into compliance He intends "to issue further direction to the OPA at a later date with respect to these domestic content requirements." <sup>202</sup>

c) Connection Point changes for NextEra

Energy Ministerial Directions to the OPA	
Date	Key Directions
June 3, 2011	Energy Minister Duguid directed the OPA, following the release of the Ontario Long-Term Energy Plan, that: "before determining the FIT contract offers, the OPA shall provide a five (5) business day window for proponents to change their connection points. This opportunity to change connection points will only be made available for FIT projects that are on the priority ranking list for the Bruce and West of London transmission areas and only where the proponent wishes to change their connection point to a connection point in one of these two areas." <sup>203</sup>

<sup>200</sup> Letter from Bob Chiarelli (Minister of Energy) to Colin Andersen (OPA), June 12, 2013 (*Investor's Schedule of Exhibits at C-0248*)

<sup>201</sup> Letter from George Smitherman (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, September 24, 2009 (*Investor's Schedule of Exhibits at C-0051*)

<sup>202</sup> Letter from Bob Chiarelli (Minister of Energy) to Colin Andersen (OPA), June 12, 2013 (*Investor's Schedule of Exhibits at C-0248*)

<sup>203</sup> Letter from Minister Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, (*Investor's Schedule of Exhibits at C-0046*)



Energy Ministerial Directions to the OPA	
Date	Key Directions
July 11, 2012	<p>Energy Minister Bentley directed the OPA to "continue the FIT Program", subject to the following:</p> <p>"the OPA shall revise the FIT Rules to provide for a limit for non-hydroelectric projects with respect to the distance between a project's connection point on the existing transmission or distribution grid and the land within the project's location to which the applicant has access rights at the time of application. The OPA shall not enter into a FIT contract where the proposed project is located 50 km or more from its proposed connection point on the existing transmission or distribution grid according to the measurement in the preceding paragraph."<sup>204</sup></p>

d) Korean Consortium's Better Treatment

Energy Ministerial Directions to the OPA	
Date	Key Directions
September 30, 2009	<p>Energy Minister Smitherman directed the OPA to set aside transmission capacity for members of the Korean Consortium (without mentioning the members of the <i>GEIA</i>):</p> <p>"in carrying out the Transmission Availability Test under the FIT Program Rules, to hold in reserve 240 MW of transmission capacity in Haldimand County and a total of 260 MW of transmission capacity in Essex County and the Municipality of Chatham-Kent jointly for renewable energy generating facilities whose proponents have signed a province-wide framework agreement with the province."<sup>205</sup></p>
April 1, 2010	<p>Energy Minister Duguid directed the OPA to negotiate:</p> <p>one or more power purchase agreements as appropriate with respect to each Phase with the Korean Consortium or the appropriate Project Companies.</p> <p>each power purchase agreement entered into shall be...substantially similar to those provided for under the OPA's FIT Contract and the FIT Program Rules</p> <p>that the OPA shall...give priority to projects within the scope of this direction when assessing transmission availability with respect to the FIT Program</p> <p>Energy Minister Duguid also establishes what became "working group meetings" between the Korean Consortium and the government and directed that an Implementation Task Force be established.</p> <p>He "further directed to give priority to GEIA projects when assessing transmission availability..."<sup>206</sup></p>

<sup>204</sup> Letter from Minister Bentley (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, July 11, 2012 (*Investor's Schedule of Exhibits at C-0210*)

<sup>205</sup> Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, September 30, 2009 (*Investor's Schedule of Exhibits at C-0105*)

<sup>206</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, April 1, 2010 (*Investor's Schedule of Exhibits at C-0079*)

Energy Ministerial Directions to the OPA	
Date	Key Directions
September 17, 2010	Energy Minister Duguid directed the OPA to hold in reserve "500 MW of transmission capacity to be made available in the Bruce area..." <sup>207</sup> in addition to the 250 MW and 260 MW already reserved for the Korean Consortium as of the September 30 direction. <sup>208</sup>
July 29, 2011	Energy Minister Duguid directed the OPA to: enter into Power Purchase Agreements with the Korean Consortium or its Project Companies for Phase 1 wind and solar projects in Haldimand County. <sup>209</sup>

ii. *Direct Ministry of Environment Involvement & Influence Over the Process of the OPA*

149. The Ministry of Energy's directions and continued involvement with the OPA with regard to the implementation and administration of the FIT Program went beyond its mandate to direct the OPA to develop the program. This is especially evident following the execution of the *GEIA* where the Ministry of Energy can be seen to exert inappropriate influence over the OPA with regard to the administration of the FIT Program and the awarding of renewable energy contracts.
150. Rather than allow the OPA to develop and administer the FIT Program, the Ministry of Energy was involved in many aspects of the program, including: scheduling of the program launch,<sup>210</sup> awarding of contracts<sup>211</sup>, and reviewing and editing OPA emails and web postings.<sup>212</sup>

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<sup>207</sup> This 500 MW is in addition to the 510 MW that were already reserved in Haldimand county and Chatham-Kent municipality as of the September 30, 2009 direction.

<sup>208</sup> Letter from Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, September 17, 2010 (*Investor's Schedule of Exhibits at C-0119*)

<sup>209</sup> Letter from Minister Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, July 29, 2011 (*Investor's Schedule of Exhibits at C-0252*) Note that this direction also demonstrates specific examples of the Ontario government provided the KC with preferential treatment. For example, the KC would be permitted to "relocate their wind or solar projects for Phase 1" if it was unable to reach an agreement by July 31, 2012 with the Six Nations Elected Council. That is, the Ministry of Energy was "providing the Korean Consortium with an additional year to develop a mutually beneficial agreement with the Six Nations Elected Council." Such an extension, and the option to change project locations, was not available under the standard FIT contract.

<sup>210</sup> Email from Shawn Cronwright (OPA), to Sue Low (Ministry of Energy), May 19, 2011 (*Investor's Schedule of Exhibits at C-0310*) see also Internal Question and Answer document dated May 27, 2011 prepared by the OPA where it was explained that "the Ministry of Energy determined the length of the connection point window...". Ontario Power Authority, Internal Document, "Bruce to Milton Capacity Allocation, Internal Use Only, Questions and Answers", May 27, 2011 (*Investor's Schedule of Exhibits at C-0289*)

<sup>211</sup> Email from Sunita Chander (Ministry of Energy) to Shawn Cronwright (OPA), May 11, 2011 (*Investor's Schedule of Exhibits at C-0314*)

<sup>212</sup> Email from Kristin Jenkins (OPA) to Jim MacDougall (OPA) et al., June 2, 2011 (*Investor's Schedule of Exhibits at C-0290*)

151. The Ministry of Energy was heavily involved in developing the rule changes that the OPA released on June 3, 2011. The Ministry of Energy participated in a large number of meetings, calls and emails, etc. regarding the development of the FIT Program. Internal MOE correspondence also suggests that discussions and decision making took place without the involvement of the OPA. For example, in an email dated May 13, 2011 regarding the timeline for awarding contracts to projects in the Bruce region and proposed plan to implement the program, Sunita Chander and Ceiran Bishop, both employees of the Ministry of Energy, discussed issues surrounding the change window and suggested that it would "be good to solicit OPA feedback."<sup>213</sup>
152. The disconnect between the Ministry of Energy and the OPA is especially evident when the Ministry of Energy's correspondence is compared with an internal OPA email from the previous day. On May 12, 2011 Bob Chow, Director, Transmission Integration Power System Planning Division, wrote to JoAnne Butler, Shawn Cronkwright and Michael Lyle, OPA, regarding revisions to the Bruce to Milton FIT process:
- With respect to your questions concerning change of connection point, it will complicate the process [we will have to update the capability table (for Bruce/WOL area only or everywhere ... this we need to discuss); provide a process to change the connection point in the application; re-assess the new configurations (we have been rehearsing the past month on the non-change point assumption); and hope there are no surprises and complications (eg. Somebody want to connect to the 500kV lines)]. The cleaner TAT/DAT approach is the preferred option. We also believe that allowing a change of connection point coupled with proponent paid through connection upgrades will lead to more MW in the London area. But it is hard to know what that would be as we have no control or knowledge with how proponents would change their connection point (eg. Move their current constraint connection point to a main station bus). Generally, allowing more options will lead to less predictability, more complications and more work for us.<sup>214</sup>
153. The Ministry of Energy actions, as depicted above, appear to go beyond their mandate as set out in the *Electricity Act*, to direct the OPA to "develop a feed-in-tariff program".<sup>215</sup> The OPA has commented that, "as Ontario's energy planner, it requires some level of independence to allow it to objectively and proactively develop alternative options and ideas instead of relying exclusively on ministerial directions."<sup>216</sup>
154. The Auditor General, in his 2011 Annual Report, observed that the regulatory and oversight role of the Ontario Energy Board ("OEB") has been negatively impacted by the actions of the Ministry of Energy. Specifically, the Auditor General noted "[t]he

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<sup>213</sup> Email from Ceiran Bishop (Ministry of Energy), to Sunita Chander (Ministry of Energy), May 13, 2011, (*Investor's Schedule of Exhibits at C-0312*)

<sup>214</sup> Email from Bob Chow (OPA), to JoAnne Butler (OPA), May 12, 2011 (*Investor's Schedule of Exhibits at C-0307*)

<sup>215</sup> *Electricity Act, 1998*, S.O. 1998, c.15 (*Investor's Schedule of Exhibits at C-0401*)

<sup>216</sup> 2011 Annual Report of the Auditor General of Ontario, Chapter 3, VFM Section 3.03 Electricity Sector-Renewable Energy Initiatives, at p. 101 (*Investor's Schedule of Exhibits at C-0228*)

ministerial direction-making authority has limited the OEB's ability to carry out its regulatory oversight role on behalf of consumers with respect to renewable energy."<sup>217</sup>

## II. POWER AND ELECTRICITY IN ONTARIO

155. Power in the Province of Ontario goes through three primary phases: electricity generation, electricity transmission, and the final stage of commercial sale to retail consumers. The entire process is regulated by the provincial government, provincial agencies, and legislation. Responsibility for generating, transmitting, and distributing electricity is shared between public and private actors.
156. In the past decade, Ontario has made a concerted effort to treat electricity as a competitive commodity and open the province's electricity market, whereby private actors are invited to compete for a share in Ontario's market so that they may generate, transmit, or distribute electricity at a profit.
157. Ontario's power supply is overseen by the Ontario Power Authority. The OPA was created in 2004 as part of a provincial restructuring, brought about by the *Electricity Restructuring Act, 2004*.<sup>218</sup> The *Electricity Restructuring Act, 2004* created the Ontario Power Authority to be "an 'agency' of the Government of Ontario responsible for managing Ontario's electricity supply and resources in order to meet its medium and long-term needs".<sup>219</sup> The Ministry of Energy has "legislative responsibility" for the Ontario Power Authority and the Minister of Energy is empowered to issue directives, and directions, which the OPA must receive and execute<sup>220</sup>. Ontario's own Auditor General found that the OPA "directed their energies to implementing the Minister's requested actions as quickly as possible".<sup>221</sup>
158. Ontario Power Authority supply contracts guarantee prices for long-term periods, usually 20 years.<sup>222</sup> The OPA secures present and future electricity in various forms – nuclear, gas, hydro, wind, solar, and biotech, through its contracts.<sup>223</sup> Since June 2006 it

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<sup>217</sup> 2011 Annual Report of the Auditor General of Ontario, Chapter 3, VFM Section 3.03 Electricity Sector-Renewable Energy Initiatives, at p. 101 (***Investor's Schedule of Exhibits at C-0228***)

<sup>218</sup> *Electricity Restructuring Act, 2004*, S.O. 2004, c. 23 - Bill 100, assented to December 9, 2004, Section 25.1(1) (***Investor's Schedule of Exhibits at C-0144***)

<sup>219</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.37 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>220</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.37 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>221</sup> 2011 Annual Report of the Auditor General of Ontario, Chapter 3, VFM Section 3.03 Electricity Sector-Renewable Energy Initiatives, at p. 89 (***Investor's Schedule of Exhibits at C-0228***)

<sup>222</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.38 (***Investor's Schedule of Legal Authorities at CL-001***) quoting, IESO Market Manual Part 5.5: Physical Markets Settlement Statements, Issue 44.0, 12 October 2011, Sections 1.6.7 and 1.6.11.

<sup>223</sup> *Canada - Renewable Energy* - Panel Report, para. 7.38 (***Investor's Schedule of Legal Authorities at CL-001***) quoting IESO Guide to Electricity Charges, Exhibit JPN-1.

- has implemented directions from the Minister of Energy to increase Ontario's renewable energy capacity.<sup>224</sup>
159. The Ontario Energy Board is another "agency" of the Ontario government, which regulates the province's electricity and natural gas sectors in the public interest.<sup>225</sup> The Ontario Energy Board sets the rates for the transmission and distribution of electricity, as well as licensing to all market participants and the rates paid by retail consumers for electricity.<sup>226</sup> The Ontario Energy Board was created by the *Ontario Energy Board Act, 1998*.
160. The current electricity distribution system in Ontario dates back to 1906 with the creation of the Hydro-Electric Power Commission of Ontario, billed by the Government of Ontario as "the world's first publicly owned electric utility."<sup>227</sup> In 1974, Hydro-Electric Power Commission of Ontario became Ontario Hydro, a crown corporation that dominated electricity in the province until 1998.
161. In 1998 Ontario passed the *Energy Competition Act, 1998* that enacted the *Electricity Act*. The effect was to open up Ontario's electricity market. Ontario Hydro was split between the following five entities:
- a) Independent Market Operator: The Independent Market Operator is responsible for administering the wholesale electricity market in Ontario and, through the transmission system, directing the flow of energy from producers to consumers.
  - b) Ontario Power Generation: Ontario Power Generation inherited the assets of Ontario Hydro, which amounted to about 90% of the province's electricity capacity.
  - c) Hydro One Inc.: Hydro One became responsible for transmission network and rural distribution businesses.
  - d) Ontario Electricity Financial Corporation: The Ontario Electricity Financial Corporation assumed other Ontario Hydro assets, including its contracts with Non-Utility Generators (Non-Utility Generators are private generators that had entered into contracts with Ontario Hydro in the 1980s and 1990s and produce approximately 2% of Ontario's power) and CAD \$20 billion in stranded debt.

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<sup>224</sup> 2011 Annual Report of the Auditor General of Ontario, Chapter 3, VFM Section 3.03 Electricity Sector-Renewable Energy Initiatives, at p. 97 (*Investor's Schedule of Exhibits at C-0228*)

<sup>225</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.42 (*Investor's Schedule of Legal Authorities at CL-001*), quoting Government of Ontario: All Agencies List; and Agency Details, Ontario Energy Board, Government of Ontario website

<sup>226</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.42 (*Investor's Schedule of Legal Authorities at CL-001*), quoting *Ontario Energy Board Act of 1998*, S.O. 1998, Chapter 15, Schedule B, as amended.

<sup>227</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.21 (*Investor's Schedule of Legal Authorities at CL-001*)

- e) Electrical Safety Authority: The Electrical Safety Authority was responsible for the safety of Ontario's electricity system.<sup>228</sup>
162. Power generation in Ontario was restructured in order to open Ontario's power market and hope that new investment in power generation would follow the May 2002 opening of Ontario's power market. However, investment failed to materialize and high energy prices caused by a hot summer in 2002 caused the Ontario government to step in and freeze electricity prices.<sup>229</sup>
163. The 2004 restructuring, and the creation of the Ontario Power Authority, was a direct result of the problematic restructuring in 2002. This restructuring has been explained as being to:
- ...restructure Ontario's electricity sector, to promote the expansion of electricity supply and capacity, including supply and capacity from alternative and renewable energy sources, facilitate load management and electricity demand management, encourage electricity conservation and the efficient use of electricity and to regulate prices in par of the electricity sector<sup>230</sup>
164. The result of the 2004 restructuring has been the creation of "hybrid" system, where the government and private entities jointly participate in the generation, transmission, distribution, and retail activities.<sup>231</sup>
165. To the extent that the actions and omissions of the Ontario Energy Board, Hydro One and the IESO have not been under the direction of the Minister, Canada remains responsible for those breaches pursuant to NAFTA Article 1503.<sup>232</sup>

### III. POWER GENERATION

166. The WTO panel in *Canada-Renewable Energy* summarized the electrical generation capacity in Ontario as follows:

As of year-end 2010, there were approximately 34,700 MW of installed generation capacity in Ontario. This capacity can be roughly separated into three groups of generators: (i) the government-owned assets of OPG, which as already mentioned are the former generation assets of Ontario Hydro; (ii) NUGs, which are private generators that entered into supply contracts with Ontario Hydro in the 1980s and 1990s; and (iii) Independent Power Producers ("IPPs"), which comprise all the other generators in Ontario that have started to operate since the wholesale market was restructured. The IPPs include generators operating under the FIT Programme.<sup>233</sup>

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<sup>228</sup> *Electricity Act, 1998*, S.O. 1998, c.15Part VIII (***Investor's Schedule of Exhibits at C-0401***)

<sup>229</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.23 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>230</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.24 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>231</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.25 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>232</sup> The Investor reserves its right to make this argument pending determinations stemming from further document production in this matter by the OPA in January 2014.

<sup>233</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.26 (***Investor's Schedule of Legal Authorities at CL-001***)

167. The WTO panel identified that 58% of the electricity generation market in Ontario was supplied by publicly-own utilities. The remaining 42% came from private market electricity generators. The panel summarized the market as follows:

The remaining generators operating in Ontario account for 42% of electricity supply. Of these, the IPPs, which generate around 40% of Ontario's electricity supply, receive prices that are negotiated or set under different types of OPA initiatives and contracts including: the Clean Energy Supply ("CES") contracts for natural gas; the Renewable Energy Supply ("RES") Requests for Proposals I, II and III; the Hydroelectric Contract Initiative ("HCI") for grid-connected non-OPG-owned hydro facilities; the Combined Heat and Power ("CHP") Requests for Proposals I, II, III; the Renewable Energy Standard Offer Programme ("RESOP"); and the FIT Programme.<sup>234</sup>

168. The WTO panel identified the process under which private companies had previously bid for the renewable energy power purchase agreements with Ontario. The panel stated:

Under the CES and RES initiatives, the OPA awarded supply contracts through a competitive bidding process which set prices for delivered electricity at the levels of the lowest bids meeting the specified conditions. Prices paid to generators operating under the HCI and CHP initiatives were negotiated with the OPA and, according to Canada, generally guided by the rates paid under competitive contracts determined through a request for proposal. Under the RESOP, the prices paid to solar PV generators are based primarily on the principle of cost recovery. For non-solar RESOP generators, prices are based on those applied under the RES initiative. As regards the FIT Programme, the price received by qualified generators is guided by the principle of cost recovery and margin. The after tax rate of return on equity used to develop the FIT Price Schedule in 2009 was 11%.<sup>235</sup>

169. Power generation in Ontario is presently divided into three production groups:

- a) Ontario Power Generation: Ontario Power Generation produces approximately 58% of Ontario's power through assets it inherited from Ontario Hydro;
- b) Non-Utility Generators
- c) Independent Power Producers: Independent Power Producers are all the other generators that began operating since the market was restructured and collectively produce about 40% of Ontario's power.

170. Independent Power Producers receive different electricity pricing from the Ontario Power Authority than does the OPG and it varies according to the type of electricity and how it is governed. For example, natural gas contracts are regulated by the Clean Energy Supply, and the Hydroelectric Contract Initiative governs grid-connected non-Ontario Power Generation-owned hydro facilities.<sup>236</sup> Contracts under these various initiatives can be awarded through competitive bidding.<sup>237</sup>

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<sup>234</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.28 (*Investor's Schedule of Legal Authorities at CL-001*)

<sup>235</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.29 (*Investor's Schedule of Legal Authorities at CL-001*)

<sup>236</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.28 (*Investor's Schedule of Legal Authorities at CL-001*)

<sup>237</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.29 (*Investor's Schedule of Legal Authorities at CL-001*)

#### IV. POWER TRANSMISSION, DISTRIBUTION AND COMMERCIAL SALE

171. The WTO panel summarized the process for electricity transmission and commercial sale of power in Ontario as follows:

... In Ontario, high-voltage transmission lines carry electricity at voltages above 50 kilovolts ("kV") and are used to move electricity over long distances from generating stations to load or population centres to reduce power losses. Once the electricity nears a distribution hub, voltage is reduced at a transformer station and carried to customers over distribution lines at voltages 50 kV and under.

Generators typically connect to the transmission system or to the distribution system based on their capacity. In particular, generators with capacity greater than 10 MW (including large-capacity FIT generators) typically connect to the transmission system, and generators with capacity of 10 MW or less (including small-capacity FIT and microFIT generators) typically connect to the distribution system. Generators that connect to the transmission system must deliver electricity at voltages above 50 kV, while generators connected to the distribution system must deliver electricity at voltages of 50 kV or less.

Transmission-connected generators register with the IESO, and connect to the high-voltage transmission system, which is almost completely owned and operated by Hydro One.<sup>238</sup>

172. Ontario industrial and residential consumers obtain their electrical power at commercial rates from the Ontario transmission grid through these distribution companies which are all connected through the transmission grid owned and run by Hydro One.

173. Ontario's power transmission is via a system of high-voltage transmission lines from generating stations to lower-voltage distribution lines. The high-voltage transmission lines carry electricity at a voltage over 50 kilovolts (kV). Lower voltage distribution lines carry electricity under 50 kV after its voltage is reduced at transformer stations located near to distribution hubs.

174. The WTO panel reported on the prevalence of local distribution companies (LDCs) in delivering power to retail customers. The panel found that "In 2010, there were 77 private-sector electricity retailers in Ontario that sold "contracts to businesses and consumers". There are currently 45 licensed electricity retailers that compete with LDCs in their respective service areas."<sup>239</sup>

175. Canada admitted at the WTO that electricity purchased under the FIT Program is injected into Ontario's electricity grid, where it is pooled with electricity from other sources<sup>240</sup>.

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<sup>238</sup> *Canada - Renewable Energy* - Panel Report, at paras. 7.32 – 7.35 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>239</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.57 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>240</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.148 (***Investor's Schedule of Legal Authorities at CL-001***), referring to Canada's opening statement at the first meeting of the Panel, at para. 56; response to Panel question No. 25(a) (first set); second written submission, at para. 68; and opening statement at the second meeting of the Panel, at para. 47



176. Hydro One owns, through the subsidiary Hydro One Networks, 97% of the provincial transmission system with the remaining 3% is owned by four private companies.<sup>241</sup>
177. Hydro One also owns and operates approximately 25% of the province's distribution-connected generators through its system of local distribution companies.<sup>242</sup> Electricity is sold on commercial terms and the distribution companies make a profit. This power is then provided by way of commercial sale to retail consumers and industrial consumers in Ontario.

## V. THE FEED-IN-TARIFF PROGRAM

178. As part of Ontario's efforts to open up the electricity sector to increased competition between private entities, it passed the *Green Energy and Green Economy Act, 2009* in March, 2009.<sup>243</sup> This act created a new landscape for renewable energy use in Ontario and led to changes in the way policy and programs were created and implemented.
179. The 2011 Ontario Auditor General Report noted that the *Green Energy and Green Economy Act, 2009* removed a layer of bureaucratic and regulatory control because it "delegated a certain part of the responsibility for dramatically increasing the province's renewable energy supply directly to the Minister of Energy."<sup>244</sup> It continued and pointed out that the Act provided "the Minister with the authority to supersede [through the issuance of directives and directions] many of the government's usual planning and regulatory oversight processes."<sup>245</sup> The Auditor General has reported that reliance on Ministerial directives and directions "has created some ambiguity regarding the original mandates of the OPA and the OEB from the planning and oversight perspective."<sup>246</sup> The *Green Energy and Green Economy Act, 2009* permits directions to be issued without Cabinet approval, which was restricted to a degree before the Act.<sup>247</sup>
180. Under the auspices of the *Green Energy and Green Economy Act, 2009*, Ontario began the FIT Program, the purpose of which was to facilitate the generation, transmission, and distribution of renewable energy throughout the province by private companies. The program permitted different companies to compete for contracts to generate energy from renewable sources into Ontario's transmission network to be distributed to

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<sup>241</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.34 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>242</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.35 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>243</sup> *Green Energy Act, 2009*, SO 2009, c.12, Sched. A (***Investor's Schedule of Exhibits at C-0003***)

<sup>244</sup> 2011 Annual Report of the Auditor General of Ontario, Chapter 3, VFM Section 3.03 Electricity Sector-Renewable Energy Initiatives, at pp. 88-89 (***Investor's Schedule of Exhibits at C-0228***)

<sup>245</sup> 2011 Annual Report of the Auditor General of Ontario, Chapter 3, VFM Section 3.03 Electricity Sector-Renewable Energy Initiatives, at p. 89 (***Investor's Schedule of Exhibits at C-0228***)

<sup>246</sup> 2011 Annual Report of the Auditor General of Ontario, Chapter 3, VFM Section 3.03 Electricity Sector-Renewable Energy Initiatives, at p. 100 (***Investor's Schedule of Exhibits at C-0228***)

<sup>247</sup> *Green Energy Act, 2009*, SO 2009, c.12, Sched. A (***Investor's Schedule of Exhibits at C-0003***)

customers. Due to the fixed capacity of the transmission network, the generation capacity of renewable energy available under the FIT Program was limited. Contracts awarded under the FIT Program provided for a fixed-rate for a long-term supply of renewable energy. Contract types varied by type of energy being generated, such as solar or wind energy.

181. Notwithstanding the fact that the FIT Program found its roots in legislation, its creation and implementation was, to a degree, unstructured. The Auditor General's report states, "The OPA, the OEB, and the IESO acknowledged that: no independent, objective, expert investigation had been done to examine the potential effects of renewable-energy policies on prices..."<sup>248</sup> It continued, "The OPA informed us that it designed the FIT program at a time when no long-term energy plan was in place and it was unsure about the quantities of power the FIT program was intended to procure."<sup>249</sup> The Ministry of Energy also did not estimate "potential job losses and the cost per renewable-energy-related job in Ontario."<sup>250</sup>
182. The FIT Program was launched on September 24, 2009 after completion of a public comment period on draft program rules. Upon the program launch, Version 1.0 of the FIT Rules was released, as well as a standard form contract and definitions. There were two components to the FIT Program: the Micro FIT program, which applies to renewable energy projects that are 10 kW or less, and the FIT Program which applies to projects over 10 kW.
183. The WTO Appellate Body summarized findings from the panel report and described the FIT Program in general as follows in its Report:
- 1.3. The FIT Programme is a scheme implemented by the Government of the Province of Ontario and its agencies in 2009, through which generators of electricity produced from certain forms of renewable energy are paid a guaranteed price per kilowatt hour (kWh) of electricity delivered into the Ontario electricity system under 20-year or 40-year contracts. Participation in the FIT Programme is open to facilities located in Ontario that generate electricity exclusively from one or more of the following sources of renewable energy: wind, solar PV, renewable biomass, biogas, landfill gas, and waterpower. It is administered by the OPA and implemented through the application of a standard set of rules, standard contracts, and, for each class of generation technology, standard pricing. The FIT Programme is divided into two streams: (i) the FIT stream— for projects with a capacity to produce electricity that exceeds 10 kilowatts (kW), but is no more than 10 megawatts (MW) for solar PV projects or 50 MW in the case of waterpower projects; and (ii) the microFIT stream – for projects having a capacity to produce up to 10 kW of electricity. The microFIT stream is intended to provide

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<sup>248</sup> 2011 Annual Report of the Auditor General of Ontario, Chapter 3, VFM Section 3.03 Electricity Sector-Renewable Energy Initiatives, at p. 97 (*Investor's Schedule of Exhibits at C-0228*)

<sup>249</sup> 2011 Annual Report of the Auditor General of Ontario, Chapter 3, VFM Section 3.03 Electricity Sector-Renewable Energy Initiatives, at pp. 106-107 (*Investor's Schedule of Exhibits at C-0228*)

<sup>250</sup> 2011 Annual Report of the Auditor General of Ontario, Chapter 3, VFM Section 3.03 Electricity Sector-Renewable Energy Initiatives, at p. 118 (*Investor's Schedule of Exhibits at C-0228*)

"a simplified approach for enabling the development of renewable micro-generation projects in Ontario', with a view to attracting participants such as homeowners, farmers and small businesses". Only projects that satisfy all of the specific eligibility requirements, and that can be connected to the Ontario electricity system, will be offered a FIT or microFIT Contract by the OPA, and thereby permitted to participate in the FIT Programme.<sup>251</sup>

## VI. PARTICIPATION IN THE FIT PROGRAM: THE PROCESS FOR OBTAINING A CONTRACT

184. Due to finite transmission capacity in Ontario, not all projects that submitted applications were able to receive contracts. The FIT Rules set out a methodology for scoring and ranking projects as the means to determine which applications would receive contracts. This allocation process is sometimes referred to as "capacity allocation."
185. The first FIT applications were accepted during the "launch period" from October to November, 2012.<sup>252</sup> Applications submitted during that time were required to provide detailed information and were scored on four criteria:<sup>253</sup>
- a) Whether the project is exempt from the Renewable Energy Approval (REA) Process;<sup>254</sup>
  - b) Guaranteed access to wind turbine supply. Applicants had to show that they owned or were executing a contract with an equipment supplier to supply a certain type of equipment needed to generate the electricity. The required equipment was referred to as a "Major Equipment Component," which was further regulated in the FIT Rules;<sup>255</sup>
  - c) Expertise in wind power development. The FIT Rules required applicants to have "three full-time employees with successful experience with planning and developing one or more similar facilities"; and
  - d) Financial Capacity. This was described in the FIT Rules as requiring that "any one person or one group of person must account for 15% or more of the direct or indirect economic interest in the applicant and has an individual tangible net worth

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<sup>251</sup> *Canada - Renewable Energy* - AB Report, at paras. 1.3, 1.4 (***Investor's Schedule of Legal Authorities at CL-002***)

<sup>252</sup> Section 13 ("Program Launch") of the FIT Rules version 1.1 sets out the information relevant to applications submitted during that time frame. Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009 (***Investor's Schedule of Exhibits at C-0258***)

<sup>253</sup> These four criteria are set out at Section 13.4(a) of FIT Rules Version 1.1 - September 30, 2009 (***Investor's Schedule of Exhibits at C-0258***)

<sup>254</sup> The REA is the Ontario Ministry of Environment regulatory oversight and approval process for renewable energy projects. FIT Standard Definitions, version 1.0, at p. 17 (***Investor's Schedule of Exhibits at C-0416***)

<sup>255</sup> The Domestic Content Grid is listed under Exhibit D of the FIT Rules version 1.1, September 30, 2009 Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009 (***Investor's Schedule of Exhibits at C-0258***)

- or collective tangible net worth of \$500 or more per kW of proposed contract capacity at the end of the most recent fiscal year."
186. For each of those four criteria, a launch period applicant should have been awarded one point, for a maximum possible "criteria score" of four points. Applicants were required to include supporting evidence in order to obtain these points.
187. In addition to the four criteria, the FIT Rules set out a number of steps for ranking launch period applications:
- a) First, projects were ranked based upon the number of days that they are willing to reduce the time between the Contract Date and the Milestone Date for Commercial Operation (defined in the rules as "COD Acceleration Days"). The COD Acceleration Days are subject to a minimum of zero days and a maximum of 365 calendar days.<sup>256</sup>
  - b) Where two or more launch applications propose the same number of COD Acceleration Days, projects were ranked on the Criteria Score set out above. The Criteria Score was calculated by adding the COD Acceleration Days plus 90 calendar days for each point awarded to the project under the four criteria.<sup>257</sup>
  - c) The evidence of access rights date is used to break a tie between projects with the same COD Acceleration Days and with the same criteria score. Where two or more launch applications propose the same number of COD Acceleration Days and have the same criteria score, these launch applications will be assigned a time stamp in priority of applicants with the earliest Access Rights Date.<sup>258</sup>
  - d) In the event that two or more launch applications propose the same number of COD Acceleration Days, have the same criteria score, and have the same Access Rights Date, the time stamp is assigned in relative priority to one another by random draw.<sup>259</sup>
188. Projects received two different rankings, one that was province-wide and a regional one based on regions drawn up by the OPA.<sup>260</sup>

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<sup>256</sup> Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 134(b)(ii), at para. 13.4 (***Investor's Schedule of Exhibits at C-0258***)

<sup>257</sup> Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 134(b)(ii), at para. 13.4 (***Investor's Schedule of Exhibits at C-0258***)

<sup>258</sup> The FIT Rules define Access Rights Dates as the date that access rights were first acquired by the applicant or the rights to the location were first acquired by the applicant. Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 134(b)(ii) (***Investor's Schedule of Exhibits at C-0258***)

<sup>259</sup> Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 134(b)(ii), at para. 13.4 (***Investor's Schedule of Exhibits at C-0258***)

<sup>260</sup> Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010 (***Investor's Schedule of Exhibits at C-0073***)

189. After rankings were complete, launch applications were assigned time stamps that were earlier than time stamps for applications received after the launch period.<sup>261</sup> Applications submitted after the launch period were ranked in the order that applications were received.<sup>262</sup>

#### **A. Domestic Content Requirements**

190. A key requirement of the FIT Program is the local content requirements, which stemmed from a September 24, 2009 direction from the Minister of Energy to the OPA. The direction required FIT projects to use a certain qualifying percentage of goods produced in Ontario in the generation of their electricity. The percentage of locally-sourced content varied with the type of project and the commercial operation date of the project. For projects that became operational after January 1, 2012, the given level of required domestic content was 50%.<sup>263</sup> To verify this requirement, an interested applicant had to complete the Domestic Content Report package within 60 days of reaching Commercial Operation pursuant to the requirements of the FIT PPA Contract.<sup>264</sup>

#### **B. The TAT**

191. A further step applications had to undergo before contracts were awarded was a Transmission Availability Test (TAT). This was the initial tool used by the OPA to determine whether there was sufficient transmission capacity available for any given project.<sup>265</sup> TATs were automatically performed by the OPA for all applicants that

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<sup>261</sup> FIT Rules version 1.5, June 3, 2011, at para. 13.5 (*Investor's Schedule of Exhibits at C-0005*)

<sup>262</sup> Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 134(b)(ii), at para. 13.5 (*Investor's Schedule of Exhibits at C-0258*)

<sup>263</sup> Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011, at para. 6.4(a)(i) (*Investor's Schedule of Exhibits at C-0005*)

<sup>264</sup> Feed-in Tariff Program, FIT Contract Version 1.5, June 3, 2011, Ontario Power Authority, at paras. 2.11(c). All of the prescribed forms necessary for the submission of a complete Domestic Content Report are available online (*Investor's Schedule of Exhibits at C-0263*)

<sup>265</sup> The Transmission Availability Test (TAT) is described in the FIT Rules Version 1.1 – September 30, 2009, Section 5.2(a). The TAT is a test to "determine whether the Transmission System has sufficient connection resources to accommodate the connection of the project, taking into consideration Planned In-Service Transmission Developments; all prior Applications that have been processed; Applications in the FIT Production Line and FIT reserve with an earlier Times Stamp; and any other generating facilities that are existing, committed or are the subject of a ministerial direction." A Transmission System is a system for conveying electricity of more than 50 kilovolts and includes any structures, equipment or other things used for that purpose. Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 5.2 (*Investor's Schedule of Exhibits at C-0258*)

identified a connection point.<sup>266</sup> A project that passed its TAT and was ranked such that it was in line for a FIT contract received one.

### C. The ECT

192. Projects that failed their TAT were still competitive for FIT contracts, subject to a further Economic Connection Test (ECT). The purpose of the ECT was to determine whether or not the required upgrades to Ontario's transmission system necessary to accommodate such a project were worthwhile and viable.<sup>267</sup> However, the ECT process was abandoned without notice and was not available to proponents that did not pass the TAT.
193. The first FIT PPA Contracts were awarded on April 8, 2010. Successful applicants received a Power Purchase Agreement from the OPA that guaranteed a set purchase price over a twenty year period.<sup>268</sup> This guaranteed purchase price was based on 13.5 cents per kilowatt hour plus escalators.<sup>269</sup>

## VII. FACTS IN THE PRESENT DISPUTE

194. In order to transmit and sell wind generated power on the Ontario grid, Mesa needed a Power Purchase Agreement with the OPA. Mesa applied for Power Purchase Agreements for four Ontario-based wind projects – Arran, TTD, Summerhill and North Bruce – all of which were are located in the Bruce Region.
195. In order to facilitate the transmission of power in the Bruce Region under the FIT program, a Bruce to Milton Transmission project was planned. This project consisted of a 500kV transmission line that was designed to increase the transmission capacity

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<sup>266</sup> In addition to the TAT, some projects also have to go through the "DAT" or Distribution Availability Test. Only those projects that will connect to the "distribution lines" – these are lower voltage lines that are connected to the higher voltage "transmission lines". The DAT is a process to screen applications for their impact on the relevant Distribution System, where a Distribution System is a system connected to the IESO-Controlled Grid (the Transmission System), used for distributing electricity at voltages of 50 kilovolts or less, and includes any structures, equipment or other things used for that purpose. Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 5.3 (*Investor's Schedule of Exhibits at C-0258*); Mesa's projects would not have had to undergo the DAT because the projects were to connect to transmission lines, and not to distribution lines.

<sup>267</sup> Ontario Power Authority presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010 (*Investor's Schedule of Exhibits at C-0088*)

<sup>268</sup> Feed- Ontario Power Authority, Feed-In Tariff Program, Program Overview, August, 2010, Section 6.4 (*Investor's Schedule of Exhibits at C-0141*)

<sup>269</sup> Ontario Power Authority, Feed-In Tariff Program, Program Overview, August, 2010, at p. 13 (*Investor's Schedule of Exhibits at C-0141*) Escalators are economic incentives provided for in the FIT Program, Ontario Power Authority, Feed-In Tariff Program, Program Overview, August, 2010, Section 1(d) (*Investor's Schedule of Exhibits at C-0141*)

available in the Bruce area in order to enable increased renewable energy production.<sup>270</sup> Through the FIT Program, the OPA planned to offer 1,200 MW of renewable energy contracts within this region.<sup>271</sup>

196. On December 21, 2010, the OPA issued its first-round priority ranking, and indicated that priority ranking was based on the acceleration – shovel readiness criteria.<sup>272</sup>
197. As such, TTD and Arran expected to get contracts if at least 663 MW became available in the Bruce Region. Mesa had amongst the highest number of points in the region of project proponents but despite this, it was ranked 8<sup>th</sup> and 9<sup>th</sup> in the Bruce Region:<sup>273</sup>

<b>Bruce Region Priority Ranking - December 21, 2010</b>		
<b>Rank</b>	<b>Applicant Name</b>	<b>Capacity (MW)</b>
1	Boulevard Associates Canada, Inc.	102
2	Boulevard Associates Canada, Inc.	23
3	Grand Bend Wind, L.P.	100
4	Grand Valley Wind Farms Inc.	40
5	St. Columban Energy L.P.	15
6	Skyway 127 Wind Energy Inc.	100
7	St. Columban Energy L.P.	18
<b>8</b>	<b>TTD Wind Project ULC</b>	<b>150</b>
<b>9</b>	<b>Arran Wind Project ULC</b>	<b>115</b>
	Total	663

198. Mesa had calculated they would receive [REDACTED] out of a possible 725 points available.<sup>274</sup> When they received their ranking, they were ranked far below their calculated position. Mesa's projects TTD and Arran were ranked 8<sup>th</sup> and 9<sup>th</sup> in the Bruce region, and 91<sup>st</sup> and 96<sup>th</sup> in the province, respectively.
199. When Mesa received its ranking on December 21, 2010, it was unclear why the ranking received was different from the ranking it expected. As such, on May 20, 2011, the Investor wrote to the OPA to verify that the OPA had correctly calculated their priority

<sup>270</sup> Ontario Power Authority, Allocating Capacity and Offering FIT Contracts for Bruce to Milton Enabled Projects, June 3, 2011 (*Investor's Schedule of Exhibits at C-0140*)

<sup>271</sup> Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010 (*Investor's Schedule of Exhibits at C-0073*)

<sup>272</sup> Feed-in Tariff Program, Program Update, Priority ranking for First Round FIT Contracts, December 21, 2010 (*Investor's Schedule of Exhibits at C-0405*)

<sup>273</sup> Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010 (*Investor's Schedule of Exhibits at C-0073*)

<sup>274</sup> Letter from Mark Ward (Mesa), Chuck Edey (Leader Resources) and Michael Bernstein (Capstone Infrastructure) to Shawn Cronkwright (OPA), May 20, 2011 (*Investor's Schedule of Exhibits at C-0098*)

rank and asked for more information about the method used for ranking to ensure that there were no errors or oversights in the ranking process.<sup>275</sup>

200. When the OPA responded on June 17, 2011, it did not provide any substantive explanation or disclose the ranking methodology. The OPA limited its response to state that they had verified the ranking and that the Investor's Arran and TTD projects were ranked correctly.<sup>276</sup> The OPA did not provide the supporting calculations requested by the Investor so that it could itself verify the ranking, claiming they were confidential.<sup>277</sup>

#### **A. Changes to the FIT Program Rules & Connection Point Changes**

201. On June 3, 2011, without any prior notice, the Ontario Minister of Energy directed the OPA to issue a new set of rules for awarding FIT Program contracts.<sup>278</sup> The same day, the OPA issued a version of the FIT Rules based on that direction<sup>279</sup> which incorporated the following fundamental changes to the FIT Program:
- a) The Ontario Power Authority was directed to award 750 MW of FIT Program contracts in the Bruce Region transmission zone, and 300 MW in the West of London Region transmission zone<sup>280</sup> compared to the old amounts of 1200 MW for the two regions combined;
  - b) Each project was now to be provided the opportunity to change its interconnect point during a five-day period commencing Monday, June 6, 2011;<sup>281</sup>
  - c) Projects in the Bruce or West of London Regions could change and select an interconnect point outside their own region, and could build long transmission lines outside of their own regions and into neighbouring regions to facilitate the connection.<sup>282</sup>

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<sup>275</sup> Letter from Mark Ward (Mesa), Chuck Edey (Leader Resources) and Michael Bernstein (Capstone Infrastructure) to Shawn Cronkwright (OPA), May 20, 2011 (*Investor's Schedule of Exhibits at C-0098*)

<sup>276</sup> Letter from Shawn Cronkwright (OPA) to Mark Ward (Mesa), Chuck Edey (Leader Resources Corp.) and Michael Bernstein (Capstone Infrastructure Corp.), June 17, 2011 (*Investor's Schedule of Exhibits at C-0154*)

<sup>277</sup> Letter from Shawn Cronkwright (OPA) to Mark Ward (Mesa), Chuck Edey (Leader Resources Corp.) and Michael Bernstein (Capstone Infrastructure Corp.), June 17, 2011 (*Investor's Schedule of Exhibits at C-0154*)

<sup>278</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, June 3, 2011 (*Investor's Schedule of Exhibits at C-0077*)

<sup>279</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, June 3, 2011 (*Investor's Schedule of Exhibits at C-0077*)

<sup>280</sup> Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011, at para. 5.4.1(c)(iv) (*Investor's Schedule of Exhibits at C-0005*)

<sup>281</sup> Ontario Power Authority, News Release, "Allocating Capacity and Offering FIT Contracts for Bruce to Milton Enabled Projects", June 3, 2011 (*Investor's Schedule of Exhibits at C-0078*)

<sup>282</sup> [REDACTED] (*Investor's Schedule of Exhibits at C-0207*) [Restricted]



202. Section 5 of the FIT Rules, titled "Connection Availability Management" sets out the process for how the OPA would determine which applicants would be offered contracts.<sup>283</sup> Prior to June 3, 2011, the rules provided that an applicant in any region of the province would first go through a Transmission Availability Test to determine whether there was sufficient transmission capacity at the project's selected connection point. Those projects that were successful would be offered contracts;<sup>284</sup> those projects that were not successful in the Transmission Availability Test would proceed to the Economic Connection Test.<sup>285</sup>
203. The June 3, 2011 rule change added a completely separate and unprecedented section to the Rules which provided a new process for the OPA to award FIT contracts.<sup>286</sup> This new section of the Rules titled "Newly Enabled Bruce-to-Milton Transmission Capacity" created a process that was only available for projects in the Bruce Region and the West of London Region. Mesa Power and other FIT proponents were awaiting an ECT and had been repeatedly informed by the OPA that the next step in the FIT application process was an ECT.<sup>287</sup> Instead, the change to the FIT Rules created a new process that was not consistent with proponents' expectations.
204. The most significant impact of these rule changes was that rankings in the Bruce Region were affected by proponents from the West of London Region, through building new and long transmission lines who were able to connect in Bruce and displace those projects originally placed in Bruce that had proceeded on the assumption that they were competing against those projects in their specific region. In such a situation Mesa was confident of its position as both the Arran and TTD projects were within the top 750 MW of transmission in the Bruce Region. When this assumption was undone, when the new rules were announced on June 3, 2011, proponents in Mesa's position were given five days, between June 6<sup>th</sup> and 10<sup>th</sup>, to reformulate their original and long-standing strategies.
205. Transmission Capacity was more restricted in West of London, compared to Bruce. As such, as soon as the window opened, projects flooded in from West of London. It had

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<sup>283</sup> FIT Rules, Version 1.1, September 30, 2009, Section 5 (*Investor's Schedule of Exhibits at C-0258*)

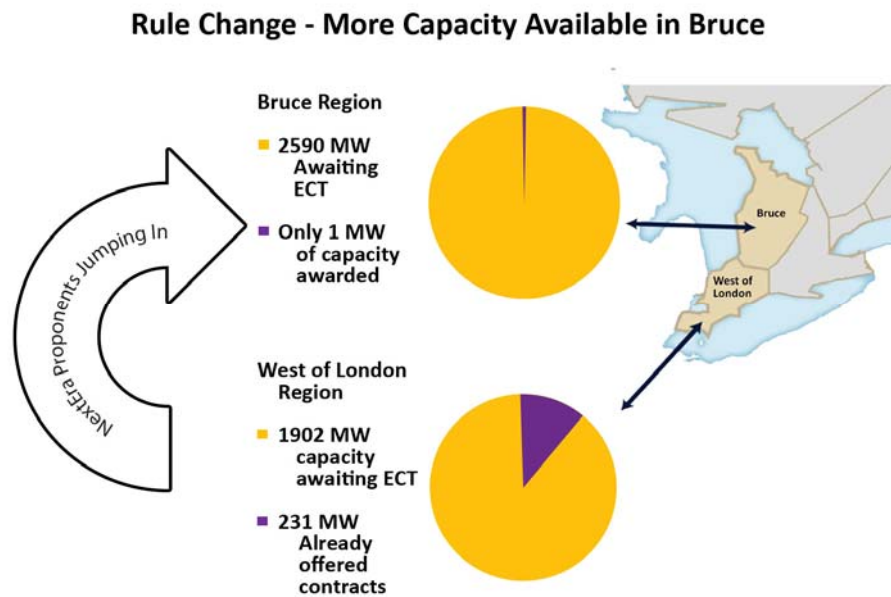
<sup>284</sup> Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009 Section 5.2(c) (*Investor's Schedule of Exhibits at C-0258*)

<sup>285</sup> Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 5.2(b) (*Investor's Schedule of Exhibits at C-0258*)

<sup>286</sup> Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011, Section 5.4 (*Investor's Schedule of Exhibits at C-0005*)

<sup>287</sup> Letter from JoAnne Butler, OPA, to Charles Edey, April 8, 2010 (*Investor's Schedule of Exhibits at C-0182*); Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010 (*Investor's Schedule of Exhibits at C-0073*); Ontario Power Authority presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010, Page 39 (*Investor's Schedule of Exhibits at C-0088*)

the effect of operating one-way and clearly benefitted proponents in the West of London region. The following diagram is illustrative of this point.



**Figure 1: Diagram of MWs Offered in Bruce Region and in West of London Region<sup>288</sup>**

206. Following the connection point change window, PPAs were offered to proponents on July 4, 2011, including new entrants, in the Bruce region. Had these new entrants not been admitted, the Investor's projects in that region would have been granted a PPA.
207. A total of 14 PPAs were offered in the Bruce Region on July 4, 2011 totalling 750 MW.<sup>289</sup> Figure 2 shows the names of those wind projects that received contracts offers on July 4, 2011 in the Bruce Region.<sup>290</sup> Of the contracts offered, five of the projects were originally ranked in the West of London Region and requested to the change to connection points in the Bruce Region. In total, 443.5 MW of the 750 MW awarded on July 4 were projects that had moved from the West of London Region to the Bruce Region. The projects in bold, italic red font are those that moved into the Bruce Region from the West of London Region. Four of those five contracts were owned by Boulevard – a subsidiary of NextEra.
208. On July 4, 2011 the OPA published updated priority rankings for the Bruce Region. These rankings were updated to reflect the fact that a number of the projects previously

<sup>288</sup> Ontario's FIT Program and Grid Expansion, May 6, 2011 (*Investor's Schedule of Exhibits at C-0209*)

<sup>289</sup> FIT Contract Offers for the Bruce – Milton Capacity Allocation process, July 4, 2011 (*Investor's Schedule of Exhibits at C-0292*)

<sup>290</sup> FIT Contract Offers for the Bruce – Milton Capacity Allocation process, July 4, 2011 (*Investor's Schedule of Exhibits at C-0292*)

ranked in the Bruce Region had been awarded, and also to reflect that certain projects that had previously requested to connect in the West of London region were now located in the Bruce Region.

209. Figure 2 also contains the project rankings for the June 3, 2011 announcement in addition to the contract awards and priority rankings in the Bruce Region of July 4<sup>th</sup>.<sup>291</sup> In this updated ranking, Mesa's projects, TTD and Arran were ranked 3<sup>rd</sup> and 4<sup>th</sup> and were within the top 415MW in the Bruce Region, even after the rule change that permitted projects to move into the Bruce Region. Had West of London projects not been permitted to change their connection points and enter into the Bruce region, there would have been sufficient capacity for Mesa's TTD and Arran projects to receive contracts:

Before the June 3 Announcement		
Bruce Region Priority Ranking		
Rank	Applicant Name	Sufficient Capacity (750 MW)
1	Goshen Wind Energy Centre (NextEra) (102)	Yes
2	East Durham Wind Energy Centre (NextEra) (23)	Yes
3	Grand Bend Wind, L.P. (100)	Yes
4	Grand Valley Wind Farms Inc. (40)	Yes
5	St. Columban Energy L.P. (15)	Yes
6	Skyway 127 Wind Energy Inc. (100)	Yes
7	St. Columban Energy L.P. (18)	Yes
8	TTD Wind Project ULC (150)	Yes
9	Arran Wind Project ULC (115)	Yes
20	Blue Water Wind	No

West of London Region Priority Ranking		
Rank	Applicant Name	Sufficient Capacity (300 MW)
1	Erieau Wind (99)	Yes
2	East Lake St. Clair Wind (NextEra) (99)	Yes
3	Bluewater Wind Energy Centre (60)	Yes
4	Jericho Wind Energy Centre (150)	No
5	Adelaide Wind Power Project (Suncor) (40)	Yes
6	Bornish Wind Energy Centre (NextEra) (73.5)	No
7	Camalachie Wind Power Project (Suncor) (40)	No
8	Cedar Point Wind Power (Suncor) (100)	No
9	Adelaide Wind Energy Centre (NextEra) (60)	No

After the June 3 Announcement		
Bruce Region Priority Ranking		
Rank	Applicant Name	Sufficient Capacity (750 MW)
1	Bluewater Wind Energy Centre (60)	Yes
2	Jericho Wind Energy Centre (150)	Yes
3	Bornish Wind Energy Centre (73.5)	Yes
4	Goshen Wind Energy Centre (102)	Yes
5	Cedar Point Wind Power (Suncor) (100)	Yes
6	Adelaide Wind Energy Centre (60)	Yes
7	East Durham Wind Energy Centre (23)	Yes
8	Grand Bend Wind, L.P. (100)	Yes
9	Grand Valley Wind Farms Inc. (40)	Yes
10	St. Columban Energy L.P. (15)	Yes
11	Suncor Energy Products Inc. (Suncor) (50)	No
12	Skyway 127 (100)	No
13	TTD Wind Project (150)	No
14	Arran Wind Project (115)	No

Figure 2: Effect of the June 3, 2011 Rule Change<sup>292</sup>

## B. Revisions to REA Process

210. After the first FIT PPA contracts were awarded, the FIT Program underwent unannounced changes. In August 2011, various Ontario ministries published revised guidelines as related to the REA process. These recent changes make the REA process significantly easier for proponents, ensuring their ability to move quickly and demand less stringent development requirements on potential projects.

<sup>291</sup>FIT Contract Offers for the Bruce – Milton Capacity Allocation process, July 4, 2011 (*Investor's Schedule of Exhibits at C-0292*); FIT Priority Ranking by Region, July 4, 2011 (*Investor's Schedule of Exhibits at C-0293*)

<sup>292</sup>FIT Contract Offers for the Bruce – Milton Capacity Allocation process, July 4, 2011 (*Investor's Schedule of Exhibits at C-0292*)

211. These changes allowed proponents with FIT PPA contracts to avoid certain development work. However, at the same time, and on the basis of a reasonable expectation that it would be awarded a FIT PPA Contract, Mesa Power aggressively developed its projects as they would need to be operational by 2013. In contrast, those proponents that were awarded with FIT PPA Contracts faced a short timeline to develop their projects and have asked for a relaxation of the original rules for permitting.

### **C. Waiver of Termination Rights**

212. Another major change was announced by the OPA on August 2, 2011 the after receiving a direction from the Ministry of Energy, that it would modify the termination provisions of the FIT Program to ensure that any PPA awarded could not be terminated under the existing four-month termination provisions in the FIT Program.<sup>293</sup>

213. The pre-existing section 2.4(a) of the FIT PPA Contract provided that the OPA could terminate the FIT PPA Contract prior to the OPA's issuance of a Notice to Proceed (NTP) before the FIT Proponent had paid its security deposit.<sup>294</sup> The August 2, 2011 direction did away with that requirement. Proponents that were able to demonstrate a completed Domestic Content Plan and a manufacturing equipment agreement by December 21, 2011, could request a waiver of the OPA's termination rights.

214. On August 5, 2011, the OPA further notified proponents that if a proponent was to submit an accurate and complete waiver on or before August 15, 2011, the OPA would review and execute the waiver before the Ontario general election by a September 30, 2011 deadline.

The map below shows the locations of selected wind projects that sought power purchase agreements in the West of London and Bruce Regions. In particular, the map shows the locations of the six projects owned by NextEra that received FIT contract offers on July 4, 2011, the four wind projects owned by Mesa Power, and the location of two projects owned by members of the Korean Consortium and Pattern that received contracts in August 2011.<sup>295</sup>

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<sup>293</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Anderson (OPA), Direction to the OPA, August 2, 2012 (*Investor's Schedule of Exhibits at C-0084*)

<sup>294</sup> The FIT Contract s. 2.4(b) specified that certain NTP Prerequisites were required, including: (i) regulatory approvals, (ii) financing plan, (iii) domestic content plan, and (iv) electricity connection approvals. Ontario Power Authority, Feed-In Tariff Contract (FIT Contract) Version 1.5, June 3, 2011, at para. 2.4(a) (*Investor's Schedule of Exhibits at C-0263*)

<sup>295</sup> The below map was compiled with information from Hydro One's transmission map (*Investor's Schedule of Exhibits at C-0202*); NextEra Energy Canada's Presentation on the Net Zero Proposal in Ontario, August 10, 2010 (*Investor's Schedule of Exhibits at C-0207*); and Leader Resources Summary of FIT Rule Changes, (*Investor's Schedule of Exhibits at C-0178*)

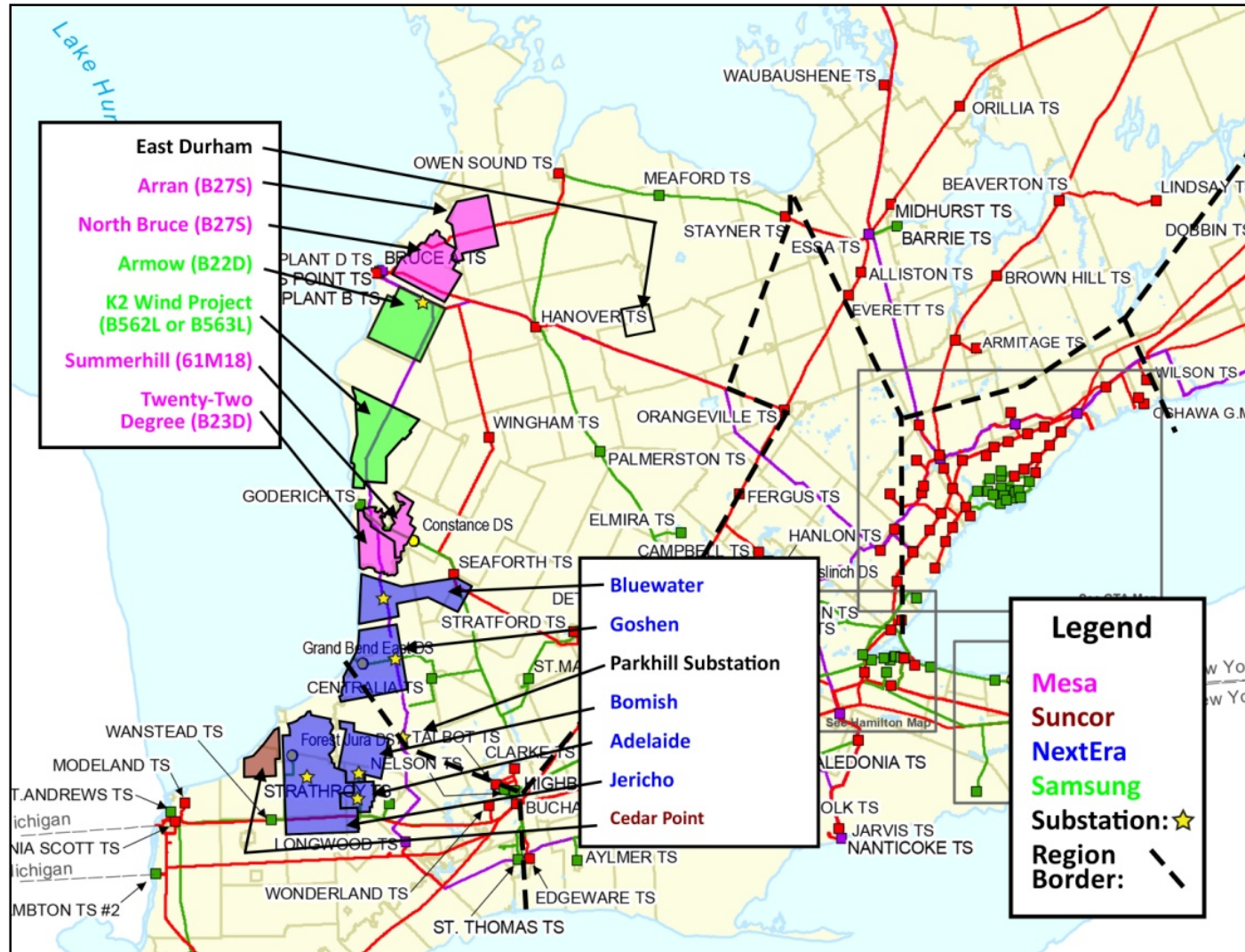


Figure 3: Map Compiled from Hydro One Transmission Data<sup>296</sup>

<sup>296</sup> Compiled with information from Hydro One's transmission map (*Investor's Schedule of Exhibits at C-0202*)

#### **D. The Korean Consortium's Green Energy Investment Agreement**

215. In June and July, 2009, Minister of Energy George Smitherman went to Korea and met with the Korean Consortium; meetings continued in Ontario through the summer and fall of 2009.
216. The *GEIA* provided further incentives to the Korean Consortium that were not available to FIT applicants. For simply endeavouring to bring manufacturing facilities to Ontario, or for identifying existing facilities that could be used to meet Ontario domestic content requirements imposed by the FIT Program, the Korean Consortium was awarded with two economic development adders, which had a guaranteed bonus price per kWh for wind and solar generation that it received. Another preferential treatment that the Korean Consortium received included a guarantee of transmission capability.
217. On January 21, 2010, two Korean-controlled companies, Samsung C&T Corporation and Korea Electric Power Corporation, signed a \$7 billion green energy investment agreement with Ontario's Premier and with Ontario's Minister of Energy called the *Green Energy Investment Agreement*.<sup>297</sup> The existence of the agreement was made public, but its terms and conditions were kept secret. The confidential agreement granted the Korean Consortium guaranteed priority access to transmission capacity for its renewable energy projects, and an increased contract price per kWh. The Korean Consortium agreed to build 2000 MW of wind power projects and 500 MW of solar power projects in Ontario by 2016. Equipment for the deal was to be manufactured in Ontario and the projects were to be implemented in five phases.
218. The OPA and Ontario Energy Board were not consulted on the *GEIA*, which has been described by the Ministry of Energy as an "investment agreement".<sup>298</sup> The Auditor General found that in the negotiation and signing of the *GEIA*, "the normal due diligence process for an expenditure of this magnitude had not been followed... we expected but did not find that a comprehensive and detailed economic analysis had been prepared."<sup>299</sup> It continues and notes that Cabinet approval was not required.<sup>300</sup>
219. On April 1, 2010, the Minister of Energy issued a Ministerial Direction to the OPA related to the *GEIA* directing the OPA to negotiate Power Purchase Agreements with the Korean

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<sup>297</sup> Samsung C&T Corporation, Article, "Samsung C&T to Build World's Largest Wind, Solar Panel, Cluster in Ontario", January 21, 2010 (*Investor's Schedule of Exhibits at C-0020*)

<sup>298</sup> 2011 Annual Report of the Auditor General of Ontario, Chapter 3, VFM Section 3.03 Electricity Sector-Renewable Energy Initiatives, at p. 108 (*Investor's Schedule of Exhibits at C-0228*)

<sup>299</sup> 2011 Annual Report of the Auditor General of Ontario, Chapter 3, VFM Section 3.03 Electricity Sector-Renewable Energy Initiatives, at p. 108 (*Investor's Schedule of Exhibits at C-0228*)

<sup>300</sup> 2011 Annual Report of the Auditor General of Ontario, Chapter 3, VFM Section 3.03 Electricity Sector-Renewable Energy Initiatives, at p. 108 (*Investor's Schedule of Exhibits at C-0228*)

- Consortium.<sup>301</sup> Shortly thereafter, in June 2010 the OPA commenced a series of negotiating meetings with the Korean Consortium and its partners to determine the terms of the Power Purchase Agreements.
220. The Ministerial Direction revealed some of the details of the *GEIA*, and that the Korean Consortium had agreed to develop 2,500 MW of wind and solar renewable generation projects in Ontario in five Phases.<sup>302</sup> The Korean Consortium committed to bringing manufacturing plants to Ontario to manufacture wind and solar generation components. Phase 1 of the *GEIA* was to provide for Targeted Generation Capacity of 400 MW of wind power and 100 MW of solar power with the targeted commercial operation date as of March 31, 2013.<sup>303</sup>
221. Owing to the advantageous terms afforded under the *GEIA*, certain proponents that had put forward contracts under the FIT Program opted instead to partner with the Korean Consortium to obtain the better terms. One of the proponents was Pattern Energy Group LLC ("Pattern Energy"), an independent, fully integrated energy company that develops, constructs, owns and operates renewable energy and transmissions assets in the United States, Canada and Latin America.<sup>304</sup> Following the signing of the *GEIA*, Samsung entered into an agreement with Pattern in 2010, through which Pattern became involved in the development of the first three stages of the *GEIA*. Through this partnership, representatives from Pattern and its local Canadian subsidiary participated in various secret Working-Group meetings with the government while at the same time competing for a piece of Ontario's renewable energy market through the FIT Program.
222. Unlike applicants to the FIT Program, whose access to the OPA and Ministry of Energy was restricted, the Korean Consortium enjoyed open access to the government in the lead up to and after the negotiation of the *GEIA*.
223. The Auditor General reported:
- "In April 2010, the Minister directed the OPA to give priority to connecting the consortium projects to the grid when assessing the availability of already-limited transmission capacity. This commitment to the consortium affected the FIT contract allocation process."<sup>305</sup>

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<sup>301</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, April 1, 2011 (*Investor's Schedule of Exhibits at C-0089*)

<sup>302</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, April 1, 2011 (*Investor's Schedule of Exhibits at C-0089*)

<sup>303</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, April 1, 2011 (*Investor's Schedule of Exhibits at C-0089*)

<sup>304</sup> Chatham News Article headed "Pattern Energy and Samsung Renewable Energy Acquire Wind Development Projects from Suncor Energy and Northland Power", April 18, 2011. (*Investor's Schedule of Exhibits at C-0101*)

<sup>305</sup> 2011 Annual Report of the Auditor General of Ontario, Chapter 3, VFM Section 3.03 Electricity Sector-Renewable Energy Initiatives, at p. 116 (*Investor's Schedule of Exhibits at C-0228*)

224. The OPA admitted that it delayed awarding PPAs for FIT proponents competing for access because of difficulties in getting the ECT process.
- "The OPA could not start to assess the transmission availability until the consortium finalized the connection points for phases two and three of its projects."<sup>306</sup>
225. After the signing of the *GEIA*, the Korean Consortium continued to benefit from its access to the Ontario Government by its participation in meetings with various government entities. Working-group meetings between it, the Ministry of Energy, the Ministry of Tourism and Culture, the OPA, and the IESO. These meetings began in 2010 and continued regularly through 2011; their purpose was to facilitate the implementation of the *GEIA* by recommending suitable project sites, facilitating resolution of issues related to transmission and capacity, and assisting with securing rights of way to the Transmission System.
226. Further meetings were held with the specific objective of negotiating the terms of Power Purchase Agreements between Ontario and the Korean Consortium. These meetings began in June 2010 and continued through at least May 2011.
227. Prior to signing of the *GEIA*, the Ontario Ministry of Energy had directed the OPA on September 30, 2009 to hold in reserve 240 MW of transmission capacity in Haldimand County, Ontario, and a total 260 MW of transmission capacity in Essex County and the Municipality of Chatham-Kent jointly for renewable energy generating facilities with respect to proponents that signed province-wide framework agreements, in order to satisfy Phase 1 of the *GEIA*.<sup>307</sup> As a result of the *GEIA*, the Korean Consortium received a guaranteed right of first refusal on transmission access in these transmission zones in the Province of Ontario.
228. A further Ministerial Direction was given to the OPA on July 29, 2011 for the OPA to enter into PPAs with the Korean Consortium. On August 2, 2011, the OPA entered into PPAs with the Korean Consortium for four wind projects: K2 Wind Project,<sup>308</sup> Armow Wind Project,<sup>309</sup> Haldimand Wind Project,<sup>310</sup> and South Kent Wind Project<sup>311</sup>. As a result

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<sup>306</sup> 2011 Annual Report of the Auditor General of Ontario, Chapter 3, VFM Section 3.03 Electricity Sector-Renewable Energy Initiatives, at p. 116 (*Investor's Schedule of Exhibits at C-0228*)

<sup>307</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, April 1, 2011 (*Investor's Schedule of Exhibits at C-0089*)

<sup>308</sup> K2 Wind Project Power Purchase Agreement between Ontario Power Authority and K2 Wind Ontario Limited Partnership, August 3, 2011 (*Investor's Schedule of Exhibits at C-0287*)

<sup>309</sup> Armow Wind Project, Power Purchase Agreement between Ontario Power Authority and SP Ontario Wind Development LP, August 2, 2011 (*Investor's Schedule of Exhibits at C-0286*)

<sup>310</sup> Haldimand Wind Project, Power Purchase Agreement between Ontario Power Authority and Grand Renewable Wind LP, August 2, 2011 (*Investor's Schedule of Exhibits at C-0285*)

<sup>311</sup> South Kent Wind Project Power Purchase Agreement between Ontario Power Authority and South Kent Wind LP, August 2, 2011 (*Investor's Schedule of Exhibits at C-0284*)



of its guaranteed transmission capacity and this Ministerial Direction, the Korean Consortium was able to purchase lower-ranked projects which were otherwise undeserving of PPAs.

229. On August 3, 2011, the OPA announced changes to the terms granted to the Korea Consortium.<sup>312</sup> The Minister of Energy gave a one-year extension to the Korea Consortium.

#### **E. Boulevard's Involvement in the FIT Program**

230. In mid-January 2011, shortly after the OPA announced that 1200MW of contracts would be offered in the Bruce region, a lobby organization, the Canadian District Energy Association, contacted the OPA to set up a meeting on behalf of NextEra Energy Resources, one of Mesa's competitors under the FIT Program, to discuss the migration of their projects in the "West of London" region to the "Bruce" region.<sup>313</sup> In advance of the meeting, the OPA reminded NextEra:

We have limitations on the extent we can discuss information that is relevant and material to the upcoming ECT process. We will try to be helpful, but as I said to all who wish to discuss this kind of matter with us, we can't recommend, suggest or consult on your specific needs. We can clarify rules and provide better understanding as they related to disclosed information.<sup>314</sup>

231. The OPA met with this lobby organization and NextEra representatives to discuss "data confirmation as to what [NextEra] modeled in [their] load flows."<sup>315</sup> Following this meeting, an internal OPA communication recommended that "going forward, [the OPA] should reflect this potential connection point in [their] studies."<sup>316</sup>
232. The content of this meeting directly contravened the warning the OPA had sent to NextEra that it could not "consult on your specific needs". The (date) meeting between NextEra and the OPA was only the beginning of a unique relationship whereby NextEra continued to benefit from preferential access to the OPA and Ministry of Energy.
233. A concern for NextEra was the ability to change the connection point for their projects and gain different access to the transmission system. On February 25, 2011, representatives of NextEra met with the Ministry of Energy to obtain further information about how to change their projects' connection point, including the specific

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<sup>312</sup> Ontario Power Authority, News Release, "Power purchase agreements signed with Korean Consortium", August 3, 2011 (*Investor's Schedule of Exhibits at C-0059*)

<sup>313</sup> Email from Mary Ellen Richardson (Canadian District Energy Association) to Bob Chow (OPA), January 14, 2011 (*Investor's Schedule of Exhibits at C-0294*)

<sup>314</sup> Email from Bobby Adjemian (NextEra Energy) to Bob Chow (OPA), January 18, 2011 (*Investor's Schedule of Exhibits at C-0234*)

<sup>315</sup> Email from Bobby Adjemian (NextEra Energy) to Bob Chow (OPA), January 18, 2011 (*Investor's Schedule of Exhibits at C-0234*)

<sup>316</sup> Email from Tracy Garner (OPA) to Irwin Ng (OPA), January 25, 2011 (*Investor's Schedule of Exhibits at C-0095*)

timing of a window to conduct those changes.<sup>317</sup> At this time there was no reason for Mesa, or other applicants, to suspect that they should be considering, or would have the opportunity to consider, changing their respective connection points.

234. In early April 2011, the IESO scheduled a meeting with NextEra and its representatives regarding possibilities for connecting to 500kV transmission lines. NextEra would eventually change connection points in order to connect to these exact transmission lines.
235. Owing to their possession of unique information gleaned from numerous meetings and communications with the OPA and Ministry of Energy that began in January, 2011, NextEra was uniquely prepared to make such a substantial overhaul to its projects when the announcement was made on June 3.

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<sup>317</sup> Email from Bob Lopinski (Counsel Public Affairs) to Pearl Ing (Ministry of Energy), February 25, 2011 (*Investor's Schedule of Exhibits at C-0190*)

### **PART THREE: SUBSTANTIVE LEGAL ISSUES**

236. The Investor claims that Canada has violated at least the following provisions of Section A of NAFTA Chapter 11:

- a) Article 1106 – Performance Requirements
- b) Article 1102 – National Treatment
- c) Article 1103 – Most Favored Nation Treatment
- d) Article 1104 – Standard of Treatment
- e) Article 1105 – International Law Standards of Treatment
- f) Article 1503(2) – State Enterprises

And these breaches have resulted in damage to the Investor.

#### **I. PERFORMANCE REQUIREMENTS- ARTICLE 1106**

237. NAFTA Article 1106 restricts the imposition of performance requirements on investments or investors. The prohibited practices are specifically enumerated in NAFTA Article 1106(1) and Article 1106(3). These prohibitions apply to all investments or investors including those from non-NAFTA parties.

238. Article 1106(1) sets out a general prohibition on performance requirements. It states:

No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory.

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such an investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or
- (g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

239. Article 1106(3) lists a sub-set of performance requirements that cannot be imposed in connection with the provision of an advantage:

- No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:
- (a) to achieve a given level or percentage of domestic content;
  - (b) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
  - (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign inflows associated with such investment;
  - (d) to restrict sales of goods or services in its territory that such an investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earning.
240. Article 1101(1)(c) provides that the NAFTA Parties obligations in Article 1106 apply to measures adopted or maintained by a Party to all investments in the territory of the Party. As a result of this wide scope provision, these NAFTA obligations apply broadly, not only to the investments of investors from other NAFTA Parties, but to *all investments* within the territory of a NAFTA Party irrespective of nationality. Thus, Canada is bound through this broad obligation not to engage in these market distorting industrial policy activities for investments of any foreign or domestic investor, whether they come from a NAFTA Party or not.<sup>318</sup>
241. Performance requirements refer to specific industrial policies that are adopted by the state. Because these policies can have extensive investment distorting effects, the NAFTA Parties agreed to impose broad limitations on the future use of these policy instruments. Similar limits have also been imposed in the WTO Agreement on Trade Related Investment Measures (TRIMs) Code. Thus, in *Canada-Renewable Energy*, Ontario's local minimum domestic content requirements were found to be impermissible performance requirements under the TRIMs Agreement. There is a close relationship between the National Treatment obligation in the GATT and the TRIMs Agreement such that a local content requirement that violates TRIMs would normally have been found to violate the National Treatment obligation in Article III:4 of the GATT.
242. Performance requirements can only be imposed if:
- a) Direct performance requirements are set out in a regulatory scheme, government policy or practice; and
  - b) Indirect performance requirements are imposed where a measure has the effect of according an advantage to domestic over foreign interests. In *Canada - Foreign*

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<sup>318</sup> Appleton, B. *Navigating NAFTA: A Concise User's Guide to the North American Free Trade Agreement* (Scarborough: Carswell, 1994) ("Appleton (1994)"), at p. 83. The author notes that the obligations in the NAFTA go further than those in the GATT or in the earlier Canada- US Free Trade Agreement (***Investor's Schedule of Legal Authorities at CL-037***)

*Investment Review Act*, for example, the GATT Panel found undertakings to purchase goods manufactured in Canada which were given in order to obtain governmental approval for an investment, constituted prohibited requirements which gave less favourable treatment to imported products.<sup>319</sup>

243. A Performance Requirement must also be related to a specified investment activity such as the operation, expansion or conduct of the investment.

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<sup>319</sup> *Canada - Administration of the Foreign Investment Review Act*, L/5504 - 30S/140, Report of the Panel (7 February 1984) ("Canada - Foreign Investment Review Act - Panel Report"), at para. 5.13 (***Investor's Schedule of Legal Authorities at CL-038***)

## II. NATIONAL TREATMENT

244. NAFTA Article 1102 prescribes the treatment the NAFTA Parties are to provide to the investors of another Party and their investments:

### National Treatment

Each Party shall accord to Investor of another Party treatment no less favorable than that it accords, in like circumstances, to its own Investor with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Each Party shall accord to investments of Investor of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own Investor with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

245. NAFTA Article 1102 obliges the NAFTA Parties to treat investors from other NAFTA Parties and their investments as favorably as it treats domestic investors and their investments operating in like circumstances.
246. Canada treated the Investor and its Investment less favorably than domestic investors operating in like circumstances. Other investors or Investments in like circumstances were treated more favorably.
247. Each of the ways in which Canada and Ontario treated the Investor and its Investments less favorably than other Canadian investors and investments in like circumstances constitutes a violation of NAFTA Article 1102.
248. The purpose of Article 1102 is to ensure that investors and the investments of investors from the United States or Mexico receive treatment equivalent to that provided to the most favorably treated Canadian investor or its investment. The purpose of the obligation is clear: it is to ensure that Canadian governments do not provide better treatment to locals than that provided to foreigners.
249. NAFTA Article 1103 provides a similar obligation to provide investors and their investments the best treatment provided to investors of a third party state.
250. NAFTA Article 1104 confirms that the NAFTA's intent is to provide the investments of an investor from another NAFTA party with the best treatment provided in like circumstances in the jurisdiction, whether it be national treatment or most favoured nation treatment.
251. The terms "national treatment", "most favored nation treatment" and "fair and equitable treatment", are not specifically defined in the NAFTA, but they have been used in more than 1,000 bilateral investment treaties. So the NAFTA, like these many other agreements, chose to incorporate the living meaning of these well-known

- international law terms – a meaning that comes from countless international tribunal decisions and from international customary law.
252. The meaning of "national treatment" is therefore based on the ordinary meaning of the words, in their context, and in light of NAFTA's object and purpose, as the *Vienna Convention* mandates. National treatment is one of three fundamental interpretative principles informing the meaning of the entire NAFTA.<sup>320</sup>
253. Acknowledging Article 1102's origins in, and similarity to, GATT Article III:4, several NAFTA Tribunals have drawn from GATT Article III:4 jurisprudence in interpreting the elements of Article 1102.<sup>321</sup> Indeed, in applying this jurisprudence, the *Feldman* Tribunal noted that GATT Article III:4 is "analogous" to Article 1102 of the NAFTA.<sup>322</sup>
254. There are three elements which an investor or investment needs to establish for a NAFTA Party to be held in breach of NAFTA Article 1102:
- a) The foreign investor or investment must be in like circumstances with local Investor or investments;
  - b) The NAFTA Party treated the foreign investor or investment less favorably than it treated local investors or investments; and
  - c) The treatment must be with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

#### A. Likeness

255. Similar to the likeness test under NAFTA Article 1103, the likeness test under NAFTA Article 1102 compares, for the purposes of the arbitration, the "like circumstances" between local Canadian proponents and a foreign NAFTA Party Investor and its Investment.

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<sup>320</sup> NAFTA Article 102(1). In addition to its use in NAFTA Article 1102, several other NAFTA provisions oblige the Parties to accord national treatment. For example, there are national treatment obligations for goods (Article 301), for energy (Article 602), for services (Article 1202) and for financial services (Article 1405).

<sup>321</sup> *S. D. Myers* - First Partial Award, at para. 244 (***Investor's Schedule of Legal Authorities at CL-033***); *Pope & Talbot Inc. v. The Government of Canada*, Award on the Merits of Phase 2 (April 10, 2001) ("*Pope & Talbot* - Award on Merits of Phase 2") para. 68, 69 and footnote 68 (***Investor's Schedule of Legal Authorities at CL-039***); *Feldman* - Award, at para. 165 (***Investor's Schedule of Legal Authorities at CL-040***)

<sup>322</sup> *Feldman v. United Mexican States*, Award, 2002 WL 32818521 (December 16, 2002) ("*Feldman* - Award"), at para. 165 (***Investor's Schedule of Legal Authorities at CL-040***): "The national treatment/non-discrimination provision is a fundamental obligation of Chapter 11. The concept is not new with NAFTA. Analogous language in Article III of the GATT has applied as between Canada and the United States since 1947, and with Mexico since 1985, with regard to trade in goods."

256. The comparison between the circumstances of foreign and domestic investments needs only be "like". There can be many differences in circumstances, but once the threshold of likeness is met, a comparison of treatment follows.
257. Likeness needs to be considered in the circumstances. Where the question of likeness arises in the context of government regulations, likeness requires the Tribunal to consider all of those who are competing for similar regulatory permissions. This was the approach taken by the NAFTA Tribunal in *Grand River*<sup>323</sup>, and the approach taken in *Occidental Petroleum*.<sup>324</sup> In this NAFTA claim, all of those, who like Mesa Power sought regulatory permission from Ontario to obtain Power Purchase Agreements directed by the Government of Ontario to be offered by the Ontario Power Authority, are in like circumstances. This is the class of investments and investors whose treatment needs to be considered.
258. Where it is a process of general application that is itself at issue, such as the process to obtain Power Purchase Agreements from the Government of Ontario, all entities, domestic and foreign, are like in being subject to the same regulatory regime.
259. In *Grand River* the Tribunal surveyed the approach taken by five recent NAFTA Tribunals to discern a pattern and common approach to the analysis of "like circumstances". The Tribunal in *Grand River* reviewed the approach taken by Tribunals in *Pope & Talbot, Inc. v. Canada*, *ADF Group, Inc. v. United States of America*, *Feldman v. Mexico*, *Methanex Corp. v. United States of America*, and *United Parcel Service of America v. Canada (UPS)*. It concluded that what matters most in ascertaining whether investors and investments are in like circumstances is whether they are governed by the same legal regime:
- The reasoning of these cases shows the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like for purposes of Articles 1102 and 1103.<sup>325</sup>
- Therefore, investors and investments will be in like circumstances when they are competing in the same market of regulatory treatment and the question is about the regulatory treatment accorded to them.
260. Although the origin of the obligation dates back over a century, the main influences on NAFTA Article 1102 are equivalent provisions in the WTO's GATT and GATS.<sup>326</sup> The

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<sup>323</sup> *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, Award (January 12, 2011) ("*Grand River - Award*"), at para. 167 (***Investor's Schedule of Legal Authorities at CL-041***)

<sup>324</sup> *Occidental Production Company v. Republic of Ecuador*, Final Award, 2004 WL 3267260 (July 1, 2004) ("*Occidental - Final Award*"), at para. 173 (***Investor's Schedule of Legal Authorities at CL-027***)

<sup>325</sup> *Grand River - Award*, at para. 167 (***Investor's Schedule of Legal Authorities at CL-041***)

<sup>326</sup> The interpretive principle of Most-Favoured Nation Treatment contained in NAFTA Article 102 would also strongly support a relationship between these agreements and NAFTA. So does Article 103 which specifically addresses that relationship.



relationship between the NAFTA and the GATT is expressed in the preamble of the NAFTA, where the NAFTA Parties expressly recognize that the NAFTA is built on "their respective rights and obligations under the General Agreement on Tariffs and Trade."<sup>327</sup>

The NAFTA and WTO national treatment provisions are virtually identical. GATT Article III:4 states:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Similarly, Article XII of the GATS says:

... each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than it accords to its own like services and service suppliers...

The requirement of "no less favorable" treatment is the same. Indeed, the Pope & Talbot Tribunal described Article 12 of the GATS as "identical" to NAFTA Article 1102(2).<sup>328</sup>

261. Canada's *Statement of Implementation* also expressly acknowledges the influence of the GATT/WTO on the NAFTA:

The NAFTA and the Uruguay Round agreements cover much of the same ground and the two sets of rules are largely complementary and mutually reinforcing. In many respects, the NAFTA built on progress that had been made in the Uruguay Round while the Round in turn profited from the experience of Canada, the United States and Mexico in negotiating the NAFTA.<sup>329</sup>

262. It is clear from Canada's own statement, made in regard to the implementation of the NAFTA, that the GATT and the NAFTA negotiations were inter-connected and inter-dependent.

263. The origins of NAFTA Article 1102, GATT Article III, the common wording in the provisions, the equivalent purposes and Canada's acknowledgement of the influence of the WTO provisions on the NAFTA enshrines that GATT/WTO national treatment jurisprudence informs the meaning of the three elements of NAFTA Article 1102. It is for this very reason that NAFTA Tribunals have drawn from GATT/WTO jurisprudence to interpret the elements of NAFTA Article 1102.<sup>330</sup>

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<sup>327</sup> The preamble forms an integral part of the NAFTA and it must be given meaning in the interpretation of the NAFTA pursuant to NAFTA Article 102 and the Vienna Convention.

<sup>328</sup> *Pope & Talbot* - Award on Merits of Phase 2, at para. 52 (*Investor's Schedule of Legal Authorities at CL-032*)

<sup>329</sup> *Canadian Statement on Implementation*, at p. 75 (*Investor's Schedule of Legal Authorities at CL-012*)

<sup>330</sup> *S. D. Myers* - First Partial Award, at para. 244, (*Investor's Schedule of Legal Authorities at CL-033*) *Pope & Talbot* - Award on Merits of Phase 2, at para. 68 - 69, footnote 68 (*Investor's Schedule of Legal Authorities at CL-039*); *Feldman* - Award, at para. 165 (*Investor's Schedule of Legal Authorities at CL-040*)

264. Other tribunals have also considered competition as being the critical element of likeness. In the result, all of those, who like Mesa competed for Power Purchase Agreements offered by the Ontario Power Authority at the direction of the Ontario Government, were in like circumstances, and this is the class of investments whose treatment needs to be considered in the context of regulatory permission.
265. The WTO Panel in *Canada – Renewable Energy* concluded that Canada had violated the GATT Article III:4 national treatment obligation in its operation of the FIT Program, especially on account of the presence of clear discriminatory provisions within the program.
266. Relying on the findings from the Panel, the WTO Appellate Body considered that likeness was to be considered on the basis of "products that are directly competitive to or substitutable with the product purchased under the challenged measure and concluded:
- Article III:8(a) thus concerns, in the first instance, the product that is subject to the discrimination. The coverage of Article III:8 extends not only to products that are identical to the product that is purchased, but also to "like" products. In accordance with the Ad Note to Article III:2, it also extends to products that are directly competitive to or substitutable with the product purchased under the challenged measure. For convenience, this range of products can be described as products that are in a competitive relationship. What constitutes a competitive relationship between products may require consideration of inputs and processes of production used to produce the product.<sup>331</sup>
267. The existence of a difference does not make one investor unlike another for the purposes of like circumstances. That is why the words used in the NAFTA are "like circumstances", and not "identical circumstances".
268. As the GATT has recognized, judgment needs to be applied.<sup>332</sup> And the interpretation and application of the test of likeness must further the objectives of equality of competitive opportunity.<sup>333</sup> In other words, the analysis is, in substance, a matter of functional common sense.

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<sup>331</sup> *Canada - Renewable Energy* - AB Report, at para. 5.63 (***Investor's Schedule of Legal Authorities at CL-002***)

<sup>332</sup> *United States - Measures Affecting Alcoholic and Malt Beverages* (US-Malt Beverages), DS23/R, GAIT Panel Report, (June 19, 1992) BISD 395/206 ("*US-Malt Beverages*"), at paras. 5.23 – 5.26 (***Investor's Schedule of Legal Authorities at CL-043***)

<sup>333</sup> The words "treatment no less favorable" were used in NAFTA Article 1102 as their meaning had been considered extensively in GATT jurisprudence. This jurisprudence had interpreted "treatment no less favorable" as requiring equality of competitive opportunities. See, for example, *United States - Taxes in Petroleum and Certain Imported Substances*, Report of the Panel 1987 WL 421960 (G.A.T.T.) (June 17, 1987) ("*Taxes in Petroleum* - Panel Report"), at para. 5.2.2 (***Investor's Schedule of Legal Authorities at CL-044***); *EC Asbestos* - AB Report, at para. 99 (***Investor's Schedule of Legal Authorities at CL-045***)

## **B. Treatment No Less Favorable**

269. NAFTA Article 1102's second element is the obligation to accord a foreign investor and its investments with "treatment no less favourable" than that provided to domestic investors in like circumstances.
270. The interpretive task for the Tribunal therefore begins with the text of Article 1102. But is not completed until Article 1102 is examined in the context of the NAFTA as a whole.
271. The context and objectives of the NAFTA make it clear that Article 1102 requires the NAFTA Parties to provide equality of competitive opportunities. The notion of equality of competitive opportunities allows for different treatment that is not less favorable treatment. It allows a regulatory process to produce different outcomes, as long as the process demonstrably treats the parties with evenhandedness, to ensure that investments are granted equal opportunities. To be evenhanded, the treatment need not be identical. Neither does the result need to be equal. But the opportunities must be equal.
272. The text of Article 1102 makes clear that it requires a difference of nationality between the more favourably treated local investor or investment and the Claimant investor or its investment. But it contains no requirement of intentional nationality-based discrimination. A violation of national treatment can be easily seen when there is actual nationality-based discrimination, but intentional nationality-based discrimination is not an element of Article 1102.
273. The *Feldman* Tribunal pointed out that NAFTA Article 1102 does not require an investor to demonstrate explicitly that a distinction is a result of their foreign nationality.<sup>334</sup> It also noted the *Pope & Talbot* Tribunal's observation that requiring proof of intent would effectively limit NAFTA Article 1102 to *de jure* violations, thereby severely limiting the effectiveness of the National Treatment concept in protecting foreign investors.<sup>335</sup>
274. The *Feldman* Tribunal also noted:
- ... requiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government. It would be virtually impossible for any claimant to meet the burden of demonstrating that a government's motivation for discrimination is nationality rather than some other reason.<sup>336</sup>

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<sup>334</sup> *Feldman* – Award, at para. 181 (***Investor's Schedule of Legal Authorities at CL-040***)

<sup>335</sup> *Feldman* - Award, at para. 183, 184 (***Investor's Schedule of Legal Authorities at CL-040***), citing to *Pope & Talbot*, Award on the Merits of Phase 2, April 10, 2001, at paras. 78 and 79 (***Investor's Schedule of Legal Authorities at CL-039***) According to the *Pope & Talbot* Tribunal, was that showing discrimination based on nationality would "tend to excuse discrimination that is not facially directed at foreign owned investments."

<sup>336</sup> *Feldman* - Award, at para. 183 (***Respondent's Schedule of Legal Authorities at CL-040***)

275. However, both *de jure* and *de facto* discrimination is covered by NAFTA Article 1102.
276. A Joint Review Panel administered by the Canadian Environmental Assessment Agency requested that the Canadian Department of Foreign Affairs and International Trade to send an official to public hearings to explain the meaning of Chapter Eleven of the NAFTA. The Department sent a senior official, Gilles Gauthier, the Director of the Investment Trade Policy Division, together with departmental legal counsel, to provide an official government explanation of the meaning of Chapter Eleven of the NAFTA. In his formal presentation, Mr. Gauthier confirmed that NAFTA Article 1102 "prohibits both *de facto* or *de jure* discrimination".<sup>337</sup>
277. *De jure* discrimination occurs when government measures on their face impose a difference in treatment based on nationality.
278. *De facto* discrimination is established by facts that show the detrimental treatment of a foreign investor, not only in the nature and magnitude of a difference in treatment but in relation to whether it can be objectively justified by non-nationality based legitimate considerations.
279. In essence, the National Treatment obligation to accord "treatment no less favourable" means that a Party cannot modify the "competitive opportunities" to the detriment of another Party's investors and its investments.<sup>338</sup> GATT/ WTO case law establishes that it is an objective test, applicable to both *de jure* and *de facto* measures,<sup>339</sup> and serves to guarantee that foreign economic interests receive the best treatment given to domestic interests. NAFTA Tribunals have adopted the same approach.<sup>340</sup>
280. After an investor has demonstrated that the different results stem from different competitive opportunities, the evidentiary burden shifts to the Government to excuse the *prima facie* violation of national treatment. And the burden on the government is a strict one. It requires the government to show that the less favorable treatment was necessary.

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<sup>337</sup> Transcript of Mr. Gilles Gauthier's Presentation by the Department of Foreign Affairs and International Trade to the Bilcon of Delaware Joint Review Panel, June 19, 2007, at p. 2 (***Investor's Schedule of Exhibits at C-0421***)

<sup>338</sup> See, for example, *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/R, Report of the Panel (March 15, 2005) ("*EC-Agricultural Products*"), at para. 178 (***Investor's Schedule of Legal Authorities at CL-046***); *Taxes in Petroleum* - Panel Report, at para. 5.2.2 (***Investor's Schedule of Legal Authorities at CL-044***); *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/R, Report of the Panel (March 15, 2005) ("*EC-Agricultural Products*") (***Investor's Schedule of Legal Authorities at CL-046***)

<sup>339</sup> For clarity, "de jure" means by law, whereas "de facto" means while not law, there is evidence in practice.

<sup>340</sup> *Merrill & Ring* – Award, at para. 80 (***Investor's Schedule of Legal Authorities at CL-036***); *S.D. Myers*, First Partial Award, at para. 254 (***Investor's Schedule of Legal Authorities at CL-033***); and *Feldman* – Award, at para. 187 (***Investor's Schedule of Legal Authorities at CL-040***)

281. So, where there is different treatment in like circumstances, the burden is on Canada to show that the different treatment was not less favourable, or not necessary. Canada cannot meet that burden.
282. Common to NAFTA tribunals -most explicitly in *Feldman*-and recent decisions of the WTO Appellate Body on National Treatment, is the notion that once the nature and magnitude of the difference of treatment between likes has been established by the Investor, the burden shifts to the Respondent to show that this difference, both its nature and magnitude can be fully accounted for by legitimate regulatory considerations such as non-nationality related considerations.
283. This was the approach taken by the WTO Appellate Body in *Tuna II*:
- With respect to the burden of showing that a technical regulation is inconsistent with Article 2.1 of the *TBT Agreement*, we recall that it is well-established "that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".<sup>462</sup> Where the complaining party has met the burden of making its *prima facie* case, it is then for the responding party to rebut that showing.<sup>341</sup>
284. In this case, considerations of nationality lay below the surface and sometimes came up to the surface in relation to Mesa. The WTO's finding of that presence of nationality-based local content preferences demonstrates the existence of nationality-based discriminatory considerations directly within the government measure at issue.
285. The issue of discriminatory effects of the FIT program against foreign investors was a prominent issue before the WTO. The WTO Panel's findings of underlying discrimination in the FIT Program against persons who were not from Ontario,<sup>342</sup> and the resulting benefit to locals who were from Ontario, are certainly sufficient to require Canada to prove that the FIT Program did not constitute a discriminatory regime. 2) Moreover, it is notable that in the WTO proceeding Canada did not even attempt to offer a defense of its measures as necessary for or in relation to legitimate public policy objectives, as provided for in Article XX, the general exceptions provision of the GATT.
286. In these circumstances, it is entirely reasonable to require a full demonstration on Canada's part that all differences of treatment between Mesa and Canadian entities subject to the same regulatory process were fully justified by objective regulatory considerations.
287. As the difficulties with the discovery process in this case illustrate, the Investor cannot easily access the internal deliberations of governments to reveal all the considerations

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<sup>341</sup> *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, Report of the Appellate Body (May 16, 2012) ("*US-Tuna II*-Appellate Body") para. 216 (***Investor's Schedule of Legal Authorities at CL-047***)

<sup>342</sup> *Canada - Renewable Energy* - AB Report, at para. 5.63 (***Investor's Schedule of Legal Authorities at CL-002***)

that affected the treatment Mesa received. This is exactly why the law puts the onus on the Responding state to prove that objective legitimate considerations can fully account for the difference in treatment.

288. Canada's obligation to provide Mesa with "treatment no less favorable" required that Canada accord Mesa treatment that was the same as the best treatment received by domestic investors in direct competition with Mesa. This is not only required by the jurisprudence,<sup>343</sup> but by the plain wording of NAFTA Article 1102(3) itself:

The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than *the most favorable treatment* accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part. [emphasis added]

**C. "With Respect to the Establishment, Acquisition, Expansion, Management, Conduct, Operation, and Sale or Other Disposition of Investments"**

289. NAFTA Article 1102 requires that the treatment involved must be with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. An application for a FIT Contract undoubtedly satisfies that requirement.

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<sup>343</sup> *United States - Section 337 of the Tariff Act of 1930, General Agreement on Tariffs and Trade*, Report of the Panel (November 7, 1989), ("US-Section 337"), at para. 511 (***Investor's Schedule of Legal Authorities at CL-048***)

### III. MOST FAVORED NATION TREATMENT

290. NAFTA Article 1103 says:

4. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
5. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

291. NAFTA Article 1103 entitles Mesa Power and its investment to receive the best level of treatment available to any foreign investors or investments in Ontario, and requires Canada to provide Mesa with treatment no less favorable than that provided to foreign investors or investments under other international agreements to which Canada is a party. Canada has not met this obligation. Article 1103.

292. The concept of Most-Favored-Nation (MFN) treatment is one of the longest-standing principles of international economic law. Prof. John Jackson dates it back to the 17<sup>th</sup> century.<sup>344</sup> Bilateral investment treaties frequently included this obligation which ensures investors treatment as favorable as that given to investors from any third party country. The commitment reflects long-standing trade obligations contained in numerous international agreements, including the GATT and WTO.<sup>345</sup>

293. When combined, National Treatment and Most Favored Nation require governments to provide to the investments of foreign treaty investors the best treatment provided to any investor, whether domestic or foreign.

294. Consistent amongst commentators, lawyers, and economists, the concept of MFN is rooted in strong economic rationales.<sup>346</sup> Viewed as a "central pillar of the international trading system", the MFN Treatment obligation has served as an important tool in multilateral trade negotiations:

[B]y giving the investors of all parties benefitting from a country's MFN clause the right, in similar circumstances, to treatment no less favourable than a country's closest or most influential

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<sup>344</sup> Jackson, J.H. *World Trade and the Law of GATT* (Bobbs-Merrill Company, 1969), extracts ("Jackson (1969)"), at pp. 249-250 (***Investor's Schedule of Legal Authorities at CL-049***) Professor Jackson suggests that the Most Favoured Nation obligation first appeared at the end of the 17<sup>th</sup> century.

<sup>345</sup> *General Agreement on Trade and Tariffs* ("GATT") (***Investor's Schedule of Legal Authorities at CL-050***), *General Agreement on Trade in Service*, World Trade Organization (WTO) Status of Legal Instruments WTO/Leg/1 Supplement 3, (October 2002) ("GATS"), Articles I and II (***Investor's Schedule of Legal Authorities at CL-190***)

<sup>346</sup> Horn, H. and Petros C Mavroidis, "Economic and legal aspects of the Most-Favoured Nation Clause", *European Journal of Political Economics*, Volume 17, 2001 ("Horn (2001)"), at p. 234 (***Investor's Schedule of Legal Authorities at CL-051***)

- partners can negotiate on the matters the clause covers, *MFN avoids economic distortions* that would occur through more selective country-by-country liberalisation.<sup>347</sup>
295. In addition to sharing similar purposes with National Treatment, the MFN obligation appears throughout the NAFTA and the WTO agreements, which were negotiated concurrently with the NAFTA.<sup>348</sup> Although the MFN Treatment obligation originated centuries ago, the main influence on NAFTA Article 1103 were the equivalent provisions in the GATT and GATS.<sup>349</sup>
296. The relationship between the NAFTA and the GATT is expressed in the Preamble of the NAFTA, in which the NAFTA Parties expressly recognised that the NAFTA is built on "their respective rights and obligations under the General Agreement on Tariffs and Trade." Thus, like the WTO, the non-discrimination obligations to afford National Treatment and MFN Treatment are at the heart of the NAFTA.
297. Tribunals considering Most Favored Nation clauses similar to NAFTA Article 1103 have also interpreted these clauses to ensure they fulfill their purpose. In *Asian Agricultural Products v Sri Lanka*, for example, the Tribunal held that the *Sri Lanka-UK BIT* equivalent of Article 1103:
- ...may be invoked to increase the host State's liability in case a higher standard of international protection becomes granted to investments pertaining to nationals of a Third state.<sup>350</sup>
298. MFN treatment has interpretive as well as substantive effect. Under NAFTA Article 102(1), the NAFTA Parties specifically said that the MFN principle was one of the principles and rules that must inform the interpretation of the NAFTA's provisions, in light of their context and the NAFTA's objectives.
299. The elements which establish that a NAFTA Party has breached NAFTA Article 1103 are:
- a) The foreign investor or investment was in like circumstances to other investors or investments of any other Party or non-NAFTA party;

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<sup>347</sup> Organization for Economic Cooperation and Development (OECD), "Most-Favoured-Nation Treatment in International Investment Law", Working Papers on International Investment Law No. 2004/2, OECD Paris, September 2004 ("OECD - MFN (2004)") (*Investor's Schedule of Legal Authorities at CL-052*)

<sup>348</sup> For example, there are most-favoured-nation obligations for goods (Article 308), for services (Article 1203) and for financial services (Article 1406).

<sup>349</sup> Both Articles 103 and 1103 strongly support a relationship between these WTO agreements and the NAFTA. In addition the impact of the GATT upon the most-favoured-nation non-discrimination provision is evidenced by the early drafting stages of NAFTA Article 1103, which centred upon the Mexican-US proposal for additional "GATT exception"-type language; See Kinnear, M., Andrea K. Bjorklund, John F.G. Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11, June 2006, Article 1103 Most-Favoured Nation Treatment*, (London: Kluwer, 2006) ("Kinnear (2006)"), at pp. 2-1103 (*Investor's Schedule of Legal Authorities at CL-053*)

<sup>350</sup> *Asian Agricultural Products v. Sri Lanka*, 4 ICSID Reports 246, Award (June 27, 1990) ("*Asian Agricultural Products – Award*"), at para. 43 (*Investor's Schedule of Legal Authorities at CL-055*)



- b) The NAFTA Party treated the foreign investor or investment less favorably than it treated third party investors or investments; and
- c) The treatment was with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

**A. Likeness**

- 300. NAFTA Article 1103 requires investments to establish that the Investor or its investment be "in like circumstance" with other investors, or their investments.
- 301. The comparison between the circumstances of foreign and domestic investments needs only to be "like". There can be many differences in circumstances, but once the threshold of likeness is met, a comparison of treatment follows.
- 302. Foreign investors are to be accorded "treatment no less favorable" than domestic investors "in like circumstances". It does not require them to be in "identical" circumstances.
- 303. Focussing NAFTA Article 1103 analysis on the competitive relationship between investors is also required by the context and purposes of the NAFTA.
- 304. The *Columbia-Ports* panel considered the meaning of likeness under GATT Article I:1, and rejected the notion that likeness must be for the same or similar specific goods.<sup>351</sup> The Panel considered whether advance customs entry clearance procedures available to goods originating from some WTO Members, but not others, constituted an advantage for importers from those WTO Members which were allegedly provided with the more favourable treatment. With regard to the meaning of "like products" in the GATT MFN obligation, the Panel concluded that when examining generally applicable regulation, it was *not* necessary to examine whether the better treatment was provided to the *same or similar specific goods* when coming from other WTO Members, but rather whether better customs treatment was provided *generally* to goods from those Members. The Panel found that the more favourable treatment provided under the regulatory scheme was afforded not on the basis of a distinction between products, but "*rather [based] on the territory from which the product arrives.*"<sup>352</sup>
- 305. The essence of a violation of MFN provisions was also articulated by the *Parkerings* Tribunal:

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<sup>351</sup> *Colombia - Indicative Prices and Restrictions on Ports of Entry*, Report of the Panel, WT/DS366/R (April 27, 2009) ("*Columbia - Indicative Prices - Panel Report*"), at para. 7.355 (***Investor's Schedule of Legal Authorities at CL-056***)

<sup>352</sup> *Columbia - Indicative Prices - Panel Report*, at para. 7.355 (***Investor's Schedule of Legal Authorities at CL-056***)

The essential condition of the violation of a MFN clause is the existence of a different treatment accorded to another foreign investor in a similar situation. Therefore, a comparison is necessary with an investor in like circumstances. The notion of like circumstances has been broadly analyzed by Tribunals.<sup>353</sup>

306. In *Maffezini v. Spain* the Tribunal held that the MFN provision could provide an Investor with a higher level of procedural protection contained in another treaty than in the treaty which initiated the arbitration.

From the above considerations it can be concluded that if a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause.<sup>354</sup>

307. In *MTD v. Chile*, the Tribunal applied MFN to provide more substantive fair and equitable treatment, which was imported from another treaty.

The Tribunal has concluded that, under the BIT, the fair and equitable standard of treatment has to be interpreted in the manner most conducive to fulfill the objective of the BIT to protect investments and create conditions favorable to investments. The Tribunal considers that to include as part of the protections of the BIT those included in Article 3(1) of the Denmark BIT and Article 3(3) and (4) of the Croatia BIT is in consonance with this purpose.<sup>355</sup>

308. Other tribunals have considered the issue of competition as being critical to establish likeness. For the purposes of this arbitration, all of those, who like Mesa, competed for Power Purchase Agreements offered by the Ontario Power Authority at the direction of the Ontario Government, were in like circumstances. This is the class of investments whose treatment needs to be considered under the regulatory permission likeness test.

## **B. Treatment No Less Favorable**

309. The second element of NAFTA Article 1103 is the obligation to accord a foreign investor and its investments with "treatment no less favourable" than that provided to domestic investors in like circumstances.
310. Treatment is informed by the regulatory framework in which the measure is being applied. The *Bayindir v. Pakistan* Tribunal interpreted "treatment" in the MFN obligation to consist of all dealings between the host state and the investor. The

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<sup>353</sup> *Parkerings - Compagniet AS v. Republic of Lithuania*, Award, 2007 WL 5366481 (September 11, 2007) ("*Parkerings - Award*"), at para. 369 (***Investor's Schedule of Legal Authorities at CL-057***)

<sup>354</sup> *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction (January 25, 2000) ("*Maffezini v. Spain - Jurisdiction*") para. 56 (***Investor's Schedule of Legal Authorities at CL-191***) MFN provisions were also applied to procedural matters in *Compania de Agua del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Request for Annulment of Award (August 10, 2010) para. 57 ("*Vivendi v. Argentina*") (***Investor's Schedule of Legal Authorities at CL-059***)

<sup>355</sup> *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, Award, 2004 WL 3254661 (May 25, 2004) ("*MTD Equity - Award*"), at para. 104 (***Investor's Schedule of Legal Authorities at CL-060***) In *Bayindir Insaat Turzim Ticaret Ve Sanayi, A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB./03/29, Decision on Jurisdiction (November 14, 2005) ("*Bayindir - Jurisdiction*"), at para. 206 (***Investor's Schedule of Legal Authorities at CL-061***)

Tribunal held that even though all investors are subject to the same legal and regulatory framework, the obligation may be violated by treatment that involves the exercise of discretion by officials within that framework in a manner that favours some investors in "similar situations" over others.<sup>356</sup> The Tribunal interpreted the MFN clause in the Pakistan-Turkey Investment Treaty to import the fair and equitable standard found in other treaties entered into by Pakistan, as the Pakistan-Turkey Treaty did not contain a fair and equitable treatment clause.<sup>357</sup>

311. In *White Industries v. India* the Tribunal found that ensuring better treatment for investors through MFN provisions was not a distortion of the treaty and was in fact necessary to achieve the treaty's objectives. "This does not "subvert" the negotiated balance of the BIT. Instead, it achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause."<sup>358</sup> To determine the applicability of an MFN provision the Tribunal stated that the working assumption must be that the treatment in question is covered by the MFN provision. "The sole relevant factor is whether MFN treatment applies or whether it is subject to an explicit or implicit exception."<sup>359</sup>
312. The Tribunal in *MTD Equity* also added that giving the claimants the protection offered in the Croatian Treaty was consonant with the purpose of interpreting treaty standards "in the manner most conducive to fulfill the objective of the BIT to protect investments and create conditions favorable to investments."<sup>360</sup>
313. The *Siemens* Tribunal interpreted the MFN clause in a similar way. In deciding to give the investor the protection offered in the clause, the Tribunal said "the term 'treatment' [in the MFN clause] is so general that the Tribunal cannot limit its application except as specifically agreed by the parties."<sup>361</sup>
314. The *Rumeli* Tribunal decided that the Investor's international obligations assumed in other bilateral treaties, and in particular, the United Kingdom-Kazakhstan bilateral

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<sup>356</sup> *Bayindir* - Jurisdiction, at para. 206 (***Investor's Schedule of Legal Authorities at CL-061***)

<sup>357</sup> *Bayindir* - Jurisdiction, at paras. 205-206, 213 (***Investor's Schedule of Legal Authorities at CL-061***)

<sup>358</sup> *White Industries Australia Limited v. The Republic of India*, Final Award (30 November 2011) ("*White Industries-Award*") para. 11.2.4 (***Investor's Schedule of Legal Authorities at CL-062***)

<sup>359</sup> *White Industries* – Award, at para. 11.2.8 (***Investor's Schedule of Legal Authorities at CL-062***) Quoting Schill, Stephan W. "Multilateralizing Investment Treaties through Most-Favoured-Nation Clauses", (2009) 27 *Berkeley Journal of International Law*, 496 ("Schill (2009)") (***Investor's Schedule of Legal Authorities at CL-063***)

<sup>360</sup> The Tribunal eventually found Chile had not breached the MFN clause because the Croatian treaty only required Chile to issue permits in accordance with local law and issuing the permits to the Malaysian investors would have required a change of law. *MTD Equity* – Award, at para. 104 (***Investor's Schedule of Legal Authorities at CL-060***)

<sup>361</sup> *Siemens* - Decision on Jurisdiction, at para. 106 (***Investor's Schedule of Legal Authorities at CL-021***)

- investment treaty, was applicable in the case.<sup>362</sup> As a result, the *Rumeli* Tribunal found that other obligations related to fair and equitable treatment applied in this case.<sup>363</sup>
315. The *Maffezini v Spain* Tribunal allowed the claimant to rely on the MFN clause within the Argentina - Spain BIT to have the benefit of the more favorable dispute settlement provisions within the Chile - Spain BIT.<sup>364</sup>
316. An overarching concept in the analysis of treatment is even-handedness. The WTO Appellate Body in *Clove Cigarettes*<sup>365</sup> held that technical regulations should be applied "in an even-handed manner." While the AB in *Cloves* acknowledged that a Member Country could regulate to achieve legitimate policy objectives, the regulations could not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on international trade.<sup>366</sup> Differences in treatment that are not applied in an even-handed manner violate an investor's protections under MFN.
317. An important decision in this regard is *Parkerings v. Lithuania*.<sup>367</sup> The Tribunal in that case said:
- Discrimination is to be ascertained by looking at the circumstances of the individual cases. Discrimination involves either issues of law, such as legislation affording different treatments in function of citizenship, or issues of fact where a State unduly treats differently investors who are in similar circumstances. [...] However, to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases. It would be necessary, in each case, to evaluate the exact circumstances and the context. The essential condition of the violation of a MFN clause is the existence of a different treatment accorded to another foreign investor in a similar situation.<sup>368</sup>
318. In *COOL*, the WTO Appellate Body held a range of factors must be accounted for and the impact of the measure must be looked at broadly:

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<sup>362</sup> *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, Award, 2008 WL 4819868 (July 29, 2008) ("*Rumeli* - Award"), at para. 575 (***Investor's Schedule of Legal Authorities at CL-064***)

<sup>363</sup> *Rumeli* - Award, at para. 575 (***Investor's Schedule of Legal Authorities at CL-064***)

<sup>364</sup> *Maffezini v. Kingdom of Spain*, Award, 2000 WL 34513944 (November 9, 2000) ("*Maffezini* - Award"), at para. 21 [emphasis added] (***Investor's Schedule of Legal Authorities at CL-058***)

<sup>365</sup> *United States - Measures Affecting the Production and Sale of Clove Cigarettes*, Report of the Appellate Body, WT/DS406/AB/R (April 12, 2012) ("*Clove Cigarettes* - AB Report"), at para. 95 (***Investor's Schedule of Legal Authorities at CL-065***)

<sup>366</sup> *Clove Cigarettes* - AB Report, at para. 95 (***Investor's Schedule of Legal Authorities at CL-065***)

<sup>367</sup> *Parkerings* – Award (***Investor's Schedule of Legal Authorities at CL-057***)

<sup>368</sup> *Most Favoured Nation Treatment*, United Nations Conference on Trade and Development (UNCTAD), UNCTAD Series on Issues in International Investment Agreements II (New York and Geneva: 2010) ("*MFN, UNCTAD*") para. 64 (***Investor's Schedule of Legal Authorities at CL-066***) quoting *Parkerings* – Award, paras. 368-369 (***Investor's Schedule of Legal Authorities at CL-057***)

A panel's analysis must take into consideration the totality of the facts and circumstances before it, including any implications for competitive conditions discernible from the design and structure of the measure itself, as well as all features of the particular market at issue that are relevant to the measure's operation within that market. In this regard, "any adverse impact on competitive opportunities for imported products vis-à-vis like domestic products that is caused by a particular measure may potentially be relevant" to a panel's assessment of less favourable treatment under Article 2.1.<sup>369</sup>

319. The Appellate Body summarized the steps to be taken in the analysis:

[A] panel should analyze whether a measure is even-handed to determine whether the measure has a detrimental impact, as well as to determine whether that impact stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination. Ultimately, then, the question is whether the measure is even-handed. If it is even-handed, because it does not provide different treatment *in fact*, then it would not breach Article 2.1.<sup>370</sup>

320. This interpretation is consistent with the decision in *ICS Inspection and Control Services Limited (United Kingdom) v Argentina*, where the Tribunal held:

The treatment identified must be more favourable in a general manner such that the clause performs its purpose of averting distortions in the competition between investors of different provenance. On the other hand, the treatment accorded need not be found to be more favourable under all circumstances.<sup>371</sup>

321. Examination of the non-discrimination requirement under MFN requires the main focus to be objective analysis into the nature of the differential treatment, and whether it can be justified on objective, rational, non-national origin based considerations.

322. The NAFTA Chapter 20 Panel in *Cross-border Trucking Services* provided the clearest explanation of Article 1103's identical provisions Article 1202 as protecting expectations of equal competitive opportunities, and that states could not provide treatment that failed to accord with that objective. It held "that differential treatment should be no greater than necessary for legitimate regulatory reasons."<sup>372</sup>

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<sup>369</sup> *United States - Certain Country of Origin Labeling (COOL) Requirements*, Reports of the Appellate Body, WT/DS384/R - WT/DS386/R, AB-2012-3 (29 June 2012) ("COOL - AB Report"), at para. 286 (***Investor's Schedule of Legal Authorities at CL-067***)

<sup>370</sup> COOL - AB Report, at para. 328 (***Investor's Schedule of Legal Authorities at CL-067***)

<sup>371</sup> *ICS Inspection and Control Services Limited (United Kingdom) v. The Argentine Republic*, PCA Case No. 2010-09, Award on Jurisdiction, 10 February 2012 ("*ICS Inspection - Jurisdiction*") para. 319 (***Investor's Schedule of Legal Authorities at CL-068***)

<sup>372</sup> *In the Matter of Cross-Border Trucking Services*, NAFTA Secretariat File No. USA-MEX-98-2008-01, Final Report of the Panel (February 6, 2001) ("*Cross- Border Trucking - Panel Report*"), at para. 258 (***Investor's Schedule of Legal Authorities at CL-069***)

323. In essence, the MFN Treatment is "essential for ensuring a level playing field between all trading partners" and is meant "to ensure an equality of competitive conditions between foreign investors of different nationalities."<sup>373</sup>
324. And once the Investor has discharged its burden of showing that Mesa and Mesa's investments are in like circumstances with other investors and investments, and have *prima facie* been treated differently, it falls to Canada to justify the differential treatment on objectively legitimate grounds that bear no nexus to the Investor.
325. It is therefore for Canada to show that the difference in treatment, both its nature and magnitude, can be fully justified by legitimate regulatory considerations.
326. This is consistent with the practice of NAFTA Tribunals. For example, in *Feldman*, the Tribunal held that after the Claimant "made a *prima facie* case for differential and less favorable treatment of the Claimant," Mexico "failed to meet its burden of adducing evidence to show otherwise."<sup>374</sup>

**C. "With Respect to the Establishment, Acquisition, Expansion, Management, Conduct, Operation, and Sale or Other Disposition of Investments"**

327. The treatment in question also needs to be "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."
328. The treatment provided to Mesa was clearly in connection with its operation of its investment, and it is simply incontrovertible that the "less favorable treatment" Canada accorded Mesa satisfies this requirement.

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<sup>373</sup> United Nations Conference on Trade and Development (UNCTAD), "Most Favoured Nation Treatment" UNCTAD Series on Issues in International Investment Agreements (New York and Geneva: 1999) ("MFN, UNCTAD (1999)"), at p. 13 (*Investor's Schedule of Legal Authorities at CL-054*)

<sup>374</sup> *Feldman* - Award, at para. 187 (*Investor's Schedule of Legal Authorities at CL-040*)

#### IV. INTERNATIONAL LAW STANDARD OF TREATMENT

329. NAFTA Article 1105(1) sets out the international law standard of treatment that a Party is obliged to accord to investments of investors of another Party:

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

330. The international law standard is a composite standard; it subsumes within it various duties, including a duty to provide fair and equitable treatment, and a duty to provide full protection and security.<sup>375</sup>

331. The express wording of NAFTA Article 1105, "*in accordance with international law*", confirms that Canada is obligated to provide investments of foreign investors treatment that accords with the rules and principles established by the four sources of international law as enumerated in Article 38 of the *Statute of the International Court of Justice*. The meaning of "international law standard" is therefore determined by reference to customary international law principles and practices, and the many decisions of international tribunals in respect of the overarching international law obligation to act in *good faith*.

332. Article 38(1) of the *Statute of the International Court of Justice* ("*ICJ Statute*") sets out the sources of international law:

- a) International conventions;
- b) International custom, as evidence of a general practice accepted as law;
- c) General principles of law; and
- d) Judicial decisions and the teachings of the most highly qualified publicists, as subsidiary means for the determination of rules of law.

333. The *Vienna Convention* rules are drafted in mandatory language. Article 31 of the *Vienna Convention* requires a treaty to be interpreted "in good faith" and "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". Article 31(2) sets out the context of a treaty as encompassing the preamble of the treaty, and its annexes.

334. Article 31 of the *Vienna Convention* requires the interpretation of a treaty to also take into account:

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<sup>375</sup> *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (July 14, 2006) ("*Azurix - Award*"), at para. 407 (***Investor's Schedule of Legal Authorities at CL-070***); *National Grid PLC v. Argentine Republic*, Award, 2008 WL 5819369 (November 3, 2008) ("*National Grid - Award*"), at paras. 187-189 (***Investor's Schedule of Legal Authorities at CL-071***)

- a) any subsequent agreement regarding the interpretation of a treaty;
- b) any subsequent practice in the application of the treaty; and
- c) and relevant rules of international law applicable.<sup>376</sup>

335. Under NAFTA Article 1131(1), the Tribunal is therefore required to apply all the principles of treaty interpretation, including the rules embodied in Articles 31 and 32 of the *Vienna Convention*. NAFTA Article 1131 states:

**Governing Law**

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

**A. The Protection of Customary International Law**

336. NAFTA Article 1105 sets out a standard of treatment that includes, at a minimum, a requirement that Canada follow customary international law.
337. By their agreement to be bound by customary international law in NAFTA Article 1105, the NAFTA Parties accepted and incorporated customary international law into the NAFTA. The content of the international law standard is not simply a matter of custom. It entails drawing on tribunal decisions that have addressed the content of the obligation, which includes custom, and custom that has been similarly incorporated into other treaties such as Bilateral Investment Treaties.
338. In adopting this approach, the *Mondev* Tribunal said:
- ... the question is not that of a failure to show *opinio juris* or to amass sufficient evidence demonstrating it. The question rather is: what is the content of customary international law providing for fair and equitable treatment and full protection and security in investment treaties?<sup>377</sup>
339. The *Mondev* Tribunal went on to say that "the standard of treatment, including fair and equitable treatment, and full protection and security, is to be found by reference to the normal sources of international law determining the minimum standard of treatment of foreigners."<sup>378</sup> The Tribunal then drew the content of customary international law from international decisions, including the NAFTA *Azinian* decision.<sup>379</sup> The subsequent *ADF* NAFTA Tribunal specifically endorsed the *Mondev* Tribunal's holding that the content of customary international law can be sourced through international tribunal decisions,

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<sup>376</sup> *Vienna Convention on the Law of Treaties* (1969), art. 31(3)(a), (b) and (c) (***Investor's Schedule of Legal Authorities at CL-011***)

<sup>377</sup> *Mondev* – Award, at para. 113 (***Investor's Schedule of Legal Authorities at CL-034***)

<sup>378</sup> *Mondev* – Award, at para. 120 (***Investor's Schedule of Legal Authorities at CL-034***)

<sup>379</sup> *Mondev* – Award, at paras. 126- 127 (***Investor's Schedule of Legal Authorities at CL-034***)



and that it is not necessary to specifically prove the elements of practice and *opinio juris*.<sup>380</sup>

340. International tribunal decisions are therefore a primary source of the content of customary international law.
341. Tribunals, NAFTA and non-NAFTA alike, have also recognized that the customary international law standard has been influenced by the many bilateral investment treaties obliging states to provide fair and equitable treatment and full protection and security. The *Mondev* Tribunal, for example, said:

In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for 'fair and equitable' treatment of, and for 'full protection and security' for, the foreign investor and his investments.<sup>381</sup>

342. The *Mondev* Tribunal's comments echo those of the *Pope & Talbot* NAFTA Tribunal, which said:

Canada's views on the appropriate standard of customary international law for today were perhaps shaped by its erroneous belief that only some 70 bilateral investment treaties have been negotiated; however, the true number, now acknowledged by Canada, is in excess of 1800. Therefore, applying the ordinary rules for determining the content of custom in international law, one must conclude that the practice of states is now represented by those treaties.<sup>382</sup>

343. The *CMS v. Argentina* Tribunal reached a similar conclusion, holding that the customary international law standard of treatment mandated "fair and equitable treatment", and "full protection and security." The Tribunal said "... the Treaty standard of fair and equitable treatment ... is not different from the international law minimum standard and its evolution under customary law."<sup>383</sup>
344. Judge Stephen Schwebel, former President of the International Court of Justice, has expressed the same view, stating that "when BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the

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<sup>380</sup> *ADF Group Inc. v. United States*, Award, 2003 WL 24083234 (January 9, 2003) ("ADF Group - Award"), at para. 184: "We understand *Mondev* to be saying - and we would respectfully agree with it - that any general requirement to accord 'fair and equitable treatment' and 'full protection and security' must be disciplined by being based upon State practice and judicial or arbitral case law or other sources of customary or general international law." (*Investor's Schedule of Legal Authorities at CL-072*)

<sup>381</sup> *Mondev* – Award, at para. 125 (*Investor's Schedule of Legal Authorities at CL-034*)

<sup>382</sup> *Pope & Talbot* - Award on Damages", at para. 62 [emphasis added] (*Investor's Schedule of Legal Authorities at CL-032*)

<sup>383</sup> *CMS Gas Transmission Company v. Argentine Republic*, Award, 2005 WL 1201002 (May 12, 2005) ("*CMS Gas - Award*") para. 284 (*Investor's Schedule of Legal Authorities at CL-073*)

standard of international law embodied in the terms of some two thousand concordant BITS."<sup>384</sup>

## B. Fair and Equitable Treatment

### i. *The Duty to Act in Good Faith*

345. The duty to act in good faith is "the" fundamental norm underpinning international legal responsibility.<sup>385</sup> The International Court of Justice acknowledged that the good faith principle is "one of the basic principles governing the creation and performance of legal obligations."<sup>386</sup> Not surprisingly, the overarching duty of good faith is the touchstone for much of the content of the international law standard.<sup>387</sup>

346. Article 26 of the *Vienna Convention*, entitled "*Pacta sunt servanda*", provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."<sup>388</sup> The *Vienna Convention* preamble notes: "that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized", and Bin Cheng has noted the *pacta sunt servanda* principle is founded in good faith. He said that the principle is "but an expression of the principle of good faith which above all signifies the keeping of faith, the pledged faith of nations, as well as that of individuals."<sup>389</sup>

347. The duty of good faith and the duty to provide fair and equitable treatment are inter-related as fundamental principles of the international law standard. Dr. Mann describes it as the pre-eminent substantive standard in investment treaties:

... it is submitted that the right to fair and equitable treatment goes much further than the right to most-favored-nation and to national treatment .... So general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that other provisions of the

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<sup>384</sup> Schwebel S., "Investor-State Disputes and the Development of International Law: The Influence of Bilateral Investment Treaties on Customary International Law" in *The American Society of International Law Proceedings of the 98th Annual Meeting*. (Washington: ASIL, 2004) ("Schwebel (2004)"), at pp. 29-30 (***Investor's Schedule of Legal Authorities at CL-074***)

<sup>385</sup> Franck, T. *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995), extract ("Franck (1995)") at 42-43 (***Investor's Schedule of Legal Authorities at CL-075***)

<sup>386</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, 253 ("*Nuclear Tests*") para. 46 (***Investor's Schedule of Legal Authorities at CL-076***) ("One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. ... Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration").

<sup>387</sup> O'Connor, J. F. *Good Faith in International Law* (Brookfield: Dartmouth, 1991), extract ("O'Connor (1991)"), at p. 107 (***Investor's Schedule of Legal Authorities at CL-077***)

<sup>388</sup> *Vienna Convention on the Law of Treaties* (1969) (***Investor's Schedule of Legal Authorities at CL-011***)

<sup>389</sup> Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Grotius: Cambridge, 1987) ("Cheng (1987)"), at p. 113 (***Investor's Schedule of Legal Authorities at CL-078***)

- Agreements affording substantive protection are no more than examples of specific instances of this overriding duty.<sup>390</sup>
348. Investor-state tribunals have endorsed Dr. Mann's views. The *S.D. Myers* Tribunal, for example, said of the fair and equitable treatment standard that:
- Article 1105 imports into the NAFTA the international law requirements of due process, economic rights, *obligations of good faith* and natural justice.<sup>391</sup>
349. Other tribunals have considered the central principle of good faith in the interpretation of the fair and equitable treatment standard:
- a) The *Tecmed* Tribunal said that "the commitment of fair and equitable treatment included in Article 4(1) of the [Spain-Mexico] Agreement is an expression and part of the *bona fide* principle recognized in international law."<sup>392</sup>
- b) The *Eureko v. Poland* Tribunal endorsed the *Tecmed* Tribunal's reliance on the good faith principle in interpreting the obligation to provide fair and equitable treatment.<sup>393</sup>
- c) The Tribunal in *Saluka v. The Czech Republic* held that a foreign investor was entitled to expect that a State:
- ... implements its policies *bona fide* by conduct that is, as far as it affects the investor's investment, reasonable justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination [emphasis added].<sup>394</sup>
- ii. *Fairness and Reasonableness*
350. NAFTA Article 1105 contains an explicit reference to the "fair and equitable treatment" standard, and, thereby confirms that treatment must be in accordance with the requirements of *jus aequum* – fairness and reasonableness.

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<sup>390</sup> Mann, F.A. "British Treaties for the Promotion and Protection of Investments", (1981) 52 *British Yearbook of International Law* 241 ("Mann (1981)") at p. 243 (***Investor's Schedule of Legal Authorities at CL-079***)

<sup>391</sup> *S. D. Myers* - First Partial Award, at para. 134 [emphasis added] (***Investor's Schedule of Legal Authorities at CL-033***)

<sup>392</sup> *TECMED* – Award, at para. 153 (***Investor's Schedule of Legal Authorities at CL-035***)

<sup>393</sup> *Eureko B.V. v. Republic of Poland*, Partial Award, 2005 WL 2166281 (19 August 2005) ("*Eureko* - Partial Award"), at para. 235 (***Investor's Schedule of Legal Authorities at CL-080***): "The Tribunal finds apposite the words of an ICSID Tribunal in a recent decision that the guarantee of fair and equitable treatment according to international law means that: " ... this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment..." citing *TECMED* - Award, at para. 154 (***Investor's Schedule of Legal Authorities at CL-035***)

<sup>394</sup> *Saluka Investments B.V. v. Czech Republic*, Partial Award, 2006 WL 1342817 (March 17, 2006) ("*Saluka* - Award"), at para. 307 (***Investor's Schedule of Legal Authorities at CL-081***)

351. The principles of fair and equitable treatment have been considered by the Appellate Body of the World Trade Organization, and the United Nations Human Rights Committee. The U.N. Human Rights Committee considering application of the *International Covenant on Civil and Political Rights*, held that for a regulatory scheme not to be considered arbitrarily imposed, it must be specific, fair and reasonable, and its application must be transparent.<sup>395</sup>

352. In the *Shrimp –Turtle* case, the Appellate Body decided:

For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. As we emphasized in *United States – Gasoline*, WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the WTO Agreement.<sup>396</sup>

The Appellate Body further indicated that if a regulatory measure is applied too rigidly or inflexibly, that in itself may constitute "arbitrary discrimination".<sup>397</sup>

353. The broad applicability of the fair and equitable treatment standard has, consequently, linked the standard with international law principles, and has connected the standard with other absolute principles, such as Most Favored Nation Treatment, and National Treatment. In their treatise on bilateral investment treaties, Dolzer and Stevens state that investment treaties which refer to international law, in addition to the fair and equitable treatment, "reaffirm that international law standards are consistent with, but complementary to, the provisions of the [treaty]."<sup>398</sup>

354. The concepts of fairness and equity are at the core of international law. The Permanent Court of Justice observed that what are "widely known as principles of equity have long been considered to constitute part of international law, and as such they have often been applied in international tribunals."<sup>399</sup>

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<sup>395</sup> United Nations, Human Rights Committee, Communications No. 633/1995: Canada 05/05/99, CCPR/C/D/633/1995 ("UNHRC Communications No. 633/1995"), at para. 13.6 (***Investor's Schedule of Legal Authorities at CL-082***)

<sup>396</sup> *United States-Import Prohibitions of Certain Shrimp and Shrimp Products (US-Shrimp)*, Report of the Appellate Body, WT/DS58/AB/R (October 12, 1998) ("*US - Shrimp - AB Report*"), at para. 186 (***Investor's Schedule of Legal Authorities at CL-083***)

<sup>397</sup> *US - Shrimp - AB Report*, at paras. 177-180 (***Investor's Schedule of Legal Authorities at CL-083***)

<sup>398</sup> Dolzer, R. & Stevens, M., *Bilateral Investment Treaties* (London: Martinus Nihoff Publishers, 1995) ("Dolzer (1995)") at 60 (***Investor's Schedule of Legal Authorities at CL-084***)

<sup>399</sup> *Diversion of Water from the Meuse Case* (Netherlands v. Belgium). [1937], P.C.I.J. (Ser. A/B) No. 70 ("*Diversion of Water*"), at p. 321 (***Investor's Schedule of Legal Authorities at CL-085***)

355. Prof. Kenneth J. Vandeveld, an author of several US Model Bilateral Investment Treaties which formed the drafting foundation of the NAFTA, wrote a treatise examining the investment treaty practice of the United States. In relation to NAFTA Article 1105, Prof. Vandeveld said:

... the standard is breached not only by acts of bad faith, but by any conduct that is not fair and equitable. Even the weakest reading of the terms "fair and equitable would seem to require more than a mere avoidance of outrage and bad faith. In the absence of the reference to fair and equitable treatment, Article 1105 might have been interpreted to prohibit only outrageous conduct.<sup>400</sup>

356. The *Pope & Talbot* Tribunal found that the "fair and equitable treatment" standard was a standard separate to that provided by international law, to be interpreted according to the ordinary meaning of the words. According to the *Pope & Talbot* Tribunal, fair and equitable treatment obliged the NAFTA Parties to provide the international law standard, as well as to act fairly and equitably.<sup>401</sup>

357. Prof. Vandeveld notes that the principle of reasonableness "requires that host State treatment of covered investment be reasonably related to a legitimate public policy objective".<sup>402</sup> The concept of "reasonableness" prescribes that treaty protection of an Investor's interests will be violated by arbitrary, discriminatory conduct, particularly if it is motivated by animus against the Investor's investment.<sup>403</sup>

358. The Tribunal in *Genin* clarified that "a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith" is a failure legitimate regulatory conduct.<sup>404</sup> In *ADF Group*, the NAFTA Tribunal observed that it was examining the conduct of the host State for actions that are "idiosyncratic or aberrant and arbitrary" and that are "grossly unfair and unreasonable."<sup>405</sup>

359. As to the meaning of the "reasonableness" standard, the Tribunal in *Saluka Investments* said:

The standard of "reasonableness" has no different meaning in this context than in the context of the "fair and equitable treatment" standard with which it is associated; and the same is true with

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<sup>400</sup> Kenneth J. Vandeveld, *Bilateral Investment Treaties, History, Policy, and Interpretation* (Oxford: Oxford University Press, 2010), extracts ("Vandeveld (2010)"), at p. 193 (***Investor's Schedule of Legal Authorities at CL-086***)

<sup>401</sup> *Pope & Talbot* - Award on Merits of Phase 2, at paras. 111 and 113 (***Investor's Schedule of Legal Authorities at CL-039***)

<sup>402</sup> Kenneth J. Vandeveld, "A Unified Theory of Fair and Equitable Treatment", (2010) 43 *New York University Journal of International Law and Politics* 43 ("Vandeveld I (2010)"), at p. 104 (***Investor's Schedule of Legal Authorities at CL-088***)

<sup>403</sup> Vandeveld I (2010), at p. 104 (***Investor's Schedule of Legal Authorities at CL-088***)

<sup>404</sup> *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, Award, 2001 WL 34788584 (June 25, 2001) ("*Genin* - Award"), at para. 367 (***Investor's Schedule of Legal Authorities at CL-089***)

<sup>405</sup> *ADF Group* - Award, at paras. 188,189 (***Investor's Schedule of Legal Authorities at CL-072***)

regard to the standard of "non-discrimination". The standard of "reasonableness" therefore requires, in this context as well, a showing that the State's conduct bears a reasonable relationship to some rational policy, whereas the standard of "non-discrimination" requires a rational justification of any differential treatment of a foreign investor.<sup>406</sup>

The Tribunal concluded that in applying the "fair and equitable treatment standard" under an investment treaty, it would have "due regard to all relevant circumstances" to protect a foreign investor's interests, because a host State can not act in a way that is "manifestly inconsistent, non-transparent, unreasonable (*i.e.* unrelated to some rational policy), or discriminatory (*i.e.* based on unjustifiable distinctions).<sup>407</sup>

360. As to conduct motivated by anti-investor animus, the NAFTA Tribunal in *Chemtura* said that "thwart[ing] or improperly influenc[ing]" a regulatory review process would violate the international law standard of treatment under NAFTA Article 1105.<sup>408</sup>

361. The NAFTA Tribunal in the *Waste Management (II)* case provided a summary of the jurisprudence regarding the meaning of fair and equitable treatment:

...fair and equitable treatment is infringed by conduct attributable to the state and harmful to the claimant if the conduct is *arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory* and exposes the claimant to *sectional or racial prejudice*, or involves a *lack of due process* leading to an outcome that *offends judicial propriety* - as might be the case with a *manifest failure* of natural justice in judicial proceedings or a complete *lack of transparency and candour in an administrative process*. In applying this standard, it is relevant that the treatment is in breach of representations made by the host state which were reasonably relied on by the claimant.<sup>409</sup>

362. The *Biwater Gauff* Tribunal considered a dispute arising under the United Kingdom-Tanzania BIT. It held that fair and equitable treatment includes the protection of legitimate expectations, good faith, transparency, consistency and non-discrimination.<sup>410</sup> The Tribunal outlined the components of the standard of fair and equitable treatment:<sup>411</sup>

6. Denial of justice
7. Protection of legitimate expectations, such as the reasonable and legitimate expectations taken into account by the foreign investor to make the investment, and were relied upon by the investor to make the investment.<sup>412</sup>

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<sup>406</sup> *Saluka* - Award, at para. 460 (***Investor's Schedule of Legal Authorities at CL-081***)

<sup>407</sup> *Saluka* - Award,, at para. 309 (***Investor's Schedule of Legal Authorities at CL-081***)

<sup>408</sup> *Chemtura Corporation v. Government of Canada*, Award (August 3, 2010) ("*Chemtura* - Award"), at para. 160 (***Investor's Schedule of Legal Authorities at CL-090***)

<sup>409</sup> *Waste Management Inc. v. United Mexican States (II)* Award, 2004 WL 3249803 (April 30, 2004) ("*Waste Management II* - Award"), at para. 98 [emphasis added] (***Investor's Schedule of Legal Authorities at CL-091***)

<sup>410</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008) ("*Biwater Gauff* - Award"), at para. 602 (***Investor's Schedule of Legal Authorities at CL-092***)

<sup>411</sup> *Biwater Gauff* – Award, at para. 602 (***Investor's Schedule of Legal Authorities at CL-092***)

<sup>412</sup> *Waste Management II* - Award, at para. 305 (***Investor's Schedule of Legal Authorities at CL-091***)

8. Good faith, which includes the general principle as recognized in international law whereby all contracting parties must act in good faith, although a violation of this principle would not require bad faith on the part of the State.<sup>413</sup>
  9. Transparency, consistency, non-discrimination, which implies that the conduct of the State must be transparent,<sup>414</sup> consistent<sup>415</sup> and non-discriminatory, that is, "not based on unjustifiable distinctions or arbitrary."<sup>416</sup>
363. In *Rumeli Telekom v. Kazakhstan*, the Tribunal observed the parties had agreed that the fair and equitable treatment standard encompasses certain clear principles:
- a) The state must act in a transparent manner;
  - b) The state is obliged to act in good faith;
  - c) The state's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process;
  - d) The state must respect procedural propriety and due process.<sup>417</sup>
364. The *Rumeli* Tribunal also held that fair and equitable treatment included an obligation that the State respect the investor's reasonable and legitimate expectations.<sup>418</sup>
365. International investment tribunals have interpreted the fair and equitable treatment standard as requiring adherence to five core principles: reasonableness, security, nondiscrimination, transparency, and due process.<sup>419</sup> These five principles have been interpreted as requiring treatment consistent with *the rule of law*.<sup>420</sup>
- iii. Treatment Free from Arbitrary Conduct*
366. A state breaches customary international law obligations when it acts arbitrarily. A state, therefore, breaches its customary international law obligation when it acts on "prejudice or preference rather than on reason or fact."<sup>421</sup> As stated by the Tribunal in

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<sup>413</sup> *Waste Management II - Award*, at para. 138 (***Investor's Schedule of Legal Authorities at CL-091***); *Saluka - Award*, at para. 303 (***Investor's Schedule of Legal Authorities at CL-081***)

<sup>414</sup> *Saluka - Award*, at para. 164 (***Investor's Schedule of Legal Authorities at CL-081***); *CME Czech Republic B.V. v. Czech Republic*, Final Award, 2003 WL 24070172 (March 14, 2003) ("CME - Award"), at para. 611 (***Investor's Schedule of Legal Authorities at CL-093***); *Maffezini - Award*, at para. 83 (***Investor's Schedule of Legal Authorities at CL-058***); *Metalclad Corporation v. The United Mexican States* Award, 2000 WL 34514285 (August 30, 2000) ("*Metalclad* (2000) - Award") (***Investor's Schedule of Legal Authorities at CL-098***)

<sup>415</sup> *Saluka - Award*, at para. 164 (***Investor's Schedule of Legal Authorities at CL-081***); *CME - Award*, at para. 611 (***Investor's Schedule of Legal Authorities at CL-093***)

<sup>416</sup> *Saluka - Award*, at para. 164 (***Investor's Schedule of Legal Authorities at CL-081***); *Waste Management II - Award*, at para. 98 (***Investor's Schedule of Legal Authorities at CL-091***); *CME - Award*, at para. 611 (***Investor's Schedule of Legal Authorities at CL-093***)

<sup>417</sup> *Rumeli - Award*, at para. 609 (***Investor's Schedule of Legal Authorities at CL-064***)

<sup>418</sup> *Rumeli - Award*, at para. 609 (***Investor's Schedule of Legal Authorities at CL-064***)

<sup>419</sup> *Vandevelde I* (2010), at p. 105 (***Investor's Schedule of Legal Authorities at CL-088***)

<sup>420</sup> *Vandevelde I* (2010), at p. 105 (***Investor's Schedule of Legal Authorities at CL-088***)

<sup>421</sup> *Lauder v. Czech Republic*, Final Award, 2001 WL 34786000 (3 September 2001) ("*Lauder - Final Award*") para. 221 (***Investor's Schedule of Legal Authorities at CL-095***)

the *CMS v. Argentina* Award, "[t]he standard of protection against arbitrariness ... is related to that of fair and equitable treatment. Any measure that might involve arbitrariness ... is in itself contrary to fair and equitable treatment."<sup>422</sup>

367. The United States – Panama Claims Commission in the *de Sabla* case held that a country fails to accord a minimum standard of treatment to a foreign national where it imposes a measure affecting private interests that was not transparent or properly administered.<sup>423</sup> Arbitrariness either by design or in application is a hallmark of a violation of the customary international law standard of treatment owed by countries to foreign nationals operating within their territory.

368. NAFTA Tribunals have consistently found arbitrary measures to constitute a breach of the international law standard. The *Waste Management (II)* NAFTA Tribunal stated:

Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed... if the conduct is arbitrary...<sup>424</sup>

369. The *Metalclad* NAFTA Tribunal considered a claim that Mexico breached its fair and equitable treatment obligation through the actions of one of its municipalities. The municipality in question was only legally allowed to consider construction issues when granting or denying building permits. The municipality exceeded that authority when it refused the investor's permit on environmental grounds.<sup>425</sup> In finding that this conduct amounted to a breach of the fair and equitable treatment standard, the NAFTA Tribunal said:

None of the reasons [for refusing the permit] included a reference to any problems associated with the physical construction of the landfill or to any physical defects therein. The Tribunal therefore finds that the construction permit was denied without any consideration of, or specific reference to, construction aspects or flaws of the physical facility.<sup>426</sup>

370. In finding that Mexico breached the international law standard of treatment, the *Metalclad* NAFTA Tribunal also held that arbitrary conduct breaches international law

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<sup>422</sup> *CMS Gas* - Award, at p. 290 (*Investor's Schedule of Legal Authorities at CL-073*)

<sup>423</sup> *Marguerite de Joly*, at pp. 362-363 (*Investor's Schedule of Legal Authorities at CL-097*)

<sup>424</sup> *Waste Management II* - Award, at para. 98 (*Investor's Schedule of Legal Authorities at CL-091*)

<sup>425</sup> The *Metalclad* tribunal said at para. 86: "Even if Mexico is correct that a municipal construction permit was required, the evidence also shows that, as to hazardous waste evaluations and assessments, the federal authority's jurisdiction was controlling and the authority of the municipality only extended to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations in the case of what was basically a hazardous waste disposal landfill, was improper, as was the municipality's denial of the permit for any reason other than those related to the physical construction or defects in the site." *Metalclad* (2000) - Award, (*Investor's Schedule of Legal Authorities at CL-098*)

<sup>426</sup> *Metalclad* (2000) - Award, at paras. 92, 93 [emphasis added] (*Investor's Schedule of Legal Authorities at CL-098*)



obligations when the conduct is based on *improper* or *irrelevant considerations*.<sup>427</sup> For example, the Tribunal noted that "the construction permit was denied without any consideration of, or specific reference to, construction aspects or flaws of the physical facility."<sup>428</sup> With respect to irrelevant considerations, the *Metalclad* NAFTA Tribunal held:

... the authority of the municipality only extended to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations ... was improper, as was the municipality's denial of the permit for any reason other than those related to the physical construction or defects in the site.<sup>429</sup>

The NAFTA Tribunal went on to conclude that "Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105."<sup>430</sup>

371. The *S.D. Myers* NAFTA Tribunal found that a violation of Article 1105 occurs "when it is shown that an investor has been treated in such an *unjust or arbitrary* manner that the treatment rises to the level that is unacceptable from the international perspective."<sup>431</sup> The Award in *S.D. Myers* indicated:

In some cases, the breach of international law by a host Party may not be decisive in determining that a foreign investor has been denied '*fair and equitable treatment*', but the fact that a host Party has breached a rule of international law that is specifically designed to protect investors will tend to weigh heavily in favor of finding a breach of Article 1105 [emphasis in original].<sup>432</sup>

372. Other investor-state tribunals have similarly concluded that a state acts arbitrarily when it proceeds on the basis of prejudice or preference, and not on reason or fact:

- a) In *Lauder v. Czech Republic*, for example, the ICSID Tribunal found an arbitrary measure to be something founded on prejudice or preference rather than reason or fact.<sup>433</sup> The Tribunal held:

... The measure was arbitrary because it was not founded on reason or fact, nor on the law ... but on mere fear reflecting national preference.<sup>434</sup>

- b) The *Pope & Talbot* NAFTA Tribunal also found Canada breached the international law standard by acting on prejudice rather than on reason or fact. Canada breached the obligation by threatening the investor, denying its "reasonable requests for

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<sup>427</sup> *Metalclad* (2000) - Award, at para. 86 (*Investor's Schedule of Legal Authorities at CL-098*)

<sup>428</sup> *Metalclad* (2000) - Award, at para. 93 (*Investor's Schedule of Legal Authorities at CL-098*)

<sup>429</sup> *Metalclad* (2000) - Award, at paras. 86 (*Investor's Schedule of Legal Authorities at CL-098*)

<sup>430</sup> *Metalclad* (2000) - Award, at para. 101 (*Investor's Schedule of Legal Authorities at CL-098*)

<sup>431</sup> *S. D. Myers* - First Partial Award, at para. 263 (*Investor's Schedule of Legal Authorities at CL-033*)

<sup>432</sup> *S. D. Myers* - First Partial Award, at para. 264 (*Investor's Schedule of Legal Authorities at CL-033*)

<sup>433</sup> *Lauder* - Final Award, at paras. 232 (*Investor's Schedule of Legal Authorities at CL-095*), at para. 221 the Tribunal said: "The Treaty does not define an arbitrary measure. According to Black's Law Dictionary, arbitrary means 'depending on individual discretion; ... founded on prejudice or preference rather than on reason or fact'...."

<sup>434</sup> *Lauder* - Final Award, at paras. 232 (*Investor's Schedule of Legal Authorities at CL-095*)

- pertinent information" and requiring the investor "to incur unnecessary expense and disruption in meeting SLD's requests for information."<sup>435</sup>
- c) In finding that Poland failed to provide fair and equitable treatment, the Tribunal for the *Eureko B.V. v. Republic of Poland* case, said Poland "acted not for cause but for purely arbitrary reasons ..."<sup>436</sup>
  - d) The *Occidental* Tribunal also found that Ecuador breached its obligation to provide fair and equitable treatment by acting in an arbitrary manner.<sup>437</sup>
  - e) As observed by the *CMS Gas* Tribunal "[a]ny measure that might involve arbitrariness ... is in itself contrary to fair and equitable treatment."<sup>438</sup>
  - f) The Tribunal in *National Grid v. Argentina* held that the words "arbitrary" and "unreasonable" are coterminous, and that they mean "something done capriciously, without reason."<sup>439</sup>

These cases demonstrate comprehensive agreement among tribunals that the fair and equitable treatment obligation includes an independent obligation not to act arbitrarily against investors from other NAFTA parties.

373. As to the factors that may constitute arbitrary action, the Tribunal in *Genin* observed that a violation of the investment treaty would occur when any procedural irregularity amounted to bad faith, a wilful disregard of due process of law or an extreme insufficiency of action.<sup>440</sup>
374. The NAFTA Tribunal in *Metalclad* held that the denial of a construction permit to the Investor was a breach of the fair and equitable treatment standard, because the "permit was denied at a meeting of the Municipal Town Council of which Metalclad had received no notice, to which it received no invitation, and at which it was given no opportunity to appear."<sup>441</sup>

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<sup>435</sup> *Pope & Talbot*, Award on Merits of Phase 2, at paras. 177-181 (***Investor's Schedule of Legal Authorities at CL-039***)

<sup>436</sup> *Eureko* - Partial Award, at para. 233 (***Investor's Schedule of Legal Authorities at CL-080***)

<sup>437</sup> *Occidental* - Final Award, at para. 163 (***Investor's Schedule of Legal Authorities at CL-027***), finding that "the investor: ... was confronted with a variety of practices, regulations and rules dealing with the question of VAT. ... this resulted in a confusing situation ... it is that very confusion and lack of clarity that resulted in some form of arbitrariness ..." See also *International Thunderbird Gaming Corporation v. United Mexican State*, Award, 2006 WL 247692 (January 26, 2006) ("*Thunderbird v. Mexico* - Award") (***Investor's Schedule of Legal Authorities at CL-194***); *Metalclad* (2000) - Award, at para. 99 (***Investor's Schedule of Legal Authorities at CL-098***); *CMS Gas* - Award, at para. 290 (***Investor's Schedule of Legal Authorities at CL-073***); *TECMED* - Award, at para. 154 (***Investor's Schedule of Legal Authorities at CL-035***)

<sup>438</sup> *CMS Gas* - Award, at para. 290 (***Investor's Schedule of Legal Authorities at CL-073***)

<sup>439</sup> *National Grid* - Award, at para. 197 (***Investor's Schedule of Legal Authorities at CL-071***)

<sup>440</sup> *Genin* - Award, at para. 371 (***Investor's Schedule of Legal Authorities at CL-089***)

<sup>441</sup> *Metalclad* (2000) - Award, at para. 88 (***Investor's Schedule of Legal Authorities at CL-098***)

iv. *Transparency*

375. "Transparency is considered to enhance the predictability and stability of the investment relationship and thus to represent an incentive for the promotion of investment".<sup>442</sup> Chapter 18 of the NAFTA is largely dedicated to the importance of transparency. The fair and equitable treatment standard also requires that Canada provide investors with a transparent and fair business environment. The NAFTA Tribunal in *Metalclad* defined the host State's obligation for transparency as including:
- ... all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.<sup>443</sup>
376. Correspondingly, the customary international law standard is also breached where a party acts without transparency. As stated by the NAFTA Tribunal in *Waste Management (II)*, the "minimum standard of treatment of fair and equitable treatment is infringed ... if the conduct ... involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with ... a complete lack of transparency and candour in an administrative process."<sup>444</sup>
377. The duty of transparency is a broad one, described by Martins Paparinskis as conduct which is "in apparent breach of domestic law, or justified only by sparse reasoning and sometimes addressing the choice of different means, matters may be reasonably expected or procedural improprieties."<sup>445</sup> Mr. Paparinskis summarizes the test as the investor needs to be provided with "sufficient accessibility in light of local practices, where the investor has relied on competent assistance."<sup>446</sup>
378. Roland Kläger also undertook a significant analysis of transparency obligations under international law, and considers the "notion of transparency in this context is concerned

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<sup>442</sup> Roland Kläger, *Fair and Equitable Treatment in International Investment Law* (New York: Cambridge University Press, 2011), at p. 228 ("Klager (2011)") (*Investor's Schedule of Legal Authorities at CL-101*)

<sup>443</sup> *Metalclad* (2000) - Award, at para. 76 (*Investor's Schedule of Legal Authorities at CL-098*) This transparency obligation was vacated by a reviewing domestic law court which held that transparency was not an independent ground of the international law standard of treatment.

<sup>444</sup> *Waste Management II* - Award, at para. 98 (*Investor's Schedule of Legal Authorities at CL-091*)

<sup>445</sup> Martins Paparinskis, *The International Minimum Standard of Treatment and Equitable Treatment* (Oxford: Oxford University Press, 2013) ("Paparinskis (2013)"), at p. 248 (*Investor's Schedule of Legal Authorities at CL-103*) citing *Maffezini* – Award, at para. 83 (*Investor's Schedule of Legal Authorities at CL-058*); *Rumeli* – Award, at para. 617 (*Investor's Schedule of Legal Authorities at CL-064*); *Vivendi v. Argentina*, at para. 7.4.31 (*Investor's Schedule of Legal Authorities at CL-059*); *TECMED* - Award, at para. 154 (*Investor's Schedule of Legal Authorities at CL-035*); *Saluka* - Award, at para. 348-407 (*Investor's Schedule of Legal Authorities at CL-081*); and *PSEG Global Inc. and Konya Igin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID No. ARB/02/5, Award (January 19, 2007) ("*PSEG Global v. Turkey* - Award") para. 264 (*Investor's Schedule of Legal Authorities at CL-102*)

<sup>446</sup> Paparinskis (2013), at p. 249 (*Investor's Schedule of Legal Authorities at CL-103*)

with the openness and clarity of the host state's legal regime and procedures".<sup>447</sup> This is not surprising as a "number of international investment agreements have expressly incorporated transparency obligations" into investment treaties.<sup>448</sup>

v. *Protection Against Abuse of Rights*

379. Canada has an obligation within the international law standard of treatment to protect against the abuse of rights which harm the investments of foreign investors. The *Azinian* NAFTA decision<sup>449</sup> and the writings of eminent scholars such as Prof. Bin Cheng<sup>450</sup> and Sir Hersch Lauterpacht,<sup>451</sup> consider this requirement to be a standalone obligation under customary international law.

380. In his treatise about the central role of general principles of law the international law standard, Professor Bin Cheng has explained that the obligation to act in good faith includes an obligation on the state not to abuse its power. He wrote:

The principle of good faith requires that every right be exercised honestly and loyally. Any fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated. Such an exercise constitutes an abuse of the right, prohibited by law.<sup>452</sup>

He further explained that:

"the theory of abuse of rights (*abus de droit*), recognised in principle both by the Permanent Court of International Justice and the International Court of Justice is merely an application of this principle [of good faith] to the exercise of rights."<sup>453</sup>

381. This long-standing principle also applies to abuses of administrative and regulatory mandate. In the *Bering Fur Seals* case, the Tribunal accepted that the malicious exercise of a right was an abuse of a state's authority.<sup>454</sup>

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<sup>447</sup> Klager (2011), at p. 228 (*Investor's Schedule of Legal Authorities at CL-101*)

<sup>448</sup> Klager (2011), at p. 229 (*Investor's Schedule of Legal Authorities at CL-101*)

<sup>449</sup> *Azinian, Davitian, & Baca v. United Mexican States*, ICSID Case No. ARB (AF)/97/2), Award (November 1, 1999) ("*Azinian v. Mexico - Award*") para. 103 (*Investor's Schedule of Legal Authorities at CL-104*)

<sup>450</sup> Cheng (1987), at p. 123 (*Investor's Schedule of Legal Authorities at CL-078*)

<sup>451</sup> H. Lauterpacht, *The Function of Law in the International Community* (Oxford: Oxford University Press, 1933) ("*Lauterpacht (1933)*"), at p. 289 (*Investor's Schedule of Legal Authorities at CL-105*)

<sup>452</sup> Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Portland: Hart Publishing, 2006), at p. 31 ("*Panizzon (2006)*") (*Investor's Schedule of Legal Authorities at CL-106*), referencing Cheng (1987), at pp. 123-32 (*Investor's Schedule of Legal Authorities at CL-078*)

<sup>453</sup> Cheng (1987), at p. 121 (*Investor's Schedule of Legal Authorities at CL-078*)

<sup>454</sup> Cheng (1987), at pp. 121-122 (*Investor's Schedule of Legal Authorities at CL-078*), citing *Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering's sea and the preservation of fur seals*, Decision of 15 August 1893 ("*Bering Sea*") (*Investor's Schedule of Legal Authorities at CL-107*)

382. In considering similar early developments of the law, Sir Hercsh Lauterpacht related the concept of abuse of rights to the flexible evolution of international law.<sup>455</sup> He demonstrates that the principle allows for international tribunals to ensure that the actions of states are judged in accordance with modern views of morality.<sup>456</sup>
383. In the context of the international law standard of treatment, the abuse of rights arises in three principal ways:
- a) A state exercises powers in such a way as to hinder an investor in the enjoyment of its rights, resulting in injury to the investor;
  - b) A fictitious exercise of a right; or
  - c) An abuse of discretion in the exercise of governmental power.<sup>457</sup>
384. Alexandre Kiss in his article on Abuse of Rights in the *Encyclopedia of Public International Law* concludes that no proof of intention to cause harm is necessary where there is an abuse of discretion, in the exercise of governmental power.<sup>458</sup> However, such intent is necessary when looking at the fictitious exercise of a right (such as where a right is exercised intentionally for an end that is different from that for which that right was created).<sup>459</sup>
385. The *Azinian Award* confirmed how protection against the abuse of power was contained the international law standard guaranteed by NAFTA Article 1105:
- There is a fourth type of denial of justice, namely clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of "pretence of form" to mask a violation of international law.<sup>460</sup>
386. Abuses of administrative decision-making will therefore violate the "fair and equitable treatment" standard. In his Separate Opinion for *Impregilo v Argentina*, Judge Charles N. Brower described actions by Argentina as "nothing less than deliberate abuse of administrative power with a political motive."<sup>461</sup> He described a "behavioral pattern": a

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<sup>455</sup> Lauterpacht (1933), at p. 287 (*Investor's Schedule of Legal Authorities at CL-105*)

<sup>456</sup> Lauterpacht (1933), at p. 287 (*Investor's Schedule of Legal Authorities at CL-105*)

<sup>457</sup> Panizzon (2006), at p. 30 (*Investor's Schedule of Legal Authorities at CL-106*)

<sup>458</sup> Alexandre Kiss, "Abuse of Rights", *Max Plank Encyclopedia of Public International Law (vol 1)*. (Oxford: Oxford University Press, 1992) ("Kiss (1992)"), at pars 5-6 (*Investor's Schedule of Legal Authorities at CL-108*)

<sup>459</sup> *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, P.C.I.J., Judgment, (June 7, 1932) ("Free Zones") (*Investor's Schedule of Legal Authorities at CL-109*) Cheng (1987), at p. 123 (*Investor's Schedule of Legal Authorities at CL-078*)

<sup>460</sup> *Azinian v. Mexico – Award*, at para. 103 (*Investor's Schedule of Legal Authorities at CL-104*)

<sup>461</sup> Separate Opinion of Judge Charles N. Brower, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, (June 21, 2011) ("*Impregilo - Separate Opinion of Judge Brower*"), at paras. 12-15 (*Investor's Schedule of Legal Authorities at CL-110*) Judge Charles N. Brower concurred with the majority of the Tribunal that had accepted Impregilo's arguments on "fair and equitable treatment". However, he disagreed with the deferential attitude

series of unreasonable legislative and regulatory burdens, delays, unduly extensive information requests and cost-raising tactics on the part of the Province of Buenos Aires – acts that transcended mere "contractual violations" and constituted substantial and undue interference with the investment.<sup>462</sup>

387. In another example, the Tribunal in *PSEG Global, Inc. v. Turkey* observed that the fair and equitable treatment was essential to according a stable and predictable legal framework. As such, the fair and equitable treatment obligation was breached by abuse of authority and by delivery of inconsistent administrative acts.<sup>463</sup>

vi. *Procedural Fairness*

388. In *Lauder*, the Tribunal observed that the obligation to provide full security and protection extends beyond physical security to ensure that the "judicial system has remained fully available to the claimant."<sup>464</sup> The obligation to provide procedural fairness requires a State to act in a manner that is in accordance with its obligation of good faith as secured by treaty protections or general international law. The Appellate Body in *Thailand-Cigarettes* recently elaborated on the importance of due process in procedures adopted by an administrative panel:

Due process is a fundamental principle of WTO dispute settlement. It informs and finds reflection in the provisions of the DSU. In conducting an objective assessment of a matter, a panel is "bound to ensure that due process is respected". *Due process is intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules.*<sup>465</sup>

389. A number of tribunals have focused on whether in the "totality of the circumstances", the host State provided an "orderly process and timely disposition" and a "transparent

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towards government actions, which he believed constituted further violations of Argentina's "fair and equitable treatment" obligations under the treaty.

<sup>462</sup> *Impregilo* - Separate Opinion of Judge Brower, at para. 12-14, 15 (***Investor's Schedule of Legal Authorities at CL-110***): Judge Brower further described events that "fit into the pattern of the Province [of Buenos Aires] disruptive actions", and emphasized how a "series of steps" can culminate into a breach of the "fair and equitable treatment" standard.

<sup>463</sup> *PSEG Global v. Turkey* – Award, at paras. 247-248 (***Investor's Schedule of Legal Authorities at CL-102***)

<sup>464</sup> *Lauder* - Final Award, at para. 314 (***Investor's Schedule of Legal Authorities at CL-095***)

<sup>465</sup> *Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines*, Report of the Appellate Body, WT/DS371/AB/R (17 June 2011) ("*Thailand - Cigarettes* - AB Report"), at para. 147 (***Investor's Schedule of Legal Authorities at CL-111***) The Appellate Body has held that "the protection of due process is an essential feature of a rules-based system of adjudication, such as that established under the DSU", and that "due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings". (Appellate Body Reports, Canada – Continued Suspension / US – Continued Suspension, at para. 433; and Appellate Body Report, Thailand – H-Beams, at para. 88, respectively).

- and predictable framework" for an investor's business planning and investment, thereby, treating the investor "*fairly and justly* in accordance with the NAFTA."<sup>466</sup>
390. The *Methanex* NAFTA Tribunal implicitly recognized that NAFTA Article 1105(1) includes due process by concluding that "[i]f Article 1105(1) had already included a non-discrimination requirement, there would be no need to insert that requirement in Article 1110(1)(b), for it would already have been included in the incorporation of Article 1105(1)'s due process requirement."<sup>467</sup>
391. The Tribunal in *Genin* observed that a violation of the investment treaty would occur when any procedural irregularity present amounted to bad faith, a wilful disregard of due process of law, or an extreme insufficiency of action.<sup>468</sup>
392. The NAFTA Tribunal in *Metalclad* considered whether the denial of a construction permit to the Investor was a breach of the fair and equitable treatment standard. The Tribunal observed that the "permit was denied at a meeting of the Municipal Town Council of which Metalclad had received no notice, to which it received no invitation, and at which it was given no opportunity to appear",<sup>469</sup> and noted that, beyond that requirement of transparency, the "absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit" contributed to its reasons for finding a breach of NAFTA Article 1105(1).<sup>470</sup>
393. The customary international law standard is also breached where a party acts without transparency. As noted by the NAFTA Tribunal in *Waste Management (II)*, the "minimum standard of treatment of fair and equitable treatment is infringed ... if the conduct ... involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with ... a complete lack of transparency and candour in an administrative process."<sup>471</sup>
394. The NAFTA Tribunal in *Metalclad* defined the host State's obligation for transparency as including:
- ... all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable

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<sup>466</sup> *Metalclad* (2000) - Award, at para. 99 [emphasis added] (***Investor's Schedule of Legal Authorities at CL-098***)

<sup>467</sup> *Methanex - Award on Jurisdiction*, at para. 15 (***Investor's Schedule of Legal Authorities at CL-022***); Tudor, I., *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford: Oxford University Press, 2008), extract ("*Tudor* (2008)"), at p. 178 (***Investor's Schedule of Legal Authorities at CL-112***)

<sup>468</sup> *Genin* - Award, at para. 371 (***Investor's Schedule of Legal Authorities at CL-089***)

<sup>469</sup> *Metalclad* (2000) - Award, at para. 91 (***Investor's Schedule of Legal Authorities at CL-098***)

<sup>470</sup> *Metalclad* (2000) - Award, at para. 88 (***Investor's Schedule of Legal Authorities at CL-098***)

<sup>471</sup> *Waste Management II* - Award, at para. 98. (***Investor's Schedule of Legal Authorities at CL-091***)

of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.<sup>472</sup>

*vii. Legitimate Expectations*

395. The fair and equitable treatment obligation includes the obligation to protect legitimate expectations. Numerous tribunals interpreting modern investment treaties have affirmed that a state fails to meet the international law standard of treatment when it fails to fulfil the legitimate expectations of investors.<sup>473</sup>
396. For example, the *Tecmed* Tribunal explained that an investor can legitimately expect the host State to act consistently, free from ambiguity and transparently under international law.<sup>474</sup>
397. In *Tecmed*, the Tribunal observed that the "fair expectations of the Claimant were that the Mexican laws applicable to such investment, as well as the supervision, control, prevention and punitive powers granted to the authorities in charge of managing such system, would be used for the purpose of assuring compliance with environmental protection, human health and ecological balance goals underlying such laws."<sup>475</sup> The Tribunal noted the evidence revealed "inconsistencies" between this stated purpose and the governmental authority's actions,<sup>476</sup> and conclude the government's decision to not renew the investor's permit was "actually used to permanently close down a site whose operation had become a nuisance due to political reasons relating to the community's opposition expressed in a variety of forms...".
398. Interference with the regulatory process that is motivated by the "social and political" pressures was held to be inconsistent with the obligation to provide fair and equitable treatment under the treaty, and was also "objectionable from the perspective of international law."<sup>477</sup> The *Tecmed* Tribunal said:

... in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.<sup>478</sup>

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<sup>472</sup> *Metalclad* (2000) - Award, at para. 76 (***Investor's Schedule of Legal Authorities at CL-098***) This transparency obligation was vacated by a reviewing domestic law court which held that transparency was not an independent ground of the international law standard of treatment.

<sup>473</sup> *TECMED* - Award (***Investor's Schedule of Legal Authorities at CL-035***), *Metalclad* (2000) - Award, (***Investor's Schedule of Legal Authorities at CL-098***), *MTD Equity* – Award (***Investor's Schedule of Legal Authorities at CL-060***); *Occidental - Final Award* (***Investor's Schedule of Legal Authorities at CL-027***) and *CMS Gas* - Award (***Investor's Schedule of Legal Authorities at CL-073***)

<sup>474</sup> *TECMED* - Award, at para. 154 (***Investor's Schedule of Legal Authorities at CL-035***)

<sup>475</sup> *TECMED* - Award, at para. 157 (***Investor's Schedule of Legal Authorities at CL-035***)

<sup>476</sup> *TECMED* - Award, at para. 163 (***Investor's Schedule of Legal Authorities at CL-035***)

<sup>477</sup> *TECMED* - Award, at para. 163 (***Investor's Schedule of Legal Authorities at CL-035***)

<sup>478</sup> *TECMED* - Award, at para. 154 (***Investor's Schedule of Legal Authorities at CL-035***)



The *Tecmed* Tribunal also noted that legitimate expectations included the expectation that the state will conduct itself in a coherent manner, without ambiguity, and transparently, so as to enable the investor to plan its activities, and to adjust its conduct to the governing statutes, regulations, policies and administrative directions.<sup>479</sup>

399. The *Metalclad* NAFTA Tribunal similarly held that Mexico failed to fulfil its obligation because it acted contrary to Metalclad's legitimate expectations:

Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.<sup>480</sup>

400. Recent investor-state arbitration tribunal decisions are to the same effect. In *MTD v. Chile*, after expressly adopting the *Tecmed* standard, the Tribunal found that Chile failed to meet that standard by "authorizing an investment that could not take place for reasons of its urban policy."<sup>481</sup>

401. Similarly, the *Occidental v. Ecuador* Tribunal found that, after Occidental had made investments, Ecuador changed its tax law "without providing any clarity about its meaning and extent" and that the state's "practice and regulations were also inconsistent with [the] changes [to the law]."<sup>482</sup> The Tribunal concluded these actions fell below the standard established in the *Tecmed* case, and accordingly found a breach of the BIT. The *Occidental* Tribunal thereby also recognized a state may breach its obligation to treat an investor fairly and equitably by failing to follow its own laws.

viii. *Treatment Free from Political Motivation*

402. Conduct motivated by political animus will also violate the reasonableness principle contained in the obligation to provide fair and equitable treatment. For example, in *Eureko v. Poland*, the Tribunal found that Poland violated the fair and equitable treatment standard under the Netherlands-Poland bilateral investment treaty, because Poland refused to honor its commitment for "purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character."<sup>483</sup>

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<sup>479</sup> *TECMED* - Award, at para. 154 (***Investor's Schedule of Legal Authorities at CL-035***)

<sup>480</sup> *Metalclad* (2000) - Award, at para. 99 (***Investor's Schedule of Legal Authorities at CL-098***) The Metalclad Award was subsequently partially set aside by the Supreme Court of British Columbia NAFTA Chapter 18 exhaustively addressed transparency within the NAFTA. However, only the Tribunal's incorporation of transparency in the international standard of treatment was set aside. *The United Mexican States v. Metalclad Corporation*, Award, 2001 WL 34786543 (May 2, 2001) ("*Metalclad* (2001) - Award"), at para. 99 (***Investor's Schedule of Legal Authorities at CL-113***) Their remaining comments on the standard were not questioned.

<sup>481</sup> *MTD Equity* – Award, at paras. 114- 115, 188 (***Investor's Schedule of Legal Authorities at CL-060***)

<sup>482</sup> *Occidental* - Final Award, at para. 184 (***Investor's Schedule of Legal Authorities at CL-027***)

<sup>483</sup> *Eureko* - Partial Award, at para. 233 (***Investor's Schedule of Legal Authorities at CL-080***)

403. The NAFTA Tribunal in *Loewen* observed that the trial court "permitted the jury to be influenced by persistent appeals to local favoritism as against a foreign litigant."<sup>484</sup> The NAFTA Tribunal then held that the lower court jury trial was "improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment."<sup>485</sup>
404. Prof. Kenneth Vandeveldel has observed that "[t]ribunals have found violations of the reasonableness principle where the host state's conduct was politically motivated; that is, where government action was not motivated by legitimate public policy considerations, but by animus toward the investment or investor."<sup>486</sup>
405. The *Biwater Gauff* case involved a dispute about contractual performance under a water and sewage services contract for the city of Dar es Salaam. The Minister of Water and Livestock Development was campaigning at the time for the office of prime minister, and called a press conference terminating the investment's contract. Four days after this announcement, the Minister confirmed the termination at a political rally. The Tribunal held that these actions were "an unreasonable disruption of the contractual mechanisms ... and motivated by political considerations."<sup>487</sup> The Tribunal observed that the public statements constituted "an unwarranted interference" which "inflamed the situation, and polarised public opinion still further", thereby ensuring that the process could not follow a normal contractual course.<sup>488</sup> The Tribunal found this political action to violate the fair and equitable treatment standard.<sup>489</sup>
406. The *Biwater Gauff* Tribunal concluded:
- In the Arbitral Tribunal's view, as a matter of principle, the failure to put in place an independent, impartial regulator, insulated from political influence, constitutes a breach of the fair and equitable treatment standard, in that it represents a departure from BGT's legitimate expectation that an impartial regulator would be established to oversee relations between City Water and DAWASA.<sup>490</sup>

ix. *Treatment Free from Discriminatory Conduct*

407. The Tribunal in *LG&E* found that the obligation not to discriminate against foreign investors, in the context of investment treaties, is such that "a measure is considered

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<sup>484</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003) ("*Loewen*"), at para. 136 [emphasis added] (*Investor's Schedule of Legal Authorities at CL-121*)

<sup>485</sup> *Loewen*, at para. 137 (*Investor's Schedule of Legal Authorities at CL-121*)

<sup>486</sup> Vandeveldel I (2010), at p. 59 (*Investor's Schedule of Legal Authorities at CL-088*)

<sup>487</sup> *Biwater Gauff* - Award, at para. 500 (*Investor's Schedule of Legal Authorities at CL-092*)

<sup>488</sup> *Biwater Gauff* - Award, at para. 627 (*Investor's Schedule of Legal Authorities at CL-092*)

<sup>489</sup> *Biwater Gauff* - Award, at para. 628 (*Investor's Schedule of Legal Authorities at CL-092*)

<sup>490</sup> *Biwater Gauff* - Award, at para. 615 (*Investor's Schedule of Legal Authorities at CL-092*)

discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect".<sup>491</sup>

408. As stated by the Chamber of the International Court of Justice in the *ELSI* case, a measure is discriminatory, if there is:
- a) An intentional treatment
  - b) In favor of a national
  - c) Against a foreign investor
  - d) That is not taken under similar circumstances against another national.<sup>492</sup>
409. The Tribunal in *Lauder* held that the fair and equitable treatment standard will "prevent discrimination against the beneficiary of the standard, where discrimination would amount to unfairness or inequity in the circumstances".<sup>493</sup> And, Iona Tudor has observed that "a discriminatory treatment would be sufficient to find a breach of [fair and equitable treatment]."<sup>494</sup>
410. NAFTA Tribunals have held that NAFTA Article 1105 extends to discrimination. In *Loewen*, the NAFTA Tribunal recognized the principle of non-discrimination<sup>495</sup> and held that under NAFTA Article 1105, the United States has a duty to provide a fair trial, free of sectional or local prejudice.<sup>496</sup> The NAFTA Tribunal said:
- It is the responsibility of the State under international law and, consequently, of the courts of a State to provide a fair trial of a case to which a foreign investor is a party. It is the responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice.<sup>497</sup>

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<sup>491</sup> *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, Decision on Liability, 2006 WL 2985837 (October 3, 2006) ("LG & E - Decision on Liability") para. 146 (***Investor's Schedule of Legal Authorities at CL-117***)

<sup>492</sup> *Elettronica Sicula S.p.A. (ELSI)*, (*United States of America v. Italy*), Judgment, I.C.J. Reports 1989 (20 July 1989) ("Elettronica") (***Investor's Schedule of Legal Authorities at CL-100***)

<sup>493</sup> *Lauder* - Final Award, at para. 292 (***Investor's Schedule of Legal Authorities at CL-095***) (citing United Nations Conference on Trade and Development (UNCTAD), "Fair and Equitable Treatment" *UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: 1999) ("MFN, UNCTAD (1999)"), at p. 16 (***Investor's Schedule of Legal Authorities at CL-197***))

<sup>494</sup> Tudor (2008), at p. 178 (***Investor's Schedule of Legal Authorities at CL-112***); *Iurii Bogdanov, Agurdino-Invest Ltd., Agurdino-Chimia and JSC v Republic of Moldova*, Award, 2004 WL 235957 (September 22, 2005) ("*Iurii Bogdanov* - Award"), at p. 16 (***Investor's Schedule of Legal Authorities at CL-120***)

<sup>495</sup> Vandeveld (2010), at p. 393 (***Investor's Schedule of Legal Authorities at CL-086***)

<sup>496</sup> *Loewen*, at para. 123 (***Investor's Schedule of Legal Authorities at CL-121***)

<sup>497</sup> *Loewen*, at para. 123 (***Investor's Schedule of Legal Authorities at CL-121***)

411. In evaluating fair and equitable treatment, the NAFTA Tribunal in *Waste Management II* adopted the test from *Loewen*, and referred to a customary law prohibition on conduct that "*is discriminatory and exposes the claimant to sectional or racial prejudice*".<sup>498</sup>
412. In his treatise about the meaning of the international standard of treatment, Martins Paparinskis says that non-discrimination is an essential element of the classical international law meaning of the international law standard:

In the classical international law, the obligation to treat persons and property of aliens in a non-discriminatory manner was well-established....., the historical narrative, starting from the prominent prohibitions of discriminatory administration of justice in particular and the discriminatory conduct in general, suggests that when new rules are developed, they go with, rather than against, the grain of non-discrimination. There are no obvious examples of other customary rules on the treatment of aliens that would permit discrimination. If non-discrimination is accepted as constituting a non-exhaustive core of the international standard of the first half of the twentieth century, the proper question to ask is whether subsequent practice and *opinio juris* in favour of lawfulness of discriminatory conduct have changed the rule.<sup>499</sup>

### C. The Law of Full Protection and Security

413. The requirement of "full protection and security" is specifically expressed as a constituent part of the International Law Standard of Treatment in NAFTA Article 1105. Full protection and security is commonly incorporated in investment treaties. It requires a host country to exercise reasonable care to protect investments against injury by private parties.<sup>500</sup> This obligation requires the host country to do so with the level of "diligence" required by customary international law. In determining whether the host-state has accorded the appropriate level of diligence, international tribunals have historically taken into account several factors:
- a) whether the facts at issue were either publicly known, or had been brought to the attention of the authorities;<sup>501</sup>
  - b) whether the host state conducted investigations in response to complaints by the foreign claimant;<sup>502</sup>

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<sup>498</sup> *Waste Management II* - Award, at para. 98 (***Investor's Schedule of Legal Authorities at CL-091***)

<sup>499</sup> Paparinskis (2013), at p. 246 (footnotes omitted) (***Investor's Schedule of Legal Authorities at CL-103***)

<sup>500</sup> UNCTAD, "Bilateral Investment Treaties in the Mid-1990s" (New York: United Nations, 1998) ("UNCTAD - Bilateral Investment Treaties") (***Investor's Schedule of Legal Authorities at CL-122***)

<sup>501</sup> See *Mexico City Bombardment Cases*, British-Mexican Claims Commission, (1930) 5 RIAA 80 ("*Bombardment Cases*") (***Investor's Schedule of Legal Authorities at CL-123***); *George Adams Kennedy (U.S.A.) v. United Mexican States*, US-Mexico Claims Commission, (1927) 4 RIAA 194 ("*Kennedy*") (***Investor's Schedule of Legal Authorities at CL-124***)

<sup>502</sup> *Too v. Greater Modesto Insurance Associates and the United States of America*, US-Iran Claims Tribunal, Award No. 460-880-2 (29 December 1989) ("*Too*") (***Investor's Schedule of Legal Authorities at CL-125***)

- c) whether the host state took adequate steps to apprehend a wrongdoer, or otherwise adequately enforce a penalty;<sup>503</sup>
  - d) whether the standard of police protection for foreign nationals was less than what is provided generally for a State's own nationals;<sup>504</sup> and
  - e) whether the nearest civil or military authority was far away from the site of the crime.<sup>505</sup>
414. The very first ICSID investment treaty award in *Asian Agricultural Products Ltd. v. Sri Lanka*<sup>506</sup> considered the meaning of the "full protection and security" obligation with respect to a shrimp farm that was destroyed during an armed conflict between the government and rebel forces. The Tribunal held Sri Lanka liable for the failure of its security officials to inform the Claimant's management that they were about to conduct a dangerous counter-insurgency operation. Had Sri Lanka done so, the deaths of several of the Claimants' employees could have been avoided, along with related property damage.
415. The *Asian Agricultural Products* Tribunal described the diligence standard that a host government is required to meet:
- The "due diligence" is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances ...<sup>507</sup>
- Liability is established by the "mere lack or want of diligence, without any need to establish malice or negligence."<sup>508</sup>
416. In *American Manufacturing & Trading v. Republic of Zaire* the Tribunal expounded on the content of the duty of a host state, and held that the full protection and security obligation was an "obligation of vigilance":

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<sup>503</sup> *Francisco Mallén (United Mexican States) v. United States of America*, US-Mexico Claims Commission, (1927) 4 RIAA 173 ("Mallén") (**Investor's Schedule of Legal Authorities at CL-126**); *Thomas H. Youmans (U.S.A.) v. United Mexican States*, 4 RIAA 110 (23 November 1926) ("Youmans") (**Investor's Schedule of Legal Authorities at CL-127**); *S.J. Stallings (U.S.A.) v. United Mexican States*, 4 RIAA 478 (22 April 1929) ("Stallings") (**Investor's Schedule of Legal Authorities at CL-128**); *Richard A. Newman (U.S.A.) v. United Mexican States*, 4 RIAA 518 (6 May 1929) ("Newman") (**Investor's Schedule of Legal Authorities at CL-129**); *Sarah Ann Gorham (U.S.A.) v. United Mexican States*, 4 RIAA 640 (24 October 1930) ("Gorham") (**Investor's Schedule of Legal Authorities at CL-130**); *Norman T. Connolly and Myrtle H. Connolly (U.S.A.) v. United Mexican States*, 4 RIAA 387 (15 October 1928) ("Connolly") (**Investor's Schedule of Legal Authorities at CL-131**); *Lillian Greenlaw Sewell, In Her Own Right and As Guardian of Vernon Monroe Greenlaw, a Minor (U.S.A.) v. United Mexican States*, 4 RIAA 626 (24 October 1930) ("Sewell") (**Investor's Schedule of Legal Authorities at CL-132**)

<sup>504</sup> *Too*, at para. 22 (**Investor's Schedule of Legal Authorities at CL-125**)

<sup>505</sup> *J.J. Boyd (U.S.A.) v. United Mexican States*, US-Mexico Claims Commission, (1928) 4 RIAA 380 ("J.J. Boyd") (**Investor's Schedule of Legal Authorities at CL-133**)

<sup>506</sup> *Asian Agricultural Products – Award*, at para. 50 (**Investor's Schedule of Legal Authorities at CL-055**)

<sup>507</sup> *Asian Agricultural Products – Award*, at para. 77 (**Investor's Schedule of Legal Authorities at CL-055**)

<sup>508</sup> *Asian Agricultural Products – Award*, at para. 77 (**Investor's Schedule of Legal Authorities at CL-055**)

- [the Host State] as the receiving State of investments made by [the Investor], shall take all measures necessary to ensure the full enjoyment of protection and security of [the Investment] and should not be permitted to invoke its own legislation to detract from any such obligation.<sup>509</sup>
417. Recent tribunals have found that the obligation to provide full protection and security includes an obligation on governments to provide a stable legal and business environment to foreign investors. For example, the *Azurix v. Argentina* Tribunal noted that the obligation to provide full protection and security includes an obligation to provide a "secure investment environment".<sup>510</sup>
418. In *Wena Hotels v. Egypt*, the Tribunal considered several factors to determine whether there had been a breach of the diligence standard resulted in liability:
- a) the delay on the part of the authorities to go to the investment to investigate;
  - b) the failure to take any immediate act of protection;
  - c) the delay in returning the investment to the investor;
  - d) the damage to, and deterioration of, the investment;
  - e) the failure of the Host State to provide compensation; and
  - f) the lack of serious punishment to the perpetrators.<sup>511</sup>
419. Repetitive nature failure to protect is also relevant. In *Eureko B.V. v. Republic of Poland*, the Tribunal concluded, with respect to the full protection and security obligation, that if harassment was "repeated and sustained, it may be that the responsibility of the [Host State] would be incurred by a failure to prevent them."<sup>512</sup>
420. The level of due diligence required of the NAFTA state may also correlate with the resources of the NAFTA state. In the *Pantechniki v. Albania* case, Jan Paulsson, the sole arbitrator, noted that the host State's responsibility to the investor and its investments

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<sup>509</sup> *American Manufacturing and Trading, Inc. v. Zaire*, Merits Award, 1997 WL 33804538 (February 21, 1997) ("*American Manufacturing - Merits Award*"), at para. 6.05 (***Investor's Schedule of Legal Authorities at CL-135***)

<sup>510</sup> *Azurix - Award*, at para. 408 (***Investor's Schedule of Legal Authorities at CL-070***): "The cases referred to above show that full protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view. The Tribunal is aware that in recent free trade agreements signed by the United States, for instance, with Uruguay, full protection and security is understood to be limited to the level of police protection required under customary international law. However, when the terms 'protection and security' are qualified by 'full' and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security. To conclude, the Tribunal, having held that the Respondent failed to provide fair and equitable treatment to the investment, finds that the Respondent also breached the standard of full protection and security under the BIT." See para. 375 for the Tribunal's conclusion that Argentina's failure to allow Azurix to assess tariffs consistent with the concession agreement breached Argentina's obligation to provide fair and equitable treatment.

<sup>511</sup> *Wena Hotels Ltd v. Arab Republic of Egypt*, Award, 2000 WL 34514091 (December 8, 2000) ("*Wena Hotels - Award*"), at paras. 89-95 (***Investor's Schedule of Legal Authorities at CL-136***)

<sup>512</sup> *Eureko - Partial Award*, at para. 237 (***Investor's Schedule of Legal Authorities at CL-080***)

needs to bear some proportion to its resources. Mr. Paulsson quoted the recent Investment Treaty treatise by Newcombe and Paradell, saying:

Although the host state is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified objective standard – the host state must exercise the level of due diligence of a host state in its particular circumstances. In practice, tribunals will likely consider the state's level of development and stability as relevant circumstance in determining whether there has been due diligence. An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo.<sup>513</sup>

#### D. The Severity of Violations of International Standards

421. In the *Neer* case, the US-Mexico Claims Commission stated:

It is in the opinion of the commission possible to go a little further than the authors quoted, and to hold (*first*) that the propriety of governmental acts should be put to the test of *international standards*

And (*second*) that the treatment of a alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so *far short of international standards* that every reasonable and impartial man would readily recognize its insufficiency.<sup>514</sup>

422. In other words, the view of the Commission in *Neer* was that not all actions that violate primary obligations (international standards) engage state responsibility. However, the notion that it may not be enough that governmental action falls short of the international law standard was ended by the adoption of the ILC Articles on State Responsibility. The ILC Articles have specifically overruled this approach, by providing that a state is responsible for *every* act that violates international standards, regardless of *how far* short that measure may be from those standards.<sup>515</sup>

423. Many other Tribunals – NAFTA and non-NAFTA alike – have now adopted this approach, confirming that a violation of "fair and equitable treatment", need not be characterized as "outrageous" or "egregious".<sup>516</sup>

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<sup>513</sup> *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (July 30, 2009) ("*Pantechniki* - Award"), at para. 81 (***Investor's Schedule of Legal Authorities at CL-031***)

<sup>514</sup> *L.F.H. Neer and Pauline E. Neer (United States.) v. United Mexican States* (October 15, 1926) 4 UNRIAA 138 (March 14, 1927) ("*Neer*"), at pp. 61-62 (***Investor's Schedule of Legal Authorities at CL-141***)

<sup>515</sup> *ILC Articles with Commentaries*, at p. 54 (***Investor's Schedule of Legal Authorities at CL-008***) Article 12 of the ILC Articles on State Responsibility states "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."

<sup>516</sup> *Pope & Talbot* - Award on Merits of Phase 2, at para. 116 (***Investor's Schedule of Legal Authorities at CL-039***); *ADF Group* - Award, (***Investor's Schedule of Legal Authorities at CL-072***), *Waste Management II* - Award (***Investor's Schedule of Legal Authorities at CL-091***); *GAMI Investments, Inc. v. The Government of the United Mexican States*, Final Award (November 15, 2004) ("*GAMI v. Mexico*") (***Investor's Schedule of Legal Authorities at CL-195***)

424. To the contrary, several tribunals have determined that a violation of "fair and equitable treatment" may be triggered by behaviour that is simply "unreasonable".<sup>517</sup> The Tribunal in *Saluka* drew the direct relationship between "reasonableness" and "fair and equitable treatment":

The standard of "reasonableness" has no different meaning in this context than in the context of the "fair and equitable treatment" standard with which it is associated; and the same is true with regard to the standard of "non-discrimination". The standard of "reasonableness" therefore requires...a showing that the State's conduct bears a reasonable relationship to some rational policy, whereas the standard of "non-discrimination" requires a rational justification of any differential treatment of a foreign investor."<sup>518</sup>

425. The direct nexus between "fair and equitable treatment" and the duty to act "reasonably" was also affirmed by the Tribunal in *Continental Casualty*:

...the fair and equitable standard is aimed at assuring that the normal law-abiding conduct of the business activity by the foreign investor is not hampered without good reasons by the host government and other authorities.<sup>519</sup>

426. The Tribunals in *MTD Equity*, *Azurix*, and *Siemens* all affirmed that, in the context of "fair and equitable treatment", what international law and the NAFTA require is "treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment."<sup>520</sup> Where the treatment is unjust or not even-handed, there is a violation of "fair and equitable treatment."

427. Not only does the obligation to accord foreign investors "fair and equitable treatment" require Canada to act in a non-arbitrary and non-discriminatory manner, but it also requires Canada to act reasonably. Where there is no reasonable relationship between Canada's actions and a rational policy, it fails to act reasonably, thereby violating its duty to provide "fair and equitable treatment".

428. In any case, this issue is of very limited significance on the facts of the instant case, as the conduct of Canada, pervaded by political motivation and national prejudice, would have risen to the requisite standard of gravity under the traditional law of diplomatic protection and *a fortiori* does so under contemporary international values or norms.

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<sup>517</sup> *Iurii Bogdanov* – Award, at p. 10 (***Investor's Schedule of Legal Authorities at CL-120***); *Eureko* - Partial Award, at para. 234 (***Investor's Schedule of Legal Authorities at CL-080***)

<sup>518</sup> *Saluka*, at para. 460 (***Investor's Schedule of Legal Authorities at CL-081***)

<sup>519</sup> *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (September 5, 2008) ("*Continental Casualty* - Award"), at para. 254 (***Investor's Schedule of Legal Authorities at CL-143***)

<sup>520</sup> *MTD Equity* – Award, at para. 113 (***Investor's Schedule of Legal Authorities at CL-060***); *Azurix* – Award, at para. 360, (***Investor's Schedule of Legal Authorities at CL-070***); and *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (February 6, 2007) ("*Siemens* - Award"), at para. 290 (***Investor's Schedule of Legal Authorities at CL-144***)



**E. The Test is a Flexible One to be Applied in All the Circumstances**

429. What amounts to a violation of the "fair and equitable treatment" standard is necessarily specific to the circumstances of each case. As the *Waste Management* Tribunal noted, "the standard is to some extent a flexible one which must be adapted to the circumstances of each case."<sup>521</sup> And as the *Mondev* Tribunal pointed out:

A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.<sup>522</sup>

430. What is certain, however, is that the jurisprudential trend has been consistently evolving towards a higher customary law standard of investment protection from what Prof. Schreuer terms as "state interference".<sup>523</sup> As a result, the customary law standard of treatment is now higher than it has been in the past, incorporating modern notions of administrative fairness and due process of law.

431. And as the Tribunal in *Rumeli* put it:

The precise scope of the [fair and equitable treatment] standard is...left to the determination of the Tribunal which will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable.<sup>524</sup>

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<sup>521</sup> *Waste Management II* - Award, at para. 99 (***Investor's Schedule of Legal Authorities at CL-091***)

<sup>522</sup> *Mondev* – Award, at para. 118, (***Investor's Schedule of Legal Authorities at CL-034***)

<sup>523</sup> See, for example, Schreuer, C., "Fair and Equitable Treatment in Arbitral Practice" (June 2005) 6:3 *The Journal of World Investment & Trade*, 357 ("Schreuer (2005)"), at p. 370 (***Investor's Schedule of Legal Authorities at CL-145***)

<sup>524</sup> *Rumeli* – Award, at para. 610, (***Investor's Schedule of Legal Authorities at CL-064***)

**V. ARTICLE 1503(2): STATE ENTERPRISES MUST COMPLY WITH NAFTA CHAPTER 11**

432. NAFTA Chapter Fifteen sets out primary obligations that apply to state trading enterprises. These obligations add to other primary obligations of the NAFTA in respect of State enterprises, such as those under NAFTA Articles 1102, 1103, 1105, where the conduct of the State enterprise is attributable to the state under international law rules, such as under the ILC Articles on State Responsibility.
433. NAFTA Article 1503(2) says:
- Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.
434. A NAFTA Party breaches its obligations under NAFTA Article 1503(2) if four elements are satisfied:
- a) The state enterprise acts inconsistently with the Party's NAFTA obligations;
  - b) The state enterprise acts under delegated authority;
  - c) That delegated authority is governmental;
  - d) The Party failed to ensure, through regulatory control, administrative supervision or the application of other measures, that the state enterprise acted consistently with the Party's NAFTA Chapter Eleven obligations.
435. Annex 1505 provides a specific definition of a state enterprise for Canada as including a "Crown corporation within the meaning of the Financial Administration Act (Canada), a Crown corporation within the meaning of any comparable provincial law or equivalent entity that is incorporated under other applicable provincial law."<sup>525</sup>
436. Article 1503(2) supplements NAFTA Parties' obligations under NAFTA Chapter Eleven. Customary international law principles of state responsibility attribute responsibility to Governments for breaches of international obligations by agents acting under delegated governmental authority. A NAFTA Party is, therefore, already responsible under NAFTA Chapter 11 for acts as a state enterprise inconsistent with Chapter Eleven obligations. Article 1503(2) imposes an additional obligation on NAFTA Parties to provide supervision to ensure that state enterprises follow the obligation of NAFTA Chapter Eleven.

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<sup>525</sup> NAFTA Annex 1505.

437. The need for this additional obligation arises from the unique opportunity of state enterprises to treat foreign investors unfairly and to disrupt international economic relations. The OECD says that:

The impact that state trading enterprises, monopolies, and enterprises with special or exclusive rights can have on market access for imports has been a matter of longstanding concern in international trade relations.<sup>526</sup>

Consequently,

the WTO includes a number of competition-related provisions regarding monopolies, state enterprises and enterprises with exclusive or special privileges. Similarly, many RTAs [regional trade agreements] provide for extensive obligations regarding the conduct of such enterprises.<sup>527</sup>

438. Of the WTO provisions that address monopoly and state enterprise conduct, GATS Article VIII says:

a) Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments.

b) Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service *outside the scope of its monopoly rights* and which is subject to that Member's specific commitments, the Member shall ensure that such supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments [emphasis added].

439. Article XVII(1)(a) of the GATT (1947) is similar, but applies to state enterprise actions regarding imports and exports.

440. In its *Statement on Implementation*, Canada said:<sup>528</sup>

Market integration under NAFTA will generate a dynamic transitional period resulting in increased competition throughout the free-trade area. The response by the private sector, whether through pricing or other business practices, must be competitively appropriate.

441. NAFTA Article 1503(2) contemplates that authority can be delegated by a broad range of government acts. NAFTA Note 44 says that in Article 1502, "a 'delegation' includes a

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<sup>526</sup> Organization for Economic Cooperation and Development (OECD), Working Party of the Trade Committee, *The Relationship between regional trade Agreements and the Multilateral Trading Systems: Competition* (May 7, 2002) ("OECD, Working Party"), at para. 31 (*Investor's Schedule of Legal Authorities at CL-146*)

<sup>527</sup> OECD, Working Party, at para. 31 (*Investor's Schedule of Legal Authorities at CL-146*)

<sup>528</sup> *Canadian Statement on Implementation*, at pp. 180-181 (*Investor's Schedule of Legal Authorities at CL-012*)  
The Statement on Implementation provides: With the increasing globalization of production and markets, the role of competition policy in influencing trade, investment and technology exchange has suggested the need or governments to address differences in approach to competition. Recent experience demonstrates the extent to which differences in competition policy can act as a barrier to trade or as a source of dispute. The FTA made brief reference to monopolies (article 2010); the NAFTA devotes considerably more attention to the subject.

- legislative grant, and a government order, directive or other act transferring to the monopoly, or authorizing the exercise by the monopoly of, governmental authority".
442. Customary international law also informs the meaning of "delegation" within NAFTA Article 1503(2). The commentary to the *ILC Articles* says that States attract responsibility for agents' actions taken under discretionary authority:
- ... an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State.<sup>529</sup>
443. The interpretation is consistent with the purpose of attributing responsibility to states for the actions of agents to which the state has delegated authority. Just as the state cannot escape responsibility for delegating authority to non-state entities, the state cannot escape responsibility for delegating authority in a vague manner.<sup>530</sup>
444. Where the state agency or entity in question is granting licenses, by giving investors permission to operate, it is irrefutable that the activity falls within Article 1503(2). This then compels an examination as to whether the state fulfilled its responsibilities and "ensure[d], through regulatory control, administrative supervision or the application of other measures," that the state agency or enterprise acted consistent with the state's obligations under NAFTA Chapter 11.

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<sup>529</sup> Crawford (2002), at p. 102 (*Investor's Schedule of Legal Authorities at CL-006*)

<sup>530</sup> The United States, therefore, has no support in the text, customary international law, or the principles which underlie it, when it argues that authority must be "specifically" delegated to the agent to fall within Articles 1502(3)(a) and 1503(2). *United Parcel Service v. Canada*, Second Submission of the United States of America, 2007 WL 5366485, May 13, 2002 ("*U.P.S. - Second Submission of the US*"), at para. 9 (*Investor's Schedule of Legal Authorities at CL-147*)

## VI. THE PROCUREMENT DEFENSE CANNOT APPLY

### A. The Article 1108 Defense

445. Canada contends that under Article 1108 "procurement by a Party or state enterprise is not subject to the obligations in NAFTA Articles 1102, 1103 and 1106."<sup>531</sup> However, as Canada has not provided a Statement of Defence, the Investor is unable to discern what point Canada is purporting to make.

446. The Investor notes, however, that in considering the questions of whether the procurement exemption in Article 1108 applied to a domestic content obligation, the Tribunal in *ADF* concluded that the definition of procurement for the purposes of Chapter Eleven could be discerned from the NAFTA as a whole, and gave particular attention to the definition of procurement in Chapter 10, which is specifically about "Procurement."<sup>532</sup>

447. The definition of procurement in Chapter Ten contains Article 1001(5), excludes:

- a) Goods resold by procuring governments to others, and
- b) Procurement by state and local government.

Neither of these types of transactions are covered by the NAFTA definition of procurement.

448. The definition of procurement in Article 1001(5) of NAFTA says in particular:

... Procurement does not include:

- e) non-contractual agreements or any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services to persons or state, provincial and regional governments .... [emphasis added]

449. Significantly, whether the Government *acquires ownership over or purchases* the goods is not defining or dispositive of procurement: hence lease or rental arrangements are also included. Equally significantly, where what is involved is "provision of services" to "persons" (i.e. non-governmental entities) or even to *other* governments, such arrangements fall outside the definition of a procurement. In sum, what defines a procurement is the government obtaining goods and services for its own use, not for provision to others.

450. There is no procurement contemplated by the Government of Canada in this arbitration. There is an allegation of procurement by Ontario, however, the definition of a

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<sup>531</sup> Canada, Outline of Potential Issues, at para. 22.

<sup>532</sup> *ADF Group - Award*, at para. 161 (*Investor's Schedule of Legal Authorities at CL-072*)

procurement in Chapter Ten explicitly excludes provincial procurement as well as government provision of goods and services to the public.

451. The scope of provincial coverage within the NAFTA Procurement Chapter is set out in Article 1001(1)(a). It says that the Chapter relates to procurement by a province or provincial government entities only if they are in accord with Article 1024 (which requires further negotiation) and are then set out in an annex after that negotiation (Annex 1001.1a-3). The list in Annex 1001.1a-3 has no entries, so procurement from unlisted provinces or provincial entities are not subject to the definition of the term "procurement" in the NAFTA.
452. A similar limitation on what constitutes procurement is NAFTA Article 1502(4). In relation to government monopolies, it clearly indicates that commercial resale is outside the scope of procurement:
- Paragraph 3 does not apply to procurement by governmental agencies of goods or services for governmental purposes and not with a view to **commercial resale** or with a view to use in the production of goods or the provision of services for commercial sale.
453. The commercial resale exclusion is identical to Article III:8(a) of the GATT 1994, which states:
- The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to **commercial resale** or with a view to use in the production of goods for commercial sale.
454. The predecessor of GATT 1994 was in effect at the time the NAFTA was negotiated.
455. The approach taken by the NAFTA Tribunal in *ADF*, and adopted by the *UPS* Tribunal,<sup>533</sup> is also consistent with the approach to interpretation mandated by NAFTA Article 1131(1) and Article 31 of the the *Vienna Convention* which incorporates through international law the widespread trade-law meaning of the procurement.<sup>534</sup>

## **B. Procurement Under the NAFTA**

### *i. The Concept of a "Procurement"*

456. Under the FIT Program, power provided by renewable energy producers, like Mesa, was to supply energy into the Ontario grid, which would immediately be available for commercial resale. None of the energy that would have been produced by Mesa under the FIT Program would have been available for a purpose other than commercial resale.

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<sup>533</sup> *United Parcel Service v. Canada, Award & Separate Opinion of Dean Ronald A. Cass, 2007 WL 5366485 (May 24, 2007) ("U.P.S. - Award") at para. 131 (Investor's Schedule of Legal Authorities at CL-148)*

<sup>534</sup> *Vienna Convention on the Law of Treaties* (1969), art. 31(3)(c) (*Investor's Schedule of Legal Authorities at CL-11*)

The way that Ontario's electrical grid is organized, all power goes into a grid, and all power is available for commercial resale from the grid.

457. Thus, the OPA's "purchase" of electricity from generators under the FIT Program was a transaction that, neither individually nor collectively, could be characterized as "procurement" by OPA.

*ii. Government Purposes*

458. Both the EU and Japan submitted to the WTO Panel that "government purchases" for "government purposes" must be "for government use or benefit," and they noted that the significance of how purchased products are used is confirmed by Article III:8(a) of the GATT, which contrasts "governmental purposes" with "use in the production of goods for commercial sale."<sup>535</sup>

459. In addition, the EU referenced the negotiating history of Article III of the GATT to observe that it was intended to refer to the same type of government procurement as Article XVII:2 of the GATT 1994, which defines "procurement" as requiring "immediate or ultimate consumption in governmental use."<sup>536</sup>

*iii. "Commercial Resale"*

460. There can be no doubt that electricity purchased by the OPA is resold to Ontario consumers. At the WTO, however, Canada contended that the resale was not "commercial" because the Ontario electricity market was something other than "commercial." The Panel rejected the contention and held that "commercial" does not require the transaction to be for-profit, or profitable, though it also found as a matter of fact that the Ontario market was one characterized by commercial competition between electricity suppliers to customers.

461. The French version of Article III:8(a) confirms the Panel's understanding of "commercial" resale. The French equivalent of "commercial resale" is "*revendus dans le commerce*," which confirms that "commercial resale" simply means in Article III:8 (a) that the goods are resold in or through "commerce". No market benchmark is expressed or implied, and "commerce" can occur in any kind of market. The obvious contrast is between situations where goods change hands *within* the government or between government entities (i.e., the "resale" occurs within the public sector), and situations (like that of

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<sup>535</sup> *Canada - Measures Relating to the Feed-In Tariff Program*, WT/DS426, First Written Submission of the European Union (February 14, 2012) ("*Canada - FIT EU Submission*"), at para. 119 (***Investor's Schedule of Legal Authorities at CL-202***)

<sup>536</sup> *Canada - Measures Relating to the Feed-in Tariff Program*, at para. 32 (***Investor's Schedule of Legal Authorities at CL-004***)

electricity in Ontario) where resale makes the goods available to non-governmental consumers in or through commerce.

462. The International Court of Justice, in its Judgment on Jurisdiction in the *Oil Platforms case (Iran v. United States)* noted that the expression "commerce" in a treaty should be given its ordinary meaning, and not a restrictive meaning, unless there is clear evidence that the drafters intended otherwise:

In the view of the Court, there is nothing to indicate that the parties to the Treaty intended to use the word "commerce" in any sense different from that which it generally bears. The word "commerce" is not restricted in ordinary usage to the mere act of purchase and sale; it has connotations that extend beyond mere purchase and sale to include "the whole of the transactions, arrangements, etc., therein involved" (*Oxford English Dictionary*, 1989, Vol. 3, p. 552). In legal language, likewise, this term is not restricted to mere purchase and sale because it can refer to "not only the purchase, sale, and exchange of commodities, but also the instrumentalities and agencies by which it is promoted and the means and appliances by which it is carried on, and transportation of persons as well as of goods, both by land and sea (*Black's Law Dictionary*, 1990, p. 269).<sup>537</sup>

463. In the *Costa Rica v. Nicaragua* case, the International Court of Justice also applied the ordinary meaning of the term "commerce", rejecting arguments that it had special meanings. The ICJ held that "commerce" or a "commercial transaction" is any transaction where goods or services are exchanged for valuable consideration.<sup>538</sup>
464. In *Canada – Renewable Energy* the WTO Panel and the Appellate Body found that the Ontario minimum local content requirements in the FIT Program violated Canada's obligations under the Trade-Related Investment Measures Agreement. These are obligations owed to over 150 member countries. The WTO considered and then rejected the applicability of a procurement exception which was similar to the Article 1108(7) exception in the NAFTA.
465. Indeed, the drafters of the GATT and the NAFTA could never have imagined such a vast carve out from fundamental non-discrimination requirements. The potential for abuse could also be great, as governments could avoid their obligations of non-discriminatory market access for imports by having the government acquire some temporary entitlement to the goods.

iv. *Article XVII of the GATT: State Trading Enterprises*

466. The importance of non-discrimination disciplines when government is a market participant or operator (and not simply a consumer for its own use) is illustrated by

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<sup>537</sup> *Oil Platforms* - Preliminary Objection, at para. 45 (***Investor's Schedule of Legal Authorities at CL-020***)

<sup>538</sup> *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, 213 ("Costa Rica v. Nicaragua"), at para. 71 (***Investor's Schedule of Legal Authorities at CL-149***)



Article XVII of the GATT, which extends state responsibility to entities which may have a formal legal personality that is formally independent of state organs.

467. Blank and Marceau note, after the initial GATT was negotiated, that:

Public purchases of supplies for governmental use became subject only to an obligation of fair and equitable treatment in favor of other countries under the Article on state-trading enterprises.<sup>539</sup>

468. Article XVII requires that state trading enterprises, "in their purchases or sales involving either imports or exports – are to act in accordance with the general principles of non-discrimination. It also instructs that Members are to notify their state trading enterprises to the WTO annually."<sup>540</sup>

469. In the *Korea-Beef* report, the Appellate Body upheld that the general principle of non-discrimination.<sup>541</sup> As Blank and Marceau observe:

a distinction needs to be drawn between state-trading and government procurement. In state-trading, governments or their agents are involved in buying, selling and sometimes reselling: governments are trading-actors like any other firms. Government procurement involves governments or their agents acting as consumers, procuring for their own consumption and not for resale.<sup>542</sup>

470. Thus, Article XVII:2 of the GATT defines government procurement as an exception in a manner that is essentially the same as Article III:8 of the GATT. As Professor Ping Wang observed:

the wording of Article XVII:2 is similar to that of Article III:8 GATT. Just 'for governmental purposes' was replaced by 'for immediate or ultimate consumption in governmental use' and 'not for commercial resale' was replaced by 'not otherwise for resale.' It could be argued that these differences are not substantial.<sup>543</sup>

471. Professor Wang's analysis conforms to the interpretative principles in Article 31 of the *Vienna Convention on the Law of Treaties*. Considering the object and purpose of Article III and the GATT as a whole, it would be highly incongruent if the word "commercial" in

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<sup>539</sup> Annet Blank & Gabrielle Marceau, "A History of Multilateral Negotiations on Procurement: From ITO to WTO," in Bernard M. Hoekman & Petros C. Mavroidis (eds.), *Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement* (Ann Arbor: University of Michigan Press, 1997) ("Blank & Marceau: "A History""), at p. 51 (***Investor's Schedule of Legal Authorities at CL-150***)

<sup>540</sup> World Trade Organisation "The regulation of state trading under the WTO system" State Trading Enterprises: Regulation <<http://www.wto.org>> (retrieved November 14, 2013) ("WTO: "Regulation of State Trading") (***Investor's Schedule of Legal Authorities at CL-151***)

<sup>541</sup> *Korea- Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO/DS161/AB/R, WT/DS169/AB/R, Report of the Appellate Body (10 January 2001) ("*Korea Beef*") (***Investor's Schedule of Legal Authorities at CL-152***)

<sup>542</sup> Blank & Marceau: "A History", at p. 33 (***Investor's Schedule of Legal Authorities at CL-150***)

<sup>543</sup> Ping Wang, "The Procurement of State Trading Enterprises Under the WTO Agreements: A Proposal for the Way Forward," in Sue Arrowsmith and Robert D. Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge: Cambridge University Press, 2011) ("Wang: "Procurement""), at pp. 217-218 (***Investor's Schedule of Legal Authorities at CL-153***)

Article III:8, along with its absence in Article XVII:2, were read such that *organs* of the state do not have to comply with the National Treatment obligation when they are market operators, while *state trading enterprises*, which may well not be organs, do have to abide by principles of non-discrimination.

v. *WTO Agreement on Government Procurement*

472. The WTO Agreement on Government Procurement (the GPA) is focused on the subject of government procurement, and is more detailed than the procurement exemption under GATT Article III:8(a). Article I:2 of the GPA indicates that "government procurement" may include lease or rental arrangements. Thus, for the GPA, what is defining or dispositive of a procurement is not that at some stage the government has acquired legal ownership over or purchased the goods, but that it has obtained them for its own use and benefit.

473. In Canada's General Notes to Appendix I of the GPA, Canada defines procurement as "contractual transactions to acquire property or services *for the direct benefit or use of the government*."<sup>544</sup> Procurement therefore cannot refer to products that are intended to be sold to consumers.

vi. *The WTO's conclusions on the nexus of the Procurement Exemption*

474. The WTO Panel considered the nature of the electricity market in Ontario. It recognized that there was a private marketplace and that Ontario was obtaining power that was being immediately resold into that private marketplace for delivery to consumers and industry. The Panel found:

We recall that the Government of Ontario purchases electricity under the FIT Programme, through the FIT and microFIT Contracts. The purchased electricity is injected by generators into Ontario's electricity grid via transmission and distribution networks, and is eventually sold to consumers by Hydro One, LDCs [Local Distribution Companies] and private-sector licensed electricity retailers. Hydro One is a holding company wholly-owned by the Government of Ontario and an "agent" of the Government of Ontario. As explained in more detail below, Hydro One is also a "public body" for the purpose of Article 1 of the SCM Agreement. Of the 80 LDCs that currently operate in Ontario, 77 are owned by municipal governments. The private-sector licensed retailers "sell contracts to businesses and consumers"<sup>545</sup>. We understand there are currently 45 licensed electricity retailers operating in Ontario that compete with LDCs in their respective service areas. Thus, it is evident that the electricity purchased by the Government of Ontario under the FIT Programme is resold to retail consumers through Hydro One and the LDCs in competition with private-sector retailers.<sup>546</sup>

475. The Panel continued:

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<sup>544</sup> *Canada - FIT EU Submission*, at para. 120 (*Investor's Schedule of Legal Authorities at CL-202*)

<sup>545</sup> Ontario's Long-Term Energy Plan, Appendix One (*Investor's Schedule of Exhibits at C-0414*)

<sup>546</sup> *Canada - Renewable Energy - Panel Report*, at para. 7.147 (*Investor's Schedule of Legal Authorities at CL-001*)

We are not convinced by Canada's argument that electricity purchased under the FIT Programme is not *resold* because of the fact that it is injected into Ontario's electricity grid, where it is pooled with electricity from other sources<sup>547</sup>. As we see it, the fact that electricity purchased under the FIT Programme is consumed through precisely the same channels as electricity supplied from all other generating sources supports the view that it is resold by the Government of Ontario and the municipal governments through Hydro One and the LDCs in competition with private-sector electricity retailers.

Thus, to the extent that the notion of commerce should, as the complainants argue, be understood to simply encompass the buying and selling or trading of products into a market, the Government of Ontario's purchases of electricity, through the FIT Programme, may be considered to be a first step in the resale of electricity to retail consumers, and thereby the introduction of electricity into commerce. Canada, however, argues that even under the complainants' interpretation of the term "commercial resale", the purchases of electricity by the Government of Ontario under the FIT Programme cannot be qualified as being made "with a view to commercial resale". In particular, Canada argues that the OPA cannot be said to sell or introduce products into the "*market*", because a "*market*" "where supply and demand freely meet" does not exist in the Ontario electricity system<sup>548</sup>. We are not persuaded by Canada's argument. In our view, the consideration of whether Ontario's electricity system is, as a whole, highly regulated or made up entirely of competitive markets at the different levels of trade does not change the basic fact that electricity purchased by the Government of Ontario under the FIT Programme is bought from generators and sold to retail consumers through the same channels as all other electricity by Hydro One and LDCs *in competition with private sector electricity retailers*. Therefore, consistently with the complainants' interpretation of "commercial resale", the purchased electricity is introduced into commerce.<sup>549</sup>

476. The WTO Appellate Body considered the findings of the Panel as to whether the operation of the FIT Program constituted procurement that should apply as a defense under GATT Article III:8, and concluded:
- a) Many of the measures in the FIT Program are not procurements at all.<sup>550</sup> This is especially important as the NAFTA definition of procurement only applies to a procurement transaction itself, and thus is narrower than the GATT definition.
  - b) The terms of the FIT Program did not govern government procurement of electricity, but the purchasing policies of the private sector entities that would supply the power into the electricity grid – and so such measures never could be considered to be procurement measures.<sup>551</sup>
477. In addition to the findings of the WTO Appellate Body, the advantages provided to the members of the Korean Consortium are not procurements at all. Indeed, the definition

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<sup>547</sup> *Canada - Renewable Energy* - Panel Report, at paras. 7.148 and 7.149 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>548</sup> *Canada - Measures Affecting the Renewable Energy Generation Sector*, at paras. 129-130 (***Investor's Schedule of Legal Authorities at CL-003***)

<sup>549</sup> *Canada - Renewable Energy* - Panel Report, at paras. 7.147 and 7.148 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>550</sup> *Canada - Renewable Energy* - AB Report, at para. 5.79 (***Investor's Schedule of Legal Authorities at CL-002***)

<sup>551</sup> *Canada - Renewable Energy* - AB Report, at para. 5.84 (***Investor's Schedule of Legal Authorities at CL-002***)

of procurement in NAFTA Chapter Ten excludes "cooperation agreement" and any form of government assistance. Nor are many of the other measures complained of by the Investor even close to being within the ordinary meaning of the word "procurement", such as decisions about transmission that are regulatory or administrative acts quite separate from any individual transaction for the acquisition of generated energy by the Government.

478. The Ontario local content requirement does not require local content in the generated renewable energy that is being purchased, but is a separate imposition concerning the Investor's purchases of equipment and services.
479. Accordingly, Canada is not able to rely upon the procurement exemption in Article 1108 because
  - a) The measures at issue are simply not procurements, but other kinds of government measures such as cooperation Agreements with the Korean Consortium, which are excluded from any meaning of "procurement."
  - b) The notion of procurement does not apply where a commercial resale is involved;  
and
  - c) The definition of procurement does not apply to a provincial government under NAFTA Article 1005(1).

#### **PART FOUR: THE LAW APPLIED TO THE FACTS**

480. This section of the Memorial focuses on how Canada's measures described in Part Two of the Memorial were inconsistent with Canada's NAFTA obligations described in Part Three.
481. Canada imposed Performance Requirements in violation of NAFTA Article 1106 by requiring that investors meet a minimum level of purchases of domestic goods and services.
482. Canada contravened its Most Favored Nation Treatment obligation in NAFTA Article 1103:
- a) Canada provided treatment that was less favorable to Mesa and its investments than was provided to companies owned by investors from Non-Parties in like circumstances to Mesa, such as Samsung C&T and the Korean Electric Power Corporation; and
  - b) The measures interfered with the conduct, management, operation and expansion of Mesa Investments.
483. Canada contravened its National Treatment obligation in NAFTA Article 1102:
- a) Canada provided treatment that was less favorable to Mesa Power and its investments than was provided to Canadian companies in like circumstances to Mesa, including Pattern Renewable Holdings Canada and Boulevard Associates Canada; and
  - b) The measures interfered with the conduct, management, operation and expansion of Mesa Investments.
484. NAFTA Article 1104 requires that an investor from the United States, and its investments, receive from Canada the best treatment provided in the jurisdiction under either NAFTA 1102 or 1103.
485. Canada contravened its International Law Standard of Treatment obligation in NAFTA Article 1105:
- a) Canada treated Mesa Power in a discriminatory manner by altering the regulatory process to favor select investments including Samsung C&T's and NextEra's investments, based on political considerations;
  - b) Canada acted in a non-transparent manner by guaranteeing priority treatment to certain proponents;

- c) Canada failed to provide information to Mesa and did not accord Mesa procedural fairness it was reasonably entitled to expect, given the overall legal and regulatory framework, and the manner in which other market participants were being treated;
  - d) Canada's process for awarding Power Purchase Agreements was unfair, unreasonable and arbitrary toward Mesa; and
  - e) In failing to follow the process prescribed by the FIT Rules, Canada violated Mesa reasonable and legitimate expectations.
486. Mesa suffered harm, loss, injury and damage as a result of each of these breaches of the NAFTA. The harm suffered by the Investor as a result of the domestic content requirements, preferential treatment granted to Samsung and its partners, and the unlawful operation of the FIT Program, is set out in Part Six of the Memorial.

#### **I. PERFORMANCE REQUIREMENTS**

487. Ontario's FIT Program conditioned the granting of a PPA on a requirement that proponents achieve a level of domestic content in their investments. This is a direct violation of Article 1106(1)(b), which prohibits conditioning the establishment of an investment on achieving a level of domestic content.
488. The practical effect of the domestic content requirements was that Mesa was required to change its business plan and expend capital to meet Ontario's requirements.<sup>552</sup> This led to business decisions and contracts being entered into that Mesa would not have normally engaged. However, it had no choice.
489. The domestic content requirements were contained in Section Rule 6.4 of the FIT Rules of the FIT Program, and included the caveat that those who failed to meet the required levels of domestic content "will be in default".<sup>553</sup>

#### **A. The Domestic Content Requirement is a Breach of Article 1106(1)**

490. Rule 6.4 of the FIT Rules stipulates that Contract Facilities utilizing windpower with a Contract Capacity greater than 10 kW, or Contract Facilities utilizing solar (PV), must achieve a minimum percentage for their Domestic Content Level. The level each needs to achieve is set out in the FIT Contract Cover Page ("The Minimum Required Domestic Content Level"):
- a) For windpower Projects with a Contract Capacity greater than 10 kW, the Minimum Required Domestic Content Level is 25% for FIT Contracts that have a Milestone

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<sup>552</sup> CWS - Robertson, at para. 18.

<sup>553</sup> Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 6.4 (*Investor's Schedule of Exhibits at C-0258*)

- Date For Commercial Operation prior to January 1, 2012, and 50% for FIT Contracts that have a Milestone Date for Commercial Operations on or after January 1, 2012.
- b) The Domestic Content Level of a Contract Facility will be calculated in accordance with the methodology set out in Exhibit D to the FIT Contract. If a Contract Facility does not meet the Minimum Required Domestic Content Level, the Supplies will be in default under the FIT Contract.<sup>554</sup>
491. The specific thresholds to be incorporated in the FIT PPA Contracts were set out in Section 6.4 of the Rules, which provided:
- For wind power Projects with a Contract Capacity greater than 10kW, the Minimum Required Domestic Content Level is 25 percent for FIT Contracts that have a Milestone Date For Commercial Operations prior to January 1, 2012 and 50% for FIT Contracts that have a Milestone Date For Commercial Operation on or after January 1, 2012.<sup>555</sup>
492. Domestic content levels established in the FIT Rules range from 25% for wind power projects over 10kW in 2009-2011, and jump to 50% for wind projects over 10kW in 2012. A distinction is made regarding the level of local inputs according to the source of energy, and the size of the renewable energy project, and the levels of domestic content increase over time. All contracts involving Mesa Power required a 50% minimum domestic content.
493. A FIT Contract had to meet the minimum required domestic content level,<sup>556</sup> and would not be eligible to receive the benefits of the FIT Program unless it complied with the requirements set forth in the FIT Rules and provided in the FIT Contract. An interested applicant had to complete the Domestic Content report package within 60 days of reaching Commercial Operation pursuant to the requirements of Section 2.11(c) of the FIT Contract.<sup>557</sup>
494. The FIT Program's minimum domestic content requirement was designed to require all successful applications to contain a minimum percentage of local content. However, the domestic content percentage was arbitrary and discriminatory by non-transparently increasing the effective minimum domestic content significantly beyond the stated percentages and limiting how much each component of a project could be counted.

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<sup>554</sup> Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 6.4(a)(i),6.4(b) (***Investor's Schedule of Exhibits at C-0258***)

<sup>555</sup> Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011, at para. 6.4 (a)(i) (***Investor's Schedule of Exhibits at C-0005***)

<sup>556</sup> Ontario Power Authority, Feed-In Tariff Contract (FIT Contract) Version 1.5, June 3, 2011, at paras. 2.2(f), 2.4(b)(iii) (***Investor's Schedule of Exhibits at C-0263***)

<sup>557</sup> Ontario Power Authority, Feed-In Tariff Contract (FIT Contract) Version 1.5, June 3, 2011, at paras. 2.11(c) (***Investor's Schedule of Exhibits at C-0263***)

495. For example, wind turbine blades cast in a mould in Ontario, and instrumentation in the blades that were also assembled in Ontario, were together artificially capped at a maximum contribution of 16 percent of the total domestic content. Yet wind turbine blade costs represented far more than 16 percent. As a result, the total amount of local content is significantly higher than the ostensible minimum percentage of domestic content required by the FIT Rules because of the limits and number of sub-component categories the FIT Rules required.
496. Wind projects that became operational after January 1, 2012, were required to locally source 50% of the equipment and services they used in the generation of electricity.<sup>558</sup> To ascertain whether or not a proponent reached the required threshold of domestic content, the FIT Rules prescribed that certain activities equalled a certain "qualifying percentage" of the domestic content required. An example can be seen in Exhibit D to the FIT Contract version 1.5 which breaks down the different mechanical and production sub-components required to generate wind power and identifies how sourcing each of those components in Ontario would be calculated towards the minimum domestic content requirements:<sup>559</sup>

Designated Activity	Qualifying Percentage
Wind turbine blades case in a mould in Ontario, and instrumentation that is within the blades has been assembled in Ontario.	16%
Pitch system, where the gear wheels for the pitch system has been cut, carburized and ground in Ontario, and where the pitch system has been assembled and tested in Ontario.	3%

497. The way the sub-component maximums were set was capricious and the entire industrial fabrication process was distorted to increase the investment distorting effect of the minimum domestic content requirements.
498. The WTO Appellate Body made the following observations:

Under the FIT stream, electricity generation facilities utilizing windpower and solar PV technologies must comply with "Minimum Required Domestic Content Levels", which must be satisfied in the development and construction of these facilities. .... The "Domestic Content Level" of a facility participating in either stream of the FIT Programme is calculated pursuant to a methodology that identifies a range of different "Designated Activities" and an associated "Qualifying Percentage". For each Designated Activity that is performed in relation to a facility, an associated Qualifying Percentage will be achieved. A project's Domestic Content Level "will be

<sup>558</sup> Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011, at para. 6.4(a)(i) (*Investor's Schedule of Exhibits at C-0005*)

<sup>559</sup> Ontario Power Authority, Feed-In Tariff Contract Version 1.1, September 30, 2009, Exhibit D, Table 1 (*Investor's Schedule of Exhibits at C-0109*)



- determined by adding up the Qualifying Percentages associated with all of the Designated Activities performed in relation to that particular project".<sup>560</sup>
499. The WTO Panel Report explained the process and how it created obligations for investors like Mesa to move part of their manufacturing and processing to Ontario to be compliant with the FIT Rules:
- For each "Designated Activity" that is performed in relation to the Contract Facility, an associated "Qualifying Percentage" will be achieved. For example, where the wind turbine blades of a windpower project have been "cast in a mould in Ontario" and the "instrumentation that is within the blades has been assembled in Ontario", the Contract Facility will achieve a Qualifying Percentage of 16%. The FIT Contract explains that a project's Domestic Content Level will be determined by adding up the Qualifying Percentages associated with all of the Designated Activities performed in relation to that particular project.<sup>561</sup>
500. In order to ensure that applicants were compliant, FIT proponents had to complete a Domestic Content Report package.<sup>562</sup> These requirements leave no doubt that the local content requirements set down by the OPA at the instruction of the Ministry of Energy were, in the words of the *Pope & Talbot* Tribunal, "impose[d] or enforce[d]".<sup>563</sup>
501. The Appellate Body of the WTO found that it was impossible for an applicant in the FIT Program to not abide by the Program's requirements, such as the local content requirements:
- An entity that enters into a FIT or microFIT Contract is required to, inter alia, build, operate, and maintain the approved generation facility in accordance with all relevant laws and regulations, and deliver the electricity produced into the Ontario electricity system.<sup>564</sup>
502. The WTO Panel Report found that the domestic requirement was a necessary precondition to being awarded a FIT contract:
- As we explain in more detail elsewhere in these Reports, the evidence before us reveals that the "Minimum Required Domestic Content Level" is a condition that must be satisfied by electricity generators utilizing solar PV or windpower technologies wanting to participate in the FIT Program. In other words, the "Minimum Required Domestic Content Level" compels the purchase and use of certain renewable energy generation equipment that is sourced in Ontario as a necessary prerequisite for the alleged procurement by the Government of Ontario to take place...<sup>565</sup>

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<sup>560</sup> *Canada - Renewable Energy* - AB Report, at paras. 1.3, 1.4 (***Investor's Schedule of Legal Authorities at CL-002***)

<sup>561</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.160 (***Investor's Schedule of Legal Authorities at CL-001***); The AB Report reached the same conclusion, see *Canada - Renewable Energy* - AB Report, at para. 4.22 (***Investor's Schedule of Legal Authorities at CL-002***)

<sup>562</sup> All of the prescribed forms necessary for the submission of a complete Domestic Content Report are available online. Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011, at paras. 2.11(c) (***Investor's Schedule of Exhibits at C-0005***)

<sup>563</sup> *Pope & Talbot v. Government of Canada*, Interim Award (June 26, 2000) para. 75 ("*Pope* - Interim Award") (***Investor's Schedule of Legal Authorities at CL-154***)

<sup>564</sup> *Canada - Renewable Energy* - AB Report, at para. 4.20 (***Investor's Schedule of Legal Authorities at CL-002***)

<sup>565</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.124 (***Investor's Schedule of Legal Authorities at CL-001***)

503. At the WTO, Canada acknowledged that the FIT Program was a measure. The Panel noted:

First, Canada contends the challenged measures are law, regulations or requirements governing the procurement of electricity. Canada considers that Section 25.35 of the *Electricity Act of 1998*; the Ministerial Direction; and the FIT and microFIT Rules and Contracts are laws or requirements for the purposes of Article III:8(a).<sup>566</sup>

504. The WTO AB summarized the WTO Panel findings about how the FIT Program constituted a performance requirement:

At the outset of its analysis, the Panel addressed the question of whether the FIT Programme and related FIT and microFIT Contracts are "trade-related investment measures"(TRIMs) within the meaning of Article 1 of the TRIMs Agreement. The Panel found that one aim of the FIT Programme and Contracts is to encourage investment in the local production of equipment associated with the generation of electricity from renewable sources in Ontario.<sup>567</sup> Furthermore, the Panel found that the FIT Programme and Contracts "compel [electricity generators] to purchase and use certain types of renewable energy generation equipment sourced in Ontario in the design and construction of their facilities".<sup>568</sup> On this basis, the Panel concluded that the FIT Programme and Contracts constituted TRIMs "to the extent they envisage and impose domestic content requirements".<sup>569</sup>

505. For the same reasons, the minimum content requirements of the FIT Program constitute prohibited performance requirements under NAFTA Article 1106. The Panel said:

Thus, based on the foregoing analysis, we find that the FIT Programme, and the FIT and microFIT Contracts, to the extent they envisage and impose a "Minimum Required Domestic Content Level", constitute TRIMs within the meaning of Article 1 of the TRIMs Agreement.<sup>570</sup>

#### **B. Mesa took steps to secure Domestic Content**

506. Mesa took steps to secure domestic content in line with the requirements. The local content requirements in the FIT Program were a direct impediment to Mesa being able to proceed with its investment in an efficient and expeditious manner, and interfered with Mesa's ability to obtain a fair return from its investment.

507. In November 2009, Mesa was forced to restructure a pre-existing contract with its major supplier, General Electric (GE), on the acquisition of the Arran and TTD project, so that it could meet the minimum local content requirements of the FIT Program. The value of the Master Turbine Supply Agreement that Mesa restructured in order to comply with the FIT local content requirements was approximately USD\$150 million.

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<sup>566</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.88 (*Investor's Schedule of Legal Authorities at CL-001*)

<sup>567</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.109 (referring to Minister's 2009 FIT Direction, at p. 1) (*Investor's Schedule of Legal Authorities at CL-001*)

<sup>568</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.111 (*Investor's Schedule of Legal Authorities at CL-001*)

<sup>569</sup> *Canada - Renewable Energy* - AB Report, at para. 5.38 (*Investor's Schedule of Legal Authorities at CL-002*)

<sup>570</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.111 (*Investor's Schedule of Legal Authorities at CL-001*)

508. After re-structuring its agreement with GE for turbines, Mesa had to ensure that the production of turbines would satisfy the FIT Program's domestic content requirements. GE updated Mesa in January 2011 that "we are working to ensure that the products offered to developers in Ontario will meet the requirements set forth by the OPA."<sup>571</sup>
509. Much of Mesa's interaction with GE was centered around its need to successfully meet the local content requirements set out in the FIT Program. Mesa's concern was that it would be able to meet the full extent of the requirements for all projects subject to the quota.
510. GE did not respond to this enquiry and did not confirm that any turbine other than the 1.6 MW turbine could successfully meet the Ontario domestic content minimums necessary to have a successful FIT bid.<sup>572</sup>
511. When GE introduced a new component that could have saved costs associated with the project, Mesa's primary concern was not to implement the cost-saving measure, but instead to ensure that "there are not any hang-ups with the local content requirements of the Ontario market" before it proceeded.<sup>573</sup>
512. The minimum domestic content rules created invidious effects for Mesa, which had to constantly change its optimal product component mix and substitute its strategic commercial plans with less efficient and more costly items to comply with the capricious minimum domestic content rules.
513. Canada has produced a few documents evidencing any discussion between government officials, agencies and public bodies surrounding domestic content requirements. These limited documents cannot represent full documentary production of the many officials who were tasked to address domestic content for renewable energy PPAs.<sup>574</sup> The documents produced refer to a "domestic content working group" with representatives from the OPA and the Ministry of Energy. No meeting minutes or agendas have been produced, nor any of the other ordinary documents one would expect to be generated from such meetings.

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<sup>571</sup> Letter from Ben Kennedy (GE) to Chuck Edey, January 4, 2011 (*Investor's Schedule of Exhibits at C-0187*)

<sup>572</sup> CWS - Robertson, at para. 19.

<sup>573</sup> Email from Michal Volpe (GE) to Mark Ward, April 29, 2010 (*Investor's Schedule of Exhibits at C-0394*)

<sup>574</sup> These documents are covered by Investor's Document Request No. 5(c), which requested "communications between Government Entities involving discussions and/or negotiations of Domestic Content requirements". Furthermore, no documents have been produced under Investor's Document Request No. 5(f) requesting "Documents and plans describing how the specific projects with FIT Contracts qualified under the domestic content requirements".

## II. MOST FAVORED NATION TREATMENT

514. Canada did not ensure that it provided treatment as favorable as that provided to investments of investors from other NAFTA Parties or Non NAFTA Parties who were in like circumstances to Mesa. As a result, Canada did not meet its obligation to provide Most Favored Nation Treatment to the Investment and to its Investor under Article 1103:
- a) Mesa and its investment were in like circumstances with those seeking to obtain transmission access and Power Purchase Agreements, as were the members of the Korean Consortium, and the Korean Consortium's joint venture partner, Pattern Energy;
  - b) The Korean Consortium was provided better treatment than Mesa in that it was given preferential access to transmission capacity in Ontario's power grid and other governmental assistance;
  - c) The Korean Consortium received better pricing for renewable power sold in PPAs and automatic rights to increase power project size. This favourable treatment was not provided to Mesa; and
  - d) The better treatment provided to Korean Consortium was "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition" of Mesa's investment.<sup>575</sup>

### A. Likeness

515. Samsung C&T and its joint venture partner, Pattern Energy Group, like Mesa, were seeking Power Purchase Agreements from the Ontario government, and were competing for a portion of Ontario's limited transmission capacity.
516. Proponents competing for renewable energy Power Purchase Agreements knew that they were competing against one another for access to the limited total transmission capacity available in the Ontario transmission system. Whether they were attempting to obtain that transmission capacity through the FIT Program or through the *GEIA*, for a PPA to be awarded, there had to be transmission access.
517. Indeed, those involved during 2009-2011 in the Ontario renewable energy market on behalf of Samsung and Pattern have acknowledged that they competed for transmission.

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<sup>575</sup> NAFTA Article 1103.

- a) Colin Edwards, Pattern's Director of Grand Renewable Wind GP Inc. stated in a sworn declaration filed in the Courts of the State of California that: "The environment in Ontario remains intensely competitive for the award of power contracts," and acknowledged that transmission capacity is fixed.<sup>576</sup>
- b) Zohrab Mawani, who acted as the Director of Business Development and Assistant General Manager of Samsung Canada, swore in a declaration that:
- "There is a finite amount of transmission capacity in the province of Ontario and companies that seek PPAs in Ontario are in competition to obtain access to this limited transmission capacity. Samsung Korea competed against these other companies for transmission access in order to sell power under PPAs."<sup>577</sup>
518. More specifically, in addition to competing for a fixed amount of transmission capacity, Mesa and Samsung were competing for the very same connection points to the transmission system in the Bruce Region, specifically connection points B22D and B23D.
519. Under oath, Colin Edwards admits that [REDACTED]  
[REDACTED]  
[REDACTED] In the end, Samsung's Armow project connected to both the B22D and B23D circuits.<sup>579</sup> Mesa's application for the Twenty Two Degree project had listed B23D as its connection point circuit, which put Mesa in direct competition with Samsung's superior treatment to access this limited transmission capacity.<sup>580</sup>
520. Likeness between Mesa and Samsung and their similar efforts to obtain PPAs and transmission capacity is further evidenced by the commonality of the *GEIA* and FIT Contracts. The *GEIA* provides that, "Such PPA [entered into by the OPA] shall be substantially in the form of the FIT Contract used by the OPA at the time such PPA is being entered into..."<sup>581</sup>
521. After the *GEIA* was concluded, the Minister of Energy directed the OPA that the Power Purchase Agreements entered into with the Korean Consortium should be "substantially

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<sup>576</sup> Declaration of Colin Edwards in Support of Motion to Quash, March 12, 2012, at para. 7 (*Investor's Schedule of Exhibits at C-0184*); and "Q: ...there's a limited amount of transmission capacity, right? A: Correct." Transcript of Colin Edwards Deposition In *Re Application of Mesa Power Group, LLC*, page 64 lines 10-12 (August 3, 2012) (*Investor's Schedule of Exhibits at C-0131*); Colin Edwards is a Senior Developer at Pattern Renewable Holdings Canada ULC (*Investor's Schedule of Exhibits at C-0184*)

<sup>577</sup> Declaration of Zohrab Mawani, at para. 10 (*Investor's Schedule of Exhibits at C-0406*)

<sup>578</sup> Transcript of Colin Edwards Deposition In *Re Application of Mesa Power Group, LLC*, pages 185, Lines 6-17 (August 3, 2012) (*Investor's Schedule of Exhibits at C-0224*)

<sup>579</sup> Email from Lee-Jeong Tack (Samsung) to Carolyn Calwell (MOE), cc Jonathan Norman (MOE) and Garry McKeever (MOE), July 26, 2011 (*Investor's Schedule of Exhibits at C-0208*)

<sup>580</sup> Online FIT Application for Twenty Two Degree, June 17, 2011, at p. 3 (*Investor's Schedule of Exhibits at C-0155*)

<sup>581</sup> Green Energy Investment Agreement, January 21, 2010, Article 9.1 (*Investor's Schedule of Exhibits at C-0322*)

similar to those under the OPA's FIT Contract and the FIT Program Rules."<sup>582</sup> The reliance on the FIT Program was contemplated from the beginning, as evidenced by the minutes of the negotiating meetings between the OPA and the Korean Consortium, which state, for example, that "[t]he FIT contract should act as the template for all PPAs applicable to all five phases [of the GEIA]..."<sup>583</sup>

522. Korean Consortium projects were also subject to similar conditions as FIT proponents concerning, among other things, land access, documentation, domestic content, quarterly status reports, and waiver forms. The K2 Wind Project Power Purchase Agreement, under the *GEIA*, states:

"Each power purchase agreement shall be consistent with the *GEIA* and incorporate its relevant provisions and be substantially similar to the FIT Contract with such necessary modifications as are required to reflect the terms of the *GEIA*."<sup>584</sup>

523. As discussed in the negotiations, the terms of the FIT Program's Power Purchase Agreements and its conditions were used as the template. Like a Power Purchase Agreement awarded through the FIT Program, [REDACTED]

524. Other similarities between the *GEIA* and FIT Contracts include:

- a) [REDACTED]

<sup>582</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, April 1, 2010 (*Investor's Schedule of Exhibits at C-0079*)

<sup>583</sup> OPA Negotiations with Korean Consortium Draft Meeting Minutes Meeting #1: June 23, 2010 (*Investor's Schedule of Exhibits at C-0151*)

<sup>584</sup> Green Energy Investment Agreement, January 21, 2010, section 7.3(c) (*Investor's Schedule of Exhibits at C-0322*)

<sup>585</sup> K2 Wind Project Power Purchase Agreement between Ontario Power Authority and K2 Wind Ontario Limited Partnership, August 3, 2011, Section 2.4(g) (*Investor's Schedule of Exhibits at C-0287*)

<sup>586</sup> K2 Wind Project Power Purchase Agreement between Ontario Power Authority and K2 Wind Ontario Limited Partnership, August 3, 2011, Exhibit D (*Investor's Schedule of Exhibits at C-0287*); Ontario Power Authority, Feed-In Tariff Contract (FIT Contract) Version 1.5, June 3, 2011, Exhibit D (*Investor's Schedule of Exhibits at C-0263*); and *Green Energy Investment Agreement*, January 21, 2010, section 7.3(c) (*Investor's Schedule of Exhibits at C-0322*)

- b) [REDACTED]
- c) The Korean Consortium is required to submit to the OPA "connection details and evidence of necessary Access Rights as specified in Section 3.1(d) and (e) of the FIT Rules..."<sup>588</sup>

525. Likeness is also apparent from the fact that the while it was negotiating the *GEIA* with the Ministry of Energy, the Korean Consortium used the FIT Contracts as a basis for its negotiation, demonstrating that not only were Mesa and the Korean Consortium competing for the same transmission capacity, but the Korean Consortium was working to the very contract that Mesa was expecting to be awarded.

526. A July 8, 2009 email from Jonathan Norman, a representative from the Ministry of Energy to Samsung, stated, [REDACTED] Suggesting that it was not content to proceed under the terms of the FIT Program, in an August 7, 2009 negotiation meeting the Korean Consortium said [REDACTED]

527. On September 2, 2009, Hagen Lee, one of Samsung's lead negotiators of the *GEIA* requested a meeting with the MOE to learn about the FIT Program:

"We have been studying the FIT rules, contracts, and exhibits drafts. We would like to understand the process better so that we can make a sound decision regarding project development strategy which will tie in closely with our FA as well. Who would be the best person to give us the latest details and walk us through the process?"<sup>591</sup>

528. Like circumstances between Mesa and the Korean Consortium are further evidenced by the Korean Consortium seeking to obtain *GEIA* renewable energy Power Purchase Agreements for projects that had already submitted FIT applications, increasing the

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<sup>587</sup> K2 Wind Project Power Purchase Agreement between Ontario Power Authority and K2 Wind Ontario Limited Partnership, August 3, 2011, Exhibit F (*Investor's Schedule of Exhibits at C-0287*) ; Ontario Power Authority, Feed-In Tariff Contract (FIT Contract) Version 1.5, June 3, 2011, Exhibit F (*Investor's Schedule of Exhibits at C-0263*)

<sup>588</sup> *Green Energy Investment Agreement*, January 21, 201, Article 9.1 (*Investor's Schedule of Exhibits at C-0322*)

<sup>589</sup> Email from Jonathan Norman, Ministry of Energy, to Gy Yoo and Hagen Lee, July 8, 2009 (*Investor's Schedule of Exhibits at C-0334*)

<sup>590</sup> Draft Minutes/Action Items, KC/MEI Negotiation Team Meeting, August 7, 2009, at p. 2 (*Investor's Schedule of Exhibits at C-0329*)

<sup>591</sup> Email from Hagen Lee to Samira Viswanathan and Pearl Ing, September 2, 2009 (*Investor's Schedule of Exhibits at C-0338*)

Korean Consortium's ability to acquire a larger portion of Ontario's fixed transmission capacity to the detriment of the applicants who remained in the FIT process.

529.

[REDACTED]

530. The Korean Consortium and its partners also sought to purchase wind power projects from Mesa, which further indicates the extent to which they were in competition and in like circumstances. These attempts took place in 2010 and 2011.<sup>593</sup>

#### **B. Canada Provided Better Treatment to the Korean Consortium**

531. The members of the Korean Consortium, and their joint venture partners, were treated in a more favourable manner that was not available to Mesa. Whereas Mesa was left to compete for transmission capacity through the FIT process, the Korean Consortium was able to bypass all requirements and any competition from its renewable energy competitors. Instead of being subject to the same regulatory process and scrutiny as Mesa and other FIT applicants, the Korean Consortium negotiated in secret with the Government of Ontario for guaranteed transmission capacity within Ontario's grid at a guaranteed price, with room for an adder, and it did so on an expedited basis. The *GEIA* gave the Korean Consortium the ability to not only jump the queue, but in the end, undermined Mesa's opportunity for a FIT contract. Without Mesa ever knowing, the Korean Consortium poached transmission capacity for its own projects, by being able to choose its desired connection points, at the expense of Mesa.

532. In June 2008, Samsung and KEPCO approached the Ministry of Energy and proposed a major investment in Ontario's renewable energy sector.<sup>594</sup> This led to the signing of a Memorandum of Understanding ("MOU") between the Korean Consortium and the Government of Ontario on December 12, 2008.<sup>595</sup> The discussions intensified in June

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<sup>592</sup> Email from Frank Davis (Pattern Energy) to Susan Kennedy (OPA), August 2, 2011 (*Investor's Schedule of Exhibits at C-0280*)

<sup>593</sup> Email from Zohrab Mawani (Samsung) to Kathryn Freimanis (Leader Wind), September 2, 2010 (*Investor's Schedule of Exhibits at C-0085*); Email from Zohrab Mawani to Mark Ward, September 2, 2010 (*Investor's Schedule of Exhibits at C-0397*); Email from Zohrab Mawani to Mark Ward, September 3, 2010 (*Investor's Schedule of Exhibits at C-0395*); Email from Zohrab Mawani to Mark Ward, September 23, 2010 (*Investor's Schedule of Exhibits at C-0396*); Email from Zohrab Mawani to Mark Ward, September 15, 2010 (*Investor's Schedule of Exhibits at C-0393*); CWS - Robertson, at para. 30; Declaration of Colin Edwards, March 12, 2012, at para. 21 (*Investor's Schedule of Exhibits at C-0184*)

<sup>594</sup> 2011 Auditor General's Report, "Electricity Sector – Renewable Energy initiatives", at p. 108 (*Investor's Schedule of Exhibits at C-0228*)

<sup>595</sup> This MOU is referenced in the Recitals of the Draft Framework Agreement. Draft Framework Agreement by and Among Her Majesty The Queen In Right of Ontario, Korea Electric Power Corporation and Samsung C&T Corporation, September 25, 2009 (*Investor's Schedule of Exhibits at C-0328*)



- 2009 when Samsung representatives met with Ministry of Energy officials, including Minister Smitherman;<sup>596</sup> a few weeks later the Energy Minister visited Samsung headquarters in South Korea.<sup>597</sup> During this time, the Korean Consortium also engaged in communication with, and received special assistance from, Ministry of Energy officials on such matters as regulatory approvals,<sup>598</sup> planning, and development.<sup>599</sup>
533. Formal negotiations towards an agreement began in late July 2009.<sup>600</sup> In the meetings, the Ministry of Energy discussed with the Korean Consortium details of the soon-to-be launched FIT Program. Indeed, Ministry of Energy officials stated that one of their objectives for the FIT Program was that it "support" any agreement with the Korean Consortium.<sup>601</sup>
534. On September 29, 2009, the ongoing negotiations between the government and the Korean Consortium were publicly announced, and the Cabinet was briefed on the details.<sup>602</sup> The parties signed a Framework Agreement in late October 2009<sup>603</sup>, and on January 21, 2010 the *Green Energy Investment Agreement* ("GEIA") was signed at a public ceremony.<sup>604</sup>
535. The *GEIA* "gave the Consortium special access to the Ontario electricity market through Power Purchase Agreements for energy obtained through renewable energy sources."<sup>605</sup> In the months leading up to the *GEIA*, , the Korean Consortium was able to negotiate the terms of the Agreement, and were able to secure far more favourable terms than was made available to other renewable energy proponents. Among these more favourable terms were access to an additional price adder called the Economic Development Adder, guaranteed priority access to the transmission system, additional force majeure

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<sup>596</sup> Agenda for meeting with Minister of Energy and Infrastructure, June 3, 2009 (*Investor's Schedule of Exhibits at C-0323*)

<sup>597</sup> Letter from Saad Rafi, Ministry of Energy and Infrastructure to Cheong-Hwan Kim, Samsung C&T Corporation, June 18, 2009 (*Investor's Schedule of Exhibits at C-0324*)

<sup>598</sup> Email from Ing, Pearl (MEI) to GY Yoo, July 6, 2009 (*Investor's Schedule of Exhibits at C-0325*)

<sup>599</sup> Email from Jonathan Norman (MEI) to GY Yoo, Hagen Lee, cc Rhonda Wright-Hilbig (MEI), Pearl Ing (MEI), Karen Slawner (MEI), Faruq Remtulla (MEI), July 8, 2009 (*Investor's Schedule of Exhibits at C-0334*) ; Briefing Note, "Transmission and Distribution Considerations for Korean Consortium - Purchase of Existing Projects Proposal", July 2009 (*Investor's Schedule of Exhibits at C-0326*)

<sup>600</sup> Samsung Consortium/MEI Negotiation, "Kick-Off" Meeting, July 28, 2009 (*Investor's Schedule of Exhibits at C-0327*)

<sup>601</sup> Draft Minutes/Action Items, KC/MEI Negotiation Team Meeting, August 7, 2009, at p. 1 (*Investor's Schedule of Exhibits at C-0329*)

<sup>602</sup> 2011 Auditor General's Report, "Electricity Sector – Renewable Energy initiatives", at p. 91 (*Investor's Schedule of Exhibits at C-0228*)

<sup>603</sup> Email from Mohamed Dhanani (Ministry of Energy) to Hagen Lee, October 1, 2009 (*Investor's Schedule of Exhibits at C-0339*) The signing of the Framework Agreement was confirmed for October 29, 2009.

<sup>604</sup> Green Energy Investment Agreement, January 21, 2010 (*Investor's Schedule of Exhibits at C-0322*)

<sup>605</sup> Declaration of Zohrab Mawani, August 15, 2013, at para. 7 (*Investor's Schedule of Exhibits at C-0406*)

- protections, assistance with aboriginal consultation and engagement, and the right to waive the OPA's ability to terminate the contract.
536. By reserving transmission capacity for the Korean Consortium, Mesa was adversely affected; the transmission capacity set-aside precluded Mesa from being awarded a contract.
- i. The Government of Ontario reserved preferential transmission capacity for the Korean Consortium*
537. Under the *GEIA*, the Government of Ontario guaranteed the Korean Consortium priority access to 2,500 MW of Ontario's fixed transmission capacity<sup>606</sup>. This transmission would be used over five phases, with each phase consisting of 400 MW of wind energy and 100 MW of solar energy. Whereas other renewable energy proponents had to compete for available transmission capacity, the Government of Ontario reserved transmission capacity for the Korean Consortium.
538. While the Korean Consortium was guaranteed priority access to 500 MW of transmission capacity in the Bruce region, Mesa was required to compete in an unlevel playing field for the remaining capacity.
539. On September 30, 2009, four months before the *GEIA* was signed, the Minister of Energy directed the OPA to "hold in reserve 240 MW of transmission capacity in Haldimand County and a total of 260 MW of transmission capacity in Essex County and the Municipality of Chatham-Kent" for the Korean Consortium's Phase 1 Projects.<sup>607</sup> This provision was included in the *GEIA*.<sup>608</sup>
540. On September 17, 2010, in addition to the 260 MW and 240 MW already set aside in Haldimand County and Essex County, the Minister of Energy further directed the OPA to hold in reserve "500 MW of transmission capacity to be made available in the Bruce area,"<sup>609</sup> which undermined Mesa's ability to obtain a PPA in the Bruce area.
541. In the FIT Rankings that were published on December 21, 2010, the OPA stated that there was "1200 MW of additional capability" which would be made available on the Bruce to Milton line and would "be allocated during the ECT" process<sup>610</sup>. As directed by

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<sup>606</sup> Green Energy investment Agreement, January 21, 2010, Article 3 (*Investor's Schedule of Exhibits at C-0322*)

<sup>607</sup> Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, September 30, 2009 (*Investor's Schedule of Exhibits at C-0105*)

<sup>608</sup> Green Energy investment Agreement, January 21, 2010, Article 7.3(b) and (c) (*Investor's Schedule of Exhibits at C-0322*)

<sup>609</sup> Letter from Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, September 17, 2010 (*Investor's Schedule of Exhibits at C-0119*)

<sup>610</sup> Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010 (*Investor's Schedule of Exhibits at C-0073*)

the Minister of Energy,<sup>611</sup> 750 MW worth of contracts were awarded in the Bruce Region on July 4, 2011.<sup>612</sup> In the meantime, an additional 500 MW of transmission capacity had already been reserved for the Korean Consortium.

542. On the same day, the OPA released updated rankings which demonstrated that Mesa's TTD and Arran projects were in the top 415 MW of projects for the Bruce Region following contract awards.<sup>613</sup> It is therefore clear, that had it not been for the 500 MW reserved for the Korean Consortium, Mesa would have been awarded a contract through the FIT Program.

543. Following these contract awards, Mesa received an email from a senior representative at Pattern, George Hardie, which acknowledged that the reservation of transmission capacity for the Korean Consortium impaired Mesa's ability to receive a contract on July 4, 2011:

"I am writing to let you know that we were surprised to see that your Arran and 22 Degree sites did not secure FIT contracts – as we were pretty sure you'd get contracts for at least one and probably both of the sites. And, on a personal level, I'm genuinely disappointed for you guys. I can say, however, with 100% certainty that our current POI's did not have any impact on the FIT award outcome – although the Samsung 500 MW transmission allocation obviously didn't help matters."<sup>614</sup> [emphasis added]

544. In his sworn declaration, Zohrab Mawani confirmed that "Samsung Korea's guaranteed access to transmission capacity under the *GEIA* allowed Samsung Korea to be in a better competitive position than those companies without guaranteed transmission access, like Mesa Power Group."<sup>615</sup>

545. The preferential treatment afforded to the members of the Korean Consortium through its guaranteed transmission access also was noted by other renewable energy proponents. In a meeting with the Ministry of Energy in February 2010, representatives from LDK Solar complained that the Korean Consortium's priority access enabled it to "jump the queue" ahead of other proponents to acquire capacity.<sup>616</sup>

546. Indeed, government officials themselves acknowledged the preferential treatment offered by the priority access provision of the *GEIA*. In an internal Q & A sheet from April

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<sup>611</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, June 3, 2011 (*Investor's Schedule of Exhibits at C-0046*)

<sup>612</sup> Ontario Power Authority, "FIT Contract Offers for the Bruce-Milton Capacity Allocation Process", July 4, 2011 (*Investor's Schedule of Exhibits at C-0292*)

<sup>613</sup> Ontario Power Authority, "FIT Car Priority Ranking by Region", July 4, 2011 (*Investor's Schedule of Exhibits at C-0293*)

<sup>614</sup> Email from George Hardie (Pattern Energy) to Cole Robertson (Mesa), July 11, 2011 (*Investor's Schedule of Exhibits at C-0038*)

<sup>615</sup> Declaration of Zohrab Mawani, at para. 10, August 15, 2013 (*Investor's Schedule of Exhibits at C-0406*)

<sup>616</sup> Meeting Notes, LDK Solar and Ministry of Energy and Infrastructure, February 25, 2010 (*Investor's Schedule of Exhibits at C-0215*)

- 2010, the Ministry of Energy entertained such hypothetical questions from FIT proponents as: "How can the [GEIA] be justified particularly since KC not only gets the transmission capacity without competing for it but also receives a higher payment for the power it generates?"<sup>617</sup>
547. Furthermore, in a December 2010 meeting with NextEra, the Deputy Minister of Energy stated that any deal given to an energy proponent similar to that given the Korean Consortium would "require bumping other projects already in the queue for the FIT program to accommodate them", acknowledging that this was the effect of the Agreement with the Korean Consortium.<sup>618</sup>
548. Government officials also were keenly aware that any set-aside of capacity for the Korean Consortium through a Ministerial Direction would be perceived by FIT proponents as preferential treatment. For instance, a May 20<sup>th</sup> presentation prepared by the Ministry of Energy states that an "[a]nnouncement of another set-aside for the Korean Consortium will likely bring up criticism of preferential treatment for KC."<sup>619</sup>
549. Under the *GEIA*, the Korean Consortium was entitled to receive an additional increase to the size of its specific renewable energy projects.
550. In section 3.4 of the *GEIA*, the Korean Consortium would be entitled to an increase in particular projects of either 10% or 20% depending on certain circumstances. All of these increases were capped at a maximum transmission allocation for the members of the Korean Consortium of 2500 MW. This increase was highly unusual excersize of favourable treatment only provided to the members of the Korean Consortium despite the fact that at the time of the signature of the *GEIA*, the Korean Consortium had no actual applications for renewable energy projects pending in Ontario.
551. Section 3.4 states:
- The Korean Consortium may adjust the Targeted Generation Capacity for each Phase of the Project specified in Articles 3.1 and 3.2 within the range of plus or minus ten percent (10%) upon reasonable notice to the Government of Ontario, and subject to Article 16.8. the Parties acting reasonably, may agree to amend the Targeted Generation Capacity for each Phase of the Project within the range of plus or minus twenty percent (20%), in each case based on such factors as technical evaluations, the availability of Transmission System access and design capacity, site location and characteristics, availability of suitable land, availability of necessary equipment,

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<sup>617</sup> Feed-In Tariff Program, Key Messages and Questions & Answers, April 6, 2010 (*Investor's Schedule of Exhibits at C-0110*)

<sup>618</sup> Email from Andrew Mitchell (Ministry of Energy) to Craig MacLennan (Ministry of Energy) and Candace Major (Ministry of Energy), December 22, 2010 (*Investor's Schedule of Exhibits at C-0066*)

<sup>619</sup> Draft Issues Management Plan, Bruce-Milton IPA Announcement, May 20, 2011, at p. 2 (*Investor's Schedule of Exhibits at C-0193*); see also Draft Questions and Answers, Bruce-to-Milton IPA Announcement, May 20, 2011 (*Investor's Schedule of Exhibits at C-0192*)

- permitting and the then current economic circumstances, subject to Targeted Generation Capacity of 2,500 MW overall for the Project.
552. Under Section 3.4, the members of the Korean Consortium were entitled to modify the terms of Power Purchase Agreements. Proponents seeking FIT contracts had no such entitlement.
553. In addition, under Section 3.4, the members of the Korean Consortium were entitled to modify the size of their power projects plus or minus ten percent simply by providing notice to the Government of Ontario. By comparison, proponents who receive power purchase agreements under the FIT Program were not entitled to unilaterally increase the size of their projects.
554. The Witness Statement of Cole Robertson confirms that Mesa would have gladly utilized adjacent lands and increased the size of its wind power projects in Ontario by an additional ten percent if the terms of the power purchase program with Ontario under the FIT had permitted it to do so.<sup>620</sup>
- ii. The Korean Consortium received better contract price for energy*
555. Under the *GEIA*, the Korean Consortium was entitled to receive an additional contract price per kilowatt hour ("kWh"), called the Economic Development Adder.<sup>621</sup>
556. The Economic Development Adder provided that the Korean Consortium was entitled to receive an additional 0.5 cents per kWh for wind generation to a maximum of \$437 million. The Economic Development Adder was ""in consideration of the Korean Consortium's attraction of Manufacturing Plants to the Province of Ontario..."<sup>622</sup>
557. The terms of the *GEIA* also guaranteed that the benefits of the Economic Development Adder would be bestowed exclusively on the Korean Consortium. Article 8.7 of the *GEIA* provided that, the Government of Ontario "shall not provide...to any other renewable energy project or developer the benefit of an economic development adder or similar incentive which is greater than the Economic Development Adder..."<sup>623</sup> The standard FIT contract, for which Mesa was competing, did not include an additional contract price.
558. In the *GEIA* Amending Agreement of July 29, 2011, the Government of Ontario reduced the Economic Development Adder for wind generation to 0.27 cents per kWh, to a

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<sup>620</sup> CWS - Robertson, at para. 66.

<sup>621</sup> Green Energy investment Agreement, January 21, 2010, Article 9.3 (*Investor's Schedule of Exhibits at C-0322*)

<sup>622</sup> Green Energy Investment Agreement, January 21, 2010, Article 8.3 (*Investor's Schedule of Exhibits at C-0322*)

<sup>623</sup> Green Energy Investment Agreement, January 21, 2010, Article 8.7 (*Investor's Schedule of Exhibits at C-0322*)

maximum payout of \$110 million.<sup>624</sup> This reduction in the Economic Development Adder was negotiated in exchange for the Government of Ontario allowing the Korean Consortium to extend its contract deadlines.<sup>625</sup> In contrast, FIT applicants were not granted opportunity to miss deadlines or renegotiate terms.

*iii. The Korean Consortium was able to purchase the projects of unsuccessful FIT Applicants*

559. In addition to reserving capacity for the Korean Consortium, the Government of Ontario also provided it with information on [REDACTED] and methods for interconnecting.<sup>626</sup> As Zohrab Mawani has affirmed, the *GEIA* set out that the Government of Ontario was required to "provide the Korean Consortium with...assistance with the selection of connection points on the transmission grid with sufficient transmission capacity."<sup>627</sup> Such assistance was not provided to other renewable energy proponents, like Mesa.

560. In his deposition, Colin Edwards stated that Pattern, the joint venture partner of the Korean Consortium, had the opportunity to select the best circuits after examining where other FIT Contract holders connected. He also claimed that once Pattern had selected an interconnect point, the Korean Consortium could look for lower ranked projects to purchase:

Q: Did you look at the public information of where your competitors wanted to do interconnection points when selecting your won interconnection points for the GEIA project?

A: We had an awareness of where different parties ranked on the publicly available list when we made our interconnection point selections.

Q: And how would that affect your decision, the ranking?

A: We would -- parties who were ranked higher on the list would be more likely to stay in the queue in hopes of keeping their project and receiving a FIT contract, knowing that there was transmission capacity coming to this area.

Q: And the lower ones would be low-hanging fruit, right?

A: The lower ranked parties would have a lesser chance to get a FIT contract.

Q: And it would be more easily able to buy their assets in order to fulfill your obligations under the GEIA as a joint venture, correct?

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<sup>624</sup> *Green Energy Investment Agreement – Amending Agreement*, By and Among Her Majesty The Queen In Right Of Ontario as represented by the Minister of Energy And Korea Electric Power Corporation And Samsung C&T Corporation, July 29, 2011 (***Investor's Schedule of Exhibits at C-0282***)

<sup>625</sup> Transcript of Colin Edwards Deposition In *Re Application of Mesa Power Group, LLC*, at p. 107 (August 3, 2012) (***Investor's Schedule of Exhibits at C-0404***)

<sup>626</sup> Draft Summary of Framework Agreements, Ledger for Discussion, August 13, 2009, at p. 10 (***Investor's Schedule of Exhibits at C-0331***)

<sup>627</sup> Declaration of Zohrab Mawani, at para. 14, August 15, 2013 (***Investor's Schedule of Exhibits at C-0406***)

- A: Perhaps.<sup>628</sup>
561. The Ministry of Energy also assisted the Korean Consortium in identifying renewable energy projects for purchase. In a July 2009 Briefing Note, the Ministry of Energy identified a list of projects that the Korean Consortium could consider. This briefing note included information about project locations, connection requirements for the projects, as well as the estimated cost to connect the project to the transmission system.<sup>629</sup>
562. Moreover, the Korean Consortium used its guaranteed transmission access to obtain contracts for projects that were unsuccessful in obtaining contracts through the FIT Program.<sup>630</sup> These projects did not receive contracts through the FIT Program because there was insufficient transmission capacity and they were ranked too low to receive contract offers. Because Mesa was not granted priority access to the transmission system, it did not have the opportunity to purchase such [REDACTED]<sup>631</sup>
- a) [REDACTED]  
[REDACTED]  
Armow was originally ranked 24<sup>th</sup> in the Bruce region, well behind Mesa's projects.
- b) [REDACTED]  
[REDACTED] The  
K2 project was originally ranked 27<sup>th</sup> in the Bruce Region,<sup>634</sup> behind Mesa's projects.
- iv. *Samsung delayed the ECT test that was never carried out*
563. Samsung's priority access to transmission capacity meant that Ontario was forced to delay the ECT tests, a stated component of the FIT Program that Mesa relied on in submitting its application. The delay accommodated Samsung's hand-picking its projects' connection points, and the governmental decision to abandon the ECT

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<sup>628</sup> Transcript of Colin Edwards Deposition In *Re Application of Mesa Power Group, LLC*, page 186, 24-187:17 (August 3, 2012) (***Investor's Schedule of Exhibits at C-0244***)

<sup>629</sup> Briefing Note, "Transmission and Distribution Considerations for Korean Consortium - Purchase of Existing Projects Proposal", July 2009 (***Investor's Schedule of Exhibits at C-0326***)

<sup>630</sup> Transcript of Colin Edwards Deposition In *Re Application of Mesa Power Group, LLC*, at page 187 (August 3, 2012) (***Investor's Schedule of Exhibits at C-0244***)

<sup>631</sup> Transcript of Colin Edwards Deposition In *Re Application of Mesa Power Group, LLC*, at page 187, lines 9-10 (August 3, 2012) (***Investor's Schedule of Exhibits at C-0244***)

<sup>632</sup> Armow Wind Project Power Purchase Agreement between Ontario Power Authority and SP Ontario Wind Development LP, August 2, 2011 (***Investor's Schedule of Exhibits at C-0286***)

<sup>633</sup> K2 Wind Project Power Purchase Agreement between Ontario Power Authority and K2 Wind Ontario Limited Partnership, August 3, 2011 (***Investor's Schedule of Exhibits at C-0287***)

<sup>634</sup> Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010 (***Investor's Schedule of Exhibits at C-0073***)

- precluded Mesa from being awarded a FIT Contract, as transmission capacity that it expected to be available was not.
564. The priority transmission access granted to the Korean Consortium resulted in the delay of the ECT and of FIT contract awards in the Bruce Region. This was yet another instance of discrimination against Mesa in favour of Samsung that of which Mesa was not aware.
565. According to the plan set out by the OPA and communicated to Mesa, initial FIT contracts were to be awarded in three stages.<sup>635</sup> The first round of contracts was to be awarded following a TAT for projects applied for during the FIT launch period (between October and November 2010). The second round of contracts was to be awarded following a second TAT for projects applied for during the second round of FIT applications (between December 2009 and June 2010). The third round of contracts was to be awarded following an ECT encompassing all FIT projects that had not been awarded contracts in the first two rounds.
566. The first round of FIT contracts was awarded in April 2010.<sup>636</sup> Mesa's TTD and Arran projects were demonstrably eligible for contracts during this round, but did not receive any. Thus, they awaited the ECT for the next opportunity to receive FIT contracts. The ECT process could not begin until the TAT for second round FIT applicants was completed.<sup>637</sup>
567. Because transmission capacity had been reserved for the Korean Consortium in the Bruce Region<sup>638</sup>, and because, the *GEIA*, access to this capacity was to be "priority"<sup>639</sup>, the OPA could not run the TAT for second-round FIT applicants in the Bruce Region without the Korean Consortium first finalizing the connection points for its Phase 2 projects in the Region. As stated by Ministry of Energy official Cieran Bishop,

KC's commitment on connection points before the release of TAT...assure their priority access is factored into transmission availability – so any contract awards that come out of TAT will take KC's phases to date (1, 2, 3) into account.<sup>640</sup>

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<sup>635</sup> Ontario Power Authority presentation, "The Economic Connection Test Process", March 23, 2010, at p. 16 (*Investor's Schedule of Exhibits at C-0034*)

<sup>636</sup> Ontario Power Authority, News Release, "Ontario Announces 184 Large-Scale Renewable Energy Projects", April 8, 2010 (*Investor's Schedule of Exhibits at C-0080*)

<sup>637</sup> Ontario Power Authority, Presentation, "The Economic Connection Test Process", March 23, 2010, at p. 16 (*Investor's Schedule of Exhibits at C-0034*)

<sup>638</sup> Letter from Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, September 17, 2010 (*Investor's Schedule of Exhibits at C-0119*)

<sup>639</sup> Green Energy Investment Agreement, January 21, 2010, section 7.3(c) (*Investor's Schedule of Exhibits at C-0322*)

<sup>640</sup> Email from Ceiran Bishop (Ministry of Energy) to Samira Viswanathan (Ministry of Energy) and Faruq Remtulla (Ministry of Energy), November 18, 2010 (*Investor's Schedule of Exhibits at C-0159*)



568. Because the running of a TAT for second-round FIT applicants was a necessary step to an ECT, the Korean Consortium's finalization of connection points was a precondition for running an ECT as well, and for the awarding of FIT contracts resulting from it.
569. The OPA originally communicated to Mesa that it would conduct the ECT in August 2010,<sup>641</sup> however an ECT never occurred. Ontario's Auditor General determined the ECT was delayed because the Korean Consortium had not finalized the connection points for its Phase 2 projects in the Bruce Region.<sup>642</sup>
570. The Korean Consortium provided provisional connection points for its Phase 2 projects to the OPA on September 30, 2010.<sup>643</sup> This allowed the TAT for second-round FIT projects in the Bruce Region to begin. However, the process could not be completed, and the ECT started, until the Korean Consortium provided final confirmation of its connection points.<sup>644</sup> This occurred on January 7, 2011.<sup>645</sup>
571. Even after the Korean Consortium submitted connection points for its projects in January 2011, both government officials and the Korean Consortium did not regard them as final. The Korean Consortium stated that [REDACTED]
572. This latitude given to the Korean Consortium in regard to its connection points was a source of consternation for some OPA officials. A few days after the Korean Consortium's submission, [REDACTED]
- However, authorities do not appear to have followed [REDACTED]

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<sup>641</sup> Ontario Power Authority, The Economic Connection Test, Approach, Metrics and Tests, May 19, 2010. Page 39 (*Investor's Schedule of Exhibits at C-0088*); OPA, Program Update – FIT Program Timeline, June 1, 2010 (*Investor's Schedule of Exhibits at C-0235*)

<sup>642</sup> 2011 Auditor General's Report, Chapter 3 – Electricity Sector – Renewable Energy Initiatives, at p. 116 (*Investor's Schedule of Exhibits at C-0228*)

<sup>643</sup> Ministry of Energy Presentation, October 1, 2010, at p. 2 (*Investor's Schedule of Exhibits at C-0093*)

<sup>644</sup> Email from Kristin Jenkins (OPA) to Andrew Mitchell (Ministry of Energy) et al., November 22, 2010 (*Investor's Schedule of Exhibits at C-0071*)

<sup>645</sup> Email from Barbara Constantinescu (IESO) to Bob Chow (OPA), John Sabiston (Hydro One), January 11, 2011 (*Investor's Schedule of Exhibits at C-0070*)

<sup>646</sup> Email from Barbara Constantinescu (IESO) to Bob Chow (OPA), John Sabiston (Hydro One), January 11, 2011 (*Investor's Schedule of Exhibits at C-0070*)

<sup>647</sup> Email from Barbara Constantinescu (IESO) to Bob Chow (OPA), John Sabiston (Hydro One), January 11, 2011 (*Investor's Schedule of Exhibits at C-0070*)

- [REDACTED]
- [REDACTED]
573. Because the Korean Consortium failed to finalize its connection points in a timely manner, the TAT for second-round FIT applicants was not completed until the end of February 2011 – more than two months later than anticipated<sup>649</sup> – and the ECT for all FIT applicants was never conducted.
574. That the Korean Consortium was the cause of the ECT delay. The resulting delay in the awarding of FIT contracts is further attested to by Zohrab Mawani. Mr. Mawani states that "PPAs under the FIT Program could only be awarded after manufacturing, transmission access, and selection of site provisions in the *GEIA* were adequately addressed", and observes that the failure of the Korean Consortium to resolve these matters "effectively resulted in a freeze on other projects that were to receive contracts under the FIT program."<sup>650</sup>
575. As observed by the Ontario Auditor General, the "commitment to the [Korean] consortium affected the FIT contract allocation process and the timely connection of renewable energy projects from other generators".<sup>651</sup> While the OPA continually demonstrated a willingness to accommodate the Korean Consortium's preferred timeline for project acquisition and planning, Mesa was subject to continued schedule changes and delays outside of their control and contrary to what they were led to expect.
576. If the ECT process had not been delayed by the Korean Consortium and the process of awarding FIT contracts had run as originally scheduled, Mesa would have received a FIT contract so long as NextEra was not permitted to change connection points for its projects in the West of London region.
577. The 500 MW of capacity in the Bruce Region reserved for the Korean Consortium also prevented Mesa from receiving a FIT contract. If this capacity had been reserved for FIT projects and allocated as part of the Bruce-to-Milton process, then Mesa would have been awarded a FIT contract for both its TTD and Arran projects. Even after the June 3<sup>rd</sup> rule change that allowed NextEra to move its Bluewater and Jericho projects to the Bruce region, TTD and Arran were both within the top 1250 MW in the Bruce region and

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<sup>648</sup> Email from Lee-Jeong Tack (Samsung) to Carolyn Calwell (MOE), cc Jonathan Norman (MOE) and Garry McKeever (MOE), July 26, 2011 (*Investor's Schedule of Exhibits at C-0208*)

<sup>649</sup> Email from Kristin Jenkins (OPA) to Andrew Mitchell (Ministry of Energy) et al., November 22, 2010 (*Investor's Schedule of Exhibits at C-0071*)

<sup>650</sup> Declaration of Zohrab Mawani, August 15, 2013, at para. 32 (*Investor's Schedule of Exhibits at C-0406*)

<sup>651</sup> 2011 Auditor General's Report, Chapter 3 – Electricity Sector – Renewable Energy Initiatives, at p. 116 (*Investor's Schedule of Exhibits at C-0228*)

thus would have been able to be connect through the transmission capacity enabled in the region by the Bruce-to-Milton line.<sup>652</sup>

v. *Working Group meetings provided Samsung with preferred access and opportunities*

578. After the *GEIA* was signed, the Korean Consortium was able to meet with Government of Ontario representatives in Working Group meetings. These meetings were tasked with resolving issues relating to implementing the *GEIA*, and providing technical assistance that was not provided to FIT applicants. Participating government entities included the Ministry of Energy, the OPA, the Independent Electricity System Operator, Hydro One, the Ministry of the Environment, the Ministry of Natural Resources, the Ministry of Aboriginal Affairs, the Ministry of Economic Development and Trade, as well as the Ontario Realty Corporation.<sup>653</sup> Access to these meetings was reserved exclusively for signatories of the *GEIA*, and government representatives. A participant in the meetings pointed out that the Korean Consortium's competitors, "who were also seeking PPAs from the OPA, were not allowed access to Working Group"<sup>654</sup> meetings.
579. The Working Group meetings were set out under section 5.2 of the *GEIA*. The responsibilities of the Working Group include:
- a) recommending suitable sites for Phases 2 through 5;
  - b) "assisting and facilitating the Korean Consortium in securing rights of way for connection to the Transmission System, through participation in a joint committee to work on land owner issues";
  - c) "negotiating Aboriginal consultation/engagement protocols..."<sup>655</sup>
580. As Zohrab Mawani testifies, these meetings "addressed the business needs of the *GEIA* partners, such as:
- a) facilitating transmission access for renewable energy projects to be owned by Samsung Canada and its partners;
  - b) available transmission capacity for renewable energy projects to be owned by Samsung Canada and its partners;

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<sup>652</sup> Ontario Power Authority, "FIT CAR Priority Ranking by Region", July 4, 2011 (*Investor's Schedule of Exhibits at C-0293*)

<sup>653</sup> Declaration of Zohrab Mawani, August 15, 2013, at para. 30 (*Investor's Schedule of Exhibits at C-0406*)

<sup>654</sup> Declaration of Zohrab Mawani, August 15, 2013, at para. 33 (*Investor's Schedule of Exhibits at C-0406*)

<sup>655</sup> Green Energy investment Agreement, January 21, 2010, Article 7.3(b) and (c) (*Investor's Schedule of Exhibits at C-0322*)

- c) which government officials could assist in obtaining required regulatory and environmental approvals for renewable energy projects to be owned by Samsung Canada and its partners;
- d) which government officials could assist with aboriginal consultations for renewable energy projects to be owned by Samsung Canada and its partners;
- e) the Ontario government's approach to energy policies and programs;
- f) suitable wind and solar project locations for the Korean Consortium; and
- g) government-owned lands that could be made available to the Korean Consortium".<sup>656</sup>

vi. *The Korean Consortium was able to increase its contract size*

581. Under the *GEIA*, the Korean Consortium was permitted to adjust the generation capacity for each Phase of the project by 10%. Section 3.4 of the *GEIA* states:

The Korean Consortium may adjust the Targeted Generation Capacity for each Phase of the Project specified in Articles and within the range of plus or minus ten percent (10%) upon reasonable notice to the Government of Ontario....<sup>657</sup>

582. Unlike the Korean Consortium, other renewable energy proponents like Mesa Power were not able to increase their contract size. The Government of Ontario thereby provided better treatment to the Korean Consortium by granting it greater flexibility in making changes to its projects.

vii. *Additional Government Assistance*

583. The Government of Ontario provided the Korean Consortium with special assistance in securing regulatory approvals that that was not provided to standard FIT applicants.

584. Under the *GEIA*, the Government of Ontario undertook to "facilitate the Korean Consortium in obtaining necessary regulatory approvals and permits through the Renewable Energy Facilitation Office of the Ministry of Energy and Infrastructure."<sup>658</sup> While the services of the Renewable Energy Facilitation Office were made available to all FIT Proponents, the speed with which the Ministry of Energy "fast-track[ed]"<sup>659</sup> the Korean Consortium's regulatory approvals through the Working Group is significant and constitutes more favourable treatment.

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<sup>656</sup> Declaration of Zohrab Mawani, August 15, 2013, at para. 30 (*Investor's Schedule of Exhibits at C-0406*)

<sup>657</sup> Green Energy Investment Agreement, January 21, 2010, Section 3.4 (*Investor's Schedule of Exhibits at C-0322*)

<sup>658</sup> Green Energy investment Agreement, January 21, 2010, Article 7.3(a) (*Investor's Schedule of Exhibits at C-0322*)

<sup>659</sup> Draft Summary of Framework Agreements, Ledger for Discussion, August 13, 2009, at p. 8 (*Investor's Schedule of Exhibits at C-0331*)

585. At the direction of the Ministry of Energy, the government also established an "Implementation Task Force", whose aim was to "ensure that the myriad of technical and logistical issues can be resolved in a cooperative and efficient manner."<sup>660</sup> The task force was made up of representatives from the Ministry of Energy and the OPA, who had requisite technical, legal, regulatory, and other relevant expertise. The Implementation Task Force was made exclusively available to the Korean Consortium.

586. Through its Working Group, the Ontario government also committed to "[securing] appropriate land sites" for 2000 MW of wind power, for Phases 2 through 5<sup>661</sup>.

587. The Government of Ontario further provided the Korean Consortium with special assistance in its communications with Aboriginal groups and with the Ministry of Aboriginal Affairs.<sup>662</sup> [REDACTED]

[REDACTED] This agreement was accelerated by the Government of Ontario. While the Ministry of Energy would generally facilitate meetings with aboriginal groups for all FIT proponents, the Korean Consortium had to assist it the Working Group, which listed "negotiating aboriginal consultation/engagement protocols" among its functions.<sup>664</sup> The Ministry of Energy also [REDACTED]

588. There were further instances of special assistance given to the Korean Consortium by the Government of Ontario, which included:

a) [REDACTED]

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<sup>660</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, April 1, 2010 (*Investor's Schedule of Exhibits at C-0079*)

<sup>661</sup> Green Energy investment Agreement, January 21, 2010, Article 6.4 (*Investor's Schedule of Exhibits at C-0322*)

<sup>662</sup> Green Energy investment Agreement, January 21, 2010, Articles 5.2(i) and Article 10 (*Investor's Schedule of Exhibits at C-0322*)

<sup>663</sup> Email from Colin Edwards (Pattern Energy) to Michael Killeavy (OPA), May 8, 2012 (*Investor's Schedule of Exhibits at C-0288*)

<sup>664</sup> *Green Energy Investment Agreement*, January 21, 2010, Article 5.2(i) (*Investor's Schedule of Exhibits at C-0322*)

<sup>665</sup> Letter from Rick Jennings (Ministry of Energy) to Chief Allen MacNaughton (Six Nations), October 6, 2009 (*Investor's Schedule of Exhibits at C-0011*)

[REDACTED] The Korean Consortium also received [REDACTED]  
[REDACTED]

- b) The Ministry of Economic Development and Trade (MEDT) made available a team of officials to work with the Korean Consortium following the signing of the *GEIA*. It provided the Korean Consortium "information on costs, labour availability, transportation infrastructure, utilities, government programs, and other key determinants of production", and used its contacts in the Ontario economic development community to facilitate the Korean Consortium's projects.<sup>668</sup>
- c) Even prior to the *GEIA*, MEDT officials assisted the Korean Consortium in a wide array of areas, including providing information regarding manufacturing contacts,<sup>669</sup> sites for prospective manufacturing facilities,<sup>670</sup> and a letter for Samsung officials to present at the customs border.<sup>671</sup>

### C. Canada provided better treatment regarding exceptions to others

589. Canada has entered into investment treaties with Non-NAFTA Party countries, with which it has much less close economic integration than with the NAFTA Parties, for example the Czech Republic, without any exception or limitation to obligations with respect to government procurement.<sup>672</sup> Canada is thereby offering better treatment to investors and investments from Non-NAFTA parties who are in like circumstances to Mesa by not permitting exceptions to these Non-NAFTA Party investors and investments, and thereby not prohibiting local content performance requirements, violations of national treatment or MFN treatment when there is government procurement. This is a higher standard of investment protection, and NAFTA Article 1103 requires that Canada provide treatment equal to this better treatment be provided to Mesa and its investments.

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<sup>666</sup> Letter from Rick Jennings (Ministry of Energy) to Chief Allen MacNaughton (Six Nations), October 6, 2009 (*Investor's Schedule of Exhibits at C-0011*)

<sup>667</sup> Email from Hagen Lee (Samsung) to Henry Chow (Ontario Realty Corporation) et al., March 16, 2010 (*Investor's Schedule of Exhibits at C-0012*)

<sup>668</sup> Email from John Langley (Ministry of Economic Development and Trade) to Hagen Lee (Samsung), February 5, 2010 (*Investor's Schedule of Exhibits at C-0014*)

<sup>669</sup> Email from John Langley (Ministry of Economic Development and Trade) to Hagen Lee (Samsung), July 3, 2009 (*Investor's Schedule of Exhibits at C-0015*)

<sup>670</sup> Email from John Langley (Ministry of Economic Development and Trade) to Hagen Lee (Samsung) and Lisa Qi (Ministry of Economic Development and Trade), July 9, 2009 (*Investor's Schedule of Exhibits at C-0019*)

<sup>671</sup> Email from Pearl Ing to Hagen Lee, June 5, 2009 (*Investor's Schedule of Exhibits at C-0016*)

<sup>672</sup> *Agreement Between Canada and the Czech Republic for the Promotion And Protection of Investments* (2009) ("Canada-Czech BIT") (*Investor's Schedule of Legal Authorities at CL-134*)

*i. Negotiation of the Green Energy Investment Agreement*

590. The relationship between the Government of Ontario and the Korean Consortium, and its joint venture partners, constitutes better treatment than that provided to Mesa. Such a collaborative relationship was never an opportunity for those vying for transmission capacity through the transparent and public terms of the FIT Program, as opposed to through the secret "back door" process under the *GEIA*.
591. Negotiations between the Korean Consortium and the Government of Ontario took place before the *GEIA* was signed, and meetings took place on:
- a) August 7, 2009<sup>673</sup>
  - b) August 10, 2009<sup>674</sup>
  - c) August 12, 2009<sup>675</sup>
  - d) October 29, 2009<sup>676</sup>
592. Through those negotiations, the Korean Consortium had special access to senior Ontario government representatives. For example, in June 2009, then Minister of Energy George Smitherman met with the Korean Consortium in South Korea.<sup>677</sup> In addition to its preferential access to senior government representatives, the Korean Consortium was also given special and exclusive government assistance:
- a) The Korean Consortium was able to expedite meetings through senior government officials like the Ministry of the Environment's Director, Doris Dumais<sup>678</sup>.
  - b) The Korean Consortium was given the opportunity to discuss Renewable Energy Approval Timelines with the Ministry of Energy.<sup>679</sup>
  - c) The Ministry of Energy made a recommendation that Samsung retain a preferred local Canadian law firm, McCarthy Tetrault, as its legal counsel.<sup>680</sup>

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<sup>673</sup> Draft Minutes/Action Items, KC/MEI Negotiation Team Meeting, August 7, 2009 (*Investor's Schedule of Exhibits at C-0329*)

<sup>674</sup> Draft Minutes/Action Items, KC/MEI Negotiation Team Meeting, August 10, 2009 (*Investor's Schedule of Exhibits at C-0330*)

<sup>675</sup> Draft Minutes/Action Items, KC/MEI Negotiation Team Meeting, August 12, 2009 (*Investor's Schedule of Exhibits at C-0332*)

<sup>676</sup> The Korean Consortium signed the Framework Agreement with the Government of Ontario on October 29, 2009 (*Investor's Schedule of Exhibits at C-0339*)

<sup>677</sup> Letter from Minister Smitherman to Cheol-Woo Lee, July 13, 2009 (*Investor's Schedule of Exhibits at C-0335*)

<sup>678</sup> Email from Pearl Ing, Ministry of Energy, to Hagen Lee, Samsung, September 1, 2009 (*Investor's Schedule of Exhibits at C-0337*)

<sup>679</sup> Email from Hagen Lee to Pearl Ing (Ministry of Energy), October 27, 2009 (*Investor's Schedule of Exhibits at C-0333*)

- d) The Ministry of Energy arranged for the OPA to brief Samsung on the FIT Program before the Program was officially launched. This meeting allowed Samsung to "run different scenarios" by the OPA, and have questions regarding the operation of the FIT Program answered.<sup>681</sup>
593. The Korean Consortium was given the opportunity to negotiate the terms of its Power Purchase Agreements with the OPA. The Minister of Energy directed the OPA to negotiate agreements with the Korean Consortium in his April 1, 2010 Direction.<sup>682</sup> After this, the OPA had a series of meetings with representatives of the Korean Consortium to negotiate the terms of its Power Purchase Agreements.<sup>683</sup> And then had subsequent meetings to implement the *GEIA*<sup>684</sup>. In addition to the ongoing Power Purchase Agreement Negotiations, meetings took place on:
- a) June 23, 2010
  - b) July 7, 2010
  - c) July 20, 2010
  - d) August 18, 2010
  - e) September 22, 2010
  - f) December 8, 2010
  - g) February 1, 2011
  - h) March 4, 2011
  - i) May 6, 2011

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<sup>680</sup> Email from Richard Ogden, Ministry of Energy, to Hagen Lee, August 14, 2009 (*Investor's Schedule of Exhibits at C-0336*)

<sup>681</sup> Email from Hagen Lee to Pearl Ing (Ministry of Energy), September 3, 2009 (*Investor's Schedule of Exhibits at C-0338*)

<sup>682</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, April 1, 2010 (*Investor's Schedule of Exhibits at C-0079*)

<sup>683</sup> OPA Negotiations with Korean Consortium Draft Meeting Minutes Meeting #1: June 23, 2010 (*Investor's Schedule of Exhibits at C-0151*); OPA Negotiations with Korean Consortium, Draft Meeting Minutes Meeting #2: July 7, 2010 (*Investor's Schedule of Exhibits at C-0115*); July 20, 2010 (*Investor's Schedule of Exhibits at C-0150*); August 18, 2010 (*Investor's Schedule of Exhibits at C-0274*); OPA Negotiations with Korean Consortium: Draft Meeting Minutes, Meeting #5: September 22, 2010, Undated (*Investor's Schedule of Exhibits at C-0254*); OPA Negotiations with Korean Consortium, Draft Meeting Minutes, Meeting #6: December 8, 2010, Undated (*Investor's Schedule of Exhibits at C-0271*); OPA Negotiations with Korean Consortium, Draft Meeting Minutes, Meeting #7: February 1, 2011, Undated (*Investor's Schedule of Exhibits at C-0272*); OPA Negotiations with Korean Consortium, Draft Meeting Minutes, Meeting #8: March 4, 2011, Undated (*Investor's Schedule of Exhibits at C-0273*); OPA Negotiations with Korean Consortium, Agenda, Meeting #9: May 6, 2011 (*Investor's Schedule of Exhibits at C-0128*)

<sup>684</sup> Transcript of Colin Edwards Deposition In *Re Application of Mesa Power Group, LLC*, pages 84-85 (August 3, 2012) (*Investor's Schedule of Exhibits at C-0407*)



594. The Korean Consortium's preferential access to senior government representatives as evidenced by the negotiation of the *GEIA* was not made available to other renewable energy proponents, like Mesa.

595. Similarly, the ability to negotiate Power Purchase Agreements was not made available to other renewable energy proponents like Mesa; FIT proponents were only offered a Standard FIT Contract, with no opportunity of negotiation.

*ii. The Korean Consortium was granted a force majeure provision*

596. As a result of their negotiations, the Korean Consortium was secured more advantageous terms in its Power Purchase Agreements than those awarded through the FIT Program. One example of this is evidenced by the Korean Consortium's ability to secure additional *force majeure* protections. The *force majeure* provisions in the Korean Consortium's PPAs [REDACTED]

[REDACTED] The *force majeure* provisions in the standard FIT contract did not include such a clause.

*iii. The Korean Consortium was granted beneficial Notice to Proceed provisions*

597. Another benefit given to the Korean Consortium is found in its [REDACTED] Whereas standard FIT applicants [REDACTED] [REDACTED] [REDACTED] which was not an opportunity in the standard FIT Contract.<sup>688</sup>

*iv. The Korean Consortium benefited through its Aboriginal Participation Level*

598. The Korean Consortium was also able to receive additional benefits in its Power Purchase Agreements with regard to the calculation of the Aboriginal Participation Level. The Aboriginal Participation Level was an additional contract payment that a proponent would be eligible for if its project contained a certain level of Aboriginal

<sup>685</sup> South Kent Wind Project Power Purchase Agreement between Ontario Power Authority and South Kent Wind LP, August 1, 2011, Section 10.3 (*Investor's Schedule of Exhibits at C-0281*)

<sup>686</sup> South Kent Wind Project Power Purchase Agreement between Ontario Power Authority and South Kent Wind LP, August 1, 2011, Section 2.4(d) (*Investor's Schedule of Exhibits at C-0281*)

<sup>687</sup> South Kent Wind Project Power Purchase Agreement between Ontario Power Authority and South Kent Wind LP, August 1, 2011, Section 2.4(d) (*Investor's Schedule of Exhibits at C-0281*)

<sup>688</sup> South Kent Wind Project Power Purchase Agreement between Ontario Power Authority and South Kent Wind LP, August 1, 2011, Section 2.4(g) (*Investor's Schedule of Exhibits at C-0281*)

participation. Under its Power Purchase Agreements, the Korean Consortium was able to have the economic interest of any person contribute to both the Aboriginal Price Adder as well as the Community Participation Price Adder. The standard FIT Contract did not permit the economic interest of one person to count toward both the Aboriginal and Community Participation Adders. To the contrary, it said:

The Economic Interest of any Person contributing towards the Community Participation Level shall be excluded from the calculation of the Aboriginal Participation Level.<sup>689</sup> [emphasis added]

599. This limitation was not included in the Korean Consortium's Power Purchase Agreements. The Korean Consortium was therefore able to receive two additional price adders, where under similar circumstances, other FIT proponents could only receive one.

**D. Establishment, Expansion, Conduct and Operation**

600. NAFTA Article 1103 requires that the treatment must be with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. Article 1103 would by definition have to address the establishment, expansion, conduct or operation of economic activity proposed by the investor.

**E. Conclusion**

601. Canada has breached its obligations under NAFTA Article 1103 by providing better treatment to foreign investments and foreign investors who are in like circumstances to the Investor and its Investments.
602. The Investor and its Investments are in like circumstances to the general class of applicants who competed for transmission capacity opportunity in the Ontario grid and for renewable energy PPA opportunity in Ontario.
603. Canada has breached its most-favoured nation treatment obligation in Article 1103 by not treating the Investor and its Investment as favorably as investors and investments of investors from other states.
604. Rather than providing treatment equal to the most favourable treatment available, Canada actually provided the worst treatment possible to the Investor and its Investment. By comparison, Canada provided more favorable treatment to investments from other NAFTA Parties and non-NAFTA Parties.

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<sup>689</sup> FIT Contract Version 1.5, at section 15.7 (*Investor's Schedule of Exhibits at C-0340*)

605. In these circumstances, the burden shifts to Canada to show that the difference in treatment, both its nature and magnitude, can be fully justified by legitimate regulatory considerations.
606. The Investor, and its Investment, have injury, loss, harm and damage as a result of Canada's failure to meet its Most Favoured Nation obligation.
607. Treatment with respect to applications for transmission capacity to generate renewable energy was in relation the establishment, expansion, management, conduct or operation of investments.
608. Thus Canada has therefore breached its NAFTA Article 1103 obligation to provide most favoured nation treatment to Mesa and its investments.

### III. NATIONAL TREATMENT

609. Canada did not ensure that it provided treatment as favorable as that provided to Investments of Investors from Canada who were in like circumstances to Mesa. As a result, Canada did not meet its obligation to provide National Treatment to the Investment and to its Investor under Article 1102:

- a) Mesa and its investments were in like circumstances with Pattern Renewable Holdings, Canada and Boulevard Associates Canada;
- b) Pattern Renewable Holdings Canada and Boulevard Associates Canada were provided better treatment than Mesa, including by being given preferential access to transmission capacity in Ontario's power grid, preferential treatment in the operation of the FIT Program and the opportunity to obtain Power Purchase Agreements; and
- c) The better treatment was "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition" of Mesa's investment.<sup>690</sup>

#### A. Pattern Renewable Holdings Canada, is in like circumstances with the Investor.

610. Pattern Renewable Holdings Canada ULC (Pattern Canada) is a wholly-owned Canadian subsidiary of California-based Pattern Energy Group.

611. Like Mesa, Pattern Canada sought Power Purchase Agreements from the Ontario government and were in competition for access to Ontario's limited transmission capacity. In all aspects of their business activities, the companies competed for the same opportunity of obtaining renewable energy PPAs in the same regulatory system overseen by the OPA.

612. Pattern Canada, a Toronto-based company, has acknowledged to being in direct competition with Mesa for Power Purchase Agreements from the OPA.<sup>691</sup> As a competitor within the FIT Program, investments owned by Pattern Canada applied for at least seven FIT contracts in the West of London Region, and one project in the Niagara

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<sup>690</sup> NAFTA, Article 1102.

<sup>691</sup> Declaration of Colin Edwards, March 12, 2012 (*Investor's Schedule of Exhibits at C-0184*); Colin Edwards states "I am a Senior Developer for Pattern Renewable Holdings Canada ULC, based in Toronto, Ontario" and Q:..."Pattern is a competitor of Mesa for – for Power Purchase Agreements, right, in Ontario. A: Correct."; Transcript of Colin Edwards Deposition In *Re Application of Mesa Power Group, LLC*, page 63 Lines 19-23 (August 3, 2012) (*Investor's Schedule of Exhibits at C-0199*)

Region.<sup>692</sup> FIT applications from Pattern Canada's investment were being ranked on the same criteria and involved in the same regulatory process as Mesa's projects. When Pattern joined with Samsung, it was still seeking Power Purchase Agreements from the OPA, as confirmed by Colin Edwards:

"Pattern's affiliate, Pattern Ontario Wind Development Inc., did enter into a joint venture agreement with Samsung Renewable Energy Inc., under which the two companies agreed to jointly develop several wind farms in the Ontario region with an aggregate nameplate capacity (*i.e.*, the output if producing at full capacity) of up to 1200 MW."<sup>693</sup>

613. Pattern Canada clearly competed with Mesa for access to the limited amount of electricity transmission capacity which was set aside for Samsung and its partners. Colin Edwards explained,

"Samsung has priority access for an additional 800 MW of wind projects under the Green Energy Investment Agreement, and will be selecting one or more partners over the coming year. Pattern will be in direct competition with Mesa and similar companies for possible new joint venture opportunities with Samsung and/or others."<sup>694</sup>

*i. Pattern Canada received Better Treatment than Mesa*

614. Under the *GEIA*, members of the Korean Consortium were able to partner with investors or other strategic partners for the development of wind and solar projects.<sup>695</sup> Samsung partnered with Pattern Canada, and it thereby received the benefits of the *GEIA*.

615. In the spring of 2010, Samsung entered into a joint venture with Pattern, "under which the two companies agreed to jointly develop several wind farms...with an aggregate nameplate capacity (*i.e.* output at full capacity) of up to 1200MW."<sup>696</sup> Pattern explained its role in the *GEIA* and relationship with Samsung in an email [REDACTED]

<sup>692</sup> Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010 (*Investor's Schedule of Exhibits at C-0073*); BWP is a Pattern subsidiary. Pattern received a contract for one of its West of London projects (Merlin) in 2010, which was later merged into a *GEIA* project.

<sup>693</sup> Declaration of Colin Edwards, paragraph 9, March 12, 2012 (*Investor's Schedule of Exhibits at C-0184*)

<sup>694</sup> Declaration of Colin Edwards, paragraph 20, March 12, 2012 (*Investor's Schedule of Exhibits at C-0184*)

<sup>695</sup> The Green Energy Investment Agreement, January 21, 2010 at Section 4.1 says: "The Korean Consortium may undertake each Phase of the Project through one or more entities (hereinafter individually referred to as a "Project Company") and may invite one or more investors, including ... strategic partners, to the Project or a particular Phase of the Project..." *Green Energy Investment Agreement*, Article 4.1, January 21, 2010 (*Investor's Schedule of Exhibits at C-0322*)

<sup>696</sup> Declaration of Colin Edwards, March 12, 2012, paragraph 9 (*Investor's Schedule of Exhibits at C-0184*)

- [REDACTED]
616. Prior to entering into the joint venture agreement with Samsung, Pattern Canada submitted ten FIT applications for wind projects and was awarded a FIT contract on April 8, 2010.<sup>698</sup>
617. In 2010, Pattern elected to enter into an agreement with Samsung in lieu of pursuing Power Purchase Agreements under the FIT Program. The FIT contract offered to Pattern Canada was for Merlin, a wind project totalling 10 MW. When Pattern entered the joint venture with Samsung, it was guaranteed 1,500 MW. This is a clear example of the preferential treatment Pattern received through the *GEIA*. Colin Edwards acknowledged that the *GEIA* provided better treatment to those seeking a PPA than the treatment otherwise provided under the FIT. Mr. Edwards has stated:
- "The fact that we assigned a joint venture agreement and elected to participate with Samsung is evidence that we thought this [the *GEIA*] was a better opportunity."<sup>699</sup>
618. Through its partnership with Samsung, Pattern Canada had privileged access to senior government officials who facilitated the implementation of Pattern's projects. The key benefits that Pattern Canada received through its partnership with Samsung were the guarantee that Pattern Canada would receive PPAs and the ability to reserve transmission capacity at specific points. In contrast, Mesa was required to invest significant time and capital to develop projects and strategically select connection points without such guarantees in what was ultimately a charade.
- ii. *Pattern Canada obtained PPA terms that were more favorable than the standard FIT contract available to proponents like Mesa Power*
619. Pattern Canada attended various PPA Negotiation Meetings with the Korean Consortium and the OPA. Representatives from Pattern Canada attended at least [REDACTED] such meetings. The purpose of the meetings was for the Korean Consortium to negotiate the terms of its agreement with Ontario, and secure far more favourable terms than was made available to other renewable energy proponents.<sup>700</sup>

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<sup>697</sup> Email from Colin Edwards (Pattern Energy) to David Lindsay (Ministry of Energy), July 5, 2011 (*Investor's Schedule of Exhibits at C-0276*)

<sup>698</sup> Transcript of Colin Edwards Deposition In *Re Application of Mesa Power Group, LLC*, page 48, Lines 4-18 (August 3, 2012) (*Investor's Schedule of Exhibits at C-0201*)

<sup>699</sup> Colin Edwards Deposition transcript, Page 193 line 25- Page 194 line 3 (*Investor's Schedule of Exhibits at C-0229*)

<sup>700</sup> OPA Negotiations with Korean Consortium, Draft Meeting Minutes Meeting #1: June 23, 2010 (*Investor's Schedule of Exhibits at C-0151*) ; OPA Negotiations with Korean Consortium, Draft Meeting Minutes Meeting #2: July 7, 2010 (*Investor's Schedule of Exhibits at C-0115*) ; July 20, 2010 (*Investor's Schedule of Exhibits at C-0150*) ; August 18, 2010 (*Investor's Schedule of Exhibits at C-0274*) ; OPA Negotiations with Korean

620. Zohrab Mawani, former Director of Business Development at Samsung Canada, has sworn a declaration that "Colin Edwards, the chief representative of Pattern Energy in Canada, told me that he was very happy to be able to attend the PPA negotiation meetings while other competitors for PPAs were not."<sup>701</sup>
621. Pattern Canada utilized the negotiation meetings to secure advantageous contract terms. The terms included a price "adder", enhanced force majeure protections, and more flexibility about the notice to proceed, which were then included in Pattern's projects at Armow,<sup>702</sup> Kingsbridge II (K2),<sup>703</sup> Grand Renewable Energy Park<sup>704</sup> and South Kent.<sup>705</sup>
622. In the result, Pattern Canada was able to cancel the FIT contract that it received for its Merlin project, and was able to include the project as part of its South Kent wind project.<sup>706</sup> This allowed Pattern Canada to obtain a Power Purchase Agreement for that project with all the preferential terms available under the *GEIA*.<sup>707</sup> In addition to Merlin, five of the other projects that Pattern Canada submitted to the FIT Program, that were not offered contracts, also became part of its South Kent project.<sup>708</sup>
- iii. Pattern received privileged information and assistance through meetings with senior Ontario Government Representatives*
623. Through the Working Group meetings, Pattern Canada was given inside information by the government that enabled Pattern and Samsung to "identify attractive wind projects

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Consortium, Draft Meeting Minutes, Meeting #5: September 22, 2010, Undated (*Investor's Schedule of Exhibits at C-0254*) ; OPA Negotiations with Korean Consortium, Draft Meeting Minutes, Meeting #6: December 8, 2010, Undated (*Investor's Schedule of Exhibits at C-0271*) ; OPA Negotiations with Korean Consortium, Draft Meeting Minutes, Meeting #7: February 1, 2011, Undated (*Investor's Schedule of Exhibits at C-0272*) ; OPA Negotiations with Korean Consortium, Draft Meeting Minutes, Meeting #8: March 4, 2011, Undated (*Investor's Schedule of Exhibits at C-0273*) ; OPA Negotiations with Korean Consortium, Agenda, Meeting #9: May 6, 2011 (*Investor's Schedule of Exhibits at C-0128*)

<sup>701</sup> Declaration of Zohrab Mawani, August 15, 2013 at paragraph 37 (*Investor's Schedule of Exhibits at C-0406*)

<sup>702</sup> Armow Wind Project Power Purchase Agreement between Ontario Power Authority and SP Ontario Wind Development LP, August 2, 2011 (*Investor's Schedule of Exhibits at C-0286*)

<sup>703</sup> K2 Wind Project Power Purchase Agreement between Ontario Power Authority and K2 Wind Ontario Limited Partnership, August 3, 2011 (*Investor's Schedule of Exhibits at C-0287*)

<sup>704</sup> Haldimand Wind Project Power Purchase Agreement between Ontario Power Authority and Grand Renewable Wind LP, August 2, 2011 (*Investor's Schedule of Exhibits at C-0285*)

<sup>705</sup> South Kent Wind Project Power Purchase Agreement between Ontario Power Authority and South Kent Wind LP, August 2, 2011 (*Investor's Schedule of Exhibits at C-0284*)

<sup>706</sup> Email from Frank Davis (Pattern Energy) to Susan Kennedy (OPA), July 26, 2011 (*Investor's Schedule of Exhibits at C-0278*)

<sup>707</sup> Colin Edwards discussed the decision to move the Merlin contract into *GEIA* instead of FIT; see Transcript of Colin Edwards Deposition In *Re Application of Mesa Power Group, LLC*, pages 137-138 (August 3, 2012) (*Investor's Schedule of Exhibits at C-0222*)

<sup>708</sup> Transcript of Colin Edwards Deposition In *Re Application of Mesa Power Group, LLC*, page 48, line 21, - page 49, line 21 (August 3, 2012) (*Investor's Schedule of Exhibits at C-0216*)

that were already under development in the Bruce Region of Ontario."<sup>709</sup> Together with Samsung, Pattern, and Pattern Canada identified and purchased projects in the Bruce Region where the Mesa projects were located. Unlike Mesa, however, Pattern and Pattern Canada were able to purchase and develop FIT projects in the Bruce Region with a guarantee that transmission would be reserved at specific connection points for its projects.

624. In addition to OPA negotiation meetings, Pattern Canada also attended meetings of the *GEIA* Working Group, even though it was not a member of the Working Group. The Working Group was defined in the *GEIA*:

"The Parties will establish a working group (the "Working Group"), comprised of eight (8) members, with equal membership from the Korean Consortium and the Government of Ontario, which will meet regularly throughout the term of this Agreement. Each of the Korean Consortium and the Government of Ontario shall name a Co-chair of the Working Group. The Working Group may be informed by such persons with such expertise as are required by any Party from time to time, including persons affiliated with the Parties' agencies or affiliates" [emphasis added]<sup>710</sup>

625. Documents of the Pattern Energy Group reflect that, at a minimum, Pattern Canada representatives attended Working Group Meetings in June 2010<sup>711</sup>, October 2010<sup>712</sup>, and July 2011<sup>713</sup>. Zohrab Mawani has confirmed that Pattern "was permitted to attend some meetings with the OPA".<sup>714</sup>
626. Mesa received less favorable treatment than Pattern Energy Group and Pattern Canada as Mesa was not guaranteed Power Purchase Agreements, was not invited to regular meetings with government representatives, was not provided government assistance in selecting and developing wind projects, and was not given the opportunity to negotiate contract terms that were superior to the standard FIT contract.

**B. Boulevard Associates Canada, Inc. is in like circumstances with the Investor.**

627. Boulevard Associates Canada, a Canadian subsidiary of NextEra, also sought FIT contracts from the OPA in the same regions as Mesa, Bruce and the neighbouring West of London Region.<sup>715</sup> Colin Edwards has acknowledged that NextEra, and therefore

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<sup>709</sup> Declaration of Zohrab Mawani, August 15, 2013 at paragraph 31 (*Investor's Schedule of Exhibits at C-0406*)

<sup>710</sup> Green Energy Investment Agreement, January 21, 2010, Section 5.2 (*Investor's Schedule of Exhibits at C-0322*)

<sup>711</sup> Email from Pearl Ing (Ministry of Energy and Infrastructure) to Colin Edwards (Pattern Energy), June 16, 2011 (*Investor's Schedule of Exhibits at C-0275*)

<sup>712</sup> Email from Colin Edwards (Pattern Energy) to Travis Lusney (OPA), October 11, 2010 (*Investor's Schedule of Exhibits at C-0153*)

<sup>713</sup> Email from Shawn Cronkwright (OPA) to Woong Han (Samsung), July 25, 2011 (*Investor's Schedule of Exhibits at C-0277*)

<sup>714</sup> Declaration of Zohrab Mawani, August 15, 2013 at paragraph 34 (*Investor's Schedule of Exhibits at C-0406*)

<sup>715</sup> BWP is a Pattern subsidiary. Pattern received a contract for one of the West of London projects (Merlin) in 2010, which was later merged into a *GEIA* project. Ontario Power Authority, Priority ranking for First Round FIT



Boulevard, were direct competitors to Mesa.<sup>716</sup> The competition was so direct between NextEra/Boulevard and Mesa that Boulevard specifically inquired of the OPA about transmission capacity availability at points of interconnect that Mesa had applied for: B22D and B23D.<sup>717</sup>

If a party wishes to interconnect to the Seaforth TS 115kV bus, is it fair to assume that the capability is 480 MW which is the sum of the circuit capacities of lines B22D and B23D? If not, what is the available capacity?

*i. Canada Provided Preferential Treatment to Boulevard Associates Canada, Inc.*

628. The Ontario Power Authority granted discriminatory and unfair preferences to Boulevard Associates Canada, a direct competitor with Mesa Power.
629. On June 3, 2011 a Ministerial Direction was issued to the OPA by the Ministry of Energy. The Direction required the OPA to implement a new Rule in the FIT Program permitting projects to change their connection points between the West of London and the Bruce transmission regions within a five-day period from June 6-10, 2011.
630. Boulevard had advance notice of the Rules change. It was aware of an upcoming change to the FIT Rules by May 13, 2011, 22 days prior to the June 3, 2011 announcement about the West of London and Bruce Regions. By May 31, 2011, three days prior to the announcement, NextEra had knowledge that there would be a window for proponents to change connection points.<sup>718</sup> Prior to the Rules change, NextEra met with various representatives regarding changes to connection points for its projects.
631. On December 21, 2010 the OPA announced that 1200 MW of contracts would be offered in the Bruce Region. After that announcement, various meetings between NextEra, Boulevard's parent company, and the Ontario Power Authority led to the discussion of interconnection point changes.
632. After the release of the initial rankings, the OPA met with NextEra as early as January 2011 to discuss Boulevard's projects and their placement regions.

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Contracts, December 21, 2010 (*Investor's Schedule of Exhibits at C-0073*); NextEra also received contracts for two wind projects, Summerhaven and Conestogo, which are located in the Niagara transmission region. Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010, at pp. 7 and 9 (*Investor's Schedule of Exhibits at C-0073*)

<sup>716</sup> In addition to Mesa, Edwards listed NextEra as a larger competitor. Transcript of Colin Edwards Deposition In Re Application of Mesa Power Group, LLC, page 65 lines 6-13 (August 3, 2012) (*Investor's Schedule of Exhibits at C-0410*)

<sup>717</sup> Email from Nicole Geneau (NextEra Energy Resources) to Shawn Cronkwright (OPA), June 9, 2011 (*Investor's Schedule of Exhibits at C-0148*); Specifically, NextEra asked: "If a party wishes to connect to Seaforth TS 115kV is it fair to assume that the capability is 480MW which is the sum of the circuit capacities of lines B22D and B23D?" Email from Nicole Geneau (NextEra Energy) to the OPA, June 8, 2011 (*Investor's Schedule of Exhibits at C-0300*)

<sup>718</sup> Email from Patricia Lightburn to Jim MacDougall, May 31, 2011 (*Investor's Schedule of Exhibits at C-0299*)

- a) On January 21, 2011 representatives of Boulevard met with Bob Chow, Director, Transmission Integration and Tracy Garner, Planner with the OPA to discuss the possibility of Boulevard's Bluewater project being placed in a less favourable region.<sup>719</sup> As a result, the Bluewater project was moved by the OPA to the closest transmission area to the project location.
  - b) Bluewater and Jericho were two of NextEra's projects discussed at the meeting.<sup>720</sup> Both projects ultimately changed connection points in June 2011 during the change window of June 6-10, 2011.<sup>721</sup>
633. Hydro One and IESO met with Boulevard representatives to discuss connections to the 500kV transmission line as early as July 2010. The inside technical information given to Boulevard during these meetings related directly to the connection point changes that NextEra filed with the OPA in June 2011.
- a) NextEra sought a meeting with Hydro One and IESO as early as July 2010 on the proposed interconnection of the 500 kV system.<sup>722</sup>
  - b) A communication on April 1, 2011 reveals that a discussion between NextEra and the IESO took place regarding the 500 kV "interconnection solutions" for NextEra's projects that were in the Economic Connection Test queue. NextEra also requested another follow-up meeting at the IESO office to discuss options for the 500 kV line.<sup>723</sup>
  - c) This resulted in a meeting on April 8, 2011 between NextEra, Hydro One and IESO regarding "pre FIT consultations."<sup>724</sup>
634. Various meetings continued to take place that provided assistance to NextEra prior to the connection change window.
- a) One meeting on either May 19, 2011 or June 2, 2011, was scheduled on April 5, 2011 between Gowlings law firm, NextEra, HydroOne, Power Advisory, and IESO.<sup>725</sup>

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<sup>719</sup> Email from Mary Ellen Richardson (Canadian District Energy Association) to Bob Chow (OPA), January 14, 2011 (***Investor's Schedule of Exhibits at C-0294***); Handwritten Notes, January 21, 2011 (***Investor's Schedule of Exhibits at C-0295***); Email from Tracy Garner (OPA) to Irwin Ng (OPA), January 25, 2011 (***Investor's Schedule of Exhibits at C-0297***)

<sup>720</sup> Email from Tracy Garner (OPA) to Irwin Ng (OPA), January 25, 2011 (***Investor's Schedule of Exhibits at C-0297***)

<sup>721</sup> E-mail from Jim MacDougall (OPA) to Nicole Geneau (NextEra Energy), May 31, 2011 (Section 1782 Evidence) (***Investor's Schedule of Exhibits at C-0068***)

<sup>722</sup> Email from Bobby Adjemian (NextEra) to Ioan Agavriiloai (IESO), July 2, 2010 (***Investor's Schedule of Exhibits at C-0149***)

<sup>723</sup> Email from Bobby Adjemian (NextEra Energy) to Mike Falvo (IESO), April 1, 2011 (***Investor's Schedule of Exhibits at C-0125***)

<sup>724</sup> Email from Bobby Adjemian (NextEra Energy) to Mike Falvo (IESO), April 1, 2011 (***Investor's Schedule of Exhibits at C-0125***)

<sup>725</sup> Email from Bonnie Hiltz (OPA) to Jennifer Tuck (NextEra), Viviana von Bertoldi (OPA) et al., April 5, 2011 (***Investor's Schedule of Exhibits at C-0127***)

- b) Another meeting was held at Starbucks for a "quick chat" on May 26, 2011, between Nicole Geneau, Project Manager at NextEra Energy Resources and Jim MacDougall, Manager of FIT Program, Electricity Resources.<sup>726</sup>
635. The OPA provided special assistance to NextEra on the connection change window leading up to the Rules change that was announced on June 3, 2011, that enabled contracts in the West of London Region to move into the Bruce Region.
- a) On May 13, 2011, 22 days in advance of the window announcement, Jennifer Tuck, Director, Regulatory Affairs and Government Relations with NextEra, contacted JoAnne Butler, Vice President of the OPA, to discuss the Economic Connection Test process and connection point changes.<sup>727</sup>
- b) The OPA was in close communication with NextEra. On May 13, 2011, NextEra was aware of the opportunity for applicants to change connection points well in advance of the OPA's announcement, and well in advance of its direct competitor, Mesa.
- c) On May 31, 2011, 3 days in advance of the Rules change announcement, Jim MacDougall, Manager of FIT Electricity Resources, was contacted by Nicole Geneau, Project Manager of NextEra, and Mr. Jim MacDougall gave her inside advice on connection options for NextEra.<sup>728</sup>
- d) Nicole Geneau had asked:
- Knowing that the "window" is opening, is this one of the changes you'd prefer us to make when we're updating the application? If, so we'll remove the FIT application from the list of asset.<sup>729</sup>
- e) Jim MacDougall responded:
- It is best to request assignments asap, in advance of any connection change window.<sup>730</sup>
636. NextEra therefore had at least 3 days advance notice of the connection change opportunity.
637. Through this advance notice, NextEra's Canadian projects were able to strategically plan to maximize the opportunity for NextEra's projects to receive contracts. In contrast,

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<sup>726</sup> Email from Nicole Geneau to Devin Petteplace, May 19, 2011 (*Investor's Schedule of Exhibits at C-0221*) ; Email from Nicole Geneau to Jim MacDougall, May 26, 2011 (*Investor's Schedule of Exhibits at C-0212*) ; Email from Jim MacDougall (OPA) to Nicole Geneau (NextEra Energy), May 26, 2011 (*Investor's Schedule of Exhibits at C-0270*)

<sup>727</sup> Email from JoAnne Butler (OPA) to Jennifer Tuck (NextEra Energy), May 13, 2011 (*Investor's Schedule of Exhibits at C-0123*)

<sup>728</sup> Most of NextEra's projects under Boulevard Associates and NextEra decided to create individual companies for each of the projects. NextEra sought advice on whether or not they should request assignment before the connection change window.

<sup>729</sup> Email from Jim MacDougall to Nicole Geneau, May 31, 2011 (*Investor's Schedule of Exhibits at C-0220*)

<sup>730</sup> Email from Jim MacDougall to Nicole Geneau, May 31, 2011 (*Investor's Schedule of Exhibits at C-0220*)

Mesa was completely surprised by the June 3 Rules changes, and had limited time to plan to improve its opportunity to receive a contract.

**C. NextEra Energy Resources, LLC is in like circumstances with the Investor.**

*i. NextEra's privileged access to information as to the capacity availability at L7S*

638. On November 22, 2010, the Ministry of Energy was asked: "Can a FIT applicant subject to the ECT do anything to jump the queue...?" In response to this, the Ministry of Energy replied: "Projects subject to the ECT must undergo this process: there are no shortcuts".<sup>731</sup> At this time, the Ministry of Energy and the OPA were already in discussions with Nextera which would eventually allow NextEra to circumvent the established FIT Program, and take a secret shortcut to contracts.
639. NextEra's Goshen project was the top-ranked project in the Bruce region. It had a nameplate capacity of 102 MW and, prior to the connection point change window, had nominated its connection point as L7S.<sup>732</sup>
640. Before the Rules change, on June 3, 2011, the OPA released to FIT proponents an updated Transmission Availability Table, setting out available transmission capacity at all connection points in the Bruce and West of London Regions. According to the Table, the circuit at which Goshen was to connect, L7S, had only 30 MW of capacity available, which was insufficient to accommodate NextEra's Goshen project.<sup>733</sup>
641. If a project identified a connection point that did not have sufficient capacity to accommodate it, then the project would not receive a FIT contract, notwithstanding its ranking. Thus, based on the transmission availability information from the OPA, Goshen would have been reasonably expected to change its connection point from L7S during the change window.
642. However, Goshen did not change its connection point. Moreover, Goshen was awarded a FIT contract on July 4 based on its connection point of L7S.<sup>734</sup> The only possible explanation for this is that, contrary to the information publicly provided by the OPA to Mesa and other project competitors, the OPA had told NextEra that, in fact, there was more transmission capacity available at L7S. Indeed, there must have been at least 102

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<sup>731</sup> Ministry of Energy, Draft Transmission-Related Questions and Answers, November 22, 2010 (*Investor's Schedule of Exhibits at C-0092*)

<sup>732</sup> Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010, at pp. 7 and 9, at p. 1 (*Investor's Schedule of Exhibits at C-0073*)

<sup>733</sup> Ontario Power Authority, FIT Program, Transmission Availability Table, June 3, 2011, at p. 1 (*Investor's Schedule of Exhibits at C-0166*)

<sup>734</sup> Ontario Power Authority, "FIT Contract Offers for the Bruce-Milton Capacity Allocation Process", July 4, 2011 (*Investor's Schedule of Exhibits at C-0292*)

- MW of available capacity since the connection point was able to accommodate the generation capacity of the Goshen project.<sup>735</sup>
643. The lack of transparency and preferential access to information on available capacity at L7S caused damage to Mesa's TTD project.
644. Northland's Grand Bend project was ranked 3<sup>rd</sup> in the priority rankings in the Bruce Region. It had originally identified its connection point as L7S.<sup>736</sup> Based on the TAT tables released on June 3, Grand Bend determined that L7S would not have sufficient capacity to accommodate its project, and decided to change its connection point to B23D.<sup>737</sup> This, in turn, forced TTD to change its connection point from B23D to B22D, and to incur the cost for the change.
- ii. NextEra had a close relationship with the Ontario Power Authority.*
645. In communications between NextEra and the OPA, a special relationship had been formed between NextEra and Bob Chow, OPA Director of Transmission Integration by at least June 17, 2010,<sup>738</sup>
- a) On January 14, 2011, NextEra arranged a meeting with the OPA through Bob Chow to discuss "some areas of concern that they have identified during their analysis of options for revising the interconnection points of their prospective FIT projects in Ontario."<sup>739</sup> Seven days later, on January 21, 2011, the meeting took place.<sup>740</sup>
646. NextEra formed a special relationship with JoAnne Butler, OPA Vice President, Electricity Resources by at least May 13, 2011.<sup>741</sup>
- a) On May 13, 2011, Jennifer Tuck, Director, Regulatory Affairs and Government Relations with NextEra contacted JoAnne Butler of the OPA to discuss the ECT

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<sup>735</sup> In the list of FIT contract Offers for the Bruce - Milton allocation process, Goshen's connection point is listed as "L7S". Ontario Power Authority, "FIT Contract Offers for the Bruce-Milton Capacity Allocation Process", July 4, 2011 (*Investor's Schedule of Exhibits at C-0292*)

<sup>736</sup> Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010, at p. 1 (*Investor's Schedule of Exhibits at C-0073*)

<sup>737</sup> Ontario Power Authority, "FIT Contract Offers for the Bruce-Milton Capacity Allocation Process", July 4, 2011 (*Investor's Schedule of Exhibits at C-0292*)

<sup>738</sup> Email from Bobby Adjemian (NextEra) to Bob Chow (OPA), June 18, 2010 (*Investor's Schedule of Exhibits at C-0152*)

<sup>739</sup> Email from Mary Ellen Richardson (Canadian District Energy Association) to Bob Chow (OPA), January 14, 2011 (*Investor's Schedule of Exhibits at C-0294*)

<sup>740</sup> Email from Mary Ellen Richardson (Canadian District Energy Association) to Bob Chow (OPA), January 14, 2011 (*Investor's Schedule of Exhibits at C-0294*); Handwritten Notes, January 21, 2011 (*Investor's Schedule of Exhibits at C-0295*); Email from Tracy Garner (OPA) to Irwin Ng (OPA), January 25, 2011 (*Investor's Schedule of Exhibits at C-0297*)

<sup>741</sup> Email from JoAnne Butler (OPA) to Jennifer Tuck (NextEra Energy), May 13, 2011 (*Investor's Schedule of Exhibits at C-0123*)

- process and connection point changes, specifically whether or not proponents would be given the opportunity to change their connection points.<sup>742</sup> Six days later, on May 19, 2011, the meeting was set up.<sup>743</sup>
647. NextEra formed a relationship with Jim MacDougall, OPA Manager FIT Electricity Resources by at least November 26, 2009.<sup>744</sup> In an Email dated May 31, 2011, Nicole Geneau thanked Jim MacDougall for meeting with her the previous week and discussed her advance knowledge of the connection Rules change.<sup>745</sup> Jim MacDougall's response of the same date, after consulting with his OPA colleague, advised her that it is best for NextEra "to request assignment asap, in advance of any connection change window".<sup>746</sup>
648. Despite the OPA's formalized correspondence procedure set up on June 6, 2011, NextEra continued to receive assistance.
649. On June 6, 2011, the OPA directed its staff to formalize correspondence with proponents. Proponents were purportedly not allowed to contact individuals at the OPA, and instead were directed to send any inquiries to fit@powerauthority.on.ca.<sup>747</sup> Although the OPA staff was ostensibly not permitted to provide information directly to proponents, the OPA continued to communicate directly with NextEra:
- a) On June 9, 2011, Nicole Geneau contacted Jim MacDougall directly to follow up on NextEra's projects and he responded to her on the same day.<sup>748</sup>
  - b) On June 10, 2011, Shawn Cronkwright continued to communicate directly with NextEra about the "unlocking" of applications.<sup>749</sup>
  - c) On July 12, 2011, Allen Wiley of NextEra thanked the OPA for its assistance during the FIT contract process. Allen Wiley stated that he was "impressed" with the OPA's helpfulness, as he was "privy to a number of the discussions and Email traffic that have gone back and forth between your staff and NextEra..."

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<sup>742</sup> Email from JoAnne Butler (OPA) to Jennifer Tuck (NextEra Energy), May 13, 2011 (*Investor's Schedule of Exhibits at C-0123*)

<sup>743</sup> Email from Nicole Geneau (NextEra Energy) to Devin Petteplace (Ministry of Agriculture and Food), May 19, 2011 (Section 1782 Evidence) (*Investor's Schedule of Exhibits at C-0122*)

<sup>744</sup> Email from Nancy Cowan (NextEra Energy) to Jim MacDougall (OPA), November 26, 2009 (*Investor's Schedule of Exhibits at C-0113*)

<sup>745</sup> Email from Nicole Geneau (NextEra Energy) to Jim MacDougall (OPA), May 31, 2011 (*Investor's Schedule of Exhibits at C-0302*)

<sup>746</sup> Email from Nicole Geneau (NextEra Energy) to Jim MacDougall (OPA), May 31, 2011 (*Investor's Schedule of Exhibits at C-0302*)

<sup>747</sup> Email from Tracy Garner (OPA) to Bob Chow (OPA), June 6, 2011 (*Investor's Schedule of Exhibits at C-0298*)

<sup>748</sup> Email from Nicole Geneau (NextEra Energy) to Jim MacDougall (OPA), June 9, 2011 (*Investor's Schedule of Exhibits at C-0301*)

<sup>749</sup> Email from Shawn Cronkwright (OPA) to Nicole Geneau (NextEra), June 10, 2011 (*Investor's Schedule of Exhibits at C-0303*)

d) Allen Wiley wrote:

Your staff has been very helpful in working through the logistics in getting all of the paper work in order for the six contracts that have been afforded to NextEra.<sup>750</sup>

e) JoAnne Butler of the OPA commented on this email to other OPA representatives by saying "Good job to your teams!"<sup>751</sup>

650. While the OPA continued to directly communicate with NextEra, it did not accord the same treatment to Mesa. On May 20, 2011, Mesa wrote to the OPA inquiring about the FIT Ranking Process.<sup>752</sup> The OPA did not respond to Mesa until after the connection Rules change.<sup>753</sup>

iii. *Ontario granted special privileges to NextEra by allowing NextEra's projects to connect to the 500 kV transmission line.*

651. Originally, NextEra had wanted an arrangement with Ontario similar to that which was afforded to the Korean Consortium; it asked for guaranteed priority access to the transmission system, and for a working group to facilitate execution.<sup>754</sup> When it was not successful, NextEra switched its plan to building transmission lines, and asked to have a certain percentage of the transmission line build out in Ontario.<sup>755</sup> Nextera called the proposal "NetZero".

652. The strategy behind the proposal was "the packaging of transmission, generation and economic development opportunities."<sup>756</sup> The "NetZero" proposal [REDACTED]

653. The concept [REDACTED] paralleled NextEra's later approach in the West of London Region, where Nextera connected to the Bruce to Longwood Line – a 500 kv line that did not have any renewable energy projects connected. The goal of the proposal was to [REDACTED]

<sup>750</sup> Email from Allen Wiley (NextEra) to Colin Andersen (OPA) and JoAnne Butler (OPA), July 12, 2011 (*Investor's Schedule of Exhibits at C-0304*)

<sup>751</sup> Email from Allen Wiley (NextEra) to Colin Andersen (OPA) and JoAnne Butler (OPA), July 12, 2011 (*Investor's Schedule of Exhibits at C-0304*)

<sup>752</sup> Letter from Mark Ward (Mesa), Chuck Edey (Leader Resources) and Michael Bernstein (Capstone Infrastructure) to Shawn Cronkwright (OPA), May 20, 2011 (*Investor's Schedule of Exhibits at C-0098*)

<sup>753</sup> Letter from Shawn Cronkwright, Ontario Power Authority (OPA) to Mark Ward, Mesa Power Group LLC; Charles Edey, Leader Resources Services Corp., Michael Bernstein, Capstone Infrastructure Corp., June 17, 2011 (*Investor's Schedule of Exhibits at C-0195*)

<sup>754</sup> Email from Bob Lopinski (Counsel Public Affairs) to Craig MacLennan (Ministry of Energy) et al., April 1, 2010 (*Investor's Schedule of Exhibits at C-0136*); Email from Christopher Quirke to Petra Fisher, April 30, 2010 (*Investor's Schedule of Exhibits at C-0191*)

<sup>755</sup> Email from Christopher Quirke to Petra Fisher, April 30, 2010 (*Investor's Schedule of Exhibits at C-0191*)

<sup>756</sup> Email from Phil Dewan to Rick Jennings, July 19, 2010, (*Investor's Schedule of Exhibits at C-0213*)

- [REDACTED]
- [REDACTED]
654. The Ministry of Energy dedicated specific staff to handling NextEra. Rick Jennings, Assistant Deputy Minister of Energy, was designated to "lead a broader table to discuss the packaging of transmission, generation and economic development opportunities".<sup>758</sup> In its attempt to bundle together transmission projects with generation projects, NextEra had unprecedented access to Ministry officials.
655. In an internal Ministry of Energy note on the proposal, Ministry staff noted that for it to proceed, "Ontario would need to make significant changes to the market rules that govern the dispatching and settlement operations managed by the IESO".<sup>759</sup>
656. Through these discussions on transmission build out NextEra was given an advantage in the FIT process. For example, only Nextera was made aware that it would be able to connect to the 500 kv line that was previously a prohibitive connection. Using this information, NextEra connected into the Bruce to Longwood 500 kv line for its Jericho, Goshen, and Bluewater projects<sup>760</sup>.
657. In a May 25, 2011 draft Bruce to Milton Contract Allocation announcement, the Ministry of Energy wrote that "projects with connection points that trigger upgrades...will be eligible to receive a contract offer where capacity is available."<sup>761</sup> Given that [REDACTED] [REDACTED] in the West of London Region, both the Ministry of Energy and NextEra knew full well that such an "upgrade" had already been triggered through NextEra's negotiations with the government.
658. Before the June 3, 2011 Rules change that allowed Nextera to connect directly to the 500 kv Bruce to Longwood line, this line functioned as the Bruce Special Protection System (SPS), which was intended to be reserved as a "blackstart" reserve line in the event that that the Bruce Nuclear facility ever needed to restart.<sup>763</sup>
659. Moreover, given that the 500 kv Bruce to Longwood line was not an available "connection resource", connecting to it was beyond the FIT Rules (Section 5.4(b)).

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<sup>757</sup> Email from Phil Dewan to Rick Jennings, July 19, 2010, (*Investor's Schedule of Exhibits at C-0213*)

<sup>758</sup> Email from Phil Dewan to Rick Jennings, July 19, 2010, (*Investor's Schedule of Exhibits at C-0213*)

<sup>759</sup> Ministry of Energy, Meeting Note, August 19, 2010 (*Investor's Schedule of Exhibits at C-0002*)

<sup>760</sup> [REDACTED] at p. 11 (*Investor's Schedule of Exhibits at C-0207*)

<sup>761</sup> Email from Jennifer Wismer (Ministry of Energy) to Michael Maddock (Ministry of the Environment), May 25, 2011 (*Investor's Schedule of Exhibits at C-0069*)

<sup>762</sup> [REDACTED] at p. 11 (*Investor's Schedule of Exhibits at C-0207*)

<sup>763</sup> CWS - Robertson, at para. 40.



Section 5.4.1(c)(i) and (ii) of the FIT Rules only provided for "available connection resources" and "connection resources...existing, committed, or [under ministerial direction]...". Since the Bruce to Longwood line was a reserve line, its capacity was not an available connection resource.

660. Indeed, when Mesa asked if it was possible for a wind power project to connect to the Bruce to Longwood 500 kv line, it was told it could not.<sup>764</sup>

661. However, the OPA changed the FIT Standard Definitions to allow Nextera to connect to the Bruce to Longwood 500 kv line. The original draft of the definition said:

**Prohibitive Connection Schedule** means the schedule, established by the OPA and amended from time to time in the OPA's sole discretion, that defines transformer stations that are prohibitive connection points<sup>765</sup>

The definition was then changed to say:

**Prohibited Connection Schedule** means the "Prohibited Connection Schedule", document published by the OPA on the Website identifying transformer stations which cannot accept additional generation, as updated or amended from time to time [emphasis added]<sup>766</sup>

662. By changing the definition from "prohibitive connection points" to stations which "cannot accept additional generation", the OPA enabled Nextera to connect directly to the 500 kv Bruce to Longwood line, which had been previously designated as a Special Protection System.

663. Moreover, the OPA tried to hide the fact that these additions were made. In previous versions of the FIT Standard definitions, there was no mention of a "Prohibitive Connection Schedule". Every time that the OPA released revised versions of the FIT Rules or Standard Definitions, the new versions were published on the OPA's website, and along with the updated version the OPA published a "redline" version which compared the previous version with the new version so that all changes were easily identifiable. While every other change to the FIT Rules and FIT Standard Definitions was documented in comparisons on the OPA website, the FIT Standard Definition Comparison of Version 1.3.2 to 1.4, did not include this change of definition in its redline, even though it was the only change to the Rules.<sup>767</sup>

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<sup>764</sup> CWS - Robertson, at para. 41.

<sup>765</sup> Draft FIT Standard Definitions, September 30, 2010, at p. 16, emphasis added (*Investor's Schedule of Exhibits at C-0227*)

<sup>766</sup> Draft FIT Standard Definitions, July 2, 2010, at p. 16 (*Investor's Schedule of Exhibits at C-0227*)

<sup>767</sup> Standard practice indicates that when a change to the FIT Standard Definitions was made, the OPA would produce a redlined version of the Standard Definitions, clearly indicating what changes were made. An example of this is the FIT Standard Definitions Comparison (Version 1.0 to 1.2), November 19, 2009 (*Investor's Schedule of Exhibits at C-0412*); In the version where the "Prohibited Connection Schedule" was added, however, no such changes were highlighted. See FIT Standard Definitions Comparison (Version 1.4 to 1.3.2), December 8, 2010 (*Investor's Schedule of Exhibits at C-0411*)

664. Ordinarily, the OPA also published a chart which showed changes to the FIT Rules, and explained the reasoning for the change. In this case, it did not.
665. Connecting to the Bruce to Longwood line was a drastic change from the original intention of the FIT Program. JoAnne Butler's comment, in advance of the June 3, 2011 Rules change was that she hoped there would be "no surprises and complications like someone wanting to connect to the 500 kv lines...".<sup>768</sup> That such a senior official at the OPA would view connecting to the 500 kv line as a "surprise", is telling to say the least.
666. NextEra's projects were the first projects to connect directly to the Bruce-Longwood "reserve" 500 kV transmission line. To make this connection, NextEra had to construct a lengthy additional transmission line.<sup>769</sup>
667. On June 3, 2011, the same day that the connection point Rules change was announced,<sup>770</sup> one of NextEra's subsidiaries, Upper Canada Transmission, applied for an Ontario Transmission License. The transmission license was granted on November 23, 2011 and gave NextEra one of the 13 transmission licenses in Ontario.<sup>771</sup>
668. Extensive planning, research and cost is required for a lengthy transmission line with a high voltage capacity. NextEra's Ontario transmission license application was submitted on the same day as the Rules change announcement, which makes clear that NextEra had the time and resources to plan for the application long before the Rules change announcement.
669. NextEra was also given special assistance from various Ontario departments, specifically to help it connect to the 500 kV transmission line.
- a) As early as July 2010, NextEra was arranging to meet Hydro One and IESO on the proposed interconnection of the 500 kV system.<sup>772</sup>
  - b) In April 2011, NextEra met with Hydro One to discuss connection options to the Bruce-Longwood "reserve" 500kV line.<sup>773</sup>

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<sup>768</sup> E-mail from Sue Lo (Ministry of Energy) to JoAnne Butler (OPA), Shawn Cronkwright (OPA), and Michael Lyle (OPA), May 12, 2011 (*Investor's Schedule of Exhibits at C-0147*)

<sup>769</sup> Hydro One Draft, Customer Impact Assessment, Adelaide/Bornish/Jericho Wind Energy Centre, November 11, 2011 (*Investor's Schedule of Exhibits at C-0241*) Three of NextEra's projects (Adelaide, Bornish and Jericho), which received contracts following the Connection Point Amendment Window, were merged into one project called NextEra 500 kV Wind energy Centre; Draft Customer Impact Assessment, Adelaide/Bornish/Jericho Wind Energy Centres, November 11, 2011, Appendix A: Diagrams, Figure 1 p. 000242 (*Investor's Schedule of Exhibits at C-0241*)

<sup>770</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, June 3, 2011 (*Investor's Schedule of Exhibits at C-0046*)

<sup>771</sup> Ontario Energy Board, Electricity Transmitter Issued Licences, November 12, 2013 (*Investor's Schedule of Exhibits at C-0398*)

<sup>772</sup> Email from Bobby Adjemian (NextEra) to Ioan Agavriiloai (IESO), July 2, 2010 (*Investor's Schedule of Exhibits at C-0149*)

670. The OPA published an updated Transmission Availability Table on June 3, 2011, the day that the Rules changes were announced.<sup>774</sup> That Table provided applicants with information regarding the transmission capacity available at the specific connection points in the Bruce and West of London Regions. In the Transmission Availability Table, the OPA added a sentence that was not included in previous Transmission Availability Tables:

Note 3: Applicants should contact the IESO for information regarding connecting to a 500 kV circuit

671. NextEra then attended various meetings with Hydro One and IESO, after contracts were offered, to discuss technical issues relating to NextEra's projects connecting to the 500 kV transmission system.

- a) On July 22, 2011, a meeting was held between NextEra, IESO and Hydro One to discuss all aspects of the five new FIT transmission projects that were announced by the OPA on July 4, 2011.<sup>775</sup>
- b) On August 24, 2011, another meeting was held between NextEra, IESO and Hydro One to discuss NextEra's 500 kV FIT projects to Review Regulatory and Environmental Requirements.<sup>776</sup>
- c) On September 13, 2011 a joint meeting Suncor and NextEra was scheduled with Hydro One and IESO regarding projects connecting at the B562L and B563L connection points.<sup>777</sup>

672. On June 20, 2011, in a letter to Minister of Energy Brad Duguid, Acciona, another FIT project applicant complained that it is unfair for a proponent to change connection points and build a lengthy transmission line to reach the newly desired connection point. Acciona's position was that allowing proponents to build a lengthy transmission lines discriminates against proponents that designated a connection point in the application from the beginning and whose projects do not require extensive construction. Acciona stated:

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<sup>773</sup> Email from Bobby Adjemian (NextEra Energy) to Mike Falvo (IESO), April 1, 2011 (*Investor's Schedule of Exhibits at C-0125*)

<sup>774</sup> Ontario Power Authority, FIT Program, Transmission Availability Table, June 3, 2011 (*Investor's Schedule of Exhibits at C-0166*)

<sup>775</sup> Minutes of Meeting/Conference Call, NextEra Energy Canada IESO and Hydro One Networks on New FIT Projects, July 22, 2011 (*Investor's Schedule of Exhibits at C-0001*)

<sup>776</sup> Email from Michael Lesychyn (Hydro One) to John Sabiston (Hydro One), Ben Greenhouse (NextEra) et al., July 29, 2011 (*Investor's Schedule of Exhibits at C-0124*) ; Email from Michael Leschyn (Hydro One) to Robyn Wong (Hydro One), Ben Greenhouse (NextEra), Jennifer Tuck (NextEra), et al., August 24, 2011 (*Investor's Schedule of Exhibits at C-0126*)

<sup>777</sup> Minutes of Meeting, re NextEra/Suncor Joint Meeting with HONI/IESO, September 21, 2011 (*Investor's Schedule of Exhibits at C-0219*)

- In conducting that TAT, the OPA (along with the IESO and LDCs) have reserved for themselves a reasonable degree of subjectivity...*If an Applicant has changed its connection point and as a result the Applicant would have to build a transmission line of such extended length that the likelihood of ever completing the Projects is low* (particularly as compared to Projects who originally identified the proper connection point and, not surprisingly, are located closed to the connection point).<sup>778</sup>
673. On July 11, 2012, the Ministry of Energy directed the OPA to not allow any other proponents to build a line longer than 50km in order to connect to the grid. The Direction stated:
- Clarifying Transmission and Distribution
- The OPA shall revise the FIT Rules to provide a limit for non-hydroelectric projects with respect to the distance between a project's connection point on the existing transmission or distribution grid and the land within the project's location to which the applicant has access rights at the time of application
- The OPA shall not enter into a FIT contract where the proposed project is located 50 km or more from its proposed connection point on the existing transmission or distribution grid according to the measurement in the preceding paragraph.*<sup>779</sup>
674. Under the next version of FIT Rules, released on August 10, 2012, the OPA prohibited proponents from selecting connection points more than 50km away:
- (j) except in the case of a waterpower Project, [a project is] not be located 50 kilometres or more from the proposed Connection Point, [as measured from the point on the Site (as proposed in the Application) closest to such proposed Connection Point. For clarity, such proposed Connection Point must be located on the Distribution System or IESO-Controlled Grid, as the case may be, in existence at the date of the Application. A Project shall not be configured for the purpose of avoiding such 50 kilometre requirement. Whether the Project is configured for such purpose shall be determined by the OPA in its reasonable discretion. If the OPA determines that a Project has been configured to avoid such requirement, the proposed generating facility shall be deemed to have not met this eligibility requirement.]<sup>780</sup>
675. By then, however, various Ontario departments, specifically the Ontario Power Authority had already accorded better treatment and provided extraordinary assistance to Mesa's competitors. Through its meetings and direct communications with the OPA, NextEra had been given advance notice of the OPA's Rules changes to the FIT Program, and had been given direct assistance to connect to a 500 kV transmission line.

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<sup>778</sup> Letter from Daniel Dubois (Acciona), to the Honourable Brad Duguid (Minister of Energy), June 20, 2011. [emphasis added] (***Investor's Schedule of Exhibits at C-0311***)

<sup>779</sup> Letter from Chris Bentley (Minister of Energy) to Colin Andersen (OPA), Direction to the OPA, July 11, 2012. [emphasis added] (***Investor's Schedule of Exhibits at C-0210***)

<sup>780</sup> Ontario Power Authority, Feed-In Tariff Program, FIT Rules, Version 2.0, August 10, 2012, Section 2.1(vii)(j) (***Investor's Schedule of Exhibits at C-0058***)

**D. Establishment, Expansion, Conduct and Operation**

676. NAFTA Article 1102 requires that treatment must be with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
677. The preferential treatment received by Pattern and Boulevard related to the conduct and operation of wind projects, and related directly to the efforts of projects owned by Mesa and its competitors to secure Power Purchase Agreements in Ontario.

**E. Conclusion**

678. Canada has breached its obligations under NAFTA Article 1102 by providing better treatment to Canadian investors or Canadian investments who were in like circumstances to the Investor and its Investments.
679. The Investor and its Investments were in like circumstances with the general class of applicants who competed for transmission capacity in the Ontario grid, and those who sought renewable energy PPAs from Ontario.
680. In these circumstances, the burden therefore shifts to Canada to show that the difference in treatment, both its nature and magnitude, was fully justified by legitimate regulatory considerations.
681. The issue of discriminatory effects of the FIT program against foreign investors was a prominent issue before the WTO. The WTO Panel's findings on the underlying discrimination of the FIT Program in favour of local Ontarians and against persons who are not from Ontario<sup>781</sup> are certainly sufficient to require Canada to demonstrate how the Program did not constitute a discriminatory regime.
682. The treatment with respect to an application for transmission capacity to generate renewable energy always occurred in relation to the establishment, expansion, management, conduct or operation of investments. It is revealing in this regard that in the WTO proceeding, Canada did not even attempt to justify the discriminatory features of its measures under Article XX of the *GATT*, which provides a framework for the justification of measures that are necessary for legitimate public policy purposes.
683. Thus Canada has therefore breached its NAFTA Article 1102 obligation to provide national treatment.
684. The Investor, and its Investment, has suffered harm, injury, loss and damage as a result of Canada's failure to meet its national treatment obligation.

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<sup>781</sup> *Canada - Renewable Energy* - AB Report, at para. 5.63 (*Investor's Schedule of Legal Authorities at CL-002*)

#### IV. INTERNATIONAL LAW STANDARD OF TREATMENT

685. The OPA and Ministry of Energy did not execute the FIT Program in a manner that corresponded with the international law standard of treatment. The FIT Program was conducted in an arbitrary manner that was not fair, reasonable or transparent. While Ontario was rolling out the FIT Program and leading renewable-energy producers to expect that this was the process through which they needed to enter Ontario's market, the government was at the same time secretly negotiating with the Korean Consortium and NextEra for separate energy deals.
686. The flawed implementation of the FIT Program, which included:
- a) Unexpected and arbitrary changes to the FIT Rules
  - b) Changes to the FIT Rules, influenced by and for the benefit of NextEra
  - c) Unfairly permitting enabler requested projects to select connection points
  - d) Failing to conduct Economic Connection Tests as required by the FIT Rules
  - e) Entering into the *GEIA* and providing the Korean Consortium guaranteed priority access to transmission to the detriment of other energy providers in the province
  - f) Delay in the FIT Program to benefit Samsung and its partners
  - g) Unfairly ranking projects
  - h) Failure to give reasons for the June 3, 2011 Rules changes
  - i) Failure to operate the FIT Program fairly and transparently contrary to Mesa's reasonable legitimate expectations
- i. Unexpected and arbitrary changes to the FIT Rules*
687. Throughout the existence of the FIT program, the Rules that governed the Program were changed. In particular, the Minister of Energy's June 3, 2011 Direction and the new version of the FIT Rules released the same day, made significant and unexpected changes to the Program.
688. The continuous, arbitrary, and unexpected Rules changes to the FIT Program created conditions that made it difficult for Mesa and other competing proponents to methodically satisfy requirements of the FIT Program as it was in constant flux. The lack of stability in the regulatory competition caused Mesa to expend considerable time, resources and money to meet the conditions of the Rules, only to discover that the Rules were changed. The timing and manner of the rule changes systematically benefited certain operators and systematically disadvantaged Mesa. This was results-driven administration, where the Government departed from normal methods and

- procedures, and stated frameworks and guidelines, whenever doing so enabled market access for the firms that it preferred.
689. In May 2011, the OPA and Ministry of Energy discussed the process that would be used to award contracts in the Bruce Region. On May 11, Shawn Cronkwright of the OPA wrote to Joanne Butler of the OPA, and to Sue Lo from the Ministry of Energy,<sup>782</sup> about options for the award of OPA contracts in the Bruce and London areas, including a "Special version of a TAT/DAT type process" and "running the IPA portion of the ECT". Mr. Cronkwright indicated that if the process selected was "consistent with the FIT rules" the OPA would "not likely require an additional directive (subject to confirmation from OPA legal)."<sup>783</sup> This email nonetheless shows that the OPA was, at the time, considering processes for awarding contracts that did not follow Mesa's expectations and the process set out in the FIT Rules.
690. These emails also show that the OPA and Ministry of Energy understood that it would be necessary for the Minister of Energy to issue a Direction in order for the OPA to change the process for awarding contracts. On May 11, 2011, Shawn Cronkwright wrote to JoAnne Butler and Sue Lo saying, "if the process aligns with the rules, the need for a directive diminishes."<sup>784</sup>
691. On June 3, 2011, the Minister of Energy directed the OPA to establish a process for allocating transmission capacity enabled by the new Bruce-to-Milton transmission line. As part of the process, the Minister instructed the OPA to open a five-day window for proponents with projects in the Bruce or West of London Regions to change their connection points to another point "in one of these two areas."<sup>785</sup>
692. On the very same day, the OPA released Version 1.5 of the FIT Rules. This new version of the Rules implemented the Direction from the Minister of Energy.<sup>786</sup>
693. Specifically, FIT Rules Version 1.5 implemented the Minister's Direction to allow proponents to change connection points between regions as part of the Bruce-to-Milton Capacity Allocation process.<sup>787</sup> Section 5.4.1(b) stated:

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<sup>782</sup> Email from Susan Lo to Shawn Conkwright and Joanne Butler, May 11, 2011 (*Investor's Schedule of Exhibits at C-0309*)

<sup>783</sup> Email from Susan Lo to Shawn Conkwright and Joanne Butler, May 11, 2011 (*Investor's Schedule of Exhibits at C-0309*)

<sup>784</sup> Email from Shawn Cronwright (OPA), to JoAnne Butler (OPA), Sue Lo (Ministry of Energy), May 11 2011 (*Investor's Schedule of Exhibits at C-0091*)

<sup>785</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, June 3, 2011 (*Investor's Schedule of Exhibits at C-0077*)

<sup>786</sup> Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, June 3, 2011 (*Investor's Schedule of Exhibits at C-0077*); Ontario Power Authority, Allocating Capacity and Offering FIT Contracts for Bruce to Milton Enabled Projects, June 3, 2011 (*Investor's Schedule of Exhibits at C-0140*)

- At any time, the OPA may, by notice posted on the Website, provide a period of not less than five (5) Business Days during which Applicants may, in respect of a Newly Enabled Project, change the Project's proposed Connection Point by amending Section 3 of the Application accordingly and submitting it to the OPA, in accordance with instructions posted on the Website from time to time.
694. On June 3, the OPA posted a form on its website for the purpose of connection point change. The form included instructions, stating that "[o]nly connection points requested in the Bruce Transmission Area or the West of London Transmission Area will be permitted."<sup>788</sup>
695. The unexpected connection point Rules change benefitted some proponents over others. The OPA Vice President JoAnne Butler, in an email to the Ministry of Energy's Sue Lo, "we need a Directive."<sup>789</sup>
696. Bob Chow, Director at the OPA, said that allowing the connection Rules change would "complicate the process".<sup>790</sup> An internal Ministry of Energy briefing note described the beneficial effect the connection point Rules change would have for NextEra:  
"NextEra may change connection points for a number of their projects in the West of London region[...] and possibly "bump" two of Leader's Bruce region projects down the priority ranking list."<sup>791</sup>
697. The Ministry of Energy was therefore well aware that such a change of the rules would adversely affect Mesa Power's projects, while benefitting those of NextEra.
698. The change in the FIT Rules for the Bruce-to-Milton allocation process resulted in priority rankings for the Bruce and West of London Regions that differed from those issued in December 2010 and February 2011. By enabling proponents to change connection points from the West of London Region to the Bruce Region, and thereby change the Region within which a project was ranked, the new Rules allowed projects that were previously outside the priority rankings for the Bruce Region, and would not have been awarded contracts, to receive contracts. This caused projects like Mesa's Arran and Twenty Two Degree projects, that were previously within the priority rankings for the Bruce region, and which would therefore have been awarded contracts, to not receive contracts.

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<sup>787</sup> Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011, Section 5.4.1 (*Investor's Schedule of Exhibits at C-0005*)

<sup>788</sup> Ontario Power Authority, Feed-In Tariff Program, Form, "Request for Connection Point Amendment", Undated (*Investor's Schedule of Exhibits at C-0247*)

<sup>789</sup> Email from JoAnne Butler (OPA) to Sue Lo (Ministry of Energy) and Shawn Cronkwright, May 12, 2011 (*Investor's Schedule of Exhibits at C-0313*)

<sup>790</sup> Email from Bob Chow to JoAnne Butler, Shawn Cronkwright and Michael Lyle, May 12, 2011 (*Investor's Schedule of Exhibits at C-0308*)

<sup>791</sup> Briefing Note, Bruce to Milton Contract Awards, Objective of Connection Change Window-Stakeholder Reaction, June 15, 2011 (*Investor's Schedule of Exhibits at C-0318*)



699. The changes to the FIT Rules were made without notice, and resulted in significant changes to the FIT Program that could not have been anticipated by Mesa, which was arbitrary.
700. Previously, in May 2010, the OPA had announced that a "window to request a change of connection point" would open from July 5 to July 23, 2010.<sup>792</sup> This was completely different from what occurred in June 2011:
- a) The 2010 window only allowed changes within a region, not between regions
  - b) The 2010 window was three weeks long, not five days long
  - c) The 2010 window was announced two months in advance, not three days in advance.
701. The 2010 window also never actually happened. Although the ability to change connection points within a region had been contemplated as part of the FIT Program,<sup>793</sup> this opportunity was never implemented. It was also only ever contemplated under the FIT Rules in three scenarios:
- a) If the project was connected to the Distribution System and was required to undergo a Distribution Availability Test, it could change its connection point prior to undergoing an Economic Connection Test ("ECT")<sup>794</sup>
  - b) If the project was part of the FIT Reserve,<sup>795</sup> or
  - c) If the project was part of the FIT Production Line.<sup>796</sup>
702. For a project to join either the FIT Production Line or the FIT Reserve, it first had to undergo an ECT.<sup>797</sup> By June 2011, the OPA had still not conducted an ECT. Since an ECT had not taken place, no project could have been placed in either the FIT Reserve or the

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<sup>792</sup> Ontario Power Authority presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010, at p. 39 (*Investor's Schedule of Exhibits at C-0088*)

<sup>793</sup> Ontario Power Authority presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010 (*Investor's Schedule of Exhibits at C-0138*)

<sup>794</sup> Despite the fact that this explicit allowance was not provided for under the Transmission Availability Test (TAT) section of the FIT Rules, projects in both the FIT Production Line and the FIT Reserve, were permitted to change their connections points, given sections 5.5(d) and 5.6(d) of the FIT Rules.

<sup>795</sup> A project joins the FIT Reserve if the Economic Connection Test determines that the costs of the grid upgrades required to connect the project are not reasonable at that time (*Investor's Schedule of Exhibits at C-0399*)

<sup>796</sup> A project joins the FIT Production Line once it completes the Economic Connection Test, and once the OPA determines that the costs of the grid upgrades required to accommodate that project are reasonable. A project will wait in the FIT Production Line until the grid expansion plans have been approved (*Investor's Schedule of Exhibits at C-0399*);

<sup>797</sup> Ontario Power Authority presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010 (*Investor's Schedule of Exhibits at C-0138*) See flow-charts.

- FIT Production Line – meaning the only projects eligible to change connection points would have been projects that were already connected to the Distribution System.<sup>798</sup>
703. NextEra's projects, which changed their connection points, were connected to the transmission system, not the distribution system. They therefore would not have been able to change connection points unless the FIT Rules were changed.
704. In an internal Ministry of Energy presentation, [REDACTED]
705. Indeed, there were many internal government concerns about the Rules change. Agencies were not prepared for such a sudden, unprecedented change. Hydro One, for example, described the connection point amendment window as a "very short period"<sup>800</sup> and expressed concerns about being able to manage the requests in time.<sup>801</sup>
706. The Ministry of Energy, in its view, confirmed that "a number of developers (e.g. Acciona, Leader Resources) have complained about the connection change window process"<sup>802</sup>. Assistant Deputy Minister of Energy, Sue Lo, wrote that "many developers have waded in expressing either support, disappointment or surprise of the change window."<sup>803</sup>
707. One developer was Acciona Renewable Energy Canada, was a competing proponent whose projects, Armow and Zurich, were ranked 24<sup>th</sup> and 25<sup>th</sup> in the Bruce Region.<sup>804</sup> On June 20, 2011, Acciona's Daniel Dubois wrote to the Minister of Energy to complain about the new connection point Rules change.<sup>805</sup> Acciona expressed specific concerns about transmission capacity and the 750 MW cap in the Bruce Region. Acciona also expressed "concerns regarding the fairness of a process which allows applicants to jump

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<sup>798</sup> The FIT Rules also never allowed connection point changes for enabler-requested projects prior to an ECT.

<sup>799</sup> Ministry of Energy, Draft presentation, "DRAFT Bruce to Milton Next Steps", May 11, 2011 (*Investor's Schedule of Exhibits at C-0163*)

<sup>800</sup> Email from Bing Young to Patricia Lightburn, June 6, 2011 (*Investor's Schedule of Exhibits at C-0321*)

<sup>801</sup> Email from Sue Lo to Erika Botond and Andrew Mitchell, June 16, 2011 (*Investor's Schedule of Exhibits at C-0317*); Email from Sue Lo (Ministry of Energy) to Shawn Cronkwright (OPA), May 20, 2011 (*Investor's Schedule of Exhibits at C-0316*)

<sup>802</sup> Ministry of Energy Briefing Note, Bruce to Milton Contract Awards, Objective of Connection Change Window-Stakeholder Reaction, June 15, 2011 (*Investor's Schedule of Exhibits at C-0318*)

<sup>803</sup> Email from Sue Lo to Erika Botond and Andrew Mitchell, June 16, 2011 (*Investor's Schedule of Exhibits at C-0317*)

<sup>804</sup> Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010 (*Investor's Schedule of Exhibits at C-0073*)

<sup>805</sup> Letter from Daniel Dubois (Acciona) to the Honourable Brad Duguid, Minister of Energy, June 20, 2011 (*Investor's Schedule of Exhibits at C-0311*)

a connection queue that was already established based on the applicants original connection points."<sup>806</sup>

708. Acciona expected that the proponents who chose a connection point from the beginning, and whose projects did not require more extensive construction, would be given priority:

When the OPA originally announced that it was contemplating allowing Applicants to change their original connection point as part of allocating connection resources in the Bruce to Milton and West of London Transmission areas, Acciona reasonably believed the reallocation of available connection resources, by connection point, would only apply to connection resources available after allocating connection resources to those Applicants who originally identified the connection point. Instead, Acciona understands it is the OPA's intention to ignore the original connection point identified by the Applicants. This would seem to reward Applicants who did not correctly identify their original connection point and submitted Applications with an aggressive number of Acceleration Days which will very likely be irrelevant given the structural delays in Ontario in existence at this time.<sup>807</sup> [emphasis added]

709. During the time that Ontario was deciding how Bruce-to-Milton contracts would be awarded, Ministry of Energy officials also expressed concern about announcing another capacity setaside for the Korean Consortium,<sup>808</sup> for fear of complaints of preferential treatment from FIT proponents.<sup>809</sup>
710. The government did not want to set aside capacity for the Korean Consortium in a region for which there was transmission available for FIT applicants as a result of the Bruce-to-Milton line.<sup>810</sup> Under such a scenario, renewable energy PPAs could not be awarded to FIT applicants until the Korean Consortium had finalized its connection points, in accordance with its priority access to transmission capacity. This would mean that the time given to the Korean Consortium to select its connection points would come under greater scrutiny, as it would affect the timing of FIT contract awards.<sup>811</sup>
711. The initial plan for Bruce-to-Milton allocation proposed by Ministry of Energy officials was to split the West of London Region into two regions: West of London and

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<sup>806</sup> Letter from Daniel Dubois (Acciona Renewable Energy Canada) to Brad Duguid, Ministry of Energy, June 20, 2011, at p. 3 (*Investor's Schedule of Exhibits at C-0311*)

<sup>807</sup> Letter from Daniel Dubois (Acciona Renewable Energy Canada) to Brad Duguid, Ministry of Energy, June 20, 2011, at p. 3 (*Investor's Schedule of Exhibits at C-0311*)

<sup>808</sup> The Minister of Energy previously directed the OPA to set aside transmission capacity for the Consortium's Phase 1 and 2 projects on September 30, 2009 and September 17, 2010, respectively. Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, September 30, 2009 (*Investor's Schedule of Exhibits at C-0105*); Letter from Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, September 17, 2010 (*Investor's Schedule of Exhibits at C-0119*)

<sup>809</sup> Draft Issues Management Plan, Bruce-Milton IPA Announcement, May 20, 2011, at p. 2 (*Investor's Schedule of Exhibits at C-0193*)

<sup>810</sup> Email from Ceiran Bishop to Sunita Chander, April 27, 2011 (*Investor's Schedule of Exhibits at C-0082*)

<sup>811</sup> Ministry of Energy, Presentation, "Bruce to Milton Transmission Line: FIT Contract Awards", Undated, at p. 4 (*Investor's Schedule of Exhibits at C-0269*)

- London/London East. Under this scenario, all capacity enabled by the Bruce-to-Milton line in West of London would be set aside for the Korean Consortium, while the capacity enabled in London/London East (as well as in the Bruce region) would be allocated to other proponents.<sup>812</sup> This would have allowed the government to accommodate the needs of the Korean Consortium while allowing the allocation process for FIT to proceed independent of the Korean Consortium's timeline.
712. However, this plan was ultimately abandoned. It appears that the reason was that the Premier's Office objected to FIT projects located in a new West of London Region being effectively excluded from the Bruce-to-Milton allocation.<sup>813</sup> Based on their geographical location, NextEra's projects,<sup>814</sup> would have been included in the new West of London Region instead of London/London East. Thus, in opposing the exclusion of West of London projects from the Bruce-to-Milton allocation, the Premier's Office was in effect advocating for a process that benefitted NextEra.
713. In accordance with the Premier's Office's wishes, the June 3<sup>rd</sup> Direction that established the process for allocating capacity enabled by Bruce-to-Milton to FIT did not split the West of London into two regions. Instead, it allotted only 300 MW for FIT proponents in the Region.<sup>815</sup> Significantly, the Direction did not specify what was to be done with the remaining 200 MW enabled by the Bruce-to-Milton line in West of London. The capacity, however, was not allotted to the FIT Program.
714. The process the government ultimately decided on for the Bruce-to-Milton allocation directly benefitted both the Korean Consortium and NextEra. It benefitted the Korean Consortium by not allocating 200 MW in West of London for FIT. It effectively set aside capacity for the Korean Consortium's projects without tying the planning or implementation of these projects in any way to the FIT process. And, by not setting aside the 200 MW through a Ministerial Direction (as had been done previously for capacity set aside for the Korean Consortium in Haldimand and Bruce), the government even managed to avoid bringing it to the attention of FIT proponents.
715. The process directly benefitted NextEra by allowing its FIT projects in the West of London Region to participate in the Bruce-to-Milton allocation, and more particularly, allowed them to move their projects from a region where they would not receive

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<sup>812</sup> Ministry of Energy, Presentation, "Bruce to Milton Transmission Line: FIT Contract Awards", Undated, at p. 4 (*Investor's Schedule of Exhibits at C-0269*)

<sup>813</sup> Email from Sue Lo (Ministry of Energy) to Pearl Ing and Sunita Chander (Ministry of Energy), May 12, 2011 (*Investor's Schedule of Exhibits at C-0083*)

<sup>814</sup> [REDACTED] at p. 11 (*Investor's Schedule of Exhibits at C-0207*) [Restricted]

<sup>815</sup> Letter from Minister Brad Duguid to Colin Andersen (OPA), Direction to the OPA, June 3, 2011 (*Investor's Schedule of Exhibits at C-00046*)

contracts (West of London), to a nearby region (Bruce) where they did receive FIT contracts.

ii. *NextEra influenced changes to the FIT Rules*

716. The connection Rules change enabled NextEra's projects to receive FIT contracts, when they otherwise would not have. NextEra was fully aware it would not receive FIT contracts for its four projects in the West of London Region if a connection Rules change did not occur.<sup>816</sup> Rankings for the West of London Region had been released on December 21, 2010. NextEra had four projects located in West of London and those projects were ranked 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 9<sup>th</sup> in the Region.<sup>817</sup> When the rankings were released, the OPA had also indicated that only 300 MW would be awarded in the West of London Region. After the two projects which ranked higher than NextEra were awarded contracts, the remaining transmission capacity in the Region would be insufficient to accommodate NextEra's projects.<sup>818</sup>
717. Furthermore, two of NextEra's projects (Bluewater and Jericho) did not have an identified connection point and were "enabler requested".<sup>819</sup> Enabler-requested projects were precluded from participating in the Bruce-to-Milton allocation process.<sup>820</sup> So, NextEra was profoundly aware that the ability to change connection points from the West of London to Bruce transmission Region was essential for there to be sufficient transmission capacity for its projects to receive FIT contracts.
718. As a result of the Rules change, proponents in the West of London Region, such as NextEra, were allowed to change their interconnection points to connect in the Bruce

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<sup>816</sup> Based on the FIT priority ranking list that was released on December 21, 2010. Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010 (*Investor's Schedule of Exhibits at C-0073*)

<sup>817</sup> FIT Priority Ranking List, December 21, 2010 (*Investor's Schedule of Exhibits at C-0073*)

<sup>818</sup> International Power had two projects (Erie Wind and East Lake St. Clair Wind) ranked higher than NextEra in the West of London region, totalling 198 MW. NextEra's four projects (Bluewater Wind Energy Centre, Jericho Wind Energy Centre, Adelaide Wind Power Project, and Bornish Wind Energy Centre) followed in priority ranking, totaling 323.5 MW. The total transmission capacity that was to be awarded in this region was 350 MW. Thus, after the two highest projects receive contracts, there was only 152 MW available, meaning there was not enough for all four of NextEra's projects to receive contracts. FIT Priority Ranking List, December 21, 2010 (*Investor's Schedule of Exhibits at C-0073*)

<sup>819</sup> FIT Priority Ranking List, December 21, 2010 (*Investor's Schedule of Exhibits at C-0073*)

<sup>820</sup> Ontario Power Authority, "Questions and Answers, Bruce to Milton Contract Allocation Process", June 8, 2011, at p. 1 (*Investor's Schedule of Exhibits at C-0291*) By allowing enabler-requested projects in the Bruce and West of London Regions to select connection points during the change window, the OPA allowed Bluewater and Jericho to effectively change their status from enabler-requested, and thereby participate in the Bruce-to-Milton allocation; FIT Rules Version 1.5, June 3, 2011 (*Investor's Schedule of Exhibits at C-0005*)

- Region, thereby displacing Mesa's projects.<sup>821</sup> The result was insufficient capacity in the Bruce Region for Mesa's TTD and Arran projects, which in turn caused Mesa to not receive contracts. Consequently, the connection Rules change resulted in other proponents being given contracts, and contracts being denied to the Investor.
719. The Rules changes therefore had a discriminatory impact on Mesa, for a benefit to NextEra. The Rules were changed to suit one applicant to the detriment of another.
720. During the Spring of 2010, the Government of Ontario considered implementing a range of changes to the FIT Rules. Every iteration of proposed Rules changes benefited NextEra, and resulted in Nextera being able to have access to more transmission capacity than it would have had if the Rules remained as they were.
721. The Rules change was also specifically designed with NextEra in mind. On a number of occasions, the Minister of Energy's Office took explicit steps to ensure the process was being executed to the benefit of NextEra. In advance of an April 8, 2010 meeting between NextEra and Minister Duguid, Paul Ungerman of the Minister's Office asked for an update on the status of NextEra's projects, so the Minister could "be prepared to contextualize next steps for the company".<sup>822</sup> Moreover, in a June 15, 2011 Briefing Note on the Bruce to Milton Contract Awards, the Ministry of Energy noted that the Rule change "allows projects...who did not request a specific connection point at the time of application to request one now", and specifically listed NextEra's projects as examples.<sup>823</sup>
722. The Rules change significantly departed from the procedure previously established by the OPA for connection point changes. The Rules allowed a FIT proponent that previously requested a connection point in their application to change to a different connection point within their transmission zone,<sup>824</sup> and also allowed proponents to change their status to enabler requested.<sup>825</sup> However, the OPA never intended projects that originally identified as enabler requested to request a connection point. This was not allowed in any version of the FIT Rules.

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<sup>821</sup> Ontario Power Authority, "FIT Contract Offers for the Bruce-Milton Capacity Allocation Process", July 4, 2011 (*Investor's Schedule of Exhibits at C-0292*); Ontario Power Authority, "FIT Car Priority Ranking by Region", July 4, 2011 (*Investor's Schedule of Exhibits at C-0293*)

<sup>822</sup> Email from Paul Ungerman (Ministry of Energy) to Joanne Lorenzi (Ministry of Energy), April 8, 2010 (*Investor's Schedule of Exhibits at C-0112*)

<sup>823</sup> Ministry of Energy Briefing Note, "Bruce to Milton Contract Awards", June 15, 2011 (*Investor's Schedule of Exhibits at C-0172*)

<sup>824</sup> Ontario Power Authority presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010, Page 39, 46 (*Investor's Schedule of Exhibits at C-0088*)

<sup>825</sup> Ontario Power Authority presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010, Page 46 (*Investor's Schedule of Exhibits at C-0088*)

723. NextEra also gained assistance through the Ontario Premier's office. In May 2011 the Premier's office injected itself into the FIT Program, and began expressing its political preferences for matters that were entirely within the regulatory realm of the OPA. An email from Sue Lo of the Ministry of Energy to multiple individuals in the Ministry stated that Premier's office wanted to advance the schedule for awarding contracts, but that it also wanted to set aside capacity for the Korean Consortium.<sup>826</sup> The Premier's office also expressed a preference for the connection-point Rules change.<sup>827</sup> This direction of the details of the FIT Program, constituted a patent abuse of governmental and regulatory authority, resulting in a violation of the Investor's rights.
724. Tailoring the FIT Program to suit the political needs and priorities of the Premier's office compromised the independence of the regulatory process. Instead of administering the FIT Program on independent and proscribed regulatory criteria, the Premier's office added a layer of irrelevant political considerations, of which Mesa had no knowledge and which then determined regulatory requirements which Mesa expected to be free of political influence.
725. NextEra had direct access to the Premier's Office. Representatives of NextEra met with members of the Premier's Office on October 5, 2010. However, no documents have been produced by Canada addressing what occurred at that meeting or arising from it. Jamison Steeve and Sean Mullin of the Premier's Office attended the meeting.<sup>828</sup>
726. Documents from the Ministry of Energy indicate that the Premier's office had preferences regarding the Bruce to Milton Capacity Allocation Process.<sup>829</sup> Canada has not produced any communications between the Ministry of Energy and the Premier's Office that evidence how the Ministry of Energy came to have this knowledge.<sup>830</sup> Documents have also not been produced for a May 11, 2011 meeting between NextEra and the Ministry of Energy and follow-up phone call on May 13, 2011.<sup>831</sup>

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<sup>826</sup> Email from Sue Lo (Ministry of Energy) to Pearl Ing and Sunita Chander (Ministry of Energy), May 12, 2011 (***Investor's Schedule of Exhibits at C-0083***)

<sup>827</sup> Email from Sue Lo (Ministry of Energy) to Pearl Ing and Sunita Chander (Ministry of Energy), May 12, 2011 (***Investor's Schedule of Exhibits at C-0083***)

<sup>828</sup> Email from Bob Lopinski (Counsel Public Affairs) to Sonya Rachel Konzak (Ministry of Energy), Shantie Prithipal (Ministry of Energy), Sue Lo, and Rick Jennings (Ministry of Energy), September 20, 2010 (***Investor's Schedule of Exhibits at C-0094***) These missing documents are covered by Investor's Document Request No. 56 (relating to documents created or received by the IESO, OPA, Hydro One, Ministry of Energy, and the Premier's Office with respect to NextEra's projects).

<sup>829</sup> Email from Sue Lo to Andrew Mitchell, May 19, 2011, (***Investor's Schedule of Exhibits at C-0023***) and Email from Pearl Ing to Sue Lo and Sunita Chander, May 12, 2011 (***Investor's Schedule of Exhibits at C-0083***)

<sup>830</sup> These documents are also covered by Investor's Document Request No. 56.

<sup>831</sup> E-mail from Phil Dewan (Counsel Public Affairs) to Sue Lo (Ministry of Energy), May 12, 2011 (***Investor's Schedule of Exhibits at C-0090***)

*iii. OPA unfairly permitted enabler requested projects to select connection points*

727. FIT Proponents had the opportunity to identify a desired connection point in their FIT application. Those projects that did not select connection points were "enabler requested", and required upgrades to be able to connect to the Ontario transmission system. A project that was "enabler requested" did not go through the same process as projects that had selected connection points.
728. Projects, like all those belonging to Mesa, which had selected connection points, were able to receive a FIT contract offer through either a TAT or an ECT.<sup>832</sup> Under the FIT Rules, an "enabler requested" project could only receive a FIT contract offer through an ECT.<sup>833</sup> There was no provision in the FIT Rules that allowed an enabler requested project to select a connection point in advance of either a TAT or an ECT.
729. NextEra's Bluewater and Jericho projects were enabler requested projects, and were listed as such in the FIT rankings.<sup>834</sup> Because the projects were "enabler requested", they required a newly constructed "enabler" facility to connect to the transmission grid. They would not have such a facility under the established FIT process.<sup>835</sup>
730. Prior to the connection point Rules change, the Bluewater and Jericho projects were ranked 6th and 9th respectively on the FIT Priority Ranking.<sup>836</sup> When the Rules were changed, both Bluewater and Jericho, which had been ranked in the West of London Region, opted to change connection points to connection points in the Bruce Region. Ultimately, both Bluewater and Jericho were awarded FIT contracts in the Bruce Region.
731. Contrary to the draft that had been circulated internally within the OPA, the final connection point Rules change excluded the restriction on enabler projects and permitted all proponents within the Bruce and West of London Regions to change their connection points:

"Only applications submitted between October 1, 2009 to June 4, 2010, and that are currently listed in the Priority Ranking in the Bruce Transmission Area or the West of London Transmission Area...are eligible to submit a connection point amendment request."<sup>837</sup>

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<sup>832</sup> Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.4, December 8, 2010, Sections 5.2 and 5.4 (*Investor's Schedule of Exhibits at C-0239*)

<sup>833</sup> Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.4, December 8, 2010, Section 5.4 (*Investor's Schedule of Exhibits at C-0239*)

<sup>834</sup> OPA FIT Priority Ranking list, December 21, 2010, at p. 6 (*Investor's Schedule of Exhibits at C-0073*)

<sup>835</sup> Ontario Power Authority presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010, at p. 45 (*Investor's Schedule of Exhibits at C-0088*)

<sup>836</sup> FIT Priority Ranking by Region, June 3, 2011 (*Investor's Schedule of Exhibits at C-0225*)

<sup>837</sup> Email from Patricia Lightburn (OPA) to Alexandra Wiles (OPA), June 3, 2011 (*Investor's Schedule of Exhibits at C-0156*); Ontario Power Authority, Feed-In Tariff Program, Form, "Request for Connection Point Amendment", Undated (*Investor's Schedule of Exhibits at C-0247*)



732. The only beneficiary of the decision to include enabler requested projects in the connection change window was NextEra. Its Bluewater and Jericho projects were the only enabler-requested projects in the West of London Region.<sup>838</sup> They also were the only enabler-requested projects in either the Bruce or West of London Region to change their status and select a connection point during the Rules change window.<sup>839</sup>
733. The OPA thereby unfairly and discriminatorily changed the FIT Rules, in a non-transparent manner, to the benefit of NextEra and the detriment of Mesa. The OPA had explicitly excluded enabler requested projects from the Bruce-to-Milton contract allocation process.<sup>840</sup> Only those projects that had available transmission capacity at the projects' identified connection point were to be awarded FIT contracts. To enable NextEra to be awarded FIT contracts, the OPA had to do away with its stated distinction between enabler requested projects and those that specified desired connection points.<sup>841</sup>
734. The result of this deviation was that the OPA opened the experssly for NextEra who had not indicated a connection point in the Bruce Region, and which were assigned to a different Region, to jump the queue and receive contracts. As a direct consequence, Mesa was deprived of the opportunity to fairly compete for those contracts.
- iv. Failing to conduct an Economic Connection Test as required by the FIT Rules*
735. The Economic Connection Test was set out in the FIT Rules as a means for projects that were not awarded FIT contracts on completion of the TAT or DAT process to still compete. Section 5.4(c) of the Rules states that a project would be "submitted to the [ECT] as a result of not passing the Transmission availability Test," and that if a project passed the ECT it would enter the FIT Production Line.<sup>842</sup>
736. Despite the Rules, and despite repeated assertions by the OPA that it would conduct ECTs from the time of the inception of the FIT Program in September 2009 until the elimination of the ECT process in August 2012, the OPA did not carry out a single ECT. Mesa had relied on the Rules and the OPA's assertions, and had planned accordingly.

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<sup>838</sup> FIT Priority Ranking by Region, February 24, 2011, at pp. 8-9 (*Investor's Schedule of Exhibits at C-0233*)

<sup>839</sup> Ontario Power Authority, "FIT Contract Offers for the Bruce-Milton Capacity Allocation Process", July 4, 2011 (*Investor's Schedule of Exhibits at C-0292*); Ontario Power Authority, "FIT Car Priority Ranking by Region", July 4, 2011 (*Investor's Schedule of Exhibits at C-0293*)

<sup>840</sup> Ontario Power Authority, "Questions and Answers, Bruce to Milton Contract Allocation Process", June 8, 2011, at p. 1 (*Investor's Schedule of Exhibits at C-0291*)

<sup>841</sup> The FIT Rules have district provisions for those that are enabler requested projects.

<sup>842</sup> Section 5.4(c) is found in all versions of the FIT Rules through Version 1.5.1. Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.5.1, July 15, 2011 (*Investor's Schedule of Exhibits at C-0237*)

- What it did not know and was never told, was that its reliance was misplaced, as no ECT would be conducted.
737. The prospect of an ECT as a gateway to obtaining a FIT contract was a significant factor relied on by Mesa in deciding to submit a FIT application.
738. Section 5.4(a) of the FIT Rules explicitly stated that "The Economic Connection Test will be run for each region of the Province at least every six months."<sup>843</sup> The language of the FIT Rules for the ECT remained the same through Version 1.5, published on June 3, 2011.<sup>844</sup> Accordingly, Mesa expected its projects to go through the ECT as part of the competition process, and that the ECT would follow the steps prescribed in the FIT Rules.
739. The first TAT for the FIT Program took place in the Spring of 2010. On April 8, 2010, the OPA announced the first round of FIT contract offers following the TAT. As set out in six contracts were offered in the West of London Region, totalling 230.7 MWs. Only 1 project was offered a contract in the Bruce Region. At that time, transmission capacity in the Bruce Region was limited, because the Bruce to Milton line, which was explicitly sanctioned to enable the transmission of electricity generated by renewable energy projects, was not yet operational.
740. Mesa was notified on April 8, 2010 that its TTD Wind Energy and Arran Wind Energy projects were not successful in the TAT and that the projects would proceed to the next Economic Connection Test, "which is scheduled to be performed during the summer of this year."<sup>845</sup> Significantly, this letter was sent to all FIT applicants who had specified connection points in the Bruce Region, as the Bruce to Milton line was not yet operational.<sup>846</sup> A FIT program update released by the OPA on the same day, stated that "[t]he first [ECT] will start in August/September."<sup>847</sup>
741. The next month, on May 19, 2010, the OPA gave a presentation to FIT applicants providing them with information about the ECT process. As part of the presentation, the OPA set out the following schedule and key dates for the first ECT:<sup>848</sup>

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<sup>843</sup> Ontario Power Authority, Feed-In-Tariff Program, FIT Rules Version 1.0, September 24, 2009, Section 5.4(a) (*Investor's Schedule of Exhibits at C-0260*)

<sup>844</sup> FIT Rules Version 1.5, June 3, 2011, Page 9 (*Investor's Schedule of Exhibits at C-0005*)

<sup>845</sup> Letter from JoAnne Butler, Ontario Power Authority, to Charles Edey, April 8, 2010 (*Investor's Schedule of Exhibits at C-0182*)

<sup>846</sup> Magnum Wind Energy Corp. Zurich project, a microFIT project, received a contract in the Bruce Region. FIT Contract Awards, April 8, 2010 (*Investor's Schedule of Exhibits at C-0400*)

<sup>847</sup> Ontario Power Authority, News Release, "Ontario Announces 184 Large-Scale Renewable Energy Projects", April 8, 2010 (*Investor's Schedule of Exhibits at C-0080*)

<sup>848</sup> Ontario Power Authority presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010, Page 39 (*Investor's Schedule of Exhibits at C-0088*)

- a) June 4, 2010 – Deadline for submitting new FIT applications to be eligible for the upcoming ECT; and
- b) Early August – Planned start of ECT.
742. Shortly thereafter, on June 1, 2010, the OPA announced an update to the FIT Program that provided a detailed timeline for the processing of FIT applications. Again, the OPA stated that the start date for the first ECT was early August 2010.<sup>849</sup>
743. However, no ECT was conducted by the OPA in August, 2010.
744. On October 18, 2010, the OPA announced, as part of another Program update, that the timing of the ECT would be posted shortly:
- An update on the timing of the ECT and the preceding activities, including the window to change a project's connection point and the priority ranking of projects pending ECT, will be posted shortly.<sup>850</sup>
- No such update was ever posted by the OPA. Nonetheless, on December 21, 2010, Mesa was once again told by the OPA that its projects would be included in the upcoming ECT.<sup>851</sup>
745. The OPA continued to make public representations through February 24, 2011.<sup>852</sup> On February 24, 2011, the OPA released an updated priority ranking list for FIT projects.<sup>853</sup> In addition to projects applied for within the launch period, these rankings included projects applied for in the second round of FIT applications. Even with the addition of second round projects, Mesa's Arran and TTD projects retained their ranking positions of 8 and 9 in the Bruce Region.<sup>854</sup> On the same day, the OPA announced contract awards for the second round of FIT applications. Included in the announcement was the following statement:
- Applicants who were not awarded contracts because transmission capacity is not currently available have been added to the priority ranking list and will proceed to the Economic Connection Test.<sup>855</sup>

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<sup>849</sup> OPA, Program Update – FIT Program Timeline, June 1, 2010 (*Investor's Schedule of Exhibits at C-0235*)

<sup>850</sup> Ontario Power Authority, Feed-In Tariff Program, Program Update, "FIT Program Up Timeline", October 18, 2010 (*Investor's Schedule of Exhibits at C-0257*)

<sup>851</sup> Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010 (*Investor's Schedule of Exhibits at C-0073*)

<sup>852</sup> Ontario Power Authority Presentation re The The Economic Connection Test- Approach, Metrics and Process, May 19, 2010 (*Investor's Schedule of Exhibits at C-0088*); Ontario Power Authority, News Release, "Ontario Announces Second Round Of Large-Scale Renewable Energy Projects", February 24, 2011 (*Investor's Schedule of Exhibits at C-0009*)

<sup>853</sup> Ontario Power Authority, News Release, "Ontario Announces Second Round Of Large-Scale Renewable Energy Projects", February 24, 2011 (*Investor's Schedule of Exhibits at C-0009*)

<sup>854</sup> FIT Priority Ranking by Region, February 24, 2011 (*Investor's Schedule of Exhibits at C-0233*)

<sup>855</sup> Ontario Power Authority, News Release, "Ontario Announces Second Round Of Large-Scale Renewable Energy Projects", February 24, 2011 (*Investor's Schedule of Exhibits at C-0009*)

746. However, by March 2011, the OPA had begun to internally acknowledge that the ECT would not be run as planned. In a March 21, 2011 internal presentation, the OPA spoke of a "reduced-scope ECT", and acknowledged the effect of such a reduced-scope ECT would be that "Proponents will be angry."<sup>856</sup>
747. By this time, all of the events that had been contemplated in the timelines provided to proponents in the June 2010 and October 2010 OPA updates, as prerequisites to the ECT process, had occurred.<sup>857</sup> The second round of FIT applications had been reviewed and approved; the TAT/DAT process for second round projects had been run; and contract offers for second round projects following the TAT/DAT process had been made. Despite this, no ECT was conducted.
748. Instead, on June 3, 2011, the OPA announced the Bruce-to-Milton Capacity Allocation process, and a five-day window for proponents in the Bruce and West of London transmission regions to change connection points between the two regions. During the five-day window (June 6 – 11), NextEra changed the connection points for four of its projects from the West of London Region to the Bruce Region. This in turn bumped Mesa's Arran and Twenty Two Degree wind projects from the final Bruce Region priority ranking list, so that neither of these projects could receive FIT contracts.
749. When the June 3, 2011 announcement was made, the Ministry of Energy knew the ECT was not going to occur. An internal document prepared by the OPA on April 28, 2011 titled "ECT Communications Strategy KJ", reveals that the ECT tests were no longer planned. Under the heading "Be transparent", it states:

Proponents have been waiting a long time for information about the ECT. It will be important to be clear and transparent about the fact that the ECT is not proceeding and the next steps in the evolution of the FIT program i.e. the two year review.<sup>858</sup>

The proponents, however, were never told.

750. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] A later version of the document adjusted the wording to simply say

<sup>856</sup> Ontario Power Authority presentation, "Economic Connection Test (ECT) & Program Evolution, March 21, 2011, at p. 5 (*Investor's Schedule of Exhibits at C-0170*)

<sup>857</sup> OPA, Program Update – FIT Program Timeline, June 1, 2010 (*Investor's Schedule of Exhibits at C-0235*); Ontario Power Authority, Feed-In Tariff Program, Program Update, "FIT Program Up Timeline", October 18, 2010 (*Investor's Schedule of Exhibits at C-0257*)

<sup>858</sup> Email from Kristen Jenkins (OPA) to Craig MacLennan (Ministry of Energy), April 29, 2011 (*Investor's Schedule of Exhibits at C- 0165*)

<sup>859</sup> Ministry of Energy, Draft presentation, "DRAFT Bruce to Milton Next Steps", May 11, 2011 (*Investor's Schedule of Exhibits at C-0163*)

"the application of the ECT process is no longer needed."<sup>860</sup> But again, the proponents were never told.

751. To the contrary, despite what the Ministry and the OPA actually knew, the announcement of the Bruce-to-Milton Capacity Allocation process, on June 3, 2011, misrepresented to proponents, that an ECT still would take place:

Projects that did not receive contract offers through the Bruce to Milton Capacity Allocation will remain on the priority ranking list. The OPA continues its work on the ECT process.<sup>861</sup>

752. In anticipation of contract offers, Mesa continued to develop its FIT projects since the OPA continued to represent to proponents that there would be an ECT, Mesa Power spent considerable time, resources and money to ensure that its projects would be "shovel-ready" and economical to implement.<sup>862</sup>

753. The ECT, however, was never conducted.<sup>863</sup>

754. In not carrying out an ECT, the OPA failed to adhere to its own rules governing the FIT process and failed to communicate honestly and transparently with Mesa about how the FIT Program was actually being administered. Furthermore, it denied Mesa a means of obtaining a FIT contract offer that had been expressly set out in the FIT Rules.

v. *Mesa Power expected its projects to participate in the ECT in 2010, and not conducting the ECT deprived Mesa of the opportunity to compete for a FIT contract*

755. Mesa Power submitted FIT applications for two wind projects (Arran and TTD) during the launch period, and FIT applications for two additional wind projects (Summerhill and North Bruce) in March 2010. Because all four project applications were submitted prior to the deadline of June 4, 2010, all of Mesa's projects qualified for the first ECT.<sup>864</sup>

756. Mesa relied on the FIT Rules and the representations of the OPA that it would conduct an ECT, and that its projects would be included in the process.

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<sup>860</sup> Ministry of Energy Draft Presentation, Bruce to Milton Next Steps, May 11, 2011 (*Investor's Schedule of Exhibits at C-0315*)

<sup>861</sup> Ontario Power Authority, Allocating Capacity and Offering FIT Contracts for Bruce to Milton Enabled Projects, June 3, 2011 (Emphasis added.) (*Investor's Schedule of Exhibits at C-0140*)

<sup>862</sup> CWS - Robertson, at para. 38.

<sup>863</sup> Transcript of the Cross-Examination of JoAnne Butler on August 15, 2012 regarding the Divisional Court Court File No. 352112, between Skypower CL 1 LP, et al, and Minister of Energy (Ontario) and Ontario Power Authority. ["Cross-Examination of Joanne Butler"] (320: 19-20) (*Investor's Schedule of Exhibits at C-0168*)

<sup>864</sup> Ontario Power Authority, Presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010, Page 39 (*Investor's Schedule of Exhibits at C-0088*)

757. According to the OPA's presentation of May 19, 2010, there were three possible outcomes for projects that participated in the ECT:<sup>865</sup>
- a) Remain in the FIT Reserve (if sufficient capability was not available and be included in the next ECT);
  - b) Move to the FIT Production Line (if there is sufficient existing or planned capability throughout the transmission and distribution system); or
  - c) Receive a contract offer.
758. Based on these possible outcomes, if Mesa's projects had participated in an ECT, it would have had the opportunity to receive a contract on completion of the test. By delaying the ECT, the OPA thereby denied contracts to projects that would have been successful in the ECT.
759. If an ECT had been conducted in accordance with the FIT Rules and the representations made to Mesa, Mesa's Arran and TTD projects would have qualified for FIT contract given their respective priority rankings.<sup>866</sup> As no ECT was conducted prior to the Bruce-to-Milton allocation process, Mesa was deprived of the opportunity to secure contracts for these projects that the OPA had led Mesa to expect would be forthcoming based on the established Rules of the FIT Program.
- vi. The failure to conduct an ECT prior to the Bruce-to-Milton Capacity Allocation process caused Mesa Power to lose contract awards*
760. In August 2012, the OPA issued FIT Rules Version 2.0 which eliminated the ECT process.<sup>867</sup> The change resulted from a Directive from the Minister of Energy that stated that "[g]iven the transmission projects planned through the Long Term Energy Plan and changes to the FIT Program, the OPA shall not run the Economic Connection Test."<sup>868</sup>
761. At the time of the cancellation of the ECT process, the OPA had not conducted a single ECT for projects applied for through the FIT Program, even though until then the FIT Rules required they be conducted every six months.
762. The continued assurances by the OPA that an ECT would be forthcoming, did not cause Mesa to expect that the ECT would never in fact occur. By knowingly misleading Mesa,

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<sup>865</sup> Ontario Power Authority, Presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010, Page 69-72 (*Investor's Schedule of Exhibits at C-0088*)

<sup>866</sup> CWS - Robertson, at para. 54(b).

<sup>867</sup> Ontario Power Authority, Feed-In Tarriff Program, FIT Rules, Version 2.0, August 10, 2012 (*Investor's Schedule of Exhibits at C-0058*)

<sup>868</sup> Letter from Chris Bentley (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, April 5, 2012 (*Investor's Schedule of Exhibits at C-0052*)

the OPA abused its authority, and failed its basic obligation to act with Mesa in good faith.

*vii. Delay in the FIT process in order to benefit Samsung and its partners*

763. Mesa was prejudiced by unfair and non-transparent deviations from the FIT Rules. At the time it applied for its projects, Mesa expected regulators to administer the FIT Program in good faith. It did not expect them to be engaged in a behind-the-scenes effort that undermined the FIT Program, and prevented it from being administered honestly, fairly, with transparency and in good faith.<sup>869</sup>
764. The priority transmission access granted to the Korean Consortium resulted in the delay of the ECT and the award of FIT contracts in the Bruce Region.
765. According to the plan set out by the OPA and represented to Mesa, initial FIT contracts were to be awarded in three stages.<sup>870</sup> The first round of contracts was to be awarded following the running of a TAT for projects applied for during the FIT launch period (between October and November 2010). The second round of contracts was to be awarded following the running of a second TAT for projects applied for during the second round of FIT applications (between December 2009 and June 2010). The third round of contracts was to be awarded following the conduct of an ECT encompassing all FIT projects that had not been awarded contracts in the first two rounds.
766. The first round of FIT contracts was awarded in April 2010.<sup>871</sup> Although Mesa's TTD and Arran projects were eligible for contracts during this round, it did not receive any. Thus, Mesa awaited the ECT for the next scheduled opportunity to receive FIT contracts. The ECT process, however, could not begin until the TAT for second round FIT applicants was completed.<sup>872</sup>
767. Because the government had secretly reserved transmission capacity for the Korean Consortium in the Bruce Region<sup>873</sup>, and because, under the *GEIA*, access to this transmission capacity was to be "priority"<sup>874</sup>, the OPA could not conduct the TAT for second-round FIT applicants in the Bruce Region until the Korean Consortium finalized

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<sup>869</sup> CWS - Robertson, at para. 58.

<sup>870</sup> Ontario Power Authority, Presentation, "The Economic Connection Test Process", March 23, 2010, at p. 16 (*Investor's Schedule of Exhibits at C-0034*)

<sup>871</sup> Ontario Power Authority, News Release, "Ontario Announces 184 Large-Scale Renewable Energy Projects", April 8, 2010 (*Investor's Schedule of Exhibits at C-0080*)

<sup>872</sup> Ontario Power Authority, Presentation, "The Economic Connection Test Process", March 23, 2010, at p. 16 (*Investor's Schedule of Exhibits at C-0034*)

<sup>873</sup> Letter from Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, September 17, 2010 (*Investor's Schedule of Exhibits at C-0119*)

<sup>874</sup> *Green Energy Investment Agreement*, January 21, 2010, section 7.3(c) (*Investor's Schedule of Exhibits at C-0322*)

the connection points for its Phase 2 projects in the Region. As stated by Ministry of Energy official Cieran Bishop,

KC's commitment on connection points before the release of TAT...assure their priority access is factored into transmission availability – so any contract awards that come out of TAT will take KC's phases to date (1, 2, 3) into account.<sup>875</sup>

768. Because the conduct of a TAT for second-round FIT applicants was a necessary step before an ECT, the Korean Consortium's finalization of connection points was a precondition for the ECT as well. The selection of connection points by the Korean Consortium was necessary and thereby for the award of FIT contracts resulting from the ECT.<sup>876</sup>
769. The Korean Consortium provided provisional connection points for its Phase 2 projects to the OPA on September 30, 2010.<sup>877</sup> This allowed the TAT for second-round FIT projects in the Bruce Region to begin. However the process could not be completed, and the ECT could not be started, until the Korean Consortium provided final confirmation of its connection points.<sup>878</sup> This occurred on January 7, 2011.<sup>879</sup>
770. However, even after the Korean Consortium [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
771. This latitude given to the Korean Consortium regarding their connection points was a source of consternation for some OPA officials. A few days after the Korean Consortium's submission, Bob Chow emphasized that finality regarding the Korean Consortium's connection points was a "major consideration" for the OPA, and stated that "[w]e can't be uncertain with the KC going into ECT". He urged that the OPA "be firm here with KC" to "maintain transparency and process integrity".<sup>881</sup> However, the

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<sup>875</sup> Email from Ceiran Bishop (Ministry of Energy) to Samira Viswanathan (Ministry of Energy) and Faruq Remtulla (Ministry of Energy), November 18, 2010 (*Investor's Schedule of Exhibits at C-0159*)

<sup>876</sup> 2011 Auditor General's Report, Chapter 3 – Electricity Sector – Renewable Energy Initiatives, at p. 116 (*Investor's Schedule of Exhibits at C-0228*)

<sup>877</sup> Ministry of Energy Presentation, October 1, 2010, at p. 2 (*Investor's Schedule of Exhibits at C-0093*)

<sup>878</sup> Email from Kristin Jenkins (OPA) to Andrew Mitchell (Ministry of Energy) et al., November 22, 2010 (*Investor's Schedule of Exhibits at C-P04489 C-0071*)

<sup>879</sup> Email from Barbara Constantinescu (IESO) to Bob Chow (OPA), John Sabiston (Hydro One), January 11, 2011 (*Investor's Schedule of Exhibits at C-0070*)

<sup>880</sup> Email from Barbara Constantinescu (IESO) to Bob Chow (OPA), John Sabiston (Hydro One), January 11, 2011 (*Investor's Schedule of Exhibits at C-0070*)

<sup>881</sup> Email from Barbara Constantinescu (IESO) to Bob Chow (OPA), John Sabiston (Hydro One), January 11, 2011 (*Investor's Schedule of Exhibits at C-0070*)



- authorities did not followed Mr. Chow's advice. Indeed, the Korean Consortium was permitted to change connection points for its projects in the Bruce Region a mere week prior to the signing of PPAs for the projects.<sup>882</sup>
772. Because the Korean Consortium did not to finalize its connection points, the TAT for second-round FIT applicants was not completed until the end of February 2011 – more than two months later than anticipated<sup>883</sup> – and the ECT for all FIT applicants was never conducted at all.
773. That the Korean Consortium was the cause of the ECT delay, and the resulting delay in the awarding of FIT contracts is further attested to by Zohrab Mawani. Mr. Mawani states that "PPAs under the FIT Program could only be awarded after manufacturing, transmission access, and selection of site provisions in the *GEIA* were adequately addressed", and observes that because the Korean Consortium did not resolve these matters, "effectively resulted in a freeze on other projects that were to receive contracts under the FIT program."<sup>884</sup>
774. The Ontario Auditor General also concluded that the "commitment to the [Korean] consortium affected the FIT contract allocation process and the timely connection of renewable energy projects from other generators".<sup>885</sup> While the OPA was striving to accommodate the Korean Consortium's preferred timeline for project acquisition and planning, Mesa was being kept hostage to changes and delays outside of its control and contrary to what it was led to expect.
775. If the ECT process had not been delayed by government pandering to the Korean Consortium, and the established process of awarding FIT contracts had been conducted as scheduled, NextEra would not have been permitted to change connection points for its projects in the West of London Region and Mesa would have received a FIT contract.
776. The government's reservation of 500 MW of capacity in the Bruce Region for the Korean Consortium also prevented Mesa from receiving a FIT contract. If this capacity had been reserved for FIT projects, and allocated to the Bruce-to-Milton process, Mesa would have been awarded a FIT contract for both its TTD and Arran projects. Even after the June 3<sup>rd</sup> Rules change, that allowed NextEra to move its Bluewater and Jericho projects to the Bruce Region, Mesa's TTD and Arran projects were both within the top 1250 MW

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<sup>882</sup> Email from Lee-Jeong Tack (Samsung) to Carolyn Calwell (MOE), July 26, 2011 (*Investor's Schedule of Exhibits at C-0208*)

<sup>883</sup> Email from Kristin Jenkins (OPA) to Andrew Mitchell (Ministry of Energy) et al., November 22, 2010 (*Investor's Schedule of Exhibits at C-0071*)

<sup>884</sup> Declaration of Zohrab Mawani, August 15, 2013, at para. 32 (*Investor's Schedule of Exhibits at C-0406*)

<sup>885</sup> 2011 Auditor General's Report, Chapter 3 – Electricity Sector – Renewable Energy Initiatives, at p. 116 (*Investor's Schedule of Exhibits at C-0228*)

in the Bruce Region, and thus would have been able to be connect through the transmission capacity enabled in the Region by the Bruce-to-Milton line.<sup>886</sup>

*viii. Failure to give reasons regarding the ranking process and the June 3, 2011 Rules changes*

777. On May 20, 2011, Mesa wrote to Shawn Cronkwright, OPA Director, Renewables Procurement to confirm their understanding of the ranking system:<sup>887</sup>

Our understanding of the OPA process is that all projects were assessed and placed in the FIT CAR Priority ranking based on the existing capacity at the particular interconnection listed in the application. Further, we understand the ranking took an explicit consideration of the number of acceleration days, [REDACTED] We would greatly appreciate your feedback as to whether we have interpreted the OPA process correctly.<sup>888</sup>

778. The OPA ignored Mesa's letter and chose to not respond until June 17, 2011, at the end of the contract offer process for the Bruce Region, and most importantly, after FIT Rules version 1.5 was published, which enabled projects in the West of London Region to move into Bruce Region.<sup>889</sup>

779. The OPA's deliberate delay in response and patent non-transparency with Mesa, was in itself a violation of the policy as set out in the FIT Rules which permitted:

The fundamental objective of the program is to facilitate the increased development of Renewable Generating Facilities...via a standardized, open and fair process.<sup>890</sup>

780. Mesa's letter of May 20, 2011 listed in detail the breakdown of Twenty Two Degree and Arran's Commercial Operation Date ("COD") acceleration days calculation along with their date of first lease and dollars spent to date.<sup>891</sup> The OPA's delayed response did not provide confirmation of Mesa's COD calculations,<sup>892</sup> and the OPA declined to provide any

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<sup>886</sup> Ontario Power Authority, "FIT Car Priority Ranking by Region", July 4, 2011 (*Investor's Schedule of Exhibits at C-0293*)

<sup>887</sup> Letter from Mark Ward (Mesa), Chuck Edey (Leader Resources) and Michael Bernstein (Capstone Infrastructure) to Shawn Cronkwright (OPA), May 20, 2011 (*Investor's Schedule of Exhibits at C-0098*) Notes on the OPA Bruce Region Priority Rankings, Undated (*Investor's Schedule of Exhibits at C-0074*)

<sup>888</sup> Letter from Mark Ward (Mesa), Chuck Edey (Leader Resources) and Michael Bernstein (Capstone Infrastructure) to Shawn Cronkwright (OPA), May 20, 2011 (*Investor's Schedule of Exhibits at C-0098*)

<sup>889</sup> Letter from Shawn Cronkwright, Ontario Power Authority, to Mark Ward, Mesa Power Power Group LLC, Charles Edey, Leader Resources Services Corp. and Michael Bernstein, Capstone Infrastructure Corp., June 17, 2011 (*Investor's Schedule of Exhibits at C-0195*)

<sup>890</sup> Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 1.1 (*Investor's Schedule of Exhibits at C-0258*); Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 2.0 comparison to draft, August 10, 2012, Section 1.1 (*Investor's Schedule of Exhibits at C-0060*)

<sup>891</sup> Letter from Mark Ward (Mesa), Chuck Edey (Leader Resources) and Michael Bernstein (Capstone Infrastructure) to Shawn Cronkwright (OPA), May 20, 2011 (*Investor's Schedule of Exhibits at C-0098*)

<sup>892</sup> Letter from Shawn Cronkwright, Ontario Power Authority, to Mark Ward, Mesa Power Power Group LLC, Charles Edey, Leader Resources Services Corp. and Michael Bernstein, Capstone Infrastructure Corp., June 17, 2011 (*Investor's Schedule of Exhibits at C-0195*)

- further information regarding the criteria score of Mesa's projects and their rankings on the purported basis that the information was confidential.<sup>893</sup>
781. In the result, Mesa was never provided with its actual COD Acceleration Days score and evaluated ranking.
782. The refusal by Ontario and the OPA to disclose this information, even in the document production process, amounts to arbitrary abuse of authority, and a violation of Mesa's right to a fair, good faith and transparent process as protected by Article 1105.
- ix. *The MOE and the OPA failed to give reasons and explanations of the FIT ranking process to the Investor*
783. On June 9, 2011, Michael Bernstein, President and CEO of Capstone Infrastructure Corp., contacted David Lindsay, Deputy Minister of Energy, on behalf of Mesa Power Group to request a call or a meeting to discuss the June 3, 2011 Directive, the Rules change, and Mesa's project rankings.<sup>894</sup>
784. Several days later, on June 13, 2011, Chris Benedetti of Sussex Strategy Group, contacted Shawn Cronkwright, OPA Director, on behalf of Mesa to request a meeting to clarify the information used by the OPA to develop the rankings.<sup>895</sup>
785. On June 15, 2011, Michelle Wasylyshen of Sussex Strategy Group contacted Sue Lo, Assistant Deputy Minister of the Renewables and Energy Efficiency Division at the Ministry of Energy to reiterate Mesa's concerns with the OPA's rankings.<sup>896</sup>
786. Mesa repeatedly attempted to contact the OPA after the OPA failed to give clear explanation with regards to the Investor's rankings in their response letter of June 17, 2011.
787. On June 17, 2011, immediately upon receiving the OPA's response to its May 20, 2011 letter, Mesa contacted Mr. Cronkwright again, to request a meeting to clarify the FIT ranking criteria assessment.<sup>897</sup>

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<sup>893</sup> Letter from Shawn Cronkwright, Ontario Power Authority, to Mark Ward, Mesa Power Power Group LLC, Charles Edey, Leader Resources Services Corp. and Michael Bernstein, Capstone Infrastructure Corp., June 17, 2011. The OPA claimed in their response letter that "Consistent with all OPA procurement process, once the evaluation process has been completed, the results are kept strictly confidential." (*Investor's Schedule of Exhibits at C-0195*)

<sup>894</sup> Email from Samira Viswanathan (Ministry of Energy) to Sunita Chander (Ministry of Energy), June 10, 2011 (*Investor's Schedule of Exhibits at C-0096*)

<sup>895</sup> Email from Chris Benedetti (Sussex Strategy) to Shawn Cronkwright (OPA), June 13, 2011 (*Investor's Schedule of Exhibits at C-0162*)

<sup>896</sup> Email from Michelle Wasylyshen to Sue Lo, June 15, 2011 (*Investor's Schedule of Exhibits at C-0226*)

<sup>897</sup> CWS - Robertson, at para. 46.

788. On June 21, 2011, Chris Benedetti told Mesa that the Ministry of Energy and the Premier's Office "supports sitting down with the OPA as soon as possible to ensure that no mistakes were made (in advance of award contracts)." <sup>898</sup>
789. On June 22, 2011, Mr. Cronkwright told Mesa that the OPA was offering FIT contracts and it would be unfair to give Mesa special access. He stated that the OPA is not accepting meetings from proponents in the Bruce or West of London Region in connection with this process, <sup>899</sup> so the OPA did not want to meet with Mesa.
790. On July 4, 2011, FIT Contracts were awarded. On the same day, Mark Ward, Managing Director of Mesa wrote to Colin Anderson, Minister Brad Duguid, Minister Carol Mitchell, Minister Sandra Pupatello, and Premier Dalton McGuinty to express Mesa's shock at the FIT announcement. Specifically, Mesa asked how it could be possible for "one generator, with a majority of original applications never even on Bruce area lines could be awarded six contracts totalling more than 460 MW." Mesa again requested a meeting with the government departments involved to discuss the TTD and Arran projects in the context of the FIT contracts awarded and Mesa's current and future investments in Ontario. Mesa was never given the courtesy of a meeting, or any reason or explanation of why it did not receive a contract, or the opportunity to make any representations about the decision being in error. <sup>900</sup> Indeed, for TTD and Arran, Mesa did not even receive notice that it had not received contract offers. <sup>901</sup>
791. On July 7, 2011, The Ministry of Energy prepared a draft meeting note with an agenda item to discuss and "alleged mistake in the OPA priority rankings affecting the Arran Wind Energy and Twenty Two Degree Energy projects." <sup>902</sup> However, on July 8, 2011, Mesa was told that Minister Duguid had no desire to meet. <sup>903</sup>
792. Ten days later, on July 14, 2011, the OPA wrote to Mesa advising that it too would not meet. <sup>904</sup> Nor did the Ministry suggest any alternative channel or means whereby Mesa might pursue answers to its concerns.

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<sup>898</sup> CWS - Robertson, at para. 46.

<sup>899</sup> CWS - Robertson, at para. 48.

<sup>900</sup> Letter from Mark Ward to Colin Anderson, July 4, 2011 (*Investor's Schedule of Exhibits at C-0186*); Letter from Mark Ward to Minister Brad Duguid, July 4, 2011 (*Investor's Schedule of Exhibits at C-0177*); Letter from Mark Ward to Minister Carol Mitchell, July 4, 2011 (*Investor's Schedule of Exhibits at C-0175*); Letter from Mark Ward (Mesa) to Minister Sandra Pupatello (Ministry of Economic Development and Trade), July 4, 2011 (*Investor's Schedule of Exhibits at C-0169*); Letter from Mark Ward (Mesa) to Premier Dalton McGuinty, July 4, 2011 (*Investor's Schedule of Exhibits at C-0025*)

<sup>901</sup> CWS – Robertson, at para.53.

<sup>902</sup> Ministry of Energy's draft meeting note prepared for a meeting with Leader Resources, July 7, 2011 (*Investor's Schedule of Exhibits at C-0189*)

<sup>903</sup> CWS - Robertson, at para. 52.

<sup>904</sup> Letter from Colin Andersen to Mark Ward, July 14, 2011 (*Investor's Schedule of Exhibits at C-0205*)

x. *Unfair ranking of projects*

793. The FIT Rules set out the basis for the ranking of projects. The "launch period" of the FIT program was from October-November 2012, during which time the first FIT applications were accepted.<sup>905</sup> Applications submitted within 60 days of Program Launch were required to provide detailed information, and were to be scored on four criteria set out in Section 13.4 of the Rules<sup>906</sup>:

- a) Whether the project was exempt from the Renewable Energy Approval Process.<sup>907</sup>
- b) Whether the proponent guaranteed access to major equipment.<sup>908</sup>
- c) Expertise in wind power development,<sup>909</sup> and
- d) Financial Capacity.<sup>910</sup>

794. The Rules also set out the steps for ranking launch period applications:

- a) First, projects were ranked based upon the number of days that they are willing to reduce the time between the Contract Date and the Milestone Date for Commercial Operation of the project (defined in the rules as "COD Acceleration Days"). The COD Acceleration Days were subject to a minimum of zero days and a maximum of 365 calendar days.
- b) If two or more launch applications proposed the same number of COD Acceleration Days, projects were ranked on Criteria Score. The Criteria Score was calculated by adding the COD Acceleration Days (0-365 calendar days) plus 90 calendar days for each point awarded to the project under the four criteria.
- c) Evidence of access rights date was to be used to break a tie between projects with the same COD Acceleration Days and with the same Criteria Score. Launch applications with the earliest Access Rights Date were ranked in priority.<sup>911</sup>

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<sup>905</sup> FIT Rules version 1.5 Section 13 ("Program Launch") sets out the information relevant to applications submitted during that time frame (*Investor's Schedule of Exhibits at C-0005*)

<sup>906</sup> These four criteria are set out at Section 13.4(a) of FIT Rules Version 1.1. Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009 (*Investor's Schedule of Exhibits at C-0258*)

<sup>907</sup> These four criteria are set out at Section 13.4(a) of FIT Rules Version 1.1. Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009 (*Investor's Schedule of Exhibits at C-0258*)

<sup>908</sup> The Domestic Content Grid is listed under Exhibit D of the FIT Rules. Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009 (*Investor's Schedule of Exhibits at C-0258*)

<sup>909</sup> These four criteria are set out at Section 13.4(a) of FIT Rules Version 1.1. Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009 (*Investor's Schedule of Exhibits at C-0258*)

<sup>910</sup> Ontario Power Authority, Feed-In-Tariff Program, FIT Rules Version 1.0, September 24, 2009, Section 13.4 (*Investor's Schedule of Exhibits at C-0260*)

<sup>911</sup> The FIT Rules define Access Rights Dates as the date that access rights were first acquired by the applicant or the rights to the location were first acquired by the applicant. FIT Standard Definitions, Version 1.1 (*Investor's Schedule of Exhibits at C-0416*)

- d) If two or more launch application proposed the same number of COD Acceleration Days, had the same Criteria Score, and had the same Access Rights Date, the time stamp was to be assigned in relative priority to one another by random draw.
795. This ranking process only applied to launch applications. Projects submitted after the launch period were ranked according to their timestamp.
796. Each project received a province wide ranking, and was then organized by transmission region and received a particular ranking for its transmission region.
797. When Mesa submitted its applications for the TTD and Arran projects in November 2009, Mesa fulfilled all the requirements for [REDACTED] [REDACTED] [REDACTED] [REDACTED] Because Mesa was, as a result, [REDACTED] [REDACTED] [REDACTED] [REDACTED]
798. For those projects with the same COD Acceleration days and criteria score, the projects are ranked by the earliest lease date which acted as a tie breaker.<sup>916</sup> Mesa's lease dates for the TTD and Arran projects were November 3, 2003<sup>917</sup> and July 9, 2006,<sup>918</sup> respectively.

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<sup>912</sup> TTD Wind Project application, Confirmation Letter, at p. 103 (*Investor's Schedule of Exhibits at C-0364*) ; Arran Wind Project FIT Application, December 2, 2009, at p. 102 (*Investor's Schedule of Exhibits at C-0129*)

<sup>913</sup> Leader Resources, the developers of Mesa's projects, have more than five years of experience developing and planning similar facilities. See FIT Application, Arran Wind Project, November 25, 2009 (*Investor's Schedule of Exhibits at C-0129*) and FIT Application, TTD Wind Project, November 25, 2009 (*Investor's Schedule of Exhibits at C-0364*)

<sup>914</sup> Mesa provided the financial statements for both GE and Mesa, which indicated sufficient financial ability. See FIT Application, Arran Wind Project, November 25, 2009 (*Investor's Schedule of Exhibits at C-0129*) and FIT Application, TTD Wind Project, November 25, 2009 (*Investor's Schedule of Exhibits at C-0364*)

<sup>915</sup> Mesa never received confirmation of this calculation. Mesa wrote to the OPA on May 20, 2011 requesting a confirmation of their understanding of the ranking system and confirmation that the lease date stated on their application was the lease date used by the OPA. Letter from Mark Ward (Mesa), Chuck Edey (Leader Resources) and Michael Bernstein (Capstone Infrastructure) to Shawn Cronkwright (OPA), May 20, 2011 (*Investor's Schedule of Exhibits at C-0098*) ; The OPA responded to this letter on June 17, 2011, and confirmed that Mesa's understanding of the ranking system was correct, but did not confirm that their calculation of COD acceleration days was correct (*Investor's Schedule of Exhibits at C-0195*)

<sup>916</sup> Where projects have the same COD Acceleration days, the projects are ranked by the earliest lease date. Section 13.5(c) of the FIT Rules version 1.1 states: "Where two or more Launch Applications propose the same number of COD Acceleration days, those Launch Applications will be assigned a Time Stamp in relative priority to one another such that Launch Applications with an earlier Access Rights Date shall be assigned an earlier Time Stamp than those Launch Applications with a later Access Date." [emphasis added] Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009 (*Investor's Schedule of Exhibits at C-0258*)

<sup>917</sup> Agreement To Grant Exclusive License and Option for Exclusive Easement to Twenty Two Degree Energy Corp., between Twenty Two Degree Energy Corp. and Frederick Dirk Van Maar and Arlene Joyce Van Maar, November 3, 2003 (*Investor's Schedule of Exhibits at C-0265*)

799. The initial project rankings were issued on December 21, 2010.<sup>919</sup> Mesa projects Twenty Two Degrees and Arran were ranked at 8 and 9 respectively for the Bruce Region, and in both cases were within the top 700 MW of allocated capacity.
800. Canada has failed to produce communications between the Ministry of Energy and the OPA addressing the concerns raised by Mesa over its project rankings. The Investor has only seen a draft of a meeting note that was prepared in response to its complaint.<sup>920</sup> No final version of this note has been produced to Mesa by Canada.
- xi. The 2010 project ranking under the FIT Program was arbitrary*
801. Mesa's ranking score was 8th for TTD Wind Energy project, and 9th for Arran Wind Energy project, in the Bruce transmission area.<sup>921</sup> These ranks were ostensibly determined on the project's number of COD (Commercial Operation Date) acceleration days. Mesa's projects had the following calculated COD days:
- a) [REDACTED] out of 735 possible acceleration days, for its TTD Wind Energy project,<sup>922</sup> and
  - b) [REDACTED] out of 735 possible acceleration days, for its Arran Wind Energy project.<sup>923</sup>
802. Other projects, such as Skyway 127, were given higher rankings than Mesa, although they did not have any qualifications that exceeded those of Mesa.<sup>924</sup>
803. [REDACTED]
804. However, both of Mesa's projects [REDACTED]. Mesa's lease dates for TTD and Arran were November 3, 2003<sup>925</sup> and July 9, 2006<sup>926</sup> respectively. Skyway 127's earliest lease date was July 24, 2008.<sup>927</sup>

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<sup>918</sup> Agreement to Grant Exclusive Licence and Option for Exclusive Easement from Paul Faust to Leader Resources Corp., July 19, 2006 (*Investor's Schedule of Exhibits at C-0072*)

<sup>919</sup> Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010 (*Investor's Schedule of Exhibits at C-0073*)

<sup>920</sup> Ministry of Energy Meeting Note on Leader Resources, July 7, 2011 (*Investor's Schedule of Exhibits at C-0189*). These documents are covered by Investors Document Request No. 47 (relating to the Investor's ranking and Criteria Score) and Document Request No. 48 (relating to Mark Ward's letter of May 20, 2011).

<sup>921</sup> FIT CAR Priority Ranking by Region, June 3, 2011. 2011 (*Investor's Schedule of Exhibits at C-0225*)

<sup>922</sup> Online FIT Application for Twenty Two Degree, June 17, 2011 (*Investor's Schedule of Exhibits at C-0155*)

<sup>923</sup> Online OPA FIT application, Arran Wind Energy (*Investor's Schedule of Exhibits at C-0188*)

<sup>924</sup> Option to Lease and Easement Agreement, between Skyway 127 Wind Energy Inc. and Ryan and LeeAnn Wolfe, July 24, 2008 (*Investor's Schedule of Exhibits at C-0167*)

<sup>925</sup> Agreement To Grant Exclusive License and Option for Exclusive Easement to Twenty Two Degree Energy Corp., between Twenty Two Degree Energy Corp. and Frederick Dirk Van Maar and Arlene Joyce Van Maar, November 3, 2003 (*Investor's Schedule of Exhibits at C-0265*)

805. Therefore, the OPA failed to apply its own Rules regarding what was to occur in the event of a tie of COD acceleration days, and arbitrarily ranked TTD and Arran below Skyway 127.
806. The erroneous ranking of Mesa's TTD and Arran projects was done in an unfair and arbitrary manner, resulting in Mesa not receiving a FIT contract.
- xii. Failure to operate the FIT Program fairly and transparently was contrary to Mesa's reasonable and legitimate expectations*
807. When Mesa made its application to the FIT Program it expected to take part in a fair government program, regulated and administered according to the FIT Rules. In addition to the Rules of the FIT Program, Mesa relied on the governing principles of the OPA, as stated in section 25.31 of the *Electricity Act, 1988*:
- Procurement processes and selection criteria must be fair and clearly stated ... open and accessible to a broad range of interested bidders. To the greatest extent possible, the procurement process must be a competitive process. There must be no conflicts of interest or unfair advantage allowed in the selection process.<sup>928</sup>
808. This requirement was emphasized by a commitment from the OPA that was written into every version of the FIT Rules:
- The fundamental objective of the program is to facilitate the increased development of Renewable Generating Facilities...via a standardized, open and fair process.<sup>929</sup>
809. Mesa expected, and was entitled to expect a stable, predictable, and standardized FIT Program based on the FIT Rules for the process and on the OPA's stated objectives.
810. The OPA promised adherence to also listed guiding principles for the ECT assessment, that reinforced Mesa's expectation of a fair and transparent process in accord with the FIT Rules. In a presentation by the OPA to proponents on May 19, 2010, the OPA told proponents that guiding principles for the Economic Connection Test Process were:
- a) Consistency - can it be applied equally across projects and locations?
  - b) Simplicity - can it be manageably applied during the time frame allotted for the ECT?
  - c) Transparency - can it be easily understood by stakeholders?

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<sup>926</sup> Agreement to Grant Exclusive Licence and Option for Exclusive Easement from Paul Faust to Leader Resources Corp., July 19, 2006 (*Investor's Schedule of Exhibits at C-0072*)

<sup>927</sup> Option to Lease and Easement Agreement, between Skyway 127 Wind Energy Inc. and Ryan and LeeAnn Wolfe, July 24, 2008 (*Investor's Schedule of Exhibits at C-0167*)

<sup>928</sup> *Electricity Act, 1998*, Ontario Regulation 426/04, Ontario Power Authority Procurement Process (*Investor's Schedule of Exhibits at C-0401*)

<sup>929</sup> Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 1.1 (*Investor's Schedule of Exhibits at C-0258*); Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 2.0 comparison to draft, August 10, 2012, Section 1.1 (*Investor's Schedule of Exhibits at C-0060*)



- d) Balancing Policy Objectives - does it appropriately balance generators' right to connect and provincial rate payer impact?<sup>930</sup>
811. Mesa also expected that any changes to the ECT process as set out in the FIT Rules would be promptly and clearly communicated to FIT proponents. The OPA itself recognized its responsibility in this regard, and in the course of its consideration of changes to the ECT process in early 2011, the OPA acknowledged that "FIT Rules and communications will need to be coordinated to reflect the change to the ECT process".<sup>931</sup> It also acknowledged that failure to discharge this responsibility, or to otherwise act in a manner that was "inconsistent with FIT principles", would "likely trigger legal action against the Government and the OPA".<sup>932</sup>
812. Based on the FIT Rules, Mesa expected ECT assessments to be carried out once every six months. However, the ECT assessments were never carried out, notwithstanding the importance Mesa and its competitor proponents placed in them, and the repeated representations of the OPA that they would be carried out.<sup>933</sup>
813. Mesa also relied on the regional connection points the OPA had set out, and reasonably expected that they would be the basis for dividing the transmission grid and awarding FIT contracts. However, the FIT Rules were discriminatorily and without notice changed to permit applicants to change connection points between regions instead of only within them.<sup>934</sup>
814. Canada did not produce any e-mails, or internal documents, between the Ministry of Energy and FIT Proponents regarding their respective FIT Rankings. As a result, there is no evidence about the process taken by Ontario to develop or change the FIT Program rankings.<sup>935</sup> Relevant documents would include the following proponents:
- a) NextEra
  - b) Pattern
  - c) Windrush
  - d) Suncor

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<sup>930</sup> Ontario Power Authority presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010, at p. 18 (*Investor's Schedule of Exhibits at C-0088*)

<sup>931</sup> Ontario Power Authority presentation, "Economic Connection Test (ECT) & Program Evolution, March 21, 2011, at p. 13 (*Investor's Schedule of Exhibits at C-0170*)

<sup>932</sup> Ontario Power Authority presentation, "Economic Connection Test (ECT) & Program Evolution, March 21, 2011, at p. 10 (*Investor's Schedule of Exhibits at C-0170*)

<sup>933</sup> FIT Rules, Version 1.1, September 30, 2009, Section 5.4 (a) states "The Economic Connection Test will be run for each region of the Province at least every six months." (*Investor's Schedule of Exhibits at C-0258*) and Letter from Chris Bentley (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, April 5, 2012 (*Investor's Schedule of Exhibits at C-0052*)

<sup>934</sup> FIT Rules, Version 1.5, June 3, 2011 (*Investor's Schedule of Exhibits at C-0005*)

<sup>935</sup> This was ordered in response to Investor's Document Request No. 8.

e) Northland

815. Secret preferential treatment was also given to the Korean Consortium, which undermined Mesa's expectation of a stable business and legal environment. When Mesa made its investments in Ontario, it expected that its investment would be governed by the Rule of Law, without secrets and hidden agendas that would undermine the investment.
816. Mesa now knows, that while the FIT regulatory process was purportedly in operation, a secret side-deal was made with the Korean Consortium, and the OPA secretly was amending the FIT Program to accommodate NextEra's projects to the detriment of Mesa's. These actions stand in stark contrast to the FIT Program's stated objective of a "standardized, open and fair process" – which is how an investor would expect a regulatory process to unfold in Ontario.<sup>936</sup> A comparison of how Mesa, NextEra, and the Korean Consortium were each treated shows that there was nothing open, honest or fair in how the Province and its agencies dealt with them.
817. Ontario chose to give preferential treatment to the Korean Consortium for political purposes, as the *GEIA* had long been about the Ontario government's political priorities. For example, when the construction of a wind tower plant in Windsor, Ontario, which was intended to supply *GEIA* projects, announced in December 2010, Ontario's Finance Minister Dwight Duncan effused that, "The McGuinty government's energy plan is working."<sup>937</sup> In September 2011 Premier McGuinty campaigned in London, Ontario on the jobs he said would be created by the *GEIA*, and warned that his opponent in the upcoming election "will kill those jobs."<sup>938</sup> When Mesa invested in Ontario it did not expect that its competitors would be given special preferential treatment because of provincial government politics, contrary to the NAFTA, and contrary to the Rule of Law enshrined in the NAFTA.

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<sup>936</sup> Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, Section 1.1 (*Investor's Schedule of Exhibits at C-0258*); Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 2.0 comparison to draft, August 10, 2012, Section 1.1 (*Investor's Schedule of Exhibits at C-0060*)

<sup>937</sup> Ministry of Energy, News Release, "New Wind Tower Plant Creates 700 Jobs in Windsor", December 1, 2010 (*Investor's Schedule of Exhibits at C-0013*)

<sup>938</sup> News Article, by Dale Carruthers, The London Free Press, "McGuinty plays his jobs card in London", September 9, 2011 (*Investor's Schedule of Exhibits at C-0130*)

## PART FIVE: JURISDICTION

818. Canada has raised a jurisdictional question about the time the Notice of Arbitration in this proceeding was submitted, and contends that it has not consented to the arbitration of the Investor's claim relating to measures that first arose after April 4, 2011 (six months before the filing of the Notice of Arbitration).<sup>939</sup>
819. Canada also contends that the parties did not hold a consultation under NAFTA Article 1118.<sup>940</sup> In support of this contention, Canada filed selective documents. But Canada omitted to disclose the two key originating documents, which show that the request for Article 1118 consultations was made by the Investor many months earlier.
820. In any event, Canada's contentions bare no relationship to the measures which are at issue in this arbitration. Canada has simply contested dates within a series of continuing wrongful acts, and outrageously presumes to invite this Tribunal to decline to exercise jurisdiction because Canada continued in a course of conduct of internationally wrongful behaviour.
821. The measures at issue in this arbitration began in November 2009, once Mesa made an investment in Ontario<sup>941</sup> and became subject to measures which were inconsistent with Canada's NAFTA obligations. The fact that Canada did not take steps to stop or prevent the wrongful treatment of Mesa cannot be a basis for making the dispute resolution provisions of NAFTA Chapter Eleven ineffective. On the contrary, the failure of Canada to stop or prevent wrongful governmental actions is a reason for this Tribunal to give effect to the dispute resolution procedures of the NAFTA.
822. In Document Request No. 70, the Investor requested documents created or received by "government entities" specifically relating to 12 individuals working at the Ministry of Energy. On September 13, 2013, Canada only produced approximately 150 documents in response to the Investor's Request, the majority of which were emails. The Investor's Request was limited to those individuals who were identified as the likely key players in the development and implementation of the FIT program.
823. Given the errors and irregularities with the management and operation of the FIT Program that have been described, the fact that only 150 documents were produced in

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<sup>939</sup> Government of Canada's Objections to Jurisdiction, 3 December 2012 at para. 17.

<sup>940</sup> Government of Canada's Objections to Jurisdiction, 3 December 2012 at paras. 15 - 16.

<sup>941</sup> Certificate of Incorporation for Arran Wind Project ULC (*Investor's Schedule of Exhibits at C-0049*); Certificate of Incorporation for TTD Wind Project ULC under the *Alberta Business Corporations Act*, November 17, 2009 (*Investor's Schedule of Exhibits at C-0087*) The remaining two wind farms were incorporated on April 6, 2010. Certificate of Incorporation for for the Summerhill Project ULC, under the *Alberta Business Corporations Act*, April 6, 2010 (*Investor's Schedule of Exhibits at C-0041*); Certificate of Incorporation for North Bruce Project, ULC, April 6, 2010 (*Investor's Schedule of Exhibits at C-0050*)

response to a request for documents relating to 12 individuals is surprising. For example, it appears that only one document related to Tamar Heisler was produced (although not in relation to Request No. 70) and only a very few documents related to Deputy Minister Lindsay were produced, despite his monthly meetings with the OPA.

824. NAFTA Article 102(2) provides that the NAFTA is to be interpreted in light of its objectives in Article 102(1). Paragraph (e) of Article 102(1) confirms the NAFTA Parties objective to:

Create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes.

825. Canada's plenary consent to arbitration is contained expressly in Article 1120 of the NAFTA. No further consent from Canada is needed. Furthermore, placing non-bona fide obstacles in the way of arbitration is highly inappropriate, and is a justifiable basis for imposing serious cost penalties and moral damages on Canada.

826. In *Procedural Order No. 3*, the Tribunal determined that Canada's jurisdictional questions would be heard with the merits of the Investor's claim.

827. The Tribunal subsequently determined that the substance of Canada's jurisdictional questions was to be discerned from the pleadings exchanged by the disputing parties. Canada, however, has refused to file a Statement of Defense in this arbitration. As a result, the Investor can only surmise the basis for Canada's mischief making.

## **I. THE LEGAL CONTEXT**

### **A. Interpretation**

828. NAFTA Article 102(2) requires that the NAFTA be interpreted in light of its objectives, which are set out in NAFTA Article 102(1), and include, in particular to:

e. Create effective procedures ... for the resolution of disputes

829. Article 31 of the *Vienna Convention of the Law of Treaties* compels the same interpretive mandate.

830. In this regard, the *Ethyl* Tribunal said:

Initially, there is an issue as to whether the phrase "events giving rise to a claim" is intended to include all events (or elements) required to constitute a claim, or instead some, at least, of the events leading to crystallization of a claim. The argument is made that the object and purpose of NAFTA, set forth in its Article 102(1)(c) and (e), to "increase substantially investment opportunities" and at the same time to "create effective procedures ... for the resolution of disputes" would not be best served by a rule absolutely mandating a six-month respite following the final effectiveness of a measure until the investor may proceed to arbitration. Had the NAFTA

- parties desired such rigidity, it is contended, they explicitly could have required passage of six months "since the adoption or maintenance of a measure giving rise to a claim."<sup>942</sup>
831. Similarly, in *Pope & Talbot*, where Canada objected to the Investor's inclusion of a claim relating to a new stumpage fee that had not been specifically listed in the Statement of Claim,<sup>943</sup> the Tribunal determined that the Investor was challenging the statutory regime as a whole, and that the challenge of the new fee was not a "'new' claim, but relate[d] instead to a new element that ha[d] been recently grafted onto the overall Regime."<sup>944</sup> The Tribunal said:

Lading [the NAFTA dispute resolution] process with a long list of mandatory preconditions, applicable without consideration of their context, would defeat [the] objective, [of "provid[ing] a mechanism for the settlement of investment disputes that assures 'due process' before an impartial tribunal"], particularly if employed with draconian zeal.<sup>945</sup>

It must be remembered in considering the positions taken by the State Parties, that if their arguments prevailed, it would still be open to the Investor to instate a new claim to be handled by a new tribunal. It is difficult to see how the aims of Article 1115 would be furthered by resort to this duplication of effort.<sup>946</sup>

832. In Canada's attempt to frustrate this arbitration, Canada refers to two actions which were mentioned in the Notice of Arbitration, but which were not in the Notice of Intent, because they occurred after the filing of the Notice of Intent.<sup>947</sup> The two actions are:
- a) that Ontario withdrew its ability to terminate FIT contracts for cause;<sup>948</sup>
  - b) that Ontario extended the term of the special preferences given to the Korean Consortium by a year.<sup>949</sup>

Neither of these two events constituted a specific new breach of the NAFTA, but are relevant to the evaluation of the continuing breaches at issue.

833. There is no prohibition in the NAFTA against the reference to relevant facts which relate to the regulatory scheme in dispute in this arbitration. Reference to those facts does not affect the jurisdiction of this Tribunal in any way. Neither of these actions constitute a new breach of the NAFTA, but both are relevant to the quantification of damages in this arbitration. And, even if these actions did constitute new breaches of the NAFTA, the

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<sup>942</sup> *Ethyl Corp* - Jurisdiction Award, at para. 83 (***Investor's Schedule of Legal Authorities at CL-013***)

<sup>943</sup> *Pope & Talbot Inc v. the Government of Canada*, Award Concerning the Motion by Government of Canada Respecting the Claim based upon imposition of the "Super Fee" (7 August 2000) ("*Pope & Talbot* - Award "Super Fee"), at para. 6 (***Investor's Schedule of Legal Authorities at CL-156***)

<sup>944</sup> *Pope & Talbot* - Award "Super Fee", at para. 25 (***Investor's Schedule of Legal Authorities at CL-156***)

<sup>945</sup> *Pope & Talbot* - Award "Super Fee", at para. 26 (***Investor's Schedule of Legal Authorities at CL-156***)

<sup>946</sup> *Pope & Talbot* - Award "Super Fee", at para. 26, footnote 4 (***Investor's Schedule of Legal Authorities at CL-156***)

<sup>947</sup> Government of Canada's Objections to Jurisdiction, 3 December 2012, at para. 14.

<sup>948</sup> Investor's Notice of Arbitration, 4 October 2011, at para. 36.

<sup>949</sup> Investor's Notice of Arbitration, 4 October 2011, at para. 37.

Tribunal would still have jurisdiction over those breaches because they arise from the same statutory and regulatory regime as the rest of the claim.<sup>950</sup>

834. In effect, Canada is asking this Tribunal to interpret Article 1120 as requiring the Investor to wait six months after *all* of its possible claims have materialized,<sup>951</sup> rather than six months after "*a* claim" has arisen, as Article 1120 plainly states is sufficient.
835. Canada's purported interpretation is not only contrary to the interpretive mandate of NAFTA Article 102 and Article 31 of the *Vienna Convention of the Law of Treaties*, it would be absurd to require an Investor to wait six months from every subsequent breach of the NAFTA before it could bring a claim in respect of a prior breach. The result would be that continuous and ongoing breaches would in effect bar a tribunal from ever deciding a claim. As long as a the NAFTA Party kept committing wrongful acts against an Investor, the Investor could never launch a claim. The NAFTA party could simply avoid accountability for past wrongs by continuing to commit new wrongs.
836. Christoph Schreuer eloquently expresses the point in *The Oxford Handbook of International Investment Law*:

It would seem that the question of whether a mandatory waiting period is jurisdictional or procedural is of secondary importance. What matters is whether or not there was a promising opportunity for a settlement. There would be little point in declining jurisdiction and sending the parties back to the negotiating table if these negotiations are obviously futile. Negotiations remain possible while the arbitration proceedings are pending. Even if the institution of arbitration was premature, compelling the claimant to start the proceedings anew would be a highly uneconomical solution. A better way to deal with non-compliance with a waiting period may be a suspension of proceedings to allow additional time for negotiations if these appear promising.<sup>952</sup>

#### **B. The Legal Regime of Articles 1120, 1119 and 1118**

837. Canada also contends that the express provisions of Articles 1118 and 1119 are simply duplicated by implication into Article 1120. Not only does that serve no practical, logical or conceptual purpose, the proposition is directly contrary to the plain text of the NAFTA and the deliberate choice of the NAFTA Parties to draft Articles 1118 through 1120 as distinct requirements, each providing separately for consultation (in Article 1118), notice of dispute (in Article 1119) and a cooling-off period (in Article 1120).

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<sup>950</sup> *Pope & Talbot - Award "Super Fee"*, at para. 25 (*Investor's Schedule of Legal Authorities at CL-156*)

<sup>951</sup> Government of Canada's Objections to Jurisdiction, 3 December 2012, at para. 23.

<sup>952</sup> Christoph Schreuer, "Consent to Arbitration" in P. Muchlinski, F. Ortino, C. Schreuer, eds., *The Oxford Handbook of International Investment Law*, (New York: Oxford University Press, 2008), Ch. 21 ("Schreuer (2008)"), at p. 846 (*Investor's Schedule of Legal Authorities at CL-157*)

*i. Article 1119 Notice Requirement*

838. Notice to the respondent state is a pre-requisite to initiating of a NAFTA claim. The Investor satisfied this requirement, which Canada does not dispute. As required by Article 1119, the Notice of Intent was issued on July 6, 2011.
839. The United States *Statement of Administrative Action*, which was made in connection with the implementation of the NAFTA, and which sets out the U.S. understanding of the NAFTA at the time of implementation, confirms Article 1119 to be the notice provision:
- Article 1118 encourages the settlement of claims through consultation or negotiation. Articles 1119 and 1120 set forth the process leading up to the submission of a dispute to an arbitral panel.
- Article 1119 provides that an investor must provide notice of its intention to submit a claim to arbitration at least 90 days before doing so, and specifies the Content of such notice. Article 1120 provides that once 180 days have elapsed from the events giving rise to a claim, the investor may submit the claim for arbitration...<sup>953</sup>
840. In purporting to have not received requisite notice, Canada conflates the Article 1119 notice requirement with the cooling-off period requirement of Article 1120. The same conflation was resoundingly rejected by the *Ethyl* Tribunal.<sup>954</sup>
841. NAFTA Article 1120 does not impose an additional notice requirement. It is only Article 1119 that requires "written notice of [an Investor's] intention to submit a claim to arbitration".
842. In Article 1119, the NAFTA Parties agreed to a 90 day notice period under Article 1119. Nothing more. The Investor's Notice of Arbitration was filed on October 4, 2011, 90 days after it issued its Notice of Intent on July 6, 2011.

*ii. Article 1118 Consultation Issue*

843. Immediately following the Notice of Intent, the Investor, on July 6, 2011, invited Canada to engage in consultations.<sup>955</sup>
844. Although NAFTA Article 1118 does not specify a time frame for consultation, Canada acknowledges that consultation generally occurs after notice.<sup>956</sup>

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<sup>953</sup> *The North American Free Trade Agreement Implementation Act*, Statement of Administrative Action ("*NAFTA - Statement of Administrative Action*"), at p. 146 (***Investor's Schedule of Legal Authorities at CL-158***)

<sup>954</sup> *Ethyl Corp - Jurisdiction Award*, at paras. 83-85 (***Investor's Schedule of Legal Authorities at CL-013***)

<sup>955</sup> Letter from Appleton & Associates to Myles J. Kirvan, Deputy Minister of Justice and Deputy Attorney General of Canada, July 6, 2011 (***Investor's Schedule of Exhibits at C-0100***); L Letter from Appleton & Associates to Premier Dalton McGuinty, July 6, 2011 (***Investor's Schedule of Exhibits at C-0099***)

<sup>956</sup> It is possible, of course, for consultation and negotiations to happen before a NOI as part of an effort by the Investor to resolve the issues underlying the claim.

845. The logical practicality is affirmed by the NAFTA Free Trade Commission which stated:

Efforts to settle NAFTA investment claims through consultation or negotiation have generally taken place only after the delivery of the notice of intent. The notice of intent naturally serves as the basis for consultation or negotiations between the disputing investor and the competent authorities of a Party.<sup>957</sup>

846. While Canada has provided a listing of its correspondence with respect to consultations in paragraphs 16 and 37 of its Submission, it omitted to disclose to the Tribunal that it was the Investor who initiated these privileged discussions. Canada also omitted to provide to the Tribunal a listing of the responding letters from the Investor to Canada's letters.<sup>958</sup> Instead, Canada chose to deliberately mischaracterize the matter. The Investor and Canada exchanged a series of privileged correspondence under the terms of NAFTA Article 1118, but no consultations resulted as a result of a disagreement between the Investor and Canada over the lack of confirmation that Canada's delegation would include the persons actually responsible for the measures in dispute by the Government of Ontario. As the Investor repeatedly stated in the correspondence, it wanted the consultations between the parties to be meaningful.

847. The NAFTA parties were careful to ensure that each of them confirmed their full respect for their constitutions. NAFTA Article 601 states:

**Article 601: Principles**

1. The Parties confirm their full respect for their Constitutions.

848. The constitutional division of powers in Canada is ordered in a way that any meaningful discussion about the settlement of the underlying dispute would require the active involvement of responsible officials of the Government of Ontario. The Canadian Federal Government was not constitutionally competent to offer the kind of undertakings that might lead to the satisfaction of the Investor's concerns.

849. Indeed, Canada's own statements about document production acknowledge that Ontario has not provided Canada with timely production of documents about this dispute, even two years after the Notice of Intent in this matter was filed. Clearly, it would not be possible to have a meaningful exchange of information in any NAFTA Article 1118 consultation without a meaningful presence from the Government of Ontario

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<sup>957</sup> *Re Notices of Intent to Submit a Claim to Arbitration* (2003) (NAFTA Free Trade Commission) ("*NOI to Submit a Claim*"), at para. 16 (***Investor's Schedule of Legal Authorities at CL-159***)

<sup>958</sup> Letter from Barry Appleton to John O'Neil, July 13, 2011 (***Investor's Schedule of Exhibits at C-0103***); Letter from Barry Appleton to John O'Neil, July 14, 2011 (***Investor's Schedule of Exhibits at C-0104***); Letter from Barry Appleton to Sylvie Tabet, September 23, 2011; and Letter from Barry Appleton to John O'Neil, December 28, 2011 (***Investor's Schedule of Exhibits at C-0114***)



850. In these circumstances, and failing any indication that the federal Government was prepared to offer monetary compensation, it was reasonable to adjudge that any consultation without the meaningful engagement of the Government of Ontario would be fruitless.

*iii. Article 1120 waiting period*

851. NAFTA Article 1120 imposes no additional notice or consultation requirement. It requires the investor to wait six months after the events which gave rise to a claim before filing a notice of arbitration. As affirmed by the *Feldman* Tribunal, it is simply a "cooling off" period:

Article 1120 (1) provides for a cooling-off period of six months between the events giving rise to a claim and the submission of the claim to arbitration.<sup>959</sup>

852. In its request for bifurcation in the *Grand River* case, the United States confirmed that it considered Article 1120 to be a "cooling-off" period, that is distinct from the notice period:

Article 1119 provides that a claimant must deliver a notice of intent identifying the challenged measures at least 90 days prior to submitting its claims to arbitration... Claimants also failed to observe the "cooling-off" period prescribed by Article 1120. Article 1120 requires that six months must elapse after the events giving rise to a claim before the claim may be submitted to arbitration. ...

The Tribunal should apply the notice and six-month waiting period requirements in accordance with their plain meaning.<sup>960</sup>

853. There is no issue that there are events that give rise to a claim that occurred more than six months prior to the filing of the Notice of Arbitration on October 4, 2011.

854. The only issue is whether the Tribunal can also consider acts and omissions that extend beyond that date. The events have been clearly set out in this Memorial and they demonstrate events that occurred more than six months before the arbitration that give rise to a claim.

855. In the *Ethyl* case, the Tribunal held that events giving rise to a claim could also include the knowledge of future events, such as pending legislation.<sup>961</sup> In this case, the Investor had concerns that the improper application of the ranking criteria to its projects would lead to a further loss. Similarly, the Investor had substantial concerns that the special

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<sup>959</sup> *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, *Interim Decision on Preliminary Jurisdictional Issues (December 6, 2000)* ("*Marvin Roy - Interim Decision on Jurisdiction*"), at para. 46 (***Investor's Schedule of Legal Authorities at CL-160***)

<sup>960</sup> *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, Request for Bifurcation of Respondent, 29 August 2005 ("*Grand River - Request for Bifurcation*"), at pp 7-8 (***Investor's Schedule of Legal Authorities at CL-161***)

<sup>961</sup> *Ethyl Corp - Jurisdiction Award*, paras. 87-88 (***Investor's Schedule of Legal Authorities at CL-013***)

treatment granted to the Korean Consortium would result in better treatment to the Korean Consortium and its partners who were competing with the Investor for Power Purchase Agreements.

**C. US-Ecuador BIT notice provision is not comparable to Article 1120**

856. Canada refers to two cases under the US-Ecuador BIT,<sup>962</sup> where tribunals declined jurisdiction over aspects of a claim that had taken place within six months of the submission of the claim to arbitration: *Burlington* and *Murphy*.<sup>963</sup> Those decisions, however, have no application to this arbitration, as the notice provisions of the US-Ecuador BIT and the NAFTA are completely different.
857. Professor Kenneth Vandeveld, in his treatise "*U.S. International Investment Agreements*", explains that the US-Ecuador BIT adopted the 1992 version of the standard US Model BIT as the basis for the US-Ecuador BIT.<sup>964</sup> Unlike the NAFTA, the only notice provision in the US-Ecuador BIT is contained in Article VI(3)(a), which states:
- 3.(a) Provided that...six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration [to the ICSID].<sup>965</sup>
858. The *Burlington* Tribunal explained that this provision serves both a notice and a consultation purpose:
- ...by imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, [...] effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an opportunity to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant has deprived the host State of that opportunity. That suffices to defeat jurisdiction.<sup>966</sup>

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<sup>962</sup> Government of Canada Objections to Jurisdiction, December 3, 2012, at paras. 26-27.

<sup>963</sup> *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (June 2, 2010) ("*Burlington* - Jurisdiction"), at para. 315 (***Investor's Schedule of Legal Authorities at CL-162***); *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (December 15, 2010) ("*Murphy* - Jurisdiction"), at paras. 149, 154, 155 (***Investor's Schedule of Legal Authorities at CL-163***)

<sup>964</sup> Kenneth Vandeveld, *U.S. International Investment Agreements*, (New York: Oxford University Press, 2009), extracts ("Vandeveld (2009)") (***Investor's Schedule of Legal Authorities at CL-118***) Professor Vandeveld notes that there are some minor modifications in this Treaty from the 1992 model treaty was that exceptions to MFN and national treatment were in a protocol. Otherwise, this BIT followed the 1992 model BIT.

<sup>965</sup> *The Treaty Between the United States of America and the Republic of Ecuador Concerning The Encouragement and Reciprocal Protection of Investment, With Protocol and a Related Exchange of Letters*, Signed at Washington on August 27, 1993 ("*US-Ecuador Treaty*") at Article VI(3)(a) (***Investor's Schedule of Legal Authorities at CL-165***)

<sup>966</sup> *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (June 2, 2010) ("*Burlington* - Jurisdiction"), at para. 315 (***Investor's Schedule of Legal Authorities at CL-162***)

859. The *Burlington* Tribunal reasoned that a dispute arises only when the host state is informed of the existence of the dispute and that notice periods are "designed precisely to provide the State with an opportunity to redress the dispute before the investor decides to submit the dispute to arbitration."<sup>967</sup> Similarly, the *Murphy* Tribunal focused on the importance of consultation and negotiations that could only occur after notice has been given.<sup>968</sup>
860. The *Burlington* case concerned an entirely different issue than whether acts and omissions that occurred within six months of the Notice of Arbitration are within the jurisdiction of the tribunal. The issue in *Burlington* was whether the language of various communications from the investor to the host state authorities was sufficient to give those authorities any notice of the existence of a dispute at least six months in advance of the filing of a claim. In *Burlington*, the holding on jurisdiction was premised on the Tribunal's finding that none of the earlier communications from the Claimant to the state gave the host state notice that a dispute existed regarding ANY act or omission violating ANY provision of the treaty.<sup>969</sup>
861. The *Murphy v. Ecuador* award also does not assist Canada. The basis of the finding concerning jurisdiction in relation to the cooling-off period was that the Claimant had not asserted any treaty breach in any communication to the respondent state six months prior to bringing the claim<sup>970</sup>. Nowhere in *Murphy* did the Tribunal suggest that the meaning of a six month cooling off period is that there is no jurisdiction to consider additional acts and omissions that occurred within that period, even where the Claimant has given clear notice of other acts and/or omissions giving rise to a claim more than six months before the filing. This is simply not addressed by the *Murphy* Tribunal.
862. As Professor Vandeveldel notes, the provision in the NAFTA Investment Chapter is completely different from the Model US BIT. The NAFTA "included an investment chapter that resembled, but in many respects differed from, the BITs".<sup>971</sup> Instead of one notice provision, into which time for consultation needed to be implied, the NAFTA provides for three separate and distinct requirements in Articles 1118, 1119 and 1120.
863. The essential purpose of Article VI (3)(a) in the US-Ecuador BIT is contained in Article 1119 of the NAFTA, which provides for the state to be informed of a dispute, so it can then collect information and engage in consultations as provided for in Article 1118.

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<sup>967</sup> *Burlington* - Jurisdiction, at paras. 316, 312 (*Investor's Schedule of Legal Authorities at CL-162*)

<sup>968</sup> *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (December 15, 2010) ("*Murphy* - Jurisdiction"), at paras. 149, 154, 155 (*Investor's Schedule of Legal Authorities at CL-163*)

<sup>969</sup> *Burlington* – Jurisdiction, at para. 335 (*Investor's Schedule of Legal Authorities at CL-162*)

<sup>970</sup> *Murphy* – Jurisdiction, at paras. 103 - 104 (*Investor's Schedule of Legal Authorities at CL-163*)

<sup>971</sup> Vandeveldel (2009), at p. 95 (*Investor's Schedule of Legal Authorities at CL-118*)

#### **D. The NAFTA Parties rejected the approach of the US-Ecuador BIT**

864. Unlike the US-Ecuador BIT, the NAFTA was carefully designed to have separate provisions regarding consultation, notice periods, and waiting periods. The Tribunal needs to give effect to the express choice made by the NAFTA Parties explicitly in the treaty text.

865. The earliest drafts of the NAFTA contained a dispute settlement provision that was based on the 1992 US model BIT like that in Article VI(3)(a) of the US-Ecuador BIT.<sup>972</sup> For example, the September 4, 1992 negotiation text of the NAFTA shows:

**DRAFT Article 1120: Arbitration Fora**

1. Provided that six months have elapsed since the date on which the investment dispute arose, the investor may submit the dispute to arbitration under...<sup>973</sup>

866. The early NAFTA draft is virtually identical to Article VI (3)(a) of the US-Ecuador BIT:

**US-Ecuador BIT:** Provided that...six months have elapsed from the date on which the dispute arose,<sup>974</sup>

**1992 US Model BIT:** Provided that...six months have elapsed from the date on which the dispute arose,<sup>975</sup>

**Early NAFTA Draft:** Provided that six months have elapsed since the date on which the investment dispute arose,<sup>976</sup>

867. The final wording of NAFTA Article 1120, however, is very different. The NAFTA Parties expressly rejected the single provision approach in favor of the three separate provisions contained in Articles 1118, 1119 and 1120.<sup>977</sup> They chose to replace the term "since the date when the dispute arose" with the term "since the events giving rise to a claim", and to address the specific notice requirement in Article 1119 and the consultation requirement in Article 1118.

868. The negotiation history of the NAFTA is also completely consistent with the plain meaning of the text of Article 1120. Put simply, NAFTA Article 1120 cannot be

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<sup>972</sup> NAFTA, Draft Text of May 22, 1992, in Barry Appleton, ed., *NAFTA: Legal Text and Interpretive Materials, Vol. 3* (Toronto: Thomson West, 2007) ("Appleton I (2007)") Sec. 20:10 at 261 (***Investor's Schedule of Legal Authorities at CL-164***)

<sup>973</sup> NAFTA, Draft Text of September 4, 1992, 1:30pm, in Barry Appleton, ed., *NAFTA: Legal Text and Interpretive Materials, Vol. 3* (Toronto: Thomson West, 2007) ("Appleton II (2007)") Sec. 20:26 at 666 [emphasis added] (***Investor's Schedule of Legal Authorities at CL-188***)

<sup>974</sup> *US-Ecuador Treaty*, at para. 3 (***Investor's Schedule of Legal Authorities at CL-165***)

<sup>975</sup> Vandeveld (2009), at p. 95 (***Investor's Schedule of Legal Authorities at CL-118***)

<sup>976</sup> Appleton I (2007), at Sec. 20:26 at 666 (***Investor's Schedule of Legal Authorities at CL-164***)

<sup>977</sup> NAFTA, Draft Text of September 4, 1992, 6:00pm, in Barry Appleton, ed., *NAFTA: Legal Text and Interpretive Materials, Vol. 3* (Toronto: Thomson West, 2007) ("Appleton III (2007)") Sec. 20:27 at 687 (***Investor's Schedule of Legal Authorities at CL-166***)

interpreted in a way that would ignore its plain words terms and replace them with a meaning that the NAFTA Parties explicitly rejected.

869. There is simply no question of Article 1120 restricting Canada's consent to arbitration in the present case. Interpretation of other treaties' notice provisions cannot have the effect of changing the plain meaning of Article 1120 from being a cooling-off period and turning it into a notice and consultation period.

**E. The timing requirements of Articles 1119 and 1120**

870. NAFTA Articles 1119 and 1120 are related to, but independent of each other. For example, the six month cooling-off period under Article 1120 can run prior to or concurrently with the 90 day notice period under Article 1119.
871. Yet, Canada unabashedly asks this Tribunal to rewrite NAFTA in order to "send the message" that an Investor cannot submit a Notice of Arbitration and Notice of Intent at the same time.<sup>978</sup> But there is no message to send. The NAFTA already does this. Article 1119 requires an Investor to wait 90 days between the Notice of Intent and the Notice of Arbitration. It is not possible under the NAFTA for a State to have less than 90 days to inform itself of the dispute and to attempt negotiation and consultation. The NAFTA Article 1119 and 1120 requirements are clear; the only "message" the Tribunal should send is a message to Canada directing it to stop its systemic practice of attempting to delay access to justice through spurious jurisdictional delays.<sup>979</sup>
872. The only preliminary factual question, therefore, is whether "*the events giving rise to a claim*" in this arbitration arose at least "*six months*" prior to the filing of the Notice of Arbitration.
873. In this arbitration, the Notice of Arbitration was filed on October 4, 2011. The events giving rise to a claim by the Investor began on November 17, 2009, when the Investor incorporated its first two wind projects, and thereby became subject to the domestic content requirements of the FIT Program.<sup>980</sup>

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<sup>978</sup>Government of Canada Objections to Jurisdiction, 3 December 2012, at para. 38.

<sup>979</sup>The recent bifurcation decision of the NAFTA Tribunal in *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, 25 January 2013 rejected a request to bifurcate jurisdictional arguments where, as in the present hearing, that bifurcation would still require a hearing on the merits of some of the Investor's claims. *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, Procedural Order Deciding Bifurcation and Non-Bifurcation, 25 January 2013 ("*Apotex - Procedural Order on Bifurcation*") (***Investor's Schedule of Legal Authorities at CL-167***)

<sup>980</sup>Certificate of Incorporation for Arran Wind Project ULC (***Investor's Schedule of Exhibits at C-0049***); Certificate of Incorporation for TTD Wind Project ULC under the *Alberta Business Corporations Act*, November 17, 2009 (***Investor's Schedule of Exhibits at C-0087***) The remaining two wind farms were incorporated on April 6, 2010. Certificate of Incorporation for for the Summerhill Project ULC, under the *Alberta Business Corporations Act*,

874. Unlike some investment treaties, like the US-Ecuador BIT for example, the requirement to provide "notice of a dispute" under the NAFTA is expressly contained in NAFTA Article 1119. The notice requirement of Article 1119 is an entirely separate provision from the requirement to provide a Notice of Arbitration under NAFTA Article 1120. Similarly, the requirement to attempt resolution of a dispute through negotiation or consultation is also expressly contained in a separate provision in NAFTA Article 1118.
875. The interpretation urged by Canada of the cooling-off period is entirely contrary to the effective settlement of disputes. Canada is essentially saying that even if they are an integral part of the factual matrix and are governed by the same legal arguments as those that have arisen six months prior to commencing arbitration, the later acts and omissions could only be addressed by filing a new claim and establishing a different tribunal.
876. Canada's suggestion is costly, wasteful, and would lead to a situation where two different tribunals are considering under the same applicable law acts and omissions of different times that nevertheless constitute elements of the same composite or continuing breaches. Such an approach could easily lead to incoherence and the possibility of conflicting conclusions concerning what is essentially the same matter.
877. Canada has not even provided proof of any element of unfair surprise, or bad faith on the part of the Investor. It was entirely predictable that that the Investor would include in its claims acts that almost inevitably flowed from the early conduct, or were further iterations within a composite or continuing breach. Canada has not shown why, or how, in any way the lack of a six month cooling-off period with respect to the particular acts and omissions in question compromised the possibility of settlement in this matter, or burdened Canada with any disadvantage in this proceeding.
878. Indeed, the dispute procedures of the WTO require a prior consultation period before a Member has an entitlement to a dispute panel. The WTO Appellate Body has repeatedly been faced with arguments that acts and omissions cannot be considered if they did not occur before the beginning of the required consultation period, and has consistently rejected those arguments.<sup>981</sup>
879. In the actual circumstances of this arbitration, there can be no doubt that the Investor has completely satisfied each of the prerequisites of NAFTA Articles 1118, 1119 and 1120:

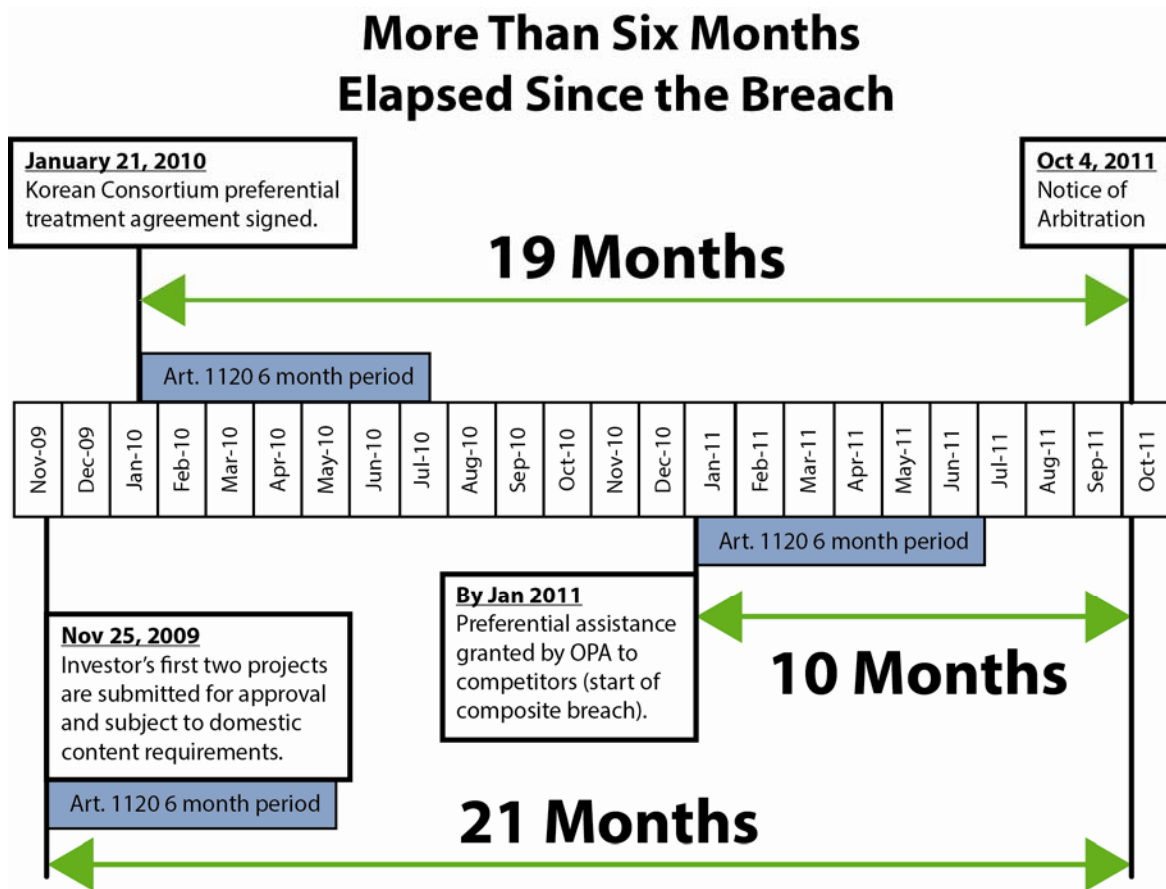
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April 6, 2010 (*Investor's Schedule of Exhibits at C-0041*); Certificate of Incorporation for North Bruce Project, ULC, April 6, 2010 (*Investor's Schedule of Exhibits at C-0050*)

<sup>981</sup> Brazil-Aircraft paras. 162-163 (*Investor's Schedule of Legal Authorities at CL-200*); Mexico-Anti-Dumping measures, at para. 165 (*Investor's Schedule of Legal Authorities at CL-201*)

- a) In respect of NAFTA Article 1118 consultations, the Investor first requested consultations with Canada in a letter to the Deputy Attorney General of Canada, on July 6, 2011,<sup>982</sup> and with Ontario in a letter to Premier McGuinty.<sup>983</sup>
- b) In respect of NAFTA Article 1119, the Investor issued its Notice of Intent on July 6, 2011, 90 days before the Notice of Arbitration was filed on October 4, 2011.
- c) In respect of NAFTA Article 1120, the events giving rise to a claim first arose on November 17, 2009, almost 2 years before the Notice of Arbitration was filed on October 4, 2011.

880. Each of the specific events giving rise to the Investor's claims in this arbitration, which include composite breaches of the NAFTA are presented as follows.



881. The International Law Commission's *Articles on State Responsibility*, consider the date which gives rise to a composite breach as being the earliest date in the series of

<sup>982</sup> Letter from Appleton & Associates to Myles J. Kirvan, Deputy Minister of Justice and Deputy Attorney General of Canada, July 6, 2011 (*Investor's Schedule of Exhibits at C-0100*)

<sup>983</sup> Letter from Appleton & Associates to Premier Dalton McGuinty, July 6, 2011 (*Investor's Schedule of Exhibits at C-0099*)

events.<sup>984</sup> In this arbitration, the date on which the composite breach commences, January 17, 2011, is also clearly more than six months before the filing of the Notice of Arbitration.

882. Canada has identified two dates on which it engaged in measures which occurred within six months of the filing of the Notice of Arbitration.<sup>985</sup> Each of these dates is an artificial date in related to the events giving rise to the claim. The actions which occurred on these two dates are part of a composite act which commenced long before. The two actions – being the last minute modification of the FIT Program Rules providing a five day window for filing application changes in June 2011, and the improper award of contracts on July 4, 2011 – were the results of a larger systemic NAFTA measure which commenced in both cases more than six months before the filing of the Notice of Arbitration. Based on the applicable international law rules codified in the ILC *Articles on State Responsibility*, the acts giving rise to the claim with respect to both of these particular events started on dates which commenced more than six months before the submission of the Notice of Arbitration.

883. In essence, Canada's entire contention is to have this Tribunal ignore the longstanding international law rules that the timing of composite acts begin at the start of the series of actions.

884. The determination of when a composite act arises is well settled. Professor Crawford, Special Rapporteur on State Responsibility to the International Law Commissions, writes:

Paragraph 2 of article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions have occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series.<sup>986</sup> [emphasis added]

885. Instead, Canada contends that the six month period in Article 1120 runs from the last event of the composite act.<sup>987</sup> Canada has submitted no authority for such a proposition.

886. The Commentary to the ILC *Articles of State Responsibility* addresses the nature of composite breaches. Paragraph 2 of the Commentary on Article 15 confirms that "systemic acts of discrimination prohibited by a trade agreement" constitute a composite breach.<sup>988</sup> Within the claim before this Tribunal, the following systemic breaches form part of a composite breach:

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<sup>984</sup> ILC *Articles*, Article 15(2) (*Investor's Schedule of Legal Authorities at CL-009*) provides that the events giving rise to a claim over a composite breach begin at the first act in the series

<sup>985</sup> Government of Canada's Objections to Jurisdiction, December 3, 2012, at paras. 11-12.

<sup>986</sup> Crawford (2002), at p. 143 (*Investor's Schedule of Legal Authorities at CL-006*)

<sup>987</sup> Government of Canada Objections to Jurisdiction, 3 December 2012, at paras. 15, 38.

<sup>988</sup> Crawford (2002), at p. 141 (*Investor's Schedule of Legal Authorities at CL-006*)



- a) The systemic requirement for local content in the FIT program;
- b) The systemic failure to follow the FIT Program Rules with respect to the ranking and evaluation of applications;
- c) The special privileges and inducements provided to the Korean Consortium with respect to Power Purchase Agreements, and its priority access to power transmission;
- d) Systemic discrimination applied to Mesa and its investments as opposed to the better treatment provided to applicants from others, such as Boulevard Associates, which was owned by NextEra.

Each of these breaches at issue in this arbitration is a part of composite breaches.

887. Article 1120 requires that the events giving rise to the arbitration claim arise more than six months before the filing of the Notice of Arbitration. Two particular events took place within this six month period - the amendment of the designation of the interconnection point on June 3, 2011, and the award of FIT Contracts on July 4, 2011.
888. Both of these events were part of composite measures arising more than six months before the submission of the claim to arbitration.
- a) The interconnection point amendment was merely the culmination of discriminatory and unfair preferences given to competitors who had private and secret meetings with the governmental authority commencing in January 2011.
  - b) The award of contracts was the culmination of unfair and discriminatory preferences given to competitors who had private and secret meetings with governmental authorities commencing in January 2011, as well as from the discriminatory administration and operation of the local content rules in the Fit Program which date back to the fall of 2009.
889. International law recognizes that the events giving rise to the arbitration start at the beginning of the series of events. Thus, the fact that these two events manifested less than six months before the filing of the Notice of Arbitration is entirely consistent with the requirement of NAFTA Article 1120, as they were part of a composite breach.

## II. THE FACTUAL CONTEXT

890. A number of measures attributed to Canada constitute specific breaches of the NAFTA. These measures are:

Measure	FIT Program applicable to Investment	Granting of Privileges to Korean Consortium	Private Meeting with Competitors to Facilitate Connection Point Changes
Date	November 25, 2009	January 21, 2010	January 2011
Days prior to NOA	686	621	259

891. The measures taken by Canada are completely interrelated. The result of the measures was the denial of Power Purchase Agreements that the Investor was otherwise entitled to receive on July 4, 2011.

892. In December 2010, the Ontario Power Authority announced that 1200 MW of transmission capacity would be available to projects in the Bruce Region.<sup>989</sup> If the rankings had been conducted correctly in 2010, if competitors had not been given advance information about FIT Program Rule changes starting in January 2011, and if transmission capacity had not been reserved for the Korean Consortium pursuant to the *Green Energy Investment Agreement*, Mesa would have been entitled to receive FIT contracts on July 4, 2011.

### A. Domestic Content Requirements of the FIT Program

893. On September 24, 2009, Ontario announced the FIT Program.<sup>990</sup> Canada explained the purpose of the Program in its submissions to the WTO on challenges from Japan and the EU:

Like FIT programs in other parts of the world, the Ontario FIT Program was created to induce new renewable generation. As recognized by Japan, the Ontario 'FIT Program ... became necessary to encourage the entry into the market of renewable energy generators, most of which would not have entered the market in the absence of the FIT Program.<sup>991</sup>

<sup>989</sup> Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010 (*Investor's Schedule of Exhibits at C-0073*)

<sup>990</sup> Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), September 24, 2009 (*Investor's Schedule of Exhibits at C-0264*)

<sup>991</sup> *Canada - Renewable Energy - Panel Report*, at para. 9.18 (*Investor's Schedule of Legal Authorities at CL-001*); *Canada - Measures Affecting the Renewable Energy Generation Sector*, at para. 49 (*Investor's Schedule of Legal Authorities at CL-004*)

894. Whether a well-sited investment would be fruitful was entirely dependent on choosing a connection point where a project had a high probability of being granted a Power Purchase Agreement. Once a PPA was granted, the Investor would benefit from a guaranteed rate of return from the purchase of all the electricity it could generate under the PPA.

895. The WTO Panel Report explained the system of guaranteed payments:

As we have explained elsewhere in these Reports, the FIT Programme guarantees a fixed price for every kWh of electricity delivered into the Ontario electricity system over a period of 20 years by qualifying generators of electricity using solar PV and windpower technology. The prices paid under the FIT Programme were established by the OPA with a view to ensuring that participants are able to cover "typical" development costs and obtain a reasonable rate of return. Thus, generators participating in the FIT Programme will be remunerated for each kWh of electricity delivered into Ontario's electricity system at a price calculated to ensure economically viable operations for "typical" facilities for a 20-year period.<sup>992</sup>

The WTO Panel determined that "at least some Ontario-sourced (and therefore Canadian-Sourced) goods *must* be used to satisfy" the "Minimum Required Domestic Content Level" requirement to obtain a PPA.<sup>993</sup>

896. There were only a limited number of Ontario manufacturers of the components required to meet these domestic content requirements.<sup>994</sup> Investors were therefore *de facto* required to purchase option contracts with these domestic producers, to guarantee that when offered a PPA they could meet its terms.<sup>995</sup> The Investor entered into agreements with GE Energy LLC to secure domestic content manufacturing capacity.<sup>996</sup> Canada's wrongful actions forced the Investor to default on these agreements at a cost of approximately USD\$150 million.

897. The FIT Program and the obtaining of PPAs with Ontario was required to be operated in accordance with the NAFTA, particularly Articles 1102 through 1106.

898. The Investor is entitled to present a case on whether the domestic content requirements, which were a "necessary condition and prerequisite for the electricity generators to participate in the FIT Programme"<sup>997</sup> were in violation of the prohibition of

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<sup>992</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.165 (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>993</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.163 [emphasis added] (***Investor's Schedule of Legal Authorities at CL-001***)

<sup>994</sup> Indeed, this is one of the reasons Ontario signed the Korean Consortium agreement, to boost local manufacturing in the renewable energy sector.

<sup>995</sup> An option contract gives priority manufacturing capacity to a purchaser over other customers. Project rankings were partially based on whether an applicant had an option contract that would satisfy local content requirements.

<sup>996</sup> Letter from Carson Granger (General Electric) to Monty Humble (Mesa), November 24, 2009 (***Investor's Schedule of Exhibits at C-0029***)

<sup>997</sup> *Canada - Renewable Energy* - Panel Report, at para. 7.165 (***Investor's Schedule of Legal Authorities at CL-001***)

domestic content requirements under Article 1106(1)(b) of the NAFTA. The events surrounding this domestic content requirement included:

- a) The creation of the requirement (September 24, 2009);
- b) The incorporation of the Investor's initial projects which first subjected Mesa to the requirements (November 17, 2009);
- c) The negotiation of the agreement with GE Energy to obtain local content production capacity in November 2009; and
- d) The Investor being required to cancel its option contract at a cost of approximately USD\$150 million by December 21, 2012.<sup>998</sup>

899. The Investor was subjected to the domestic content purchasing requirement 686 days prior to the Notice of Arbitration. This is more than the 180 day minimum required by the NAFTA.

900. A similar result occurs with continuous breach. For example, the *Mobil Oil v Canada* NAFTA Award demonstrates that a continuous act, in that case federal guidelines inconsistent with the NAFTA which were still in effect at the time of the hearing, was not a jurisdictional bar to the Tribunal's determination of the issues in dispute.<sup>999</sup>

## **B. Ontario's Mismanagement of FIT Program Rankings**

901. The FIT Program was designed to grant investors a competitive opportunity based upon their rank in accordance with a point system. Under the FIT Program Rules, the Investor was entitled to receive █████ out of a possible 725 points available.<sup>1000</sup> When it received its ranking, it was ranked far below its calculated position. On May 20, 2011, the Investor wrote to the OPA to verify that the OPA had correctly calculated their priority rank.<sup>1001</sup> The OPA refused to provide the Investor with supporting calculations, claiming they were confidential.<sup>1002</sup>

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<sup>998</sup> This recent date demonstrates the fallacy of Canada's argument that the Investor must wait 180 days from every claim. Events may arise during the arbitration which involve the matters in dispute and are part of existing claims.

<sup>999</sup> *Mobil Investments Inc. v. Government of Canada*, ICSID Case No ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (May 22, 2012) ("*Mobil - Decision on Liability*") (***Investor's Schedule of Legal Authorities at CL-168***)

<sup>1000</sup> Letter from Mark Ward (Mesa), Chuck Edey (Leader Resources) and Michael Bernstein (Capstone Infrastructure) to Shawn Cronkwright (OPA), May 20, 2011 (***Investor's Schedule of Exhibits at C-0098***)

<sup>1001</sup> Letter from Mark Ward (Mesa), Chuck Edey (Leader Resources) and Michael Bernstein (Capstone Infrastructure) to Shawn Cronkwright (OPA), May 20, 2011 (***Investor's Schedule of Exhibits at C-0098***)

<sup>1002</sup> Letter from Shawn Cronkwright (OPA) to Mark Ward (Mesa Group), Charles Edey (Leader Resources Services Corp.) and Michael Bernstein (Capstone Infrastructure Corp.), June 17, 2011 (***Investor's Schedule of Exhibits at C-0195***)

902. Under the FIT Program Rules, the Investor had amongst the highest number of points of all project proponents. Despite this, it was ranked 8<sup>th</sup> and 9<sup>th</sup> in the Bruce Region, below projects that had lower rankings:

<b>Bruce Region Priority Ranking - December 21, 2010</b>		
<b>Rank</b>	<b>Applicant Name</b>	<b>Capacity (MW)</b>
1	Boulevard Associates Canada, Inc.	102
2	Boulevard Associates Canada, Inc.	23
3	Grand Bend Wind, L.P.	100
4	Grand Valley Wind Farms Inc.	40
5	St. Columban Energy L.P.	15
6	Skyway 127 Wind Energy Inc.	100
7	St. Columban Energy L.P.	18
<b>8</b>	<b>TTD Wind Project ULC</b>	<b>150</b>
<b>9</b>	<b>Arran Wind Project ULC</b>	<b>115</b>
	Total	663

903. The ranking of the Investor's projects according to alternative criteria on December 21, 2010, deprived it of a PPA. This occurred 287 days prior to the Notice of Arbitration.

### **C. The Korean Consortium**

904. The Korean Consortium, comprised of Samsung C & T Corporation and Korea Electric Power Corporation, was granted preferential access to generating contracts in exchange for establishing green energy manufacturing facilities in Ontario.
905. In addition to its wrongful ranking in the OPA ranking system, the Investor now knows that the system was bypassed by the Korean Consortium and its partners. The Korean Consortium was granted preferential access to connection points with guaranteed access to transmission capacity. This preferential treatment permitted the Korean Consortium to identify lower ranked applicants for PPAs, purchase those projects and secure a PPA for those projects by integrating their operation into the Korean Consortium. This scheme granted other investors and their Canadian subsidiaries preferential treatment to the Investor.
906. The events giving rise to this scheme were ongoing:
- a) Ontario started negotiations with the Korean Consortium in the fall of 2008.<sup>1003</sup>
  - b) The Agreement consummating the special privileges was signed on January 21, 2010.<sup>1004</sup>

<sup>1003</sup> Legislative Assembly of Ontario, Official Report of Debates (Hansard), May 3 2012, at p. 2052 (*Investor's Schedule of Exhibits at C-0018*)

<sup>1004</sup> Green Energy Investment Agreement, January 21, 2010 (*Investor's Schedule of Exhibits at C-0322*)

- c) Projects owned by Pattern Inc, a competitor of the Investor and a partner of Samsung, were transferred from the FIT Program to obtain the better terms available through the Korean Consortium's Agreement.<sup>1005</sup>
  - d) Projects owned by other investors were transferred from lower-ranked positions through the Korean Consortium Agreement to a privileged status such that they received PPAs.<sup>1006</sup>
907. The events giving rise to this claim<sup>1007</sup> occurred 621 days prior to the Notice of Arbitration.

**D. Meeting with competitors and advanced notice of Connection Point changes**

908. In mid-January 2011, shortly after the OPA announced that 1200MW of contracts would be offered in the Bruce Region, a lobby organization, the Canadian District Energy Association, contacted the OPA for a meeting on behalf of a competitor, NextEra Energy Resources, to discuss the migration of its projects in the West of London Region to the Bruce Region.<sup>1008</sup> The OPA met with NextEra, and the meeting precipitated the Rules change that was made some six months later on June 3, 2011.

We have limitations on the extent we can discuss information that is relevant and material to the upcoming ECT process. We will try to be helpful, but as I said to all who wish to discuss this kind of matter with us, we can't recommend, suggest or consult on your specific needs. We can clarify rules and provide better understanding as they related to disclosed information.<sup>1009</sup>

909. The OPA met with NextEra representatives to discuss "data confirmation as to what [NextEra] modeled in [their] load flows."<sup>1010</sup> Following the meeting an internal OPA communication recommended that "going forward, [the OPA] should reflect this

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<sup>1005</sup> Email from Frank Davis (Pattern Energy) to Susan Kennedy (OPA), August 2, 2011 (*Investor's Schedule of Exhibits at C-0280*)

<sup>1006</sup> See, for example, Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010 (*Investor's Schedule of Exhibits at C-0073*) Armow Wind Project was ranked 24<sup>th</sup> in Bruce area and 180<sup>th</sup> provincially. It then received a PPA through the Green Energy Investment Agreement. Ontario Power Authority, News Release, "Power purchase agreements signed with Korean Consortium", August 3, 2011 (*Investor's Schedule of Exhibits at C-0059*)

<sup>1007</sup> Canada's jurisdiction submission inexplicably state that the better treatment afforded the Korean Consortium is relevant to the merits of the Investor's case but did not give rise to a claim (para. 3 n.3). To the contrary, better treatment afforded to nationals of another party gives rise to a claim for breach of Article 1103 of the NAFTA.

<sup>1008</sup> E-mail from Mary Ellen Richardson (Canadian District Energy Association) to Bob Chow (OPA), January 17, 2011 (*Investor's Schedule of Exhibits at C-0139*)

<sup>1009</sup> Email from Bob Chow (OPA) to Bobby Adjemian (NextEra Energy), January 18, 2011 (*Investor's Schedule of Exhibits at C-0234*)

<sup>1010</sup> Email from Bobby Adjemian (NextEra Energy) to Bob Chow (OPA), January 18, 2011 (*Investor's Schedule of Exhibits at C-0234*)

- potential connection point in [their] studies."<sup>1011</sup> In effect, despite stated reservations that the OPA would not "consult" on "specific needs", the OPA met with a competitor and then made changes to the FIT Program that were directly beneficial to that competitor.
910. In February 2011, Ontario continued to grant NextEra extraordinary assistance not available to other investors. Representatives of NextEra met with the Ministry of Energy on February 25, 2011, and obtained inside information about how to change its projects connection points, including specific timing of a window to make those changes.<sup>1012</sup>
911. In early April 2011, the IESO scheduled a meeting with NextEra and its representatives in regard to connecting to 500kv transmission lines, the lines to which NextEra changed during the connection point change window.
912. As a result of these interactions with multiple government actors in the Ontario energy regulation sector, NextEra was prepared for the connection point window change opportunity, which was announced without prior notice on June 3, 2011, with a window of only 5 days.
913. Canada has noted that other projects also changed connection points during the change window.<sup>1013</sup> Those changes, however, were minor. NextEra's change involved the construction of a transmission line of hundreds of kilometers. The due diligence and expense required for such a substantial change can only be explained by NextEra having advance knowledge of the change window, and that its change would be approved.
914. Following this connection point change, PPAs were offered to proponents on July 4, 2011, including new entrants, in the Bruce Region. Had these new entrants not been admitted, the Investor's projects in that Region would have been entitled to a PPA:

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<sup>1011</sup> Email from Tracy Garner (OPA) to Irwin Ng (OPA), January 25, 2011 (*Investor's Schedule of Exhibits at C-0296*)

<sup>1012</sup> Email from Bob Lopinski (Counsel Public Affairs) to Pearl Ing (MEI), February 25, 2011 (*Investor's Schedule of Exhibits at C-0319*) The Ministry of Energy also met with NextEra on May 11 and May 13, 2011. Email from Phil Dewan (Counsel Public Affairs) to Sue Lop (Ministry of Energy), May 12, 2011 (*Investor's Schedule of Exhibits at C-0090*)

<sup>1013</sup> Canada's Outline of Potential Issues, 31 July 2012, at para. 11.

<b>Bruce Region Contract Offers – July 4, 2011</b>		
<b>Rank</b>	<b>Applicant Name</b>	<b>Capacity (MW)</b>
1	<i>New NextEra Project: Boulevard Associates Canada, Inc.</i>	60
2	<i>New NextEra Project: Boulevard Associates Canada, Inc.</i>	150
3	<i>New NextEra Project: Bornish Wind, L.P.</i>	73.5
4	Boulevard Associates Canada, Inc.	102
5	<i>New Project: Suncor Energy Products Inc.</i>	100
6	<i>New NextEra Project: Summerhaven Wind, L.P.</i>	60
7	Boulevard Associates Canada, Inc.	23
<b>8</b>	Grand Bend Wind, L.P.	<b>100</b>
<b>9</b>	Grand Valley Wind Farms Inc.	<b>40</b>
<b>10</b>	St. Columban Energy L.P.	15
		723.5
<b>Bruce Region Contract Offers – July 4, 2011</b>		
<b>Rank</b>	<b>Applicant Name</b>	<b>Capacity (MW)</b>
1	Suncor Energy Products Inc.	50
2	Skyway 127 Wind Energy inc.	100
<b>3</b>	<b>TTD Wind Project ULC</b>	<b>150</b>
<b>4</b>	<b>Arran Wind Project ULC</b>	<b>115</b>

915. The manner with which the OPA conducted the connection point window change was unreasonable, unforeseeable and unfair, and constituted a breach of Article 1105.
916. Furthermore, the decision to grant a competitor, NextEra Energy, preferential access to the Bruce Region by allowing construction of a massive transmission line, also constitutes unfair and unreasonable treatment that deprived the Investor of a PPA it was otherwise entitled to.
917. The events giving rise to this claim occurred 259 days prior to the Notice of Arbitration, and the events from January through July 2011 constitute a composite breach of the NAFTA.
918. The unfair and arbitrary 2010 project rankings made under the FIT Program resulted in Mesa not receiving a PPA offer on July 4, 2011. Based on the FIT Rules, Mesa was entitled to a higher ranking than other projects in the queue. Mesa was concerned that the ranking process in Section 13 of the FIT Rules had not been followed, and sought information about the apparent impropriety of the FIT ranking process in a May 20, 2011 letter.<sup>1014</sup>
919. The changes to the FIT Rules on June 3, 2011, of which competitors like NextEra had advance notice, contributed to Mesa not being given a contract on July 4, 2011. Before

<sup>1014</sup> Letter from Mark Ward (Mesa), Chuck Edey (Leader Resources) and Michael Bernstein (Capstone Infrastructure) to Shawn Cronkwright (OPA), May 20, 2011 (*Investor's Schedule of Exhibits at C-0098*)



other competitors were allowed to change from the West of London Region, where only 350 MW of transmission was available, to the Bruce Region where at least 750 MW of transmission capacity was available, Mesa was entitled to receive contracts for its TTD and Arran projects because those projects were within the top 750 MW of transmission capacity in that Region. NextEra was able to submit an application to change its connection point because it obviously had advance notice of the Rules change. The change in connection point that NextEra was permitted to complete would not have been possible without advance notice to prepare the applications.

920. The signing of the *Green Energy Investment Agreement* in January 2010 resulted in Mesa not obtaining a contract on July 4, 2011. The loss resulted from Canada's earlier NAFTA breach in granting special privileges to the Korean Consortium in the *GEIA*. If the *GEIA* parties had not been granted priority access to transmission capacity in the Bruce Region, a greater amount of transmission capacity would have been available for FIT applicants. In December 2010, the OPA indicated that 1200 MW of transmission capacity would become available in the Bruce Transmission Region. However, the actual transmission capacity that was made available to FIT applicants was only 750 MW, because the Korean Consortium had been guaranteed access to 450 MW in the Bruce Region, and was able to select its desired connection points. Despite the erroneous rankings and the connection point amendment window, Mesa was within the top 1200 MW of transmission capacity. It was therefore entitled to receive a contract had it not been for the special and guaranteed access to transmission that the *GEIA* parties received.
921. By any measure, more than six months elapsed from each of the distinct events giving rise to the Investor's claim.

### III. CONCLUSION

922. The first of the events that gave rise to the Investor's claim arose well over six months prior to the submission of the Notice of Arbitration. There can be no factual doubt that the Investor has met the timing requirements and satisfied the purpose of each of Articles 1118, 1119, and 1120.
923. Accordingly, the Investor respectfully requests that the Tribunal summarily dismiss Canada's jurisdictional contentions.

## PART SIX: DAMAGES

### I. THE OBLIGATION TO PAY DAMAGES

924. Under international law, the Investor is entitled to full compensation from Canada for all harm caused to it and to its investments resulting from Canada's unlawful actions.
925. The purpose of damages is to restore the Investor to the position it would have been in "but for" Canada's NAFTA breaches. The well-established international law compensation principle is that damages should wipe out the consequences of the wrongful act and put the harmed party back to the *status quo*.<sup>1015</sup>
926. The NAFTA requires that the Investor be compensated for the breach of Canada's obligations in NAFTA Chapter Eleven. The calculation of damages also needs to take into account what would have been earned by the Investor and the Investments but for Canada's unlawful actions.
927. The *Independent Valuators' Report* sets out an independent expert calculation of the quantification of the damage sustained by the Investor and its Investments. As more fully set out in the *Independent Valuators' Report*, the Investor has suffered substantial loss in the value of its investments in Canada. The midpoint of total losses is CAD\$653,183 million.

### II. LEGAL ISSUES

928. The international law principle of compensation requires Canada to compensate the Investor for all loss caused to the Investor and its Investments resulting from Canada's violation of its international law obligations.

#### A. The "But For" Test

929. Once a violation has been established, the remedial objective of an international tribunal is to place the injured Investor and its Investments in the position they would have been in but for the illegal conduct. In the words of the *S.D. Myers* NAFTA Tribunal, "Compensation should undo the material harm inflicted by a breach of an international obligation."<sup>1016</sup>

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<sup>1015</sup> *Case Concerning the Factory at Chorzów*, Merits Award, Permanent Court of International Justice, September 13, 1928, PCIJ, Series A, No. 17 ("*Chorzów - Merits Award*"), at p. 47 [emphasis added] (***Investor's Schedule of Legal Authorities at CL-169***); *Amco Asia Corp. v. Indonesia*, Award, ICSID Reports Volume 1, 413 (November 20, 1984) ("*Amco Asia - Award*"), at para. 267, adopted the reasoning of the Chorzow Factory Case, calling it the "basic precedent" in international law on compensation (***Investor's Schedule of Legal Authorities at CL-170***)

<sup>1016</sup> *S. D. Myers - First Partial Award*, at para. 315 (***Investor's Schedule of Legal Authorities at CL-033***)

930. The principle underlying the international law of compensation was enunciated by the Permanent Court of International Justice in the *Chorzow Factory case*. The Court held:

The essential principle contained in the actual notion of an illegal act ... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation for an act contrary to international law.<sup>1017</sup>

This compensation principle has been adopted and applied by numerous international tribunal decisions.<sup>1018</sup>

## B. Consequential damages

931. In the *Amoco* case, the Iran-US Claims Tribunal considered the proper application of the *Chorzow Factory Case* principles in the circumstance of an expropriation. Judge Charles Brower took the opportunity in his Concurring Opinion to further clarify the application of the *Chorzow Factory Case* in the context of a modern valuation and business analysis. Judge Brower stated:

In my view *Chorzow Factory* presents a simple scheme: If an expropriation is lawful, the deprived property is to be awarded damages equal to 'the value of the undertaking' which it has lost, including any potential future profits, as of the date of taking; in the case of an unlawful taking, however, either the injured party is to be actually restored to enjoyment of his property, or, should this be impossible or impractical, he is to be awarded damages equal to the greater of (i) the value of the undertaking at the date of loss (again including lost profits), *judged on the basis of information available as of that date*, and (ii) its value (likewise including lost profits) as shown by its probable performance subsequent to the date of loss and prior to the date of the award, based on actual post-taking experience, *plus* (in either alternative) *any consequential damages*. Apart from the fact that this is what *Chorzow Factory* says, it is the only set of principles that will guarantee just compensation to all expropriated properties.

The substantive test of the judgment of *Chorzow Factory* is consonant with the conclusion that the 'value of the undertaking' includes its potential for earning profits. The Court thus described such value as including '*the cessation of the working and the loss of profit which have accrued*' as encompassing all elements of damages except those that are 'outside the undertaking itself;' and as embracing 'the worth of the enterprise as a whole' or 'the total value of the undertaking' including 'profit.'<sup>1019</sup>

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<sup>1017</sup> *Chorzów* - Merits Award, at p. 47 [emphasis added] (***Investor's Schedule of Legal Authorities at CL-169***)

<sup>1018</sup> See, for example, *S. D. Myers* - First Partial Award at paras. 311 and 317. At para. 311 the Tribunal stated, "The principle of international law stated in the *Chorzow Factory Case* is still recognised as authoritative on the matter of general principle". Similarly, at para. 317 the Tribunal stated, "In summary, the Tribunal will assess the compensation payable to SDMI on the basis of the economic harm that SDMI legally can establish." (***Investor's Schedule of Legal Authorities at CL-033***) See also *Amco Asia* - Award at para. 267, in which the Tribunal adopted the reasoning of the *Chorzow Factory Case*, calling it the "basic precedent" in international law on compensation (***Investor's Schedule of Legal Authorities at CL-170***)

<sup>1019</sup> *Amoco* - Award, at pp. 300-302, at paras. 17-19 (***Investor's Schedule of Legal Authorities at CL-171***)

932. Similarly, in *Sapphire International Petroleum Arbitration*, the Tribunal held that:

This compensation includes the loss suffered (*damnum emergens*), for example the expenses incurred in performing the contract, and the profit lost (*lucrum cessans*), for example the net profit which the contract would have obtained. The award of compensation for the lost profit or the loss of a possible benefit has been frequently allowed by international arbitral tribunals.<sup>1020</sup>

### C. Lost Profits

933. Damages for lost profits includes loss that is a foreseeable consequence of the breach, where the lost profits can be calculated with reasonable certainty.<sup>1021</sup> An array of international law awards have awarded compensation not only for actual losses suffered, but also for consequential damages such as the loss of future business profits.<sup>1022</sup> Compensation for lost profits is a common element of international compensation awards.<sup>1023</sup>

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<sup>1020</sup> *Sapphire International Petroleums Ltd. v. National Iranian Oil Company*, Arbitral Award, March 15, 1963, 35 ILR 136 ("*Sapphire - Award*"), at p. 186 (***Investor's Schedule of Legal Authorities at CL-172***)

<sup>1021</sup> In J. Gillib Wetter and Stephen Schwebel "Some Little-Known Cases on Concessions - The *Greek Telephone Company Case*" (1964) 40 *British Yearbook of International Law* 216 ("Gillib and Schwebel (1964)") at 221, the Tribunal found that Greece must compensate the investor for the lost profits "for what it would have obtained" had the concession contract been implemented by the State (***Investor's Schedule of Legal Authorities at CL-087***) In *Sea-Land Service, Inc. v. Iran*, Iran, Award 135-33-1, June 20, 1984, (1984) 6 Iran-US CTR 149 (***Investor's Schedule of Legal Authorities at CL-116***), the Tribunal cited its decision in *Pomeroy et al. v. Iran*, Iran - United States Claims Tribunal, Case No. 40, Award No. 50-40-3, 2 Iran-US CTR 372 (June 8, 1983), ("*Pomeroy - Award*") (***Investor's Schedule of Legal Authorities at CL-173***) as a basis for this determination.

<sup>1022</sup> *German American Mixed Claims Commission*, Preliminary Administrative Decisions, VII *British Yearbook of International Law* 222 ("*German American Mixed Claims Commission*"), at pp. 222-225 (***Investor's Schedule of Legal Authorities at CL-142***); *Laura M. B. Janes et al v. United Mexican States (1925)*, Mexico/United States General Claims Commission, IV Report of International Arbitration Awards 82 ("*Janes Case*") (***Investor's Schedule of Legal Authorities at CL-094***) See also *Affaire Relatif a La Concession de Phares de L'Empire Ottoman (France/Greece)*, Permanent Court of International Justice, 24,27 July 1956, XII Reports of International Arbitration Awards 155 ("*Lighthouses Arbitration*"), at pp. 245-250 (***Investor's Schedule of Legal Authorities at CL-119***); *AGIP Spa v. Congo*, ICSID Case ARB/77/1, Award (November 30, 1979) ("*AGIP Spa - Award*"), at para. 98 (***Investor's Schedule of Legal Authorities at CL-174***)

<sup>1023</sup> In *Sapphire - Award* at p. 186 (***Investor's Schedule of Legal Authorities at CL-172***) the Tribunal found that: "This compensation includes the loss suffered (*damnum emergens*), for example the expenses incurred in performing the contract, and the profit lost (*lucrum cessans*), for example the net profit which the contract would have obtained. The award of compensation for the lost profit or the loss of a possible benefit has been frequently allowed by international arbitral tribunals." In *May Case (Guatemala/United States) (1900)*, XV Reports of International Arbitration Awards 55, ("*May Case*"), at p. 72 (***Investor's Schedule of Legal Authorities at CL-096***), the Tribunal came to a similar conclusion that compensation should include both the damage suffered and the lost profit. In this case, the investor was "entitled to all the profit to be derived from the railroad until the completion of the term." Similarly, in *Shufeldt Claim (Guatemala/United States) (1930)*, II Reports of International Arbitration Awards 1081 ("*Shufeldt Claim*") (***Investor's Schedule of Legal Authorities at CL-099***), the arbitrator rendered an award on damages that covered both the losses suffered and the lost profits.

934. In the *Shufeldt Claim*, the arbitrator held that the lost profits:

...must be the direct result of the contract and not too remote or speculative ... (but as) may reasonably be supposed to have been in the contemplation of both parties as the probable result of a breach of it.<sup>1024</sup>

935. In its discussion of international compensation law, the *Amco Asia* Tribunal noted that the basic principles of international compensation law used to quantify damages are those of contract law:

The legal bases of calculation of damages will be set up according to the principles governing the matter, where the prejudice to be compensated results from the failure of a party to a contract to fulfill its obligations under the contract.

This method is justified in the instant case, in spite of the relationship between the host state and the investor not being strictly identical to a private law contract, as earlier shown, but merely comparable to such a contract....

Moreover, it could by no means be contended that if the illegal acts of the State were of delictual nature, the damages to be awarded in compensation of the prejudice should be a lower amount than damages awarded in the framework of contractual liability.<sup>1025</sup>

936. In the *Amoco* case, Judge Brower concluded that international law should compensate an investor for loss of its "probable performance" in the market.<sup>1026</sup>

937. An award compensating the Investor for its lost opportunity of access to cash flow would reflect the damage incurred directly from Canada's unlawful actions. This direct consequential loss must be based upon the opportunity lost by the Investor by not re-deploying its cash flow from its Canadian-based business operation.

938. As the Independent Valuers have identified, Mesa entered into a Master Turbine Sale Agreement with General Electric, in consideration of which Mesa paid an initial amount of USD\$153,592.67<sup>1027</sup> to secure the provision of wind turbines from GE. The entire amount was forfeited by Mesa when Canada wrongly failed to provide Mesa with a Power Purchase Agreement for its wind development projects.

939. Additionally, as examined in the Independent Valuers' Report, Mesa incurred development costs associated with the Projects from December 2009 to December 2011.<sup>1028</sup> Because Mesa was unable to obtain the FIT Contracts for its projects, these losses are not recoverable and Mesa is entitled to be reimbursed for them.

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<sup>1024</sup> *Shufeldt Claim* at p. 1099 (***Investor's Schedule of Legal Authorities at CL-099***)

<sup>1025</sup> *Amco Asia* – Award, at para. 265 [emphasis added] (***Investor's Schedule of Legal Authorities at CL-170***)

<sup>1026</sup> *Amoco International Finance Corporation v. Iran*, Iran - United States Claims Tribunal, Case No. 56, Award 310-56-3, (July 14, 1987) ("*Amoco* - Award"), at p. 300 (***Investor's Schedule of Legal Authorities at CL-171***)

<sup>1027</sup> CER- Independent Valuers' Report of Low and Taylor of Deloitte, paras. 2.18, 2.19 and 2.20.

<sup>1028</sup> CER- Independent Valuers' Report of Low and Taylor of Deloitte, at paras. 4.1(v), 4.30 and 4.31.

#### D. Mitigation

940. The duty of mitigation is a general principle of law, which forms part of the principles of international law.<sup>1029</sup>

941. The principle has been recognized by several international tribunals including the International Court of Justice.<sup>1030</sup> For example, in the *Gabcikovo-Nagymaros Project* case, the International Court stated:

It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained. It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.<sup>1031</sup>

942. The duty of mitigation is also reflected in the Commentary to Article 31 of the *ILC Articles*. The Commentary to Article 31 notes that mitigation of damage is an element affecting the scope of reparation.<sup>1032</sup>

#### E. Opportunity Loss: Interest and Costs

943. It is not sufficient for the Investor to be awarded only the amount of its loss at the time of Canada's breach. International tribunals have broad discretion to take into account all relevant circumstances, including equitable considerations on a case by case basis, to ensure that full compensation ensues.<sup>1033</sup> These types of considerations usually take the form of an award dealing with opportunity loss (that is, interest of some form) and awards of costs.

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<sup>1029</sup> *Middle East Cement Shipping and Handling Co. S.A. v. The Arab Republic of Egypt*, ICSID ARB/99/6, Award (April 12, 2002) ("*Middle East Cement - Award*"), at para. 167 (***Investor's Schedule of Legal Authorities at CL-114***)

<sup>1030</sup> See for example: *Well Blowout Control Claim*, S/AC.26/1996/5/Annex, reproduced in 36 ILM 1279 (November 15, 1996) ("*Well Blowout*"), at para. 54 (***Investor's Schedule of Legal Authorities at CL-175***) *Gabcikovo-Nagymaros (Hungary/Slovakia)*, International Court of Justice, I.C.J. Reports 1997 (September 25, 1997) ("*Gabcikovo-Nagymaros*"), at para. 80 (***Investor's Schedule of Legal Authorities at CL-176***)

<sup>1031</sup> *Gabcikovo-Nagymaros* at para. 80 (***Investor's Schedule of Legal Authorities at CL-176***)

<sup>1032</sup> Crawford (2002), at p. 205 (***Investor's Schedule of Legal Authorities at CL-006***)

<sup>1033</sup> *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, Case No. ARB/96/1, Final Award (February 17, 2000) ("*Compañía del Desarrollo de Santa Elena - Award*"), at paras. 90-92 (***Investor's Schedule of Legal Authorities at CL-115***) This view was also maintained by a number of Iran-US Claims Tribunal awards such as those in the *American International Group, Inc. v. Iran*, Iran - United States Claims Tribunal, Case No. 2, Award 93-2-3, December 19, 1983, 4 Iran-US CTR 96 ("*AIG - Award*"), at p. 109 (***Investor's Schedule of Legal Authorities at CL-177***); *Phillips Petroleum Co. Iran v. Iran*, Iran - United States Claims Tribunal, Case No. 39, Award 425-39-2, 29 June 1989, 21 Iran-US CTR 79 ("*Phillips Petroleum - Award*"), at paras. 111-112 and 157 (***Investor's Schedule of Legal Authorities at CL-178***); and *Starrett Housing Corp. v. Iran*, Iran - United States Claims Tribunal, Award, 32-24-1, 4 Iran-US CTR 112 (December 19, 1983) ("*Starrett Housing - Award*"), at para. 157 (***Investor's Schedule of Legal Authorities at CL-179***)

944. Under international law, tribunals can award damages for opportunity loss. For example, in its decision in the *Aminoil* case, the Tribunal acknowledged that "...the reasonable rate of return, assessed on a somewhat more liberal scale, constitutes one of the elements of compensation."<sup>1034</sup> The *Asian Agricultural Products* case supports the principle that "interest becomes an integral part of the compensation itself, and should run consequently from the date when the State's international responsibility is engaged."<sup>1035</sup> The Tribunal in the *Santa Elena* case similarly supported the award of compound interest to the investor:

... where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, *the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest.* It is not the purpose of compound interest to attribute blame to, or to punish, anybody for delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.<sup>1036</sup>

945. Similarly, the ICSID Tribunal in *Middle East Cement Shipping* held that:

...international jurisprudence and literature have recently, after detailed consideration, concluded that interest is an integral part of the compensation due after the award and that compound (as opposed to simple) interest is at present deemed appropriate as the standard of international law in such expropriation cases.<sup>1037</sup>

Other international Tribunals have taken a similar position, including the ICSID Tribunals in *Wena Hotels v. Egypt*,<sup>1038</sup> *Santa Elena v. Canada*<sup>1039</sup> and the Tribunal in *Metalclad v.*

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<sup>1034</sup> Award in the Matter of an Arbitration Between Kuwait and the American Independent Oil Company (*Aminoil*), Award, 21 ILM 976 (March 24, 1982) ("*Aminoil* - Award"), at para. 163 (***Investor's Schedule of Legal Authorities at CL-180***)

<sup>1035</sup> *Asian Agricultural Products* – Award, at para. 128 (***Investor's Schedule of Legal Authorities at CL-055***); The Tribunal in *Asian Agricultural Products* was quoting from Lillich, R. "Interest in the Law of International Claims" in *Essays in Honour of Voitto Saario and Toivo Sainio* (Helsinki: International Law Association, 1983) ("Lillich (1983)"), at para. 55-56 (***Investor's Schedule of Legal Authorities at CL-181***)

<sup>1036</sup> *Compañía del Desarrollo de Santa Elena* – Award, at para. 104 [emphasis added] (***Investor's Schedule of Legal Authorities at CL-115***) Other international arbitral awards have expressly allowed compound interest to be paid on the award of damages; See *Fabiani Case* (1905), French/Venezuelan Claims Commission, X Reports of International Arbitration Awards 83 ("*Fabiani Case*"), at p. 93 (***Investor's Schedule of Legal Authorities at CL-182***); *Chemins de Fer Zeltweg-Wolfsberg (Austria v. Yugoslavia)*, III Reports of International Arbitration Award 1795, at pp. 1808-1809 ("*Chemins*"), at p. 1808 (***Investor's Schedule of Legal Authorities at CL-183***) Dr. Mann has similarly concluded that compound interest should be awarded to the claimant as an integral part of damages awards by international tribunals: Mann, F. A. *Further Studies in International Law* (Oxford: Clarendon Press, 1990) (***Investor's Schedule of Legal Authorities at CL-184***)

<sup>1037</sup> *Middle East Cement* – Award, at para. 174 (***Investor's Schedule of Legal Authorities at CL-114***)

<sup>1038</sup> *Wena Hotels* – Award, at para. 129 (***Investor's Schedule of Legal Authorities at CL-136***)

<sup>1039</sup> *Compañía del Desarrollo de Santa Elena* – Award, at paras. 96-110 (***Investor's Schedule of Legal Authorities at CL-115***)

*Mexico*.<sup>1040</sup> Accordingly, the Investor respectfully requests that the Tribunal award compound interest on the damage award.

946. The Investor's losses arising from Canada's failure to act in accordance with its Treaty Obligations have been calculated by Robert Low and Richard Taylor of Deloitte LLP in its *Independent Valuators' Report*. On the basis of the international law of damages, the Investor's compensable losses include:
- a) Losses as a result of Canada's failure to meet its Treaty obligations;
  - b) Losses arising from the failure to effectively operate the Investments;
  - c) Interest; and
  - d) Professional fees and costs of this arbitration.
947. The award of interest is to compensate the Investor and the Investment from the time of the breach of September 24, 2009, through to the date of the award.
948. The compound rate of interest is appropriately based on a rate of return equal to commercial interest rates. In any event, the rate should not be less than the average yield of one to three year Government of Canada bonds quoted on the Bank of Canada website compounded annually.

### III. SUMMARY OF VALUATION REPORT

949. Robert Low and Richard Taylor are Chartered Business Valuators and Chartered Accountants with the firm of Deloitte LLP. The *Independent Valuators' Report* sets out the calculations of the independent valuers of how the damage caused by Canada's unlawful actions to the Investor and their Investments is properly quantified.<sup>1041</sup>
950. The *Independent Valuators' Report's* methodology in summary is comprised of:
- a) The near certainty of the Investor obtaining a contract for the Projects, given the prominent market position of the Investor and the Investment, as well as the nature and characteristics of the *Green Energy Act*, and the contract entered into between the Government of Ontario and the Korean Consortium;
  - b) The total is the volume of revenue lost by the Investor and Investment;
  - c) The revenue loss is then assessed to produce a loss of cash flow attributable to the Investor and the Investment after deducting all appropriate expenses. This figure constitutes the base economic loss to which the Investor and the Investment are entitled under the NAFTA;

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<sup>1040</sup> *Metalclad* (2000) – Award, at para. 128 (*Investor's Schedule of Legal Authorities at CL-098*)

<sup>1041</sup> CER- Independent Valuators' Report of Low and Taylor of Deloitte, at paras. 4.74, 4.75 and 4.76.



- d) This base lost cash flow figure is then adjusted for out of pocket losses and an applicable rate of interest (still to be applied) to produce the total amount required to put the Investor and the Investment in the position they would have been in but for the wrongful acts of Canada, net of the costs of this arbitration, including professional representation.

**A. Damage Suffered by the Investor**

951. The *Independent Valuators' Report* calculates the total damage resulting from Canada's actions that were inconsistent with its Treaty obligations. The Report calculates the resulting damages that flow from the economic losses, including:

- a) Incremental costs incurred to mitigate Canada's failure to protect the investment; and  
b) Future Losses.<sup>1042</sup>

952. The *Independent Valuators' Report* includes the additional costs the Investor incurred, defined in the Report as "Past Costs Incurred", and also included is the forfeited deposit by the Investor to GE, based on the nature and mechanics of the damages calculation.<sup>1043</sup>

*i. Discount Cash Flow Analysis*

953. The Independent Valuators have used the discounted cash flow approach (DCF) for economic loss, which was considered the most appropriate and reliable.<sup>1044</sup> Cash flows are identified for a period of 20 years into the future and discounted to the date of the analysis by an appropriate discount rate. As the revenue stream was provided in the FIT Contract and guaranteed by the OPA for 20 years, the Independent Valuators concluded:

Revenues can be forecast with a relatively high degree of confidence. The price per kWh is established by contract while the wind production can be reasonably estimated, with estimates supported by independent wind studies, and therefore revenues were readily determinable<sup>1045</sup>

954. The *Independent Valuators' Report* also calculates future losses using the Investor's Production Forecast. It uses the DCF approach to determine the economic losses sustained over the future loss period. The DCF approach calculates the present value of future losses by converting the losses to their present value equivalent. The discount rate used to convert the future losses to their present value equivalent reflects both the

<sup>1042</sup> CER- Independent Valuators' Report of Low and Taylor of Deloitte, at para. 4.66.

<sup>1043</sup> CER- Independent Valuators' Report of Low and Taylor of Deloitte, at para. 4.66.

<sup>1044</sup> CER- Independent Valuators' Report of Low and Taylor of Deloitte, at paras. 4.4, 4.5, 4.6, 4.7 and 4.8.

<sup>1045</sup> CER- Independent Valuators' Report of Low and Taylor of Deloitte, at para. 4.7(a).

time value of money and the perceived risk of the loss arising as forecast. The DCF approach is based on a projection of future cash flows that would have been realized from the ongoing operations of the affected investment.<sup>1046</sup>

955. The cash flows to be discounted are determined on a pre-interest basis and therefore the appropriate discount rate is a weighted average cost of capital (WACC) which represents a weighted average of the after-tax cost of debt, and the after-tax cost of equity where the weighting is based on the company's target debt-equity ratio, measured at market. The *Independent Valuators' Report* determined the appropriate WACC to be 5.50 to 5.75%.<sup>1047</sup>
956. NAFTA Article 1104 ensures that the best treatment in the jurisdiction is to be provided in the event that there is a difference between national treatment and most favoured nation treatment:
- Article 1104: Standard of Treatment**
- Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.
957. Based on this, the *Independent Valuators' Report* concludes the midpoint damages of the loss incurred by the Investor is broken down as follows:<sup>1048</sup>
- a) Damages for breaches of Article 1102, 1103 or 1105     \$653,183 million
  - b) Damage for breach of Article 1106                             \$105,250 million
958. The damages for category (a) includes damages in category (b). Thus categories (a) and (b) are not additive, and the damages in category (b) would only be applicable if the Tribunal did not find a breach of Articles 1102, 1103 or 1105.
959. Legal costs have not been included in this total, and are an appropriate addition at the discretion of the Tribunal.
960. In total, the Independent Valuators calculate the midpoint of the Investor's losses due to Canada's breach of the Treaty, excluding legal and arbitration costs, to be CDN\$653,183 million.<sup>1049</sup>
961. While the Report recognizes the need to consider pre and post-judgment interest, those amounts have not been included in the amounts stated above.

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<sup>1046</sup> CER- Independent Valuators' Report of Low and Taylor of Deloitte, at para. 4.4.

<sup>1047</sup> CER- Independent Valuators' Report of Low and Taylor of Deloitte, at para. 4.54.

<sup>1048</sup> CER- Independent Valuators' Report of Low and Taylor of Deloitte, at para. 4.3.

<sup>1049</sup> CER- Independent Valuators' Report of Low and Taylor of Deloitte, at para. 4.54.

**PART SEVEN: RELIEF REQUESTED**

962. In view of the facts and law set out in this Memorial, the Investor respectfully request that the Tribunal grant the following relief:
- a) A Declaration that Canada has acted in a manner inconsistent with its Treaty obligations under NAFTA Articles 1102, 1103, 1105 and 1106;
  - b) Damages in the amount of CDN\$653,183 million plus interest from September 24, 2009, at a rate set by the Tribunal; and
  - c) An award in favour of the Investor for their costs, disbursements and expenses incurred in the arbitration for legal representation and assistance, plus interest, and for the costs of the Tribunal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Appleton & Associates International Lawyers

Date: November 20, 2013