

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

MESA POWER GROUP, LLC

Investor

v.

GOVERNMENT OF CANADA

Respondent

INVESTOR'S REPLY STATEMENT OF COSTS

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I. INTRODUCTION

1. The Investor set out its costs and positions on the "Investor's Statement of Costs" on March 3, 2015. The disputing parties agreed to file a Statement of Costs rather than filing extensive submissions which would ordinarily contain extensive details on each and every cost incurred in the arbitration. The Investor maintains the contents of that submission. The present submission is limited to issues raised by Canada in its March 3, 2015 Submission on Costs.
2. Arbitration must be undertaken in a reasonable, efficient, and practical manner directed at resolving a dispute. These objectives guided the Investor's conduct throughout these proceedings.
3. Generally, costs should follow the cause. Costs may also address conduct that imposes undue or frivolous burdens upon the Tribunal or disputing party. Such conduct must be distinguished from situations where one party is merely asserting its rights and interests based on reasonable grounds, or upon a reasonable belief.
4. In this submission, the Investor refutes Canada's assertions. Canada's conduct has caused unjustifiable inefficiencies in these proceedings resulting in longer delays and increased workloads for both the Investor and the Tribunal. In these instances, costs should be assessed against Canada to address actions that imposed unnecessary burden on the Tribunal and the Investor.

II. THE INVESTOR SHOULD BE AWARDED BOTH ARBITRATION AND REPRESENTATION COSTS

5. The costs sought by the Investor are reasonable. Consequently, based on the UNCITRAL Rules, subsequent case law, and Canada's conduct throughout these proceedings, the Tribunal should award the Investor with all costs claimed if the Investor is successful.

1. COSTS SHOULD FOLLOW THE CAUSE

6. Article 40 of the UNCITRAL Arbitration Rules states that costs follow the cause. While Article 40 provides discretion in the apportionment of representation costs, this general principle should apply. Party conduct should be taken into consideration as a subsequent factor based on criteria previously noted in the Investor's Statement of Costs.¹

¹ Investor's Statement of Costs, paras. 89 and 96-99

7. As noted in the *Pope & Talbot* cost award, representation costs may be based on the overall success of a party in arbitration.²
8. Further, any conduct taken into account should be quantifiable so that a tribunal may properly assess costs of any party or counsel conduct at issue against that party.
9. But for Ontario's unlawful actions, the Investor would not have commenced these arbitral proceedings. Consequently, the Investor should recover all costs associated with this arbitration if it is successful in this case.

2. REPRESENTATION COSTS OF THE PARTIES ARE REASONABLE

10. The Investor and Canada provided approximately the same amount of legal services in this arbitration. In particular, the general number of hours of legal work performed in this arbitration is similar. The Investor's legal counsel cumulatively provided 17,594.56 hours of legal services. Canada reports it provided more hours of legal services throughout the course of this arbitration: 19,616.00 hours.³
11. The number of hours of legal work provided by both parties is relatively similar and reasonable given the complexity of these proceedings. Similarly, the costs for expert witnesses are similar and reasonable in the circumstances. If anything, the Investor's legal counsel were more efficient by spending 2,000 hours less than Canada's legal counsel.
12. Consequently, any difference in legal costs relate primarily to one element – rates for legal services. Canada admittedly chose to bill hours worked by all their legal counsel "substantially below the market rate."⁴ This accounts for the majority of the difference in legal costs claimed in this arbitration given that Canada actually spent more hours in defense than the Investor as the claimant.
13. The rates charged by the Investor's counsel are reasonable and are at market rates. Both firms representing the Investor are experienced in investor-state arbitration. Moreover, the Investor has in fact paid the fees charged by its counsel and should not be punished by the fact that it lacks in-house and experienced investor-state arbitration counsel that can charge government rates such as Canada. The Investor had to pay market rates for its counsel.
14. Additionally, it should be noted that the Investor's legal representation costs include a substantial number of hours dedicated to the Section 1782 proceedings in the United States, which were of critical importance to the Investor in these proceedings. The

² *Pope & Talbot, Inc v. Government of Canada*, Award in Respect of Costs, November, 22 2002, at para. 17
(Investor's Reply Statement of Costs Schedule of Documents at Tab-01)

³ Canada's Submission on Costs, at Annex I – Cost of Legal Representation

⁴ Canada's Submission on Costs, at footnote 79

importance of the Section 1782 proceedings to the Investor's case was detailed in the Investor's Statement of Costs.

3. MESA'S MANAGEMENT COSTS ARE REASONABLE

15. Reasonable costs were incurred by T. Boone Pickens who was a witness at the hearing. Mr. Pickens spent numerous hours working with counsel as well as additional staff in preparation for his time as a witness. This included reviewing documents as well as the pleadings to ensure that he was prepared and informed for Canada's cross-examination of him. The Investor only has sought reimbursement of Mr. Pickens' out of pockets costs as disbursements related to his role as a witness in the arbitration claim. Recovery for such reasonable costs is specifically permitted under Article 38 of the UNCITRAL Arbitration Rules.
16. Reasonable costs for assistance are specifically permitted under Article 38 of the UNCITRAL Arbitration Rules. Such costs are particularly reasonable when cases address regulatory and technical issues, such as those arising in the Mesa arbitration. Reasonable costs were incurred by Mesa to engage Cole Robertson and Mark Ward to provide technical assistance to legal counsel. The costs claimed by Mesa's were for specific costs incurred by Mesa for persons who provided assistance to the legal team and provided critical technical, financial and regulatory information to enable the claim to proceed efficiently.
17. Throughout these entire proceedings, Cole Robertson provided regulatory and financial guidance regarding the Ontario FIT process and the damages issues. Mr. Robertson also served as a witness in these proceedings. Canada's cross-examination of Mr. Robertson was significant and detailed. Mr. Robertson's travel costs and reasonable expenses regarding this function are also covered under Article 38 of the UNCITRAL Arbitration Rules.
18. The Investor has claimed reimbursement for the specific costs spent by Mesa for Mr. Robertson to provide assistance to legal counsel in this arbitration.
19. Mesa has also sought reimbursement for the actual costs paid to Mark Ward, who worked on this claim to assist counsel as a technical advisor. Mr. Ward is an engineer with extensive knowledge about the specific Mesa Projects and the FIT program. Mr. Ward left employment with Mesa after Canada's unlawful actions prevented Mesa from continuing its renewable energy pursuits in Ontario. Mesa was required to contract for Mr. Ward to provide assistance for these proceedings. These reasonable costs were claimed and are properly recoverable under UNCITRAL Article 38.
20. To the extent the Tribunal does not consider the costs of Mr. Robertson and Mr. Ward to constitute assistance by Mesa, then such reasonable costs incurred should be awarded by the Tribunal as an additional damages with respect to Mesa's claim.

III. CANADA'S ALLEGATIONS OF INVESTOR CONDUCT ARE BASELESS AND ILL-CONCEIVED

21. Canada's allegations relating to the Investor's conduct are baseless and ill-conceived. Consequently, the Investor should not be held responsible for any such costs.
22. The overall success of a party should be the key element in the apportionment of representation costs. Only, after taking overall success into account, should other relevant factors such as conduct be considered.
23. Factors that previously have been considered by other NAFTA tribunals were outlined in the Investor's Statement of Costs at paragraphs 89 and 96-99.
24. Canada has alleged various baseless instances of the Investor's conduct that it states should favor the apportionment of costs to Canada. Many of these examples are based on the UNCITRAL Working Group document entitled "Settlement of Commercial Disputes: Revision of the UNCITRAL."⁵ The UNCITRAL document cites as its source the Report of UNCITRAL's Second Working Group in its sixty-first session.⁶ In relation to costs the latter document states the following:

23. In relation to the determination of costs, it was suggested that guidance might be provided in relation to whether in-house legal counsel costs ought to be included in the determination of costs, and if so, how those might be calculated. Another suggestion was made to draw parties' attention to the possible cost consequences of parties' conduct during proceedings. It was furthermore suggested that matters such as responsibility for costs, security for costs and failure to pay advances on costs might also be addressed in the Notes.

In effect, the basis for the majority of Canada's allegations is a suggestion noted in a working group meeting report, not something adopted by the Working Group or the UNCITRAL.

25. Canada has not cited a single legal authority to support its contention that representation costs be apportioned in its favor assuming the Investor is successful on its claims. Furthermore, while mischaracterizing various factual scenarios, Canada did not even attempt to define or set any standard for conduct that should be taken into account for the apportionment of costs.
26. From Canada's Submission on Costs, it appears that the threshold for conduct that should be taken into account for the apportionment of cost is any conduct that Canada disagrees with, ignoring the fact that the parties may have even agreed on certain conduct.

⁵ UNCITRAL, "Settlement of commercial disputes: Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings", A/CN.9.WG.II/WP.186, Sixty-Second Session, New York, 2-6 February 2015 (**Respondent's Schedule of Legal Authorities at RL-115**)

⁶ Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-first session (Vienna, 15-19 September 2014), at para. 23 (**Investor's Reply Statement of Costs Schedule of Documents at Tab-02**)

27. In sum, the Investor should not be held responsible for Canada's representation costs in the event that Mesa is successful.

1. THE INVESTOR RESPECTED THE TIME LIMITATIONS IN NAFTA ARTICLE 1120

28. As detailed in the Investor's Memorial and Counter-Memorial, the Investor has complied with all jurisdictional requirements.⁷
29. Within NAFTA jurisprudence, a clear reasoning has developed in support of the Investor's position through cases such as *Ethyl*. Consequently, the Investor had a legally sound and reasoned position for submitting its Notice of Arbitration on October 4, 2011, which was more than six months after Canada started to take measures in violation of NAFTA Chapter Eleven.
30. Despite the clear precedent in interpreting NAFTA Article 1120, Canada consistently has taken a narrow approach to interpreting the requirements contained in Article 1120. In the present case, Canada has attempted simply to reargue a point that was clearly determined in *Ethyl*, and that has been crystallized over time.
31. Canada was awarded a very limited amount of costs in *Ethyl* for the Investor's decision to file its Notice of Arbitration two days early. Canada's arguments relating to NAFTA Article 1120 were novel. As *Ethyl* was the first case brought under the NAFTA, Canada did not have the benefit of jurisprudence as it does at present. By comparison, Mesa did not make a decision to file its Notice of Arbitration early.
32. Canada now attempts to claim its legal costs, stating that it was "left with no choice" but to make a legal argument that had little chance of success. The Investor disagrees with that statement.
33. Conduct based on a reasoned legal approach in investment treaty arbitration is not the type of conduct that was suggested by the comment to the UNCITRAL Working Group as constituting conduct in relation to apportioning costs. In making such an assertion, Canada completely disregards any threshold of conduct that would be required or necessary for a tribunal to make such a finding, and severely overstretches the suggestions made during the non-binding UNCITRAL working group meeting.
34. The Investor acted professionally and on the basis of legally-sound reasoning in submitting its Notice of Arbitration. Such conduct is plainly outside the scope of any suggestion considered at the UNCITRAL Working Group relied upon by Canada and does not, in any way, correspond to the conduct cited in cost precedents.
35. If anything, Canada's arguments regarding jurisdiction were completely meritless. The Investor should not be punished for responding to arguments Canada raised.

⁷ Investor's Memorial, paras. 818-923; Investor's Reply Memorial, paras. 817-849

2. THE INVESTOR FAIRLY AND REASONABLY ASSERTED BOTH ITS PROCEDURAL AND SUBSTANTIVE RIGHTS

a) The Investor used the agreed upon time at the hearing supporting relevant and material issues

36. The Parties agreed on the time that each Party required during the hearing based on the issues at hand.⁸
37. The hearing was completed earlier than predicted only because Canada chose not to use all the time that it was allotted. The Secretary of the Tribunal stated that Canada had 8 hours and 10 minutes remaining at the end of its cross-examinations.⁹ Canada had one full hearing day still available to it, but decided not to use its time.
38. The Investor used virtually all of the time allocated to it. Within the time allotted, it had to cross-examine numerous witnesses that Canada itself presented.
39. The Investor, as the party bringing the claim, had a burden to establish the breaches that it was claiming. As part of establishing these breaches, and as is common to most cases, the Investor had cross-examination questions for witnesses under Canada's control that the Investor did not have access to prior to the hearing.
40. The Investor acted prudently and streamlined all its examinations. In fact, the Investor had requested more time,¹⁰ given the imbalance in the number of witnesses between the parties. Canada objected to this request, and it was denied.¹¹ Ironically, Canada successfully prevented the Investor from using Canada's unused time, and now claims that the Investor should be punished for using its allocated time.
41. More specifically, Canada has not noted a single instance of irrelevant or unnecessary examination or questions of limited relevance. Canada could not do so, because it could not point to a period of time that would support its allegation.
42. Instead, Canada states that the Investor questioned witnesses "regarding Ontario's investment agreement with the Korean Consortium,"¹² that it engaged in re-direct and cross-examination permitted by the Tribunal, and that it questioned the credibility of an expert to opine on the specifics at issue in this case, given his prior experience and education.

⁸ See *Procedural Order No. 14*, para. 23

⁹ Hearing Transcript, Day 4, p. 330, lns 18-19

¹⁰ Investor's Letter of September 18, 2014 (*Investor's Reply Statement of Costs Schedule of Documents at Tab-03*)

¹¹ See *Procedural Order No. 14*, para. 23

¹² Canada's Submission on Costs, para. 37

43. All such examinations were relevant and material to this case. Canada's improper agreement with the Korean Consortium is at the heart of this case. The length of the cross-examinations was due to the breadth of topics to which witnesses testified.
44. Again, in this situation there is no conduct that should be taken into consideration when apportioning costs. The Investor examined on pertinent, relevant and material issues, and kept within the agreed upon timeframe. A party should not be penalized for using the time allotted to them for issues that are relevant and material to the dispute.

b) The Investor made the procedural requests necessary for it to fully represent its clients and assert its rights

45. In its submission, Canada objects to the Investor asserting its rights and alleges that this is a ground that should be taken into account in apportioning costs. In making such an argument, Canada asserts that the Investor should have voluntarily provided Canada an additional round of document production, that it should not have challenged certain confidentiality designations made by Canada, and that it should not have advanced positions in its interest in these proceedings such as bifurcation on jurisdiction.
46. In effect, Canada proposes that any time an Investor challenges a decision by a government, or attempts to assert its rights, that such an activity should be considered in the apportionment of costs.
47. Again, such a suggestion is far reaching and well outside the scope of the any cost issue. Further, the conduct noted by Canada was not conduct that could be considered unprofessional, or inefficient. Nor does it fall into the type of conduct decided in any NAFTA tribunal.¹³
48. The procedural requests at issue should therefore not be considered in the apportionment of costs.

c) The Investor's submissions were all relevant and pointed toward the resolution of new and outstanding issues between the parties

49. Any additional submissions made by the Investor were specific to outstanding or new issues that would have had to have been dealt by the parties in any event.
50. In raising issues before the Tribunal the Investor was attempting to act proactively in addressing new issues that had arisen. In other circumstances, the Investor was attempting to ensure that outstanding issues were dealt with in full.

¹³ In each of their initial submissions, Canada and the Investor refer to *Azinian v. Mexico* as the leading case that sets out the criteria that may aid a Tribunal for cost apportionment.

51. For example, in one of only two instances noted by Canada, the Tribunal stated that it “appears that some new issues have been raised by the Claimant (modification of the Confidentiality Order etc.). Furthermore, as it may facilitate the Tribunal’s eventual decision on the issues addressed by the Claimant, the Tribunal invites the Respondent to comment on the Claimant’s Communication.”¹⁴
52. Canada was not prejudiced by such submissions as it always offered the opportunity to respond. Furthermore, as the issues being raised were new or outstanding, Canada performed no additional work from any of the instances that it cites in which the Investor submitted correspondence that was noted by the Tribunal as unsolicited.
53. This alleged conduct should not factor into the apportionment of costs.

d) The Investor followed all rules relating to the submission of evidence

54. The Investor acted consistently with the procedural rules on the submission of evidence set out by the Tribunal.
55. Based on the rules governing the submission of evidence in *Procedural Order No. 1*, the Investor placed evidence into record through its pleadings, and as the dispute developed and issues narrowed, the Investor placed evidence into the record as new issues arose through subsequent submissions.
56. The Investor made submissions of new evidence along with its Article 1128 response submission. It did so based on its reading of the rules governing the submission of evidence, and based on established practice relating to Article 1128 submissions.
57. The Tribunal allowed the Investor’s supporting Article 1128 documentary evidence into the record.
58. In *Procedural Order No. 14*, the Tribunal confirmed the Investor’s position that “the Tribunal had not imposed any limitations prohibiting the Parties from filing documents with their comments on the non-disputing party submissions.”¹⁵ The Investor and the Tribunal specifically offered Canada an opportunity to comment on such evidence.¹⁶ Canada was under no obligation to make any comments on this evidence.
59. The alleged conduct identified by Canada should not factor into the apportionment of costs.
60. Additionally, as a result of an agreement reached at a pre-hearing meeting between the parties and the Tribunal, *Procedural Order No. 14* allowed for Parties to submit corrections

¹⁴ Tribunal’s Letter of March 27, 2014 (*Investor’s Reply Statement of Costs Schedule of Documents at Tab-04*)

¹⁵ *Procedural Order No. 14*, at para. 48

¹⁶ *Procedural Order No. 14*, at para. 49

to witness statements and expert reports.¹⁷ The parties also agreed to allow expert witnesses to present a summary of their reports for the purposes of efficiency.¹⁸

61. As a result of this agreement, the Investor instructed all of its witnesses to perform a thorough review of their statements and reports and to address any corrections that should be made.
62. The Investor's damages expert made corrections, based both on their and the Investor's understanding of the word "correction."
63. As noted in the Investor's Statement of Costs, Canada challenged the Investor's damage expert correction letter, while admitting that it did so without a thorough analysis of the corrections that were submitted.¹⁹
64. As a result of Canada's objection, the Investor withdrew Deloitte's correction letter. However, at the hearing, the parties reached an agreement that certain damages issues might be dealt with in principle at least.
65. During their presentation, the Investor's expert valuator, Robert Low, provided a summary based on the agreement between parties. In its Submission on Costs, Canada now attempts to state that the conduct almost completely based on party consent should warrant the apportionment of costs in their favor.
66. This alleged conduct should not factor into the apportionment of costs.
67. If anything, Canada prevented the Investor's expert from presenting evidence to counter some of the criticisms Canada launched, albeit unfairly, against the Investor's expert report on damages. Canada was not prejudiced in that situation and should not be awarded costs.
68. In sum, in both of the instances mentioned by Canada, the Investor's conduct should not be a factor in the apportionment of costs.

3. THE INVESTOR DID NOT WITHDRAW ANY OF ITS ARGUMENTS, AND CANADA DID NOT ATTEMPT TO CONTACT THE INVESTOR REGARDING ITS VIEW ON ANY WITHDRAWN ARGUMENTS

69. It is well established that if a party withdraws any part of the argument that it has pleaded that it must clearly do so. The Investor did not withdraw any of its arguments. The Investor gave no indication to Canada that it would withdraw any of its arguments.

¹⁷ *Procedural Order No. 14*, at para. 37

¹⁸ *Procedural Order No. 14*, at para. 15

¹⁹ See Canada's Letter of October 18, 2014 (*Investor's Statement of Costs Schedule of Documents at Tab-05*)

70. In its Submission on Costs, Canada stated that it requested the Investor to clarify its position on certain arguments at the hearing. Yet, in support of this allegation Canada only cites rhetorical questions that it posed during its closing statements.
71. Specifically, counsel for Canada stated in its closing argument:
- “Now, perhaps the claimant is dropping these claims about OPA conduct. Maybe it is dropping these allegations entirely, and, if they are, I think they should say so, because it would save everybody a lot of time in the post hearing submissions and in writing and drafting any part of the award. But to the extent they are still challenging them, we have fully addressed them in our previous submissions, including the opening and all of our written submissions, so I don't propose to come back to them in this closing argument, at all.”²⁰
72. Canada never engaged the Investor in a discussion outside of these rhetorical remarks in its closing statement. Canada never contacted the Investor before the hearing, never spoke with the Investor during the hearing, and never contacted the Investor after the hearing on this issue.
73. Furthermore, this is not an issue of Investor conduct. As noted above, in no way did the Investor ever indicate that any of the arguments it made would be withdrawn.
74. As such, this should not be considered in the slightest in relation to the apportionment of costs.

IV. CANADA HAS NOT QUANTIFIED ANY OF THE INVESTOR'S CONDUCT THAT ALLEGEDLY MERIT ANY APPORIONMENT TO CANADA

75. Canada's has not quantified in any way costs in relation to any of the alleged Investor conduct that should be taken into account in cost apportionment. Conduct that is taken into account for the apportionment of costs by a tribunal should be quantified to allow for the proper apportionment. This will allow a tribunal to properly assess costs against a party for inappropriate conduct.
76. In certain instances, for example, in relation to its baseless and ill-conceived allegations regarding the “cooling-off” period, Canada openly admits that it cannot “isolate its costs related to jurisdiction.”²¹
77. The Tribunal should disregard all allegations that have not been quantified by Canada.

²⁰ Hearing Transcript, Day 6, pp. 138-9, lns 23-9

²¹ Canada's Submission on Costs, at footnote 8

V. CANADA'S CONDUCT MERITS APPORTIONMENT OF REPRESENTATION COSTS TO THE INVESTOR

78. The Investor thoroughly detailed Canada's appalling conduct in relation to its non-production of critical responsive and material evidence obtained through the Section 1782 proceedings, its meritless subsidy argument and its non-compliance with document production in its Statement of Costs. Costs for addressing these arguments should be assessed against Canada, even if the Investor were not to prevail on its claims.

1. SECTION 1782 PROCEEDINGS, DOCUMENT REQUESTS & CONFIDENTIALITY OF DOCUMENTARY EVIDENCE

79. The Investor detailed its position regarding the Section 1782 proceedings and confidentiality in paragraphs 42-56 of its Statement of Costs. These two issues are closely linked.

a) Section 1782 Proceedings & Document Requests

80. The Section 1782 process proved to be necessary and produced critical information that informed the Investor's positions in this arbitration and provided crucial evidence to support the Investor's pleadings.
81. Such information was crucial in the early phases of these proceedings due to the information asymmetry between Canada and Investor. Canada had access to a vast array of material and relevant documents to which the Investor was not privy. This included information regarding the formulation and implementation of the FIT program, including the Korean Consortium and the bid program.
82. In this regard, the Investor attempted to "level the playing field" and proactively obtained material and relevant information from US corporations in the US through the Section 1782 process. As noted in its Statement of Costs, this allowed the Investor to obtain access to the text of the GEIA.²² Canada was unwilling, and, for reasons that escape the Investor, would not disclose the text of the GEIA in full until after the Investor obtained it through the Section 1782 process. Further, at the hearing when directly confronted about when the text and subsequent amendments of the GEIA were publically available, counsel and witnesses for Canada were evasive in their answers.²³ This is one of several crucial examples of why the assistance of the US courts in the Section 1782 proceedings were

²² The Investor first obtained the GEIA through its 1782 proceedings against Pattern Energy.

²³ Testimony of Sue Lo, Hearing Transcript, Day 3, pp. 25-30, Ins 7-10

- critical to the Investor in obtaining relevant and critical evidence within a time frame that would not have severely prejudiced it in pursuing this claim.²⁴
83. Such information was subject to a restrictive confidentiality designation from US courts to which the Investor had to comply.
 84. Canada was fully aware of such proceedings as early as July 2012 and chose not to participate or intervene in them.²⁵ Such participation in the US process was fully available to Canada. All hearings in the process were public and were not *ex parte* (only the initiation of the original subpoena was *ex parte*. Canada chose to not participate before the US courts.
 85. In undertaking Section 1782 proceedings, the Investor in no way prejudiced Canada. This conduct is in no way conduct that comes close to any standard that should be taken into account by a tribunal when determining the apportionment of costs.
 86. Moreover, the Investor did not engage in “overly burdensome” document requests. The Investor made its document requests based on the information that it had available to it at the time and in a tailored fashion whenever possible.
 87. In many instances, as a result of the information asymmetry between the parties the Investor was not in position to further clarify the exact nature and scope of its requests. Further, numerous document requests which Canada includes in its figure of requests that were denied, or seriously reduced include requests related to information from the OPA and Hydro One.
 88. Additionally, although Canada did produce roughly 8000 documents to the Investor, Canada did a poor job of analyzing such documents for relevance. As such, out the documents that the Investor did receive there were numerous duplicates or documents that were irrelevant to the dispute.
 89. Further, some documents produced by Canada contained no information at all. Such documents include entirely redacted emails²⁶ or simply blank documents.²⁷

²⁴ The GEIA was later obtained by the Investor through requests made under the Ontario *Freedom of Information and Protection of Privacy Act* (FIPPA).

²⁵ See Investor's Statement of Costs, footnotes 11 and 12

²⁶ See, for example, Email from Dan Shear to Sunita Chander (***Investor's Reply Statement of Costs Schedule of Documents at Tab-05***) and Email from Pearl Ing to Dan Shear and Sunita Chander (***Investor's Reply Statement of Costs Schedule of Documents at Tab-06***), produced in response to Investor's Document Request No. 37, submitted April 17, 2013.

²⁷ See, for example, the blank document at bates page 030738-030740 (***Investor's Reply Statement of Costs Schedule of Documents at Tab-07***), which does not appear on Canada's Index of Document Production, September 13, 2013 (***Investor's Statement of Costs Schedule of Documents at Tab-26***)

90. Here, both with respect to the Section 1782 proceedings and document requests, the Investor submits that the conduct at issue should not be taken into account for the apportionment of costs.

b) Confidentiality

91. Canada seeks costs with respect to the difficulties of addressing confidentiality arising from orders obtained from US courts. Canada does not deny that the Investor was bound by confidentiality and conduct rules by the US courts. Canada simply complains that costs should be awarded with respect to Canada's motions to declassify information that was provided by the courts to the Investor as constituting confidential business information. The irony is that it was Canada's own trading partners in the U.S. that wanted the confidentiality, not the Investor.
92. Canada's arguments never could apply to documents obtained under US Court Orders which specifically stated that the NAFTA Tribunal had the power to govern confidentially and use of the documents. Canada's objections could apply only with respect to US Court Orders which were not in perfect alignment with the Confidentiality Order issued by the Tribunal. There was only one order which had a variance with the Tribunal's Confidentiality orders. This related to the documents obtained from NextEra.
93. The documents obtained from NextEra never were produced by Canada, and were highly relevant and material during the witness hearing.
94. The documents obtained from Pattern Energy also were highly relevant and material. The Investor itself was precluded from changing the level of designation on the documents it received from Pattern under the US Protective order. Modifications could only be made to the designations through an order from the Tribunal. The Investor cooperated fully with the Tribunal to address Canada's motions to modify the level of confidentiality. This was entirely within the Tribunal's authority based on the US Court Order and the Tribunal's Confidentiality order – the only restriction was the ability of the Investor to modify the level of confidentiality on its own.
95. Canada's arguments ignore the key issue. Canada refused all of the Investor's requests to simply produce its own copy of the documents provided by NextEra or Pattern. These were documents obtained from Ontario by the US counterparty, who produced it under a US Court Order. If Canada simply had produced its own copy of the very same specific document, there would have been no issue to consider before the Tribunal. The Investor on multiple occasions sought Canada's consent to produce these documents.
96. Canada never raised any issue about the authenticity of the documents obtained under the Section 1782 process, yet Canada also never produced its own copy of these documents. Had Canada done so, it would have saved the Tribunal the need to rule upon this issue and it would have saved the Investor over one thousand hours of work in reviewing,

declassifying and producing documents that Canada always had within its possession and knowledge.

97. Where possible, the Investor attempted to agree with the position advanced by Canada. For example, the Investor went to great lengths to secure NextEra's consent so that it could avoid any confidentiality dispute with Canada.²⁸ In other circumstances, the Investor was able to waive confidentiality over documents that were not part of a US Court Order.
98. Canada now claims that the Investor's narrowing of the confidentiality issues in dispute by agreeing with Canada's position should form a basis for costs assessed against the Investor. The Investor acted reasonably and in the spirit of good faith and cooperation. Canada's arguments in this respect should be dismissed.
99. With respect to the re-classification of Section 1782 evidence, the Tribunal had no choice but to follow Canada's objection under the applicable procedural orders and Confidentiality Order. However, Canada should be responsible for the cost and effort arising from its decision not to simply produce the specific documents that were in contention and which were clearly in Canada's possession. Had Canada done so, a great deal of effort and cost would have been saved by all.

2. SUBSIDY

100. The Investor detailed the additional time, effort and the specific cost to it of Canada's meritless subsidy defense in its Statement of Costs.²⁹
101. Despite Canada's attempt to misconstrue the facts, what is clear is that Canada asserted subsidy as a defence to the Investor's claims. This was explicitly stated by Canada on numerous occasions.³⁰
102. Such a defence, albeit a legally and factually flawed defence, had the potential to create a serious consequence for the Investor's claim. The Investor realized this and diligently defended its interests which required additional legal resources expended on this issue.
103. Yet, in its Submission on Costs, Canada purports that the Investor should not have taken this legal defence raised and defended by Canada seriously.
104. Canada attempts to downplay the foolish, meritless, and baseless argument that they raised and defended. As clearly pointed out in the Investor's Post-hearing submission, the

²⁸ See Investor's Letter of April 15, 2014 (*Investor's Reply Statement of Costs Schedule of Documents at Tab-08*) noting that NextEra has consented to the disclosure of NextEra's documents.

²⁹ Investor's Statement of Cost, at paras. 60-67

³⁰ Canada's Letter of August 19, 2014 (*Investor's Statement of Costs Schedule of Documents at Tab-23*)

“logical consequence” that Canada has consistently alleged defies the most basic tenants of common sense, let alone any further or more complex logical inferences.³¹

105. Canada presented and consistently asserted the legal defence of subsidy knowing that such a defence was legally indefensible and knowing that they had no evidence to support such an argument.
106. Canada's conduct in this regard should be directly taken into account in relation to specific costs it caused the investor.

3. NON-COMPLIANCE WITH DOCUMENT PRODUCTION

107. At paragraphs 68 to 87 in its Statement on Costs, the Investor outlined Canada's non-compliance with the Tribunal's document production orders.
108. As noted in those submissions, Canada's non-compliance with the Tribunal's document production orders is another instance where the Investor should be awarded costs. The Investor submitted in its Statement of Costs that these costs should come in the form of a sanction for non-compliance.

VI. CONCLUSION

109. The Investor reiterates its request that the Tribunal grant an award pursuant to NAFTA Article 1135(1) and Articles 38 and 40 of the *UNCITRAL Arbitration Rules* ordering that the Government of Canada bear the costs of this arbitration, as well as the Investor's costs for legal representation and assistance, in the amount of US\$ 9,306,156.02.
110. Further, based on the Investor's Statement of Costs and the further arguments stated here the Investor submits that it should not be liable for any of Canada's arbitration or representative costs.
111. The Investor reiterates that in the event that the Investor is not successful on any of its claims in this arbitration, the Investor requests an award for US \$2,791,847 in costs based on Canada's vexatious argumentation and conduct which caused the Investor specific, identifiable, and unnecessary costs.
112. The Investor reserves the right to seek additional costs arising subsequent to the filing of this cost submission.

³¹ Investor's Post-Hearing Submission, paras. 369-371

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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