PUBLIC

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

BETWEEN:

MESA POWER GROUP, LLC

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

COUNTER-MEMORIAL AND REPLY ON JURISDICTION

February 28, 2014

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TABLE OF CONTENTS

INTRODUCTION

I. Overview

1. In any procurement process there are necessarily winners and losers—applicants who are successful and are awarded contracts and those who are not. In virtually every such procurement process, applications have to be evaluated, decisions made, and contracts eventually awarded based on the merits of the applications and the needs and goals of the government. In managing and implementing procurement processes, decision-makers are often forced to make adjustments at key junctures in order to best satisfy the policy objectives of the government and ensure that the process unfolds in a fair, transparent and efficient manner. Such adjustments often result in winners and losers as well, as changes operate to the benefit of some and the detriment of others.

2. Those who are unsuccessful usually disagree with the outcome. They often feel aggrieved and allege that their applications were better than those of their competitors. The fact that they were unsuccessful is proof, in their eyes, of a conspiracy, wrong-doing and injustice. In reality, it is nothing more than a commercial consequence of the legitimate policy choices which must be made as any such process unfolds.

3. At the heart of this arbitration brought against Canada by Mesa Power Group, LLC (the "Claimant" or "Mesa") are these sort of typical complaints. The Claimant is disappointed that it did not receive a contract as part of Ontario's Feed-in Tariff Program ("FIT Program") – particularly because it had hoped to use such a contract to mitigate its losses from an ill-advised decision to sign a multi-billion dollar agreement to purchase wind turbines for a Texas project that failed prior to the FIT Program's launch. It alleges that its applications were better than those of its competitors who did receive contracts. It then makes broad and unsubstantiated accusations of discriminatory treatment and egregious conduct.

4. There is no evidence to support the Claimant's allegations. As is shown below, both the Government of Ontario and the Ontario Power Authority ("OPA") acted fairly

and in good faith, and in particular, they treated all applicants consistently and equally in the creation and administration of the FIT Program regardless of their nationality.

5. In the mid-2000s, the Government of Ontario was confronted by an electricity system that obtained a significant proportion of its generation from heavily-polluting coal-fired power plants. Further, even with these plants operating, it understood that there would be a shortage of generating capacity in the near future. As a result, it undertook to restructure Ontario's electricity system by eliminating the use of coal-fired generation and obtaining supply and capacity from alternative and renewable energy sources. In order to accomplish this, it created the OPA, an independent state enterprise. The OPA was tasked with long-term system planning, conservation, demand management and the procurement of new generation through centralized, long-term power purchase agreements ("PPAs").

6. By 2008, the environment in which the Government of Ontario and the OPA were operating had changed significantly. The world had begun falling into the worst economic crisis in decades – a crisis which would last several years. Investment levels fell to near historic lows as investor confidence plummeted and financial institutions severely restricted the availability of credit. Further, unemployment rates had soared as the recession took its toll across the economies of all developed countries, including Canada.

7. Consequently, in 2008, the Government of Ontario, like many other governments across the world, including that of the United States, used its procurement powers to stimulate the economy. In particular, it initiated a number of larger scale procurement initiatives designed not only to obtain needed electricity generation, but to acquire it from renewable energy sources in a way that would provide an economic stimulus and create jobs. The two primary initiatives were the *Green Energy and Green Economy Act 2009* ("GEGEA") and the *Green Energy Investment Agreement* ("GEIA").

8. The GEGEA, which was introduced into the Ontario Legislature in February of 2009 and came into force on May 14, 2009, authorized the Minister of Energy to direct the OPA to establish a FIT Program. Starting in early 2009, the OPA held numerous public stakeholder sessions in which it received feedback and input on drafts of the FIT Program Rules ("FIT Rules") and the FIT Program Contract ("FIT Contract").

9. On September 24, 2009, the Minister issued the formal direction to the OPA to establish the FIT Program. The OPA launched this program and began accepting applications on October 1, 2009. The FIT Program was designed to be a streamlined standard offer program pursuant to which long-term fixed price contracts would be awarded to successful applicants for specified amounts of renewably generated electricity. FIT Contract prices were set sufficiently high so as to encourage investment in renewable energy generation. Further, in order to ensure that the money being spent on this procurement program would result in the desired economic stimulus and job creation, the FIT Program also included minimum domestic content requirements for FIT contract holders.

10. In designing the FIT Program, the OPA had to take into account the fact that, as a simple technical matter, the amount of new generation that can connect to the electricity system, both overall and at any one specific point, is limited. This is due in large measure to a lack of existing capacity on transmission and distribution systems, and the fact that changes to such infrastructure often require significant public and private financial investment. In light of these transmission constraints, the OPA designed a methodology by which it would rank applications for FIT Contracts.

11. The process would have two phases – a special procedure for ranking projects received during the first sixty-days of the program (the "launch period") and a standard procedure for ranking all later-received applications. Applications received during the launch period would be ranked based on criteria which would identify the most development-ready (or "shovel-ready") projects whereas post-launch period applications would be ranked based on the time that the applications were received by the OPA. As

with every other aspect of the FIT Program, the basis upon which the projects would be ranked was the subject of extensive public consultations in the summer of 2009.

12. Initially, when launching the FIT Program, both the OPA and the Government of Ontario were concerned that the economic recession and the resulting credit crunch would mean that there might be an insufficient number of applicants to meet Ontario's generation needs. However, when the Program opened on October 1, 2009 there was a flood of applications – far more than expected and far more than had been planned for. Working with an "independent fairness monitor", London Economics International LLC ("LEI"), the OPA designed a methodology to process this huge volume of applications which would ensure that every application was treated fairly and consistently. No FIT applicant received different or more favourable treatment under the FIT Program.

13. The Claimant submitted two FIT applications during the launch period, one application for each of its proposed TTD and Arran wind projects. In addition, the Claimant submitted an additional four FIT applications for the two phases of each of its proposed Summerhill and North Bruce wind projects after the close of the launch period. The Claimant's launch period applications (TTD and Arran) failed to satisfy any of the objective criteria developed by the OPA to assess development-readiness. As a result, they were not highly ranked, coming in at 91 (TTD) and 96 (Arran) in the Province. The other four applications (Summerhill and North Bruce) were ranked in the order in which they were received by the OPA, between 318 and 321 in the Province.

14. The Claimant's proposed projects were all located in an area of Ontario known as the Bruce Peninsula (referred to as the "Bruce region" for transmission planning purposes). As all FIT applicants were aware, technical transmission constraints meant that there was no capacity available in the Bruce region at the time the FIT Program was launched. Thus, applicants knew that unless such constraints were resolved, no projects located there would receive FIT Contracts.

15. FIT applicants were also aware, however, that in 2007, prior to the introduction of the GEGEA in the Ontario Legislature, Hydro One, Inc. ("Hydro One" an independent state enterprise responsible for Ontario's transmission lines) had proposed the construction of a new high-voltage transmission line to resolve the transmission constraints in the Bruce region (the "Bruce to Milton Line"). Hydro One proposed the new line primarily to allow for increased generation from the existing nuclear facility located there. However, it was believed that there would be unused capacity available on the new line which could be made available for renewable energy projects. Thus, shortly after the launch of the FIT Program, the OPA began public discussions with respect to how any new remaining capacity on this line, if approved, would be allocated.

16. The Bruce to Milton Line did not receive its final significant regulatory approval until May 2011. By then, the environment in which the FIT Program was being implemented had changed. In particular, the FIT Program had already resulted in the procurement of much of the renewable generation that the Government of Ontario had determined was desirable. With this in mind, the Ministry of Energy, in collaboration with the OPA, developed a process for allocating transmission capacity on the Bruce to Milton Line to FIT applicants in a way that would respect the needs and policies of the Government as well as align, as much as possible, with what had been previously discussed by the OPA in its public consultations.

17. This revised process was outlined in a direction issued by the Minister of Energy to the OPA on June 3, 2011 ("June 3, 2011 Direction"). Consistent with what the OPA had been discussing publicly since 2010, a key component of the allocation process was the possibility for applicants to change the point at which they proposed to connect their project to Ontario's electricity grid. While a change in connection point would not affect a project's ranking in the FIT Program, it would allow projects to adjust their plans (at their own expense) in order to connect to different parts of the grid where capacity was available.

18. The change in connection point window was open for only five business days. During this window, a number of highly ranked projects chose to change their connection points in order to locate themselves in the Bruce region so that they could compete for access to the new transmission capacity created by the Bruce to Milton Line. After this change window closed, the OPA proceeded to consider applications for FIT Contracts based on the previously existing rankings of the applications.

19. On July 4, 2011, the OPA awarded contracts to FIT applicants for the available capacity on the Bruce to Milton Line. As a result of their low rankings, none of the Claimant's proposed projects received a FIT Contract offer. On July 6, 2011, two days later, the Claimant filed a Notice of Intent to submit a claim to arbitration under Chapter 11 of NAFTA. Three months later, the Claimant purported to initiate NAFTA proceedings by filing a Notice of Arbitration pursuant to the UNCITRAL Arbitration Rules. In its Notice of Arbitration, the Claimant alleged breaches of Articles 1102 (National Treatment), 1103 (Most-Favoured-Nation Treatment), 1105 (Minimum Standard of Treatment), and 1106 (Performance Requirements).

20. The Tribunal lacks jurisdiction to hear this claim. By filing a mere three months after learning that it had not received a contract, the Claimant has failed to respect NAFTA's mandatory cooling-off period. Accordingly, Canada has not consented to arbitrate this dispute and it should be dismissed for that reason alone. Moreover, even if this Tribunal were to proceed further, it has no jurisdiction to consider certain of the Claimant's claims, including those with respect to measures made before the Claimant made any investment, and those which are not measures of the Government of Ontario, but of state enterprises that were not acting in the exercise of delegated governmental authority.

21. Even if the Tribunal were to find that it does have jurisdiction and considers the measures in question, the Claimant has failed to establish any of its claims that Canada has breached its obligations under NAFTA.

22. First, Canada does not have any obligations under Articles 1102, 1103 or 1106 with respect to the measures in question because the challenged measures constitute procurement, initiated at the direction of the Government of Ontario and implemented by the OPA. As a result, pursuant to Article 1108, the above referenced articles do not apply.

23. Second, even if the Tribunal were to consider the alleged breaches of Articles 1102 and 1103, the Claimant's claims have no merit. Articles 1102 and 1103 are designed to prohibit nationality-based discrimination against U.S. or Mexican investors in favour of either Canadian or third party investors. The Claimant has fundamentally misconstrued these provisions. Indeed, for its national treatment claim, it relies on the treatment that was allegedly accorded to other U.S. investors and their investments in Canada. Essentially, the Claimant is asserting that a national treatment violation can be proven by showing treatment that was accorded to a non-national. That position is meritless. With respect to its most-favoured nation claim, the Claimant has attempted to compare the treatment it received with that accorded to a consortium of Korean investors who were not making a FIT application, did not receive a FIT Contract, and who committed, pursuant to the GEIA, to investments in Ontario valued at $7 billion.[1] The treatment accorded to those investors cannot be compared with the treatment accorded to the Claimant because it was not accorded in like circumstances.

24. Third, Canada has not violated any of its obligations under Article 1105. As confirmed by the independent fairness monitor in its contemporaneous audit, the applications to the FIT Program were fairly and reasonably assessed. The fact is that the Claimant's FIT applications did not merit a high ranking, and thus did not merit a contract offer. Moreover, while the FIT Program adapted over the years to meet evolving market conditions and policy objectives, there is nothing manifestly arbitrary, unfair or unjust about that fact. Most, if not all, government programs of any degree of complexity

[1] Unless otherwise specified, all dollar ($) amounts are stated in Canadian dollars (CAD).

and longevity need to evolve. Article 1105 does not prohibit governments from adapting programs in order to respond to changed circumstances.

25. Fourth and finally, even if this Tribunal were to find a breach of Canada's obligations, the Claimant's damages claim is significantly inflated. In order to reach the figure it does, the Claimant ignores the fact that most of the alleged losses it claims were not caused by any of the measures that it is challenging, but rather by its own business failures. Further, with respect to the small portion of damages that could be causally related to the alleged NAFTA breachesA, the Claimant relies on false and unsubstantiated assumptions, calculation errors, and misrepresentations of the relevant standards and risks involved in their projects. Ultimately, if a breach of NAFTA is found, the Claimant is reasonably entitled to no more than its actual sunk costs.

II. Materials Submitted By Canada

26. Along with this Counter-Memorial and the attached exhibits and authorities, Canada has submitted the following documents:

- **Witness Statement of Susan Lo:** Ms. Susan ("Sue") Lo was the Assistant Deputy Minister of the Renewables and Energy Efficiency Division at the Ministry of Energy from June 2009 until February 2013. As a result, she was involved with both the implementation of the FIT Program and the negotiation and administration of the GEIA. She was also responsible for meeting with FIT proponents throughout this period of time. Ms. Lo was further involved in the development of the Government of Ontario's 2010 Long-Term Energy Plan ("2010 LTEP") and the Bruce to Milton transmission capacity allocation process.

- **Witness Statement of Rick Jennings:** Mr. Rick Jennings is the Assistant Deputy Minister of Energy Supply at the Ministry of Energy. He has held this role since 2005, and as a result, was involved in the development of the GEGEA and the FIT Program. Mr. Jennings is also familiar with how the Government of Ontario oversees the electricity system and its policy goals in its procurement processes.

- **Witness Statement of Jim MacDougall:** Mr. Jim MacDougall was the Manager of the FIT Program at the OPA from July 2009 to June 2011. He was directly involved in the development of the FIT Rules, the FIT Contract and

other FIT Program documents, as well as the development of the ranking criteria for launch period projects. He was also responsible for managing communications with FIT applicants and contract holders.

- **Witness Statement of Richard Duffy:** Mr. Richard Duffy is the Manager of Generation Procurement at the OPA, a position he has held since July 2009. In that role, he was directly involved in the development and administration of the FIT application process, and in particular, the review and ranking of the FIT applications received during the launch period.

- **Witness Statement of Bob Chow:** Mr. Bob Chow is the Director, Transmission Integration, at the OPA. Mr. Chow was responsible for assessing the transmission and distribution resources of Ontario in connection with which FIT projects could be offered contracts in the program. He was also directly involved in explaining to the public how aspects of the FIT Program would work. Finally, he was involved in the development of the Bruce to Milton transmission capacity allocation process from the technical perspective.

- **Witness Statement of Shawn Cronkwright:** Mr. Shawn Cronkwright is currently the Director, Renewables Procurement, at the OPA. He assumed that position in 2010. He was involved in the implementation of the FIT Rules, the implementation of Ministerial directions issued as a result of the GEIA, and the development of the Bruce to Milton transmission capacity allocation process. He was also involved in correspondence with FIT applicants, including the Claimant, concerning the events that have led to this claim.

- **Expert Report of Steve Dorey:** Mr. Steve Dorey, on behalf of Queens Quay Consulting, has provided an expert report on the history and background of Ontario's electricity system, and on the development of the Bruce to Milton Line. Mr. Dorey's experience is in working in the energy system in Ontario, including as a strategic advisor to the President of the OPA from 2009 to 2010.

- **Expert Report of Berkeley Research Group:** Mr. Chris Goncalves, of Berkeley Research Group ("BRG") has provided an expert report assessing the Claimant's damages claim. He and his team are economics and valuation experts with experience assessing the value of renewable energy projects, and in assessing damages in international arbitration.

THE FACTS

I. Background on the Electricity Industry in Ontario

A. Fundamentals of an Electricity Industry

27. The overarching goal of an electrical system is straightforward – make sure that the lights stay on.[2] To do so, one must ensure at all times that a reliable electricity supply exists to meet consumer demand. Achieving this goal, however, is extraordinarily difficult and requires that numerous factors be considered, balanced and forecast, virtually all day, every day.[3] The reasons for this complexity are inherent in the real-time manner in which electricity is produced, transmitted and consumed, and the desire to provide electricity in a cost-effective and sustainable manner.[4]

28. In order to get power from generators to consumers, a complex system of high voltage transmission lines is required.[5] If at any moment, the demand exceeds supply, then consumers will experience voltage dips (brownouts) or blackouts.[6] On the other hand, if supply severely exceeds demand, blackouts and brownouts can result as well.[7] Moreover, such events can damage transmission infrastructure, leading to costly repairs.[8]

29. As a result, in order to maintain a safe and reliable electrical system, operators must ensure that the supply of electricity from generation is in an essentially instantaneous balance with the demand for it at all times.[9] However, this is difficult because demand can vary greatly even within a single day.[10]

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[2] RWS-Jennings, ¶ 11.

[3] RWS-Jennings, ¶ 5; RWS-Chow, ¶ 15.

[4] RWS-Jennings, ¶¶ 5-8; Expert Report of Steve Dorey ("Dorey Report"), ¶ 21.

[5] RWS-Chow, ¶ 5; RWS-Jennings, ¶ 16.

[6] Dorey Report, ¶ 5.

[7] *Ibid*.

[8] *Ibid*.

[9] RWS-Chow, ¶ 15; RWS-Jennings, ¶ 5; Dorey Report, ¶¶ 5 and 28.

[10] RWS-Jennings, ¶ 9.

30. Accordingly, most electricity systems employ different types of generating facilities: base load, intermediate and peaking resources.[11] Base load generating facilities are large-scale facilities, like nuclear power plants and certain hydro-electric facilities, that are capital intensive to construct, but relatively inexpensive to operate.[12] They are designed to operate continuously throughout the day, week and year to provide the necessary amount of electricity to meet the base level of expected demand.[13] However, they cannot be started up or shut down quickly, and once operating, their output cannot be quickly increased or decreased.[14] As such, they need to be supplemented with more flexible types of generation capability.[15]

31. Intermediate facilities such as coal-fired plants and certain combined-cycle natural gas-fired electricity generation facilities, are used to supply electricity when demand is above the base level, but is not at its peak.[16] These plants will typically operate during the day and the evening only, and can be started and shut down relatively quickly as needed.[17]

32. Finally, peaking generating facilities such as oil and single or simple-cycle gas burning generation facilities, are relatively inexpensive to construct and have extremely responsive ramp-up rates, but also have significant operating costs.[18] Such facilities have the flexibility to respond to sudden changes in demand, and thus are operated only when

[11] Dorey Report, ¶¶ 9-15.

[12] *Ibid*, ¶ 9.

[13] *Ibid*, ¶ 9.

[14] *Ibid*, ¶ 9.

[15] *Ibid*, ¶ 9.

[16] *Ibid*, ¶ 14.

[17] *Ibid*, ¶ 14.

[18] *Ibid*, ¶ 15.

the demand is high, such as on the hottest days of summer.[19] Some peak load facilities may need to operate as little as a few hours per year.[20]

33. In order to maintain the required balance between supply and demand, the output of these various types of generators on the system must be constantly adjusted.[21] For this reason, the generation and flow of electricity on the system must be managed and centrally coordinated. For decades, Ontario did so through the use of a single state-owned vertically integrated entity, Ontario Hydro.[22] However, in the last 15 years or so, that approach has radically changed several times. In this period, the industry has been characterized more by change than by stability.[23]

B. The State-Owned Vertically Integrated Electricity Industry: 1906-1998

34. Ontario Hydro was first established by the Government of Ontario in 1906.[24] As a vertically integrated monopoly, it was able to plan and coordinate generation and transmission together.[25] System planning during the early decades was driven by rapidly and consistently increasing demand resulting from the industrialization and modernization of society.[26] In essence, consistent demand growth led to an ongoing requirement to add supply to the system.[27]

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[19] *Ibid*, ¶ 15.

[20] *Ibid* , ¶ 15.

[21] RWS-Chow, ¶ 15; RWS-Jennings, ¶¶ 5 and 9-11.

[22] Dorey Report, ¶ 50.

[23] *Ibid*, ¶¶ 57-63.

[24] *Ibid*, ¶ 50.

[25] *Ibid*.

[26] **R-021**, The Report of the Royal Commission on Electric Power Planning: Vol. 1 – Concepts, Conclusions, and Recommendations (Feb. 1980), Chapter 3 ("Royal Commission Report"). Available at: http://archive.org/stream/reportofroyelecpow01onta/reportofroyelecpow01onta_djvu.txt.

[27] **R-033**, Ontario Power Authority, Supply Mix Advice (Dec. 9, 2005), vol. 3, p. 5 ("Supply Mix Advice").

35. As time went on, planning became more challenging because there was no longer the steady increase in demand that had persisted for decades.[28] By 1993, when all of Ontario's nuclear generation assets had come online, demand actually suffered a decrease as a result of a recession in the economy.[29] As a result, the need for new generation assets was deferred. All that was required was to manage the amount of generation so that it was balanced with the demand.

36. As the 1990s progressed, cost overruns were experienced at the nuclear facilities and the Government was faced with the need to replace or refurbish much of the decades-old infrastructure in the Province. At the time, the international trend was to introduce competitive markets into traditionally fully regulated monopoly sectors such as electricity. In line with this trend, the Government of Ontario set about to restructure and reform the electricity industry.[30]

C. The Competitive Approach to The Electricity Industry: 1998-2004

37. In 1998, the Ontario Legislature passed the *Energy Competition Act, 1998*,[31] the *Electricity Act, 1998*[32] ("Electricity Act") and the *Ontario Energy Board Act, 1998*.[33] These Acts changed how the electricity system in Ontario was managed and regulated, including by restructuring Ontario Hydro and distributing its assets amongst a number of independent separate corporate entities.[34] In particular, the *Energy Competition Act, 1998* created:

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[28] **R-021**, Royal Commission Report, Chapter 3.

[29] **R-033**, Supply Mix Advice, p. 5.

[30] Dorey Report, ¶¶ 57-58.

[31] **R-023**, *Energy Competition Act*, S.O. 1998, Bill 35. As assented to: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=1836&isCurrent=false&BillStagePrintId=3699&btnSubmit=go.

[32] **C-0401**, *Electricity Act*, 1998, S.O. 1998, c. 15 ("*Electricity Act*").

[33] **R-024**, *Ontario Energy Board Act*, S.O. 1998, c. 15, Sch. B. Current version at: http://www.canlii.org/en/on/laws/stat/so-1998-c-15-sch-b/latest/so-1998-c-15-sch-b.html.

[34] Dorey Report, ¶ 58; **R-033**, Supply Mix Advice, p. 7.

- Independent Electricity Market Operator (later renamed the Independent Electricity System Operator or "IESO"): an independent, non-share-capital and not for profit corporation with a board of directors appointed by the Government of Ontario.[35] The IESO is funded by the fees derived from wholesale electricity transactions which are set by the Ontario Energy Board ("OEB").[36] The IESO is charged with the administration of the electricity market as well as the reliable operation of the bulk transmission system;[37] and

- Hydro One: an Ontario share-capital corporation wholly-owned by the Province of Ontario.[38] Hydro One assumed the transmission and rural distribution businesses of Ontario Hydro.[39] As a result, it owns most of Ontario's transmission system.[40] Further, because it is the primary distributor for rural customers, Hydro One and its subsidiary, Hydro One Networks, Inc., is the largest local distribution company in Ontario.[41] Hydro One is paid for both transmission and distribution at rates subject to regulation by the OEB.[42]

38. The competitive electricity market opened in May 2002.[43] In the intervening period, Ontario had come out of the recession and demand for electricity had begun to increase.[44] However, while the Government had been restructuring the system, there was no system planning and hence, no new generating assets.[45] In fact, older assets had been closed for refurbishment, and thus, supply had decreased significantly.[46]

39. Accordingly, when the competitive market opened, supply conditions were very tight, and as the summer approached and the first heat wave occurred, prices soon

[35] **C-0401**, *Electricity Act*, s. 4.

[36] *Ibid*, s. 19.

[37] *Ibid*, s. 5.

[38] *Ibid*, Part IV; **R-131**, Hydro One, 2012 Annual Report (2013), p. 13.

[39] *Ibid*, p. 20.

[40] *Ibid*, p. 21.

[41] *Ibid*, p. 21; **R-131**, Hydro One, 2012 Annual Report, p. 14.

[42] **R-131**, Hydro One, 2012 Annual Report, p. 17.

[43] *Ibid*, p. 21; **R-025**, Ontario Electricity Conservation & Supply Task Force, "Tough Choices: Addressing Ontario's Power Needs – Final Report to the Minister" (2004), p. 26.

[44] Dorey Report, ¶ 59; **R-033**, Supply Mix Advice, p. 7.

[45] Dorey Report, ¶ 59; **R-033**, Supply Mix Advice, p. 8.

[46] *Ibid*.

spiked.[47] Amidst public criticism, the Government was forced to act in November of 2002 by introducing price controls and caps, as well as freezing distribution and transmission rates.[48] While these controls reduced consumer prices, they also created barriers to private investment in new generation, further tightening the supply of electricity.[49]

40. In 2003, a new provincial government was elected. It inherited a system with an unsustainable price freeze for residential customers, a projected future shortfall of generating capacity, and no mechanism to incentivize investment in new supply to meet demand growth or to replace aging facilities. Consequently, further reforms were required.[50]

D. The Hybrid Approach to the Electricity Industry: 2004-Current

41. The new Government proposed restructuring the Province's electricity sector again in an effort to curb future price spikes and encourage new electricity supply.[51] In order to do so, the Government sought to develop an approach to the industry that would procure electricity from private generators via long-term PPAs that would provide price stability and ensure insufficient returns to incentivize new generation development.[52]

42. In particular, in June 2004 the Government introduced the *Electricity Restructuring Act, 2004* (the "ERA").[53] The purpose of the ERA was "to restructure Ontario's electricity sector, to promote the expansion of electricity supply and capacity including from alternative and renewable energy sources, facilitate load management and

[47] Dorey Report, ¶ 59; **R-033**, Supply Mix Advice, p. 7.

[48] Dorey Report, ¶ 59; **R-033**, Supply Mix Advice, p. 8.

[49] *Ibid*.

[50] **R-033**, Supply Mix Advice, pp. 8-9.

[51] Dorey Report, ¶¶ 60-62.

[52] *Ibid*.

[53] **C-0144**, *Electricity Restructuring Act*, 2004, S.O. 2004, c. 23; Dorey Report, ¶ 62.

electricity demand management, encourage electricity conservation and the efficient use of electricity, and regulate prices in parts of the electricity sector."[54]

43. The ERA created the OPA, an independent non-share capital corporation whose board of directors, except for its chair, is appointed by the Government of Ontario.[55] The OPA is responsible for long-term system planning, conservation, demand management and procurement of new generation through long-term PPAs and contracts for differences.[56] The OPA is also charged with developing long-term integrated system plans to manage and respond to the demand, supply and transmission goals identified by the Government.[57]

II. Ontario's Early Efforts to Procure Electricity Produced by Renewable Energy Generators

44. In restructuring the electricity industry in 2004, the Government of Ontario was faced with a number of challenges. In particular, the electricity system was dependent on heavily polluting coal-fired generation facilities.[58] At the time, coal-fired plants accounted for 23 percent of Ontario's generation capacity.[59] The elimination of Ontario's reliance on such facilities had been one of the key priorities of the new Government's election campaign in 2003.[60]

45. In 2005, the Government commissioned an independent study entitled, *Cost Benefit Analysis: Replacing Ontario's Coal-Fired Electricity Generation*, which

[54] **R-152**, Ontario Energy Board website excerpt, "Electricity Restructuring Act, 2004". Available at: http://www.ontarioenergyboard.ca/OEB/Industry/About%20the%20OEB/Legislation/History%20of%20the%20OEB/Electricity%20Restructuring%20Act%202004.

[55] **C-0401**, *Electricity Act*, Part II.1, s. 25.1; **R-033**, Supply Mix Advice, p. 9.

[56] **C-0401**, *Electricity Act*, Part II.1, s. 25.2; **R-033**, Supply Mix Advice, pp. 9-10.

[57] **C-0401**, *Electricity Act*, Part II.1; **R-033**, Supply Mix Advice, p. 10; Dorey Report, ¶ 62.

[58] **C-0414**, Ministry of Energy, Ontario's Long-Term Energy Plan (2010), pp. 5-6 ("Ontario's Long-Term Energy Plan"); RWS-Jennings, ¶ 20; RWS-Lo, ¶ 5.

[59] **R-025**, Ontario, Electricity Conservation & Supply Task Force, "Tough Choices: Addressing Ontario's Power Needs – Final Report to the Minister" (2004), p. 24.

[60] **R-033**, Supply Mix Advice, p. 8.

estimated that the elimination of coal-fired generation would lead to annual savings of approximately $4.4 billion, when health and environmental costs were taken into consideration.[61] However, eliminating coal-fired generation would require the procurement of a significant amount of replacement capacity. In practical terms, the shortfall in energy supply that would result from the elimination of coal would be primarily made up by the refurbished nuclear plants and new natural gas-fired plants. However, Ontario also sought to significantly increase generation from renewable energy sources, such as wind, solar and biomass.[62] It introduced a number of procurement initiatives for renewable sources of energy in order to meet the considerable challenges facing the Province's electricity sector.[63]

46. The initiatives included:

- a June 2004 initiative, referred to as Renewable Energy Supply ("RES") I, which resulted in ten contracts for the procurement of 300 MW of renewably generated electricity; [64]
- a June 2005 initiative, known RES II, which resulted in nine contracts for the procurement of approximately 1,000 MW of new electricity supply from

[61] **R-132**, Ministry of Energy News Release, "Ontario Getting Out of Coal-fired Generation" (Jan. 9, 2013). Available at: http://news.ontario.ca/mei/en/2013/1/ontario-getting-out-of-coal-fired-generation.html; **R-027**, DSS Management Consultants Inc. and RWDI Air Inc., "Cost Benefit Analysis: Replacing Ontario's Coal-Fired Electricity Generation".

[62] **R-035**, CBC News, "New date for coal plant closures: 2014" (Nov. 14, 2006); **R-029**, Ministry of Energy Archived News Release, "McGuinty Government Closes Lakeview Generating Station For Cleaner Air and Better Health" (Apr. 28, 2005). Available at: http://news.ontario.ca/opo/en/2005/04/mcguinty-government-closes-lakeview-generating-station-for-cleaner-air-and-better-health.html.

[63] **R-045**, Ontario Power Authority Presentation, "Standard Offer Program – Renewable Energy For Small Electricity Generators – An Introductory Guide" (Jun. 2008), pp. 11-12. The first two of the initiatives were begun prior to the formation of the OPA. In November 2005, after the OPA was created, the Minister of Energy directed it to "assume […] responsibility for exercising all powers and performing all duties of the Crown" in respect of the RES I contracts that had been signed, and to "enter into contracts contemplated by the RES II RFP […] with each of the suppliers". **R-030**, Direction from Donna Cansfield, Ministry of Energy to Jan Carr, Ontario Power Authority (Nov. 7, 2005) ("RES I Direction"). Available at: http://www.powerauthority.on.ca/sites/default/files/20051107_MOE_directive_2005-11-14_Res_1_RFP_.pdf; **R-031**, Direction from Donna Cansfield, Ministry of Energy to Jan Carr, Ontario Power Authority (Nov. 16, 2005) ("RES II Direction"). Available at: http://www.powerauthority.on.ca/sites/default/files/page/4818_November_16,_2005_RES_II_Directive.pdf

[64] **R-026**, Ministry of Energy, Request for Proposals For 300 MW Of Renewable Energy Supply, Request For Proposal No: SSB-065230 (Jun. 24, 2004); **R-030**, RES I Direction.

renewable energy suppliers with generating projects that had capacities between 20 MW and 200 MW;[65] and

- a March 2006 program, known as the Renewable Energy Standard Offer Program ("RESOP"), which by May 13, 2008, had resulted in 314 twenty-year fixed-price contracts for the procurement of approximately 1,300 MW of renewably generated electricity from small renewable energy projects (less than 10 MW).[66]

47. By 2008, demand for the RESOP had far exceeded the opportunities available to connect to the distribution systems.[67] As a result, the OPA recognized a "need to reassess how much generation [it] wanted on the system and what type or mix of generation".[68] In May 2008, RESOP was frozen and a two-year review of the program was initiated.[69]

III. The Financial Crisis and the Economic Recession

48. By the time the RESOP review began, Ontario (and the world) were in a time of unprecedented uncertainty in the domestic and global markets.[70] Credit became scarce as

[65] **R-031**, RES II Direction; **R-032**, Knowles Consultancy Services Inc., Request for Proposals For Up to 1,000 MW Of Renewable Energy Supply From Generating Facilities With A Contract Capacity of Between 20.0 MW and 200.0 MW, Inclusive (Renewables II RFP) – Fairness Review Report (Nov. 19, 2005). Available at: http://www.powerauthority.on.ca/sites/default/files/page/1134_FairnessCommissionerReportRESII_%28Renewables_II_RFP_Fairness_Commissioner_Report%29.pdf.

[66] **R-034**, Letter (Direction) from Donna Cansfield, Minister of Energy to Ontario Power Authority (Mar. 21, 2006); **R-046**, Ontario Power Authority Report, "Ontario's Renewable Energy Standard Offer Program" (Jun. 2008); **R-050**, Ontario Power Authority Presentation, "Ontario's Renewable Energy Standard Offer Program: Lessons from a Large Scale Distribution Connected Electricity Procurement Program" (Dec. 10-12, 2008). Available at: http://www.conference-on-integration.com/pres/16_MacDougall.pdf; **R-044**, Ontario Power Authority Presentation, "Renewable and Clean Energy Supply Procurement Update" (May 13, 2008); **R-043**, Ontario Power Authority, "Backgrounder: Ontario Renewable Energy – Successes and Improvements" (May 13, 2008). Available at: http://www.powerauthority.on.ca/sites/default/files/news/6460_ORE_-_Backgrounder.pdf

[67] **R-050**, Ontario Power Authority Presentation, "Ontario's Renewable Energy Standard Offer Program: Lessons from a Large Scale Distribution Connected Electricity Procurement Program" (Dec. 10-12, 2008), p. 17.

[68] *Ibid*.

[69] *Ibid*, p. 21.

[70] **R-052**, Speech from the Throne, 2nd session, 40th Parliament (Jan. 26, 2009): ("Today we meet at a time of unprecedented economic uncertainty. The global credit crunch has dragged the world economy into a crisis whose pull we cannot escape. The nations of the world are grappling with challenges that Canada can address but not avoid."). Available at: http://www.parl.gc.ca/Parlinfo/Documents/ThroneSpeech/40-2-e.html.

doubts grew over the viability of existing assets and the cycle of investment which facilitated economic growth came to a virtual standstill.[71]

49. These events had particularly negative implications for Ontario, which was heavily dependent on its export-oriented manufacturing sector for jobs and growth.[72] The downturn in credit markets prompted purchasers to hoard inventory and consumers to reduce spending.[73] This exacerbated long-term trends in Ontario's economy away from manufacturing. In 2008 alone, manufacturing jobs in Ontario plunged by 87,000[74] and the sector contracted by 28 percent, with year-over-year output plummeting by $6.7 billion.[75] Overall, from the time the financial crisis began in summer 2007 until May 2009, the number of people employed by Ontario's manufacturing sector fell by 18 percent, with 144,000 jobs being lost,[76] and the sector's output decreasing by over $9 billion, or 35 percent.[77]

IV. The Green Energy and Green Economy Act, 2009

50. During the economic crisis, the Government of Ontario saw an opportunity to use its procurement power in the electricity sector not only to meet Ontario's generation needs but also as an economic stimulus to create opportunities and jobs.[78] Accordingly,

[71] **R-137**, Bank of Canada. "Lessons from the Financial Crisis: Bank Performance and Regulatory Reform," Discussion Paper 2013-4 (Dec. 2013), p. 2. Available at: http://www.bankofcanada.ca/wp-content/uploads/2013/12/dp2013-04.pdf.

[72] **R-051**, Government of Ontario, "Ontario Economic Outlook and Fiscal Review, 2009", p. 23. Available at: http://www.fin.gov.on.ca/en/budget/fallstatement/2009/paper_all.pdf.

[73] *Ibid*, p. 22.

[74] **R-092**, Statistics Canada. CANSIM 301-0006, Principal statistics for manufacturing industries, by North American Industry Classification System (NAICS) (Undated).

[75] **R-091**, Statistics Canada, CANSIM 304-0015, Manufacturing sales, by North American Industry Classification System (NAICS) and province (Undated).

[76] **R-092**, Statistics Canada. CANSIM 301-0006, Principal statistics for manufacturing industries, by North American Industry Classification System (NAICS) (Undated).

[77] **R-091**, Statistics Canada, CANSIM 304-0015, Manufacturing sales, by North American Industry Classification System (NAICS) and province (Undated).

[78] RWS-Lo, ¶ 8; **R-059**, Ministry of Energy Archived News Release, "McGuinty Government's Plan Will Lead to Green Jobs and Green Energy", (May 14, 2009). Available at: http://news.ontario.ca/mei/en/2009/05/ontario-legislature-passes-green-energy-act.html.

the Government of Ontario developed the GEGEA. The GEGEA was first introduced by the Government on February 23, 2009. It was passed by the Ontario Legislature and received Royal Assent, thus becoming law, on May 14, 2009. [79]

51. The GEGEA created new standalone legislation known as the *Green Energy Act, 2009*[80] and amended 15 other existing statutes.[81] It had a number of key components including the creation of the Renewable Energy Facilitation Office,[82] the development of a streamlined environmental approvals process for renewable energy generation projects,[83] and the adoption of aggressive new conservation targets.[84]

52. In addition, the GEGEA added section 25.35 to the *Electricity Act*. This new section authorized the Minister of Energy to direct the OPA to develop a feed-in tariff program.[85]

53. A feed-in tariff program is a renewable energy standard offer procurement program that features standardized program rules, contract prices designed to reflect the costs of generation, and economic incentives for developers of renewable generation.[86]

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[79] **R-057**, *Green Energy and Green Economy Act*, S.O. 2009, c. 12 ("GEGEA"); **R-058,** Hansard Transcripts of the Ontario Legislative Assembly of Ontario, Session 39:1, (May 14, 2009). Available at: http://hansardindex.ontla.on.ca/hansardeissue/39-1/l151.htm.

[80] **C-0003**, *Green Energy Act*, S.O. 2009, c. 12, Sch. A.

[81] **R-057**, GEGEA.

[82] **R-123**, Ministry of Energy website excerpt, "Renewable Energy Facilitation Office". Available at: http://www.energy.gov.on.ca/en/renewable-energy-facilitation-office/#.UuFJWJIo7Qc.

[83] **R-059**, Ministry of Energy Archived News Release, "McGuinty Government's Plan Will Lead to Green Jobs and Green Energy" (May 14, 2009); **R-101**, Ministry of Energy Presentation, "Guide: Provincial Approvals for Renewable Energy Projects" (2011), p.4. Available at: http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@resources/documents/resource/std01_079527.pdf.

[84] **R-148**, Ministry of Energy website excerpt, "Green Energy Act". Available at: http://www.energy.gov.on.ca/en/green-energy-act/#.UvvKHJLVB8E; **C-0414**, Ontario's Long-Term Energy Plan, p. 39.

[85] **C-0401**, *Electricity Act*, s. 25.35; RWS-Lo, ¶¶ 10-11.

[86] **R-053**, Ontario Power Authority Presentation, "Proposed Feed-in Tariff Program Stakeholder Engagement – Session 1" (Mar. 17, 2009), pp. 26-27. Available at: http://fit.powerauthority.on.ca/Storage/10117_Session_1_Presentation_-_March_17.pdf; **C-0414**, Ontario's Long-Term Energy Plan, p. 31.

Feed-in tariff programs are used worldwide to encourage and promote the greater use of renewable energy sources. In fact, in the summer of 2008, the Minister of Energy had made trips to Denmark, Germany, Spain and California where he reviewed their approaches to renewable energy, including their use of feed-in tariff programs.[87]

54. The fundamental objective of establishing the FIT Program in Ontario was to facilitate the increased development of renewable generating facilities of varying sizes, technologies and configurations via a standardized, open and fair process. Although the procurement of renewable energy through the FIT Program had cost-effectiveness implications (related to electricity pricing) because of the financial incentives necessary to make it successful, Ontario believed that the long-term benefits outweighed these costs.[88]

55. In addition to these long-term benefits, the Government of Ontario saw the FIT Program as a way to provide an economic stimulus and create much needed jobs.[89] As described above, the impact of the 2008 financial crisis was most heavily experienced by Ontario's manufacturing and resources sectors. Declines in Ontario's steel, automotive and pulp sectors created major challenges concerning job losses.[90]

56. Renewable energy projects require the manufacture of several components, such as the construction of wind turbines and solar modules. When the GEGEA was enacted, Ontario's renewable energy sector was still under-developed. There were very few

[87] **R-048**, Hamilton, Tyler, "The wind at his back" (Sep. 27, 2008). Available at: http://www.folkecenter.net/mediafiles/folkecenter/awards/Smitherman_The_wind_at_his_back.pdf; **R-047**, Campbell, Murray, "'Dougs' take warning: Curious George is keen on green" (Sep. 25, 2008). Available at: http://www.theglobeandmail.com/news/national/dougs-take-warning-curious-george-is-keen-on-green/article716206/.

[88] **C-0228,** Annual Report of the Auditor General of Ontario (2011), pp. 89, 119-120.

[89] RWS-Lo, ¶ 8; **R-059**, Ministry of Energy, "McGuinty Government's Plan Will Lead to Green Jobs and Green Energy", (May 14, 2009), Archived Release. Available at: http://news.ontario.ca/mei/en/2009/05/ontario-legislature-passes-green-energy-act.html.

[90] RWS-Lo, ¶ 7; **R-041**, Canwest News Service, "Ontario now in recession: report" (Mar. 25, 2008). Available at: http://www.canada.com/windsorstar/news/story.html?id=66c28a64-b94e-4aa9-b8af-b352c7ba64a3&k=52712.

manufacturers that produced parts for renewable energy projects.[91] For that reason, the new subsection 25.35 of the *Electricity Act* required the Minister of Energy to include domestic content requirements in any direction authorizing a feed-in tariff program. Including such requirements was believed to be a way to encourage the creation of a green energy manufacturing sector in the Province, which would mean much-needed manufacturing jobs.[92]

V. The Feed-In Tariff Program

57. Work at the Ministry of Energy and the OPA on the development of the FIT Program began in early 2009.[93] This process involved consultations between the OPA, the office of the Minister of Energy and the Ministry of Energy.[94] It also involved extensive consultations with the IESO, Hydro One and public stakeholders, with ten sessions ultimately being held over the summer of 2009.[95]

58. Ontario's FIT Program was designed to be a "standardized, open and fair process"[96] that would encourage the development of generating facilities using renewable energy sources.[97] The FIT Rules governed eligibility for the FIT Program. They set forth

[91] RWS-Lo, ¶ 28.

[92] **R-076**, Ministry of Energy Archived Backgrounder, "Ontario Delivers $7 Billion Green Investment" (Jan. 21, 2010). Available at: http://news.ontario.ca/mei/en/2010/01/backgrounder-20100121.html; **C-0354**, Ministry of Energy, "Ontario's Feed-in Tariff Program: Two-Year Review Report" (Mar. 19, 2012), pp. 1, 5-7, 10 ("Ministry of Energy, Two-Year Review Report"); **R-057**, GEGEA, Sch. B, s. 7.

[93] RWS-MacDougall, ¶¶ 3, 7.

[94] RWS-MacDougall, ¶¶ 8-9; RWS-Lo, ¶ 14.

[95] RWS-MacDougall, ¶¶ 10-13 ; RWS-Duffy, ¶ 3; See for example, **R-053**, Ontario Power Authority Presentation, "Proposed Feed-in Tariff Program Stakeholder Engagement – Session 1" (Mar. 17, 2009); **R-055**, Ontario Power Authority Presentation, "Proposed Feed-in Tariff Project Eligibility, Application Requirements, and Application Review Stakeholder Engagement – Session 2" (Mar. 24, 2009). Available at: http://fit.powerauthority.on.ca/Storage/10120_Session_2_Presentation_-_March_24_2009.pdf; **R-064**, Ontario Power Authority Presentation, "Proposed Feed-in Tariff Program – Revisions to Draft FIT Rules" (Jul. 21, 2009). Available at: http://fit.powerauthority.on.ca/Storage/10333_FIT_July_21_Presentation.pdf

[96] **R-003**, Ontario Power Authority, FIT Program Rules, v. 1.2, s. 1.1 (Nov. 19, 2009) ("FIT Program Rules, v. 1.2").

[97] **R-161**, Ontario Power Authority website excerpt: "FIT Program". Available at: http://fit.powerauthority.on.ca/fit-program; RWS-Lo, ¶ 11.

objective criteria pursuant to which applications were to be evaluated.[98] The FIT Rules were not intended to be set in stone but rather to provide a framework that could evolve and respond.[99]

59. Three project classifications existed under the FIT Rules. MicroFIT projects were very small projects, 10 kW or less in size, such as residential rooftop panels.[100] Capacity allocation exempt ("CAE") projects were larger than MicroFIT, between 10 kW and 500 kW.[101] Capacity allocation projects required ("CAR") projects were for large industrial type projects, larger than 500 kW.[102]

60. As required by the GEGEA, the FIT Rules specifically articulated the proportion of a FIT project's components that had to be domestically sourced prior to commercial operation.[103] For CAE or CAR wind power projects, the minimum required domestic content level was 25 percent for projects that had a commercial operation date ("COD") prior to January 1, 2012 and 50 percent for those where the COD fell on or after January 1, 2012.[104] The level reached by a project was calculated in accordance with the methodology contained in Exhibit D of Schedule 1 to the standard FIT Contract.[105]

[98] RWS-MacDougall, ¶¶ 16-18; **R-003**, FIT Program Rules, v. 1.2, ss. 2-4 and 13.4.

[99] **R-003**, FIT Program Rules, v. 1.2, ss. 1 and 10.

[100] *Ibid*, s. 1.1; **R-069**, Ontario Power Authority, microFIT Program Rules, v. 1.1 (Sep. 30, 2009) ("microFIT Program Rules, v. 1.1"). Available at: http://microfit.powerauthority.on.ca/sites/default/files/page/microFITRulesVersion1.1.pdf. See also: **R-155**, Ontario Power Authority website: "About microFIT". Available at: http://microfit.powerauthority.on.ca/about-microfit; RWS-Duffy, ¶ 6; **C-0354**, Ministry of Energy, Two-Year Review Report, p. 22.

[101] RWS-Duffy, ¶ 6; **C-0354**, Ministry of Energy, Two-Year Review Report, p. 22.

[102] *Ibid*.

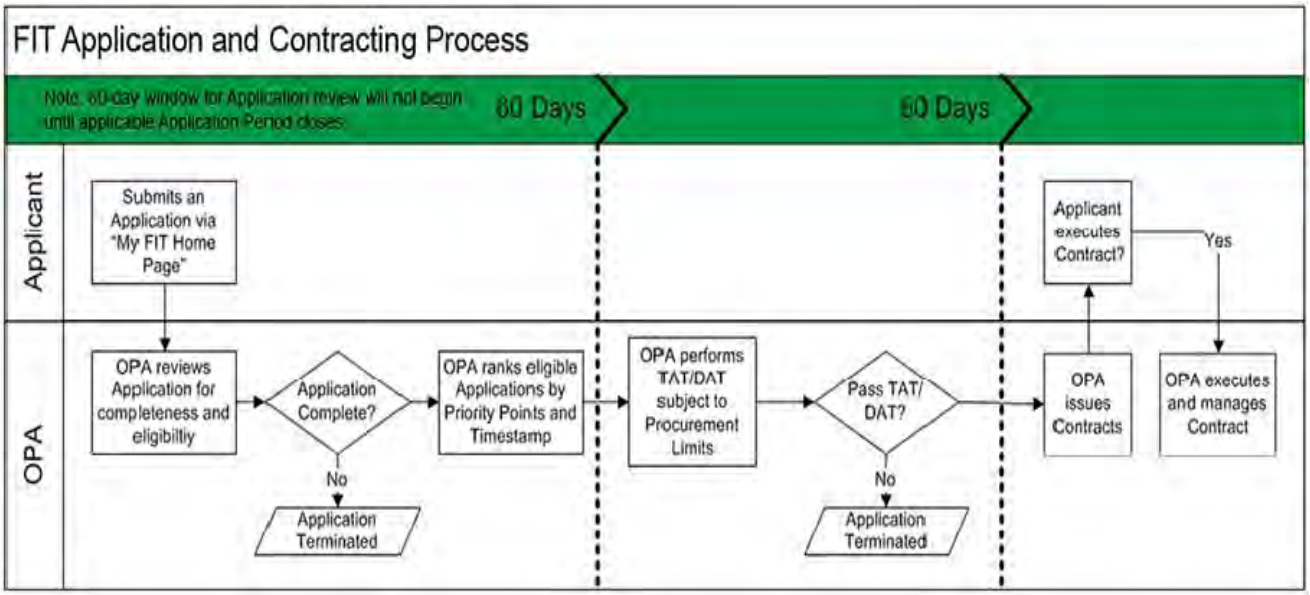
[103] **R-003**, FIT Program Rules, v. 1.2, s. 6.4(a).

[104] *Ibid*, s. 6.4(a)(i).

[105] *Ibid*, s. 6.4(b) and Exhibit D of Schedule 1.

61. On September 24, 2009, the Minister of Energy directed the OPA to create the FIT Program.[106] FIT Rules Version 1.1 were released on September 30, 2009[107] and the OPA opened the process to applications the next day, on October 1, 2009.[108] FIT Rules Version 1.2, which had minor modifications, were released on November 19, 2009.[109]

62. The steps in the FIT Program as initially envisaged are displayed in the figure below[110] and are described in more details in the following sections.



A. Application to the FIT Program

63. The FIT Program was designed by the OPA as "a simplified and streamlined Request for Proposals ("RFP")".[111] It was designed in this manner to attract the highest possible number of applicants. As Richard Duffy has explained:

[106] RWS-Lo, ¶11; **R-001**, Letter (Direction) from the Honourable George Smitherman, Minister of Energy and Infrastructure to Colin Andersen, CEO, Ontario Power Authority (Sep. 24, 2009).

[107] **C-0258**, Ontario Power Authority, FIT Program Rules, v. 1.1 (Sep. 30, 2009).

[108] **R-005**, Ontario Power Authority Backgrounder: "Ontario's Feed-in Tariff Program" (Apr. 8, 2010).

[109] **R-003**, FIT Program Rules, v. 1.2.

[110] **R-154**, Ontario Power Authority, FIT Application and Contracting Process Flow Chart. Available at: http://fit.powerauthority.on.ca/sites/default/files/news/flow-lrg.png.

> In particular, the OPA required less evidence and documentation with the submission of an application than was typically did in an RFP process […] We designed the FIT Program this way because we were uncertain as to how many applicants the program would attract and we hoped that an easier process would attract numerous participants, including those who were not traditional energy companies or sophisticated players in the field.[112]

64. To be deemed eligible for the FIT Program, a project had to meet a number of basic requirements.[113] First, the project had to include a renewable energy technology, such as wind (onshore or offshore), solar PV, biomass, biogas, biofuel, landfill gas or waterpower.[114] Second, the project had to be located in Ontario,[115] and either be a new project, or an addition of incremental capacity to an existing project.[116] Third, the project had to be connected either to a distribution system, a transmission system or through a customer.[117]

65. With respect to the third requirement, an applicant had an option to either indicate a specific connection point, or to indicate that it was "enabler requested".[118] In a large province such as Ontario, there are a number of locations that have significant renewable energy resources, but are located far from any connection to the electrical system.[119] In such cases, an applicant would have to build, at its own expense, a long connection line to the nearest point at the system.[120] The OPA was of course amenable to applicants

[111] RWS-Duffy, ¶ 5.

[112] *Ibid*.

[113] **R-003**, FIT Program Rules, v. 1.2, s. 2.1.

[114] *Ibid*, s. 2.1(a)(i).

[115] *Ibid*, s. 2.1(a)(ii).

[116] *Ibid*, s. 2.1(a)(iii)-(v).

[117] *Ibid*, s. 2.1(a)(vi) .

[118] FIT Applications for enabler requested projects did not specify a connection point as required under Section 3.1(d) of the FIT Rules, v. 1.2. Instead, FIT Applications for these projects indicated that they wished to proceed directly to the Economic Connection Test and be processed in accordance with section 5.2(b) of the FIT Rules. **R-003**, FIT Program Rules, v. 1.2, s. 3.1(d); RWS-Chow, ¶¶ 22-23.

[119] **R-002**, Ontario Power Authority, FIT Program Overview, v. 1.1, p. 18 ("FIT Program Overview, v. 1.1").

[120] RWS-Chow, ¶¶ 22-23.

doing so, but it could be costly.[121] Therefore, applicants also had the option of seeking to pool together with other projects located nearby to form an "enabler" facility to which they could all connect, and which would then itself connect to the grid.[122] Applicants in such a situation could then split the cost of the long connection line to the grid that was required.[123]

B. The Review for Completeness and Eligibility

66. The first step in the evaluation of a FIT application was the review for completeness and eligibility.[124] In order to establish that a project met the program eligibility conditions, FIT applicants had to submit to the OPA:

(a) non-refundable application fee ($500/MW of proposed capacity, for a minimum of $500 and a maximum of $5,000);[125]

(b) application security ($20,000/MW for solar PV, $10,000/MW for other technologies, and $5,000/MW for community-based or Aboriginal projects, refundable upon contract signing or withdrawal due to impossibility to connect);[126]

(c) an authorization letter in the prescribed form authorizing the local distribution company ("LDC") (if applicable) and IESO to provide the OPA information relating to the applicant or project;[127]

(d) connection details regarding the project, including contract capacity, renewable fuel(s), proposed connection point and other information such as name of feeder, transformer station or high-voltage circuit) or an indication that it intended to be enabler requested;[128]

[121] *Ibid*.

[122] RWS-Chow, ¶ 23; **R-002**, FIT Program Overview, v. 1.1, pp. 18-19.

[123] *Ibid*.

[124] RWS-Duffy, ¶ 18.

[125] **R-003**, FIT Program Rules, v. 1.2, s. 3.1(a).

[126] *Ibid*, s. 3.1(b).

[127] *Ibid*, s. 3.1(c).

[128] *Ibid*, s. 3.1(d).

(e) evidence of site access (land ownership, land lease, option agreement, etc.);[129] and

(f) a valid email address for the purposes of correspondence related to the FIT Program.[130]

C. The Ranking of Applications

67. The second stage in the evaluation process was for the OPA to rank the projects.[131] As explained by Bob Chow, Richard Duffy and Rick Jennings, technical limits on transmission capacity mean that it is not possible to procure unlimited amounts of new capacity.[132] As part of the FIT Program, the OPA was therefore required to determine an order in which to assess the applications.[133]

68. At the launch of the FIT Program in October 2009, it was believed that there was no reason to rank either microFIT or CAE projects because they were so small that the capacity they required would almost always be available as a technical matter.[134] As a result, the OPA decided that only applications for CAR projects would be ranked.[135]

69. In general, the OPA decided that it would rank the CAR applications in the order in which they were received.[136] However, the OPA was also guided by the desire of the Government to procure, first and foremost, "shovel-ready" projects.[137] The projects that were the most development-ready were the ones that would most likely lead to job creation, in both the construction and manufacturing sectors, in the near term.[138] Simply

[129] *Ibid*, s. 3.1(e).

[130] *Ibid*, s. 3.1(f).

[131] RWS-Duffy, ¶ 23.

[132] RWS-Duffy, ¶ 7; RWS-Chow, ¶¶ 7-8.

[133] RWS-MacDougall, ¶ 15; RWS-Duffy, ¶ 7.

[134] **R-003**, FIT Program Rules, v. 1.2, s. 4.2(e); **R-155**, microFIT Program Rules, v. 1.1, s. 3.2(a).

[135] RWS-Duffy, ¶ 7.

[136] RWS-Duffy, ¶ 8.

[137] RWS-MacDougall, ¶ 15; RWS-Duffy, ¶ 9; RWS-Lo, ¶ 14.

[138] *Ibid*.

awarding contracts to those projects that submitted their applications faster than others would not achieve this objective.[139]

70. As a result, the OPA decided to put in place a launch period for an initial ranking of the applications.[140] This 60-day period, ran from October 1 to November 30, 2009. For ranking purposes, the OPA considered all of the applications submitted within that period to be received at the same time.[141] Applicants during this launch period then had opportunity to bid for points by demonstrating that their project met certain shovel-readiness criteria. The shovel-readiness criteria, which were outlined in FIT Rules section 13.4, and how it was translated into a ranking for launch period projects, is discussed further below.

71. Applications submitted after the launch period received a time stamp based on the actual date and time the application was received by the OPA.[142] The ranking of such projects was based solely on their time stamps.

1. The Ranking of Launch Period Applications

72. In order to assess shovel-readiness, the OPA decided to look at four criteria, some of which it had used for similar purposes in other procurement processes. These criteria were: (1) the project was exempt from the renewable energy approval process ("REA Exempt"); (2) the applicant owned or had a firm order for a major component ("Major Equipment Control"); (3) the applicant had successfully developed a similar facility to the project ("Prior Experience"); and (4) the applicant had the financial backing to develop the project ("Financial Capacity").[143]

[139] RWS-Duffy, ¶ 9.

[140] RWS-Duffy, ¶ 10; **R-003**, FIT Program Rules, v. 1.2, s. 13.4.

[141] RWS-Duffy, ¶ 10.

[142] **R-003**, FIT Program Rules, v. 1.2, s. 4.1; **R-082**, London Economics Report, "Feed-in Tariff Launch Period Criteria Evaluation – Independent Process Review" (Mar. 31, 2010), p. (i) ("London Economics Report").

[143] RWS-Duffy, ¶ 11; RWS-MacDougall, ¶ 19; **R-003**, FIT Program Rules, v. 1.2, s. 13.4.

73. If an applicant could show that its project met one of these criteria, it would be awarded a point. For each point awarded, the FIT applicant was committing to a COD for its project of 90-days earlier than otherwise required under the standard FIT Contract (known as, "COD Acceleration Days").[144]

74. Accordingly, if an applicant bid for all four criteria points, it was indicating that it was willing to commit to bring its project into commercial operation 360 days earlier than otherwise required by the FIT Contract.[145] Of course, simply bidding for the days did not mean that the OPA would award a criteria point.[146] The OPA had to assess each of the bid criteria in order to ensure that it was met, and that applicants were not trying to "game the system" by bidding days for which they did not have sufficient evidence.[147]

75. In addition to COD Acceleration Days based on the criteria points, the OPA also allowed every launch period applicant to state that they would be ready up to 365 days earlier than otherwise required by the FIT Contract without submitting any proof at all.[148] Thus, in total, a launch period applicant could bid a maximum of 725 COD Acceleration Days.[149]

76. At the close of the launch period, applications would then be ranked based on the number of COD Acceleration Days that they had been awarded.

[144] RWS-Duffy, ¶ 11.

[145] RWS-Duffy, ¶ 12; **R-003**, FIT Program Rules, v. 1.2, s. 13.4(b)(i); **R-082**, London Economics Report, p. 3.

[146] RWS-Duffy, ¶¶ 28-39.

[147] *Ibid*.

[148] RWS-Duffy, ¶ 12; **R-003**, FIT Program Rules, v. 1.2, s. 13.4(b)(i); **R-082**, London Economics Report, p. 3.

[149] RWS-Duffy, ¶ 12; **R-082**, London Economics Report, p. 4.

(a) The REA Exempt Criteria Point

77. The first criterion applicants could bid for was REA Exempt.[150] In general, renewable energy projects required an environmental assessment before they could be developed in Ontario.[151] As noted above, one of the changes that the GEGEA had put in place was the development of a new streamlined process for assessing the environmental effects of renewable energy projects.[152] This process was outlined in the *Renewable Energy Approval Regulation, Ontario Regulation 359/09* (the "REA Regulation"), which was formally made under the *Environmental Protection Act, 1990* on September 8, 2009.[153]

78. A project was REA Exempt if it was not subject to the REA process, or if the transitional provisions of the REA Regulation did not require the facility to have REA.[154] For example, a Class 1 wind facility, with a capacity of less than or equal to 3 kW, was exempt from assessment.[155] Similarly, projects that already had all of their required permits and approvals on the date that the REA Regulation came into force were exempt from the REA under the transitional provisions.[156]

79. While the REA process was designed to be streamlined, the OPA believed that demonstrating that a project was exempt from the process would mean that time would be

[150] RWS-Duffy, ¶¶ 29-30; RWS-MacDougall, ¶¶ 21-22; **R-003**, FIT Program Rules, v. 1.2, s. 13.4(a)(i).

[151] RWS-Duffy, ¶¶ 31-32; RWS-MacDougall, ¶¶ 20-21.

[152] See Claimant's Memorial, Section IV(A) – Promoting Renewable Energy; RWS-Duffy, ¶¶ 31-32; RWS-MacDougall, ¶¶ 20-21; **R-082**, London Economics Report, p. 4.

[153] **R-065**, Ontario Regulation 359/09 *made under the Environmental Protection Act*, S.O. 2009, s. 8(b) ("REA Regulation"). Available at: http://www.e-laws.gov.on.ca/html/source/regs/english/2009/elaws_src_regs_r09359_e.htm.

[154] RWS-MacDougall, ¶ 22; **R-082**, London Economics Report, pp. 4-5.

[155] **R-065**, REA Regulation, s. 8(b); RWS-MacDougall, ¶ 22.

[156] **R-065**, REA Regulation, s. 9(l); RWS-MacDougall, ¶ 22.

saved in obtaining the required regulatory approvals.[157] Thus, being REA Exempt meant that a project was more shovel-ready than a project that was not.[158]

(b) The Major Equipment Control Criteria Point

80. The second criteria point for which applicants could bid was Major Equipment Control.[159] This criteria had been used before by the OPA in procurement programs to assess the level of a project's development.[160] If a project controls the major equipment components needed for its development at the time of application, then it will be immune to typical supply-side risks.[161] Accordingly, the FIT Rules provided that a point could be awarded if the FIT applicant owned, or had a fixed or guaranteed maximum price contract for a major equipment component.[162] For wind projects, major equipment components included towers, turbines and nacelles.[163]

81. In addition to showing control of a major equipment component, a FIT applicant had to submit evidence that the component met or would be able to meet when manufactured, the FIT Program's domestic content requirements.[164] All the OPA required as evidence in this respect was an engagement letter from the manufacturer indicating that it was aware of the FIT Program's domestic content requirements and would be able to satisfy them.[165]

82. In order to obtain this point, an applicant was <u>not</u> required to have already purchased the equipment, or to have entered into a contract which bound them to

[157] RWS-Duffy, ¶¶ 29-30; RWS-MacDougall, ¶ 21.

[158] *Ibid*.

[159] **R-003**, FIT Program Rules, v. 1.2, s. 13.4(a)(ii).

[160] RWS-MacDougall, ¶ 23.

[161] *Ibid*.

[162] **R-003**, FIT Program Rules, v. 1.2, s. 13.4(a)(ii); **R-082**, London Economics Report, p. 5.

[163] RWS-MacDougall, ¶ 23.

[164] RWS-Duffy, ¶ 31; RWS-MacDougall, ¶ 24; **R-003**, FIT Program Rules, v. 1.2, s. 13.4(a)(ii).

[165] RWS-Duffy, ¶¶ 32-33.

purchase it regardless of whether they were awarded a FIT Contract.[166] In the vast majority of cases, applicants submitted major equipment contracts which were conditional on the applicant obtaining a FIT Contract.[167]

(c) The Prior Experience Criteria Point

83. The third criteria point was the Prior Experience of the applicant in constructing a similar facility.[168] This criteria had also been used in other OPA procurement programs to assist in determining the level of readiness of a project.[169] It was believed that prior experience with similar projects "would show that the people running the project understood and were ready for the typical difficulties that would be encountered in getting the project into operation".[170]

84. An applicant could prove that it was entitled to this point in two ways. First, the applicant could submit evidence that it, an entity that it controlled, or an entity that controlled it (together, the "Applicant Control Group") had relevant prior experience taken as a whole.[171] Second, the applicant could submit evidence that any three full-time employees of any entity in the Applicant Control Group had relevant prior experience.[172] This second method allowed the OPA to recognize corporate applicants and companies that were new to renewable energy or were special purpose vehicles being set up specifically for the purposes of applying for a FIT Contract in Ontario.[173] Part-time

[166] *Ibid*.

[167] RWS-Duffy, ¶ 32.

[168] RWS-Duffy, ¶ 35; RWS-MacDougall, ¶¶ 25-26; **R-003**, FIT Program Rules, v. 1.2, s. 13.4(a)(iii).

[169] RWS-MacDougall, ¶ 25.

[170] RWS-Duffy, ¶ 35; RWS-MacDougall, ¶ 24.

[171] RWS-MacDougall, ¶ 25.

[172] RWS-MacDougall, ¶ 25; **R-003**, FIT Program Rules, v. 1.2, s. 13.4; **R-082**, London Economics Report, p. 5.

[173] RWS-MacDougall, ¶ 25.

employees and outside consultants were excluded and would not be recognized as part of the Prior Experience evaluation.[174]

85. As to what was relevant prior experience, the OPA decided to accept experience from anywhere in the world as long as it was with respect to a facility using the same renewable energy source with a capacity of at least 25 percent of the proposed contract capacity of the FIT application.[175]

(d) The Financial Capacity Criteria Point

86. The final criteria point for which an applicant could bid was the Financial Capacity criteria point.[176] This criteria, also used by the OPA in other procurement programs, served to assess shovel-readiness by eliminating risks associated with capital-intensive energy development projects.[177] The necessary level of financial security at the application stage ensured that no risk of funding failure would subsist at the development stage.[178]

87. This criteria point was to be awarded based on a Tangible Net Worth ("TNW") test. The TNW test was met if any person (natural or legal) or group of persons which had a 15 percent or greater economic interest in the company, had a TNW of more than $500/kW of the proposed contract capacity at the end of the most recent fiscal year.[179] The OPA required an audited balance sheet prepared in conformity with generally accepted accounting principles or international financial reporting standards for the most recent fiscal year as evidence when bidding for this point.[180]

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[174] *Ibid*.

[175] RWS-MacDougall, ¶ 26; **R-082**, London Economics Report, p. 5.

[176] RWS-Duffy, ¶ 38; RWS-MacDougall, ¶¶ 27-29; **R-003**, FIT Program Rules, v. 1.2, s. 13.4(a)(iv).

[177] RWS-MacDougall, ¶ 27.

[178] *Ibid*.

[179] RWS-Duffy, ¶ 38; RWS-MacDougall, ¶ 28; **R-003**, FIT Program Rules, v. 1.2, s. 13.4(a)(iv); **R-082**, London Economics Report, p. 6.

[180] RWS-MacDougall, ¶ 29; **R-003**, FIT Program Rules, v. 1.2, s. 13.4(a)(iv)(A).

2. The Consolidated Ranking for Launch Period and Post-Launch Period Applications

88. In order to consolidate the launch period rankings and the post-launch rankings, the OPA developed a procedure to translate awarded COD Acceleration Days back into a "time stamp."[181] Thus, the top-ranked launch period project[182] based on the number of COD Acceleration Days it had been awarded during the launch period review, would be accorded the "earliest" time stamp. The second ranked project would be accorded the next earliest, and so on until all the launch period projects had been ranked.[183] As noted above, applications submitted during the post-launch period would then be ranked in accordance with their actual time stamp.[184]

89. The OPA only ever developed a single province-wide ranking, which included launch and post-launch period projects.[185] While the provincial ranking was published several times ordering the projects according to their provincial rank by region, as explained by Richard Duffy, this was done to facilitate the communication of relevant information to proponents and for no other reason.[186] The OPA never used these area orderings for any other purpose.

D. Connection Availability

90. After reviewing and ranking the applications, the OPA would then consider whether there was transmission capacity for the proposed projects to connect to the

[181] RWS-Duffy, ¶ 13.

[182] *Ibid*.

[183] *Ibid*.

[184] **R-003**, FIT Program Rules, v. 1.2, s. 4.1; **R-082**, London Economics Report, p. 1.

[185] RWS-Duffy, ¶ 56.

[186] *Ibid*.

grid.[187] The OPA would not enter into a contract with a FIT applicant when there was no connection capacity available for it.[188]

91. Thus, prior to the award of FIT Contracts, the projects were to be subjected to a connection availability assessment.[189] This assessment would be used to determine whether the existing and committed transmission and distribution infrastructure could likely accommodate the electricity generated by a FIT project.[190] There were potentially two parts to connection availability assessment: (1) the Transmission Availability Test[191] ("TAT"), and (2) the Distribution Availability Test[192] ("DAT"). If the TAT, and when applicable, the DAT, indicated that there would likely be capacity, then the project could receive a FIT Contract.[193] If not, then no contract would be offered and the OPA would proceed to consider the next project in the ranking list to determine if there was sufficient capacity for it, and so on until all the available capacity was used.

1. The Transmission Availability Test

92. The TAT was performed by the OPA in order to screen applications for their impact on the IESO-Controlled Grid.[194] The TAT included consideration of all prior OPA contracts, prior applications that had been processed, system capacity allocated to other OPA programs and any other generating facilities that were existing, committed or the subject of a Ministerial direction.[195]

[187] **R-002**, FIT Program Overview, v. 1.1, s. 5.

[188] RWS-Chow, ¶¶ 16-20.

[189] **R-160**, Ontario Power Authority website excerpt, "FIT Program: Introduction". Available at: http://fit.powerauthority.on.ca/fit-program/introduction; RWS-Chow, ¶¶ 16-20.

[190] **R-002**, FIT Program Overview, v. 1.1, s. 5; RWS-Chow, ¶ 17.

[191] **R-002**, FIT Program Overview, v. 1.1, s. 5.1; RWS-Chow, ¶ 17.

[192] **R-002**, FIT Program Overview, v. 1.1, s. 5.2.; RWS-Chow, ¶ 16.

[193] **R-003**, FIT Program Rules, v. 1.2, s. 6.1(a); RWS-Chow, ¶ 16.

[194] RWS-Chow, ¶ 17.

[195] *Ibid*; **R-002**, FIT Program Overview, v. 1.1, s. 5.1.

93. The TAT would only be carried out once for each application.[196] A proposed project would pass the TAT if it was likely there was connection availability or if connection availability was expected before the project's milestone date for commercial operation.[197] If the project passed the TAT, and would not be connected to a distribution system, the OPA proceeded to offer the applicant a FIT Contract.[198]

94. In order to facilitate connection point selection by FIT applicants, the OPA published TAT Tables.[199] Information provided in the TAT Tables was developed as a collaborative effort between the IESO, transmitters, local distribution companies and the OPA. These tables provided applicants with an indication of the electricitys system's ability to accommodate new renewable generation projects at specific connection points in particular areas.[200] The TAT Tables also included the area limits for the electricity grid.[201] These area limits refer to the technical limitations on the bulk transfer of electricity from one area of the province to another.[202] FIT applicants were told to note these area limits before meeting with their transmitter about connecting their FIT project.[203]

95. Information in the TAT Table was intended only to provide general guidance to FIT applicants for the purposes of facilitating the planning of projects and assisting

[196] **C-0034**, Ontario Power Authority Presentation: "The Economic Connection Test Process" (Mar. 23, 2010), slide 8 ("OPA Presentation, The Economic Connection Test Process"); RWS-Chow, ¶ 19-20.

[197] **R-002**, FIT Program Overview, v. 1.1, s. 5.1; RWS-Chow, ¶ 19-20.

[198] **R-002**, FIT Program Overview, v. 1.1, s. 5.1; RWS-Chow, ¶ 16, 20.

[199] RWS-Chow, ¶ 31; **R-167**, Ontario Power Authority website excerpt, "Transmission Availability Tables". Available at: http://fit.powerauthority.on.ca/program-resources/connection-availability-resources/transmission-availability-tables.

[200] RWS-Chow, ¶ 31; **R-167**, Ontario Power Authority website excerpt, "Transmission Availability Tables".

[201] *Ibid*.

[202] **R-167**, Ontario Power Authority website excerpt, "Transmission Availability Tables": ("These limits should be noted before you meet with your LDC or transmitter about connecting the project.").

[203] RWS-Chow, ¶ 31; **R-167**, Ontario Power Authority website excerpt, "Transmission Availability Tables".

applicants in their discussions with transmitters and local distribution companies.[204] There are numerous technical factors which can affect the amount of power generation that can be connected at any particular point on a circuit.[205] Such factors could mean that there was more or less capacity at a connection point than was indicated in the TAT Table.[206] Further, TAT Table values reflected available transmission capacity at only a specific moment in time.[207] As a result, FIT applicants were consistently reminded that the TAT would determine the acceptability of applications for new generation under the FIT Program, not the TAT Tables.[208]

2. The Distribution Availability Test

96. The DAT was only used when a FIT project also proposed to connect to a distribution system, such as those maintained by local utilities.[209] A project did not proceed to the DAT, unless it first passed the TAT.[210] The DAT is a process to screen applications for their impact on the relevant distribution system. It should be noted that the DAT is a screening process and as such it does not ensure ability to connect the Project.[211] The DAT considered numerous factors including all prior OPA contracts, prior applications that had been processed, and any other generation facilities that existed, were committed or were the subject of Ministerial direction.[212]

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[204] RWS-Chow, ¶¶ 32-33; **R-167**, Ontario Power Authority website excerpt, "Transmission Availability Tables".

[205] RWS-Chow, ¶¶ 10-11, 32-33; **R-167**, Ontario Power Authority website excerpt, "Transmission Availability Tables".

[206] RWS-Chow, ¶¶ 10, 32-33.

[207] RWS-Chow, ¶¶ 32-33; **R-167**, Ontario Power Authority website excerpt, "Transmission Availability Tables".

[208] RWS-Chow, ¶ 17; **C-034**,OPA Presentation, "The Economic Connection Test Process", slide 3; **R-002**, FIT Program Overview, v. 1.1, s. 5.1.

[209] RWS-Chow, ¶ 16; **R-002**, FIT Program Overview, v. 1.1, s. 5.2.

[210] *Ibid*.

[211] **R-003**, FIT Program Rules, v. 1.2, s. 5.3(a); **R-002**, FIT Program Overview, v. 1.1, s. 5.2.

[212] **R-158**, Ontario Power Authority website excerpt, "Distribution Availability Test". Available at: http://fit.powerauthority.on.ca/fit-program/application-review-process/connection-availability-screening/distribution-availability-test.

E. The Economic Connection Test

97. If capacity was not immediately available, a project would fail the TAT or the DAT, and the application would pass to the Economic Connection Test ("ECT").[213] The purpose of the ECT was to determine whether upgrades to the transmission system were economically and technically feasible to connect renewable energy projects to the grid.[214] The ECT was intended to "be the framework for managing FIT applications on an ongoing basis and was conceptualized as a means to expand the FIT Program".[215]

98. The FIT Rules stated that the ECT was to be run at least once every six months.[216] However, as the FIT Rules indicated they could be amended at any time by the OPA, there was no guarantee to FIT applicants that an ECT would be run at all. [217]

1. The ECT Process

99. The ECT process would have unfolded in two phases: (1) an individual project assessment; and then, (2) if necessary, a network expansion planning and economic assessment.

(a) The Individual Project Assessment

100. The first stage of the ECT process was the Individual Project Assessment ("IPA").[218] The IPA was intended to assess whether projects could be connected to the current grid based on the transmission and distribution capability existing when the ECT was run.[219] While all of the projects being considered during an ECT would have initially failed the TAT or DAT, additional capacity on the existing transmission system could

[213] RWS-Chow, ¶ 19; **R-002**, FIT Program Overview, v. 1.1, s. 5.3.

[214] **R-082**, London Economics Report, p. 1; RWS-Chow, ¶ 25; **R-002**, FIT Program Overview, v. 1.1, s. 5.3.

[215] RWS-Chow, ¶ 25; **C-0034**, OPA Presentation, "The Economic Connection Test Process", slide 5.

[216] **R-003**, FIT Program Rules, v. 1.2, s. 5.4(a); RWS-Chow, ¶ 36.

[217] **R-003**, FIT Program Rules, v. 1.2, s. 10 and 12.

[218] RWS-Chow, ¶ 26; **C-0034**, OPA Presentation, "The Economic Connection Test Process", slide 21; RWS-Chow, ¶ 26.

[219] **C-0034**, OPA, "The Economic Connection Test Process", slide 21; RWS-Chow, ¶ 26.

have become available since that time due to new transmission facilities coming into service, or the cancellation of another project.[220]

101. Thus, as part of the IPA, the OPA would provide updated TAT Tables so as to inform FIT applicants about where any new capacity was located.[221] The next step would be a period during which FIT applicants could change their connection point.[222] As described by Bob Chow, "[w]hen a FIT applicant originally selected its connection point in its FIT application, […], it did so without knowledge of which connection point other FIT applicants had chosen".[223] The possible result was that good projects might fail on a connection assessment simply because they all happened to choose the same connection point or the same region. Allowing changes in connection points would eliminate such undesirable inefficiencies and ensure that "projects with a higher priority time stamp [had] first access to newly available existing transmission capacity".[224] All of this information was clearly communicated in Bob Chow's stakeholder presentations of March 23 and May 19, 2010.[225] Information on how to request a change of connection point was also posted on the OPA's FIT website.[226]

102. Connection point changes during an ECT were not limited to being within a particular region.[227] As Bob Chow explains, "[a]t no time has the OPA ever expressed any limitations on an applicant electing to change its connection point during the ECT to

[220] **C-0034**, OPA Presentation, "The Economic Connection Test Process", slide 22-23; RWS-Chow, ¶ 27.

[221] RWS-Chow, ¶ 31.

[222] RWS-Chow, ¶ 28; **C-0034**, OPA Presentation, "The Economic Connection Test Process", slides 14 and 30.

[223] RWS-Chow, ¶ 28.

[224] **C-0034**, OPA Presentation, "The Economic Connection Test Process", slide 22.

[225] **C-0034**, OPA Presentation, "The Economic Connection Test Process"; **C-0088**, Ontario Power Authority Presentation: "The Economic Connection Test – Approach, Metrics and Process" (May 19, 2010) ("OPA Presentation, The Economic Connection Test – Approach, Metrics and Process").

[226] RWS-Chow, ¶ 29.

[227] *Ibid*, ¶ 30.

connect in a different electrical region".[228] Electrically this "would have made no sense whatsoever".[229]

103. If a FIT applicant passed the IPA, it was informed that it was eligible for a FIT Contract.[230] If a project did not pass the IPA, it would then be considered during the second phase of the ECT.[231]

(b) The Network Expansion Planning and Economic Assessment

104. The second phase of the ECT provided a process to assess the need, scope and economies of potential expansions to the transmission system.[232] At this stage, the OPA, IESO, transmitters and distributors (as appropriate), would work together to determine if transmission upgrades could be done on an economical basis in order to permit new renewable energy projects to connect to the electricity grid.[233] This would involve balancing the goal to support renewable generation with the OPA's obligation to consider the provincial ratepayer impact of transmission expansion costs.[234]

2. The Results of the ECT

105. If the second stage of an ECT were run, then projects that passed would be placed in the "FIT Production Line" until grid expansion plans were approved and the OPA was reasonably certain that the enhancements would be constructed in time to allow the

[228] *Ibid*.

[229] *Ibid*.

[230] RWS-Chow, ¶ 34; **C-0034**, OPA Presentation, "The Economic Connection Test Process", slide 21.

[231] RWS-Chow, ¶ 34; **C-0034**, OPA Presentation, "The Economic Connection Test Process", slide 22.

[232] RWS-Chow, ¶ 35; **C-0034**, OPA Presentation, "The Economic Connection Test Process", slide 3.

[233] RWS-Chow, ¶ 35; **C-0034**, OPA Presentation: "The Economic Connection Test Process", slide 48.

[234] **C-0088**, OPA Presentation, The Economic Connection Test – Approach, Metrics and Process, slides 7, 18.

proposed project to connect and be in service by the milestone date for commercial operation.[235]

106. Projects that failed the ECT would be placed in the "FIT Reserve".[236] This reserve consisted of a group of projects for which there was no connection capacity, and no way to economically expand the transmission system to allow for their connection. These projects were to be held in reserve—instead of rejected—on the premise that conditions could change in the future such that the costs to connect them could become reasonable.[237] FIT applications retained their time stamp while in the FIT Reserve and the FIT Production Line.[238]

F. The Standard FIT Contract

107. FIT applications that were successful were offered the opportunity to enter into a FIT Contract with the OPA. The FIT Contract was a standard long-term fixed-price contract.[239] If the applicant signed the contract, then it was obliged to follow the timelines contained therein for the commencement of commercial operation.[240] A project was deemed to have achieved commercial operation when the FIT Contract holder met all the requirements as outlined in section 2.6 of the FIT Contract, and received a Notice to Proceed from the OPA.[241]

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[235] **R-002**, FIT Program Overview, v. 1.1, s. 5.4; **C-0034**, OPA Presentation, "The Economic Connection Test Process", slide 9.

[236] **R-002**, FIT Program Overview, v. 1.1, s. 5.5; **C-0034**, OPA Presentation, "The Economic Connection Test Process", slide 9.

[237] **R-002**, FIT Program Overview, v. 1.1, s. 5.5; **C-0034**, OPA Presentation, "The Economic Connection Test Process", slide 9.

[238] **C-0034**, OPA Presentation, "The Economic Connection Test Process", slide 9.

[239] RWS-Lo, ¶ 16. For the purpose of this section, version 1.5 of the FIT Contract will be referenced as that was the one in effect for the July 4, 2011 contract awards.

[240] **C-0263**, Ontario Power Authority, FIT Contract, v. 1.5, article 9.

[241] **R-110**, Ontario Power Authority, Feed-In Tariff Program, Commercial Operation Date Instructions: Version 1.0 (May 13, 2011). Available at: http://fit.powerauthority.on.ca/sites/default/files/COD%20Instruction.v1_PZ_VvB_110513%20%28Secured%29.pdf; **C-0263**, Ontario Power Authority, Feed-in Tariff Contract (FIT Contract), v. 1.5 (Jun. 3, 2011), articles 2.6 and 2.4 ("FIT Contract, v. 1.5").

108. Time frames for achieving commercial operation varied depending on the renewable fuel type specified on the FIT Contract cover page, as well as provisions included in Schedule A of the FIT Contract.[242] Section 2.5 and Exhibit A of the FIT Contract indicate that the milestone timelines for reaching commercial operation are as follows:

- three (3) years following the contract date for solar PV (including rooftop and ground mount), bioenergy (including biogas, biogas on-farm, landfill gas and renewable biomass) and wind (on-shore) facilities;
- four (4) years following the contract date for wind (off-shore) facilities, if applicable; and,
- five (5) years following the contract date for waterpower facilities.[243]

109. Further, if it was a launch period application in which the applicant had bid for and been awarded criteria points, this COD date could be accelerated by as much as 725 days.[244] The contract emphasized that time was of the essence in achieving this "Milestone Date for Commercial Operation".[245]

110. Failure to attain commercial operation by the Milestone Date for Commercial Operation meant that the term of the contract could be reduced by the length of the delay.[246] This could be overridden by the OPA,[247] or if the FIT Contract holder paid compensation at a rate specified in the FIT Contract.[248]

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[242] **C-0263**, FIT Contract, v. 1.5, Sch. A.

[243] **R-157**, Ontario Power Authority website excerpt, "Commercial Operation"; **R-162**, Ontario Power Authority website excerpt, "Milestone Date for Commercial Operation". Available at: http://fit.powerauthority.on.ca/contract-management/commercial-operation/timelines/supplier-timelines/milestone-date-commercial-oper; **C-0263**, FIT Contract, v. 1.5, article 2.5, exhibit A.

[244] RWS-Duffy ¶ 12; **R-003**, FIT Rules, v. 1.2, s. 13.

[245] **C-0263**, FIT Contract, v. 1.5, article 2.5.

[246] *Ibid*.

[247] *Ibid*, article 8.1(c).

[248] *Ibid*, article 8.1(d).

111. Where the length of the delay beyond the Milestone Date for Commercial Operation was 18 months or longer, the FIT Contract allowed the OPA to declare the FIT Contract holder in default of the agreement.[249] This activated remedial provisions in the contract which enabled the OPA to terminate it with notice, set-off amounts owed by the supplier against outstanding monies owed by the OPA, or withhold all, or a portion of, the completion and performance security.[250]

112. The FIT Contract also obligated FIT Contract holders to construct wind and solar facilities in accordance with a minimum required domestic content level.[251] As noted above, the minimum domestic content level was specified in the FIT Rules. The FIT Contract enumerated the criteria for meeting the domestic content requirements.[252] It specified "designated activities" for which a qualifying percentage would be applied if that activity had been completed using domestic resources. The cumulative total of the qualifying percentages awarded for each eligible designated activity had to be equal to, or greater than, the minimum required domestic content level. In order to ensure compliance with these requirements, the OPA could audit at any time.[253]

113. In exchange for undertaking these obligations, amongst others, the FIT Contract required the OPA to purchase electricity generation from the facility for a period of 20 years[254] at a price set in accordance with the schedule of prices in force at the time the application had been received by the OPA. In order to attract investors, the FIT Program was initially developed to offer attractive prices for renewable energy. For example, in

[249] *Ibid*, article 9.1(j).

[250] *Ibid*, article 9.2.

[251] *Ibid*, article 2.2(f).

[252] *Ibid*, Exhibit D, Table 1.

[253] **R-156**, Ontario Power Authority website excerpt, "Audits". Available at: http://fit.powerauthority.on.ca/contract-management/post-cod-contract-management/audits.

[254] This period was forty years for hydro-electric projects.

2009, when the FIT Program opened, the specified price for onshore wind facilities was 13.5 cents/kW.[255]

G. The Steps Remaining in the Development of FIT Projects after the Awarding of FIT Contracts

114. Obtaining a FIT Contract did not guarantee that a project would be permitted to proceed to development.[256] There were numerous regulatory approvals, permits and licenses that were still required before any particular project could be developed. These included a REA, various impact assessments, financial plan approval, domestic content plan approval, a supplier's certificate regarding commercial operation (Exhibit F of the FIT Contract), an independent engineers certificate regarding commercial operation, a metering plan (or relevant metering information), an as-built single line electrical drawing, a *Workplace Safety and Insurance Act* clearance certificate, an OEB generator licence and connection confirmation from the local distribution company.[257] Some of these approvals were significant hurdles for FIT Contract holders. For example, only half of all projects with FIT Contracts have yet to receive their REA approvals.[258]

VI. The Green Energy Investment Agreement

115. While work on the development of the GEGEA and the FIT Program was ongoing, the Government of Ontario was also exploring another renewable energy initiative with a private consortium of investors. In June 2008, the Ministry of Energy was approached by two large Korean companies, Samsung C&T ("Samsung") and Korea Electric Power Corporation, and together, the "Korean Consortium"), regarding a proposal for a major investment in Ontario's renewable energy sector. This led to

[255] **R-067**, Ontario Power Authority, Feed-in Tariff Prices for Renewable Energy Projects in Ontario (Sep. 24, 2009). Available at: http://fit.powerauthority.on.ca/Storage/11126_FIT_Price_Schedule.pdf.

[256] **C-0263**, FIT Contract, v. 1.5, article 2.4; **R-164**, Ontario Power Authority website excerpt,: "Notice to Proceed". Available at: http://fit.powerauthority.on.ca/contract-management/notice-proceed.

[257] **C-0263**, FIT Contract, v. 1.5, article 2.

[258] BRG Report, ¶ Attachment II, ¶ 139.

ongoing discussions between the Ministry of Energy and the Korean Consortium and the signing of a memorandum of understanding in December 2008.[259]

116. A central goal of the GEGEA was to create opportunities in Ontario that would stimulate investment in the renewables sector. At the time of the discussions with the Korean Consortium, Ontario's renewable energy sector was not yet well developed and interest in the FIT Program being considered was unknown.[260] Having an investment contract which not only guaranteed the establishment of manufacturing facilities, but also included the development of large-scale renewable energy projects, was seen as particularly attractive. In particular, it was believed that it would help to provide a foundation for Ontario's renewable energy procurement initiatives and support other developers so that they could meet their domestic content requirements under the FIT Program.[261] It was also believed that having an agreement with an internationally renowned company like Samsung would further spark investor confidence in the renewable energy sector in Ontario.[262]

117. Negotiations of a framework agreement continued throughout the following months, including after the passage of the GEGEA in May 2009. In June 2009, the Minister of Energy travelled to Korea to accept the 2009 World Wind Energy Award for his role in championing the GEGEA and to have further discussions with the Korean Consortium.[263]

118. On September 25, 2009, the Government of Ontario and the Korean Consortium entered into a framework agreement, which set out the terms and conditions of their

[259] **C-0228**, Annual Report of the Auditor General of Ontario, (2011), p. 108.

[260] RWS-Lo, ¶¶ 19, 28.

[261] RWS-Lo, ¶ 28; **R-076**, Ministry of Energy Archived Backgrounder, "Ontario Delivers $7 Billion Green Investment" (Jan. 21, 2010).

[262] RWS-Lo, ¶ 29.

[263] **R-062**, Ministry of Energy Archived News Release, "Ontario, Canada Lauded As North American Wind Power Leader" (Jun. 24, 2009). Available at: http://news.ontario.ca/mei/en/2009/06/ontario-lauded-as-north-american-wind-power-leader.html; **C-0228**, Annual Report of the Auditor General of Ontario, (2011), p. 108.

partnership and cooperation to develop a renewable energy investment agreement.[264] In a September 30, 2009 direction, the Minister of Energy publicly acknowledged that the Province was exploring opportunities in the renewable energy sector and that it had signed a "province-wide framework agreement" with certain proponents to further enable the development of Ontario's green energy economy.[265] The Minister also specifically directed the OPA to set aside 500 MW of transmission capacity for proponents that entered into such an agreement with Ontario, thereby giving public notice that transmission set-asides were part of what Ontario was offering in return for the contemplated investments.[266]

119. The Government of Ontario officially entered into the GEIA with the Korean Consortium on January 21, 2010.[267] As stated at the time by the Minister of Energy:

> By executing this project, the Ontario government will be one step closer to taking the lead in the North American green energy industry by securing the industrial infrastructure for low-carbon growth, creating new jobs and establishing a renewable energy cluster.[268]

120. Valued at $7 billion, the GEIA was the single largest investment in renewable electricity generation in the Province's history.[269] Specifically, the agreement required the Korean Consortium to establish and operate manufacturing facilities for wind and solar generation equipment and components in Ontario.[270] It was understood that these

[264] **C-0328,** Framework Agreement by and among Her Majesty the Queen in Right of Ontario, Korea Electric Power Corporation and Samsung C&T Corporation, (Sep. 25, 2009), s. 1.1.

[265] **C-0105**, Letter (Direction) from George Smitherman, Minister of Energy to Colin Andersen, CEO, Ontario Power Authority, (Sep. 30, 2009).

[266] *Ibid*.

[267] **R-076**, Ministry of Energy Archived Backgrounder, "Ontario Delivers $7 Billion Green Investment" (Jan. 21, 2010).

[268] **R-077**. Samsung C&T Press Release, "Samsung C&T to Build World's Largest Wind, Solar Panel Cluster in Ontario" (Jan. 22, 2010). Available at: http://www.samsungcnt.com/EN/trading/ne/501000/articleRead.do?board_id=6&article_id=1805&page_index=4.

[269] **R-076**, Ministry of Energy, Archived Backgrounder, "Ontario Delivers $7 Billion Green Investment" (Jan. 21, 2010).

[270] *Ibid*.

facilities would create approximately 16,000 green energy jobs over six years in Ontario.[271]

121. In exchange, the Korean Consortium was guaranteed priority access to 2,500 MW of transmission capacity in Ontario.[272] The capacity was to be allocated in five phases over five years, with each phase targeting approximately 500 MW of capacity.[273] The agreement provided that the guarantee of transmission capacity in subsequent phases was contingent on the Korean Consortium meeting its commitments to establish and operate four manufacturing plants in accordance with the agreement schedule.[274]

122. Pursuant to the GEIA, the Government of Ontario directed the OPA to negotiate and enter into one or more PPAs for the "procurement of Electricity supply and capacity contemplated by [each] Phase [of the agreement]".[275] The PPAs were to be "substantially in the form of the FIT Contract…as amended to give effect to the terms and conditions of [the GEIA]".[276] However, these PPAs were not part of the FIT Program.

123. The price payable by the OPA pursuant to these PPAs was to be the aggregate of: (1) current FIT Prices for renewable energy projects in Ontario, as determined by the OPA in accordance with the FIT Rules; *plus* (2) an additional Economic Development Adder based on the Korean Consortium's ability to deliver on its manufacturing commitments.[277]

124. The GEIA also specifically included a section on Aboriginal communities, which provided that the Korean Consortium would "carry out all appropriate steps and provide

[271] *Ibid*.

[272] **C-0322**, *Green Energy Investment Agreement* (Jan. 21, 2010), ss. 3.1 and 3.2 ("GEIA").

[273] Pursuant to sections 3.1 and 3.2 of the original GEIA, each phase targeted generation capacity of 400MW of wind and 100MW of solar energy. *Ibid*, ss. 3.1 and 3.2.

[274] *Ibid*, ss. 7.4 and 8.1.

[275] *Ibid*, s. 9.1.

[276] *Ibid*, s. 9.1.

[277] *Ibid*, ss. 9.1 and 9.3

all necessary mutual assistance to ensure that the Duty to Consult obligations, if any, regarding [its projects] or activities related to it are met and that Aboriginal Communities are engaged as necessary".[278]As an incentive for working with these Aboriginal communities, the GEIA stated that the Korean Consortium would qualify for the "Aboriginal Price Adder" provided for under the FIT Rules.[279] In exchange, the Korean Consortium undertook to negotiate a ten percent equity interest with the Six Nations community in a project known as the "Grand Renewable Energy Park". It was estimated that the project would contribute at least $65 million to the Six Nations through land lease agreements, job opportunities and other long-term investments in the community.[280]

125. In carrying out their respective roles and responsibilities under the GEIA, the parties agreed to establish an "Implementation Task Force",[281] which consisted of members of the Korean Consortium, the Ministry of Energy and the OPA.[282] According to Section 5.2 of the GEIA, the roles and responsibilities of the Implementation Task Force included exchanging information relevant to the Korean Consortium's renewable energy projects, assisting and facilitating the Korean Consortium connections to Ontario's transmission system, and negotiating Aboriginal consultation protocols.[283] In short, due to the wide-ranging scope of the GEIA, the purpose of the Implementation Task Force was "to coordinate the OPA and the Ministry of Energy's work in implementing the GEIA and to ensure that it was on track to achieve each milestone in the agreement."[284]

[278] *Ibid*, s. 10.1.

[279] *Ibid*, s. 10.3.

[280] **R-136**, Six Nations Council Press Release, "Six Nations announces historic investment in Grand Renewable Energy Park" (Oct. 15, 2013). Available at: http://www.sixnationsfuture.com/pdfs/GREP%20Press%20Release.pdf.

[281] RWS-Lo, ¶ 30; **C-0322**, GEIA, s. 5.2.

[282] RWS-Lo, ¶ 30.

[283] **C-0322**, GEIA, s. 5.2.

[284] RWS-Lo, ¶ 30.

VII. The Claimant's Investments in Renewable Energy Projects

A. The Claimant's Turbine Sales Contract with GE for the Pampa Wind Farm

126. On [redacted] roughly a year before the announcement of the FIT Program, one of the Claimant's alleged subsidiaries, Mesa Power LP, and General Electric ("GE") signed a Master Turbine Sales Agreement ("MTSA") for the purchase of 667 1.5 MW wind turbines.[285] These turbines were being purchased for the Pampa wind project in Texas that was being proposed by the Claimant.[286] The Pampa wind project was to be the "largest wind project in the world".[287] Pursuant to the MTSA, the first [redacted] turbines were to be delivered in [redacted] and the remaining [redacted] turbines no later than [redacted].[288] An initial deposit of USD $153,592,670 was made pursuant to the MTSA.

[285] **R-042,** Master Turbine Sale Agreement for the Sale of Power Generation Equipment and Related Services, between General Electric Company and Mesa Power LP [redacted]

[286] **R-099,** Project No Project, "Pampa, Texas Wind Farm, T. Boone Pickens, Mesa Power, LP" (Nov. 29, 2010). Available at: http://www.projectnoproject.com/2010/12/pampa-texas-wind-farm-t-boone-pickens-mesa-power-lp-2/; **R-124**, Business Week, Bloomberg News, "Pickens Reviving Plans for Texas Wind Power at Smaller Scale" (Apr. 4, 2012). Available at: http://www.businessweek.com/news/2012-04-04/pickens-reviving-plans-for-texas-wind-projects-at-smaller-scale; **R-085**, Wind Coalition News Article, "Billionaire T. Boone Pickens is building a 377-megawatt wind farm in Texas" (Apr. 12, 2010). Available at: http://windcoalition.org/billionaire-t-boone-pickens-is-building-a-377-megawatt-wind-farm-in-texas/; **R-125**, PR Newswire, "Mesa Power Group to Partner with Wind Tex Energy on Stephens Bor-Lynn Wind Project South of Lubbock" (Apr. 4, 2012). Available at: http://www.prnewswire.com/news-releases/mesa-power-group-to-partner-with-wind-tex-energy-on-stephens-bor-lynn-wind-project-south-of-lubbock-146107035.html.

[287] **R-124**, Business Week, Bloomberg News, "Pickens Reviving Plans for Texas Wind Power at Smaller Scale" (Apr. 4, 2012); **R-085**, Wind Coalition News Article, "Billionaire T. Boone Pickens is building a 377-megawatt wind farm in Texas" (Apr. 12, 2010); **R-125**, PR Newswire, "Mesa Power Group to Partner with Wind Tex Energy on Stephens Bor-Lynn Wind Project South of Lubbock" (Apr. 4, 2012).

[288] **R-042,** Master Turbine Sale Agreement for the Sale of Power Generation Equipment and Related Services, between General Electric Company and Mesa Power LP [redacted] Attachment 3 - Price, Payment and Termination Charges. A First Change order was signed on [redacted] further to Mesa's request to [redacted] **R-056**, Master Turbine Sale Agreement – External Change Order (ECO) Proposal No. 1 [redacted]

127. By the summer of 2009, the Pampa wind project had, for all intents and purposes, failed.[289] However, under the terms of the MTSA, if the Claimant did not take delivery of the turbines, it would forfeit its substantial deposit.[290]

B. The Claimant's Investment into Ontario

128. On [redacted], the Claimant signed an amended MTSA with GE to avoid forfeiture of its deposit.[291] The number of turbines was reduced to [redacted]1.5 or 1.6 MW turbines, [redacted] 2.5XL turbines subject to availability.[292] According to publicly available reports, the Claimant now planned to use the turbines in Ontario and at the Goodhue wind project in Minnesota.[293] On the same day, TTD Wind Project ULC and Arran Wind Project ULC were incorporated as Alberta corporations.[294] On April 6, 2010, North Bruce Project ULC and Summerhill Project ULC were incorporated as Alberta corporations.[295]

C. The Launch Period Applications for the TTD and Arran Projects

129. Applications for the TTD and Arran wind projects were submitted by Leader Resources Services Corp. ("Leader Resources"),[296] an outside consultant, during the FIT Program launch period, on November 25, 2009.[297]

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[289] **R-063**, Welch, Kevin, Amarillo Globe News, "Pampa wind farm delayed, not canceled, Pickens says" (Jul. 15, 2009). Available at: http://amarillo.com/stories/071509/new_news5.shtml.

[290] **R-042,** Master Turbine Sale Agreement for the Sale of Power Generation Equipment and Related Services, between General Electric Company and Mesa Power LP[redacted] Attachment 3 Price, Payment and Termination Charges.

[291] **C-0379,** Amended and Restated Master Turbine Sale Agreement for the Sale of Power Generation Equipment and Related Services, between General Electric Company and Mesa Power LP[redacted]

[292] *Ibid*.

[293] **R-086**, Anderson, Mark, WindPower Monthly Article, "T. Boone Pickens new Minnesota wind project hits resistance" (Apr. 16, 2010). Available at: http://www.windpowermonthly.com/article/997272/t-boone-pickens-new-minnesota-wind-project-hits-resistance.

[294] Claimant's Memorial, ¶ 32.

[295] *Ibid*.

[296] Claimant's Memorial, ¶ 39.

130. The TTD wind project application proposed a 150 MW wind farm in the Municipality of Central Huron, County of Huron, consisting of 60 commercial wind turbines.[298] The Arran wind project application proposed a 115 MW wind farm in the Municipality of Arran-Elderslie and the Town of Saugeen Shores, County of Bruce, consisting of 46 commercial wind turbines.[299]

131. Both applications elected to take the 365 COD acceleration days available under the FIT Rules, and to bid for an additional three criteria points.[300] In particular, both applications bid for points for major equipment control, prior experience and financial capacity.[301]

D. The Post-Launch Period Applications for the North Bruce and Summerhill Projects

132. Applications for the North Bruce and Summerhill wind projects, identified as North Bruce I[302] and North Bruce II,[303] Summerhill I[304] and Summerhill II,[305] were submitted after the close of the launch period, on May 29, 2010.[306]

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[297] **C-0364**, Twenty-Two Degrees Wind Project, FIT Application (Nov. 25. 2009) ("TTD FIT Application"); **C-0365**, Arran Wind Project, FIT Application (Nov. 25, 2009) ("Arran FIT Application").

[298] **R-140**, AWA Wind Projects website excerpt, "Projects: Twenty-Two Degree". Available at: http://www.awawindprojects.com/?page_id=82; **C-0364**, TTD FIT Application.

[299] **R-139**, AWA Wind Projects website excerpt, "Projects: Arran Wind". http://www.awawindprojects.com/?page_id=49; **C-0365**, Arran FIT Application.

[300] **C-0364**, TTD FIT Application (Nov. 25. 2009); **C-0365**, Arran FIT Application; RWS-Duffy, ¶¶ 40-51.

[301] *Ibid*.

[302] **C-0360**, North Bruce Wind Energy I, FIT Application (May 29, 2010) ("North Bruce I FIT Application").

[303] **C-0361**, North Bruce Wind Energy II, FIT Application (May 29, 2010) ("North Bruce II FIT Application").

[304] **C-0362**, Summerhill Wind Energy I, FIT Application (May 29, 2010) ("Summerhill I FIT Application").

[305] **C-0363**, Summerhill Wind Energy II, FIT Application (May 29, 2010) ("Summerhill II FIT Application").

[306] **C-0360**, North Bruce I FIT Application; **C-0361**, North Bruce II FIT Application; **C-0362**, Summerhill I FIT Application; **C-0363**, Summerhill II FIT Application.

133. The North Bruce Projects were a 200 MW wind farm in the Municipality of Kincardine and Town of Saugeen Shores, County of Bruce, consisting of 80 commercial wind turbines.[307] The Summerhill wind projects were a 100 MW wind farm in the Municipality of Central Huron, County of Huron, consisting of 40 commercial wind turbines.[308]

E. GE's Partial Ownership of the TTD, Arran, North Bruce and Summerhill Wind Projects

134. In 2009, the Claimant and GE formed a joint venture known as American Wind Alliance ("AWA").[309] This partnership was the owner of the TTD, Arran, North Bruce and Summerhill wind projects in Ontario at the time these investments were made in Canada.

135. Indeed, the FIT applications for the TTD and Arran wind projects, submitted on November 25, 2009, indicate that "GE Energy LLC, a limited liability corporation organized and existing under the laws of the State of Delaware, U.S.A […] maintains at least 15% or more, direct or indirect, economic interest in the Applicant".[310] In addition, the FIT application for the Arran wind project indicates that "American Wind Alliance, a joint venture of Mesa Power Group LLC and GE Energy, is the equity provider for Arran Wind Project ULC, and brings a wealth of experience to the project".[311] The same information appears in the application for the TTD wind project.[312]

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[307] **C-0360**, North Bruce I FIT Application; **C-0361**, North Bruce II FIT Application.

[308] **C-0362**, Summerhill I FIT Application; **C-0363**, Summerhill II FIT Application.

[309] **R-080**, Golder Associates, Twenty Two Degree Wind Energy Project, Draft Project Description Report (Mar. 2010) ("Golder Associates Report"). Cole Robertson's witness statement also indicates that American Wind Alliance "was originally a joint venture between Mesa and GE Development and Strategic Initiatives.", CWS-Robertson, ¶ 5; **R-054**, Letter from Keith Stelling, Wind Concerns Ontario to Minister Brad Duguid, Ministry of Energy (Mar. 24, 2009).

[310] **C-0364**, TTD FIT Application, p. 31 (bates 001810); **C-0365**, Arran FIT Application, p. 31 (bates 109607).

[311] **C-0365**, Arran FIT Application, p. 21 (bates 109597).

[312] **C-0364**, TTD FIT Application, pp. 21-22 (bates 107918-107919).

136. The evidence shows that the partnership continued to exist into 2010. A March 2010 draft project report submitted to the Ministry of Energy with respect to the TTD wind project, indicates:

> American Wind Alliance (AWA), a joint venture of Mesa Power Group LLC and General Electric (GE) Energy, is the financer of TTD, which purchased the Twenty Two Degree Wind Energy Project in 2009, and brings a wealth of experience to the Project. AWA is driving continued growth in the wind industry by developments of wind projects in North America, such as the Twenty Two Degree Wind Energy Project.[313]

137. Additionally, a draft presentation prepared by GE and dated [redacted] indicates that GE had a [redacted] ownership interest in AWA at that time.[314] Further, in [redacted] GE attempted to arrange financing for the TTD wind project with the Export-Import Bank of the United States ("U.S. Exim Bank").[315] In response to the submission of GE, the U.S. Exim Bank replied:

> Exim Bank is very interested in participating in the financing for this transaction…We understand that <u>you</u> propose to engineer and build a project named TTD Wind Project ULC in Canada.[316]

138. Finally, in July 2010, Mark Ward, Managing Director of AWA, wrote to the OPA [redacted][317]

139. The relationship between the Claimant and GE appears to have ended no later than June 8, 2011.[318]

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[313] **R-080**, Golder Associates Report, p. 2.

[314] **R-088**, GE Draft Presentation, "Twenty-two degrees wind project – U.S. Exlm Briefing" [redacted] p. 6 ("TTD – US Exlm Briefing").

[315] *Ibid*; **C-0377**, Letter from Barbara A. O'Boyle, Export-Import Bank of the United States to Steven W. Howlett, GE Capital Markets Corporate (Sep. 23, 2010).

[316] **C-0377**, Letter from Barbara A. O'Boyle, Export-Import Bank of the United States to Steven W. Howlett, GE Capital Markets Corporate (Sep. 23, 2010) (emphasis added).

[317] **R-094**, Letter from Mark Ward, American Wind Alliance to Ontario Power Authority (Jul. 22, 2010).

[318] **R-119**, E-mail from Mark Ward to Cole Robertson (Jun. 8, 2011) (emphasis added).

VIII. The OPA's Evaluation of the Launch Period Applications

A. The Completeness and Eligibility Review

140. When the FIT Program was launched on October 1, 2009, the Government of Ontario and the OPA were unsure of the amount of interest to expect because of the economic recession.[319] Ultimately, the program was far from the failure that had been feared. The OPA received 498 CAR applications during the launch period alone.[320]

141. The simplified nature of the FIT Program was designed to encourage a broader range of participants to apply. While this objective was achieved, early on it became clear that due to their lack of experience, the vast majority of applications were inadequately completed.[321] The most common mistakes related to evidence of site access, errors in letters of credit and inappropriate identification of connection points.[322] As a result of these errors, most applications would have failed the completeness and eligibility review phase simply due to missing or incorrect information.[323]

142. Having to fail most of the applications at this initial stage was not a desired outcome for the FIT Program.[324] As such, the OPA decided to communicate with applicants for the sole purpose of asking them to provide or correct the missing or incorrect information.[325] An online tool was created for this purpose.[326] This tool allowed the OPA to communicate with proponents in order to request information or the modification of an application.[327] When the OPA wanted the applicant to complete or

[319] RWS-Duffy, ¶ 5; RWS-Lo, ¶ 12.

[320] RWS-Duffy, ¶ 14.

[321] RWS-Duffy, ¶¶ 15-17.

[322] RWS-Duffy, ¶ 20.

[323] RWS-Duffy, ¶ 17.

[324] RWS-Duffy, ¶ 18.

[325] *Ibid*, ¶ 19.

[326] *Ibid*; **R-134**, Ontario Power Authority, FIT Application Management Extranet, FIT-FZ2K5LZ – Twenty Two Degree Energy (Jun. 27, 2013); **R-135**, Ontario Power Authority, FIT Application Management Extranet, FIT-FNRGE96 – Arran Wind Energy (Jun. 27, 2013).

[327] RWS-Duffy, ¶ 19.

correct missing or incorrect information, it would "unlock" the application through the tool to give access to the applicant.[328] Other than providing or correcting the identified information, if the applicant wanted to contact the OPA, it was required to do so through other means of communication, such as email or hard copy submission.[329]

143. In both the TTD and Arran FIT applications, there was information that was either missing or incorrect.[330] With respect to the TTD wind project, amendments to its letter of credit and a correction with respect to the connection point information was necessary.[331] With respect to the Arran wind project, supplementary information on the correct name of the grantee and on the easements for the site access, a revision to the name of the circuit where the connection to the transmission system was to be made, and amendments to the letter of credit were all necessary.[332] Without the OPA's assistance, the Claimant's TTD and Arran wind applications would have failed the completeness and eligibility review.[333]

144. Ultimately, of the 498 applications, 34 were rejected because they failed the completeness and eligibility test, 13 were actually CAE projects that did not require review, and 4 were projects under construction that also did not require review. Accordingly, a total of 447 launch period applications had to be substantively reviewed.[334]

145. While this volume of applications meant that the program was a success in terms of attracting interest, it also created its own challenges. In particular, the typical review

[328] *Ibid*.

[329] *Ibid*.

[330] *Ibid*, ¶ 21.

[331] *Ibid*; **R-134**, Ontario Power Authority, FIT Application Management Extranet, FIT-FZ2K5LZ – Twenty Two Degree Energy (Jun. 27, 2013).

[332] RWS-Duffy, ¶ 21; **R-135**, Ontario Power Authority, FIT Application Management Extranet, FIT-FNRGE96 – Arran Wind Energy (Jun. 27, 2013.

[333] *Ibid*.

[334] *Ibid*, ¶ 22.

mechanisms employed by the OPA in reviewing applications to a procurement program could not process such a volume of applications in a reasonable period of time. As a result, a new process had to be developed.[335]

B. The Retention of an Independent Fairness Monitor

146. As a matter of policy, the OPA often endeavours to hire a "fairness monitor" when it runs a procurement programs. Doing so ensures that an independent third party can verify the fairness and transparency of the program, and can account for the OPA's management of the review of the applications.[336] As unsuccessful participants are typically disappointed in the end result of the process and likely to question it, an audit from a fairness monitor is a helpful safeguard for the OPA.

147. With respect to the FIT launch period ranking process, the OPA published a Request for Quote on its website on November 30, 2009 for an independent fairness monitor to conduct an independent process review of the launch period criteria evaluation.[337] Four companies responded. The OPA interviewed the top two candidates, and on December 17, 2009, LEI was selected.[338]

148. As part of the process review, LEI carried out three distinct roles. First, it acted as an advisor to the OPA with respect to the initial set up of the launch period evaluation framework.[339] Second, LEI provided guidance to the OPA on process issues as they

[335] RWS-Duffy, ¶¶ 22-23; **R-003**, FIT Program Rules, v. 1.2, s. 13.4; **R-079**, Ontario Power Authority Evaluation Criteria Checklist (Feb. 16, 2010) ("OPA, Evaluation Criteria Checklist").

[336] RWS-Duffy, ¶ 52.

[337] **R-073**, Ontario Power Authority, Request for Quote: Fairness Monitor required in assisting the Feed-in Tariff Application Criteria Review (Nov. 30, 2009); **R-072,** Email from OPA Procurement Services to OPA Procurement Services (Nov. 30, 2009).

[338] **R-075**, Email from Susan Kennedy, Ontario Power Authority to Sally Leung and Sheri Bizarro, Ontario Power Authority (Dec. 19, 2009).

[339] **R-082**, London Economics Report, p. 13.

arose.[340] Finally, LEI independently monitored the OPA's evaluation of the applications, which included a sample audit evaluation and review of the results obtained.[341]

C. The Launch Period Review Process

149. In designing the launch period application review, the OPA developed a process which would ensure accountability, efficiency and fairness. It set up a team of six individuals: two supervisors and four reviewers.[342] The supervisors were Susan Kennedy, OPA's Associate General Counsel and Director, Corporate/Commercial Law, and Richard Duffy, OPA's Manager of Generation Procurement.[343] Of the four reviewers, three had been seconded to the OPA from the IESO specifically to assist in this review.[344]

150. Each of the four reviewers was assigned a single criterion to review with respect to all applications.[345] In general, the OPA attempted to assign reviewers a topic with which they had expertise or at least familiarity. For example, the IESO Manager of Settlement assessed bids for the Financial Capacity criteria point, and an IESO corporate lawyer assessed whether anyone within the corporate structure of the applicants had relevant prior experience developing renewable energy projects. The individual from IESO who was reviewing whether a project was REA Exempt had access to staff at the MOE if a question ever arose, and an OPA employee reviewed the major equipment control point. All complex issues were submitted to Ms. Kennedy and Mr. Duffy for consideration.[346]

[340] *Ibid.*

[341] *Ibid*.

[342] RWS-Duffy, ¶ 24.

[343] *Ibid*.

[344] *Ibid*.

[345] *Ibid*.

[346] RWS-Duffy, ¶ 25.

151. The review team was set up in one room and reviewed the applications over a period of two weeks.[347] They followed a type of assembly line process. Once a group of applications had passed their eligibility review, they were wheeled into the review room on a cart.[348] Ms. Kennedy looked through the applications, and on a control sheet designed by the OPA to track the review process of each application, indicated which criteria had to be reviewed. No order was set for the review of the criteria: it simply depended upon the availability of the reviewers. Once the reviewer had completed his or her work on the assigned criteria point, he or she would return the application to the cart for the next criteria to be assessed by another reviewer. There was no distinction made between applications during this review based on where the projects were located, or where they were seeking to connect to the grid.[349]

152. In order to keep track of the review and its results, a master spreadsheet was created.[350] The spreadsheet contained a tab per criterion. For each criterion tab, there were a series of pre-determined "yes or no" questions.[351] As the reviewer answered the questions for each application, he or she came to an assessment of whether the criteria point was merited for the project. Every reviewer had access to the ranking spreadsheet during the day and completed it as he or she moved through this process.[352] At the end of each day, all of the separate results were aggregated into a single master spreadsheet.

153. As discussed above, the OPA involved the independent fairness monitor, LEI, in every aspect of the design of the review process. In particular, LEI was involved in the design of the checklist and evaluation spreadsheet.[353] LEI also provided guidance to the

[347] *Ibid*, ¶ 26.

[348] *Ibid*; **R-079**, OPA Evaluation Criteria Checklist.

[349] **C-0154**, Letter from Shawn Cronkwright, Ontario Power Authority to Mark Ward, Mesa, Chuck Edey, Leader Resources and Michael Bernstein, Capstone Infrastructure (Jun. 17, 2011).

[350] RWS-Duffy, ¶ 27; **R-079**, OPA, Evaluation Criteria Checklist.

[351] RWS-Duffy, ¶ 28; **R-079**, OPA, Evaluation Criteria Checklist, Print Tab.

[352] RWS-Duffy, ¶ 27.

[353] **R-082**, London Economics Report, p. 7.

OPA on a number of other process parameters, including: the number of stages to include in the process; the composition of the evaluation team; how to assign roles within the team; the medium for the evaluation checklist; and the content of the evaluation checklist.[354] LEI worked with the OPA to identify both strengths and weaknesses with the proposed process and helped identify the "most appropriate course of action".[355] As noted by LEI, the "OPA was careful to ensure that the objectives of consistency, fairness, and transparency were taken into account in all major decisions".[356]

154. In addition, during the review itself, LEI was consulted by the OPA on a number of additional discrete issues. These were "primarily internal, and related to the evaluation process".[357] One example included guidance on the appropriate interpretation of the criteria requirements in the FIT Rules.[358] LEI "acted as a sounding board, providing feedback, examining potential pitfalls, exploring alternatives, and suggesting improvements if necessary".[359]

D. The Results of the Launch Period Review

155. As a general matter, applicants were awarded criteria points about 50 percent of the time that they bid for such points.[360] However, this result was skewed because most people who bid for the REA Exempt point received it as they usually knew whether or not they were REA Exempt. With respect to the other three points, in general only about a third of the bidders were awarded the point. In particular, 80 applicants bid for the REA Exempt point, and 78 were awarded it;[361] 185 applicants bid for the Major

[354] *Ibid*, p. 13.

[355] *Ibid*.

[356] *Ibid*.

[357] *Ibid*.

[358] *Ibid*.

[359] *Ibid*.

[360] **R-079**, OPA, Evaluation Criteria Checklist.

[361] **R-079**, OPA, Evaluation Criteria Checklist, Applicant Listing Tab, Criteria #1 Tab.

Equipment Control criteria point, and only 92 were actually awarded it;[362] 261 applicants bid for the Prior Experience point and only 102 were awarded it;[363] and 259 applicants bid for the Financial Capacity criteria point, but only 142 were awarded it.[364]

156. As noted above, the TTD and Arran wind projects each bid for three criteria points for Major Equipment Control, Prior Experience, and Financial Capacity. Like many other applicants, they failed to merit a single point.[365] The reasons for their failure are summarized below, and explained more fully in the testimony of Richard Duffy.[366]

1. TTD's and Arran's Bid for the Major Equipment Control Point

157. In support of their bid for this point, the TTD and Arran applications included a one-sentence letter from GE merely stating [redacted][367] A copy of this contract was not submitted with either of the applications. As Richard Duffy explains, this one-sentence letter was "generously" considered to be sufficient to establish that the first prong of the above test regarding Major Equipment Control was met.[368]

158. This same letter also presumed to set out the projects' compliance with the domestic content requirement, by indicating that [redacted] Without any

[362] *Ibid*, Criteria #2 Tab.

[363] *Ibid*, Criteria #3 Tab.

[364] *Ibid*, Criteria #4 Tab.

[365] RWS-Duffy, ¶ 40.

[366] RWS-Duffy, ¶¶ 40-51.

[367] Letter from GE Energy to Mesa Power Group, LLC, (Nov. 24, 2009) contained in **C-0364**, TTD FIT Application, at p. 103 (bates 108000); Letter from GE Energy to Mesa Power Group, LLC, (Nov. 24, 2009) contained in **C-0365**, Arran FIT Application, at p. 104 (bates 109680); **C-0029**, Letter from Carson Granger, General Electric to Monty Humble, Mesa (Nov. 24, 2009).

[368] RWS-Duffy, ¶ 42; **R-079**, OPA, Evaluation Criteria Checklist, Criteria #2 Tab.

[369] Letter from GE Energy to Mesa Power Group, LLC, (Nov. 24, 2009) contained in **C-0364**, TTD FIT Application, at p. 103 (bates 108000); Letter from GE Energy to Mesa Power Group, LLC, (Nov. 24, 2009)

reference to the Province of Ontario, the domestic content requirements of the FIT Program, the expected compliance with the domestic content requirements set out in the FIT Rules, or even any mention at all of "domestic content", this statement was far from sufficient. A mere reference to the fact that the turbines could ("may") be used in Canadian projects was not considered as enough evidence by the OPA to demonstrate that the applicant would be respecting the domestic content requirement.[370] As such, the TTD and Arran applications were not awarded a point for Major Equipment Control.

159. In fact, the insufficiency of the evidence submitted with the TTD and Arran applications stands in stark contrast with that submitted by other applicants. The evidence submitted by Skyway 127 Wind Energy Inc. ("Skyway"). Skyway also submitted a letter from GE as supplier, except in this letter, GE stated that the turbines for which it had a fixed-price contract with Skyway, would "have undergone one of the designated activities set out in the Domestic Content Grid in Exhibit D of the FIT Contract".[371] The OPA considered that the GE letter to Skyway was sufficient for establishing compliance with the domestic content requirement for the purpose of awarding the Major Equipment Control criteria point.[372]

2. TTD's and Arran's Bid for the Prior Experience Criteria Point

160. The TTD and Arran applications indicated that they were bidding for this point. However, additional information regarding their prior experience was not provided. Specifically, neither application included a statement that the prior experience had been obtained with relevant similar facilities, gave any information detailing why the point was sought, or even specified whether the point was bid for under the Applicant Control Group test or because of the individual experience of three full-time employees, as

contained in **C-0365**, Arran FIT Application, at p. 104 (bates 109680); **C-0029**, Letter from Carson Granger, General Electric to Monty Humble, Mesa (Nov. 24, 2009).

[370] RWS-Duffy, ¶ 43.

[371] **R-071**, Letter from Roslyn McMann, General Electric to Pim de Ridder, Premier Renewable Energy Ltd. (Skyway) (Nov. 27, 2009), p. 3.

[372] **R-079**, OPA, Evaluation Criteria Checklist, Review Checklist Print Tab, Criteria #2 Tab, 2.1(d) and 2.2(c).

required by the FIT Rules.[373] All that was submitted were the resumes of a number of individuals, whose relationship to AWA was not made clear, and which contained some general statements about renewable energy but no evidence of the successful development of similar facilities. As a result, the TTD and Arran FIT applications failed to receive that criteria point.[374]

3. TTD's and Arran's Bid for the Financial Capacity Criteria Point

161. In support of their bid for this point, the TTD and Arran applications included 2008 unaudited financial statements of the Claimant.[375] The FIT Rules clearly required audited financials from the most recent fiscal year, which would have been the 2009 fiscal year.[376] This failure alone was sufficient to mean that neither TTD nor Arran wind projects could be awarded a point for financial capacity.

E. The Independent Evaluation Monitor's Quality Audit

162. After the OPA had completed their review, LEI conducted an independent sample audit in order to benchmark the results of the OPA evaluation against that of an independent third party.[377] LEI identified and reviewed 72 applications, approximately 16 percent of the total number of completed applications.[378] LEI concluded that "there were no discrepancies" between its review and that of the OPA, that the "audit [could] be interpreted to reveal that the OPA performed a fair and consistent evaluation of the criteria requirements"[379] and that the "OPA took the appropriate measures to ensure that

[373] RWS-Duffy, ¶ 47; **R-003**, FIT Program Rules, v. 1.2, s. 13.4(a)(iii)(a).

[374] **R-079**, OPA, Evaluation Criteria Checklist, Review Checklist Print Tab, Criteria #3 Tab; RWS-Duffy, ¶ 48.

[375] **R-079**, OPA, Evaluation Criteria Checklist, Criteria #4 Tab. Notably, at counter 84 and 85 for the TTD and Arran Projects, the reviewer made a specific note that "the TNW declaration for Mesa uses unaudited 2008 financial statements".

[376] **R-003**, FIT Program Rules, v. 1.2, s. 13.4(a)(iv(A).

[377] **R-082**, London Economics Report, p. 14.

[378] *Ibid*, p. 14.

[379] *Ibid*, p. 15.

the results of the evaluation were unbiased".[380] Further, LEI concluded that the results of evaluation process were "as to be expected".[381]

IX. The First Round of FIT Contracts are Offered to FIT Launch Period Applicants

163. On April 8, 2010, after the connection availability tests were run to determine whether transmission capacity was available for the projects, the OPA offered a first round of 184 contracts to launch period applicants.[382] This represented a total of approximately 2,500 MW of capacity.[383] Because of transmission constraints, no contracts were awarded to any projects in the Bruce region.

164. In terms of being awarded a contract as a result of the launch period process, no single criterion was determinative. For example, a significant number of applicants were granted contracts for their projects without providing proof that they could meet the domestic content requirements. Less than a quarter of applicants overall were awarded the criteria point for Major Equipment Control (of which domestic content was a component), and 109 applicants received FIT Contracts without having bid for this criteria at all.[384]

X. Ontario's 2010 Long-Term Energy Plan

165. Approximately one year after the launch of the FIT Program, when the success of the launch period process was clear, the Ministry of Energy began a review of its energy policies.[385] The purpose was to reassess the Province's future energy needs, in light of the procurement efforts that had taken place under the FIT Program and the progress of the

[380] *Ibid*, p. 16.

[381] *Ibid*, p. 16.

[382] **C-0400**, Ontario Power Authority, FIT Contracts April 8-10 – Applicant Legal Name Order (Apr. 8, 2010); **R-083**, Test email from Application.FIT, Ontario Power Authority (Apr. 8, 2010).

[383] **C-0400**, Ontario Power Authority, FIT Contracts April 8-10 – Applicant Legal Name Order (Apr. 8, 2010).

[384] RWS-Duffy, ¶ 34; **R-079**, OPA, Evaluation Criteria Checklist, Criteria #2 Tab.

[385] RWS-Lo, ¶ 32.

GEIA, to date. This was to be the first comprehensive review of Ontario's major renewable energy initiatives, including the GEGEA, FIT Program and GEIA.[386]

166. On November 23, 2010, the Government of Ontario released the results of the review in 2010 LTEP,[387] which included a number of significant conclusions about the supply of and demand for electricity in Ontario. First, it concluded that because of the continuing economic crisis, as well as the success of conservation promotion efforts, Ontario's electricity demand outlook was only "medium growth".[388] It also concluded that the FIT Program had been quite successful in attracting investment in renewable energy generation and had resulted in proposals for more generating capacity than was actually needed to meet Ontario's requirements.[389] The 2010 LTEP also concluded that based on the plan, government projections and forecasts available at the time, consumer rates were already expected to increase by 3.5 percent annually over the next twenty years.[390]

167. As a result of these supply and demand factors, the 2010 LTEP introduced a target amount for Ontario to procure in terms of renewably generated electricity – a total of 10,700 MW of renewable energy capacity by 2018.[391] This target was based on Ontario's planned transmission expansion, the overall demand for electricity and the ability to integrate renewables into the system.[392] It included all the renewable energy that Ontario had procured pursuant to the early renewables programs as well as the renewable energy being procured through the GEIA and the FIT Program.

[386] *Ibid*.

[387] **C-0414**, Ontario's Long-Term Energy Plan.

[388] *Ibid*, pp. 8 and 13-15.

[389] RWS-Lo, ¶¶ 35-36; **C-0414**, Ontario's Long Term Energy Plan, pp. 28-31.

[390] **C-0414**, Ontario's Long-Term Energy Plan, pp. 3, 11 and 59.

[391] *Ibid*, pp.10 and 37.

[392] RWS-Lo, ¶¶ 34-36.

XI. The Publication of the Rankings

168. On December 21, 2010, the OPA published the priority rankings for the 242 FIT applications that had not received a FIT Contract in April 2010.[393] As the ranking clarified in the first headnote, these were "launch period applications (submitted prior to December 1, 2009) which are in the FIT reserve, awaiting the running of the ECT".[394] The rankings did not include applications submitted after the close of the launch period. In total, the launch period applications that had not received contracts amounted to approximately 6,000 MW of additional capacity.[395]

169. The publication of these rankings was necessary to provide relevant information to applicants in advance of any ECT. The rankings were not meant to serve any other purpose, and certainly did not provide for the order in which contracts would be awarded. Indeed, as the third note at the top of the rankings reminded applicants: "FIT applicants will have the opportunity to request a change of connection point prior to the ECT. Connection point changes could impact the ECT outcome for other applicants requesting a nearby connection point".[396] In essence, if a higher ranked project changed its connection point to locate itself on a circuit or in a region with a lower ranked project, that lower ranked project might lose out on a contract if the higher ranked project used all the available capacity.

170. In this ranking, the OPA provided applicants awaiting an ECT with a number of pieces of information necessary for them to make a decision on whether they wanted to change connection points. For each project, the OPA provided the provincial ranking, the applicant's legal name, the project name, the project city, the project source (renewable

[393] **C-0405**, Ontario Power Authority website excerpt, "Priority ranking for first-round FIT Contracts posted" (Dec. 21, 2010); **C-0073**, Ontario Power Authority, "Priority ranking for first-round FIT Contracts" (Dec. 21, 2010) ("OPA, Priority Ranking for first-round FIT Contracts").

[394] **C-0073**, OPA, Priority Ranking for first-round FIT Contracts, Note 1.

[395] *Ibid*.

[396] *Ibid*.

energy type), the nameplate capacity (in kW), the connection point and whether the project was enabler requested.[397]

171. In addition, for the purposes of this list, instead of simply providing a list of 242 projects in their ranking order, the OPA divided the ranking into "transmission areas" (i.e. regions) and provided what was labelled as an "area ranking". Applications were placed into these areas based on the location of their proposed connection point.[398] The geographic location of the project was not determinative. In doing so, the OPA had to deal with enabler requested projects. As noted above, enabler requested projects did not specify a connection point.[399] Therefore, the OPA was forced to make some decisions about where these projects would be electrically located for the purposes of the ranking information.[400] The OPA generally used geographic location, though for several projects that were located near the border of two regions, the OPA simply made a decision one way or the other without consulting the applicant. Such decisions ultimately did not matter because the division of the rankings by region was for information purposes only in advance of the running of the ECT.[401]

172. Dividing the rankings by transmission area was important for a number of reasons. In particular, as Bob Chow explains in his witness statement, because of how Ontario's transmission system works, there is only a certain amount of power that can be put on the transmission lines coming out of any specific area.[402] In order to fully understand whether they needed to change their connection point, FIT applicants had to

[397] *Ibid*, Note 3.

[398] RWS-Chow, ¶ 24.

[399] *Ibid*, ¶¶ 22-24.

[400] *Ibid*, ¶ 24.

[401] *Ibid*.

[402] *Ibid*, ¶¶ 6-9.

be aware of what the area limits were and how much power was trying to come out of a particular area in relation to that area limit.[403]

173. Thus, in advance of the ECT, and in making a decision on whether to change their connection point, all applicants in the FIT Program were aware of the ranking, size and location of other projects trying to connect to the grid.[404] With such information, applicants could make informed decisions about whether they should seek to change their connection points.[405]

174. For example, with respect to the Bruce region, the ranking indicated that there were 30 projects that had applied for a connection point in the Bruce region and one project that was enabler requested and geographically located in the Bruce region. Together, these projects represented 1,609.5 MW of generating capacity.[406] Applicants were also made aware that the top ranked project in the area was the Goshen Wind Energy Centre, which was provincially ranked number nine.[407] There were only two other projects in the top 20 of the province-wide rankings that were seeking to connect in this area: the East Durham Wind Energy Centre (number 18) and Grand Bend Wind Farm (number 20). In the specific headnote for the Bruce region, the OPA made clear that the area limit was zero MW at the time.[408] It also clarified that there would be "1200 MW of additional capability which will be made available by the Bruce [to] Milton transmission line [which] will be allocated during the ECT" in the Bruce Region.[409]

175. Similarly, in respect of the West of London region (which borders the Bruce region) the rankings indicated that 57 projects had applied for connection points in this

[403] *Ibid*, ¶¶ 10-13, 25, and 31-32.

[404] **C-0073**, OPA, Priority Ranking for first-round FIT Contracts.

[405] RWS-Chow, ¶¶ 31-32.

[406] **C-0073**, OPA, Priority Ranking for first-round FIT Contracts, p. 1.

[407] *Ibid*.

[408] *Ibid*.

[409] *Ibid*.

area and that three projects which were enabler requested had been located in the area by the OPA.[410] These 60 applications represented a total of 1,634.712 MW. As it happened, eight out of the top ten provincially ranked projects were located in this one transmission area. Together, these eight projects were seeking to connect 641.5 MW of electricity generation capacity to the grid in the area.[411] However, the rankings made clear that the area limit at the time was zero MW and that the OPA expected that only "approximately 300 MW of additional capability which will be made available by the Bruce [to] Milton transmission line will be allocated during the ECT" in the West of London region.[412]

176. Thus, the rankings made clear to all FIT applicants that there were a number of projects in the West of London region that were highly ranked but that would not be able to connect in that region because of the area limit even when the Bruce to Milton Line came into service.

177. On December 23, 2010, two days after the release of the rankings, the Claimant issued a press release acknowledging that it was expecting that the transmission capacity on the Bruce to Milton Line would be allocated through the ECT and made available to "all projects in [the] western region of Ontario":

> On December 21, the OPA posted the priority ranking for 242 first-round FIT projects - applications submitted between Oct. 1, 2009 and Nov. 30, 2009 - that are without contracts. **All wind projects in the western region of Ontario are now being considered for ranking** because 1,200 MW of additional capacity that will be made available by the Bruce to Milton transmission line will be allocated during the next step, which is the Economic Connection Test (ECT).[413]

[410] *Ibid*, p. 6.

[411] *Ibid*.

[412] *Ibid*.

[413] **R-100**, Businesswire Press Release, Mesa, "AWA's Wind Energy Projects Rank High on Canadian Priority List" (Dec. 23, 2010) (emphasis added). Available at: http://www.businesswire.com/news/home/20101223005664/en/AWA%E2%80%99s-Wind-Energy-Projects-Rank-High-Canadian#.UvFxfmJdWSo.

XII. The 2011 Supply Mix Directive

178. On February 17, 2011, the Government of Ontario issued a Supply Mix Directive to the OPA with respect to the preparation of an integrated power system plan.[414] This new directive was based on the information collected from the review prior to the 2010 LTEP. The Supply Mix Directive directed the OPA to use a "medium electricity demand growth scenario" and target to reduce electricity usage during peak hours by 7,100 MW, through "Conservation and Demand Management".[415] As stated in the 2010 LTEP, the OPA was required to plan for 10,700 MW of renewable energy capacity, excluding hydro-electric, by 2018.[416] In total, these renewable energy sources were to account for 10-15 percent of Ontario's total electricity generation by 2018.[417]

XIII. The Second Round of Contract Offers for Launch Period Projects

179. On February 24, 2011, after running a second TAT, 40 additional CAR projects were offered contracts for a total of 872 MW.[418] Once again, no contracts were awarded in the Bruce region because of the transmission capacity constraints.[419]

180. These contracts were for applications submitted between December 1, 2009, and June 4, 2010.[420] As the OPA explained when announcing these offers, these contract awards "were delayed because of the exceptionally high volume of second round FIT

[414] **C-0267**, Letter, (Directive) from Brad Duguid, Minister of Energy to Colin Andersen, OPA (Feb. 17, 2011).

[415] *Ibid*.

[416] *Ibid*.

[417] *Ibid*.

[418] **R-009**, Ontario Power Authority, News Release, "Ontario Announces Second Round of Large-Scale Renewable Energy Projects" (Feb. 24, 2011); **R-102**, Ontario Power Authority website excerpt: "February 24, 2011 – Second Round of Large-Scale Renewable Energy Projects". Available at: http://fit.powerauthority.on.ca/program-updates/newsroom/february-24-2011-second-round-large-scale-renewable-energy-projects; RWS-Duffy, ¶ 57.

[419] **R-102**, Ontario Power Authority website excerpt: "February 24, 2011 – Second Round of Large-Scale Renewable Energy Projects"; RWS-Duffy, ¶ 58.

[420] RWS-Duffy, ¶ 59; **R-102**, Ontario Power Authority website excerpt: "February 24, 2011 – Second Round of Large-Scale Renewable Energy Projects".

applications received. In total, there were 324 large FIT applications (greater than 500 kW) with a potential generating capacity of 4,547 MW".[421]

181. The post-launch period applications which did not receive a contract because of the lack of transmission capacity were added to the priority ranking list and were scheduled for the ECT.[422] In the announcement, the OPA explained that "[d]etails and timing regarding the ECT process will follow shortly".[423] In advance of the ECT, the OPA released a new priority ranking, reflecting all applications received up to and including June 4, 2010.[424]

XIV. The Bruce to Milton Allocation Process

182. As noted above, due to transmission constraints, there was no capacity available in the Bruce region to offer to applicants seeking FIT Contracts when the FIT Program launched. It had been long known that this transmission constraint would only be alleviated by the construction of a new high-voltage transmission line to transport additional capacity out of the area. This new line was known as the Bruce to Milton Line.

A. The Development of the Bruce to Milton Line

183. The Bruce Generation Station, a nuclear facility in the Bruce region, supplies much of Ontario's electricity needs, and is accordingly responsible for creating electricity congestion in the Bruce region.[425] In the 1990s, Ontario Hydro had shut down several nuclear units in the Bruce Generation Station as part of its Nuclear Asset Optimization Plan.[426] However, when Bruce Power, a private company, took over the operation of the

[421] **R-102**, Ontario Power Authority website excerpt: "February 24, 2011 – Second Round of Large-Scale Renewable Energy Projects".

[422] *Ibid*.

[423] *Ibid*.

[424] **C-0233**, FIT CAR Priority Ranking by Region (Feb. 24, 2011). Available at: http://fit.powerauthority.on.ca/Storage/11220_Priority_Ranking_FINAL_by_Region1.pdf.

[425] RWS-Chow, ¶ 39.

[426] Dorey Report, p. ¶ 78.

Bruce Generation Station in 2001, it undertook to refurbish those units.[427] Transmission capability was not sufficient to accommodate the output of all units at the Bruce Generation Station meaning that additional transmission expansion would be required. Moreover, around this same period the Greater Toronto Area ("GTA") was experiencing significant load growth.[428]

184. In light of these developments with respect to both supply and demand, in 2006, the OPA, Hydro One and IESO began examining ways to expand transmission capacity out of the Bruce region.[429] After considering several options, the OPA concluded that "the only technically acceptable and practical solution is a new 500 kilovolt ("kV") double-circuit line from the Bruce area directly to the GTA".[430] In a public letter dated March 23, 2007, Jan Carr, then Chief Executive Officer of the OPA, urged Hydro One to initiate activities to construct the new double-circuit line with a targeted in-service date of December 1, 2011.[431] On March 29, 2007, Hydro One filed a leave to construct application to the OEB to "construct approximately 180 kilometres of double-circuit 500 kV electricity transmission line adjacent to the existing transmission corridor […] extending from the Bruce Power Facility in Kincardine Township to Hydro One's Milton Switching Station in the town of Milton" (known as the "Bruce to Milton Transmission Reinforcement Project").[432]

[427] Dorey Report, ¶ 79.

[428] Dorey Report, ¶¶ 80-84.

[429] Dorey Report, ¶¶ 87-91.

[430] **R-036**, Letter from Jan Carr, CEO, Ontario Power Authority to Laura Formusa, President and CEO (Acting), Hydro One Inc. (Mar. 23, 2007).

[431] *Ibid*.

[432] **R-037**, Hydro One website, Bruce to Milton Transmission Reinforcement Leave to Construct Application, EB -2007-0050 (Mar. 29, 2007). Available at: http://www.hydroone.com/RegulatoryAffairs/Pages/BMS92.aspx.

B. The Transmission Capacity to Be Made Available in the Bruce and West of London Regions

185. The Bruce to Milton Line was initially expected to increase the total transmission capacity in the Bruce region from 5,000 MW to approximately 8,200 MW.[433] Most of this new capacity would be used to transmit nuclear generation but the OPA initially estimated that the line also had the capacity to transmit up to 1,000 MW of renewable generating sources.[434] In 2010, this was reassessed by the OPA, which then estimated that the new line would result in approximately 1,200 MW of transmission capacity in the Bruce region and approximately 300 MW in the West of London region for renewable energy projects.[435]

186. This was the capacity that would be available for all renewable energy projects, not just FIT Program projects. As noted above, the Government of Ontario had also entered into a separate agreement with the Korean Consortium pursuant to which it committed investments in Ontario valued at $7 billion in exchange for priority access to 2,500 MW of transmission capacity in Ontario.[436] In accordance with its commitments under the GEIA, the Korean Consortium, along with Siemens Canada Limited, had announced its plans to build a turbine blade factory in Ontario on August 10, 2010.[437] Subsequently, it had indicated its interest in developing renewable energy projects in the Bruce region.[438] As a result, pursuant to the GEIA, on September 17, 2010 the Minister

[433] Dorey Report, ¶ 85.

[434] **R-036**, Letter from Jan Carr, CEO, Ontario Power Authority to Laura Formusa, President and CEO (Acting), Hydro One Inc. (Mar. 23, 2007).

[435] RWS-Lo, ¶ 44; **R-095**, IESO Wind Power Standing Committee, Minutes of Meeting (Sep. 23, 2010), Action Item #52, p. 3. Available at: http://www.ieso.ca/imoweb/pubs/consult/windpower/wpsc-20100923-Minutes.pdf.

[436] **C-0322**, GEIA; RWS-Lo, ¶¶ 23-25.

[437] **C-0119**, Letter (Direction) from Brad Duguid, Minister of Energy to Colin Andersen, OPA (Sep. 17, 2010).

[438] *Ibid*.

of Energy directed the OPA to hold 500 MW of transmission capacity in the Bruce region in reserve for the Korean Consortium's Phase 2 projects.[439]

C. The Regulatory Approvals for the Bruce to Milton Line

187. The submission of Hydro One's leave to construct application was only the beginning of the development process for the Bruce to Milton Line. Before Hydro One could commence construction of the transmission line, it was required to obtain several approvals, including environmental approvals.[440]

188. Approval of the Bruce to Milton Line proved to be an especially lengthy and contentious process due to the appeal that was filed on October 30, 2009 of the Niagara Escarpment Commission's ("NEC's") conditional approval of the portions of the transmission line which crossed the Niagara escarpment.[441] The approval of the NEC was the final significant regulatory hurdle before Hydro One could commence its construction of the transmission line.[442]

189. As such, while the Bruce to Milton Line remained widely anticipated, the appeal made it impossible to determine whether and when it would be built.[443] Accordingly, the Ministry of Energy and the OPA could not move forward with a process to award FIT Contracts that were dependent on the construction of this Line.[444]

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[439] *Ibid*.

[440] The entire approvals process was publically documented on the Hydro One website. See: **R-145**, Hydro One website excerpt: "Bruce to Milton Transmission Reinforcement Project". Available at: http://www.hydroone.com/Projects/BrucetoMilton/Pages/Default.aspx; Dorey Report, ¶¶ 92-105.

[441] **R-105**, Ministry of Natural Resources, Notice of Decision made under the provision of the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990 (May 10, 2011). Available at: http://www.hydroone.com/Projects/BrucetoMilton/Documents/09130d1.pdf.

[442] RWS-Cronkwright, ¶¶ 14.

[443] Dorey Report, ¶¶ 106-108.

[444] RWS-Cronkwright, ¶ 15.

190. Ultimately, the appeal of the NEC's approval was unsuccessful, and on May 10, 2011 the Minister of Natural Resources directed the NEC to issue a development permit to Hydro One for the construction of the Bruce to Milton transmission line.[445]

D. The Minister of Energy's June 3, 2011 Direction to the OPA with respect to the Bruce to Milton Capacity

191. The Ministry of Energy began to consider plans for allocating the transmission capacity that would be made available by the Bruce to Milton Line in the spring of 2011, with input from the OPA in April and May 2011.[446] On June 3, 2011, the Minister publicly issued a direction through a web-posting on the OPA website, outlining a process for allocating this capacity.[447] The June 3, 2011 Direction provided, *inter alia*, that:

> 1. In determining FIT contract offers in each of the Bruce and West of London transmission areas, the OPA shall include in its assessment those projects whose connections require upgrades to connection assets paid for by their proponents.
>
> […]
>
> 3. 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.
>
> 4. Offer FIT contracts for up to 750 MW of renewable generation facilities in the Bruce transmission area based on priority project rankings in the area and available connection resources.

[445] *Ibid*, ¶ 16; **R-105**, Ministry of Natural Resources, Notice of Decision made under the provision of the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990 (May 10, 2011).

[446] **R-104**, Ontario Power Authority, Draft Memorandum RE: Release of Additional FIT Contracts from Bruce to Milton Transmission Capacity (Apr. 27, 2011); RWS-Lo, ¶ 46; RWS-Cronkwright, ¶ 16.

[447] **R-011**, Letter (Direction) from Minister Brad Duguid, Ministry of Energy to Colin Andersen, Ontario Power Authority (Jun. 3, 2011).

> 5. Offer FIT contracts for up to 300 MW of renewable generation facilities in the West of London transmission area based on priority project rankings in the area and available connection resources.[448]

1. The Decision to Conduct a Separate Allocation Rather than an ECT

192. Despite the delays in its approval, the proposed development of the Bruce to Milton Line was well known in advance of the development of the FIT Program and was a major consideration for numerous FIT proponents who had applied for FIT Contracts in Western Ontario.[449]

193. Indeed, the Bruce to Milton Line had been a reoccurring topic of discussion with the public since the OPA's initial consultations with developers regarding the creation of the FIT Program.[450] As early as March 23, 2010, [during its ECT stakeholder presentation made publicly available online and via a FIT teleconference], the OPA communicated that it was considering the option of allocating the capacity that would be made available on the Bruce to Milton Line through the ECT process.[451] Similarly, the OPA's consideration of this option was also communicated to FIT proponents during its May 19, 2010 ECT stakeholder presentation.[452] Finally, in the OPA's December 21, 2010 publication of the priority ranking for the first-round FIT projects, it noted that

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[448] *Ibid*.

[449] See, for example, **R-084**, Newswire Article, "Pristine Announces Advancement of Ontario Feed In Tariff Wind Projects" (Apr. 8, 2010). Available at: http://www.newswire.ca/en/story/665481/pristine-announces-advancement-of-ontario-feed-in-tarriff-wind-projects; **R-087**, Alison Forbes, "A mighty wind blows - OPA's FIT Program issues hundreds of FIT Contracts" (Apr. 27, 2010). Available at: http://www.stikeman.com/cps/rde/xchg/se-en/hs.xsl/13835.htm.

[450] See for example **C-0034**, OPA Presentation, "The Economic Connection Test Process", slide 23; **R-090**, IESO Wind Power Standing Committee, Action Item Summary (May 13, 2010). Available at: http://www.ieso.ca/imoweb/pubs/consult/windpower/wpsc-20100923-Action-Item-Summary.pdf; **R-095**, IESO Wind Power Standing Committee, Minutes of Meeting (Sep. 23, 2010); **R-096**, Hydro One, Ontario Feed-In Tariff Supply Chain Forum, Transmission and Distribution Expansion Update (Oct. 5-6, 2010), p. 5. Available at: http://borealsolar.com/pdfs/FIT/Hydro%20One%20-%20Mark%20Graham.pdf.

[451] **C-0034**, OPA Presentation, "The Economic Connection Test Process", slide 23.

[452] **C-0088**, OPA Presentation, "The Economic Connection Test – Approach, Metrics and Process", slides 41 and 62.

additional capacity in the Bruce and West of London regions created by the Bruce to Milton Line would be allocated using an ECT process.[453]

194. However, by the time Hydro One finally received approval to construct the line in 2011, much had changed in terms of Ontario's energy needs, policy, and the FIT Program.[454] Specifically, the 2010 LTEP had established a renewable energy target of a total of 10,700 MW of renewable energy capacity in Ontario by 2018.[455] The 2011 Supply Mix Directiive had directed the OPA to plan to hit this target with renewables making up 10-15% of the supply mix in Ontario.[456] Due to the overwhelming success of the FIT Program, the Province was quickly approaching this target and it became clear that Ontario would need to slow down the pace of its procurement of renewable energy.[457]

195. The concern with an ECT process was that it was designed to be run on a province-wide basis. As Ontario was already quickly approaching its renewable energy target, it was unclear as to whether it was practical to run a province-wide ECT,[458] especially when the only need was really to allocate the new capacity on the Bruce to Milton Line.

196. Thus, the Ministry of Energy, in consultation with the OPA, sought to create a more discrete process that was specific to the Bruce to Milton Line.[459] In doing so, Ontario and the OPA also realized that FIT applicants had anticipated that the next step

[453] **C-0073**, OPA, "Priority ranking for first-round FIT Contracts".

[454] RWS-Cronkwright, ¶ 16.

[455] **C-0414**, Ontario's Long-Term Energy Plan, pp. 8, 13-15 and 37.

[456] **C-0267**, Letter (Directive) from Brad Duguid, Minister of Energy to Colin Andersen, OPA (Feb. 17, 2011).

[457] RWS-Lo, ¶¶ 39 and 46; **R-107**, Ministry of Energy Presentation, "Bruce to Milton Transmission Line - FIT Contract Awards" (May 12, 2011), slide 2.

[458] RWS-Lo, ¶¶ 39-40.

[459] **R-106**, Email from Ceiran Bishop, Ministry of Energy to Rick Jennings and Jonathan Norman, Ministry of Energy (May 12, 2011).

of the FIT Program would be the ECT,[460] and in particular that it was through this process that the capacity on the Bruce to Milton Line would be awarded. Hence, they sought to design a process that preserved developers' expectations. As explained by Sue Lo:

> The goal was to develop a fair process for allocating this capacity that would meet developer expectations by including the relevant components of an ECT, without actually being a province-wide ECT.[461]

2. The Connection Point Amendment Window

197. As discussed above,[462] the first step in the ECT was to be the IPA, which would entail the opportunity for applicants to change connection points, or if they were enabler requested, to select a connection point. The fact that a change in connection point would be allowed as part of the ECT had been consistently emphasized by the OPA since the first presentations on the ECT process in early 2010. In fact, FIT applicants had been counting on the ability to change connection points since the beginning of the FIT Program. In an email of May 18, 2011, discussing the possibility of not including a connection point amendment window in the Bruce to Milton allocation process, Patricia Lightburn of the OPA wrote:

> I am concerned about those projects that border two regions and chose a connection point in the first round outside of the Bruce area specifically because they knew Bruce was at 0 capacity, with the intention of changing to Bruce prior to ECT.
>
> I know that I reviewed at least a couple applications like this, though I would not be able to tell you exactly who.[463]

[460] RWS-Lo, ¶ 46; **R-107**, Ministry of Energy Presentation, "Bruce to Milton Transmission Line - FIT Contract Awards" (May 12, 2011), slide 2.

[461] RWS-Lo, ¶ 46.

[462] *Supra*, ¶¶ 100-103.

[463] **R-111**, Email from Patricia Lightburn, Ontario Power Authority to Jim MacDougall, Tracy Garner and Bob Chow, Ontario Power Authority (May 18, 2011).

198. Similarly, on May 27, 2011, the Canadian Wind Energy Association ("CanWEA") wrote to the Minister of Energy urging him to allow a change in connection points stating that "a majority" of its members were of the view that the Government of Ontario and the OPA should follow through with the envisaged process:

> CanWEA is writing to express the view of a majority of our members that the Government of Ontario and the Ontario Power Authority (OPA) should follow through with the established Feed In Tariff (FIT) process by immediately opening the window for point of interconnection changes to enable the next round of FIT contracts to be issued in June of this year.
>
> As you know, developers were told by the OPA on numerous occasions that the opportunity would exist to change their point of interconnections before the running of the Economic Connection Test (ECT) and the awarding of contracts. We are asking that the OPA follow the process and provide this opportunity.[464]

199. In line with these expectations, the Minister of Energy decided to direct the OPA to allow a five-day change window during which any applicant in the Bruce and West of London region could change their connection point prior the allocation of the Bruce to Milton capacity.[465] That window was open from June 6-10, 2011.

200. While the connection point change window that had been contemplated as part of the ECT had been planned for longer (three weeks), a shorter period was chosen for the Bruce to Milton allocation process for several reasons. First, as described by Sue Lo "[t]he period of 5 days was chosen because both the Premier's Office and CanWEA had [...] expressed a desire for a short change window in order to avoid delaying the process of awarding further contracts".[466]

[464] **R-113**, Letter from Robert Hornung, President of CanWEA to the Brad Duguid, Minister of Energy (May 27, 2011).

[465] **R-011**, Letter (Direction) from Minister Brad Duguid to Colin Andersen, Ontario Power Authority (Jun. 3, 2011).

[466] RWS-Lo, ¶ 50.

201. Further, as CanWEA had pointed out in its May 27, 2011 letter, a shorter window was appropriate given that FIT applicants had advance notice of both the development of the Bruce to Milton Line and the possibility of a change in connection points:

> Over the past several months, our members have collectively invested significant time and money to prepare their respective interconnection strategies. Once the updated Transmission Availability Tables are made available our members can be ready to act quickly and respond within the window of time communicated to our members by the OPA. For these reasons, a majority of our members believe the window only needs to be open for a short period of time.[467]

3. The Procurement Targets for the Bruce and West of London Regions

202. In light of the new approach to renewable energy procurement, and specifically the targets set in the 2010 LTEP and the approach of the 2011 Supply Mix Directive, the Minister of Energy decided to direct the OPA to procure a specific amount of capacity in the Bruce and West of London areas during the Bruce to Milton allocation process. In particular, the Minister directed the OPA to acquire 750 MW in the Bruce region and 300 MW in the West of London region.

203. Prior to this, no specific procurement targets had been set in the FIT Program. Of course, in this case, the targets set by the Minister of Energy were approximately equal to what the OPA had estimated would be available as a result of the Bruce to Milton Line for FIT projects in the Bruce and West of London regions. As noted above, it was believed that the Bruce to Milton Line would create approximately 1200 MW of capacity.[468] Pursuant to the GEIA, 500 MW had been reserved for projects of the Korean Consortium, leaving approximately 700 MW available. By providing specific targets, the direction ensured that there would be certainty as to how much would ultimately be procured during the process.

[467] **R-113**, Letter from Robert Hornung, President of CanWEA to Brad Duguid, Minister of Energy (May 27, 2011).

[468] *See supra*, ¶ 84.

4. The June 3, 2011 Direction and the Korean Consortium

204. In the September 17, 2010 direction, the Minister of Energy had instructed the OPA to hold 500 MW of capacity in the Bruce region in reserve for the Korean Consortium for its GEIA projects.

205. However, when Ontario and the OPA were developing the Bruce to Milton allocation process in May 2011, the Korean Consortium had yet to finalize its preferred connection points in the Bruce region.[469] With respect to this issue, the Premier's Office indicated that its preference was to award FIT Contracts on the Bruce to Milton Line by June.[470] Therefore, it was decided that the Bruce to Milton allocation process would not be delayed while the Korean Consortium finalized its connection points.[471]

206. Thus, FIT applicants were permitted to select their connection points in the Bruce and West of London regions during the five-day change in connection point window between June 6 and 10, 2011, *prior* to the finalization of the connection points of the Korean Consortium's projects.[472] This effectively prevented the Korean Consortium's delays in selecting connection points from having any impact on the timing of the FIT Contract awards or the location of the FIT project connection points.

E. Communications with FIT Proponents

207. Throughout the development of the Bruce to Milton allocation process, the Government of Ontario and the OPA carried on in the normal course in terms of the FIT Program. This included regular communications with FIT proponents and other stakeholder on various issues, such as the approvals process for renewable energy projects and commercial matters relating to FIT applications. Sue Lo, Bob Chow, and

[469] RWS-Cronkwright, ¶ 19.

[470] **R-112**, Email from Sue Lo, Ministry of Energy to Rick Jennings, Ministry of Energy (May 20, 2011).

[471] RWS-Lo, ¶ 47; **C-0083**, Email from Pearl Ing, Ministry of Energy to Sue Lo and Sunita Chander, Ministry of Energy (May 12, 2011).

[472] RWS-Lo, ¶ 47.

Jim MacDougall all describe how they met with many FIT proponents to listen and to share public information about the process.[473]

208. For example, a U.S. based FIT applicant, NextEra Energy, LLC ("NextEra") was engaged in several communications with Ontario, the OPA, Hydro One and IESO in the winter and spring of 2011 relating to: (1) a separate business proposal it had made in the summer of 2010[474]; (2) the placement of its enabler requested projects in the West of London region;[475] and (3) the corporate assignment of its FIT applications.[476]

209. Ontario's and the OPA's communications with applicants and potential applicants about the FIT Program in general, and the ECT and upcoming allocation of capacity on the Bruce to Milton Line in particular, contained only publicly available information, so as to avoid providing anyone (e.g. developers, suppliers, manufacturers, interest groups, investors, etc.) with an unfair advantage.[477] As explained by Sue Lo:

> Although developers were well-aware of the possibility that *a* connection point change window would be part of any process for allocating capacity on the Bruce to Milton transmission line, no developer was given advance notice or preferential access to information regarding the details of the Bruce to Milton allocation process that we were developing. In its responses to developers, the Ministry of Energy only commented generally on what an application for a change of connection point would entail under the FIT Rules.[478]

210. Further, while it was not uncommon for developers, including NextEra, to approach the OPA to express their views as to how the change in connection point should

[473] RWS-Lo, ¶¶ 52-53; RWS-Chow, ¶ 55; RWS-MacDougall, ¶¶ 36, 43, 46-47.

[474] **R-089**, Ministry of Energy, Draft Note from Meeting with FPL Group/NextEra (May 10, 2010); **C-0002**, Ministry of Energy, Meeting Note (Aug. 19, 2010) (meeting with Ministry of Energy to propose framework agreement with Ontario for the building of new transmission lines utilizing the connection facilities of peaking generators (i.e. 500kV Lennox GS).

[475] Bob Chow, ¶¶ 52-54; **C-0234**, Email from Bobby Adjemian, NextEra to Bob Chow, Ontario Power Authority (Jan. 18, 2011).

[476] RWS-MacDougall, ¶ 43; **C-0302**, Email from Jim MacDougall, Ontario Power Authority to Nicole Geneau, NextEra (May 31, 2011) (See specifically, email from Nicole Geneau sent at 4:31 PM).

[477] RWS-Lo, ¶¶ 53-55; RWS-Chow, ¶ 51; RWS-MacDougall, ¶ 36.

[478] RWS-Lo, ¶ 56.

occur and the timeline of the ECT, neither Ontario nor the OPA provided anyone with any advance information in this regard that was not publicly available.

211. For example, in an email response to a meeting request to discuss the connection points of NextEra's Bluewater, Goshen, Adelaide and Bornish wind projects on January 28, 2011, Bob Chow cautioned Bobby Adjemian of NextEra that the OPA was limited in the extent it could discuss information that was relevant and material to the upcoming ECT and that the OPA could not "recommend, suggest or consult" on NextEra's specific needs.[479]

212. Furthermore, as stated in an email from Phil Dewan of Counsel Public Affairs Inc. (who represented NextEra) to Sue Lo on May 11, 2011, following his meeting with Andrew Mitchell, of the Minister's Office, and Al Wiley, Senior Vice President of NextEra:

> Andrew was clear that a decision has not been made yet on whether or not to open the POI [point of interconnection] amendment window, and whether, if so, to do so province-wide or just for Bruce-to-Milton and West of London.[480]

213. Similarly, as Jim MacDougall explains about his response to an email from Nicole Geneau in respect of a request for assignment of NextEra's FIT applications:

> The OPA had decided that, as a matter of policy, we would not allow for assignments of applications to be made once the window was open. While it was therefore relevant to inform Nicole Geneau of this policy (which we would have done for anyone), it was equally important not to give away non-public details about the work going on regarding allocating the Bruce to Milton capacity (work that I was not substantially involved in personally).
>
> As you see from my response, we told Ms. Geneau that it was better "to request assignment asap, in advance of <u>any</u> change window". I discussed my response with colleagues before sending it, and our choice of the word

[479] RWS-Chow, ¶ 54; **C-0234**, Email from Bobby Adjemian, NextEra to Bob Chow, Ontario Power Authority (Jan. 18, 2011).

[480] **C-0090**, Email from Phil Dewan, Counsel Public Affairs to Sue Lo, Ministry of Energy (May 11, 2011).

> "any" to describe the change window was quite deliberate. By using it we were making a general statement, and were acknowledging nothing more than what the industry already knew – that a change window would be a part of the process of allocating the capacity on the Bruce to Milton line. I certainly did not give her any specifics on when that change window might be occurring nor did I give her any information that was not publicly known.[481]

214. Ontario and the OPA continued the same policy following the announcement of the June 3, 2011 Direction. Thus, while the OPA continued to communicate with applicants about matters unrelated to the Bruce to Milton allocation process (including, for example, the assignment of applications), it also continued to avoid private discussions regarding the allocation process. In an effort to ensure that all FIT applicants received the same information, the OPA directed all communications to be sent to fit@powerauthority.on.ca. If the OPA determined that a response was warranted, it was posted on the OPA's website for all to see, rather than individually communicated to the specific applicant who had posed the question.[482]

F. The Results of the Bruce to Milton Allocation Process - The Awarding of PPAs to FIT Proponents in the Bruce and West of London Regions

215. The OPA received 39 requests to change connection points during the 5-day change of connection point window from June 6 to June 10, 2011.[483] Of these applications, several projects changed their connection points from the West of London region to the Bruce Region.[484] These projects included NextEra's Bluewater Wind Energy Centre, Jericho Wind Energy Centre, Bornish Wind Energy Centre and Adelaide

[481] RWS-MacDougall, ¶¶ 46-47.

[482] **C-0298**; Email from Tracy Garner, Ontario Power Authority to Bob Chow, Ontario Power Authority (Jun. 6, 2011); **R-115,** Email from Shawn Cronkwright, Ontario Power Authority to Bob Chow (OPA) et. al (Jun. 6, 2011).

[483] **R-121,** Ontario Power Authority Memo Request, "Connection Point Amendment Window –Requests", (Jun. 28, 2011).

[484] *Ibid*.

Wind Energy Centre projects, as well as Suncor's Cedar Point Wind Power project.[485] These projects had rankings of 4th, 5th, 6th, 7th and 10th, respectively, in the Province.

216. After the close of the connection point amendment window, a total of 14 FIT Contracts were offered in the Bruce region, totalling 749.5 MW.[486] The contracts were offered to the projects based on their ranking and the results of the connection availability tests. Thus, the first 11 contracts in the Bruce region went to the top ranked projects. After those were awarded, only 8.5 MW of the 750 MW limit remained. As a result, the OPA awarded contracts to the next highest ranked projects that could fit within this remaining capacity.

XV. Communications with the Claimant Regarding its Rankings and the Bruce to Milton Allocation Process

217. On May 20, 2011, Mark Ward, Charles Edey, and Michael Bernstein, President and CEO of Capstone Infrastructure Corp., sent a letter to Shawn Cronkwright, Director of Renewables Procurement at the OPA.[487] This letter requested confirmation of Mesa's understanding of the priority ranking process for FIT launch applications and the specific dates used by the OPA as the "Access Rights Dates" for the TTD and Arran wind projects. A project's Access Rights Date was used by the OPA as a "tiebreaker" in case two projects had the same number of COD Acceleration Days in the launch period process.[488]

[485] **C-0292**, Ontario Power Authority, "FIT Contract Offers for the Bruce-Milton Capacity Allocation Process" (Jul. 4, 2011).

[486] *Ibid*.

[487] **C-0098**, Letter from Mark Ward (Mesa), Chuck Edey (Leader Resources) and Michael Bernstein (Capstone Infrastructure) to Shawn Cronkwright (OPA) (May 20, 2011); RWS-Cronkwright, ¶ 22.

[488] *Ibid*; RWS-Cronkwright, ¶¶ 21-24.

218. This letter did not request confirmation of Mesa's launch period COD Acceleration Days calculations, nor did it request further information or clarification on the criteria scores or rankings of the Claimant's projects.[489]

219. As a follow-up, on June 9, 2011, Michael Bernstein, acting on behalf of Mesa, emailed the Deputy Minister of Energy to request a meeting about the June 3, 2011 Direction.[490] This email did not mention Mesa's project rankings.[491]

220. On June 13, 2011 Chris Benedetti, also acting on behalf of Mesa, emailed Shawn Cronkwright and Bob Chow of the OPA to repeat Mesa's concern that incorrect Access Rights Dates had been used by the OPA for the two projects.[492] This email expressed no additional concerns. Michelle Wasylyshen, similarly acting on behalf of Mesa, emailed the same message to Sue Lo on June 15, 2011.[493]

221. The OPA endeavoured to provide a timely and thorough response that fully addressed the concerns raised by Mesa in their letter of May 20, 2011.[494] The OPA's reply was delivered on June 17, 2011.[495] In it, the OPA clarified that the priority ranking process was based on the outcome of the evaluation of COD Acceleration Days, and was not determined by the capacity at the connection points identified on the application, as suggested by Mesa in its May 20, 2011 letter. [496] In order to ensure the consistent and

[489] *Ibid*; RWS-Cronkwright, ¶ 22.

[490] **C-0096**, Email from Samira Viswanathan, Ministry of Energy to Sunita Chander, Ministry of Energy (Jun. 10, 2011).

[491] *Ibid*.

[492] **C-0162**, Email from Chris Benedetti, Sussex Strategy to Shawn Cronkwright, Ontario Power Authority (Jun. 13, 2011).

[493] **C-0226**, Email from Michelle Wasylyshen, Sussex Strategy to Sue Lo, Ministry of Energy (Jun. 15, 2011).

[494] RWS-Cronkwright, ¶ 25.

[495] **C-0195**, Letter from Shawn Cronkwright, Ontario Power Authority to Mark Ward (Mesa), Charles Edey (Leader Resources), and Michael Bernstein (Capstone Infrastructure) (Jun. 17, 2011); RWS-Cronkwright, ¶¶ 25-28.

[496] **C-0195**, Letter from Shawn Cronkwright, Ontario Power Authority to Mark Ward (Mesa), Charles Edey (Leader Resources), and Michael Bernstein (Capstone Infrastructure) (Jun. 17, 2011).

fair evaluation of all applications, the OPA noted that an evaluation monitor was engaged and that the confidentiality of the results of the procurement process would be maintained in strict confidence.[497] The OPA also confirmed that the appropriate Access Rights Dates for the Claimant's projects had been used.[498]

222. Dissatisfied with this response, on June 17, 2011, the Claimant contacted the OPA requesting a meeting to clarify the Claimant's project rankings.[499] On June 22, 2011, the OPA informed the Claimant that since the assessment process was underway, it would be unfair to the other applicants if the parties were to meet.[500]

223. Then, on July 4, 2011, Mark Ward, wrote to the Premier of Ontario,[501] the Minister of Energy,[502] the Minister of Agriculture, Food and Rural Affairs,[503] the Minister of Economic Development and Trade,[504] and Colin Andersen, Chief Executive Officer of the OPA,[505] expressing disappointment over the FIT Contracts awarded that day. He requested a meeting with these parties to discuss the outcome of this process and the company's future involvement in the Province.

224. While the Ministry of Energy prepared a draft note ahead of a possible meeting,[506] the issuance of the Claimant's Notice of Intent to Submit a Claim to Arbitration on July 6, 2011, which challenged the procurement process and project rankings that the

[497] *Ibid*; RWS-Cronkwright, ¶¶ 26-27.

[498] *Ibid*; RWS-Cronkwright, ¶ 28.

[499] **R-120**, Email from Shawn Cronkwright, Ontario Power Authority to Chris Benedetti, Sussex Strategy Group (Jun. 22, 2011).

[500] *Ibid*.

[501] **C-0025**, Letter from Mark Ward, Mesa to Premier Dalton McGuinty (Jul. 4, 2011).

[502] **C-0177**, Letter from Mark Ward, Mesa to Minister Brad Duguid, Minister of Energy (Jul. 4, 2011).

[503] **C-0175**, Letter from Mark Ward, Mesa to Minister Carol Mitchell (Jul. 4, 2011).

[504] **C-0169**, Letter from Mark Ward, Mesa to Minister Sandra Pupatello, Minister of Economic Development and Trade (Jul. 4, 2011).

[505] **C-0186**, Letter from Mark Ward, Mesa to Colin Andersen, Ontario Power Authority (Jul. 4, 2011).

[506] **C-0189**, Ministry of Energy, Draft Meeting Note (Jul. 7, 2011).

Claimant allegedly wanted to discuss, brought considerations of a meeting to a close.[507] In light of the fact that Mesa had commenced legal proceedings regarding this matter, Mr. Andersen replied to Mesa's letter on July 14, 2011 stating that such a meeting would be inappropriate.[508]

XVI. The Claimant's Further Failed Efforts to Develop Wind Projects

225. On [redacted] Mesa sent GE a notice of termination for [redacted] 1.6XL turbines, forfeiting [redacted] of the initial deposit paid to GE.[509]

226. On [redacted] Mesa signed a Second Amended MTSA with GE.[510] This Second Amended MTSA revised the order to [redacted] turbines [redacted] 1.6xle-100 and [redacted] 1.6xle-82.5 turbines).[511] These turbines were now to be used at the Stephens Bor-Lynn project in Texas.[512] The delivery of the turbines was to take place between [redacted]. GE retained the remainder of the initial deposit of USD [redacted] as a

[507] **C-0205**, Letter from Colin Andersen, Ontario Power Authority to Mark Ward, Mesa (Jul. 14, 2011).

[508] *Ibid*.

[509] BRG Report,

[510] **R-126**, Second Amended and Restated Master Turbine Sales Agreement for the Sale of Power Generation Equipment and Related Services, between General Electric Company and Mesa Power Pampa LLC [redacted]

[511] *Ibid*, Attachment 3 Price, Payment and Termination Charges, Section 3B, Payments, Payment Schedule.

[512] BRG Report, Attachment VI, ¶ 65; **R-129**, Letter from Gary Elieff, General Electric to Mark Ward, Mesa [redacted] **R-141**, Business Week, Bloomberg News, "Pickens Reviving Plans for Texas Wind Power at Smaller Scale"; **R-085**, Wind Coalition News Article, "Billionaire T. Boone Pickens is building a 377-megawatt wind farm in Texas" (Apr. 12, 2010); **R-125**, PR Newswire, "Mesa Power Group to Partner with Wind Tex Energy on Stephens Bor-Lynn Wind Project South of Lubbock" (Apr. 4, 2012); **R-063**, Welch, Kevin, Amarillo Globe News, "Pampa wind farm delayed, not canceled, Pickens says". This article refers to a conversation held by Mr. Pickens with a Bloomberg Financial Reporter, whereby he confirmed that the 667 turbines bought from GE for the Pampa projects would be used for smaller projects or he would just "put them in the garage".

portion of the initial payment.[513] On [redacted] Mesa terminated the Second Amended MTSA and forfeited the remainder of the deposit.[514]

XVII. The Current Environment for FIT Projects

227. For a number of various regulatory, technical and commercial reasons, the majority of FIT Contract holders have had difficulty bringing their projects into commercial operation. As a result, while the number of contracts issued for large CAR FIT projects is relatively significant in terms of projects and MW, the number of projects that are actually pumping renewable energy into the system remains small. For example, 70 FIT Contracts were offered to large wind projects. To date, only 13 or 18.6 percent of those projects have actually reached commercial operation, while over 54 percent have been delayed or terminated.[515]

228. In October 2011 the contemplated FIT two-year review began.[516] The review made several recommendations for improvement to the program based on stakeholder consultations.[517] On June 12, 2013, the Ministry of Energy issued a direction to the OPA indicating that there would be no further procurement of additional MW for large scale FIT projects.[518] Procurement for large scale FIT projects was now to be completed through a new competitive procurement process that is currently being designed.[519] All

[513] **R-126**, Second Amended and Restated Master Turbine Sales Agreement for the Sale of Power Generation Equipment and Related Services, between General Electric Company and Mesa Power Pampa LLC [redacted] **R-129**, Letter from Gary Elieff, General Electric to Mark Ward, Mesa [redacted]

[514] **C-0382**, Letter from Cole Robertson, Mesa to Stephen Swift, GE [redacted]

[515] BRG Report, Attachment 11.

[516] **R-149**, Ministry of Energy website excerpt, "Feed-In Tariff Program Two-Year Review". Available at: http://www.energy.gov.on.ca/en/fit-and-microfit-program/2-year-fit-review/#.UwkVV5Ksh8E

[517] **C-0354**, Ministry of Energy, Two-Year Review Report.

[518] **C-0248**, Letter (Direction) from Bob Chiarelli, Minister of Energy to Colin Andersen, Ontario Power Authority (Jun. 12, 2013).

[519] *Ibid*.

FIT applications for CAR projects made up until that point which had not received a contract were cancelled and their deposits refunded in whole.[520]

THE TRIBUNAL LACKS JURISDICTION TO HEAR THE CLAIMANT'S CLAIM

I. Summary of Canada's Position

229. In submitting its claim to arbitration, the Claimant chose to ignore the clear rules in NAFTA Chapter 11 with respect to when its claim could be filed. The Claimant may find these rules bothersome. It may believe that such rules operate to delay the efficient resolution of its claims. However, these rules cannot be ignored. They are the conditions of Canada's consent to arbitration and they circumscribe the jurisdiction of this Tribunal.

230. As will be shown below, this Tribunal is without jurisdiction over all of the claims, as the Claimant has failed to respect the conditions placed on Canada's consent to the NAFTA Chapter 11 arbitration. Alternatively, even if the conditions required to submit a claim to arbitration have been met, the Claimant has still made numerous arguments relating to measures which are outside the jurisdiction of this Tribunal. First, the Claimant has made claims with respect to alleged breaches that occurred before the Claimant made its investment. Second, the Claimant has made claims based on the actions of state enterprises who were not acting in the exercise of delegated governmental authority.

II. The Claimant Bears the Burden of Establishing that this Tribunal Has Jurisdiction over the Dispute

231. An investor bringing a claim under NAFTA Chapter 11 bears the burden of proving that it has satisfied the conditions precedent to commence arbitration and that the Tribunal has jurisdiction over the dispute. This fundamental principle was recently confirmed in *Apotex v. United States* where the Tribunal held that "Apotex, as the claimant, bears the burden of proof with respect to the factual elements necessary to

[520] *Ibid*.

establish the Tribunal's jurisdiction in this regard".[521] In so holding, the *Apotex* Tribunal followed earlier NAFTA tribunals, including those in *Methanex v. United States*, *Bayview v. Mexico* and *Grand River v. United States*, which have all consistently affirmed that it is for the claimant to establish that its claims fall within NAFTA Chapter 11 and within the tribunal's jurisdiction.[522]

232. Further, as recently explained by the Tribunal in *ICS Inspection v. Argentina*, if there is any ambiguity as to whether or not jurisdiction exists, the tribunal should decline to act. In that case, the Tribunal specifically explained:

> [A] State's consent to arbitration shall not be presumed in the face of ambiguity. Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties. The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.[523]

[521] **RL-042**, *Apotex Inc. v. United States* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013, ¶ 150 (citing *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) Award, 15 April 2009, ¶¶ 58-64 (summarizing previous decisions and concluding "if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established prima facie] at the jurisdictional phase.").

[522] **RL-062**, *Methanex Corporation v. United States of America* (UNCITRAL) Preliminary Award on Jurisdiction, 7 August 2002 ("*Methanex - Partial Award on Jurisdiction*"), ¶¶ 120-121 (finding that a claimant must establish that the requirements of NAFTA Articles 1116-1121 have been met); **RL-043**, *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB(AF)/0501) Award, 19 June 2007, ¶¶ 63, 122 (finding that "Claimants have not demonstrated that their claims fall within the scope and coverage of NAFTA Chapter Eleven" and rejecting claimant's submission that "Respondent bears the burden of demonstrating that the Tribunal should not hear the claim…"); **CL-041**,*Grand River Enterprises Six Nations, Ltd, et al. v. United States of America* (UNCITRAL) Award, 12 January 2011 ("*Grand River - Award*"), ¶ 122: ("Claimants must…establish an investment that falls within one or more of the categories established by that Article [1139]"). Outside of the NAFTA-context, *see* **RL-072**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28) Decision on Bifurcated Jurisdictional Issue, 5 March 2013, ¶ 48: ("[a]s a party bears the burden of proving the facts it asserts, it is for the Claimant to satisfy the burden of proof required at the jurisdictional phase."); **CL-061**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Decision on Jurisdiction, 14 November 2005, ¶ 192: ("[Claimant] has the burden of demonstrating that its claims fall within the Tribunal's jurisdiction."); **RL-056**, *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3) Decision on Jurisdiction, 22 April 2005, ¶ 79 (Claimant acknowledged it had the burden of proving jurisdiction).

[523] **CL-068**, *ICS Inspection and Control Services Limited (U.K.) v. The Argentine Republic* (UNCITRAL) Award on Jurisdiction, 10 February 2012, ¶ 280 (emphasis added). This principle has been long established

233. Accordingly, in this case, the Tribunal must be satisfied that the Claimant has proven with sufficient certainty that this Tribunal has jurisdiction over the dispute.[524] For the reasons explained below, the Claimant has not met its burden. Therefore, its claims should be dismissed.

III. The Tribunal Lacks Jurisdiction Because Canada Has Not Consented to Arbitrate the Claimant's Claim

234. As Canada indicated in its Objection to Jurisdiction, the NAFTA Parties have offered their advance consent to arbitrate certain investment disputes. However, that consent is neither universal nor unconditional. The NAFTA Parties offered it only with respect to particular types of claims, brought by particular types of investors, in particular circumstances. Specifically, in Articles 1118 to 1121, the NAFTA Parties conditioned their consent on a potential claimant following certain procedures and meeting certain requirements when submitting a claim to arbitration. These conditions on each Party's consent are a fundamental part of the agreement reached by the NAFTA Parties. In fact, in its Memorial, the Claimant admitted that in order for its claim to be validly submitted to arbitration, it was required to comply with Articles 1118, 1119 and 1120.[525]

235. For the reasons explained below, the Claimant failed to comply with Article 1120 when it filed its Notice of Arbitration on October 4, 2011, only three months after failing to be awarded a FIT Contract – the event that precipitated its claim. As a consequence, its claim should be dismissed.

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at the International Court of Justice. See **RL-047**, *Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* Judgment, I.C.J Reports, 4 June 2008, ¶ 62: ("The consent allowing for the Court to assume jurisdiction must be certain…whatever the basis of consent, the attitude of the respondent State must 'be capable of being regarded as 'an unequivocal indication' of the desire of that State to accept the Court's jurisdiction in a 'voluntary and indisputable manner'") (internal citations omitted)).

[524] **RL-039**, *Achmea B.V. v. The Slovak Republic* (formerly *Eureko B.V. v. The Slovak Republic*) (UNCITRAL) Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, ¶ 219: ("[t]ribunal must satisfy itself of the existence and extent of its jurisdiction."); **RL-062**, *Methanex - Preliminary Award on Jurisdiction*, ¶ 107: ("Tribunal has the express power to rule on objections that it has no jurisdiction.").

[525] Claimant's Memorial, ¶¶ 838-855.

A. Canada's Consent Is Conditioned Upon Six Months Having Elapsed Since All of the Events which Gave Rise to the Claim Submitted to Arbitration

236. Article 1120, states that claims may be submitted to arbitration "provided that six months have elapsed since the events giving rise to a claim".[526] In its Objection to Jurisdiction, Canada explained that the ordinary meaning[527] of the phrase "events giving rise to a claim" means each and every event which led to the claim being filed. The use of the plural term "events" lends itself to no other credible interpretation. If the intent had been to refer to only some of the precipitating events, or the first event in the chain of events that led to the claim, the singular term "event", or language such as "any of the events", would have been used. It was not.

237. In its Memorial and Response on Jurisdiction, the Claimant has suggested that Article 1120 should be interpreted differently. Not only does its interpretation of Article 1120 have no merit, it would destroy the very purpose of the Article.

1. The Claimant's Interpretation of Article 1120 is Incompatible with the Plain Language of the Provision Interpreted in its Context

238. In interpreting Article 1120, the Claimant focuses not on the operative language of "events giving rise to", but rather on the use of the phrase "a claim." It alleges that Canada has misunderstood Article 1120 "as requiring the Investor to wait six months after ***all*** of its possible claims have materialized, rather than six months after "***a*** claim" has arisen, as Article 1120 plainly states is sufficient".[528]

239. In this argument, the Claimant seems to be suggesting that as long as six months have elapsed since the events giving rise to at least some claim, the investor is free to

[526] NAFTA, Article 1120.

[527] Pursuant to the Article 31 of the Vienna Convention on the Law of Treaties, this language is to 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." (**CL-011**, *Vienna Convention on the Law of Treaties* (1969), Article 31).

[528] Claimant's Memorial, ¶ 834 (emphasis added).

make any and all possible claims in a single submission to arbitration. Relying on *Pope & Talbot v. Canada*, the Claimant argues that adding "new elements" to a claim is permitted under the NAFTA since they are not a "new claim".[529] However, in *Pope & Talbot*, the issue was whether to allow the amendment of the claim to add a new event that had not been specifically listed in the Statement of Claim. The issue was not about how to interpret Article 1120.

240. The Claimant's reading is contrary to the ordinary meaning of the phrase "a claim" interpreted in its proper context. The title of Article 1120 is "Submission of a Claim to Arbitration". The term "a claim" used in that article is not referring to any particular claim, but rather the claim that is being submitted to arbitration. This is made clear by reading the entire chapeau of Article 1120 which says "[e]xcept as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration". Accordingly, Article 1120 requires that a claimant wait until six months have elapsed since the events giving rise to the claim that is being submitted to arbitration. If that claim includes allegations relating to multiple breaches or numerous events, then Article 1120 requires that six months have passed since all of the events giving rise to any aspect of the claim have occurred before submitting it to arbitration.

2. The Claimant's Interpretation of Article 1120 Would Vitiate Its Purpose

241. The interpretation that the Claimant offers of Article 1120 is also inconsistent with the purpose of the provision. As Canada explained in its Objection to Jurisdiction, this six-month period plays an important role in the overall operation of Chapter 11.[530] Article 1120 provides a respondent state with six months to learn of events which may give rise to a claim, to meet with any potential claimants and to work to remedy the

[529] Claimant's Memorial, ¶ 831.

[530] Canada's Objection to Jurisdiction, 3 December 2012, ¶¶ 23-24 ("Objection to Jurisdiction").

measure, if possible, pursuant to Article 1118.[531] In essence, the consultation provisions of Article 1118 and the notice of potential claims in Article 1119 are embodied in the purpose of Article 1120.

242. This is especially important, as Canada indicated in its Objection to Jurisdiction, when measures of sub-national governments raise potential claims.[532] By requiring six months before a claim can be submitted to arbitration, the NAFTA provides the responsible national government with adequate time to speak with representatives from the relevant sub-national government, to learn more about the events which occurred and to understand what measures may have been taken.

243. The Claimant has argued that in explaining this purpose, Canada has conflated the obligations in Articles 1118-1120. In particular, the Claimant argues that Article 1120 does not contain a consultation or notice requirement.[533] This is simply not the case. Articles 1118-1120 must be read and interpreted together.

244. The Claimant asserts that consultations are not relevant to Article 1120 because such consultations typically occur after the submission of the Notice of Intent in the NAFTA context.[534] While Canada agrees that this is often the case in practice, there is nothing in NAFTA that is inconsistent with consultations also occurring during the six-month cooling off period provided for in Article 1120 prior to filing of the Notice of Arbitration.

245. Further, while Canada agrees with the Claimant that Article 1119 places an obligation on the Claimant to provide 90-days' notice of a dispute,[535] this misses the point. While Article 1119 is relevant to the notice of an actual dispute, Article 1120 relates to Canada's notice of events giving rise to a claim which may lead to the

[531] Objection to Jurisdiction, ¶ 24.

[532] Objection to Jurisdiction, ¶ 28.

[533] Claimant's Memorial, ¶ 851.

[534] Claimant's Memorial, ¶¶ 844-845.

[535] Claimant's Memorial, ¶ 871.

submission of a dispute. There is nothing inconsistent about these two provisions both being understood as notice provisions.

246. For these reasons, the Claimant's efforts to distinguish the decisions in *Burlington Resources v. Ecuador* and *Murphy v. Ecuador* fail. In the eyes of the Claimant, Article VI(3)(a) of the US-Ecuador Bilateral Investment Treaty ("BIT") is equivalent to Article 1119 of the NAFTA, but not Article 1120.[536] Indeed, the Claimant bases its position on the proposition that the "NAFTA was carefully designed to have separate provisions regarding consultation, notice periods and waiting periods".[537] However, combined, Article 1119 and 1120 share the same overall objective as Article VI(3)(a) of the BIT, which, as the tribunal in *Burlington Resources* indicated, is to "[provide] the State with an opportunity to redress the dispute before the investor decides to submit the dispute to arbitration".[538] The fact that notice and consultation requirements were included in a single provision in the US-Ecuador BIT (because the periods were of the same duration) rather than in separate provisions like NAFTA (because these periods differ in duration) is irrelevant.[539]

B. The Claimant Has Failed to Respect the Condition in Article 1120 Even under its Own Erroneous Tests

247. Nevertheless, even if the Tribunal were to accept the Claimant's erroneous interpretation of Article 1120, the Claimant is not able to satisfy even its own test. The Claimant asserts that Article 1120 allows the submission of a dispute to arbitration as long as six months have elapsed since any claim arose. Under NAFTA Article 1116, no claim exists until an investor has allegedly suffered harm arising from a measure that it

[536] Claimant's Memorial, ¶¶ 859-860.

[537] Claimant's Memorial, ¶ 864.

[538] **RL-002**, Burlington Resources, ¶ 312.

[539] The Claimant attempts to shore up its argument that Article 1120 of the NAFTA is entirely different than Article VI(3)(a) of the US-Ecuador BIT by pointing to the writings of Prof. Kenneth Vandevelde, Claimant's Memorial ¶¶ 857, 862. However, Prof. Vandevelde's comments are totally irrelevant. They are very general comments made with respect to the differences of the NAFTA and the US Model BIT at that time, and do not specifically address NAFTA Articles 1119 and 1120 or the equivalent model BIT provision.

alleges breaches the obligations in NAFTA. In its Memorial, the Claimant points to numerous events which occurred more than six months prior to the submission of its claim to arbitration, such as November 17, 2009 (the date the investor incorporated its first two wind projects[540]), January 17, 2011 (the date on which Mary Ellen Richardson of the Canadian District Energy Association sent an email to Bob Chow at the OPA[541]), and January 21, 2010 (the date the GEIA was signed).[542] However, while these facts are alleged "events", they are not "events giving rise to a claim".

248. These events caused no harm to the Claimant in and of themselves. Indeed, not even the Claimant suggests that it could have brought a NAFTA claim based on these events alone. Hence, these events did not "give rise to a claim". They are merely events. The Claimant's claim arose on July 4, 2011, when it was not awarded a FIT Contract as part of the Bruce to Milton allocation process. As a result, even under its own interpretation, it should have had to wait six months after that date before submitting its claim to arbitration.

249. The Claimant tries to argue that the date on which it became aware that it would not be awarded a contract is irrelevant for two reasons: first, it claims that it is permissible for the purposes of Article 1120 to take into account "future events;"[543] and second, it asserts that the events here were a composite breach.[544] Both arguments are without merit, but even if the Tribunal were to accept them, the Claimant still did not comply with Article 1120.

250. With respect to the first argument, the Claimant suggests *Ethyl v. Canada* stands for the proposition that the term "events giving rise to a claim" can also include

[540] Claimant's Memorial, ¶ 873.

[541] Claimant's Memorial, ¶ 881 and fn. 1008.

[542] Claimant's Memorial, ¶ 880.

[543] Claimant's Memorial, ¶¶ 854-855.

[544] Claimant's Memorial, ¶¶ 880-889.

knowledge of future events.[545] Canada explained in *Ethyl v. Canada* and reiterates here, that the consideration of any future event is not consistent with the plain meaning of Article 1120, which requires time to have "elapsed" – in the past tense. Moreover, the paragraphs referenced by the Claimant do not support its position in this arbitration.[546] In *Ethyl v. Canada* the "future events" in question were the coming into force of the legislation challenged by the claimant. The Tribunal in that case essentially took into account the Claimant's knowledge of that "future event" because its occurrence was a certainty in light of what had happened.[547]

251. In this case, the Claimant characterizes both the June 3, 2011 Direction and the July 4, 2011 awarding of FIT Contracts by the OPA as future events which stem from improper ranking criteria and alleged special treatment granted to the Korean Consortium, both of which occurred more than six months prior to its submission of its claim to arbitration.[548] However, neither the rankings nor the treatment of the Korean Consortium made it certain that the June 3 Direction would occur or that the contracts would be awarded in the way they were on July 4, 2011. The earlier events may be relevant to what happened later in time, but they are not the sort of events that could lead one to say that the Claimant knew at that point that the future events which actually gave rise to its claims were going to occur.

252. With respect to the second argument, the Claimant has argued that the June 3, 2011 Direction and the awarding of FIT Contracts on July 4, 2011 "are part of a composite act which commenced long before" those dates and thus the requirements of Article 1120 have been met.[549] In particular, the Claimant points to the domestic content requirements in the FIT Program, the alleged failure to follow the FIT Rules with respect to the ranking and evaluation of applications, the alleged preferential treatment given to

[545] Claimant's Memorial, ¶ 855.

[546] **CL-013**, Ethyl – Award on Jurisdiction, ¶¶ 87-88.

[547] *Ibid*, ¶ 69.

[548] Claimant's Memorial, ¶ 855.

[549] Claimant's Memorial, ¶ 882.

the Korean Consortium, and the alleged preferential treatment provided to other FIT applicants.[550]

253. The Claimant rests its characterization of these events as a composite breach solely on its interpretation of Paragraph 2 of the Commentary on Articles 15 of the International Law Commission's *Articles on State Responsibility* ("ILC's Articles"), which indicates that "systemic acts of discrimination prohibited by a trade agreement" may constitute a composite breach.[551] It offers no further explanation of why these acts should be considered to form a composite breach, and Canada disputes that they do. However, the issue of whether they do or do not is ultimately irrelevant, because even if they do, the Claimant has still not complied with Article 1120.

254. The Claimant argues that the date which gives rise to a composite breach is "the earliest date in the series of events".[552] For this proposition the Claimant points to Article 15(2) of the ILC's Articles[553] and Commentary, which indicates that "the breach is dated to the first of the acts in the series".[554] However what the Claimant fails to point out is that the commentary to Article 15(2) also indicates that a "consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place."[555] It goes on to define the time that "a composite act 'occurs' as the time at which the last action or omission occurs, which, taken with the other actions or omissions, is sufficient to constitute the wrongful act".[556]

255. This is entirely consistent with the language of Article 1120, which speaks of "events giving rise to a claim". Thus, for the purposes of Article 1120, what is relevant is

[550] Claimant's Memorial, ¶ 886.

[551] Claimant's Memorial, ¶ 886.

[552] Claimant's Memorial, ¶ 881.

[553] Claimant's Memorial, ¶ 881.

[554] Claimant's Memorial, ¶ 884.

[555] **CL-006**, *ILC Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Chapter II, (*ILC Articles*), Article 15, Commentary(7), p. 143 (emphasis added).

[556] *Ibid*, p. 63 (emphasis added).

the time that the alleged wrongful act resulting in damage to the Claimant occurred, and by consequence a claim, arose. In the case of a composite act, a "claim" arises only when, taken together, there are enough acts or omissions sufficient to constitute the allegedly wrongful act. It is only once six months have elapsed from this date that a claim can be validly submitted to arbitration under Article 1120 of the NAFTA. By filing a mere three months after it did not receive a contract, the Claimant did not respect Article 1120 even if the measures in question were considered a composite act.

C. The Claimant's Failure to Comply with the Terms of Article 1120 Deprives this Tribunal of Jurisdiction

256. A claimant's failure to abide by a six month waiting period is sufficient to defeat the jurisdiction of a tribunal.[557] In *Burlington Resources*, the Tribunal found that the absence of six months' notice of a dispute before the claim is submitted to arbitration "suffices to defeat jurisdiction."[558] Similarly, in *Murphy*, the Tribunal dismissed the claim for lack of jurisdiction, finding that the waiting period of a BIT "constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration".[559] It further explained that holding the waiting period to be anything other than "mandatory and jurisdictional in nature" would improperly leave it to "the investor [to] decide whether or not to comply with [an explicit treaty requirement] as it deems fit".[560]

257. Further, the fact that six months have now elapsed since all of the events giving rise to this alleged claim is irrelevant to this question of jurisdiction. As discussed by Canada in its Objection to Jurisdiction, it will almost always be the case that six months will have elapsed at the time a decision on jurisdiction is made.[561] A decision made with regards to compliance with Article 1120 that is based on the fact that six months have

[557] **RL-002**, *Burlington Resources*, ¶¶ 312, 315; **RL-011**, *Murphy Exploration*, ¶ 157.

[558] **RL-002**, Burlington Resources, ¶ 315.

[559] **RL-011**, *Murphy Exploration*, ¶ 149.

[560] *Ibid*, ¶ 148.

[561] Objection to Jurisdiction, ¶ 35.

now since elapsed would make Article 1120 devoid of any purpose. This could not have been the intention of the drafters of the NAFTA.

258. Finally, it is also irrelevant whether attempts to resolve the dispute would have been successful.[562] In this regard, the Claimant still has not advanced any evidence suggesting that negotiations would have proven futile. The Claimant simply points to the lack of a guarantee that a representative from the Government of Ontario would be present during consultations.[563] The Claimant then goes to argue that, based on Canada's constitutional division of powers, meaningful consultations "about settlement of the underlying dispute would require the active involvement of responsible officials of the Government of Ontario".[564] In this line of reasoning, the Claimant implies that the only "meaningful" discussion that could have taken place is one where the Government of Ontario could have offered the Claimant a FIT Contract. There is no basis for this assertion.

259. In these circumstances, the Tribunal should dismiss the Claimant's claim in its entirety. The Claimant waited only 90 days after the last of the events allegedly giving rise to its claim before submitting a Notice of Arbitration. The provisions of NAFTA are clear, and so should be the consequences for their wilful disregard.

D. In the Alternative, the Tribunal Should Dismiss All Claims Related to Events that Occurred Subsequent to April 4, 2011.

260. At the very least, the Tribunal should dismiss any claims that arise from events that occurred within the six-month period preceding the submission of the claim to arbitration. This was the approach followed by the Tribunal in *Burlington Resources*,

[562] Objection to Jurisdiction, ¶ 37.

[563] Claimant's Memorial, ¶¶ 846-850.

[564] Claimant's Memorial, ¶ 848.

which found that it only had jurisdiction over those claims for which the claimant had complied with the relevant waiting period.[565]

261. In this case, the Claimant submitted its Notice of Arbitration on October 4, 2011. Accordingly, at that time, it was permitted to submit a dispute to arbitration that arose out of events giving rise to a claim which occurred prior to April 4, 2011. Accordingly, Canada cannot be considered to have consented to arbitrate any disputes arising from events subsequent to April 4, 2011, and nor can it be considered to have consented to arbitrate any disputes for which proper notice pursuant to Article 1119 has not been provided. In such circumstances, the only claims that the Claimant has included in its Notice of Arbitration in compliance with Article 1120 are those that relate to the creation of the FIT Program on September 24, 2009, including the domestic content requirements, the ranking of the Claimant's FIT applications in late 2009 and the signing of the GEIA on January 21, 2010.

IV. In the Alternative, the Tribunal Lacks Jurisdiction Over Certain Aspects of the Claimant's Claims

262. Even if the Tribunal finds that the waiting period of Article 1120 has been satisfied, the Tribunal lacks jurisdiction over certain measures challenged by the Claimant for other reasons as well. First, the Claimant has made claims with respect to alleged breaches that occurred before the Claimant owned any investment in Canada. Second, the Claimant makes allegations against the OPA, Hydro One and the IESO, which are state enterprises whose actions are not attributable to Canada pursuant to Article 1503(2) because they were not exercising delegated governmental authority.

A. The Tribunal Lacks Jurisdiction Over any Alleged Breaches that Occurred before the Claimant Owned Investments in Canada

263. The Claimant alleges that this Tribunal has jurisdiction under NAFTA Article 1116(1). This provision provides, in part:

[565] **RL-002**, *Burlington Resources*, ¶¶ 317-318.

> An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
>
> (a) Section A…

264. NAFTA Article 1101(1) further provides that Chapter 11 applies to measures "adopted or maintained" by a Party that relate to investors of another Party or investments of investors of another Party. As such, for Chapter 11 to apply to a measure relating to an investment, the investment must be "of an investor of another party" at the time of the alleged measure.

265. Consistent with this interpretation, investment tribunals have consistently found that they do not have jurisdiction unless a claimant can establish that an investment was owned by an "investor of another Party" when the challenged measure occurred.[566] As the Tribunal in *GEA Group v. Ukraine* noted, "for [a] tribunal to hear the Claimant's claim, the Claimant must have held an interest in the alleged investment before the alleged treaty violations were committed".[567] Similarly, in *Phoenix Action v. Czech Republic*, the Tribunal held:

> The Tribunal is limited *rationae temporis* to judging only those acts and omissions occurring after the date of the investor's purported investment. The proposition that bilateral investment treaty claims cannot be based on acts and omissions occurring prior to the claimant's investment results from the nature of the host State's obligations under a bilateral investment treaty. All such obligations relate to the host State's conduct regarding the investments of nationals of the other contracting party. Therefore, such obligations cannot be breached by the host State until there is such an investment of a national of the other State.[568]

[566] **RL-041**, *Limited Liability Company AMTO v. Ukraine*, SCC Arbitration No. 080/2005, Final Award, 26 March 2008, ¶ 48(c); **CL-081**, *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 244; **RL-066**, *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5) Award, 15 April 2009, ¶ 67 ("*Phoenix Action*").

[567] **RL-054**, *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16) Award, 31 March 2011, ¶ 170.

[568] **RL-066**, *Phoenix Action – Award*, ¶ 68.

266. Further, the Tribunal in *Cementownia v. Turkey* indicated that "[i]t is undisputed that an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that it was an investor at the relevant time, i.e. at the moment when the events on which its claim is based occurred".[569]

267. In the NAFTA context, the tribunal in *GAMI v. Mexico* reached a similar result, stating that "NAFTA arbitrators have no mandate to evaluate laws and regulations that predate the decisions of a foreign investor to invest".[570] And even more recently, the Tribunal in *Gallo v. Canada* followed *Phoenix Action v. Czech Republic* explaining:

> As the Tribunal in Phoenix declared, it does not need extended explanation to assert that a tribunal has no jurisdiction *rationae temporis* to consider claims arising prior to the date of the alleged investment, because the treaty cannot be applied to acts committed by a State before the claimant invested in the host country.[571]

268. Accordingly, this Tribunal does not have jurisdiction to consider acts or measures which occurred before the Claimant made its investment in Canada. In this case, TTD Wind Project ULC and Arran Project ULC were incorporated in Alberta on November 17, 2009.[572] Both the North Bruce Project ULC and Summerhill Project ULC were incorporated on April 6, 2010.[573] These are the earliest dates on which the Claimant can be considered to have made its investments in Canada.[574]

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[569] **RL-046**, *Cementownia "Nowa Huta" S.A. v. Turkey* (ICSID Case No. ARB(AF)/06/2) Award, 17 September 2009, ¶ 112.

[570] **CL-195**, *GAMI Investments, Inc. v. The Government of the United Mexican States* (UNCITRAL) Final Award, 15 November 2004, § 93.

[571] **RL-052**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Award, 15 September 2011, ¶ 326, citing *Phoenix Action Limited v. Czech Republic* (ICSID Case No. ARB/06/5), ¶ 68.

[572] Claimant's Memorial, ¶ 32.

[573] Claimant's Memorial, ¶ 32.

[574] In fact, the Claimant admits in its Memorial that it had no investment at all prior to the incorporation of Arran and TTD, stating that "[t]he events giving rise to a claim by the [Claimant] began on November 17, 2009 when the investor incorporated its first two wind projects..." See Claimant's Memorial, ¶ 873 (emphasis added).

269. As such, the Tribunal has no jurisdiction over measures which occurred prior to November 17, 2009 for all of the Claimant's wind projects and April 6, 2010 for the Summerhill and North Bruce wind projects. For example, the Claimant alleges that the GEIA, which was signed on January 21, 2010, provided special privileges to the Korean Consortium in violation of Article 1102 and 1103 of NAFTA. This agreement was signed prior to the Claimant's investments in the North Bruce and Summerhill wind projects. Thus, the Tribunal does not have the jurisdiction to consider claims that the GEIA breached NAFTA with respect to those investments.

B. The Tribunal Lacks Jurisdiction to Consider the Challenged Acts of the OPA, Hydro One and the IESO

270. The Claimant alleges that Canada has breached its obligations under the NAFTA as a result of certain actions taken by the OPA, Hydro One, and the IESO. As explained below, none of these claims has any merit. However, as a preliminary matter, this Tribunal should refuse to consider these allegations as it has no jurisdiction over the types of actions that the Claimant challenges with respect to these entities.

1. The OPA, Hydro One and the IESO Are Not Organs of the Government of Ontario

271. Canada is responsible for the acts of any organ of its federal government, as well as the acts of any organ of any of its sub-national governments, such as provincial governments.[575] Indeed, such responsibility is a cornerstone rule of the customary international law regarding State responsibility.[576] It is reflected in Article 4 of the ILC Articles which provides:

[575] Canada's responsibility at international law for measures of its sub-national governments was reaffirmed in Article 105 of NAFTA: ("The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.").

[576] **RL-050**, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), I.C.J. Reports 2007, Judgment of 26 February 2007 ("*Genocide Convention Case*"), ¶ 385.

> Article 4. Conduct of organs of a State
>
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.[577]

272. At customary international law, a person or entity is an "organ" of a State if it is one of the individuals or collective entities that "make up the organization of the state and acts on its behalf".[578] This definition can be met in one of two ways: (1) if the person or entity has the status of an organ, under the law of the State in question (i.e. it is a *de jure* organ); or (2) if the person or entity may, for the purposes of international responsibility, be equated with a State organ, even if it does not have that status in the internal law of the State (i.e. it is a *de facto* organ).[579] The Claimant has failed to prove that the OPA, Hydro One and the IESO satisfy either of these tests.

(a) The OPA, the IESO and Hydro One Are Not *De Jure* Organs of the Government of Ontario

273. As codified in paragraph 2 of Article 4 of the ILC Articles, a person or entity is an organ of a State at international law if it has the status of an organ in a State's internal law.[580] None of the OPA, Hydro One or the IESO have this status under Canadian or Ontario law.

274. With respect to the OPA, the Claimant asserts that it is "without doubt, an organ of the Government of Ontario".[581] This is incorrect. There are no Ontario laws which

[577] **CL-009**, *ILC Articles*, Article 4.

[578] **CL-006**, *ILC Articles*, Article 4, Commentary(1), p. 94; *See also* **RL-050**, *Genocide Convention Case*, ¶ 388**.**

[579] **RL-050**, *Genocide Convention Case*, ¶¶ 386, 392**.**

[580] **RL-050**, *Genocide Convention Case*, ¶ 386.

[581] Claimant's Memorial, ¶ 66.

define the organs of the Government of Ontario. And while there is no question that the OPA is an entity created by statute, it is well established that that alone does not make it an organ of the State.[582]

275. Indeed, for the same reason, contrary to what the Claimant asserts, the fact that it was characterized as a "public body" at the WTO[583] is not relevant to the question of whether it is an organ of the Government of Ontario.[584] When the *UPS v. Canada* Tribunal was faced with a nearly identical argument with respect to Canada Post, it reasoned that "the WTO panel report in the *Canada Periodicals* case […] is not in point. The provisions of the GATT considered in that case do not distinguish, as chapters 11 and 15 of NAFTA plainly and carefully do, between organs of a State of a standard type (like the Canadian Post Office before 1981) and various other forms of State enterprises".[585]

276. The fact is that the OPA is a non-share capital corporation,[586] which has independent legal personality. Its principle purpose is to, among other things, "engage in activities in support of the goal of ensuring adequate, reliable and secure electricity supply and resources in Ontario".[587] In so doing, the OPA acts independently, not as an agent of the Crown.

[582] **RL-057**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13) Award, 6 November 2008, ¶ 170 ("*Jan de Nul – Award*"); **RL-055**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24) Award, 18 June 2010, ¶ 202 ("*Gustav – Award*") (explaining that "[i]t is not enough for an act of a public entity to have been performed in the general fulfilment of some general interest, mission or purpose to qualify as an attributable act.").

[583] Claimant's Memorial, ¶ 74.

[584] In deciding that the OPA was a "public body" the WTO was not interpreting the ILC Articles. Instead, it was discussing the definition of "public body" in Article 1.1 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

[585] **RL-075**, *United Parcel Service of America, Inc. v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007, ¶ 61 ("*UPS – Award*").

[586] **C-0401**, *Electricity Act*, s. 25.1(1).

[587] *Ibid*, s. 25.2(1).

277. Contrary to what the Claimant alleges,[588] the OPA is funded by ratepayers in the Province of Ontario, and not through public funds.[589] Further, the fact that the OPA's employees are public servants[590] also does not make the OPA an organ of the Government of Ontario. Indeed, the *Broader Public Sector Accountability Act, 2010*,[591] which is the provincial legislation governing public sector employees, expressly states that "[n]othing in this Act makes an organization a Crown agent where that organization would not otherwise be a Crown agent".[592] In this regard, the Claimant avoids section 25.3 of the *Electricity Act*, the statute creating the OPA, specifically provides that the OPA is not a Crown agent for any purposes.[593]

278. Instead, the Claimant points to the Government of Ontario's *All Agencies List* in support of its contention that the OPA is an organ of the government.[594] However, this list is not a list of agencies of the Government of Ontario for legal purposes and simply being included on the list does not mean that the OPA is an organ of the Government of Ontario.[595] The two must be distinguished. The *All Agencies List* is developed by Ontario's Public Appointments Secretariat to provide information to "individuals who wish to apply to serve on a government classified agency or non-classified entity."[596] As the Claimant has noted, the Minister of Energy is responsible for appointing the board members of the OPA.[597] Moreover, even if the Tribunal were to look to the *All Agencies*

[588] Claimant's Memorial, ¶ 55.

[589] **C-0401**, *Electricity Act*, s. 25.20(1).

[590] Claimant's Memorial, ¶¶ 55-57.

[591] **R-075A**, *Broader Public Sector Accountability Act*, S.O. 2010, c. 25, s. 1(2). Available at: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_10b25_e.htm

[592] *Ibid*.

[593] **C-0401**, *Electricity Act*, s. 25.3.

[594] Claimant's Memorial, ¶¶ 50, 66.

[595] **R-170**, Ontario Public Appointments Secretariat website excerpt, "General Information". Available at: http://www.pas.gov.on.ca/scripts/en/generalInfo.asp.

[596] **R-171**, Ontario Public Appointments Secretariat website excerpt, "What We Do". Available at: http://www.pas.gov.on.ca/scripts/en/Home.asp.

[597] Claimant's Memorial, ¶ 56; **C-0401**, *Electricity Act*, s. 25.4(1).

List, it does not actually support the Claimant's interpretation. As noted, the list includes what are called both "classified agencies" and "non-classified entities." As described by the Public Appointments Secretariat, a classified agency means:

> a provincial government organization:
>
> - which is established by the government, but is not part of a ministry;
> - which is accountable to the government;
> - to which the government appoints the majority of the appointees; and
> - 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. [598]

279. The types of classified agencies, and the abbreviations used for them in the list are then described and explained.[599] A non-classified entity, which is one that does not meet the above criteria for a "classified agency" are noted in the list with the abbreviation "N/A".[600] On the *All Agencies List*, the page for the OPA indicates that its "type" is "N/A".[601] That is, the list, upon which the Claimant relies so heavily, states that the OPA is a non-classified entity. Accordingly, even putting aside the fact that merely being included on this list does not mean that an entity is an organ of the Government of Ontario as a general matter, the fact is that this list itself contradicts rather than supports the Claimant's position.

280. The Claimant has also mischaracterized the nature of the powers and duties of the OPA. The Claimant refers to section 25.32 of the *Electricity Act* which indicates that the OPA is responsible for exercising "all powers and performing all duties of the Crown". However, the Claimant ignores the fact that this grant of authority only relates to

[598] **R-170,** Ontario Public Appointments Secretariat website excerpt, "General Information". Available at: http://www.pas.gov.on.ca/scripts/en/generalInfo.asp.

[599] *Ibid.*

[600] *Ibid.*

[601] **R-097**, Ontario Public Appointments Secretariat website excerpt, Agency Details: Ontario Power Authority, Available at: https://www.pas.gov.on.ca/scripts/en/BoardDetails.asp?boardID=141181.

contracts that the Government of Ontario had entered into or initiated prior to the creation of the OPA.[602] The OPA does not have any independently existing or enduring governmental powers.

281. Further, the Claimant's assertion that the OPA was the subject of judicial review in *Skypower v. Minister of Energy and Ontario Power Authority*[603] does not make it an organ of the Government of Ontario. Judicial review in Ontario is available with respect to entities that exercise statutory powers of decision.[604] There is no requirement that the entity be an organ, and no need for the court to conclude that it is in order to proceed with the review. The Ontario Superior Court did not conclude that the OPA was an organ of the Government of Ontario. In fact, whether or not the OPA was an organ was not even discussed.[605]

282. With respect to the IESO, the Claimant asserts that it is a state organ because 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".[606] The Claimant seems to base this claim on the assertion that the IESO is "owned and controlled by the Province of Ontario."[607] However, like the OPA, the IESO is a non-share capital corporation created under the *Electricity Act.*[608] Its objective is to, amongst other things, "direct the operation and maintain the reliability of the IESO controlled grid" to promote the purposes of the *Electricity Act.*[609]

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[602] **C-0401**, *Electricity Act*, s. 25.32(4).

[603] Claimant's Memorial, ¶ 54.

[604] **R-022**, *Judicial Review Procedures Act*, R.S.O. 1990, c. J.1. Available at: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90j01_e.htm.

[605] **R-128**, *Skypower CL 1 LP et al. v. Minister of Energy (Ontario) and Ontario Power Authority*, 2012 ONSC #4979, 10 September 2012.

[606] Claimant's Memorial, ¶ 88.

[607] Claimant's Memorial, ¶ 83.

[608] **C-0401**, *Electricity Act*, s. 4(1).

[609] *Ibid*, s. 5(1).

283. As it did with respect to the OPA, the Claimant relies upon the fact that the IESO is on the *All Agencies List*.[610] For the reasons explained above, that is not relevant to the question of whether or not it is an organ at Ontario law. Further, the Claimant also ignores the fact that, like the OPA, the IESO is specifically identified as a "non-classified entity" on that list.[611] Finally, similar to the OPA, the Claimant's argument ignores the fact that pursuant to its constituting statute, the IESO "is not an agent of Her Majesty for any purpose, despite the *Crown Agency Act*".[612]

284. Finally, with respect to Hydro One, the Claimant also asserts that it is an organ because it is "wholly owned and controlled by the Province of Ontario".[613] Hydro One is a share capital corporation whose sole shareholder is the Government of Ontario. However, the fact that it is wholly owned by the Government is, in essence, proof that it is not a *de jure* "organ" of Ontario – to speak of a Government "owning" its organs as a shareholder is nonsense and would completely destroy the careful distinction drawn in international law and in NAFTA between organs and state enterprises.

285. The fact is that Hydro One is a corporation with independent legal personality.[614] It was established to "operate generation facilities and distribution systems in, and [...] distribute energy within" communities in Ontario as prescribed by regulation.[615] The Claimant argues, without legal authority, that Hydro One "acts on behalf of the Province".[616] It points again to the *All Agencies List*[617] and in this regard, Canada

[610] Claimant's Memorial, ¶ 86.

[611] **R-108,** Ontario Public Appointments Secretariat website excerpt, Agency Details: Independent Electricity System Operator, Available at https://www.pas.gov.on.ca/scripts/en/BoardDetails.asp?boardID=128220.

[612] **C-0401**, *Electricity Act*, s. 6.

[613] Claimant's Memorial, ¶ 93.

[614] **R-143**, Hydro One website excerpt, Historical Timeline ("share ownership company under Ontario's Business Corporations Act, like any other business."). Available at: http://www.hydroone.com/OurCompany/Pages/Timeline.aspx.

[615] **C-0401**, *Electricity Act*, s. 48.1(1).

[616] Claimant's Memorial, ¶ 94.

[617] Claimant's Memorial, ¶ 98.

reiterates its earlier arguments on this point, and notes that like the OPA and the IESO, Hydro One is stated to be a "non-classified entity" on that list.[618] Further, as with the OPA and the IESO, section 48 (2) of the *Electricity Act* clarifies that Hydro One "and its subsidiaries are not agents of Her Majesty for any purpose, despite the *Crown Agency Act*".[619]

(b) The OPA, Hydro One and the IESO Are Not *De Facto* Organs of the Government of Ontario

286. The OPA, Hydro One and the IESO are also not *de facto* organs of Ontario.

287. In the *Genocide Convention* case, the International Court of Justice ("ICJ") explained that, in "exceptional" circumstances, persons or entities without the status of organs at internal law, can be considered organs at international law.[620] However, the ICJ further explained that:

> persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument[emphasis added].[621]

288. In applying this standard, the ICJ has made it clear that customary international law requires an extraordinarily high degree of dependence, on the one hand, and control, on the other hand, in order for a person or entity that is not *de jure* an organ of a State to be considered a *de facto* organ.[622] NAFTA tribunals have followed this guidance. For example, in *Fireman's Fund Insurance Company v. Mexico*, the Tribunal refused to attribute to Mexico the conduct of a working group composed of government officials,

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[618] **R-173,** Ontario Public Appointments Secretariat website excerpt, Agency Details: Hydro One, Inc., Available at https://www.pas.gov.on.ca/scripts/en/BoardDetails.asp?boardID=125201.

[619] **C-0401**, *Electricity Act*, s. 48(2).

[620] **RL-050**, *Genocide Convention Case*, ¶ 393.

[621] **RL-050**, *Genocide Convention Case*, ¶ 392 (emphasis added).

[622] **RL-064**, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, (*Nicaragua v. United States of America*), International Court of Justice, Judgment of 27 June 1986, ¶¶ 109, 115-116; **RL-050**, *Genocide Convention case*, ¶¶ 388, 394-395**.**

noting that its recommendations were "subject at all times to ratification or rejection by the competent government authorities".[623] Similarly, in *GAMI Investments Inc. v. Mexico*, the Tribunal rejected a claim that the failures of an agricultural group composed in part of government officials, could be attributed to Mexico as "[t]he Mexican government was not the only actor in important aspects of the [program]".[624]

289. In this case, the OPA, Hydro One and the IESO are not *de facto* organs of the state because they are not in a relationship of "complete dependence" on the Government of Ontario, nor does the Government exercise complete control over them. All of these bodies have their own independent legal personalities. None are funded directly by government revenues. Moreover, while the Government of Ontario exercises some control where appropriate, this is not sufficient to meet the test of "complete dependence" or "complete control". In fact, such a relationship of dependence and control would be antithetical to the independent nature of these bodies.

2. The OPA, Hydro One and the IESO Are State Enterprises

290. The Claimant advances a number of separate other arguments as to why the IESO, Hydro One, and the OPA are subject to the obligations in Chapter 11. Ultimately, none of these arguments need to be considered by the Tribunal. The Claimant has asserted that if the OPA, Hydro One and the IESO are not considered organs of the Government of Ontario, they are at least state enterprises pursuant to Chapter 15 of NAFTA.[625] Canada agrees. Accordingly, there is no further dispute between the parties about the status of these entities that requires resolution by the Tribunal.

[623] **RL-051**, *Fireman's Fund Insurance Company v. United Mexican States* (ICSID Case No. ARB(AF)/02/1) Award, 14 July 2006, ¶¶ 149-150.

[624] **CL-195**, *GAMI – Award*, ¶ 110.

[625] Claimant's Memorial, ¶¶ 80, 92, 101.

3. Pursuant to Article 1503(2), State Enterprises Are Only Subject to the Obligations of Chapter 11 if They Are Exercising Delegated Governmental Authority

291. Article 1503 establishes the NAFTA Parties' obligations with regards to state enterprises. Article 1503(2) provides that:

> 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 11 (Investment) and Fourteen (Financial Services) wherever such enterprises 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

292. As explained by the Tribunal in *UPS*, Article 1503(2) creates a *lex specialis* which means that the customary international law rules regarding when the acts of a state enterprise can violate a State's international law obligations do not apply.[626] As the Tribunal noted:

> Chapter 15 provides a *lex specialis* regime in relation to the attribution of acts of monopolies and state enterprises, to the content of the obligations and the method of implementation.[627]

293. Accordingly, all of the Claimant's arguments about whether or not the conduct of the IESO, Hydro One and the OPA breached Canada's obligations because of rules of customary international law, such as Article 8 of the ILC's Articles on State Responsibility, are wholly irrelevant.[628] The only question with respect to a state enterprise is whether or not the challenged act was done in the exercise of delegated governmental authority. If it was not, then the obligations in Chapter 11 simply do not apply to that act.

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[626] **RL-075**, *UPS – Award*, ¶ 62.

[627] *Ibid.*

[628] If they were relevant, Canada would be able to demonstrate that they are in error. In the interests of brevity, and given that the fact that these entities are not state enterprises is not in dispute, Canada will not waste the Tribunal's time doing so.

4. The Acts of the IESO, Hydro One, and the OPA that the Claimant Alleges Are Breaches of NAFTA Were Not Done in the Exercise of Delegated Governmental Authority

294. The Tribunal in *UPS* was faced with the task of interpreting Article 1503(2), and in particular, whether a state enterprise was acting in the exercise of delegated governmental authority when considering a claim against Canada based on the conduct of Canada Post. The claimant in that case alleged, much as it does here, that as a creature of statute that was performing an essential government function, all of Canada Post's acts were "under governmental authority" for the purposes of Article 1503(2).[629] The Tribunal disagreed. It held that although Canada Post was indeed a creature of statute created to serve the public interest and with "an essential role in the economic, social and cultural life of Canada".[630] not all of its acts in the exercise of its statutory mandate were done in the exercise of governmental authority.[631] In particular, the Tribunal found that the decisions relating to the use of Canada Post of its own infrastructure were not made in the exercise of public authority.[632]

295. Similarly, while the general rules of customary international law are not controlling because of the *lex specialis* created by Article 1503(2), the decisions of other tribunals as to the meaning of the similar term "governmental authority" in Article 5 of the ILC's Articles can be informative.

296. In *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, the Tribunal considered a claim against Egypt based on the conduct of the Suez Canal Authority ("SCA"), an entity that the Egyptian government had created by statute to manage maintain and develop the Suez canal.[633] The claim in question involved the authority's exercise of that statutory mandate related to a contract to widen and deepen

[629] **RL-075**, *UPS – Award*, ¶ 71.

[630] *Ibid*, ¶ 57.

[631] *Ibid*, ¶ 77.

[632] *Ibid*, ¶ 78.

[633] **RL-057**, *Jan de Nul – Award*, ¶ 45.

the southern regions of the Canal.[634] The Tribunal explained that the fact that the "subject matter" of the disputed conduct "related to the core functions of the SCA" which were acting for the government's and public's benefit in managing the Suez Canal, was irrelevant.[635] In particular, it held that "[w]hat matters is not the "*service public*" element, but the use of "*prérogatives de puissance publique*" or governmental authority."[636]

(a) The Challenged Acts of the IESO Were Not Done While the IESO Was Exercising Delegated Governmental Authority

297. While wrongly pointing to Article 5 of the ILC's Articles instead of Article 1503(2), the Claimant does argue that the actions of the IESO can be attributed Canada because it "exercises delegated governmental authority"[637] by carrying out "activities that have historically always been conducted by Crown Agencies, including acting as the Reliability Co-ordinator for the province", "operating a wholesale electricity market", and "managing the settlements and financial operations of the $10 billion wholesale market and overseeing emergency preparedness activities for Ontario's power system".[638]

298. The Claimant does not explain how any of these actions constitutes an exercise of "governmental authority." Indeed, the *All Agencies List*, upon which the Claimant has chosen to rely, suggests that the IESO does not have delegated governmental authority.[639] But more importantly, none of the identified events even relate to any of the alleged actions of the IESO which led to a supposed breach of the NAFTA. Simply because the IESO is a creature of statute does not mean that all the actions carried out by it are

[634] *Ibid*, ¶ 46.

[635] *Ibid*, ¶ 169.

[636] *Ibid*, ¶ 170; See also **RL-055**, *Gustav – Award*, ¶ 202 (explaining that "[i]t is not enough for an act of a public entity to have been performed in the general fulfilment of some general interest, mission or purpose to qualify as an attributable act.").

[637] Claimant's Memorial, ¶ 90.

[638] Claimant's Memorial, ¶ 91.

[639] *Supra*, ¶¶ 278, 283.

exercises of "government authority." The Tribunal must look to the specific acts the Claimant has alleged breached the NAFTA.

299. The only actions of the IESO the Claimant refers to in its Memorial are the IESO being part of the "Korean Consortium Working Group"[640] and the fact that the IESO, along with Hydro One, met with Boulevard Associates' representatives to discuss connection to a 500 kv transmission line at various times in 2010 and 2011.[641] Being part of a working group and meeting with a customer—which is what Boulevard Associates is in respect to the IESO—are not acts of delegated governmental authority.

(b) The Challenged Acts of Hydro One Were Not Done While Hydro One Was Exercising Delegated Governmental Authority

300. Although it again erroneously refers to Article 5 of the ILC's Articles rather than Article 1503(2) of NAFTA, the Claimant does argue that Hydro One exercised elements of governmental authority "previously exercised by the Crown Agency, Ontario Hydro and continues to exercise control and authority over the Ontario power sector."[642]

301. As with the IESO, the Claimant does not explain how any of these actions constitutes an exercise of "governmental authority", and it again ignores the fact that the document upon which the Claimant itself relies suggests that Hydro One does not exercise delegated governmental authority.[643] Further, as with the IESO, all of the identified Hydro One acts in the Claimant's Memorial relate not to governmental authority, but rather to Hydro One's own internal organization and its dealing with its customers. Indeed, the actions of Hydro One that are mentioned as an alleged breach of the NAFTA are nothing more than attending meetings. Similar to the IESO, the Claimant

[640] Claimant's Memorial, ¶ 225.

[641] Claimant's Memorial, ¶¶ 234, 578, 633 and 671.

[642] Claimant's Memorial, ¶ 100.

[643] *Supra*, ¶¶ 273, 284.

alleges that Hydro One was part of the Korean Consortium Working Group,[644] and that Hydro One, along with the IESO, met with Boulevard Associates' representatives to discuss connecting to a 500 kv transmission line in July 2010.[645] Again, being part of a working group and meeting with a customer, are not acts of delegated governmental authority.

(c) The Challenged Acts of the OPA Were Not Carried Out by the OPA in the Exercise of Delegated Governmental Authority

302. The Claimant has not alleged in its Memorial that the OPA was exercising delegated governmental authority with respect to any of its acts that the Claimant alleges violates NAFTA Chapter 11.[646] As explained above, Article 1503(2) creates a *lex specialis* such that the only grounds on which the actions of a state enterprise can breach Chapter 11 are if that state enterprise was acting in the exercise of delegated governmental authority. As the Claimant has not even argued this issue, let alone met its burden in this regard, the challenge to the acts of the OPA should be dismissed.

303. However, even if the Tribunal were to consider the acts of the OPA further, none of the acts that the Claimant alleges are in breach of Chapter 11 were done by the OPA in the exercise of delegated governmental authority.

304. Again, "[t]he fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity".[647] Although these corporate entities may be owned by the State, they are "considered to be separate, *prima facie* their conduct in carrying out

[644] Claimant's Memorial, ¶ 578.

[645] Claimant's Memorial, ¶¶ 633, 671.

[646] Claimant's Memorial, ¶¶ 50-81.

[647] **CL-006**, *ILC Articles*, Article 8, Commentary(6), p. 112 (citing, for example, the Workers' Councils considered in Schering Corporation v. The Islamic Republic of Iran, Iran-U.S. C.T.R., vol. 5, p. 361 (1984), Otis Elevator Company v. The Islamic Republicof Iran, Iran-U.S. C.T.R., vol. 14, p. 283 (1987) and Eastman Kodak Company v. The Government of Iran, Iran-U.S. C.T.R., vol. 17, p. 153 (1987)).

their activities is not attributable to the State unless they are exercising elements of governmental authority".[648]

305. The Claimant challenges the OPA's design and administration of the FIT Program. In particular, the Claimant challenges the OPA's design of the FIT Rules, its creation and implementation of the ranking criteria for launch period projects, and its subsequent award of contracts during this procurement process. These acts by the OPA, while carried out for the public good and in furtherance of the policy objectives of the government, cannot be considered to be the exercise of delegated governmental authority. This is not to say that procurement carried out by a state enterprise could never be carried out in the exercise of delegated government authority. However, much like Canada Post in *UPS* or the Suez Canal Authority in *Jan de Nul*, the OPA performed a public service in designing and implementing the FIT Program, but there was nothing governmental about any of its acts. At the Minster's direction, it designed a procurement program pursuant to which it entered into commercial contracts with energy generators. It did not make any decisions on permits, licenses, approvals or anything that would have involved governmental authority. In fact, Canada notes again that the All Agencies List, which is the document which the Claimant has relied upon, suggests that the OPA does not exercise delegated governmental authority.[649] All relevant exercises of governmental authority were carried out by the relevant Ministries of the Government of Ontario. Accordingly, the acts of the OPA in designing and implementing the FIT Program are not subject to the obligations in NAFTA Chapter 11.

V. Conclusion

306. This Tribunal is without jurisdiction over the entirety of the Claimant's claims as the Claimant has failed to respect the conditions placed on Canada's consent to Chapter 11 arbitration outlined in Article 1120. Alternatively, even if the Claimant has complied with Article 1120, the Claimant has still made numerous arguments relating to measures

[648] **CL-006**, *ILC Articles*, Article 8, Commentary(6), p. 112.

[649] *Supra*, ¶¶ 273-274, 278-279.

which are outside the jurisdiction of this Tribunal. As such, this Tribunal is without jurisdiction over the Claimant's alleged claims, and they should be dismissed.

CANADA HAS NOT VIOLATED ITS NAFTA OBLIGATIONS

I. Articles 1102, 1103 and 1106(1)(B) Do Not Apply to the FIT Program by Virtue of the Procurement Exemption in Article 1108

C. Summary of Canada's Position

307. The Claimant alleges that the measures of the Government of Ontario and the actions of the OPA in designing and implementing Ontario's FIT Program have breached Canada's obligations under Articles 1102, 1103, and 1106(1)(b). Not only are the Claimant's allegations meritless, they are precluded by Article 1108(7)(a) and 1108(8)(b), which expressly preserve the NAFTA Parties' right to pursue policy objectives through procurement, even where they impose performance requirements or amount to discriminatory treatment.

308. As will be shown below, when interpreted in accordance with it ordinary meaning and in its proper context, it is evident that the provisions of Article 1108 apply to the measures that the Claimant is challenging here. Ultimately, all of the claims are based in their entirety on the Claimant's failed attempts to obtain a FIT Contract during the FIT Program. Articles 1102, 1103 and 1106 "do not apply" to such measures as they "constituted or involved" procurement by a Party or state enterprise.[650] The Claimant's attempt to bypass Article 1108 and import concepts and requirements from the WTO ("GATT") and NAFTA Chapter 10 must be rejected.

D. The Exclusion of Procurement from the Coverage of Chapter 11's Obligations

309. In NAFTA Chapter 11, the NAFTA Parties carved out for themselves significant policy space with respect to the use of their procurement powers. In particular, they decided to exclude procurement from the coverage of certain of the significant

[650] NAFTA, Articles 1108(7)(a), 1108(8)(b); **CL-072**, *ADF - Award*, ¶ 170.

obligations contained in Chapter 11. Reflecting this decision, Article 1108 provides, in relevant part:

> 7. Articles 1102, 1103, and 1107 do not apply to:
>
> (a) procurement by a Party or a state enterprise…
>
> 8. The provisions of:
>
> […]
>
> (b) Article 1106(1)(b), (c), (f) and (g), and 3(a) and (b) do not apply to procurement by a Party or statement enterprise.

310. Article 1108 thus applies when: (1) the measure constitutes or involves procurement; and (2) the measure was adopted or maintained by a Party or a state enterprise. When both of these conditions are met, the obligations in Article 1102, 1103 and 1106(1)(b) do not apply.[651] As is shown below, the measures challenged by the Claimant constitute procurement by a Party or state enterprise. Accordingly, the Claimant's Article 1102, 1103 and 1106 claims must be dismissed.

E. The FIT Program Constitutes Procurement

1. The Ordinary Meaning of "Procurement" in Its Context

311. Chapter 11 does not define "procurement." The ordinary meaning of the term has, however, been specifically considered in *ADF v. U.S.* and *UPS v. Canada*.[652] In *ADF*, the Tribunal was faced with a challenge under Articles 1102 and 1106 to the domestic content requirements imposed by the United States on steel to be used by a foreign investor in a highway interchange project procured by the State of Virgina. The Tribunal looked to the ordinary meaning of the term "procurement" and explained:

> In its ordinary or dictionary connotation, "procurement" refers to the act of obtaining, "as by effort, labor or purchase." To procure means "to get; to gain; to come into possession of." In the world of commerce and industry,

[651] **CL-072**, *ADF – Award*, ¶ 162.

[652] *Ibid*, ¶¶ 160-174; **RL-075**, *UPS - Award*, ¶¶ 121-136.

> "procurement" may be seen to refer ordinarily to the activity of obtaining by purchase goods, supplies, services and so forth.[653]

312. The Tribunal in *UPS* adopted a similarly broad interpretation of the term "procurement" as used in Article 1108. In that case, the Tribunal was faced with a challenge to the material handling, data entry and duty collection services provided by Canada Post for the Government of Canada.[654] The Tribunal held that Article 1102 did not apply to these measures because they constituted procurement by a Party or state enterprise pursuant to Article 1108. In coming to this conclusion, the Tribunal relied on the fact that the service in question was provided pursuant to a "commercial fee-for-service contract"[655] that covered services provided to the government, such as duty collection.[656] It came to this conclusion despite the fact that the service was provided for the benefit of, and paid for by, the persons or companies importing goods by mail rather than by the government.[657]

313. Further, even the WTO Panel and Appellate Body in Canada – Renewable Energy, recognized that the ordinary meaning of the term procurement is quite broad. Specifically, the WTO Panel noted: "[a]s the parties have explained, the ordinary meaning of the word "procurement" includes '[t]he action of obtaining something; an

[653] **CL-072**, *ADF – Award*, ¶ 161.

[654] **RL-075**, *UPS - Award*, ¶¶ 121-136

[655] *Ibid*, ¶¶ 132-134; Ultimately, the *UPS* Tribunal held that ("NAFTA Article 1108(7) does not require, as the Claimant alleges, that the fee for the service provided be paid according to a specific formula or in a particular manner in order to fall within the scope of the exception. There is no such basis for such a requirement in the text of the Article").

[656] *Ibid*, ¶ 132.

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

acquisition'".[658] The Appellate Body also noted it "understood the word 'procurement' to refer to the process pursuant to which a government acquires products".[659]

314. Thus, the ordinary meaning of the term "procurement", as it is used in Article 1108, covers all measures constituting or involving the lease or purchase of goods or services for any purpose, regardless of whether the government ultimately paid the cost, and regardless of whether the government retained possession of the end product.[660] Understood in accordance with this plain language interpretation, the FIT Program constitutes procurement for the purposes of Article 1108.

2. The FIT Program Involves the Procurement of Electricity

315. As shown below, the FIT Program was designed and implemented as a means for procuring electricity from renewable energy generation projects. In 2008, the Government of Ontario decided to completely phase out the Province's reliance on coal-fired production of electricity for health and environmental policy reasons.[661] In order to accomplish this, it enacted the GEGEA which added section 25.35 to the *Electricity Act*.[662] That section states, in relevant part:

> (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.
>
> […]
>
> (4) In this section, "feed-in tariff program" means a program for procurement, including a procurement process, providing standard

[658] **CL-001**, Panel Report, ¶ 7.131 (emphasis in original, footnotes omitted).

[659] **CL-002**, Appellate Body Report, ¶ 5.59. However, the Appellate Body did not agree that "purchase" and "procurement" are to be equated.

[660] On this last point, the Claimant appears to expressly agree. See Claimant's Memorial, ¶ 449.

[661] **C-0414**, Ontario's Long-Term Energy Plan, p. 19.

[662] The *Green Energy and Green Economy Act, 2009* amended the *Electricity Act, 1998* by adding s. 25.35, which provides the statutory basis for the FIT Program.

> 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 (emphasis added).

316. Using this authority, on September 24, 2009, the Minister of Energy directed the OPA to establish a feed-in tariff program, "designed to procure energy from a wide range of renewable sources".[663] The direction states that the objectives of the FIT Program are to, among other things, "introduce a simpler method to procure and develop generating capacity from renewable sources of energy".[664]

317. The FIT Rules implemented this Ministerial direction.[665] The FIT Rules confirm that the OPA is purchasing electricity. In particular, they state that "[a]pplicants must […] enter into a FIT Contract with the OPA pursuant to which the OPA will pay the Supplier for Electricity delivered from its generating facility".[666] Similarly, the FIT Rules state that "[t]he OPA's payment obligations under the FIT Contract will be […] to pay for Hourly Delivered Electricity at the Contract Price".[667]

318. The standard FIT Contract that the OPA enters into with generators is expressly called a "Power Purchase Agreement".[668] These agreements are fixed-price long-term supply contracts[669] pursuant to which the OPA purchases "Electricity and Future Contract Related Products" from the generator.[670] As further evidence that the OPA is purchasing the electricity, the contract also confirms that, by paying the contract price, the OPA

[663] **C-0051**, Letter (Direction) from George Smitherman, Ministry of Energy to Colin Andersen, Ontario Power Authority (Sep. 24, 2009), p. 1 (emphasis added).

[664] *Ibid* (emphasis added).

[665] **C-0260**, FIT Program Rules, v. 1.0.

[666] *Ibid*, s. 1.2 (emphasis added).

[667] *Ibid*, s. 6.3(a) (emphasis added).

[668] **C-0051**, Letter (Direction) from George Smitherman, Ministry of Energy to Colin Andersen, Ontario Power Authority (Sep. 24, 2009), p. 2.

[669] **C-0258**, FIT Program Rules, v. 1.1, s. 6.3.

[670] **C-0109**, Ontario Power Authority, Feed-in Tariff Contract, Version 1.1 (Sep. 30, 2009), art. 3.5 (emphasis added)..

obtains the "environmental attributes" of the renewable electricity, including carbon credits.[671]

319. Accordingly, the FIT Program is a measure through which electricity is procured. Consequently, the first part of the test under Article 1108 is satisfied.

3. The Claimant's Interpretation of "Procurement" Is Incorrect

320. The Claimant argues that the OPA's purchases are not procurements because they fail to satisfy certain additional criteria not found in NAFTA Article 1108. However, none of the criteria identified by the Claimant are applicable in this case. Indeed, the Claimant is attempting to import conditions on the procurement exclusion in Article 1108 from GATT Article III and NAFTA Chapter 10.[672] For the reasons below, this Tribunal should reject this attempt.

(a) The Procurement Exception in GATT Article III:8 Contains Additional Elements which Are Irrelevant in the Interpretation of NAFTA Article 1108

321. Under the GATT, the Members of the WTO have undertaken certain obligations with respect to the trade in goods. The GATT sets out a procurement exception with respect to the national treatment obligation. In particular, Article III:8(a) provides that:

> The provisions in 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 resale.

322. In *Canada – Renewable Energy*, the Ontario FIT Program was challenged under the GATT, and the WTO had the opportunity to interpret the above exception as it

[671] *Ibid*, s. 2.10(a): ("[t]he Supplier hereby transfers and assigns to, or to the extent transfer or assignment is not permitted, holds in trust for, the OPA who thereafter shall, subject to Section 2.10(d), retain, all rights, title, and interest in all Environmental Attributes associated with the Contract Facility during the Term of this Agreement. […]").

[672] Claimant's Memorial, ¶ 479.

applied to the program. The Claimant incorrectly concludes that the WTO Appellate Body decision in *Canada – Renewable Energy* shows that:

> [T]he 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.[673]

323. That statement is inaccurate and misleading. What the WTO Appellate Body actually concluded was that "the discrimination relating to generation equipment contained in the FIT Program and Contracts is not covered by the derogation of Article III:8(a) of the GATT 1994". Not surprisingly, the WTO Appellate Body decision was expressly limited to a determination as to whether or not Article III:8(a) applied. That determination is irrelevant to the question of whether Article 1108 applies in this arbitration.

324. As the Appellate Body noted, "Article III:8(a) contains several elements describing the types and the content of measures falling within the ambit of the provision".[674] These elements include limitations to the exception to: (1) "laws, regulations or requirements governing the procurement by governmental agencies:; (2) the procurement of "products";[675] (3) instances where the products were "purchased for governmental purposes," and (4) instances where the products purchased were "not for a commercial resale".[676]

[673] Claimant's Memorial, ¶ 476.

[674] **CL-002**, Canada – Certain Measures Affecting The Renewable Energy Generation Sector, Canada – Measures Relating To The Feed-In Tariff Program (WT/DS412/AB/R, WT/DS426), Reports of the Appellate Body, 19 February 2013, ¶ 5.57 ("Appellate Body Report").

[675] It was this particular element upon which the Appellate Body made its decision. It reasoned that: "[b]oth the obligations in Article III and the derogation in Article III:8(a) refer to discriminatory treatment of products," and that the "products purchased" must therefore be informed by the word "products" found elsewhere in Article III. For the Appellate Body, this meant that the product at issue must be the one being discriminated against, in other words, the components used to generate electricity rather than the electricity being procured. *Ibid*, ¶ 5.63.

[676] *Ibid*, ¶¶ 5.57-5.58.

325. None of the additional elements contained in Article III:8(a) of the GATT are found in Article 1108. Instead, Article 1108 contains nothing more than the term procurement – unrestricted in any way and unencumbered by any further conditions. The Claimant's attempt to pilot these additional GATT criteria into NAFTA Article 1108 would arbitrarily change the meaning of that provision.[677] Indeed, NAFTA negotiators had the option of including all of these GATT terms into Article 1108. They did not.

326. This failure to include such limitations in Article 1108 is especially telling since where the NAFTA negotiators wanted to track the GATT language and impose additional restrictions on the procurement exception, they did so.[678] For example, in Article 1502, the NAFTA Parties undertook certain obligations with respect to measures adopted or maintained by certain monopolies. In Article 1502(4), they provided an exception to those obligations for procurements. That exception reads:

> 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.

327. Thus, in Article 1502(4), the NAFTA Parties replicated the language of GATT, but in NAFTA Article 1108 they did not. The broad and unencumbered exception in

[677] Previous tribunals have expressed strong reluctance to rely on GATT provisions or analysis in their interpretation of NAFTA Chapter 11. For example, see **RL-075**, *UPS – Award*, ¶ 61 where the Tribunal dismisses the Claimant's reliance on a WTO Report on the basis that the provisions of the GATT considered in that case do not distinguish, as Chapters 11 and 15 of NAFTA plainly and carefully do, between organs of State and state enterprises; See also, **CL-022**, *Methanex Corporation v. United States of America* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, at Part II - Chapter B, p. 2, where the Tribunal states that "There is no specific "envoi" to the GATT in any of the provisions of Section A …. In the Tribunal's view, interpreting Article 1131(1) to create a jurisdiction extending beyond Section A of Chapter 11 would indeed be to transform it, as unwarranted under NAFTA"; See also **RL-059**, *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Award, 31 March 2010, ¶ 86: ("The Tribunal is mindful of the need not to make expressions used in different contexts and treaties interchangeable in spite of their similarity, as is the case of "like products" under GATT Article III:4. WTO panels and other tribunals have been extremely careful not to interpret expressions or concepts used in specific provisions in the light of the use of those or similar expressions in other contexts").

[678] See for example, Article 1502(4) where the NAFTA Parties chose to replicate the language of the GATT and include the additional elements of "governmental purposes" and "commercial resale".

Article 1108 must be given its full effect by this Tribunal, and the Claimant's efforts to import additional criteria into Article 1108 should be denied.

(b) NAFTA Chapter 10 Does Not Impose Additional Limitations on Article 1108

328. The Claimant also tries to import further conditions on the term procurement in Article 1108 from NAFTA Chapter 10. In particular, it cites the description of "procurement" in Article 1001(5) and argues that, based on this, the term "procurement" in Article 1108 does not include the "government provision of goods and services to persons". It claims that because the electricity procured by the Government through the FIT Program was ultimately provided to other persons, it is not covered by the definition of Chapter 10 and thus should not be covered by Article 1108. The Claimant is wrong. In fact, in making this argument, the Claimant fundamentally misinterprets both this specific provision, as well as Chapter 10 and its function in the NAFTA.

329. First, the interpretation of Article 1001(5) being offered by the Claimant is untenable. The Claimant focuses solely on the phrase "government provision of goods and services to persons" to argue that "what defines procurement is the government obtaining goods and services for its own use, not for provision to others."[679] However, the phrase "government provision of goods and services to persons or state, provincial and regional governments" does not stand on its own, but must be read in the context of subparagraph (a). When read properly, the use of the term "includes" makes clear that this phrase merely serves as an example of "non-contractual agreements" or a "form of governmental assistance". Thus, this provision is meant to capture non-contractual aid and social programs performed by government and to exempt such activity from the obligations in Chapter 10. It is not defining what is and is not procurement for the purposes of NAFTA generally. Rather, it is excluding certain types of measures from the obligations in Chapter 10.

[679] Claimant's Memorial, ¶ 449.

330. The fact is that governments procure on behalf of their people all of the time. Indeed, the annexes to Chapter 10 list many types of goods and services that are provided to the general public and are not just for the benefit of the government. These include telecommunication services, postal services, and health and social services.[680] They also include utilities, like electrical services, which Mexico and Canada have excluded from coverage in Annex 1001.1b-2.

331. Second, even if the Claimant was right in its conclusion that this provision imposed a limitation on the definition of procurement, in arguing that it should also be applied in the context of Article 1108, the Claimant fundamentally misunderstands the point of Chapter 10. In Article 1108, the NAFTA Parties expressly carved out all procurement measures. These carve outs were meant to reflect the fact that the Parties wanted to negotiate separate obligations with respect to procurement and what entities would be covered and to what extent. In Chapter 10, the NAFTA Parties expressly detailed what specific forms of procurement would be subject to obligations, and what obligations they would be subject to. Chapter 10 does not modify in any way the exclusion created for the purposes of Chapter 11 in Article 1108.

332. Thus, contrary to what the Claimant asserts, Article 1001(5) is not a definition of procurement for all of NAFTA. Rather, it is a description of the conduct that is being carved back into the agreement and subjected to the specific obligations in Chapter 10. While the *ADF* tribunal found it helpful to refer to Article 1001(5) to interpret NAFTA Article 1108,[681] it never once suggested that Article 1108 will only apply to a measure with respect to which NAFTA Parties have taken Chapter 10 obligations. Indeed, such an interpretation would make no sense in light of the approach adopted by the NAFTA Parties. In short, Article 1108 applies to all procurement by a Party or a state enterprise irrespective of whether the NAFTA Parties have taken on obligations with respect to that procurement in Chapter 10.

[680] See, for example, NAFTA, Appendix 1001.1b-2-B, Common Classification System. Available at: http://www.worldtradelaw.net/nafta/chap-10.pdf.

[681] **CL-072**, *ADF - Award*, ¶ 161 (emphasis in original).

333. Indeed, the importation of such a restriction into Article 1108 was implicitly rejected by the *ADF* and *UPS* Tribunals. In *ADF*, the highway project being procured by the government of Virginia was meant for public use. Similarly, in *UPS*, the Tribunal found that a contract for customs collection services amounted to a procurement even though it was for the benefit of persons other than the government.

F. The FIT Program Is Procurement "by a Party or State Enterprise"

1. The Ordinary Meaning of "by a Party or State Enterprise"

334. The second element that must be met for the exception found in Article 1108 to apply is that the procurement be "by a Party or state enterprise".

335. While the NAFTA does not define "Party", there is no dispute that the obligations in Chapter 11 apply to measures at the federal and the provincial levels of government in Canada.[682] If the obligations are applicable to both the central government and the governments of the territorial units,[683] it is logical that the exceptions would apply to all levels of government as well. This was the express holding of the tribunal in *ADF v. United States*, which was squarely presented with this issue. In that case, the Tribunal held that "the exclusionary effect of Article 1108(7)(a) and 8(b) operates on both federal and state governmental procurement."[684] Thus, as applied in the Canadian context, the phrase "procurement by a Party" includes procurement by either the federal government or a provincial government.

336. NAFTA defines "state enterprise" in Articles 201 and 1505 as "an enterprise owned, or controlled through ownership interests, by a Party." Again, while the term Party is not defined anywhere, as explained above, in this particular context, it would include both the federal government as well as the provincial or state. Thus, a state

[682] See NAFTA, Article 105, which provides that "The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance … by state and provincial governments".

[683] **CL-009**, *ILC Artcles*, Article 4.

[684] **CL-072**, *ADF - Award*, ¶ 170.

enterprise includes an enterprise owned or controlled through ownership interests by either level of government in a NAFTA Party.

2. The FIT Program Is a Procurement Process Designed by a Party and Implemented by a State Enterprise"

337. The FIT Program is a procurement program that was established pursuant to the direction of the Government of Ontario. The Government of Ontario created this specialized procurement process, directing the OPA to run it using sufficiently beneficial terms to ensure that investors would be willing to take the commercial risks necessary to develop a renewable energy sector that would be sufficiently robust to meet the province's future needs.[685] In addition, in the September 24, 2009 Ministerial Direction to the OPA with respect to the establishment of the FIT Program, the Government of Ontario prescribed the methodology and process for establishing prices,[686] the duration of FIT Contracts,[687] restrictions on the land on which electricity production facilities can be built,[688] specific rules for aboriginal and community participation[689], and rules governing reporting and review.[690]

338. As such, the FIT Program itself can be considered a procurement program of a provincial government in Canada. Thus, it is procurement by a Party for the purposes of Article 1108.

339. Furthermore, the FIT Program is administered by the OPA, which procures the generation pursuant to FIT Contracts. The OPA implemented the detailed technical

[685] RWS-Lo, ¶ 19, RWS-Duffy, ¶ 5.

[686] **C-0051**, Letter (Direction) from George Smitherman, Ministry of Energy to Colin Andersen, Ontario Power Authority (Sep. 24, 2009), p. 2: ("In setting and re-setting prices in accordance with program rules, the OPA should generally be guided by the principle that the prices should seek to cover the costs that projects of a particular type and category are generally expected to experience, plus a reasonable return on investment").

[687] *Ibid*: ("The FIT Program should provide for a 20-year […]").

[688] *Ibid*, p. 4: ("Restrictions on Prime Agricultural Land – [..] not to enter into FIT contracts […] where those facilities are located on: land comprised of […]").

[689] *Ibid*, pp. 2 and 3; *See* "Aboriginal and Community Participation" section.

[690] *Ibid*., pp. 6 and 7; *See* "Governance of Programs" section.

processes of the FIT Program, which included drafting the FIT Rules and the standard FIT Contract. The OPA also assessed applicants based on objective eligibility requirements, and awarded standard fixed-price long-term FIT Contracts to successful applicants. In this case, the Claimant has alleged that the OPA is a state enterprise.[691] As discussed above, Canada agrees.[692] As a state enterprise, procurements by the OPA are expressly covered by Article 1108. Indeed, given the Claimant's position on the status of the OPA, it would appear that the parties are in agreement that this second element of the test for the application of NAFTA Article 1108 is satisfied. Certainly the Claimant cannot be permitted to assert that the OPA is a state enterprise for the purposes of the obligations in Chapter 11, but not for the purposes of the exceptions to those obligations.

3. The Claimant's Interpretation of "Party or State Enterprise" Is Incorrect

340. The Claimant argues that the FIT Program is not procurement by a Party or state enterprise because it is a provincial measure and NAFTA Chapter 10 "excludes" procurement by state and local government. This argument ignores the fact that the procurement is concluded by the OPA, which the Claimant itself contends is a state enterprise under NAFTA. However, even if it were to be considered further, it has no merit and has already been rejected by NAFTA tribunals.

341. Underlying this argument is the same misunderstanding of the role of Chapter 10 of NAFTA that was the basis for the Claimant's arguments on the definition of procurement. Again, Chapter 10 is designed to create positive obligations on certain types of procurement. It does not modify the exclusion created in Article 1108.

342. Thus, Article 1001(1)(a) provides that Chapter 10:

> [A]pplies to measures adopted or maintained by a Party relating to procurement by a federal government entity set out in Annex 1001.1a-1, a government enterprise set out in Annex 1001.1a-2, or a state or provincial

[691] Claimant's Memorial, ¶ 80.

[692] See *Supra*, ¶ 290.

> government entity set out in Annex 1001.1a-3 in accordance with Article 1024 [Further Negotiations].

343. The Claimant is correct that no state or provincial entities have yet been listed in the Annex. Thus, not only do the exceptions in Chapter 11 still apply to any and all procurement by a Party or state enterprise, including both levels of government, but with respect to provincial government procurement, the NAFTA Parties have not undertaken, as of yet, any obligations. The failure of the NAFTA Parties to provide a list of provincial government entities means that no such entities are subject to the obligations in Chapter 10.

344. As noted above, the Tribunal in *ADF* was squarely presented with this exact issue, and, in line with the reasons above, held that Article 1108 applies to procurements by entities at the state (or provincial) level.[693] This Tribunal should do the same.

G. Conclusion

For the above reasons, the FIT Program constitutes procurement by a Party or state enterprise and thus Article 1108 applies. Accordingly, Articles 1102, 1103 and 1106 do not apply to the conduct at issue in this arbitration[694] and the Claimant's claims based on those Articles must be dismissed.

II. The Claimant Has Failed to Demonstrate a Violation of Articles 1102 And 1103 – National Treatment and Most-Favoured-Nation Treatment

A. Summary of Canada's Position

345. The Claimant has alleged that Canada has violated NAFTA Articles 1102 (National Treatment) and 1103 (Most-Favoured-Nation Treatment) by according it less favourable treatment than the treatment accorded to the Korean Consortium, Pattern Canada, NextEra and Boulevard Associates. Although Articles 1102 and 1103 do not

[693] *Supra*, ¶ 311.

[694] NAFTA, Articles 1108(7)(a), 1108(8)(b); **CL-072**, *ADF – Award*, ¶ 170.

apply to the treatment at issue here because of the exclusion in Article 1108, even if they did, the treatment accorded to the Claimant was consistent with Canada's obligations.

346. As is shown below, the Claimant has failed to establish the essential elements of each of its claims. In particular, with respect to its national treatment claim, the Claimant has failed to meet the most basic and fundamental requirement. To support its allegations, it does not refer to a single instance of treatment that was accorded to a Canadian company. Instead, it refers to the treatment accorded to a U.S. investor (NextEra) and the investments of U.S. investors (Pattern Canada and Boulevard Associates). The treatment accorded by Canada to U.S. investors or their investments cannot serve as the basis for a claim that Canada has failed to accord the Claimant, an alleged U.S. investor, national treatment.

347. With respect to its most-favoured-nation clam, the Claimant seeks to compare the treatment that it was accorded in the FIT Program with the treatment accorded to the Korean Consortium pursuant to the GEIA. In so doing, it ignores the glaring differences between the circumstances in which the treatment accorded to each of them. In particular, the Korean Consortium agreed to investments into manufacturing in Ontario valued at $7 billion. The Claimant did not. The Claimant seems to think that this is irrelevant. However, if the Claimant's position is correct, then every single investment agreement entered into by States around the world is in violation of their most-favoured-nation obligations. That cannot be correct.

B. The Claimant Bears the Burden of Establishing the Essential Elements of Articles 1102 and 1103

348. NAFTA Articles 1102 and 1103 ensure treatment of foreign investors in accordance with the principles of national treatment and most-favoured nation treatment.

349. Article 1102 requires, in relevant part that:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors

> with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

350. Article 1103 provides for a similar obligation on the basis of most-favoured-nation treatment – that is, on the basis of treatment accorded to investors and investments from a third country. Specifically, Article 1103 provides, in relevant part, that:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

351. Under these provisions, it is fundamental to any allegation of breach that the allegedly more favourable treatment has been accorded to another investor of the appropriate nationality. In particular, in the context of a dispute between a U.S. investor and Canada, the relevant comparator investors and investments for the purposes of Article 1102 are Canadian, and the relevant comparator investors and investments for the purposes of Article 1103 would be either Mexican or nationals of a non-NAFTA Party. Indeed, confirming that the right comparators are being offered is the first fundamental step in either an Article 1102 or 1103 analysis.[695]

352. Once a claimant has shown that it is comparing itself to an appropriate other class of investors or investments, it then bears the burden of showing that: (1) the government

[695] **CL-033**, *S.D. Myers - Partial Award*, ¶ 252; **CL-039**, *Pope & Talbot - Award on the Merits of Phase 2*, ¶ 31; **CL-040**, *Feldman - Award*, ¶ 171.

accorded both the claimant and the comparators "treatment with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition" of their respective investment;[696] (2) the government accorded the alleged treatment "in like circumstances";[697] and (3) the treatment accorded to the Claimant or its investments was "less favourable" than the treatment accorded to the comparator investors or investments.[698]

353. The burden falls squarely on a claimant's shoulders, and it does not shift, as the Claimant suggests, "to Canada to show that the difference in treatment, both in its nature in magnitude, was fully justified by legitimate regulatory considerations".[699] The Claimant offers no support for that unsubstantiated assertion, because none exists. For the reasons below, the Claimant has failed to meet its burden in this case.

C. The Claimant Has Failed to Meet its Burden of Showing the Essential Elements of Articles 1102 and 1103

1. With Respect to its Allegation of a Breach of Article 1102, the Claimant Fails to Show Treatment Accorded to Canada's Own Investors

354. As explained above, Article 1102 is a relative standard which requires a comparison of the treatment accorded to the Claimant with the treatment accorded to Canadian nationals. This element flows from the very purpose of Article 1102 which is to prevent discriminatory treatment based on the nationality of an investor or its investment. In past NAFTA Chapter 11 arbitrations, all three NAFTA Parties have agreed that the

[696] **CL-036**, *Merrill & Ring - Award*, ¶¶ 81-82; **RL-075**, *UPS – Award*, ¶ 83.

[697] **RL-075**, *UPS - Award*, ¶ 83; **CL-121**, *Loewen - Award*, ¶ 139; **RL-040**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/05) Award, 21 November 2007, ¶ 205 ("*ADM – Award*"); **CL-033**, *S.D. Myers - Partial Award*, ¶ 252.

[698] **RL-075**, *UPS - Award*, ¶ 83.

[699] Claimant's Memorial, ¶¶ 605 and 680.

national treatment obligation is designed to protect against discrimination on the basis of nationality.[700]

355. NAFTA Chapter 11 awards also acknowledge that the central objective of Article 1102 is to prevent nationality-based discrimination. The *Loewen v. United States* Tribunal found that Article 1102 is directed "only to nationality-based discrimination and that it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality".[701] Similarly, the *ADM* Tribunal found that "Article 1102 prohibits treatment which discriminates on the basis of the foreign investor's nationality. Nationality discrimination is established by showing that a foreign investor has unreasonably been treated less favourably than domestic investors in like circumstances".[702]

356. With respect to its Article 1102 claim, the Claimant identifies a number of other investors who allegedly received more favourable treatment than was accorded to it.

[700] On behalf of the United States, see **RL-058,** *The Loewen Group Inc., and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB (AF)/98/3) Counter Memorial of the United States of America, 30 March 2001, p. 123: ("[T]hey have no evidence of any "nationalistic" bias on the part of the Mississippi judiciary."). On behalf of Mexico see **RL-053**, *GAMI Investments, Inc. v. Mexico* (UNCITRAL) Statement of Defense, 24 November 2003, ¶ 273: ("A violation of national treatment requires discrimination on the basis of nationality."). *See also* **RL-061,** *Methanex Corporation v. The United States of America* (UNCITRAL) Mexico Fourth Submission pursuant to Article 1128, 30 January 2004, ¶ 16: **("**When applying the national treatment rule, the *only* relevant issue of status is the investor's nationality. Where a breach of Article 1102 is alleged, it is less favourable treatment based on the Claimant's Canadian nationality *only* that can give rise to a finding of breach of Article 1102"). On behalf of Canada, *see* **RL-067**, *Pope & Talbot v. Government of Canada*, (UNCITRAL) Counter Memorial of the Government of Canada, 29 March 2000, ¶ 166: ("Article 1102(2) does not prevent a Party from implementing a measure that affects investments differently as long as the measure neither directly nor indirectly discriminates on the basis of nationality as between foreign and domestic investments."). *See also* **RL-074,** *United Parcel Service of America, Inc. v. Government of Canada* (UNCITRAL) Counter Memorial (Merits Phase) of the Government of Canada, 22 June 2005, ¶ 585: **(**"The terms of Article 1102…reveal the article's general purpose of preventing nationality-based discrimination."). *See also* **RL-060,** *Methanex Corporation v. The United States of America* (UNCITRAL) Canada's Fourth Submission pursuant to Article 1128, 30 January 2004, ¶ 5: ("[Article 1102] prohibits treatment which discriminates on the basis of the foreign investment's nationality."). This agreement of the NAFTA Parties constitutes "subsequent practice" under Article 31(3)(b) of the Vienna Convention on the Law of Treaties, **CL-011**, *Vienna Convention on the Law of Treaties* (1969).

[701] **CL-121**, *Loewen - Award*, ¶ 139.

[702] **RL-040**, *ADM - Award*, ¶ 205.

First, it claims that the treatment that Pattern Canada was accorded pursuant to the GEIA was more favourable than the treatment accorded to applicants, including itself, under the FIT Program.[703] However, in the Claimant's own words, "Pattern Renewable Holdings Canada ULC (Pattern Canada) is a wholly-owned Canadian subsidiary of California-based Pattern Energy Group".[704]

357. Thus, the Claimant clearly admits that Pattern Canada is neither a Canadian investor nor an investment of a Canadian investor. It is an investment of a U.S. investor. As such, the treatment accorded to it simply cannot serve as the basis for a national treatment claim. Thus, there is no need to consider whether the treatment of which the Claimant complains was accorded in like circumstances or whether it was no less favourable.

358. Second, the Claimant asserts that the treatment that was accorded to Boulevard Associates was more favourable than the treatment accorded to it during the FIT Program.[705] Once again, however, in the Claimant's own words, Boulevard Associates is "a Canadian subsidiary of NextEra".[706] While the Claimant does not directly refer to the nationality of NextEra in its Article 1102 submission, a basic search of the company reveals that it is headquartered in Juno Beach, Florida,[707] and is a wholly-owned subsidiary of NextEra Energy Inc. According to documents listed on EDGAR, the official U.S. Securities and Exchange Commission database for company filings, NextEra

[703] Claimant's Memorial, ¶¶ 614-626.

[704] Claimant's Memorial, ¶ 610 (emphasis added).

[705] Claimant's Memorial, ¶¶ 627-637.

[706] Claimant's Memorial, ¶ 627 (emphasis added).

[707] **R-141**, Bloomberg Businessweek website excerpt, "Company Overview of NextEra Energy Resources, LLC". Available at: http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=818964 ("NextEra Energy Resources, LLC was formerly known as FPL Energy, LLC. The company was founded in 1985 and is based in Juno Beach, Florida").

Energy Inc. is a public company incorporated in the State of Florida.[708] The Tribunal is also well aware of NextEra's U.S. nationality as a result of the Claimant's *ex parte* discovery efforts to obtain information from NextEra in U.S. courts.[709]

359. Thus, Boulevard Associates is also neither a Canadian investor nor an investment of a Canadian investor. Like Pattern Canada, Boulevard Associates is the investment of a U.S. investor. Comparing the treatment accorded to an investment of a U.S. investor to that of another U.S. investor is not relevant to a claim alleging a breach of the national treatment obligation in Article 1102. Accordingly, this Tribunal may stop its analysis here and need not consider further whether the complained of treatment with respect to Boulveard Associates was accorded in like circumstances or was more favourable than that accorded to the Claimant.

360. Finally, the Claimant alleges that the treatment accorded directly to NextEra itself is also a violation of Article 1102.[710] However, as explained above, NextEra is a U.S. corporation. It is not a Canadian investor, nor is it an investment of a Canadian investor. In fact, it is not even an investment in Canada of a U.S. investor. The Claimant here seems to be arguing that the treatment accorded to one U.S. investor can constitute a violation of national treatment if more favourable than the treatment accorded to another U.S. investor. That position is a frivolous interpretation of Article 1102.

361. Given this fundamental failure, there is no reason for the Tribunal to proceed with an Article 1102 analysis in this case. However, as the analysis of the Claimant's allegation of a breach of Article 1103 is similar to that required for its allegation of a breach of Article 1102, in what follows, Canada explains how the Claimant has failed to

[708] **R-142**, EDGAR Search Results, "NEXTERA ENERGY INC CIK#: 0000753308" (Last Updated Feb. 24, 2014). Available at: http://www.sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0000753308&owner=include&count=40&hidefilings=0.

[709] See Claimant's Letters to the Tribunal dated November 9, 2012; November 21, 2012; November 26, 2012; February 22, 2013; March 4, 2013; July 29, 2013; August 28, 2013; September 5, 2013; and September 11, 2013.

[710] Claimant's Memorial, ¶¶ 627-662 and 666-675.

prove that it was accorded less favourable treatment than the treatment that was accorded in like circumstances to other investors under either Article 1102 or 1103.

2. The Treatment Accorded to the Claimant Was in Its Capacity as a FIT Applicant

362. The first step of the analysis under both Articles 1102 and 1103 is to establish that the government accorded "treatment" to the investor or its investments. In particular, the alleged treatment must be with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of its investment. Canada does not dispute that the Claimant was accorded treatment by the Government of Ontario. Canada also agrees with the Claimant that the treatment it received was with respect to its "application for a FIT Contract".[711]

3. The Claimant Has Failed to Establish that the Treatment Accorded to It Was Accorded In Like Circumstances with the Treatment Accorded to the Korean Consortium for the Purposes of Article 1103

363. The second element that the Claimant must show is that the treatment accorded to it and the treatment of its identified comparators was accorded "in like circumstances". This element is a precondition to a finding of less favourable treatment, since treatment can only be less favourable if it is accorded in like circumstances.

364. Canada does not dispute that the treatment accorded to the Claimant and the treatment accorded to other FIT applicants, including Boulevard Associates and NextEra, was accorded in like circumstances to the extent that these companies "sought FIT contracts from the OPA in the same regions as Mesa".[712]

365. However, the Claimant's contention that "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

[711] Claimant's Memorial, ¶ 289.

[712] Claimant's Memorial, ¶ 627.

Consortium's joint venture partner, Pattern Energy"[713] must be rejected. In order to come to this conclusion, the Claimant glosses over the meaning of "in like circumstances" by simply asserting that the two investors were "competing for a fixed amount of transmission capacity"[714] and that it didn't matter "[w]hether they were attempting to obtain that transmission capacity through the FIT Program or through the *GEIA*".[715]

366. Accepting the Claimant's grossly oversimplified analysis, which is based principally on competition for transmission capacity, would lead to extreme results. It would place the Claimant in like circumstances with any electricity provider in Ontario, from solar to hydro-electric and even nuclear facilities, like Bruce Power. In essence, the Claimant's argument that competition for transmission access is all that matters with respect to like circumstances means that every FIT Program in the world would violate national treatment and most-favoured-nation provisions since each such program treats renewable energy producers competing for transmission capacity more favourably than non-renewable energy producers competing for that same capacity. Thus, the Claimant's unreasonable interpretation of like circumstances would lead to an absurd outcome. It is exactly that sort of absurdity that the like circumstances analysis is designed to prevent.

367. Ultimately, whether treatment was accorded in like circumstances is not decided only by whether two entities are competing within the same sector. Rather, it depends on the treatment at issue and "will require consideration…of all the relevant circumstances in which the treatment was accorded".[716] As described in more detail below, the treatment accorded to the Claimant and the Korean Consortium was accorded in completely different circumstances.

[713] Claimant's Memorial, ¶ 514.

[714] Claimant's Memorial, ¶ 518.

[715] Claimant's Memorial, ¶ 516.

[716] **RL-075**, *UPS - Award*, ¶ 87; *See also*, **RL-065**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia* (UNCITRAL), Award on Jurisdiction and Liability, 28 April 2011, ¶ 475 ("*Paushok*").

(a) The Korean Consortium was Accorded Treatment Pursuant to the GEIA Rather than the FIT Program

368. The Claimant was an applicant in the FIT Program, which was a procurement program designed to offer fixed prices for long-term renewable energy contracts through "standardized program rules, prices and contracts".[717] FIT applicants were awarded contracts based on their ability to meet the applicable eligibility requirements, if there was sufficient transmission and distribution availability to connect to the grid. As a standard offer program, the FIT Contract was non-negotiable. It was open to anyone to participate in the FIT Program by submitting a FIT Application to the OPA.

369. The Korean Consortium was not a FIT applicant. The Korean Consortium obtained transmission access not through the FIT Program but through the GEIA, an investment agreement with the Government of Ontario. Indeed, the GEIA represented the largest investment agreement in Ontario's history. The agreement was aimed at creating 16,000 jobs in Ontario with respect to the construction, installation and operation of renewable energy projects, as well as direct employment in renewable energy manufacturing plants and indirect job creation in areas such as finance, consulting and other manufacturing, service and development industries.[718] In the GEIA, the Korean Consortium committed to an ambitious five-year timeline for the completion of four manufacturing facilities to produce wind towers, wind blades, solar module and solar inverters.[719] The investment commitments made by the Korean Consortium in the GEIA were valued at $7 billion.[720]

[717] **R-172**, Ontario Power Authority website excerpt, "General Information about the FIT and microFIT Programs". Available at: http://fit.powerauthority.on.ca/program-resources/faqs/general-information-about-fit-and-microfit-programs.

[718] **R-076**, Ministry of Energy, "Ontario delivers $7 Billion Green Investment", Archived Backgrounder. Available at: http://news.ontario.ca/mei/en/2010/01/backgrounder-20100121.html.

[719] **C-0322**, GEIA, s. 3.2.

[720] **R-076**, Ministry of Energy, "Ontario delivers $7 Billion Green Investment", Archived Backgrounder.

370. In return for this massive commitment, the Korean Consortium was guaranteed 2,500 MW of priority transmission capacity for its proposed solar and wind projects.[721] The renewable generation projects established by the Korean Consortium did not participate in the FIT Program. For example, when Pattern Canada entered into a joint venture with Samsung under the GEIA, it elected to do so *in lieu* of pursuing PPAs under the FIT Program.[722] As a result, it was no longer subject to the requirements of the FIT Program but instead, subject to the terms and conditions of the PPAs negotiated pursuant to the GEIA.

(b) Article 1103 Does Not Limit a Party`s Ability to Enter into Investment Agreements like the GEIA

371. Contrary to the Claimant`s belief, NAFTA Parties have not forfeited their ability to attract investment by providing incentives through investment agreements such as the GEIA. Indeed, the GEIA is not unique. Governments routinely negotiate investment agreements as a means of achieving their public policy goals. In exchange for exclusive benefits, these agreements help to create jobs, and promote health, safety and environmental policy objectives. Investors that agree to undertake commitments in exchange for the benefits under such agreement are naturally treated differently than other investors who do not undertake responsibilities.

372. A governments' ability to enter into investment agreements was recognized by the Tribunal in *Paushok v. Mongolia*. As that Tribunal confirmed, it is a matter of policy for governments to decide if they wish to enter into investment agreements.[723] In particular it explained that:

[721] *Ibid*.

[722] **C-0278**, Email from Frank Davis, Pattern to Susan Kennedy, Ontario Power Authority and Colin Edwards, Pattern (Jul. 26, 2011). Specially, Pattern Canada was required to sign FIT Contract Termination Agreements with respect to its FIT projects prior to signing of the PPAs pursuant to the GEIA.

[723] **RL-065**, *Paushok*, ¶ 476.

> [T]here is certain element of administration discretion in the negotiation of such agreements; the concessions granted by a government will very much depend on the size of the investment contemplated.[724]

373. The *Paushok* Tribunal determined that the claimant and its competitor, Boroo Gold, were not in similar situations because Boroo Gold had committed to substantial future investments, whereas the Claimant had not.[725] As a result of its future investment commitments, Boroo Gold was able to successfully negotiate a stability agreement with Mongolia, which granted certain tax benefits. According to the Tribunal, the fact that the claimant did not receive the same tax benefits as Boroo Gold did not constitute unfair treatment, because the claimant was not willing to commit to substantial future investments.[726]

374. The United Nations Conference on Trade and Development's "Most Favoured Nation Treatment" publication equally recognizes that the special privileges or incentives of investment contracts do not violate most-favoured-nation treatment principle:

> As was pointed out in the first edition on MFN (UNCTAD 1999a) if a host country grants special privileges or incentives to an individual investor through a contract, there would be no obligation under the MFN treatment clause to treat other foreign investors equally. The reason is that a host country cannot be obliged to enter into an individual investment contract. In this case, "freedom of contract prevails over the MFN clause" (UNCTAD 1999a). Furthermore, the foreign investor that did not enter into a contract is not in "like circumstances" with the third foreign investor that did conclude the contractual arrangement with the host State.[727]

375. For these very same reasons, the treatment of the Korean Consortium under the GEIA was not accorded in like circumstances to the treatment accorded to the Claimant.

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[724] *Ibid*, ¶ 488.

[725] *Ibid*, ¶¶ 475-476.

[726] *Ibid*.

[727] **CL-066**, United Nations Conference on Trade and Development, *Most-Favoured-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II, p. 29 (2010) (emphasis added).

4. The Treatment Accorded to the Claimant Was Not Less Favourable than the Treatment Provided to other Investors with Whom the Claimant Is in Like Circumstances

376. Finally, in order to establish a breach of Articles 1102 and 1103, the Claimant is required to show that the treatment that it was accorded was "less favourable" treatment than that accorded in like circumstances to its comparators. As noted above, Canada does not dispute that the Claimant was in like circumstances with other FIT proponents. However, as is shown below, the Claimant received the same treatment that other FIT proponents received.

377. As stated by the Tribunal in *Pope & Talbot*, "'no less favourable' means equivalent to, not better or worse than, the best treatment accorded to the comparator".[728] In the context of its Article 1102 claim, the Claimant seems to allege that it was accorded less favourable treatment than another FIT applicant, NextEra and its subsidiary Boulevard Associates. Leaving aside the fact pointed out earlier that these entities are not Canadian nationals, the Claimants allegations of less favourable treatment are also completely unjustified.

378. All FIT applicants were treated the same. All had the same level of access to government officials and OPA staff.[729] All were subject to the same eligibility requirements and ranking methodology.[730] All had access to the same information regarding the availability of transmission capacity in Ontario and FIT Rule changes, including those related to the Bruce to Milton allocation process.[731] And all FIT applicants in the Bruce and West of London regions had the same right to change their

[728] **CL-039**, *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Award on the Merits of Phase 2, 10 April 2001, ¶ 42.

[729] RWS-Lo, ¶¶ 52-54; RWS-Chow, ¶ 59.

[730] RWS-Duffy, ¶¶ 7-28; RWS-MacDougall, ¶¶ 15-20.

[731] RWS-Chow, ¶ 59; RWS-Lo, ¶¶ 55-56.

connection point during the June 3, 2011 Direction connection point change window, including to a point on other lines, such as the Bruce to Longwood transmission line.[732]

379. In fact, in its Article 1103 claim, the Claimant seems to actually acknowledge and rely upon the fact that all FIT applicants were accorded the same treatment. In that context, it admits freely to being treated like other FIT applicants,[733] and every example of less favourable treatment it raises is treatment that was provided to all of the proponents in the FIT Program.

D. Conclusion

380. The Claimant has failed to meet its burden of proving that the treatment accorded to it by Ontario and the OPA with respect to its applications for FIT Contracts violated Canada's obligations under Articles 1102 and 1103. With respect to its Article 1102 claim, not only did the Claimant fail to meet the most basic burden of establishing treatment accorded by Canada to its own investors, it also failed to show that any of other FIT applicants in fact received more favourable treatment than it did during the FIT Program. With respect to its Article 1103 claim, it has failed to show that the treatment of the Korean Consortium was accorded in like circumstances with the treatment accorded to it. Thus, its claims under Articles 1102 and 1103 must be dismissed.

III. The Claimant Has Failed to Demonstrate a Violation of Article 1105(1) - the Minimum Standard of Treatment

A. Summary of Canada's Position

381. The Claimant has alleged that virtually each and every aspect of the conduct of Ontario and the OPA in the design and implementation of the FIT Program and the GEIA has violated Canada's obligations under Article 1105. These claims are without merit. The fact is that throughout this process, from the design of the FIT Program, to the ranking of FIT applications, to the Bruce to Milton allocation process, the Government of

[732] RWS-Chow, ¶¶ 29, 46-47.

[733] Claimant's Memorial, ¶¶ 531, 541, 553, 558, 582, 583 and 595-599.

Ontario and the OPA acted fairly, honestly, and in good faith, and that all applicants were treated equally.

382. The Claimant may be disappointed that it did not receive a FIT Contract for any of its projects. In particular, it may be disappointed that some of the ways in which the FIT Program evolved in order to meet changing policy needs did not operate to its specific benefit. However, the NAFTA does not guarantee that every legitimate policy decision made by a government will operate to the benefit of foreign investors. The Claimant decided to invest in the Ontario electricity industry, specifically aware of its heavily regulated nature and the fact that the Government was often forced to adapt its policies to meet changing needs. Having made this decision, the Claimant should not be permitted to claim a breach of NAFTA simply because a legitimate policy decision did not turn out in its favour. Indeed, such a conclusion is even more appropriate where, as here, the claim appears to be little more than a transparent attempt to recoup the losses suffered by the Claimant as a result of its earlier failures to develop similar projects in the United States.

383. In support of its allegations, the Claimant has offered a repetitive and confusing jumble of facts taken out of context, combined with wholly unsupported allegations. In order to respond to what it understands to be the Claimant's allegations, Canada has sought to group and order the alleged breaches of Article 1105 in a logical and concise manner.

384. After explaining the legal standard applicable under Article 1105, Canada will address the three challenged measures of the Government of Ontario: (1) the reservation of 500 MW of transmission capacity in the Bruce region for the Korean Consortium; (2) the decision with respect to how to allocate the capacity made available by the Bruce to Milton Line; and (3) the decision not to run an ECT. Canada will then address the three challenged acts of OPA: (1) the ranking of FIT applications; (2) the management of the Bruce to Milton allocation process; (3) the refusal to discuss the Claimant's FIT project

rankings with the Claimant. As is shown below, none of these acts breached Canada's obligations under Article 1105.

B. Article 1105(1) Requires that Canada Accord to the Investments of the Claimant the Customary International Law Minimum Standard of Treatment

385. In Article 1105 the NAFTA Parties accepted the obligation to accord to investments of investors of another Party the "Minimum Standard of Treatment". Article 1105(1) provides that:

> (1) 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.

386. The proper interpretation of this Article was conclusively determined by the NAFTA Free Trade Commission ("FTC'") in its July 31, 2001 *Note of Interpretation*. Pursuant to Article 1131(2), this interpretation is binding on all Chapter 11 tribunals.[734] The FTC confirmed that the proper interpretation of Article 1105(1) was that it "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".[735] It further clarified that "[t]he concepts of 'fair and equitable treatment' and 'full

[734] NAFTA, Article 1131(2) provides that: ("an interpretation by the [Free Trade] Commission of a provision of [the NAFTA] shall be binding on a Tribunal established under this Section"). NAFTA Tribunals have consistently recognized that the Note of Interpretation is binding on them. See, for example, **CL-138**, *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Award, 8 June 2009, ¶ 599; **CL-194**, *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL) Final Award, 26 January 2006, ¶ 192 *et seq.*; **CL-022**, *Methanex – Final Award on Jurisdiction and Merits*, Part IV, Chapter C, ¶ 20; **CL-034**, *Mondev – Award*, ¶ 100 *et seq.*; **CL-121**, *The Loewen Group Inc. and Raymond L. Loewen v. United States of America* (ICSID No. ARB/98/3) Award on Merits, 26 June 2003, ¶ 126 ("*Loewen – Award*"); **CL-091**, *Waste Management Inc. v. United Mexican States* (ICSID No. ARB(AF)00/3) Award, 30 April 2004, ¶ 90 *et seq*., ("*Waste Management II - Award*"); **RL-045**; *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶¶ 135, 267-268 ("*Cargill – Award*"), **CL-072**, *ADF – Award*, ¶ 176.

[735] **RL-063**, NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions, 31 July 2001 ("*Note of Interpretation*"), at B. Indeed, Canada's Statement of Implementation for NAFTA indicated that the intent of Article 1105 is "to assure a minimum standard of treatment of investments of NAFTA investors" and to provide for "a minimum absolute standard of treatment, based on long-standing principles of customary international law". *See* **CL-012**, Canada, Department of Foreign Affairs and International Trade, *Statement of Implementation: North American Free Trade Agreement*, vol. 128, no.1 (Ottawa: Canada Gazette, 1994), p. 149.

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".[736]

387. Despite this binding interpretation, the Claimant argues that Article 1105 obliges Canada "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*".[737] Indeed, it suggests that Article 1105 "sets out a standard of treatment that includes, at a minimum, a requirement that Canada follow customary international law".[738] On the basis of these arguments, the Claimant sets out "principles and practices" that it says form part of Article 1105.[739]

388. The Claimant's interpretation of Article 1105 is baseless. Article 1105 does not create an open-ended obligation to be defined by tribunals. As the Tribunal in *Mondev* stated when speaking directly to this point, it is not for a tribunal to "apply its own idiosyncratic standard in lieu of the standard laid down in Article 1105(1)".[740] Article 1105(1) is an "objective" standard of treatment for investors set by rules of customary international law. In the words of the Tribunal in *Cargill v. Mexico*, "Article 1105(1) requires no more, no less, than the minimum standard of treatment demanded by customary international law".[741] Similarly, as explained by the Tribunal in *Chemtura v. Canada*, "it is not disputed that the scope of Article 1105[…] must be determined by reference to customary international law".[742]

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[736] *Ibid*.

[737] Claimant's Memorial, ¶ 331.

[738] Claimant's Memorial, ¶ 336.

[739] Claimant's Memorial, ¶ 331.

[740] **CL-034**, *Mondev - Award*, ¶ 119. Contrary to the Claimants' suggestion and as the *Loewen* Tribunal noted, fair and equitable treatment and full protection and security are "not free standing obligations", "[t]hey constitute obligations only to the extent they are recognized by customary international law". *See* **CL-121**, *Loewen - Award*, ¶ 128; See also, **RL-073**, *United Parcel Service v. Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002 ("*UPS - Award on Jurisdiction*"), ¶ 97: ("The obligation to accord fair and equitable treatment is not in addition to or beyond the minimum standard").

[741] **RL-045**, *Cargill - Award*, ¶ 268.

[742] **CL-090**, *Chemtura Corporation v. Government of Canada* (UNCITRAL) Award, 3 August 2010, ¶ 121.

C. The Claimant Bears the Burden of Establishing the Existence of a Rule of Customary International Law

389. As the ICJ, prominent scholars, and several NAFTA tribunals have all confirmed, the party alleging the existence of a rule of customary international law has the burden of proving it.[743] The Claimant must therefore discharge two burdens: first that a customary rule of international law exists, and second, that Canada has breached it. The *UPS* Tribunal explained that "to establish a rule of customary international law, two requirements must be met: consistent State practice and an understanding that the practice is required by law". [744] Similarly, the *Cargill* Tribunal held that where the existence of custom has not been demonstrated, "it is not the place of the Tribunal to assume this task.

[743] **RL-068**, *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States)*, [1952] I.C.J. Rep. 176, 27 August 1952, p. 200 citing *The Asylum Case (Colombia v. Peru)*, [1950] I.C.J. Rep. 266: ("The Party which relies on custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party."); See also, **RL-044**, Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford: Oxford University Press, 2008), p.330: ("In practice the proponent of a custom has a burden of proof the nature of which will vary according to the subject-matter and the form of the pleadings"); **CL-072**, *ADF - Award*, ¶ 185: ("The investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that the current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts."); See also, **RL-073**, *UPS - Award on Jurisdiction*, ¶ 84: ("the obligations imposed by customary international law may and do evolve. The law of state responsibility of the 1920s may well have been superseded by subsequent developments. It would be remarkable were that not so. *But relevant practice and the related understandings must still be assembled in support of a claimed rule of customary international law*."[emphasis added]).

[744] **RL-073**, *UPS - Award on Jurisdiction*, ¶ 84; *See also*, **CL-024**, *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* [1969], I.C.J. Rep. 4, Judgment, 20 February 1969 ("*North Sea Continental Shelf Cases – Judgement*"), ¶ 74: ("it is an 'indispensable requirement' to show that State practice, including that of States whose interests are specifically affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occured in such a way as to show a general recognition that a rule of law or legal obligation is involved"); **CL-025**, *Case Concerning the Continental Shelf (Libyan Arab Jamahiriyah v. Malta)* [1985] I.C.J. Rep.13 ("*Libyan Arab Jamahiriyah*"), ¶ 27: ("it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states…"); **RL-064**, *Case Concerning Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America)* Merits, Judgment, I.C.J. Reports 1986, ¶ 207: ("For a new customary rule to be formed, not only must the acts concerned 'amount to settled practice', but they must be accompanied by the *opinio juris sive necessitates*. Either the States taking such action or the other States in a position to react to it must have behaved so that their conduct is 'evidence of a belief that this is practice is rendered obligatory by the existence of a rule of law requiring it.'").

Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted".[745]

390. The Claimant suggests that this Tribunal ignore how customary international law is established. It argues that "the content of customary international law can be sourced through international tribunal decisions, and that it is not necessary to specifically prove the elements of state practice and *opinio juris*".[746] Such a position represents a fundamental misunderstanding of how international law works. As the Tribunal in *Glamis v. United States* explained, international arbitration awards can "serve as illustrations of customary international law if they involve an examination of customary international law," but they "do not constitute State practice and thus cannot create or prove customary international law".[747] Simply put, while customary international law may be described in the decisions of international tribunals, it cannot, as the Claimant alleges, be "sourced" through such decisions.

391. Accordingly, for an arbitral decision to be at all relevant to understanding the content of Article 1105, the tribunal rendering it must at least be considering the customary international law minimum standard of treatment. The authorities submitted by the Claimant do not meet this basic requirement. The decisions on which the Claimant bases its interpretation apply the autonomous standard of "fair and equitable treatment".[748] NAFTA tribunals have consistently found that arbitral awards applying "autonomous standards provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom".[749] As the *Cargill* Tribunal most recently

[745] **RL-045**, *Cargill - Award*, ¶ 273.

[746] Claimant's Memorial, ¶ 339.

[747] **CL-138**, *Glamis - Award*, ¶¶ 605-607; *See also* **RL-045**, *Cargill - Award*, ¶ 277: ("It is important to emphasize, however, as Mexico does in this instance that the awards of international tribunals do not create customary international law but rather, at most, reflect customary international law. Moreover, in both the case of scholarly writings and arbitral decisions, the evidentiary weight to be afforded such sources is greater if the conclusions therein are supported by evidence and analysis of custom.").

[748] Claimant's Memorial, ¶ 349.

[749] **CL-138**, *Glamis - Award*, ¶ 608; S*ee also* **RL-045**, *Cargill - Award*, ¶ 278 (Arbitral awards are "relevant to the issue presented in Article 1105(1) only if the fair and equitable treatment clause of the BIT

explained, "significant evidentiary weight should not be afforded to autonomous clauses inasmuch as it could be assumed that such clauses were adopted precisely because they set a standard other than required by custom".[750]

392. Similarly, tribunals interpreting the autonomous standard of "fair and equitable treatment" have also emphasized the distinction to be made with the customary international law minimum standard of treatment. As the *Enron* Tribunal concluded, "the fair and equitable treatment standard, at least in the context of the treaty applicable in this case [the U.S. - Argentina BIT], can also require a treatment additional to, or beyond that of, customary international law".[751] In fact, not a single case cited by the Claimant holds that the customary international law minimum standard of treatment requires the NAFTA Parties to act in accordance with a generic and autonomous standard of, for example, "fairness and reasonableness", "legitimate expectations", or "treatment free from discriminatory conduct".[752]

393. Finally, the Claimant misconstrues its burden by asserting that "[t]ribunals, NAFTA and non-NAFTA alike, have also recognized that the customary international

in question was viewed by the Tribunal as involving, like Article 1105, an incorporation of the customary international law standard rather than autonomous treaty language.").

[750] **RL-045**, *Cargill - Award*, ¶ 276. *See also* **RL-073**, *UPS - Award on Jurisdiction*, ¶ 97: ("in terms of *opinio juris* there is no indication that [the BITs] reflect a general sense of obligation.").

[751] **RL-049**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID No. ARB/01/3) Award, 22 May 2007, ¶ 258; *See also*, **RL-070**, *Sempra Energy International v. Argentine Republic* (ICSID No. ARB/02/16) Award, 28 September 2007, ¶ 302.

[752] *See* Claimant's Memorial, ¶¶ 350-365, ¶¶ 407-412, and ¶¶ 395-406, 417. For example, there was no reference to the minimum standard of treatment under customary international law in the relevant BITs in any of the arbitral decisions in *Tecmed*, *Eureko*, *Saluka*, *Biwater Gauff*, or *Azurix*, all of which are relied on by the Claimants (Claimants' Memorial, ¶¶ 349, 405-406). Similarly, none of these tribunals undertook an analysis of State practice or *opinio juris*. *See* for example **CL-035**, *Tecnicas Medioambientales TECMED S.A. v, Mexico* (ICSID No. ARB(AF)00/2) Award, 29 May 2003, ¶¶ 152-174; **CL-080**, *Eureko v. Republic of Poland*, Partial Award, 19 August 2005, ¶¶ 77, 231-235; **CL-081**, *Saluka Investments B.V. v. Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶¶ 294, 296; **CL-092**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22) Award, 24 July 2008, ¶¶ 586, 590; **CL-070**, *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12) Award, 14 July 2006, ¶¶ 361-363. The *National Grid* award is equally inapplicable since, as the Tribunal noted, "there is no reference to the minimum standard of treatment under international law in the Treaty in contrast to the language of NAFTA, the Tribunal will proceed to examine the ordinary meaning of 'fair' and 'equitable'" (**CL-071**, *National Grid P.L.C. v. Argentine Republic* (UNCITRAL) Award, 3 November 2008, ¶ 167).

law standard has been influenced by the many bilateral investment treaties obliging states to provide fair and equitable treatment and full protection and security."[753] While the Claimant cites to the *Mondev* Tribunal in support of this proposition, the *Mondev* award actually provides that Article 1105(1) "refers to a standard existing under customary international law, and not to standards established by other treaties of the three NAFTA Parties".[754]

D. The Threshold for Demonstrating a Violation of Article 1105 Is High

394. The above errors in understanding the basis for Article 1105 and how its content must be established lead the Claimant to misconstrue the threshold for a violation of Article 1105(1). Article 1105(1) was included "to avoid what might otherwise be a gap"[755] and to establish a "floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner".[756]

395. The "floor" articulated in Article 1105 does not call for NAFTA tribunals to second-guess government policy and decision-making. To the contrary, international law provides a "high measure of deference…to the right of domestic authorities to regulate matters within their own borders."[757] Whenever a government exercises its purchasing power through a procurement initiative, there will inevitably be winners and losers – those who receive contracts and those who do not. While those outcomes are inevitably perceived by those who failed to obtain contracts as unfair or inequitable, NAFTA Chapter 11, and in particular Article 1105(1), "was not intended to provide foreign investors with blanket protection from this kind of disappointment."[758] To provide otherwise - to find a State liable for exercising its powers in a manner merely *perceived*

[753] Claimant's Memorial, ¶ 341.

[754] **CL-034**, *Mondev - Award*, ¶ 121; **CL-072**, *ADF – Award*, ¶ 183.

[755] **CL-033**, *S.D. Myers - Partial Award*, ¶ 259.

[756] *Ibid*.

[757] *Ibid*, ¶ 263.

[758] **CL-104**, *Azinian*, ¶ 83.

as being unfair or inequitable - would ultimately cripple governments from being able to govern altogether.[759]

396. As noted by the *S.D. Myers* Tribunal, "[w]hen interpreting and applying the 'minimum standard', a Chapter Eleven tribunal does not have an open-ended mandate to second-guess government decision-making" as "[g]overnments have to make many potentially controversial choices".[760]

397. Accordingly, the threshold for proving a violation of the customary international law minimum standard of treatment under Article 1105(1) is extremely high.[761] As the *S.D. Myers* Tribunal explained, "a breach of Article 1105 occurs only 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".[762]

398. Similarly, the *Thunderbird* Tribunal observed that "the threshold for a violation of the minimum standard of treatment still remains high", holding that the conduct of the host State would have to be "manifestly arbitrary or unfair" in order to breach Article

[759] **CL-138**, *Glamis - Award*, ¶ 804: ("governments must compromise between the interests of competing parties and, if they were bound to please every constituent and address every harm with each piece of legislation, they would be bound and useless.").

[760] **CL-033**, *S.D. Myers – Partial Award*, ¶ 261.

[761] NAFTA tribunals since the FTC *Note of Interpretation* was issued in July 2001 have confirmed that the threshold for a violation of Article 1105 is high and requires an action that amounts to gross misconduct or manifest unfairness such that it breached the international minimum standard of treatment. *See* **CL-034**, *Mondev – Award*, ¶ 127: ("In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in light of all the available facts that the impugned decision was clearly improper and discreditable…."). The *ADF* Tribunal held that "something more than simple illegality or lack of authority under the domestic law of a State is necessary" to establish a violation of Article 1105(1) (**CL-072**, *ADF – Award*, ¶ 190). In summarizing the consideration of what constituted a breach of the minimum standard of treatment, the *Waste Management* Tribunal indicated that the standard would be breached by conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves lack of due process leading to an outcome which 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 the administrative process." (**CL-091**, *Waste Management II - Award*, ¶ 98).

[762] **CL-033**, *S.D. Myers - Partial Award*, ¶ 263.

1105.[763] In that case, mere "arbitrary" conduct of an administrative agency was insufficient to constitute a breach of Article 1105(1); rather, as that Tribunal explained, the government action must amount to a "gross denial of justice or manifest arbitrariness falling below accepted international standards" in order to breach the minimum standard of treatment.[764]

399. The *Glamis* Tribunal summarized the high threshold as follows:

> [A] violation of the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of Article 1105.[765]

400. Further, the *Cargill* Tribunal found that:

> the current customary international law standard of "fair and equitable treatment" at least reflects the adaptation of the agreed Neer standard to current conditions[…] If the conduct of the government toward the investment amounts to gross misconduct, manifest injustice or, in the classic words of the Neer claim, bad faith or willful neglect of duty, whatever the particular context the actions taken in regard to the investment, then such conduct will be a violation of the customary obligation of fair and equitable treatment.[766]

[763] **CL-194**, *Thunderbird – Final Award*, ¶¶ 194, 197: ("The Tribunal cannot find sufficient evidence on the record establishing that the SEGOB proceedings were arbitrary or unfair, *let alone as manifestly arbitrary or unfair as to violate the minimum standard of treatment.*") (emphasis added). It is also noteworthy that the Tribunal acknowledged that administrative proceedings "may have been affected by certain procedural irregularities". However, the Tribunal held that there were no "administrative irregularities that were grave enough to shock a sense of judicial propriety and thus give rise to a breach of the minimum standard of treatment." (¶ 200).

[764] **CL-194**, *Thunderbird – Final Award*, ¶ 194.

[765] **CL-138**, *Glamis – Award*, ¶ 627 (emphasis added).

[766] **RL-045**, *Cargill* – Award, ¶ 286 (emphasis added). Notwithstanding the clear and consistently held view of NAFTA tribunals that there is a threshold for a breach of the minimum standard of treatment, the Claimants attempt to dispense with a threshold, and in particular the *Neer* standard, by claiming that "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

401. Finally, most recently the Tribunal in *Mobil v. Canada* had the opportunity to discuss the applicable standard in relation to Article 1105.[767] It noted that:

> Article 1105 may protect an investor from changes that give rise to an unstable legal and business environment, but only if those changes may be characterized as arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard. In a complex international and domestic environment, there is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor. Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made. Governments change, policies changes and rules change.[768]

402. The use by all of these tribunals of adjectives such as "*egregious*," "*shocking*," "*gross*," "*blatant*," "*manifest*," "*complete*," and "*wilful*" is no accident. All recognized the extremely high threshold for establishing a violation of Article 1105(1). All recognized the high level of deference to be accorded to domestic authorities in governing affairs within their own borders. All recognized the fact that Article 1105 does not prevent a government from adapting regulatory regimes in order to take into account new policies and needs.

E. The Claimant Has Failed to Prove a Breach to Article 1105

1. The Challenged Measures of the Government of Ontario Did Not Violate Article 1105

403. The Claimant's arguments, which are organized under 11 different headings, essentially identify three measures of the Government of Ontario that allegedly breach

standards, regardless of *how far* short that measure may be from those standards." *See* Claimant's Memorial, ¶ 422.

[767] **CL-168**, *Mobil Investments Canada, Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶¶ 152-153 ("*Mobil – Decision*").

[768] **CL-168**, *Mobil - Decision*, ¶ 153.

NAFTA Article 1105: (1) the reservation of 500 MW of transmission capacity in the Bruce Region for the Korean Consortium; (2) the decision as how to allocate the capacity made available by the Bruce to Milton Line; and (3) the decision not to run an ECT. None of these measures taken on their own, nor in combination, constitute a breach of NAFTA 1105.

(a) The Reservation of 500 MW of Transmission Capacity in the Bruce Region for the Korean Consortium Did Not Violate Article 1105

404. The Claimant alleges that the Minister of Energy's direction to the OPA to reserve 500 MW of capacity in the Bruce region for the Korean Consortium violates Article 1105 because it: (1) was politically motivated, "in accordance with the Premier's Office's wishes";[769] (2) was done "without tying the planning or implementation of these projects in any way to the FIT process";[770] and (3) was a "behind-the-scenes effort that undermined the FIT Program, and prevented it from being administered honestly, fairly, with transparency in good faith"[771] by "secretly reserv[ing] capacity for the Korean Consortium in the Bruce region".[772]

405. These arguments are meritless. The set-aside of the 500 MW of capacity in the Bruce region for the Korean Consortium was done pursuant to the Government of Ontario's obligations under the GEIA.[773] In the GEIA, the Korean Consortium committed to investments in Ontario valued at $7 billion and expected to create approximately 16,000 green energy jobs.[774] In exchange for that economic commitment, the Government of Ontario agreed to, among other things, reserve certain amounts of

[769] Claimant's Memorial, ¶ 713.

[770] Claimant's Memorial, ¶ 714.

[771] Claimant's Memorial, ¶ 763.

[772] Claimant's Memorial, ¶ 767.

[773] **C-0322**, GEIA, s. 3.1, 3.2, Recitals; RWS-Lo, ¶ 25.

[774] RWS-Lo, ¶¶ 23-24, 26; **R-076**, Ministry of Energy, Archived Backgrounder, "Ontario Delivers $7 Billion Green Investment" (Jan. 21, 2010). Available at: http://news.ontario.ca/mei/en/2010/01/backgrounder-20100121.html.

transmission capacity for the Korean Consortium, provided that it was meeting its targets.[775] In the fall of 2010, the Korean Consortium hit certain of those investment targets, and as a result, it had the right to 500 MW of transmission capacity at the connection points of its choosing.[776] It indicated that it wanted those connection points to be in the Bruce region since this was where the Korean Consortium had identified desirable connection points.[777] Accordingly, Ontario was contractually obliged to reserve this capacity for the Korean Consortium.

406. While it is true that the overall transmission capacity available in the Bruce region was affected by the reservation of 500 MW for the Korean Consortium, doing so was not a violation of customary international law. There is nothing manifestly arbitrary, grossly unjust, egregious or shocking about a government entering into an investment agreement in which it accords certain advantages to a particular investor in exchange for certain investment commitments by that investor. Governments all over the world enter into such agreements all the time and to suggest that each time one does so it violates customary international law is baseless.

407. Indeed, as noted above, a governments' ability to enter into investment agreements and provide favourable treatment to certain investors as a result was recognized by the Tribunal in *Paushok*.[778] In that arbitration, the claimant alleged unfair treatment because its competitor, Boroo Gold, had been able to successfully negotiate a stability agreement with Mongolia, which granted it certain tax benefits.[779] The Tribunal rejected the claim. As that Tribunal confirmed, it is a matter of policy for governments to decide if they wish to enter into investment agreements.[780] The fact that the claimant did

[775] RWS-Lo, ¶ 25; **C-0322**, GEIA, s. 3.1, 3.2.

[776] **C-0119**, Letter (Direction) from Brad Duguid, Minister of Energy to Colin Andersen, Ontario Power Authority (Sep. 17, 2010).

[777] *Ibid*; **C-0079**, Letter (Direction) from Brad Duguid, Minister of Energy to Colin Andersen, Ontario Power Authority (Apr. 1, 2010).

[778] **RL-065**, *Paushok*, ¶¶ 475-476 .

[779] *Ibid*, ¶¶ 475-476.

[780] *Ibid*, ¶ 476.

not receive the same tax benefits as Boroo Gold did not constitute manifestly unfair treatment.

408. Further, while not ultimately relevant because of a government's discretion to enter into investment agreements as it sees fit, the Claimant's allegation that this was a secret agreement intended to undermine the FIT Program[781] is false. Indeed, the very evidence the Claimant uses to support this allegation is a publicly available direction.[782] The fact that an agreement was being negotiated with the Korean Consortium had been announced on September 26, 2009, months before the Claimant even invested in Canada.[783] And, the fact that the Government of Ontario was reserving transmission capacity as a priority for the Korean Consortium was announced on the same date that the GEIA was signed, January 21, 2010, a year and a half before the Bruce to Milton allocation process took place.[784] Finally, the fact that 500 MW was being reserved in the Bruce region for the Korean Consortium pursuant to the GEIA was announced September 17, 2010, months before the Bruce to Milton allocation process was developed.[785] Finally, as explained by Sue Lo, far from seeking to undermine the FIT Program, the GEIA was entered into in order to develop the manufacturing industry necessary to support FIT applicants.[786]

[781] Claimant's Memorial, ¶ 767.

[782] See Claimant's Memorial, fn. 873 citing **C-0119**, Letter (Direction) from Brad Duguid, Minister of Energy to Colin Andersen, Ontario Power Authority (Sep. 17, 2010).

[783] **R-068**, Ministry of Energy Archived News Release, "Statement from the Minister of Energy and Infrastructure and Samsung C&T Corporation" (Sep. 26, 2009). Available at: www.news.ontario.ca/mei/en/2009/09/statement-from-the-minister-of-energy-and-infrastructure-and-samsung-c-t-corporation.html. The Claimant made its first investments in Canada on November 17, 2009 when both the TTD Wind Project ULC and Arran Wind Project ULC were incorporated.

[784] **R-076**, Ministry of Energy, Archived Backgrounder, "Ontario Delivers $7 Billion Green Investment" (Jan. 21, 2010).

[785] **C-0119**, Letter (Direction) from Brad Duguid, Minister of Energy to Colin Andersen, Ontario Power Authority (Sep. 17, 2010)

[786] RWS-Lo, ¶ 28.

(b) The Decision with respect to How to Allocate the Capacity in the Bruce Region Did Not Violate Article 1105

409. Under numerous separate headings, the Claimant alleges that the Minister of Energy's June 3, 2011 Direction to the OPA with respect to the allocation of the new Bruce to Milton capacity in the Bruce and West of London regions violates Article 1105.[787] In particular, the Claimant alleges that the June 3, 2011 Direction was a "continuous, arbitrary and unexpected" change to the FIT Rules evidenced by a "lack of stability in the regulatory competition"[788] and that the "Rules change significantly departed from the procedure previously established".[789] These claims have no merit.

410. First, as noted above, even if the FIT Program did change and evolve as time went on in a way that ultimately affected the Claimant, this is not a violation of Article 1105. As the Tribunal in *Mobil* made clear, while Article 1105 "may protect an investor from changes that give rise to an unstable legal and business environment" it only does so "if those changes may be characterized as arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard".[790] Article 1105 does not prevent a government from "changing the regulatory environment to take account of new policies and needs" as it "is not, and was never intended to amount to, a guarantee against regulatory change".[791] To the extent that the June 3, 2011 Direction is viewed as a change in the FIT Rules, as explained by Sue Lo, it was done for legitimate policy reasons to take into account changes in the policy needs and goals of the government.[792]

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[787] Claimant's Memorial, Part Four - IV(i) – Unexpected and Arbitrary Changes to the FIT Rules; Part Four - IV(ii) – NextEra influenced changes to the FIT Rules; Part Four - IV(ix) – The MOE and the OPA failed to give reasons and explanations of the FIT Ranking to the Investor.

[788] Claimant's Memorial, ¶ 688.

[789] Claimant's Memorial, ¶ 722.

[790] **CL-168**, *Mobil - Decision*, ¶153.

[791] *Ibid*.

[792] RWS-Lo, ¶ 42; RWS-Cronkwright, ¶ 16; **C-0414**, Ontario's Long-Term Energy Plan, pp. 8, 13-15, 37. See *supra* ¶¶ 192-196.

411. Second, the Claimant's allegation that the June 3, 2011 Direction was somehow an unexpected change in the FIT Rules is baseless. As explained below, the June 3, 2011 Direction and the process used to allocate the Bruce to Milton capacity was not materially different than the process that had been publicly discussed by the OPA since the initiation of the FIT Program, nor was it intended to favour any particular proponent.

(i) The Bruce to Milton Allocation Process Was Consistent with the Approach that had been Publicly Discussed by the OPA since the Beginning of the FIT Program

412. The FIT Rules had originally contemplated the running of an ECT to determine economic ways in which to maximize the amount of renewable generation that could be accommodated on the electricity system.[793] In this regard, the additional capacity in the Bruce and West of London regions created by the Bruce to Milton Line was originally planned to be allocated through an ECT.[794] While a province-wide ECT was not run, with respect to proponents in the Bruce and West of London regions, such as the Claimant, there were no material differences between an ECT and the Bruce to Milton allocation process created by the June 3, 2011 Direction. Indeed, as confirmed by Sue Lo, Shawn Cronkwright and Bob Chow, the June 3, 2011 Direction was specifically crafted to create a regional ECT-like process so as to respect the expectations of the investors in the affected regions.[795]

413. The Claimant seems to focus its complaint particularly on the fact that the direction "enable[ed] 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".[796] The Claimant admits that connection point changes were always going to be a

[793] RWS-Chow, ¶ 26; RWS-Lo, ¶ 39; **R-003**, FIT Program Rules, v. 1.2, s. 5.4.

[794] **C-0073**, Ontario Power Authority, Priority ranking for First Round FIT Contracts (Dec. 21, 2010); RWS-Chow, ¶ 25; RWS-Cronkwright, ¶ 15; RWS-Lo, ¶ 46.

[795] RWS-Chow, ¶ 41; RWS-Cronkwright, ¶ 17; RWS-Lo, ¶ 46.

[796] Claimant's Memorial, ¶ 698.

part of the Bruce to Milton allocation process.[797] However, it argues that prior to the June 3, 2011 Direction, such changes would not have been permitted from one region to another.[798] This is false.

414. In support of this allegation, the Claimant cites a May 19, 2010 OPA presentation, which, according to the Claimant, makes clear that connection changes would only be "allowed within a region, not between regions".[799] The presentation makes no such statement. In fact, in the eight times the presentation refers to the option to change connection points it never once limits this based on transmission region.[800] It does not so much as even insinuate that connection point changes would be so restricted; nor does the word "region" ever appear in the 97 page presentation.[801]

415. The fact is that it had always been contemplated that FIT applicants would be able to change the connection point that they originally indicated in their FIT Application once they had a chance to see the FIT priority rankings and the updated TAT tables.[802] There were never going to be regional limits on the changes that would be permitted.[803] For the Claimant to allege otherwise is nothing but pure fiction. As Bob Chow confirms in his witness statement, "[a]t no time has the OPA ever expressed any limitations on a proponent electing to change its connection point during the ECT to connect in a different electrical region".[804] This was because:

[797] Claimant's Memorial, ¶¶ 700-701.

[798] Claimant's Memorial, ¶¶ 700 and 722.

[799] Claimant's Memorial, ¶ 700.

[800] **C-0138**, OPA Presentation, "The Economic Connection Test – Approach, Metrics and Process", slides 39, 46, 48, and 97.

[801] **C-0138**, OPA Presentation, "The Economic Connection Test – Approach, Metrics and Process".

[802] RWS-Chow, ¶¶ 27, 29; **C-0034**, OPA Presentation, "The Economic Connection Test".

[803] RWS-Chow, ¶ 30.

[804] *Ibid*.

> If an applicant was close to the border of two regions, it would make no sense to prohibit it from changing its connection to go one way merely because of a line drawn by the OPA solely for planning purposes.[805]

416. The Claimant also complains that the June 3, 2011 Direction allowed a proponent that previously asked to be enabler requested to choose a specific connection point.[806] According to the Claimant, the FIT Rules "never intended projects originally identified as enabler requested to request a connection point".[807] This is also absolutely false. There is nothing in the FIT Rules that restricted enabler requested proponents from selecting a connection point during the connection point change window as this had always been contemplated.[808] As explained by Bob Chow, one of the purposes of allowing FIT applicants to request a connection point change was to provide enabler requested projects with the opportunity to select a connection point based on: (1) the location of other projects (i.e. connection availability); and (2) an assessment of the costs associated with connecting to the transmission grid (i.e. "generator paid upgrades").[809]

417. The lack of such restrictions on connection point changes is also confirmed by contemporaneous documents with respect to other FIT applicants and organizations, including some of which the Claimant was a member. These documents demonstrate that it was understood that changes in connection points would be permitted. As Patricia Lightburn, an OPA employee, explained in a May 18, 2011 email sent to Bob Chow, Jim MacDougall and Tracy Garner of the OPA, in response to the possibility of a change in connection point not being part of the June 3, 2011 Direction:

> I am concerned about those projects that border two regions and chose a connection point in the first round outside of the Bruce area specifically because they knew Bruce was at 0 capacity, with the intention of changing to Bruce prior to ECT.

[805] *Ibid*.

[806] Claimant's Memorial, ¶ 722.

[807] *Ibid*.

[808] RWS-Chow, ¶ 27; **R-003**, FIT Rules, v. 1.2, s. 5.2(b), 3.1(d), and 5.4.

[809] RWS Chow, ¶¶ 22, 23, and 24.

> I know that I reviewed at least a couple applications like this, though I would not be able to tell you exactly who.[810]

418. Further, according to a letter to Minister of Energy Brad Duguid from CanWEA:

> [D]evelopers were told by the OPA on numerous occasions that the opportunity would exist to change their point of interconnections before the running of the Economic Connection Test (ECT) and the awarding of contracts. We are asking that the OPA follow the process and provide this opportunity.[811]

419. The Claimant is a member of CanWEA, and its promoter, Leader Resources, wrote a follow-up letter in response to the CanWEA letter to the Minister, which disagreed with CanWEA's request to provide the opportunity for a connection point change.[812] The letter asks the Minister "to stay the course to avoid further delay" but it does not contest CanWEA's assertion that the OPA told developers on numerous occasions that a change window would open.[813]

420. Finally, despite the fact that it now argues that the connection point change window was a process that "did not follow Mesa's expectations",[814] the Claimant's own documents evidence that it was fully aware that the Bruce to Milton capacity would be available to applicants outside of the Bruce region via a connection change point window. In a press release dated on December 23, 2010, the Claimant acknowledged that it was expecting that the transmission capacity on the Bruce to Milton Line would be made available to "*all* projects in the western or (sic) region of Ontario".[815] It is inconceivable

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[810] **R-111**, Email from Patricia Lightburn, Ontario Power Authority to Jim MacDougall, Tracy Garner and Bob Chow, Ontario Power Authority (May 18, 2011).

[811] **R-113**, Letter from Robert Hornung, President of CanWEA, to the Honourable Brad Duguid, Minister of Energy (May 27, 2011).

[812] **R-114**, Letter from Charles Edey, Leader Resources to Brad Duguid, Minister of Energy (May 30, 2011).

[813] *Ibid*.

[814] Claimant's Memorial, ¶ 689.

[815] **R-100**, Businesswire Press Release, "Mesa, AWA's Wind Energy Projects Rank High on Canadian Priority List" (Dec. 23, 2010) (emphasis added). Available at: http://www.businesswire.com/news/home/20101223005664/en/AWA%E2%80%99s-Wind-Energy-Projects-Rank-High-Canadian#.UvFxfmJdWSo.

that by "western region of Ontario" the Claimant meant only the Bruce region. Thus, its own press release demonstrates that the Claimant was fully aware that the Bruce to Milton capacity was not going to be reserved solely for those projects that had initially indicated a connection point in the Bruce region.

(ii) The Bruce to Milton Allocation Process Was Not Developed to Favour Any Particular Proponent

421. The Claimant alleges that the June 3, 2011 Direction, and the accompanying changes in the FIT Rules, "systematically benefited" NextEra, and were in fact "specifically designed with NextEra in mind".[816] This is untrue. As Sue Lo explains "[o]ther than wanting the most shovel-ready projects, the Government of Ontario had no particular preference as to which developers would be awarded contracts as long as its policy goals were being met".[817]

422. The Claimant's only evidence of the conspiracy it alleges is the fact that meetings took place between NextEra and government representatives.[818] However, the mere fact that meetings occurred is not a reason for the Tribunal to assume some sort of conspiracy. In fact, both the Ministry of Energy and the OPA regularly had meetings with numerous FIT applicants throughout the relevant period.[819] As stated by Sue Lo, "if someone requested a meeting, it was part of my job to meet with them".[820] She explains that she met with hundreds of proponents.[821] NextEra is neither unique nor unusual in this regard.[822] And as Sue Lo confirms, FIT applicants were not provided with any special treatment during these meetings: "[a]ny information provided was publicly available"[823]

[816] See, for example, Claimant's Memorial, ¶¶ 688, 697, 719, and 721.

[817] RWS-Lo, ¶¶ 14, 54.

[818] Claimant's Memorial, ¶¶ 721, 725, and 726.

[819] See *supra*, ¶¶ 206-213; RWS-Lo, ¶¶ 53-54; RWS-Chow, ¶¶ 49-59; RWS-MacDougall, ¶¶ 30-49.

[820] RWS-Lo, ¶ 53.

[821] RWS-Lo, ¶¶ 53, 57.

[822] RWS-Lo, ¶¶ 53-54; RWS-Chow, ¶¶ 49-59; RWS-MacDougall, ¶¶ 30-49.

[823] RWS-Lo, ¶ 54.

and "developers were never given preferential access to information about the Bruce to Milton allocation process such as when it would occur or what it would entail".[824] The same is true for meetings with the OPA.[825]

423. The Claimant has presented no actual evidence in support of its allegations. Indeed, it has no real evidence that NextEra was given any sort of advance information that gave them an unfair advantage or that the Government of Ontario or OPA discussed ways in which their projects would most benefit. For example, as support for its allegation that "the Minister of Energy's Office took explicit steps to ensure the process was being executed to the benefit of NextEra", the Claimant cites a meeting note asking for the Minister to be prepared to contextualize next steps for the company.[826] It also refers to a briefing note, which sets out how 'enabler requested' projects would be able to request a connection point.[827] This is hardly evidence that demonstrates discriminatory intent or favouritism.

424. Similarly, the Claimant alleges that NextEra "gained assistance through the Ontario Premier's office" which expressed "its political preferences",[828] however, the email that the Claimant cites in support of its allegation simply notes the Premier's preference to speed up the contract award process and for it to include a connection point amendment window.[829] These so-called "political" preferences demonstrate that the Minister's office was simply interested in a fair and efficient outcome. They do not in

[824] RWS-Lo, ¶¶ 54-55.

[825] RWS-Chow, ¶¶ 49-59; RWS-MacDougall, ¶¶ 30-49.

[826] Claimant's Memorial, ¶ 721.

[827] **C-0172**, Ministry of Energy Briefing Note, "Bruce to Milton Contract Awards" (Jun. 15, 2011); Claimant's Memorial, ¶ 721.

[828] Claimant's Memorial, ¶ 723.

[829] **C-0083**, Email from Sue Lo, Ministry of Energy to Pearl Ing and Sunita Chander, Ministry of Energy (May 12, 2011). In contrast, in an email to Sue Lo dated May 11, 2011, Phil Dewan from Counsel Public Affairs reiterated that BxM process had not been decided. See **C-0090**, Email from Sue Lo, Ministry of Energy to Phil Dewan, Counsel Public Affairs (May 12, 2011).

any way evidence "a patent abuse of governmental and regulatory authority", as alleged by the Claimant.[830]

425. Finally, perhaps in recognition of the absence of evidence, the Claimant asks that the Tribunal simply assume that NextEra was given some inside information on the basis that it was able to change its connection points during the 5-day window established by the June 3, 2011 Direction.[831] The Claimant suggests that the changes that NextEra made were somehow so significant that it simply must have had advance notice that the window was upcoming.[832] In asking the Tribunal to draw this inference, without any evidence to support it, the Claimant ignores the fact that every FIT applicant had been aware that a connection point change window would be part of allocating the Bruce to Milton allocation process for months.[833] Further, they had been in possession of the FIT provincial priority ranking, which indicated where their projects were in terms of priority in the Province—as well as the connection points of every project—since December 21, 2010.[834] This was all the information that proponents would have needed to determine whether or not to attempt to change their connection point.[835]

426. Indeed, in November 2010, Ortech Power, a consulting firm in Ontario similar to Leader Resources, had publicly advised that "the number of affected ECT projects are significant and the time window will be limited. ORTECH advises clients with ECT

[830] Claimant's Memorial, ¶ 723.

[831] Claimant's Memorial, ¶¶ 725-726.

[832] *Ibid*.

[833] See *supra* ¶¶ 410-418.

[834] **C-0405**, Ontario Power Authority website excerpt, "Priority ranking for first-round FIT Contracts posted", (Dec. 21, 2010). Available at: http://fit.powerauthority.on.ca/december-21-2010-program-update; **C-0073**, Ontario Power Authority, "Priority ranking for first-round FIT Contracts", (Dec. 21, 2010). Available at: http://fit.powerauthority.on.ca/Storage/11184_Launch_Project_Information_-_Dec_21_2010.pdf.

[835] RWS-Chow, ¶¶ 29-33.

projects that would like assistance with the connection review to initiate the process early".[836]

(c) The Decision Not to Run an ECT Did Not Violate Article 1105

427. Under numerous subheadings, the Claimant alleges that the decision not to run a province-wide ECT violated Article 1105.[837] In particular, the Claimant alleges that "[i]n 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".[838] It further argues that "[t]he 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, the OPA abused its authority, and failed its basic obligation to act with Mesa in good faith".[839]

428. In arguing that such a change violates Article 1105, the Claimant confuses the minimum standard of treatment at customary international law with a guarantee that the FIT Program would never change. This ignores the fact that the FIT Rules themselves clearly provided that they were subject to change, and that they would be reviewed periodically.[840] It also ignores the fact that, as explained above, Article 1105 only protects against "changes [that] may be characterized with the customary international law standard".[841] As the Tribunal in *Teco v. Guatemala* recently pointed out:

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[836] **R-098**, Ortech Newsletter "HEADS UP FOR ONTARIO ECT PROJECTS" (Nov. 2010). Available at: http://www.docstoc.com/docs/63529996/HEADS-UP-FOR-ONTARIO-ECT-PROJECTS.

[837] Claimant's Memorial, ¶¶ 735-762 (Part 4, IV(iv) – Failing to conduct and Economic Connection Test as required by the FIT Rules; Part 4, IV(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; Part 4, IV(vi) – The Failure to conduct an ECT prior to the Bruce to Milton capacity allocation process caused Mesa Power to lose contract awards).

[838] Claimant's Memorial, ¶ 754.

[839] Claimant's Memorial, ¶ 762.

[840] **R-003**, FIT Program Rules, v. 1.2, s. 1.1, 10; RWS-Lo, ¶ 18.

[841] **CL-168**, *Mobil – Decision*, ¶ 153.

> In the absence of a stabilization clause, it is perfectly acceptable that the State amends the relevant laws and regulations as appropriate. It is only if a change to the regulatory framework is made in bad faith or with the intent to deprive the investor of the benefits of its investment that it could entail the State's international responsibility.[842]

429. There is no doubt that the FIT Program did originally contemplate the running of an ECT in order to determine whether and where to build out further transmission capacity for the FIT Program.[843] However, by 2011, the number of FIT applications and mega-wattage offered had far surpassed expectations and the rate of attrition had also proved lower than expected.[844] As such, the Government needed to slow date the rate of its procurement of renewable energy.[845] At the same time, there had been a decrease in the demand for electricity because of the continued economic recession and the success of conservation efforts.[846] As a result, from the critical perspective of balancing supply and demand, the system had all the renewable energy it needed.[847]

430. This was coupled with the fact that a running of the ECT would have led to the procurement of additional generation capacity at the prevailing FIT prices.[848] The impact of these FIT prices on the overall cost of electricity to ratepayers had been significantly higher than forecast, and that impact would have been even greater had the ECT been run.[849]

431. All of these factors led the Government of Ontario to change its policy with respect to the ECT. The Government recognized that running it was no longer desirable

[842] **RL-071**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23) Award, 19 December 2013, ¶ 629 (footnotes omitted).

[843] **C-0258**, FIT Program Rules, v. 1.1, s. 5.4.

[844] RWS-Lo, ¶¶ 40, 35 and 36.

[845] RWS-Lo, ¶¶ 35-36.

[846] RWS-Lo, ¶ 34.

[847] RWS-Lo, ¶ 38.

[848] RWS-Lo, ¶¶ 37-40.

[849] RWS-Lo, ¶¶ 37-40.

from a transmission, policy or economic perspective.[850] In short, the decision not to run the ECT was neither manifestly arbitrary, grossly unfair nor discriminatory. It was a legitimate change based on wholly reasonable and rational policy and economic considerations.[851] The decision of the Government of Ontario not to run the ECT is not the sort of bad faith, arbitrary or grossly unfair change that could constitute a breach of the customary international law minimum standard of treatment.

2. Even If Attributable to Canada, the OPA's Actions Did Not Violate Article 1105

432. The Claimant alleges that the OPA violated Article 1105 through its: (1) ranking of the FIT Applications;[852] (2) management of the Bruce to Milton allocation process;[853] and (3) refusal to discuss the Claimant's rankings with the Claimant.[854] As explained above, these actions of the OPA were not carried out in the exercise of "governmental authority".[855] As a result, pursuant to the *lex specialis* created by Article 1503(2), these actions are not subject to Article 1105.[856] However, even assuming that they were, the Claimant's arguments are without merit.

(a) The OPA's Ranking of the Claimant's FIT Applications Did Not Violate Article 1105

433. The Claimant alleges that the OPA's ranking of its FIT Applications was unfair[857] and arbitrary.[858] These allegations are baseless. As audited and confirmed by the independent fairness monitor retained by the OPA, the OPA carried out a fair and

[850] RWS-Lo, ¶ 46; RWS-Chow, ¶¶ 37, 41; RWS-Cronkwright, ¶¶ 16-17.

[851] RWS-Lo, ¶¶ 37-40, and 46; RWS-Chow, ¶ 41; RWS-Cronkwright, ¶¶ 16-17.

[852] Claimant's Memorial, ¶¶ 793-800, 801-806.

[853] Claimant's Memorial, ¶¶ 727-734.

[854] Claimant's Memorial, ¶¶ 783-792.

[855] See *supra* Jurisdiction, Part IV(B) – The Claimant Lacks Jurisdiction to Consider the Challenged Acts of the OPA, Hydro One and the IESO.

[856] See *supra*, ¶ 290.

[857] Claimant's Memorial, ¶¶ 686(g), 793-800.

[858] Claimant's Memorial, ¶¶ 801-806.

consistent evaluation of the launch period applications.[859] Moreover, the FIT priority ranking of the TTD and Arran wind projects was appropriate given the poor quality of the information provided in those applications.

(i) The OPA's Review Process for Launch Period FIT Applications was Fair and Reasonable

434. As described above, when the OPA opened the FIT Program on October 1, 2009, it was faced with a flood of launch period applications.[860] In order to process the nearly 500 applications it received, and to rank them in accordance with the FIT Rules, the OPA developed a special process.[861] This process differed in certain respects from that which the OPA would have used in a smaller procurement process.[862] However, this does not make it wrongful. In all aspects, the process was open and fair, and ensured that all applications were treated equally.[863]

435. As previously described, to ensure that this was the case, the OPA hired an independent fairness monitor, LEI.[864] Contrary to the Claimant's baseless accusations that the OPA's ranking was unfair and arbitrary, LEI's contemporaneous audit of 72 of the applications evaluated by the OPA review team led them to the conclusion that "there were no discrepancies" between its review and the OPA's and that the "audit [could] be interpreted to reveal that the OPA performed a fair and consistent evaluation of the criteria requirements".[865] The Claimant has pointed to no evidence to contradict this independent conclusion reached by LEI.

[859] *Supra*, ¶ 161; **R-082**, London Economics Report, p. 15.

[860] *Supra*, ¶ 139. See also RWS-Duffy, ¶¶ 5, 14-15.

[861] **R-003**, FIT Program Rules, v. 1.2 s. 13(4).

[862] RWS-Duffy, ¶¶ 5 and 15.

[863] **R-082**, London Economics Report, p. 15.

[864] *Supra*, ¶¶ 145-147; RWS-Duffy, ¶¶ 52-55.

[865] **R-082**, London Economics Report, p. 15.

(ii) The Rankings for the TTD and Arran Wind Projects Were Appropriate

436. The ranking of FIT applicants was intended to fulfill the Government of Ontario's objective to procure the most shovel-ready projects.[866] Applications submitted during the initial 60-day launch period benefited from a special ranking regime based on the applicants' evidence of their projects' shovel-readiness.[867] As described above, an applicant could bid for up to four criteria in order to obtain an "earlier time stamp" and increase its ranking.[868] The Claimant bid for three of those criteria: Major Equipment Control, Prior Experience, and Financial Capacity.[869] It did not receive a single point for any of those criteria for a simple reason: in each instance, the Claimant failed to submit sufficient information as required under the FIT Rules.[870]

437. In certain instances, the applications for the TTD and Arran wind projects failed because of basic mistakes on part of the Claimant.[871] For example, instead of audited financial statements for the most recent year as clearly required in the FIT Rules,[872] the TTD and Arran FIT applications contained unaudited financial statements from the wrong fiscal year.[873] Similarly, the Claimant failed to provide the basic elements required to demonstrate prior experience.[874]

438. In other instances, the information submitted was simply inadequate as a matter of proof. In particular, in order to prove that the major equipment it controlled could meet the Ontario FIT Program's domestic content requirements, as required under the FIT

[866] RWS-Duffy, ¶ 9; *Supra*, ¶¶ 69-70; RWS-Lo, ¶¶ 54, 57.

[867] **R-003**, FIT Program Rules, v. 1.2, s. 13.

[868] *Supra*, ¶¶ 72-76 dealing with COD; RWS-Duffy, ¶¶ 10-11.

[869] RWS-Duffy, ¶ 40.

[870] RWS-Duffy, ¶¶ 40, 49; *Supra*, ¶ 155.

[871] RWS-Duffy, ¶¶ 49-50.

[872] RWS-Duffy, ¶ 49; *Supra*, ¶ 160.

[873] *Supra*, ¶ 160; RWS-Duffy, ¶ 49; **R-079**, OPA, Evaluation Criteria Checklist, "Criteria #4" Tab, criteria 2.1(d).

[874] *Supra*, ¶ 159; RWS-Duffy, ¶¶ 46-48.

Rules, the Claimant merely submitted a letter from GE.[875] However, that letter stated only that the turbines the Claimant had already purchased [redacted][876] The letter does not attach the contract to evidence its terms, does not mention the FIT Program or its domestic content requirements, and indeed does not even mention Ontario at all. There was no way that such a letter could be accepted as sufficient, especially in light of the fact that GE had submitted much more specific letters in support of other projects that expressly confirmed their ability to meet the FIT Program's requirement.[877]

439. As Richard Duffy explains, many of the failures of Mesa's projects were due to carelessness, and while it is "possible that Mesa's projects were better than they proved with the applications submitted, the OPA could only assess the applications received".[878]

(b) The OPA's Implementation of the Bruce to Milton Allocations Process Did Not Violate Article 1105

440. The Claimant alleges that the OPA's management of the connection point change window during the Bruce to Milton allocation process unfairly benefited NextEra to the detriment of Mesa.[879] Ultimately the only allegations of the Claimant with respect to the OPA's involvement in this process are that OPA staff met with NextEra in advance of the issuance of the June 3, 2011 Direction, and that they continued to meet with the OPA after the direction had been issued.[880]

[875] *Supra*, ¶¶ 156-158; RWS-Duffy, ¶¶ 41-45.

[876] *Supra*, ¶¶ 156-157; RWS-Duffy, ¶¶ 42-43. See also, Letter from GE Energy to Mesa Power Group, LLC, (Nov. 24, 2009) contained in **C-0364**, Twenty-Two Degrees Wind Project, FIT Application (Nov. 25. 2009), p. 103; Letter from GE Energy to Mesa Power Group, LLC, (Nov. 24, 2009) contained in **C-0365**, Arran Wind Project, FIT Application (Nov. 25, 2009), p. 104.

[877] **R-071**, Letter from Roslyn McMann, General Electric to Pim de Ridder, Premier Renewable Energy Ltd. (Skyway); RWS-Duffy, ¶ 44.

[878] RWS-Duffy, ¶ 50.

[879] See, for example, Claimant's Memorial, ¶¶ 696, 703, 732-733, 748, 776.

[880] Claimant's Memorial, ¶¶ 908-915.

441. The customary international law minimum standard of treatment does not prohibit the staff of a state enterprise from meeting with proponents. The Claimant has no evidence that NextEra was provided any non-public information by the OPA, and for the reasons described above with respect to the Ministry of Energy, there is no reason for the Tribunal to infer that they did.[881] Moreover, the OPA employees involved in these meetings have all confirmed that they did not provide any non-public information to NextEra during these meetings.[882]

442. For example, Bob Chow has explained:

> I am aware that I and others are alleged to have had some sort of "special relationship" with NextEra simply because we met with them on numerous occasions. This is false. I do not have a special relationship with NextEra or any other FIT applicants or proponents. […] The OPA never provided preferential treatment or inside information to any individual FIT proponent.[883]

443. Jim MacDougall has similarly explained:

> I am aware that the Claimant alleges otherwise, and in particular, it seems to be alleging that I gave confidential non-public information to Nextera Energy LLC ("NextEra") that benefited them by giving them advance notice of upcoming changes. This is absolutely false. I never provided any company non-public information regarding the FIT Program or any other procurement program of the OPA.[884]

444. The Claimant's attempts to take statements out of context and to misrepresent the very purpose of certain communications should be rejected by the Tribunal. The facts simply do not provide any basis to conclude that NextEra had any special treatment nor that it enjoyed any sort of special relationship with the OPA.

[881] *Supra*, ¶¶ 420-421.

[882] RWS-Chow, ¶¶ 49-59; RWS-MacDougall, ¶¶ 30-49.

[883] RWS-Chow, ¶ 59. See also ¶¶ 49-58.

[884] RWS-MacDougall, ¶ 36. See also, ¶¶ 37-49.

(c) The OPA's Decision Not to Explain the Rankings of the TTD and Arran Wind Projects to the Claimant Did Not Violate Article 1105

445. The Claimant submits that the OPA's refusal to disclose the scores for its TTD and Arran wind projects, as well as the reasons for such scores, 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".[885] The Claimant further alleges that the Ministry of Energy and OPA's failure to meet with the Claimant in order to explain its ranking also violates Article 1105.[886] These claims have no merit.

446. Indeed, the OPA has good reason to refuse to disclose the results of a procurement evaluation process, and often refuses to do so.[887] Providing results and feedback to one applicant but not others would not provide equal treatment to all applicants.[888] Thus, if the OPA is going to give feedback to any applicant, it has a policy of doing so for all applicants.[889] However, it is highly burdensome and time consuming for the OPA to provide individual feedback. For a program like the FIT Program, which received close to 500 applications, it was practically impossible to conduct such a process.[890]

447. It was for this reason that when, on June 17, 2011, Mr. Cronkwright replied to the Claimant's letter of May 20, 2011 he explained that "once the evaluation process has

[885] Claimant's Memorial, ¶¶ 772-782.

[886] Claimant's Memorial, ¶¶ 783-792.

[887] RWS-Cronkwright, ¶ 26. In a limited number of programs, the OPA has offered individual debriefs to participants. This was done when the number of applicants was sufficiently low so that it could be managed.

[888] RWS-Cronkwright, ¶ 26.

[889] RWS-Cronkwright, ¶ 26.

[890] RWS-Cronkwright, ¶¶ 26-27.

been completed, the results are kept strictly confidential".[891] Mr. Cronkwright again refused to meet with the Claimant on June 22, 2011 for this very same reason.[892]

448. While the Claimant may have been disappointed that the OPA would not meet with it so that it could lobby for a better result than it deserved, the OPA's refusal to do so is not a violation of the customary international law minimum standard of treatment. Indeed, the policy adopted by the OPA in this regard, which applied equally to all applicants, was the only way to ensure that all applicants were treated fairly and equally.

F. Conclusion

449. The Claimant's allegations that the measures of Ontario and the OPA in the design and implementation of the FIT Program and the GEIA violate the customary international law minimum standard of treatment are baseless. Far from being manifestly arbitrary, unjust or otherwise egregious, the decisions made and approaches taken by both were reasonable and appropriate responses to the situations that presented themselves. Article 1105 does not prevent a government from adapting regulatory programs as required, nor does it provide an investor with an insurance policy when it fails to obtain the results it desires due largely to its own errors.

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

I. Summary of Canada's Position

450. When the Claimant was formed in 2008,[893] one of its first moves was to make a USD $2 billion bet. It signed an agreement to purchase 667 wind turbines from GE[894] for

[891] **C-0195**, Letter from Shawn Cronkwright, Ontario Power Authority to Mark Ward, Mesa, Charles Edey, Leader Resources, and Michael Bernstein, Capstone Infrastructure, (Jun. 17, 2011).

[892] CWS-Robertson, ¶ 48; RWS-Cronkwright, ¶ 29; **R-120**, Email from Shawn Cronkwright, Ontario Power Authority to Chris Benedetti, Sussex Strategy (Jun. 22, 2011).

[893] Mesa Renewables LLC amended its name to Mesa Power Group LLC on July 11, 2008, **C-0117**, Certificate of Amendment of Mesa Renewables LLC (July 11, 2008). Mesa Renewables LLC was formed on May 20, 2008; **C-0039**, Limited Liability Company Agreement of Mesa Renewables LLC (May 20, 2008).

its Texas-based Pampa wind project. It gambled that it could make that project into the largest wind farm in the world despite having no regulatory approvals, no contracts for sale, and no experience at all as a wind producer. Before the FIT Program was even launched, that gamble had failed to pay off, and the Claimant was left with what amounted to a warehouse full of turbines and a huge bill.

451. In an apparent effort to partially mitigate the consequences of its failure, the Claimant shifted its focus to Ontario and the opportunities under the FIT Program.[895] Contrary to what the Claimant now seems to allege, the FIT Program did not guarantee that each and every applicant would be awarded a FIT Contract for whatever capacity it desired. Indeed, the FIT Program was not a blank cheque written to assist investors in recovering their losses for previous business failures. Neither is NAFTA.

452. And yet, that is how the Claimant is seeking to use it. The Claimant is asking this Tribunal to have the Government of Canada insure its losses of allegedly $653.002 million. As is shown below, even if the Tribunal finds that any of the measures in question here breached Canada's obligations under NAFTA, the Claimant is not entitled to recover the damages that it seeks. First, the Claimant has failed to establish that certain of the damages that it seeks were caused by any of the measures that it alleges breach Canada's obligations under NAFTA.[896] Second, the Claimant has failed to show, as required under Article 1116, that it suffered all of the damages that it seeks. Third, in seeking compensation for its alleged future losses, the Claimant is asking this Tribunal to engage in multiple layers of speculation in order to conclude that its unapproved, undeveloped and non-operating ventures would have come into successful operation. If

[894] **R-042,** Master Turbine Sale Agreement for the Sale of Power Generation Equipment and Related Services, between General Electric Company and Mesa Power LP [redacted]

[895] **C-0360**, North Bruce Wind Energy I, FIT Application (May 29, 2010); **C-0361**, North Bruce Wind Energy II, FIT Application (May 29, 2010); **C-0362**, Summerhill Wind Energy I, FIT Application (May 29, 2010); **C-0363**, Summerhill Wind Energy II, FIT Application (May 29, 2010); **C-0364**, Twenty-Two Degrees Wind Project, FIT Application (Nov. 25. 2009), p. 103 (bates 108000); **C-0365**, Arran Wind Project, FIT Application (Nov. 25, 2009), p. 104 (bates 109680).

[896] BRG Report, ¶¶ 178-191.

the Claimant is entitled to any damages, those damages should be equal to no more than its proportionate share of the sunk costs related to the TTD and Arran wind projects.[897]

II. The Alleged Breaches of NAFTA Did Not Cause Certain of the Damages Claimed by the Claimant

A. The Claimant Bears the Burden of Showing that the Alleged Breaches of NAFTA Caused it Harm

453. Article 1116(1) requires that the Claimant demonstrate that it "has incurred loss or damage, by reason of, or arising out of" a breach of NAFTA.[898] As explained by several NAFTA tribunals, this language requires a "sufficient causal link"[899] or an "adequate[] connect[ion]"[900] between the alleged breach of NAFTA and the loss sustained by the investor.

454. The Tribunal in *Biwater Gauff v. Tanzania* explained that causation in international investment law "comprises a number of different elements, including (inter alia) (a) a sufficient link between the wrongful act and the damage in question, and (b) a threshold beyond which damage, albeit linked to the wrongful act, is considered too indirect or remote".[901] The Commentary to Article 31 of the ILC's Articles describes the requirement of causation as follows:

> [R]eference may be made to losses 'attributable [to the wrongful act] as a proximate cause', or to damage which is 'too indirect, remote, and

[897] BRG Report, ¶ 235.

[898] NAFTA, Article 1116.

[899] **RL-069**, *S.D. Myers Inc. v. Canada* (UNCITRAL) Second Partial Award, 21 October 2002 ("*S.D. Myers - Second Partial Award*"), ¶ 140; *See also* **CL-092**, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, (ICSID Case No. ARB/05/22) Award, 24 July 2008 ("*Biwater - Award*"), ¶ 779: ("Compensation for any violation of the BIT, whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach of the BIT and the loss sustained by [the Enterprise].").

[900] **CL-040**, *Marvin Feldman v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Final Award, 16 December 2002, ¶ 194.

[901] **CL-092**, *Biwater - Award*, ¶ 785; **RL-048**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19) Award, 18 August 2008, ¶ 468 ("*Duke Energy – Award*").

> uncertain to be appraised', or to 'any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of' the wrongful act. Thus causality in fact is a necessary but not a sufficient condition of reparation. […] The notion of a sufficient causal link which is not too remote is embodied in the general requirement in Article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.[902]

455. As such, in order for the Claimant to be entitled to damages, it must prove specifically how each of its alleged losses was caused by one or more of the alleged breaches of NAFTA. The Claimant has not met this burden. The Claimant has alleged that it suffered $653.002 million as a result of Canada's breaches of Articles 1102, 1103, 1105, and 1106.[903] However, the Claimant fails to link any of its alleged harm to any specific alleged breach of the NAFTA.[904] In particular, by assessing damages attributed to breaches of Articles 1102, 1103 and 1105 together,[905] the Claimant has entirely failed to make a *prima facie* case of causation.

456. In its Memorial, the Claimant states that "damages for [breaches of Article 1102, 1103 or 1105] includes damages [for breach of Article1106]". It goes on to add that these two categories "are not additive, and that damages [for breach of Article 1106] would only be applicable if the Tribunal did not find a breach of Articles 1102, 1103 or 1105". However, Deloitte calculates the losses arising out of the alleged breach of Article 1106 solely based on the effects that it assumes having to meet the domestic content requirements would have had on the future revenue and expenses of the Claimant's wind projects. In short, despite the Claimant's claim in its Memorial, its own experts recognize that any losses arising out of the alleged violation of Article 1106 arise only if the Tribunal determines that the Claimant should have been awarded a FIT

[902] **CL-006**, *ILC Articles*, Article 31, Commentary(10), pp. 204–205 (citations omitted).

[903] Deloitte Report, ¶ 1.29.

[904] BRG Report, ¶¶ 102-130.

[905] Deloitte Report, ¶ 4.1, Schedule A. Canada notes that while damages alleged as a result of breaches of Article 1106 are separately assessed, they are claimed contingently on the alleged breach of Article 1102, 1103 or 1105.

Contract. Thus, as calculated by the Claimant's own expert, a finding of damages for Article 1106 is only possible if the Tribunal first finds a breach of Article 1102, 1103 or 1105. If the Tribunal finds that none of the challenged conduct violates those Articles, then Deloitte's own analysis appears to admit that the Claimant has not suffered damages for a beach of Article 1106.

457. It is not enough for the Claimant to simply identify alleged breaches, and then to identify alleged losses. NAFTA, and international law, requires more than this.

B. The Claimant has Failed to Prove that the Alleged Breaches Caused Any Damages with respect to its North Bruce and Summerhill Wind Projects

458. In its damages claim, the Claimant has included a request for $257.427 million in respect of the alleged sunk costs and future losses of the Summerhill and North Bruce wind projects.[906] However, as is shown below, when the proper approach to the consideration of damages is applied, it is clear that the Claimant has not proven that the losses it claims with respect to the North Bruce and Summerhill wind projects were caused by any of the alleged breaches. As BRG concludes, "[u]nder no scenario for individual or combined violations of NAFTA would there have been <u>any impact or harm</u> caused to Mesa Power's Summerhill and North Bruce Projects [because] without the alleged violations [they] would not have received FIT Contracts."[907]

1. The Claimant Has Not Proven that the 500 MW Set Aside for the Korean Consortium and the Decision to Allow Proponents to Change their Connection Points Caused Harm to the North Bruce and Summerhill Wind Projects

459. Because of the Claimant's failure to even attempt to link any of its alleged losses to any particular breach of the NAFTA, it is difficult to understand which of the alleged breaches allegedly led to harm to the North Bruce and Summerhill wind projects.[908] At least implicitly, the Claimant seems to admit that these alleged losses were not caused by

[906] BRG Report, Figure 2.

[907] BRG Report, ¶ 127.

[908] BRG Report, ¶ 109a.

the 500 MW set aside for the Korean Consortium, nor by the connection change window in the Bruce to Milton allocation process that allowed projects in the West of London region to change their connection points to the Bruce region. It could not reasonably have argued otherwise.

460. Summerhill consisted of two FIT applications for projects of 70 MW and 30 MW[909] and North Bruce consisted of two FIT applications for projects of 100 MW each.[910] The projects were provincially ranked – based solely on the time that the applications were received by the OPA – between 318 and 321.[911] In effect, these projects were ranked so low that even if there was an additional 500 MW of capacity made available only to FIT applicants who originally located their connection points in the Bruce region, they would not have received a contract.[912] Indeed, even in such a situation, for the Claimant's North Bruce and Summerhill wind projects to have received FIT Contracts, the Bruce to Milton Line would have had to have made available approximately 2,000 MW of capacity to renewable energy projects in the Bruce region alone – 750 MW more than it technically could.[913] This extra capacity simply did not exist. Hence, neither the set-aside for the Korean Consortium nor the Bruce to Milton allocation process caused any harm to the Claimant's North Bruce and Summerhill wind projects.[914]

2. The Claimant May Not Prove Causation by Relying on a Hypothetical World Which Could Not Exist in Reality

461. In an apparent recognition of the futility of the above arguments, the Claimant resorts to alleging that it should be able to recover losses for its Summerhill and North

[909] **C-0362**, Summerhill Wind Energy I, FIT Application (May 29, 2010), p. 2; **C-0363**, Summerhill Wind Energy II, FIT Application (May 29, 2010), p. 2.

[910] **C-0360**, North Bruce Wind Energy I, FIT Application (May 29, 2010), p. 2; **C-0361**, North Bruce Wind Energy II, FIT Application (May 29, 2010), p.2.

[911] **C-0233**, FIT CAR Priority Ranking, p. 1.

[912] BRG Report, Attachment IV, ¶ 39a.

[913] BRG Report, ¶¶ 38-39.

[914] BRG Report, ¶ 109a.

Bruce wind projects because, but for the alleged violations of NAFTA, it should have received the benefits granted to the Korean Consortium under the GEIA.[915] Therefore, it seems to be asserting that it should have been granted priority access to the Ontario transmission grid in the same way that the projects of the Korean Consortium were granted access to the grid pursuant to the GEIA.

462. In making this argument, the Claimant ignores the fact that the GEIA was an investment agreement entered into by the Korean Consortium and the Government of Ontario.[916] Under its terms, the Korean Consortium committed to establish and operate manufacturing facilities in Ontario for the manufacture of wind and solar generation equipment, employing thousands of people and supplying significant quantities of wind and solar electricity.[917] The investments that it had originally committed to making were valued at $7 billion.[918] In return, it was provided with amongst other things, priority access to 2,500 MW of Ontario's transmission grid.[919]

463. By seeking to recover damages related to the North Bruce and Summerhill wind projects, the Claimant is asking the Tribunal to find that the appropriate remedy for an alleged violation of Article 1103 is that the Claimant should be permitted to have access to the benefits of the GEIA without being saddled with any of the investment and manufacturing commitments in that agreement.[920] In particular, whereas the Korean Consortium had to earn its transmission priority for each phase of the GEIA,[921] the

[915] Deloitte Report, ¶ 4.18a. The Deloitte experts use as their first "key assumption" the following "The Projects obtained a FIT Contract as we have assumed Mesa Power would have been provided with the same treatment as the Korean Consortium" (BRG Report, ¶¶ 234, 236(e)).

[916] **C-0322**, GEIA; **R-076**, Ministry of Energy, Archived Backgrounder, "Ontario Delivers $7 Billion Green Investment" (Jan. 21, 2010).

[917] RWS-Lo, ¶¶ 24, 28; **C-0322**, GEIA, Art. 3.

[918] **R-076**, Ministry of Energy Archived Backgrounder, "Ontario Delivers $7 Billion Green Investment" (Jan. 21, 2010).

[919] RWS-Lo, ¶ 25.

[920] BRG Report, ¶¶ 33 and 183.

[921] RWS-Lo, ¶¶ 24-25; **C-0322**, GEIA, ss. 8.1, 8.3.

Claimant suggests that it should have been entitled to the same transmission priority without having to earn it.

464. If the Claimant is correct, then it is suggesting that the remedy for the alleged violation of Article 1103 requires that it be offered more favourable treatment than any other FIT applicants and even more favourable than the Korean Consortium, itself.[922] That is not what international law requires. For instance, as explained by the Tribunal in *Duke Energy*, which followed the seminal *Factory at Chorzów* case,[923] "any award should as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[924]

465. If the GEIA is in breach of Article 1103, and it is not, then the remedy for that breach would not be to give the benefits of that agreement without the corresponding obligations to only the Claimant. Indeed, extending to the Claimant the allegedly wrongful treatment is not an appropriate approach to a damages analysis. Rather, the remedy would be to consider the situation which would "in all probability [would] have existed"[925] if the GEIA had not existed – one in which no enterprise had priority access to Ontario's transmission grid (i.e. an analysis that corrects the alleged harm).

466. The only consequence of such a hypothetical as it relates to projects in the Bruce region is that the Korean Consortium would not have been entitled to a 500 MW set-aside of transmission capacity. As explained above, even if the Korean Consortium had not been granted a 500 MW set-aside in the Bruce region, the Summerhill and North Bruce wind projects still would not have received contracts.[926]

[922] BRG Report, ¶¶ 33 and 183.

[923] **CL-169**, Case *Concerning the Factory at Chorzòw* (*Germany* v. *Polish republic*) P.C.I.J., 13 September 1928, (Ser.A) No. 17, p. 47.

[924] **RL-048**, *Duke Energy - Award*, ¶ 468 (emphasis added).

[925] *Ibid*.

[926] See BRG Report, Attachment IV.

467. In sum, the Claimant should not be permitted to trump up its claim for damages by resorting to a hypothetical "but for" world that is improbable, self-serving and would result in it being offered more favourable treatment than any of its competitors.[927] The Claimant has not proven that any wrong-doing by Canada is the proximate cause of any loss to the Summerhill and North Bruce wind projects and thus, its claim of $257.427 million in alleged past and future losses related to these projects must be rejected.

C. The Claimant Has Not Proven that the Failure to Run an ECT Caused it Harm

468. The Claimant also alleges that the failure to run an ECT caused it harm. However, again, the Claimant's failure to demonstrate a link between the alleged harm suffered with any alleged breach makes it difficult to understand the source of its claim.[928] In its arguments on Article 1105, the Claimant alleged that:

> [I]f 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.[929]

469. To the extent that the Claimant is suggesting that the failure to run the ECT was the "but for" cause of the Claimant's projects not receiving a contract, it has entirely failed to meet its burden. To suggest that its projects would have received a FIT Contract had the ECT been run is complete and utter speculation. Indeed, contrary to the Claimant's assertion, running an ECT would not have guaranteed that any particular project would receive a contract. As Bob Chow has explained:

> The running of an ECT would not guarantee a FIT contract to an applicant. In the course of the ECT, the OPA would examine what could be done in a transmission region to make a connection economical. Only once an economic expansion of the transmission system had been identified, received the required regulatory approvals, and advanced

[927] BRG Report, ¶¶ 33 and 183.

[928] BRG Report, ¶¶ 102-104.

[929] Claimant's Memorial, ¶ 758.

> sufficiently such that the OPA was reasonably certain that the upgrades will be completed by a project's milestone date for commercial operation, would an applicant be awarded a contract pursuant to an ECT and placed in the FIT Production Line. Otherwise, the application would be placed in the FIT Reserve Line and await the next ECT process.[930]

470. The Claimant has failed to establish that any additional transmission capacity in the Bruce region would have been economical to develop, particularly in light of the circumstances that led to the cancellation of the ECT – i.e. sufficient supply, decreasing demand, and existing ratepayer burden.[931] Furthermore, there is no guarantee that a transmission expansion would have received the required regulatory approvals, or that any expansion project would have been completed in time for the milestone commercial operation date of either the North Bruce and Summerhill wind projects.[932]

471. In short, the Claimant has offered no evidence that the ECT would actually have resulted in any of its projects receiving a contract, and hence it has failed to prove that the decision not to run the ECT at all was a "but for" cause of any of its alleged damages.

D. The Claimant Has Failed to Show that Any Losses Associated with the Cancellation of the Turbine Contract with GE Were Caused by the Alleged Breaches

472. The Claimant alleges that it should be awarded the $156.833 million in damages as compensation for the deposit that it forfeited under its MTSA with GE.[933] The Claimant argues that such compensation is appropriate because it had to forfeit its deposit in this contract as a result of wrongfully not being awarded FIT Contracts.[934] This is false. As is shown below, the Claimant entered into this contract long before the FIT Program even existed in Ontario, and it terminated it long after its FIT Applications were

[930] RWS-Chow, ¶ 36.

[931] RWS-Chow, ¶ 37; RWS-Lo, ¶ 40.

[932] BRG Report, ¶¶ 81, 149-151 and Attachment XI.

[933] BRG Report, ¶ 189; Deloitte Report, Sch. IA, fn. 6.

[934] Deloitte Report, ¶¶ 1.6, 4.1(a)(iv).

unsuccessful and it filed this claim. In short, none of the alleged breaches of NAFTA caused the Claimant to forfeit its deposit on this contract.

473. The Claimant entered into the MTSA with GE in [redacted] in order to obtain turbines for its Pampa wind project in Texas.[935] At the time the Claimant entered into the MTSA, the FIT Program had not even been announced in Ontario. Pursuant to the MTSA, the Claimant had to take delivery of the purchased turbines by a certain date,[936] and in order to guarantee its order the Claimant paid a non-refundable deposit to GE of USD $153,592,670.[937]

474. By the summer of 2009, before the FIT Program was even launched, the Pampa wind project had failed.[938] At that moment, the Claimant was at risk of forfeiting its entire deposit. Indeed, if the FIT Program had not come into existence, the Claimant would have been in the same position as it was when it was not awarded FIT Contracts in July 2011. In sum, the fact that this deposit was at risk had nothing to do with the FIT Program, which did not even require applicants to already own major equipment. To the contrary, the "but for" cause of the deposit being at risk was the Claimant's decision to gamble that it would be able to develop the Pampa wind project – that was a gamble that did not pay off.

475. Not only was the payment of the deposit, and its becoming at risk unrelated to the FIT Program, the proximate cause of the forfeiture of the deposit was also unrelated to Ontario's measures. In [redacted] the Claimant sought to repurpose its GE

[935] **R-042,** Master Turbine Sale Agreement for the Sale of Power Generation Equipment and Related Services, between General Electric Company and Mesa Power LP [redacted] BRG Report, 38 and 85a.

[936] **R-042,** Master Turbine Sale Agreement for the Sale of Power Generation Equipment and Related Services, between General Electric Company and Mesa Power LP [redacted] Article b. Scope of Supply; Projects; Purchase Orders, (b) Projects.

[937] **R-042,** Master Turbine Sale Agreement for the Sale of Power Generation Equipment and Related Services, between General Electric Company and Mesa Power LP [redacted] Attachment 3 Price, Payment and Termination Charges.

[938] **R-099,** Project No Project, "Pampa, Texas Wind Farm, T. Boone Pickens, Mesa Power, LP" Available at: http://www.projectnoproject.com/2010/12/pampa-texas-wind-farm-t-boone-pickens-mesa-power-lp-2/.

turbines for use at wind projects in Ontario and Minnesota.[939] When it did not obtain a FIT Contract on July 4, 2011,[940] it very quickly tried to repurpose these turbines again. After terminating the agreement for [redacted] of these 1.6xle turbines on [redacted] the Claimant entered into a second amended and restated version of the MTSA on [redacted][941] The Claimant was now seeking to use the turbines that it had committed to in [redacted] for another smaller project in Texas, as well as the project in Minnesota.[942] The deposit paid in [redacted] was retained by GE for this new version of the contract.[943]

476. Like all of the Claimant's projects, these new projects also never went into development.[944] And it was only at that point, in [redacted] that the Claimant fully terminated the MTSA.[945]

[939] **R-086**, WindPower Monthly, "T. Boone Pickens new Minnesota wind project hits resistance" (Apr. 16, 2010). Available at: http://www.windpowermonthly.com/article/997272/t-boone-pickens-new-minnesota-wind-project-hits-resistance.

[940] **C-0292**, Ontario Power Authority, "FIT Contract Offers for the Bruce-Milton Capacity Allocation Process" (Jul. 4, 2011).

[941] **R-126**, Second Amended and Restated Master Turbine Sales Agreement for the Sale of Power Generation Equipment and Related Services, between General Electric Company and Mesa Power Pampa LLC [redacted] **R-141**, Business Week, Bloomberg News, "Pickens Reviving Plans for Texas Wind Power at Smaller Scale" (Apr. 4, 2012). Available at: http://www.businessweek.com/news/2012-04-04/pickens-reviving-plans-for-texas-wind-projects-at-smaller-scale; **R-085**, "Billionaire T. Boone Pickens is building a 377-megawatt wind farm in Texas" (Apr. 12, 2010); **R-125**, PR Newswire, "Mesa Power Group to Partner with Wind Tex Energy on Stephens Bor-Lynn Wind Project South of Lubbock" (Apr. 4, 2012).

[942] **R-141**, Business Week, Bloomberg News, "Pickens Reviving Plans for Texas Wind Power at Smaller Scale" (Apr. 4, 2012); **R-085**, "Billionaire T. Boone Pickens is building a 377-megawatt wind farm in Texas" (Apr. 12, 2010); **R-125**, PR Newswire, "Mesa Power Group to Partner with Wind Tex Energy on Stephens Bor-Lynn Wind Project South of Lubbock" (Apr. 4, 2012); **R-063**, Amarillo Globe News "Pampa wind farm delayed, not canceled, Pickens says" (Jul. 15, 2009). Available at: http://amarillo.com/stories/071509/new_news5.shtml. This article refers to a conversation held by Mr. Pickens with a Bloomberg Financial Reporter, whereby he confirmed that the 667 turbines bought from GE for the Pampa projects would be used for smaller projects or he would just "put them in the garage".

[943] **R-126**, Second Amended and Restated Master Turbine Sales Agreement for the Sale of Power Generation Equipment and Related Services, between General Electric Company and Mesa Power Pampa LLC [redacted] Attachment 3 Price, Payment and Termination Charges, Section 3B, Payments, Payment Schedule; **R-129**, Master Turbine Sale Agreement External Change Order (ECO) Proposal No.4 (Letter from Gary Elieff, GE to Mark Ward, Mesa [redacted]

[944] BRG Report, ¶ 85b, and Attachment VI.

477. In sum, the MTSA was entered into for the purpose of supplying a U.S. project, and it was terminated and the deposit forfeited after the failure to develop other U.S. projects.[946] Ontario was not the primary or proximate cause of any of these events. Of course, the Claimant cannot bring a NAFTA claim against the U.S. Government and hence it has brought this claim against Canada, hoping that the Tribunal will insure its risky business decisions. Canada should not have to pay $156.833 million for the Claimant's failed projects in the U.S. The loss of the GE deposit was not caused by any alleged breach of NAFTA by Canada, and therefore the Claimant cannot recover damages for its alleged loss related to this agreement.[947]

III. If the Claimant Is Entitled to Damages, Those Damages Must Be Reduced on Account of Its Partial Ownership of the Projects

478. Further, if the Claimant is entitled to damages at all, its recovery must be reduced to reflect its partial ownership of the enterprises at the relevant time. The Claimant has brought this arbitration pursuant to Article 1116. Under that Article, a Claimant may only bring a claim for loss or damage that it as "the investor has incurred".[948] As such, in a claim under Article 1116, such as this one, the Claimant may not bring a claim for all of the damages suffered by an enterprise unless it can prove that all of the damages suffered by that enterprise were suffered directly by it as the investor. This is consistent with the general principle of international law that a tribunal's jurisdiction is limited to

[945] **C-0382**, Letter from Cole Robertson, Mesa to Stephen Swift, GE [redacted] Deloitte Report, ¶ 2.23.

[946] **R-056**, Master Turbine Sale Agreement - External Change Order (ECO) Proposal No. 1 (Letter from Carson H. Granger, GE to Mark Ward, Mesa [redacted] **R-061**, Master Turbine Sale Agreement - External Change Order (ECO) Proposal No. 2 (Letter from GE to Mesa) ([redacted] **C-0380**, Master Turbine Sale Agreement - External Change Order (ECO) Proposal No. 3 (Letter from Carson Harkrader, GE to Mark Ward) [redacted] **R-129**, Master Turbine Sale Agreement - External Change Order (ECO) Proposal No. 4 (Letter from Gary Elieff, GE to Mark Ward, Mesa) [redacted] **R-130**, Master Turbine Sale Agreement - External Change Order (ECO) Proposal No. 5 (Letter from Gary Elieff, GE to Mark Ward, Mesa) [redacted]

[947] BRG Report, ¶¶ 128-130 and 189-190.

[948] NAFTA, Article 1116.

considering a claim for damages in proportion to the claimant's ownership interest in the investment.[949]

479. The Claimant here has failed to prove that at the time of the alleged breaches it wholly owned any of the wind projects for which it seeks damages. The Claimant alleges that the TTD, Arran, North Bruce and Summerhill wind projects "are ultimately wholly-owned by an American enterprise, Mesa Power Group, LLC".[950] According to the Claimant's Memorial, this ownership is through AWA.[951] The relationship between AWA and Mesa is further discussed in the witness statement of Mr. Robertson, where he testifies that AWA was "originally a joint venture between Mesa and GE Development and Strategic Initiative".[952]

480. As to the extent of GE's share of the joint venture, and when, if ever, it relinquished that share, the Claimant has failed to provide much evidence. The FIT applications for both the TTD and Arran wind pojects, submitted on November 25, 2009, indicate that GE maintained a [redacted][953] Further, both applications indicate that "American Wind Alliance, a joint venture of Mesa Power Group LLC and GE Energy, is the equity provider" for the wind project.[954]

481. GE's partial ownership of these projects was further confirmed in a March 2010 draft project report submitted to Ontario's Ministry of Energy[955] and a draft presentation

[949] **CL-081**, *Saluka - Partial Award*, ¶ 244.

[950] Claimant's Memorial, ¶ 37.

[951] Claimant's Memorial, ¶ 35.

[952] CWS-Robertson, ¶ 5.

[953] **C-0364**, TTD FIT Application, p. 31 (bates 107928); **C-0365** Arran FIT Application, p. 31 (bates 109607).

[954] **C-0364**, TTD FIT Application, p. 30 (bates 107927); **C-0365**, Arran FIT Application, p. 30 (bates 109606).

[955] **R-080**, Golder Associates Report, p. 2: ("American Wind Alliance (AWA) a joint venture of Mesa Power Group LLC and General Electric (GE) Energy is the financier of TTD").

prepared by GE dated [redacted] In [redacted] GE attempted to arrange project financing for the TTD wind project with the U.S. Ex-Im Bank[957] and in July 2010, Mark Ward of AWA wrote to the OPA [redacted][958] Finally, as indicated above, based on an email from Mr. Ward to Mr. Robertson, this relationship ended no later than June 8, 2011.[959]

482. As a result, in order to comply with the terms of Article 1116, and to avoid unjustly enriching the Claimant by awarding it GE's "share" of any recovery, any damages awarded to the Claimant in this case must be reduced by 50 percent.

IV. If the Claimant Is Entitled to Damages, They Should Be Limited to Its Share of the Sunk Costs for the TTD and Arran Wind Projects

483. If the Tribunal finds that Canada has breached NAFTA, then the appropriate award of compensation in these circumstances is the Claimant's proportionate share of the sunk costs related to the TTD and Arran wind projects.

484. Where an investment is still in the pre-operational stage or has no history of profits, awarding any amount for future losses would require an impermissible degree of speculation on the part of an investment arbitration tribunal. In such situations, tribunals have looked to more certain methods of valuing losses such as book-value, or an assessment of the sunk costs.[960]

485. For instance in *Metalclad v. Mexico* despite the fact that the investor had purchased, permitted, financed and constructed a waste disposal facility in Mexico whose

[956] **R-088**, GE Draft Presentation, "Twenty-two degrees wind project – U.S. Exlm Briefing" [redacted] slides 2, 5, and 6.

[957] *Ibid*.

[958] **R-094**, Letter from Mark Ward, American Wind Alliance to Ontario Power Authority (Jul. 22, 2010).

[959] **R-119**, Email from Mark Ward, AWA to Cole Robertson, Mesa (Jun. 8, 2011) (emphasis added).

[960] *See* for example: **CL-098**, *Metalclad - Award*, ¶ 122; **CL-144**, *Siemens A.G. v. Argentine Republic* (ICSID No. ARB/02/8) Award, 6 February 2007, ¶¶ 355, 368-370; **CL-136**, *Wena Hotels Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Award on Merits, 8 December 2000, ¶¶ 123-125.

operation was thwarted by a local governor's Ecological Decree, the Tribunal ruled that since the landfill was never operational, the "fair market value is best arrived at […] by reference to Metalclad's actual investment in the project".[961] This finding led the *Metalclad* Tribunal to dismiss a discounted cash flow ("DCF") methodology applied to a claim for speculative lost profits in favour of ascertainable and unspeculative investment value to arrive at fair market value.[962]

486. The *Metalclad* Tribunal's ruling is consistent with the decision of nearly every other international investment tribunal that has considered the question of the fair market value of a non-operating company or one without a proven track record. In *Wena Hotels v. Egypt*, the company at issue had operated one of its hotels for less than 18 months and had not completed the construction of the other.[963] The Tribunal awarded the investment costs of the enterprise.[964] In *Vivendi v. Argentina*,[965] the enterprise was not a going concern, and had never been financially viable or ever turned a profit.[966] The Tribunal in that case awarded investment value as the "closest proxy" for fair market value.[967] Similarly, in *Siemens v. Argentina*, the business was not a going concern, and the Tribunal awarded only the investor's sunk costs.[968] In *PSEG v. Turkey*, the Tribunal recognized that the parties had never finalized the terms of the contract at issue. It further noted lost profits were normally reserved for compensation of investments that are

[961] **CL-098**, *Metalclad – Award*, ¶¶ 121-122 (citing *Phelps Dodge Corp. v. Iran* (10 Iran-U.S. CTR 121) (1986) and *Biloune, et al. v. Ghana Investment Centre, et al.* 95 I.L.R. 183, 207-210, 228-229 (1993)).

[962] *Ibid*, ¶ 121.

[963] **CL-136**, *Wena – Award*, ¶ 124.

[964] *Ibid*, ¶ 123.

[965] **RL-077**, *Compagna de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina* (ICSID Case ARB/97/3) Award, 20 August 2007.

[966] *Ibid*, ¶ 8.3.5.

[967] *Ibid*, ¶ 8.3.13.

[968] **CL-144**, *Siemens – Award*, ¶¶ 362-389.

substantially made and have a record of profits and that tribunals are "reluctant to award lost profits for a beginning industry and unperformed work".[969]

487. There is no reason why the Tribunal should vary from this well-established approach to damages in the circumstances of this case. Even if this Tribunal finds that "but for" the wrongful behaviour of Ontario or the OPA, the Claimant's projects would have received FIT Contracts, the fact is that a FIT Contract was no guarantee that a FIT project would actually come into commercial operation and begin making money.

488. As made clear in the BRG Report, the completion risks associated with these projects was significant.[970] These risks included construction, development, regulatory and financing risks.[971] As BRG notes, the real world evidence shows that these risks have manifested and many projects that were actually awarded FIT Contracts have not come into commercial operation. BRG's analysis of the data shows over 43 percent of all wind projects that were awarded FIT Contracts have suffered significant delays or been terminated entirely.[972] Out of the 70 wind projects that received contracts, nine (approximately 13 percent) have been terminated entirely.[973]

489. The Claimant asks the Tribunal to ignore these risks and assume instead that everything would have simply worked out for their projects.[974] There is no reason for the Tribunal to do so. Indeed, there are plenty of reasons to believe these projects would not work out, especially given the Claimant's track record of failures in other wind projects around North America.

[969] **CL-102**, *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Award, 19 January 2007, ¶¶ 310-319.

[970] BRG Report, ¶¶ 75-81.

[971] BRG Report, ¶¶ 75-81 and Attachments X and XI .

[972] BRG Report, Attachment XI, ¶ 137.

[973] BRG Report, Attachment XI, ¶ 137.

[974] Claimant's Memorial, ¶¶ 950, 957, and 962.

490. Accordingly, should the Tribunal decide that the Claimant is entitled to some damages, it should be able to collect no more than its proportionate share of the sunk costs of the TTD and Arran wind projects. The Claimant's expert Deloitte estimates that these costs are $6.42 million. However, as noted by BRG, they have provided insufficient substantiation to prove that the expenditures that make up this amount are legitimate sunk costs related to the TTD and Arran wind projects. As such, the Claimant has not yet met its burden of proving that it suffered any damages as a result of any of the alleged breaches of NAFTA Chapter 11.

V. Even if the Tribunal Believes that the Claimant Should Be Entitled to Some Future Losses, the Valuation Offered by the Claimant Is Unreliable

491. Even if this Tribunal were to consider the speculative future losses of the TTD and Arran wind projects in awarding compensation (which it should not), the Claimant's future loss analysis is full of flawed assumptions and biased calculation errors.[975] These have been systematically identified and corrected by BRG.[976] In what follows, Canada highlights only a few of the more significant ones in order to evidence the general flawed approach taken by the Claimant and its expert, Deloitte. Once these errors and flawed assumptions have been corrected, then as BRG concludes, assuming a violation of NAFTA and assuming that the Tribunal finds that it should engage in speculation as to the future losses of these projects, the value of the future losses of the TTD and Arran wind projects are no more than $6.909 million.[977] The Claimant's proportionate share of those losses would be $3.4545 million.

A. The Claimant Is Not Entitled to the GEIA Economic Development Adder or Capacity Expansion

492. In its analysis of the alleged future losses of the TTD and Arran wind projects, the Claimant includes the 0.27 cents per kWh "Economic Development Adder" and the 10 percent capacity expansion that were available to the Korean Consortium under the

[975] BRG Report, ¶¶ 156-158.

[976] BRG Report, ¶¶ 171-233.

[977] BRG Report, Figure 7.

GEIA.[978] This results in an additional claim of alleged damages of between $10.2 and $11.3 million. This is a meritless claim, and it should be rejected by the Tribunal.

493. As explained above, the Claimant is once again trying to obtain the benefits of the GEIA, while avoiding all of the significant obligations thereunder. It should not be permitted to do so. An appropriate damages analysis should consider the situation which would in all probability have existed but for the allegedly wrongful conduct. The Tribunal should reject the Claimant's illogical attempts to benefit from GEIA terms.[979]

494. Under the GEIA, in recognition of the significant economic development activities the Korean Consortium was undertaking,[980] Ontario offered it an Economic Development Adder to the rate of wind generated electricity of 0.27 cents per kWh.[981] The purpose of the adder was to acknowledge that the Korean Consortium was actually doing much more under the GEIA than a wind developer under a FIT Contract. It would be entirely unreasonable to provide proponents who have not taken on obligations to increase economic development, through for instance opening four clean technology manufacturing facilities and employing thousands of people, with an Economic Development Adder.

495. Under the GEIA, the Korean Consortium was limited to a total of 2,500 MW of transmission capacity.[982] This capacity was to be allocated to it over the course of five phases of 500 MW each. However, the Korean Consortium was able to elect to adjust its

[978] Deloitte Report, ¶ 4.1.

[979] *Supra*, ¶¶ 461-467.

[980] As noted above, the Korean Consortium was obligated to open four manufacturing facilities in Ontario employing 1,440 people and develop 2,500 MW of wind and solar electricity generation capacity.

[981] The base rate was set by the terms of PPA's negotiated with the OPA. These PPA's were on similar terms and the same rates (13.5¢ / kWh) for wind generation as FIT Contracts. Section 15 of the GEIA Amending Agreement amended the Economic Development Adder from 0.5 cents per KXh for wind and 2.6 cents per kWh for solar to 0.27 cents per kWh for wind generation and 1.43 cents per kWh for solar. **C-0322**, GEIA, s. 9.1, 9.3; **C-0282**, Amended Green Energy Investment Agreement, s. 5.

[982] **C-0322**, GEIA, Art. 3.

targeted generation capacity of 500 MW for a particular phase by ten percent.[983] This meant that, for instance, the Korean Consortium could increase Phase 1 capacity by 50 MW to 550 MW, but only if it reduced all other phases collectively by 50 MW to maintain the 2,500 MW total. As such, the total production capacity would not change.[984]

496. In its analysis, Deloitte completely misunderstands these GEIA terms. Deloitte misconstrues these terms to mean that the Korean Consortium was able to elect to increase its overall generation by ten percent.[985] As a result, Deloitte assumes for its future loss calculations that all the Claimant's projects could also produce ten percent more electricity and that the Claimant is, therefore, entitled to the net present value of that additional production. This serves to wrongfully inflate the Claimant's alleged damages.

B. The Claimant Makes Speculative Assumptions About the Availability of Its Preferred Wind Turbines

497. If the Tribunal does find a breach of Article 1102, 1103 or 1105, and holds that but for that breach the Claimant's projects would have been awarded a FIT Contract, then Deloitte asserts that the domestic content requirements in the FIT Program would have allegedly caused $106.3 million in damages with respect to the TTD and Arran wind projects.[986]

498. It comes to this conclusion because it assumes that "but for" the FIT Program's domestic content requirements, the Claimant would have used different wind turbines in its projects.[987] In particular, the Claimant contends that instead of using the GE 1.6xle

[983] **C-0322**, GEIA, s. 3.4.

[984] **C-0322**, GEIA, s. 3.4.

[985] Deloitte Report, ¶ 4.14.

[986] Deloitte Report, ¶ 4.3(i).

[987] *Ibid*, ¶ 4.1(b)(i), 4.15.

wind turbines, it could have used the larger and more efficient GE 2.5XL turbines.[988] Deloitte estimates that these turbines were cheaper and would have generated more electricity over the course of a 20-year FIT Contract.[989]

499. However, the Claimant has not provided any evidence that the GE 2.5XL turbines were available for use on its projects or, if they were, at what price GE would have been willing to supply them, and how much they would have cost to maintain.[990]

500. Using information on a contemporaneous wind farm known to use the GE 2.5XL turbines and two estimates of its installed costs, BRG was able to determine that there was small margin for error in terms of the cost versus economic benefit of using the larger turbines.[991] BRG found that if Deloitte's cost estimates were off by only 5-6 percent, then there would be no positive value or damages impact in using the GE 2.5XL turbines. Given the highly speculative nature of Deloitte's assumptions on the availability and cost of the GE 2.5XL turbines, the Tribunal should not accept this $106.3 million of alleged damages as part of its consideration of the alleged future losses of the TTD and Arran wind projects.[992]

C. Deloitte Makes Numerous Inappropriate Assumptions, Calculation Errors and Omissions Inflating the Claimant's Claim

501. The Claimant's experts have also made a number of errors and omissions in their report which should seriously call into question whether a *prima facie* case of any loss has been demonstrated.[993] In fact, BRG even found spreadsheet errors and calculation errors related to failures to capitalize interest during construction of the projects that were

[988] Ibid.

[989] *Ibid*, ¶ 4.15(a).

[990] BRG Report, ¶¶ 87-91, BRG Attachment VII.

[991] BRG Report, ¶¶ 88c and d, BRG Attachment VII, ¶¶ 72-73.

[992] BRG Report, ¶¶ 87-91 and 184-188, BRG Attachment VII.

[993] BRG Report, Figure 7.

to the Claimant's benefit.[994] Together, BRG estimates that the flaws in Deloitte's analysis account for $153.618 million in wrongly claimed future losses in relation to the TTD and Arran wind projects.[995] Canada highlights a couple of these errors below.

502. First, with respect to financing by the U.S. Ex-Im Bank, Deloitte inappropriately speculates that all of the projects would have received such financing.[996] As BRG notes, this assumption is unsound for a number of reasons.[997] The only evidence relied on by Deloitte is a letter of intent from the U.S. Ex-Im Bank to Mesa.[998] However, the letter of intent is just that and admits that it does not "constitute a commitment."[999] Moreover, it also only relates to the TTD wind project and makes absolutely no mention of any of the Claimant's other projects.[1000]

503. The letter of intent also appears to be based on a total projected cost for the TTD wind project that is significantly more expensive (by [redacted][1001] than what Deloitte itself assumed for its DCF analysis.[1002] Interestingly, the U.S. Ex-Im Bank letter of intent is also based on a U.S. domestic content level of [redacted] of the total project cost.[1003]

[994] BRG found that Deloitte had underestimated alleged damages to Arran and TTD by over $2.3 million by failing to depreciate capitalized interest costs for tax purposes and by making certain spreadsheet errors. BRG Report, ¶¶ 228-230.

[995] BRG Report, Figure 7.

[996] Deloitte Report, ¶ 4.41(b); BRG Report, ¶¶ 212-214; **C-0377**, Letter from Barbara A. O'Boyle, Export-Import Bank of the United States to Steven W. Howlett, GE Capital Markets Corporate (Sep. 23, 2010).

[997] BRG Report, ¶¶ 212-214, BRG Attachment IX.

[998] **C-0377**, Letter from Barbara A. O'Boyle, Export-Import Bank of the United States to Steven W. Howlett, GE Capital Markets Corporate (Sep. 23, 2010).

[999] *Ibid*.

[1000] *Ibid*.

[1001] *Ibid.* At a cost of [redacted] with total U.S. content estimated at [redacted]

[1002] Deloitte Report, ¶¶ 4.41-4.42.

[1003] **C-0377**, Letter from Barbara A. O'Boyle, Export-Import Bank of the United States to Steven W. Howlett, GE Capital Markets Corporate (Sep. 23, 2010). In response to the submission of GE, the U.S. Exim Bank replied: ("Exim Bank is very interested in participating in the financing for this transaction. We understand that you propose to engineer and build a project named TTD Wind Project ULC in Canada. [redacted]

How the Claimant would have complied with the FIT Program's 50 percent Ontario content level and the U.S. Ex-Im Bank's 85 percent U.S. content requirement is left completely unaddressed by both the Claimant and Deloitte.[1004]

504. Accordingly, the Tribunal should not accept Deloitte's assumption that Claimant would have been able to obtain funding at the low rate of [redacted] offered by the U.S. Ex-Im Bank.[1005] Instead, the Tribunal should assume, as BRG notes, that financing would have been obtained at market rates, which both BRG and Deloitte calculate to be about seven percent.[1006] Correcting this assumption has a $28 million impact on the damages claim with respect to the TTD and Arran wind projects.[1007]

505. Second, in coming to its conclusions, it appears that Deloitte mistakenly eliminated capital expenditures of Arran and TTD of $10.8 and $13.8 million, respectively, with respect to post valuation date development costs.[1008] As BRG explains, this resulted in a significant overstatement of alleged damages of $23.517 million. These damages should be rejected by the Tribunal.[1009]

506. Finally, Deloitte made significant errors related to cost of capital calculations.[1010] For example, Deloitte applied an inappropriate 1.85 percent size premium for low-cap stocks to the projects.[1011] According to the Ibbotson SBBI 2010 Valuation Yearbook ("Ibbotson") relied on by Deloitte, a 1.85 percent size premium accords to low-cap stocks with market capitalizations of between $432,175,000 and $1,600,169,000.[1012] However as BRG points out, according to its FIT application for both TTD and Arran Mesa Power

[1004] Deloitte Report, ¶ 4.41(b).

[1005] Deloitte Report, ¶ 4.41(b).

[1006] BRG Report, ¶ 213.

[1007] BRG Report, ¶ 214.

[1008] BRG Report, ¶¶ 218-221.

[1009] BRG Report, ¶ 221.

[1010] BRG Report, ¶¶ 198-211.

[1011] Deloitte Report, ¶ 4.5.4(iv).

[1012] BRG Report, ¶ 199.

only lists [redacted] of capital.[1013] According to Ibbotson, such capital would warrant a much higher 12.06 percent size premium.[1014] This error by Deloitte represents a $50.556 million overstatement of alleged damages related to the Arran and TTD wind projects.[1015]

507. Deloitte also speculates that the Claimant's projects should have a company-specific risk adjustment of -3.00 percent based on the presumption that the Claimant should have been entitled to the benefits of the GEIA (without the obligations), including the Government of Ontario's facilitation of the regulatory approvals and permits.[1016] As explained by BRG, there is no factual or theoretical basis to suggest that this adjustment is appropriate and Deloitte provided no justification for it.[1017] In particular, it is unreasonable for the purposes of assessing company-specific risk to focus only on government backed obligations under the GEIA or FIT Contract and ignore the fact that the Claimant had, at the time, only ever attempted one other sizable wind project. It had failed miserably in that effort. This unreasonable company-specific risk adjustment results in an overstatement of alleged damages related to the Arran and TTD wind projects of $50.502 million.

VI. Conclusion

508. The Claimant asks that this Tribunal award it the huge sum of $653.683 million. However, it has failed to prove that a significant portion of these damages is at all causally related to the measures that it alleges breach Canada's obligations under NAFTA. In particular, nearly half of this claim relates to hypothetical future losses of its North Bruce and Summerhill wind projects, even though there is no "but for" world in which those projects would have received FIT Contracts. Moreover, with respect to its remaining claims, they are largely speculative, based on improbable and biased

[1013] BRG Report, ¶ 200b.

[1014] BRG Report, ¶ 200b.

[1015] BRG Report, ¶ 201.

[1016] Deloitte Report, Sch. 6A.

[1017] BRG Report, ¶¶ 202-203.

assumptions and riddled with computational errors. If anything, the Claimant should be entitled to recover no more than its proportionate share of the sunk costs for the TTD and Arran wind projects. In determining these costs, the Tribunal should reject any attempt by the Claimant to recoup the losses the Claimant suffered as a result of its risky purchase of wind turbines for a previously failed venture. Further, with respect to these sunk costs, the Claimant has as yet failed to meet its burden of introducing evidence that would support the damages that it seeks.

COSTS

509. Pursuant to Article 1135 of NAFTA, and Articles 38 to 40 of the 1976 UNCITRAL Arbitration Rules, Canada requests that the Tribunal award it costs related to this arbitration and its legal representation.

510. Articles 38 to 40 codify the principle that the costs of UNCITRAL arbitration are to be borne by the unsuccessful party. This is a rule that has been followed by a number of recent NAFTA tribunals. For example, after ruling that Canada had prevailed in the recent *Chemtura* arbitration, the Tribunal held that it "finds it fair that the Claimant bear the entire costs of the arbitration," a total sum of USD $688,219.[1018] The Tribunal further found it "appropriate and just that the Claimant bear one half of the fees and costs expended by the Respondent in connection with this arbitration", which are a total amount of $2,889,233.80.[1019]

511. Canada requests that the Tribunal order the Claimant to pay the entire cost of the arbitration and to indemnify Canada for its legal fees and costs, including all of the costs associated with the extensive and overbroad document requests, as well as the costs associated with the numerous and repetitive motions that had to be filed in this matter related to the Claimants failure to abide by the clear terms of the Tribunal's Procedural and Confidentiality Orders filed by the Claimant in this matter. Should the Tribunal

[1018] **CL-090**, *Chemtura – Award*, ¶ 272.

[1019] *Ibid*, ¶ 273.

decide that costs are appropriate, Canada respectfully requests the opportunity to submit a more detailed submission on costs to more fully address all relevant considerations.

CONCLUSION AND PRAYER FOR RELIEF

512. For the foregoing reasons, Canada respectfully requests that the Tribunal dismiss the Claimant's claims in their entirety and with prejudice, order that the Claimant bear the costs of this arbitration, including Canada's costs for legal representation and assistance, and grant any further relief it deems just and proper.

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Respectfully submitted on behalf of Canada,

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